Effective Litigation Strategies to Improve State Education and Social Service Systems

IHELG Monograph

17-05

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Forthcoming in 45 Journal of Law & Education (2016)

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Effective Litigation Strategies to Improve State Education and Social Service Systems

Albert Kauffman*

Texas border area Latino plaintiffs brought state court litigation, the Lulac case, to improve higher education opportunities in the Texas-Mexico borderlands. Plaintiffs successfully parlayed their trial court judgment into a massive influx of resources and permanent improvement in higher education in the Texas border. The Article describes the history of the Lulac case and includes an original analysis of the improvement of higher education in the Texas border area. The Article then develops a model for the successful integration of litigation, legislation, public advocacy and community involvement, and applies this model to the Lulac case and the Texas school finance litigation. The author was a lead attorney in both these multi decade struggles.

I. INTRODUCTION¹

In 1987, a group of Latino organizations and college students in Texas’s border area filed a lawsuit in state court challenging Texas’s system of

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¹ This Article reflects a ten-year labor of love. The author thanks his able litigation co-counsel: Norma Cantu, Susan Brown, Brian Ganson, Don Branson and Jose Sanchez. The author also thanks a series of wonderful research assistants from St. Mary’s University School of Law: Diana Cavazos, Michelle Garza. Michael Lezcano, Claire Partin and Sera McManus, and Jessie Brown of Harvard Law School. The author also thanks the University of Houston Institute for Higher Education Law and Governance and the faculty of St. Mary’s University School of Law for their helpful comments on earlier versions of this Article. In addition, I thank Dr. Michael Olivas and Dr. Maggie Rivas-Rodriguez for their reviews of the first full draft, and Linda Battles of the Texas Higher Education Coordinating Board for her help in locating and interpreting Coordinating Board documents. Finally, I thank the staff of the Journal of Law and Education for their thoughtful and detailed edits.
funding public senior colleges, graduate schools, and professional schools. The lawsuit alleged that the predominately Mexican American Texas border area was the most populous area in the United States with no comprehensive public university. The region had an inferior depth and breadth of higher education programs, due to a history of inadequate and inequitable funding, program creation and support.

2. See generally Richards v. League of United Latin American Citizens (Lulac), 868 S.W.2d 306 (Tex. 1993) (finding the State had no duty to provide free higher education under the Texas constitution). The group was composed of the League of United Latin American Citizens (Lulac), American GI Forum, Texas Association of Chicanos in Higher Education (TACHE), and Latino/Hispanic student groups at the Reynaldo Garza school of law, UT Law School, University of Houston school of law, Texas Southern University school of law, Texas Tech school of law, University of Texas San Antonio, and fifteen individual Latino students.

3. See Lulac, 868 S.W.2d at 309.
The lawsuit alleged that this lack of quality and equality in higher education was caused by a history of discrimination and that the Texas higher education funding system had serious negative effects on educational attainment and economic development in the Texas border area.⁴

⁴ See id.
After twenty years, it is clear that *Lulac* has been an effective catalyst in improving access, quality and funding for public higher education in the Texas border region. For example, the border area has progressed from receiving eleven percent to eighteen percent of the state’s higher education funding, and from three to at least sixty doctoral programs. The powerful injunction that the state district court entered for the plaintiffs was unanimously reversed by the Texas Supreme Court. However, before the Texas Supreme Court issued its opinion, the Texas Legislature responded to the lawsuit with significant new funding, construction and programs. This quantum leap in funding, both in terms of total funds and as a proportion of state funds to higher education, has had continued positive effects on higher education opportunities in the

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5. *See* discussion *infra* Part V.
6. *See* discussion *infra* Part V, Section A.
7. *See* *Lulac*, 868 S.W.2d at 317.
8. *See* discussion *infra* Part IV.
border area; the initial funding increase has been followed by significant new funding, programs and administrative support.9

For many years, legal scholars have been quibbling over the normative and legal dimensions of court involvement in “reforming” state social systems.10 Most of these analyses focus on either the role of individual federal judges or the U.S. Supreme Court in ongoing legal proceedings, or on seminal opinions and their legal offspring. Few analyses focus on the interrelationship among legal proceedings and the community, advocacy, legislative dimensions, and other scholarship that has led to the litigation.

Part I of this Article will describe the history of the Texas higher education system up to 1987. Part II describes the status of higher education in the border area at the time the case was tried in 1991. Part III describes the development of the Lulac case, the evidence introduced at the trial, the judgment in the case and the Texas Supreme Court decision reversing the district court judgment. Part IV describes the post judgment efforts to develop an agreed remedy and to advocate for that plan. Part V is an original analysis of the changes in funding and enrollment at all universities in Texas from 1993 to 2013, focusing on the changes in funding and programs in the border area, and the effect of the lawsuit on these later changes.

In Part VI, I will review the literature and summarize some efforts to model the relationship of legal proceedings and systemic change. In Part VII, I will describe a model which is more dynamic and synergistic than the existing models, and I will apply this model to the Lulac litigation. In Part VIII, I will apply this new model to the Texas school finance litigation.11 Finally, in Part IX, I will suggest further applications and


10. See discussion infra Part VI.

uses of this model both to better describe past litigation and to provide a best practices model for future litigation.

II. THE HISTORY OF HIGHER EDUCATION IN TEXAS, AND THE DEVELOPMENT OF THE UNIVERSITY SYSTEMS AND THE COORDINATING BOARD: SIGNIFICANT PROGRESS IN ALL PARTS OF TEXAS EXCEPT THE BORDER AREA

Both the United States, in general, and Texas, in particular, have long and tragic histories of discrimination against persons of color in access to and equality in education. The historical struggle of African-Americans against racial discrimination is chronicled in case law and historical and sociological literature. Mexican American history, especially in Texas, has been described in greater detail and depth only in recent years.


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

A. Texas has Discriminated Against Mexican Americans in Higher Education

Texas has historically discriminated against Mexican Americans in public education (K-12), by segregating them, tracking, underfunding, denying bilingual education, and through a myriad of other measures; such discrimination is well documented in other excellent work.\(^\text{16}\) In higher education, Mexican Americans were almost completely excluded from the public higher education institutions well into the twentieth century.\(^\text{17}\)

B. Texas Opened its First Public Universities in Areas Away From the Border\(^\text{18}\)

In this Part of the Article, I describe the sequence and level of the creation of state universities in Texas. This development created the context in which the Lulac lawsuit was filed and the South Texas Border Initiative was developed.

The 1876 Texas Constitution, which, after hundreds of amendments remains in place today, mandated separate schools for white and “colored” children and provided for a dual system of higher education.\(^\text{19}\)

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17. See id.


The Constitution of 1876 provided for the establishment of a “university of the first class” to be called the University of Texas, and by a vote of the people, Austin, in central Texas, was chosen as the
site.\textsuperscript{20} Texas A\&M opened its doors in 1876,\textsuperscript{21} and the University of Texas at Austin opened in Austin in 1883.\textsuperscript{22} The University enrolled 221 students (163 men and 58 women), along with a faculty of 8 males.\textsuperscript{23} By the end of the nineteenth century, Texas had created four public universities, all located in central Texas, at least 200 miles from the Texas-Mexico border.\textsuperscript{24}

In the early 20th century, Texas created several new universities in North Texas: one university in Commerce,\textsuperscript{25} one university in Arlington,,\textsuperscript{26} and two new universities in Denton—the University of North Texas and Texas Women's University\textsuperscript{27}—but Texas again created no new university in South Texas.\textsuperscript{28}

The number of public institutions doubled between 1900 and 1920.\textsuperscript{29} This prompted the 37th Texas legislature to create a committee to study these institutions.\textsuperscript{30} The 1925 Texas Educational Survey recommended the implementation of a coordinating agency, noting that the mandatory budget submissions to the State Board of Control were ineffective

\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} See MAP 3, infra at 25.
\textsuperscript{29} See Generally Villalon, supra note 24 at 53.
\textsuperscript{30} Id.
because of the political pressure that existing universities exerted towards expansion.  

After Texas created eight other universities in other parts of the state, it created Sul Ross State University, in the small remote West Texas town of Alpine, in 1920. Texas finally created its first South Texas public four-year university, in Kingsville, as an additional teacher’s college in 1925 named South Texas State Teacher’s College (later changed to Texas College of Arts and Industries (Texas A&I) and now Texas A&M University – Kingsville).

In 1946, while one-sixth of Texas’s population was Mexican American, comprising over twenty percent of the state’s scholastic population, Mexican Americans made up only 1.7 % of the state’s college population. The institutions with the largest percentage of Mexican American enrollment were located in the South and Southwestern regions of the state.

From 1923 until 1965 when Pan American College in Edinburg became a public college, and 1971 when UT in San Antonio was opened, the major public university in the South Texas area was in Kingsville. There was no public university in the major population centers of the border area in the Texas Valley, San Antonio, Corpus Christi, and Laredo. Until 1971 San Antonio was the largest city in the United States without a four-year public university.

C. The Development of University Systems

Texas has gradually shifted toward organizing public universities by systems, rather than allowing individual universities to operate

31. Id.
34. See Villalon, supra note 24, at 61; See also Ruth A. Fogartie, Texas-Born Spanish Name Students In Texas Colleges and Universities, 1945–46 (Austin: Tex.: University of Texas Press, Inter-American Education Occasional Papers 111, 1948) (hereinafter Fogartie) (over 1 million in population with college enrollment of only 473).
35. Villalon-Francisco, supra note 24, at 61; see Fogartie, supra note 34.
independently. Almost all public universities belong to one of the six university systems, each established by the Legislature to oversee and operate the various universities acquired or established by legislation or system action.\textsuperscript{37} I describe here the largest systems in the state—the University of Texas system and the Texas A&M system—major and competing forces in Texas in general and the Texas legislature in particular.

1. The University of Texas System

The UT System now has nine academic institutions and six health institutions.\textsuperscript{38} The UT System expanded to three campuses when the Texas School of Mines and Metallurgy in El Paso (now UT El Paso) became part of the UT System in 1919.\textsuperscript{39} In 1965, Arlington State College (now UT Arlington) was transferred from the Texas A&M System to the UT System.\textsuperscript{40} Two years after the acquisition of Arlington State College, the Legislature changed the names of institutions within the UT System, giving them “uniform designations” as they appear today.\textsuperscript{41} In 1969, the Legislature also created three academic branches: UT Dallas, UT Permian Basin in Odessa, and UT San Antonio.\textsuperscript{42}

South Texas gained greater representation in the UT System in the late 20th century as UT Pan American and UT Brownsville joined the UT System in 1989 after the \textit{Lulac} case was filed in 1987. In 2013,\textsuperscript{43} Texas merged UT Pan American and UT Brownsville and a new

\textsuperscript{37} There are six university systems: Texas A&M University System, University of Texas System, Texas State University System, University of North Texas System, University of Houston System, and the Texas Tech University System. The only universities that remain independent and under individual control are Midwestern State University in Wichita Falls, Stephen F. Austin State University in Nacogdoches, Texas Southern University in Houston, and Texas Women’s University in Denton. \textit{See Public Universities}, Texas Higher Education Coordinating Board, TEX. HIGHER EDUC. DATA, \url{http://www.txhighereddata.org/Interactive/Institutionsshow.cfm?Type=1&Level=1} (last visited Aug. 22, 2013).

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{See History, supra} note 20.

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{Id.} (“1967 The Legislature changes the names of institutions within the UT System, giving them uniform designations.”).

\textsuperscript{42} \textit{Id.}

medical school, forming the new University of Texas Rio Grande Valley in 2015.

2. The Texas A&M University System

The Texas Legislature established the Texas A&M University System (A&M System) in 1948. The A&M System oversees eleven universities, seven state agencies, and one health science center. Originally, the A&M System consisted of both Texas A&M College in College Station and Prairie View A&M in Prairie View. Texas created Prairie View A&M as a separate college for African Americans.

In 1989, the A&M System expanded into South Texas through the addition of Texas A&M International University (then Laredo State University) in Laredo, Texas A&M University–Corpus Christi (then Corpus Christi State University) in Corpus Christi, and Texas A&M University – Kingsville (then Texas A & I University) at Kingsville. In 2000 and was finally established as a separate university in 2009.

3. The Two South Texas Systems Merged into the Flagship Systems

The Pan American University system (Edinburg and Brownsville campuses) and the University System of South Texas (Kingsville, Corpus Christi, and Laredo campuses) went through several internal

44. See History, supra note 20.
45. Id.
46. Id.
51. Id.
changes in university name and control within the systems.\textsuperscript{52} However, the Pan American University system merged with the UT system in 1989 and the University System of South Texas merged with the Texas A&M system in 1989,\textsuperscript{53} 1 1/2 years after the \textit{Lulac} lawsuit was filed.

\section*{III. THE LACK OF EQUAL OPPORTUNITY AND FUNDING IN THE TEXAS BORDER AREA AT THE TIME THE LAWSUIT WAS FILED IN 1987 AND THE EDUCATIONAL AND ECONOMIC EFFECTS OF THAT INFERIOR STATUS}

In this Part II, I will summarize the status of higher education in the border area when MALDEF filed the lawsuit in 1987, explain some of the educational and economic ramifications of that status, and the reasons for that status.

\textbf{A. At the Time the Lawsuit was Filed in 1987, the Texas Border Area Had Inferior and Inefficient Access to Higher Education}\textsuperscript{54}

The most important facts in the case were summarized by what the attorneys called the 3 D's- Degrees, Distance, and Dollars. The border

\begin{flushleft}
\textsuperscript{52} \textit{Id.}
\textsuperscript{54} \textit{See} Reply Brief of Appellees, \textit{Lulac}, 868 S.W.2d 306 (documenting the status of higher education in Texas in 1990); \textit{see also} VALENCIA, \textit{supra} note 15, at 251–267 (detailing a recent description of the record in the case); MICHAEL A. OLIVAS, \textsc{Suing Alma Mater: Higher Education And The Courts}, 108–119 (2013) (describing the factual record and a careful analysis of the legal theories); Jones & Kauffman, \textit{supra} note 32 (describing accessibility to Texas higher education).
\end{flushleft}
TABLE 1: Comparisons of the Border Region vs. Non-Border Regions of Texas in 1991

<table>
<thead>
<tr>
<th></th>
<th>Border Region</th>
<th>Rest of Texas</th>
</tr>
</thead>
<tbody>
<tr>
<td>Texas Population in Region</td>
<td>20%</td>
<td>80%</td>
</tr>
<tr>
<td>University Revenues Sent to Region</td>
<td>10%</td>
<td>90%</td>
</tr>
<tr>
<td>University/Health Center Revenues Sent to Region</td>
<td>11%</td>
<td>89%</td>
</tr>
<tr>
<td>Percent Hispanic Enrollment</td>
<td>54%</td>
<td>7%</td>
</tr>
<tr>
<td>Percent Hispanic Population</td>
<td>64%</td>
<td>16%</td>
</tr>
<tr>
<td>Appropriation per Capita</td>
<td>$43</td>
<td>$103</td>
</tr>
<tr>
<td>Expenditures per Capita</td>
<td>$84</td>
<td>$199</td>
</tr>
<tr>
<td>Research Expenditures per Capita</td>
<td>$4</td>
<td>$23</td>
</tr>
<tr>
<td>Physical Plant Value per Capita</td>
<td>$145</td>
<td>$400</td>
</tr>
<tr>
<td>Facility Space per Capita</td>
<td>1.6 sq. ft.</td>
<td>3.4 sq. ft.</td>
</tr>
<tr>
<td>University Library Expenditures per Capita</td>
<td>$3</td>
<td>$6</td>
</tr>
<tr>
<td>Average Faculty Salaries</td>
<td>$36,000</td>
<td>$43,000</td>
</tr>
<tr>
<td>Faculty-Student Ratios</td>
<td>22-1</td>
<td>17-1</td>
</tr>
<tr>
<td>Doctoral Programs per Million People</td>
<td>1</td>
<td>43</td>
</tr>
<tr>
<td>New Doctoral Programs 1970–90 per Million People</td>
<td>1</td>
<td>27</td>
</tr>
<tr>
<td>Total Programs per Million People</td>
<td>192</td>
<td>323</td>
</tr>
<tr>
<td>Unemployment Rate</td>
<td>10%</td>
<td>5%</td>
</tr>
<tr>
<td>Personal Income per Capita</td>
<td>$11,400</td>
<td>$16,600</td>
</tr>
<tr>
<td>University Library Volumes per 100 People</td>
<td>76</td>
<td>149</td>
</tr>
<tr>
<td>Average Mileage to Closest Comprehensive University</td>
<td>225</td>
<td>45</td>
</tr>
<tr>
<td>Percent Students Attending Comprehensive University</td>
<td>21%</td>
<td>61%</td>
</tr>
<tr>
<td>Average Mileage to Closest Medical School</td>
<td>181</td>
<td>52</td>
</tr>
<tr>
<td>Percent of Students From Outside Region</td>
<td>5%</td>
<td>41%</td>
</tr>
</tbody>
</table>

area universities offered significantly fewer degrees at the master’s and doctoral level than the rest of Texas universities, relative to either the total population or student population in the area. Students in the border area on average lived significantly farther from a comprehensive university than did students in any other part of the State. The border area had 20 percent of the population of the State but only 10 percent of the state’s resources dedicated to higher education. These facts are summarized as follows (see table 1):

The lawsuit was both factually and legally based on the Texas population in the border area, at the time there were about 3.5 million of

the 17.5 million people in Texas. However, residents and students of the border area know they cannot ignore the millions of Mexican Nationals who live right across the Rio Grande in the Mexican states of Tamaulipas, Nuevo Leon, Coahuila and Chihuahua. Each of the Mexican sister cities of each border city had about twice the population of the Texas city, and at the time of trial in 1991, at least 4 million persons lived in Mexico within a few miles of the Texas Mexico border. With the passage of NAFTA and the proliferation of “maquiladores,” 56 and other developments on the Mexican side of the Rio Grande River (the border between Texas and Mexico) that population has grown significantly. The Texas border is affected by this Mexican population in terms of culture, employment, trade, health, education and development.

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

(1) about 20% of all Texans live in the border area, yet only about 10 percent of the State funds spent for public universities are spent on public universities in that region;
(2) about 54% of the public university students in the border area are Hispanic, as compared to 7% in the rest of Texas;
(3) the average public college or university student in the rest of Texas must travel 45 miles from his or her home county to the nearest public university offering a broad range of master’s and doctoral programs, but the average border area student must travel 225 miles;
(4) only three of the approximately 590 doctoral programs in Texas are at border area universities;
(5) about 15% of the Hispanic students from the border area who attend a Texas public university are at a school with a broad range of master’s and doctoral programs, as compared to 61% of public university students in the rest of Texas;
(6) the physical plant value per capita and number of library volumes per capita for public universities in the border area are approximately one-half of the comparable figures for non-border universities; and

(7) these disparities exist against a history of discriminatory treatment of Mexican Americans in the border area (with regard to education and otherwise), and against a present climate of economic disadvantage for border area residents.  

B. The Educational Ramifications of the Lack of Higher Education

Money makes a difference in higher education as it does in public education. Universities use their funds to attract and retain the best professors, build the best classrooms, laboratories, libraries and access to electronic media, and to develop and maintain special programs for their student bodies. Some universities are more efficient than others; but universities with the greatest resources can offer the most robust and broadest educational programs.

The state sought to defend the inferior resources available to universities within the border area because of the State's neutral application of its formula system and program request procedures. The state formula system rewards higher level programs and educational programs offering the highest degrees. More specifically, within a certain discipline, for example English, the state formula system allocates more funds for master’s programs than for bachelor’s programs and more funds for doctoral programs than for master’s programs. The ratio is roughly ten for doctoral programs to three for master’s programs to one for bachelor’s programs. Similarly, the state rewards programs in science and engineering at a higher per student unit level than programs in liberal arts and education. And as in all programs, these higher funded areas receive more at doctorate level than at master’s level and more at master’s level than at bachelor's level. At the extremes, one credit hour at the doctoral level in pharmacy generates about thirty-five times the funding generated by one credit hour in English at the bachelor level. The Texas Legislative Budget Board recently summarized the formula system:

57. Lulac, 868 S.W.2d at 309.
58. The formula system generates about 60% of the state funds and is based on the number of credit hours generated and the funds for each credit hour in that particular course (calculations on file with author).
SCH is weighted by discipline (e.g., nursing is weighted more than liberal arts) and by level (i.e., lower and upper division, master’s, doctoral, and professional). For instance, a lower division liberal arts course receives a weight of 1.0. A doctoral level liberal arts course receives a weight of 9.23. A nursing lower division course receives a weight of 2.03. A doctoral nursing course receives a weight of 9.25.\(^{60}\)

Recent battles in the Legislature by several universities to be declared the next Tier 1 university in Texas again reflect the recognition by universities and communities around the state on the importance of increased funding for higher education.\(^{61}\) In 2009, Texas passed a constitutional amendment to allow extra funding for universities competing to become the next Tier 1 university in the state.\(^{62}\)

There is a debate whether a professor at a small bachelor level institution teaches freshman English better than a professor at a Research 1 university teaches freshman English. The record in the case, however, supports the concepts that educational quality is directly related to the depth and breadth of educational offerings at the

<table>
<thead>
<tr>
<th></th>
<th>Lower Div.</th>
<th>Upper Div.</th>
<th>Master’s</th>
<th>Doctoral</th>
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<td>Liberal Arts</td>
<td>1.00</td>
<td>1.76</td>
<td>4.00</td>
<td>10.77</td>
</tr>
<tr>
<td>Science</td>
<td>1.78</td>
<td>3.02</td>
<td>7.53</td>
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</tr>
<tr>
<td>Fine Arts</td>
<td>1.47</td>
<td>2.52</td>
<td>6.03</td>
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<tr>
<td>Teacher Ed</td>
<td>1.63</td>
<td>2.08</td>
<td>2.56</td>
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<tr>
<td>Agriculture</td>
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<td>2.75</td>
<td>7.80</td>
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<tr>
<td>Engineering</td>
<td>2.38</td>
<td>3.52</td>
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<td>1.57</td>
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<td>1.26</td>
<td></td>
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<td>35.14</td>
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<tr>
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<td>1.88</td>
<td>3.39</td>
<td>23.92</td>
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<td>Teacher Ed Practice</td>
<td>2.28</td>
<td>2.13</td>
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<tr>
<td>Technology</td>
<td>2.26</td>
<td>2.41</td>
<td>3.89</td>
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<tr>
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<td>1.72</td>
<td>2.11</td>
<td>3.34</td>
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</tbody>
</table>


university.\textsuperscript{63} Simply because a university can offer several different doctoral programs in English does not guarantee that the instructor in the freshman English class will be better. But the breadth of the programs does guarantee that professors at the comprehensive university will more likely be top researchers, leading scholars and faculty attracted to working in a very rich environment in their particular academic fields.\textsuperscript{64}

Universities in the border area received less total funding and less funding per student than did universities in the rest of Texas.\textsuperscript{65} At the time of the trial in 1991, universities in the border area had significantly fewer – in fact only three of the 600 in the state– doctoral programs and significantly and disproportionately fewer master’s programs than did the other universities. These deficits are based on relation of number of programs both to number of students and to the number of persons in the general population.

The paucity of higher level programs greatly restricts the alternatives available to students in the border universities. A student in Brownsville, Texas who wished to obtain a doctoral degree in education would have to travel to Houston (350 miles) or Austin (230 miles) to get one. A student in Houston, Austin, Dallas, Fort Worth, Lubbock, Denton, Commerce, College Station, or any other Texas population center, need only be admitted to their local comprehensive university—certainly within commuting distance—to enroll in a doctoral program.\textsuperscript{66}

In addition, there are indirect benefits to the range of higher level programs available at major universities. A master’s degree in physics or biochemistry is advantageous both because of its basic educational worth and the fact that these degree offerings represent significantly greater educational offerings to support them. To offer a master’s in physics, a university must have a greater range of professors with

\begin{itemize}
  \item \textsuperscript{63} See Appendix to Reply Brief of Appellees at 11–13, Lulac, 868 S.W.2d 306 (No. D 2197) (summarizing testimony of witnesses Valdez, Overfelt, Natalicio, Hinojosa, Chahin, Jones, Cota-Robles).
  \item \textsuperscript{64} Id.
  \item \textsuperscript{65} See supra Part III.
  \item \textsuperscript{66} See JONES & KAUFFMAN, supra note 36 (discussing the pattern of students attending a university within commuting distance and the significant differences between access to comprehensive universities for border students compared to students in the rest of Texas).
\end{itemize}
doctoral degrees and greater availability of advanced—and very costly—research facilities. This advantage to higher level programs is especially acute when discussing doctoral programs, particularly in the science and engineering fields. Those universities that can offer doctoral degrees in physics, electrical engineering, or advanced computer design must have superior resources in terms of laboratories, faculty, educational materials, infrastructure, and related programs.

Individual students benefit from this great range of programs and resources. The student has a wide array of research opportunities, on-campus employment, access to top level faculty, and easy access to advanced laboratories and educational materials.

The record in the litigation was replete with testimony, research and explanations on the importance of increased funding and ranges of programs to the overall educational levels and educational opportunities of the students attending those universities. Plaintiffs offered the testimony of nationally respected researchers in higher education and Texas history from San Antonio, Corpus Christi, Kingsville, Brownsville, Laredo, El Paso and Austin. In addition, the plaintiffs supplemented that record with higher education experts from California, Arizona and New Mexico.67

C. The Lack of Economic Opportunity Caused by the Lack of Higher Education

Though many experts and community members will agree on the educational benefits of higher education programs at the highest levels, the record on the economic benefits of research universities is not as complete.

A Tier 1 university in a community is advantageous both to the attraction of business and industry because of technical assistance and laboratory facilities, as well as access to employees of businesses to advanced educational programs for themselves and their families. The

chambers of commerce throughout the border area were strongly in support of the litigation.

When businesses and industries are seeking to relocate, one of the factors they most highly weigh is the access to top level higher education opportunities. Even in Texas, a low wage and allegedly low tax state, businesses are much more likely to move to areas with significant higher education offerings.  

Top-level higher education universities offer a range of consulting and research opportunities for businesses. In addition, research universities offer significant numbers of graduate students and professors to study and recommend solutions for socioeconomic issues. The border area of Texas, one of the poorest areas in the United States, has long suffered from a dearth of students and professors with experience in and interest in researching local socioeconomic and education issues.

At the most basic level, a university with its large number of employment opportunities for professionals and high-level staff is itself a great economic generator for a community. Testimony at the trial in 1991 showed that the Texas A & M University in Bryan-College Station Texas has an annual effect of $1,000,000,000 dollars on the local economy (in 1991 dollars). This is greater than the economic effect of all of the universities in the entire border area of Texas. In 2015, Texas A&M University-Kingsville conducted an economic analysis showing its 5,000 student university to have a $491 million annual economic impact on the surrounding community.  

68. The testimony by Dr. Henry Cisneros, former mayor of San Antonio and later Secretary of United States Department of Housing and Urban Development and president of Univision, is particularly on point. Dr. Cisneros testified that San Antonio lost to Austin in the competition for placement of a national computer research center, even though San Antonio put together a superior package of tax and land incentives. Dr. Cisneros personally went to Chicago to compete for the placement, but “we lost because we could not offer the science and engineering programs offered in Austin at UT Austin.” Lori L. Taylor & Heather Gregory, Low Texas Wages Are Mostly Good News, THE STATESMEN (July 16, 2011), http://www.statesman.com/news/news/opinion/low-texas-wages-are-mostly-good-news/nRcg5/.  

69. See Reply Brief of Appellees, supra note 54.

Houston system published a study that it had an economic impact on the Houston metropolitan area of more than $3,000,000,000 per year.\textsuperscript{71}

**IV. THE LEGAL AND FACTUAL FOCUS OF THE LAWSUIT AND THE COURSE OF LITIGATION OF THE *LULAC CASE***

**A. The Higher Education Funding Lawsuit was Part of a Larger Lawsuit Built on Decades of Struggle**

The Mexican American Legal Defense and Educational Fund (MALDEF) filed the case to achieve two basic objectives\textsuperscript{72}: (1) to obtain equitable financing for higher education in the border area compared to the rest of Texas, and (2) to achieve better educational access to higher education institutions throughout Texas for the Latino community in admissions, placement, graduate programs and employment.

The financing objective had its start with MALDEF's successful litigation in the school finance area related to Texas public school financing.\textsuperscript{73} *Edgewood* was a definite catalyst for improvement in Texas school finance equity, though the battle continues.\textsuperscript{74} During the preparation and litigation of the *Edgewood* case, attorneys at MALDEF learned more of the long-term deficits in higher education within areas of large Mexican American population concentrations. MALDEF attorneys learned of the similarities between discrimination against Mexican Americans in public school education and the discrimination in higher education.

Studies of the history of Texas and its relations to its Mexican American population, as explained in great detail in David Montejano's


\textsuperscript{72} See MALDEF: The Latino Legal Voice for Civil Rights in America, http://maldef.org (last visited Feb. 29, 2016) (describing MALDEF’s role as the lead attorney for Latinos throughout the United States, and particularly in Texas, where it has won major cases in education, voting and immigration).

\textsuperscript{73} See Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I), 777 S.W.2d 391, 397 (Tex. 1989).

\textsuperscript{74} See discussion infra Part IX (explaining in more detail the Edgewood battle and its relationship to the Lulac case).
classic work, *Anglos and Mexicans in the Making of Texas, 1836–1986*, lead to the conclusion that discrimination against Mexican Americans in education went from prekindergarten to postgraduate and professional level education.

There are also significant differences between the discrimination in financing in public education and the financing of higher education. School districts were created by the state to serve students within a certain geographic area, and it is comparatively easy to show the effects of state education financing on the individual school districts within the state. On the other hand, universities are not limited by either statute or regulation to serve only persons within a certain geographic area. However, the record showed that in fact—*de facto* in the language of Equal Protection analysis—students attend universities near their home communities. For the Mexican American population, and in general minority populations affected by poverty, the closest university is the university that the student will most likely attend. The Mexican American community in the border region was most negatively affected by this pattern. Only approximately 20% of university students from the border region attended a comprehensive university, while about 60% of university students in the rest of Texas attended a comprehensive university. Nevertheless, there are legitimate criticisms of the use of a large geographic area as a base for a discrimination claim, but Texas history and the record in the case do support the allegations that Texas had discriminated against the border area because of the area's heavy Mexican American population.

The racial discrimination claim was based in part on the extensive record of discrimination against Mexican Americans in higher education developed during the decades long federal review and findings


76. See *San Miguel, Jr., supra* note 75.

77. See *Olivas, supra* note 54, at 118; see also *Valencia, supra* note 15, at 251–267.

78. See *Jones & Kauffman, supra* note 36 (describing the literature in this area and showing college students in Texas are significantly more likely to attend the nearest university to them, which is especially acute for low income Mexican Americans).

79. See *Jones & Kauffman, supra* note 36, at Table 3.

80. See Lulac, 868 S.W.2d at 311 (Tex. 1993); see also *Olivas, supra* note 54, at 114.
regarding Texas higher education. Since the 1970s, the Office for Civil Rights of the United States Department of Education (formerly the office for Civil Rights of the Department of Health, Education and Welfare) had been investigating Texas higher education regarding its racial discrimination. Briefly stated, the flagship universities in Texas—the University of Texas at Austin and Texas A&M University in College Station—have historically had low proportions of Mexican Americans when compared to the Mexican American population, Mexican American public education students, or even Mexican American high school graduates. The historical second tier of universities in Texas—Texas Tech University and the University of Houston—also had low proportions of Mexican American students. The lack of participation by Mexican Americans is more extreme at the higher levels of higher education, such as in the master’s and doctoral programs. For example, large numbers of doctoral programs at the University of Texas at Austin and Texas A&M University had no Mexican American students at all, and the proportion of Mexican American students in the most competitive master’s programs remains very low.

The Lulac case that is the subject of this article was a trial only of the first objective of the lawsuit, to declare that the higher education system discriminates against Latinos in the border area of Texas in the creation and development of higher education institutions, and to achieve a more equitable funding for the universities within the border area.

B. Final Preparation for the Litigation and Course of Litigation

1. Legislative Efforts Preceding Lawsuit

South Texas legislators had worked for many years to obtain a greater level of university programs and funding for the South Texas

81. See OLIVAS, supra note 16, at 162–63; see also Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (summarizing the OCR struggle with Texas and how that relationship contributed the legal action).
area. The subject of this Article is the *Lulac* case, which alleged discrimination against Mexican Americans in the “border” area of Texas. However, the border area is a larger geographical area than the South Texas area. Historically, South Texas was defined more as the area from Corpus Christi to Laredo to Brownsville, a triangle of land with many common characteristics, including super majorities of Mexican American population and a long history of discrimination in all aspects of life. The border area extended from this South Texas area to include the area all the way along the Texas-Mexico border to El Paso and to include San Antonio, Texas. Using the larger border area was advantageous in terms of its recognition of the overall discrimination against Mexican Americans in Texas, however, the “Texas border” area was not nearly as well recognized by legislators and community members as the “South Texas” area.

South Texas legislators passed legislation to create a commission to study the lack of higher education opportunities in the South Texas area. The study collected an array of statistical and testimonial evidence, documenting the lack of higher education opportunities in the Laredo–Corpus Christi–Brownsville area.

82. *See* Map 1 *supra*, at 2.
83. *See* Map 3 *infra*, at 25.
84. *Compare* the border area shown in Map 1, *supra*, at 2, with the South Texas Area in Map 3, *infra*, at 25.
Figure 4: The South Texas Area

COUNTIES OF THE SOUTH TEXAS REGION

Independently, legislators in San Antonio and El Paso had struggled to obtain universities and increased higher education opportunities within their respective areas. San Antonio and El Paso, both in the border area, were the largest cities in Texas—in fact in the entire United States—without easy access to a Tier 1 research University education.86

The lawsuit benefited from the long-term collaborative efforts of Texas representatives and senators from the Texas border area. However, the larger area defined as the “border,” was not an area that had long been considered in legislative advocacy for higher education. Nevertheless MALDEF research and the actual history of Texas

86. See JONES & KAUFFMAN, supra note 36, at 271–272.
strongly supported the concept of the entire “border” area as a common area sharing a common history and common discrimination in higher education. The cohesiveness of the border area and the lack of education opportunities in the area as compared to the United States, was documented in great detail by experts in the case.®

2. A History of the Lawsuit

a. Pre Trial Effects of the Lawsuit on Mergers

MALDEF filed the case in December, 1987 in the 107th state district court in Brownsville, Texas.® The original petition included a large number of co-counsel who were members of the Texas Legislature. This exhibited to Texas executive and legislative leadership and the administrations of the UT and A & M systems that the lawsuit was not only being brought by the organization that had just strongly defeated Texas in the school finance litigation, but also that it was a lawsuit strongly supported by leading members of the Texas Legislature.

The lawsuit was one of the major factors, if not the factor, leading to a great reorganization of border higher education institutions in 1989, 1 1/2 years after the case was filed. South Texas legislators urged the University of Texas and the Texas A & M systems to take immediate action to improve higher education opportunities within the South Texas area. The systems reacted quickly and forcefully. In effect, the

87. San Antonio was the capital of the Mexican State of Coahuila y Tejas and the scene of the most famous battle of the Texas revolution from Mexico.
88. See JONES & KAUFFMAN, supra note 36, at 281.
89. The case was originally filed as Lulac v. Clements, No. 12-87-5242-A, 107th District Court, Cameron County Texas, in December 1987. The trial court certified the case as a class action in 1989, and that class action order was affirmed by the Texas Thirteenth Court of Appeals, Clements v. Lulac (Clements), 800 S.W.2d 948 (Tex. 13th Court of Appeals, 1990), reh’g overruled (1991). After the election of Governor Richards in November 1990, the case named was changed to Richards v. League of United Latin American Citizens. The trial court entered its final judgment in the case January 20, 1992, Richards v. League of United Latin American Citizens, No. 12-87-5242-A, Final Judgment (Jan. 20, 1992), holding the Texas higher education funding system unconstitutional and enjoining its enforcement unless a solution was implemented by May, 1993. This judgement was reversed by the Texas Supreme Court October 6, 1993, Richards v. League of United Latin American Citizens, 868 S.W. 2d 306 (Tex. 1993), reh’g overruled Feb. 2, 1994. For the sake of simplicity the case is generally described as Lulac in this Article.
University of Texas system and the Texas A&M system, long the strongest forces within the higher education world in Texas, merely split up the South Texas area and “bought” the existing institutions. More specifically, the Pan American University campuses in Brownsville and Edinburg merged with the University of Texas system; the University System of South Texas universities at Texas A & I in Kingsville, Laredo State University, and Corpus Christi State University merged into the Texas A & M system.

These mergers provided the South Texas universities increased access to educational programs and political help from the two largest university systems in the State. The University systems promised to start new programs in the South Texas area and to partner with the South Texas universities in many cooperative programs.

On the other hand, the mergers also gained the University of Texas System and the Texas A & M System greater control over the universities in South Texas; a control that would be very beneficial to the large university systems during and after the Lulac actual litigation in 1989–1993. In other words, the university systems preferred controlling the administrations of the border universities rather than having border universities with their own boards of regents with their own political powers and agendas. The South Texas systems could have either realigned as plaintiffs in the case or confessed judgment. Given the discriminatory treatment to which the South Texas universities had historically been subject, changing sides might have been a reasonable strategy.

b. Discovery and Class Action Battle

Just as in other lawsuits, the case began with discovery requests and discovery battles. The plaintiffs, represented by MALDEF, took depositions of many university presidents and other university and Coordinating Board officials. The State took depositions of the many experts offered by the plaintiffs and all of the individual plaintiffs in the lawsuit.

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90. See History, supra note 46.
91. Id.
The first major procedural skirmish in the lawsuit was the plaintiffs' effort to have Mexican Americans within the border area certified as a class for purposes of the Texas class action rule. Judge Gilberto Hinojosa, a Texas District Court judge in Brownsville, Texas held a seven day hearing and determined that the plaintiffs had established all elements of a proper class action under Texas law. The judge rendered his opinion in 1988.

The State appealed this class action certification to the Thirteenth Texas Court of Appeals. The Court of Appeals affirmed the class action ruling allowing the case to proceed to litigation of the merits of the case.

c. The Trial

After an intense period of discovery of expert witnesses and documents for use at trial, the case was tried before a jury in October and November 1991. The case was intensely litigated by both sides.

1) The Plaintiffs' Case

Briefly, the plaintiffs introduced expert witnesses and documentary evidence related to four basic issues.

(a) The Overall Lack of Educational Opportunities in the Border Area, Especially Related to the Themes of Degrees, Dollars and Distance

The leading witnesses for the plaintiffs in this area were experts Dr. Albert Besteiro and Dr. Richard Jones. They documented in incredible detail the lack of doctoral and master’s programs in the border universities, the lack of funding in the border universities, and the

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92. TEX. R. CIV. P. 42.
93. Discovery and further action in the case was stayed during the appeal of the class action order under a Texas Statute regarding interlocutory appeals. See TEX. CIV. PRACT. & REM. CODE, §§ 51.014(a)(3), (b) (West 2013).
94. Clements, 800 S.W.2d 948.
95. See OLIVAS, supra note 54, at 115–16.
96. See id. at 112–14; see also VALENCIA, supra note 15, at 254–60 (providing excellent descriptions of many of the facts in the case).
general lack of educational opportunities for students in all border universities. On this issue the plaintiffs carefully documented all of the types of discrimination in higher education, as set out by the United States Supreme Court in *Sweatt v. Painter*. This quote from *Sweatt* structured much of the evidence presented by the plaintiffs on this first issue:

“in terms of number of the faculty, variety of courses and opportunities for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior.”

**(b) The Alternative Ways of Funding Higher Education and the Ability of the Higher Education System Rapidly to Improve Educational Opportunities Within an Area**

This evidence was a response to arguments of the defendants that developing new university programs is always a slow, deliberate process and that there are no other models available. Dr. Cota-Robles of the University of California system was particularly persuasive on this point when he documented the incredible rapidity with which the University of California system developed comprehensive universities in San Diego and Irvine;

**(c) The Negative Effects of a Lack of Higher Education Opportunities on the Education and Economic Opportunity of All Persons Within the Border Area.**

This argument was exemplified best by testimony of Dr. Henry Cisneros (former mayor of San Antonio and later Secretary of the US Department of Housing and Urban Development) and developed further by the expert professors from each of the border universities.

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97. Reply Brief of Appellees, *supra* note 54 (attaching some of the major exhibits in the case).
98. See *Sweatt*, 339 U.S. 629.
99. *Id.* at 633–34.
100. See *Bowman*, *supra* note 67.
(d) The History of Discrimination Against Mexican Americans in Each of the Areas Covered by the Border Area, Specifically Witnesses from El Paso, San Antonio, Corpus Christi, Kingsville, Laredo, and Brownsville.

Also related to this set of information was testimony by individual students who were denied higher education opportunities because of their inability to travel to far away universities with high-quality and graduate programs.

(2) The State's Case

The major responses of the State were to defend the funding system of the Texas higher education system related to formula funding and program requests from universities. There were four major sets of information offered by the State.

(a) The State Offered Detailed Analyses of All Requests for New Programs From The Border-Area Universities And The Rest Of The State

The State's argument was that border universities had not requested the same types or number of programs that were requested by other universities, and, therefore, Texas could not be blamed for not placing these programs within the border universities. The border had received approval on a greater proportion of new programs during the ten years before the trial (1980–1990) than had the rest of Texas.

(b) The State Offered Analyses of the Formula Funding Program in Texas That Gives Universities Greater Funding for Doctoral Programs Than for Master’s Programs and Greater Funding for Science and Engineering Programs Than for Liberal Arts Programs

The state argued that the system was an objective one and that the same programs were financed at the same level, regardless of the location of the program. In other words, the formula system generated the same funding for one credit hour of bachelor level English, regardless of the university.
(c) *The State Also Offered Analyses of the Border Region, Showing That If The Regions of Texas Were Reconfigured in Other Ways, There was no Discrimination Among the Regions*

The implication of this testimony was that the border region had been designed only to show greater disparities in higher education opportunities rather than for any basic historical or sociological reasons.

(d) *The State Offered Exhibits to Show That an 1876 Vote of the People to Decide the Location of the University of the First Class and the First Medical College Resulted in a Vote for Austin for the University and Galveston for the Medical College*

d. *The Jury Verdict and the Final Judgment of the Trial Court*

At the end of a seven-week trial, the case was submitted to the jury. After disagreements among counsel on the propriety of the jury charge, the jury decided the case. The jury verdict was a split verdict. The jury found that the system of higher education was not efficient and discriminated against the border area of Texas. However, the jury did not find any of the individual members of the boards of regents or the Governor individually responsible for the discrimination.

Judge Benjamin Euresti entered a judgment on January 20, 1992, holding that the Texas higher education system was unconstitutional and discriminated against Mexican Americans. Also, Judge Euresti enjoined funding of the entire university education system if the Legislature did not design a nondiscriminatory plan for higher education funding by the end of the legislative session in 1993.¹⁰¹

MALDEF lawyers, who had worked on the judgment in the Texas school finance case, proposed a judgment in the Lulac case.¹⁰² The proposed judgment, adopted by Judge Euresti, followed exactly the same model as the school finance judgment. The judgment did not lay

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¹⁰¹ Lulac et. al. v. Clements et. al., No. 12-87-5242-A, 107th District Court, Cameron County, Texas Final Judgment (Jan. 20, 1992).

¹⁰² In Texas, any party may file a proposed judgment for consideration by the court. In this case, the district court, after an oral argument and briefing, entered the judgment proposed by MALDEF.
out or outline the new plan for funding of higher education in the border. As in most cases in which courts find state systems unconstitutional, the judgment held the system unconstitutional and gave the Texas Legislature the time and the flexibility to design and implement a plan for funding higher education that would remedy the unconstitutionality in the system.

The January, 1992 judgment of the court declaring the system unconstitutional and enjoining funding of the higher education system after one-and-a-half years received extensive publicity all around Texas, with some coverage in national media as well.

At the same time, in the spring of 1992, Texas also was under a court order to reform its public school finance system, coming from the second Edgewood Supreme Court opinion. State leaders certainly understood the possible ramifications of a district court judgment declaring one of their educational systems unconstitutional.

e. Response of Many Parts of Community to the Judgment

MALDEF attorneys, state legislators, community members, faculty, administrators, and students at border universities were empowered by the court judgment. These different constituencies joined together in discussions and decided not to wait for the final Supreme Court ruling, which would be expected in one to two years. Instead, these groups committed to work together to design a plan for the development of higher education in the border area.

f. A Brief Description of the District Court Judgment and the Texas Supreme Court Opinion that Reversed the District Court

Consistent with Texas procedure regarding motions for judgment and judgment notwithstanding the verdict, and the detailed instructed verdict in this case, the trial court entered judgment on January 20, 1992. The trial court judgment held that the Texas Higher Education System:

(1) does not provide to the class that Plaintiffs represent equal rights under the law because of Plaintiffs' Mexican American national origin

and discriminates against Plaintiffs and the class they represent because of their national origin, in violation of Art. I § 3 of the Texas Constitution, and denies Plaintiffs equal educational opportunity; (2) has resulted in the expending of less state resources on higher education in geographic areas of significant Mexican American population than in other geographic areas of the state, and thereby denied to Mexican Americans equal rights and equality under the law, in violation of Texas Constitution Arts. I § 3 and I § 3a; and (3) expends less state resources on higher education in the border area of Texas . . . than its population would warrant thereby denying Plaintiffs and the class they represent equal rights and equality under the law guaranteed by the Texas Constitution in violation of Texas Constitution Art. I § 3 and Texas Constitution Art. I § 3a. 104

g. The Texas Supreme Court Erroneously Reversed the District Court Judgment

In October, 1993 the Texas Supreme Court unanimously reversed the judgment for plaintiffs and rendered judgment for the state defendants. 105 In a thorough opinion that ignored the record in the case and the realities of Texas history, the Texas Supreme Court held the following:

(1) the higher education funding system was an objective one; 106
(2) border universities had been more successful than other universities in getting programs approved by the Coordinating Board; 107
(3) Plaintiff's case was a case of geographic discrimination rather than racial discrimination and therefore should be analyzed under the rational basis standard of review; 108
(4) even if plaintiff could prevail in an intentional discrimination case based on severe adverse impact, the plaintiffs did not show severe adverse impact in this case; 109
(5) Plaintiffs did not show intentional discrimination; 110

105. Lulac, 868 S.W.2d 306.
106. Id. at 309.
107. Id.
108. Id. at 314.
109. Id.
110. Id.
(6) Plaintiffs would not prevail even if intent were not required in this case;\footnote{Id. at 314.}
(7) higher education is not a fundamental right under the Texas Constitution;\footnote{Id. at 315.}
(8) the \textit{Fordice}\footnote{United States v. Fordice, 505 U.S. 717, 727 (1992).} case does not apply because \textit{Fordice} was based on a previous history of \textit{de jure} discrimination in the State.\footnote{Lulac, 868 S.W.2d at 315.}
(9) the Education Clause of the Texas Constitution does not apply to higher education;\footnote{TEX. CONST. art. VII, § 1 ("A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."); \textit{Id}.}
(10) the University of the First Class provision in the Texas Constitution only requires “a” University of the First Class to be established; it does not require a “system” of universities.\footnote{TEX. CONST. art. VII, § 10 ("The legislature shall as soon as practicable establish, organize and provide for the maintenance, support and direction of a University of the first class, to be located by a vote of the people of this State, and styled, 'The University of Texas,' for the promotion of literature, and the arts and sciences, including an Agricultural, and Mechanical department."); \textit{Id}.} Therefore, plaintiffs cannot be denied rights to equal access to the system.\footnote{OLIVAS, \textit{supra} note 54; VALENCIA, \textit{supra} note 15, at 259–260 (summarizing the Lulac opinion).}

Fortunately for the plaintiffs and the Texas border area, by the time the Supreme Court issued its opinion in October 1993, the South Texas Border Initiative had already built in systemic changes to improve higher education in the border area that lead to long-term legislative and administrative changes.

The Texas Supreme Court opinion was based on a long series of legal and factual errors, but for purposes of this Article, only these errors will be explained:

\textit{(1) The Opinion Ignored the Fact that Seemingly Neutral Formulas Such as The Formula System and the Program Approval Process, in Fact Locked in Discrimination of the Past}
In the context of Texas higher education, these formulas were "grandfather clauses." This locking in of past discrimination was explained in detail during testimony in the case and the briefing before the Texas Supreme Court. For example, testimony showed that border institutions did not even request doctoral programs because of a Coordinating Board rule that universities without a doctoral program, or only one, could not obtain more. Evidence also disclosed that in the twenty years before the trial, universities outside the border had added more than 371 doctoral programs and universities inside the border area had added three programs.

(2) The Court's Strict Construction of the Texas Constitutional Language of TEX. CONST. Art. VII, § 1 and TEX. CONST. Art. VII, § 10 was in Stark Contrast to the Court's Own Interpretation of TEX. CONST. Art. VII, § 1 in the Edgewood School Finance Cases.\(^{118}\)

The same Texas Supreme Court that broadly and correctly construed the Texas Constitution to invalidate Texas's long term school finance system, was reluctant to enter the fray again by interpreting the Texas Constitution to give persons equal rights to a University of the First Class, as guaranteed by TEX. CONST. art. VII, § 10 or to an "efficient" system of higher education, as guaranteed by TEX. CONST. art. VII, § 1.

(3) The Court Purposely Misconstrued the Plaintiff's Evidence About Discrimination Against Mexican Americans in the Border Area

Plaintiffs proved in the trial court that the border area was discriminated against because it was a predominately Mexican American area and the students in its universities were predominately Mexican American. The fact that Mexican Americans in Houston or Dallas might be benefited by the Texas higher education system was essentially irrelevant. Mexican Americans outside the border area lived in areas that were heavily Anglo, and the Mexican American populations in those areas were much more recent additions to the

\(^{118}\) See Edgewood I, 777 S.W.2d 391 (Tex. 1989).
population than were the Mexican Americans in the border area, an area that had historically been part of Mexico.\footnote{See Montejano, supra note 15.}

(4) In Addition, the Judgment of the District Court was Not Inconsistent with Texas Law or Procedure

The trial court's judgment was based on the jury findings supporting plaintiff's causes of action, as well as on the courts' directed verdict. The jury did find for the individual defendants on the issues regarding intentional discrimination, but plaintiffs had properly preserved error to those questions before the jury verdict, and filed a motion for judgment on the verdict, completely consistent with Texas procedure.\footnote{120. TEX. R. CIV. P. 301. (“The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.”).}

The next part of this Article describes the efforts to organize the many different communities within the border area to develop a plan for higher education and then to promote that plan as a legislative remedy to the case.

V. SUCCESSFUL EFFORTS TO ACHIEVE AN AGREED PLAN—THE LESSONS OF EDGECWOOD

A. First Major Meetings with Community Groups, Legislators, and Other Experts

MALDEF lawyers had learned an important lesson from the Texas school finance litigation. The lawyers and interested advocates for public schools had not designed a school finance system that would meet the standards of the Texas school finance district court opinion in 1987, and were not prepared to propose a remedy in the 1989
Legislature. It was not until late 1989, after the Texas school finance Texas Supreme Court opinion in *Edgewood v. Kirby*, that the lawyers for the low wealth districts and community groups tried to develop a joint plan to submit to the Legislature as a “remedy” for the violations of the Texas constitution that had been found by the state district court. The many interest groups involved in the school finance case could not agree on one plan; significant divisions and schisms among the various parties ensued. Those divisions hindered the development of a legislative solution. At the same time, this disunity made it significantly easier for opponents of school finance reform to avoid major changes because of the divisions among the proponents of school finance reform.

In the *Lulac* litigation and follow up, MALDEF lawyers, and the many groups with whom they had worked in development of the litigation, determined to avoid those problems by developing a joint plan supported by community groups, academic leaders, and legislators to present to state leaders and the Texas Legislature.

With organizational help from the Tomas Rivera Center and Texas Rural Legal Aid, MALDEF lawyers organized several types of meetings to develop this higher education plan.

First, MALDEF lawyers worked with groups of advocates within each major city in the border—in this case, Brownsville, Edinburg, Laredo, Corpus Christi, Kingsville, Alpine, El Paso, and San Antonio. Each of these areas had a university within it, but also had very active community members and academics interested in improving higher education in the border area. Ms. Cantu and Mr. Kauffman met often with each of these areas and developed a plan for higher education for each of the areas. For example, Laredo sought a full four-year university with a broad range of master’s and doctoral programs in international trade. El Paso sought extensive additions to its master’s degrees, a large array of doctoral programs, and additional research laboratories and facilities. San Antonio sought extensive new doctoral programs at the University of Texas San Antonio and the creation of a downtown campus. Brownsville sought a full four–year university with significant additions to its array of master’s programs and some doctoral programs

121. See Edgewood I, 777 S.W.2d 391.
specifically adapted to Brownsville. The task of the MALDEF lawyers and their associates was to devise plans which met the needs of the local cities, universities and communities. At the same time, the organizers of the plan realized that it was necessary to put limitations on the overall plan in order to design a border wide plan that was both comprehensive and reasonable.

B. Development of the Joint Border Region University Plan

The next step in the effort to devise the border plan, known as the Border Region University Plan,122 was to have border region wide meetings. Each area picked five persons to represent the area in a border wide planning committee. The border wide committee held two meetings in San Antonio; almost all of the Texas state representatives and senators from the border area attended both meetings. The meetings were to develop a consensus plan and to compromise, where necessary, so that the plan would not be duplicative. For example, if the plan were to propose a school of pharmacy in Kingsville (which the plan proposed and became a reality), the plan could not also propose a school of pharmacy in Corpus Christi, forty miles from Kingsville. Similarly, the plan proposed a medical school for the Texas Valley,123 though it certainly could not recommend a medical school in both Brownsville and in Edinburg, sixty miles away.

The organizers of the plan knew that it would only be successful if all of the areas and their legislators signed onto it. After two intense and productive meetings of the entire border region, the plan was adopted. The organizers of the meeting retained a former university president to craft the entire plan into a cohesive document and to develop a budget of the various programs. The organizers of the plan knew they had to bite the bullet and predict a cost to the plan, not just propose a long list of programs and new schools. The total cost of the plan, developed in 1992, was $2,077,600,000 to be added over several years to the regular yearly funding of the universities in the border area. The plan

122. See Kauffman et al., Border Region University Plan: Student and Community Access to Quality University Education (1992) (on file with author) (summarizing the complete plan).
123. See id. at 4.
summarized the costs of the plan for each of the border universities, broken down into Program Enhancements, New Programs and Capital Improvements.

Next, in Fall 1992, the organizers set up meetings with Texas state legislative leadership, specifically Gov. Ann Richards, Lt. Gov. Bob Bullock, and the two leading candidates for Speaker of the Texas House in the 1993 legislative session. Interested state representatives met with the speaker candidates, and the senators from the border area met with Lt. Gov. Bullock. At all of these meetings, the organizers of the plan and their allies in the Texas Legislature touted the complete agreement of the plan by all of the interested legislators and community groups.

In late 1992, individual legislators developed specific legislation to implement the South Texas Border Initiative. As described in the following parts of this Article, the South Texas Border Initiative was extremely successful and lead to legislation which has had a long term positive effect on the availability of higher education opportunities in the border area of Texas.

C. The Development and Passage of the South Texas Border Initiative in the 1993 Legislature

1. The Contents of the South Texas Border Initiative and its Relationship to the Judgment and the South Texas Border Initiative Plan

The South Texas Border Initiative, passed by the Texas Legislature in Spring 1993, was the greatest influx of higher education funding into a particular area of Texas in Texas history. The funding immediately increased the percentage of funding on higher education sent to the border area from 10% to 13% ($166,410,390 in FY 1993 to $244,493,899 in FY 1994). Given the size and complexity of higher

125. See infra Chart 3.
126. See Kauffman et al., Boarder Region University Plan (last updated 2016) (on file with author) (detailing the revenue to each university in Texas for the last 25 years).
education finance in Texas, this was a remarkable and unique achievement.

The Texas Supreme Court noted the “good faith” of the Legislature in supporting higher education when the court summarized the 1993 legislation as follows:

During the last session, however, the Legislature did pass the South Texas Initiative, a measure which allocates an additional $460 million to nine border area universities and colleges over four years. The package includes $112 million to improve and expand undergraduate and graduate course offerings, and $348.4 million in tuition revenue bonds for building and expanding campuses and facilities.127

Briefly, the South Texas Border Initiative specified funding for each of the border universities and some funds for other universities to set up programs in the border.128 For example, UTEP received over $35 million for the 94–95 biennium, and Texas A & M International University in Laredo over $49 million.129 In addition to passing the comprehensive legislation in 1993, twenty-nine of the thirty-one Texas senators signed on to a Senate Resolution requiring the Coordinating Board to give the South Texas institutions adequate support, and describing the inequitable funding of higher education in South Texas.130

2. The Relationship of the Texas Supreme Court Proceedings and the Passage of the South Texas Border Initiative

The Supreme Court case was argued in November 1992, before the beginning of the Texas legislative session in January, 1993.131 The

127. Lulac, 868 S.W.2d at 314, n. 10.
129. Id.
131. The Texas Legislature meets only 140 days beginning in January of odd numbered years.
opinion remained pending during the legislative session and the Texas Supreme Court did not render its opinion until October 1993, five months after the end of the Texas legislative session. In summary, during the 1993 Texas legislative session the injunction of all funding for higher education in Texas hung over the heads of the Texas Legislature like a “sword of Damocles.” At the same time, the historical quantum leap in funding for the border area would certainly have mollified any concerns of the members of the Texas Supreme Court about the clearly inferior funding for the border universities, and the Supreme Court reflected that recognition of the actions of the Legislature in the opinion itself.132

3. Unsuccessful Efforts to Follow Up on STBI Working Group

After the great success of the South Texas Border Initiative in June 1993, and the loss of the court order at the Texas Supreme Court in October 1993, several members of the coalition that developed the South Texas Border plan tried to reinvigorate the group, based on the assumption that the great progress made in 1993 would only be continued if the border region continued to work together in the legislature to advocate for the needs of the students in the Texas border area. However these efforts were not successful.133

VI. EXTRAORDINARY IMPROVEMENT OF HIGHER EDUCATION IN THE TEXAS BORDER AREA

A. A Continuous Improvement of Numbers of Students, Number of MA, MS and Phd Programs And Professional Programs

Since 1993, the border area improved in every one of the indicators of inferiority used in the trial. The percentage of total higher education funds going to the border area increased rapidly. The number and

132. Lulac, 868 S.W.2d at 314.
133. Jim Kazen, now an official with the University of Texas Health Science Center in San Antonio, was particularly consistent and hard-working in his efforts to rejuvenate the South Texas Border Initiative working group.
percentage of doctoral programs and master’s programs increased significantly. The border area obtained several new professional programs, and many special programs for students. The border area increased from 11% to 18% of Texas higher education expenditures, .33% of doctoral programs to 13% of doctoral programs,134 and 13% of the state's public university college students to 18% of Texas public university students. The border region also improved its array of universities from no universities in the top three of five tiers of universities in Texas to representation in all but the highest tier.

This success is greater than that achieved by any area of Texas for any five-year period within the last 25 years.135 Better to understand the degree and direction of these changes, we describe them in more detail in the next subsections.

B. The Method of Computing these Changes in Funding

In order to analyze the changes in funding to Texas universities we have prepared an excel file of all thirty-seven (now forty) Texas public universities and their “All Funds”136 revenues from each of the appropriation acts in Texas since 1989, a total of twenty-seven years of funding. We have included the final student enrollment numbers for each university as well, then computed total funds, total to border universities, percent to border universities, total students, total attending border universities, and percent attending border universities—basically a 56 x 70 excel sheet.137 We based the analysis on the exact amounts


135. Id.


137. See KAUFFMAN EXCEL SHEET, supra note 134 (on file with author).
from the biannual appropriations bills, and enrollment data from Texas Higher Education Coordinating Board audited figures.

Through the years, universities have changed names and a few have been added. Each time a name change occurred, we modified the chart to reflect these changes. The number of bachelors, master’s, and doctoral degrees was also derived from THECB files and the designation of the universities was taken directly from the Carnegie commission website.

Most of the analyses here are based on the twenty-year period from FY 1993 (the year before the South Texas Border Initiative went into effect), until FY 2013, a twenty-year period with all audited numbers.

C. Follow the Money

The funding of higher education in the border area has increased significantly, and based on a series of measures used in the trial of the case, one can analyze very closely the degree and direction of these changes.

Total funding to the border area has increased from $166,410,380 in 1992–93 to $508,296,238 in 2012–2013, an increase of 206%. This is also an increase compared to both the percentage of the total state population in the border area and the number of students in the border area.

The proportion of higher education funding going to border universities has increased from eleven percent in 1993 to eighteen percent in 2013. During this time the population of the border area, even though it has increased significantly, has remained about twenty percent of the total population of the State.


141. KAUFFMAN EXCEL SHEET, supra note 134, at row 64 (on file with author).
Figure 5: Border Region Higher Education Funding as Percentage of Total State Funding

*Series 1 is defined as: Border Percent of Total State Funding*

Even though the number of university students in the border area has grown much faster than the number of university students in the rest of the state, the funding in the border area has increased even faster than the number of university students in the border area. From 1993 to 2013, the number of students attending border universities increased from 64,066 to 108,264, an increase of sixty-nine percent. The state as a whole increased only thirty-eight percent.

The funding per student in the border area has increased from $2,673 per student in 1993 to $4,695 per student in 2013, an increase of eighty-one percent.

One other particularly important indicator is that the dollars-per-student spent in the border area has reached almost the same level as the dollars-per-student in the rest of the State. In 1993, the expenditures for students in the border area were only seventy-one percent of the expenditures per student in the rest of the State. In 2013, the expenditures per student in the border area were ninety-four percent of the expenditures per student in the state as a whole. In FY 2000, the funding-per-student in the border area actually reached the funding-per-student
level for the state as a whole ($5,390 per student for border and $5,387 for the whole state).

This improvement in the per student expenditures is due to the increase of higher level programs at the doctorate and master’s levels as well as significant new funding for new programs and professional schools in the border area.

No matter how one looks at the changes in border higher education, there's been clear and consistent improvement in the funding of these universities and the programs they can offer to students.

These "numbers" represent a major recognition of border communities and border students as equal participants in the higher education enterprise. Border communities have a much greater array of programs available and easier access to advanced programs. And border communities have achieved a remarkable increase of state investment in their area, at a rate much faster than the increase in the rest of Texas.
Table 2 and table 3 are summaries of these improvements in funding in the border area between 1993 and 2013.142

A quick look at the effects of the changes on specific universities in the border is in table 4.

D. Degrees

The number of doctoral degrees in the border area and the proportion of all the doctorate degrees in the State that are in the border area have both increased extremely quickly. At the time of the trial in 1991, there were three doctorate programs in the border area. In 2015, there are at least sixty-three doctoral programs in the border area. And, even more important, several of the universities in the border area have become multi-doctorate research institutions.

At the time of the trial in 1991, the Texas Higher Education Coordinating Board had a policy that it would not grant new doctoral programs to institutions that had one or fewer doctoral programs.

A brief review of the program offerings at the universities in the border area also show a significant increase in master’s programs and bachelors programs as well. In an analysis produced for this author in 2016, the Texas Higher Education Coordinating Board showed twenty-three percent of all Texas bachelors degree programs and twenty-three percent of master’s programs are at border universities. There was a very rapid growth of bachelors and master’s programs at the border universities within 5 years of the passage of the South Texas Border Initiative in 1993. And the border universities grew rapidly in number of bachelor degrees and number or master’s degrees awarded between 1990 and 1997. (table 5).

The Texas Comptroller’s Office completed a study of the border area in 1998 and observed that the lawsuit had significant positive effects on higher education in the border area, concluding:

144. See Id.
146. Email correspondence and Excel sheet from Texas Higher Education Coordinating Board, February 26, 2016 addressed to author (on file with author).
148. Id. at 120–24.
149. Id. at 135.
Measured simply by dollars invested, the initiative made an immediate, dramatic impact. In only seven years, from fiscal 1990 through fiscal 1996, Border higher education reaped $87 million more in annual state funding, a 69 percent gain. Border colleges and universities also began to claim a bigger share of the state pie. They began the decade with $125.5 million in general revenue funding, or 11 percent of $1.1 billion appropriated to all Texas general academic institutions. By fiscal 1996, the reconfigured institutions were pulling down $212.5 million, or 15.2 percent of the state’s $1.4 billion general fund appropriation to general academic . . . Academic program gains were equally unprecedented. On top of valuable affiliations with the state’s two major university systems, Border institutions created 136 new academic programs, added 600 faculty members, erected several new buildings, and renovated still more.150

In 2003, the Texas Higher Education Coordinating Board (THECB) described the South Texas Border Initiative in glowing terms and significant detailed analysis.151

151. See Teri Flack, Deputy Comm’r, Tex. Higher Educ. Coordinating Bd., Presentation on South Texas Border Initiatives, Address Before the House Border and International Affairs
TABLE 6: TEXAS UNIVERSITY TIERS IN 1991

<table>
<thead>
<tr>
<th>Tier</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tier 1</td>
<td>The flagship institutions: Texas A&amp;M University at College Stations and University of Texas at Austin;</td>
</tr>
<tr>
<td>Tier 2</td>
<td>The multi-doctorate universities with professional school: Texas Tech University in Lubbock and University of Houston, University Park;</td>
</tr>
<tr>
<td>Tier 3</td>
<td>Multi-doctorate institutions: University of North Texas in Denton; Texas Woman’s University in Denton; University of Texas at Arlington; University of Texas at Dallas and East Texas University in Commerce;</td>
</tr>
<tr>
<td>Tier 4</td>
<td>The four year universities with some graduate programs;</td>
</tr>
<tr>
<td>Tier 5</td>
<td>The upper level institutions: institutions teaching only junior and senior courses and offering a limited range of masters programs.</td>
</tr>
</tbody>
</table>

E. The tiers of higher education in the border area.

The development and approval of additional doctoral programs and professional schools in the border and the expansion of the upper division universities to full universities has increased the tiers of the universities in the border area. The border area now offers access to a comprehensive university to most college students in the border area.

At the time of the trial in 1991 and the passage of the STBI in 1993, the tiers of higher education in Texas were (table 6):

Plaintiffs described the tiers in this way in their main brief to the Texas Supreme Court in July 1992:

“Relating these tiers to the Border Region, one sees that none of the tier one universities is in the Border Region. None of the tier two universities is in the Border Region. None of the tier three universities is in the border Region. Only some of the 4th and 5th tier institutions are found in the Border Region. One of the state’s eight medical schools/health science centers is in the Border Region. The Border Region has none of the state’s law schools, pharmacy schools, architecture or comprehensive graduating engineering schools.”

This 1991 analysis was based on the Carnegie system and defined comprehensive universities as follows:


A comprehensive public university, for the purposes of this paper and as accepted by both the Plaintiffs and the Defense in the Lulac vs. State of Texas trial, is defined as a public institution offering 20 or more Ph.D. degrees annually in at least one discipline; or ten or more Ph.D.s in three or more disciplines (this is the Carnegie Foundation’s definition for a “doctoral I” institutions[ 10]).\textsuperscript{153} \textsuperscript{154}

The Tiers have changed to this in 2016 (see table 7):

In summary, the University of Texas at San Antonio and the University of Texas at El Paso have moved up to the second tier, and UTSA is in a competition to obtain first tier status.\textsuperscript{155}

Texas A & M University-Corpus Christi, Texas A & M University-Kingsville and The University of Texas-Rio Grande Valley are now Carnegie designated doctoral institutions.

These border institutions have now added approximately sixty doctoral programs at the rate of universities outside the border in the

\begin{table}[h]
\centering
\begin{tabular}{|l|l|}
\hline
Tier 1: Carnegie R1 Doctoral Universities, Highest Research Activity & Texas A\&M University-College Station, Texas Tech University, The University of Texas at Arlington, the University of Texas at Austin, The University of Texas at Dallas, University of Houston, University of North Texas \\
\hline
Tier 2: Carnegie R2 Doctoral Universities, Higher Research Activity & Texas A\&M University-Commerce, Texas State University, **The University of Texas El Paso, **The University of Texas at San Antonio \\
\hline
Tier 3: Carnegie R3 Doctoral Universities, Moderate Research Activity & Lamar University, Prairie View A\&M University, Sam Houston State University, **Texas A\&M University-Corpus Christi, **Texas A\&M University-Kingsville, Texas Southern University, Texas Woman’s University, **The University of Texas-Rio Grande Valley* \\
\hline
Tier 4: Other 4 year universities, including these border universities, Master’s Colleges & Universities & **Sul Ross State University, **Texas A\&M Internations University* \\
\hline
Tier 5: Upper division universities & **Sul Ross Rio Grande in Uvalde remains an upper division university \\
\hline
\end{tabular}
\caption{Analysis of Tiers of Texas Higher Education, Based on Carnegie Classifications 2015}
\end{table}

twenty years before the case went to trial. During the 1970–1990 period, the state approved three new doctoral programs in the border and 371 in the rest of the state, including eighty-four new programs at University of North Texas-Denton.

This is a seismic shift in the structure of Texas higher education. Though there is no guarantee that the general quality of higher education at these institutions has significantly improved, there is no doubt that the range of programs offered at the border universities has increased significantly, and that this expansion is directly related to the additional funding sent to the universities by the state.

Two border universities, The University of Texas at San Antonio and the University of Texas at El Paso, are among the eight universities presently competing to become formally designated research universities entitled to partake in a fund created in the Texas Constitution to encourage research universities.

F. Distance

For purposes of this article, I have not replicated the detailed computer analysis of the average distance of all students in the border to a comprehensive university, as compared to the distance of students from outside the border area to a comprehensive university. At the time of the trial, the average student in the rest of Texas was only forty-five miles from a comprehensive University, and the average student in the border area was 225 miles from a comprehensive university.

With comprehensive universities in San Antonio, El Paso, Kingsville, Corpus Christi, and the Rio Grande Valley (Brownsville and Edinburg), Laredo is the only major population center without its own comprehensive university and it is rapidly approaching that goal. Though I have not completed a separate study of it, I estimate that

157. Id.
159. See JONES & KAUFFMAN, supra note 36, at 272.
students in the border area are now about the same distance from a comprehensive university as students in any other part of Texas.

VII. AN ANALYSIS OF EXISTING MODELS OF RELATIONSHIP AMONG LITIGATION, LEGISLATION AND COMMUNITY.

A. Most models focus on role of particular judges in several stages of a certain case

Malcolm Feeley and Edward Rubin’s *Judicial Policymaking in the Modern State* develops a comprehensive analysis of the judge’s role in policymaking.¹⁶⁰ Through the lens of prison reform in the late twentieth century, the authors discuss the judiciary’s attempts to reform prisons across the nation through adjudication and supervision.¹⁶¹ Feeley and Rubin compare the judicial method of policymaking to policymaking by other branches of government.¹⁶²

Feeley and Rubin present a classic model of policymaking: problem definition, goal identification, articulation of alternatives, selection of solutions, and implementation.¹⁶³ This process, according to Feeley and Rubin, is common in all modes of judicial decision making as they interpret precedent and apply precedent to the pertinent facts.¹⁶⁴

Through incrementalism, judges follow administrative agency tradition by adopting cautious and incremental steps, rather than by complete system-wide overhaul.¹⁶⁵ Feeley and Rubin recognize this consistent practice as a structural constraint on judicial policymaking, which is often overlooked by critics who condemn judicial policymaking as an abuse of separation of powers and federalism.¹⁶⁶

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¹⁶¹ Id.
¹⁶³ Id. at 339.
¹⁶⁴ Id.
¹⁶⁵ Id. at 356.
¹⁶⁶ Id.
Feeley and Rubin examine the nature of policymaking from the bench as they focus on the judge, rather than the outside forces and factors. Focusing on constraints and limitations, the authors defend judicial policymaking based on the actions of judges around the nation in prison reform litigation. Their ultimate contention is that judicial policymaking will only improve through further examination and acceptance as a legitimate avenue for institutional reform.  

Feeley and Rubin’s analysis has been criticized by scholars who perceive the judge-centric analysis as blind to outside sources of institutional reform. Proponents of Feeley and Rubin’s analysis often expand the scope of the analysis in their own works.

This method of analysis has been criticized by claims that a judicial focus is narrow and blind to outside sources of reform. Judges generally follow the plaintiff’s lead, and omission of the role of the attorneys undermines the importance of the civil rights movement underlying prison reform litigation. Schlanger asserts that the presence of civil rights attorneys transformed prison reform into a civil rights movement.

B. Some analyses look at the court case in the broader context of a social movement in conjunction with political and community systems

While Feeley and Rubin’s Judicial Policymaking and the Modern State focuses on the judge’s role in several cases, its specific focus is on prison reform litigation. The authors regarded prison reform litigation as the most prominent example of judicial policymaking in modern United States. Judges inserted themselves into a public institution by

167. Id. at 361.
169. ZARING, supra note 159, at 1023.
170. SCHLANGER, supra note 174, at 2009.
171. See id. at 2015–16.
172. See id. at 2016–17.
173. FEELEY & RUBIN, supra note 162, at 13 (stating that in 1964, no US court had ever ordered a prison to change its practices or conditions; then in 1965 after an Arkansas court
fashioning a complete set of judicial rules derived from scholarship and their own views of morality.¹⁷⁴

Recognizing that these suits are not isolated or insulated from outside forces, uniform judicial standards are explicable and are based on a unique form of precedent. Slaughter calls this phenomenon, “Judicial Cross-Fertilization,” noting that the trend appears to be increasing.¹⁷⁵ Zaring describes this collaboration as an alternative national rule generation, creating an alternate form of judicial decision making, derived not from agreed-upon principles, but from comparison to previously adopted standards across the nation in similar cases.¹⁷⁶

C. Hanusheck, Sandler, and Schoenbrod focus on criticism of courts as anti-democratic

Scholars have argued that institutional reform precedent does not develop vertically, but horizontally, as cases are decided across the nation often without Supreme Court guidance or precedent.¹⁷⁷ While rules of law are generally promulgated by the Supreme Court and integrated by lower courts, institutional reform litigation often results in consent decrees; these do not mirror established precedent, they represent mutual agreement and compromise between the parties to the suit.¹⁷⁸

Some would call this anti-democratic, as nationwide similarities in consent decrees result from a network of repeat players and the exchanges of information, strategy, and participants who appear across the nation in institutional reform cases.¹⁷⁹ Schlanger argues that

found a prison to be in violation of the 8th amendment; within a decade, prisons in 25 of 50 states and the entire prison system of 5 states had been placed under comprehensive court orders; a decade later 35 prisons and 9 states; by 1995 prisons in 41 states, D.C., Puerto Rico, and the Virgin Islands had at one point been under a court order.


¹⁷⁶. ZARING, supra note 159, at 1074.

¹⁷⁷. See id. at 1016.

¹⁷⁸. See id. at 1074.

¹⁷⁹. See id. at 1038, 1076.
attorneys representing plaintiffs in different cases shared strategy, creating national standards without the guidance of a central national authority.\textsuperscript{180}

The uniformity of consent decrees, particularly in the prison reform litigation context, can be attributed to judge attendance at national conferences, repeat judges, and the convergence of ideas occurring outside the case itself.\textsuperscript{181} Sandler and Shoenbrod criticize this judicial involvement by noting that involvement in these cases can be the highlight of a judge’s career.\textsuperscript{182}

In assessing the strengths and limitations of traditional institutional reform litigation, Borgersen determines that the threat of judicial force, while necessary, was alone insufficient to effect meaningful reform.\textsuperscript{183} Three other elements were determined to be essential in successful reform, including a change in the state’s political climate, an innovative approach, and the replacement of litigators for parties with agency expertise.\textsuperscript{184}

**D. Heubert and Mezey focus on positive contributions of court decisions and court enforcement of decrees**

Both Jay Heubert and Susan Gluck Mezey emphasize the victories that institutional reform litigation have brought about, focusing on areas that the usual legislative and voter initiative measures traditionally have overlooked. Emphasizing the rights of children, who are voiceless in the political process, and unable to seek help independently, Heubert and Mezey examine the positive steps that litigation has accomplished; they see law driven reform as a necessary means of redress for constitutional violations of individual liberties.\textsuperscript{185}

\begin{footnotes}
\footnote{180. See id. at 1059, 1061–62; see also SCHLANGER, supra note 174, at 2020.}
\footnote{181. ZARING, supra note 159, at 1070.}
\footnote{182. See id. at 1071; see also SANDLER & SCHÖNBRÖD, supra note 168, at 218, 267 (discussing the media’s praise of selected judges as having championed prison reform through their rulings).}
\footnote{184. See id. at 196–97.}
\footnote{185. JAY P. HEUBERT, LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 3 (1999).}
\end{footnotes}
Jay Heubert’s model combines articles from multiple scholars to emphasize the importance of collaboration between lawyers, educators, researchers, administrators, and parents in school reform litigation efforts.\textsuperscript{186} The purpose of the collective works, he argues, is for the purpose of providing an interdisciplinary approach to law driven school reform participants.\textsuperscript{187} In examining the successes and improvements made through litigated reform efforts in public schools, Heubert seeks to develop a framework to assist both litigators and interested parties to the litigation in successfully pursuing reform efforts.\textsuperscript{188}

Focusing on the six most important areas of law-driven school reform efforts, Heubert discusses the improvements that have been realized and conversely criticizes political and social obstacles that have prevented complete access to education for the less fortunate.\textsuperscript{189} Lawyers seeking reform of school systems must consider several trends in education, research, politics, and child advocacy, and must look to examples of successful systems for guidance and potential success.\textsuperscript{190}

Heubert blames the failure to successfully collaborate as a waste of resources and the hindrance of policies or actions, which would otherwise be consistent and amenable to the goals of all parties involved.\textsuperscript{191} Finding that collaboration is key, Heubert encourages attorneys undertaking school reform to work closely with educators, parents, administrators and researchers; this may even require attorneys to spend years specializing in a specific area of school reform.\textsuperscript{192}

A discussion of the original problem prompting reform was the basis of \textit{Brown v. Board of Education}.\textsuperscript{193} The exclusion of certain groups of students, while addressed in \textit{Brown}, was not the end of discriminatory segregation for minority groups such as Mexican Americans, Native

\begin{itemize}
  \item \textsuperscript{186} See id. at 5.
  \item \textsuperscript{187} See id. at 9.
  \item \textsuperscript{188} See id. at 5.
  \item \textsuperscript{189} See id. at 9.
  \item \textsuperscript{190} See id. at 5.
  \item \textsuperscript{191} See id. at 8 (stating that this can result in driving a wedge between educators and the populations they serve).
  \item \textsuperscript{192} See id. at 8.
  \item \textsuperscript{193} See generally \textit{Brown v. Bd. of Educ.}, 347 U.S. 483 (1954) (holding that racial segregation in public schools deprives children of equal educational opportunities).
\end{itemize}
Americans and Asian Americans.\textsuperscript{194} While \textit{Brown} set a reliable precedent used in many successful subsequent litigation reform efforts, schools around the nation did not cease to enforce separation based on race and national origin.\textsuperscript{195}

It was not until \textit{Plyler v. Doe} \textsuperscript{196} in 1982 that the Supreme Court invalidated laws excluding children from public school based on their parent’s immigration status.\textsuperscript{197} The arguments made in favor of inclusion cited \textit{Brown} and successfully achieved the recognition of a constitutional right, providing access to education for those who would previously have been relegated to the caste system that perpetual inferior education causes.\textsuperscript{198}

Success has been most visible and permanent as a result of litigation concerning the exclusion or segregation of children with disabilities, likely due to the advances in research that prove learning disabilities are remediable.\textsuperscript{199} Federal constitutional and statutory protections accompanied by regulatory entitlements resulted from the advocacy and victories won in the late 1960’s based on \textit{Brown}’s constitutional guarantees.\textsuperscript{200} While political inequality explains the waning success of litigation concerning minorities and immigrants, it also explains the success of litigation regarding disabled children who exist in all races, classes, and cultures.\textsuperscript{201}

The necessity of an interdisciplinary approach to school reform is reinforced by the convergence of legal standards and educational norms.\textsuperscript{202} Heubert proposes that success is more likely when educators and researchers agree that a proposed policy is in the best interests of students or that the policies or practices challenged are without value or necessity.\textsuperscript{203}
Current trends in educational research demonstrate that heterogeneous classrooms are beneficial, rather than detrimental, providing an attractive avenue when reform efforts are based on historically popular tracking systems. 204 Similarly, a legal presumption against exclusion has arisen, mandating inclusion to the maximum extent appropriate. 205 According to Heubert, 206 these are examples of the convergence of legal standards and educational norms, which provide the best avenues to success.

Concerning future efforts to reform public education, Heubert warns that political trends show declining support for civil rights, and resistance to granting new or expanded rights to immigrants. 207 However, he also notes that litigation will continue to be a viable option to seek public education reform. 208 Heubert predicts that lawyers will need to pay close attention to political climates, as coalitions have proved to be important in achieving victory. 209 Lawyers will also need to develop several non-litigation skills such as practicing preventative law, mediating, and lobbying government branches. 210

E. Susan Mezey's model best accounts for the relationship between litigation and legislative and community action

Susan Mezey developed a five-phased descriptive model to explain the origins and consequences of child welfare litigation, focusing on intense litigation against the Illinois Department of Children and Family Services to improve the foster care system. 211 B.H., ___. 212 The five

204. See id. at 18.  
205. Id. at 20.  
206. See id.  
207. See id. at 27–28.  
208. See id. at 31–32.  
209. See id. at 33–34.  
210. See id. at 32–33.  
211. B.H. are the initials of one of the named plaintiffs, and all of the plaintiffs are identified only by their initials. There are a long set of opinions involved and the author identifies four of them, B.H. v McDonald, 49 F.3d 294 (7th Cir. 1995), B.H. v Ryder, 856 F. Supp. 1285 (N.D. Ill. 1994), B.H. v Ryder, 984 F. 2d 196 (7th Cir. 1993); B.H. v Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989)  
phases are stimulus, accountability, adjudication, implementation and response.\textsuperscript{213}

1. Stimulus

The stimulus phase is best described as “ripening conditions for a lawsuit.”\textsuperscript{214} System-wide failure is attributed to legislative demands on an already crumbling child welfare system, coupled with the increased reporting of child abuse.\textsuperscript{215} In examining previous litigation, Mezey deduces that an increasing class-action culture and specific federal child welfare litigation led the way for the \textit{B.H. ____} litigation.\textsuperscript{216} The legal players involved in \textit{B.H. ____} are described, providing a background as well as a foreground for the litigation that would ensue.\textsuperscript{217}

This phase of Mezey’s model serves both descriptive and predictive functions in her analysis of the true results of the \textit{B.H.} litigation. Mezey describes the immediate circumstances surrounding \textit{B.H.____}. However, she also examines intermediate and interrelated forces that often drive and determine the outcome of institutional reform litigation.

2. Accountability

The accountability phase assesses the limits, both constitutional and procedural, that face institutional reform plaintiffs.\textsuperscript{218} First, the parties are introduced through a description of the common characteristics of the class of plaintiffs seeking reform of the institution.\textsuperscript{219} Second, Mezey

\textsuperscript{213} Id. at 10.
\textsuperscript{214} Id. at 39; see also id. at 11–61.
\textsuperscript{215} See id. at 41–42.
\textsuperscript{216} See id. at 48–55 (“Unflattering local media attention from the \textit{Chicago Tribune} placed a spotlight on the DCFS, inciting political action, culminating in hearings on abuse deaths and the DCFS’s performance. The DCFS became a common scapegoat, criticized even by a local juvenile court judge.”).
\textsuperscript{217} See id. at 55–61.
\textsuperscript{218} See id. at 63–87.
\textsuperscript{219} See id. at 63–64 (focusing on the plaintiffs and the defendant, noting that the class of children named as plaintiffs in \textit{B.H. ____} are representative of a broader, systemically victimized population of children in foster care).
examines the claims made. Third, Mezey traces the constitutional precedent in appellate courts as well as the statutory developments enabling the suit.

The federal courts’ involvement in child welfare policy making laid a foundation “paving the way for [a] ruling in B.H. ____.”

The first two phases of Mezey’s model are historically descriptive, and somewhat prejudicial. The stimulus phase encompasses over twenty years of child welfare litigation and history and places B.H. ___ at a tipping point in the more broad progressive movement to cure systemic failure in the troubled and tumultuous child welfare system. While focusing on local failures and Illinois DCFS specific incidences, Mezey is cognizant of the national judicial and atmospheric build up to the B.H. litigation. Mezey’s model refines the scope of reform in the second phase, as specific parties and claims are developed. Again, however, her analysis of B.H. ___ is not limited to the parties and claims within the pleadings.

3. Adjudication

Mezey’s third phase discusses adjudication, described as devising a blueprint for systemic reform. She discusses important preliminary rulings: class certification and the judge’s refusal to dismiss the claim a year later. A change in the DCFS directorship, the willingness to agree, and the increase in nationwide litigation seeking systemic reform of child welfare litigation, propelled the settlement process in that case.

220. See id. at 65–66 (claiming that the states were required to provide a safe foster care system under the Civil Rights Act of 1871, 42 U.S.C. § 1983).
221. See id. at 66–80, 87 (culminating in DeShaney v. Winnebago, the decisions of the lower courts found concurrence in the Supreme Court’s decision. DeShaney held that in limited circumstances, states have an affirmative duty to provide safety to children in state custody. The plaintiff’s enjoyed the additional advantage of the statutory duty imposed by P.L. 96–272, recognized by lower courts as a legislative extension of constitutional due process protection over children in state foster care system).
222. See id. at 87.
223. See id. at 88.
224. See id. at 88–91.
225. See id. at 93–94. The court entered into an agreed order appointing a panel of experts who would assist in creating a more informed negotiated settlement. See also id. at 101–103. This judge-ordered panel of third party experts prompted the DCFS to create workgroups
4. Implementation

Mezey described implementation as the most difficult phase, as the judiciary oversaw the efforts of the plaintiffs and defendants in undertaking the momentous task of systemic change. The agency culture of suspicion as to judicial reform aids in explaining the reluctance on behalf of the defendant state agency as the greatest threat to meaningful reform rested not on open defiance but on “quiet resistance.” Other obstacles to effective reform were attributed to the “revolving door” of agency directorship and the legislature’s failure to fund the staff necessary to maintain the decree’s pivotal caseload limitation. Legal developments also affected the outcome of agency compliance with the consent decree. Constitutional and statutory arguments addressed in the B.H. litigation did not lie dormant and were frequently considered by other federal courts throughout the nation.

In discussing the judicial oversight exercised over the B.H. consent decree, Mezey notes that Judge Grady limited his role to that of an arbitrator; he encouraged settlement between the parties and recognized his role as an outsider in child welfare systems. Overseeing the implementation of a consent decree, the monitor

within the system to form their own decisions as to the changes needed to accomplish a more effective system of child welfare. See also id. at 104. These efforts culminated in a 69-page consent decree, approved by Judge Grady on December 20, 1991. Id. at 105. Provisions in the consent decree reflected successful litigation achieved throughout the nation. Id. at 105–106. The judge appointed a monitor at the state’s expense who would supervise compliance largely based on limiting caseworker caseloads. Id. at 107. The decree benefited both plaintiffs and defendants to the litigation because the legislature was compelled to appropriate additional funding to the severely underfunded state child welfare agency.

226. See id. at 108. Compliance by the state agency was further complicated by the increase of children in DCFS custody, which rose 86 percent between 1991 and 1994, the three years following issuance of the consent decree. Id. at 109.

227. Id. at 110.

228. See id. at 111–12.

229. See id. at 114–118 (explaining the agency’s creation of an office of litigation management, whose specific purpose was to oversee the implementation of current and future consent decrees); see also id. at 122 (stating that, by 1996, the DCFS was operating under eight consent decrees).

230. See id. at 127–29 (“Grady compensated by trying to educate himself about the child welfare system and, more important, by enlisting the aid of experts to assist the court.”).
expands the role of the judiciary in systemic reform. This allowed post-adjudication oversight and assurance of compliance.\footnote{See id. at 130–32 (describing the reaction to the monitor appointed by Judge Grady).}

5. Response

The final phase of Mezey’s model is the response, which describes the reaction to litigation.\footnote{See id. at 134.} The response phase is more analytical than chronological, encompassing the entirety of the litigation.\footnote{See id.}

The political leaders depicted include the governor, other state executives and the legislature.\footnote{See id. at 135.} An immediate impact of the litigation was the consistent increase of the agency’s budget incident to statewide budget cuts.\footnote{See id. at 139.} The Illinois legislature remained hostile to the ACLU and other plaintiffs in B.H. \footnote{See id. at 139–49.} along with future litigation. The legislature required the attorney general to notify the house and senate speakers before settling any class action lawsuit involving substantial amounts of funding.\footnote{See id. at 150.}

Concluding that that B.H. fell short of meaningful change, children’s advocates complained of “cozy” relations between sides of the lawsuit and urged further reform in the opinion

Child welfare authorities instituted a program allowing for kinship, saving an estimated $40 million over the next five years.\footnote{See id. at 152.} Caseloads declined as a result of an alteration to the state’s definition of neglect.\footnote{See id. at 151.} In addition, the reorganization of juvenile court systems also assisted in reducing the burden on the struggling agency.\footnote{See id. at 153–54.}
VIII. DEVELOPMENT OF A NEW MODEL AND THE APPLICATION OF THAT NEW MODEL TO THE LULAC CASE

A review of these models reveals their organized structure and clarity. However, they are not dynamic and synergistic enough to model the effects of a lawsuit on a legislature or the community at large. Based on thirty-five years of action and study, I describe a model that better reflects the realities of working on litigation involving state systems.

I list the elements of the model below. I will then apply them to the Lulac case and to the Texas School Finance litigation, followed by a brief comment on the model's applicability to other ongoing litigation.

A. New model must include these elements:

1. A history of violation of civil or political rights leading up to judicial action
2. Community education and involvement
3. Development of expertise and studies
4. Legislative and executive acknowledgement and response
5. Frustration with legislative and executive action and inaction
6. Development of lawsuit involving experts and community groups and related to real problems expressed by these groups
7. Involvement of political and community figures in the lawsuit itself
8. Public dissemination and publicity
9. Trial and decision publicity
10. Immediate involvement of community groups and political leaders in designing remedy
11. Remedy that is broadly supported by otherwise disagreeing factions.
13. Following up on remedy.

241. See infra Part VII and note 252 (explanations of the Edgewood cases).
B. The application and evaluation of these elements in the *Lulac* case

1. A history of violation of civil or political rights leading up to judicial action

I described the history of higher education in the border area of Texas in a previous part of this Article. For the purposes of this section of the article, it is clear that there had been a long history of inferior higher education opportunities in the border area, and both the higher education professionals and many in the general community were quite aware of these disparities.

2. Community education and involvement

MALDEF, the Thomas Rivera Policy Institute, and many political leaders studied and discussed the lack of higher education opportunities in the border for many years. Certainly, the administrations of all of the universities in the border area knew of the disparities. Some of the political leaders, especially those actively involved in the education committees in the Texas Senate and House, were also aware of the disparities. However, the faculties of the universities had less of an understanding of the disparities, and the communities at large had very little understanding of the disparities or of the causes of the disparities. Anyone in Texas involved in higher education knew that the flagships—University of Texas at Austin and the Texas A & M in College Station—had a much wider array of programs and resources than did the universities in the border area. However, few persons in the community knew about the disparities in the rest of Texas, that is, the access of all Texans in other areas to comprehensive universities, specifically Research 1 universities, and the lack of such access in the border area.

242. See supra Part I.
3. Development of expertise and studies

Two particular studies of higher education opportunities in the border area were instrumental in leading to the data analysis used in the *Lulac v. Richards* case. A joint committee formed in the Texas Senate and House in the mid-1980s studied higher education accessibility in the border area and issued a detailed and very useful report.244 In addition, Dr. Von Ende at the University of Texas Pan American in Edinburg,245 developed an important analytical framework in which he developed a comparison of program and funding availability in the South Texas area246 – as distinguished from the border area – compared to the rest of Texas. This study was disseminated widely in the South Texas area and aroused much discussion and further study by other organizations, including MALDEF.

4. Legislative and executive acknowledgement and response

Although the Legislature completed studies of higher education accessibility in the border area in the 1980's, the studies did not lead to any improvement in the accessibility of higher education in the region. The University of Texas at Austin and University of Houston offered limited doctoral level classes at the border institutions, but Texas made no major changes. Each level of government blamed the problem on the other levels of government or other actors. State agencies blamed universities; universities blamed public education; and legislators blamed the taxpayers. Similarly, local senators and representatives from the border area talked about the intransigence of the University of Texas and Texas A&M systems and the difficulties of getting new proposals


246. The area studied was the Corpus Christi, Kingsville, Laredo, Edinburg, Brownsville area, which the author described as a diamond. See *supra* MAP 3 (depicting the relevant South Texas area) Von Ende at 7.
and new universities through the Texas Higher Education Coordinating Board.247

5. Frustration with legislative and executive action and inaction

The increasing studies on the lack of higher education opportunities in the border area, and media and political coverage of the studies, did lead both to a better understanding of the disparities and increasing frustration with the lack of legislative and executive action. As the frustration developed into political action and community involvement, the frustration and anger were often focused at the local university level; in other words the Corpus Christi community was frustrated with the lack of higher education opportunities in Corpus Christi, as was the Laredo community about lack of opportunities in Laredo, and the Texas Valley about lack of opportunities in the Texas Valley; El Paso and San Antonio similarly were very concerned about their own lack of higher education opportunities. This lack of focus on the broader issue of higher education in the border made it much easier for statewide officials to delay action, blaming this delay on the inability of the border area universities and communities to work together. State officials and the large university systems implied or argued off the record that “if we give a program to Kingsville, then Corpus Christi and Laredo (each within a fairly short distance of Kingsville), will each want the same programs, which would be very inefficient and expensive.” A plaintiff witness at the trial, Dr. Joaquin Cigarroa, M.D., a former member of the Texas Higher Education Coordinating Board, described this as putting Laredo and the other border cities into a struggle to get the "huesitos," the little bones.248

6. Development of lawsuit involving experts and community groups and related to real problems expressed by these groups

MALDEF was aware of this increasing frustration and the increasing amount of useful and persuasive data about the lack of higher education opportunities within the border area. Seminal works on the history of Mexicans and Americans in the State of Texas, and the struggle of Latinos for equal educational opportunity in Texas focused attention on the overall border of Texas and its long-term suffering at the hands of the rest of the State.249 Long term legislators such as Rep. Irma Rangel and Sen. Carlos Truan, and later Senators Judith Zaffirini and Eddie Lucio, used their expertise and power on education committees and appropriation committees to begin to require the attention of the higher education community on the needs of the border area. MALDEF lawyers worked closely with these political leaders to develop further data analyses that would be useful in determining whether to file litigation against Texas regarding higher education financing in the border area.

7. Involvement of political and community figures in the lawsuit itself

Lawyers working in such important cases involving public institutions are caught in an important dilemma. They wish to work with legislators, community groups, and political leaders to develop data and support for their important litigation initiatives. On the other hand, lawyers are under practical and evidentiary limitations not to discuss their proposed strategy and litigation process with the community as a whole.250 Two MALDEF attorneys involved in the Lulac case decided that the case would best be developed by working very closely with


250. See Tex. EVID. CODE 503 (discussing the lawyer-client privilege); Tex. EVID. CODE 511 (discussing waiver of privilege by voluntary disclosure); Tex. R. Civ. P. 192.5 (discussing the work product privilege). The author of this article gave an hour lecture on the case to a packed community meeting in Corpus Christi soon before the trial. The lecture was filmed and sent to Texas A & M University, one of the major defendants in the case. This tape became a source for the development of important defense exhibits.
legislators and community groups. MALDEF lawyers met with the House Mexican American Legislative Caucus and the Senate Hispanic Caucus to discuss the possibility of litigation and the issues to be developed in that litigation. At the same time, the MALDEF lawyers in the case felt strong pressure from academics and higher education professionals to pursue the overall case of discrimination against Mexican Americans in all universities in Texas, and at all levels within those universities, even including faculty and administration.

The MALDEF lawyers decided to litigate both issues at once - to file a case which alleged general discrimination by all the universities in Texas and specifically alleged the issue of the lack of higher education financing for universities within the border area of Texas. So, the lawsuit was filed against all of the university systems in Texas as well as the Texas Higher Education Coordinating Board. Due in part to the recent success of the public school financing case at the district court level and the attention that the Edgewood251 school finance case brought to bear on the public financing of public schools, MALDEF decided to litigate the “border finance” part of the case first.

Before the lawsuit was filed, MALDEF gathered a group of co-counsel legislators, members of the Texas House and Texas Senate who were both attorneys and dedicated to the improvement of higher education opportunities in the border area. Ten members of the legislature joined as co-counsel. This required both significant communication with co-counsel before the filing of the case and before major initiatives in the litigation, and also helped to create a greater sense of “buy-in” among the legislators in the course of the litigation and its potential long-term benefit to the border area.

8. Public dissemination and publicity

In December of 1987, when the case was filed, MALDEF issued a press release and made copies of the petition in the litigation available to the press, legislators and community members. In addition, MALDEF lawyers held lengthy interviews with interested members of the press from San Antonio, the Texas Valley, El Paso, and Dallas, a city outside

the border area but with a border reporter very interested in the issues in the litigation. MALDEF, like many other organizations on both the "left" and on the "right" has become increasingly adept at developing community support and legislative support by consistent communication with media, legislators, and other organizations.

9. Trial and decision publicity

One week before the trial of the case, one of the MALDEF lawyers made a one-day trip to Laredo, Texas to meet with community leaders to explain the details of the lawsuit. In the month before the trial, MALDEF lawyers made presentations on the lawsuit in Corpus Christi, the Rio Grande Valley and El Paso.

MALDEF did significant, continuous work with media as the date of the trial in October 1991 approached. The opening day of the trial and jury selection were held in a large courtroom with a very large crowd of local leaders, representatives of university systems, and the press. As in other litigation of the sort, the crowds at the trial quickly diminished, with only university and media representatives continuing to cover the trial throughout its seven weeks.252

10. Immediate involvement of community groups and political leaders in designing remedy

One of the stages of this lawsuit that is significantly different than much institutional litigation, was the intense efforts by MALDEF and supporting organizations to develop a strong remedy with support by all of the various communities within the border area. These efforts are described above in some detail.253 Nevertheless, for this part of the

252. Maggie Rivas of the Dallas morning news, Veronica Flores of the Brownsville and then Corpus Christi papers, and Ed Sills of the San Antonio Express News gave fairly continuous coverage of the trial. Several legislators had members of their staffs keep track of the progress of the trial and attend at times in order to inform Senators and Representatives and the Texas Mexican American caucus and the Senate to spend a caucus of the progress of the litigation. See Maggie Rivas, Deliberations Begin in Border College Suit: Closing Arguments Center on Fund Formulas, DALLAS MORNING NEWS, Nov. 20 1991; See also Maggie Rivas, Judge Rules State System for College Funding Illegal Border Area Discriminated Against, He Says, DALLAS MORNING NEWS, Jan. 21 1992.
253. See supra Part IV.
article, we must focus on the successful efforts to coordinate the needs and aspirations of the many communities within the border area, and to mollify the historical tensions among communities within the area.

Struggles between nearby communities for resources are not unique to the Texas border area. There have been classic struggles in Texas between Fort Worth and Dallas, thirty miles apart, between Dallas and Houston, and between Austin and San Antonio, as well as the normal urban–rural split in Texas which exists in almost every state. Unfortunately, because of the relative powerlessness of the legislators and businesses within the border area, quarrels among the communities had been especially negative and lead to a very easy "cop-out" by Texas leaders when any one community in the border area sought further resources.

There was a risk in developing such a remedy. Any remedy proposed by the Texas legislators in the border area as well as MALDEF, the attorneys for the plaintiffs, and the plaintiff organizations, could limit the range and flexibility of remedies that might be imposed by a court should the state fail to respond appropriately. Similarly, one might see the remedy offered by the plaintiffs and their organizations and counsel as the maximum “ask,” one that would certainly be watered down by state leadership before it was enacted. Nevertheless, the plaintiffs, the organizations, the attorneys in the case, and the legislative leaders recognized the great benefit of working together and proposing a remedy joined by the many communities within the border area.

11. Remedy that is broadly supported by otherwise disagreeing factions

One difficult but important facet of the remedy was a focused effort to get historically “warring” communities to work together. Laredo and San Antonio have often struggled to be the gateway to Mexico. Corpus Christi and Brownsville had struggled to be the academic institution most involved in ocean studies. Kingsville, Corpus Christi and Edinburg have long struggled to be known as the major academic center in South Texas. And El Paso, Texas, 600 miles from the other major population

254. See supra text accompanying note 132.
areas in the border, and sometimes seen by state leaders as “part of New Mexico,” was extremely suspicious of any plan that would appear to
give more power to San Antonio or the Rio Grande Valley than to El Paso. The coordinators of the committees systematically and intensely
worked with every one of the committees set up in each of the border
communities (Brownsville, Edinburg, Laredo, Alpine, El Paso, San Antonio, Corpus Christi, and Kingsville) to develop a plan specifically
tailored to their community's needs, while the same time not to duplicate
programs and not to appear unrealistic in the expectations. The total cost
of the proposed plan was $2,070,000,000,(in 1992 dollars) broken down
into specific programs and costs for each university.\(^{255}\)

One particularly important part of the design of the South Texas
Border Initiative is that all of the border senators and representatives
were involved in the development of the plan and indeed officially
“signed on” to the plan. In other words, the state leaders and higher
education officials knew that this plan was one to which they had to pay
attention. Even though the House Mexican American caucus and the
Senate Hispanic Caucus were not the most powerful forces within the
Texas Legislature, the state officials and university officials knew that
they would confront major opposition if they did not pay close attention
to a unified remedy that was so broadly supported and well structured.

12. Political approach to “selling” remedy

The next step in the effort was to present the plan to the statewide
officials, the Governor, Lt. Governor, and the Speaker of the House.
MALDEF and several legislators worked together to set up meetings
candidates for speaker of the Texas House of Representatives. The
meeting with Lt. Gov. Bullock, a historical Texas political figure, was
particularly successful.\(^{256}\) At that meeting, Lt. Gov. Bullock polled the
senators in the room and asked each of them for their major priorities in

\(^{255}\) Border Region University Plan-Student & Community Access to Quality University
Education, completed 1992 (on file with author).

\(^{256}\) The author of this article presented the plan to Lt. Governor Bullock at this meeting,
and he was accompanied by all of the senators from the border area and a Hispanic Senator
from Austin.
higher education within their areas. Those major priorities did in fact become South Texas Border Initiative passed by the State legislature in 1993. For example Senator Gregory Luna of San Antonio asked for a campus in the downtown area of San Antonio. That proposal now exists as UTSA downtown. Judith Senator Zaffirini asked for the expansion of the upper division university in Laredo into a full four-year University. That proposal became Texas A&M International University.

The South Texas Border plan became the structure for a series of bills in the 1993 legislature to delineate the specific programs and funding for each university in detail. Each bill reflected the compromises developed before the 1993 legislature in the joint plan.257

13. Following up on remedy

The South Texas Border Initiative, passed in 1993, was the direct result of the lawsuit and the efforts to coordinate and disseminate a joint plan for higher education within the border area. However, efforts to continue the strong coalition developed after the lawsuit, and to further improve higher education within the border area, were not directly successful. Certainly, academic professionals and university administrators within the border area saw the advantages of working together to pursue joint initiatives. However it was difficult to maintain the broad coalition of community members throughout the border area, without the obvious power and support of the court injunction. The South Texas Border Initiative was passed before the Texas Supreme Court vacated the injunction,258 finding for the State in the litigation.


A. Introduction and summary of section

Fortunately we have another example of systemic litigation in the area of education in Texas with which to compare the Lulac litigation. The Texas Supreme Court has written seven opinions since 1989 on efforts to improve the Texas school finance system. Both the Texas Supreme Court's opinions and significant writing on the topic give a thorough history and analysis of the opinions, and to a lesser extent, the legislative responses to the opinions.

Even though the Texas Supreme Court has held the Texas school finance system unconstitutional several times, the creation of a long-term remedy has not yet been agreed upon. In the area of Texas school finance, significant progress has been made by the Texas Legislature in response to the Texas Supreme Court's opinions, but that remedy could have been improved significantly if the model outlined in this article had been followed more closely. In the school finance area, the first eight steps of the model were followed very much as in the Lulac litigation. However, the later steps-especially those in which leaders made systematic efforts to gather legislators, community members and experts into an organized process to compromise on their long term differences-were not followed in the school finance cases.
B. A detailed application of the model to the Edgewood cases

1. A history of violation of civil or political rights leading up to judicial action

The Texas public school finance system was a system of inequalities between rich districts and poor districts from its very inception. After a decade of struggle, the Texas school finance system was barely upheld by the United States Supreme Court in 1973. In Rodriguez, the US Supreme Court held 5-4 that it was a close decision whether to uphold the Texas school finance system, even under the rational basis standard, the lowest standard of review. All the parties and the Court agreed that if the system had been analyzed under the fundamental rights standard, the system failed. The Rodriguez decision did lead Texas to reevaluate its school finance system and make some minor improvements in the years after the decision.

2. Community education and involvement

However, through the mid 1980's, there was significant ignorance in the state about the reasons for the inequalities in school finance. Community members knew that poor districts had fewer resources than rich districts, but did not understand how that system developed or how the inequities occurred. In the 1970s and 1980s, two organizations, the Intercultural Development Research Association (IDRA) and the Equity Center, began to prepare a series of long-term studies and to develop community interest and education on school finance inequities.

262. See generally San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that the Texas school-financing system did not violate the equal protection clause of the Fourteenth Amendment).
263. See id. at 44.
266. See JOSE E. CARDENAS, TEXAS SCHOOL FINANCE REFORM AN IDRA PERSPECTIVE (Intercultural Dev. Research Ass’n (IDRA) ed. 1997. See EQUITY CENTER,
Unlike the higher education area, public education has a plethora of organizations focused on the development and finance of public education. However, most of these organizations are focused on the interest of their particular members, whether they be school board members, administrators, teachers, counselors, etc. Almost all of these groups advocated for more funding for public schools; but they were not focused on the issue of equity among the school districts, or even general 267 “adequacy” of the State school finance system.

3. Development of expertise and studies

IDRA in the late 1970s continued its series of in-depth studies of the lack of equity in Texas school finance, 268 and the Equity Center continued those studies and disseminated the information to its school board members. These organizations educated legislators and school officials and the community at large about the inequities.

4. Legislative and executive acknowledgement and response

After the Rodriguez litigation in 1969–1973, and several state studies required by the state legislature, legislators began to force the state education agency to develop more information on the equity and inequity of the system. Education committees and individual legislators forced the Texas education agency to produce printouts showing the effects on every Texas school district of any proposed legislative enactments. This improvement in information lead in part to the major change in the structure of Texas school finance in 1984, popularly known as House Bill 72. 269 Ross Perot, later a presidential candidate, was the head of a commission appointed by the governor to develop a


267. Equity and adequacy are different but interdependent theories used in almost every school finance case, and are the subject of intense academic discussion.


269. See H.B. 72, 68th Leg., Reg. Sess. (Tex. 1984). The author of this article wrote the petition in the Edgewood case in 1984 and worked on the case for 18 years after that.
new school finance plan and a broader plan to reform Texas public education. This commission resulted in House Bill 72. However, the focus of his committee and HB 72 was more on changes in curriculum than systemic change in school finance, moving away from Texas as an agricultural state to Texas as an industrial and high-tech state.

5. Frustration with legislative and executive action and inaction

At the time of the passage of HB 72 in 1984, MALDEF had already filed state court litigation to address the inequities in Texas school finance. The frustrations of the late 1970s and early 1980s had led a small group of school districts and families, with expertise from IDRA and the Equity Center, to develop a lawsuit against Texas.

6. Development of lawsuit involving experts and community groups and related to real problems expressed by these groups

Although there was a great deal of public focus on the Texas education system brought about by HB 72 and Ross Perot, the lawsuit was being developed by a fairly small group of experts at IDRA, the Equity Center, and MALDEF.

7. Involvement of political and community figures in the lawsuit itself

Though MALDEF and IDRA informed legislators of the possibility of a lawsuit, there was little involvement by legislators in the design of the plan or the particular theories in the lawsuit.

8. Public dissemination and publicity

During the Edgewood cases, MALDEF lawyers and IDRA worked closely with the House Mexican American Legislative Caucus and the Senate Hispanic Caucus to develop support for the lawsuit. The Equity Center performed analyses and data compilations and educated its member school districts about the lawsuit. The filing of the lawsuit engendered significant publicity throughout Texas and the nation. On the date of the filing of the first Edgewood lawsuit in May 1984, MALDEF organized a march from the State Capitol building to the Travis County Courthouse (about 10 blocks) to file the papers in the case in front of the press and community members.
9. Trial and decision publicity

In 1987, the first day of the trial in Travis County District Court was to a packed gallery. Every State education organization, many legislators, and a wide variety of interest groups were represented at the hearing. As in most such long-term cases the crowd waned quickly during the three months of the trial. As the trial of the first Edgewood case ended, media again began to focus on the decision which was made in open court by Judge Harley Clark in April 1987. The court holding that the school finance system was unconstitutional received extensive publicity in almost every major news organization in Texas.

10. Immediate involvement of community groups and political leaders in designing remedy

As in other court cases, the case took years to wind its way through the court system to a Texas Supreme Court opinion holding the system unconstitutional in October 1989. The Texas Legislature made no changes to the school finance system in Spring 1989. Legislators and community groups were waiting for the Texas Supreme Court to decide the case.

This is one very significant difference between the school finance case development and the higher education finance case development. In the higher education case, MALDEF attorneys and their experts moved quickly to design a remedy and advocate for it in the legislature even before the Texas Supreme Court could decide the case.

270. Edgewood Indep. Sch. Dist. et al. v. Kirby et al., Case no. 362,516, 250th District Court, Travis county Texas, August 27, 1987 (this opinion is available in JOSE E. CARDENAS, TEXAS SCHOOL FINANCE REFORM, AN IDRA PERSPECTIVE 221–54 (Intercultural Def. Research Ass’n (IDRA) ed. 1997).
11. Remedy that is broadly supported by otherwise disagreeing factions

One other major difference between the school finance history and the higher education finance history is that significant efforts to develop a school finance plan were never successful in addressing the equity issues. There seemed to be general agreement among all of the educational and their legislative supporters that schools in Texas needed to be better funded. However, because these organizations represented employees of both very wealthy and very poor school districts, and because they operated within the political system in Texas, no one could devise a plan to promote equity that would be supported by all of the organizations, or even a great majority of the organizations and supporters. This inability to develop a plan satisfactory to the many different groups within the school finance world lead to great confusion and a lack of overall support for the legislative efforts that followed the Texas Supreme Court case.

12. Political approach to “selling” remedy

There was no single remedy for the school finance case that was generally accepted and supported by advocates for school finance reform. In 1990, after the first Edgewood Supreme Court opinion, in October, 1989, MALDEF and IDRA developed a legislative proposal, called the Uribe–Luna plan, which would have created the most equitable school finance system to date in Texas. However, because the plan was not broadly supported by wealthy districts and even other low wealth districts, the plan was unsuccessful in the Legislature. The Uribe-Luna bill did became the theoretical basis for the 1991 school finance plan, called the Community Education District plan. Unfortunately, because that plan was strongly opposed by wealthy

273. Id.
274. See S.B. 9, 71st Leg., 3d Reg. Sess. (Tex. 1990); see also KAUFFMAN, supra note 261, at 570.
275. See supra note 256, at 570.
districts, those wealthy districts sued the state on that plan and successfully ended it.276

13. Following up on remedy.

The Texas Legislature, like most legislatures, passes a new school finance plan every session. Usually, the basic elements of the plan are the same from session to session, but major changes to the elements of the plan are made each session. Thirty -two years after the school finance case was first filed, and twenty-seven years after the Texas Supreme Court first found the school finance system unconstitutional, there is still a great deal of inequity in the system and it is presently before the Supreme Court for the seventh time.277

X. CONCLUSION

A. This model is more dynamic and interactive than other models, and it is more comprehensive in consideration of outside factors.

The model I've outlined in this article to analyze the development of changes in large state systems, which are the subject of litigation, is more dynamic and realistic than the others reviewed. The model seeks to focus on the interrelationship among the courts, legislators, lawyers and community groups, all of which have been involved in major changes to governmental systems.

By focusing on the relationship of the lawsuit to a proposed remedy and developing community support for that remedy, the model should be helpful to persons embarking on litigation affecting State systems.

276. Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992) (Edgewood III) (holding that the public school finance system enacted under Senate Bill 351 was a constitutional violation).

B. This model may be too “sui generis” and too tied to particular litigation efforts of MALDEF

The model may be too focused on the specifics of the two lawsuits described in some detail in this article, and might not be generally applicable for that reason. Nevertheless, a review of institutional reform litigation and the models of that litigation to date leads this author to the conclusion that the model described here is both a more accurate representation of effective litigation in this area and a better model for use by attorneys, legislators and community groups when considering the relationship between litigation and legislative action.

C. This model will be useful in analyzing range of cases such as school finance, children’s welfare litigation and prison litigation successes and failures

This model should be useful to attorneys and others involved in the litigation process in designing a long term plan to integrate litigation into other crucial steps in the process of converting a litigation concept into useful long term improvements in state systems. It will also be useful to those involved in ongoing litigation efforts to review their litigation process and modify to improve it over time.

Two ongoing policy battles playing out in the courts and the public is a good examples of this model. In Texas v U.S.,\textsuperscript{278} Texas and 26 other states filed federal court litigation against the federal government to enjoin the U.S. government from giving Dreamers and their families certain rights not to be prosecuted. This arose from long term struggles in the country on immigration, divisive legislative battles, and press and organizational discussion and education on the issues. By the time this article is printed, the case will probably have been decided by the US Supreme Court. However, because of the lack of an agreed plan and broader support, the battle will go on.

And the long series of cases and legislation regarding abortion have followed parts of this model, though agreement in that area seems impossible.

\textsuperscript{278} Texas v. U.S., 809 F.3d 134 (5th Cir. 2015), aff’d, 84 U.S.L.W. 4471 (2016).
The *Lulac* litigation was very successful, even though the plaintiffs ultimately lost the final legal battle. It can be described as winning the war, even though the last battle was lost. Possibly, that was just an accident of history, and no doubt the specific political and educational climate into which the litigation was thrust was very important to this very positive outcome. Nevertheless, there are important lessons to be garnered from the case, and it is the purpose of this article to try to share those lessons.