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Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980

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INTRODUCTION

Perhaps surprisingly, some commentators have argued that minority scholars often have been excluded from the debate regarding key issues of race or civil rights law.[1] Arguably, any such exclusion caused the literature dealing with race and American law to be distorted and seriously incomplete.[2] In response, critical race scholars have begun to explore civil rights issues.[3] Nonetheless, to date, no one has undertaken a critical examination of the Mexican-American litigation experience in light of contemporary jurisprudential and critical scholarship.[4] This article seeks to help fill that void and contribute to the on-going reevaluation of issues of race and law.[5]

In particular, the article explores a jurisprudential point: legal indeterminacy in the context of Mexican-American civil rights litigation.[6] Traditional legal theory has recognized that legal doctrine is sometimes indeterminate in that it does not always dictate

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[1] This position has been forcefully defended by Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984). He has written: "I think I have discovered a second scholarly tradition. It consists of white scholars' systematic occupation of, and exclusion of minority scholars from, the central areas of civil rights scholarship." *Id.* at 566.

[2] *See id.* at 566-73 (excluding minority writings about key issues of race law causes "bluntings, skewings, and omissions in the literature dealing with race, racism and American Law").

[3] *See* Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1, 6 (1991) (stating that critical race scholarship developed in late 1970s with realization that 1960s civil rights movement was losing ground).

[4] There are some older works addressing some aspects of the Mexican-American civil rights movement. *See, e.g.*, Richard Delgado & Victoria Palacios, *Mexican-Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME LAW. 393 (1975); Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662 (1975); Jorge C. Rangel & Carlos M. Alcala, Project Report, *De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307 (1972); Guadalupe Salinas, Comment, *Mexican-Americans and the Desegregation of Schools in the Southwest*, 8 HOUS. L. REV. 929 (1971).

[5] *See* Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQ. J. 103, 127-28 (1987) (arguing that critical legal theory provides way for minorities to decode dominant culture's legal texts and help bring about social transformation).

[6] *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 328 (1987) (arguing importance of understanding how legal indeterminacy works in specific contexts).

results.[7] For example, H.L.A. Hart writes that "[i]n every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents."[8] More recently, pragmatists, critical legal scholars, and others have argued that law is indeterminate in the sense that legal materials—statutes and court decisions—often permit a judge to justify multiple outcomes to lawsuits.[9]

In light of this open texture in the law, legal theorists have argued that judicial decisions are often not logically compelled and are instead the result of conscious or unconscious discretionary policy choices.[10] Accordingly, one of the goals of this article is to

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[7] *See* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 11-12 (1984) (stating traditional legal theory incorporates indeterminacy).

[8] H.L.A. HART, THE CONCEPT OF LAW 132 (1961).

[9] *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 23 (1990) ("Moreover, the American legal tradition is now so rich, variegated, conflicted, and ambivalent that a strand of it can easily be found to support either side in difficult cases."); DAVID KAIRYS, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 140, 160-61 (1982) ("[S]ince precedents and reasoning can be distinguished, modified, or discarded, they do not require any particular rule or result. . . . [T]he law merely provides a variety of bases for justifying choices made on other grounds."); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 819 (1983) (arguing that prior decisions cannot constrain present decisions because "it turns out that the limits of craft are so broad that in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants"); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (describing how law is infused with irreconcilably opposed principles and ideals).

[10] *See, e.g.*, GEORGE C. CHRISTIE, JURISPRUDENCE 642 (1973). One of the goals of the American legal realists was to show that legal results were not logically compelled and that judicial decisions were "really the result of policy preferences. The realists wanted to expose these policy choices, particularly when they were unconscious choices." *Id.*; *see also* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (stating that when legal rules do not dictate result, judicial decisions are made in light of social policies). The notion of judicial discretion also raises important questions about the legitimacy of judicial decision-making. *See* POSNER, *supra* note 9, at 21. Judge Posner stated:

> The idea of judicial discretion — a blank space or black box, not the solution to the problem of deciding cases when the rules run out but merely the name of the problem — is no matter how fancied up, a source of unease to the legal profession. If, much of

demonstrate that courts' decisions either for or against Mexican-Americans were often not inevitable or compelled. In so doing, policy choices of the courts are revealed and brought to the surface. This article argues that exposing the exercise of judicial discretion and the lack of inevitability in civil rights cases is important for two principal reasons. At one level, exposing the exercise of judicial discretion is significant because it helps reveal the extent to which the courts have helped or failed to help establish the rights of Mexican-Americans. At another level, exposing false necessity in judicial decision-making by explaining how the decision might have gone another way—*i.e.*, offering a counterstory[11]—is important because it may help break down barriers to racial reform. Drawing on critical race theory, legal pragmatism, and the philosophy of science, this article argues that providing judges with counterstories or alternative perspectives on civil rights issues is one way to help them overcome the "unthinking conviction that [their] way of seeing the world is the only one—that the way things are is inevitable, natural, just, and best."[12] By acknowledging their limited perspective, judges can avoid serious moral error and promote justice in civil rights cases.[13]

This article analyzes the published decisions concerning Mexican-American efforts to litigate certain civil rights issues for the years 1930 to 1980. Part I identifies how Mexican-Americans have

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> the time, and certainly in the most interesting cases, judges are legislators, why are they not subject to the same political — today, democratic — controls as legislators?

Id.

11 *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1989) (recommending counterstorytelling in order to "shatter complacency and challenge the status quo"). As one commentator has observed, there is almost no legal subject that cannot be viewed as some form of story. *See* Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 255 n. 3 (1994). Indeed, "[l]aw is itself a story." *Id.* at 262 (citing Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 807 (1993)).

12 Delgado, *supra* note 11, at 2439.

13 *Id.*; *see also* Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1958 (1991) (exposing false necessity in civil rights law can enable "judges to avoid the types of mistakes we include within the term 'serious moral error'"); Martha Minow, *Foreward: Justice Engendered*, 101 HARV. L. REV. 10, 95 (1987) ("Justice is engendered when judges admit the limitations of their own view-points, when judges reach beyond those limits by trying to see from contrasting perspectives . . . .").

challenged discrimination in the areas of public accommodations, land grants, restrictive covenants, and racial slurs. Part II of this article notes that Mexican-Americans also have confronted segregation in public schools and have been litigating to eliminate that form of oppression since 1930. The more recent struggle in the courts to establish a right to bilingual and bicultural education under Title VI of the 1964 Civil Rights Act is also examined in Part II. Overall, the article argues that because of legal uncertainty or indeterminacy, the resolution of key issues often was not inevitable. Judges often had discretion to reach their conclusions. The article, however, seeks to do more than establish that important conclusion.

Part III of this article draws some general conclusions from the cases about the effects of legal indeterminacy and judicial discretion. In this regard, the article concludes that the courts generally exercised their discretion by taking a position against Mexican-Americans on key issues. Part III also seeks to place the article in the context of a larger effort to generate legal reform in the areas of race and civil rights. Exposing the lack of inevitability in civil rights judicial decision-making may help eliminate barriers to racial reform. Applying the insights of critical race theory, legal pragmatism, and the philosophy of science, this article concludes that justice can be promoted in civil rights cases by providing judges with alternative perspectives on civil rights issues.

I. MEXICAN-AMERICANS TAKING A STAND: LITIGATION IN THE AREAS OF PUBLIC ACCOMMODATIONS, LAND GRANTS, RESTRICTIVE COVENANTS, AND RACIAL SLURS

Mexican-Americans have challenged discrimination in the areas of public accommodations, land grants, restrictive covenants, and ethnic slurs. As the discussion below illustrates, the cases indicate that the outcomes in these lawsuits often were not inevitable.

A. Public Accommodations

Throughout history, racial discrimination has been based on the notion that certain groups of people are inferior to the white majority.[14] One of the ways that the dominant group in our society

[14] *See generally* DERRICK BELL, RACE, RACISM AND AMERICAN LAW (3d ed. 1992); STEPHEN J. GOULD, THE MISMEASURE OF MAN (1981); RUDOLFO ACUÑA, OCCUPIED AMERICA: THE CHICANO'S STRUGGLE TOWARD LIBERATION (1972); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR (1978); .

has branded minorities as inferior has been to exclude them from places where members of the white Christian majority were free to travel or live.[15] There are three published cases in which Mexican-Americans have challenged this form of discrimination: *Lueras v. Town of Lafayette*,[16] *Terrell Wells Swimming Pool v. Rodriguez*,[17] and *Lopez v. Secombe*.[18] Each case deals with access to a public swimming pool and is discussed in turn.

The earliest published decision is *Lueras v. Town of Lafayette*.[19] Mexican-American plaintiffs alleged that defendant town and other officials had violated plaintiffs' federal constitutional rights by refusing to admit them to a public swimming pool.[20] The town had leased the pool to a volunteer fire department. The fire department placed a sign outside the pool stating that it was for use by whites only. Plaintiffs sought a judgment declaring that they had a constitutional right to use the pool.[21] The court refused to grant that judgment.[22] Although the reasoning of the court is unclear—the court cited no cases and offered no clear legal analysis—the court apparently refused to issue that judgment because it concluded that the leasing arrangement relieved the town of any duty to admit plaintiffs to the pool.[23] *Lueras* appears to be an example of a government entity attempting to avoid desegregation by leasing a public pool to a private party, the volunteer fire department. In the early years of the civil rights movement, a number of governmental entities used this tactic in their attempts to circumvent federal anti-discrimination laws.[24] The Fourteenth Amendment forbids racial

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15 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-15, at 1477 (2d ed. 1988) (stating that racial segregation's appearance of "symmetry" is false because segregation represents and reinforces "white supremacy").

16 65 P.2d 1431 (Colo. 1937).

17 182 S.W.2d 824 (Tex. Civ. App. 1944).

18 71 F. Supp. 769 (S.D. Cal. 1944).

19 65 P.2d 1431 (Colo. 1937).

20 *Id.* at 1431.

21 *Id.*

22 *Id.*

23 *Id.* at 1432. It is interesting that although the court did not provide plaintiffs with relief, it emphasized the trial judge's misgivings about racial discrimination. The court observed that racial discrimination tended to produce antagonisms potentially harmful to society. *Id.*

24 *See* Mitchell P. House, Jr., Comment, *Constitutionality of "Segregation by Indirection" Through Sale or Lease of Public Recreational Facilities*, 8 MERCER L. REV. 355 (1957).

discrimination by state action, not private action.[25] Thus, these leasing arrangements allowed a defendant to argue that the discrimination was not unconstitutional because it did not result from state action, but rather from private action.[26]

To the extent that *Lueras* exemplifies such an effort to circumvent the law, the court might have resolved it differently. Later courts struck down similar arrangements intended to circumvent federal anti-discrimination laws.[27] For example, in *Lawrence v. Hancock*,[28] an African-American plaintiff sought to compel city officials to admit him to a public swimming pool. The city had leased the pool to a private operator who had refused to admit plaintiff. The court held that the leasing arrangement did not relieve the city of its constitutional obligation to afford all of its citizens equal rights to use the pool.[29]

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25 *See* TRIBE, *supra* note 15, at 1688 (observing that almost all constitutional guarantees of individual rights protect against only government action); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 452 (4th ed. 1991) (noting that constitutional amendments that protect individual liberties address federal and state actions).

26 *See, e.g.*, Lawrence v. Hancock, 76 F. Supp. 1004, 1008 (S.D. W. Va. 1948). There the court held that "[j]ustice would be blind indeed if she failed to detect the real purpose in this effort of the City of Montgomery to clothe a public function with the mantle of private responsibility." *Id.* The court recognized that this practice was "clearly but another in the long series of stratagems which governing bodies of many white communities have employed in attempting to deprive the Negro of his constitutional birthright; the equal protection of the laws." *Id.*; *see also* Culver v. City of Warren, 83 N.E.2d 82, 88 (Ohio Ct. App. 1948) (holding lease to veterans organization was subterfuge adopted by city to avoid its constitutional obligation under Fourteenth Amendment). *See generally* House, *supra* note 24.

27 *See* Department of Conserv. and Dev. v. Tate, 231 F.2d 615, 616 (4th Cir.), *cert. denied*, 352 U.S. 838 (1956) (holding state could not avoid its constitutional requirement of non-discrimination by leasing to private business); Anderson v. Moses, 185 F. Supp. 727, 734 (S.D.N.Y. 1960) (holding Tavern-on-the-Green was instrumentality of state because it was operated on state property and was subject to state control; and therefore, it was subject to Fourteenth Amendment which prohibits discrimination because of race or color); Lawrence v. Hancock, 76 F. Supp. 1004, 1008 (S.D. W. Va. 1948) (holding city could not evade its constitutional obligations to afford all its citizens equal rights to use public swimming pool by leasing pool to private party); Kern v. City Comm'rs of Newton, 100 P.2d 709, 713 (Kan. 1940) (holding city could not lease property to private party to evade constitutional obligations).

28 76 F. Supp. 1004 (S.D. W. Va. 1948).

29 *Id.* at 1008.

At the time of the *Lueras* and *Lawrence* decisions, the Supreme Court's decision in *Plessy v. Ferguson*[30] provided some authority for the proposition that states could racially segregate public places.[31] Courts, however, interpreted *Plessy* to authorize segregation of minorities only so long as they received separate services or treatment purportedly equal to that provided for whites.[32] Although the *Lawrence* court did not discuss *Plessy*, the court may not have applied *Plessy* because the city had not provided separate but equal swimming facilities for African-Americans.[33] Similarly, it appears that *Plessy* would not have authorized the segregation in *Lueras*. The opinion does not indicate that the town had provided separate but equal facilities for Mexican-Americans.

In any event, in 1937 the *Lueras* case taught Mexican-Americans that the American legal process would not always be responsive to their problems. Nevertheless, Mexican-Americans elsewhere continued to litigate access to public accommodations.

Terrell Wells Swimming Pool v. Rodriguez,[34] decided during the Second World War, arose in Texas. Jacob Rodriguez sought an injunction requiring the defendant swimming pool operator to offer equal accommodations to all persons of Mexican descent.[35] The lower court granted the injunction.[36] The Texas Court of Civil Appeals reversed. The appellate court held that, in the absence of civil rights legislation to the contrary, the proprietor of a privately operated place of amusement may exclude any person for any reason.[37]

In reaching its decision, the *Terrell Wells* court rejected an ingenious argument by plaintiff. Plaintiff contended that the pre-

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30 163 U.S. 537 (1896) (upholding segregation on passenger trains).

31 *See* NOWAK & ROTUNDA, *supra* note 25, at 619 (stating that doctrine of *Plessy v. Ferguson* was used to sanction widespread segregation in public schools and other state institutions); BELL, *supra* note 14, at 112-16.

32 *See* NOWAK & ROTUNDA, *supra* note 25, at 617. Between 1896 and 1954, the concept of "separate but equal" allowed separate treatment for persons of minority races if their treatment was equal to that provided for whites. *Id.* In fact, the "apparent symmetry in treatment created only a shallow illusion of equality." TRIBE, *supra* note 15, § 16-15, at 1475. The stereotypes of racial inferiority were created and sustained by the social stigma and attendant circumstances resulting from legally imposed racial segregation. *Id.* at 1477.

33 *See Lawrence*, 76 F. Supp. at 1010.

34 182 S.W.2d 824 (Tex. Civ. App. 1944).

35 *Id.* at 825.

36 *Id.*

37 *Id.*

existing law had been changed by a Texas House Concurrent Resolution. The resolution, which had been passed by the Texas legislature and proclaimed by the governor, established as a matter of Texas public policy that all Caucasians were entitled to equal accommodations.[38] Plaintiff argued that he could not be excluded from the pool on the basis of his Mexican ancestry because that would violate the public policy expressed in the resolution.[39] The court refused to enforce the public policy on the ground that the concurrent resolution did not have the effect of a statute.[40] Thus, the corporation retained the right to exclude persons of Mexican descent.

The *Terrell Wells* court's conclusion that the concurrent resolution did not have the effect of a statute is questionable. Significantly, the court ignored Texas Supreme Court authority establishing the proposition that a joint resolution, when approved by the governor, was as binding as a statute.[41] The governor had

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[38] The resolution declared the following Texas public policy:

> 1. All persons of the Caucasian Race within the jurisdiction of this State are entitled to the full and equal accommodations . . . of all public places of business or amusement . . . .
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> 2. Whoever denies to any person the full advantages . . . except for good cause applicable alike to all persons of the Caucasian Race . . . shall be considered as violating the good neighbor policy of our State.

Id. at 826. The resolution came about because discrimination against Mexican-Americans in Texas had been particularly egregious. *See* Greenfield & Kates, *supra* note 4, at 706. As a result, the Mexican Ministry of Labor declared in 1943 that no more Mexicans would be allowed to go to Texas. *See id.* In response, the Texas legislature passed the concurrent resolution at issue in *Terrell Wells*. *See id.*

[39] *Terrell Wells*, 112 S.W.2d at 826.

[40] *Id.* Subsequently, the Texas legislature failed to pass a bill which expressly prohibited discrimination against Mexican-Americans. *See* Greenfield & Kates, *supra* note 4, at 706-07.

[41] *See* Terrell v. King, 14 S.W.2d 786, 793 (Tex. 1929) ("It is no longer an open question in Texas that a joint resolution of both houses, approved by the Governor, reflects the command and will of the state in one of the modes prescribed by the Constitution, and is as binding as a statute."); *see* Weekes v. City of Galveston, 51 S.W. 544, 547 (Tex. Civ. App. 1899) (holding that joint resolutions have "the force and effect of law" and are "imperative upon the courts"). In *Terrell Wells*, the court instead relied on cases stating that a concurrent resolution did not have the effect of a statute. The court, however, could have distinguished or avoided those cases on the grounds that (1) they did not involve resolutions that had been proclaimed by the governor, and (2) they were, in any event, contrary to the Texas Supreme Court's position in *Terrell v. King*.

approved the resolution at issue in *Terrell Wells*.[42] Thus, if the court had followed binding precedent, it should have found that the resolution had the binding effect of a statute.

Moreover, the *Terrell Wells* court's determination that it could not enforce the public policy against discrimination in the absence of legislation was not logically compelled. In *James v. Marinship Corp.*,[43] decided in the same year, the California Supreme Court held that a private labor union could not discriminate against African-Americans. The court found that the labor union discrimination violated the public policy against race discrimination expressed in the Fifth, Fourteenth, and Fifteenth Amendments.[44] The court expressly held that a statute was not necessary to enforce the public policy against racial discrimination when private rather than public action was involved.[45] Thus, arguably, the *Terrell Wells* court could have enforced the anti-discrimination public policy expressed in the resolution or in the Federal Constitution to prevent public accommodation discrimination against Mexican-Americans.

In *Lopez v. Seccombe*,[46] plaintiffs sought to enjoin the City of San Bernardino and other officials from excluding Mexican-Americans from the public swimming pool and park facilities.[47] Without explaining its reasoning, the court held that defendants had violated plaintiffs' rights under the Fourteenth Amendment and issued an injunction.[48]

The *Lopez* court's decision to uphold the rights of Mexican-Americans is puzzling because the court did not articulate the basis for its ruling. The court did not explain why *Plessy* did not authorize the segregation or whether public policy concerns played a role. If *Plessy* was not applicable because the city had failed to provide separate but equal facilities for Mexican-Americans, then *Lopez* indicates

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[42] *Terrell Wells*, 182 S.W.2d at 826.

[43] 155 P.2d 329 (1944).

[44] *Id.* at 339.

[45] *Id.* at 340; *see also* Black v. Cutter Lab., 278 P.2d 905, 917 (Cal. 1955) (stating that courts may be called upon to recognize and give special effect to public policy).

[46] 71 F. Supp. 769 (S.D. Cal. 1944).

[47] The court found that the defendant had prevented Mexican-Americans from using the public park solely because they were of Mexican descent. *Id.* at 771.

[48] *Id.* at 772.

how the separate but equal doctrine limited the *Lopez* court's discretion to rule against the Mexican-American plaintiffs.[49]

At this juncture, it is worth noting that the Supreme Court and other authorities have claimed that state courts were reluctant to enforce the rights of minorities. Because of this reluctance, they contend, it has been left up to the federal courts to guarantee minorities' constitutional rights.[50] The fact that state courts in both *Lueras* and *Terrell Wells* denied the rights of Mexican-Americans provides some support for that proposition.

B. Land Grants

Mexican-Americans have contended that they were illegally deprived of land in those areas of the southwest that Mexico ceded to the United States in 1848 under the Treaty of Guadalupe

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[49] *Cf.* Sweatt v. Painter, 339 U.S. 629 (1950) (holding that state could not exclude African-Americans from law school where state had not provided substantially equal law school for African-Americans).

[50] *See, e.g.*, Mitchum v. Foster, 407 U.S. 225, 238-42 (1972). The predecessor to 42 U.S.C. § 1983 authorized a federal remedy against state officials who deprived individuals of their federal civil rights. *Id.* at 240. Congress enacted the statute because "state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Id.*; *see also* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105-06 (1977) (arguing that state courts "are less likely to be receptive to vigorous enforcement of federal constitutional doctrine" and that forum allocation decisions should be viewed "not as outcome-neutral allocations of judicial business but as indirect decisions on the merits, which weaken disfavored federal constitutional rights by remitting their enforcement to less receptive state forums"); Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965). The author notes that

> [T]he Civil War radically altered the view which the national legislature had previously taken, that generally the state legislatures, courts, and executive officials were the sufficient protectors of the rights of the American people. The assumption was abandoned that the state courts were the normal place for enforcement of federal law save in rare and narrow instances where they affirmatively demonstrated themselves unfit or unfair. Now the federal courts were seen as the needed organs, the ordinary and natural agencies, for the administration of federal rights.

Id. at 828.

Hidalgo.[51] The Treaty, which resolved the Mexican-American War, forced Mexico to cede much of what is now the American Southwest.[52] The Treaty professed to respect prior Spanish and Mexican land grants; nevertheless, federal laws and American businesses divested Mexican-Americans in California and the Southwest of most of their land.[53]

In *Vigil v. United States*,[54] plaintiff Mexican-Americans brought a class action against the United States. Plaintiffs brought the action on behalf of Mexican-American descendants of the original recipients of land grants made by Spain and Mexico. Plaintiffs argued that the United States had taken that land without compensation in violation of the Federal Constitution.[55] The court held that the complaint had failed to state a claim and dismissed the suit. The court ruled that plaintiffs had failed to set forth specific facts to support the allegations in the complaint.[56] Significantly, the court did not cite any authority supporting the proposition that a plaintiff

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51 *See* Vigil v. United States, 293 F. Supp. 1176 (D. Colo. 1968) (discussed *infra* notes 54-58), *aff'd*, 430 F.2d 1357 (10th Cir. 1970).

52 *See* Charles F. Wilkinson, *The Law of the American West: A Critical Bibliography of the Nonlegal Services*, 85 MICH. L. REV. 953, 969 (1987). The Mexican-American War, a product of American expansionism, culminated in 1848 in the Treaty of Guadalupe Hidalgo. *Id.* Under the Treaty, the United States compelled Mexico to cede California, Nevada, Utah, most of Arizona, and parts of New Mexico, Colorado, and Wyoming. *Id.* Overall, The Republic of Mexico lost nearly one-half its territory. *Id.*

53 *Id.*; *see* Salinas, *supra* note 4, at 936 (stating that Mexican-Americans lost millions of acres of land following enactment of Treaty of Guadalupe Hidalgo).

54 293 F. Supp. 1176 (D. Colo. 1968), *aff'd*, 430 F.2d 1357 (10th Cir. 1970).

55 Plaintiffs alleged that they were descendants of persons who received the Beaubien-Miranda Grant and the Tierra Amarilla Grant. *Id.* at 1180.

56 *Id.* at 1184. The court held the complaint defective because it was

> based on the general allegation that the plaintiffs and their ancestors were beneficiaries of land grants made by Spain and Mexico and that the United States Government has taken the lands subject to such grants without providing just compensation to the plaintiffs or their ancestors in violation of the Fifth Amendment. Precisely what land the plaintiffs or their ancestors claimed title to under the land grants is not stated in the complaint, nor are there any allegations pointing out the land which the government has taken, how the Government took such land or when the Government took it, not to mention a description of the interests taken.

Id.

must plead specific facts in order to state a claim.[57] The Tenth Circuit Court of Appeals affirmed, stating only that the trial court's judgment was "manifestly correct."[58]

The decision in *Vigil* is an example of false necessity in civil rights decision-making. The court's conclusion that the complaint was defective because the plaintiff failed to allege specific facts to support the claim was contrary to Supreme Court authority and was not authorized by the Federal Rules of Civil Procedure. In *Conley v. Gibson*,[59] the Supreme Court endorsed Federal Rule 8(a)'s notice pleading requirement.[60] The Court cautioned courts against dismissing a complaint for failing to state a claim unless it was manifestly clear that the plaintiff could not plead any facts in support of her claim.[61] Applying this principle, the *Conley* Court expressly rejected the defendant's argument that the complaint should be dismissed because it failed to set forth specific facts to support its general allegations of race discrimination.[62] Thus, in general, the

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[57] *See id.* In general, the federal rules of civil procedure do not require specific fact pleading. *See infra* notes 59-63 and accompanying text (discussing pleading standard).

[58] Vigil v. United States, 430 F.2d 1357, 1358 (10th Cir. 1970).

[59] 355 U.S. 41 (1957).

[60] In 1938, the Supreme Court adopted Federal Rule of Civil Procedure 8(a). *See* JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE 253 (2d ed. 1993) (discussing Rule 8 and basic requirements of notice pleading). Rule 8(a)(2) requires a party to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). This established the concept of "notice pleading." FRIENDENTHAL, ET AL., *supra*, at 253. The idea behind the new rule was that cases should not be decided on the pleadings, but instead should be decided on the merits, by jury trial after full disclosure through discovery. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986).

[61] *Conley*, 355 U.S. at 43 (stating that "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief").

[62] *Id.* at 47. The Court explained:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the rules require is "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's" claim is and the grounds upon which it rests.

Id. In Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160 (1993), the Supreme Court recently reaffirmed *Conley v. Gibson*. There, the Supreme Court rejected a heightened pleading standard for civil rights cases. *Id.* at 1161. The Court observed that the heightened

Federal Rules of Civil Procedure do not authorize federal courts to require specific fact pleading.[63] Under these circumstances, the *Vigil* court's conclusion that the plaintiffs' complaint was defective for lack of specificity is highly questionable.

C. Restrictive Covenants

Another important method the white majority has used to force minorities into a subordinate position in society has been through racially restrictive covenants.[64] These legal devices in deeds of land typically prohibited the sale or lease of property to persons of a particular race, religion, or national origin.[65] These covenants were developed to exclude minorities from white residential areas.[66] Mexican-Americans faced this invidious discrimination[67] and took their struggle to the courts in at least two instances.

In *Clifton v. Puente*,[68] plaintiffs contended that the Mexican-American defendant's title to property was invalid because a deed, which was part of his chain of title, contained a restrictive covenant prohibiting the sale or lease of property to "persons of Mexican descent."[69] Relying on *Shelley v. Kraemer*, then a recently decided case, the court held that denying the defendant title would amount

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pleading standard was inconsistent with the liberal notice pleading requirement established by Rule 8(a)(2) and endorsed in *Conley v. Gibson*. *Id.* at 1163.

63 *See* FRIEDENTHAL, ET AL., *supra* note 60, at 256. Federal Rule 9 requires detailed pleading of only a small number of specific matters—*e.g.*, fraud. *See* FED. R. CIV. P. 9. These matters were not at issue in *Vigil*.

64 *See* D.O. McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*, 33 CAL. L. REV. 5, 37 (1945) (stating that racial residential restrictions "keep the negro masses inferior").

65 *See, e.g.*, Mays v. Burgess, 147 F.2d 869 (D.D.C.), *cert. denied*, 325 U.S. 868 (1945); Bogan v. Saunders, 71 F. Supp. 587 (D.D.C. 1947); Herb v. Gerstein, 41 F. Supp. 634 (D.D.C. 1941).

66 *See* GUNNAR MYRDAL, AN AMERICAN DILEMMA 348-49, 619, 624 (1972) (documenting white citizen's and federal government's enforcement of housing segregation using restrictive covenants that prohibited sale of properties in "white areas" to African-Americans and other minorities).

67 *See* McGovney, *supra* note 64, at 15 (noting common exclusion of Mexicans and persons of Mexican descent in Southwest); Greenfield & Kates, *supra* note 4, at 716 (noting that Mexican-Americans, like African-Americans and Asian-Americans, often confronted restrictive covenants when attempting to buy or rent property).

68 218 S.W.2d 272 (Tex. Civ. App. 1948).

69 *Id.* at 273.

to enforcement of the restrictive covenant in violation of the Fourteenth Amendment.[70]

Mexican-Americans in California faced similar discrimination through restrictive covenants. In *Matthews v. Andrade*,[71] the lower court enjoined defendant Mexican-Americans from occupying land subject to a restrictive covenant. The covenant prohibited "persons of the Mexican race" from using or occupying the land.[72] The court of appeals reversed, holding that, under *Shelley*, court enforcement of the restrictive covenant was discriminatory state action in violation of the Fourteenth Amendment.[73]

These cases illustrate how the Supreme Court's decision in *Shelley* constrained courts' discretion to rule against Mexican-Americans. This is confirmed by the fact that both the Texas and California courts had upheld restrictive covenants prior to *Shelley*.[74]

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[70] Shelley v. Kraemer, 334 U.S. 1 (1948). In *Shelley*, petitioner African-Americans argued that judicial enforcement of racially restrictive covenants violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 7-8. In ruling for petitioners, the Supreme Court observed that the Fourteenth Amendment protects only against state action. Thus, "restrictive agreements standing alone" could not violate the petitioners' right to equal protection. *Id.* at 13. The Court, however, held that judicial enforcement of racially restrictive agreements constituted state action and a denial of equal protection. *Id.* at 19-20; TRIBE, *supra* note 15, at 1697.

[71] 198 P.2d 66 (Cal. App. 1948).

[72] *Id.* at 66.

[73] *Id.*

[74] *See* Los Angeles Inv. Co. v. Gary, 186 P. 596 (Cal. 1919) (upholding racially restrictive covenants); Liberty Annex Corp. v. City of Dallas, 289 S.W. 1067 (Tex. Civ. App. 1926) (upholding racially restrictive convenant). Interestingly, mainstream commentators have long regarded *Shelley* as "unprincipled." LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 259 (1985); *see, e.g.*, Bell v. Maryland, 378 U.S. 226, 329-32 (1964) (Black, J., dissenting); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29, 31 (1959). *See generally* Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962) (arguing that *Shelley* should be given limited reading, and that new qualifications should be developed regarding state responsibility for discrimination). For example, Herbert Wechsler has argued that *Shelley* was an "ad hoc" determination of a narrow problem. *See* Wechsler, *supra*, at 31. In his view, the Court failed to articulate a neutral principle that would explain why the enforcement of the covenant amounted to state discrimination rather than a legal recognition of the freedom of the individual. *See id.* at 29.

D. Racial Slurs

Minorities also have been the subject of racial or ethnic slurs.[75] Such slurs are yet another device the majority has used to exclude certain groups and perpetuate their inferior status. Mexican-Americans have suffered this psychological abuse and have challenged it in the courts.[76]

In *Contreras v. Crown Zellerbach Corp.*,[77] a Mexican-American sued his employer for the tort of outrage.[78] Defendant's employees continuously had subjected plaintiff to racial jokes and slurs. Plaintiff alleged that this conduct amounted to the tort of outrage.[79] The trial court dismissed the suit for failure to state a claim.[80] The Washington Supreme Court reversed, holding that plaintiff had stated a claim for the tort of outrage.[81]

In reversing the trial court, the supreme court took a position against psychological abuse directed against Mexican-Americans.[82] Although the court reached a positive result for Mexican-Americans, legal precedents did not dictate this result. Prior to *Contreras*, the court had allowed a husband to assert a claim for the tort of outrage in *Grimsby v. Samson*[83] based on the allegation that his wife's doctors had caused her death by abandoning her.[84] The trial court distinguished *Grimsby* by restricting it to its facts. Reading the case narrowly, the trial court restricted the tort of outrage to situations

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75 *See generally* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

76 *See* Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2332 (1989) (noting that "[r]acist hate messages, threats, slurs, epithets, and disparagement" are communicated "on the street, in schoolyards, in popular culture and in the propaganda of hate widely distributed in this country"); *see also* Patricia J. Williams, *Spirit Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 MIAMI L. REV. 127, 129 (1987) (describing harm from racist speech as "spirit murder"); Delgado, *supra* note 75, at 165-81 (suggesting tort remedy for injury from racist words).

77 565 P.2d 1173 (Wash. 1977).

78 *Id.* at 1174.

79 *Id.*

80 *Id.* at 1175.

81 *Id.* at 1177.

82 *See* Delgado, *supra* note 75, at 146 (proposing that racial insults cause psychological harm to victim because racial slurs evoke and intensify effects of past "stigmatization, labeling, and disrespectful treatment").

83 530 P.2d 291 (Wash. 1975).

84 *Id.* at 292.

where a third person, not the victim, brought the suit.[85] The Washington Supreme Court, however, construed *Grimsby* broadly to allow the victim to recover. In addition, the court held for the first time that the tort of outrage could be based on racial slurs.[86] The court reasoned that once-accepted racial slurs could not be characterized as harmless insults.[87] Thus, the court concluded that it was up to the trier of fact to determine whether racial epithets constituted extreme outrage.[88]

In *Contreras*, the Washington Supreme Court exercised its discretion in support of Mexican-Americans on two levels. First, the court read *Grimsby* broadly to allow the recipient of conduct to assert a claim for the tort of outrage. Significantly, the decision to read a case narrowly or broadly is a matter of judicial discretion.[89] Second, the court decided as a matter of first impression that racial slurs could support a claim for the tort of outrage. The *Contreras* court might easily have disallowed the claim. Other courts had taken the position that such insults must be tolerated in our rough-edged society and refused to allow racial slurs to support a cause of action for outrage or the intentional infliction of emotional distress.[90] Thus, the *Contreras* court's decision was not inevitable.

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85 *Contreras*, 565 P.2d at 1175.

86 *Id.*

87 *Id.*

88 *Id.*; *see also* Delgado, *supra* note 75, at 181 (arguing that independent tort for racial slurs would safeguard interests of personality and equal citizenship, and affirm right to live free of attacks on dignity and psychological integrity).

89 *See* POSNER, *supra* note 9, at 95. Judge Posner explains:

> Precedents can be read broadly or narrowly . . . . If, read as narrowly as possible, a precedent dictates the decision of a later case, that decision will be a decision based on precedent. If, read that narrowly, the precedent does not control the later case, but the court in the later case chooses to read the precedent more broadly so that it will control, the key to the decision is precisely that choice, a choice not dictated by precedent — a choice as to what the precedent *shall* be. Once the choice has been made, the precedent, viewed as authority rather than example, drops out of the picture. There is no practical difference between on the one hand treating a case as one of 'first impression,' and on the other hand subsuming it under a previous case after first deciding as a matter of discretion to read the previous case broadly enough to enable the subsumption.

Id.

90 For example, in Bradshaw v. Swagerty, 563 P.2d 511 (Kan. App. 1977), an African-American brought an action for the tort of outrage, based on the allegation that defendant had called him a "nigger." *Id.* at 513. The court

E. Summary

We have noted several cases dealing with the Mexican-American litigation experience in the areas of public accommodations, land grants, restrictive covenants, and ethnic slurs. They demonstrate that Mexican-Americans have been faced with exclusion from public facilities, neighborhoods, and with racial slurs in a manner similar to the experience of African-Americans.[91] Mexican-Americans attempted to fight this discrimination in the courts. The cases demonstrate that the resolution of key issues often was not inevitable. In this regard, the courts generally exercised discretion to rule against Mexican-American efforts to desegregate public accommodations and to reclaim land. As to the effort to eliminate restrictive covenants, the Supreme Court's decision in *Shelley v. Kramer* constrained the discretion of the state courts to rule against Mexican-Americans. Finally, the Washington Supreme Court exercised its discretion to protect Mexican-Americans against racial slurs.

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held that these facts could not make out the tort of outrage, holding that "the trial court was fully justified in regarding the epithets complained of here as 'mere insults' of the kind which must be tolerated in our rough-edged society." *Id.* at 514; *see also* Irving v. J.L. Marsh, Inc., 360 N.E.2d 983, 986 (Ill. App. 1977) (holding that African-American customer was unable to recover for intentional infliction of severe emotional distress where he was called "arrogant nigger" by retail store employee).

91 Ironically, if this similar experience had been more widely recognized, at least one interesting case might have come out differently. *See, e.g.*, Davis v. Meyer, 212 N.W. 435 (Neb. 1927). In *Davis*, a white woman claimed that defendant defamed plaintiff by calling her a half-breed Mexican. The Nebraska Supreme Court held that there could be no recovery because the language used was not actionable *per se*. *Id.* at 436. The court ruled that the words in question did not subject plaintiff to public ridicule, ignominy, or disgrace. *Id.* It had been actionable *per se* to charge a white person with being black because blacks were subject to social and legal discrimination such as separate schools and separate public accommodations. *Id.* The court asserted that Mexican-Americans did not face such restrictions. The court, therefore, concluded that calling a person a "Mexican" could not "in any manner, subject him to public ridicule, ignominy or disgrace." *Id.* Contrary to the Nebraska Supreme Court's finding, there is substantial evidence that Mexican-Americans have been subjected to similar discrimination as that experienced by blacks. Given this history, plaintiff should have prevailed in *Davis*. *See infra* notes 92-268 and accompanying text (discussing segregation of Mexican-Americans in public schools).

II. Litigation of the Right to Education: Mexican-American Fights Against Segregation and for Bilingual Education

A. Fighting Segregation in the Public Schools

One of the most damaging manifestations of racial discrimination has been the segregation of minorities in the public schools.[92] It is well known that states commonly segregated African-Americans in public schools.[93] It is less widely acknowledged that Mexican-Americans have faced a similar obstacle in their effort to become educated citizens.

1. Litigation to Desegregate Public Schools, 1930-1969

a. Segregation Not Authorized by Statute

In this era, all courts took the position, for various reasons, that segregation of Mexican-Americans in public schools was permissible. The cases indicate that this position was not inevitable. One of the key areas of legal indeterminacy in these early cases centers on the question whether segregation of Mexican-Americans was permissible where it was not authorized by statute. The result of this legal uncertainty is significant and instructive.

The first case to litigate this issue appears to be *Independent School District v. Salvatierra*.[94] The city of Del Rio, Texas operated a "Mexican" elementary school, that the city used exclusively for teaching children of Mexican descent. No Texas statute[95] expressly authorized the segregation of Mexican-Americans.[96] Mexican-Americans

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92 *See* Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (noting that "[separating children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. Rev. 150, 159 (1955) (stating in 1955 that cruelty of segregation to African-American children was "obvious and evident" for at least 20 years).

93 *See* Cahn, *supra* note 92, at 159; Bell, *supra* note 14, at 530-684.

94 33 S.W.2d 790 (Tex. Civ. App. 1930), *cert. denied*, 284 U.S. 580 (1931).

95 Texas statutes only authorized separate schools for white and black children. *See* Act of April 1905, ch. 124, §§ 93-96, Gen. Laws of Tex. 263, 288-89; Greenfield & Kates, *supra* note 4, at 682 n.92 (stating that Texas authorized segregated schools for "'white and colored children' . . . and defined 'colored children' as 'all persons of mixed blood descended from Negro ancestry'").

96 The district superintendent explained that segregation was necessary because many of the Mexican-American children were migrant farm workers and worked far into the school term. *See Salvatierra*, 33 S.W.2d at 792. The district reasoned that segregation protected the morale of the students by separating them from the Anglo children who would have had a four month

sought to enjoin this segregation.[97] The Texas Court of Civil Appeals held that the school authorities could not arbitrarily segregate Mexican-American children solely because of ethnic background.[98] The court, however, ruled that Del Rio was not arbitrarily segregating these Mexican-American children. The court found that the reasons the district gave for segregating the children—linguistic difficulties and starting school late because of migrant farm working—were sound if impartially applied to all children alike.[99]

This case is highly significant because it provided two justifications for segregating Mexican-American children. Specifically, the district could segregate children because of linguistic difficulties or because they were migrant farm workers. This case also presents us with another example of legal indeterminacy. The *Salvatierra* court acknowledged that no other Texas court had yet addressed the legality of segregating Mexican-Americans from other white races.[100] Given this vacuum, the court's decision disallowing race-based segregation for Mexican-Americans was not compelled. The court could have followed other jurisdictions that allowed school boards to segregate children on the basis of race, even without statutory authorization.[101] Similarly, the court's conclusion that Mexi-

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advantage in their training. *See id.* The district also segregated the Mexican-American children because they had problems with the English language. *Id.* Thus, the district claimed that its segregation was not based solely on race. *Id.* Rather, the purpose of the system was to give a "fair opportunity of all children alike" and to meet each group of children's "peculiar needs." *Id.* The district admitted, however, that migrant Anglo students who entered school late were not segregated into the Mexican school. *Id.* at 793.

97 *Id.* at 793-94.

98 *Id.* at 795.

99 *Id.* The court stated that "to the extent that the plan adopted is applied in good faith . . . with no intent . . . to discriminate against any of the races involved, it cannot be said that the plan is unlawful or violative even of the spirit of the constitution." *Id.* Segregation would be unlawful only if "the rules for the separation are arbitrary and are applied indiscriminately to all Mexican pupils in those grades without apparent regard to their individual aptitudes . . . while relieving children of other white races from the operation of the rule." *Id.* The court refused to grant an injunction because it was not shown that the school officials were at that time unlawfully segregating or intended to do so in the future. *Id.*

100 *Id.* at 794.

101 *See, e.g.*, Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 209 (1850) (stating even in absence of express legislation, school board has discretion to segregate). The *Roberts* decision was an important precedent in school desegregation litigation. BELL, *supra* note 14, at 534. Indeed, Derrick Bell has

can-Americans could be segregated for "benign reasons" was not logically compelled. Because only Mexican-Americans were segregated for linguistic difficulties and migrant farm-working patterns,[102] the court might have found that, in effect, such segregation was race-based and therefore illegal. Alternatively, the court might have followed the reasoning of courts in other jurisdictions which had held that, in the absence of express legislation, segregation was illegal.[103] As no legislation expressly authorized the specific segregation at issue in *Salvatierra*, the court could have held that segregation—even for linguistic or migrant farm worker reasons—was illegal.

Moreover, the court allowed the segregation to stand despite clear evidence that the district practiced arbitrary segregation. For example, white children who started school late were not placed in the Mexican school.[104] Thus, the school board's assertion that it segregated children in the Mexican school because they started school late was a mere pretext. In addition, there were no tests demonstrating that the Mexican-American children were less proficient in English, the other alleged justification for the segregation. In any event, the court did not consider the possibility that bilingual education might address any language problems better than segregation.[105]

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pointed out that the *Plessy* decision relied heavily on *Roberts*. *Id.* at 537. *Plessy* reasoned that "if school segregation was permissible in one of the states 'where the political rights of the colored race have been longest and most earnestly enforced,' then segregation of public streetcars should be deemed reasonable." *Id.* (quoting Plessy v. Ferguson, 165 U.S. 537, 544 (1896)).

102 *See Salvatierra*, 33 S.W.2d at 793 (stating that migrant Anglo students who entered school late were not segregated into Mexican school).

103 *See, e.g.*, Wysinger v. Crookshank, 23 P. 54, 56 (Cal. 1890) (finding that school boards and personnel do not have power to segregate students without state legislature granting that power); Rowles v. Board of Educ., 91 P. 88, 89 (Kan. 1907) (stating that in absence of express legislation, "no city or school districts has any authority to discriminate against any child, or to deny it admission to any public school thereof, on account of its color"); BELL, *supra* note 14, at 536 (noting that some courts held "where local officials segregated their schools without legislative authority, mandamus would lie ordering the admission of black children to white schools").

104 *Salvatierra*, 33 S.W.2d at 793. The district superintendent testified: "No, I did not send any of those English speaking children who came in late over to the school where I sent the Mexican or Spanish speaking children . . . ." *Id.*

105 *See* United States v. Texas, 342 F. Supp. 24 (E.D. Tex. 1971) (ordering bilingual/bicultural education to prevent segregation of Mexican-Americans), *aff'd*, 466 F.2d 518 (5th Cir. 1972); Rangel & Alcala, *supra* note 4, at 386 ("Most

The *Salvatierra* court dealt a serious blow to the struggle to end the segregation of Mexican-Americans. By the 1940's, the segregation of Mexican-Americans was widespread throughout the southwest, and school districts often justified it on the "benign" grounds approved in *Salvatierra*.[106] There does not appear to be another case raising the issue anywhere until *Westminster School District v. Mendez*.[107]

In *Mendez*, Mexican-American children in California filed a petition for relief against officials of several school districts. District officials had segregated the children into schools attended solely by children of Mexican descent. The trial court held that the segregation violated plaintiffs' Fourteenth Amendment rights.[108] The Ninth Circuit affirmed, distinguishing cases—including *Plessy*—in which courts had upheld segregation based on legislative acts.[109] The court of appeals held that those cases were not controlling because the California legislature had not authorized segregation in *Mendez*.[110]

Although the *Mendez* court reached a favorable result for the Mexican-American plaintiffs, the case provides another illustration that judicial decisions are often not compelled or inevitable. The

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educators contend that the special needs of Mexican-American students can be met through bilingual-bicultural programs."). Finally, this case is remarkable because the court appears to be oblivious to the concerns of the Mexican-American plaintiffs. In some striking passages, the court states:

> [I]t is to the credit of both races that, notwithstanding widely diverse racial characteristics, they dwell together in friendship, peace, and unity, and work amicably together for the common good and a common country. . . . [I]t is a matter of pride and gratification in our great public educational system . . . that the question of race segregation, as between Mexicans and other white races, has not heretofore found its way into the courts of the state . . . .

Salvatierra, 33 S.W.2d at 794.

106 *See* Greenfield & Kates, *supra* note 4, at 711-14 ("Separate schools were built and maintained, in theory, simply . . . to benefit the Mexican child. He had a 'language handicap' and needed to be 'Americanized' . . . .") (quoting JOAN W. MOORE, MEXICAN AMERICANS 78 (1970)).

107 161 F.2d 774 (9th Cir. 1947).

108 *Id.* at 776.

109 *Id.* at 780.

110 *See id.* ("In the first place we are aware of no authority justifying any segregation fiat by an administrative or executive decree as every case cited to us is based upon a legislative act."); BELL, *supra* note 14, at 536 (stating that some courts refused to allow local officials to segregate schools without legislative authority).

Mendez court gave a narrow reading to previous cases and held that these cases authorized segregation only where the legislature had mandated segregation. The court could have read these cases broadly to justify segregation imposed by administrative bodies such as school boards but chose not to.[111]

The decision in *Mendez*, however, is not wholly favorable for Mexican-Americans. The court left open the possibility that Mexican-Americans could be segregated lawfully.[112] If California were to enact a statute authorizing school boards to segregate Mexican-Americans, the case would not be distinguishable from the other cases where the Supreme Court had upheld state laws providing for segregation.[113] Moreover, the court left open the possibility that English language difficulties might justify segregating Mexican-American children absent statutory authorization.[114] That conclusion was questionable. Consistent with its insistence that legislation must authorize segregation, the court might have taken the position that school districts could not justify segregation for linguistic reasons without specific legislative authorization.

The next reported case involving segregation of Mexican-Americans arose in Arizona. In *Gonzalez v. Sheely*,[115] Mexican-Americans sued officials of the Tolleson Elementary School District. The court

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111 *See, e.g.*, Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849) (finding even in absence of express legislation, school board had discretion to segregate). Indeed, the *Mendez* court expressly acknowledged that *Roberts* allowed segregation that "was not founded directly upon a state statute." *Mendez*, 161 F.2d at 779 n.6.

112 *See* Mendez, 161 F.2d at 781 (noting that California could legislatively authorize this type of segregation).

113 *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding Louisiana segregation law on railroad cars); NOWAK & ROTUNDA, *supra* note 25, at 619 (discussing cases upholding state laws authorizing segregation); Rangel & Alcala, *supra* note 4, at 336 (analyzing court decisions based on state legislative authority).

114 *Mendez*, 161 F.2d at 784. The court stated:

> English language deficiencies of *some* of the children of Mexican ancestry as such children enter elementary public school life as beginners may justify differentiation by public school authorities in the exercise of their reasonable discretion as to the pedagogical methods of instruction to be pursued with different pupils, and foreign language handicaps may be to such a degree in the pupils in elementary schools as to require separate treatment in separate classrooms.

Id.

115 96 F. Supp. 1004 (D. Ariz. 1951).

found that defendants had segregated Mexican-American school children into one school attended solely by Mexican-Americans.[116] The court determined that this segregation harmed the children's ability to learn English and inhibited the development of a common cultural attitude thought to be essential to American public life.[117] Furthermore, the court found that the school district's segregation fostered antagonism in the children and wrongly suggested to them that they were inferior.[118]

Following the reasoning of *Mendez*, the court held that this segregation violated plaintiffs' Fourteenth Amendment rights.[119] The court enjoined discriminatory practices against students of Mexican descent where the legislature had not specifically authorized the segregation. The court did leave open the possibility that English language deficiencies might justify separate treatment in separate classrooms.[120] School districts, however, could institute separate treatment lawfully only after a credible examination by the appropriate school officials.[121]

Gonzalez demonstrates how the *Mendez* court's exploitation of legal indeterminacy to reach a conclusion favoring Mexican-Americans operated to constrain court discretion to rule against Mexican-Americans. *Gonzalez* also represents a significant advance over *Salvatierra*. The *Gonzalez* court is far more sensitive to the plight of the Mexican-American student than the court in *Salvatierra*. The *Gonzalez* court, anticipating *Brown v. Board of Education*,[122] recognized that segregation placed a stamp of inferiority on Mexican-Americans and harmed their ability to learn English.[123] The *Gonzalez* court's conclusion that segregation generated a feeling of inferiority in Mexican-Americans is also significant for its rejection of the notion in *Plessy* that legally compelled segregation did not stamp

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116 *Id.* at 1006.

117 *Id.* at 1007.

118 *Id.*

119 *See id.* at 1005 (stating that "[t]he principle established in *Westminster School District of Orange County v. Mendez* . . . appears to be controlling").

120 *Id.* at 1009 (noting that "English language deficiencies of some of the children of Mexican ancestry . . . may exist to such a degree in the pupils in elementary schools as to require separate treatment in separate classrooms").

121 *Id.*

122 347 U.S. 483 (1954).

123 *Cf. id.* at 494 (finding that segregation creates enduring feelings of inferiority "that may affect their hearts and minds in a way unlikely ever to be undone"); *see also* Rangel & Alcala, *supra* note 4, at 338 n.182.

minorities with a badge of inferiority.[124] The *Salvatierra* court was oblivious to such concerns. Nevertheless, the legacy of *Salvatierra* remains. *Gonzalez* does not foreclose the possibility of justifying segregation of Mexican-Americans on the basis of language difficulties. That notion, however, is inconsistent with the court's concern about placing a stigma of inferiority on children. The court might have taken the position that school districts could not justify segregation even for linguistic reasons because it places a stamp of inferiority on Mexican-Americans.[125] Evidently, the court did not consider another possible solution to the problems: bilingual education without segregation.[126]

b. Brown v. Board of Education

Three years after *Gonzalez*, the Supreme Court decided the landmark case of *Brown v. Board of Education*.[127] In *Brown*, African-Americans sought to enjoin enforcement of state statutes that required or permitted the segregation of African-American children in public schools. Plaintiffs alleged that such segregation violated the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court found that segregation of children in public schools on the basis of race deprived the children of equal educational opportunities[128] and generated lasting feelings of inferiority.[129] The Court further held that "in the field of public education the doctrine of 'separate but equal' has no place. Sepa-

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124 *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896) ("If [segregation makes minorities feel inferior], it is not because of anything found in the act, but solely because the colored race chooses to put that construction upon it."); NOWAK & ROTUNDA, *supra* note 25, at 618 (stating that *Plessy* found that segregation did not identify African-Americans as inferior and that laws could not overcome social prejudice).

125 *See* United States v. Texas, 342 F. Supp. 24, 28 (E.D. Tex. 1971) (refusing to allow segregation of Mexican-Americans because of linguistic difficulties to prevent creating stigma of inferiority).

126 *See supra* note 105 and *infra* notes 269-98 (discussing bilingual education).

127 347 U.S. 483 (1954); *see* BELL, *supra* note 14, at 544 ("As with other landmark cases, the Supreme Court's 1954 decision in *Brown v. Board of Education* has taken on a life of its own, with meaning and significance beyond its facts and perhaps greater than its rationale."); Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518 (1980) (stating that *Brown* "triggered a revolution in civil rights law").

128 *Brown*, 347 U.S. at 493, 495.

129 *Id.* at 494.

rate educational facilities are inherently unequal."[130] Thus, segregation in public schools amounted to a denial of equal protection.[131]

After *Brown*, the first Mexican-American desegregation case to reach the courts arose in California. In *Romero v. Weakly*,[132] Mexican-Americans filed an action against officials of the El Centro School District. At defendants' request, the federal district court exercised its discretion[133] to abstain under the *Pullman* doctrine.[134] The federal court sent the case into the state courts to have questions of state law resolved prior to adjudicating the constitutionality of the school district's actions.[135] The Ninth Circuit Court of

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130 *Id.* at 495; *see* TRIBE, *supra* note 15, at 1480 (stating that *Brown* abolished "odious . . .'separate but equal'" doctrine)

131 *Brown*, 347 U.S. at 495. Derrick Bell has observed that *Brown* brought about a social upheaval and "transformed blacks from beggars pleading for decent treatment to citizens demanding equal treatment under the law as their constitutionally recognized right." Bell, *supra* note 127, at 518. Despite these effects, some legal scholars questioned the validity of *Brown*'s reasoning. *See, e.g.*, Wechsler, *supra* note 74, at 34 (questioning whether neutral principle could be found to support holding in *Brown*). For responses to Wechsler, see Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Ira M. Heyman, *The Chief Justice, Racial Segregation and the Friendly Critics*, 49 CAL. L. REV. 104 (1961); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

132 131 F. Supp. 818 (S.D. Cal.), *rev'd*, 226 F.2d 399 (9th Cir. 1955).

133 *Pullman* abstention is discretionary. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 603 (1989).

134 *See* Railroad Comm'n of Tex. v. Pullman, 312 U.S. 496, 500-01 (1941) (providing substance and rationale of *Pullman* abstention doctrine). In *Pullman*, the Supreme Court held that "where state law is uncertain and a clarification of state law might make a federal court's determination of a constitutional question unnecessary," the federal court may "abstain until the state court has had an opportunity to resolve the uncertainty as to state law." CHEMERINSKY, *supra* note 133, at 595; *see also* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 282 (2d ed. 1990) (stating that *Pullman* abstention doctrine cautions federal courts against adjudicating constitutionality of ambiguous state laws until state courts have had a reasonable opportunity to consider their constitutionality) (citing Harrison v. NAACP, 360 U.S. 167, 176 (1959)). The *Pullman* abstention doctrine serves the goals of avoiding premature constitutional adjudication and interference with important state functions. *See* REDISH, *supra*, at 282; *Pullman*, 312 U.S. at 501.

135 Defendants argued that state courts had to apply and construe local law before the federal court could reach any constitutional questions. The district court dismissed the case on that basis, ruling that California courts had to ascertain and construe state law regarding the school authorities' policies

Appeals reversed, ruling that there was no unclear question of state law that might justify the use of the *Pullman* abstention doctrine.[136] The court further observed that plaintiffs might have concluded that there was a greater chance that they would receive justice in the federal courts than in the state courts because the state judge is elected and the federal judge is appointed for life.[137] Finding the *Pullman* abstention doctrine inapplicable, the Ninth Circuit ordered the district court to hear the case.[138]

The district court's exercise of discretion was obviously not inevitable and is open to serious criticism. When the district court employed the abstention doctrine, it sent the case into a forum generally thought to enforce federal constitutional rights less vigorously,[139] and where Mexican-Americans had not fared well.[140] Moreover, the abstention doctrine has been heavily criticized for imposing significant delay and expense on parties forced into state court for a determination of state law issues.[141] This delay might moot the issues or so frustrate the plaintiffs that they abandon the litigation altogether. Thus, an abstention order may doom the suit.[142] For these reasons, and for the reasons stated by the Ninth Circuit, the district court's decision to abstain was highly questionable.

The first case to be decided on the merits after *Brown* was *Hernandez v. Driscoll Consolidated Independent School District.*[143] Mexican-Americans claimed that the defendant school district violated their constitutional rights by maintaining separate classrooms for children of Mexican descent in the first and second grades and by requiring a majority of the children to spend three years in the first

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before the court could determine a constitutional violation. *Romero*, 226 F.2d at 401-02.

136 *Id.*

137 *Id.* at 401.

138 *Id.* at 402.

139 Neuborne, *supra* note 50, at 1105-06.

140 *See supra* note 50 and accompanying text (discussing state courts' failure to vigorously enforce federal civil rights).

141 Martha Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1085 (1974); *see also* REDISH, *supra* note 134, at 283; NOWAK & ROTUNDA, *supra* note 25, at 98 (noting that abstention doctrine creates additional expense and delay for parties forced to return to state courts).

142 Field, *supra* note 141, at 1086.

143 2 Race Rel. L. Rptr. 329 (S.D. Tex. 1957).

grade before promotion to the second grade.[144] Following *Salvatierra* and *Mendez*, the court held that segregation of Mexican-Americans was permissible so long as the classification was not arbitrary.[145] Specifically, the court held that language handicaps could justify segregation into separate classrooms, but only after a credible examination of each child by the appropriate school official.[146] The district had failed to administer language tests, thus the court determined that the segregation constituted arbitrary and unreasonable race discrimination.[147]

The decision could have gone another way. First, the court might have read *Brown* to prohibit the segregation of Mexican-American children even for language difficulties.[148] Instead, it followed two pre-*Brown* cases without even discussing whether *Brown* might have overruled those earlier cases. Second, there was expert testimony that the best way to address the language difficulties was to group all children together regardless of their language ability.[149] The court, nonetheless, chose to permit linguistic problems to justify segregation. It took this position despite clear evidence that school officials used the linguistic rationale as a pretext for segregating Mexican-Americans from Anglos. If the district was truly concerned about the language difficulties of its Mexican-American

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144 *Id.* at 329. Defendants denied that they were discriminating on the basis of race and argued that it was necessary to separate the children who could not speak English into separate classrooms. *Id.* at 331.

145 *Id.* at 333.

146 *Id.*

147 *Id.* at 332. Plaintiffs, however, did not receive an immediate injunction. *Id.* at 333. The injunction was not to take effect until the beginning of the next school term. *Id.*

148 *See* United States v. Texas Educ. Agency, 467 F.2d 848, 869 (5th Cir. 1972) (acknowledging that *Brown* did not permit linguistic difficulties or other benign justifications for segregating Mexican-Americans).

149 *See* Gonzalez v. Sheely, 96 F. Supp. 1004, 1007 (D. Ariz. 1951) ("Spanish speaking children are retarded in learning English by lack of exposure to its use because of segregation, and commingling of the entire student body instills and develops a common cultural attitude among the school children which is imperative for the perpetuation of American institutions and ideals."); Jeffrey W. Kobrick, *A Model Act Providing for Transitional Bilingual Education Programs in Public Schools*, 9 HARV. J. ON LEGIS. 260, 281 (1972) (stating that isolating non-English speakers from English speakers discourages learning of English); Terri L. Newman, Comment, *Proposal: Bilingual Education Guidelines for the Courts and the Schools*, 33 EMORY L.J. 577, 606 (1984) (asserting that segregating children with limited English proficiency hinders their learning of English because they do not hear conversational English spoken).

students, it would have administered language tests to assess the students' levels of English proficiency. Most telling, however, is the district's refusal to admit a Mexican student to the Anglo school even though she spoke no Spanish.[150]

c. Summary

In the years between 1930 and 1969, Mexican-Americans were segregated in public schools in Arizona, California, and Texas. The cases demonstrate that rulings on key issues often were not inevitable. Courts often exercised discretion to reach their conclusions. In this era, courts exercised their discretion to conclude that, at least under certain circumstances, segregation of Mexican-Americans was justifiable. The courts took this position in both pre-*Brown* and post-*Brown* cases. This proved to be an omen. In later years, courts tended to find ways to permit segregated schools for Mexican-Americans.

2. Litigation to Desegregate Public Schools, 1970-1980: Legal Indeterminacy and De Facto Versus De Jure Segregation

In the 1970's Mexican-Americans again took to the courts attempting to fulfill the promise of *Brown* by putting an end to the segregation of Mexican-American children. Early on, Mexican-Americans had to deal with court discretion. In *Alvarado v. El Paso Independent School District*,[151] Mexican-Americans filed a class action seeking to desegregate the El Paso schools. The district court dismissed the case on the pleadings, finding that plaintiffs had failed to allege specific facts to support their claim of discrimination.[152] Significantly, the district court cited no authority to support the requirement of specific fact pleading.[153]

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150 *Hernandez*, 2 Race Rel. L. Rptr. at 331. *Hernandez* is the last desegregation case from this time period. There are no published decisions involving Mexican-American efforts to desegregate schools during the 1960s. This is not surprising. In the view of one commentator, "from 1955 to 1968, the [Supreme] Court abandoned the field of public school desegregation." J. HARVIE WILKINSON III, FROM *Brown* to *Bakke* 61 (1979).

151 326 F. Supp. 674 (W.D. Tex.), *rev'd*, 445 F.2d 1011 (5th Cir. 1971).

152 *Id.* at 675 (holding that plaintiffs have no right to institute class action where they have not alleged any specific act of discrimination).

153 *See id.*

The district court's decision was highly questionable. As discussed above,[154] in general, the Federal Rules of Civil Procedure, as interpreted by the Supreme Court,[155] do not require specific fact pleading. Thus, the district court should not have dismissed the complaint for failure to allege specific acts of discrimination. Ultimately, the Fifth Circuit Court of Appeals reversed, holding that the complaint adequately stated a claim under the Federal Rules notice pleading requirement.[156]

From 1970-1980, courts found a new way to uphold the segregation of Mexican-Americans. In many cases, courts took the position that the Federal Constitution prohibited only de jure (intentionally caused) segregation[157] as opposed to de facto segregation.[158] During this period of Mexican-American civil rights litigation, the major areas of legal indeterminacy focused on whether (1) only de jure segregation was prohibited by the Federal Constitution; (2) whether the Constitution permitted benign justifications for Mexican-American segregation; and (3) if de jure segregation was required to prove unconstitutional segregation, whether "intent" should be determined under an objective standard. The cases, considered in chronological order below, are categorized for discussion purposes into three groups: (1) those decided prior to the Supreme Court's decision in *Keyes v. School District No. 1*;[159] (2) those that were decided after *Keyes*, but prior to the Supreme Court's decision in *Washington v. Davis*;[160] and (3) those decided after *Washington v. Davis*. The cases indicate that the courts exploited legal uncertainty in these areas to reach their conclusions.

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154 *See supra* notes 59-63 and accompanying text.

155 *See supra* notes 59-62 (discussing Supreme Court's interpretation of Rule 8(a) in *Conley*).

156 Alvarado v. El Paso Indep. Sch. Dist., 445 F.2d 1011, 1011 (5th Cir. 1971).

157 *See* NOWAK & ROTUNDA, *supra* note 25, at 635 ("De jure ('by law') segregation is racial separation which is the product of some purposeful act by government authorities.").

158 *See id.* ("De facto ('by the facts') segregation occurs because of housing and migration patterns and is unconnected to any purposeful governmental action to racially segregate schools."); Seth F. Kreimer, Note, *Reading the Mind of the School Board: Segregative Intent and the* De Facto/De Jure *Distinction*, 86 YALE L.J. 317, 317 (1976) (stating that de jure segregation arises from "explicit assignment of pupils on the basis of race" whereas de facto segregation arises from "causes other than race-conscious action").

159 413 U.S. 189 (1973).

160 426 U.S. 229 (1976).

a. Litigation Prior to Keyes v. School District No. 1

With respect to Mexican-Americans, the question of de jure segregation was first addressed in *People v. San Diego Unified School District.*[161] The State of California sought to force the school district to eliminate racial imbalance in its schools.[162] In finding for plaintiffs, the court noted that a majority of courts had held that a state did not have an affirmative federal constitutional duty to relieve racial imbalance in its schools that were not the result of de jure segregation.[163] The court observed, however, that a minority of courts had held that states had a federal constitutional duty, where de facto segregation existed, to remedy the racial imbalance.[164] Relying on what it recognized to be dicta in two prior California Supreme Court decisions, the court eliminated the de jure/de facto distinction, holding that, as a matter of California law, school authorities had a "constitutional duty to 'take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools'" whether it stemmed from de jure or de facto segregation.[165]

San Diego is an example of a case where the court exercised its discretion in favor of Mexican-Americans. Since earlier cases merely stated in dicta that de facto segregation violated California law, the *San Diego* court was not bound by those cases.[166] By requir-

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161 96 Cal. Rptr. 658 (1971), *cert. denied*, 405 U.S. 1016 (1972).

162 A survey demonstrated that the Mexican-American pupil population was 10.1% of the total student population in the district. *Id.* at 661. Yet, in one elementary school, the Mexican-American student population exceeded 50% of the total population in the school. *Id.* The district refused to take steps to eliminate the racial imbalance. *Id.* The State alleged that the district was denying students attending these schools an equal educational opportunity. *Id.*

163 *Id.* at 663 (citing, *e.g.*, Banks v. Muncie Community Sch., 433 F.2d 292, 294 (7th Cir. 1970); Norwalk Core v. Norwalk Bd. of Educ., 423 F.2d 121, 122 (2d Cir. 1970)). Those courts held that assigning students according to a neighborhood school attendance policy not intended to create or perpetuate racial imbalance, but that nonetheless caused an imbalance, was not unconstitutional; although state action, it was merely de facto segregation. *Id.*

164 *San Diego*, 96 Cal. Rptr. at 664 (citing, *e.g.*, Kelley v. Metropolitan County Bd. of Educ., 317 F. Supp. 980, 986 (M.D. Tenn. 1970); Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501, 522 (C.D. Cal. 1970)).

165 *Id.* at 666 (quoting Jackson v. Pasadena City Sch. Dist., 382 P.2d 878, 882 (1963)).

166 *See* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 261 (2d ed. 1921) The author notes:

> [A]t the Common Law not every opinion expressed by a judge forms a Judicial Precedent. In order that an opinion may have the

ing school districts to remedy racial imbalance caused by de facto segregation, the court made challenging desegregation easier for Mexican-Americans. In future cases, they would not be faced with the difficult task of proving that the school officials intended to segregate the students.[167]

San Diego also highlights a key issue in the school desegregation cases: whether or not de facto segregation offends the Federal Constitution. Some commentators argue that *Brown* held de facto segregation unconstitutional when it declared separate educational facilities inherently unequal.[168] They contend that the constitutional evil was not the government's intention to segregate African-Americans, but rather the "harmful psychological and educational effects" of isolating minorities from whites in schools the community regarded as inferior.[169] In their view, any state action that brings about these effects violates the principle for which *Brown* stands.[170]

These cases reveal that some courts chose to read *Brown* narrowly to bar only de jure segregation when they could have read the case broadly to bar de facto segregation. As of 1976, the Supreme Court

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> weight of a precedent, two things most occur: it must be, in the first place, an opinion given by a judge, and, in the second place, it must be an opinion the formation of which is necessary for the decision of a particular case; in other words it must not be *obiter dictum.*

Id.

167 *See* BELL, *supra* note 14, at 561 n.18 (describing requirement that plaintiffs prove intentional segregation as a formidable obstacle); Kreimer, *supra* note 158, at 325 (noting that proving subjective intent poses serious evidentiary difficulties).

168 *See* Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 277 (1972); Kreimer, *supra* note 158, at 118. *See generally*, James R. Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 67-69 (1967); Owen M. Fiss, *Racial Imbalance in Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965); J. Skelly Wright, *Public School Desegregation — Legal Remedies for De Facto Segregation*, 40 N.Y.U. L. REV. 285 (1965). But compare Moses v. Washington Parish Sch. Bd., 276 F. Supp. 834, 841 (E.D. La. 1967) and Lynch v. Kensten Sch. Dist. Bd. of Educ., 229 F. Supp. 740, 742 (N.D. Ohio 1964), which refuse to read *Brown* as holding de facto segregation unconstitutional.

169 Goodman, *supra* note 168, at 277; Kreimer, *supra* note 158, at 318 ("A second line of authority, however, focused on the proposition in *Brown* that 'separate educational facilities are inherently unequal.' It argued that racial separation, and not the method by which that separation came about, was the evil condemned by *Brown*.").

170 *Id.*

had yet to squarely face the question of whether de facto segregation was unlawful.[171] Apparently, prior to that time, courts that required a showing of de jure segregation could have required only a showing of de facto segregation. In any event, courts resisted prohibiting de facto segregation. Thus, *San Diego* is especially noteworthy because it involved a California state court staking out a progressive position on the de facto segregation issue.

Federal courts in Texas also addressed the de jure/de facto distinction. In *United States v. Midland Independent School District*,[172] the United States alleged that the Midland School District assigned children to schools based on race. Although the district's desegregation plan concentrated Mexican-American children into one elementary school, the district court approved the plan.[173] The court reasoned that the concentration of Mexican-Americans was not the result of de jure segregation and, therefore, was not unconstitutional.[174] The plan did not assign children to neighborhood schools according to race, but rather on the basis of neighborhood zoning arrangements.[175] The Fifth Circuit Court of Appeals reversed, holding that the facts showed that the school board's pri-

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171 Several courts acknowledged that the constitutionality of *de facto* segregation was an open question. *See, e.g.*, Oliver v. Michigan St. Bd. of Educ., 508 F.2d 178, 181 n.3 (6th Cir. 1974); Arthur v. Nyquist, 415 F. Supp. 904, 912 n.10 (W.D.N.Y. 1976); Crawford v. Board of Educ., 551 P.2d 28, 33 (Cal. 1976); *cf.* Ybarra v. City of San Jose, 503 F.2d 1041, 1042-43 & n.2 (9th Cir. 1974) (stating that open question is whether racial imbalance inherent in neighborhood school policy [de facto segregation] is unconstitutional in absence of de jure segregation).

172 334 F. Supp. 147 (W.D. Tex. 1971), *rev'd*, 519 F.2d 60 (5th Cir. 1975).

173 *Id.* at 152.

174 *Id.* at 151. The court stated that "[t]here has never been any *de jure* segregation of Mexican-American children and there has never been a dual system involving Mexican-Americans." *Id.*

175 *Id.* at 149. The court determined that the concentration of Mexican-Americans was not caused by state action, but by economic factors and the Mexican-Americans' desire to living in a predominately Mexican-American neighborhood rather than in predominantly white neighborhoods. *Id.* at 150. The court held that "[a] school district has no affirmative obligation to achieve a balance of the races in the schools when the existing imbalance is not attributable to school policies . . . and is the result of housing patterns and other forces over which the school administration had no control." *Id.* at 150. Moreover, the court expressed its preference for neighborhood schools, suggesting that abolishing neighborhood schools for young children would be unproductive. *Id.* at 151.

mary objective was to segregate Mexican-Americans.[176] Because the court of appeals found intent to segregate, there was no need to consider whether de facto segregation was permissible.

The district court's conclusion in *Midland* that the school district had no affirmative obligation to remedy de facto segregation was not logically compelled. Because the Supreme Court's decisions had left open the question of whether de facto segregation violated the Constitution,[177] and the Fifth Circuit did not require a showing of discriminatory intent at the time of the decision,[178] the district court could have rejected the de jure/de facto distinction. In addition, the district court could have barred the segregation for the reasons stated by the court of appeals — namely, that discriminatory intent was present. Instead, Mexican-Americans had to wait four years to be vindicated.[179] This case is noteworthy because the district court was unsympathetic to plaintiffs' cause.[180] In many of

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176 United States v. Midland Indep. Sch. Dist., 519 F.2d 60, 64 (5th Cir. 1975). The record clearly showed that the district deliberately segregated Mexican-Americans. *Id.* at 62. In 1912, the school board resolved to provide a separate school for Mexican-Americans which operated until the 1940's. *Id.* The Mexican school of the present day district had always been an all Mexican school. *Id.* Mexican-Americans were bused to the school, and Anglos living near the school were sent elsewhere. *Id.* Finally, the neighborhood school zone for the Mexican school exactly covered "Mexican Town." *Id.* at 63. The totality of these facts showed segregative intent on the part of the district. *Id.*

177 *See, e.g.*, Goodman, *supra* note 168, at 275-76. In 1972 Goodman stated that the

> problem of *de facto* segregation—racial imbalance resulting merely from adherence to the traditional, racially neutral, neighborhood school policy in a community marked by racially segregated residential patterns—has yet to be faced. On this issue, the Supreme Court has kept tight-lipped silence, denying certiorari in several cases squarely presenting the issue.

Id.; *see also* Crawford v. Board of Educ., 551 P.2d 28, 33 (Cal. 1976) (acknowledging that whether de facto segregation violated Federal Constitution was open question); *supra* note 171 (listing other cases addressing same issue).

178 *See* Cisneros v. Corpus Christi Indep. Sch. Dist., 467 F.2d 142, 150 (5th Cir. 1972) ("While there is admittedly no catholicity of viewpoints in the Circuits on the question of intentional state action, this Court has never tempered its prohibition of school board actions that create, maintain or foster segregation by the requirement that a discriminatory intent be shown.").

179 *See supra* notes 172-76 and accompanying text (discussing reversal of district court decision).

180 *See supra* notes 172-76 and accompanying text.

these cases, plaintiffs had to rely on the circuit court to uphold their rights.

In *Tasby v. Estes*,[181] Mexican-Americans sought to desegregate the Dallas Independent School District. The district court ruled against plaintiffs on the ground that they had failed to establish de jure segregation.[182] Without addressing the validity of the de jure/de facto distinction, the Fifth Circuit Court of Appeals reversed, finding sufficient evidence to establish de jure segregation.[183] The district court's decision in *Tasby* was questionable. As discussed, the court could have found that even de facto segregation was impermissible.

Turning to the second major area of legal indeterminacy, in *United States v. Texas* the court addressed the question whether benign reasons, such as linguistic difficulties, could justify segregation of Mexican-Americans.[184] The court held that the Del Rio school district (the same district that had been the defendant in *Salvatierra*) intentionally segregated Mexican-American students.[185] To bring about "true integration" and to "avoid the creation of a stigma of inferiority akin to the badges and incidents of slavery," the court ordered bilingual and bicultural education for Anglos and Mexican-Americans thereby ensuring that everyone received equal educational opportunities.[186] Thus, the court barred segregation of the Mexican-American children into separate classrooms or schools because of linguistic difficulties.

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181 342 F. Supp. 945 (N.D. Tex. 1971), *rev'd*, 517 F.2d 92 (5th Cir. 1975).

182 *Id.* at 948.

183 Tasby v. Estes, 517 F.2d 92, 106 (5th Cir. 1975).

184 United States v. Texas, 342 F. Supp. 24 (E.D. Tex. 1971). In ordering the desegregation of the San Felipe del Rio School District, the court held that Mexican-American students were a cognizable ethnic group and, hence, were entitled to Fourteenth Amendment protection. *Id.* at 24.

185 *Id.* In creating a remedy, the court exhibited unusual sensitivity. The court suggested that special educational consideration be given to students "in assisting them in adjusting to those parts of their new school environment which present a cultural and linguistic shock." *Id.* at 28.

186 *Id.* As one commentator has noted, the court's conclusion that desegregation required bilingual and bicultural education was sound; attempting to solve linguistic difficulties by segregating Mexican-Americans into separate classrooms "would defeat the purposes of desegregation." Stephen G. Sneeringer, Comment, *Bilingual-Bicultural Education in Texas*, 7 URB. L. ANN. 400, 405 (1974). Thus, "[i]n a desegregated atmosphere where bilingualism is utilized, education in the minority culture furthers desegregation." *Id.* at 406.

One of the most significant and positive opinions to be rendered on the issue of Mexican-American segregation, *United States v. Texas*, was not, however, inevitable. The courts in *Salvatierra*, *Mendez*, *Gonzalez*, and *Hernandez* permitted school districts to segregate Mexican-American children to deal with English language problems. Thus, there was ample authority for the court to have adopted that position. Instead, the court recognized that resorting to segregation placed a stigma of inferiority on the children. The court also understood that bilingual education provided a remedy without such segregation. As a result, the court took a step toward eliminating that most stubborn of justifications for the segregation of Mexican-Americans, namely, difficulties with the English language.

Cisneros v. Corpus Christi Independent School District[187] is a landmark case dealing with the de jure/de facto distinction. Plaintiffs brought a class action against the Corpus Christi School District to desegregate the public schools. The district court held that the city's segregation of Mexican-American children was illegal.[188] On review, the Fifth Circuit Court of Appeals observed that this was a novel school desegregation case because the segregation of Mexican-Americans in Corpus Christi had never been mandated by Texas statute.[189] The court held that, although *Brown* had dealt with statutory segregation, unlawful segregation extended beyond statutorily mandated segregation and included actions and policies of school authorities.[190] The court directly addressed the issue of de jure versus de facto segregation[191] and read *Brown* as requiring

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[187] 467 F.2d 142 (5th Cir. 1972).

[188] *Id.* at 144. The court ordered the school district to immediately reassign its teaching staff and implement a student reassignment plan to integrate the school system. *Id.*

[189] *Id.* The court acknowledged that this case raised a new issue which had not been present in the black/white dual systems: whether the non-statutory segregation of Mexican-Americans was constitutionally permissible. *Id.*

[190] *Id.* at 147. The court announced that dual school systems were not more tolerable because they developed without legislative insistence; the state's endorsement was nonetheless apparent. *Id.* at 148. The continuing effort to characterize this as de facto segregation and beyond the court's authority to remedy was "no longer entitled to serious consideration." *Id.*

[191] The court determined that, since 1938, the district had assigned Anglo and Mexican-American children to schools according to a neighborhood school plan composed of geographic attendance zones. *Id.* at 146. This plan, given residential segregation, resulted in the segregation of Mexican-Americans from Anglos in the public schools. *Id.* The trial court found that de jure segregation existed in the city and that Mexican-Americans had been unconstitutionally segregated in the public schools. *Id.* at 147. On appeal, the

plaintiffs to establish only that action by the school board resulted in a segregated system.[192] Plaintiffs did not have to prove a discriminatory purpose.[193] Thus, the Fifth Circuit affirmed the lower court's finding that the board had illegally segregated Mexican-Americans.[194]

The Fifth Circuit's decision in *Cisneros* is important because it flatly rejected the de jure/de facto distinction in requiring plaintiffs to establish only that state action resulted by segregation.[195] While the court acknowledged that other courts insisted on a showing of a discriminatory purpose to find unconstitutional segregation, it refused to accept their view.[196] Thus, *Cisneros* confirms that the choice made by other courts to require de jure segregation to establish unconstitutional segregation was not inevitable.

The Fifth Circuit finally disposed of the argument that benign reasons could justify segregation of Mexican-Americans in *United States v. Texas Education Agency*.[197] The United States filed a suit against the Austin Independent School District and the Texas Edu-

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board argued that this segregation was not the result of board action, but rather of housing patterns. *Id.* at 148. Moreover, the board argued that even if the segregation were the result of board action, there would be no constitutional violation. *Id.* at 150. The board contended that plaintiffs had not shown that the board had acted with a discriminatory purpose, a showing required to demonstrate de jure segregation. *Id.*

192 *Id.* The court stated:

> *Brown* prohibits segregation in public schools that is the result of state action. It requires simply the making of two distinct factual determinations to support a finding of unlawful segregation. First, a denial of equal educational opportunity must be found to exist, defined as racial or ethnic segregation. Secondly, this segregation must be the result of state action.

Id.

193 *Id.* at 149-50. The court stated that it had consistently prohibited school boards from instituting or perpetuating segregation without requiring plaintiffs to show discriminatory intent. *Id.* The court noted that "[s]chool cases serve to emphasize the correctness of this principle, for regardless of motive, the children that suffer from segregation suffer the same deprivation of educational opportunity that *Brown* condemns." *Id.*

194 *Id.* at 144-45. Although the court of appeals affirmed the district court's ruling, it changed the remedy by minimizing the use of busing in the desegregation plan. *Id.* at 152.

195 *Id.* at 150.

196 *Id.*

197 467 F.2d 848 (5th Cir. 1972).

cation Agency alleging unlawful segregation.[198] The district court held that there had been no de jure segregation against the Mexican-Americans.[199] The Fifth Circuit reversed, holding that the district court had applied an erroneous legal standard. The court explained that when a discriminatory effect was present, it was not necessary to prove a discriminatory purpose in order to establish an Equal Protection violation.[200]

This case is significant because the court found that *Brown* did not permit the old justifications for segregating Mexican-Americans: English language problems and migrant labor difficulties.[201] Thus, the Fifth Circuit rejected the view of other post-*Brown* courts that had approved segregation for benign reasons.[202] It is remarkable that these justifications were still being offered in defense of segregation more than forty years after they were first accepted by the *Salvatierra* court. It is perhaps more remarkable that it took forty years before the Fifth Circuit finally rejected these "benign justifications" for the segregation of Mexican-Americans.

Finally, in *Arvizu v. Waco Independent School District*,[203] Mexican-Americans sought to desegregate the Waco Independent School District. Following *Cisneros*, the court acknowledged that two find-

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198 *Id.* at 853. The complaint charged that Mexican-Americans were assigned to schools that were identifiable as Mexican-American schools and were attended almost exclusively by Mexican-American and African-American students. *Id.*

199 *Id.* at 854.

200 *Id.* at 864-65. Plaintiffs must prove only that the natural and foreseeable consequence of the board's actions was the segregation of Mexican-Americans. *Id.* at 863-64. In this case, school authorities assigned children to schools by choosing sites for and constructing new schools, and drawing attendance zone lines. *Id.* at 863. The court found that the "natural and foreseeable" effect of these actions was the segregation of Mexican-Americans. *Id.*

201 *Id.* at 868-69. In defense, the school district raised a strikingly familiar argument. It claimed that segregation of Mexican-Americans was justified because they needed extra help and attention. *Id.* at 868. The Mexican-American children suffered English language difficulties, and they were children of migrant labor families who arrived at school late in the fall semester. *Id.* at 868-69. The court was not convinced that separate schools were necessary to meet the special educational needs of Mexican-American children. *Id.* at 869. The court cautioned that "[a] benign motive will not excuse the discriminatory effects of the school board's actions." *Id.*

202 See, for example, Hernandez v. Driscoll Consol. Indep. Sch. Dist., 2 Race Rel. L. Rptr 329 (1957), a post-*Brown* case approving segregation for benign purposes.

203 373 F. Supp. 1264 (W.D. Tex. 1973), *rev'd*, 495 F.2d 499 (5th Cir. 1974).

ings were needed to support a finding of unlawful segregation: (1) the "denial of equal education opportunity . . . defined as racial or ethnic segregation," and (2) segregation resulting from state action.[204] Purporting to apply *Cisneros*, the court held that plaintiffs "failed to show the necessary history of official discrimination or official acts with the inevitable consequence of creating segregation to justify a finding that the concentration of Mexican-American students in certain schools is the result of state action."[205] According to the court, "residential patterns," not state action, caused the segregation.[206]

The decision of the *Arvizu* court is questionable. In *Cisneros*, the Fifth Circuit expressly rejected the Corpus Christi School District's argument that segregation in that case was only the result of "housing patterns" and not state action.[207] The *Cisneros* court held that where a neighborhood school plan is applied in the context of marked residential segregation, producing inevitable segregation in the schools, then such segregation is the result of state action.[208] In *Arvizu*, the school district employed a "'neighborhood school' concept"[209] in the context of a pattern of Mexican-American residential segregation.[210] Thus, in *Arvizu*, the neighborhood school plan pro-

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204 *Id.* at 1268.

205 *Id.* at 1269.

206 *Id.* at 1268-69 (stating conclusively that concentration of Mexican-Americans in certain schools was result of residential housing patterns).

207 *Cisneros*, 467 F.2d at 148. In response to the school district's argument that the segregation was merely the result of housing patterns and did not constitute de jure segregation, the *Cisneros* court stated that "[w]e must . . . reject this type of continued meaningless use of de facto and de jure nomenclature to attempt to establish a kind of ethnic and racial separation of students in public schools that federal courts are powerless to remedy." *Id.*

208 *Id.* at 149 ("[I]n our view the use of the neighborhood school plan is the direct and effective cause of segregation in the schools of the city."). See also Wright, *supra* note 168, at 296, stating:

> Where a forthright effort is made to determine the cause of racial imbalance, the probability of finding state action in segregated Negro schools, in some degree at least, is increased immeasurably. Discrimination in job opportunities, housing and other necessities drives Negroes into the segregated slums, and application of the neighborhood school policy seals their children in the slum school which these children are compelled by law to attend. . . . [T]he legal compulsion to attend the segregated school should be sufficient state action to bring all de facto segregation within the rule of *Brown*.

209 *Arvizu*, 373 F. Supp. at 1267.

210 *Id.* at 1268.

duced inevitable segregation in the schools.[211] Given this, under *Cisneros*, the court should have found state action sufficient to support a finding of unconstitutional segregation. Under these circumstances, the *Arvizu* court's insistence that there must be a history of "official discrimination" to justify a finding of state action seems to be an attempt to require a finding of purposeful segregation—a requirement that was expressly rejected in *Cisneros*.

b. Litigation After Keyes v. School District No.1, *But Prior to Washington v. Davis*

The next desegregation confrontation took place in Colorado. In *Keyes v. School District No. 1.*,[212] a Mexican-American desegregation case finally reached the United States Supreme Court. The interpretation of *Keyes* created another major area of legal indeterminacy.

In *Keyes*, plaintiffs alleged that defendant school board was practicing de jure segregation. The Supreme Court held that the lower courts had applied an incorrect legal standard in addressing plaintiffs' claim that the school board had an unconstitutional policy of deliberate segregation.[213] The Court ruled that plaintiffs do not bear the burden of proving the elements of de jure segregation as to each and every school within the system. Rather, where plaintiffs prove that school officials have carried out a program of segregation affecting a substantial portion of the school system, this showing will be sufficient to establish that a dual school system exists.[214]

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211 *Id.*

212 413 U.S. 189 (1973).

213 *Id.* at 198. Plaintiffs had proved at trial that defendants had an unconstitutional policy of deliberately segregating Park Hill schools, one segment of the Denver school district. *Id.* The district court held that this did not impose an affirmative duty on the school board to desegregate throughout the school district. *Id.* at 199-200. Rather, the district court required plaintiffs to make a new showing of de jure segregation in each area of the city they wanted desegregated. *Id.* at 198-200.

214 *Id.* at 200. The Court also held that a finding of intentional segregation in a meaningful portion of the school system creates a presumption that other segregation within the school system is intentional. *Id.* at 208. The finding establishes a *prima facie* showing of the school officials' unlawful segregative intent and shifts to those officials the burden of proving the other segregated schools within the system are not the result of intentionally segregative actions. *Id.* In discharging their burden, it is not enough for defendants to rely on some allegedly neutral explanation for their actions; they must show that segregative intent was not among the factors that motivated their actions. *Id.* at 210. For example, defendant argued that its neighborhood school

Although the *Keyes* opinion contains references to de jure segregation, the Supreme Court never directly addressed the question of whether de facto segregation was a constitutional violation.[215] Prior to the decision, commentators expected the Court to directly address the question.[216] By declining to resolve the question, the Supreme Court sustained the legal indeterminacy on the issue. Thus, after *Keyes*, lower courts continued to be split on the issue and often exploited the ambiguity in *Keyes* in reaching their decisions. Five cases illustrate this point.

For example, in *Soria v. Oxnard School District*,[217] Mexican-Americans brought a desegregation suit against the Oxnard School Dis-

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policy explained the ethnic concentration within the core city schools. *Id.* at 211. In response, the Court stated that "the mere assertion of such a policy is not dispositive where, as in this case, the school authorities have been found to have practiced *de jure* segregation . . . by techniques that indicate that the 'neighborhood school' concept has not been maintained free of manipulation." *Id.* at 212.

215 *See id.* ("[W]e have no occasion to consider in this case whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of finding that school authorities have committed acts constituting *de jure* segregation."); Arthur v. Nyquist, 415 F. Supp. 904, 912 n.10 (W.D.N.Y. 1976) ("Since the plaintiffs in *Keyes* pleaded and proved *de jure* segregation, the Supreme Court was not forced to decide whether merely proof of *de facto* segregation constitutes cognizable legal wrong."); Zamora v. New Braunfels Indep. Sch. Dist., 362 F. Supp. 552, 557 (W.D. Tex. 1973) (recognizing that *Keyes* majority did not directly address question whether to uphold de jure/de facto distinction), *rev'd*, 519 F.2d 1084 (5th Cir. 1975); Crawford v. Bd. of Educ., 551 P.2d 28, 33 n.4 (Cal. 1976) (addressing *Keyes* statement regarding de jure segregation); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 43, 70 n.58 (1974) (stating "constitutionality of *de facto* segregation" was "explicitly left open in *Keyes*"); Comment, *Public School Segregation and the Contours of Unconstitutionality: The Denver School Board Case*, 45 U. COLO. L. REV. 457, 475-76 (1974) ("The questions as to the necessity of proving intent [to segregate] raised by the Fifth Circuit's disposition of *Cisneros* were thus never at issue in the Supreme Court's consideration of *Keyes*. . . . [T]he distinction between de jure and de facto segregatory conditions was never really at issue in the Court's consideration of *Keyes* . . . ."); *see also supra* note 168 (discussing constitutionality of de facto segregation).

216 *See* Morales v. Shannon, 366 F. Supp. 813, 827 (W.D. Tex. 1973), *modified*, 516 F.2d 411 (5th Cir. 1975); Goodman, *supra* note 168, at 276 n.6 (predicting that *Keyes* might resolve constitutional status of de facto segregation); Comment, *supra* note 215, at 457 n.5 (noting considerable speculation that *Keyes* would invalidate de jure/de facto distinction) (citing Robert L. Herbst, *The Legal Struggle to Integrate Schools in the North*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 60, 62 (1973)).

217 488 F.2d 579 (9th Cir. 1973).

trict. The district court found an illegal racial imbalance within Oxnard's elementary schools resulting from the board's neighborhood school policy.[218] The Ninth Circuit Court of Appeals reversed, holding that the district court applied an improper legal standard in determining whether the board instituted unconstitutional segregation. Relying on *Keyes*, the court of appeals held that plaintiffs must establish de jure segregation in order to show a constitutional violation.[219] Thus, the *Soria* Court interpreted *Keyes* to require de jure segregation to establish a constitutional violation. As discussed, this interpretation was not logically compelled because the *Keyes* court never directly addressed that issue.

Federal courts in Texas also interpreted *Keyes*. In *Zamora v. New Braunfels Independent School District*,[220] Mexican-Americans sought to desegregate schools in the district. The district court concluded that the segregation at issue was not illegal because it was not de jure segregation.[221] The court observed that the Fifth Circuit in *Cisneros* had rejected the de jure/de facto analysis.[222] The district court, however, held that the Supreme Court in *Keyes appeared* to have approved the de jure/de facto distinction.[223] The court acknowledged, however, that the *Keyes* majority did not directly

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218 *Id.* at 580. Plaintiffs argued that the board could be held accountable for segregated schools which had resulted from the natural, foreseeable consequences of its actions and omissions, regardless of any discriminatory motives behind its acts. *Id.* The trial court agreed and ruled in plaintiffs' favor. *Id.*

219 *Id.* at 585. The court relied on *Keyes* for the proposition that a prerequisite for a finding of unconstitutional board action was a determination that the board intentionally discriminated against minority students. *Id.* The court remanded the case to allow the parties to litigate the issue of the board's intent. *Id.* On remand, the district court found convincing evidence of the board's intent to segregate its elementary schools. Soria v. Oxnard Sch. Dist., 386 F. Supp. 539, 540 (C.D. Cal. 1974). Moreover, the court found that the district was in violation of California law (as announced in Jackson v. Pasadena City Sch. Dist., 382 P.2d 878 (1963)) that school boards must alleviate racial imbalance regardless of its cause. *Soria*, 386 F. Supp. at 545. This claim did not require proof of segregative intent.

220 362 F. Supp. 552 (W.D. Tex. 1973).

221 *Id.* at 559 ("To the contrary . . . any existing segregation is purely *de facto* and strictly the result of shifting residential patterns within the community.")

222 *Id.* at 556. The court noted that "[u]ntil last August, the line between constitutional and unconstitutional segregation had traditionally been drawn in light of the *de facto-de jure* dichotomy. It was at that time that the Fifth Circuit indicated in Cisneros v. Corpus Christi . . . that this distinction would not be followed . . . ." *Id.*

223 *Id.* at 557.

address the question whether to uphold the de jure/de facto categories.[224] Without discussing the de jure/de facto distinction, the Fifth Circuit reversed,[225] holding that the record showed that the school district had a history going back to 1910 of deliberately segregating Mexican-Americans.[226]

The *Zamora* trial court's decision illustrates false necessity in civil rights decision-making. First, the district court admitted that *Keyes* had not squarely reached the issue of whether the de jure/de facto distinction was legitimate. Because the Fifth Circuit's ruling in *Cisneros* remained binding precedent, the trial court should have held that plaintiffs need not prove a discriminatory purpose. Second, it could have found discriminatory intent; the Fifth Circuit found ample evidence to support such a finding.[227]

The interpretation of *Keyes* continued in *Morales v. Shannon*.[228] Mexican-Americans alleged that, because of the school attendance zoning plan, Mexican-American students were segregated from Anglos.[229] Finding no intent to segregate, the *Morales* court discussed the de jure/de facto distinction. The court acknowledged that *Cisneros* held that Mexican-Americans could get a desegregation order without showing an intent to segregate.[230] The court,

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224 *Id.* ("[T]he [*Keyes*] majority never squarely faced the issue of whether or not to perpetuate the distinction between *de jure* and *de facto* segregation . . . .").

225 Zamora v. New Braunfels Indep. Sch. Dist., 519 F.2d 1084 (5th Cir. 1975).

226 *Id.* at 1084 (stating that record demonstrated present segregation of Mexican-American students was result of NBISD's segregative intent dating back to 1910 when it built first Mexican school).

227 *Id.*

228 366 F. Supp. 813 (W.D. Tex. 1973).

229 *Id.* at 815-16. They also alleged that the district had failed to properly handle the English language difficulties of the Mexican-American students. *Id.* at 816. Two of the four schools were more than 90% Mexican-American. *See id.* The court found no evidence of past or present discriminatory intent in the way the school district assigned students to the elementary schools. *Id.* at 818. It determined that the location of attendance zones was done on an ethnically neutral basis, the object being to construct a neighborhood school system.

230 *See id.* at 827-28 ("[I]n *Cisneros* the Fifth Circuit clearly discarded any finding of discrimination, as opposed to segregation or ethnic isolation, as a predicate to the authority of the District Court to order a restructuring of a school district.").

however, refused to abandon the de jure/de facto analysis.[231] The court decided not to enter judgment until *Keyes* was decided.[232]

After *Keyes* was decided, the *Morales* court issued a supplemental opinion citing *Keyes* as upholding the de jure/de facto distinction.[233] The court found that the segregation was purely de facto.[234] The district's motive in drawing attendance zones was to preserve neighborhood schools and not to segregate.[235] On appeal, the Fifth Circuit disingenuously held that *Cisneros* had been overruled by *Keyes* on the issue of whether it was necessary to show discriminatory intent.[236] However, the court ruled that the district court's finding of no segregative intent was clearly erroneous.[237]

The decisions of the trial court and the Fifth Circuit to adhere to the de jure/de facto distinction are questionable. The courts read *Keyes* to uphold that distinction despite the fact that the *Keyes* court

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231 *Id.* at 831. The court stated that it could not "share the Orwellian proclivity of the majority of the Fifth Circuit who tend to exercise an overzealous intrusion into the affairs of any school district." *Id.*

232 *Id.* The *Morales* court recognized that the Supreme Court had never addressed the constitutional status of de facto segregation. The court stated:

> It is highly significant to the determination of the law to be applied in this case that the Supreme Court has never written on the question of school segregation *not* brought about by the discriminatory action of school authorities or a State law requiring separate educational facilities for racial or ethnic minorities — that is, De Facto Segregation.

Id. at 827. The court, however, believed that the Supreme Court would decide "that very question" in *Keyes*. *Id.*

233 *See id.* at 833 (finding that *Keyes* confirmed that Supreme Court had not rejected de jure/de facto distinction).

234 *See id.* (stating that existing segregation was purely de facto and resulted from neighborhood residential patterns).

235 *Id.* at 831.

236 *See* Morales v. Shannon, 516 F.2d 411, 412-13 (5th Cir. 1975). The court stated: "With respect to the first issue, segregatory intent, we are governed by *Keyes* . . . which supervened our holding in *Cisneros v. Corpus Christi* . . . to the extent that *Keyes* requires, as a prerequisite to a decree to desegregate a de facto system, . . . proof of segregatory intent as a part of state action." *Id.* The court admitted, "We said not in *Corpus Christi*, holding cause and effect a sufficient basis, but the Supreme Court held to the contrary in *Keyes*." *Id.*

237 *Id.* at 413. As early as 1907, there had been a Mexican school in the district. *Id.* In 1954, one school was constructed in a Mexican-American neighborhood and one in an Anglo area. *Id.* A neighborhood school plan was imposed upon this situation. *Id.* The system froze the Mexican-Americans into predominantly Mexican-American schools. *Id.* This was strong evidence of segregative intent.

had not directly addressed the issue of whether the distinction was justified.[238] The Fifth Circuit's decision in *Morales* is a key turning point. Because the court of appeals said that the Supreme Court took a position in *Keyes* that it never actually took, *Morales* is best viewed as an attempt by the Fifth Circuit to render its decision less controversial. In short, it was an "easy" way to overrule its own precedent.

California federal courts also continued their effort to interpret *Keyes*. In *Ybarra v. City of San Jose*,[239] Mexican-Americans charged that discriminatory administration of zoning ordinances resulted in segregated schools. The district court dismissed the case on the ground that plaintiffs could not make out any showing of de jure segregation. The Ninth Circuit Court of Appeals reversed, observing that the district court's ruling rested on the premise that no constitutional violation can occur when the school board has followed a neighborhood school policy resulting in an ethnic composition of the schools that merely reflects residential patterns.[240] The court stated that the *Keyes* Court had left this issue open.[241] Thus, because the legal issue was so unsettled, the district court was not justified in dismissing the complaint.[242]

This case is significant because the Ninth Circuit recognized that *Keyes* did not hold that segregation resulting from a neighborhood school policy was constitutional. Yet the *Zamora*[243] and *Morales*[244] courts cited *Keyes* as allowing segregation resulting from neighborhood school plans. In this regard, the *Ybarra* decision is also interesting because it appears to be inconsistent with the Ninth Circuit's

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238 *See supra* note 215 and accompanying text (discussing fact that *Keyes* Court did not directly address issue); Crawford v. Board of Educ., 551 P.2d 28, 33 (Cal. 1976) (holding that "issue as to whether school districts have an obligation under the *federal* Constitution to avoid perpetuation of purely de facto school segregation remains an open question"). Indeed, the trial court, in a melodramatic passage, expressed its conviction that Orwellian horrors of the novel 1984 would result if it abandoned the distinction. *Morales*, 366 F. Supp. at 831.

239 503 F.2d 1041 (9th Cir. 1974).

240 *Id.* at 1042-43.

241 *Id.* ("The *Diaz* ruling apparently rested on the premise that no constitutional violation can occur when the 'School District has adhered to a "neighborhood school policy," with the result that ethnic composition of the schools merely reflects residential patterns.' This precise issue was reserved in *Keyes* . . . .").

242 *Id.*

243 *See supra* notes 220-27 and accompanying text (discussing *Zamora*).

244 *See supra* notes 228-38 and accompanying text (discussing *Morales*).

prior decision in *Soria*. There, the Ninth Circuit held that *Keyes* required plaintiffs to make a showing of de jure segregation, and that de facto segregation resulting from a neighborhood school policy was constitutional.[245] Under these circumstances, it appears that *Ybarra* represents the mirror image of the Fifth Circuit's decision in *Morales*: the Ninth Circuit was limiting its earlier precedent.

Finally, the California Supreme Court sought to construe *Keyes*. In *Crawford v. Board of Education of the City of Los Angeles*,[246] Mexican-Americans brought a desegregation action against the Los Angeles school district in 1968. The trial court found that the Los Angeles public schools were segregated and ordered the board to desegregate the schools.[247] On appeal, the board conceded that the district's schools were segregated but it contended that the segregation was de facto, and it, therefore, had no constitutional duty to alleviate the segregation.[248] The California Supreme Court stated that the recent federal cases, including *Keyes*, left open the issue as to whether school districts had an obligation under the Federal Constitution to avoid perpetuating purely de facto segregation.[249] Moreover, the court observed that defendants were ignoring a line of cases construing the California Constitution that established school boards' obligation to take reasonable steps to alleviate segregation in public schools, whether the segregation be de facto or de jure.[250] Defendant urged the court to abandon this position but the court stood by its prior decisions.[251]

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245 *See supra* notes 217-19 and accompanying text (discussing *Soria*).

246 551 P.2d 28 (Cal. 1976).

247 *Id.* at 30.

248 *Id.* at 33.

249 *Id.* The court stated that the United States Supreme Court had never directly held

> that a school district is constitutionally free to ignore the segregative consequences of adhering to "neutral," facially nondiscriminatory policies, and in *Keyes* itself the court explicitly declared: "We have no occasion to consider in this case whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting *de jure* segregation."

Id. at 33 n.4 (quoting *Keyes*, 413 U.S. at 212).

250 *Id.* at 35 (stating that California school boards are constitutionally required to take reasonable steps to alleviate school segregation whatever its cause).

251 *Id.* at 36. The court emphasized that the harm inflicted on minority students flows from racial isolation and not from whether the segregation is de jure or de facto. *Id.* at 37. It is racial isolation that creates unequal education.

Crawford is an excellent example of a court faced with a legally indeterminate situation. The court had to choose between incompatible rules. One rule would have prohibited only de jure segregation and the other would have barred even de facto segregation. The court adopted a rule prohibiting de facto segregation. The case is also highly significant for the California Supreme Court's recognition that *Keyes* did not decide whether de facto segregation offends the United States Constitution. As discussed,[252] other courts interpreted *Keyes* differently and cited *Keyes* for the proposition that only de jure segregation violates the Constitution.

c. Washington v. Davis: *Legal Indeterminacy and the Meaning of Intent*

In 1976, the Supreme Court decided *Washington v. Davis*,[253] an employment discrimination case that would have an impact on whether only intentionally caused segregation could establish a constitutional violation.[254] At issue was whether plaintiffs could prove unconstitutional race discrimination without proving discriminatory intent. The Supreme Court acknowledged that some of its cases indicated that a showing of discriminatory intent was not necessary and that courts of appeals had held in a variety of cases that equal protection violations could be established without proving

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Id. Thus, minorities endure significant harm when they are educated in segregated schools whatever the source of the segregation may be. *Id.* In view of the consequences that segregated schools have traditionally imposed on minorities, "a school board in this state is not constitutionally free to adopt any facially neutral policy it chooses, oblivious to such policy's actual differential impact on the minority children in its schools." *Id.* at 38. Thus, the court rejected the de jure/de facto distinction.

252 *See supra* notes 212-52 (discussing cases after *Keyes*).

253 426 U.S. 229 (1976).

254 Two African-American police officers filed suit against officers of the District of Columbia, alleging that the promotion policies of the District's police department were racially discriminatory. *Id.* at 232. Among other things, plaintiffs alleged that the Department's policies discriminated on the basis of race because they required applicants to take a written personnel test which excluded a disproportionately high number of African-American applicants. *Id.* at 233. The court of appeals held that the lack of discriminatory intent in designing and administering the test was irrelevant for determining an equal protection violation based on racial discrimination. *Id.* at 237. Rather, the fact that the test had a disproportionate impact on African-Americans "standing alone and without regard to whether it indicated a discriminatory purpose," was sufficient to establish a constitutional violation. *Id.*

discriminatory intent.[255] Despite these cases' impressive arguments to the contrary, the Court nonetheless held that proof of discriminatory intent or purpose was necessary in order to prove racial discrimination violating the Equal Protection Clause.[256] Thus, in *Washington v. Davis,* the Supreme Court resolved some legal uncertainty by holding that plaintiffs must establish discriminatory intent in order to prove unconstitutional racial discrimination.[257]

That resolution of legal uncertainty, however, was short-lived. Even if a court concluded that only intentional segregation violated the Constitution, legal indeterminacy would still be present. Courts took advantage of legal uncertainty in interpreting the notion of intent.[258] In *United States v. Texas Education Agency,*[259] the Fifth Circuit Court of Appeals concluded that the Austin School District intentionally discriminated against Mexican-Americans.[260] The court observed that the Supreme Court had not made it clear whether trial courts were to determine discriminatory intent neces-

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255 *Id.* at 244-45.

256 *Id.* at 238-45.

257 *See* TRIBE, *supra* note 15, at 1509 (stating that *Washington v. Davis* would result in "search for a bigoted decision-maker" in future litigation involving constitutional claims or racial discrimination directed against facially race-neutral rules) (citing Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine,* 62 MINN. L. REV. 1049, 1052-54 (1978)). Alan Freeman has argued that the intent requirement in antidiscrimination law is the result of approaching racial discrimination from the perspective of its perpetrator. *See* Freeman, *supra,* at 1052-54. According to Freeman, this approach ignores the perspective of the victim of racial discrimination: "From the victim's perspective, racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass." *Id.* at 1052. To solve the problem of race discrimination, then, would require affirmative efforts to change that condition. *Id.* at 1053. The perpetrator perspective does not address that condition because the remedial dimension of the perpetrator perspective is negative. *Id.* According to the perpetrator perspective, the goal of antidiscrimination law is merely to counter the perpetrator's discriminatory action. *Id.*

258 Kreimer, *supra* note 158. *See generally* Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation,* 58 GEO. WASH. L. REV. 1105, 1131 (1990) (applying Strauss' discriminatory intent argument to segregation cases); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989) (arguing that discriminatory intent approach is inadequate).

259 564 F.2d 162 (5th Cir. 1977), *cert denied sub nom.* Austin Indep. Sch. Dist. v. United States, 443 U.S. 915 (1979).

260 *Id.* at 163.

sary to establish de jure segregation under a subjective standard, which would require courts to determine whether school officials had a subjective desire to discriminate, or under an objective standard, by which officials would be held to have intended the reasonable foreseeable consequences of their decisions.[261] The court chose the objective standard.[262]

In *Texas Education*, the Fifth Circuit exploited legal indeterminacy in interpreting the notion of intent. The court could have adopted a subjective test[263] or an objective tort law[264] test. The court employed the objective tort law test and, thereby, made it somewhat easier for plaintiffs to show intent to segregate.[265] Thus, the court used the indeterminacy present in the law on intent and weakened the de jure segregation requirement. Indeed, one commentator has argued that the objective interpretation of intent as foreseeability eliminates the distinction between de facto and de

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261 *Id.* at 167.

262 The court reasoned that the principle that an actor is held to intend the reasonably foreseeable results of his actions is firmly rooted in the common law of torts. *Id.* at 168. Thus, the court held that "when the official actions challenged as discriminatory include acts and decisions that do not have a firm basis in well accepted and historically sound non-discriminatory social policy, discriminatory intent may be inferred from the fact that those acts had foreseeable discriminatory consequences." *Id.* Significantly, the court placed an important qualification on this test: "As a practical matter, in school desegregation cases we can envision few official actions, other than the decision to use a neighborhood school policy for student assignment, that would not be subject to the 'natural foreseeable consequences' rule." *Id.*

263 Several other courts have adopted the subjective test for intent. *See, e.g.*, Bronson v. Bd. of Educ., 525 F.2d 344 (6th Cir. 1975); Soria v. Oxnard Sch. Dist. Bd. of Trustees, 488 F.2d 579, 585 (9th Cir. 1973); *see also* Kreimer, *supra* note 158, at 321 (stating that several cases have equated segregative intent with decision maker's subjective desire to segregate).

264 Other courts have adopted the objective test for intent. *See, e.g.*, Hart v. Community Sch. Bd. of Educ., 512 F.2d 37, 50 (2d Cir. 1975); Morgan v. Hennigan, 379 F. Supp. 410, 478 (D. Mass.), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974); *see also* Kreimer, *supra* note 158, at 321 (stating that several courts have held that school board or its members can be liable for reasonably foreseeable consequences of their actions).

265 *See* Kreimer, *supra* note 158, at 325-26. The author states:

> [T]he subjective test poses severe evidentiary problems, problems that stand in the way of consistent and principled adjudication. Since individual decision-makers will rarely admit improper motivation, a finding of subjective intent generally must be inferred from circumstantial evidence. In evaluating such evidence, no set of facts compels a finding of illicit motivation.

Id.

jure segregation because, if strictly applied, the objective test amounts to a rule against all racial imbalance in the public schools.[266] The *Texas Education* court, however, preserved the de jure/de facto distinction by exempting neighborhood school policies from the natural foreseeable consequences test. This conclusion was unfortunate because school districts generally claim that they did not intend to segregate children but rather only intended to have neighborhood schools. The natural foreseeable consequence of the neighborhood school policy will generally be segregated schools because of segregated residential areas.[267] Thus, if courts applied the objective test in this situation, plaintiffs could show that the district intended to segregate by its use of a neighborhood school plan.[268]

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[266] *Id.* at 329-30. The author states that when

> any racial imbalance exists in a school district, the failure to adopt policies that alleviate the imbalance necessarily maintains and perpetuates the imbalance. Such a result is clearly natural and foreseeable. Thus, any school authority that tolerates racially imbalanced schools would be held to have acted with segregative intent under the foreseeability test.

Id. at 329.

[267] *See* T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 338 (1992). The author reports that, despite progress in some metropolitan areas, African-Americans and whites do not commonly live in the same communities. *Id.* This residential segregation contributes to segregated schools, neighborhood associations, parks, and places of worship. *Id.* He suggests that these conditions should deeply disturb a society convinced that it has made substantial progress toward eradicating discrimination. *Id.*; *see also* Diaz v. San Jose Unified Sch. Dist., 733 F.2d 660, 676 (9th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985) (recognizing that neighborhood school policy would probably perpetuate segregation); Reynolds Farley, *Residential Segregation and Its Implications for School Integration*, 39 LAW & CONTEMP. PROBS. 164 (1975); Dolcia L. Rudley, *School Desegregation, Whose Responsibility?*, 12 T. MARSHALL L. REV. 109, 109 n.1 (1986).

[268] In *United States v. Texas Educ. Agency*, 600 F.2d 518 (5th Cir. 1979), the United States filed an action seeking to desegregate the Lubbock, Texas Independent School District. The district court found de jure segregation in nine of the District's twenty-two minority schools. *Id.* at 521-24. The segregation in the remaining minority schools was only de facto segregation resulting from shifting housing patterns. *Id.* Thus, the district court ordered desegregation in only nine of the District's twenty-two minority schools. *Id.* The Fifth Circuit Court of Appeals reversed, remanding the case for additional fact finding. *Id.* at 527. In particular, the district court was to determine whether the school board's intentional segregative acts helped establish the housing patterns, and therefore, caused the segregation in the remaining minority schools. *Id.* If so, the segregation in the remaining

d. Summary

This completes our review of Mexican-American litigation to desegregate the public schools in the era of 1970-1980. Cases were tried throughout Arizona, Texas, Colorado, and California. The cases indicate that just as their predecessor's had, many courts of this generation found a way to justify segregation of Mexican-Americans. Previously, Mexican-Americans could be segregated because of language difficulties and migrant farming patterns. The courts in this generation rejected these "benign" reasons for segregation, but developed a more sophisticated doctrine to permit segregation: the de jure/de facto distinction. Thus, most courts took the position that de facto segregation of Mexican-Americans did not violate the Federal Constitution. The cases indicate that the decision to prohibit only de jure segregation was not logically compelled. The California state courts rejected the de jure/de facto distinction, and for a time, the Fifth Circuit joined in the effort. Thus, with respect to that issue and many others, the cases indicate that courts often exercised discretion in reaching their conclusions.

B. Bilingual Education

Mexican-Americans have traditionally done poorly in school because they have not been proficient in English and because they have lacked knowledge of their cultural heritage.[269] In response, Mexican-Americans have brought lawsuits under Title VI of the 1964 Civil Rights Act[270] in order to compel school authorities to

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schools would constitute a constitutional violation. *Id.* In determining whether intent existed, the Fifth Circuit instructed the lower court to apply the objective test it enunciated in United States v. Texas Educ. Agency, 467 F.2d 848 (5th Cir. 1972). *Id.*; *see supra* notes 260-68 and accompanying text (discussing objective test).

269 *See* Kobrick, *supra* note 149, at 264 ("Far from accomplishing its professed aim of integrating minorities into the mainstream, the monolingual, monocultural school system has succeeded only in denying whole generations of children an education and condemning them to lives of poverty and despair."); Erica Black Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 54 (1979) (documenting educational problems that Mexican-Americans face because of linguistic difficulties); Newman, *supra* note 149, at 577-78 (stating that limited-English-proficiency students suffer high drop out rates, increased crime rates, and feelings of inferiority as result of their inability to understand instruction in English-only classrooms).

270 42 U.S.C. § 2000(d) (1981) provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from

provide bilingual/bicultural[271] education. In this area as well, Mexican-Americans felt the effect of legal indeterminacy—in particular, indeterminacy resulting from the manipulation of precedent to generate conflicting results.

In *Serna v. Portales Municipal Schools*,[272] Mexican-Americans sought an order requiring the Portales School District to provide bilingual and bicultural education under Title VI of the 1964 Civil Rights Act.[273] Relying on a recent Supreme Court decision, *Lau v. Nichols*,[274] the Tenth Circuit Court of Appeals held that the Portales School District's failure to provide a bilingual/bicultural educational program so as to provide Mexican-Americans with a mean-

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participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

271 Bilingual and bicultural instruction combine two distinct components. Jonathan D. Haft, *Assuring Equal Educational Opportunity for Language-Minority Students: Bilingual Education and the Equal Educational Opportunity Act of 1974*, 18 COLUM. J.L. & SOC. PROBS. 209, 250-51 (1983). The bilingual component involves native language instruction in substantive courses. *Id.* The bicultural component involves instruction in the history and culture relating to the student's native language in addition to instruction in American culture and history. *Id.*

272 499 F.2d 1147 (10th Cir. 1974).

273 42 U.S.C. § 2000(d) (1981).

274 414 U.S. 563 (1974). In *Lau*, non-English speaking students of Chinese ancestry brought an action against the San Francisco School District, alleging that the district had violated Title VI of the 1964 Civil Rights Act. *Id.* at 564-65. There were 2856 students of Chinese ancestry in the district who did not speak English. *Id.* at 564. The district provided about 1000 of those students with supplemental courses in the English language. *Id.* The Court found that the San Francisco School District had violated Title VI by failing to provide non-English-speaking Chinese students with appropriate instruction designed to remedy their English language difficulties. *Id.* at 568. In particular, the Court held that Title VI, read together with Health, Education and Welfare regulations, required school boards to take affirmative steps toward rectifying language deficiencies. *Id.* at 567-68. The Court ruled that these steps were necessary to provide students with a meaningful education where school policies had the effect of discriminating, even in the absence of discriminatory intent. *Id.*; *see* Bernard J. McFadden, *Bilingual Education and the Law*, 12 J.L. & EDUC. 1, 10 (1983) (outlining guidelines established in *Lau*). The *Lau* Court found that the district's failure to provide appropriate instruction to Chinese students demonstrated that the Chinese students received fewer benefits from the school system than the English-speaking majority. *Lau*, 414 U.S. at 568. The Court concluded that this amounted to discrimination in violation of Title VI. *Id.* Importantly, in *Lau*, the Supreme Court found a Title VI violation even though the District had made a significant effort to remedy the language difficulties by providing supplemental English language instruction. *See id.* at 564-65.

ingful education deprived them of their statutory rights under Title VI.[275] Significantly, the court reached this conclusion even though the school district was making a substantial effort to provide compensatory and bilingual instruction.[276]

Serna is an important case in the struggle for equal education for Mexican-Americans. The language and cultural barriers had led to lower educational achievement and high dropout rates for Mexican-Americans.[277] Bilingual education provided a hope that Mexican-Americans would be able to enjoy a meaningful educational experience.[278]

Other decisions, however, ignored or interpreted *Lau* and *Serna* to reach different results. For example, in *Keyes v. School District No. 1*,[279] Mexican-Americans alleged that the Denver school board's failure to adopt a bilingual and bicultural program constituted a violation of Title VI.[280] The Tenth Circuit Court of Appeals found that the Denver school board had identified 344 students with language difficulties and had determined that 251 of these students needed special help in acquiring language skills necessary to function satisfactorily in school.[281] The court also found that the district had implemented various programs to address the students'

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275 *See Serna*, 499 F.2d at 1153-54 (stating that district had failed to establish a remedial program that would ensure meaningful education for children). The court affirmed the trial court's order that the school district provide plaintiffs with a bilingual/bicultural program which would ensure that Mexican-Americans receive a meaningful education. *Id.* at 1154.

276 Serna v. Portales Mun. Sch., 351 F. Supp. 1279, 1281 (D.N.M. 1972) (stating district had several Mexican-American teachers, provided bilingual/bicultural program for first grades, and provided limited program in English as second language in second through sixth grades); Grubb, *supra* note 269, at 61 ("The facts in *Serna* indicated that school officials had made significant commitments to compensatory and bilingual instruction.").

277 Grubb, *supra* note 269, at 54-55; Newman, *supra* note 149, at 577-78.

278 *See* Peter D. Roos, *Bilingual Education: The Hispanic Response to Unequal Educational Opportunity*, 42 LAW & CONTEMP. PROBS. 111, 111 (1978) ("A common sentiment among Hispanics . . . is . . . that for Hispanics to overcome the effects of decades of discrimination, the primary focus should be on bilingual and bicultural education."); Grubb, *supra* note 269, at 56.

279 521 F.2d 465 (10th Cir. 1975). The Tenth Circuit Court of Appeals decided this case following remand to the district court by the Supreme Court in *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

280 *Keyes*, 521 F.2d at 481.

281 *Id.* at 483 n.22.

needs.[282] The court found that the record could not support a violation of Title VI.[283]

The Tenth Circuit's decision in *Keyes* is questionable. First, the court did not explain why those facts could not amount to a violation of Title VI. Second, the court did not discuss *Lau* or its very recent decision in *Serna* and, therefore, did not explain how its ruling was consistent with those cases.

One possible reading of the Tenth Circuit decision in *Keyes* is that it stands for the proposition that there could be a Title VI violation only if a school board had taken no steps to remedy language difficulties.[284] If that is the meaning of *Keyes*, then it is not surprising why the court failed to distinguish *Lau* or *Serna*. *Lau* and *Serna* are not distinguishable on that ground. In *Lau*, the school district had made a substantial effort to remedy the English language difficulties.[285] Similarly, in *Serna*, the Portales schools had made a significant effort to alleviate the language problem and even had a bilingual program for first graders and an English as a second language program.[286] In *Serna*, the Tenth Circuit found these efforts insufficient and ordered the school district to enlarge the program.[287] Thus, *Lau* and *Serna* provided authority for the propositions that (1) a school district could violate Title VI even though it had taken some steps to correct language difficulties, and (2) a school district could be ordered to enlarge its effort and create a full blown bilingual and bicultural program. Other courts also found violations of Title VI where the school district had taken some steps to remedy language problems.[288]

Another key case interpreting *Lau* and *Serna* arose in Colorado. In *Otero v. Mesa County Valley School District*,[289] Mexican-Americans filed a class action to compel the school district to provide bilingual

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282 *Id.*

283 *Id.*

284 *See* Guadalupe Org., Inc. v. Tempe Elem. Sch., 587 F.2d 1022, 1029 n.7 (9th Cir. 1978) (suggesting this interpretation of *Keyes*).

285 *See supra* note 276 (describing school district's efforts).

286 *Serna*, 351 F. Supp. at 1281.

287 *Id.* at 1281-82.

288 *See* Rios v. Read, 480 F. Supp. 14, 18-20 (E.D.N.Y. 1978) (finding statutory violation even though school district offered some bilingual education); Cintron v. Brentwood Union Free Sch. Dist., 455 F. Supp. 57, 59-64 (E.D.N.Y. 1978) (finding statutory violation even though school district provided bilingual program in grades one through five).

289 408 F. Supp. 162 (D. Colo. 1975), *vacated*, 568 F.2d 1312 (10th Cir. 1977).

and bicultural education. The court held that the district had complied with Title VI by making an effort to solve language problems.[290] Unlike the *Keyes* court, the *Otero* court distinguished *Lau* and *Serna* on the ground that they dealt with a school board that had made no real effort to remedy the language problem.[291] Thus, the court read *Lau* and *Serna* to support the finding of a Title VI violation only where the school district had taken no meaningful steps to resolve language problems. The court also distinguished *Lau* and *Serna* on the theory that they dealt with large numbers of students who had language deficiencies; in *Otero*, about eight percent of the students had language problems.[292]

The court's effort to distinguish *Lau* and *Serna* is not persuasive. As discussed, those cases are not distinguishable on the ground that they involved districts that had taken no substantial affirmative steps to remedy language problems.[293] Moreover, the *Otero* court's effort to distinguish *Lau* and *Serna* on the basis of the number of Hispanics involved was questionable. Other courts found that failure to provide bilingual education to small numbers of students supported a Title VI violation.[294]

The meaning of *Serna* was also at issue in *Guadalupe Organization v. Tempe Elementary School District*.[295] Mexican-Americans brought an action to compel the Tempe Elementary School District to provide all non-English speaking Mexican-Americans with bilingual/bicultural education.[296] The Ninth Circuit held that the requirements

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290 *Id.* at 171.

291 *Id.* The court noted that "*Lau* and *Serna* dealt with school boards which were making no real effort to meet the problem. We deal with a school board which is making a real, conscientious effort to recognize, face and solve any problem which may exist as to any students." *Id.*

292 *See id.* ("*Lau* and *Serna* both had to do with large numbers of students who had language deficiencies and who could not learn in English. Our case involves a very few, if any, students who have real language deficiency.").

293 *See supra* notes 272-88 and accompanying text (analyzing *Lau* and *Serna*).

294 *See* Rios v. Read, 480 F. Supp. 14, 17-24 (E.D.N.Y. 1978) (finding violation where only seven percent of students were Hispanics); Cintron v. Brentwood Union Free Sch. Dist., 455 F. Supp. 57, 59-64 (E.D.N.Y. 1978) (finding violation where about 20% of students were Hispanic).

295 587 F.2d 1022 (9th Cir. 1978).

296 *Id.* at 1024. Plaintiffs claimed that their rights to equal educational opportunities had been disregarded in violation of the Equal Protection Clause and that the school district's failure to provide bilingual education violated their rights under § 601 of the 1964 Civil Rights Act. *Id.* The district granted defendant summary judgment. *Id.*

of Title VI were met because the district provided plaintiffs with remedial instruction in English.[297] The court distinguished *Serna* on the grounds that no affirmative steps had been taken by the district in that case to rectify language difficulties.[298] Thus, the Ninth Circuit also read *Serna* to authorize the finding of a Title VI violation only where the school district had taken no steps to remedy language problems.

Guadalupe Organization further illustrates false necessity in civil rights judicial decision making. The court's effort to distinguish *Serna* was not persuasive. As noted, *Serna* is not distinguishable on the ground that it involved a district that had taken no affirmative steps to remedy language problems. Contrary to the Ninth Circuit's reasoning, *Serna* could have been read to support the proposition that a district could violate Title VI even if it had taken significant action to resolve language difficulties.

The Mexican-American's struggle for bilingual and bicultural education began on a promising note in *Serna.* However, other courts so severely limited *Serna* that Mexican-Americans would not be able to compel a school district to provide them with bilingual/bicultural education so long as the district had taken some steps to remedy language difficulties. Thus, Mexican-Americans sustained a significant defeat in this area.

III. Summary and an Alternative Vision

This article has sought to expose how courts have exercised their judicial discretion in the context of Mexican-American civil rights litigation. The article has argued that the resolution of key issues often was not inevitable because of legal uncertainty or indeterminacy. Judges often exercised discretion to reach their conclusions. Part III seeks to draw some general conclusions and place this article in the context of a larger effort to generate racial reform.

First, the cases indicate that a number of courts generally exercised their discretion by taking a position against Mexican-Americans on key issues. For example, in the effort to desegregate public accommodations, the courts ruled against Mexican-Americans

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297 *Id.* at 1029 (holding that remedial instruction in English met requirements of Title VI by providing meaningful education and equal educational opportunity).

298 *Id.* at 1029 n.7 (stating that *Serna* found a Title VI violation where "*no affirmative steps were taken* by the Portales school district to rectify . . . language deficiencies").

where they might have done otherwise.[299] Likewise, the judiciary chose to reject Mexican-American efforts to reclaim land.[300] Similarly, with respect to the effort to desegregate the public schools, most courts exercised their discretion to permit the segregation of Mexican-Americans for "benign" reasons — *e.g.*, linguistic difficulties[301]—or because the segregation was "merely" de facto.[302] Finally, with respect to bilingual education, courts generally exercised discretion to limit access to bilingual and bicultural education.[303]

At one level, exposing the exercise of judicial discretion is important because it helps reveal the extent to which the courts have helped, or failed to help establish the rights of Mexican-Americans.[304] In this regard, the inescapable conclusion is that courts could have done significantly more to help establish the rights of Mexican-Americans.[305]

In this connection, critical race scholars have argued that civil rights gains tend to be cut back.[306] This article provides new support for that argument. The cases reveal that the rights of Mexican-Americans were often cut back through the use of judicial discretion. For example, in the area of school desegregation, the early

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299 *See supra* notes 14-50 and accompanying text (discussing cases addressing public accommodations).

300 *See supra* notes 51-63 and accompanying text (discussing cases addressing land grants).

301 *See supra* notes 94-126, 143-50 and accompanying text (discussing cases in which school districts justified their actions based on students' language abilities).

302 *See supra* notes 157-252 and accompanying text (discussing cases addressing de facto segregation).

303 *See supra* notes 269-98 and accompanying text (discussing bilingual education).

304 *Cf.* NOWAK & ROTUNDA, *supra* note 25, at 617 (stating that it is only against background of Supreme Court legal history "that one can understand the basis for recent decisions and the degree to which the Supreme Court as an institution has helped, or failed to help, establish the rights of racial minorities"); HIGGINBOTHAM, *supra* note 14, at 7 (analyzing role courts and legislatures played in suppression of African-Americans).

305 *Cf.* DERRICK BELL, AND WE ARE NOT SAVED 51-74 (1987) (questioning effectiveness of civil rights litigation and reliance on courts to induce racial reform); HIGGINBOTHAM, *supra* note 14, at 7 (documenting "vacillation of the courts [and] the state legislatures . . . in trying to decide whether blacks were people").

306 *See, e.g.*, Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 656 (1993) (arguing that civil rights, once won, are generally cut back).

cases held that Mexican-Americans could not be segregated solely on the basis of race.[307] That right, however, was immediately limited because most courts allowed the segregation of Mexican-Americans for "benign" reasons, and school boards often justified segregation on that basis.[308] Similarly, after the Supreme Court decision in *Brown v. Board of Education*, most courts narrowly interpreted *Brown* to bar only de jure segregation.[309] Thus, the Court's refusal to bar de facto segregation limited the rights of Mexican-Americans. Finally, in the area of bilingual education, the courts construed earlier cases so as to limit the right to bilingual education.[310]

These conclusions are important; however, this article seeks to do more than merely establish these negative conclusions. The article seeks to help establish the hope of racial reform. In this regard, there is reason to believe that exposing the lack of inevitability in civil rights decision-making may help break down barriers to racial reform. Critical race scholars have argued that a significant barrier to racial reform is the majoritarian mindset.[311] Richard Delgado has described this mindset as "the bundle of presuppositions, received wisdom, and shared understandings against a background of which legal [decision-making] takes place."[312]

The view that judicial decision-making is highly influenced by the perspective and preconceptions of the judge, and that the perspective of the dominant group may present a barrier to racial reform, finds substantial support in the recent revival of pragmatism in legal philosophy.[313] Pragmatists treat "thinking as contextual and

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307 *See supra* notes 94-150 and accompanying text.

308 *See supra* notes 95-150 and accompanying text.

309 *See supra* notes 161-268 and accompanying text.

310 *See supra* notes 269-298 and accompanying text.

311 Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741, 745-46 (1993); *see* Derrick Bell, *The Supreme Court, 1984 Term — Forward: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 8-11 (1985) (discussing role myths play in guiding racial policy).

312 Delgado, *supra* note 11, at 2413; *see also* Aleinikoff, *supra* note 267, at 327 ("The act of judging necessarily is predicated upon a range of political, psychological and social assumptions that cannot simply be discarded or overcome; without them, adjudication would be impossible."); Delgado, *supra* note 311, at 746 (describing majoritarian mindset as "the group of 'truths,' myths, and received wisdom that persons in the dominant group bring to discussions about race").

313 *See generally Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569, 1569-1853 (1990).

situated."[314] Thinking is "always embodied in practices—habits and patterns of perceiving and conceiving."[315] Thus, pragmatists have recognized that one cannot view the world except through one's preconceptions.[316] Applying this notion to legal decision-making, they have emphasized the importance of context and perspective to the act of judging.[317] Significantly, pragmatists also have recognized that the dominant perspective can stand in the way of racial reform.[318] Both critical race scholars and pragmatists offer a similar explanation for why the dominant perspective may inhibit reform. The general idea is that the dominant perspective or mindset makes current social and legal arrangements seem fair and natural.[319] Bringing this mindset to the bench, judges may commit moral error in civil rights cases because narrow habits of perceiving lead them to believe that the way things are is inevitable or just.[320]

One way to help judges break down mindset, broaden their perspectives, and promote justice in civil rights cases, is to provide counterstories—*i.e.*, explain how decisions were not inevitable.[321] Through this process judges can "overcome ethnocentrism and the unthinking conviction that [their] way of seeing the world is the only one—that the way things are is inevitable, natural, just, and best" and thereby avoid moral error when deciding *any* civil rights

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314 Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 798 (1989).

315 *Id.* (emphasis in original omitted).

316 Minow, *supra* note 13, at 46; *see also* HILARY PUTNAM, REASON TRUTH AND HISTORY 50 (1981) ("There is no God's Eye point of view that we can know or usefully imagine; there are only the various points of view of actual persons reflecting various interests and purposes that their descriptions and theories subserve.").

317 Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1600 (1990).

318 *See* Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1722-23 (1990) (noting that at time *Plessy* was decided, it corresponded with "old description of the world, composed by the dominant order and expressed in its institutions").

319 *See* Delgado, *supra* note 11, at 2413; Minow, *supra* note 13, at 54 ("Connected with many of the other assumptions is the idea that critical features of the status quo — general social and economic arrangements — are natural and desirable.").

320 Delgado, *supra* note 11, at 2416-17.

321 *See* Delgado & Stefancic, *supra* note 13, at 1958 (discussing ways judges can avoid these types of mistakes); Delgado, *supra* note 11, at 2413 (discussing ways of destroying mindset).

case.[322] Similarly, pragmatists have stressed that justice may be advanced only if judges try to grasp the world from perspectives that run counter to the dominant perspective.[323] In particular, some pragmatists have urged judges to try to grasp the world from the perspective of the dominated or the oppressed.[324] As Martha Minow has explained, the effort to take the perspective of another may help us see that our perspective is limited and that the status quo is not inevitable or fair.[325] This article has sought, in part, to breakdown narrow habits of perceiving that stand in the way of racial reform, by offering alternative perspectives or counterstories that explain how decisions were not inevitable.

Some commentators have questioned whether counterstories can transform the consciousness of the dominant group.[326] Contrary to those commentators, however, the idea that generating alternative visions of reality can advance racial reform finds important support in the philosophy of science and contemporary philosophy of law. In this regard, it is helpful to consider Thomas Kuhn's classic account of scientific change.[327] Kuhn argued that during periods of normal science, perception is dependent on conventional "paradigms."[328] According to Kuhn, a scientific revolution occurs when

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322 Delgado, *supra* note 11, at 2439; *see also* Minow, *supra* note 13, at 60 (discussing effect of judges trying to observe through other perspectives).

323 *See* Minow, *supra* note 13, at 95 ("Justice is engendered when judges admit the limitations of their own viewpoints, when judges reach beyond those limits by trying to see from contrasting perspectives, and when people seek to exercise power to nurture differences, not to assign and control them."); Radin, *supra* note 318, at 1724 (discussing different viewpoints on judiciary's role).

324 *See* Minow, *supra* note 13, at 79 (discussing adopting perspective of another); Radin, *supra* note 318, at 1724 ("[T]he best role for the judge . . . is to try to grasp the world from the perspective of the dominated, to hear the outsiders who have been silent and are now trying to speak . . . ."); DEBORAH L. RHODE, JUSTICE AND GENDER 317 (1989) ("A crucial insight is that decisions about getting from here to there — wherever there might be — must be made not from the top down but from the bottom up.").

325 Minow, *supra* note 13, at 60; *see also* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 321, 324 (1987) (arguing that adopting perspective of those at bottom — least advantaged — can promote justice).

326 *See* Farber & Sherry, *supra* note 11, at 824-27 (observing that "conversion stories are notably scarce").

327 *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

328 *See id.* at 10. Kuhn defines paradigms as "accepted examples of actual scientific practice — examples which include law, theory, application, and

there is a transition from one paradigm to another.[329] Paradigm changes cause scientists to see the world differently.[330] At times of scientific revolution, then, scientists experience shifts of perception—the scientists' perception of their environment must be re-educated.[331] According to Kuhn, the transition between competing paradigms is a conversion experience that cannot be forced by logic.[332]

Applying these notions to judicial decision-making, one leading pragmatist and philosopher of law, Judge Richard Posner, has recently argued that major changes in law often result from a similar conversion process.[333] Such conversion involves a perceptual shift where one comes to see the world differently.[334] According to Judge Posner, this process explains the major shifts that have occurred in law, including the expansion and recognition of civil rights.[335] Thus, the key turning points in American law simply

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instrumentation together — [which] provide models from which spring particular coherent traditions of scientific research." *Id.* Subsequently, Kuhn identified two primary meanings of paradigms — "*exemplars*, which are concrete problem solutions accepted by the scientific community" and "*disciplinary matrixes*, which are the shared elements which account for the relatively unproblematic character of professional communication and the relative unanimity of professional judgment in a scientific community, and have as components symbolic generalizations, shared commitments to beliefs in particular models, shared values, and shared exemplars." FREDERICK SUPPE, THE STRUCTURE OF SCIENTIFIC THEORIES 138 (1974).

329 KUHN, *supra* note 327, at 12; *see also* SUPPE, *supra* note 328, at 146-47 (stating that scientific revolution "requires rejecting the old disciplinary matrix in favor of another which contains the new theory").

330 *See* KUHN, *supra* note 327, at 111 (stating that paradigm changes lead scientists to adopt new instruments and to look in new places); SUPPE, *supra* note 328, at 149 ("The conceptual changes which come from accepting a new disciplinary matrix are like a gestalt switch; two observers looking at the same things from within different disciplinary matrixes see different things.").

331 *See* KUHN, *supra* note 327, at 112-13 (describing experiments on reeducation process of scientists).

332 *See id.* at 150-51 (noting that acceptance of paradigm shifts often occurs over long period of time); SUPPE, *supra* note 328, at 150 (stating that "conflict between incommensurable disciplinary matrixes . . . can only be resolved by persuasion and not logical argument").

333 POSNER, *supra* note 9, at 459; *see also* Radin, *supra* note 318, at 1725 (stating changes in law come about through paradigm shifts).

334 POSNER, *supra* note 9, at 149 (citing LUDWIG WITTGENSTEIN, ON CERTAINTY, at 14(e), ¶ 92 (G.E.M. Anscombe & G.H. Von Wright eds. 1969)).

335 *See* POSNER, *supra* note 9, at 151 (stating that conversion process explains "many of the seismic shifts that have occurred in our law, such as the great expansion of liability on virtually all fronts since the 1950s, the

reflect changing outlooks.[336] Judges and lawyers began to look at legal doctrine in a new way.[337] Accordingly, there is reason to believe that providing judges with alternative perspectives or counterstories may help stimulate a paradigm shift in the area of race.[338]

Beyond this, exposing the exercise of discretion through counterstories is one way to help insure that the Mexican-American experience is reflected in legal discourse. In this regard, feminists have argued that women's experience has not been recognized by the law.[339] To solve the problem of women's exclusion from legal discourse, Robin West has suggested that women must flood the legal market with their own stories.[340] In this way, legal discourse is forced to consider the perspective of women.[341] For similar reasons, critical race scholars have emphasized the importance of telling the silenced stories and unrecorded perspectives of outsider groups.[342] Thus, by offering counterstories, this Article has sought to help insure that legal discourse takes accounts of the Mexican-American experience.

Finally, by exposing the lack of inevitability in judicial decision-making, and revealing the role of discretionary policy choices which create and shape our society, it may also be possible to gain a renewed sense of community. Recently, legal scholars have emphasized the importance of promoting communitarian values.[343] Pragmatism suggests that exposing the lack of inevitability in judicial decision-making may foster a sense of community. As one of the

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expansion in the rights of criminal defendants and of prisoners, the increased recognition of women's rights, the explosive growth of constitutional law").

336 *Id.* at 152.

337 *Id.* at 151-52.

338 *Cf.* Radin, *supra* note 318, at 1722 (arguing that paradigm shifts in law are necessary in order to change status quo for oppressed people).

339 *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 60 (1988).

340 *See id.* at 65.

341 *See id.* at 70.

342 *See, e.g.*, Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2256 (1992).

343 *See generally Symposium: The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988); H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1703 (1988) (stating that modern republicanism seeks to recognize and foster community).

leaders in the revival of American pragmatism, Richard Rorty,[344] has explained, when the contingent character of human projects is recognized, "[o]ur identification with our community—our society, our political tradition, our intellectual heritage—is heightened."[345] This occurs "when we see this community as *ours* rather than *nature's, shaped* rather than *found,* one among many which men have made."[346] Similarly, once the contingent character of judicial decision-making is fully recognized, it may generate a renewed sense of community—the community may be viewed as ours rather than nature's.

CONCLUSION

This article has explored a jurisprudential point: legal indeterminacy in the context of Mexican-American civil rights litigation. The article argues that because of legal uncertainty or indeterminacy the resolution of key issues was not inevitable. Judges often had discretion to reach their conclusions. In this regard, the article concludes that the courts generally exercised their discretion by taking a position on key issues against Mexican-Americans. The article points out that exposing the exercise of judicial discretion and the lack of inevitability in civil rights cases is important for two major reasons. At one level, exposing the exercise of judicial discretion is significant because it helps reveal the extent to which the courts have helped, or failed to help establish the rights of Mexican-Americans. Thus, the article concludes that the courts could have done significantly more to help establish such rights.

The article, however, seeks to do more than establish that important conclusion. The article argues that exposing the lack of inevitability in civil rights decision-making may help break down barriers to racial reform. Drawing on critical race theory, legal pragmatism and the philosophy of science, the article argues that justice can be promoted in civil rights cases by providing judges with an alternative perspective on civil rights issues.

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344 *See* RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (1982); RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY (1989); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).

345 RORTY, CONSEQUENCES, *supra* note 344, at 166.

346 *Id.*