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# A Brief History of Chicana/o School Segregation: One Rationale for Affirmative Action

Margaret E. Montoya<sup>†</sup>

*Muy buenas tardes. Mil gracias por invitarme a hablar con Uds; es un privilegio para mi. Felicitaciones a las organizadoras de esta conferencia. Good afternoon and thank you for inviting me to speak.<sup>‡</sup>*

## INTRODUCTION

People can't get to be judges without first going to law school, and Latinas/os can't get to law school, at least in significant numbers, without affirmative action. With very few exceptions, the roomful of judges, law professors, lawyers and law students we saw over the past two days did not get to be where they are without affirmative action. When we fight for affirmative action, we fight for access to the legal profession; we fight to be public policymakers. Thus, fighting for affirmative action is a righteous struggle. It is about the well-being of our communities. It is about having a place at the table. It is about self-determination. It is about justice -- social justice, distributive justice and substantive justice. Affirmative action is the vortex of the civil rights struggle for this generation. I applaud your efforts and your struggles. I applaud you for organizing this conference on affirmative action.

Over the last two days, some have cautioned you not to neglect your studies. You have been told that you are to be students first and activists later. I am not of that opinion. I believe that students —especially law students, and most particularly law students of color, at elite universities — have a special responsibility to respond in organized ways to the institutional and structural racism and other forms of subordination that limit opportunities in this society. Students are heirs to a rich history of oppositional social action and dissent; they have been key leaders in movements for civil rights and human rights and against various military campaigns. Here at Berkeley, students have spearheaded movements that have changed the entire nation. I am thinking about the Free Speech movement, the Third World strike, the Coalition for a Diversified Faculty and now the organizing in support of

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<sup>‡</sup> This essay is based on the keynote address I delivered to the Fifth Annual Latina/o Law Students Conference in Berkeley, CA on October 28, 2001.

affirmative action and against Proposition 209 and the UC Regents' resolutions prohibiting the consideration of race and gender in student admissions and financial aid.

I exhort you to become involved and to be student activists, and I do so because I know it can make you better law students and better lawyers in the future. Your activism can contribute to your education in the following ways: first, it can expand your understanding of substantive law and hone your legal skills; second, it can construct and transform your identity/identities by strengthening your ties to subordinated populations; and third, it can teach you to build community and to value solidarity.

I suggest that you read Sumi Cho and Robert Westley's article, *Critical Race Coalitions: Key Movements that Performed the Theory*<sup>1</sup> for some historical perspective on student activism here at Berkeley. Professors Cho and Westley argue that one of the origins of Critical Race Theory was the student movement of the 1980's here at Berkeley.<sup>2</sup> That is a powerful example of how legal theory, curricula, and pedagogical practices, in and out of law schools, changed as a result of student interventions.

Student activism also engenders identity-formation and -transformation. For Raza students, this has been true since the heyday of the Chicano/a movement in the 1960s and 70s. Many of us learned through our activism what it meant to adopt a politicized racial/ethnic identity like Chicano/a. *Nuestra conscientización* was nurtured through our activism. Moreover, we learned that the class-jumping we were experiencing through access to elite educational institutions did not have to mean an abandonment of our families or our communities. These were not lessons we learned in classrooms.

Finally, student activism gives many students a home within, and a refuge against, the inhospitable climate of higher education. The alienation one can feel while in law school can be attenuated through student activism. Activism was important for me when I was an undergraduate at San Diego State, serving in the Student Senate and active in MECHA. It was important for me at Harvard, as we struggled to organize a Chicano/a student organization (we didn't have a pan-ethnic consciousness at the time). Activism remains important for me now that I am a law professor.

The Society of American Law Teachers has been in the vanguard of those responding to the backlash against civil rights over the past decade. In January 1998, SALT organized a march in San Francisco that saw some 1500 law professors, lawyers, law students and many others fill the streets. We marched from the Hilton Hotel on O'Farrell Street to Union Square. Imagine, hundreds of law professors in academic garb, lawyers in their black suits, students in their cool jeans and slouchy sweaters with picket signs that read, "S.F. law firms support Affirmative Action." "*Educar no segregar.*" "Law Professors for Access to Higher Education." Imagine Willie Brown<sup>3</sup> and Eva Patterson,<sup>4</sup> the presidents of the ABA, the LSAC and the AALS marching and chanting. It was a wonderful event.

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1. See Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377 (2000).

2. *Id. passim*.

3. Mr. Brown was, and is, Mayor of San Francisco.

More recently, SALT has organized three or four, depending on how you count, conferences on topics related to affirmative action, the LSAT and standardized testing. In early October, 2001, we organized a conference in Cincinnati on *Grutter v. Bollinger*, the case challenging the admissions process at the Michigan Law School. Over the past two years, SALT has contributed \$20,000 to help defray the litigation expenses of the Student Intervenors in the *Grutter* case.

On December 6, 2001, Miranda Massie will rise and address the Sixth Circuit Court of Appeal, sitting *en banc*, in Cincinnati. As you probably know, she will be arguing on behalf of the Student Defendant-Intervenors, a group of 41 named individuals and 3 student organizations. The Intervenors have reframed the issues and reinvigorated the national debate on affirmative action and on the use of the LSAT in student admissions. It has been my privilege to get to know the student-Intervenors and to work beside them and their lawyers.

Allow me to read a piece of the Intervenors' Reply Brief. They write:

The struggle for integration and equality has shaped and defined this nation. This struggle has taken many forms. Sometimes, the battles have occurred in open fields or at crowded lunch counters. Other times, they have occurred in courtrooms or legislative halls. When the cause of integration and equality has prevailed, we have moved forward together as one society.

Today, the struggle to defend affirmative action and integration is the touchstone issue in the struggle for equality and democracy.

Nothing in recent history has awakened the minds of students and youth, and stirred them into action as much as the defense of affirmative action. Six years ago, when the University of California (UC) Regents banned the use of affirmative action in the UC system, most political pundits and legal commentators predicted the end of affirmative action. . . .

The University of Michigan Law School (UMLS) case, like the UC Regents' ban on affirmative action, has rallied students to act. In 1999, this Court granted students the right to stand as defendants in this case. The importance of this decision cannot be overstated. This case has already affected the lives of tens of thousands of students, who increasingly regard this case as their own. . . .

For the students, the differences in this case are stark and clear.

Erika Dowdell, Concepción Escobar, and the ten of thousands of students they represent believe that higher education must not be resegregated. Like the University and the amici representing a vast array of different institutions of American society, they

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4. Ms. Patterson was, and is, Executive Director of the Lawyers' Committee for Civil Rights of the San Francisco Bay Area.

believe we must preserve the gains we have made in integrating this nation. Indeed, they believe it far more deeply—for they will live the future that will be determined here.<sup>5</sup>

Miranda will then argue that the state may use voluntary race-conscious measures to end the *de facto* segregation of its law schools and universities because integration is a compelling state interest. This is a novel and bold argument. Our prayers and hopes are with the Student Intervenors.

Keeping this argument in mind, I would like to review and reclaim some of the struggles and the victories the Chicano/a communities have experienced in challenging segregated schools in the Southwest. I want to put to rest the idea that we Chicanas/os have no claim upon desegregation as a public policy to remove the vestiges of the *de jure* and *de facto* discriminatory policies and practices of the past. Finally, I want to excavate the legal history that demonstrates that the Chicana/o communities played a central role in dismantling the legal architecture that supported the separate and unequal school systems throughout the Southwest.

The problem of segregated schools is currently of immense concern for the Latina/o communities. In July 2001, the Civil Rights Project of Harvard University, an entity engaged in empirical and qualitative research on segregation as a contemporary issue, produced a report called, *Schools More Separate: Consequences of a Decade of Resegregation*.<sup>6</sup> The report stated:

The 2000 Census tells us that Latinos have become the largest minority group in the U.S. . . . They have been more segregated than blacks now for a number of years, not only by race and ethnicity but also by poverty. There is also serious segregation developing by language. Most Latinos are concentrated in high poverty, low-achieving schools and face by far the highest drop out rate. Also, since most are concentrated in the large states where affirmative action for college is now illegal (California, Texas, and Florida), the concentration of these students in schools with a poor record of graduating students and sending them onto college raises important national issues.<sup>7</sup>

## I.

### CHICANA/O DESEGREGATION CASES

In order to understand the complexity of the ways in which educational opportunities were limited for Mexican/Mexican-American children throughout the Southwest, it is necessary to remember that Mexicans/Mexican Americans were

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5. Student Defendant-Intervenors' Final Reply Brief at 1-3, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), *appeal docketed*, (6th Cir. *en banc* Dec. 6, 2001) (No. 01-1447). *See also* *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 855-56.

6. *See* Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* (July 2001), *available at* [www.law.harvard.edu/civilrights](http://www.law.harvard.edu/civilrights) (unpublished report on file with Berkeley La Raza Law Journal).

7. *Id.* at 3-4 (footnotes omitted).

racially classified as White.<sup>8</sup> Having the Mexican mestizo/a accepted as White was a legal strategy that was pursued by Chicano lawyers and their clients up to the 1970s.<sup>9</sup> In 1954, the U.S. Supreme Court held, in *Hernandez v. Texas*,<sup>10</sup> that Mexican Americans were protected by the Fourteenth Amendment but limited its holding to the facts of the case rather than reaching the broader question of whether the group constituted an identifiable ethnic minority.<sup>11</sup>

Various forms of *de facto* segregation of schools were practiced throughout the Southwestern states.<sup>12</sup> It was, however, most entrenched in California and Texas and less widespread in New Mexico, where established Hispano families were educated side by side with Anglo elites.

Christopher Arriola described the social separation of Anglos and Mexicans in El Modena, California, the setting for one of the leading cases on segregation:

It was more common than not during the 1920s for southern California towns to be segregated. Segregation in the citrus society encompassed many harsh and unjust realities, from segregated housing and public places, to inferior social status and political and economic exploitation. Mexicans and Anglos lived in truly separate worlds. According to historian Charles Wollenberg, 'segregation was the rule wherever Mexicans reside in sizable colonies,' and it was a reality, 'from cradle to grave.'

This type of segregation was institutional and was visible in all aspects of daily life. Two common examples of segregation were the movie theaters in the larger towns and the swimming pools in almost every community. The five theaters in downtown Santa Ana were segregated. Oscar Valencia remembered that, 'the bottom [the main floor of the theater] was for the Americans, the top [balcony] was for the Mexicans. They had all kinds of segregation.' The 'plunge,' as the swimming pool in nearby Orange was called, had a 'Mexican Day' on Mondays. It was the only day Mexicans were allowed to swim. The pool was drained that night and was closed on Tuesday for cleaning and re-filling.

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8. See DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986* (1987). Montejano writes, "The death or resurrection of race divisions is fundamentally a political question, a question of efforts, in George Frederickson's words, 'to make race or color a qualification for membership in the civil community.' . . . the Mexican people of the Southwest [were] a distinct ethnic population. . . . Mexicans, following the above definition, were also a 'race' whenever they were subjected to policies of discrimination or control." *Id.* at 4-5 (endnote omitted).

9. Jorge C. Rangel & Carlos M. Alcalá, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307, 342 (1972).

10. 347 U.S. 475 (1954).

11. *Id.* at 479 n.9.

12. See Rangel & Alcalá, *supra* note 9, at 320 n.74.

Many organizations, businesses, and homeowners associations had official policies to exclude Mexicans, but in many other instances it was more of a general social understanding among Anglos that Mexicans should be excluded. . . .

Such prejudices lead to the establishment of a separate 'barrio' consisting of the downtown area of old El Modena. The town became two separate worlds in one place. Mexicans were sold 'miserable little houses' on cheap lots in the center of town 'for a good profit,' according to a long time resident. Anglos left the downtown area as more and more Mexicans arrived until the town was virtually all Mexican. Most Anglos in the community lived in small family-owned or rented citrus or walnut ranches in the plots adjacent to the town. El Modena had developed a doughnut shaped segregation. The Mexican community resided in the middle, clustered into the town, and the Anglos surrounded them living dispersed on the various nearby farms.

The separation went beyond the type and location of the houses. Mexicans and Anglos lead separate lives. They went to different churches, Anglos attending the Friends Church on the main street of Chapman, while Mexicans attended makeshift Catholic services in each other's homes until the first Catholic church was established. Mexicans had a different cultural life. The Mexican/Chicano community in El Modena brought in 'teatro' groups from Mexico, had their own dances, ran their own restaurants and small stores, and organized mutual aid societies which sponsored both Mexican and American patriotic organizations.<sup>13</sup>

In their outstanding study of school segregation in Texas, Jorge Rangel and Carlos Alcala noted that "[it was n]ot until 1930 [that the provision in the state constitution allowing separate schools 'for the white and colored children' was] held not to authorize segregation of Mexican Americans."<sup>14</sup> In a 1930 case, *Independent School District v. Salvatierra*,<sup>15</sup> the Texas Court of Civil Appeals agreed with the trial court that "school authorities have no power to arbitrarily segregate Mexican children, assign them to separate schools, and exclude them from schools maintained for children of other white races, merely or solely because they are Mexicans."<sup>16</sup> Even so, the appellate court dissolved the injunction prohibiting segregation because there was no proof of intent to discriminate. It was within the "pedagogical

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13. See Christopher Arriola, *Knocking on the Schoolhouse Door: Mendez v. Westminster, Equal Protection, Public Education and Mexican Americans in the 1940's*, 8 LA RAZA L.J. 166, 171-172 (1995) (footnotes omitted).

14. See Rangel & Alcala, *supra* note 9, at 312 (footnote omitted).

15. 33 S.W.2d 790, (Tex. Civ. App., 1930), *cert. denied*, 284 U.S. 580 (Oct 26, 1931).

16. *Id.* at 795.

wisdom”<sup>17</sup> of the educators to separate children with language problems. This became a pattern throughout the Southwest: Chicanos/as were placed in segregated schools with no explicit constitutional, statutory or regulatory authority. Consequently, fashioning legal remedies for this discrimination using theories of either *de jure* or *de facto* segregation would prove next to impossible.<sup>18</sup>

The situation in California is illustrative, although it is important to emphasize that each of the states had variations that depended on the importance of Mexicans/Mexican-Americans to the local economy. Unlike “Negroes, Mongolians and Indians”<sup>19</sup> who were prohibited from admission to the regular public schools, Mexicans were never specifically mentioned in the Education Code of California. However, by the 1920’s they were by far the most segregated group in California public education.<sup>20</sup>

The first instance of court-ordered desegregation occurred in Lemon Grove, California in *Alvarez v. Owen*.<sup>21</sup> A website maintained on the Mexican and Chicano History of San Diego describes the dispute:

On July 23, 1930 the Lemon Grove school board began to discuss what to do with the more than 75 Mexican students who were attending the local grammar school. It was decided to build a separate school for them but no notice was given to the parents of the Mexican students.

On January 5, 1931 the principal of the Lemon Grove Grammar School, Jerome T. Greene stood at the door of the school and directed the incoming Mexican students to go to the new school building, a wooden structure that came to be called “La Caballeriza,” (the barn). Instead the students returned home and thereafter the parents refused to send their children to the separate school. . . . [Enrique Ferreira, the Mexican consul,] put the parents in touch with Fred C. Noon and A.C. Brinkley, two lawyers who had worked for the consul in the past and from there they filed a writ of mandate to prevent the school board from forcing their children to attend the segregated school. They chose a student, Roberto Alvarez, to be the plaintiff in the class action suit. . . .

On February 24, 1931 Judge Claude Chambers began hearing the case. Fred Noon. . . called ten witnesses to the stand to challenge the school board’s contention that the Mexican children were

17. *Id.* at 794.

18. See Rangel & Alcalá, *supra* note 9, at 334 n.150.

19. See CHARLES WOLLENBERG, *ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION IN CALIFORNIA SCHOOLS, 1855-1975*, at 118 (Univ. of Cal. Press 1976).

20. *Id.* at 123. In 1929, “parental action did lead State Attorney General U.S. Webb to rule . . . that segregation of Mexican children was not supported by California law.”

21. No. 66-625 (Cal. Super. Ct. San Diego County filed Apr. 17, 1931).



educationally backward. Most of the students had been born in the United States and spoke English. At least one student spoke no Spanish at all. In the interrogatory Judge Chambers revealed the injustice of the differential treatment of Mexican students.

Judge Chambers: When there are American children who are behind, what do you do with them?

Answer: They are kept in a lower grade.

Judge Chambers: You don't segregate them? Why not do the same with the other children? Wouldn't the association of American and Mexican children be favorable to the learning of English for these children?

Answer: (silence)

[Judge Chambers] ruled against the Lemon Grove school district and ordered them to reinstate the children in the regular school.<sup>22</sup>

The Court concluded that Mexicans were neither Negroes nor Indians (nor Mongolians, the other category segregated under the California Education Code) and their segregation was therefore unlawful.<sup>23</sup>

In 1976, Charles Wollenberg wrote a dissertation that was to be published as a book called *All Deliberate Speed: Segregation and Exclusion in California Schools, 1855-1975*.<sup>24</sup> In it, he describes the actions taken by school boards throughout California to segregate Black, Japanese, Chinese, Indian and Mexican/Mexican-American children.

The end of World War II brought renewed protests against school segregation by Mexican-American parents (partly, Dr. Wollenberg explains, because racism had attached itself to Hitler and the Nazis).<sup>25</sup> By 1945, pressure was brought to bear on the school boards in Ontario, Mendota, Riverside, and San Bernardino.<sup>26</sup> In Westminster, several parents including Gonzalo Mendez wanted a bond issue

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22. See San Diego Mexican & Chicano History, Chapter 7: *What was the Lemon Grove School Desegregation Case All About?* at <http://www-rohan.sdsu.edu/dept/mas/chicanohistory/chapter07/c07s02.html> (last visited Oct. 24, 2001).

23. *Id.* See also, Kristi L. Bowman, *The New Face of School Desegregation*, 50 DUKE L.J. 1751 (2001) *infra* note 61, at 1771.

24. Wollenberg, *supra* note 19.

25. *Id.* at 120.

26. *Id.* at 125.

passed for the construction of a new integrated school.<sup>27</sup> The school board proposed it but the voters turned it down.<sup>28</sup>

On March 2, 1945, five fathers—Gonzalo Mendez, Thomas Estrada, William Guzman, Frank Palomino, and Lorenzo Ramirez—sued the Westminster, Garden Grove, Santa Ana and El Modeno school districts of Orange County, claiming that their children were the victims of unconstitutional discrimination.<sup>29</sup> This lawsuit was to bring an end to *de jure* segregation in California schools.<sup>30</sup> The irony was that the lawsuit was brought and won by Mexican Americans who had not been explicitly segregated.<sup>31</sup>

David Marcus, the attorney in the *Mendez* case, sued in federal court alleging that the four school districts maintained elementary schools with 100 percent Mexican/Mexican-American enrollment and that this violated the Fifth and Fourteenth Amendment rights of the children of “Mexican and Latin descent.”<sup>32</sup> The school board defended by arguing first that the federal courts had no jurisdiction in the case because education was a state matter. Second, the school board argued that the students were separated not because of race or nationality but because they lacked English-language skills and American values and culture. Finally, the school board “pointed out” that the principle of “separate but equal” was the law of the land.<sup>33</sup>

On February 18, 1946, Judge Paul J. McCormick concluded that the *Plessy v. Ferguson* precedent was inapposite because the California code did not provide for the establishment of “Mexican” schools. Therefore, their establishment was arbitrary action taken without “due process of law,” raising an issue under the Fourteenth Amendment and conferring jurisdiction on the Court.<sup>34</sup> Judge McCormick rejected the educational rationalizations for the separate schools, concluding that language difficulties would not warrant segregating children through the eighth grade.<sup>35</sup> Judge McCormick also rejected arguments that the children were intellectually inferior and heralded the notion that integration would instill “a common cultural attitude among the school children which is imperative for the perpetuation of American institutions and ideals.”<sup>36</sup>

27. *Id.*

28. *Id.*

29. *Id.* at 108.

30. *See id.*

31. *See id.* at 108 and 118.

32. *Id.* at 125 and 126.

33. *Id.* at 126-127.

34. *Id.* at 127 (citing *Mendez v. Westminster School Dist. of Orange County*, 64 F. Supp. 544 (C.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947)).

35. *Id.* at 127.

36. *Id.* at 128 (citing *Mendez v. Westminster School Dist. of Orange County*, 64 F. Supp. 544 (C.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947)).

On December 10, 1946, Joel Ogle filed his appeal with the U.S. Court of Appeals for the Ninth Circuit in San Francisco. Amicus briefs were filed by the American Civil Liberties Union, the National Lawyers Guild, the American Jewish Congress, and the Japanese American Citizens League. Thurgood Marshall and Robert Carter wrote the brief for the National Association for the Advancement of Colored People asking the Court to strike down the "separate but equal" doctrine.<sup>37</sup>

Dr. Wollenberg describes that during the oral argument, when Marcus noted that virtually all children with Spanish surnames were segregated within the Orange County schools, Judge William Denton asked what would happen to a child named O'Shaughnessy who was "five-sixths Spanish." Marcus assured the judge that he too would be segregated because the districts used appearance as well as family name.<sup>38</sup>

On April 14, 1947, the seven judges of the Court of Appeals unanimously affirmed the lower court's decision. But Judge Albert Lee Stevens' opinion refused to rule on the issue of "separate but equal." Mr. Arriola described the decision by the Ninth Circuit:

The Ninth Circuit upheld the District Court opinion on the grounds that the plaintiffs' Fourteenth Amendment rights had been violated by segregation, because no California law allowed the school boards to segregate Mexican school children. The segregation constituted unequal enforcement of the law. The segregation was not based on race discrimination, but rather was based on class discrimination against Mexican-American children. In fact, the court refused to confront the race issue and quickly sidestepped it. The Court never ruled on whether Mexicans are a group, an ethnicity, or a race, merely stating that Mexican American school children had been discriminated against and their Fourteenth Amendment rights had been violated.

The Ninth Circuit, at this time, was not willing to take a chance and rule that separate was always unequal, even though the opportunity was presented to them by the District Court. They were, however, repulsed by the actions of the school boards, and sufficiently frightened by the amicus briefs of the AJC regarding the slippery slope of social classifications, to take the necessary actions to end segregation in the schools. The Court's ruling was insufficient to overturn a significant corpus of segregation precedent, let alone *Plessy*.<sup>39</sup>

Nonetheless, this case was of great importance for Chicanas/os because it paved the way for litigation in Texas<sup>40</sup> and Arizona,<sup>41</sup> challenging segregation schemes, as well

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37. *See id.* at 129.

38. *Id.* at 129-130.

39. *See Arriola, supra* note 13 at 198 (footnote omitted).

40. *Delgado v. Bastrop Indep. Sch. Dist.*, Civil No. 388 (W.D. Tex., June 15, 1948) (enjoining Superintendent of schools from segregating pupils of Mexican descent).

as for other populations of color by helping to develop the arguments for *Brown v. Board of Education*.<sup>42</sup>

In 1977, the UCLA Chicano Studies Center published a monograph by Carlos Manuel Haro detailing the struggles of the Chicano/a communities to desegregate the Los Angeles schools.<sup>43</sup> Mr. Haro described the winding path that the cases would take. In August 1963, *Crawford v. Board of Education of the City of Los Angeles*<sup>44</sup> was filed, thus beginning litigation that was to culminate in sixty-five court days that filled sixty-two volumes of trial transcripts.<sup>45</sup> Seven years later, in May 1970, Judge Alfred Gitleson held that the Los Angeles Unified School District was substantially segregated.<sup>46</sup> The Supreme Court affirmed the decision and remanded the case for further proceedings.<sup>47</sup> The Court disagreed with Judge Gitleson that the state constitution required racial or ethnic balancing.<sup>48</sup> Instead, the Supreme Court held that the harm to minority children did not "turn on whether the segregation [was] of *de facto* or *de jure* character; it [was] the presence of racial isolation, not its legal underpinnings, that created unequal education."<sup>49</sup>

Although Mary Ellen Crawford was an African-American child, some plaintiffs were also Chicanos/as.<sup>50</sup> In trying to come up with an agreement that included Chicanos/as, Judge Egly, the judge who presided over the desegregation hearings, suggested eliminating the assimilated or mainstreamed Hispanics for those he called "the deprived minority."<sup>51</sup> The issues of desegregating school systems with significant numbers of Black, White and Chicana/o students would present themselves in other high-profile cases, most notably the case involving the Denver school system.

It was not until 1970 in *Cisneros v. Corpus Christi Independent School District*,<sup>52</sup> that Mexican Americans were held to be "an identifiable ethnic minority

41. *Gonzales v. Sheely*, 96 F. Supp. 1004 (D. Ariz. 1951) (holding separate schools for Anglos and Mexicans with unequal physical plants were a denial of equal protection).

42. 347 U.S. 483 (1954).

43. CARLOS MANUEL HARO, *MEXICANO/CHICANO CONCERNS AND SCHOOL DESEGREGATION IN LOS ANGELES* (1977).

44 No. 822854 (Cal. Super. Ct., 1963).

45. See Manuel Haro, *supra* note 43, at 18.

46. *Id.*

47. *Id.* at 19.

48. *Id.*

49. *Id.* at 22 (citing *Crawford v. Bd. of Educ. of the City of L.A.*, 17 Cal.3d 280, 295 (1976)).

50. Manuel Haro, *supra* note 43, at 26 and 29.

51. *Id.* at 72.

52. Civ. A. No. 68-C-95, 324 F. Supp. 599 (S.D. Tex., 1970).

group” for the purpose of school desegregation.<sup>53</sup> Thus, Mexican Americans were finally afforded the same protection as Blacks under the *Brown* case. In Houston, Texas, the school board responded to desegregation by pairing Black and Chicano/a children. In the ensuing lawsuit, *Ross v. Eckels*,<sup>54</sup> Judge Ben Connally asserted that Houston, and indeed all of Texas, had “always treated *Latin-Americans* as of the Anglo or White race.”<sup>55</sup> Judge Connelly opined as follows,

Content to be “White” for these many years, now, when the shoe begins to pinch, the would-be Intervenors wish to be treated not as Whites but as an “identifiable minority group.” In short, they wish to be “integrated” with Whites, not Blacks.<sup>56</sup>

Finally, the Supreme Court took up this issue of whether Chicanas/os are a “suspect” class such that they are entitled to protection under the equal protection clause of the Fourteenth Amendment. In *Keyes v. School District No. 1*, the Denver case, the Supreme Court posited that “though of different origins, Negroes and Hispanics in Denver suffer identical discrimination in treatment when compared with the treatment accorded Anglo students.”<sup>57</sup> The Denver case was brought by Black plaintiffs and the issue of Chicano/a segregation was not introduced until the remedy phase when Chicanos/as successfully intervened.<sup>58</sup> The Intervenors, the Congress of Hispanic Educators, proposed a plan to require a bilingual/bicultural program for Spanish-surnamed students.<sup>59</sup> This proposal was accepted by the District Court but later rejected by the Tenth Circuit. The *Keyes* case lasted in continuous litigation for thirty years from 1968 until 1997, when the Tenth Circuit approved the declaration by the District Court that the school system had achieved unitary status.<sup>60</sup>

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53. *Id.* at 606. See also Guadalupe Salinas, *Mexican-Americans and the Desegregation of Schools in the Southwest*, 4 EL GRITO-J. OF CONTEMP. MEX.-AM. THOUGHT 36, 36 (1971).

54. Civ. A. No. 10-444 (S.D. Tex., May 24, 1971).

55. *Id.* at 6.

56. *Id.* at 7.

57. See Betsy Levin, Salvador Castaneda, & Mary von Euler, *Appendix A: Legal Issues Related to School Desegregation and the Educational Concerns of the Hispanic Community*, in *DESEGREGATION AND EDUCATION CONCERNS OF THE HISPANIC COMMUNITY* (Conference Report of Nat'l Inst. of Educ., Oct. 1977) at 75 (citing *Keyes v. School District No. 1*, 413 U.S. 189, 198 (1973)).

58. *Id.* at 77 n. 24.

59. *Id.* at 77.

60. See Kristi L. Bowman, *The New Face of School Desegregation*, 50 DUKE L.J. 1751 (2001) *infra* note 61, at 1792.

## II. HISTORICAL ERASURES OF LATINAS/OS

Fast forward with me to 2001. This history of the struggle against the segregation of Chicana/o children in the Southwest has been largely erased. This jurisprudential history is not taught in law schools; consequently, Latinas/os children are not recognized as deserving subjects of this public policy. Kristi Bowman writes in an article entitled, *The New Face of School Desegregation*.<sup>61</sup>

In *Keyes v. Denver*, the Court endorsed the White—Non-White paradigm by deciding that it would classify Latinos with African Americans for purposes of school desegregation. Since 1973, the changing racial composition of the United States and of public schools has resulted in many courts' balancing schools according to a White—Non-White paradigm that ignores the full spectrum of racial and ethnic difference and presumes that Non-White groups are fungible for purposes of racial and ethnic balance. The White—Non-White paradigm is injurious to *Brown's* intent, because instead of promoting equality, it promotes the dominance of whiteness. . . . White dominance and privilege remain unquestioned when "White" is the standard against which all else is defined. This White norm has been particularly harmful to Latinos, whose history has been marginalized even more than that of African Americans. This approach to balancing schools . . . denies Latinos the full benefits of school desegregation.<sup>62</sup>

Ms. Bowman notes that "the Latino narrative is often overlooked in legal education, especially in the area of constitutional law. . . . Of six leading constitutional law casebooks, four overlook the topic of Latinos in connection with school desegregation."<sup>63</sup>

There is other evidence of this erasure of Latinas/os. Jack Balkin, a Yale Law School constitutional law expert, recently edited a book called *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision*.<sup>64</sup> Professor Balkin offers this observation, "In many respects, the honor *Brown* has received is ironic. *Brown* was a case about school desegregation, but by the end of the twentieth century many public schools in the United States remained largely segregated by race. . . . The present tendency toward segregation of Latinos is, if anything, even more pronounced than that with respect to blacks."<sup>65</sup> Professor Balkin continues, "[A

61. Kristi L. Bowman, *The New Face of School Desegregation*, 50 DUKE L. J. 1751 (2001).

62. *Id.* at 1753 (footnotes omitted).

63. *Id.* at 1798.

64. See JACK M. BALKIN, *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* (2001).

65. *Id.* at 6 (footnote omitted).

majority of black and Latino students around the country still attend predominantly minority schools.”<sup>66</sup> Yet, none of the constitutional experts include Latinos/as in their rewriting of this iconic classic of constitutional law. It is as though Latinas/os were neither subjected to segregation in the past nor continue to be the most segregated group in this society today.

On December 6<sup>th</sup>, I plan to be in Cincinnati for the hearing in the *Grutter* case. I plan to be there to represent Roberto Alvarez and the parents from Lemon Grove, I plan to be there to represent Gonzalo Mendez from Westminster, I plan to be there to represent the Chicanas/os from Los Angeles, Houston, Corpus Christi and Denver. I plan to be there because Chicanas/os have so much at stake. Our future is at stake. So, too, is our past.

Thank you y *mil gracias*. *Con safos*.

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66. *Id.* at 7 (footnote omitted).