

WHO GETS TO CONTROL CIVIL RIGHTS CASE  
MANAGEMENT?  
AN ESSAY ON PURPOSIVE ORGANIZATIONS  
AND LITIGATION AGENDA-BUILDING

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“All politics is local,” mis-attributed to Rep. Tip O’Neill (D-MA)<sup>1</sup>

INTRODUCTION

If all politics is local, then litigation is surely so, especially in high-stakes United States Supreme Court litigation and drilling deeply, civil rights cases. Almost by definition, given how hard it is

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1. Fred R. Shapiro, *The Way We Live Now: On Language; Familiar Words from Unfamiliar Speakers*, N.Y. TIMES, July 27, 2008, at 16 (noting the mis-citation of several popular quotes).

to bring a case before the Court, all Supreme Court cases are important, but if the cultural wars are waged in the polity, Appomattox is the Supreme Court. In this Essay, I trace several arcs bending towards this tribunal, particularly the rise of purposive civil rights organizations, defined as national focused groups that undertake litigation and legal reform for a given civil rights project, the leading example being the ACLU or the NAACP Legal Defense Fund. Using the Mexican American Legal Defense and Educational Fund (MALDEF) as a focused case study, I discuss the development and maintenance of litigation/legislative agendas, major litigation issues that arise—with substantive, tactical, and procedural valences—and other features of becoming authoritative repeat players on given and identifiable themes. While focusing on MALDEF's organizational saga and political economy, I also discuss developing examples such as those in emerging areas of same-sex litigation and similar issues where national players are vying for control of important laws, policies, and cases. In particular, I will analyze the discursive narratives that are essential to messaging and control of themes in the broader polity and examine the unique and high-stakes issues of a purposive United States Supreme Court practice and how organizational DNA and resources affect litigation strategies. Virtually all the moving parts of this balancing act have spawned volumes and will continue to do so. It is an introductory exploration, and my conclusions are less conclusory than they are suggestive.

To begin this inquiry, it can be useful to consider briefly how cases move through the system and make their way to the United States Supreme Court, such as schoolchildren learn in their civics lessons. The most common pathway enables disputes to arise from the state and federal lower courts, with the losers in these disputes seeking appeals at the next level to overturn the decision. In a traditional Term calendar, the Court will hear and decide the cases on the merits with full opinion (or opinions) in fewer than 100 instances.<sup>2</sup> Annually, the nearly 8,000 cases that surface are winnowed to the approximately eighty or ninety that live on to their

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2. Data sources on these complex calculations can be found at U.S. CENSUS BUREAU, TABLE 331. U.S. SUPREME COURT--CASES FLED AND DISPOSITION: 1980 TO 2010 (Mar. 23, 2015), <http://www2.census.gov/library/publications/2011/compendia/statab/131ed/tables/12s0331.xls>. See also *Judicial Business of the United States Courts*, U.S. COURTS, [www.uscourts.gov/Statistics/JudicialBusiness.aspx](http://www.uscourts.gov/Statistics/JudicialBusiness.aspx) (last visited Oct. 27, 2015); *Statistics*, SCOTUSBLOG, [www.scotusblog.com/statistics](http://www.scotusblog.com/statistics) (last visited Oct. 27, 2015).

day in court that Term.<sup>3</sup> There is an elaborate minuet or kabuki dance that has developed in this process of considering and accepting the various cert. petitions that has drawn most detailed attention by political scientists, historians, and legal scholars.

In this scenario, the intricacies of the complex process are well understood by the many actors, including the Justices (especially the Chief Justice, who administers the primary sorting mechanisms) and the multiple institutional players. Any scorecard would include the judicial clerks who read and review the pooled cert. petitions; the United States Solicitor General, who determines the United States' governmental interests in a given case (whether or not the United States is a formal party) and who signals the Administration preferences by briefs and alignment choices; congressional leaders, who pass statutes and influence the process; and other attorneys and interest groups, many of whom will be repeat players with broad political purposes and ideological interests. These various actors engage the larger process with competing scripts, resources, and opportunities to convey their interests and state their preferences. Such means include careful parsing of cert. denials (where the Justices are themselves engaged actors through their own signaling behavior and invitations to additional litigation);<sup>4</sup> a more robust exchange mechanism in the form of *amicus curiae* briefs, the traditional public means employed by third parties to focus the Court's (and others') attention to their point of view and legal nuance;<sup>5</sup> and the entire panoply of discursive narrative devices to advance interests—a short list of these would be the various forms of media and news outlets across all the formats; study groups and

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3. U.S. CENSUS BUREAU, *supra* note 2.

4. See Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227 (1979) (detailed study of cert denials and imbedded patterns); Robert L. Boucher & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995) (same).

5. For a detailed and comprehensive narrative of these features and the many authors, see VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA 17-32 (2007). In a wide-ranging article measuring a variety of civil rights cases across domains, Theodore Eisenberg summarized over 1,600 federal cases and noted, “[C]ivil rights plaintiffs are making less use of federal courts over time. Nonprisoner civil rights cases are a declining fraction of federal civil cases. Trials continue to disappear, and evidence exists that some of the low trial rate is attributable to increasing civil rights case settlement rates.” Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMPIRICAL LEGAL STUD. 4, 28 (2015).

think-tank messaging; and the many means of surfacing issues and branding such organizational messages.<sup>6</sup>

This universe of communicative signaling devices is usefully termed by political scientists Tom S. Clark and Benjamin Lauderdale as “doctrine space,” most notably in the citation patterns of the individual Court members to frame and cite precedents in their opinions. The authors have noted:

We seek to estimate the legal position taken by a given opinion. One way that court opinions reveal their content is by which precedents they cite positively (affirming the argument of the older opinion) and which they cite negatively (disputing the argument of the previous opinion). We develop a scaling model which estimates the location of opinions by assuming that the probability of positively citing another opinion is a decreasing function of the policy distance between the two opinions. Using original data on which precedents are cited positively or negatively by each opinion, we estimate locations in a single-dimensional space for each search and seizure and freedom of religion opinion authored by the Warren, Burger, and Rehnquist Courts (1953–2004). These estimates allow fine-grained, systematic analysis of the doctrinal content of Supreme Court opinions. Our method can be used to study a variety of substantive problems, including, but not limited to, intracourt bargaining, the judicial hierarchy, the effect of separation-of-powers mechanisms on judicial policymaking, and the consequences of Supreme Court nominations.<sup>7</sup>

Considering these liminal spaces can mask the informal networks that exist and are used by all the parties to communicate with each other. For example, political theorist Vanessa A. Baird has also carefully observed the various coded cues and has noted that, while the individual Justices can only decide matters properly presented to them, they are very sensitive to the multiple pathways where they are able to telegraph their wishes and hopes to various parties, particularly the salient policy and litigation elites (she characterizes these as the multiple “[p]olicy entrepreneurs”) that regularly practice in front of the Court and who bring (and create) the cases that will advance their specific organizational interests:

These litigants pay attention to information about the justices’ policy priorities, prompting them to “find” appropriate cases for the justices in those desired policy areas. . . . Justices benefit from the litigants’ perceptions that their reputations are important; they also depend on

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6. See Eisenberg, *supra* note 5, at 18; see also Tom S. Clark & Aaron B. Strauss, *The Implications of High Court Docket Control for Resource Allocation and Legal Efficiency*, 22 J. THEORETICAL POL. 247, 266 (2010).

7. Tom S. Clark & Benjamin Lauderdale, *Locating Supreme Court Opinions in Doctrine Space*, 54 AM. J. POL. SCI. 871, 872 (2010).

litigants' willingness to support cases to influence political or legal change.<sup>8</sup>

She has identified four- to five-year cycles, during which the best cases can be brought in alignment with the Court membership, the issue timing, the various litigation tactics and strategic behavior, and the appearance of lower court decisions or circuit splits that might propel a given issue to the fore.<sup>9</sup> If the organizations are playing the long game, there is always the litigation season itself and the equally important perennial spring training months.

#### I. THE EMERGENCE AND INEVITABILITY OF PURPOSIVE LITIGATION ORGANIZATIONS

I have attempted to explain briefly how formal cases progress and ripen through the system of pathways to emerge for full consideration by the Supreme Court, a deceptively complex process with observable criteria and interactive spaces, ones that shape the arc of cases and the degrees of freedom available to the Court. After laying out this introductory groundwork, I turn to what Vanessa Baird labeled an important “policy entrepreneur” organization, the American Civil Liberties Union (ACLU), established in 1920.<sup>10</sup> The organization has a broad and identifiable policy focus, a network of community interests and identity, a large national community-based membership that supports its goals and provides resources and expertise, and many hundreds of disputes that arise on a regular basis to produce litigation.<sup>11</sup> Moreover, the ACLU’s core values extend to many dimensions of the country’s public life and reach across a broad ideological span of influence, such as progressive nondiscrimination issues of racial profiling and immigrant rights as well as more traditional libertarian issues of privacy, free speech, and freedom of association. Its many lawyers—it employs nearly 200 full time lawyers and has access to another 2,000 volunteer attorneys—are repeat players in what has become the modern Supreme Court practice. It is well established with a comprehensive decentralized

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8. BAIRD, *supra* note 5, at 31.

9. *Id.* at 33-72.

10. *See id.* at 29-30; SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 3 (1990).

11. WALKER, *supra* note 10, at 4.

and national governance structure, allowing it to become involved and shape important legislative, public policy, and litigation events.<sup>12</sup>

Political scientist James Q. Wilson described a “purposive” organization in his book, *Political Organizations*:

The dramatic increase in the membership of civil rights, environmental, civil liberties, political reform, and feminist organizations that occurred in the 1970s could not be explained entirely or even largely by the ability of such groups to exert social pressure or supply selective benefits, though these inducements no doubt played a role. To some extent, members were responding to purposive appeals,<sup>13</sup>

which he defined as a comprehensive program of focused ideological issues, salient appeals, perceived threats, and “solidary, material, and purposive incentives” that are detailed and communicated to forge group membership and to recruit potential members with similar concerns and commitments.<sup>14</sup>

Legal scholar Omari Simmons has noted the role of these organizations in participating through litigation, especially through the targeted use of amicus briefs:

In addition to robust participation by diverse amici, the content of the arguments raised by amici illustrates how amicus participation provides a deliberative and discursive forum. The perspectives of amici may enhance the prospect of better substantive decisions and the mere opportunity to participate in the lawmaking process enhances the Court’s legitimacy even where a party disagrees with the ultimate outcome. Discursive debate and participation is particularly important for groups normally excluded from the legislative process.<sup>15</sup>

While the public messaging is virtually always positive and idealistic, some purposive groups resort to apocalyptic terminology and invoke tropes of fear and loathing to secure their views. It is jarring, for example, to read carefully the message by the conservative Christian organization The Alliance Defense Fund,

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12. See generally WALKER, *supra* note 10; LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY (2014). The national website gives many program details, including extensive case files and links to decentralized ACLU affiliates in major cities. AM. CIV. LIBERTIES UNION, <https://www.aclu.org/> (last visited Oct. 27, 2015).

13. JAMES Q. WILSON, POLITICAL ORGANIZATIONS viii (Princeton Univ. Press 1995) (1974).

14. *Id.* at viii, xii. The Princeton paperback version updated the original 1974 Basic Books edition, elaborating substantially on Wilson’s original purposive organizations analysis. *Id.* at viii.

15. Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185, 216 (2009) (footnotes omitted).

recently reconstituted as the Alliance Defending Freedom (ADF).<sup>16</sup> The ADF has become one of the most active and successful purposive organizations in challenging colleges to accommodate sectarian religious free exercise and certain cultural expressions. The ADF website reveals its avowed and focused purpose in crusade terminology: Our religious freedom is at stake.

Now, more than ever, the core values we cherish are under fierce and relentless legal attack by those who are determined to silence people of faith and redefine the U.S. Constitution. These challenges are more than legal skirmishes...they are ongoing, pitched battles for the soul of our nation.<sup>17</sup>

Many schools fear an ACLU lawsuit, so they clamp down on Christian expression. Standing alone, parents and grandparents are often overmatched by our tax-funded public education system and activists who want to remove faith from public schools.

But when the Body of Christ stands and fights together, we can - and we do - win.<sup>18</sup>

The ADF's battleground is an exceedingly narrow view both of religious freedom and of the question of whose culture is at risk, given the substantial majority privilege Christians occupy in the country.<sup>19</sup> Muslims and Jews are the target of much religious bigotry and intolerance in the United States and worldwide, and it is not clear if certain Christian groups have entirely thought through what a

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16. History, ALLIANCE DEFENDING FREEDOM, <http://www.adflegal.org/about-us/who-we-are/history> (last visited Oct. 27, 2015).

17. ALLIANCE DEFENDING FREEDOM, WHAT DOES RELIGIOUS FREEDOM MEAN TO YOU?, [https://adflegal.blob.core.windows.net/web-content-dev/documents/adf\\_signaturebrochure2012\\_final.pdf?sfvrsn=8](https://adflegal.blob.core.windows.net/web-content-dev/documents/adf_signaturebrochure2012_final.pdf?sfvrsn=8) (last visited Nov. 25, 2015).

18. *What you Must Know About Religious Freedom in Public Schools*, ALLIANCE DEFENDING FREEDOM, <http://www.adflegal.org/protect-christian-students> (last visited Nov. 25, 2015). Until recently, the ADF website read, "We must continue the fight for religious freedom and the right of conscience, so that the life-changing message of Jesus Christ can be proclaimed and transform our culture. Each win for the Body of Christ is a loss for the opposition. It's that black and white." THE ELECTRONIC CHURCH IN THE DIGITAL AGE: CULTURAL IMPACTS OF EVANGELICAL MASS MEDIA 214 (Mark Ward Sr. ed., 2015). It has since changed to the language above.

19. In the more narrow context of higher education litigation and the ADF, I review this relationship in MICHAEL A. OLIVAS, SUNG ALMA MATER: HIGHER EDUCATION AND THE COURTS 147-53 (2013). I have also drawn on this 2013 full length monograph for some of the research and references in this project.

win for “the Body of Christ” might mean across many secular domains.<sup>20</sup>

To many observers, the quintessential “policy entrepreneur” or “purposive” educational civil rights organization would be the NAACP Legal Defense Fund (the LDF), the organization founded in 1940 and led for many years by lawyer Thurgood Marshall, which had as its clear focus to dismantle the apartheid system of Jim Crow America, leading to the towering 1954 *Brown v. Board of Education* case and other civil rights actions before and since.<sup>21</sup> Conservative groups have successfully adopted the LDF model to advance their causes, particularly in opposing racial affirmative action and secular humanism; their rise has coincided with the more conservative Supreme Court direction evident since the 1970s. These groups have not only employed the litigation strategies of the LDF, the MALDEF, and other progressive public interest racial organizations, they have even begun to appropriate the argot and nomenclature of the progressive and liberal groups, styling themselves as the “Center for Equal Opportunity” (CEO), which touts itself as “the nation’s only conservative think tank devoted to issues of race and ethnicity,”<sup>22</sup> and “The Center for Individual Rights” (CIR), “a nonprofit public interest law firm dedicated to the defense of individual liberties against the increasingly aggressive and unchecked authority of federal and state governments.”<sup>23</sup> CIR, for example, litigated the 2003 affirmative action challenges, while CEO has filed several actions to thwart postsecondary affirmative action programs. One attorney who has litigated many anti-immigrant cases has conceded he took his inspiration from MALDEF, a provenance

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20. See *id.*; Michael A. Olivas, *Who Gets to Guard the Gates of Eden?*, INSIDE HIGHER ED. (June 29, 2010), <http://www.insidehighered.com/views/2010/06/29/olivas>.

21. Baird notes the dozens of purposive organizations and legal defense funds on both sides of the spectrum that have taken their approach from the LDF. See BAIRD, *supra* note 5, at 46-48. Among the best of the many reviews of the long history of the LDF, I have found most helpful TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011). The often-told tale of the LDF remains inspirational and bends towards justice. I have found most helpful several recent works. See, e.g., *id.*; Christopher W. Schmidt, *Divided by Law: The Sit-Ins and the Role of the Courts in the Civil Rights Movement*, 33 LAW & HIST. REV. 93 (2015).

22. *Mission Statement*, CTR. FOR EQUAL OPPORTUNITY, <http://www.ceousa.org/about-ceo/mission> (last visited Oct. 27, 2015).

23. *Mission*, THE CTR. FOR INDIVIDUAL RIGHTS, <https://www.cir-usa.org/mission/> (last visited Oct. 27, 2015).

and attribution that must upset the pro-immigrant organization's lawyers to no end.<sup>24</sup>

In celebrating its twentieth anniversary in 2009, CIR acknowledged its debt to the earlier civil rights firms and their struggles for racial equality:

Nowhere did liberal public interest law firms enjoy greater moral authority than in the area of civil rights. The NAACP Legal Defense Fund's forty-year effort to end discrimination in public schools stands for many as the model of tenacious public interest law advocacy.

Yet what began as a principled effort to enforce the Fourteenth Amendment's requirement that the state neither favor nor disfavor any individual because of his race turned into a systematic effort to favor particular racial groups in employment, government contracting, and college admission, often in blatant disregard of Supreme Court precedent in this area.<sup>25</sup>

In claiming lineage to the LDF, CIR successfully undertook the *Hopwood*<sup>26</sup> litigation, only to see the U.S. Supreme Court eventually overturn *Hopwood* in the 2003 *Grutter* case,<sup>27</sup> reestablishing the 1978 precedent of *UC Regents v. Bakke* and upholding the use of affirmative action in college admissions.<sup>28</sup> Following this defeat, CIR took to the electorate, cosponsoring the Michigan "Civil Rights Initiative," by which the state's voters acted to abolish the use of affirmative action; this ballot initiative was ultimately upheld by the Supreme Court.<sup>29</sup> It is clear that purposive groups across ideologies have successfully coordinated legislation and litigation projects to

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24. Julia Preston, *A Professor Fights Illegal Immigration One Court at a Time*, N.Y. TIMES, July 21, 2009, at A10 (reviewing cases brought by Kris Kobach). CEO looks for cases and assists in identifying issues, while CIR uses staff attorneys and volunteer counsel to undertake litigation. *Id.*

25. CTR. FOR INDIVIDUAL RIGHTS, ANNUAL REPORT 2009: 20<sup>TH</sup> ANNIVERSARY 7 (2009), [https://www.cir-usa.org/articles/cir\\_ar\\_2009.pdf](https://www.cir-usa.org/articles/cir_ar_2009.pdf).

26. *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996) (striking down college admissions policy). See generally Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1104-14 (1997).

27. *Grutter v. Bollinger*, 539 U.S. 306, 343-44 (2003) (upholding use of race in college admissions); see also *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013) (upholding use of race).

28. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-17 (1978) (striking down use of quotas in admissions, but upholding use of race).

29. *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1638 (2014) (upholding state voter ban on affirmative action).

secure their aims and that they can call upon a number of lawyers and law firms for support and litigation resources.

These dueling and competing interests have had convergence on messaging, language, and strategic reliance upon Supreme Court litigation, but the thermodynamics of such purposive civil rights agendas also have similar structural complexities that are the focus of this project, particularly in the trial tactics and civil rights practices that constitute their reasons for existing. Here, I identify several such issues and draw from the growing literature on high-stakes litigation as the fulcrum on which civil rights cases turn.

In a nutshell, there have developed a number of seemingly arcane but fundamental features of exactly which group of the many gets to claim an issue as its own and undertake the path to court(s). As the number of purposive organizations has grown, so have the centripetal forces at play in controlling the crowded pathways to litigation and, equally important, who gets to create and engage in the discursive narrative so essential to advancing civil rights, however defined. As the country sorts through these competing messages in a more-connected polity, unexpected developments have arisen that threaten the alliances and coalitions that underpin the more-Manichean world of civil rights projects. When combined with the stalemates evident in a polarized Congress and electorate, it is not always clear how existing structures will regularly yield efficacious results.

I use several brief case studies of one such civil rights group, MALDEF,<sup>30</sup> as a purposive exemplar of litigation where unclear

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30. For such an important organization, there are only a small number of studies of MALDEF, and surprisingly in 2015, no full-length books or histories of the organization. One such study is DAVID A. BADILLO, *MALDEF AND THE EVOLUTION OF LATINO CIVIL RIGHTS* (2005). As I have noted in several references, I have undertaken archival studies of individual MALDEF cases, but have not attempted a comprehensive organizational history. As I researched this project, I have, to my disappointment, discovered how little serious historical work there is on the various purposive litigation organizations other than that focused on the LDF and *Brown v. Board*. Some of the better exceptions include social science analysis, but still, very little historical work or detailed archival scholarship. See Stephen L. Wasby, *Civil Rights Litigation by Organizations: Constraints and Choices*, 68 J. AM. JUDICATURE SOC'Y 337 (1985); Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 LAW & SOC. INQUIRY 62 (2014); Holly J. McCammon & Allison R. McGrath, *Litigating Change? Social Movements and the Court System*, 9 SOC. COMPASS 128 (2015). In addition to being a useful piece on organizational issues, the McCammon and McGrath article ends with a wide-

narratives and the resultant uncertainties can lead to trial tactics that were occasionally at cross-purposes, dooming the minority plaintiff claims against certain governmental policies and practices. First, the technical resources needed for trials require a large investment in the basic tools of litigation: experienced and committed counsel; deep pockets for research support, data analysis, and technical assistance; and the various other litigation costs for experts, trial costs, and miscellaneous resources. In almost every circumstance, the government or defendants will have deeper pockets, more media outlets for controlling the message, and more substantial resources. Government almost always enjoys the home-court advantage.

As MALDEF matured and exerted more control over its purposive civil rights litigation undertaken on behalf of Latino communities and political interests, the issues became more nuanced, including tussles over literal control over a claim, such as who would be the named plaintiff(s), would serve as the lead counsel, would appear as the public face, and would determine the strategic direction of the case in chief. In addition, controlling the technical and administrative issues after litigation can also be uncertain and contingent: Who gets to settle a claim, to mediate or arbitrate a dispute, to agree to the implementation of a remedy, and to collect attorney's fees? Who gets to claim the victory or shield the loss? In all these cases, MALDEF has been involved in varying degrees and exerted more or less control contingent upon a number of factors that show the inherent difficulty in maintaining control over a case where multiple players and civil rights interests are involved, each exercising its own organizational and client interests.

## II. *KEYES* AND TO A LESSER DEGREE, *RODRIGUEZ*

*Keyes v. School District No. 1, Denver* was an unusual case in that it originated in Denver, Colorado, and was a school desegregation case where its southwestern geography was in play—not merely the traditional line drawing, school assignment policies, and child transportation issues—but its political geography and demography variant.<sup>31</sup> In Denver, as in most southwestern cities, there were more Mexican American children in the school system

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ranging bibliography of salient articles, across many disciplines. McCammon & McGrath, *supra*, at 136-39.

31. See 413 U.S. 189, 191-93 (1973).

than there were Black schoolchildren.<sup>32</sup> In part, this case study reveals how the untraditional comprehensive case approach was a blind spot in the traditional Black–White binary legal theory that doomed the case, especially as it was originally undertaken without Latino legal involvement. In addition, MALDEF was not yet the major purposive legal organization it matured into in the next decade when it won more and more-significant voting rights and immigrant education Supreme Court cases. However, as *Keyes* began without enlisting its participation, MALDEF had already undertaken Tenth Circuit education litigation in neighboring New Mexico and was building its organizational capacity;<sup>33</sup> therefore, this failure of White Denver lawyers to incorporate a Mexican American theory of the Denver case contributed to its failed litigation strategy.

There is always a backstory to a complex lawsuit, one that clarifies why the case was brought and, equally importantly, who brought it. By many readings, *Keyes*<sup>34</sup> was the one that got away, sort of like *San Antonio Independent School District v. Rodriguez*<sup>35</sup> got away. In *Keyes*, White private firm lawyers and Black litigators brought in from the LDF overreached in retrying *Swann v. Charlotte-Mecklenburg Board of Education*<sup>36</sup> in the Southwest and failed to involve Mexican American interests in a school district that was more Latino than it was African American.<sup>37</sup> Even as they were wed in an arranged and adversarial relationship, and after MALDEF was allowed to intervene into their case, the Mexican American remedial plan for language instruction was largely adopted by the district court, and it repudiated the desegregation shibboleth originally pursued by the plaintiff lawyers. When the U.S. Supreme Court remanded the case after vacating the plan, the Denver school district board was given a free hand in fashioning its own remedy, one not agreed to by the plaintiffs.<sup>38</sup>

The Supreme Court, even as it vacated the district court's remedial plan that had included bilingual education instructional programs for "Hispano" children, noted what could have been, given the similar racial histories of the two communities in the Southwest or areas with substantial numbers of Mexican Americans:

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32. *Id.* at 195.

33. *See Serna v. Portales Mun. Schs.*, 499 F.2d 1147 (10th Cir. 1974).

34. 413 U.S. 189 (1973).

35. 411 U.S. 1 (1973).

36. 402 U.S. 1 (1971).

37. *See Keyes*, 413 U.S. at 195, 197, 200-01.

38. *See id.* at 213.

Before turning to the primary question we decide today, a word must be said about the District Court's method of defining a "segregated" school. Denver is a tri-ethnic, as distinguished from a bi-racial, community. The overall racial and ethnic composition of the Denver public schools is 66 Anglo, 14% Negro, and 20% Hispano. The District Court in assessing the question of *de jure* segregation in the core city schools, preliminarily resolved that Negroes and Hispanos should not be placed in the same category to establish the segregated character of a school. Later, in determining the schools that were likely to produce an inferior educational opportunity, the court concluded that a school would be considered inferior only if it had "a concentration of either Negro or Hispano students in the general area of 70 to 75 percent." We intimate no opinion whether the District Court's 70%-to-75% requirement was correct. The District Court used those figures to signify educationally inferior schools, and there is no suggestion in the record that those same figures were or would be used to define a "segregated" school in the *de jure* context. What is or is not a segregated school will necessarily depend on the facts of each particular case. In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration. The District Court has recognized these specific factors as elements of the definition of a "segregated" school, and we may therefore infer that the court will consider them again on remand.

We conclude, however, that the District Court erred in separating Negroes and Hispanos for purposes of defining a "segregated" school. We have held that Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment. Indeed, the District Court recognized this in classifying predominantly Hispano schools as "segregated" schools in their own right. But there is also much evidence that in the Southwest Hispanos and Negroes have a great many things in common. The United States Commission on Civil Rights has recently published two Reports on Hispano education in the Southwest. Focusing on students in the States of Arizona, California, Colorado, New Mexico, and Texas, the Commission concluded that Hispanos suffer from the same educational inequities as Negroes and American Indians. In fact, the District Court itself recognized that "[o]ne of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination." This is agreement that, though of different origins Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. In that circumstance, we think petitioners are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of "segregated" schools.<sup>39</sup>

Despite the clear historical and current marginalization of these children and the political communities in the administration and governance of the schools in Denver, Mexican American

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39. *Id.* at 195-98 (alteration in original) (footnotes omitted) (citations omitted).

instructional and pedagogical needs, especially for English Language Learners (as bilingual Spanish–English children have come to be known), were portrayed as different than were the needs of the African American children, whose advocates were more concerned about racial isolation and desegregative policies. Even the Supreme Court could only imagine how a better and more successful case would have been fashioned with a more comprehensive and inclusive litigation strategy, one where the different racial and language interests could have been worked out by the various parties, rather than being pitted against each other with competing theories of the case.

Details from the case reveal that the lead lawyers actually attempted fitfully to involve and co-opt Latinos, if not Latino lawyers or organizations, into their plans when the local community publicly began to agitate, but no coordinated efforts emerged as MALDEF disagreed with the strategic direction of the case and so sought to intervene late in the game.<sup>40</sup> This uncoordinated tactic did allow Mexican Americans to advance a comprehensive instructional remedy, one favoring language accommodations that was accepted by the lower court, but only to be overturned by the Supreme Court.<sup>41</sup> Whether or not one accepts this narrative of two groups being played by the school district and leading to a failed plaintiff instructional remedy, *Keyes* was a disappointing and difficult loss when the *Milliken v. Bradley* Detroit litigation ended comprehensive desegregation remedies for all intents and purposes.<sup>42</sup>

And while courts of all levels knew the difference between White and Black litigants as opposing parties in civil rights cases, they had not always known how to contextualize Mexican Americans in the universal mix of more racial shadings and histories—this, notwithstanding the long history of Mexican American challenges in their own history, extending over many years. *Keyes* historian and legal scholar Tom I. Romero, II has noted:

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40. In a long analysis of *Keyes* and contemporaneous MALDEF cases, I outline the failure of the original lawyers to involve Mexican American interests or lawyers. See Michael A. Olivas, *From a “Legal Organization of Militants” into a “Law Firm for the Latino Community”*: MALDEF and the Purposive Cases of *Keyes*, Rodriguez, and Plyler, 90 DENV. U. L. REV. 1151, 1153 n.8 (2013).

41. *Id.* at 1153 n.8, 1158-62.

42. See 418 U.S. 717, 744-45 (1974) (refusing to employ cross-district or cross-jurisdictional remedies). For a contrarian view, see Kevin Brown, *Reflections on Justice Kennedy’s Opinion in Parents Involved: Why Fifty Years of Experience Shows Kennedy Is Right*, 59 S.C. L. REV. 735, 738 (2008).

MALDEF continued to push a litigation agenda to force courts to recognize the distinct racialization and color positioning of Mexican Americans. In so doing, MALDEF tested the legal boundaries of a potentially more expansive color line in jurisprudence and legal discourse by investing in the non-Whiteness and non-Blackness of the Mexican American community. Though courts would consistently relegate Mexican Americans to an in-between racial and ethnic space, a claim and commitment to “brownness” would continue to animate Mexican American legal claims to equality into the [twenty-first c]entury.<sup>43</sup>

But to prevail on an abstract theory meant little to MALDEF lawyers absent traction on a viable and efficacious result for its Mexican American clients. As the organization’s lead education lawyer noted at the time:

Arguments over bilingual education invariably turn into debates about “success” as reflected in research findings. Putting aside the inherent weaknesses in much educational research, an additional factor ought to be weighed in such discussions. It is important to understand that a bilingual education program merely seeks to provide [limited-English-proficient (LEP)] students with what others take for granted, namely, comprehensible instruction and English proficiency. While it is correct to hold bilingual education programs to high degrees of rigor and scrutiny, it should not obscure the fact that the adoption of such a program merely is the first step in assuring educational success for LEP students. “Success” will not be achieved unless those additional components of any effective school instructional program are made part of bilingual programs.<sup>44</sup>

This requirement had been undermined historically when Anglo school boards and educators used the existence of Latino schoolchildren to be traded off in demographic measures against African American children, creating a false racial calculus in mixed school districts.<sup>45</sup> This bad faith measure was made possible in part by lawyers employing the “other-White” or “class apart” legal strategies that had mousetrapped attorneys representing Mexican American children’s interests and had thwarted desegregative efforts by Mexican American communities for many years. They had reacted against Mexican-only schools in inferior situations or against all-White juries being deemed adequate by governmental bodies for

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43. Tom I. Romero, II, *MALDEF and the Legal Investment in a Multi-Colored America*, 18 BERKLEY LA RAZA L.J. 135, 146 (2007) (footnote omitted).

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

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

trying Mexican American defendants—on the spurious grounds that Mexican Americans were anthropologically or culturally “White” and so were actually being judged by their racial peers.<sup>46</sup> Whatever the classification, Mexican Americans were caught in a racial narrative that ignored Jaime Crow realities on vague racial equivalence theories and practices.<sup>47</sup>

Concerning the *Keyes* remedial plan, MALDEF’s lawyer Peter Roos wrote:

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

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

As we approached this second phase of the case, we were confronted with a decision that is common to this litigation: Do you continue with a

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46. There is a growing historical and legal literature on early- and mid-twentieth century Mexican American resistance to their legal subordination, particularly in education, but also in other areas of civil engagement and criminal law. See, e.g., RICHARD R. VALENCIA, *CHICANO STUDENTS AND THE COURTS: THE MEXICAN AMERICAN LEGAL STRUGGLE FOR EDUCATIONAL EQUALITY* (2008) (education); PHILIPPA STRUM, *MENDEZ V. WESTMINSTER: SCHOOL DESEGREGATION AND MEXICAN-AMERICAN RIGHTS* (2010) (education); Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 911 (2010) (education); Michael A. Olivas, *Hernandez v. Texas: A Litigation History*, in “COLORED MEN” AND “HOMBRES AQUÍ”: *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING 209 (Michael A. Olivas ed., 2006) (jury selection); IGNACIO M. GARCÍA, *WHITE BUT NOT EQUAL: MEXICAN AMERICANS, JURY DISCRIMINATION, AND THE SUPREME COURT* (2009) (jury selection); CYNTHIA E. OROZCO, *NO MEXICANS, WOMEN, OR DOGS ALLOWED: THE RISE OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT* (2009) (civil rights).

47. Ian Haney López & Michael A. Olivas, *Jim Crow, Mexican Americans, and the Anti-Subordination Constitution: The Story of Hernandez v. Texas*, in *RACE LAW STORIES* 273 (Rachel F. Moran & Devon W. Carbado eds., 2008); Michael A. Olivas, *Review Essay—The Arc of Triumph and the Agony of Defeat: Mexican Americans and the Law*, 60 J. LEGAL EDUC. 354 (2010).

formal litigation posture or do you attempt to reach an agreement on the remedy? We made the determination that an agreed-upon plan was a preferable solution and that a return to court should occur only if the negotiations failed. At the heart of this decision was the belief that the school district would be more likely to faithfully implement a plan for which they felt some ownership. Conversely, it was felt that a court-imposed plan might be followed to the letter but without the spirit to make it truly work. We thus approached the school district and the court with the proposal that we work toward such a plan with certain fairly demanding time frames. If negotiations did not bear fruit within these time frames, it was understood that we would feel compelled to invoke the court's processes. The school district and the court agreed.<sup>48</sup>

Legal scholar Rachel F. Moran has also commented on the structure of the various education cases leading to the *Keyes* litigation and concluded that in effect the two minority groups were counterpoised against each other by each maintaining different theories of the case, not only different but at cross-purposes. She cited the school board attorney as inevitably attempting to play one interest off the other:

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

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

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

Jackson concludes that the board did not succeed in dissociating the language issue from the desegregation case, citing the district court's

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48. Roos, *supra* note 44, at 268-69 (footnotes omitted).

refusal to speculate on how the language claims would have been resolved if they had not been part of the desegregation case.<sup>49</sup>

Professor Moran also determined that these antagonisms arose at least in part due to the complex structural differences in perspective between those lawyers on the inside defending the school district and those on the outside who were motivated by their clients' historic involvement in this case and others before it: "Clearly, in *Keyes*, prospective implementation of the legal mandate was as critical for the intervenors as [was] demonstrating past violations."<sup>50</sup> In her recounting of this rich and complex Denver story, the backstory was a mix of the civil procedure inherent of complex litigation and its political equations, especially who gets to make the decisions among the various competing parties and how complex case management virtually always favors the governmental insiders, such as the Denver school board, who may lose at the front end but who often prevail in the remedy and implementation stages. Sometimes, if they do prevail, it is not only due to these structural advantages and deeper pockets, but also to all the various tools of complex litigation: better access to statistical data, many institutional players, and the large scale political and media access residing in governmental organizations.

In *Keyes*, MALDEF played a surprisingly significant role in the case but intervened so late after the game was afoot that its curricular tactics did not mesh or coordinate with the alternative and original litigation plan, leaving MALDEF as the resented and late-intervening party guest.

### III. RODRIGUEZ: ONCE MORE INTO THE BREACH

To make matters worse, soon after in *Rodriguez*, the U.S. Supreme Court could not resolve the exceedingly complex and rival economic models of school finance (the field was "unsettled and disputed" and "this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels").<sup>51</sup> It then deferred to the state and local school districts by declaring that

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49. Rachel F. Moran, *Foreword—The Lessons of Keyes: How Do You Translate "the American Dream"?*, 1 LA RAZA L.J. 195, 199-200 (1986) (footnotes omitted) (quoting Michael Jackson, *Bilingual Education Litigation in Denver: The School District's Perspective*, 1 LA RAZA L.J. 250, 252 (1986)).

50. *Id.* at 202.

51. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23, 42 (1973).

education was not a fundamental right, choking off any remedies or resolution.<sup>52</sup> The *Rodriguez* case was brought in San Antonio, where virtually all the children were Chicano, but the legal strategy decision was made not to argue the case in racial or ethnic terms and, once again, was undertaken without active involvement of MALDEF in the original suit. (The slight was even greater than it had been in Denver, as MALDEF was established in San Antonio and, at the time, was headquartered in its founding city.)

And in *Rodriguez*, a different set of Anglo lawyers and the LDF confusingly disagreed on their own theory of the case: In the briefs supporting the plaintiffs, the LDF argued that the harm was one of racial discrimination, which was not the theory being pursued by lead local attorney Arthur Gochman, who had eschewed racial terminology as his strategic approach.<sup>53</sup>

Gochman's tactical choice even led the LDF to mischaracterize and misstate the district court's holding, noting that the *Rodriguez* "claim based on race was specifically upheld" by the trial court, when this was not correct.<sup>54</sup> This inaccuracy also led them to aver that the state's program of school finance was unconstitutionally racially discriminatory and that Gochman's clients (mostly Mexican Americans) had inherently and orthogonally claimed racial discrimination: "[T]he money differences proved by plaintiffs in this case are material enough to warrant judicial intervention in light of their relationship to the other factors present, including race and poverty" and, tellingly, "Plaintiffs are all Mexican-Americans. They claimed relief as and for Mexican Americans."<sup>55</sup>

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52. See *id.* at 37-38.

53. For a detailed study of the complex case, see Michael Heise, *The Story of San Antonio Independent School Dist. v. Rodriguez: School Finance, Local Control, and Constitutional Limits*, in *EDUCATION LAW STORIES* 51, 53-56 (Michael A. Olivas & Ronna Greff Schneider eds., 2008). Although MALDEF entered an amicus in this case, on the side of the plaintiff children, it played a subordinate role. Attorney Gochman argued the SCOTUS case by himself, and the organization was undergoing dramatic personnel upheavals, and had not yet become the authoritative purposive organization it was to become. Its influence, as can be seen, was minimal.

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

55. Brief for LDF, *supra* note 54, at 7, 14 (emphasis omitted). Ironically, this charge was the mirror image of that raised by MALDEF in its attempt to intervene in *Keyes*. These bookend cases reveal as no others why it was virtually

It is not evident that the Court would have taken the bait even if the parties had forged a single and coherent narrative, but having an uncoordinated approach inevitably blunted the legal argument and did not sharply focus attention on the plaintiff's exact claims and proposed remedies. Thus, Mexican interests had been ignored in *Keyes* and mischaracterized as racial in *Rodriguez* when in fact they were linguistic and curricular in the former and economic and fiscal in the latter—in effect, losing by both fire and ice in their earliest Supreme Court civil rights cases.

#### IV. *PLYLER* AND CASE MANAGEMENT BY MALDEF

When Texas passed the state statute that gave rise to *Plyler v. Doe*, the first challenge was brought by a Houston private lawyer in an Austin state court, as the state capitol was the jurisdiction of the implementation of the law.<sup>56</sup> In *Hernandez v. Houston ISD*, the state court held that the State was within its rights to exclude or to charge tuition to undocumented children.<sup>57</sup> When MALDEF filed its challenge in the Tyler federal district court before Judge Justice, it proceeded without reference to the original state case.<sup>58</sup> The original *Hernandez* decision had not led to similar state court litigation, as MALDEF and other lawyers filed in federal courts rather than litigating in a number of hostile state venues and in front of elected state judges.<sup>59</sup>

When MALDEF won the Tyler federal trial, the issue of its potential impact upon other Texas school districts naturally arose and prompted more than a dozen federal lawsuits, eventually forcing MALDEF to mesh its efforts, including coordinating its response to

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impossible for the LDF and MALDEF to reconcile each other's claims and bring cases jointly, where there were adverse or inconsistent African American and Mexican American claims and remedies.

56. 457 U.S. 202, 206 (1982). In this section, I draw upon earlier research conducted for Michael A. Olivas, *Plyler v. Doe, the Education of Undocumented Children, and the Polity, in IMMIGRATION STORIES* 197 (David A. Martin & Peter H. Schuck eds., 2005) [hereinafter *STORIES*] and MICHAEL A. OLIVAS, *NO UNDOCUMENTED CHILD LEFT BEHIND: PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN* (2012) [hereinafter *NO UNDOCUMENTED CHILD*].

57. *Hernandez v. Hous. Indep. Sch. Dist.*, 558 S.W.2d 121, 125 (Tex. Civ. App. 1977). I have also conducted several discussions with Houston attorney and the counsel of record Peter Williamson, who had generously filled in many of the unpublished details of the state case backstory.

58. See *Plyler*, 457 U.S. at 569-74.

59. *Hernandez*, 558 S.W.2d at 121.

the *Plyler* appeals filed by the Tyler School District and the State of Texas, with over a dozen challenges blooming in other parts of the state, especially in the State's largest school district, Houston ISD.<sup>60</sup> In September 1978, a California-based public interest law firm, headed by civil rights lawyer (and South African immigrant) Peter Schey as lead counsel, filed a lawsuit in federal court in Houston, including as defendants the State of Texas, the Texas Governor, the Texas Education Agency (the state agency that governed K-12 public education in the State), and its Commissioner.<sup>61</sup> Eventually, all these fresh cases were consolidated into *In re Alien Children* and tried in the Southern District of Texas in Houston before Judge Woodrow Seals in a month-long trial.<sup>62</sup>

Whereas MALDEF had narrowly focused upon Texas Education Code § 21.031 and solely upon the Tyler schools, the newer cases were brought by a variety of attorneys on many fronts, relying upon several theories, hoping that they could repeat the MALDEF Tyler victory, even with different facts and school circumstances. At this point, it became crucial that the various plaintiffs' lawyers coordinate their efforts, inasmuch as the defendant schools had deep pockets, state attorneys, and other tactical and resource advantages, especially the ability to outlast private groups. Although MALDEF had convinced the United States to intervene in its case on the side of the alien schoolchildren, over the long haul, the federal government could not be wholly relied upon in civil rights cases, as its interests could change depending upon the administration in office. In fact, a version of this scenario happened when the Carter Administration lost its reelection bid to Ronald Reagan.<sup>63</sup>

In May 1979, after *Plyler* had been decided at the trial level but before the consolidated *In re Alien Children* was to go to trial in Houston, counsel for the plaintiffs in the case before Judge Seals requested that MALDEF arrange to fold its efforts into their case.<sup>64</sup> MALDEF demurred, seeking to control its own case and to manage

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60. *Doe v. Plyler*, 458 F. Supp. 569, 573 (E.D. Tex. 1978).

61. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 550 (1980).

62. *Id.* at 544.

63. See generally Olivas, *supra* note 56, at 207-08 (background on behind-the-scenes maneuvering). For an extremely useful telling of the interactions of the SCOTUS justices in the case, see Linda Greenhouse, *What Would Justice Powell Do?: The 'Alien Children' Case and the Meaning of Equal Protection*, 25 CONST. COMMENT. 29, 32-35 (2008).

64. Olivas, *supra* note 56, at 205.

the appeal: The organization noted that it “felt ‘quite strongly that consolidation would not be in the best interests of our mutual efforts.’”<sup>65</sup> Of course, the dozen other cases had their own differentiated fact patterns and resource variables, and their lawyers were understandably worried that unless the cases were consolidated, the relief in *Plyler* might not extend beyond that small district.

This approach mirrored the trial strategy of the LDF on the cases leading to *Brown*, where Thurgood Marshall and his colleagues carefully picked their fights, each case—K-12 and higher education—incrementally building upon the previous cases.<sup>66</sup> MALDEF’s General Counsel Vilma Martinez had originally worked at the LDF with Marshall’s former colleague and successor, Jack Greenberg, and she clearly valued an overarching strategic vision and focused tactical litigation agenda.<sup>67</sup>

Although MALDEF’s lawyers on the ground in Texas would not agree to combine forces with the lawyers in the other cases at the crucial early stages, this matter was taken out of their hands when the

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65. *Id.* (describing the correspondence between Roos and Houston local counsel, declining to consolidate cases at that point).

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Although *Brown* concerned primary and secondary public education, the road to *Brown* ran through several higher education cases in which black students were denied admission into predominantly white colleges and universities. In these cases, the relevant universities crucially influenced place as states physically excluded blacks from these white public spaces. In response, states erected black colleges, started black law schools, paid for scholarships for blacks to attend colleges or professional schools in other states, or required blacks to sit, eat, and study in designated segregated areas within the university’s facilities.

Michael A. Olivas, *Brown and the Desegregative Ideal: Location, Race, and College Attendance Policies*, 90 CORNELL L. REV. 391, 392 (2005) (citations omitted).

67. See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ. of Topeka (Brown II)*, 349 U.S. 294 (1955). In an example of how cases can become styled, the several cases having been brought on this subject were consolidated into the case in chief, in alphabetical order of the plaintiffs. See generally Leland Ware, *The Story of Brown v. Board of Education: The Long Road to Racial Equality*, in *STORIES*, *supra* note 56, at 19, 36-40. A similar back story occurred in the same-sex marriage matter that became *Obergefell v. Hodges*: “The court will hear arguments on April 28 concerning the four cases, but because Obergefell’s suit has the lowest case number, the court, per its tradition, has lumped everything under his legal citation.” See Michael S. Rosenwald, *How Jim Obergefell Became the Face of the Supreme Court Gay Marriage Case*, WASH. POST (Apr. 6, 2015), [https://www.washingtonpost.com/local/how-jim-obergefell-became-the-face-of-the-supreme-court-gay-marriage-case/2015/04/06/3740433c-d958-11e4-b3f2-607bd612aeac\\_story.html](https://www.washingtonpost.com/local/how-jim-obergefell-became-the-face-of-the-supreme-court-gay-marriage-case/2015/04/06/3740433c-d958-11e4-b3f2-607bd612aeac_story.html).

defendant State of Texas requested consolidation so that it could concentrate upon a common defense instead of being Gulliver tied down by the growing challenges.<sup>68</sup> When Judge Seals, as had Judge Justice before him, issued a favorable decision on the merits, the plaintiff schoolchildren prevailed on all their claims.<sup>69</sup> Soon after, Judge Justice's *Plyler* decision was affirmed at the Circuit in October 1980, and in May 1981, the U.S. Supreme Court agreed to hear the matter.<sup>70</sup> At this point, the Fifth Circuit issued a summary affirmance of the consolidated Houston cases, and the Supreme Court combined the appeals of both cases by Texas under the styling of *Plyler v. Doe*, handing Peter Roos the chief case over Peter Schey's previously joined cases.<sup>71</sup> Having developed fuller records and armed with Fifth Circuit wins, the two Peters worked out an agreement to divide the oral arguments down the middle, but with MALDEF's case leading the way.

Until the Supreme Court arguments, Roos shored up political support with Carter Administration officials and with the new Reagan Administration officials in January of 1981.<sup>72</sup> Although the new Administration did not enter an amicus brief on the side of the plaintiffs (as had the earlier Democrat lawyers), their lawyers took no position on the crucial equal protection issue.<sup>73</sup> Fortunately for the plaintiffs, it did not seek to overturn the lower court decisions; rather, the unaligned amicus brief stressed the primacy of the federal government in immigration, a position that actually benefitted the MALDEF theory of the case.<sup>74</sup> On June 15, 1982, the Court ruled 5–4 for the children.<sup>75</sup> In September 1982, the Court denied the Texas petitions to rehear the case, and the matter was over.<sup>76</sup>

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68. *Plyler v. Doe*, 457 U.S. 202, 209 (1982).

69. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 597 (1980).

70. *Id.*

71. *Texas v. Certain Named and Unnamed Undocumented Alien Children*, 452 U.S. 937, 937 (1981) (noting probable jurisdiction). The *Plyler* merits decision spelled out the complex consolidation history. *Plyler*, 457 U.S. at 207-10.

72. See Olivas, *supra* note 56, at 207-08.

73. *Plyler v. Doe*, THE LEADERSHIP CONFERENCE, <http://www.civilrights.org/equal-opportunity/court-decisions/plyler-v-doe.html> (last visited Oct. 27, 2015) ("Solicitor General Lee, Assistant Attorney General Reynolds, and Edwin S. Kneedler filed a brief for the United States in No. 80-1934 and for the United States as amicus curiae in No. 80-1538.").

74. Brief for the United States as Amicus Curiae in No. 80-1538 and Brief for the United States in No. 80-1934, *Plyler v. Doe*, 457 U.S. 202 (1982) (Nos. 80-1538, 80-1934), 1981 WL 390001, at \*5.

75. *Plyler*, 457 U.S. at 230.

76. *Plyler v. Doe*, 458 U.S. 1131, 1131 (1982) (denying motion to rehear).

More than five years had passed since the issue had first appeared on the MALDEF radar screen, and the disciplined case management and overarching strategic vision enabled them to control the centripetal forces that threatened *Plyler* at every turn. The cases had a sympathetic narrative in the anonymous client children and a state statute that never had had its own counter-story, sympathetic and helpful government officials at all levels, a potentially catastrophic change in federal administration that did not sabotage the plans, the ability to keep the complex cases focused on track, and the right array of judges hearing the cases as they wended their way through the system. This issue could have foundered at any one of the many turns, winding up like *Hernandez* in state court or like *Keyes* and *Rodriguez*, even more complex federal cases where MALDEF was not in control of its litigation strategy or theories of the cases.

*Plyler* was always a close call: The decision was surprising, inasmuch as it followed the hapless experience of both *Keyes* and *Rodriguez*. *Plyler* never commanded widespread constitutional attention or gained the weight accorded other such doctrinal developments. It has been widely understood to be *sui generis*, as high moral ground, but limited in its application. Peter Schuck, among the case's most thoughtful observers, has noted that:

Some of the manifest difficulties of devising a new constitutional order in an area of law that has long defied one are revealed in *Plyler v. Doe*, in which the Court felt obliged to turn conventional legal categories and precedents inside out in order to reach a morally appealing result.<sup>77</sup>

Following *Plyler*, and several other Supreme Court and other court victories, MALDEF was clearly in command of its own domain to the extent that purposive organizations are ever masters of their cases.<sup>78</sup> MALDEF continued to carve out major civil rights victories, including efforts to unravel the wins by additional legislation or litigation. The most notable and important effort in shoring up earlier court wins was the defeat of Proposition 187, the California anti-immigrant state ballot measure, which was struck down by a federal judge in *League of United Latin American Citizens (LULAC) v. Wilson*, a case that was mooted when the California governor reached a settlement, avoiding an appeal to the

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77. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 82-83 (1984).

78. A useful study of the rise of MALDEF's influence during this period is by a political scientist. See BAIRD, *supra* note 5, at 73-82.

U.S. Supreme Court.<sup>79</sup> This was another case in which MALDEF's successful litigation strategy was aided by good luck in the changing of an administration, this one of restrictionist California Governor Pete Wilson, who ran a short-lived presidential campaign on anti-immigration themes and who was no longer in state office when the settlement talks after *LULAC* commenced.<sup>80</sup>

## V. SUBSEQUENT CASES AND SCOTUS PRACTICE

In 2003, the Texas Legislature passed a redistricting plan that replaced an earlier one created by a federal judge, based upon 2000 census data.<sup>81</sup> MALDEF and Democrat Party challengers argued the plan was unconstitutional and that it violated § 2 of the Voting Rights Act (VRA) by diluting racial minority voting and that it was designed to maximize partisan Republican advantage in two different districts. Following another VRA case, the Court accepted cert. for *League of Latin American Citizens v. Perry*, combining challenges to two congressional districts—one challenge undertaken by MALDEF and the other by the Democratic Party, where the Court argument logistics once again had to be negotiated.<sup>82</sup> The Court consolidated *Texas v. Perry*, *Jackson v. Perry*, and *GI Forum v. Perry*, and noted the complexities of the cases they had joined<sup>83</sup> and their relationship to recent VRA decisions:

Soon after Texas enacted Plan 1374C, appellants challenged it in court, alleging a host of constitutional and statutory violations. Initially, the District Court entered judgment against appellants on all their claims. Appellants sought relief here and, after their jurisdictional statements were filed, this Court issued *Vieth v. Jubelirer*. Our order vacating the District Court judgment and remanding for consideration in light of *Vieth* was issued just weeks before the 2004 elections. On remand, the District Court, believing the scope of its mandate was limited to questions of political gerrymandering, again rejected appellants' claims. [District] Judge Ward would have granted relief under the theory—presented to the court for the

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79. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1301, 1308-09 (9th Cir. 1997).

80. *See generally* BAIRD, *supra* note 5, at 78-82 (noting different litigation strategies available to MALDEF and other litigants in *LULAC* and other immigrant-rights cases).

81. “To set out a proper framework for the cases, we first recount the history of the litigation and recent districting in Texas. An appropriate starting point is not the reapportionment in 2000 but the one from the census in 1990.” *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 410 (2006).

82. *Id.*

83. *Id.*

first time on remand—that mid-decennial redistricting violates the one-person, one-vote requirement, but he concluded such an argument was not within the scope of the remand mandate.

Based on two similar theories that address the mid-decade character of the 2003 redistricting, appellants now argue that Plan 1374C should be invalidated as an unconstitutional partisan gerrymander. In *Davis v. Bandemer*, the Court held that an equal protection challenge to a political gerrymander presents a justiciable case or controversy, but there was disagreement over what substantive standard to apply. That disagreement persists. A plurality of the Court in *Vieth* would have held such challenges to be nonjusticiable political questions, but a majority declined to do so. We do not revisit the justiciability holding but do proceed to examine whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.<sup>84</sup>

In other words, the cases were complex and based upon raw partisan redistricting politics, as well as complicated and uncertain jurisdictional challenges. Nina Perales argued the MALDEF case in chief.<sup>85</sup> No single theory of the consolidated cases was possible, and MALDEF's case was congruent with, but different than the other case(s) with which it had become joined, and which were argued by an experienced private firm litigator who had earlier argued Supreme Court VRA cases and *Lawrence v. Texas*, striking down the Texas sodomy laws.<sup>86</sup> In a 5–4 decision, the Supreme Court held that the redistricting plans did not constitute a constitutional violation, but that one of the challenged districts, which snaked along a number of cities and areas, had been redrawn so that it violated the VRA by adversely affecting Mexican American voters.<sup>87</sup> In this case, MALDEF's challenge was upheld, while the other State plan redrawing a Dallas-area district and challenged by the Democratic Party's lawyers was upheld.<sup>88</sup> In a complex negotiation, the time was split by the appellees into challenges to the two different districts. When the smoke cleared, *LULAC v. Perry* also was a rare case where

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84. *Id.* at 413-14 (citations omitted).

85. *Id.* at 407.

86. 539 U.S. 558, 561 (2003). The lawyer was Paul M. Smith. *Id.*

87. *Perry*, 548 U.S. at 442 (“[T]he totality of the circumstances demonstrates a § 2 violation. Even assuming Plan 1374C provides something close to proportional representation for Latinos, its troubling blend of politics and race—and the resulting vote dilution of a group that was beginning to achieve § 2’s goal of overcoming prior electoral discrimination—cannot be sustained.”).

88. *Id.* at 447 (“We reject the statewide challenge to Texas’ redistricting as an unconstitutional political gerrymander and the challenge to the redistricting in the Dallas area as a violation of § 2 of the Voting Rights Act.”).

Latino lawyers were on opposite sides of a case: MALDEF lawyer Nina Perales, a Puerto Rican, was on the MALDEF side, and Teodoro Cruz, a Cuban, argued on the State side.<sup>89</sup> Ironically, although the Latino lawyers were on the opposite sides, both won their parts of their respective cases.<sup>90</sup>

The next VRA case in which MALDEF was in the driver's seat turned out to have been the most complicated and disappointing example of repeat-player control of a case. In November 2004, Arizona passed Proposition 200, requiring additional identification for voting than had been required, which MALDEF determined violated not only the Constitution, but two federal statutes that controlled voting policies, the Voting Rights Act of 1965, and the National Voter Registration Act of 1993. These complex challenges to voter registration had become one of MALDEF's purposive legislative and litigation priorities, as there was a general national trend by conservative interests to enact practices that negatively affected voter turnout for parties perceived to be leaning Democrat, and a number of these practices were being implemented by states and federal actors—including additional voter identification and complicated registration procedures that would make voting more difficult. Two challenges emerged to the Arizona statute, the lead plaintiffs *Gonzalez*,<sup>91</sup> represented by MALDEF, and the *Inter Tribal Council of Arizona* plaintiffs (*ITCA*),<sup>92</sup> represented by the Lawyer's Committee and several other non-profit groups. The civil procedure of the cases was daunting, even as the federal trial court consolidated the cases. In addition to the complexity and the growing significance

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89. *Id.* at 407. Cruz was subsequently elected to the United States Senate, representing Texas. *Senators of the 114th Congress*, UNITED STATES SENATE, <http://www.senate.gov/senators/contact/> (last visited Nov. 25, 2105).

90. With the caveat that I have not been able to review all the SCOTUS cases argued on Puerto Rican issues, the first known Latina to argue before the United States Supreme Court appears to have been Miriam Naveria de Rodon, who argued *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976), in 1975. Naveria de Rodon argued against Max Ramirez de Arellano, and both parties were on the brief. *Id.* at 574. I now believe this to be the first time two Latinos appeared on both sides of a Supreme Court case. This revises my earlier belief that *LULAC v. Perry* was the first such case. Flores de Otero is an interesting immigration case, well-known to immigration teachers. To an extent, Puerto Rican lawyers arguing Puerto Rican cases in the U.S. Supreme Court are a special category, but are no less important to the history of Latino/Latina lawyering.

91. *Gonzalez v. Arizona*, 677 F.3d 383, 387 (9th Cir. 2012) (Nina Perales, arguing for plaintiffs-appellants Jesus Gonzalez, et al.).

92. *Id.* (Jon M. Greenbaum, arguing for plaintiffs-appellants The Inter Tribal Council of Arizona, et al.).

of the issues, the plaintiffs wanted to accelerate the resolution of the cases before the impending national elections:

The District Court consolidated the cases and denied the plaintiffs' motions for a preliminary injunction. A two-judge motions panel of the Court of Appeals for the Ninth Circuit then enjoined Proposition 200 pending appeal. We vacated that order and allowed the impending 2006 election to proceed with the new rules in place. On remand, the Court of Appeals affirmed the District Court's initial denial of a preliminary injunction as to respondents' claim that the NVRA pre-empts Proposition 200's registration rules. The District Court then granted Arizona's motion for summary judgment as to that claim. A panel of the Ninth Circuit affirmed in part but reversed as relevant here, holding that "Proposition 200's documentary proof of citizenship requirement conflicts with the NVRA's text, structure, and purpose." The en banc Court of Appeals agreed. We granted certiorari.<sup>93</sup>

On the way to the U.S. Supreme Court, MALDEF's *Gonzalez v. Arizona* became the Lawyers' Committee's *Arizona, et al. v. Inter Tribal Council of Arizona, et al.*, in a complicated and confusing series of exchanges. As lead counsel for the case in chief, MALDEF's Perales—who had successfully argued *Gonzalez* before the Ninth Circuit—would traditionally have argued the Supreme Court appeal, parsing the arguments and determining who would argue the case.<sup>94</sup>

When the United States Department of Justice (DOJ) evinced interest, the Deputy Solicitor General Sri Srinivasan entered the equation as amicus curiae in support of the respondent, MALDEF's client, *Gonzalez*.<sup>95</sup> This support automatically accorded the DOJ time in the argument, and the remaining time would, in the normal court of business, have been MALDEF's choice, either with in-house staff counsel or outside counsel assigned to argue on its behalf. Inasmuch as she had successfully argued *LULAC v. Perry*, Perales had become one of the country's premier VRA advocates and anticipated arguing the respondents' case. But while Jon M. Greenbaum, the Lawyers'

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93. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2252-53 (2013) (citations omitted).

94. Discussions with Thomas Saenz, MALDEF General Counsel and President (Mar. 5, 2015) (notes on file with author).

95. The DOJ had also argued for amicus curiae United States. *Gonzalez*, 677 F.3d at 387. The Deputy Solicitor General is now Judge Srinivasan, having been appointed to the United States Court of Appeals in May 2013. *Sri Srinivasan*, U.S. COURT OF APPEALS D.C. CIRCUIT, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+SS> (last visited Oct. 27, 2015).

Committee counsel, had argued the companion case to this point,<sup>96</sup> the Lawyers' Committee had secured the volunteer services of Patricia Millett, who had argued nearly thirty Supreme Court cases in her career and pressed for her to argue the respondent *ITCA*'s case in chief.<sup>97</sup> Not only had MALDEF argued the consolidated case that had surfaced to the Supreme Court, making Perales lead counsel, but the alphabetical order of the cases—and MALDEF's lead counsel status—would have resulted in Gonzalez being listed as the official party over the *ITCA* case. But in what amounted to a typographical error, the case emerged from the Circuit as *ITCA* rather than as *Gonzalez*; this still would have meant that MALDEF would argue the case. It was not to be, as the Lawyers' Committee dug in its heels and insisted upon a referee to resolve the dispute.<sup>98</sup> Assuming its superior VRA expertise and status as lead counsel would prevail in any fair dispute resolution, MALDEF agreed to submit the matter to a senior civil rights leader, who heard both sides and summarized his case, but who declined to pick one or the other side. In the end, he (literally) flipped a coin,<sup>99</sup> and Patricia Millett became the Supreme Court lawyer on the case and successfully argued and won the 7–2 decision.<sup>100</sup>

#### VI. CONTROL OF THE NARRATIVE AND DISCURSIVE MESSAGES IN THE POLITY

Such disputes even among advocates on the same side of an issue arise more commonly than is recognized, in part because it is everyone's interest to keep these disputes in the family and not to give any traction to the other side of the case. And in the most precious commodity, control of the message in the narrative flow of information and shaping of public opinion in the dispute, it does not serve the case well when these internal issues are in play and publicly known. As an example, one that became well-known as the dispute widened, the various GLBT interests in striking down same-

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96. *Gonzalez*, 677 F.3d at 387 (Jon M. Greenbaum, arguing for plaintiffs-appellants The Inter Tribal Council of Arizona, et al.).

97. Discussions with Thomas Saenz, *supra* note 94. She is now Judge Millett, having been appointed to the United States Court of Appeals in December 2013. *Patricia A. Millet*, U.S. COURT OF APPEALS D.C. CIRCUIT, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+PAM> (last visited Oct. 27, 2015).

98. Discussions with Thomas Saenz, *supra* note 94.

99. *Id.*

100. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013).

sex marriage prohibitions were put to a public test when two “Odd-Couple” colleagues decided to take up the cause and to mount a challenge to California’s ballot measure banning same-sex marriage, Proposition 8.<sup>101</sup> Republican Ted Olson and Democrat David Boies joined forces a decade after they had both been involved on opposite sides of *Bush v. Gore*<sup>102</sup> and announced their litigation plans.<sup>103</sup>

Although there was evidence that public opinion on gay rights and same-sex marriage was shifting, there was still a large reservoir of intolerance and formal state structures such as marriage bans, refusals to recognize domestic and family law accommodations, and outright hostility and harassment at all levels of government and private life, from immigration to inheritance rights to military restrictions such as Don’t Ask, Don’t Tell.<sup>104</sup> At the least, these outsider groups were afraid a loss would set back the cause for many years and fatally affect organizing efforts for incremental and more permanent change. Indeed, when the dust cleared, the Supreme Court struck down the offensive Defense of Marriage Act (DOMA), but punted on the technical merits of the state marriage ban section of the case, kicking the can down the road until a different challenge was later filed.<sup>105</sup>

When Olson and Boies had stepped forward to sue California in *Hollingsworth v. Perry*, without having consulted or involving a

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101. It will be difficult to top the superb history of the *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), case and backstory, especially the run-up to the trial by KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL (2015). For a comprehensive legal history of the gay rights movement in the United States, see MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2014).

102. 531 U.S. 98 (2000).

103. YOSHINO, *supra* note 101, at 14-89 (Part I: Before). See also Jeffrey Rosen, *The Trials of John Roberts*, THE ATLANTIC (Apr. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-trials-of-john-roberts/390438/> (analyzing the role of Justice Roberts in same sex and health care cases).

104. The federal policy of “Don’t Ask, Don’t Tell,” Pub. L. No. 103-160, 107 Stat. 1670 (1993) (codified at 10 U.S.C. § 654), was repealed in 2010. Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (2010); See Russell Berman, *The Awkward Clinton-Era Debate Over ‘Don’t Ask, Don’t Tell,’* THE ATLANTIC (Oct. 10, 2014), <http://www.theatlantic.com/politics/archive/2014/10/the-awkward-clinton-era-debate-over-dont-ask-dont-tell/381374/>; see generally Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of ‘Don’t Ask, Don’t Tell,’* 108 YALE L.J. 485 (1998); Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471 (2012); William N. Eskridge Jr., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067 (2015).

105. *Hollingsworth*, 133 S. Ct. at 2661, 2668.

number of the traditional gay and lesbian civil rights groups and non-profits in their litigation strategy and against the advice of many experienced advocates, the disagreement was not only over trial tactics but over the efficacy of advocacy and control of the discursive narrative that would be required to shape the case itself.<sup>106</sup> Also, importantly, it was felt that no genuine equality could successfully emerge without incorporating larger community interests and controlling the message.<sup>107</sup> At the least, it was felt that a gay or lesbian lawyer should argue or be involved in arguing the case.<sup>108</sup>

After the successful subsequent challenge to the federal DOMA in *United States v. Windsor* in 2013,<sup>109</sup> and when the inevitable proper challenge to state marriage bans did present itself to the Court and was scheduled for argument on April 28, 2015, this issue took another unusual, complex turn when the various parties could not decide upon a single voice for arguing the consolidated cases.<sup>110</sup> As a result, the parties asked Justice Roberts and the Court to allow them to divide the time allowed for argument into smaller pieces.<sup>111</sup> Because challenges to four states had been consolidated, each with a different team of lawyers, there was no consensus as to whom the

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106. Laurence H. Tribe & Joshua Matz, *An Ephemeral Movement: Minimalism, Equality, and Federalism in the Struggle for Same-Sex Marriage Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 199, 210 (2013). The bills had begun to mount, as one state alone agreed to pay over \$1 million in attorneys' fees to the ACLU over the litigation. Zoe Tillman, *Wisconsin Agrees to Largest Same-Sex Marriage Payout: \$1M*, NAT'L L.J. (Mar. 30, 2015) [hereinafter Tillman, *Wisconsin Agrees*], <http://www.nationallawjournal.com/id=1202722000738/Wisconsin-Agrees-to-Largest-SameSex-Marriage-Payout-1M>; Zoe Tillman, *Fees Mount in Marriage Cases: States Ordered to Pay Up as Same-Sex Bans Fall*, NAT'L L.J. (Jan. 12, 2015), <http://www.nationallawjournal.com/id=1202714571384>.

107. See Tribe & Matz, *supra* note 106, at 203.

108. The legal press was a bit breathless during the period when these events were unfolding. See, e.g., Tillman, *Wisconsin Agrees*, *supra* note 106; Marcia Coyle, *Supreme Court Veteran, First-Time Advocate to Argue for Gay Marriage*, NAT'L L.J. (Mar. 31, 2015), <http://www.nationallawjournal.com/id=1202722127019/Supreme-Court-Veteran-FirstTime-Advocate-to-Argue-for-Gay-Marriage#ixzz3W01pziYB>; Marcia Coyle & Tony Mauro, *Two High-Stakes High Court Debuts*, NAT'L L.J. (Apr. 6, 2015), <http://www.nationallawjournal.com/id=1202722650222/Two-HighStakes-High-Court-Debuts#ixzz3WMGp0GEz>.

109. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (striking down DOMA).

110. See, e.g., Mark Walsh, *States of Same-Sex Marriage*, A.B.A. J., Apr. 2015, at 19. Marcia Coyle, *Who Will Argue Historic Gay Marriage Cases?*, NAT'L L.J. (Mar. 17, 2015), <http://www.nationallawjournal.com/id=1202720833996/Who-Will-Argue-Historic-Gay-Marriage-Cases>.

111. Coyle, *supra* note 110.

first chair would be and if there would be enough time to accommodate more than one lawyer on the issues being argued.<sup>112</sup> The possibilities besides private counsel hired were the ACLU, Gay & Lesbian Advocates & Defenders, National Center for Lesbian Rights, and the Lambda Legal Fund—all organizations with broad and deep experience in purposive GLBT civil rights advocacy.<sup>113</sup> Originally, the Court divided the questioning up into two parts on which they wanted arguments, and then subdivided it further for the individual parties.<sup>114</sup> In appealing the time allocation and attorney participation, the “lawyers emphasize that the cases were litigated separately in the lower courts and raised different procedural and factual circumstances. The cases also drew different defenses. All of those factors led to different points being stressed in their briefing to the justices, they said.”<sup>115</sup>

A scant four weeks before the April 28, 2015 U.S. Supreme Court arguments, the plaintiffs, seeking to strike down the state marriage bans, determined their own advocates in an array set out by the Court according to the type of bans involved in the consolidated cases: The Michigan and Kentucky cases involving actual bans on same-sex marriages were argued by Mary Bonauto, from the Gay & Lesbian Advocates & Defenders (GLAD), and private lawyer Douglas Hallward-Driemeier represented the National Center for Lesbian Rights, challenging the Ohio and Tennessee cases that involved the refusals by states to recognize same-sex marriages performed elsewhere.<sup>116</sup> While GLAD’s staff Bonauto had never argued a Supreme Court case, she had been among the most experienced trial and appellate lawyers in the gay and lesbian legal movement, while Hallward-Driemeier had argued over a dozen

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112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Lily Hiott-Millis, *Mary Bonauto & Douglas Hallward-Driemeier to Argue Marriage Cases at SCOTUS*, FREEDOM TO MARRY (Mar. 31, 2015, 10:00 AM), <http://www.freedomtomarry.org/blog/entry/mary-bonauto-and-douglas-hallward-driemeier-will-present-marriage-arguments>. There was even a “moot-off” competition, or a mock trial tryout, to determine the lawyers who would argue. Richard Socarides, *The Coming Gay-Marriage Ruling*, NEW YORKER (Apr. 8, 2015), <http://www.newyorker.com/news/news-desk/the-coming-gay-marriage-ruling>. MALDEF would not agree to such a competition in the Arizona matter. Discussions with Thomas Saenz, *supra* note 94.

Supreme Court cases.<sup>117</sup> Her topic was allotted forty-five minutes for the arguments, while his issues were accorded thirty minutes.<sup>118</sup> Both teams also requested that a quarter hour of their overall time be given to the United States, a request that was granted.<sup>119</sup> As recently as a week before the final decision allocating the various times and assignments, the press had “reported that lawyer egos, client wishes and high stakes in the cases were making the choice of the pro-marriage advocates difficult.”<sup>120</sup>

In this case, both sides had multiple parties, as the lawyers for the four states being sued for their restrictive laws also petitioned the Court under its Rule 28 authority to divide the time and allow them to use more lawyers than would ordinarily have been the norm.<sup>121</sup> One Indian law case had famously careened down an uncertain path until days before the case was to be argued when the Court clerk held their feet to the fire:

A prime example of the Supreme Court’s distaste for divided argument came in the 2008 case *Carcieri v. Kempthorne*,<sup>122</sup> an Indian land dispute originating in Rhode Island. The court twice rejected motions for divided

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117. Coyle & Mauro, *supra* note 108; Marcia Coyle, *Q&A: Mary Bonauto Reflects on High Court’s Gay-Marriage Ruling; Veteran Civil Rights Lawyer Says Debut Argument “Represented Decades of Work,”* NAT’L L.J., July 20, 2015, at 15 (discussing holding and cases that preceded it, and how additional cases will be likely needed to implement it fully).

118. SUP. CT. OF THE U.S., ORDER LIST: 574 U.S. (Jan. 16, 2015), [http://www.supremecourt.gov/orders/courtorders/011615zr\\_f2q3.pdf](http://www.supremecourt.gov/orders/courtorders/011615zr_f2q3.pdf).

119. *Id.* (“(14-556 ) OBERGEFELL, JAMES, ET AL. V. HODGES, RICHARD, ET AL.; (14-562 ) TANCO, VALERIA, ET AL. V. HASLAM, GOV. OF TN, ET AL.; (14-571 ) DeBOER, APRIL, ET AL. V. SNYDER, GOV. OF MI, ET AL.; (14-574 ) BOURKE, GREGORY, ET AL. V. BESHEAR, GOV. OF KY, ET AL. The cases are consolidated and the petitions for writs of certiorari are granted limited to the following questions: 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state? A total of ninety minutes is allotted for oral argument on Question 1. A total of one hour is allotted for oral argument on Question 2. The parties are limited to filing briefs on the merits and presenting oral argument on the questions presented in their respective petitions.”); *see also* Michael S. Rosenwald, ‘I Just Stood Up for Our Marriage,’ WASH. POST, Apr. 7, 2015, at A1, A4.

120. Coyle, *supra* note 108.

121. *See* Walsh, *supra* note 110.

122. 129 S. Ct. 338 (2008). The invaluable resource SCOTUSBLOG spelled out some of the behind the scenes maneuvering. Lyle Denniston, *Jockeying for the Podium*, SCOTUSBLOG (Oct. 29, 2008, 7:20 PM), <http://www.scotusblog.com/2008/10/jockeying-for-the-podium/> (detailing case management disputes).

argument filed by former Solicitor General Theodore Olson and local lawyer Joseph Larisa, both of whom sought to argue on behalf of the state.

The impasse continued until three days before the argument, when [then-SCOTUS Chief Clerk] William Suter gave the two one hour to decide. If they could not agree, Suter warned, the state would forfeit its chance to present oral argument—an extraordinary penalty. Larisa stood down and Olson, a Gibson Dunn & Crutcher partner, argued the case.<sup>123</sup>

CONCLUSION: CASE MANAGEMENT IN PURPOSIVE LITIGATION:  
“GREAT CASES LIKE HARD CASES MAKE BAD LAW”

In 1904, Justice Oliver Wendell Holmes, Jr. famously dissented in an antitrust matter that “[g]reat cases like hard cases make bad law.”<sup>124</sup> He meant that SCOTUS cases make their way to the pinnacle for a variety of strategic and logistical reasons, but often are the wrong case or a case wrongly structured for genuine relief or social good.<sup>125</sup> I would suggest that an equally important corollary is that bad cases or the right cases badly structured can set back civil rights progress.<sup>126</sup> The means by which this failure occurs is often the

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123. Marcia Coyle & Tony Mauro, *Marriage-Rights Advocates at Odds Over Who Will Argue Cases*, NAT’L L.J. (Mar. 23, 2015), <http://www.nationallawjournal.com/id=1202721230497/MarriageRights-Advocates-at-Odds-Over-Who-Will-Argue-Cases#ixzz3XPKC23Q1>.

124. *N. Sec. Co. v United States*, 193 U.S. 197, 400 (1904) (Holmes, C.J., dissenting). This dissent and its various meanings have been comprehensively commented upon. See, e.g., Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006); LACKLAND H. BLOOM, JR., *DO GREAT CASES MAKE BAD LAW?* (2014).

125.

Holmes did not believe that identifying the problematics of great cases and hard cases was inconsistent with his view about the merits of case-based lawmaking, because for Holmes both great cases and hard cases presented vivid factual settings whose very vividness made proper resolution of the particular case especially salient even when that proper resolution would have negative effects on future and different cases. But such scenarios were aberrational, Holmes believed, and he saw no reason why the distorting effects of great or hard cases would be present for the mine run of ordinary common law litigation.

Schauer, *supra* note 124, at 884-85.

126. As one prominent example of how a difficult case was settled rather than risking a loss, see Elaine Jones, *Luck Was Not a Factor: The Importance of a Strategic Approach to Civil Rights Litigation*, 11 ASIAN L.J. 290, 293-94 (2004) (reviewing settlement in *Piscataway* case at final stages of SCOTUS arguments); *AFFIRMATIVE ACTION SETTLEMENT; Excerpts From Statement by School Board Lawyer on Lawsuit’s Settlement*, N.Y. TIMES (Nov. 22, 1997), <http://www.nytimes.com/1997/11/22/nyregion/affirmative-action-settlement-excerpts-statement-school-board-lawyer-lawsuit-s.html>. While it is beyond the scope

overarching management of the case and its many moving parts: whose case it really is, who gets to make the many key decisions, who can fashion the theory of the case and its constitutive narrative, who can speak for its rhetoric and storytelling, and who can engage in the public discourse and message control.

These considerations happen regularly each year in the Court's calendar, and not only in civil rights cases. In an administrative law/environmental law matter involving a seven-case consolidation, the Court split the differences by requiring a single lawyer to argue but gave additional time to the state governments to plead their cases.<sup>127</sup> But the purposive organizational interests of civil rights litigation often involve the attempts to meld competing theories of the case, as in *Keyes*, and to accommodate the larger social interests often at play as the repeat-player organizations jockey for establishing primacy of the subject matter as well as management of the actual case. In the important and visible 2015 gay and lesbian cases, part of the tension being played out was the strong sense that the lead Supreme Court lawyer should be an acknowledged member of the GLBT community, as well as being experienced in the actual

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of this project, I have come to believe that the large and growing number of purposive groups and the small SCOTUS docket have led to this increased competition and organizational branding. The high stakes in play and, remarkably, the rise of organizational interests in Latino issues, for example, has meant that MALDEF is cooperating but also competing with other organizational players. When the next history of the ACLU is written, the organization's increased interest in immigration, as just one example, will likely be traceable in substantial part to the assumption of Puerto Rican Anthony Romero to its presidency.

127. *Util. Air Regulatory Grp. v. EPA*, 135 S. Ct. 702 (2014); see Coyle & Mauro, *supra* note 123. This strong hand of the judges in such cases is important. In an influential article describing the rise of public interest litigation, Abram Chayes noted:

The characteristic features of the public law model are very different from those of the traditional model. The party structure is sprawling and amorphous, subject to change over the course of the litigation. The traditional adversary relationship is suffused and intermixed with negotiating and mediating processes at every point. The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders—masters, experts, and oversight personnel. Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation.

Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

legal and legislative issues, preferably one who was a member of an identifiable and purposive organization's legal staff.<sup>128</sup> Her co-counsel was a private Michigan lawyer, Carole Stanyar, who was the counsel of record in the case.<sup>129</sup> Yet these crucial decisions were actually resolved only in the final days before the Court arguments.<sup>130</sup>

Repeat purposive advocates master these various details, or try to, and each case has its own arc and narrative structure. MALDEF has evolved and matured to the point where its lawyers often control their own fates, but this has not universally been the case, as the several backstories here revealed. As hard as it is to envision a coin flip or court's docketing error determining such fundamentals of a case, these actually happened. Good fortune can help, as in the case of *Plyler*, and one can improve the likelihood that good fortune will, in fact, occur, but the shoals of high stakes litigation are treacherous.<sup>131</sup> Particularly in the organizations that have broader and more comprehensive interests, care has to be taken to narrow and concentrate upon the most strategic interests and to evaluate the most-ideal litigation vehicle, and such cases can be shaped in an iterative, long-term strategy or incorporated into an appropriate vehicle if one arises. As repeat players, all must conserve their resources and choose carefully, even as they live for the next such battle.

The history of civil rights litigation and legislation is a long and glorious U.S. narrative, as episodic and punctuated as our country's history. To be sure, there are setbacks, even cruel reversals, as in *Shelby County v. Holder* case, one that eviscerated the heart of the VRA.<sup>132</sup> As Nina Perales noted at the time, in recording the history of anti-Latino voting rights prejudice in Texas:

Shortly before the expansion of Section 5 to Texas, the Court in *White v. Regester* invalidated Texas's state House redistricting plan because it "invidiously excluded Mexican-Americans from effective participation in political life." In every redistricting cycle following *White*, at least one of Texas's statewide redistricting plans has been blocked by the courts because of discrimination against Latino voters. In three of these four cases, the preclearance requirement of Section 5 prevented the discriminatory redistricting plans from going into effect. Since 1975,

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128. See Coyle & Mauro, *supra* note 123.

129. Coyle, *supra* note 108.

130. *Id.*

131. *Plyler* had several points at which the hard work and strategic litigation program was matched by good luck. I examine a number of these in NO UNDOCUMENTED CHILD, *supra* note 56, at 30-31.

132. 133 S. Ct. 2612 (2013).

Section 5 has worked to block more than two hundred changes in election procedures that discriminated against minority voters in Texas.<sup>133</sup>

Of course, there will be other days, in the nature of long term repeat players and veteran, mature organizations. These groups win more often than they lose, and each judges its success by the incremental gains and slow change that Court decisions occasion. Implementation and even recovering attorney's fees must be undertaken, and the constant search for resources serves as a natural constraint, as does the larger polity. And as Justice Ginsburg has noted of her own early Court successes gained on behalf of women plaintiffs, these wins must be both consolidated and implemented, but cannot get out too far ahead of the polity, lest it appear to be a bridge too far.<sup>134</sup> While she was speaking of abortion litigation, which has lost ground over time, an opposite narrative emerged concerning same sex marriage and GLBT civil rights generally.<sup>135</sup> Most observers have found themselves surprised at the relative speed with which change quickened, even after many years of lower court litigation and legislative hits and misses.<sup>136</sup>

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133. Nina Perales, *Shelby County v. Holder: Latino Voters Need Section 5 Today More than Ever*, SCOTUSBLOG (Feb. 12, 2013, 5:29 PM), <http://www.scotusblog.com/2013/02/shelby-county-v-holder-latino-voters-need-section-5-today-more-than-ever/>.

134. She noted *Roe v. Wade* as the prime example. Allen Pusey, *Ginsburg: Court Should Have Avoided Broad-Based Decision in Roe v. Wade*, A.B.A. J. (May 13, 2013, 2:20 PM), [http://www.abajournal.com/news/article/ginsburg\\_expands\\_on\\_her\\_disenchantment\\_with\\_roe\\_v\\_wade\\_legacy/](http://www.abajournal.com/news/article/ginsburg_expands_on_her_disenchantment_with_roe_v_wade_legacy/). The same scenario has also been detailed by legal scholar Nan D. Hunter, in *Reflections on Sexual Liberty and Equality: "Through Seneca Falls and Selma and Stonewall,"* 60 UCLA L. REV. DISCOURSE 172, 179-80 (2013) (explaining that backlash to *Roe v. Wade* "froze" development of substantive due process).

135. Of the many measures I could cite for this remarkable trajectory, among the more telling is how major law firms have, in essence, bailed out in providing pro bono representation for the defense of states. See the fascinating moonwalk back from identifying with the various states' sides in firm representation. *See, e.g.*, Katelyn Polantz, *Michigan Firm Stays Out of Gay Marriage Case*, NAT'L L.J. (Apr. 13, 2015), [http://www.nationallawjournal.com/id=1202722815042/Michigan-Firm-Stays-Out-of-Gay-Marriage-Case-That-Partner-Will-Argue#ixzz3WqQrL0zv](http://www.nationallawjournal.com/id=1202722815042/Michigan-Firm-Stays-Out-of-Gay-Marriage-Case-That-Partner-Will-Argue#ixzz3WqQrL0zv;); Adam Liptak, *The Case Against Gay Marriage: Top Law Firms Won't Touch It*, N.Y. TIMES, Apr. 12, 2015, at A1.

136. Of course, no matter how these cases turn out, the battle for implementation and as-applied challenges will continue. *See, e.g.*, Erik Eckholm, *Options Few for Opponents on Marriages*, N.Y. TIMES, Apr. 23, 2015, at A1; Alan Blinder & Richard Fausett, *Clerk Who Said 'No' Won't Be Alone in Court*, N.Y. TIMES, Sept. 3, 2015, at A18 (noting elected county clerk imprisoned for contempt of court for refusing federal judge's order to issue marriage licenses; clerk represented by purposive organization Liberty Counsel, established in 1989).

Through this case study of one longstanding purposive civil rights organization, an area that is likely to surface is how the architecture of purposive high-stakes litigation has built-in headwinds that can limit the full range of litigation possibilities. Of course, every case has to make it on its own merits, but it is also clear from these examples that there are many contingencies and moving parts that count, and count significantly. In immigration, for example, the need to employ preemption as a legal theory instead of due process and equal protection can also make it more difficult to collect attorney's fees, given federal statutes and fee allowances and state statutes governing fee-shifting in a number of states can make it impossible to recover fees, even when parties prevail.<sup>137</sup> And on a good day, judges do not challenge the details of fee requests. And depending upon the ruling, a complex case can either award fees or not.<sup>138</sup> For example, in a complicated federal trial, the jury found for a woman plaintiff who was routinely called a "bitch" by her male co-workers in a manufacturing plant: Trying the Title VII case had a \$300,000 cap, but the jury also awarded an additional \$170,000 in back pay and \$350,000 in front pay as well as \$400,000 in compensatory damages under both Title VII and the state statute (the Pennsylvania Human Relations Act, which does not allow punitive

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However, to give a sense of how far we have evolved on GLBT issues, see *Childers v. Dallas Police Department*, 513 F. Supp. 134, 142 (N.D. Tex. 1981) ("I have no trouble deciding that the government's interest in maintaining the efficient operation of the police department and ensuring the proper performance of duties in the Storekeeper # 7 job, outweigh Plaintiff's interest in constitutional protection for his expression and association. I emphasize that Plaintiff is in no way being denied the opportunity to associate whenever and with whomever he pleases. He is denied only the opportunity to work in the property room of the police department."), *aff'd*, 669 F.2d 732 (Table) (5th Cir. 1982). With this decision, my first cousin Steven (Slade) Childers was denied a position in the Dallas Police Department property storage room, even though he had passed all the required tests and was concededly qualified. He was represented by the ACLU.

137. For a review of fee-shifting statutes at the state and federal levels, see generally Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321 (1984), and Martin A. Schwartz, *Attorney's Fees in Civil Rights Cases—October 2009 Term*, 27 TOURO L. REV. 113 (2011). For a comparative national review of such statutes, see generally Jonathan T. Molot, *Fee Shifting and the Free Market*, 66 VAND. L. REV. 1807 (2013).

138. Sometimes, the "prevailing party" does not receive fees. See, e.g., Zoe Tillman, *Wiley Rein Denied \$2M in Fees in VRA Case*, NAT'L L.J., Sept. 7, 2015, at 15 (denial of attorney's fees, notwithstanding Voting Rights Act victory in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)); see *Texas v. United States*, No. 14-5151, 2015 WL 4910078 (D.C. Cir. Aug. 18, 2015).

damages).<sup>139</sup> All told, cobbled from different valences, the jury awarded her \$13 million, including more than \$12 million in punitive damages.<sup>140</sup> The overarching business model of spending all the resources up front only to receive fees—if allowed—after winning and after substantial delays is extraordinarily precarious. This wildcatting model can only work in a mature organization, one with deep political and financial reserves, including the range of resources that can attract support from deep-pocket law firms and other technical voluntary expertise.

When these histories are written and contemplated, it is very likely that purposive civil rights organizations and their litigation strategies will be an important part of the emergent folklore and civil rights sagas.<sup>141</sup> They will form the argot that will arise and the *corridos* that will be sung. And the grail will continue to be good cases and reasonable control over the life of these emerging cases, and their afterlife.

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139. Saranac Hale Spencer, *Pittsburgh Jury Awards \$12.5M in Gender Bias Case*, LEGAL INTELLIGENCER, Apr. 22, 2015, at 1.

140. *Id.*

141. This implementation saga began even before the Supreme Court decision was announced and escalated immediately after the Supreme Court decision was announced. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); see, e.g., Adam Nagourney, *G.O.P. Struggling with Shifts on Gay Marriage*, N.Y. TIMES, Apr. 27, 2015, at A1 (noting that conservatives vow “the fight over same-sex marriage would not end with a Supreme Court decision”); Erik Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, N.Y. TIMES, June 28, 2015, at A1; Jeffrey Toobin, *God and Marriage Equality*, NEW YORKER (June 26, 2015), <http://www.newyorker.com/news/daily-comment/god-and-marriage-equality>.

