A large number of life’s advantages and opportunities are parceled out by residence, duration, domicile, and location. There is an extensive legal and sociological literature—and literally hundreds of relevant court decisions on the varieties of legal rights and opportunities that vary by residence. The concepts of “neighborhood schools,” voting districts, tax obligations, in-state tuition, eligibility for certain resources, exposure to certain regulations, eligibility for office, and many other legal statuses derive from varying applications of place. Although there is a system of comity among states in the United States for reciprocal arrangements and full faith and credit among political entities, there is an important issue of federal jurisdiction that can preempt various state laws, such as a uniform immigration policy or national security regime or voting rights practices that can trump state residency matters.

In higher education, this complex algebra of “place” traditionally delegates the statewide coordination of the governance of higher education to the institutional boards of trustees and statewide higher education agencies who execute the legislative and corporate requirements to establish and locate colleges. And where a college is located can apportion access in a way that benefits or harms certain citizens. For Mexican Americans in Texas, “place” counts, especially in determining who goes to local colleges. Consider the “border”: forty-one counties form the border between Texas and Mexico, from El Paso in the west to Brownsville in the east, where the Gulf Coast begins. This swath is almost a thousand miles long and stretches from Ciudad Juarez to Matamoros, along the Rio Grande River/Río Bravo; it is widely referred to as “the Borderlands,” “the Valley,” or “la Frontera.” (In geopolitical if not exact cartographic terms, this frontier might also include San Antonio, approximately 150 miles from Mexico, although
it is the country’s seventh largest city and has more than a dozen public and private colleges.)

There is a long history of conflict along the border, not only with regard to its national security and immigration dimensions, but as the state’s poorest and least developed region—especially over its provisions for higher education. The Mexican American Legal Defense and Educational Fund (MALDEF), founded in San Antonio in 1968, has long been involved in various cases and efforts to improve the region’s educational achievement, especially for the schooling of the children in the Valley. The litigation has included *Plyler v. Doe*, the 1982 MALDEF case in which the U.S. Supreme Court struck down the Texas law that allowed school districts to charge tuition for undocumented school children, extensive school finance litigation (particularly complex multi-year cases such as *Edgewood v. Kirby*, which stretched from 1984 to 1995), desegregation cases, voting rights issues, and various topics such as challenging local ordinances regulating immigration.

Inspired by the early litigation and legislative successes in the *Edgewood* case; the lower court cases in *Fordice*, which later culminated in the 1992 Supreme Court case in Mississippi, discussed in chapter 4; and what seemed its promise for redistributing college political resources, MALDEF San Antonio lawyers Albert Kaufman and Norma Cantu, he a native of Galveston and she a native of Brownsville, undertook to challenge the constitutionality of the state’s system of higher education locations in state court, filing *LULAC v. Clements*. (After a change in governors, the case became *LULAC v. Richards*.) The plaintiffs contended that the policies and practices of state officials and regents of public universities denied Mexican Americans who resided in the border area of Texas participation in quality higher education programs and access to equal higher education resources, even in light of an earlier federal Office for Civil Rights (OCR) Consent Decree that had set out goals and timetables for improving minority enrollments in the state’s colleges.

Cantu and Kaufman mounted their challenge on a geographic theory of “dollars, degrees, and distance,” charging:

(1) about 20% of all Texans live in the border area, yet only about 10% of the State funds spent for public universities are spent on public universities in that region;
(2) about 54% of the public university students in the border area are Hispanic, as compared to 7% in the rest of Texas; (3) the average public college or university student in the rest of Texas must travel 45 miles from his or her home county to the nearest public university offering a broad range of masters and doctoral
programs, but the average border area student must travel 225 miles; (4) only three of the approximately 590 doctoral programs in Texas are at border area universities; (5) about 15% of the Hispanic students from the border area who attend a Texas public university are at a school with a broad range of masters and doctoral programs, as compared to 61% of public university students in the rest of Texas; (6) the physical plant value per capita and number of library volumes per capita for public universities in the border area are approximately one-half of the comparable figures for non-border universities; and (7) these disparities exist against a history of discriminatory treatment of Mexican Americans in the border area (with regard to education and otherwise), and against a present climate of economic disadvantage for border area residents.8

To bring the case, which required massive research and technical expertise, the MALDEF lawyers had a tangle of difficult tasks and technical procedural litigation issues, each almost unique to Texas and to Mexican American plaintiffs. Chief among them was the issue of standing and the issue of whether the lawyers could even prove that their clients were a discrete group, a legal prerequisite to qualify them for the harder issues of whether the actual legal theory could work or what relief would look like if they were to prevail. There was no doubt that the border was disproportionately poor in terms of its number of institutions, their quality and range of programs, and their facilities. In the north, a small college town such as Denton, outside Dallas, had two large doctoral-degree-granting universities (University of North Texas, formerly North Texas State University, and Texas Women’s University), each with dozens of doctorates and academic programs, and the flagship schools such as Texas A&M University in rural College Station and the University of Texas, in the state capital of Austin, were far from the Valley, as were other major public institutions located in Dallas, Houston, and panhandle Lubbock and other communities.

Thus, defining the who-and-where of the case was the key strategy, and it was not clear that the courts would certify such a farflung, inchoate class under the group umbrella of “the border.” Did San Antonio, with its large University of Texas-San Antonio campus, its large University of Texas Health Sciences Center medical school, several other two-year and four-year public colleges, and large Mexican American population count as being along the border for this purpose?

It also was problematic, inasmuch as it adopted in part Fordice’s African American litigation strategy, premised on the *de jure* Jim Crow system of higher education. Mexican Americans, clearly disadvantaged and subordinated by *de facto* “Jaime Crow” practices in Texas—the one southern state that included
substantial numbers of both Mexican Americans and African Americans—were not black, although the state’s regime of racial subordination clearly implicated both groups. The predominant theory of the case borrowed from MALDEF’s Edgewood school finance strategy, but followed the 1973 U.S. Supreme Court ruling in San Antonio v. Rodriguez, which thwarted equal protection challenges to K–12 school finance mechanisms and also held that education was not a fundamental right. This theory of the case would have reversed the burden of proof in the case, as a postsecondary Rodriguez was even less likely to gain constitutional favor for a postcompulsory educational setting. Complicating these alternatives was the fact that the demographics surrounding these institutions were often in flux. An area’s growth could be so pronounced that several racially distinct institutions could coexist, which appears to have happened in Houston with Texas Southern University, the University of Houston, and UH-Downtown. Furthermore, the demography could change so substantially that a college of one race could morph into a college with a different racial character. For instance, Bluefield State College in West Virginia, a historically black school, became a predominantly white institution over time; the University of Houston changed from a private white college to a public institution without a predominant undergraduate racial majority. An area’s racial calculus could also change so dramatically over time that its local colleges simply reflected changes in their communities. For example, the rise of Asian student enrollment in California colleges, particularly the University of California at the Berkeley and Irvine campuses, is surely due to changes in immigration policy, Asian academic achievement, and other historical and sociological developments in the years following shameful World War II internment practices.

Texas Rio Grande Valley institutions such as Laredo State University, Corpus Christi State University, Kingsville A&M University, Pan American University, and Texas Southmost College became predominantly Mexican American or Mexican, although the original institutions were not historically Latino. In addition, each of these institutions was absorbed into the larger University of Texas or Texas A&M University systems, creating TAMU-Laredo International University, TAMU-Corpus Christi, TAMU-Kingsville, UT-Pan American/Edinburg, and UT-Brownsville. In 1914, the Texas State School of Mines and Metallurgy was established in El Paso, morphed into Texas Western College, and then into UTEP. (It remains the only Texas institution to have won the men’s national basketball championship and was the first team in the country with an all African American starting lineup that did so, defeating the all-white team from the University of Kentucky in 1966.) A similar pattern of being reconstituted held
true for many other institutions, particularly community colleges that have become predominantly minority campuses, as the urbanization of minority populations in the twentieth century affected higher education.

For Mexican Americans, contesting the politics of place, including college place has taken a different route than that occasioned by the separate-but-equal route of *Brown* and its progeny, *Fordice*. Education was poor and inadequate for Mexican Americans in the twentieth century, and although *de jure* segregation affected Mexican Americans in ways different than the racism aimed at blacks in Texas, the end results were very similar. As one example, very few Mexican-origin children graduated from high school or attended college; fewer attended professional schools, such as law school or medical school, even in large cities like Houston, Dallas, or San Antonio. Even Catholic institutions performed poorly in serving Mexican Americans, despite the fact that the overwhelming majority of Mexican Americans are Catholic. Further, there was no Mexican American equivalent to the network of historically black institutions. Against this demographic backdrop, MALDEF attempted to carve out as its class “all persons of Mexican-(Hispanic) ancestry who reside in the Border Area consisting of these forty-one contiguous counties along the border in Texas and who are now or will be students at Texas public senior colleges and universities or health related institutions (or who would be or would have been students at Texas public senior colleges and universities or health related institutions were it not for the resource allocation policies and practices complained of in Plaintiffs’ petition). This class does not include persons with claims for specific monetary or compensatory relief.”

The trial judge in the 107th state district court in Brownsville, across the border from Matamoros, Tamaulipas, agreed to this class and enabled the trial to proceed. The defendants were the governor of Texas, the state’s commissioner of higher education, the chair and each individual member of the Texas Higher Education Coordinating Board, and the chancellors and regents of eleven universities or university systems in Texas. Before the trial could proceed, the state appealed the class certification; in December 1990, the 13th Judicial Court of Appeals upheld the class certification, allowing the trial to go forward. During an extensive and complex jury trial that lasted from September 30 to November 20, 1991, the plaintiffs entered into the record “certain statistical matters” that showed substantial disparities in the higher education resources available to the area’s residents.

On January 20, 1992, MALDEF lawyers had alleged first that the allocation of resources to the border colleges was discriminatory and unconstitutional under
the state constitution, because the state had located academic programs and physical facilities where they were largely inaccessible to border-area residents and second, that the state funded institutions in the border area at lower levels than it funded other institutions. After noting that “these disparities exist against a history of discriminatory treatment of Mexican Americans in the border area (with regard to education and otherwise), and against a present climate of economic disadvantage for border area residents,” the trial court held that the Texas system of higher education discriminated against Mexican Americans, depriving them of equal educational opportunity by spending fewer state resources in areas significantly populated by Mexican Americans, particularly the border area.13

The first question placed before the jury asked whether the defendants had treated the border institutions “differently, to their detriment, at least in part because Plaintiffs are Mexican Americans, in the process that leads to program approval or allocation of funds for Texas public institutions of higher education.” The court defined the higher education system in the jury charge as “the laws, policies, practices, organizations, entities and programs that have created, developed or maintained Texas public universities and professional schools” and instructed the jurors that, if the higher education system treated plaintiffs differently at least in part because they were Mexican American, then the defendants had done so for that reason. The jury answered “No” to each of these questions. (There were approximately eighty named and ex officio defendants in this complex case, including various elected officials, trustees, and others; the jury likely did not think that they each had individually discriminated, even if they might have felt that the system did discriminate in the aggregate, collective sense.) However, on the larger issues and more important questions, the Brownsville jury did find that (1) the legislature had “failed to establish, organize or provide for the maintenance, support or direction of a system of education in which the Plaintiffs have substantially equal access to a ‘University of the First Class’”; (2) the Texas Legislature had “failed to make suitable provisions for the support or maintenance of an Efficient System of public universities”; and (3) the state could “have reasonably located and developed university programs that provided more equal access to higher educational opportunities to Mexican Americans in the Border Region.”14 The court rendered a declaratory judgment that the higher education system was unconstitutional under the Texas Constitution. Although the case had been tried before a jury, at the close of evidence the trial judge granted the plaintiffs’ motions for an instructed verdict (notwithstanding the jury’s determination, called a JNOV, or “judgment notwithstanding verdict”)

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and for uncontroverted fact findings on certain statistical matters. The trial court stayed its injunction until May 1, 1993—seventeen months later—to allow the state time to enact a constitutionally sufficient plan for funding the public universities. This stay was later extended by the Texas Supreme Court until final resolution of the appeal.15

On October 6, 1993, the Texas Supreme Court unanimously reversed the trial court decision, holding that a claim for equal rights violation based on a “geographical classification” could not be sustained, nor could a claim based on race or national origin classification. The court denied the trial court’s reasoning, holding that the plaintiffs “failed to establish that the Texas university system policies and practices are in substance a device to impose unequal burdens on Mexican Americans living in the border region.” The court determined that the plaintiff’s theory was both under-inclusive and over-inclusive: “Whatever the effects of the Texas university system policies and practices, they fall upon the entire region and everyone in it, not just upon Mexican Americans within the region. Conversely, they do not fall upon Mexican Americans outside the region. The same decisions that plaintiffs allege show discrimination against Mexican Americans in the border area serve, at the same time, to afford greater benefits to the larger number of Mexican Americans who live in metropolitan areas outside the border region.”16

The Texas Supreme Court also found that the Fordice case was not applicable, as Texas had never maintained a de jure discriminatory system that applied to Mexican Americans. In fact, the court did not grant that any of the theories advanced by the plaintiffs were persuasive: “Because we hold that plaintiffs’ evidence of impact in this case is insufficient under any standard to prove an equal protection violation, we do not need to consider the effect, in this case, of the jury’s finding of no purposeful discrimination or intent. Nor do we need to address plaintiffs’ many arguments as to why that finding by the jury is inconsequential.” MALDEF appealed for a reconsideration of the verdict, but the court denied the rehearing on February 2, 1994. Without a federal issue to appeal to the U.S. Supreme Court, the case ended.

However, the final result was actually a different and surprising endgame. Although the plaintiffs were unsuccessful in the Texas Supreme Court, which sat on the case for almost a year before it actually released its decision, the war was won in the Texas Legislature, where border-area legislators directed substantial resources to border colleges, including doctoral and other graduate programs, established a pharmacy school in Kingsville, and substantially upgraded facilities and programs. In its opinion, the Texas Supreme Court commented on
these legislative developments. Unlike the one-time infusion of dollars and modest increases involved in the Mississippi Fordice settlement, this initiative brought substantial program resources, program authorization, and political prestige to the border-area institutions.

Some of the results were clearly tradeoffs. For example, colleges that had been small institutions with their own boards of trustees were admitted into the larger and more powerful flagship University of Texas and Texas A&M University systems with greater political regional-distribution requirements, which meant a smaller number of local area residents actually served on the consolidated boards. Given the distribution of power in the state and the significant likelihood that the south Texas region would never catch up with the state’s flagships and urban colleges in the statistical sense, it seems clear twenty years later that the region has benefited from the political settlement, even if the case originally seemed lost, an ironic and Janus-faced result. The facilities portion of what came to be known as the “Border Initiative” gave rise to genuine gains. As one of many such examples of inadequate facilities before the litigation, the Laredo State University, as it was known at the time, had leased space on the Laredo Junior College campus. One perceptive reporter who followed the story over its several years noted its successes but also characterized the initiative in an arid metaphor: “South Texas absorbed the $500 million like a desert does a brief rain, leaving the schools shortchanged in many ways.”

The state’s chief lawyer was Jay Aguilar, a Mexican American attorney in the attorney general’s office; after leaving government practice, he became a corporate lawyer in San Antonio. At the time of the trial, Daniel C. Morales was the Texas attorney general, serving from 1991 to 1999 and overlapping the administrations of Governors Ann Richards and George W. Bush. In 2003, he admitted to having falsified documents in the Texas tobacco settlement and served time in federal prison and a release facility until 2007. He surrendered his law license in 2003 to the Texas Supreme Court less than a decade after his team won LULAC in the same court. Kevin O’Hanlon and Richard Gray also argued the state’s case at various stages. O’Hanlon, who went on to a successful private trial practice in Austin, had also argued against MALDEF in earlier school finance litigation, while Gray had been aligned with MALDEF in the same litigation, representing other low-income districts; he had also litigated Texas redistricting and voting rights cases.

The two key MALDEF lawyers who conceived and litigated the South Texas Initiative, Albert Kauffman and Norma Cantu, later left the organization. Cantu served as President Bill Clinton’s assistant secretary of education for civil rights
and then became an education and law professor at the University of Texas at Austin. Kauffman succeeded her as the San Antonio MALDEF regional counsel and then left in 2002 to conduct research with several university research institutes. He is now a law professor at St. Mary’s University Law School in San Antonio.

In a second case turning on geography, MALDEF filed suit in 2004 to challenge the admissions practices of California State Polytechnic University, San Luis Obispo (CSU-SLO), which combined standardized test scores and regional criteria based on residence in certain geographic “service areas.” The plaintiffs charged CSU-SLO with using a “rigid mathematical formula” that heavily weighted the SAT and awarded “250 points to students living within a specific geographic area around the CSU-SLO campus—its so-called ‘service area.’” The complaint further claimed:

Cal Poly SLO’s geographical preference for applicants living within its “service area” also results in an adverse disparate impact against Latino, African American, and Asian American students. For high school aged individuals residing within Cal Poly SLO’s designated “service area,” whites are overrepresented, while Latinos, Asian Americans, and African Americans are underrepresented in comparison to their populations statewide. Therefore, Latinos, Asian Americans, and African Americans are eligible for the “service area” bonus at lower rates than whites. These differential rates result in a discriminatory effect on Latinos, African Americans, and Asian Americans.19

The data did, in fact, reveal that the chosen “service area” was disproportionately white at the time of the case. Of all the high school–age students in California at the time, 37.5 percent were white (55.0% in the CSU-SLO service area), 40.1 percent Latino (35.3%), 10.8 percent Asian (3.4%), and 7.0 percent black (2.4%). In the SLO-designated service area resided 1.9 percent of all white students statewide, 1.2 percent of all Latino students, 0.5 percent of all African Americans, and 0.4 percent of all Asians. As with the “geographical classification” strategy attempted in Texas, political factors undoubtedly underpinned the admissions cartography at CSU-SLO.

In *Garcia v. Board of Trustees*, the California State Court of Appeals found for the university in 2005,20 handing MALDEF another setback in its geographic access litigation strategy, which has proven to be a difficult theory to sell to courts in the two states with the largest Latino populations. Here, unlike the scenario that played out in Texas, the court held standing and the right to sue on behalf of indefinite plaintiffs to be fatal flaws, but not before invoking an unusually sympathetic architecture metaphor:
[In California,] Government Code section 11135 prohibits a state agency from discriminating on the basis of race, national origin, and ethnic group identification, among other things. Recently, the Legislature has amended section 11135 a few times. Amending a statute is like adding a room to an existing house. A successful architect must ensure that the addition be integrated into the whole. In amending section 11135, the Legislature drafted plans that call for a shower in the living room. We cannot remove the shower, but we can cap the water pipe to prevent damage to the furniture. Here we hold that the California State University is not subject to section 11135. We leave it to the Legislature to remove the shower. Its presence is anomalous, if not disquieting.21

Those designated schools in the San Luis Obispo service area may or may not have been chosen for their racial characteristics (or their plumbing, as in the court’s metaphor), but it is hard to imagine that race was not a factor. High-achieving schools are not necessarily required to be predominantly white or Asian, but the complex calculus of high school attendance line drawing is rarely race-free, just as race is often a leading factor in the checkerboard of underlying housing patterns. School board politics, the degree of parental participation, and individual school trajectories constitute the site of substantial local politics, and these often have racial, class, and, increasingly, religious overtones.22 And California’s financial problems, especially evident in its public college sector, have affected overall attendance policies.23

While the LULAC v. Richards litigation has not been examined carefully by many scholars, Richard Valencia’s authoritative study of the history of Mexican American education litigation devotes a chapter to the case. He characterizes the Texas Supreme Court ruling as “unsound” due to the way it ignored “the centrality of race and racism and the intersectionality of racism with other forms of oppression.”24 Indeed, not to put too fine a point on it, the same critique must be made of many cases that are about race but that are pleaded in deracinated or nonracial form, due to the technical requirements of litigation, the racial bona fides of the various decisionmakers, and the majoritarian assumptions of so many of the structures that support schooling or any other establishment sector. In the chronology of LULAC and the later Hopwood, many of the players on both sides of the matter were themselves Mexican American, including a Texas Supreme Court justice and the state attorney general, evidence that it is not always possible or useful to employ reductionist assumptions. In LULAC, a Jewish lawyer for MALDEF argued the case at the trial level before a Mexican American judge in a border town, with another Mexican American as the state’s lead
lawyer in this case and with white co-counsel. In 2011, the University of Texas System chancellor was a Mexican American academic physician from Laredo, Dr. Fernando Cigarroa. Chancellor Cigarroa was among the defendants in the 2012 SCOTUS case *Fisher v. UT*.

In virtually every state, a relatively small number of feeder high schools routinely send their graduates to certain colleges, and this channeling process has a powerful racial and ethnic influence as well. In its response to the *Hopwood* case that banned the use of affirmative action in Texas, before 2003’s *Grutter* decision, Texas acknowledged this “channeling” effect by its enactment of the Top Ten Percent Plan that broadened the number of high schools that send graduates to the state’s flagship public colleges. Moreover, some of the colleges have broadened their recruitment efforts beyond the traditional schools to reach a wider array of schools with promising applicants.

Quite apart from the difficulty of litigating “place” in a postcompulsory schooling context, legal challenges to the politics of resource allocation are theoretically and technically difficult, especially in the many states where the institutions are variegated by history and mission, hence by historical funding patterns and support. As another example, the complex political resources across campuses in the large City University of New York system were challenged unsuccessfully in *Weinbaum v. Cuomo*, but the court deferred to the political process and did not find constitutional grounds on which to allow the challenge to proceed. In that 1995 case, the New York Appellate Court held that the funding differences among a state’s public institution systems did not give rise to any sustainable legal theory, whether grounded in intentional racial animus, disparate funding, equal protection, or state civil rights laws: “The complaint does not set forth any facts tending to show that in making their decisions regarding [the] funding of the two systems, the defendants acted with a discriminatory purpose or were motivated by the race or ethnic background of the student bodies [and] plaintiffs point to no particular ‘civil right’ which has been denied them based on race or other protected basis. As the court below correctly recognized, there is simply no ‘right,’ constitutional or statutory, to a State financed higher or college education.”

Geography has proven to be a difficult and complex theory in search of traction in federal and state courts, and very few geographical challenges have ever prevailed, such as in the siting of new campuses in a multi-campus system, which occurred in the longstanding *Geier* cases in Tennessee. There the state successfully blocked the predominantly white University of Tennessee from establishing a new Nashville campus hundreds of miles from its home in Knox-
When the dust settled in this unusual case, the historically black Tennessee State University was in charge of the downtown Nashville venue. But neither the historically black institutions in Mississippi nor the south Texas border colleges would have made up any ground had it not been for the political solutions occasioned by the Fordice and LULAC cases.

To the extent that some legislative attention to a systemic issue is a desirable feature, such cases may be characterized as efficacious, even as partial successes. Using the courts for specific legislative change is a two-edged sword, one that can cut in either direction. Winning the LULAC case, even at the lower courts and for a short period of time, gave Mexican American plaintiffs and their organizations the political leverage and wedge that was needed in the legislature, where regional and other political considerations provided a substantial but not transformative remedy. And it may be impossible to calculate the odds against a legislative strategy, minus that leverage.

Attempting such a strategy requires enormous resources, both political and legal; just as one can lose in court, so an issue can become worse in the shifting fortunes of securing change by a legislature, especially a body, such as that in Texas, that meets only every other year in regular session. The timing, especially in such a biennial legislature, is impossible to control when a case takes longer to try. The players are more numerous, and the state always holds more of the home field advantage and for a longer number of innings. The number of moving parts is even greater than they would be in a relatively straightforward trial. Even so, for many issues that will have to be resolved by appropriations or other statutory or regulatory changes, an overarching policy strategy will consider both legal remedies and political approaches in tandem. In this matter, no lasting, permanent, systemic change resulted, and it did not substantially redraw the Texas postsecondary map, but it was not effort exerted for nothing. Such an event is the antonym for a pyrrhic victory—perhaps a victory notwithstanding the verdict.