

# SPEECH

## ON THE 30TH ANNIVERSARY OF THE CHICANO-LATINO LAW REVIEW

KEVIN R. JOHNSON\*

### I. INTRODUCTION

Thanks to the UCLA School of Law and to Beth Collins and Sylvia Rivera, Editors in Chief of Volume 23, for inviting me to speak as part of this conference commemorating the 30th anniversary of the *Chicano-Latino Law Review*. I always enjoy coming home to Los Angeles, having spent my youth in the San Gabriel Valley, the “other valley” of the greater Los Angeles area.<sup>1</sup> For those of you who are not from southern California, the San Gabriel Valley is east of East Los Angeles, and the home of a large population of working and middle class Mexican-Americans.

The year 1972 saw the publication of the inaugural edition of the *Chicano-Latino Law Review*. Congratulations for 30 years of important contributions to legal scholarship. Before I proceed any further, I want to emphasize to the fortunate UCLA law students in attendance that you have a stellar group of professors on the law faculty including, but not limited to, the ones who you will hear from at the conference today, Devon Carbado, Laura Gómez, Cheryl Harris, and Rachel Moran (visiting).

I am honored to begin this wonderful conference on *Affirmative Action in Higher Education in the New Millennium*. I come

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1. See KEVIN R. JOHNSON, HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN'S SEARCH FOR IDENTITY 73-88 (1999).

here as a proud product of Affirmative Action, both as an undergraduate and as a law student. But I am reluctant to say too much on the conference topic because of the many impressive scholars and activists that you will hear from today.

I hope to do three things in my remarks. First, I will recount a few scholarly highlights from the history of the *Chicano-Latino Law Review* and its role in the debate over Affirmative Action at UCLA School of Law. Second, I will identify and analyze a threat to Affirmative Action – and not just the legal one with which you are familiar. Finally, I want to highlight one reason why Affirmative Action is so important – the possible appointment of a Latina or Latino to the U.S. Supreme Court. Although the topics at first glance may seem unrelated, I will do my best to tie them together.

## II. AFFIRMATIVE ACTION AND THE UCLA *CHICANO-LATINO LAW REVIEW*

In preparing my remarks, I pulled all the volumes of the *Chicano-Latino Law Review* off the shelves of the UC Davis law library, and tracked down a few hidden away in my faculty colleagues' offices. Originally published as the *Chicano Law Review*, the journal changed its name in 1990 to the *Chicano-Latino Law Review*. This seemingly minor change recognized a major shift in the Latina/o population in California and the United States. For example, many Central American immigrants were joining the established Mexican-American community in southern California. By changing the name of the review, the student editors acknowledged the commonalities of the Latina/o experience in the United States.<sup>2</sup>

As I alluded to in beginning my remarks, the *Chicano-Latino Law Review* has been an important forum for analyzing legal issues particularly relevant to Latina/os for three decades. It also was the first law journal to focus on publishing scholarship centered on Latina/os in the United States.<sup>3</sup>

Let me outline just a few highlights from the illustrious history of the *Chicano-Latino Law Review*. The very first article in volume 1 in 1972 was written by my colleague, Professor (and former Associate Justice of the California Supreme Court) Cruz Reynoso on the fight for survival of California Rural Legal Assis-

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2. See Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 117-29 (1997).

3. Over a decade after publication of the *Chicano Law Review's* first issue in 1972, students at UC Berkeley (Boalt Hall) published the inaugural issue of *La Raza Law Journal* in 1983. The *Harvard Latino Law Review* and the *Hispanic Law Journal*, now the *Texas Hispanic Journal of Law & Policy*, published their first issues in 1994.

tance, a most effective public interest organization that continues to serve California's rural poor,<sup>4</sup> against attacks by then-Governor Ronald Reagan.<sup>5</sup> In that same issue, Mario Obledo, another influential Mexican-American leader, lamented the negative portrayal of Mexican-Americans in the media, an issue that continues to haunt us today.<sup>6</sup> Indeed, the Public Broadcasting System series "American Family," the first nationally-broadcast series in English centering on Latina/o family life and offering a positive image of Latina/os, only aired in 2002.<sup>7</sup>

Later volumes included scholarship on legal questions of particular significance to the Latina/o community. Long before immigration law scholars began incorporating race into the analysis of immigration law,<sup>8</sup> the *Chicano-Latino Law Review* published many articles studying the impact of immigration law on the Latina/o experience.<sup>9</sup> Indeed, race and immigration law has been perhaps the most consistently featured topic in the pages of the *Chicano-Latino Law Review*. The latest installment on this topic, published in 2001, was entitled *A Lesson from My Grandfather, The Bracero*, a critical analysis of recent Mexican guestworker proposals.<sup>10</sup>

The *Chicano-Latino Law Review* also has been prominent in the study of Latina/o identity. Perhaps the best known article on this topic is Margaret Montoya's influential *Mascaras, Trenzas y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, which analyzes her experiences as one of the few Latinas at Harvard Law School.<sup>11</sup> Professor Montoya's

4. See, e.g., RICHARD STEVEN STREET, *ORGANIZING FOR OUR LIVES* (1992) (discussing community organizing efforts of California Rural Legal Assistance in rural California).

5. See Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 CHICANO L. REV. 1 (1972).

6. Mario Obledo & Robert B. Joselow, *Broadcasting: Mexican-Americans and the Media*, 1 CHICANO L. REV. 1, 85 (1972).

7. See Julie Salamon, *Latino Family Values, Beyond the Tortillas*, N.Y. TIMES, Jan. 23, 2002, at E1.

8. See George A. Martinez, *Race and Immigration Law: A Paradigm Shift*, 2000 U. ILL. L. REV. 517, 517-681 (2000) (collecting articles discussing need for analyzing racial impacts of operation of immigration laws).

9. See, e.g., David A. Sklansky, *Proposition 187 and the Ghost of James Bradley Thayer*, 17 CHICANO-LATINO L. REV. 24 (1995); Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118 (1995); Andres Bustamante, *Immigration Raids: Search and Seizure*, 8 CHICANO L. REV. 25 (1985); Charles M. Sevilla, *In Defense of the Alien*, 4 CHICANO L. REV. 1 (1977).

10. See Lorenzo A. Alvarado, Comment, *A Lesson from My Grandfather, The Bracero*, 22 CHICANO-LATINO L. REV. 55 (2001).

11. Margaret E. Montoya, *Mascaras, Trenzas y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 15 CHICANO-LATINO L. REV. 1 (1994), published concurrently in 17 HARV. WOMEN'S L.J. 185 (1994); see also Devon W. Carbado, *The Ties That Bind*, 19 CHICANO-LATINO L. REV. 283, 283-84 (1998) (raising complex questions of Latina/o identity).

discussion of Josephine Chavez, a Chicana defendant in a case covered in criminal law classes at Harvard Law School,<sup>12</sup> deeply touches and inspires Latina/o law students. The article remains a foundational reading in critical Latina/o, or LatCrit, Theory, which was the subject of volume 19's symposium on *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*.<sup>13</sup> Collecting the proceedings of the second annual LatCrit conference in 1997, this issue – the longest (over 600 pages) in the *Chicano-Latino Law Review's* history – contributed measurably to the growth of emerging LatCrit theory, and it focused attention on the impact of law and policy on Latina/os.<sup>14</sup>

Importantly, through the pages of the *Chicano-Latino Law Review*, a reader can glean a sense of the struggles over Affirmative Action at UCLA School of Law. A series of articles document the controversy and activism over admissions at UCLA over the past thirty years. This is perfectly appropriate because this journal is a by-product of Affirmative Action and the growing Chicana/o presence at UCLA School of Law. Volume 5 in 1982 featured *The Struggle for Minority Admissions: The UCLA Experience*,<sup>15</sup> with discussion of the “Strike of 1978” and a hunger strike. In 1984, the *Chicano-Latino Law Review* published *The Poverty of Theory and Practice in Public Law School Affirmative Action Programs*,<sup>16</sup> which analyzed Affirmative Action in public law schools. Ironically, in a number of jurisdictions today, private law schools can do more than public schools to attempt to secure a diverse student body.

In 1988, the *Chicano-Latino Law Review* published a series of speeches delivered at a student protest on the front steps of the law school on *UCLA Law School's Faltering Commitment to the Latino Community: The New Admissions Process*.<sup>17</sup> The law school had recently announced a change in the role of students in the law school admissions process.<sup>18</sup> Latina/o students protested

12. See Montoya, *supra* note 11.

13. *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 CHICANO-LATINO L. REV. 1 (1998).

14. See THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998) (collecting early LatCrit theory readings); Laura E. Gómez, *Constructing Latina/o Identities*, 19 CHICANO-LATINO L. REV. 187, 189-91 (1998) (identifying principles uniting LatCrit scholarship); Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087 (1997) (outlining emerging tenets of LatCrit theory).

15. See Rogelio Flores, *The Struggle for Minority Admissions: The UCLA Experience*, 5 CHICANO L. REV. 1 (1982).

16. Keith H. Borjón, Comment, *The Poverty of Theory and Practice in Public Law School Affirmative Action Programs*, 7 CHICANO L. REV. 60 (1984).

17. *UCLA Law School's Faltering Commitment to the Latino Community: The New Admissions Process*, 9 CHICANO L. REV. 73 (1988).

18. For a discussion of the changes and student protests, see Glicina Nina Frías, *Introduction*, 9 CHICANO L. REV. (1988).

and refused to assist in outreach and recruiting efforts. Cesar Chavez, the famous President of the United Farm Workers, was among the speakers at the protest. Chavez said:

Estamos aquí ahora en estos momentos, aquí en esta escuela de leyes protestando la discriminación en contra de nuestra gente y en contra de los estudiantes minoritarios que no les permiten y no les van a permitir, si siguen con estas políticas que están adoptando, el derecho de venir a la escuela para poder salir con su educación como abogados, para que puedan regresar a los barrios para extender esos derechos. *Estamos con ustedes porque su causa es justa.*

We are here now at this moment, at this school of law, protesting the discrimination against our people and against minority students, who are not permitted, and will not be permitted if they [the law school administration] continue with these policies that are being adopted, the right to attend school, so that they can leave with their education to become attorneys, so that they can return to the community to extend those rights to others. *We are here with you because your cause is just.*<sup>19</sup>

These are powerful words from perhaps the most distinguished Latina/o leader in modern U.S. history. They should continue to inspire us today.

In 1995, *Race, Class, and UCLA School of Law Admissions, 1967-1994* appeared in the *Chicano-Latino Law Review*.<sup>20</sup> It showed that, in 1967, out of a class of 210, there were 13 African American (6.21%) and four Latino (1.9%) students.<sup>21</sup> In the fall of 2001, the entering class of 304 students had 10 African American (3.3%) and 26 Latino (8.6%) students.<sup>22</sup> The percentage of African Americans in the first year class at UCLA law school fell by almost half, from 1967 to 2001, while Latina/o numbers increased significantly.<sup>23</sup>

In 1996, the *Chicano-Latino Law Review* published *UCLA School of Law Admissions in the Aftermath of the UC Regents' Resolution to Eliminate Affirmative Action: An Admissions Policy Survey and Proposal*.<sup>24</sup> This student comment analyzed the

19. See *UCLA Law School's Faltering Commitment*, *supra* note 17, at 84 (Spanish) & n.20 (English) (emphasis added).

20. See Albert Y. Muratsuchi, Comment, *Race, Class, and UCLA School of Law Admissions, 1967-1994*, 16 CHICANO-LATINO L. REV. 90 (1995).

21. See *id.* at 95.

22. See University of California's Law Schools, at <http://www.ucop.edu/acadv/datamgmt/graddata/lawnos.html>.

23. I focus here on admissions at UCLA School of Law. The other University of California law schools have had similarly disappointing results, in no small part due to the end of Affirmative Action in California.

24. Thomas Glenn Martin, Jr., Comment, *UCLA School of Law Admissions in the Aftermath of the UC Regents' Resolution to Eliminate Affirmative Action: An Admissions Policy Survey and Proposal*, 18 CHICANO-LATINO L. REV. 150 (1996).

impact of the repeal of Affirmative Action by the Regents of the University of California, which later was followed by California's Proposition 209 and the end of Affirmative Action in all state programs.

Affirmative Action struggles at UCLA constitute part of the larger state and national ferment surrounding Affirmative Action. California, the most diverse state in the union, has been – and will likely continue to be – central to the evolution of Affirmative Action law. In the famous *Bakke* case,<sup>25</sup> the Supreme Court invalidated an Affirmative Action program at the UC Davis Medical School. Read as permitting the consideration of race as one factor in admissions, the decision today is brandished as an argument for the maintenance of Affirmative Action. However, at the time the case was decided in 1978, *Bakke* was considered a painful loss for Affirmative Action advocates. Protestors at UC Berkeley challenged even the University of California's choice of lawyers before the Supreme Court. Now, in an era of Proposition 209 and *Hopwood*,<sup>26</sup> *Bakke* is viewed as a "good" decision. Times have changed.

Besides offering important scholarship on Latina/os and the law, the *Chicano-Latino Law Review* has vigilantly focused attention on the law school admissions process and the critical importance of a diverse student body. It has been a mirror reminding the law school community of the public university's obligation to serve the diverse population of the state of California. Moreover, the lessons of the struggles over Affirmative Action at UCLA have proven important to the state and national debate over diversity in higher education.

### III. THE INTERNAL THREAT TO AFFIRMATIVE ACTION

This conference will offer insightful analysis of the legal threats to Affirmative Action, including *Croscon*,<sup>27</sup> *Adarand*,<sup>28</sup> and the color-blindness endorsed by the current U.S. Supreme Court.<sup>29</sup> We also will learn about the hope and danger in the University of Michigan litigation, which may well make its way to the Supreme Court.<sup>30</sup>

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25. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

26. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that University of Texas law school admissions program unconstitutionally considered race), *cert. denied sub nom.*, 518 U.S. 1033 (1996).

27. *City of Richmond v. J.A. Croscon Co.*, 488 U.S. 469 (1989).

28. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

29. For a critique of the Supreme Court's color-blind approach, see DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* § 4.5, at 136-54 (4th ed. 2000).

30. See *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002); 137 F. Supp. 2d 821 (E.D. Mich. 2001); *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000).

Tensions between minority communities also threaten Affirmative Action.<sup>31</sup> In 2001, Orlando Patterson, a prominent African American sociologist at Harvard, in an op/ed in the *New York Times* bluntly stated that, “[N]early half of the Hispanic population is *white* in every sense of this term . . . Latino coalition strategies, by vastly increasing the number of people entitled to Affirmative Action, have been a major factor in the loss of political support for it.”<sup>32</sup>

These comments should not be viewed as isolated, but find themselves repeated among segments of the African American community. I respectfully disagree with the contentions that Latina/os are functionally “white” and that coalition strategies have hurt African Americans in the struggle for Affirmative Action and racial justice.

Professor Patterson, however, raises questions that deserve serious – and sensitive – consideration. Others have advocated the necessity of multiracial coalitions in the struggle for racial justice.<sup>33</sup> Let me consider briefly the question whether Latina/os are legally and socially white, a longstanding issue of controversy.

Indeed, Latina/os at times have positioned themselves as white. Put differently, some have sought access to white privilege.<sup>34</sup> A historical example is the *In re Rodriguez*<sup>35</sup> naturalization case, in which a Mexican immigrant claimed to be “white” when whiteness was a prerequisite to naturalization. In social life, Latina/os have attempted to pass as white, or “Spanish.”<sup>36</sup>

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31. See, e.g., Deborah A. Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 971-74 (1995).

32. Orlando Patterson, *Race by the Numbers*, N.Y. TIMES, May 8, 2001, at A27 (emphasis added).

33. See, e.g., LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* (2002); ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999).

34. See generally STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

35. 81 F. 337 (W.D. Tex. 1897) (holding that Mexican immigrant was “white” and therefore eligible for naturalization); see George A. Martínez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 326-27 (1997) (analyzing *Rodriguez*). See also Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997) (analyzing the characterization of persons of Mexican ancestry as “white” for purposes of Equal Protection Clause). See generally IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) (analyzing case law on the whiteness requirement for naturalization from 1790-1952). The naturalization law was amended after ratification of the Fourteenth Amendment to allow persons of African ancestry to naturalize; in no reported decision, however, did an immigrant of color argue that, as a Black person, he or she was eligible to naturalize. See *id.* at 51-53.

36. See Kevin R. Johnson, “*Melting Pot*” or “*Ring of Fire*”? : *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1272-73 (1997).

In some ways, Rudy Acuña's book title says it all; persons of Mexican ancestry at various times have tried to identify as "Anything but Mexican."<sup>37</sup> There are reasons for these efforts, especially the hope of avoiding the prevalent discrimination against Mexicans. Moreover, as with whites, racism against African Americans exists among Latina/os. Indeed, part of the assimilation process for immigrants apparently includes the adoption of racist views toward African Americans. As a community, we must do more to combat such racism and heal the divisions between Latina/os and African Americans.

Consider one important but neglected decision that raises the question whether Mexican-Americans are white. In 1967, the U.S. Supreme Court in *Loving v. Virginia*<sup>38</sup> invalidated Virginia's law that barred the marriage of an African American woman and a white man.<sup>39</sup> Almost twenty years before *Loving*, the California Supreme Court struck down California's anti-miscegenation law in *Perez v. Sharp*,<sup>40</sup> the first case in modern times that invalidated a state law outlawing interracial marriage. The law at issue in the case, California Civil Code Section 60, provided that "all marriages of *white persons* with Negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void."<sup>41</sup>

The facts of *Perez v. Sharp* are simple. Andrea Perez and Sylvester Davis lived in Los Angeles County. They were Catholic and wanted to marry in a mass in a Catholic Church. But, because of California Civil Code section 60, the county clerk would not issue them a marriage license. On the application for a marriage license, Andrea Perez listed her race as "white," while Sylvester Davis identified as "Negro." Through years of litigation, nobody questioned whether Andrea Perez was "white." However, from what I can glean from the record in the case, combined with a general knowledge of Los Angeles and California, my guess is that Andrea Perez was Mexican-American.

Under the California anti-miscegenation statute, persons of Mexican ancestry generally were classified by law as white. History helps explain why this was the case. In nineteenth century California, when the original state anti-miscegenation law was

37. RODOLFO F. ACUÑA, ANYTHING BUT MEXICAN: CHICANOS IN CONTEMPORARY LOS ANGELES (1996).

38. 388 U.S. 1 (1967).

39. See generally RACHEL F. MORAN, INTERRACIAL INTIMACY (2001) (analyzing history of law regulating interracial relationships).

40. 32 Cal. 2d 711 (1948). For further analysis of the implications of *Perez v. Sharp*, see Kevin R. Johnson & Kristina L. Burrows, Struck by Lightning, or Just Lightning: Interracial Intimacy and Racial Justice (unpublished manuscript, on file with author).

41. *Perez*, 32 Cal. 2d at 712 (quoting California Civil Code section 60 – repealed 1959) (emphasis added).

enacted, Anglo men regularly married into wealthy Californio families to gain economic opportunity and social status.<sup>42</sup> However, in the twentieth century, Mexican-Americans were not socially treated as “white.” For example, housing and school segregation was common in southern California.<sup>43</sup> Just a few years before the California Supreme Court decided *Perez v. Sharp*, the Los Angeles area experienced the notorious “Zoot Suit” riots and Sleepy Lagoon murder trial during World War II, two infamous examples of racism against Mexican-Americans in California.<sup>44</sup> During the depths of the Depression, local authorities deported Mexican immigrants and Mexican-American citizens from Los Angeles County in an attempt to reduce the welfare rolls.<sup>45</sup>

Nonetheless, under California’s anti-miscegenation law, Andrea Perez was white, and she apparently considered herself to be white.

*Perez v. Sharp* raises many perplexing issues. Are Mexicans – and, more generally, Latina/os – white? Do differences exist among different Latina/o national origin groups and their whiteness? What about the classification of Latina/os for purposes of Affirmative Action? How do we address the perceptions of people like Orlando Patterson who view Latina/os as a threat to Affirmative Action and basically as whites improperly trying to secure Affirmative Action benefits? All these questions deserve our attention. More generally, we must consider interethnic tensions that arise with respect to Affirmative Action if we hope to maintain or, in some cases, resurrect such programs.

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42. See TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA 58-59 (1994); MORAN, *supra* note 39, at 16, 50-53.

43. See, e.g., *Westminster School Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947). See also Richard Delgado & Jean Stefancic, *California’s Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521 (2000) (summarizing history of discrimination against racial minorities, including Mexican-Americans, in California); George A. Martínez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994) (analyzing implications of school segregation and other civil rights litigation brought on behalf of Mexican-Americans).

44. See EDWARD J. ESCOBAR, RACE, POLICE, AND THE MAKING OF A POLITICAL IDENTITY: MEXICAN AMERICANS AND THE LOS ANGELES POLICE DEPARTMENT, 1900-1945 155-85 (1999). See generally RODOLFO F. ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (Harper & Row 3d ed. 1988) (documenting history of discrimination against Chicana/os in the United States).

45. See generally FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (1995) (discussing repatriation).

#### IV. THE IMPORTANCE OF AFFIRMATIVE ACTION IN HIGHER EDUCATION – THE SUPREME COURT

The possible appointment of a Latina or Latino Justice to the U.S. Supreme Court has been on the table for well over a decade.<sup>46</sup> Its emergence as an issue worthy of serious discussion in some ways represents an acknowledgment of the growing Latina/o presence in the United States. The possible nomination of a Latina/o, of course, raises many questions, including difficult political ones that are beyond the scope of my remarks today.

Latina/os in the United States share important common experiences, including racial discrimination.<sup>47</sup> This is one reason why Affirmative Action programs should include Latina/os. Such commonalities suggest that a Latina/o Justice may bring new perspectives to the Supreme Court. A Latina/o voice holds the promise of shaping and improving the decision-making process on constitutional law, civil rights, and other matters. Moreover, a Latina/o appointment would send a powerful message of inclusion to the greater Latina/o community.

Consider the impact of Thurgood Marshall, the first African American to serve on the U.S. Supreme Court. His constitutional law opinions possessed a clear voice, expressing a message embraced by many African Americans. In Justice Brennan's words:

What made Thurgood Marshall unique as a Justice? *Above all, it was the special voice that he added to the Court's deliberations and decisions. His was a voice of authority: he spoke from first-hand knowledge of the law's failure to fulfill its promised protections for so many Americans.*<sup>48</sup>

During Justice Marshall's tenure on the Supreme Court, the Court moved in a more conservative direction. As a result, Justice Marshall played the role of "the Great Dissenter,"<sup>49</sup> or, in the words of Drew Days, "our Supreme conscience."<sup>50</sup> In dissent, he continued to voice the sentiments of many African Americans.

Justice Marshall's opinions in two well-known Affirmative Action cases demonstrate his distinctive voice. In *Regents of the University of California v. Bakke*, Justice Marshall dissented from

46. See Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV. LATINO L. REV. 1 (2002), published concurrently in 13 LA RAZA L.J. 1 (2002), for an extended analysis of this important issue.

47. See Johnson, *supra* note 2, at 117-29.

48. William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 23 (1991) (emphasis added).

49. Kathleen M. Sullivan, *Marshall, The Great Dissenter*, N.Y. TIMES, June 29, 1991, at A23.

50. Juan Williams, *Marshall's Law*, WASH. POST MAG., Jan. 7, 1990, at 12, 15 (quoting Drew Days).

the Court's conclusion that a medical school Affirmative Action program ran afoul of the Constitution and emphasized that "[t]he position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro."<sup>51</sup> In *City of Richmond v. J.A. Croson Co.*, Justice Marshall criticized the majority's finding that a contracting program designed to remedy past discrimination was unconstitutional and emphasized that "[t]he battle against pernicious racial discrimination or its effects is nowhere near won. I must dissent."<sup>52</sup>

Importantly, the appointment of Justice Marshall to the Supreme Court was critically important to African Americans, as the nation's racial sensibilities underwent a radical, at times violent, transformation during the Civil Rights movement of the 1960s. It clearly signaled increasing acceptance of African Americans into the core of American social life. The mere presence of an African American on the nation's highest court – almost unthinkable just a few years before – forever changed the United States.

As Thurgood Marshall's appointment did for the African American community, the addition of the first Latina/o to the Supreme Court could have significant positive impacts. Importantly, a Latina/o would likely bring new and different experiences and perspectives to the Supreme Court and its decision-making process. Let me outline just one example.

In *United States v. Brignoni-Ponce*,<sup>53</sup> the Supreme Court stated that Border Patrol officers on roving patrols could consider the race of the occupant of an automobile in making an immigration stop.<sup>54</sup> In the Court's words, "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor" in the decision to stop a vehicle.<sup>55</sup> The Court authorized the Border Patrol to rely on "Mexican appearance" even if no individual, much less one who "appears Mexican," has been specifically identified as having violated the immigration laws. Such reliance is premised on the perceived statistical probability that persons of "Mexican appearance" are undocumented immigrants. Ordinary Fourth

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51. 438 U.S. 265, 395 (1978) (Marshall, J., concurring in part, dissenting in part).

52. 488 U.S. 469, 561 (1989) (Marshall, J., dissenting).

53. 422 U.S. 873 (1975).

54. For a detailed analysis of race profiling in immigration enforcement, see Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000).

55. *Brignoni-Ponce*, 422 U.S. at 886-87 (emphasis added).

Amendment and Equal Protection principles, however, generally prohibit the use of race in this way.<sup>56</sup>

A Latina/o Justice might well approach immigration stops quite differently. Latina/os are more likely than Anglos to fully appreciate the detrimental consequences of race profiling in immigration enforcement. Immigration enforcement regularly burdens Latina/o citizens and lawful immigrants and seriously undermines their sense of belonging to U.S. society.<sup>57</sup>

Moreover, a Latina/o is more likely to understand why "Mexican appearance" is a deeply flawed criterion on which to base an immigration stop. Most fundamentally, what is "Mexican appearance"? As we know, physical appearances among Latina/os run the gamut from light to dark skin, black to blond hair, brown to blue eyes.<sup>58</sup> The Border Patrol, however, apparently relies on stereotypical "Mexican appearance," dark skin, black hair, brown eyes, indigenous features, often with a class overlay.<sup>59</sup>

Other questions about *Brignoni-Ponce* are more likely to come to the mind of a Latina/o than to an Anglo. Should the Border Patrol be afforded broad discretion to question one's citizenship governed by "standards" such as "Mexican appearance"? Aren't most of the people in the United States with a stereotypical "Mexican" or "Hispanic" appearance lawfully in the country? The vast majority (90 percent or more) of the Latina/os in the United States are citizens and lawful immigrants.<sup>60</sup> However, they may be subject to stops because of little more than their physical appearance.

A Latina/o is more likely than an Anglo to be troubled by the reasoning of *Brignoni-Ponce*. It is noteworthy that *no* Justice registered disagreement with the Court's racial reasoning in that case. Moreover, a Latina/o may well have personal experience with race profiling in immigration enforcement. For example, the Border Patrol on numerous occasions has stopped federal district court judge Filemon Vela, as well as other Mexican-

56. See Johnson, *supra* note 54, at 680-88 (reviewing case law).

57. See generally KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989) (analyzing efforts by subordinated groups to secure full membership in U.S. society).

58. Johnson, *supra* note 36, at 1291-93.

59. See, e.g., *Nicacio v. INS*, 797 F.2d 700, 704 (9th Cir. 1985) (addressing case in which plaintiffs claimed discriminatory immigration enforcement and INS officers testified that they relied on whether a person had a "hungry look," was "dirty, unkempt," or is "wear[ing] work clothing," in addition to Hispanic appearance, in deciding whether to question a person about his or her immigration status).

60. See Johnson, *supra* note 54, at 708-09 (summarizing demographic data).

American judges in South Texas.<sup>61</sup> Similarly, the Border Patrol repeatedly stopped Eddie Cortez, former mayor of Pomona, a suburb of Los Angeles, and self-described Reagan Republican, well over a hundred miles from the border.<sup>62</sup>

A Latina/o on the Supreme Court also might look differently than others at various civil rights issues, including those implicated by criminal law enforcement and language regulation. Finally, and perhaps most importantly, the appointment of a Latina/o to the Supreme Court would signal a movement toward full membership for Latina/os in American social life, just as Thurgood Marshall's appointment did for African Americans. The naming of a Latina/o Justice would symbolize the growing inclusion of Latina/os in the mainstream.

Unfortunately, messages of Latina/o exclusion in the legal profession run rampant. This is one reason why diversifying the law schools, and therefore, Affirmative Action programs, is so important. Few Latina/os can be found on the state and federal bench. Latina/os are severely under-represented in elite corporate law firms.<sup>63</sup> Latina/os comprise fewer than 150 of the thousands of law professors in the United States.<sup>64</sup> The traditional paths to the Supreme Court thus have been unavailable to Latina/os. The first Latina/o Justice could help encourage the fuller integration of the legal profession and send a powerful message that Latina/os are in fact full members of U.S. society.

## V. CONCLUSION

The struggles that I have mentioned – over Affirmative Action at UCLA law school and across the nation, as well as for a Latina/o on the Supreme Court – are not called “struggles” for nothing. They are interrelated, on many fronts, and need our utmost attention. They begin in our everyday life and continue throughout our educational and professional lives.

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61. See Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000, at A17; James Pinkerton, *Border Patrol Twice Stops U.S. Judge on Way to Court*, HOUS. CHRON., Oct. 1, 2000, at 1.

62. See Lee Romney, *Over the Line?: Citing Questioning of Mayor, Activists Say Border Patrol Targets All Latinos*, L.A. TIMES, Sept. 2, 1993, at J1.

63. See Linda E. Davila, *The Underrepresentation of Hispanic Attorneys in Corporate Law Firms*, 39 STAN. L. REV. 1403 (1987).

64. See Michael A. Olivas, *Latina/o Law Professors 2001-2002*, (unpublished document, on file with author). See also Michael A. Olivas, *The Education of Latino Lawyers: An Essay on Crop Cultivation*, 14 CHICANO-LATINO L. REV. 117, 128-38 (1994) (analyzing difficulties in increasing number of Latina/o law faculty). For analysis of the efforts to hire Latina/os at Harvard Law School, for example, see Luz Herrera, *Challenging a Tradition of Exclusion: The Push for Latino Faculty at Harvard Law School*, 5 HARV. LATINO L. REV. (forthcoming 2002).

The panels at the conference today will offer insights into the Affirmative Action struggles of our day, including the University of Michigan litigation and alternatives to traditional Affirmative Action programs. We no doubt will learn much. I trust that we will leave this conference encouraged and resolved to succeed in the future struggles.