On the Appointment of a Latina/o to the Supreme Court

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INTRODUCTION

The possible appointment of a Latina or Latino Justice to the United States Supreme Court has been on the table for well over a decade. Its emergence as an issue worthy of serious discussion in some ways represents an acknowledgment of the growing Latina/o presence, and a movement away from Latina/o invisibility, in American social life. The much-publicized Census 2000 reveals that Hispanics currently constitute over 12.5% of the total U.S. population, or almost 35 million people, roughly approximating the number of African Americans in the country. Significantly higher concentrations of Latina/os live in California, Texas, Florida, New York, Arizona, and New Mexico.

In light of the demographics, we should expect—some might say demand—to see a Latina/o on the Supreme Court in the twenty-first century. The possible nomination of a Latina/o, of course, raises a plethora of questions, in-

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1. See David G. Savage, Frustrated Latinos Lobby Clinton for a Place on High Court, L.A. TIMES, July 28, 1998, at A5 ("For almost a decade, White House lawyers under Presidents Bush and Clinton have been quietly searching for a Latino jurist who could be named to the U.S. Supreme Court."); see also Tony Mauro, Supreme Dream, LEG. TIMES, Nov. 6, 2000, at 1 (stating that Hispanic National Bar Association leader can "almost taste victory in his campaign to have a Hispanic named to the U.S. Supreme Court").


cluding perplexing ideological ones. The partisan political issues implicated by a Supreme Court appointment bring to the forefront the diversity of political opinion, correlated to a certain degree with national origin ancestry, among Latina/os in the United States.5

This Essay attempts to steer clear of the heated political questions implicated by a Supreme Court appointment at this time, namely the likely conservatism of a Latina/o nominated by a Republican President.6 Nor will the relative strengths and weaknesses of possible Latina/o nominees be discussed. Rather, I instead focus on the potential beneficial impact of the appointment of a qualified Latina or Latino to the Court as an institution, the Latina/o community, and the nation as a whole.

Although a heterogenous community, Latina/os in the United States share important common experiences.7 Such commonalities suggest that a Latina/o Justice may bring new perspectives to the Supreme Court. The addition of a Latina/o voice holds the promise of improving the decision-making process on constitutional law, civil rights, and other matters.8 Moreover, just as Justice Thurgood Marshall's historic appointment in 1967 did for African Americans, a Latina/o appointment would send a powerful message of inclusion to the Latina/o community. In sum, depending on the individual, a Latina/o Justice could make a lasting difference.


7. See Johnson, supra note 5, at 117-29.

8. As has been well-documented, civil rights litigation is limited in its ability to secure social change for Latina/os in the United States, see George A. Martinez, Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980, 27 U.C. DAVIS L. REV. 555 (1994) (analyzing the failure of civil rights litigation to protect the rights of Mexican Americans); RICHARD DELGADO & JEAN STEFANCIC, FAILED REVOLUTIONS: SOCIAL REFORM AND LIMITS OF LEGAL IMAGINATION (1994); Kevin R. Johnson, Lawyering for Social Change: What's a Lawyer to Do?, 5 MICH. J. RACE & L. 201, 206-15 (1999). Consequently, I recognize that, to the extent that judges may affect the results of litigation, the immediate impact of any judicial appointment on the legal rights and status of Latina/os in the United States, is limited.
I.
A MODEL TO EMULATE: THURGOOD MARSHALL’S APPOINTMENT TO THE SUPREME COURT

In analyzing the potential impact of the appointment of a Latina/o to the Supreme Court, history informs our thinking. Consider President Lyndon Johnson’s landmark nomination of Thurgood Marshall to the Supreme Court in 1967. Justice Marshall, of course, was the first African American to serve on the high Court. The appointment undisputedly meant a great deal to African Americans, to the Court as an institution, and to the nation. The nomination of an African American alone represented an achievement for the entire African American community, unmistakably signaling that it in fact is an important part of the nation as a whole.

Let me begin this discussion with a caveat. The architect of Brown v. Board of Education, perhaps the most lauded Supreme Court decision of the twentieth century, Thurgood Marshall was special in too many ways to fully capture in this brief essay. It is not likely that a Latina/o on the Supreme Court will have the same impact that he did, just as the nomination of almost any other African American of his generation would not have equaled the impact of Justice Marshall’s appointment. Nonetheless, his appointment provides an example of the potential positive effect of naming a Latino/a Justice to the Supreme Court. In announcing the nomination of Thurgood Marshall, President Johnson remarked that the appointment was “the right thing to do, the right time to do it, the right man and the right place.” A Latina/o appointment under similar circumstances could have a comparable impact.

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11. See DERRICK BELL, RACE, RACISM AND AMERICAN LAW § 5.3, at 164 (4th ed. 2000) (“As with other landmark cases, the Supreme Court’s 1954 decision in Brown v. Board of Education has taken on a life of its own, with meaning and significance beyond its facts and perhaps greater than its rationale.”) (footnote omitted).


Thurgood Marshall’s service as Associate Justice from 1967 to 1991 deeply influenced the Supreme Court’s decisions and decision-making process. Few would claim that Justice Marshall did not affect the direction of the Court with the perspective that he brought, his life experiences, and what he said and did.14 He wrote majority opinions in many different substantive areas of law, ranging from civil procedure15 to federal Indian law16 to immigration law17 to tax18 and bankruptcy law.19 His constitutional law opinions possessed a clear and unmistakable voice, expressing a message embraced by many African Americans.20 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.”21


During Justice Marshall's tenure on the Supreme Court, it moved in a more conservative direction, away from his intellectual leanings. As a result, Justice Marshall wrote increasing numbers of dissents.\(^\text{22}\) In the role of "the Great Dissenter,"\(^\text{23}\) or, in the words of Drew Days, "our Supreme conscience,"\(^\text{24}\) Justice Marshall gave voice to the sentiments of many African Americans.

In the famous *Bakke* affirmative action case, Justice Marshall dissented from the Court's conclusion that a medical school affirmative action program ran afoul of the Constitution and starkly described the status of African Americans in the United States: "The 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."\(^\text{25}\) Over a decade later, in *City of Richmond v. J. A. Croson Co.*,\(^\text{26}\) Justice Marshall criticized the majority's finding that a minority set-aside 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."\(^\text{27}\) Perhaps most memorable, even remarkable, is Justice Marshall's last dissent, and final opinion on the Court. In *Payne v. Tennessee*,\(^\text{28}\) the Court overruled recent precedent to allow for the admission of victim impact evidence in a death penalty case. Justice Marshall bluntly wrote that "[p]ower, not reason, is the new currency of this Court's decisionmaking" and ominously warned that "[t]omorrow's victims may be minorities, women, or the indigent."\(^\text{29}\)

Thurgood Marshall also had a discernible impact on his fellow Justices and the Supreme Court as an institution. His famous story-telling ability based on his rich career as a civil rights lawyer allowed him to spin tales that gave real-life meaning to many of the cases that came before the Court. Justice White observed that Justice Marshall brought to the conference table years of experience in an area that was of vital importance to our work, experience that none

\(^{22}\) See Janet Cooper Alexander, *A Tribute to Thurgood Marshall: TM*, 44 STAN. L. REV. 1231, 1235 (1992) (noting that Justice Marshall, although dissenting for many years in civil rights and constitutional law cases, remained optimistic and believed "that in the end, right will prevail.").


\(^{27}\) *Id.*


\(^{29}\) *Id.* at 844, 856 (Marshall, J., dissenting).
of us could claim to match. Thurgood could tell us the way it was, and he did so convincingly, often embellishing with humorous, sometimes hair-raising, stories straight from his own past. He characteristically would tell us things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our own experience.30

Both Justices O'Connor and Kennedy also have written about how much they learned from their interactions with Justice Marshall.31

The exact impact of Justice Marshall's participation in Court deliberations, and thus the decision-making process of the highest court in the land, are difficult to clearly identify, much less quantify. Nonetheless, by all accounts, they existed and remain a part of his legacy.

Importantly, the appointment of Justice Marshall to the Supreme Court had a palpable impact on the African American community in the United States. Upon his confirmation, the Court added a revered African American civil rights lawyer and the architect of Brown v. Board of Education.32 The appointment 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. The nomination and confirmation of Justice Marshall represented a clear signal of increasing acceptance of African Americans into the core of American social life.33 Although resistance to such a fundamental change lingers,34 this historic appointment moved African Americans closer to full membership in U.S. society.35 The mere presence of an African American on the na-


34. Some have found it difficult to accept an African American at the highest levels of the U.S. government. For example, President Nixon denigrated Justice Marshall’s qualifications to serve on the Supreme Court. See JOHN W. DEAN, THE REHNQUIST CHOICE 96 (2001).

35. See Robert L. Carter, A Tribute to Justice Thurgood Marshall, 105 HARV. L. REV. 33, 42 (1991) (“The pride and dignity that Justice Thurgood Marshall has inspired in the black community over his long career is paralleled only by the very real, enormous contribution he has made in
tion's highest court—almost unthinkable just a few years before—forever changed the United States.

II.
THE POSSIBLE IMPACT OF THE FIRST LATINA/O SUPREME COURT JUSTICE

As Thurgood Marshall's appointment did for African Americans, the addition of the first Latina/o to the Supreme Court could have significant impacts for the greater Latina/o community, as well as to the Court and the nation as a whole. Importantly, a Latina/o would likely bring new and different experiences and perspectives to the Supreme Court and its decision-making process. A review of one decision helps demonstrate this point.

In *United States v. Brignoni-Ponce*, 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. 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. Through this pronouncement, the Court ruled that what amounted to race profiling in immigration enforcement was constitutional. The Court author ensuring that black Americans enjoy equality of citizenship.


39. *Brignoni-Ponce*, 422 U.S. at 886–87 (emphasis added). The Court held, however, that the stop in question was invalid because the Border Patrol had relied exclusively on "Mexican appearance." See id. at 884–87.

ized 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 Amendment and Equal Protection principles, however, generally prohibit use of race in this way by law enforcement. Rather, the Constitution usually requires individualized suspicion, not raw statistical probabilities, to justify a police stop.

A Latina/o Justice might well approach the reliance on race and physical appearance in immigration stops in a wholly different way than the Supreme Court did in Brignoni-Ponce. Latina/os are likely to appreciate the detrimental consequences of race profiling in immigration enforcement, which subjects innocent persons lawfully in the country to stops and interrogations largely because of their physical appearance. As a direct result of the Supreme Court's endorsement of reliance on "Mexican appearance," immigration enforcement regularly burdens Latina/o citizens and lawful immigrants of many different national origin ancestries. Such indignities seriously undermine the sense of belonging of Latina/os to U.S. society.

41. The Court admitted as much. See Brignoni-Ponce, 422 U.S. at 879 (relying on an estimate provided by the Immigration & Naturalization Service "that 85% of aliens in the country are from Mexico" as justification for considering "Mexican appearance" in immigration stop) (footnote omitted). In all likelihood incorrect in 1975, this estimate is clearly inaccurate today. See Johnson, supra note 40, at 707–08 (stating that best estimates show that only about one-half of the undocumented population in the United States is of Mexican ancestry).

42. See Johnson, supra note 40, at 680–88 (reviewing caselaw). However, when a crime victim identifies the perpetrator of a crime as of a particular race, law enforcement may consider race in making a criminal stop. See, e.g., Brown v. City of Oneonta, 195 F.3d 111 (2d Cir. 1999) (dismissing a civil rights claim in a case in which police questioned African American men after victim identified the perpetrator of the crime as African American man), cert. denied, 122 S. Ct. 44 (2001). Like race profiling generally, this use of race by law enforcement can be abused. See R. Richard Banks, Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse, 48 UCLA L. Rev. 1075 (2001).


44. See, e.g., Hodgers-Durgin v. De la Vina, 199 F.3d 1037 (9th Cir. 1999) (en banc) (dismissing on justiciability grounds civil rights claims that the Immigration & Naturalization Service (INS) stopped persons of Latina/o descent without reasonable suspicion); Farm Labor Org. Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723 (N.D. Ohio 2000) (reviewing evidence that Ohio law enforcement officers asked only Hispanic motorists for immigration documentation); Murillo v. Musegades, 809 F. Supp. 487 (W.D. Tex. 1992) (granting an injunction prohibiting Border Patrol harassment of persons of Mexican ancestry at a high school in El Paso, Texas); see also Susan Sachs, Files Suggest Profiling of Latinos Led to Immigration Raids, N.Y. TIMES, May 1, 2001, at B1 (reporting that review of INS workplace raids "showed that agents frequently cited skin color, use of Spanish, foreign accents and clothing 'not typical of North America' as primary evidence that workers were likely to be undocumented"). Many of these cases involve the alleged violation of the rights of Central Americans as well as Mexicans. Other Latina/o national origin groups also have had difficulties with the U.S. immigration bureaucracy, with the INS's conduct in the return of Elian Gonzalez to Cuba a prominent example. See David Abraham, Gonzalez ex rel. Gonzalez v. Reno, 95 AM. J. INT'L L. 204 (2001); see also Cuban American Bar Ass'n v. Christopher, 43 F.3d 1412 (11th Cir.) (holding that Cuban migrants outside the United States did not have legal right to apply for asylum), cert. denied, 516 U.S. 913 (1995); Guzman v. Tippy, 130 F.3d 64 (2d Cir. 1997) (upholding indefinite detention of Cuban national).

45. See Johnson, supra note 40, at 728–35.
Moreover, a Latina/o would more likely understand why "Mexican appearance" is a deeply flawed criterion on which to base an immigration stop. He or she might well ask logical questions about Brignoni-Ponce including but not limited to the following:

What is "Mexican appearance?" Physical appearances among Latina/os run the gamut from light to dark skin, black to blond hair, brown to blue eyes.

The Border Patrol, however, apparently relies on stereotypical "Mexican appearance," dark skin, black hair, brown eyes, indigenous features, often with a socioeconomic class overlay, when in fact persons of Mexican ancestry possess many different physical appearances.

Should the Border Patrol be afforded the broad discretion to question one's citizenship governed by "standards" such as "Mexican appearance?" Because "Mexican appearance" is vague and based on gross stereotypes of undocumented immigrants, how could Border Patrol officers, even ones acting in good faith, be expected to objectively apply this "standard?"

Aren't most of the people in the United States with a stereotypical "Mexican" or "Hispanic" appearance lawfully in the country? Although the vast majority (ninety percent or more) of the Latina/os in the United States are citizens and lawful immigrants, they may be subject to stops, particularly in the border region if not the entire Southwest, because of nothing other than their physical appearance and a Border Patrol officer's hunch that he or she is undocumented.

Doesn't allowing the Border Patrol to consider "Mexican appearance" in making an immigration stop stigmatize citizens and lawful residents of Latina/o descent who fit the stereotype? Doesn't this limit their claim to full membership in the national community?

Because of personal experiences, as well as an appreciation of the diversities of the Latina/o community in the United States, a Latina/o is more likely than an Anglo to be troubled by the reasoning of Brignoni-Ponce. Moreover,


47. 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 was "wear[ing] work clothing," in addition to Hispanic appearance, in deciding whether to question a person about his or her immigration status).

48. See Johnson, supra note 40, at 708-09 (summarizing demographic data).


51. Importantly, one cannot assume that non-Latina/o minorities will have similar con-
she or he 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 Latina/o judges in South Texas, for questioning about his immigration status.52 Border Patrol officers once told Judge Vela that he was stopped because he had too many passengers in his new sports utility vehicle; another time, he was informed that the tinted windows on his automobile—quite common in warm climates—led to the decision to stop him.53 Similarly, the Border Patrol repeatedly pulled over Eddie Cortez, former mayor of a Los Angeles suburb, well over a hundred miles from the border.54

Nor is the assumption that Latina/os are immigrants limited to the Southwest. A U.S. Capitol police officer stopped Luis Gutierrez, a member of the U.S. Congress of Puerto Rican ancestry, on the way to his congressional office and flipantly told Gutierrez that he "and [his] people should go back to the country [they] came from."55 Such experiences, analogous to those of Thurgood Marshall with respect to racial discrimination,56 almost inevitably would shape one's thinking about immigration enforcement and, more generally, the reliance on alleged group propensities in law enforcement.

Based on personal experience, a Latina/o Justice is likely to understand the fallacy of "Mexican appearance" and appreciate that Latina/os come in all shapes, sizes, and appearances, not just the stereotypical ones. Latina/os also generally know that many non-Latina/o U.S. citizens assume that Latina/os—native born in this country or not—are "foreigners," and treat them as outsiders to the national community.57 This assumption, as seen in Brignoni-Ponce, may


56. See supra text accompanying notes 9-35.

57. See Johnson, supra note 5, at 117–29.
affect analysis of immigration and immigration enforcement issues deeply impacting Latina/os.\(^\text{58}\)

Importantly, a Latina/o on the Supreme Court might well bring a unique perspective to bear on the analysis of substantive bodies of law in which issues of race arise more subtly than in immigration law. Although facially neutral, and therefore presumably lawful, English-only laws can be employed to attack Latina/os or, at a minimum, adversely affect the Latina/o community.\(^\text{59}\) For example, in Hernandez v. New York,\(^\text{60}\) the Court held that a prosecutor could constitutionally use peremptory challenges to strike Spanish-speaking jurors in a criminal case that required the translation of Spanish into English; with all Spanish-speakers excluded, a Latina/o defendant was denied a jury that included any Latina/os.

A Latina/o also might look differently than others at various civil rights issues,\(^\text{61}\) including those implicated by criminal law enforcement.\(^\text{62}\) The recent growth of Latina/o civil rights scholarship\(^\text{63}\) demonstrates that Latina/os have

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61. See Rachel F. Moran, Neither Black Nor White, 2 HARV. LATINO L. REV. 61 (1997) (arguing that civil rights matters that concern the Latina/o community differ from those of special importance to African Americans and other minority groups).


63. See, e.g., Symposium, Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections, 33 U.C. DAVIS L. REV. 751 (2000); Symposium, Comparative Latinas/os:
civil rights concerns different and apart from those of other racial minorities.\textsuperscript{64} For this reason, it should not be surprising that the experiences of Latina/os on the state and federal bench arguably have influenced their legal analysis.\textsuperscript{65}

In essence, the Supreme Court has lacked a Latina/o voice and perspective. To this point, for example, no Supreme Court Justice has emphasized for Latina/os, as Justice Marshall consistently did for African Americans,\textsuperscript{66} the long history of segregation and discrimination against Mexican Americans in the Southwest\textsuperscript{67} or the racism directed at Puerto Ricans on and off the island.\textsuperscript{68} Such deficiencies are more likely to be remedied by a Latina/o Justice than one of any other background.

Moreover, 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 signaled for African Americans.\textsuperscript{69} The naming of a Latina/o Justice in and of itself
would symbolize the growing inclusion of Latina/os in the respectable mainstream, rather than simply the entertainment industry. Such a development would be particularly important to Mexican Americans and Puerto Ricans, two Latina/o national origin sub-groups that historically have been denied access to the highest echelons of U.S. society.

Unfortunately, messages of Latina/o exclusion in the legal profession run rampant. Few Latina/os can be found on the state and federal bench. Only a handful have served as a law clerk to a Supreme Court Justice, a prestigious credential held by many of the nation's leading attorneys and judges. Severely under-represented in elite corporate law firms, Latina/os comprise only about 140 of all law professors in the United States. The traditional paths to the Court


72. See id. at 163 (stating that, at that time, only five Latina/os served on state high courts); see also John H. Culver, *The Transformation of the California Supreme Court*, 61 ALB. L. REV. 1461, 1483 (1998) (noting that the first African American, Latino, and woman were appointed to the California Supreme Court only in the last thirty years); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997) (analyzing impact of lack of racial diversity on state trial court bench).


74. See Edward S. Adams, *Market-Based Solution to the Judicial Clerkship Selection Process*, 59 MD. L. REV. 129, 136 (2000) (compiling data showing that only one percent of Supreme Court law clerks have been Latina/o).

75. The elite qualifications, such as a Supreme Court clerkship, often required of nominees to the Court suggests that the pool of eligible Latina/os for an appointment may be relatively small, making the goal of a Latina/o Justice all the more difficult to achieve.

76. See Linda E. Davila, *Note, The Underrepresentation of Hispanic Attorneys in Corporate Law Firms*, 39 STAN. L. REV. 1403 (1987); see also Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Stratijacket of Legal Practice*, 95 MICH. L. REV. 766, 767-68 (1997) ("At the beginning of [the 1990s], Blacks, Asian Americans, Latinos and Latinas, and Native Americans comprised only twelve percent of the nation's law students, less than eight percent of lawyers, eight percent of law professors, and two percent of the partners at the nation's law firms.

thus have been unavailable to Latina/os. The first Latina/o Justice could not help but to encourage the fuller integration of the legal profession and send a powerful message that Latina/os in fact must be treated as full members of U.S. society.

In this vein, appointment of a Latina/o to the Supreme Court would go far to make “visible” the relatively “invisible” Latina/o community in the United States. Public attention to the nomination itself would direct attention to the growing Latina/o national presence. The questioning of a Latina/o nominee by Senators in confirmation hearings would likely highlight Latina/o civil rights concerns. Such a high visibility platform might well have a lasting impact on the national consciousness.

CONCLUSION

The appointment of a Latina/o Justice to the United States Supreme Court unquestionably would be a historic milestone. Just as the appointment of Justice Thurgood Marshall did, a Latina/o nomination would leave a lasting impression on the Court and the nation, with the President who took this courageous step literally “making history.” The new Latina/o Justice would likely bring a fresh perspective to the Court’s decision-making process. Most importantly, a Latina/o Justice on the Court would represent a significant move toward full membership and equal citizenship for Latina/os in the United States. It would add significantly to their sense of belonging to the national community. It would announce the true arrival of Latina/os into the mainstream.


78. See supra text accompanying notes 2–4.

79. See supra text accompanying notes 37–68. The public attention paid to controversial Supreme Court nominees, such as Robert Bork and Clarence Thomas, see supra note 6, raised the national consciousness about their views on issues of pressing public concern. Cf. Laurence H. Tribe, God Save This Honorable Court (1985) (advocating careful Senate scrutiny of philosophy of Supreme Court nominees).