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## “The Right Thing to Do, the Right Time to Do It, and the Right Place:<sup>1</sup> A Latina/o United States Supreme Court Justice”

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### Introduction

For over two decades, Latino advocates and others have urged the appointment of a Latina or Latino to the United States Supreme Court.<sup>2</sup> The need for diversity on both the Supreme Court and across the federal court system to truly ensure equal access to justice has been long apparent to advocates and others. As Chief Judge Harry Edwards of the U.S. Court of Appeals for the D.C. Circuit explained, “[I]t is inevitable that judges’ different professional and life experiences have some bearing on how they confront various problems that come before them.”<sup>3</sup> Judges bring their own life experiences and perspectives based on those experiences to the bench. Thus, it is critical that the Supreme Court in particular, as the highest court in the land, be comprised of a cross section of individuals, who can bring a cross section of life experiences.

However, despite the appointment of two African-American and two female Justices to the Supreme Court in the past 40 years, the judicial branch of our government remains disproportionately white, male, and upper or upper middle class. The lack of diversity overall, and the lack of a Latino presence in particular, has tremendous implications for the decisions made by the Supreme Court, the conduct and quality of deliberation among the

Justices, and ultimately issues affecting the Latino community. Ultimately, the lack of diversity has, for over 200 years, resulted in non-minority individuals making decisions that affect the lives and well-being of minority communities, often with little understanding or awareness of the experiences and realities of those communities.<sup>4</sup>

Latinos are the fastest growing minority in the U.S. — the Latino population is projected to triple from 46.7 million in 2008 to 132.8 million in 2042. By 2042, 30% of all U.S. residents, or one out of every three Americans, will be Latino.<sup>5</sup> With these demographic trends, the need for greater Latino representation on the federal judiciary is more urgent than ever before. Yet, despite these trends, only 4.5% of all judges currently serving on the state and federal bench are Latino. (See Chart 1 below) Furthermore, Latina/os are severely underrepresented in the elite corporate law firms and federal clerkship positions — the traditional path to the Court.

**Chart 1: Numbers of Law Students, Judges, and U.S. Attorneys (2000)<sup>6</sup>**

	White	African-American	Latino
Law Students (2003–2004)	79.7%	6.6%	5.7%
Attorneys	90%	3.9%	3.3%
Judges	84.1%	8.8%	4.5%

The recent resignation of Justice Souter and President Obama’s stated commitment to increasing diversity at all levels of government present a very real opportunity for a Latino appointment to the Supreme Court.

This paper will examine the value, impact, and critical importance of diversity on the Supreme Court. It begins by looking at the impact of the only two African-American Supreme Court justices and discussing lessons learned from the African-American perspective. It then examines the implications of the appointment of a Latino Justice, for both the Court itself and the most critical issues facing the Latino community over the next few decades.

The paper will not discuss the strengths and weakness of possible Latina/o nominees or the political chaos that comes with a Supreme Court appointment. Instead, it seeks to raise awareness about the value of diverse perspectives on the Court, the critical importance of ensuring the Latino perspective is represented, and the implications for future decisions affecting Latinos of having — or not having — a Latino Supreme Court Justice.

## Background: Historical Composition of the Supreme Court

Between 1789, when the Supreme Court was established, and 1967, all Supreme Court Justices were white males. The first African-American, Thurgood Marshall was appointed in 1967 by President Lyndon Johnson. Since then, only one other African-American, Clarence Thomas, has served on the Court. The first woman, Sandra Day O'Connor, was not appointed until 1981. She was joined by Ruth Bader Ginsburg in 1993. No President has yet nominated or appointed a Latina/o, Asian American, or Native American to serve on the Supreme Court.

This lack of diversity is not limited to the Supreme Court. Throughout the federal judiciary, there is a lack of diversity. In 2001, out of approximately 1600 federal judges, only 7.2 percent were African-Americans and 4.0 percent were Latinas/os.<sup>7</sup> Moreover, although women comprise at least 50 percent of the population, they hold approximately 25 percent of all federal judgeships.<sup>8</sup>

Presidents Carter and Clinton were the first Presidents to come to office stating a commitment to appoint judges that “look like America.”<sup>9</sup> However, despite President Clinton’s efforts to nominate federal judges that mirrored America, Republicans blocked and stalled his judicial these nominations. Those most often delayed were women and minorities candidates.<sup>10</sup> In fact, at the end of President Clinton’s presidential term, the Senate Judiciary Committee had not reported on fifty-seven nominees, most of whom were women and minorities. This gave President George W. Bush the opportunity to fill those vacancies.<sup>11</sup> While, President Bush appointed the fewest number of minorities than any of his predecessors;<sup>12</sup> he did appoint a large number of Latinos to the bench – more than any other President.<sup>13</sup>

Chart 2: Percentages of Minority Appointees<sup>14</sup>

President/ Term	Total	White	African- American	Latino	Asian American	Native American
Bush-II 2001–2008	311	258 (83%)	21 (6.8%)	28 (9%)	4 (1.3%)	0
Clinton 1993–2000	372	280 (75.3%)	61 (16.4%)	25 (6.7%)	5 (1.3%)	1 (.3%)
Bush-I 1989-1992	192	171 (89.1%)	13 (6.8%)	8 (4.2%)	0	0
Reagan 1981–1988	376	353 (93.9%)	7 (1.9%)	14 (3.7%)	2 (.5%)	0
Carter 1977-	259	202 (78%)	37 (14.3%)	16 (6.2%)	3 (1.2%)	1 (.4%)

Once again, the recent resignation of Justice Souter presents the opportunity for the appointment of the first Latino to the bench. Moreover, many believe that President Obama may have the opportunity to appoint the replacements of Justices John Paul Stevens and Ruth Bader Ginsburg to the Supreme Court. It is critical that President Obama strongly consider a Latina/o to the Supreme Court for the very reasons that President Lyndon Johnson selected Justice Thurgood Marshall because it is the right thing to do, the right time to do it, and the right place.

## The Value of Diversity on Supreme Court

The federal judiciary was never intended to be a representative body. Yet, given the power and scope of its activities, there is growing recognition of the need for this body to in fact be representative of a cross section of the U.S. President Lyndon Johnson first raised the question of a representative Supreme Court when he nominated Thurgood Marshall, the first African-American to be appointed to the Court. The issue arose again two decades later when President George Bush nominated Clarence Thomas, the second African-American to be appointed to the Court. Stakes were high in both nominations.

Why is diversity on the bench important? The federal bench is charged with the duty to interpret the law and, at times, make the law where the Constitution or a given statute is silent. Thus, since federal judges look at and make decisions about issues that affect *all* Americans, they should look like and represent *all* Americans. Furthermore, as Onwuachi-Willig points out: Judges who are appointed to the federal bench are expected to be fair, in other words, to be a completely neutral arbiter.<sup>15</sup> Yet, the reality is that judges are human and they have their own biases, prejudices, or interests that prevents them from being completely neutral and fair.<sup>16</sup> Diversity matters.

But where, why, and how does it matter? According to studies not only of diversity in the judiciary, but also multi-culturalism in other facets of civic, political, and economic life, an individual’s life and professional experience will affect:

- How one confronts various problems that come before them.
- How one approaches and perceives the issues in a case.
- The language one uses to describe situations, people, and issues.

Diversity matters, although diversity alone does not ensure that there will be a representative voice on the bench. The extent to which an individual identifies

with his/her community and understands and has reflected upon that historical experience makes a significant difference as to whether the appointed judge will be a representative voice.

### The Value of Diversity: The African-American Perspective – Thurgood Marshall

In 1967, President Johnson made a conscious decision to make the Supreme Court a more representative judicial body when he nominated Thurgood Marshall, a nomination that came toward the end of and represented a significant victory for the movement for civil rights.<sup>17</sup> In 1967, Justice Marshall became the first African-American and the one-hundredth American to serve on the highest Court of the United States.<sup>18</sup>

Justice Marshall brought to the Court his distinctive experience of growing up in a time where racial discrimination and inequality were the norm. Marshall also brought his vast experience as a civil rights litigator. In 1935, as a recent Howard law graduate, Marshall joined the leading African-American civil rights legal organization, the NAACP.<sup>19</sup> In 1938 he was appointed as chief counsel, where he served for twenty-three years.<sup>20</sup> During his time at the NAACP, Marshall appeared before the Supreme Court in thirty-two cases, he prevailed in twenty-seven of these.<sup>21</sup> The most notable case that Marshall argued before the Supreme Court was *Brown v. Board of Education* (1954). In *Brown*, Marshall served as counsel for the plaintiffs. Marshall successfully argued for the Court to overturn the segregation case of *Plessy v. Ferguson* (1896).<sup>22</sup> The Supreme Court in *Brown*, ruled that separate but equal education was unconstitutional.

During his years as a Supreme Court Justice, Thurgood Marshall made a conscious effort to bring the perspectives and lessons learned from his humble upbringing, his life experiences and his legal training to the bench. As a result, he had a tremendous impact on the Court,

its decisions, the African American community, and indeed the quality of life for all Americans.

First, during Marshall's term, the Court became more conservative resulting in Justice Marshall authoring an increase number of dissents<sup>23</sup> and becoming known as "The Great Dissenter."<sup>24</sup> In Justice Marshall's dissent in *Regents of the Univ. of California v. Bakke* (1978), Justice Marshall brought a special voice on behalf of African-Americans when he stated "[t]he 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>25</sup> Years later Justice Marshall noted in his dissent in *City of Richmond v. J.A. Croson* (1989) that "[t]he battle against pernicious racial discrimination or its effect is nowhere near won. I must dissent."<sup>26</sup> Even more memorable is Justice Marshall's last dissent in *Payne v. Tennessee* (1991) when he wrote "[p]ower, not reason, is the new currency of this Court's decision making" and warned that "[t]omorrow's victims may be minorities, women, or the indigent."<sup>27</sup>

Second, Marshall had a tremendous impact on his fellow Justices because when he came to the Supreme Court he brought with him a distinct experience that no other Justice had been able to bring. Justice White remembered Justice Marshall as being the one to bring "to the conference table years of experience in an area that was of vital importance to our work, experience that none 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."<sup>28</sup>

Marshall brought his years of experience with him to the Court and shared it with his fellow Justices reminding them of unpleasant historical facts and served as a moral conscious. Justice Brennan emphasized Justice Marshall uniqueness by stating that he added a special voice 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>29</sup>

Marshall was committed to his roots and did not forget them although he was serving as the first and only minority on the highest court of the United States. Justice Burger remembered Justice Marshall for his commitment to civil rights stating that he found "it difficult to identify a single individual in the legal profession who has done more to advance the cause of civil rights than Thurgood Marshall."<sup>30</sup> Justice Powell further remembered Justice Marshall's commitment stating that "Thurgood Marshall's record as an advocate for civil rights has no parallel."<sup>31</sup>

Finally, Marshall's appointment to the Supreme Court made an immediate and ever-lasting impact on the African-American community. Before Marshall's appointment, the Supreme Court had only been made up of white males who all had a middle or a middle to upper class upbringing. Marshall's appointment brought hope to the African-American community. The civil rights movement was dedicate to end the second-class treatment of African-Americans. The nomination and confirmation was a clear indicator that these times were beginning to change for African-Americans, specifically that African-Americans were now a core part of the United States. Although there was resistance to the nomination and confirmation of Justice Marshall, his position as a Justice on the Court represented a change of time for the African Americans that signified the beginning of equality in the federal judiciary.

## The Value of Diversity: Clarence Thomas

Diversity on the Supreme Court is important; however, diversity does not ensure a representative body that the respective community would like. A clear example is Justice Clarence Thomas. Thomas, like Marshall, had a humble upbringing. Yet, Thomas as a Supreme Court Justice does not seem to have made the Court a more representative body.

First, Thomas is known to have a distinctive conservative perspective; some may say that he is the most conservative Justice on the Supreme Court.<sup>32</sup> He voted with Justice Scalia, who is arguably the most conservative Justice on the Court, 79 percent during the 1991 term and 89 percent during the 1992-1993 terms.<sup>33</sup> This distinct conservative perspective is looked upon poorly by the African-American community because this perspective generally signifies the lack of willingness to change the old traditional ways.

Second, unlike Marshall, Thomas has chosen not to be the racial conscience of the Court and not to push the Court in its understanding of race relations.<sup>34</sup> However, when he does decide to speak from his racial perspective, it's a great impact.<sup>35</sup> Unfortunately, Justice Thomas rarely "speaks from the bench and declines to engage his colleagues in oral arguments."<sup>36</sup>

Third, Thomas's mere presence on the Supreme Court is a significant impact. However, Thomas's impact on the community has been significantly less than Marshall's because of his conscious decision to not be the voice for the African-American community on issues that affect them. He has made few friends within the African-American and civil rights communities because of his opposition to affirmative action programs.<sup>37</sup> In fact, in 1991 the NAACP opposed Justice Thomas's confirmation.<sup>38</sup> Justice Thomas's response to the comments from civil rights leaders is that all they do is "bitch, bitch, bitch, moan and moan, whine and wine."<sup>39</sup>

Despite the opposition, Justice Thomas sees himself as a voice for racial equality.<sup>40</sup> Justice Thomas stated: "[i]t pains me deeply — more deeply than any of you can imagine—to be perceived by so many members of my race as doing them harm . . . . All the sacrifice, all the long hours of preparation were to help, not to hurt . . . ."<sup>41</sup>

Diversity is key to having a representative judicial body but diversity does not automatically make the Court a representative body. The Judge must make the conscious decision to be the voice of his or her community in order for the Court to be a representative body.

## The Value of Diversity: The Latino Perspective

As it has been stated, the Latino community is currently the largest minority group and the United States and it is the fastest growing minority group. Accordingly, many of the most pressing social issues our nation faces are of tremendous consequence to the Latino community. Furthermore, it is likely that a number of issues that have a significant impact on the Latino community will be before the Court in the coming years. Thus, the stakes are high for the Latino community and the need to ensure that the perspective of the Latino community is represented on the Court is greater than ever before.

Appointing a Latina/o to the Supreme Court could have significant impact on the rule of law, the fellow Justices, and the Latino community. The impact on the Court could be significant so long as the individual represents the "voice" of the Latino population in her or his dialogue with the fellow Justices and in written opinions or dissents. It is important for the Latina/o Justice to be vocal and to educate her or his colleagues on issues that affect the Latino population if the presence on the Court is to ensure fairness and neutrality.

To understand how the appointment of a Latina/o Supreme Court Justice would

impact the rule of law, fellow justices and the Latino community, it is instructive to examine past cases. There are numerous examples of past Supreme Court decisions that have negatively affected the Latino community. In many of these decisions, had there been a sitting Justice to represent the "voice" of the Latino population, the outcome may have been different. Examples of such cases include the following:

- In *United States v. Brignoni-Ponce* (1975),<sup>42</sup> the court stated that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."<sup>43</sup> How might this case have turned out differently had a Latino Justice been on the bench? It is likely that a Latina/o Justice would be personally appalled at the Court's reliance on race and physical appearance in immigration stops and thus would dissent from the other Justices. A Latino Justice would be more likely to understand that there is no such thing as a single "Mexican appearance" and be able to educate his or her fellow justices about the diversity – of skin color, eye color, hair texture, height, and other traits – within the Mexican population and the broader Latino population. A Latina/o Justice could likely strongly repudiate the Court's reliance on stereotypical Mexican appearance and point out the problems of allowing Border Patrol officers the discretion to harass anyone who see fit to fall within their personal description of "Mexican appearance."
- In *Plyler v. Doe* (1982),<sup>44</sup> the court's decision was favorable to the Latino population. The Court held that it was unconstitutional to deny education to undocumented children. Although the Court's decision positively affects the Latino community, the Court's weekly conferences indicate that Justice Rehnquist referred to the immigrant children in *Plyer* as "wetbacks."<sup>45</sup> A Latina/o justice would have explained to Justice Rehnquist and the other Justices

the derogatory meaning behind such a demeaning term. The term “wetbacks” is commonly used among those with Anti-Latino sentiments. The term is demeaning and very insulting to the Latino population.

■ In *United States v. Flores Montana* (2004),<sup>46</sup> the Court rejected a Latino’s Fourth Amendment claim upholding a stop and search of a vehicle at the U.S.-Mexican border.<sup>47</sup> Justice Breyer in his concurring opinion stated that “[c]ustoms keeps track of the border searches its agents conduct, including the reasons for the searches . . . . This administrative process should help minimize that [these] searches might be undertaken in an abusive manner.”<sup>48</sup> A Latina/o Justice might have shed some new light and perspective to Justice Breyer’s assumption that abusive searches are unlikely. A Latina/o Justice could inform Justice Breyer and the other Justices that his assumption is incorrect and that in reality abuse at the U.S.-Mexican border is frequent and well documented.<sup>49</sup> These stories clearly indicate that border control law enforcement agents are hardly self-regulated and instead the searches are usually undertaken in an abusive manner.

Furthermore, a Latina/o Justice will likely have an impact on Immigration and language regulation cases since these two issues have a significantly more impact on the Latino population in a way that no other racial group has encountered.<sup>50</sup> Other issues that may confront a Latina/o Justice differently than the other Justices are issues relating to bilingual education, the rights of United States Citizens living in Puerto Rico, and racial profiling associated with criminal law and immigration law.<sup>51</sup>

## Conclusion

The appointment of a Latina/o to the Supreme Court would signify a major triumph for the Latino community. It would symbolize the movement toward full membership and could eliminate the second-class treatment. The appointment could bring the Latino perspective and voice to the table at the highest level in our Judiciary Branch. The appointment could make the invisible and unwanted become visible and wanted. No more will Latina/os be considered “not worthy” of such a position.

The appointment could better the judicial decision-making and improve public perception. A Latina/o Justice could be expected to approach the law with a distinctive voice and perspective. Moreover, having a diverse Supreme Court could help improve the decision-making process by bringing in a wide-range of views from various backgrounds. As Justice Powell observed, “a member of a previously excluded group can bring insights to the Court that the rest of its members lack.”<sup>52</sup>

As this paper suggest, like Justices Marshall and Thomas, a Latina/o Justice would bring a new voice to the United States Supreme Court. However, it is important to note that in the past Justices from a particular race did not always yield to be the voice for that race. The two African-Americans that have held a position on the Supreme Court had similar backgrounds pre-Supreme Court but once on the Supreme Court their opinions reflected opposite judicial philosophies.

## Endnotes

- 1 President Lyndon Johnson remarks when he appointed Thurgood Marshall to the Supreme Court.
- 2 Kevin R. Johnson, *On the Appointment of a Latino/a to the Supreme Court*, 5 Harv. Latino L. Rev. 1 (2002).
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- 6 Tamara E. Holmes, *Blacks underrepresented in legal field: ABA report shows stark contrasts in the career tracks of lawyers* (2005).
- 7 Maria Coyle, *Justices Diversity Pool too Shallow? White Male High Court is Longer*, 28 Nat’l L.J. 1 (2005).
- 8 *Id.*
- 9 *Id.*, see also Michael J. Gerhardt, *The Federal Appointments Process* 131 (2000).
- 10 *Id.*
- 11 *Id.*
- 12 *Id.*, see also Rorie L. Spill & Kathleen A. Bratton, *Clinton and Diversification of the Federal Judiciary*, 84 *Judicature* 256, 258-61 (2002).
- 13 An Alliance for Justice Report, *Judicial Selection During the Bush Administration*, at 9 (Oct. 2008).
- 14 *Id.*
- 15 Angela Onwuachi-Wilig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, at 1252, (2006).
- 16 *Id.*
- 17 *Id.* at 366.
- 18 *Id.*
- 19 *Id.* at 355.
- 20 *Id.*
- 21 *Id.* at 356.
- 22 *Brown v. Board of Education*, 347 U.S. 483 (1954).
- 23 See Janet Cooper Alexander, *A Tribute to Thurgood Marshall: TM*, 44 *Stan. L. Rev.* 1231, 1235 (1992).
- 24 Kathleen M. Sullivan, Marshall, *The Great Dissenter*, N.Y. Times, June 29, 1991, at A23.
- 25 *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 395 (1978) (Marshall J., concurring in part, dissenting in part).
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- 29 William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 Harv. L. Rev. 23, 23, (1991).
- 30 Warren E. Burger, *Tribute to the Honorable Thurgood Marshall*, 44 Stan. L. Rev. 1227, 1228 (1992).
- 31 Lewis F. Powell, Jr., *Tribute to Justice Thurgood Marshall*, 44 Stan. L. Rev. 1229, 1229 (1992).
- 32 Hanah L. Weiner, *The Next "Great Dissenter"? How Clarence Thomas is Using the Words and Principles of John Marshall Harlan to Craft a New Era of Civil Rights*, 58 Duke K.J. 139, (2008).
- 33 Julian Abele Cook, Jr., *Thurgood Marshall and Clarence Thomas: A Glance at Their Philosophies* (1994); See also Christopher E. Smith & Scott Patrick Johnson, *The First-Term Performance of Justice Clarence Thomas, Judicature, December-January 1993*, at 174,175 (citing *The Justices Scold Thomas*," Time, March 9, 1992, at 31).
- 34 Sylvia R. Lazos Vargos, *Does a Diverse Judiciary Attain a Rule of law that is inclusive?: What Grutter v. Bollinger has to Say about Diversity on the Bench*, 10 Mich. J. Race & L. 101, 146 (2004).
- 35 See *Virginia v. Black*, 538 U.S. 343 (2003)
- 36 10 Mich. J. Race & L. 101, 148.
- 37 58 Duke L.J. 129, 140.
- 38 Kevin Merida & Michael A. Fletcher, *Supreme Discomfort* at 176 (2007).
- 39 Clarence Thomas, *My Grandfather's Son* at 183 (2007).
- 40 Merida & Fetcher, supra, at 176.
- 41 Justice Clarence Thomas, *Address to the National Bar Association*, Memphis, Tennessee (July 29, 1998).
- 42 422 U.S. 873 (1975).
- 43 Id. at 886-87.
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