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REFLECTING ON THE FOUNDATIONS OF LATINX CIVIL RIGHTS: LOOKING BACK AND LOOKING FORWARD

by: Rachel F. Moran*

I am grateful to Dean Kevin Johnson for his thoughtful and generous review of my scholarship on Latinx civil rights.¹ Dean Johnson has been tremendously influential in the field, and he has led by example through his long tenure as dean at UC Davis School of Law.² So his insightful assessment of my contributions is especially meaningful. Like all good retrospectives, Dean Johnson's got me thinking—not only about the past but also the future. So much has changed since I began writing about Latinx issues at the beginning of my career, and yet much remains the same. Because demography is often presumed to be destiny for the Latinx community, I would like to share a few thoughts about how this population has evolved in recent decades and how those changes pose new challenges and opportunities. It seems especially important to recognize the transformations because the law and policy landscape for Latinx remains relatively stagnant and not particularly well-suited to adapt to evolving circumstances.³

I. THE CHANGING LATINX POPULATION

When I began writing about the Latinx community in the mid-1980s, it looked very different than it does today. In 1980, 14.6 million people identified as Latinx.⁴ That number grew to 22.4 million in 1990 and 35.3 million in 2000.⁵ By 2000, the Latinx population accounted

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* Professor of Law, Texas A&M University School of Law. I want to thank Dean Johnson for his willingness to do a retrospective on my work, and I want to express my appreciation to the Hagler Institute for Advanced Studies and the Texas A&M University School of Law for their generous support of my Hagler Fellowship.

1. Kevin R. Johnson, *Professor Rachel Moran: A Foundational Latina/o Civil Rights Scholar*, 10 TEXAS A&M L. REV. 749 (2023).

2. For an impressive list of Dean Johnson's publications, see <https://law.ucdavis.edu/people/kevin-johnson> [<https://perma.cc/YN27-Z688>]. He has served as dean since 2008. *Id.*

3. See Thomas A. Saenz, *One Advocate's Road Map to a Civil Rights Law for the Next Half Century: Lessons from the Latino Civil Rights Experience*, 38 NYU REV. L. & SOC. CHANGE 607, 621–22 (2014) (noting that “[m]any of our nation's critical civil rights laws are hitting their 50-year mark,” and calling for “a broader conception of civil rights law” that puts the Latinx experience at the forefront in rethinking protections and strategies).

4. Bureau of the Census, Economics and Statistics Administration, U.S. Department of Commerce, *We the American . . . Hispanics 2* (September 1993), <https://www.census.gov/history/pdf/we-the-americans-hispanics-092020.pdf> [<https://perma.cc/W5FB-HXKY>] [hereinafter *We the American . . . Hispanics*].

5. *Id.*; U.S. Census Bureau, Economics and Statistics Administration, U.S. Department of Commerce, *The Hispanic Population: Census 2000 Brief 1* (May 2001)

for 12.5% of all Americans, and a few years later, the Census Bureau announced that Latinx had surpassed Blacks as the largest racial or ethnic group in the country.⁶ The pace of growth was astonishing, reflecting the combined effect of substantial immigration rates and comparatively high birth rates.⁷ The size of the Latinx population has continued to increase in the intervening decades. In 2022, the Pew Research Center reported that the number of Latinx in the United States surpassed 62 million, up from 50.5 million in 2010, and represented 19% of America's residents.⁸

In fact, Latinx generated more than half of the population growth in the United States from 2010 to 2021.⁹ During that time, the increase was driven primarily by birth rates, rather than immigration, a reversal of the pattern observed in the 1980s and 1990s.¹⁰ By 2021, Latinx had cemented their position as the single largest racial or ethnic minority group, now over one-third larger than the Black population, which stood at 14%.¹¹ Latinx dominance among racial and ethnic minority groups will become even more pronounced in the coming years. According to U.S. Census projections, Latinx will make up 24.6% of the American population by 2045, nearly twice the proportion of Blacks at 13.1%.¹² At the same time, non-Hispanic Whites will become a minority at 49.7%.¹³

With this growth has come heterogeneity in the Latinx population. In 1990, individuals of Mexican origin accounted for 61% of all Latinx, while Puerto Ricans made up 12%, Cubans 5%, and other groups 17%.¹⁴ By 2000, the Mexican-origin share had dropped to 58.5%, Puerto Rican to 9.6%, and Cuban to 3.5%, while other Latinx

<https://www2.census.gov/library/publications/decennial/2000/briefs/c2kbr01-03.pdf> [<https://perma.cc/D6HY-YZCK>] [hereinafter *The Hispanic Population: Census 2000 Brief*].

6. *The Hispanic Population: Census 2000 Brief*, *supra* note 5, at 1; Lynette Clemetson, *Hispanics Now Largest Minority, Census Shows*, N.Y. TIMES (Jan. 22, 2003), <https://www.nytimes.com/2003/01/22/us/hispanics-now-largest-minority-census-shows.html> [<https://perma.cc/KB28-SN7G>].

7. *We the American . . . Hispanics*, *supra* note 4, at 2.

8. Jens Manuel Krogstad et al., *Key Facts About U.S. Latinos for National Hispanic Heritage Month*, PEW RSCH. CTR. (Sept. 23, 2022), <https://www.pewresearch.org/fact-tank/2022/09/23/key-facts-about-u-s-latinos-for-national-hispanic-heritage-month/> [<https://perma.cc/GG7A-EUKW>].

9. *Id.*

10. *Id.*

11. *Id.*; Christine Tamir et al., *Facts About the U.S. Black Population*, PEW RSCH. CTR. (Mar. 25, 2021), <https://www.pewresearch.org/social-trends/fact-sheet/facts-about-the-us-black-population/> [<https://perma.cc/7XNW-UE5Y>].

12. William H. Frey, *The US Will Become 'Minority White' in 2045, Census Projects*, BROOKINGS (Mar. 14, 2018), <https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/> [<https://perma.cc/3RE2-8D9G>].

13. *Id.*

14. *We the American . . . Hispanics*, *supra* note 4, at 4.

grew to 28.4%.¹⁵ Approximately two decades later, these statistics have remained largely stable.¹⁶ The national origin groups experiencing the most rapid growth between 2010 and 2021 were Venezuelans, Dominicans, Hondurans, and Guatemalans.¹⁷ This range of national origin groups prompted some commentators to conclude that Latinx is a pan-ethnic identity largely born of the desire for political recognition, especially in the civil rights arena, rather than of any cohesive sense of community.¹⁸

Since the 1980s, the Latinx population has been relatively youthful. In 1980, 40% of Latinx were under the age of 18, compared to 26% of non-Hispanic Whites.¹⁹ By 1990, nearly 70% of the Latinx population was under 35, compared to about 50% of the non-Hispanic population. Only 5% were over 65 compared to 13% of the non-Hispanic population, and almost 40% were under the age of 20 compared to just 28% of the non-Hispanic population.²⁰ Although the median age of Latinx has been rising since the 1980s, they remain younger on average than the rest of the population.²¹ In 2014, for example, the proportion of Latinx under 18 was 32% compared to 19% for non-Hispanic Whites, 20% for Asians, and 26% for Blacks.²² As a result, the median age for Latinx that year was just 28, while the median age for non-Hispanic Whites was 43, Asians was 36, and Blacks was 33.²³ In contrast to older generations of Latinx, millennials are more likely to be born in the United States, to speak English, and to be of Mexican origin.²⁴ Given their citizenship status and language fluency, these youth should be well-positioned to participate fully in political life as they reach voting age.²⁵

Despite rapid growth, the Latinx population remained regionally concentrated during the 1980s and 1990s. In 1990, for instance, nearly

15. *The Hispanic Population: Census 2000 Brief*, *supra* note 5, at 2 fig. 2.

16. The Mexican-origin population stood at 59.5%, the Puerto Rican population at 9.3%, the Cuban population at 3.8%, and other Latinx groups accounting for the rest. Krogstad et al., *supra* note 8.

17. *Id.*

18. See G. CRISTINA MORA, *MAKING HISPANICS: HOW ACTIVISTS, BUREAUCRATS AND MEDIA CONSTRUCTED A NEW AMERICAN* 6, 58–67 (paperback ed. 2014) (describing ongoing differences among Latinx and how activists sought to overcome them to create a pan-ethnic category on the U.S. Census and achieve greater influence at the federal level).

19. Eileen Patten, *The Nation's Latino Population Is Defined by Its Youth*, PEW RSCH. CTR. (Apr. 20, 2016), <https://www.pewresearch.org/hispanic/2016/04/20/the-nations-latino-population-is-defined-by-its-youth/> [<https://perma.cc/Y3AT-6JH9>].

20. *We the American* . . . *Hispanics*, *supra* note 4, at 4.

21. Patten, *supra* note 19.

22. *Id.*

23. *Id.*

24. *Id.*

25. See, e.g., Nicole Acevedo, *Young Latinos Mobilized, Voted, and Were Pivotal in 2020. Organizers Want to Keep It Going*, NBC NEWS (Nov. 27, 2020), <https://www.nbcnews.com/news/latino/young-latinos-mobilized-voted-were-pivotal-2020-organizers-want-keep-n1246853> [<https://perma.cc/B89F-XAMT>].

90% of Latinx resided in just 10 states.²⁶ The four with the highest percentage could be found along the nation's southern border: Arizona, California, New Mexico, and Texas.²⁷ In recent decades, Latinx have been moving to states with small Hispanic-origin populations.²⁸ Even in 2020, however, just nine states accounted for 73% of all Latinx residing in the United States.²⁹ Reflecting that ongoing regional concentration, Latinx became the largest racial or ethnic group in California in 2014 and in Texas in 2021.³⁰ In addition, they became the majority population in 101 of 3140 counties in the United States; of these, 87 were located in border states like Arizona, California, New Mexico, and Texas.³¹

As this brief overview suggests, the Latinx population has evolved significantly since I began writing about these issues in the mid-1980s. The sheer size and continued growth of this constituency suggests that it will wield increasing influence in the coming years. Beyond the numbers, however, there are other important factors to consider. Some commentators worry that the Latinx population is wrongly perceived as monolithic and primarily concerned with immigration. As a result, other pressing issues are left unaddressed.³² Others predict that the heterogeneity of Latinx will make it difficult to develop a coherent agenda based on a sense of shared fate.³³ Still others believe that the Latinx population continues to be viewed as regional and thus is given short shrift at the national level.³⁴ Meanwhile, some advocates see regional concentration as a virtue because it gives Latinx unprecedented opportunities to shape state and local policies that affect their everyday lives.³⁵ Whatever the case, one barrier to full participation persists. Despite a substantial increase in the number of Latinx running for political office, they remain severely underrepresented at every level of government. Latinx hold fewer than 2% of federal and local

26. *We the American . . . Hispanics*, *supra* note 4, at 3.

27. *Id.*

28. Jeffrey S. Passel et al., *U.S. Hispanic Population Continued Its Geographic Spread in the 2010s*, PEW RSCH. CTR. (Feb. 3, 2022), <https://www.pewresearch.org/fact-tank/2022/02/03/u-s-hispanic-population-continued-its-geographic-spread-in-the-2010s/> [<https://perma.cc/LK75-C4QU>].

29. *Id.*

30. Krogstad et al., *supra* note 8.

31. Patten, *supra* note 19.

32. Albert Morales et al., *Latino Political Attitudes: Myths and Misconceptions*, 57 SOCIETY 693, 695–96 (2020).

33. Claudine Gay et al., *Americans' Belief in Linked Fate: Does the Measure Capture the Concept?*, 1 J. RACE, ETHNICITY, & POL. 117, 122 (2016).

34. Morales et al., *supra* note 32, at 693–94.

35. See Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY J. (Spring 2012), <https://democracyjournal.org/magazine/24/a-new-progressive-federalism/> [<https://perma.cc/UU8D-RJ8E>].

elected positions, well below their nearly 20% share of the population.³⁶

II. POLICY CHALLENGES FOR THE EVOLVING LATINX POPULATION

The concentration of Latinx in a relatively small number of states has had consequences for federal policy. Because Latinx were perceived as a regional population, national policymakers often failed to grasp their unique concerns. Instead, Congress, the Supreme Court, and federal agencies expanded an already well-established non-discrimination framework—one originally designed to redress harms to the Black community—to include Latinx.³⁷ When this framework did not fit, Latinx often found that their needs remained unaddressed.³⁸ In his commentary, Dean Johnson notes several areas in which I drew attention to these policy lapses. One was bilingual education, which was linked to linguistic and cultural differences, often hallmarks of recent immigration. As I argued, the law treated language as a proxy for race and ethnicity. That approach incorporated these issues into an existing civil rights paradigm prohibiting individual discrimination, rather than considering how best to foster immigrant integration by overcoming structural barriers to full participation.³⁹ Under an anti-discrimination paradigm, the goal of litigation became ensuring minimum, if not equal, access to the curriculum through the acquisition of English.⁴⁰ That assimilationist approach clashed with a pluralist vision that saw bilingual programs as ways to affirm children's identities and preserve native-language proficiency.⁴¹ At times, demands for linguistic and cultural preservation came into direct conflict with the push to

36. Yacob Reyes, *Latinos Are a Flourishing Force on Ballots*, AXIOS (Feb. 3, 2022), <https://www.axios.com/2022/02/03/latinos-in-office-election-democrats> [<https://perma.cc/24S5-VJ26>]; Dianna M. Nández, *Latinos Make Up Only 1% of All Local and Federal Elected Officials, and That's a Big Problem*, USA TODAY (Jan. 6, 2020), <https://www.usatoday.com/in-depth/news/nation/2020/01/06/aoc-julian-castro-under-represented-hispanics-aim-change-politics/4253316002/> [<https://perma.cc/MHF7-4N78>].

37. LINDA MARTÍN ALCOFF, *VISIBLE IDENTITIES: RACE, GENDER, AND THE SELF* 247, 254–55 (2006); Rachel F. Moran, *What If Latinos Really Mattered in the Policy Debate?*, 85 CAL. L. REV. 1315, 1316–17 (1997).

38. ALCOFF, *supra* note 37, at 254–55.

39. Anuscheh Farahat, *Discrimination Inside: Non-Discrimination as a Tool of Migrant Integration*, 115 AM. J. INT'L L. 350, 351 (2021) (arguing that non-discrimination norms are often construed narrowly but could be given a broader interpretation that deals with structural forms of immigrant exclusion); Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 1267–68 (1988).

40. Rachel F. Moran, *Equal Liberties and English Language Learners: The Special Case of Structured Immersion Initiatives*, 54 HOWARD L.J. 397, 409–11 (2011).

41. See Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321, 346–50 (1987) (describing how bilingual education advocates challenged a status hierarchy that privileged English over other languages).

desegregate public schools.⁴² In Denver, for instance, advocates contended that English language learners needed to remain in neighborhood schools to maintain a critical mass of students for robust programs of bilingual and bicultural instruction.⁴³ A federal court of appeals readily dispensed with these arguments, making plain that bilingual education was subordinate to the civil rights imperative of desegregation.⁴⁴

In the end, tensions over bilingual education policy were resolved by conferring wide discretion on state and local educators.⁴⁵ They would determine what method of instruction worked best for English language learners, and the only constraint would be a federal norm of non-discrimination.⁴⁶ That discretion was so broad that at times it was difficult to challenge state measures, even when they appeared to reflect a backlash against bilingual education. Consider, for instance, the enactment of Proposition 227 in California in 1998.⁴⁷ This popular referendum required that schools use only sheltered immersion programs to educate English language learners.⁴⁸ The programs minimized use of a child's native language and were designed to facilitate the acquisition of English as rapidly as possible. Those who supported bilingual programs questioned a one-size-fits-all approach, and they alleged that the initiative violated federal civil rights laws.⁴⁹ The legal challenge failed because there was at least some expert evidence that sheltered immersion was effective.⁵⁰ For that reason, federal judges declined to find that the measure was discriminatory on its face.⁵¹ The mandate for structured immersion therefore remained in

42. Rachel F. Moran, *Untoward Consequences: The Ironic Legacy of Keyes v. School District No. 1*, 90 DENV. U. L. REV. 1209, 1214–15 (2013) [hereinafter *Untoward Consequences*]; Rachel F. Moran, *Courts and the Construction of Racial and Ethnic Identity: Public Law Litigation in the Denver Schools*, in LEGAL CULTURE AND THE LEGAL PROFESSION 153, 155–56, 158–73 (Lawrence N. Friedman & Harry N. Scheiber eds., 1996) [hereinafter *Courts and the Construction of Racial and Ethnic Identity*].

43. *Untoward Consequences*, *supra* note 42, at 1214–15; *Courts and the Construction of Racial and Ethnic Identity*, *supra* note 42, at 158–60.

44. *Keyes v. School District No. 1*, 521 F.2d 465, 480 (10th Cir. 1975) (“bilingual education . . . is not a substitute for desegregation”).

45. Moran, *supra* note 39, at 1302–14.

46. Equal Educational Opportunities Act (EEOA) of 1974, 20 U.S.C. § 1703(f) (requiring state and local educators to take “appropriate action” to meet the needs of English language learners); *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981) (finding that the EEOA did not prescribe any specific method of instruction).

47. CAL. EDUC. CODE §§ 300, 305–06, 310–11, 320, 335 (1998) (repealed 2016).

48. Elizabeth T. Bangs, *Who Should Decide What Is Best for California's LEP Students? Proposition 227, Structural Equal Protection, and Local Decision-Making Power*, 11 LA RAZA L.J. 113, 120–21 (1999).

49. *Id.* at 120–21, 127–66.

50. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1015 (N.D. Cal. 1998), *aff'd sub nom. Valeria v. Davis*, 307 F.3d 1036, 1042 (9th Cir. 2002).

51. *Id.* at 1014–15.

place until 2016, when voters overturned it by passing yet another popular referendum.⁵²

Experiences like these made clear that Latinx would have to rely on state and local politics to get their needs addressed. That message was reinforced in decisions like *San Antonio Independent School District v. Rodriguez*.⁵³ There, Latinx plaintiffs challenged Texas's system of funding public schools through local property taxes. The lawsuit claimed that this approach to school finance produced impermissible disparities based on a school district's wealth and denied students a fundamental right to equal education.⁵⁴ Ultimately, the United States Supreme Court rebuffed the arguments, deferring to state and local judgments about how to structure taxes and fund public education.⁵⁵ In applying a lenient standard of review, the majority made clear that wealth was not a suspect classification and equal education was not a fundamental right.⁵⁶ Although a facially neutral system of property taxes generated stark disparities based on race and wealth, the Court held that disadvantaged families had to rectify the problem through the state and local political process.⁵⁷ By repeatedly relegating Latinx concerns to the realm of politics, the Court signaled that the traditional civil rights paradigm would be of limited utility in seeking reforms. Today, a norm of non-discrimination typically offers constitutional protection only against intentional discrimination. This approach leaves facially neutral laws that adversely affect vulnerable racial and ethnic groups beyond equal protection's reach if the justices fail to find illicit motivation.⁵⁸

Relying on the political process has posed serious difficulties for the Latinx community. Precisely because the population is relatively youthful and has a high proportion of foreign-born individuals, there is often a significant difference between the total number of Latinx and those eligible to vote. Based on 2013 data, 70.3% of the U.S. population were voting-age citizens, but there were substantial disparities by race and ethnicity.⁵⁹ For Latinx, the proportion of voting-age citi-

52. CAL. EDUC. CODE §§ 300, 305–06, 310, 320, 335 (2016); Ashley Hopkinson, *A New Era for Bilingual Education: Explaining California's Proposition 58*, ED SOURCE (Jan. 6, 2017) <https://edsources.org/2017/a-new-era-for-bilingual-education-explaining-californias-proposition-58/574852> [<https://perma.cc/TNV9-9KSS5>].

53. 411 U.S. 1 (1973).

54. *Id.* at 11–16.

55. *Id.* at 37–44.

56. *Id.* at 28–29, 35–37.

57. *Id.* at 58–59. After the Supreme Court's decision, litigants pushed for reform through the state legislative process and the state judicial process. For a thorough account of this long-running dispute, see J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 627–39, 646–57, 666–70, 672–701 (1999).

58. Reva B. Siegel, *Equality Divided*, 127 HARV. L. REV. 1, 11–23 (2013).

59. Brief of the Leadership Conf. on Civ. & Hum. Rts. et al as Amici Curiae in Support of Petitioners at Appendix 1c–4c, *Evenwel v. Abbott*, 578 U.S. 54 (2015) (No. 14-940).

zens was just 45.2% compared to 79.1% for non-Hispanic Whites, 70.2% for Blacks, and 54.5% for Asians.⁶⁰ Because the civil rights paradigm has focused on intentional discrimination against individuals, it has not fully engaged with the unique barriers to formal political participation that heavily immigrant populations face. Nor have there been sustained efforts to consider how other forms of civic engagement might close the gap by giving these communities greater voice in decisions that affect them.

As youthful Latinx, who are overwhelmingly citizens, turn 18 and become eligible to vote, these barriers may gradually decline.⁶¹ However, much will depend on future patterns of immigration, which could once again swell the ranks of foreign-born Latinx ineligible to cast a ballot. Although immigration has become less important as a factor in Latinx population growth in recent years, there are reasons to doubt that this pattern will remain stable. Climate change is likely to trigger significant global migration as people from Latin America and the Caribbean flee the prospect of sea-level rise, extreme weather, drought, famine, and resulting social unrest.⁶² A White House report has identified Central America as a region particularly at risk of displacement, and officials at U.S. Customs and Border Protection have been developing “early-warning systems” to monitor climate change impacts by relying on predictive analytics.⁶³ Already, these dynamics have prompted concerns about new pressures on the southern border of the United States as migrant flows increase.⁶⁴ Bur-

60. *Id.*

61. Anusha Natarajan & Carolyne Im, *Key Facts About Hispanic Eligible Voters in 2022*, PEW RSCH. CTR. (Oct. 12, 2022), <https://www.pewresearch.org/fact-tank/2022/10/12/key-facts-about-hispanic-eligible-voters-in-2022/> [<https://perma.cc/J26X-URA>] (describing the steady increase in the percentage of eligible voters who are Latinx and noting that Latinx voters tend to be younger than the overall electorate); Shereen Marisol Meraji et al., *The Latinx Vote Comes of Age*, NPR (Oct. 28, 2020), <https://www.npr.org/2020/10/22/926678395/the-latinx-vote-comes-of-age> [<https://perma.cc/QUF6-6BWK>] (noting that the Census Bureau reported that “a Latinx person turns 18 and becomes eligible to vote” every 30 seconds).

62. Raoul Kaenzig & Etienne Piguet, *Migration and Climate Change in Latin America and the Caribbean*, in 2 PEOPLE ON THE MOVE IN A CHANGING CLIMATE: THE REGIONAL IMPACT OF ENVIRONMENTAL CHANGE ON MIGRATION 155 (Etienne Piguet & Frank Kackzo eds., 2014), https://www.academia.edu/5083714/Migration_and_Climate_Change_in_Latin_America_and_the_Caribbean.

63. THE WHITE HOUSE, REPORT ON THE IMPACT OF CLIMATE CHANGE ON MIGRATION 11, 14–15 (2021).

64. Hannah Miao, *Climate Change Is a Major Factor Behind Increased Migration at U.S. Southern Border*, CNBC (Apr. 18, 2021, 2:15 PM), <https://www.cnbc.com/2021/04/18/us-mexico-border-climate-change-factor-behind-increased-migration.html> [<https://perma.cc/8TM5-YL4Y>]. For scholarly analyses of these coming challenges, see Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 472–74 (2018) (describing the current limits of migration law and the need to move beyond a crisis rhetoric to develop a paradigm that addresses the sustained challenges of displacement due to climate change); Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609, 619–22, 644–47 (2017) (describing how crisis rhetoric has been used to mobilize both

geoning migration due to climate change could complicate the trajectory of Latinx political inclusion if the influxes once again trigger anxiety, fear, and backlash.⁶⁵ A civil rights paradigm seems unlikely to reach these global developments, and predictions that barriers to the political process will cure themselves as citizen-youth turn 18 could prove unduly optimistic.

For Latinx, there is another major shortcoming associated with relying on a system of state and local discretion cabined by a federal norm of non-discrimination. In the area of immigration, Congress has plenary power unchecked by traditional civil rights laws.⁶⁶ The federal courts are highly deferential to Congress in this realm, so issues of immigration law and policy become matters of pure politics at the national level.⁶⁷ Latinx, despite their growing numbers, have yet to exercise significant political clout in the federal arena, so they have not been able to lobby successfully for comprehensive immigration reform.⁶⁸ At some point, substantial population growth coupled with dispersion across the country may change that.⁶⁹ For now, though, Congress has consistently failed to deal decisively with a growing undocumented population. For decades, lawmakers have declined to provide undocumented residents, even long-term ones, with a path to legal status. Instead, policymakers adopted punitive legislation that denies the undocumented (and sometimes even permanent residents) access to federal benefits like food stamps, health care, and Supplemental Security Income.⁷⁰ When the executive branch offered youthful immigrants temporary relief from the threat of deportation as well

immigration advocates and opponents and how existing legal regimes are ill-equipped to deal with the new realities of global migration).

65. See, e.g., Lindsey R. Ross, *Climate Change and Immigration: Warnings for America's Southern Border*, AM. SEC. PROJECT 4–7 (2010) (describing how increased migration flows will place pressure on border regions, strain law enforcement resources, and leave the United States vulnerable to other security threats).

66. Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 378–81 (2004) (describing how the plenary power doctrine has insulated immigration law from constitutional challenges and assessing some of the uncertainties surrounding the reach of the doctrine).

67. *Id.* at 378–86 (describing judicial deference to congressional political power over immigration law).

68. MICHAEL RODRIGUEZ-MUNIZ, *FIGURES OF THE FUTURE: LATINO CIVIL RIGHTS AND THE POLITICS OF DEMOGRAPHIC CHANGE* 163–70 (2021) (describing setbacks for Latinx advocates after the 2012 election).

69. *Id.* at 204 (noting that “[f]orty years later, advocates remain largely convinced that numbers can and will make a positive difference.”); Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 UC DAVIS L. REV. 343, 358–61, 372–78 (2018) (describing longstanding inaction on immigration reform and calling on Congress to enact appropriate legislation).

70. Kevin R. Johnson, *Proposition 187 and Its Political Aftermath: Lessons for U.S. Immigration Politics After Trump*, 53 UC DAVIS L. REV. 1859, 1878 (2020); Angelica Chazaro, *Beyond Respectability: Dismantling the Harms of “Illegality”*, 52 HARV. J. ON LEGIS. 355, 356, 368–69 (2015).

as permission to work in the formal economy, states filed suit, alleging that federal agencies had overstepped their bounds.⁷¹

Meanwhile, states and localities have enacted restrictive policies designed to exclude the undocumented from work, housing, government benefits, and even the public schools.⁷² These officials are subject to non-discrimination principles, but courts have struck down many of the initiatives as unconstitutional incursions on the federal government's prerogative to regulate immigration.⁷³ As a result, anti-discrimination law has not played the prominent role that one might expect when state and local actions target an often overwhelmingly Latinx population. In the shadow of preemption, civil rights doctrine has been less able to evolve to address circumstances affecting immigrants. One notable exception is *Plyler v. Doe*,⁷⁴ in which the Court found that a Texas statute authorizing local officials to exclude undocumented children from the public schools violated the Equal Protection Clause. Yet, this case remains exceptional, suggesting that preemption is likely to persist as the dominant safeguard when curtailing state and local actions that harm the undocumented.⁷⁵

Even when the traditional civil rights paradigm is a primary source of protection, it has not always served the Latinx population well, as cases involving bilingual education and school finance demonstrate. In coming years, I anticipate ongoing pressure on a non-discrimination framework, most notably because of the destabilization of racial categories. As Dean Johnson noted, earlier in my career I wrote about interracial intimacy, exploring the likely implications for individual identities and racial categories.⁷⁶ At the time, I predicted that any assumption that racial categories are monolithic and mutually exclusive would break down.⁷⁷ In fact, that prediction proved accurate. On the

71. Rachel F. Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals*, 53 UC DAVIS L. REV. 1905, 1926–29 (2020) (describing litigation challenging the expansion of the Deferred Action for Childhood Arrivals program and the creation of the Deferred Action for Parents of Americans); Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87 (2016) (evaluating states' responses to DACA). A current challenge to DACA is pending before the federal courts. *Texas v. United States*, 549 F. Supp. 3d 572 (S.D. Tex. 2021), *aff'd in part and remanded*, 540 F.4th 498 (5th Cir. 2022).

72. For a description of the dynamics of state and local efforts to deter undocumented immigration through restrictionist laws, see Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2086–90 (2013).

73. *Id.* at 2088–89.

74. 457 U.S. 202 (1982).

75. MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 22–33, 102–03 (2012).

76. RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE 154–78 (2001).

77. *Id.* at 159–63.

2020 Census, over 33 million Americans, or about 10%, identified with two or more races, making this the fastest growing demographic in the country.⁷⁸ In fact, 25 million more people opted for multiple categories than had done so on the 2010 Census, and Latinx accounted for 17 million of the new respondents.⁷⁹ As sociologist Reginald Daniel has noted, these shifts will “require a remaking of the way people think about race and the racial boundaries in our communities.”⁸⁰ Already, demographer Richard Alba has been documenting unprecedented fluidity in racial self-identification.⁸¹

Immigration has altered the demographic makeup of diversity dramatically, straining a paradigm rooted almost exclusively in the Black experience. In the 1960s, as the civil rights movement began calling for race-conscious remedies for discrimination, that demographic focus made sense: The vast majority of the non-White population identified as Black.⁸² Today, however, immigration has effected a sea change in this profile: Latinx and Asian Americans now outnumber Blacks by almost two to one.⁸³ Because the civil rights paradigm expanded to protect both Latinx and Asian Americans from discrimination, federal courts have had to acknowledge their presence when contemplating concepts like diversity.

For instance, in *Parents Involved in Community Schools v. Seattle School District No. 1*, the United States Supreme Court struck down voluntary desegregation plans in Louisville, Kentucky and Seattle, Washington as a violation of the Equal Protection Clause.⁸⁴ Writing for the majority, Chief Justice John Roberts rejected the use of race-based student assignments to achieve diversity, in part because he questioned the school districts’ understanding of what a diverse student body should look like. He took school officials in Louisville to task for adopting a Black/other framework, and those in Seattle for using a White/non-White framework to set enrollment goals.⁸⁵ In

78. Silvia Foster-Frau et al., ‘We’re Talking About a Big, Powerful Phenomenon’: *Multiracial Americans Drive Change*, WASH. POST (Oct. 8, 2021), <https://www.washingtonpost.com/nation/2021/10/08/mixed-race-americans-increase-census/> [<https://perma.cc/UFC9-ZFK6>].

79. *Id.*

80. *Id.*

81. RICHARD ALBA, *THE GREAT DEMOGRAPHIC ILLUSION: MAJORITY, MINORITY, AND THE EXPANDING AMERICAN MAINSTREAM* 123–33 (2020).

82. Deborah Ramirez, *Multicultural Empowerment: It’s Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 958–59 (1995).

83. *Our Changing Population: United States*, USA FACTS (updated July 2022), https://usafacts.org/data/topics/people-society/population-and-demographics/our-changing-population?utm_source=Google&utm_medium=CPc&utm_campaign=ND-DemPop&gclid=CJwKCAiAyfybBhBKEiwAgtB7fjzK4L06vQynG3sPMgpJrErf4_BbbjbQJ_Qd7xwRdblzDOIPNtzRUBoCqxIQAvD_BwE [<https://perma.cc/XU3S-F35K>] (Blacks made up 12.6% of the American population, while Latinx made up 18.9% and Asian-Americans made up 5.9%).

84. 551 U.S. 701, 709–11 (2007).

85. *Id.* at 723.

chiding Seattle for its blinkered approach, Chief Justice Roberts observed:

[U]nder the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not. It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is “‘broadly diverse.’”⁸⁶

To bring the point home, Chief Justice Roberts cited Justice Sandra Day O’Connor’s observation that “[w]e are a Nation not of black and white alone, but one teeming with divergent communities knitted together with various traditions and carried forth, above all, by individuals.”⁸⁷

The destabilization of diversity’s meaning seems likely to continue, as evidenced by recent challenges to affirmative action in admissions programs at Harvard University and the University of North Carolina.⁸⁸ During oral argument, some justices went out of their way to raise questions about disparities in admission that were linked to diversity goals but adversely affected Asian-American applicants.⁸⁹ Writing for the majority, Chief Justice Roberts criticized the racial categories themselves as “imprecise” and “plainly overbroad.”⁹⁰ He described the Hispanic classification as “arbitrary or undefined,” and he questioned the coherence of the treatment of Asian and Middle Eastern groups.⁹¹ For him, these shortcomings rendered diversity an empty concept, much as had been true in the *Parents Involved* case. As Chief Justice Roberts explained, Harvard and North Carolina “would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter.”⁹² Strikingly, the Court’s analysis of diversity focused on heavily immigrant constituencies that have complicated traditional understandings of race. Because of the Latinx population’s size and hetero-

86. *Id.* at 724 (citing *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (O’Connor, J.)).

87. *Id.* at 723–24 (quoting *Metro Broadcasting v. FCC*, 497 U.S. 547, 610 (1990) (O’Connor, J., dissenting) (internal quotation marks omitted)).

88. *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019), *aff’d*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022); *Students for Fair Admissions v. Univ. of N.C.*, 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted* 142 S. Ct. 896 (2022).

89. Transcript of Oral Argument at 51, 53–60, 63–64, *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. ____ (2023) (No. 20-1199).

90. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 2023 U.S. LEXIS 2791 at *48 (June 29, 2023).

91. *Id.*

92. *Id.* at *49.

geneity, this community will lay a critical role in rethinking the meaning of diversity, and Latinx should be at the forefront in devising strategies that reimagine an agenda for equality in the courts and beyond.⁹³

III. CONCLUSION

As I hope this brief response to Dean Johnson's essay makes clear, despite years of work by many Latinx scholars, numerous challenges lie ahead. Unfortunately, failed immigration reform efforts have coincided with crimped civil rights protections. Because of these combined shortcomings, policymakers are ill-equipped to address emerging circumstances, including increased immigration from Latin America and a predictable rise in anti-Latinx sentiment. In coming decades, new generations of scholars and advocates must build on foundational work by proposing creative reforms that confront structural realities and advance individual opportunities. These innovations will be critical not just for Latinx but for a nation that finds itself in a transforming world.

93. Saenz, *supra* note 3, at 621–22.

