

## Preface

by FRANK H. WU\*

Good morning and welcome.<sup>1</sup> It's terrific to join you here for this important symposium on a key issue not just for UC Hastings but for this diverse nation of ours. One of the obligations in my role as Dean of this law school is from time to time to come and say a few words of welcome, and I enjoy that just as I do every other aspect of this job. This morning, though, I'd like to say a few words of substance—not just words of welcome but a few more meaningful thoughts on this controversy, on this case, on the principled stand that was taken by UC Hastings. I'd like to make three points.

First, I'd like to commend the leadership of this school. By that, I do not mean self-praise, because I came in only as this case had already been accepted by the U.S. Supreme Court. I mean praise for those who preceded me—Dean Mary Kay Kane, Acting Dean Leo Martinez, Elise Traynum as our general counsel, especially. I think it's important to highlight that because, while now we know the outcome, that we prevailed, such a result was uncertain going into this years ago at a time when, like every other public school, we faced the constraints of funding, of being a public actor, of being dependent upon the state, of the vicissitudes of politics. It is not easy to take a principled stand, and the deans who preceded me along with our board of directors did something that no other school until then had done. For remember this case does not stand alone: It was preceded by many other cases in which institutions abandoned their neutral principles, their policies of nondiscrimination, in order to accommodate in a way that we believed to be unfair, the views of a

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1. These opening remarks were given at *Hastings Constitutional Law Quarterly's* symposium, The Constitution on Campus: The Case of *CLS v. Martinez*, on October 1, 2010, at University of California, Hastings College of the Law.

group that wished to discriminate against members of those schools.<sup>2</sup> And so, the result was by no means certain. Expenses had to be paid.<sup>3</sup> Lawyers had to be hired. The stress of a lawsuit had to be endured. And for that, it is crucial that we acknowledge leadership. Not everyone would have done this and I'm honored to follow those who did.

Second, it's important for me now that I am in this role to emphasize this case isn't over. You may be surprised because the Supreme Court's ruling, albeit in a five to four ruling, appears to be definitive, resolving these issues and as strongly in our favor as we could possibly have hoped.<sup>4</sup> Nonetheless, this case is on remand before the Ninth Circuit.<sup>5</sup>

And it is not only that the case itself, in formal terms, is not over. This controversy is not over. The issue of equal rights for lesbians, gays, bisexuals, and transsexuals remains in the news today, as the recent suicide shows.<sup>6</sup> It is an issue that in my view is at the very forefront of civil rights, of human rights, today.<sup>7</sup> It is not only a legal issue. It pains me as a lawyer and as a law professor to acknowledge this, but law is not the only means by which we resolve our disputes.

Even if, even when, we prevail before the Ninth Circuit and the U.S. district court when the matter is finally done, when there is a judgment, when there is closure, nonetheless understand that society will continue this discussion, and leadership will be crucial once again.

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2. See, e.g., *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006); *Truth v. Kent Sch. Dist.*, 542 F.3d 634 (9th Cir. 2008).

3. The litigation costs of UC Hastings were covered by insurance.

4. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010).

5. *Id.* at 2995; Appellant's Motion to Remand for Further Proceedings in Accordance with the Supreme Court's Instructions, *Christian Legal Soc'y v. Wu*, No. 06-15956 (9th Cir. Jul. 30, 2010).

6. Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 30, 2010, at A1. An eighteen-year-old Rutgers University student, and accomplished violinist, jumped to his death from the George Washington Bridge after becoming the subject of homosexually charged ridicule and privacy invasion by his classmates. Two days before his death, he discovered that his dormitory mates surreptitiously recorded him engaging in intimacy with another man and transmitted the video image over internet social networks.

7. See ERIC MARCUS, *MAKING GAY HISTORY: THE HALF CENTURY FIGHT FOR LESBIAN AND GAY EQUAL RIGHTS* (2002); MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* (2010); ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1996); URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* (1996).

I refer you to the example set a decade ago when the University of Michigan took a principled stand on behalf of affirmative action.<sup>8</sup> Even though they prevailed in one of the two cases in front of the Supreme Court, the more important of those cases established that diversity was a “compelling state interest,” that it was a goal that was permissible, that could be pursued.<sup>9</sup> The voters of that state, my home state where I grew up, only a few years later passed a ballot measure that effectively undid the work that had been done over the course of a decade,<sup>10</sup> the proof that diversity made a difference in the classroom.<sup>11</sup> The legal victories that we accomplish can be undone, as has been true so often, as with *Brown v. Board of Education*<sup>12</sup> and the massive resistance that followed in the late 1950s and early 1960s as southern segregationists closed down entire school districts rather than allow black children to be educated alongside white children.<sup>13</sup> The theme of “the limits of law” is familiar to all who have studied *Brown*, even as they have celebrated it.<sup>14</sup>

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8. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

9. *Grutter*, 539 U.S. at 325.

10. Mich. CONST. art. I, § 26. In November 2006, Michigan passed Proposal 2, an anti-affirmative action constitutional amendment.

11. In the University of Michigan litigation, the uncontested evidence showed that diversity made a difference in education. See *COMPPELLING INTEREST: EXAMINING THE EVIDENCE OF RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES* (Mitchell J. Chang et al. eds., 2003); *PATRICIA GURIN ET AL., DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN* (2004).

12. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

13. See *DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFILLED HOPES FOR RACIAL REFORM* (2004); *CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* (2004); *ROBERT J. COTTRILL ET AL., BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* (2003); *CHARLES J. OGLETTREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION* (2005); *GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1997); *JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2002); *THE MODERATES' DILEMMA: MASSIVE RESISTANCE TO SCHOOL DESEGREGATION IN VIRGINIA* (Matthew D. Lassiter & Andrew B. Lewis eds., 1998); *THE UNFINISHED AGENDA OF BROWN V. BOARD OF EDUCATION* (James Anderson & Dara N. Byrne eds. 2004); *MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION* (Clive Webb, ed., 2005). For a more sympathetic depiction of white resistance; see also *JASON SOKOL, THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945-75* (2007).

14. See, e.g., *BELL, supra* note 13; *ARYEH NEIER, ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE* 9 (1982) (arguing that “litigation has earned the acceptance it now enjoys of its place in resolving public policy questions”); *PATTERSON, supra* note 13; *Davison M. Douglas, The Limits of Law in Accomplishing Racial Change:*

So too here, potentially. There are those who have already warned us that because we took this principled stand legally, they will seek vengeance politically. I mention that because for those of us who are advocates, who are counselors, who are trained in law, who analyze black letter doctrine, it's crucial if we are to achieve our strategic goals that we understand that to be able to argue well is necessary but it is not sufficient. We must also organize well because principles remain at stake even after lawsuits are concluded.

Third and finally, I just want to take a moment to talk about student groups and why we join, why we support, why we allow these groups that gather on the basis of certain identifiable characteristics. What is it about these groups that is valuable to an institution of higher education? There are those who condemn them.<sup>15</sup> They say these affinity groups balkanize. There's no reason to emphasize identity. We should all come together and these organizations just serve self-interest.

I'd like to take those claims seriously. I think about my own time in law school, some two decades ago, when I joined an Asian-American group, and for me, that was a way that I could challenge myself. That may sound odd because I am, after all, of Asian descent. But to say one is "Asian American" is not easy because I grew up in a time period before multiculturalism, when diversity was not a watchword, when everyone was expected to assimilate and fit in, and, until I joined an Asian American group, I never would have wanted to acknowledge my own ancestry.<sup>16</sup> And so, what these groups do constantly is they challenge us in ways that people may not expect. To come out of the closet to join a group that is gay and lesbian, to join any group, to join with others to stand up and speak out is

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*School Segregation in the Pre-Brown North*, 44 UCLA L. REV. 677 (1997); Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417 (2004); see also THE LIMITS OF LAW (Austin Sarat et al. eds., 2005); Lon L. Fuller, *The Forms and Limit of Adjudication*, 92 HARV. L. REV. 353, 363-72 (1978).

15. See TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS* (1995); NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* (1997); WALTER BENN MICHAELS, *THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY* (2007); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965); ARTHUR M. SCHLESINGER JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (1991); JIM SLEEPER, *LIBERAL RACISM* (1997); TOM WICKER, *TRAGIC FAILURE: RACIAL INTEGRATION IN AMERICA* (1996).

16. FRANK H. WU, *YELLOW: RACE BEYOND BLACK AND WHITE*, ch. 1 (2002).

valuable and worthwhile.<sup>17</sup> And it is especially valuable and worthwhile when it leads to bridge building. Asian-American identity, for instance, brings together people whose ancestors would have been at war in Asia; it unites them in a domestic civil rights cause that is distinctively American. For me, joining an Asian-American group was only the beginning. It led me ultimately to make my career, until I came to UC Hastings, at a predominantly black school, Howard University Law School.<sup>18</sup> It was an effort that allowed me to see how, through civil rights advocacy on behalf of one, I could come to a principle that I had to then support on behalf of others.

And so, to the best student groups here through their openness, what they do is they challenge their membership.<sup>19</sup> They educate. That's what this school is about. It is what any school is about. And they allow us to reach out to others to build a sense of community and stakeholding. The critics of affinity groups would be proven right, if the formal organizations—especially benefiting from public support—were exclusive rather than inclusive.<sup>20</sup> And accordingly the more one is concerned about the risks of affinity groups, the more one ought to insist that they be more than reinforcements of ascribed identity.

Those are the thoughts that I wanted to share just as a way of framing the conversation you will now have with some real experts, people who have studied this case, who have studied others, who will set the context, tell you about the consequences, and it is these endeavors, these efforts to talk about ideas as applied in the real world, that's what makes UC Hastings such a great law school.

With that it's my pleasure to ask our counsel Ethan Schulman to come to the podium, a very experienced appellate lawyer with Crowell & Moring law firm here in San Francisco. He did something brilliant, and I want to flag that for you. As someone who teaches civil procedure not constitutional law, I read this case as a civil

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17. For an argument about the importance of asserting identity, rather than accepting coercive assimilation, see KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2007).

18. WU, *supra* note 16, at ch. 8.

19. The best argument for openness is KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES VOL. 1: THE SPELL OF PLATO* (7th ed. 2002).

20. For a thoughtful discussion of principles that might guide assertions of group identity, see KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* (2005); MARTHA MINOW, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW* (1999). *See also* CHARLES TAYLOR & AMY GUTMANN, *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* (1994).

procedure case. I read it and think the tactical decisions were made years ago before anyone had any sense of the significance, the precedent that would be set, how crucial this fight was years ago about just stipulations at a time when no one could have predicted what would become of these agreements made by lawyers that would bind their clients. Ethan recognized how important it was to establish early on what the record was and he did such a phenomenal job that when the case came to its conclusion at oral argument before the justices who would decide it, much of it was actually not about what people think the case is about, but it was about stipulations.<sup>21</sup> It's about what the facts were because it turned out that great lawyering protected our rights. There's a lesson in that for every student, for every lawyer.

Thank you so very much.

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21. *Martinez*, 130 S. Ct. 2971, 2974 (2010) (“[CLS’s] argument flatly contradicts the joint stipulation of facts the parties submitted at the summary-judgment stage.”). *See also* Transcript of Oral Argument at 4, 32, *Martinez*, 130 S. Ct. 2971 (No. 08-1371).