



University of Arkansas at Little Rock William H. Bowen School of Law
Bowen Law Repository: Scholarship & Archives

Faculty Scholarship

2011

White Male Heterosexist Norms in the Confirmation Process

Theresa M. Beiner

University of Arkansas at Little Rock William H. Bowen School of Law, tmbeiner@ualr.edu

Follow this and additional works at: http://lawrepository.ualr.edu/faculty_scholarship



Part of the [Judges Commons](#), [Law and Gender Commons](#), and the [Law and Race Commons](#)

Recommended Citation

Theresa M. Beiner, White Male Heterosexist Norms in the Confirmation Process, 32 Women's Rts. L. Rep. 105 (2011).

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

WHITE MALE HETEROSEXIST NORMS IN THE CONFIRMATION PROCESS

Theresa M. Beiner*

I. INTRODUCTION

Justice Sonia Sotomayor's confirmation hearing took a controversial turn when commentators became aware of a reference in the *New York Times* to a portion of a speech she gave in 2001.¹ In that speech, she candidly addressed how her background might influence her decision making opining, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."² Eight years later a minor

* Nadine Baum Distinguished Professor of Law, Associate Dean for Faculty Development, University of Arkansas at Little Rock, William H. Bowen School of Law. This essay is based on a paper and panel presentation delivered at DRI's Diversity for Success Seminar. I am grateful to my co-panelists, Judge Bernice Donald, United States Court of Appeals for the Sixth Circuit, and Judge Zeke Zeidler, Los Angeles County Superior Court, for earlier comments on this article as well as discussion during the panel presentation. In addition, thanks go to my colleagues, Professors Adjoa Aiyetoro and Kelly Terry, for their comments on this article, to Professor of Law Librarianship Kathryn Fitzhugh for research support, and former law student Amber Davis-Tanner for her helpful research assistance. Finally, this essay was written with the support of a research grant from the University of Arkansas at Little Rock, William H. Bowen School of Law.

¹ Charlie Savage, *A Judge's View of Judging Is on Record*, N.Y. TIMES, May 15, 2009, at AO 21, available at <http://www.nytimes.com/2009/05/15/us/15judge.html>; see also Stuart Taylor, *Identity Politics & Sotomayor*, NAT'L J., May 23, 2009, at 19. According to news reports, Justice Sotomayor had repeated these words on several occasions. See *Writings Reveal Sotomayor's Controversial 'Wise Latina' Remark Not Isolated*, FOX NEWS (June 4, 2009), <http://www.foxnews.com/politics/2009/06/04/writings-reveal-sotomayors-controversial-wise-latina-remark-isolated/>.

² Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002). Throughout this article, I sometimes use the terms "Latina," "Hispanic" and "Latina/o." I use the term "Latina" with respect to Justice Sotomayor because that is how she speaks of herself. I use the term "Hispanic" mostly with references to studies that use that term. In addition, the U.S. Census Bureau uses the terms "Hispanic or Latino," so where I reference Census data, that term is generally used. See *State & County Quick Facts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last modified Oct. 13, 2011). These terms, however, are not without political and ethnic significance, and indeed are controversial. See Naomi Mezey, *Erasure & Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1744-49 (2003); see generally Gustavo Chacon Mendoza, *Gateway to Whiteness: Using the Census to Redefine and Reconfigure Hispanic/Latino Identity*, *In Efforts to Preserve a White American National Identity*, 30 U. LA. VERNE L. REV. 160 (2008) (discussing the status of the racial identity of Hispanic individuals in the United States).

storm ensued as a result of that comment as well as the per curiam decision in *Ricci v. DeStefano*,³ in which Justice Sotomayor participated as a judge on the Second Circuit Court of Appeals.⁴ More recently, former Harvard Dean and former Solicitor General Elena Kagan came under fire during her Supreme Court confirmation hearings for supporting her faculty's position on the military's treatment of gay, lesbian, and bisexual lawyers and her opposition to "don't ask/don't tell."⁵ This led some conservative commentators to speculate that she is a lesbian.⁶ Both Justice Sotomayor and newly confirmed Justice Kagan were attacked for bringing a perspective to the bench that supported minority groups – whether it be Latinas, women, or the lesbian, gay, bisexual, and transgendered communities. Yet, having judges who understand these perspectives would no doubt add diversity to the bench.

While commentators and legal organizations have discussed the importance of diversity in the legal profession and on the bench,⁷ the treatment of these two Supreme Court nominees leads one to wonder whether those in public office are really interested in adding diversity to the bench. Could it be, instead, that it is only acceptable for a judicial candidate to be "diverse" or have sympathy for minority communities so long as he or she does not act on those sympathies? The brouhaha that both Justice Sotomayor's comment engendered and Justice Kagan's position created makes one question to what extent public officials are committed to protecting minority groups by adding diversity to the bench.

Ranging from arguments about equal opportunity to the importance of diversity in representing clients effectively, many large legal employers actively seek out diverse lawyers to staff their firms.⁸ While the American Bar Association and other organizations have addressed diversity in legal practice,⁹ others have focused on diversity on the bench.¹⁰ In particular,

³ 530 F.3d 87 (2d Cir. 2008).

⁴ See generally *Ricci v. DeStefano*, 554 F. Supp. 2d 142 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008) (affirming the district court decision in favor of a city who wished to discard the results of a recent firefighter promotion test when no Black examinees qualified for promotion).

⁵ See *infra* notes 242 to 257 and accompanying text.

⁶ See *infra* notes 265 and 270 and accompanying text.

⁷ See Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models & Public Confidence*, 57 WASH. & LEE L. REV. 405, 417 (2000) ("[T]he inclusion of multiple perspectives in judicial decision-making is a critical focus of diversity."); Angela Brouse, *The Latest Call for Diversity in Law Firms: Is it Legal?*, 75 UMKC L. REV. 847, 848-50 (2006) (describing calls for diversity from corporate counsel offices); AM. BAR ASS'N, PRESIDENTIAL DIVERSITY INITIATIVE, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS (April 2010) [hereinafter AM. BAR ASS'N, PRESIDENTIAL DIVERSITY INITIATIVE]. The American Bar Association has a Commission on Racial and Ethnic Diversity in the Profession and a Minority Counsel Program to promote the hiring of racially and ethnically diverse lawyers. See *Minority Counsel Program*, AM. BAR ASS'N (2010), <http://new.abanet.org/centers/diversity/Pages/MinorityCounselProgram.aspx>.

⁸ See Brouse, *supra* note 7, at 850-52.

⁹ See AM. BAR ASS'N, PRESIDENTIAL DIVERSITY INITIATIVE, *supra* note 7; *About Us*, LEADERSHIP COUNCIL ON LEGAL DIVERSITY, http://www.lcldnet.org/about_us.html (last visited Oct. 25, 2011).

political scientists and increasingly law professors have looked at the demographics of the judiciary, as well as the potential effects that diversity might have on the administration of justice and the perceived and sometimes actual fairness in case outcomes.¹¹ Political scientists who study federal judicial appointments refer to judges who are women and people of color as “nontraditional” appointees,¹² a term that will be used in this article to refer to women and members of racial and ethnic minority groups. Of course, diversity encompasses more than gender, race, and ethnicity. Sexual orientation, disability, socio-economic status, religion and other personal characteristics or life experiences also inform individual viewpoints and could be characteristics policymakers might consider in diversifying the bench.

This article discusses four main subjects. First, it begins by describing the demographics of the federal judiciary and compares those demographics to relevant population data. Included is a discussion of the common career tracks for nontraditional federal judges. Second, it canvasses some common arguments for a diverse bench and places the controversy over the nominations of Justice Sotomayor and Justice Kagan within the overall discussion about the benefits of diversity on the bench. Third, it describes studies that seek to determine whether the backgrounds of judges, such as their gender, race, or ethnicity, correlate with differences in decision making trends. Anecdotal evidence of differences in case outcomes that correlate to differences in personal perspective will also be addressed. This section discusses the practical implications of a diverse bench not only on case outcomes but also on court policies. Finally, this article will discuss the public commentary and questioning by the Senate Judiciary Committee members about Justice Sotomayor’s “wise Latina woman” comment, the *Ricci* case, and Justice Kagan’s position on “don’t ask/don’t tell” in an effort to fully understand the controversies that arose in those hearings and the implications for achieving a truly diverse bench. In the end, the statements and positions that provided negative fodder for those who opposed the appointment of Justices Sotomayor and Kagan ironically reflect just the types of perspectives that one would want from a

¹⁰ See *Diversity on the Bench*, BRENNAN CTR. FOR JUST., http://www.brennancenter.org/content/section/category/diversity_on_the_bench (last visited Oct. 4, 2010).

¹¹ See, e.g., Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 5 (2004) (“[A] judge’s racial background shapes her world view and almost inevitably influences her judicial decision-making.”); Leesa M. Klepper, *Gender Diversity in the Federal Judiciary: The Impact of President Bush’s First Term*, 52 FED. LAW 20 (July 2005); see generally Rorie L. Spill Solberg & Kathleen A. Bratton, *Diversifying the Federal Bench: Presidential Patterns*, 26 JUST. SYS. J. 119 (2005) (analyzing the prevalence and potential effects of diversity on the bench).

¹² Sheldon Goldman, Sara Schiavoni & Elliot Slotnick, *W. Bush’s Judicial Legacy: Mission Accomplished*, 92 JUDICATURE 258, 259 (2009) [hereinafter Goldman, Schiavoni & Slotnick, *W. Bush’s Judicial Legacy*].

diverse bench. Thus, there is a disconnect between the public discourse on individual nominees and the commentary regarding the benefits of diversity in the judiciary.

II. DEMOGRAPHICS OF THE FEDERAL BENCH¹³

The federal bench is not particularly diverse.¹⁴ This is in spite of the strides women and minority groups have made in law school attendance.¹⁵ The numbers of members of racial and ethnic minority groups in law school have increased.¹⁶ Although such improvements have not been steady for certain groups,¹⁷ overall, minority enrollment has steadily increased from a low of 6.1% in the 1971-72 school year to 22.4% in the 2009-10 school year.¹⁸ When I graduated from law school in 1989, women made up roughly 42% of law students, and the number of women enrolled in law school topped 50% during the 1992-93 school year but has not done so since.¹⁹ Yet, over twenty years later, women's and racial and ethnic minority groups' presence as law firm partners, law school professors, and members of the federal bench lag behind that of their White male

¹³ At the time this article was written, there was little information available about President Obama's appointees. Recently, however, information about his appointees suggests that they are the most diverse group of judges appointed. During his first two years in office, 70.5% of his appointees were nontraditional judges. Sheldon Goldman, Elliot Slotnick & Sara Schiavoni, *Obama's Judiciary at Midterm*, 94 JUDICATURE 262, 288 (2011) [hereinafter Goldman, Slotnick & Schiavoni, *Obama's Judiciary at Midterm*]. Women, in particular, made up more than half of his appointees. See *id.* However, even with Obama's appointees added, the gains for women were modest. See *id.* at 289 tbl.1. Further discussion regarding the impact of President Obama's appointees will have to await another article.

¹⁴ See *infra* Table 1.

¹⁵ *Law School Enrollment Edges Upward, Minorities Show Slight Gain, Women Slight Drop*, AM. BAR ASS'N NEWS RELEASE (Feb. 21, 2007), http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=87 (finding that just under half of law school enrollees were women and just over 20% were minorities in 2006).

¹⁶ *Id.*

¹⁷ From 1993 to 2008, both the percent and total number of African-American and Mexican-American law students has declined. Tamar Lewin, *Law School Admissions Lag Among Minorities*, N.Y. TIMES, Jan. 7, 2010, at A 22, available at <http://www.nytimes.com/2010/01/07/education/07law.html>. The number of persons of American Indian or Alaskan Native background who were enrolled in law school has also fluctuated a bit hitting a high in 2009-10 of 1,273, but only after dipping down into the 900s during 1999-2002. *American Indian or Alaska Native J.D. Enrollment 1971-2009*, AM. BAR ASS'N, <http://www.abanet.org/legaled/statistics/charts/stats%20-%202011.pdf> (last visited October 25, 2011). For information on how institutional racism affects the admissions of racial and ethnic minorities to law school, see Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks & Other Minorities in Law School Admissions*, 80 ST. JOHN'S L. REV. 107 (2006).

¹⁸ *First Year J.D. & Total J.D. Minority Enrollment, 1971-2010*, AM. BAR ASS'N, <http://www.abanet.org/legaled/statistics/charts/stats%20-%202008.pdf> (last visited Oct. 25, 2011).

¹⁹ *First Year & Total J.D. Enrollment by Gender 1947-2008*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats_19.authcheckdam.pdf (last visited Oct. 25, 2011).

counterparts.²⁰ A sketch of the demographics of the federal bench provides a sense of just how much.

Over the past thirty years, various presidents have made an effort to diversify the federal bench. Some efforts have been more successful than others, with promising results. By January 1, 2009, the end of President George W. Bush's administration, 25% of United States District Court judges were women and 26.9% of the United States Court of Appeals judges were women.²¹ At that point, however, there was only one sitting United States Supreme Court justice who was a woman—Justice Ruth Bader Ginsburg. That number doubled with the appointment of Justice Sonia Sotomayor by President Barack Obama, and the Court is now one-third female after the confirmation of Justice Elena Kagan.²² A recent study by the Center for Women in Government & Civil Society at SUNY Albany placed the percentage of women in the federal judiciary at 22%—somewhat lower than the percentage on January 1, 2009.²³ In terms of racial and ethnic diversity, as of January 1, 2009, 11.4% of United States District Court judges were African American and 8.3% of United States Court of Appeals judges were African American.²⁴ The percentage of Hispanic judges sitting on both the United States District Courts and United States Court of Appeals was 7.2%.²⁵ There were only eight Asian American judges sitting on a United States District Court - a total of 1.2% of sitting district court judges.²⁶ At the end of the Bush administration, there were no Asian American judges in active service sitting on a United States Courts of Appeals.²⁷

While there are obviously state to state demographic differences, it is useful to think of this data in terms of the overall population of the United States. According to United States Census Bureau estimates from 2010, 63.7% of the United States population are White not of Hispanic origin

²⁰ See, e.g., Brouse, *supra* note 7, at 847-48 (detailing the legal profession's failure to diversify); Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293 (2004). Data collected by the National Association for Law Placement ("NALP") shows that in 2009, 19.21% of law firms partners were women, 6.05% were members of minority groups, and 1.88% were minority women. *Law Firm Diversity Demographics Show Little Change, Despite Economic Downturn*, NALP, (Oct. 21, 2009), <http://www.nalp.org/oct09lawfirmdiversity>. In the associate ranks, 45.66% were women, 19.67% were members of minority groups, and 11.02% were minority women. *Id.*

²¹ Goldman, Schiavoni & Slotnick, *W. Bush's Judicial Legacy*, *supra* note 12, at 276 tbl.1.

²² See Kathy Kiely, *Senate Confirms Elena Kagan to Supreme Court*, USA TODAY (Aug. 6, 2010), http://www.usatoday.com/news/washington/judicial/2010-08-05-kagan-supreme-court-confirmation_N.htm.

²³ CTR. FOR WOMEN IN GOV'T & CIVIL SOC'Y, ROCKEFELLER COLL. OF PUB. AFFAIRS & POLICY, UNIV. AT ALBANY, STATE UNIV. OF NEW YORK, WOMEN IN FEDERAL & STATE-LEVEL JUDGESHIPS 1 (Spring 2010), available at http://www.albany.edu/womeningov/judgeships_report_final_web.pdf.

²⁴ Goldman, Schiavoni & Slotnick, *W. Bush's Judicial Legacy*, *supra* note 12, at 276 tbl.1.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

(although overall 72.4% are classified as White), 12.6% are African American, .9% are American Indian or Alaskan Natives, 4.8% are Asian, 0.2% are Native Hawaiian or other Pacific Islander, and 16.3% are of Hispanic or Latino origin.²⁸ In addition, women make up 50.8% of the United States population.²⁹ Thus, comparing percentages of judges in the various demographic categories that implicate diversity reveals a discrepancy between the percentage of certain groups in the population and their percent representation on the federal bench. As Table 1 below reveals, in both the district courts and courts of appeals, women and members of ethnic minority groups are under-represented based on their numbers in the overall United States population.

Table 1
Percentage of Federal Judges Compared to General Population Data³⁰

Group	U.S. Census Data	District Courts	Appellate Courts
White(non-Hispanic)	63.7%	80.2%	84.5%
African American	12.6%	11.4%	8.3%
Native American	0.9%	0%	0%
Asian	4.8%	1.2%	0%
Latino/a	16.3%	7.2%	7.2%
Women	50.8%	25%	27%

In addition, in certain jurisdictions, the discrepancy is more glaring. For example, in the First, Second, Fourth, Fifth, Sixth, Seventh, Eleventh and District of Columbia federal district courts, the percentage of African American judges is less than the general population of African Americans in those jurisdictions.³¹ The largest discrepancy is in the District of

²⁸ *State & County Quick Facts 2010*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Oct. 25, 2011) [hereinafter U.S. CENSUS BUREAU].

²⁹ *Id.*

³⁰ Derived from data in Goldman, Schiavoni & Slotnick, *W. Bush's Judicial Legacy*, *supra* note 12, at 276 tbl.1 and U.S. CENSUS BUREAU, *supra* note 28. This data is current as of 2010. There was some discrepancy between Goldman, Schiavoni & Slotnick's demographic designations and that of the U.S. Census Bureau. For example, the U.S. Census Bureau groups American Indians and Alaskan Natives together. Goldman, Schiavoni & Slotnick's category designation was "Native American." I am uncertain whether these differing designations include the same groups, and am assuming so for purposes of this table. In addition, the Census refers to Hispanic or Latino origin, whereas Goldman, Schiavoni & Slotnick refers to Hispanic. I have grouped this in table 1 as "Latino/a."

³¹ Goldman, Schiavoni & Slotnick, *W. Bush's Judicial Legacy*, *supra* note 12, at 277 tbl.2.

Columbia district courts, where 55.2% of the general population is African American, and only 33.3% (one third) of the district court judges are African American.³² Some jurisdictions (specifically the Third, Eighth, Ninth and Tenth) have an “over-representation” of African American district court judges based on a comparison to general population data, although it is not by a large margin.³³ For example, the jurisdiction with largest “overrepresentation” is the Eighth Circuit District Court bench, in which 7.6% of the population is African American and 15.8% of the active district court judges are African American.³⁴

In no jurisdiction are Hispanic district court judges “overrepresented” in light of their percentage in the general population.³⁵ In every jurisdiction except the District of Columbia district courts (where the number of Hispanic federal district court judges mirrors the general population – 8.3%), the percentage of Hispanic district court judges is less than the percentage of Hispanic persons present in the general population.³⁶ In three jurisdictions - the Fourth, Sixth, and Eighth Circuits - there are no sitting federal district court judges who are Hispanic Americans.³⁷ In some jurisdictions, the difference is substantial.³⁸ For example, in the Second Circuit, 15.3% of the population is Hispanic American, yet only 3.3% of federal district court judges are Hispanic American.³⁹ Similarly, in the Ninth Circuit, 28.4% of the general population is Hispanic American; yet, only 9.4% of federal district court judges are Hispanic American.⁴⁰ Finally, in the Fifth Circuit, with a general population that is 28.3% Hispanic American, only 15.2% of the federal district court judges are Hispanic American.⁴¹

The discrepancies with respect to women are also significant. While 2010 U.S. Census Bureau estimates project that women make up nearly 51% of the United States population,⁴² in five jurisdictions they are less than 25% of the sitting federal district court judges.⁴³ The Fourth Circuit has the fewest women sitting in federal trial courts – only 16% of its judges are female.⁴⁴ The largest percentage of women federal district court judges is found in the Second Circuit, where 35% of active federal district court

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Goldman, Schiavoni & Slotnick, *W. Bush's Judicial Legacy*, *supra* note 12, at 277 tbl.2.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See U.S. CENSUS BUREAU, *supra* note 28.

⁴³ Goldman, Schiavoni & Slotnick, *W. Bush's Judicial Legacy*, *supra* note 12, at 277 tbl.2.

⁴⁴ *Id.*

judges are women.⁴⁵ According to the study by the Center for Women in Government & Civil Society at SUNY Albany, there are only three states where women make up 30% or more of the federal judiciary.⁴⁶ Finally, the dearth of women sitting on the Eighth Circuit Court of Appeals – there is and only ever has been one – has led to a movement to increase the number of women sitting on that court.⁴⁷

Some might argue that comparisons to the general population are not appropriate, because the population of those who are lawyers is considerably different. While the population of lawyers would be the appropriate comparison group for matters such as an employment discrimination case involving lawyers,⁴⁸ this is not necessarily the best comparison in terms of assessing diversity on the bench because the number of lawyers in the United States from any group is much greater than the total number of judgeships. For example, there are only nine United States Supreme Court Justices, 179 federal court of appeals judges, 677 federal district court judges, and nine judges of the Court of International Trade, for a total of 875 Article III judges.⁴⁹ Thus, for any given judicial opening, there are more than enough qualified persons of diverse backgrounds from which to choose. Take, for example, the Eastern District of Arkansas, which has had two openings recent years.⁵⁰ For each position, Arkansas's Senators suggested three candidates.⁵¹ Thus, while African American or women lawyers may be fewer in number in the lawyer population in Arkansas than their White male counterparts, there are more than enough qualified women and African American lawyers from whom to choose for these two positions. Surely there are six well-qualified women or members of racial or ethnic minority groups that could be

⁴⁵ *Id.*

⁴⁶ See CTR. FOR WOMEN IN GOV'T & CIVIL SOC'Y, *supra* note 23, at 8. Those states are Minnesota, Connecticut, and New Jersey. See *id.*

⁴⁷ See Sally J. Kenney, *Infinity Project Seeks to Increase Gender Diversity of the Eighth Circuit Court of Appeals*, 92 JUDICATURE 131, 131-32 (2008). The study by the Center for Women in Government & Civil Society at SUNY Albany placed the overall percentage of women on the state bench at 26%. CTR. FOR WOMEN IN GOV'T & CIVIL SOC'Y, *supra* note 23, at 1. In addition, that study noted that in only fifteen states did women made up more than 30% of the state judiciary, and in no state did they make up 50% of the judiciary. *Id.* at 10. As to state courts of last resort, only 10.3% of those judges are members of racial or ethnic minority groups. Malia Reddick, Michael J. Nelson & Rachel Paine Caufield, *Racial & Gender Diversity on State Courts: An AJS Study*, 48 JUDGES' J. 31 tbl.2 (2009), available at <http://www.du.edu/legalinstitute/pdf/ReddickNelsonCaufield.pdf>. At the intermediate appellate court level, 12.6% of judges are members of racial and ethnic minority groups. *Id.* Finally, of judges sitting on general jurisdiction trial courts, 11.1% are members of racial or ethnic minority groups. *Id.*

⁴⁸ See *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308-09 (1977).

⁴⁹ U.S. Courts Federal Judgeships, ADMIN. OFFICE OF THE U.S. COURTS ON BEHALF OF THE FED. JUDICIARY, <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> (last visited Oct. 23, 2011).

⁵⁰ Associated Press, *9 to Vie for 3 Judge Positions*, ARKANSAS ONLINE (March 12, 2009), <http://www.arkansasonline.com/news/2009/mar/12/9-vie-3-judge-positions/>.

⁵¹ *Id.*

considered. Importantly, the demographics of the lawyer population are less likely to reflect the demographics of the litigants who are likely to appear in front of these judges than the general population data. As is explained below, who appears in front of judges and the fairness these litigants perceive are very important aspects of having a diverse bench.⁵²

That said, a look at lawyer demographics still might tell something about the discrepancies. Examining the statistics on lawyers in the United States, 31% of lawyers are women.⁵³ The Department of Labor's 2010 statistics places the number of women at 31.5% of lawyers in the United States.⁵⁴ In addition, nationally, women make up 48% of law school graduates and 45% of law firm associates.⁵⁵ The latest study of the federal bench places the percentage of federal judges who are female at 22%.⁵⁶ Thus, even this number does not reflect the percentage of women in the lawyer population, let alone in the general population. In addition, as explained above, there are glaring exceptions in specific jurisdictions where there are very few women judges. For example, as of January 1, 2009, in the Northern District of New York, there were no federal district court judges or magistrates who were female despite a large population of state court female judges.⁵⁷ In addition, in Arkansas, women make up only 15% of the federal judiciary.⁵⁸ Thus, some districts have far fewer female judges on the bench than even the low national average.

According to the Department of Labor's 2010 statistics, among lawyers, 4.3% are African American, 3.4% are Asian, and 3.4% are Hispanic or Latino.⁵⁹ The data shows that Asian Americans are also under-represented in federal court judgeships.⁶⁰ In addition, the National Association for Law Placement has been collecting data on the number of LGBT attorneys in practice since 2003.⁶¹ According to its latest data,

⁵² See *infra* notes 77 to 79 and accompanying text.

⁵³ *A Current Glance at Women in the Law 2009*, AM. BAR ASS'N, COMM'N ON WOMEN IN THE PROFESSION (Nov. 13, 2009), <http://www.americanbar.org/content/dam/aba/migrated/women/reports/CurrentGlanceStatistics2009.authcheckdam.pdf>.

⁵⁴ U.S. DEP'T OF LABOR BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES 15 (2009), <http://www.bls.gov/cps/cpsa2010.pdf> [hereinafter U.S. DEP'T OF LABOR BUREAU OF LABOR STATISTICS].

⁵⁵ CTR. FOR WOMEN IN GOV'T & CIVIL SOC'Y, *supra* note 23, at 12.

⁵⁶ *Id.* at 1. This disparity may be because President George W. Bush appointed fewer women than President Clinton. See Kenney, *supra* note 47, at 131 (noting that 30% of President Clinton's appeals court appointments were women, whereas only 20% of President Bush's appeals court appointments were women).

⁵⁷ See CTR. FOR WOMEN IN GOV'T & CIVIL SOC'Y, *supra* note 23, at 12.

⁵⁸ *Id.* at 2.

⁵⁹ U.S. DEP'T OF LABOR BUREAU OF LABOR STATISTICS, *supra* note 54.

⁶⁰ Goldman, Schiavoni & Slotnick, *W. Bush's Judicial Legacy*, *supra* note 12, at 276 tbl.1 (finding that Asian-Americans make up only 1% of federal judges).

⁶¹ *Although Most Firms Collect LGBT Lawyer Information, Overall Numbers Remain Low*, NALP (Dec. 2009), <http://www.nalp.org/dec09glbt>.

LGBT lawyers make up 1.82% of the lawyers in the firms they surveyed.⁶² Yet, there is only one openly LGBT federal judge, and he was recently appointed.⁶³ Thus, there are discrepancies with respect to some groups even when comparing to the lawyer population.

Another statistic worth noting about nontraditional, federal judicial appointees is differences in career track between these appointees and "traditional" appointees, i.e., White males. The typical career track for nontraditional appointees is through lower level positions within the judiciary. For example, during his first six years in office, 85.7% of President George W. Bush's nontraditional appointees to the United States Appeals Courts had judicial experience - whether in state court or some other federal court.⁶⁴ Only 47.4% of his traditional appointees, on the other hand, had prior judicial experience.⁶⁵ In addition, many nontraditional appointees to the United States Appeals Courts had prosecutorial experience - 33.3% of those appointed.⁶⁶ While 34.2% of President George W. Bush's United States Appeals Court traditional appointees had prosecutorial experience as well, only 4.8% of his nontraditional appointees had neither prosecutorial nor judicial experience.⁶⁷ Yet, 36.8% of his traditional appointees did not have experience as a prosecutor or judge.⁶⁸

The discrepancy in career track for traditional and nontraditional appointees is similar for President George W. Bush's district court appointees. Once again, judicial or prosecutorial experience appears to be the norm among nontraditional appointees, with only 11.8% of them having neither experience.⁶⁹ The majority of nontraditional appointees—72.9%—had prior judicial experience.⁷⁰ The percentage of his traditional appointees with prior judicial experience was only 42.0%.⁷¹ This has led some commentators to posit that we might be seeing a trend toward a career judicial track much like that present in civil law countries.⁷² Bush's nontraditional district court appointees typically had more prosecutorial experience than Bush's federal appellate court appointees.⁷³ A majority of his nontraditional district court appointees had prosecutorial experience -

⁶² *Id.*

⁶³ Alana Horowitz, *Paul Oetken, First Openly Gay U.S. Federal Judge, Confirmed by Senate*, HUFFINGTON POST (July 19, 2011, 1:18 PM) http://www.huffingtonpost.com/2011/07/19/paul-oetken-gay-judge_n_902998.html.

⁶⁴ Goldman, Schiavoni & Slotnick, *W. Bush's Judicial Legacy*, *supra* note 12, at 281 tbl.5.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 275 tbl.2.

⁷⁰ Goldman, Schiavoni & Slotnick, *W. Bush's Judicial Legacy*, *supra* note 12, at 275 tbl.2 & 281 tbl.5.

⁷¹ *Id.*

⁷² See Monique Renee Fournet, Kyle C. Kopko, Dana Wittmer & Lawrence Baum, *Evolution of Judicial Careers in the Federal Courts, 1789-2008*, 93 JUDICATURE 62, 63 (2009).

⁷³ Goldman, Schiavoni & Slotnick, *W. Bush's Judicial Legacy*, *supra* note 12, at 275 tbl.2.

52.9% - whereas 44.3% of his traditional appointees had such experience.⁷⁴ Once again, nearly a third of his traditional appointees - 31.2% - had neither prosecutorial nor judicial experience.⁷⁵

There appears to be a different career track for judges who are women or racial and ethnic minorities than there is for White male judges. Judicial or prosecutorial experience is almost a requirement. While the statistics above are the latest for President George W. Bush's administration alone, they are consistent with prior administrations as well.⁷⁶

III. ARGUMENTS IN FAVOR OF A DIVERSE BENCH

Having established that the federal bench is not as diverse as the American population nor, in some instances, the lawyer population, it is still important to examine why diversity on the bench is a goal worth pursuing. There are a variety of arguments supporting diversifying the judiciary. Political scientists have identified two overarching benefits to a diverse bench. First, a diverse bench provides symbolic representation.⁷⁷ This means that diversity provides certain groups with the opportunity to have access to positions of influence so that all members of society will believe in the fairness of the system thereby adding legitimacy to the judiciary.⁷⁸ Thus, the comparison of population data to the demographics of the judiciary earlier in this article is particularly relevant. As Professor Jeffrey Jackson explained, "Judges are not the exclusive province of any one section of society. Rather, they must provide justice for all. In order for a judicial section to be considered fair and impartial, it must be seen as representative of the community."⁷⁹

Closely related to this idea is that diversity can improve decision making by adding to the richness of debate and by influencing outcomes of cases through the inclusion of diverse perspectives. As Professor Sherrilyn Ifill explains:

[T]he creation of a racially diverse bench can introduce traditionally excluded perspectives and values into judicial decision-making. The interplay of diverse views and perspectives can enrich judicial decision-making. Because they can

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See Theresa M. Beiner, *How the Contentious Nature of Federal Judicial Appointments Affects "Diversity" on the Bench*, 39 U. RICH. L. REV. 849, 863-64 (2005) (discussing Clinton appointees).

⁷⁷ Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy & Process Ramifications*, 47 J. POL. 596, 597 (1985).

⁷⁸ R. William Ide III, *Eradicating Bias in the Justice System*, 80 A.B.A.J. 8 (1994); Tony Mauro, *Wider Courtroom Diversity Urged*, USA TODAY, Feb. 25, 1999, at 3A; see generally Jane Mansbridge, *Should Blacks Represent Blacks & Women Represent Women? A Contingent "Yes"*, 61 J. POL. 628, 629 (1999) (discussing symbolic representation in general).

⁷⁹ Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection & Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125, 145 (2007).

bring important and traditionally excluded perspectives to the bench, minority judges can play a key role in giving legitimacy to the narratives and values of racial minorities.⁸⁰

Professor Ifill also argues that racial diversity leads to greater impartiality because it ensures that no "single set of values or views . . . dominate judicial decision-making."⁸¹

The second overarching argument for diversity is what is known as the functional or substantive representation function.⁸² Under this theory, members of under-represented groups will advocate for the interests of the group to which they belong once appointed.⁸³ This means that judges of differing backgrounds will bring different perspectives to the bench based on their own lived experience, which, potentially, could lead to differing results or at the least the advocating of different results in lawsuits.⁸⁴ In addition, scholars have argued "that simple fairness" supports increasing the numbers of women judges.⁸⁵

Post-modern legal theorists would refer to functional representation as an essentialist theory.⁸⁶ Indeed the very idea that, for example, women will decide a certain way in "women's cases" is essentialist. It assumes a commonality of perspective among women that is likely unjustified, and indeed studies on the effect of gender on the decisions of female judges often have shown inconclusive effects.⁸⁷ While some studies support the idea that female judges are more sympathetic to sex discrimination plaintiffs and that African American male judges are more sympathetic to both race and sex discrimination plaintiffs,⁸⁸ it is important to note that the vast number of federal appellate cases are decided by unanimous opinion upholding the trial court.⁸⁹ Much of the time, male and female judges and

⁸⁰ Ifill, *supra* note 7, at 410 (footnotes omitted).

⁸¹ *Id.* at 411; accord Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality & Representation on State Trial Courts*, 39 B.C. L. REV. 95, 120 (1997).

⁸² See Walker & Barrow, *supra* note 77, at 597.

⁸³ See *id.*; cf. Elaine Martin, *The Representative Role of Women Judges*, 77 JUDICATURE 166, 166 (1993).

⁸⁴ See Ifill, *supra* note 7, at 412-13; Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 896-97 (1995).

⁸⁵ See Martin, *supra* note 83, at 166.

⁸⁶ See Ifill, *supra* note 7, at 414; Angela Harris, *Race & Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585-89 (1990); Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C. L. 171, 188 (2005); Sheila Foster, *Difference & Equality: A Critical Assessment of the Concept of "Diversity"*, 1993 WIS. L. REV. 105, 124 (1993).

⁸⁷ See Jennifer L. Peresie, Note, *Female Judges Matter: Gender & Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1759, 1762-64 (2005) (noting an assortment of studies on the potential effect gender may have on female judges when addressing certain issues). *But see* Nancy E. Crowe, *The Effects of Judges' Sex & Race on Judicial Decision Making on the U.S. Courts of Appeals, 1981-1996* 25 (June 1999) (unpublished Ph.D dissertation, U. of Chicago) (stating that "sex differences are real and . . . consequential").

⁸⁸ See *infra* notes 114 to 127 and accompanying text.

⁸⁹ See Crowe, *supra* note 87.

Democratic and Republican appointed judges reach the same decisions.⁹⁰ However, scholars who have eschewed the essentialism of a common identity among all members of a particular group still agree that women and racial and ethnic minorities have certain experiences in common. As Professor Hsu explained with respect to Asian Americans, although there is not a common “Asian American identity,” Asian Americans, like other members of racial and ethnic minority groups, have a common experience of racial oppression that provides common ground, despite a myriad of cultural differences within the group.⁹¹ Thus, ultimately, it is beneficial to the courts when judges bring differing perspectives to a case that reflect the varying experiences of Americans. It is possible to acknowledge this while also being aware that there are a multitude of perspectives among women as well as members of ethnic and racial minority groups.

Another theory that is sometimes relevant to a discussion on diversity is critical mass theory.⁹² Under critical mass theory, in any given group, a certain percentage of women or members of a minority group is necessary in order to change stereotypical notions of that group.⁹³ This argument was used in the University of Michigan Law School affirmative action case to support the University’s efforts to diversify its law school.⁹⁴ Indeed, most women judges believe their presence on the bench has made a difference in the way male judges perceive professional women.⁹⁵ These studies may suggest that the inclusion of openly gay and lesbian judges would likely have important impacts for lesbian and gay people. Studies show that views about lesbian and gay people change after individuals get to know people in that community.⁹⁶ Thus, having members of the lesbian and gay community who are open about their sexual orientation on the bench may help change judicial attitudes about lesbian and gay people in general, including gay and lesbian litigants.

Diversity on the bench also “provides role models for those historically excluded.”⁹⁷ Women judges themselves agree that they serve as positive role models for women attorneys.⁹⁸ These judges also have encouraged

⁹⁰ See generally *id.*

⁹¹ See Josh Hsu, *Asian American Judges: Identity, Their Narratives, & Diversity on the Bench*, 11 *ASIAN PAC. AM. L.J.* 92, 94-95 (2006).

⁹² See *Gutter v. Bollinger*, 539 U.S. 306, 318-20, 329-33 (2003).

⁹³ See *id.*; see also *CTR. FOR WOMEN IN GOV'T & CIVIL SOC'Y*, *supra* note 23, at 9.

⁹⁴ See *Gutter*, 539 U.S. at 316, 318-20, 329-33.

⁹⁵ See Martin, *supra* note 83, at 171 tbl.4 (71.4% of National Association of Women Judges (NAWJ) members surveyed agreed with this statement).

⁹⁶ See, e.g., Gregory B. Lewis, *The Friends and Family Plan: Contact with Gays and Support for Gay Rights*, 39 *POL'Y STUD. J.* 217, 231 (2011) (“Those who know LGBs are substantially more likely to support gay rights across the board.”).

⁹⁷ Edward M. Chen, *The Judiciary, Diversity, & Justice for All*, 91 *CAL. L. REV.* 1109, 1116 (2003).

⁹⁸ Martin, *supra* note 83, at 170 tbl.3 (98% of NAWJ members surveyed agreed with this statement).

other women to become judges.⁹⁹ Providing positive role models is particularly important for gay and lesbian youth, who tragically have higher suicide rates.¹⁰⁰ Having highly regarded gay and lesbian judicial role models could help increase self esteem and lead to higher achievement among gay and lesbian people.

Diverse judges already have had an impact on the bench by helping revise court policies. For example, women judges were key to the rise of gender bias task forces throughout the United States.¹⁰¹ As a result of the task force movement, at least in part, courts revised the rules governing the conduct of judges, lawyers, and other court employees, and developed education programs to train court personnel, judges, and others.¹⁰² The California state court system's Access and Fairness Committee has been particularly active, not only in developing programs to enhance gender fairness, but also in identifying barriers to the justice system for people with disabilities and examining bias based on sexual orientation.¹⁰³ In addition, California's Sexual Orientation Fairness Subcommittee specifically noted in its 2001 Report that "[t]here has been a growing awareness of the number of gay men and lesbians who are involved in various ways with the court system, as judges, attorneys, court users, and court employees."¹⁰⁴ The Report specifically noted that this has led to court rules prohibiting sexual orientation discrimination.¹⁰⁵ Finally, her study of women judges has led Elaine Martin to opine that "an increase in women judges may have an important impact in broadening the gender attitudes of the judiciary, and that these attitude changes may lead to changes in court operations."¹⁰⁶ This appears to be the case not only for women judges; in some instances, court policies also reflect the influences of judges of color and LGBT judges.¹⁰⁷

In the end, there are many good reasons to diversify the federal bench. Whether the argument is based on issues of fairness, legitimacy, providing role models, or incorporating a variety of American experiences and

⁹⁹ See *id.* at 171 tbl.4 (89.9% of NAWJ members surveyed agreed with the statement, "Since I have been a judge, I have made a special effort to encourage other women to seek judicial office.").

¹⁰⁰ See Robert Garofalo et al., *Sexual Orientation & Risk of Suicide Attempts Among a Representative Sample of Youth*, 153 PEDIATRICS & ADOLESCENT MED. 487, 487 (1999), available at http://hevratova.org.il/_Uploads/dbsAttachedFiles/sexualorientation.pdf.

¹⁰¹ See Martin, *supra* note 83, at 169.

¹⁰² See Myra C. Selby, *Examining Race & Gender Bias in the Courts: A Legacy of Indifference or Opportunity?*, 32 IND. L. REV. 1167, 1173-75 (1999) (describing and citing such changes).

¹⁰³ CAL. JUD. COUNCIL ADVISORY COMM. ON RACIAL & ETHNIC BIAS IN THE COURTS, FINAL REPORT 2 (1997), available at www.courts.ca.gov/documents/rebias.pdf.

¹⁰⁴ SEXUAL ORIENTATION FAIRNESS SUBCOMM. OF THE JUD. COUNCIL'S ACCESS & FAIRNESS ADVISORY COMM., FINAL REPORT: SEXUAL ORIENTATION FAIRNESS IN THE CAL. CTS. v (2001).

¹⁰⁵ *Id.*

¹⁰⁶ Martin, *supra* note 83, at 172.

¹⁰⁷ See CAL. JUD. COUNCIL ADVISORY COMM. ON RACIAL & ETHNIC BIAS IN THE COURTS, *supra* note 103.

perspectives into judicial decision making, the case for a diverse judiciary is strong.

IV. THE INFLUENCE OF A JUDGE'S BACKGROUND ON DECISION MAKING

The assumptions of those who espouse the theories discussed in the previous section is that a judge's background will influence how he or she understands cases. Indeed, underlying Justice Sotomayor's "wise Latina woman" comment is the idea that people of different backgrounds will bring different perspectives to the bench that may have an impact on decision making.¹⁰⁸ The effects of race, ethnicity, and gender on decision making in particular are implicated in her remarks. So, was Justice Sotomayor correct? Do these characteristics have an impact on case outcomes? Studies suggest that sometimes they do.¹⁰⁹

A. Studies of the Impact of Race and Gender of Judge

Early studies on the effect of gender, race or ethnicity of judges on case outcomes showed mixed results - some studies showed no effect while others showed some effect.¹¹⁰ However, more recent studies have shown effects based on race and gender, especially in cases involving employment discrimination and certain types of civil rights.¹¹¹

Several studies show that race and gender affect voting patterns of judges in employment discrimination cases.¹¹² For example, political scientist Nancy Crowe studied race and sex discrimination cases decided in the United States courts of appeals between 1981 and 1996.¹¹³ Her study focused on non-unanimous cases, i.e., those in which the panel disagreed on the outcome.¹¹⁴ She focused on these cases because they have the most potential for a judge's ideology to play a role, due to apparent room for disagreement.¹¹⁵ Included in Crowe's study were race, gender, and political

¹⁰⁸ Sotomayor's 'Wise Latina' Comment a Staple of Her Speeches, CNN POLITICS (June 5, 2009), http://articles.cnn.com/2009-06-05/politics/sotomayor.speeches_1_sotomayor-s-confirmation-sotomayor-supporters-judge-sonia-sotomayor?_s=PM:POLITICS [hereinafter *Sotomayor's 'Wise Latina' Comment a Staple of Her Speeches*].

¹⁰⁹ See Crowe, *supra* note 87; Joel B. Grossman, *Social Backgrounds & Judicial Decision Making*, 79 HARV. L. REV. 1551 (1966) (analyzing the influence of life experience prior to ascending to the bench on judicial decision making).

¹¹⁰ See generally Grossman, *supra* note 109 (describing studies which show correlation between judicial background and case outcome). Cf. Orley Ashenfelter et. al., *Politics & the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 260 (1995) ("[T]he characteristics of judges, including their political party and the party of their appointing president, provide little help in explaining the interjudge variance in case outcomes.").

¹¹¹ See generally Crowe, *supra* note 87 (presenting a compilation of studies pertaining to the effect of race and gender on judicial decision making in sex and race discrimination cases in an employment context).

¹¹² *Id.*

¹¹³ *Id.* at 56.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

party of appointing president.¹¹⁶ These factors had an impact in several instances. For example, women and African American judges were more likely to vote for a sex discrimination plaintiff than their White male counterparts.¹¹⁷ There was a strong correlation between political party and the decision in sex discrimination cases.¹¹⁸ For example, a White male Democrat appointed judge voted for the sex discrimination plaintiff in these cases 76% of the time, whereas his Republican appointed counterpart did so 28% of the time.¹¹⁹ There was also evidence of a partisanship effect on sex discrimination decisions for women and African American male judges.¹²⁰ While White female judges and African American male judges who were appointed by Democrats voted consistently for the sex discrimination plaintiff (White females - 90%; Black males - 93%), their Republican counterparts were far less likely to vote for the sex discrimination plaintiff (White female judges - 53%; Black male judges - 61%).¹²¹ Still, the Republican appointed White female judges and Black male judges were much more likely to vote for the sex discrimination plaintiff than their White male counterparts.¹²²

The findings in race discrimination cases were a bit different. There was little difference between White men and White women appointed by presidents of the same political party, but there was a difference for African American male judges.¹²³ Thus, White male and White female judges appointed by a Democrat voted for a race discrimination claimant in 49% and 51% of the cases respectively.¹²⁴ However, their African American male counterparts did so in 85% of the cases.¹²⁵ There was a similar pattern for judges appointed by Republican presidents. Thus, White male judges and White female judges appointed by Republican presidents voted for the race discrimination plaintiff 20% and 21% of the time respectively.¹²⁶ Their African American male counterparts voted for the race discrimination plaintiff 60% of the time.¹²⁷ Thus, political party was the decisive factor for White male and female judges, whereas race correlated for African American male judges in these cases. Similarly, Songer, Davis, and Haire

¹¹⁶ *Id.* at 2.

¹¹⁷ Crowe, *supra* note 87, at 83 fig. 3.1. Crowe did not include female African American judges in her sample because at the time of her study there were an insufficient number of such judges for purposes of statistical analysis. *Id.* at 81 n.25.

¹¹⁸ *Id.* at 83 fig.3.1.

¹¹⁹ *Id.*

¹²⁰ *See id.*

¹²¹ *Id.*

¹²² *See* Crowe, *supra* note 87, at 83 fig.3.1.

¹²³ *See id.* at 114 fig.4.1.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

found in a 1994 study that female federal appellate judges were much more likely than men to support victims of discrimination.¹²⁸

Other studies are consistent with respect to the effect of gender of appellate judges in sex discrimination cases. In a 1986 study of state supreme court justices, Gryski, Main and Dixon found that the presence of a woman on the court increased decisions in favor of sex discrimination appellants.¹²⁹ In addition, recent studies of appellate courts show that the presence of a female judge on a panel increases the likelihood that a male judge will vote for a plaintiff alleging discrimination.¹³⁰

More recently, Sarah Westergren looked at sex discrimination decisions from the United States Courts of Appeals during 1994-2000.¹³¹ While the sex of the judge did have an effect in these cases, it did not reach the 0.05 level that would be required for statistical significance.¹³² Instead, political party of appointing president and race of the judge were better predictors.¹³³ Judges who were members of minority groups were more likely to vote for the sex discrimination plaintiff than White judges.¹³⁴ In addition, judges who were appointed by Democrats were more likely to vote for sex discrimination plaintiffs than those appointed by Republicans.¹³⁵ Results such as these have led some to opine that the differences in voting patterns between men and women are better explained by the political party of the appointing president rather than gender.¹³⁶ There are many articles describing these studies in detail.¹³⁷

Similarly, results from studies of the federal district courts have found political affiliation of appointing president playing more of a role. Professor Jennifer Segal studied the effects of race and gender on judicial decision making, but her study focused on the federal district courts.¹³⁸ Unlike Crowe, Segal's study focused only on Clinton appointees to

¹²⁸ Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 434 (1994) (noting that "in sharp contrast to the results in obscenity and search and seizure cases, the coefficient for gender is positive, robust and statistically significant").

¹²⁹ Gerard S. Gryski et. al., *Models of State High Ct. Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 153 (1986).

¹³⁰ Peresie, *supra* note 87, at 1765; Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010).

¹³¹ Sarah Westergren, Note, *Gender Effects in the Courts of Appeals Revisited: The Data Since 1994*, 92 GEO. L.J. 689, 690 (2004).

¹³² *Id.* at 703-04.

¹³³ *Id.* at 704.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See Rosalind Dixon, *Female Justices, Feminism & the Politics of Judicial Appointment: A Re-Examination*, 21 YALE J.L. & FEMINISM 297, 313-15 (2010).

¹³⁷ For more on the social science of judicial decision-making, see Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113, 137-146 (1999) and Westergren, *supra* note 131.

¹³⁸ Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 137-38 (2000).

determine whether there were differences in voting behaviors based on race and/or gender of the judge.¹³⁹ She ultimately studied 799 cases for gender and 701 cases for race.¹⁴⁰ For sex, the study addressed "women's issues," including cases about "gender discrimination, sexual harassment, abortion rights and maternity rights, custody battles, and equal pay."¹⁴¹ Her race cases included "race discrimination, voting rights, school desegregation, and affirmative action."¹⁴² In addition, the study included "ethnic, disability, age and poverty discrimination, . . . alien rights," personal liberty cases, "criminal rights cases," and "federal economic regulation cases" in both the race and gender analyses.¹⁴³ There ultimately was little difference found in case outcomes based on the race or sex of the district court judge, and where she found differences, they were often unexpected.¹⁴⁴ For example, she found no statistically significant differences based on the sex of the judge except in cases pertaining to women's issues, wherein the male judges were more supportive of the women's position than the female judges.¹⁴⁵ Carp, Manning and Stidham had similar results in a study of Clinton district court appointees in criminal, civil rights and liberties, and labor and economic relations cases.¹⁴⁶ This study found that Clinton's White male appointees rendered liberal decision more often than his nontraditional appointees.¹⁴⁷ Thus, while not all studies show race or gender effects, at least in court of appeals discrimination decisions, a judge's race and sex have been shown to correlate with voting records. Thus, diversity seems to make a difference in certain situations.

B. Other Evidence of the Difference that Difference Makes

Some judges have acknowledged the impact that differences in background can make in the judiciary. Justice Sotomayor was not the first to make this suggestion with her "wise Latina woman" comment. For example, Justice Ruth Bader Ginsburg has noted "[w]omen bring a different life experience to the table. All of our differences make the judicial conferences better. That I'm a woman is part of it."¹⁴⁸ Similarly, federal appellate judge A. Wallace Tashima explained that his life experiences, including being evacuated from his home and moved to an internment camp during World War II, "shaped the way I view my job as a

¹³⁹ *Id.* at 142.

¹⁴⁰ *Id.* at 143-44.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Segal, *supra* note 138, at 144-45 tbls.2 & 3.

¹⁴⁵ *Id.* at 144-45, 146 tbl.3.

¹⁴⁶ See Robert A. Carp, Kenneth L. Manning & Ronald Stidham, *President Clinton's District Judges: "Extreme Liberals" or Just Plain Moderates?*, 84 JUDICATURE 282, 286 (2001).

¹⁴⁷ See *id.* at 286, tbl.3.

¹⁴⁸ CTR. FOR WOMEN IN GOV'T & CIVIL SOC'Y, *supra* note 23, at 1.

federal judge and the skepticism that I sometimes bring to the representations and motives of the other branches of government.”¹⁴⁹

Justice Sandra Day O'Connor explained the impact of Justice Thurgood Marshall's background on Supreme Court discussions:

Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.

At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.¹⁵⁰

Thus, judges from a variety of ethnic and racial backgrounds have acknowledged that their backgrounds and the backgrounds of their colleagues can have an impact in a variety of ways on the court system.

Justice O'Connor's own experiences likely affected her judging. Sex discrimination in employment was very real to her; after graduation from Stanford Law School, the only job offer she received was as a legal secretary.¹⁵¹ This is not to say that so-called “traditional” judges—White males—cannot attain this perspective. Indeed, Justice Sotomayor in her lecture containing the now infamous “wise Latina woman” comment, noted that:

I . . . believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable . . . [N]ine white men on the Supreme Court have done so on many occasions and on many issues including *Brown*.¹⁵²

Thus, while it is certainly possible for traditional appointees to see the perspective of others, those with direct experiences in different

¹⁴⁹ A. Wallace Tashima, *Play It Again, Uncle Sam*, 68 LAW & CONTEMP. PROBS. 7, 8 (2005), available at [http://www.law.duke.edu/shell/cite.pl?68+Law+&+Contemp.+Probs.+7+\(spring+2005\)](http://www.law.duke.edu/shell/cite.pl?68+Law+&+Contemp.+Probs.+7+(spring+2005)).

¹⁵⁰ Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992).

¹⁵¹ Michael J. Klarman, *Social Reform Litigation & Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J. L. & GENDER 251, 269 (2009) (citing Adam Cohen, Editorial, *Why Justice O'Connor Could Be Affirmative Action's Unlikely Savior*, N.Y. TIMES, Apr. 6, 2003, § 4, at 12; Ruth Bader Ginsburg, *Remarks on Women's Progress in the Legal Profession in the United States*, 33 TULSA L.J. 13, 14 (1997)).

¹⁵² Sotomayor, *supra* note 2, at 92.

communities may find it easier to understand the perspectives of those communities and raise those perspectives with colleagues.

A study of female judges suggests that they perceive themselves as more sensitive to issues of sex discrimination and believe they bring a unique perspective to the bench.¹⁵³ In her study of female state court judges, political scientist Elaine Martin asked the judges if they agreed, were neutral on, or disagreed with various statements about the role of female judges.¹⁵⁴ One of the statements read as follows: "[w]omen judges are probably more sensitive to claimants raising issues of sexual discrimination than are men."¹⁵⁵ Of those responding, 67.77% of those who were members of the National Association of Women Judges ("NAWJ") agreed, and 52.7% of those who were non-member women judges agreed as well.¹⁵⁶ In addition, 85.37% of NAWJ members and 63.59% of non-member women judges agreed that "[w]omen have certain unique perspectives and life experiences, different from those of men that ought to be represented on the bench by women judges."¹⁵⁷ Some NAWJ members also believed that their "presence on the bench has made a difference in the way men judges think about how their decisions will affect women as a group."¹⁵⁸ Finally, 80.3% of NAWJ members who were surveyed agreed that "[w]omen judges work formally and informally within their court systems to heighten the sensitivity of other judges to potential problems with gender bias in the courtroom and in substantive law."¹⁵⁹ Likewise, 76.9% agreed that "[w]omen judges have an influence on how their judicial colleagues perceive cases involving women's issues."¹⁶⁰

Evidence of differences in perspectives among judges of differing backgrounds is likewise supported by the work of gender, race, and ethnic bias task forces. For example, California's Advisory Committee on Gender Bias in the Courts found that approximately 63% of women judges believed that gender bias against women was widespread and apparent or subtle in the California courts, whereas less than 24% of male judges believed the bias was widespread.¹⁶¹ In addition, approximately 45% of female judges responded that they on occasion or frequently observed judges make remarks considered demeaning to women in and out of the

¹⁵³ Martin, *supra* note 83, at 166.

¹⁵⁴ *Id.* at 169-70.

¹⁵⁵ *Id.* at 169 tbl.2.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 171 tbl.4 (finding that 35.2% of NAWJ members agree and 39.2% of NAWJ members are neutral in regards to that statement).

¹⁵⁹ Martin, *supra* note 83, at 170 tbl.3.

¹⁶⁰ *Id.*

¹⁶¹ JUD. COUNCIL OF CAL. ADVISORY COMM. ON GENDER BIAS IN THE COURTS, ACHIEVING EQUAL JUSTICE FOR WOMEN & MEN IN THE CAL. COURTS: FINAL REPORT 30 (Gay Danforth & Bobbie L. Welling eds., 1996), available at <http://www.courts.ca.gov/documents/f-report.pdf>.

courtroom, whereas only 6.6% of male judicial officers did so.¹⁶² Based on these experiences and perceptions, women judges may have more understanding about the circumstances that give rise to an action for sex discrimination.

Race and gender likewise play a part in how judges treat individuals appearing before them. The D.C. Circuit Task Force on Gender, Race and Ethnic Bias found that 33% of minority women lawyers (as well as 33% of African American women lawyers as a subgroup) responded that a federal judge had questioned their status as a lawyer or assumed that they were not a lawyer; comparatively, only 9.9% of White women and 10% of minority men reported such behavior.¹⁶³ The number is even smaller for White men, of whom only 1% reported such behavior.¹⁶⁴ It is not much of a leap to imagine, for example, that African American women judges, who have such experiences, will treat lawyers of color respectfully in the courtroom. Thus, the experiences of these diverse lawyers, if given an opportunity to serve on the bench, might lead to more respectful treatment of women and members of minority groups who are litigants, witnesses, and lawyers in the courtroom.

C. The Role of the Diverse Judge

While the statistics and anecdotal evidence noted above suggest that some judges believe that their backgrounds influence how they perceive certain types of cases, perhaps the most compelling evidence of difference comes from judicial decisions themselves. Indeed, how a judge's background affects a case is best demonstrated by looking at real lawsuits involving nontraditional judges.

Judge Carlos Lucero is a Latino sitting federal judge on the Tenth Circuit Court of Appeals.¹⁶⁵ In *Vigil v. City of Las Cruces*,¹⁶⁶ Judge Lucero dissented from a denial of a petition for rehearing en banc.¹⁶⁷ At trial, plaintiff Mary Ann Rocha Vigil complained about sexual and racial harassment by her supervisor.¹⁶⁸ Ms. Vigil alleged that her supervisor frequently referred to Hispanics as "wetbacks," and that he commented that "I didn't know that Mexicans had rights."¹⁶⁹ This same supervisor offered

¹⁶² *Id.* at 110.

¹⁶³ Special Comm. on Gender, *Report to the D.C. Circuit Task Force on Gender, Race & Ethnic Bias*, 84 GEO. L.J. 1657, 1743 (1996).

¹⁶⁴ *Id.*

¹⁶⁵ *History of the Federal Judiciary, U.S. Court of Appeals for the Tenth Circuit, Lucero, Carlos, F.*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1434&cid=25&ctype=ac&instat=10> (last visited Oct. 11, 2010). I use the word "Latino" here because it was noted that Judge Lucero was one of President Clinton's Latino appointees. See Sylvia R. Lazo Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L. J. 1423, 1438-39 n. 87 (2008).

¹⁶⁶ 119 F.3d 871 (10th Cir. 1997).

¹⁶⁷ *Id.* at 871.

¹⁶⁸ *Id.* at 871-72 (Lucero, J., dissenting).

¹⁶⁹ *Id.* (internal citation omitted). I use the term "Hispanic" because that is the term the court used.

her pornographic software and constantly asked her to go flying with him in spite of her repeated refusals.¹⁷⁰ The panel majority held that the supervisor's alleged actions were insufficiently severe or pervasive to amount to actionable racial or sexual harassment as a matter of law.¹⁷¹ In his dissent to denial of rehearing, Judge Lucero explained why he disagreed with the panel's assessment of Ms. Vigil's racial harassment claim:

In affirming summary judgment for the City of Las Cruces, the panel holds that it is per se unreasonable for a Hispanic worker to consider what she describes as her supervisor's "frequent" references to "wetbacks" as being hostile or abusive. I am disappointed that the panel reaches that conclusion; more importantly, I can see no legal or factual basis to support it. The term "wetback" is severely degrading. . . . Accordingly, its use hardly needs to be pervasive for a Hispanic employee to find her work environment hostile and abusive – *and reasonably so*.¹⁷²

Judge Lucero understood how this term could be sufficiently severe to satisfy the standard for racial harassment; the other judges did not.¹⁷³ Did Judge Lucero's background increase his understanding of Ms. Vigil's situation? Certainly a Hispanic judge could understand the feelings and reactions that use of a term such as "wetback" would engender in a

¹⁷⁰ *Id.*

¹⁷¹ *Vigil v. City of Las Cruces*, No. 96-2059, 1997 WL 265095, at *2-3 (10th Cir. May 20, 1997).

¹⁷² *Vigil*, 119 F.3d at 874 (Lucero, J., dissenting) (internal citations omitted).

¹⁷³ *Vigil*, 1997 WL 265095 at *3. Judge Lucero also wrote a compelling dissent to a denial of rehearing en banc in *Alexander v. Oklahoma*, a civil rights case brought by the survivors and descendants of survivors of a racially based attack that destroyed the African American community in Greenwood, Oklahoma. *Alexander v. Oklahoma*, 391 F.3d 1155, 1159 (10th Cir. 2004) (Lucero, J., dissenting).

Judge Lucero argued:

No case in my tenure on the court could be more compellingly described as meeting the Rule 35 en banc standard of presenting a "question of exceptional importance" deserving the attention of the entire court than this. In one of the more shameful events in our nation's history, over two hundred African-Americans were slaughtered and a whole section of the City of Tulsa was burned in an uncontrolled riot in 1921. Official government action by the City of Tulsa and the State of Oklahoma fueled this carnage by deputizing and arming the mob, and authorizing the National Guard to detain the victims while their forty-two square block community was razed to the ground. (It is inconceivable that a government investigation of the incident of September 11 would have failed to count every person who perished, yet telling of the attitude that prevailed in Oklahoma in 1921 is that no effort was made to determine officially the number of those who died there.) All subsequent claims raised by the victims fell upon the deaf ears of the courts at the time, and most languished without even a cursory glance at the merits. None of the over one hundred lawsuits filed were successful. In a perversion of justice, a grand jury commissioned by the state exonerated the city and state, and all white rioters, and blamed the victims for the atrocity. This history alone raises a "question of exceptional importance" – the laudable recent investigation of this tragedy the State of Oklahoma compels us to confront it.

Id. For a description of the facts found at trial, see *Alexander v. Oklahoma*, 382 F.3d 1206, 1211-12 (10th Cir. 2004).

Hispanic listener. It is likely that non-Hispanic judges would have less understanding of the implications of such language on a Hispanic employee.

Other examples of a judge's background affecting decision making on the bench include several rather recent cases in which Justice Ruth Bader Ginsburg disagreed (at least in part) with the majority, and even expressed public exasperation at the positions of her fellow Justices.¹⁷⁴ Much of the public discussion came as a result of comments made by Justice Ginsburg about being the only female justice on the Court after the retirement of Justice Sandra Day O'Connor.¹⁷⁵ Several cases, in particular, made Justice Ginsburg wish for a fellow female justice. For example, *Safford Unified School District v. Redding*¹⁷⁶ involved the strip search of a thirteen-year-old girl to locate ibuprofen, a "drug" that was considered contraband in her school.¹⁷⁷ After oral argument, Justice Ginsburg made the following observation to the media regarding her male colleagues, "[t]hey have never been a 13-year-old girl. . . . It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood."¹⁷⁸ While Justice Ginsburg placed herself in the thirteen-year-old girl's position, fellow Justice Stephen Breyer likened the search to changing for gym class.¹⁷⁹ Although the Court ultimately held that the search was unreasonable, the majority agreed that the administrator who ordered it was protected by qualified immunity.¹⁸⁰ Dissenting in part, Justice Ginsburg disagreed, arguing that the search violated "clearly established" law and therefore the girl was entitled to a remedy.¹⁸¹ In particular, Justice Ginsburg focused on the continued humiliation of plaintiff Savanna Redding even after school officials found no contraband during their strip search.¹⁸² As she explained,

To make matters worse, Wilson did not release Redding, to return to class or to go home, after the search. Instead, he made her sit on a chair outside his office for over two hours. At no point did he attempt to call her parent. Abuse of authority of that order should not be shielded by official immunity.¹⁸³

¹⁷⁴ Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY, Oct. 5, 2009, http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm.

¹⁷⁵ *See id.*

¹⁷⁶ 129 S. Ct. 2633 (2009).

¹⁷⁷ *Id.* at 2637-38.

¹⁷⁸ Biskupic, *supra* note 174.

¹⁷⁹ *See* Robert Barnes, *Justices' Take on Strip Search Vary*, WASH. POST, Apr. 22, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/21/AR2009042103695.html>.

¹⁸⁰ *Redding*, 129 S. Ct. at 2644.

¹⁸¹ *Id.* at 2645-46 (Ginsburg, J., concurring in part and dissenting in part). Justice Stevens, in a concurrence and dissent in which Justice Ginsburg joined, agreed with this position. *See id.* at 2644-45 (Stevens, J., concurring and dissenting) (describing this as a case in which "clearly established law meets clearly outrageous conduct").

¹⁸² *Id.* at 2645-46.

¹⁸³ *Id.* at 2645.

Similarly, Justice Ginsburg dissented in and publicly commented on two cases involving sex discrimination, *AT&T Corp. v. Hulteen*¹⁸⁴ and *Ledbetter v. Goodyear Tire & Rubber Co.*¹⁸⁵ In *Ledbetter*, the Court held that the decision to set an employee's pay was a "discrete act" that triggered the 180-day EEOC filing period for purposes of filing a claim under Title VII.¹⁸⁶ Lily Ledbetter, a supervisor for Goodyear for nearly twenty years, was paid significantly less than similarly situated male supervisors.¹⁸⁷ Because Ledbetter filed her charge of discrimination more than 180 days after Goodyear made the discriminatory decisions, the Court held that her claim was time-barred even though she continued to receive reduced pay compared to her male colleagues within the 180-day charge filing period.¹⁸⁸

In her dissent, Justice Ginsburg examined the workplace realities of a woman employed in a traditionally male field and read the statute to encompass Ledbetter's claims.¹⁸⁹ She explained, "[c]omparative pay information . . . is often hidden from the employee's view . . . Small initial discrepancies may not be seen as meet [sic] for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves."¹⁹⁰ Justice Ginsburg personally understood the context in which Ledbetter was working – a woman among many men – and took into consideration what might cause a delay in addressing her salary concerns. Thus, Ledbetter was reasonable in waiting to complain until these disparities became "apparent and sizable."¹⁹¹ Reasoning that pay differentials of this sort result from a series of discrete acts, Justice Ginsburg forcefully argued that the standard developed for sexual harassment claims, whereby only one act of continuing harassing behavior need occur within the 180-day charge filing period to be timely, should apply.¹⁹² She also noted that in a disparate pay case, the employer continuously benefits from paying a woman lower wages than male counterparts.¹⁹³ Justice Ginsburg also detailed the evidence that Ledbetter's pay differential was indeed based on sex discrimination.¹⁹⁴ This evidence

¹⁸⁴ 129 S. Ct. 1962 (2009).

¹⁸⁵ 550 U.S. 618, 621-22 (2007), *superseded by statute*, Pub. L. 111-2, 123 Stat. 5 (Jan. 29, 2009).

¹⁸⁶ 550 U.S. at 621.

¹⁸⁷ *Id.* at 621-22.

¹⁸⁸ *Id.* at 632.

¹⁸⁹ *Id.* at 645 (Ginsburg, J., dissenting).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² 550 U.S. at 648-49.

¹⁹³ *Id.* at 650 (noting that the employer is enriched by paying a woman less than a man for the same work).

¹⁹⁴ *Id.* at 659-60. Included in this evidence were such discrepancies as Goodyear's suggestion that the pay differential was based on Ledbetter's poor performance, and yet Ledbetter received a "Top

was notably absent from the majority opinion. In response to the majority's holding in this case, Justice Ginsburg read her dissenting opinion from the bench, ending with a call to Congress to amend the statute to overturn the decision.¹⁹⁵

In *Hulteen*, the Court permitted AT&T to decrease pension benefits for women who took time off for disabilities related to pregnancy (even though leave for other disabilities did not count against an employee's benefits).¹⁹⁶ As Justice Ginsburg explained:

The history of women in the paid labor force underpinned and corroborated the views of the lower courts and the EEOC. In generations preceding – and lingering long after – the passage of Title VII, that history demonstrates, societal attitudes about pregnancy and motherhood severely impeded women's employment opportunities.¹⁹⁷

She continued in the opinion to discuss the history of widespread discrimination against women based on pregnancy in the United States. As she further stated, “[c]ertain attitudes about pregnancy and childbirth, throughout human history, have sustained pervasive, often law-sanctioned, restrictions on a woman's place among paid workers and active citizens.”¹⁹⁸ As the media reported, Ginsburg remarked that oral argument in *Hulteen* was, “‘just, for me, Ledbetter repeated’ . . . adding that her colleagues showed ‘a certain lack of understanding’ of the bias a woman can face on the job.”¹⁹⁹ In summary, Justice Ginsburg explained,

‘You know the line that Sandra [Day O’Connor] and I keep repeating . . . that ‘at the end of the day, a wise old man and a wise old woman reach the same judgment’? But there are perceptions that we have because we are women. It’s a subtle influence. We can be sensitive to things that are said in draft opinions that (male justices) are not aware can be offensive.’²⁰⁰

Justice Ginsburg noted that while “the differences between male and female justices . . . are ‘seldom in the outcome,’” she further acknowledged, “it is sometimes in the outcome.”²⁰¹

Performance Award” in 1996. *Id.* at 659. Toward the end of her career, the plant manager told her “that the plant did not need women, that [women] didn’t help it, [and] caused problems.” *Id.* at 660.

¹⁹⁵ Biskupic, *supra* note 174; *Ledbetter*, 550 U.S. at 661 (“Once again, the ball is in Congress’ court. As in 1991, the Legislature may act to correct this Court’s parsimonious reading of Title VII.”).

¹⁹⁶ 129 S. Ct. at 1966-67. The policy was applied to women who took pregnancy leave prior to enactment of the Pregnancy Discrimination Act of 1978, which now prohibits such practices. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e (k) (1978).

¹⁹⁷ *Hulteen*, 129 S. Ct. at 1974 (Ginsburg, J., dissenting).

¹⁹⁸ *Id.* at 1978.

¹⁹⁹ Biskupic, *supra* note 174.

²⁰⁰ *Id.*

²⁰¹ *Id.*

In *Safford*, the majority agreed with Justice Ginsburg that a strip search of a thirteen-year-old girl for ibuprofen was unconstitutional, but the Court still afforded her no relief.²⁰² Given the statements of some Justices during oral argument,²⁰³ it would be interesting to know if Justice Ginsburg's understanding of a thirteen year-old girl's perception swayed this outcome.

V. CONTROVERSY SURROUNDING RECENT "NONTRADITIONAL" SUPREME COURT CANDIDATES

Both Justice Sonia Sotomayor and Justice Elena Kagan encountered difficulties during their confirmation process because of statements made in academic settings.²⁰⁴ Ironically enough, their statements suggest that they would bring a diversity of perspective for which those who argue for a diverse bench advocate. However, rather than being embraced for the diversity they would bring, these two Supreme Court nominees were harangued for it. For Justice Sotomayor, the statements that caused controversy were made in a speech given at a law school.²⁰⁵ For Justice Kagan, it was a position she took as Dean of Harvard's law school.²⁰⁶ Examining reactions to the statements also reveals the prevalence of White male heterosexist norms and the resistance of certain members of the committee to anyone who challenges these norms.

A. Justice Sotomayor's Hearing & Public Commentary

Justice Sonia Sotomayor took a great deal of heat during her confirmation hearing as well as in the media for her "wise Latina woman" comment²⁰⁷ and her decision in the *Ricci v. DeStefano*²⁰⁸ case. In response

²⁰² 129 S. Ct. at 2637-38.

²⁰³ In one telling exchange, Justice Breyer likened the search in *Safford* to changing clothes in gym class. Transcript of Oral Argument at 22, *Safford United Sch. Dist. v. Redding*, 129 S. Ct. 2633 (2009), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-479.pdf. As he stated, "I'm trying to work out why is this a major thing to say strip down to your underclothes, which children do when they change for gym, they do fairly frequently, not to—you know, and there are only two women there. Is—how bad is this, underclothes? That's what I'm trying to get at. I'm asking because I don't know." *Id.* at 45. Justice Ginsburg was quick to respond: "Mr. Wolf, one thing should be clarified. I don't think there's any dispute what was done in the case of both of these girls. It wasn't just that they were stripped to their underwear. They were asked to shake their bra out, to—to shake, stretch the top of their pants and shake that out. There's no dispute, factual dispute about that, is there?" *Id.* Justice Ginsburg also recognized the humiliation the plaintiff might have felt by being left outside the vice principal's office after the search turned up nothing. *Id.* at 19-20. Her fellow Justice Scalia, responded to Justice Ginsburg's concerns by explaining, "I assume a school can assign a student to study hall. That's not considered a government seizure. Isn't that an obvious part of the parental supervision that a school exercises, sit here and stay there." *Id.* at 20.

²⁰⁴ See Sotomayor's 'Wise Latina' Comment a Staple of Her Speeches, *supra* note 108; Sheryl Gay Stolberg, *At Harvard, Kagan Aimed Slight Higher*, N.Y. TIMES, May 26, 2010, at A1, available at <http://www.nytimes.com/2010/05/26/us/politics/26kagan.html?pagewanted=all>.

²⁰⁵ See Sotomayor's 'Wise Latina' Comment a Staple of Her Speeches, *supra* note 108.

²⁰⁶ *Id.*

²⁰⁷ See Sotomayor's 'Wise Latina' Comment a Staple of Her Speeches, *supra* note 108.

to the “wise Latina woman” comment, one commentator explained that “her basic proposition seems to be that White males (with some exceptions, she noted) are inferior to all other groups in the qualities that make for a good jurist.”²⁰⁹ While this commentator conceded that he also supported diversification of the bench, he asked, “[d]o we want a new justice who comes close to stereotyping White males as (on average) inferior beings?”²¹⁰ In the popular media, Rush Limbaugh noted that Justice Sotomayor “brings a form of bigotry and racism to the Court,” and analogized her nomination to that of David Duke, former head of the Ku Klux Klan.²¹¹ Newt Gingrich tweeted with reference to Justice Sotomayor’s “wise Latina woman” statement that “new racism is no better than old racism.”²¹²

The Republican members of the Senate Judiciary Committee had similar reactions to both the “wise Latina woman” comment as well as the *Ricci* case.²¹³ In both the statements and questioning, they suggested that the comment and the *Ricci* case called into question Justice Sotomayor’s fitness as a judge.²¹⁴ This excerpt from Senator Jeff Sessions’ statement provides an example:

I want to be clear:

I will not vote for—and no senator should vote for—an individual nominated by any President who is not fully committed to fairness and impartiality toward every person who appears before them.

I will not vote for—and no Senator should vote for—an individual nominated by any President who believes it is acceptable for a judge to allow their personal background, gender, prejudices, or sympathies to sway their decision in favor of, or against, parties before the court. In my view, such a philosophy is disqualifying.

Such an approach to judging means that the umpire calling the game is not neutral, but instead feels empowered to favor one team over the other.

²⁰⁸ 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev’d* 129 S. Ct. 2658 (2009).

²⁰⁹ Taylor, *supra* note 1.

²¹⁰ *Id.*

²¹¹ Rachel Weiner, *Limbaugh: Nominating Sotomayor Like Nominating David Duke*, HUFFINGTON POST, http://www.huffingtonpost.com/2009/05/29/limbaugh-nominating-sotom_n_209151.html (last updated June 29, 2009).

²¹² Huma Khan & Jake Tapper, *Newt Gingrich on Twitter: Sonia Sotomayor ‘Racist’, Should Withdraw*, ABC NEWS (May 27, 2009), <http://abcnews.go.com/Politics/SoniaSotomayor/story?id=7685284#.Tr2b37K6Sul>.

²¹³ *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the U.S. Before the Comm. on the Judiciary U.S. Sen., 111th Cong. 7-8* (2009) (statement of Sen. Jeff Sessions, Ranking Member, Comm. on the Judiciary) [hereinafter *Sotomayor Hearings*], available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:56940.pdf.

²¹⁴ *See id.*

Call it empathy, call it prejudice, or call it sympathy, but whatever it is, it is not law. In truth, it is more akin to politics, and politics has no place in the courtroom.

Some will respond, "Judge Sotomayor would never say it's acceptable for a judge to display prejudice in a case." But I regret to say, Judge, that some of your statements that I will outline seem to say that clearly. Let's look at just a few examples.

....

And during a speech 15 years ago, Judge Sotomayor said, "I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt... continuously to judge when those opinions, sympathies, and prejudices are appropriate."

And in the same speech, she said, "my experiences will affect the facts I choose to see..."

Having tried a lot of cases, that particular phrase bothers me. I expect every judge to see all the facts.

So I think it is noteworthy that, when asked about Judge Sotomayor's now-famous statement that a "wise Latina" would come to a better conclusion than others, President Obama, White House Press Secretary Robert Gibbs, and Supreme Court Justice Ginsburg declined to defend the substance of those remarks.²¹⁵

Senator Sessions suggests that Justice Sotomayor is "prejudiced" and unfit to be a judge because of her admission that her background has some impact on her decision making.²¹⁶ The inference is that because she does not see the world in the same way that Senator Sessions does, her view brings a prejudicial perspective that his does not. Yet, Senator Sessions' impression that his version of the world is somehow "neutral" while Justice Sotomayor's is not is fundamentally flawed. Everyone approaches the world with a personal perspective. That Senator Sessions viewed his as "neutral" suggests that his viewpoint has such dominance in American discourse that he does not even understand it as a perspective. That presumption does not make it "correct" or "unbiased."²¹⁷

²¹⁵ *Id.* at 6-7.

²¹⁶ *Id.* at 7-8.

²¹⁷ Many critical theorists write about this phenomenon with respect to the privilege of being white. Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y, 245, 247 (2005) ("Characteristics of the privileged group define the societal norm."). Barbara Flagg, in her groundbreaking article, explained it well:

The most striking characteristic of whites' consciousness of whiteness is that most of the time we don't have any. I call this the *transparency* phenomenon: the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific. Transparency often is the mechanism through which white decisionmakers who disavow white supremacy impose white norms on blacks.

Senator Sessions moved on to the *Ricci* case:

I am concerned by Ricci, the New Haven Firefighters case – recently reversed by the Supreme Court – where she agreed with the City of New Haven’s decision to change the promotion rules in the middle of the game. Incredibly, her opinion consisted of just one substantive paragraph of analysis.

Judge Sotomayor has said that she accepts that her opinions, sympathies, and prejudices will affect her rulings. Could it be that her time as a leader in the Puerto Rican Legal Defense and Education Fund, a fine organization, provides a clue to her decision against the firefighters?

While the nominee was Chair of that fund’s Litigation Committee, the organization aggressively pursued racial quotas in city hiring and, in numerous cases, fought to overturn the results of promotion exams. It seems to me that in Ricci, Judge Sotomayor’s empathy for one group of firefighters turned out to be prejudice against another.²¹⁸

Thus, Justice Sotomayor’s statements and experience in a group dedicated to the civil rights of people of Puerto Rican descent render her once again prejudiced and unfit to be a Supreme Court Justice. The idea that her Latina background might affect how she decides a case is viewed as disqualifying rather than as enriching how she might understand certain cases.

Similarly, Senator Chuck Grassley, a Republican Senator from Iowa, stated:

In yet another speech, you proclaimed that the court of appeals is where policy is made. Your “wise Latina” comment starkly contradicts a statement by Justice O’Connor that a wise old man and a wise old woman would eventually reach the same conclusion in a case.

These statements go directly to your views of how a judge should use his or her background and experience when deciding cases. Unfortunately, I fear they do not comport with what I and many others believe is the proper role of a judge or an appropriate judicial method.

The American legal system requires that judges check their biases, personal preferences, and politics at the door of the courthouse. Lady Justice stands before the Supreme Court with a blindfold, holding the scales of justice. Just like Lady Justice, judges and Justices must wear blindfolds when they interpret the Constitution and administer justice.

Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness & the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993). For a similar discussion of male norms, see CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 237-38 (1989) (“In male supremacist societies, the male standpoint dominates civil society in the form of the objective standard – that standpoint which, because it dominates in the world, does not appear to function as a standpoint at all.”).

²¹⁸ *Sotomayor Hearings*, *supra* note 213, at 7-8.

I will be asking you about your ability to wear that judicial blindfold. I will be asking you about your ability to decide cases in an impartial manner and in accordance with the law and the Constitution. I will be asking you about your judicial philosophy, whether you allow biases and personal preferences to dictate your judicial methods.

....

I am looking to support a restrained jurist committed to the rule of law and the Constitution. I am not looking to support a creative jurist who will allow his or her background and personal preferences to decide cases.²¹⁹

Senator Grassley also addresses the “wise Latina woman” statement and contrasts its implications with that of the idyllic, blind “lady justice,” suggesting that Justice Sotomayor will not be able to fulfill the role of an impartial decision maker.²²⁰ Rather than viewing her Latina background as positive, he relegates it to the status of a “personal preference.”

Finally, Senator Jon Kyl, from Arizona, summed up the tenor of these remarks well:

With a background that creates a *prima facie* case for confirmation, the primary question I believe Judge Sotomayor must address in this hearing is her understanding of the role of an appellate judge. From what she has said, she appears to believe that her role is not constrained to objectively decide who wins based on the weight of the law, but rather who in her personal opinion, should win. The factors that will influence her decisions apparently include her gender and Latina heritage and foreign legal concepts that as she said, get her creative juices going.²²¹

According to Senator Kyl, Justice Sotomayor would not decide a case based on unbiased application of the law to the facts, but instead based on “personal opinion,” influenced by her gender and Latina heritage.

When Senator Sessions raised the issue of the *Ricci* case during his questioning, he noted that Judge Cabranes, “himself of Puerto Rican ancestry,” had voted to reconsider the decision *en banc*.²²² He explained that the media reported that Judge Cabranes was concerned with the outcome of that case.²²³ Senator Sessions’ comments suggest that he believed that Judge Cabranes, unlike Justice Sotomayor in the *Ricci* case, was acting appropriately in supporting the White and Hispanic firefighters’ position.

Senator Lindsey Graham, a Republican from South Carolina, stated that his “Republican colleagues who voted against you I assure you could vote

²¹⁹ *Id.* at 18 (statement of Sen. Charles Grassley).

²²⁰ *Id.*

²²¹ *Id.* at 21 (statement of Sen. Jon Kyl).

²²² *Id.* at 75 (statement of Sen. Jeff Sessions).

²²³ *Id.* at 74. One of the plaintiffs in the *Ricci* case was Hispanic. *See Ricci*, 129 S. Ct. at 2671.

for a Hispanic nominee. They just feel unnerved by your speeches and by some of the things that you have said and some of your cases.”²²⁴ Thus, while Republicans would vote for the “right” kind of Hispanic, Justice Sotomayor, as evidenced by her cases (e.g., *Ricci*) and speeches (e.g., “wise Latina woman”), was not the “right” kind.

Was Justice Sotomayor’s “wise Latina” statement really so controversial? If it is understood in the context in which she said it, the answer is “no.”²²⁵ Justice Sotomayor made the “wise Latina woman” comment during the annual Judge Mario G. Olmos lecture at the University of California, Berkeley, Boalt Hall School of Law.²²⁶ She made it in the context of a frank discussion about the impact her background might make in her judging. She began her discussion by exploring the differences between people who could be characterized as Latina or Latino.²²⁷ In a very non-essentialist manner, Justice Sotomayor explained how some of her Puerto Rican family customs would seem strange to a fellow Latina of Mexican heritage.²²⁸ She was acknowledging the range of experiences among people who could be called “Latina,” suggesting that there is no universal Latina experience.

Justice Sotomayor explored the ideas of others who have opined on diversity on the bench. For example, she mentioned a fellow jurist’s position that assuming women may be different than men as judges leads to the same type of thinking that created many paternalistic laws.²²⁹ However, she also wondered “whether by ignoring our differences as women or men of color we do a disservice both to the law and society.”²³⁰ Like her interpretation of what it means to be a Latina, she also agreed that there is no single voice of feminism, but instead a diversity of perspectives among women.²³¹ Describing impartiality as an “aspiration” for judges, she explained, “[n]ot all women or people of color, in all or some circumstances or indeed in any particular case or circumstance but enough people of color in enough cases, will make a difference in the process of judging.”²³²

²²⁴ *Sotomayor Hearings*, *supra* note 213, at 26 (statement of Sen. Lindsey Graham).

²²⁵ Some have argued otherwise. See, e.g., Taylor, *supra* note 1; Jennifer Rubin, ‘A Wise Latina Woman’: The Context Shows that Judge Sotomayor Meant What She Said, WEEKLY STANDARD (June 15, 2009), available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/016/587tzqjm.asp>.

²²⁶ The speech was reprinted in the Berkeley La Raza Law Journal at 13 BERKELEY LA RAZA L.J. 87 (2002). This was a phrase that Justice Sotomayor used in five or six speeches over the years. *Sotomayor’s ‘Wise Latina’ Comment a Staple of Her Speeches*, *supra* note 108.

²²⁷ Sotomayor, *supra* note 2, at 88.

²²⁸ *Id.* at 88.

²²⁹ *Id.* at 90.

²³⁰ *Id.* at 91.

²³¹ *Id.*

²³² *Id.*

Justice Sotomayor considered that White men have, in some instances, made decisions that were helpful to women and racial and ethnic minorities.²³³ But, she also noted that many of the important race and gender discrimination cases were brought by lawyers of color and women lawyers.²³⁴ In the very next paragraph after her "wise Latina woman" comment, she openly acknowledged that White male judges have voted for sex and race discrimination claimants.²³⁵ As she explained, "I . . . believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable."²³⁶ She used *Brown v. Board of Education* as an example.²³⁷

Yet, Justice Sotomayor also explained that people may not take the time and effort to understand the perspectives of others who are not members of their ethnic, gender, or racial group.²³⁸ While accepting that her background will have an impact, she also explained her underlying role as judge:

I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me requires . . . I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies, and prejudices are appropriate.²³⁹

This narrative reveals Justice Sotomayor to be a humble and thoughtful judge who is willing to check her perspectives when appropriate and engage them when it might be helpful in understanding the perspective of litigants.

Interestingly, Justice Samuel Alito made similar comments about his Italian American heritage, but his remarks received little comment during his hearings.²⁴⁰ As was raised by Senator Leahy during the Sotomayor

²³³ Sotomayor, *supra* note 2, at 91-92.

²³⁴ *Id.* at 92; see generally Edward V. Heck & Joseph Stewart, Jr., *Ensuring Access to Justice: The Role of Interest Group Lawyers in the 60s Campaign for Civil Rights*, 66 JUDICATURE 84 (1982) (discussing the role of lawyers of color and interest groups that engaged lawyers of color).

²³⁵ Sotomayor, *supra* note 2, at 92.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 93.

²⁴⁰ See Kate Linthicum, *Sotomayor Hearings: Judge References Samuel Alito's Comments About his Own Background*, L.A. TIMES BLOG, TOP OF THE TICKET (July 14, 2009, 1:20 PM), <http://latimesblogs.latimes.com/washington/2009/07/sotomayor-hearings-judge-references-samuel-alitos-comments-about-his-own-background-.html>; Stephen J. Fortunato, Jr., *The Historical Amnesia of Samuel Alito: A Review of The Lost World of Italian American Radicalism: Politics, Labor and Culture*,

hearings, Justice Alito stated during his confirmation hearings that “[w]hen I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender. And I do take that into account.”²⁴¹ Yet, there were no repercussions – either in the media or during the confirmation hearings – as a result of Justice Alito’s discussion regarding how his ethnicity might impact his decision making. Are certain types of diversity okay, while others are not?

B. Justice Kagan’s Position on Gays in the Military

Justice Elena Kagan’s hearing did not focus on her racial background or her gender per se, but instead on the position she took on “don’t ask/don’t tell” and military recruiting on campus while Dean at Harvard Law School.²⁴² In addition, at least some Senators emphasized aspects of Justice Kagan’s background that put her outside the mainstream.²⁴³ As Senator Kyl stated, “[o]ne recent article noted that Ms. Kagan’s experience draws from a world whose signposts are distant from most Americans: Manhattan’s Upper West Side, Princeton University, Harvard Law School, and the upper reaches of the Democratic legal establishment.”²⁴⁴ This, coupled with her admiration for Justice Thurgood Marshall, made her a questionable candidate for Republican Senators. For purposes of this article, I will be focusing on the colloquy during the hearings and in the media regarding military recruiting on Harvard’s campus to see what it might indicate about attitudes toward diversity.

Several Senators questioned Justice Kagan at length about Harvard’s position on military recruiting.²⁴⁵ Because of her position, it was implied that Kagan was anti-military.²⁴⁶ As Senator Kyl stated, “her tenure in the academy was marred, in my view, by her decision to punish the military and would-be recruits for a policy, ‘[d]on’t ask/don’t tell,’ and the Solomon amendment that was enacted by Members of Congress and signed into law

2 UNBOUND: HARV. J. LEGAL LEFT 19 (2006) (noting “the background issue of Alito’s Italian heritage occasionally seeped into discourse, but remained for the most part an issue vital only to those of Italian extraction who saw any criticism of Alito as being driven by antipathy toward his – and their – origins”).

²⁴¹ Linthicum, *supra* note 240.

²⁴² CNN Wire Staff, *Kagan Takes on GOP critics at Supreme Court Confirmation Hearing*, CNN POLITICS (June 29, 2010), http://articles.cnn.com/2010-06-29/politics/pol.senate.supreme.court_1_military-recruiters-elena-kagan-supreme-court?_s=PM:POLITICS.

²⁴³ *Id.*

²⁴⁴ *Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States*, Hearing Before the Comm. on the Judiciary, 111th Cong. 19 (2010), [hereinafter, *Kagan Hearing*] (statement of Sen. Jon Kyl), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh111-1044/sh111-1044.pdf>.

²⁴⁵ See CNN Wire Staff, *supra* note 242.

²⁴⁶ See *id.*

by President Clinton.”²⁴⁷ Similarly, Senator Sessions characterized Kagan’s treatment of the military at Harvard as a “revers[al]” of the policy that had existed at Harvard, resulting in the military being “kicked . . . out of the recruiting office in violation of federal law.”²⁴⁸ As he explained, “[h]er actions punished the military and demeaned our soldiers as they were courageously fighting for our country in two wars overseas.”²⁴⁹

Senator Sessions went on to use Justice Kagan’s own words against her, quoting her as saying “I abhor the military’s discrimination recruitment policy. I consider it a profound wrong, a moral injustice of the first order.”²⁵⁰ In response to Kagan’s position that the military was accommodated through the use of a campus veterans group to arrange interviews, Senator Sessions responded:

The military—you stopped complying [with the Solomon Amendment], and that season was lost before the military realized –frankly, you never conveyed that to them in a straight-up way like I think you should have. You just started giving them a runaround. The documents we have gotten from the Department of Defense say that the Air Force and the Army says [sic] they were blocked, they were stonewalled, they were getting the run-around from Harvard. By the time they realized that you had actually changed the policy, that recruiting season was over, and the law was never not in force.

I feel like you mishandled that. I am absolutely confident you did. But you continued to persist with this view that somehow there was a loophole in the statute that Harvard did not have to comply with after Congress had written a statute that would be very hard to get around.²⁵¹

When Justice Kagan tried to explain how she balanced Harvard’s anti-discrimination policy in recruiting, which included a policy that those who used the placement office could not discriminate based on sexual orientation, and the Solomon Amendment’s requirements, Senator Sessions characterized her actions as, “in fact . . . punishing the military.”²⁵² This was a theme taken up by Senator John Cornyn, who stated that “the sole result and impact was to stigmatize the United States military on the campus.”²⁵³ Additionally, Senator Sessions explained to Kagan that her actions “helped create a climate that was not healthy toward the military on campus.”²⁵⁴ Furthermore, Senator Sessions essentially characterized Kagan as a law breaker – someone who acted in direct contravention to the

²⁴⁷ *Kagan Hearing*, *supra* note 244, at 19 (statement of Sen. Jon Kyl).

²⁴⁸ *Id.* at 5 (statement of Sen. Jeff Sessions).

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 71.

²⁵¹ *Id.* at 73.

²⁵² *Id.* at 74.

²⁵³ *Kagan Hearing*, *supra* note 244, at 274 (statement of Sen. John Cornyn).

²⁵⁴ *Id.* at 75 (statement of Sen. Jeff Sessions).

congressionally enacted Solomon Amendment.²⁵⁵ Justice Kagan's attempts at explanation fell on deaf ears. Senator Sessions characterized Kagan's position as "unconnected to reality,"²⁵⁶ explaining:

I know what happened at Harvard. I know you were an outspoken leader against the military policy. I know you acted without legal authority to reverse Harvard's policy and deny the military equal access to campus until you were threatened by the U.S. government of loss of Federal funds. This is what happened.²⁵⁷

So what did happen with military recruiting at Harvard during Kagan's tenure as Dean? According to her testimony, prior to her tenure as Dean, Harvard balanced the need to provide military access to its students with its own anti-discrimination policy by allowing the military access to students through a campus veteran's group.²⁵⁸ This, apparently, was fine with the Department of Defense in the years prior to Kagan's tenure as dean.²⁵⁹ However, a change in the position of the Department of Defense prior to her tenure as Dean required Harvard to revise its policy and allow the military access through the placement office.²⁶⁰ During Kagan's tenure as Dean, the Third Circuit held that the Solomon Amendment was unconstitutional.²⁶¹ At that time, Harvard reverted to the policy it used during prior administrations, whereby students had access to military recruiters through a campus veteran's group.²⁶² When the Department of Defense made clear that it intended to appeal the Third Circuit's decision to the Supreme Court, Harvard returned to the policy of allowing access to the military through the placement office.²⁶³ In addition, military recruiting at Harvard actually increased during the period that the veteran's group handled recruiting – a point that Kagan made during the hearing.²⁶⁴

The emphasis on Kagan's position on "don't ask/don't tell" led to speculation among Christian and conservative political pundits regarding Kagan's sexual orientation.²⁶⁵ As Peter LaBarbera, President of Americans

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 76.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Kagan Hearing*, *supra* note 244, at 71.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 72-73.

²⁶² *Id.*

²⁶³ *Id.* at 73.

²⁶⁴ *Id.*

²⁶⁵ See, e.g., Americans for Truth about Homosexuality, *If Elena Kagan is a Lesbian, She Should Say So Because Public Has a Right to Know* (May 10, 2010), <http://americansfortruth.com/2010/05/10/if-elena-kagan-is-a-lesbian-she-should-say-so-because-public-has-a-right-to-know/>; Pray in Jesus' Name Project, *Is Elena Kagan a Lesbian? Media Ignores Four Harvard Students Outing Supreme Court Nominee, CBS News Muzzled by White House*, CHRISTIAN NEWS WIRE (May 10, 2010), <http://www.christiannewswire.com/news/8606913872.html>; Posting of Bryan Fischer, *Is She or Isn't*

for Truth about Homosexuality, explained, “Kagan has a strong pro-homosexual record, including, as Harvard dean, fighting to keep military recruiters off the campus because the military bars homosexuals. Americans certainly have a right to know if her activism is driven by deeply personal motivations that could undermine her fairness as a judge.”²⁶⁶ Thus, the leap was made from inferring Kagan’s sexual orientation based on her position on “don’t ask/don’t tell” and concomitant sympathy for gays in the military, to Kagan being an unfair judge. Interestingly, Justice Kagan’s sexual orientation was first raised in the media by conservative blogger Ben Domenech, who considered Kagan’s status as an openly gay woman a positive factor for purposes of her judicial nomination.²⁶⁷ However, conservative Christian groups quickly picked up on the speculation, demanding to know whether Kagan was a lesbian.²⁶⁸ Some made the connection between her sexual orientation, her position on “don’t ask/don’t tell” and her potential decision making.²⁶⁹ As the Christian News Wire explains, “Kagan’s private sex life already has, and will directly impact her public Supreme Court decisions, especially on ‘Don’t Ask, Don’t Tell,’ and other issues.”²⁷⁰

The Obama Administration fiercely denied the rumor that Kagan is a lesbian.²⁷¹ In fact, the only mainstream media source to report the story – CBS news on-line – pulled the story, apparently at the insistence of the Obama Administration.²⁷² Anita Dunn, who was working on the nomination for the Obama Administration, stated that the network was “applying old stereotypes to single women with successful careers.”²⁷³ While Dunn has a valid point, it is interesting that the Obama Administration felt compelled to respond to the statements via an open denial. This suggests that there is in fact something problematic with nominating an openly lesbian candidate for a position on the United States

She? Let's Ask Her, RIGHTLYCONCERNED.COM (May 10, 2010, 8:24 AM), <http://www.afa.net/Blogs/BlogPost.aspx?id=2147494169>.

²⁶⁶ Americans for Truth about Homosexuality, *supra* note 265.

²⁶⁷ Posting of Ben Domenech, *Obama's Top Ten Supreme Court Picks* (April 11, 2010), <http://newledger.com/2010/04/obamas-top-ten-supreme-court-picks/> (“Pluses: would please much of Obama’s base, follows diversity politics of Sotomayor with first openly gay justice”). Domenech later updated his April 11th post by striking through the reference to Kagan’s sexual orientation and apologized to her on the Huffington Post, stating that he did not mean to offend her by speculating on her sexual orientation. Ben Domenech, *The White House, Elena Kagan, and Me*, THE HUFFINGTON POST (April 16, 2010, 12:44 p.m.), http://www.huffingtonpost.com/ben-domenech/the-white-house-elena-kag_b_540633.html.

²⁶⁸ See, e.g., Americans for Truth about Homosexuality, *supra* note 265.

²⁶⁹ *Id.*

²⁷⁰ The Pray in Jesus Name Project, *supra* note 265.

²⁷¹ Howard Kurtz, *White House Complains About CBS News Blog Post Saying that Possible Supreme Court Nominee Is Gay*, WASHINGTON POST (April 16, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/15/AR2010041505658.html>.

²⁷² *Id.*

²⁷³ *Id.*

Supreme Court or any Article III appointment. Indeed, the first openly gay Article III judicial candidate was just recently confirmed.²⁷⁴

Leaving aside the controversy that rumors about Justice Kagan's sexual orientation spawned, her hearings are still notable for the emphasis they placed on her position against "don't ask/don't tell" and the approach Harvard Law School took toward military recruiters.²⁷⁵ Justice Kagan took a position that happened to be in support of LGBT individuals while ultimately supporting Harvard's policy against discrimination and she paid a price in the hearings for doing so.²⁷⁶ Justice Kagan defied heterosexist norms by opposing the military's position against openly gay and lesbian persons in the military. While the Senators framed their argument as "Kagan is anti-military," the only evidence supporting that was her position on "don't ask/don't tell." The subtext is clear: taking a position against "don't ask/don't tell" is the equivalent of being anti-military rather than simply being anti-discrimination. The public commentary took it one step farther – it made her a pro-gay lesbian who would vote in favor of LGBT positions as a Justice. Because LGBT people are part of the United States population, wouldn't an interest in diversity recommend a judicial candidate who had an understanding of the position of these Americans?

VI. CONCLUSION

Sylvia Lazos Vargas has argued that partisan politics is largely to blame for the difficulties diverse nominees face during the confirmation process.²⁷⁷ I believe that there is also something else going on in these cases. The irony in the backlash raised about Justice Sotomayor's "wise Latina woman" comment and decision in *Ricci* as well as Justice Kagan's outspoken position on "don't ask/don't tell" presents sad commentary about diversity in the judiciary. Looking at the reasons for supporting a diverse bench – whether it be the diversity of perspectives of nontraditional judges or the legitimacy a diverse bench brings to the justice system – it becomes obvious that these two nominees were excellent diverse candidates. Yet, it was in fact their diverse perspectives that caused them difficulty in the confirmation process. Both identified with groups that have less representation on the federal bench. And, of course, while the diversity of these candidates' perspectives hindered them, Justice Alito's perspective as an Italian American passed nearly unobserved.

²⁷⁴ See Horowitz, *supra* note 63.

²⁷⁵ See *supra* notes 245-70 and accompanying text.

²⁷⁶ See *id.*

²⁷⁷ See generally, Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423 (2008) (discussing diversity in federal judgeships and how the partisan nature of confirmation hearings ultimately hurts the ability to provide a broad range of viewpoints on the bench).

While the numbers of women and members of minority groups on the federal bench lag behind their numbers in the general population, the attack on these diverse candidates during the confirmation process could easily discourage others of diverse backgrounds from pursuing a career on the federal bench. Indeed, reading what are essentially attacks on the integrity and impartiality of Justice Sotomayor during the confirmation process certainly would discourage anyone who has publicly discussed their backgrounds from engaging in that process. Likewise, the characterization of Justice Kagan during the confirmation process as "anti-military" and the public speculation as to her sexual orientation that ensued certainly might discourage other similarly situated single accomplished women lawyers from seeking a nomination.

Members of the Senate Judiciary Committee and public commentators who attack such nontraditional candidates based on the diversity of perspective they bring do a disservice to the process of judicial confirmation and the goals of a diverse bench and ignore the supposition of White male heterosexist norms that are presented as views of "neutrality." As Justice Brennan explained, "[w]e are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide by someone else's unfamiliar . . . practice because the same tolerant impulse protects our own idiosyncrasies. . . . In a community such as ours, 'liberty' must include the freedom not to conform."²⁷⁸

If one truly understands the importance of a diverse bench to the judiciary's legitimacy, the irony in the vilification of nontraditional candidates for being, well, "nontraditional," is obvious. Bringing persons of differing perspectives to the bench strengthens the court system. It is discouraging that the confirmation process likely undermines this goal.

²⁷⁸ *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).