Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench

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INTRODUCTION

This article explores the difficulties encountered in diversifying the federal bench and why the partisanship of the confirmation process decreases the diversity of viewpoints on the bench.

Why care about diversity on the bench? Part I summarizes the arguments. Presidents who have the power to appoint federal judges have realized the powerful symbolism of breaking barriers in naming minorities to previously all-white

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institutions. When Justice Thurgood Marshall took the oath as the ninety-ninth Justice of the United States, it made a powerful statement about the values of President Lyndon B. Johnson, the Senate that confirmed him, and the nation.[1] As Juan Williams describes in his biography of Justice Marshall, such moments are a "big thing . . . even the ones who hated blacks came to the Court" on that day.[2]

Scholars champion diversity for substantive reasons. When diverse viewpoints are introduced into the judicial decision making, the deliberation of collegial courts is "sharpen[ed]."[3] Assumptions that reflect majority viewpoints are questioned and the "outsider" viewpoint is taken more seriously. An expansion of the dialogic landscape leads to better decisions. Furthermore, when courts are visibly diverse, decisions become more credible and legitimate.[4]

As a nation we have made progress in the area of diversity. The good news is that descriptive diversity, the reflection of the judiciary in miniature of the people at large, has improved because of concerted efforts by Presidents Bill Clinton and George W. Bush. As Part II discusses, data compiled from the Federal Judicial Center show that representation of minorities as of January 2008 on the federal bench is at an all time high.[5] Tables 1-5 in the appendix summarize the most recent numbers.

The politics of the appointment processes of the last two Presidents, Bill Clinton and George W. Bush, is discussed in Part III. These presidents had contrasting styles. President Clinton was flexible, willing to accommodate his political opponents. By contrast, President Bush held firm to his political positions and has nominated appointees that would be "strict constructionists."

Both Presidents valued diversity in nominating judges, but for different reasons. Both had to deal with a senatorial confirmation process that had become partisan and acrimonious. Scholarship is nearly unanimous in decrying the partisanship that has infected the process of selection and confirmation of federal judges.[6] This article offers the perspective that the politics of the confirmation process is not costless. To be clear, partisan politics has made the confirmation process treacherous for all appointees, but particularly for minority nominees. The obvious consequences are that because of unbridled partisanship, minority judges are more likely to be derailed in the confirmation process. There is another cost, which is not as obvious: less ideological and viewpoint diversity among minority judges as well. Although this article concentrates on minority judges, the same trends can be seen for other nontraditional judges, such as women and judges who hold ideological viewpoints that neither party embraces.

Some commentators have observed that increasingly judges who are likely to be successful in the nominating process must be mediocre, rather than excellent.[7] Be average, don't stick out, seems to be the message. By having ideas (and being public

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1. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 338 (1998).
2. *Id.*
3. *See infra* note 108.
4. *See infra* Part I.C.
5. *See infra* text accompanying notes notes 67-69.
6. *See infra* text accompanying notes 155–58.
7. *See infra* text accompanying notes 160–61.

about them), a nominee might be opposed as "too" ideological and therefore "out of step" with America.[8]

Part IV.A proposes a corollary to this "don't stick out" thesis with respect to diversity. Nontraditional judges who can successfully navigate the nomination and confirmation process should avoid "performing" their racial identity in a way that will make white Senators feel uncomfortable about race. Minorities run the risk of triggering negative stereotypes if they make their race salient in the confirmation process. Latent stereotypes that everyone carries in their heads bolster partisan attacks that otherwise would be unmeritorious. The inferences about a nominee's character do not have to be spelled out if the unconscious narratives that we carry in our heads about minorities and women are triggered. A liberal minority nominee clearly becomes "too liberal" and "out of step" with America if her race becomes salient, and a conservative nominee becomes a potentially dangerous minority, invoking the fears of those who oppose the jurisprudence of Clarence Thomas.

Part IV.B provides the best evidence available to support this thesis: cases from the last two decades of confirmation "battles." Some of these have become well known, such as the confirmations of Ronnie White, Miguel Estrada, and Janice Rogers Brown. When these cases are examined holistically, one can draw the conclusion that minorities are highly vulnerable during the confirmation process, because the "everything goes" ethics of politics make them targets of opposition: sometimes partisan, sometimes petty, and often racially tinged.

Part V examines judicial behavioralist data showing that the minority judges who have been appointed by Presidents Bill Clinton and George W. Bush are as conservative, and often *more conservative*, than their non-minority counterparts. These studies show a decline in disagreement between judges of color and their white counterparts, particularly in controversial civil rights cases where differing perspectives regarding the "racial facts of life" are most likely to arise. These data indicate that the hoped-for benefits of dialogic diversity are not materializing, or if they are, they are occurring at such a discrete level that a "voice of color" is difficult to discern. The highly politicized confirmation process has discouraged independent candidates, those with a distinctive "voice of color," and instead has homogenized the candidates who successfully ascend to the bench.

Who cares whether judges "look like America" if, because of politics, a "voice of color" has become a "whisper of color"? One answer is that there is value to descriptive and symbolic diversity. As Part I describes, barrier-breaking appointments make a statement about our civic joint values.

Another answer is that we all should be deeply concerned that the federal bench not just "look" different, but also "sound" different. If the "voice of color" is hardly noticeable, or if minorities who are most likely to be confirmed are those who are not too different from most white Americans, then we are failing to achieve the substantive benefits of diversity. Democratic institutions must be diverse in a whole variety of ways, including ideology, career experience, race and gender. Appointment and confirmation processes should not weed out "trouble maker" minority and women voices, just as the process should not weed out minority or women voices who are "too

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8. *Id.*; *see also infra* Part IV.B.3. Coincidentally, there has been a decline in law professors who have ascended to the bench.

conservative." Both liberal and conservative minorities are needed so that the judging process will benefit from such varying understandings of how race and gender play out in America. In conclusion, there is much left to do in the area of diversity on the bench, and it might well take a wholesale reform of the process to dampen partisan politics in order to achieve the hoped for benefits.

I. WHAT ARE THE BENEFITS TO THE JUDICIARY FROM DIVERSITY?

> *When oppressed [the Negro] can bring an action at law but they will find only white men among their judges.*[9]

Let us turn first to fundamental principles. The judiciary as the third branch of government is a democratic institution. As Alexander Hamilton explained, the judiciary is structured according to democratic principles but at the same time it must be structurally insulated from political pressures.[10] Under the American system, federal judges are appointed by the president, who is popularly elected, and must be confirmed by the Senate.[11] At the same time, judges are structurally insulated from majoritarian pressures because Art. III judges hold life tenure[12] and are appointed by the President and confirmed by the Senate.[13] When judges interpret "what the law is,"[14] they should not interpret law as the citizenry wants courts to interpret the law. Rather, the judicial code of ethics dictates impartiality; judges independently derive "what the law is" constrained only by the Constitution,[15] and "funadamental law."[16]

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9. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 343 (J. P. Meyer and Max Lerner eds, trans. George Lawrence New York: Harper & Row, 1966).

10. *See* FEDERALIST NO. 78 (Alexander Hamilton) (arguing that life tenure was necessary in order to ensure the independence of judges, "The independence of the judges is equally requisite to guard the Constitution and the rights of individual from the effect of those ill humors … sometimes disseminate among the people themselves.").

11. *See* FEDERALIST NO. 76 (Alexander Hamilton) (discussing the importance of the advice and consent of the Senate as a check on the President). *See also* MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL & HISTORICAL ANALYSIS 28 (2000) (confirmation by the Senate "is sufficiently independent from the President and protective of the public welfare to prevent the president from nominating his cronies or other unfit people to important governmental positions, to make the president account relatively swiftly for his bad judgment in making nominations, and can otherwise check the president's abuse of his nominating authority."); LEE EPSTEIN & JEFFERY A. SEGAL, ADVICE AND CONSENT : THE POLITICS OF JUDICIAL APPOINTMENTS 20-27 (2005) (confirmation by the Senate limits the discretion of the President).

12. U.S. CONST. art. III, § 1.

13. U.S. CONST. art. II, § 2, cl. 2.

14. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

15. Here is how Professor Michelman describes this important concept, "constitutionalism.. constrains . . . popular political decision making by a basic law, the Constitution." *See* FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 6 (1999). Needless to say, what is "higher law" is the big debate in jurisprudence. Should judges be anchored by textualism, or should they reflect contemporary values of modern society. *Compare* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997), *with* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification* (Oct. 12, 1985), *reprinted in* INTERPRETING THE CONSTITUTION, IN INTERPRETING THE CONSTITUTION: THE DEBATE OVER

These principles dictate that while judges are democratic, they must resist majoritarian pressure, which creates tension and questions. For example, how "democratic" should the judiciary be, and related to this, how representative should the judiciary be of "we the people"?

One response is that the judiciary, as a democratic institution, should be derived from and representative of "we the people." James Madison famously stated in *Federalist No. 39* that a republic could not legitimately claim to be representative unless government drew from all sectors of its populace.[17] Exclusion of significant sectors "degrade[s] . . . the republican character" of government.[18] Therefore, "it is *essential* to [a republican] government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it."[19] Thus, if any branch of government is dominated by an elite and their fawning cronies, the institution has become fundamentally anti-republican and anti-democratic. By extension, if the judiciary is dominated by any ideological or identity group, the institution has become anti-republican and anti-democratic.

Chisom v. Roemer[20] can be read to support the view that for a judiciary to be fundamentally representative it must also be racially and ethnically diverse. In *Chisom*, the U.S. Supreme Court held that processes of electing state trial judges fall under the purview of the Voting Rights Act, and more specifically, that a minority judge can call upon the remedies that are provided by this Act to ensure a fair opportunity to be elected.[21] The Court recognized judges are "representatives" within the statutory definition of this statute,[22] and although the Court did not further explain what it means for a judge to be a "representative," [23] its holding implies that the if state electoral processes are used to select judges, these processes must be structured so that the voting results reflect preferences not just of majorities, but also of minorities.

ORIGINAL INTENT 23-34. (Jack N. Rakove ed., 1990).

16. FEDERALIST NO. 78 (Alexander Hamilton) ("judges ought to be governed by the [Constitution] rather than the [will of the people]. They ought to regulate their decision by the fundamental laws, rather than by those which are not fundamental."). *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-46 (2ND ed., 1986).

17. THE FEDERALIST NO. 39, at 111–112 (James Madison) (Roy P. Fairfield ed., 2d ed., 1981).

18. *Id*.

19. *Id*. at 112 (emphasis omitted).

20. 501 U.S. 380, 398–99 (1991) (arguing that term "representative" includes more than only legislative elections); *see also* Houston Lawyers' Ass'n v. Attorney Gen., 501 U.S. 419, 426 (1991) (concluding that Texas' decision to elect trial judges brings the judiciary within scope of Voting Rights Act).

21. *Chisom*, 501 U.S. at 398-99.

22. *See* Michael Herz, *Choosing Between Normative and Descriptive Versions of the Judicial Role*, 75 MARQ. L. REV. 725, 747 (1992) (noting that the Court failed to acknowledge the very reasons why the black plaintiffs in *Chisom* brought the case—to be able to elect minority judges); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 463 (2000).

23. One way to interpret this case very narrowly is to limit it as a statutory interpretation case, holding that the statutory definition of "representative" means any public official who obtains her office through election. *See Chisom*, 501 U.S. at 380–404.

The question still remains, what do we mean by "diversity"[24] on the bench? In the context of the judiciary, diversity comes in three forms: descriptive, symbolic, and viewpoint (substantive).

A. Descriptive Diversity

Descriptive diversity means, as expressed by Bill Clinton, that the judiciary should "look like America." That is, the judiciary should be a "portrait, in miniature, of the people at large"[25] and representative of the demographic variety of its citizenship. It follows that if a circuit is more demographically diverse than the national average, as are the Ninth, Second, and Fifth Circuits, there should be a higher proportion of nontraditional judges to reflect the demographics of the populations that the circuit serves. Conversely, if a circuit is less diverse than the national average, as is the First Circuit, the judges of that circuit need not be as demographically diverse.

Descriptive diversity promotes three important values: citizenship, legitimacy, and remedial integration.

1. Citizenship

Americans should believe that the participation of all citizens in the adjudication process is both valued and represented. This means that citizens, regardless of their identity and racial background, should believe that they belong inside the courthouse.[26] Historically, minority groups and women were rejected from any participation in the judicial process. During the Jim Crow era de jure practices that excluded African Americans from juries, and signs,[27] such as "Colored Men" and "*hombres aqui*" (Spanish for men here) [28] posted in court houses, made it clear that racial minorities

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24. For a useful taxonomy of diversity, some of which this article adopts, see generally Devon W. Carbado & Mitu Gulati, *What Exactly is Racial Diversity?*, 91 CAL. L. REV. 1149 (2003) (reviewing ANDREA GUERRERO, SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION (2002)).

25. Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 134 (1997) (quoting HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 60 (1972)). Ifill adds that descriptive representation also has an empathetic aspect. A judge "'should think, feel, reason and act like'" the minority population that he or she represents. *Id.* There is no doubt that empathy is an important aspect of judging. *See generally* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987). But for my purposes, I will refer to "descriptive representation" solely as the visible aspect of representation—whether a judge is African American, Latina/o, or Asian American.

26. *See generally* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989).

27. *See* Strauder v. W. Va., 100 U.S. 303 (1879). (holding that the West Virginia statute that disqualified African Americans from serving on juries violated the Constitution).

28. Hernandez v. Texas, 347 U.S. 475, 480 (1953). This companion case to Brown v. Bd of Education, 347 U.S. 483 (1954) challenged the conviction of Pete Hernandez for murder on the basis that the jury's racial composition contained no Latina/os. In a county with substantial Mexican-American representation, none had served in a jury for more than a quarter century. The Court considered evidence of Jim Crow oppression in the county; for example, the county

did not belong in the courthouse. Similarly, in *Minor v. Happersett*[29] the Court affirmed the right of a state to exclude women from state bar admission, and therefore, from roles in the state's judiciary. A descriptively diverse judiciary facially corrects for past racial and gender exclusion from participation in the adjudicative system.[30]

2. Legitimacy

Legitimacy is a value closely tethered to citizenship. When citizens believe that all of the laws come from "we the people," they are more likely to obey them because they will be more inclined to believe that these laws address their needs, concerns, and values.[31] If any distinguishable citizen group is able to dominate any apparatus of democracy, it can be perceived as one group dominating the others.[32] In other words, courts should not be only exist only to aid whites; courts should not be perceived as catering only to privileged groups.

Citizens should not look at the judiciary and believe that courts will be predisposed to rule in favor of dominant groups: whites, males, etc. When the judiciary is descriptively diverse, it signals—both explicitly and implicitly—that the judiciary is willing to hear all claims by all of its citizens in a fair and unbiased manner. When there is descriptive diversity, there is a public perception of fairness, and this makes the court system more legitimate.[33]

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courthouse had two men's bathrooms, one was unmarked, and the other said "Colored Men" and "Hombres Aqui." The Court held that the exclusion of Latina/os from juries in the county was impermissible under the Constitution. *See* Ian Haney Lopez, ‚Race and Colorblindness after *Hernandez* and *Brown* IN COLORED MEN AND HOMBRES AQUI : HERNANDEZ V TEXAS AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING (Michael Olivas, ed. 2005).

29. 88 U.S. 162 (1875).

30. *See* Ifill, *supra* note 25, at 101 ("The absence of minority judges on state trial courts contributes to an atmosphere of racial exclusion which . . . marginalizes African American lawyers, litigants and courtroom personnel.").

31. *See* C.K. Ansell, *Legitimacy: Political*, *in* THE INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 8704 (2001). *See also* Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150, 207–08 (1999) (discussing Rawlsian theory and stating that inclusion of all minorities is necessary for laws to be legitimate). *Cf.* Ifill, *supra* note 25, at 98–99 (arguing that racial diversity on the bench should be promoted as a constitutional imperative); Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 MINN. L. REV. 1252 (2006).

32. For John Rawls the imposition of one group's moral position on another group is oppression. See JOHN RAWLS, POLITICAL LIBERALISM xv-xx (1993).

33. *See* John Hsu, *Asian American Judges: Identity, Their Narratives, & Diversity on the Bench*, 11 ASIAN PAC. AM. L.J. 92, 115 nn.111–12 (2006) ("A major source of the perception of bias is the lack of diversity among those who play key roles in the justice system. . . . A perceived lack of diversity leads to a lack of confidence in the system." (quoting CAL. JUDICIAL COUNCIL ADVISORY COMM., FINAL REPORT ON RACIAL AND ETHNIC BIAS IN THE COURTS (1997))); Tony Mauro, *Wider Courtroom Diversity Urged*, USA TODAY, Feb. 25, 1999, at 3A (reporting that the president of the American Bar Association called for greater diversity in the court system "to win back the confidence of minorities").

3. Remedial Integration

Finally, remedial diversity addresses past structural wrongs without placing blame. As President Jimmy Carter recognized, courts came to be predominantly white and male institutions because of a Jim Crow past that excluded African Americans,[34] Latina/os, and Asian Americans from full participation in public life. This was accomplished by limiting access to voting, serving on juries, and running for public office. By championing remedial diversity, President Jimmy Carter aimed to integrate the courts and began to remedy past wrongs without explicitly blaming whites or Southerners for the past wrongful actions of their forefathers.[35] Remedial diversity is a way to promote racial healing without making a "big deal" out of a shameful past.

B. Symbolic Diversity

Symbolic diversity communicates values: what we stand for as a people and—when carried out through presidential appointments—what ideals presidents and political parties champion.

1. Breaking Barriers

Symbolic diversity is at its most powerful when the President or a state executive names the "first" minority or woman to a bench that was previously all white or all male. Studies by political scientists have shown that the most likely circumstance for executives to name nontraditional candidates is when the executive is breaking a symbolic barrier.[36] Most minority judges are named to the bench under these circumstances.[37] An executive makes a strong symbolic statement in naming the "first" nontraditional candidate – the first African American, the first woman, or the first Latina/o – to all white or all male benches. The appointing executive is stating that he or she believes in righting past wrongs of discrimination, and in the value of diversity.

2. Role Model Rationale

Symbolic diversity also has a role model component. In appointing minorities or women with "rags to riches" stories, the appointing executive makes a statement about his or her values, more specifically, the executive's belief that leadership in American government should be accessible to all citizens, regardless of their background.

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34. *See* Sarah Wilson, *Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective*, 5 J. APP. PRAC. & PROCESS 29, 37 n.9 (2003) (relating that President Jimmy Carter pledged to a group of African American leaders that he would appoint at least one African American judge to each district court in the South that had been part of the old Confederacy and noting that when he left office, with the exception of two states, President Carter had fulfilled that promise).

35. *Cf. id.*

36. *See* Rorie L. Spill & Kathleen A. Bratton, *Clinton and Diversification of the Federal Judiciary*, 84 JUDICATURE 256, 258, 261 (2002).

37. *See id.*

All citizens should believe that they have access to the most prestigious positions of democratic leadership, including the judiciary.[38] In *Grutter v. Bollinger*,[39] one of Justice Sandra Day O'Connor's justifications for sustaining affirmative action in higher education was that it was important for the United States as a democratic society to draw its civic, governmental, and business leadership from all sectors of its demographic communities.[40] Role models "can provide a source of hope and inspiration for those who would otherwise limit their horizons and aspirations."[41]

Similarly, racial minorities, whether upper class or from humbler origins, should aspire to be a Supreme Court Justice, making it feasible for every child, regardless of her race or gender to aspire to any of the country's premier leadership positions reaffirms the democratic and cultural values of inclusion, and demonstrates that important offices are rationed according to individual merit. The promise of equal opportunity for all citizens, regardless of their personal circumstances, is more real if citizens can see others who look like them in prestigious positions of leadership.[42] If children can see racial minorities in positions of power and prestige, children will aspire to more than what immediately surrounds them.[43]

3. Cynical Twist: Symbols of Minority Success and White Guilt

Symbolic statements of diversity and citizenship may have a cynical twist. Derrick Bell has argued that high profile symbolic appointments are made in order to minimize deeply embedded sources of inequality that make it all but impossible for most racial minorities to become that successful "rags to riches" story.[44] For example, almost 85% of African Americans and 70% of Latina/os go to schools that are majority-minority and are rated inadequate, and do not receive the resources necessary to improve.[45] Because of this structural inequality, most minorities will attend schools that provide poor educational opportunities, which, in turn, likely will negatively impact their chances of advancing in American society.

The cynical twist on symbolic appointments is that token minorities are held up as triumphs in a system that distinctly favors the white majority. Such symbolic appointments reassure whites that they do not need to make deep reforms in

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38. On this point of civic justification, *see generally* Lani Guanier, Comment, *Admission Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003).

39. 539 U.S. 306 (2003).

40. *Id.* at 332 ("[T]he path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity.").

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

42. *See generally* Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377 (1996).

43. F. Michael Higginbotham, *Affirmative Action in the United States and South Africa: Lessons from the Other Side*, 13 TEMP. INT'L & COMP. L.J. 187, 207 (1999).

44. Derrick Bell, *Wanted: A White Leader Able to Free Whites of Racism*, 33 U.C. DAVIS L. REV. 527 (2001).

45. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, *BROWN* AT 50: KING'S DREAM OR *PLESSY'S* NIGHTMARE? (2004).

institutions of access, such as education. Instead, we can all believe that individual merit and hard work is all that it takes to be successful in America.[46]

C. Viewpoint Diversity

The reason that scholars champion diversity on the bench is that they believe that, at a substantive level, diversity will improve how judges make decisions and will ultimately enhance the quality of justice in our society.[47] There are three values that are promoted by viewpoint diversity: inclusiveness, credibility of the rule of law, and enhanced decision making.

1. Inclusiveness of the "voice of color"

Judicial decision making should consider all perspectives of how the world works. Each individual is influenced by background cultural and ideological assumptions of which she may not even be fully aware. Cultural and ideological framing even shape what individuals perceive as the reality of the world around them.[48] We are guided by

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46. Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1522–43 (1998); *accord* Derrick Bell, *"Here Come de Judge": The Role of Faith in Progressive Decision-Making*, 51 HASTINGS L. J. 1, 12 (1999) (commenting that successful minorities "become walking proof that even minorities can make it in American through work and sacrifice"; some might then be able to conclude "that those minorities who do not make it have only themselves to blame.")

47. Lazos Vargas, *supra* note 31, at 240–49. Professor Ifill sums up the value of viewpoint diversity this way:

> First, the 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. . . . Second, racial diversity on the bench also encourages judicial impartiality, by ensuring that a single set of values or views do not dominate judicial decision-making.

Ifill, *supra* note 22, at 410–11.

48. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 351 (1987) (arguing that because "separate incidents of racial stigmatization do not inflict isolated injuries but are part of a . . . pervasive pattern of stigmatizing actions that cumulate to compose an injurious whole"). The most recent psychological literature emphasizes how cognition and perception is influenced by ideological and cultural framing. *See* Dan M. Kahan, David Hoffman & Donald Braman, *Whose Eyes are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism.* 122 HARV. L. REV. ___ (SSRN paper, available at http://ssrn.com/abstract=1081227). In an experiment, 1350 Americans were shown a tape of a police chase involved in the facts of *Scott v. Harris*, 127 S. Ct. 1769 (2007). The researchers found that there were distinct differences in how observers perceived the facts on the key issues along observers' demographic characteristics, political ideology, and cultural worldviews. *Id*. at 20-21. Specifically, the white older male Republican saw the facts in much the same way that the Scott conservative majority did. *Id*. at 12-14 , He saw a subject being chased by the police who was erratic and a dangerous driver, and the police took correct action in using deadly force to stop. *Id*. The older African American female and middle-aged white male liberal, however, saw the facts quite differently. They were adamant that the police made a serious mistake in conducting a high speed chase, and saw the subject as

deeply engrained unconscious schemas that influence how we see the world, and whether we ascribe positive or negative meaning to ambiguous actions. Human beings continuously make assumptions and intuit based on "thin-slice" judgments. The "dark side" of intuition is that clues, such as gender, race, accent, age, and dress, are weighted down with cultural signifiers and unfortunately also incorporate cultural stereotypes. Without a conscious deliberative check, "intuitive judgments" about a person can lead us to judge actions based on automatic unconscious stereotypes instead of what they actually did or who they really are.[49]

Persons of color and women live their lives in a social environment that "ascribes" to them an identity, character traits, even emotions such as anger or fear, based on stereotypes. Minorities and women can resent others' ascriptions of their behavior and character based on stereotypes, but this fact of "life" more pragmatically means that minorities and women must negotiate this burden of majorities' stereotypical ascriptions. They must make decisions for themselves of how to interpret and "perform" their gender and racial identity in a world where stereotypes fill in a meaning that they may not intend. For these reasons, social scientists and critical race theory scholars believe that there is a distinctive "voice of color," "female voice" or "queer voice," a perspective about social reality that results from experiencing the negative ascriptions of others, having to face the reality of negotiating in public a racial and gender identity that must be performed, and handling the possible resentment of being so often on the short end of the stick of unconscious biases.[50]

The "voice of color" and "voice of gender" is by no means uniform, because each individual is different and has learned to cope with being a minority or being female in different ways. A conservative "voice of color" would have minorities do more for themselves, and not rely on government assistance to pull themselves up into the middle class. A liberal "voice of color" blames minorities' plight on societal structures of subordination, and would have the government and the law be more active in solving racial inequality. What joins these different "voices of color" is that there is a

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only moderately speeding. *Id.* This research found that "being African American (as opposed to white) exerts the largest effect" in how respondents saw the facts in *Scott v. Harris* scenario. *Id*. at 29.

49. According to psychological literature, a great many of the day to day decisions made by humans are made intuitively. See Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974). "Thin-slice judgments based on intuition can be highly accurate." *See* MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 75 (2005). But they can also mislead, because we listen to closely to emotions and cultural stereotypes. *Id*. at 75-98. *See also* Lane, Kang and Banaji, *Implicit Social Cognition and the Law* 3 ANNU. REV. LAW. SOC. SCI. 19 (2007) The whole area of how stereotypes work is very complex. For our purposes, it suffices to assert that cognitive schemas that activate stereotypes can be suppressed only with very hard work and conscious effort. *See generally* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

50. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) ("Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice."). *But see* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1781-84 (1989) (criticizing the essentialist racial perspective position).

common default assumption: life is different for them than for white America. The "normal" American experience for minorities is one in which prejudice is encountered often and routinely.[51] For example, a "voice of color" will take it as the default condition that in America racial profiling is a widespread practice and law enforcement officers often make mistakes about persons of color based on negative assumptions and unconscious biases.[52] A female "voice" might take it as the default condition that stereotyping and discrimination are widespread in the workplace and that the resulting micro-disadvantages are a major factor in how career opportunities are (mis)distributed.[53]

Judge Harry Edwards described viewpoint diversity this way:

> Because of the long history of racial discrimination and segregation in American society, it is safe to assume that a disproportionate number of blacks grow up with a heightened awareness of the problems that pertain to [equal opportunity, discrimination, and criminal law]. Of course, not all blacks have the same exposure to these problems, in part because class, not merely race, affects one's exposure. But, just as most of my Jewish colleagues have more than a fleeting understanding of anti-Semitism, the Holocaust, and issues surrounding Israel and Palestine, most blacks have more than a fleeting understanding of the effects of racial discrimination.[54]

Professor Kahan and his co-authors, who have documented the link between cognition and ideological mindset based on empirical research, make a similar argument:

> When the law … endorse[s] a factual position that aligns it with one contested view of how the world works… and if the law has not only rejected [minorities']

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51. Lazos Vargas, *supra* note 31, at 176-177. A majority of African Americans report experiencing discrimination in their everyday lives. On the other hand, whites live in an America in which they can assume that they will enjoy fairness and can proclaim that racial minorities are also subject to the same fair treatment. For Whites, racism exists in the abstract, as "'racism-in-the-head,'" while for racial minorities, racism is concrete, as "'racism-in-the-world.'" The discrepancy between whites and minorities in conceptualizing discrimination and talking about racism reflects different life conditions that cannot be ignored, assumed away, or reconciled. Rather, this epistemological divide reflects a troubled and complex interrelationship. Yet the Court has premised its view of discrimination on the white perspective, while failing even to recognize the existence of an alternative point of view. In the most recent poll on race relations in America, conducted by the New York Times and CBS news, 55% of Whites saw race relations in the United States a "generally good," while an about equal proportion, or 59% of Blacks saw race relations as "generally bad." Adam Nagourney & Megan Thee, *Poll finds Obama Candidacy Isn't Closing Divide on Race,* NY TIMES (July 16, 2008) at A1.

52. *See* Lazos Vargas, *supra* note 31, at Part I; *see e.g.*, Joshua Correll, Bernadette Park, Charles M. Judd, Bernd Wittenbrink, Melody S. Sadler & Tracie Keesee, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006 (2007) (study showing that police officers are more likely to shoot at black targets than white targets when actions of the subject are ambiguous).

53. *See generally* VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN (1999).

54. Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 328 (2002).

> view of social reality but has also refused even to permit the articulation of it .. , those who disagree lack any resources for understanding the law as theirs. .. members of that minority cannot understand (or be expected to understand) assent as anything other than acquiescence in their status as defeated and subjugated outsiders.[55]

As President Bill Clinton remarked, courts lose "sharp[ness]" if they incorporate only one viewpoint of social reality in their decision making.[56] Judges should confront social "truths" that are assumed, and strive to become aware when their unconscious intuitions are leading them to make unwarranted assumptions. The goal is not necessarily for judges to understand or empathize with the perspective of the other, or the outsider. Rather, the process of judging needs to acknowledge all viewpoints of the "truth."[57] Diversity of viewpoints serves as an important structural safeguard. If there is diversity on the bench representing different life experiences and views of world realities, the dissenting minority views can guard against decision making that incorporates assumptions that reflect bias.[58]

2. Credibility

When courts frame issues in a way that reflect only the majority viewpoint, courts lose credibility.[59] On controversial "hot button" issues (such as civil rights), where there is more than one position of certainty that can be taken, if courts consistently choose one position over another, they lose credibility as neutral arbiters of the law.[60]

If courts shut out alternative viewpoints on controversial issues, and incorporate only the majority perspective, they will also incorporate into law the privileges of the majority and be less solicitous of the ongoing everyday harms that are suffered by minorities in our society.[61] This jeopardizes impartiality.[62] Those who are excluded

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55. Kahan et al., *supra* note 48, at 46-47. For a description of the study see *supra* note 48.

56. *See infra* note 108 and accompanying text (President Clinton's justification for diversity on the bench).

57. Lazos Vargas, *supra* note 31, at Part I; Lazos Vargas, *supra* note 31, at 140 ("Discursive practice must take place in ways that are respectful of differences and that legitimize the 'realities' of all groups. Ideas (or premises based on epistemologies), regardless of whether they are held by majorities or minorities, are equally legitimate."). Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law that is Inclusive?: What* Grutter v. Bollinger *has to say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 142 (2004).

58. *See* Edward M. Chen, *The Judiciary, Diversity, and Justice For All*, 91 CAL. L. REV. 1109 (2003) (author is the first Asian Pacific American on the federal bench for the Northern District of California).

59. *See supra* notes 51 & 57.

60. *Id. See also* DEMOCRACY AND DIFFERENCE: CHANGING BOUNDARIES OF THE POLITICAL (Selya Benhabib ed., 1996); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 2 (1996).

61. *See supra* note 51.

62. *See* Ifill, *supra* note 25, at 98 ("Structural impartiality exists when the judiciary as a whole is comprised of judges from diverse backgrounds and viewpoints. The interaction of these diverse viewpoints fosters impartiality by diminishing the possibility that one perspective dominates adjudication.").

lose faith in the law,[63] may call for civil disobedience,[64] or resort to their own devices and fashion norms that make better sense. This breaks down the "rule of law."

3. Dialectic Decision Making

On appellate panels and in the U.S. Supreme Court, judicial decision making is a collegial process. Judges exchange ideas and viewpoints. There should be a give and take between diverse perspectives and identity viewpoints. There should be a struggle as to how to determine the relevant version of social facts in areas of the law where there is room for difference, such as rape cases, racial and sexual harassment cases, civil rights claims, and accusations of police misconduct. Discussion and conflict ensure a more thoughtful and balanced deliberation, and ultimately, a better decision that takes into account the experiences of all communities.[65]

According to Judge Harry Edwards,

> [I]n a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better-informed discussion. It provides for constant input from judges who have seen different kinds of problems in their pre-judicial careers, and have sometimes seen the same problems from different angles. A deliberative process enhanced by . . . a broad range of perspectives necessarily results in better and more nuanced opinions—opinions which, while remaining true to the rule of law, over time allow for a fuller an richer evolution of the law.[66]

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63. Studies show that racial minorities have less faith in the American criminal justice system than whites. *See* Susan E. Howell & Deborah Fagan, *Race and Trust in Government: Testing the Political Reality Model*, 52 PUB. OPINION Q. 343, 345 (1988); Melissa Michelson, *The Corrosive Effect of Acculturation : How Mexican Americans Lose Political Trust*, 84 SOC. SCI. Q. 918 (2003); Marvin Overby et al.. *Race Political Empowerment and Minority Perceptions of Judicial Fairness*, 86 SOC. SCI. Q. 4444, 460-62 (2005); Mary R. Rose, Christopher Ellison and Shari S. Diamond, *Preferences for Juries over Judges Across Racial and Ethnic Groups*, 89 SOC. SCI. Q. 372 (2008).

64. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (calling for African American juries to disobey the rule of law when the legal rules disproportionately impact African American males).

65. Lazos Vargas, *supra* note 31, at Part IV.B; *see also* Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 26 (2004) ("[A] diverse judiciary generally improves the decision-making process. . . . Give-and-take in arguments and deliberations generally sharpens the analysis and affects the final outcome.").

66. Edwards, *supra* note 54, at 329; *see also* Lee Epstein, Jack Knight & Andrew D. Martin, The *Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 90 8 (2003) (arguing that diverse panels will enhance judicial decision making, "diversity is distinctly related to the effective performance of social economic and political institutions [such as] the Court….); *see, e. g.*, Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992) (relating how the Justice Marshall's stories of African-American defendants in the South influenced how she thought about criminal justice issues); Johnson & Fuentes-Rohwer, *supra* note 65, at 12-13 (discussing the impact of Justice Marshall on Justices Kennedy and White).

II. FEDERAL COURTS ARE BECOMING MORE DESCRIPTIVELY DIVERSE, YET MINORITY JUDGES REMAIN UNDERREPRESENTED

A great deal of progress has been made on descriptive diversity, primarily because of the efforts of the last two-term Presidents, Bill Clinton and George W. Bush. In terms of active sitting federal judges, the appointments of George W. Bush and Bill Clinton account for almost 90% of the current non-white active federal judges.[67] By the end of George W. Bush's second term, non-white judges in active service increased by 10% from the end of the Bill Clinton's administration.[68] The entire federal judiciary is now comprised of 18% of minority judges.[69]

Still, racial minorities remain underrepresented in descriptive terms in the federal judiciary. Of the nearly 801 active sitting federal judges as of January 2008, nearly one-fifth is minority.[70] By comparison, one in three Americans is a racial/ethnic minority.[71] This represents substantial progress, but still falls short of full *descriptive* representation. As of this writing, 11% of the federal bench is African-American, 6% is Latina/o, and less than 1% is Asian-American.[72] No active federal judge was Native American or Pacific Islander.[73]

A. African-American Diversity on the Federal Bench

Active African American judges represent 11% of all federal judges, and are the one racial/ethnic minority group that comes closest to being represented on the federal bench in proportion to their 13% share of the U.S. population.[74] The courts where African-American representation on the federal bench is most likely to match population, that is, achieve descriptive representation, are those located in the First, Sixth and Seventh Circuits.[75] The greatest disparities in descriptive representation exist in the Fifth, Eighth, Ninth, Eleventh, and District of Columbia circuits–where roughly 7% of federal judges represent an African-American population that is about 15% of the total population.[76]

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67. *See infra* tbl.2.

68. Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Gary Zuk & Sara Schiavoni, *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282, 295 (2003).

69. *See infra* tbl.1. Table 1 is based on the Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf. I have excluded from the count of Latina/o judges those serving in the District of Puerto Rico.

70. . *Id*.

71. Press Release, U.S. Census Bureau, Minority Population Tops 100 Million (May 17, 2007), *available at* http://www.census.gov/Press-Release/www/releases/archives/population/010048.html; *Id.* at tbl.1, *available at* http://www.census.gov/Press-Release/www/releases/archives/cb07-70tbl1.pdf.

72. *See infra* tbl.1.

73. *Id.*

74. *Id*.

75. Goldman *et a*l., *supra* note 68, at 295. In the First Circuit, representation of minority judges is 4.1% and population is 4.5%; in the Sixth, minority representation of judges is 12.3% and population is 12.7%; and in the Seventh Circuit, minority representation of judges is 11.3% and population is 11.4%. *Id.* at tbl.2.

76. *Id.* at tbl.2. In the Fifth Circuit, aggregate representation of judges is 8.6% and

There are sixteen active African-American judges sitting on circuit courts today, an all-time high.[77] President Bill Clinton elevated to the circuit courts a total of eight African-American judges,[78] and President George W. Bush increased the overall total by five.[79]

B. Latina/o Diversity on the Federal Bench

Latina/os today represent the nation's largest and fastest growing ethnic/racial minority group.[80] Likely for that reason, the representation of Latina/os on the federal bench as compared to their representation in the general population is the most skewed. As shown in Table 1 in the appendix, the Latina/o population in the United States stands at 15%, while their representation on the active federal bench is half that at only 6%.[81] This number, although still falling substantially short of proportional descriptive diversity, is at an all-time high, reflecting the diversification success of the last two Presidents.

Of the fifty-one active federal judges who are Latina/o, about half serve in California, Florida or Texas,[82] where more than half of the Latina/o population resides.[83] Still, this proportion falls short of descriptive representation. While Latina/os make up about 25% of these states' populations,[84] their representation is only around 6% of the federal district courts representing this region.[85]

Twelve Latina/os serve on circuit courts, representing 3% of the total.[86] President Bill Clinton increased the number of Latina/o circuit court judges to six from one,[87]

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population is 17.4%; in the Eighth, aggregate representation of judges is 7.1% and population is 14.3%; in the Ninth Circuit, aggregate representation of judges is 5.3% and population is 14.0%; Eleventh and in the District of Columbia Circuit, aggregate representation of judges is 11.3% and population is 20.4%. *Id.*

77. *See infra* tbl 3.

78. *See* Robert A. Carp, Kenneth L. Manning & Ronald Stidham, *President Clinton's District Judges: "Extreme Liberals" or Just Plain Moderates?*, 84 JUDICATURE 282 (2001); Rorie L. Spill & Kathleen A. Bratton, *Clinton and Diversification of the Federal Judiciary*, 84 JUDICATURE 256 (2001).

79. *See infra* tbl. 3.

80. *See* U.S. Census Bureau, *supra* note 71, at tbl.1.

81. *See infra* tbl.1.

82. *See infra* tbl 4. I have excluded from the count of Latina/o judges those serving in the District of Puerto Rico.

83. As of July 1, 2006, California had the largest Latina/o population of any state (13.1 million), or 36%, of the total state population, followed by Texas (8.4 million), also 36% of the total state population, and Florida (3.6 million), about 20% of the state population. U.S. Census Bureau, *supra* note 70. The minority population of these three states (25.1 million) represents 57% of the total Latina/o US population. *Id.*

84. *Id.*

85. *See infra* tbl. 4.

86. They are Juan Torruella of the First circuit; Jose Cabranes and Sonia Sotomayor of the Second Circuit; Julio Fuentes of the Third Circuit; Fortunato Benavides, Edward Prado, Emilio Garza of the Fifth Circuit; Consuelo Callahan, Carlos Bea, Kim Wardlaw and Richard Paez of the Ninth Circuit, and Carlos Lucero of the Tenth Circuit. *See infra* tbl 4.

87. Spill & Bratton, *supra* note 78, at 256-61. President Clinton's Latina/o circuit court appointees were Jose Cabranes and Sonia Sotomayor of the Second Circuit; Julio Fuentes of the

and President George W. Bush increased this by five more.[88] Still, there is no Latina/o serving on the Fourth Circuit, which includes North Carolina, the state with the fastest growing Latina/o population; the Eleventh Circuit which covers Florida, the state with the third most populous Latina/o concentration; the Seventh Circuit, which includes Illinois, the state with the fourth largest Latina/o population; or the Sixth Circuit.[89]

C. Asian Pacific Islander Diversity on the Federal Bench

There are only six active Asian American federal judges; four of these serve in California, one in New York and the other in Hawaii.[90] No Asian American serves on a circuit court.[91] These figures are clearly disproportionate with their representative population. President Bill Clinton holds the record for naming the most Asian American federal judges, at four.[92]

III. CONTRASTING POLITICAL AND IDEOLOGICAL MOTIVATIONS IN DIVERSIFYING THE BENCH

"To the politically active as well as to the party faithful go the prizes."[93]

Presidents drive the diversification of the federal bench.[94] If descriptive diversity has advanced, it is because Presidents have put diversity at the top of their domestic political agenda. Judgeships traditionally have been rewards for political service. One of the first qualitative studies of federal judges in the 1960s and 1970s by Professor Woodford Howard found that appointments of federal judges were based on four major factors: political participation, professional competence, personal ambition, and a "pinch of luck."[95] It would be fair to say that diversity is now another part of the overall mix that makes a candidate a desirable nominee.

Part III.A describes the diversification efforts of President Bill Clinton, while Part III.B describes those of President George W. Bush. Each Part explores why each president emphasized diversity of the federal bench during his administration. Because there are so many other competing political goals and values, in order for diversification to actually happen, it clearly has to be a president's priority.

Third Circuit; Fortunato Benavides of the Fifth Circuit; Richard Paez of the Ninth Circuit, and Carlos Lucero of the Tenth Circuit. *See infra* tbl 4. Prior to that, Juan Torruella of the First Circuit was the lone circuit court Latina/o judge. *Id*.

88. *See infra* tbl. 5. They are Edward Prado and Emilio Garza of the Fifth Circuit; and Consuelo Callahan, Carlos Bea, and Kim Wardlaw of the Ninth Circuit. *See infra* tbl 4.

89. *Id.*

90. *See infra* tbl. 5.

91. *Id.*

92. *Id.*

93. J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 90 (1981).

94. *See* GERHARDT, *supra* note 11, at 131.

95. HOWARD, *supra* note 93, at 90.

A. President Bill Clinton: A Judiciary that "Looks Like America"

While campaigning against the first President Bush, Bill Clinton pledged that his administration would "look like America."[96] President Clinton kept his pledge, with respect to his cabinet[97] and the federal bench.

1. President Clinton Appointed More Minorities and Women to the Bench than any other President.

Overall, Clinton appointed more minorities and women to the bench than any other prior President, 112 women, sixty-two African-Americans, twenty-five Latina/os and six Asian Americans.[98] More than half of his judicial nominees were minorities or women.[99] Seventy-five percent of his confirmed appointees were white, 16.2% were African-American, and 6.3% were Latina/os.[100] Almost two-thirds of the African-American judges who are currently active were appointed by Clinton to the federal bench.[101]

2. President Clinton's Ideological Goals

President Clinton did not overtly have ideological goals in selecting his judges.[102] This murkiness may reflect assumptions that Bill Clinton made about his minority nominees, or it may also reflect his brand of politics. Bill Clinton, a "centrist" Democrat, rose to the presidency because he distanced himself from the liberal wing of

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96. *See, e.g.*, *Weekend Edition* (National Public Radio broadcast Aug. 16, 1992) (Democratic Presidential Nominee Governor Bill Clinton: "This crowd looks like America. This crowd is America. And if you elect me president, my administration will look like you. It will look like America.").

97. The five women appointed to the cabinet by Clinton include: Madeline K. Albright, Secretary of State, 1997-2001; Janet Reno, Attorney General, 1993-2001; Alexis M. Herman, Secretary of Labor, 1997-2001; Donna E. Shalala, Secretary of Health and Human Services, 1993-2001; and Hazel R. O'Leary, Secretary of Energy, 1993-1997. In addition to the five women appointed to cabinet positions, Clinton also named eight women to departments in high-ranking cabinet-level positions. Susan Tiefenbrun, *The Cultural, Political, and Legal Climate Behind the Fight to Stop Trafficking in Women: William J. Clinton's Legacy to Women's Rights*, 12 CARDOZO J.L. & GENDER 855 (2006); Ben Vient, *Leaving Diversity in His Wake; Clinton Changed the Math for Cabinet Appointments*, MSNBC, Dec. 2000, http://www.msnbc.msn.com/id/3071906/.

98. Sheldon Goldman, Elliot Slotnick, Gerard Gryski & Gary Zuk, *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228 (2001).

99. Carp *et al*, *supra* note 78, at 283.

100. Spill & Bratton, *supra* note 78, at 69.

101. *See infra* tbl.2.

102. Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 742 (1997); Spill & Bratton, *supra* note 78, at 256-61. Professors Epstein and Segal speculate that Bill Clinton may have been assuming that race and gender combined with party affiliation were sufficient proxies for interpretive ideology. See EPSTEIN & SEGAL, *supra* note 11, at 58-65.

the party.[103] By not calling attention to ideological goals, Bill Clinton obfuscated the degree to which he disagreed with his party, and it made pragmatic compromise possible with opponents.[104] His political pragmatism also drove him to select judges whose ideology would be viewed as "middle of the road" and would not draw ideological fire from partisan Republican Senators.

3. What Kind of Diversity?

Clinton chose to have diversity as an end goal, and did not appear to have an ideological litmus test for his judicial appointments. So what motivated his diversification agenda?

First, the pledge that his appointments would "look like America" might well have been driven by electoral politics. Bill Clinton made this pledge when he was a candidate for president. He may have been drawing a contrast between Democrats, who wanted to reflect the new ethnic and racial diversity of the United States, and Republicans, whose appointments under President George H.W. Bush were overwhelmingly white and male.

Like Jimmy Carter, diversification for President Bill Clinton might have also meant righting inequities of the past, acknowledging that Jim Crow had shaped the judiciary in Southern states while not necessarily placing blame.[105] This is both a symbolic statement that his administration stood for the rights of minorities, as well as a substantive accomplishment, breaking down racial barriers. When President Clinton justified the recess appointment of Judge Roger Gregory to the Fourth Circuit, the first African-American judge appointed to a circuit covering the part of the Old Confederate South with the highest African-American population, he made clear that this was an appointment that was breaking barriers.[106] With this appointment Bill Clinton integrated the Fourth Circuit, a court that had been all white and all male for centuries.[107]

Third, in the Roger Gregory appointment speech Clinton also referred to the value of viewpoint diversity. He argued "diversity in the courts, as in all aspects of society, sharpens our vision . . . ." [108] As discussed in Part II.C, judicial decisions should be inclusive and consider all racial perspectives. Particularly in hot button civil rights issues, when courts frame issues in a way that reflects only the "white" viewpoint of social reality–for example, the default condition in the workplace is that there is no stereotyping or discrimination, or that police do not engage in racial profiling. To do so

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103. ROBERT A. CARP, RONALD STIDHAM & KENNETH L. MANNING, JUDICIAL PROCESS IN AMERICA 283 (6th ed. 2004); Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113 (1999).

104. *See* Maria Echaveste, *Brown to Black: The Politics of Judicial Appointments for Latinos*, 13 BERKELEY LA RAZA L.J. 39, 40 (2003) (noting that President Clinton did not want to "draw a line in the sand" when it came to his minority judicial nominees but wanted to remain flexible and amenable to negotiation).

105. *See supra* note 34 and accompanying text.

106. Wilson, *supra* note 34, at 42.

107. Carp *et al*, *supra* note 78, at 283.

108. Wilson, *supra* note 34, at 42.

means as President Bill Clinton stated, that courts lose "sharp[ness]" by engaging only one viewpoint of social reality.[109]

Finally, in this speech Clinton argued that "diversity in the courts . . . makes us a stronger nation."[110] Here, Clinton appears to have been alluding to the symbolic citizenship aspect of diversity. A representative judiciary provides important symbolic and political meaning, has more legitimacy, demonstrates to the American public that the system is equitable and free of discrimination, and is better able to achieve its goals of fairness and justice.

B. President George W. Bush: First "Strict constructionists" and Then Diversity

President George W. Bush accomplishments in diversifying the federal bench may seem surprising. But they should not be, because diversity of the bench under George W. Bush reflects his brand of Republican party politics as well as his personal background.

1. President George W. Bush Appointed More Minorities to the Bench than any other Republican President.

For a Republican administration, President George W. Bush's record on diversity has been stellar. George W. Bush has appointed twenty African-American judges,[111] or 6.7% of his confirmed appointees.[112] George W. Bush has now appointed more Latina/os to the federal bench than any other prior President.[113] In all but one of these appointments, president Bush replaced a white male judge or used a new seat to name a Latina/o judge.[114] This record is remarkable, especially when compared to his Republican predecessors, Presidents George H.W. Bush and Ronald Reagan, who had abysmal records of appointing minorities to the bench.[115]

President George W. Bush also increased diversity within circuit courts, which traditionally constitute a pool for possible nominees to the U.S. Supreme Court. Judge Garza of the Fifth Circuit and Judge Prado of the Ninth Circuit–both elevated by

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109. *Id.*

110. *Id.*

111. *See infra* tbl.2.

112. Ken Herman, *Bush Holds the Record on Hispanic Federal Judges*, HOUSTON CHRON., Sept. 22, 2007, at A16. EPSTEIN & SEGAL, *supra* note 11, at 59 ("of [George W. Bush's] 202 appointments through 2004 to the lower federal courts, 10.4 percent have gone to Hispanics, a percentage higher than any of his predecessors.").

113. *Id. See also infra* tbl.2.

114. *Id.*

115. *See* Carl Tobias, *Dear President Bush: Leaving a Legacy on the Federal Bench*, 42 U. RICH. L. REV. 1041, 1043 , at 15, 20, 25 (noting African-Americans constituted less than 2% of President Reagan's appointees and 5% for President Georg H.W. Bush's appointees). However, the overall record of nontraditional appointments, which includes white women, is better for the Republican administrations, twenty-eight of President George H.W. Bush's appointees were nontraditional, and 14% of President Reagan's appointees were nontraditional. CARP ET AL., *supra* note 103, at 115.

George W. Bush–were contenders for each of the U.S. Supreme Court vacancies that President Bush had a chance to fill.[116]

2. George W. Bush: pursuing "the most ideological bench in history"[117]

In his campaign, George W. Bush made an ideological pledge and promised that he would seek to appoint to the bench judges who were "strict constructionists."[118] This pledge has been consistent with what has been part of the Republican's central tenet in electoral politics, that since the Warren era, the federal courts have tilted too far left, and that to correct this, Republicans must seek out and appoint conservative judges.[119] As Ronald Reagan's Attorney General Edwin Meese understood, appointing conservative judges could "institutionalize the Reagan revolution so that it can't be set aside no matter what happens in future presidential elections."[120]

In particular, social conservatives, a key interest group in the Republican party, supported President Bush's bid for the presidency. Social conservatives generally believe that the Court's *Roe v Wade* decision is wrong and immoral. Their political focus for the last twenty-five years has been to overturn this decision. President George W. Bush publicly acknowledged this agenda in a remark during the 2004 campaign that was not widely understood, in which he analogized *Roe v Wade* to the infamous *Dred Scott* decision.[121] These decisions are analogous in that social conservatives view these as judge-made law that is fundamentally immoral and should be overturned by any means possible.[122]

After seven years of battles over judicial appointments, it has become clear that President George W Bush has been determined to reshape the judiciary to conform to a more conservative agenda. By and large, President Bush has emphasized placing staunch conservatives on the bench. Democrat Senator Charles E. Schumer of New

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116. *Possible Nominees to the Supreme Court*, WASH. POST, July 1, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100756.html.

117. Neil A. Lewis, *Mixed Results for Bush in Battles Over Judges*, N.Y. TIMES, Oct. 22, 2004, at A1.

118. Elisabeth Bumiller, *Bush Vows to Seek Conservative Judges*, N.Y. TIMES, Mar. 29, 2002, at A24.

119. Since Richard Nixon, presidents have appointed judges whose political views and judicial interpretive mindset comported with the political values held by the party of the appointing president. Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 U.C. DAVIS L. REV. 695, 698 n.11 (2003) (discussing research that showed that White House staff recommended to President Nixon to use judicial appointments to "influence the course of national affairs for a quarter of a century after he leaves").

120. David M. O'Brien, *Judicial Roulette* 61-62, 21-24 (Priority Press 1988). *See also* HERMAN SCHWARTZ, RIGHT WING JUSTICE: THE CONSERVATIVE CAMPAIGN TO TAKE OVER THE COURTS (2004).

121. Timothy Noah, *Why Bush opposes* Dred Scott*; It's Code for* Roe v. Wade, SLATE, Oct. 11, 2004, http://www.slate.com/id/2108083/.

122. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381-82 (1985).

York has even charged President Bush with trying to "create the most ideological bench in history."[123]

President George W. Bush's staff has run a disciplined selection screening process focused on ensuring that the candidates that are nominated follow the President's philosophy.[124] According to Professor Viet Dinh, who was then Assistant U.S. Attorney General in the Office of Legal Policy and had a key role in the judicial selection process, the men and women to be selected must have "[President Bush's] vision of the proper role of the judiciary. That is, a judiciary that will follow the law, not make the law, a judiciary that will interpret the constitution, not legislate from the bench."[125] Judges were to be a visible part of the program. And the nominees were going to be conservative, in an attempt to change the judiciary.[126] The White House has denied that there is an ideological litmus test for nominees. [127] Some argue that there is no need to apply an actual ideological litmus test because the Bush White House has chosen nominees whose views on the "hot button" issues are known.[128]

Perhaps ideological screening, if it exists, is now made by outside interest groups, who have become highly influential in the appointments process.[129] The evidence is circumstantial, but significant, that conservative interest groups have influenced Bush White House nominations. Early on in the Bush administration, the White House eliminated screening by the American Bar Association (ABA), a role that it had assumed for fifty years and some had credited with "professionalizing" the federal bench.[130] The White House argued that the ABA was an ideological organization, and if it allowed the ABA to give input, it might also have to consider the input of other organizations.[131] Instead, the White House turned to the Federalist Society, a group of law professors and lawyers whose constitutional interpretive philosophy is conservative. Of Mr. Bush's first batch of nominees not previously nominated by President Clinton, eight out of nine were proposed to the White House by the Federalist Society.[132] U.S. Supreme Court nominee, Samuel Alito and John Roberts were members of the Federalist Society.[133] Harriet Miers, whose nomination for the

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123. Lewis, *supra* note 117.

124. *Cf.* Goldman *et al*., *supra* note 68, at 284

125. *Id*. (describing the key players in designating judicial nominees as Professor Viet Dinh;, Alberto Gonzales, then White House Counsel, Brett Kavanaugh,then Associate White House Counsel recently confirmed to the federal bench,).

126. *Id*. at 297 (quoting Nan Aron of the Alliance for Justice and an unnamed Democratic aide); David G. Savage & Henry Weinstein, *4 White Flags Fly in Courts Fight*, L.A. TIMES, JAN. 10, 2007, at A12.

127. *Id.* at 284.

128. Lewis, *supra* note 117.

129. *See generally* GERHARDT, *supra* note 11, at 217-33.

130. MICHAEL COMISKEY, SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES 88 -92 (2004).

131. Goldman *et al*., *supra* note 68, at 284. Another reason was provided by observers of the White House: The Bush Administration was intent on secrecy in the selection process, and taking the ABA out was a way to ensure that its nominees would not be leaked prior to a public announcement by the White House. *Id.* at 292.

132. *See* Lewis, *supra* note 117.

133. *See* Charles Lane, *Roberts Listed in Federalist Society '97-98 Directory: Court Nominee Said He Has No Memory of Membership*, WASH. POST, July 25, 2005, at A1; Amy

U.S. Supreme Court was withdrawn under numerous pressures, was not a member of the Federalist Society.[134]

3. What Kind of Diversity?

If ideological conservatism is the pre-eminent political goal for the Bush White House, then this goal has comfortably coexisted with a clear push for judges with diverse backgrounds. The White House has sought out minority nominees. Bush's minority nominees have all been well-credentialed, less likely to have been involved in partisan Republican politics, more likely to come from diverse experiential backgrounds–particularly private practice,and for those with judicial experience, they have had shorter tenures on the bench. [135] That is, this group does not neatly fit the mold of traditional nominees,[136] and shows flexibility and willingness to forego formulaic credential screening in order to ensure diverse pools.

Why would President George W. Bush emphasize diversity? The first reason to emphasize diversity is pragmatic electoral politics. George W. Bush has seen Latina/os as part of the constituency that he seeks to appeal to, and bring into, the Republican party.[137] The Latina/o vote was an important part of the electoral victory that he put together in 2000 and 2004.[138] Without the substantial support of Latina/o voters in key states, President Bush's electoral victories would have been in jeopardy. [139] In the long term, President Bush has been bound and determined to strengthen the Republican party by appealing to Latina/os.

The second reason is symbolic diversity. President George W. Bush's superior record on Latina/o appointments also reflects that there were many opportunities for him to name the "first" Latina/o judge to important courts where Latina/os wield important electoral clout. Naming the "first" to a court and breaking a color line barrier makes an important statement about his policies and commitments to civil rights and a

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Sullivan, *How America Decides*, TIME MAG, (July 14, 2008) (noting that Justice Samuel Alito is a longtime Federalist Society member).

134. Charles Babington, *After the Home Run, A White House Balk? Handling of Miers Nomination Cannot Stand Up to Ease of Roberts Approval*, WASH. POST, Oct. 21, 2005, at A4; *see also* Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 812-13 (2006).

135. Goldman *et al*., *supra* note 68, at. 306.

136. Epstein *et al*., *supra* note 66 at 937-38 (determining credential requisites for appointments based on statistical analysis).

137. The President's Senior Political Adviser, Karl Rove, has told reporters of the President's "mission" and "goal" of wooing the Latina/o population. Jamie Dettmer, *Future Hinges on Hispanic Vote*, INSIGHT, Oct. 1, 2001; *see also* Sylvia R. Lazos Vargas, *The Latina/o and Apia Vote Post-2000: What Does it Mean to Move Beyond "Black and White" Politics?*, 81 OR. L. REV. 783 (2002) (discussing George W. Bush's attempts to appeal to Latina/os); EPSTEIN & SEGAL, supra note 11, at 50 (appointing Hispanics to the bench may result in *future* payoffs to the Republican party).

138. *See* Greg Botelho, *Exit Polls: Electorate is Sharply Divided*, CNN, Nov. 3, 2004, http://www.cnn.com/2004/ALLPOLITICS/11/02/prez.analysis ("Bush did make inroads among Latino voters, garnering 4 percent support (7 percent more than four years ago) . . . .").

139. *See* Richard Nadler, *Bush's "Real" Hispanic Numbers: Debunking the debunkers*, NAT'L REV. ONLINE (Dec. 08, 2004), http://www.nationalreview.com/comment/nadler 200412080811.asp.

demographically diverse America.[140] At the district court level, George W. Bush has named the first Latina/o judges to the Western District of Texas, the Middle District of Florida, the Eastern District of Pennsylvania, the District of Nevada, the Southern District of Mississippi, and the District of New Jersey. Additionally, he increased by two the number of Latina/o district court judges in New Mexico. President George W. Bush's nominee Emilio Garza was only the second Latina/o ever to serve in the Fifth Circuit, which includes Texas, and has one of the highest Latina/o populations. Consuelo Callahan was the first ever Latina named to the Ninth Circuit, and only the second Latina/o judge to represent California in that circuit.

Third, the emphasis on Latina/o appointments also may reflect Bush's Texas background, and his comfort around Latina/os.[141] By all accounts, George W. Bush's roots in Midland, Texas, exposed him to many Mexican-American families. Additionally, as a Texas politician, he formed alliances with key Latina/o leaders. His family has long held close ties to key leading Mexican families, and by his own report, Bush counted President Vicente Fox as a "close" friend. Last but not least, Latina/os are family. Brother Jeb Bush is married to a Mexican national, and President George H.W. Bush once affectionately referred to President George W. Bush's nephews and nieces of this marriage as the "little brown ones."[142]

The final reason to emphasize diversity is confirmation politics. As will be discussed in more detail in Part IV below, confirmation politics looms large in that the end-game of every nomination is confirmation of the candidate. The Bush confirmation strategy has incorporated diversity as part of a public image campaign.[143] In modern times, confirmation politics have played out in the public media, and the media has become an important factor in shaping public opinion that might in turn put pressure on how Senators vote.[144] More than previous presidents, Bush has embraced the public media as part of his confirmation strategy; he has even made frequent partisan speeches accusing Democrats of being overly political in opposing nominees, and not playing fair by refusing nominees straight up-and-down votes. In the case of Miguel Estrada's failed nomination, President Bush thought it important to play up the Democrats' opposition to Estrada to Latina/o voters.

Inevitably, when minorities are nominated to the bench and they are controversial, the "race card" comes into play. Both Democrats and Republicans have been highly sensitive to charges that their opposition to a minority candidate is based on racism and bias. When Republicans opposed Bill Clinton's nomination of Richard Paez to the Ninth Circuit, some Democrats made accusations of bias against Republican opponents.[145] Conversely, when Democrats opposed George W. Bush's nomination of

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140. *See* discussion *supra* Part II.B.

141. *See generally* Herman, *supra* note 112.

142. Jim Rutenberg, *Texas Town, Now Divided, Forged Bush's Firm Stand on Immigration*, N.Y. TIMES (June 24, 2007) at A1.

143. *See infra* notes 256-62 and accompanying text. For example President Bush's first slate of eleven nominees included Janice Roger Brown, Miguel Estrada, Priscilla Owen, as well as two African-American Clinton nominees. *Id.*

144. *See generally* GERHARDT, *supra* note 11, at 234-49.

145. *See infra* Part IV.B.2.

Miguel Estrada's to the D.C. Circuit, some Republicans implied that racism motivated this opposition.[146]

Many of President Bush's candidates–such as Janice Rogers Brown (who is African American) and Priscilla Owen (who is white)–have been uncompromisingly conservative. Nominations involving women and minorities who hold strong ideological positions can almost be seen as a "dare" to opponents in the Senate for three reasons.[147] First, such a strategy capitalizes on the inability of the American media to do a good job in separating charges of racial bias from more principled ideological and political objections. It is difficult to come up with a good sound bite about why a Democrat or Republican might want to oppose a minority appointment on grounds other than race.

Second, this gambit is part of the art of persuasive politics. Minority candidates' life stories often are compelling, showing a trajectory of overcoming adversity, most often in the face of overwhelming barriers. Personal narratives are a short hand way of cluing into emotion and common values.[148] These stories are a very persuasive form of rhetoric.[149] The common emotion elicited by these narratives does more to carry the day than an argument on the merits. For example, Janice Rogers Brown, a Bush nominee who faced four filibusters by Senate Democrats, is the daughter of a sharecropper in Alabama. She attended segregated schools, rose to go to the nation's elite universities and became Supreme Court Justice of California.[150] Judge Ronnie White, an African-American Clinton nominee who was the first ever nominee to be voted down in the Senate, was the oldest son of teenage parents, grew up in a segregated crime-ridden neighborhood in St. Louis, and worked his way through grade

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146. *See infra* Part IV.B.3.

147. *Cf*. Goldman *et al*., *supra* note 68, at 288-89 (discussing interviews with Senate aides that depict the Bush White House as playing "hardball," but adding that this is a matter of which side is relating the facts).

148. *See generally* FRANCESCA POLLETTA, IT WAS LIKE A FEVER: STORYTELLING IN PROTEST AND POLITICS (2006).

149. As Professor Polletta explains,

> The relationship between culture, structure, and story is complex and variable. In their role as preservers of the status quo, stories are influential not because they are told over and over again in identical form but rather because they mesh with other familiar stories that navigate similarly between the culturally privileged and denigrated poles of well-know oppositions … *Id*, at 15 …stories make explicit the cultural schemas that underpin institutional practices *Id* at 13 . .. The dynamic at work [can be] an emotional one. *Id* at 12.

150. The biography of Janice Rogers Brown posted on the White House Website states:

> Justice Brown's personal story is an inspiring example of the American dream. Born to sharecroppers in Greenville, Alabama, Justice Brown attended segregated schools and came of age in the midst of Jim Crow laws. She grew up listening to her grandmother's stories about NAACP lawyer Fred Gray, who defended Dr. Martin Luther King, Jr., and Rosa Parks. Her experience as a child of the South motivated her to become a lawyer and to devote her life to public service.

The White House, In Focus: Justice Janice Rogers Brown, http://www.whitehouse.gov/infocus/judicialnominees/brown.html.

school, college and law school.[151] Such narratives strike a chord with Democrats and Republicans alike–*and the American public as a whole*–because Americans believe in the meritocracy myth that hard work and opportunity account for success in America.[152] Such stories of success in the face of overwhelming odds speak to the moral worthiness and character of the nominees, essential components of what makes a good judge. In addition, these narratives dissipate discomfort with racial difference. These stories confirm widely held beliefs that success is about individual effort, [153] and that race does not disproportionately disadvantage racial minorities.[154]

In addition, both Whites and minorities have a strong desire to further a less racist and equitable society, and giving meritorious minority candidates the benefit of the doubt can be viewed as one small way of bridging the racial divide.

IV. HOW THE CONFIRMATION "WARS" SHAPE THE KIND OF MINORITIES WHO SERVE ON THE BENCH

A president's goals must bend to the practicalities of confirmation politics. The president must negotiate, and sometimes "make war" [155] with the Senate, the other institution that constitutionally must "consent" to a president's nominations.[156] During the last two presidencies, the confirmation process has become vicious, intense, full of acrimony, and sometimes even petty. [157] The "confirmation wars" seemed to reach a fever pitch during the second Clinton administration and continued through George W. Bush's first term.[158] To be sure, there are no innocents in the politics of the

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151. *Transition in Washington; Excerpts from Judge's Testimony at Ashcroft Confirmation Hearing*, NY TIMES, January 19, 2001, at A28.

152. It should not be surprising that the "meritocracy myth" has been heavily critiqued. *See* Lazos Vargas, *supra* note 46, at Part II; Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996).

153. *See* Lazos Vargas, *supra* note 46, at Part II.

154. Another way of phrasing this kind of myth is to say that these stories reaffirm white privilege and white innocence. Barbara J. Flagg, *"*Was *Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); *see also* K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE (1998); STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996).

155. *See generally* Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 477 (1998) (describing "war" as breaking out in the Senate and between the Executive and the Senate whenever long understood norms, both formal and informal, are violated).

156. The Appointments Clause provides that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States . . . ." U.S. CONST. art. II, § 2, cl. 2.

157. There seems to be a consensus among commentators that the partisanship has gotten worse in what has always been a wretchedly partisan process. *See* STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994); MARK SILVERSTEIN, JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS (2004); John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush* 5, 20-22 J. APP. PRAC. & PROCESS 1 (2003).

158. *See* Maltese, *supra* note 157, at 20-22 (describing the extreme partisanship of both Republicans and Democrats); Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the*

confirmation process; both political parties have blocked minority nominees for political reasons, both parties have played the "race card" when it furthered their political objectives.

Currently the confirmation process is not configured to favor any controversial candidate, regardless of race. The Robert Bork confirmation hearings and the rejection of his nomination by Democrats marked the beginning of a new era in the Senate in which a candidate who is viewed as holding extreme ideological views of the interpretation of the Constitution, can be rejected.[159] The modern practice of rejecting a candidate because of his or her ideology has been a major part of the "cat and mouse" game that Senators engage in with nominees of the opposing party. The opposing Senators attempt to ferret out of the nominee and the record evidence that points to their intemperate judicial temperament by showing that the nominee is "out of the mainstream" or excessively ideological.

Professor Silverstein has provocatively set forth the mediocrity thesis to explain the current confirmation gamesmanship. His study concludes that "in the contemporary process the more eminent and well known the candidate, the greater the likelihood of divisive and contentious hearings…." [160] Likewise, recent empirical work by Professor John Lott has concluded that judges, who by a variety of numerical measures, can be identified as higher quality judges have a demonstrably harder time in obtaining the approval of the Senate.[161] The more you publish, the more there is to nitpick, and the more opinions you have, the more there is to criticize. To illustrate, Robert Bork was smart, controversial and outspoken, and immediately became subject to a major attack. But had Professor Bork been mediocre and discrete, he would be sitting on the Supreme Court today.

The "stealth candidate" thesis is a corollary that has been used to explain the easy confirmation of candidates such as John Roberts to the Supreme Court. [162] Stealth candidates can be highly qualified, perhaps even charismatic, and their success through the confirmation process is due to their non-existent, or scant, paper trail. When quizzed by Senators, a stealth candidate does not offer a target for opponents. He or she has the room to equivocate on his or her ideological views, and has the room to make broad statements that sound comforting to potential opponents but do not really say much as to how he or she may rule on particular issues. In the Roberts confirmation hearing, Roberts was able to avoid revealing his judicial ideology by

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Battle for the Federal Courts, 39 U. RICH. L. REV. 871 (2005); Jason Eric Sharp, Note, *Restoring the Constitutional Formula to the Federal Judicial Appointment Process: Taking the Vice Out of "Advice and Consent"* 26 U. ARK. LITTLE ROCK L. REV. 747 (2004) (describing recent partisanship).

159. *See* GERHARDT, *supra* note 11, at 71-72; SILVERSTEIN *supra* note 157, at 160-65.

160. *See* SILVERSTEIN *supra* note 157, at 162 ("[T]he contemporary confirmation process is not configured to favor nominees to the Court with . . . stature . . . unless the nominee has countervailing qualities that could 'neutralize expected opposition.'"). Professor Silverstien calls the Thomas nomination "the rankest form of political symbolism and affirmative action." *Id.* at 163.

161. John R. Lott, Jr. *The Judicial Confirmation Process: The Difficulty with Being Smart,* 2 J. EMPIRICAL LEG STUDIES 407, 434 (2005) (using a variety of empirical measures, results show that the "the higher the quality of judge, the more difficult the confirmation process).

162. *See* SILVERSTEIN *supra* note 157, at 164 ("'stealth' appointees have proven to be relatively safe choices for recent presidents."); *see also* Samahon, *supra* note 134, at 812-13.

repeatedly side-stepping specific pointed questions and repeating the broad principle that judges should be prudent.

Such a partisan confirmation atmosphere also impacts minority nominees and shapes the kind of minority judges who successfully ascend to the federal bench. Hence, the partisanship of the confirmation process is not costless, because diversity, whether it be with respect to the quality of judges,[163] career experience,[164] or racial and gender diversity, is being impacted. A "voice of color" must be diverse and balance both liberal and conservative perspectives on issues of race. "Voices of color" that are conservative and liberal should be present in the dialectical process that is involved when courts struggle with difficult, divisive racial issues. If only one "voice of color" is present, then the benefits of viewpoint diversity are unlikely to be achieved. Rather, a diverse set of viewpoints, *even among minorities themselves*, is required to attain the substantive benefits of diversity on the bench.[165]

To be clear, *all* voices of color are legitimate and authentic. This article does not advocate for a particular "voice of color." There are plural perspectives within minority communities as to how to deal with the racial facts of social life. Conservative racial ideology can be grounded in assimilating, disowning group confrontational politics, relying on individual merit and self-help, and working your way out of racial disadvantages by being "twice as good."[166] Liberal ideology is communitarian and is grounded in the view that the way racism is eliminated at the societal and individual level is by the group pulling together and confronting those who are responsible for promoting racial wrongs in society, whether that be the state or individuals.[167] The Liberal or communitarian "voice of color" also holds that a great measure of public assistance, either in the form of affirmative action or wealth transfers, is necessary to overcome the deficits caused by the Jim Crow era. Both the liberal and conservative views agree that racism is alive and well in American society. They differ as to how to remedy this ill, and how individual Americans of color should react to the social reality of discrimination and racism. What they have in common is that prejudice, stereotypes and racism is an everyday fact of life that minorities must deal with.

Part IV.A first sets out the "give no racial offense" corollary to the mediocrity and stealth candidate theses. Part IV.B provides evidence for this thesis with case studies from the last two decades of confirmation wars.

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163. *See supra* note 161.

164. *See* Epstein *et al*., *supra* note 66 at 956-59 (concluding that pool of nominees for the circuit courts is being reduced by an informal norm that the candidate must have prior bench experience, and that this norm impacts the pool of racially and gender diverse nominees who might eventually be successful).

165. *See generally* Lazos Vargas, *supra* note31.

166. For the key article describing pluralvoices of colorsee generally . Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2008-11 (1991) (describing the "voice of color" as including Randall Kennedy's view, which assimilates "meritocratic majoritarian standards," as well as Derrick Bell's, Richard Delgado's, and Mari Matsuda's views, which are concerned with the class implications of racial minorities); s*ee also supra* notes 50-53 and accompanying text.

167. Johnson & Fuentes-Rowher, *supra* note 65, at 11-18 (emphasizing multiple voices of color among judges); Angela Onwuachi-Willig, *Just Another Brother on the Supreme Court?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 970-71 (2005) (discussing the conservative voice of color of Justice Thomas).

A. The Extra Burden for Racial Minority Candidates: Do Not Give Racial Offense

The mediocrity and stealth candidate theses tell us that under the current partisan confirmation process, the nominees who are most likely to succeed are those who are the least controversial, and the least likely to raise the ire of any single Senator. A corollary is the proposition that minority candidates have an additional obstacle to overcome in the already treacherous confirmation process, the risk of triggering racial stereotypes that will invite making them a target of partisans in the Senate. Minority nominees have a difficult balancing act, how to be authentic and true to themselves and yet how to avoid negative stereotypes that might invite their becoming a target of interest groups and ideological Senators.

Racial identity is part of the profile of a minority judicial candidate. It may not be an explicit part of a resume, but each of us has a racial identity, whether we are white, African American, mixed race, or "ethnic." Because of our nation's history, the relevant racial labels in modern America are African-American, Asian-American, and Latina/o. Once a racial label is applied, ideas of what that label means are activated; we often call these ideas stereotypes. The judicial nominee has no control over how others ascribe racial stereotypes to him or her; rather, these are a coherent set of stereotypes or ideas, mostly negative, as to what that person is about because of his or her racial identity. Stereotypes also affect perception, how we interpret ambiguous actions.[168] Racial framing and labeling is powerful and real, and the racial ideas that such frames and labels trigger, consciously and unconsciously, are just as real and make mischief for all.[169]

Both the judiciary and the Senate are overwhelmingly white male institutions. The minority candidate is an aberration. When a racial minority intrudes into an all-white institution, what is triggered is not overt racism, but rather more subtle forms of discrimination: stereotypes and discomfort with the minority's racial difference. Racial discomfort arises because the minority's non-white identity signals racial difference and potential conflict over issues involving race relations, an area in which Americans have trouble disagreeing without giving offense.[170] There is anxiety on the part of the white majority that whites may be accused of racism even though they are well-meaning and "innocent." To be a success, the burden falls on the racial minority to diffuse racial discomfort.[171] It falls on him or her to make the majority feel comfortable

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168. *See, e.g.*, Correll et al., *supra* note 52 at 1006-08 (finding that police were more likely to shoot at the ambiguous conduct of African-Americans than that of whites); Kahan et al., *supra* note 48 (showing that ideology and race frame how individual Americans perceive the reasonableness of a police chase)

169. *See generally* APPIAH & GUTMANN, *supra* note 154, at 79-91 (discussing ascriptions of racial stereotypes; Cheryl Harris & Devon Carbado, "Loot or Find: Fact or Frame?" in AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE Katrina (David Troutt ed.,, 2007) (discussing racial framing in Katrina episode, and how the media's racial framing caused white Americans to think about Katrina's black victims as looters).

170. *See* Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645 (2004).

171. *Id.* at 1650-55.

with his or her non-white identity and to do everything possible to dispel stereotypes that might negatively affect the candidacy.

"Performing" racial identity refers to how a minority interprets his or her racial experience, internalizes it, and how racial identity in turn influences how he or she interacts with others.[172] Critical Race Theory and LatCrit literature emphasize that there are a broad range of ways that a racial minority can interpret his or her racial identity.[173] First, he or she must negotiate privately how he or she comes to terms with his or her racial experience. Should he or she be angry that he or she is constantly being stereotyped? Should he or she be fatalistic about racism in American society? Should he or she minimize race and talk about class instead? Second, a person of color must decide how she "performs" her racial identity in public.[174] For example, the literature regarding discrimination against gay men and lesbians explains that negotiating a public identity may mean "covering" the fact that you are gay.[175] For racial minorities, negotiating a public racial identity may mean "assimilating" into white norms; for example, not wearing dreadlocks to work,[176] not making any remarks that call attention to one's race, not speaking Spanish at the workplace.[177] In the common vernacular, this is known as "acting white." Choices must be made as well as how to deal with whites' attitudes about race. A racial minority might purposely avoid bringing up any controversial racial topics when he or she is around white co-workers. At an extreme, a minority may choose to laugh along with white co-workers when they make inappropriate derogatory racial jokes or remarks just to show that she fits in. [178]

Part of not being offensive to any senator is to avoid presenting a *public* racial identity that is disquieting to white senators.[179] Nominees are well served by displaying a public racial identity that is not unsettling. At a base level, this means not being overt about what race means in America; for example, not reminding whites of

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172. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

173. *See supra* notes 163-167 and accompanying text; *see also* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 37-49 (2001). .

174. *See* Carbado & Gulati, *supra* note 172, at 1277-78, 1290-91 (minority employees have the extra burden of figuring out how to deal with employers stereotypes. Stereotype-negating strategies are complex and entail "risk costs" ; an employee may rebut one stereotype, but run into others, and in some cases the attempts to mute some stereotypes may backfire); Carbado & Gulati, *supra* note 170, a 1650-55 (outsiders who rise to the top of organizations are likely to be adept at negotiating stereotypes, but this is a difficult balancing act).

175. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 83-84 (2006).

176. *See* Angela Onwuachi-Willig & Mario Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283.

177. *See generally* YOSHINO, *supra* note 175; s*ee also* Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents*, 85 CAL. L. REV. 1347 (1997) (arguing that adopting English-only rules in the workplace constitutes a prima facie case of Title VII discrimination on the basis of national origin).

178. *See, e.g.*, Paul M. Barrett, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999) (relating the poignant story of Lawrence Mungin, a Harvard educated African-American lawyer who strove to assimilate to white norms, nonetheless, he ended up suing his law firm for racial discrimination).

179. Currently all but three Senators are white, so this is the dominant racial viewpoint in the Senate.

their privilege, not harkening back to the sins of the Jim Crow era, not being "all over Jena,"[180] and not triggering harmful stereotypes by appearing angry.[181]

Instead, a racial minority is well served if she can present a racial identity that is appealing to whites. One way to be appealing is to be non-ideological and minimize racial difference, and reinforce the color-blindness myth. So, for example, by presenting a life story of success in the face of overwhelming barriers the racial divide is minimized, and instead what is appealed to is our common belief that everyone in America can succeed through hard work. If a candidate speaks about race, she should present a positive picture of race relations in America that is hopeful, that places no racial blame on anyone, and that strikes at chords of commonality (everyone is the same under the color of our skin).

It bears remembering that the confirmation hearings of Thurgood Marshall were problematic.[182] This is someone who should have sailed through the Senate. Marshall's track record and stellar accomplishments made him a "superstar."[183] By the time he was confirmed to the Third Circuit (and later to the Supreme Court) he had already successfully spearheaded the litigation that led to the triumph of *Brown v. Board of Education*.[184] He had shown character under fire, the ability to organize a large unwieldy African-American community that was under great pressure, and to manage a complex docket of cases. Added to these qualities of leadership is a fine legal mind that collaborated in creating the then novel theories of equal protection, and the new mode of litigation using social science that won the day in *Brown*. All this should have indicated that Marshall would make an excellent Justice.

However, Marshall drew fire from interest groups and irate white Southern Senators.[185] The Southern Senators questioned Marshall on his expansive reading of the Constitution.[186] The Senators accused Marshall of lacking judicial temperament because he was too much the advocate.[187] Insinuations were made about alleged ties to the Communist Party.[188]

Underneath these accusations there was a racial tinge. Thurgood Marshall's public racial identity would have made whites uncomfortable. It was no coincidence that the white Southern Senators led the opposition to his nomination. His role in the *Brown* litigation was personally offensive to Democrat Senators from the South. [189] The

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180. *See* Janny Scott, *A Biracial Candidate for President Walks His Own Fine Line*, N.Y, TIMES, Dec. 29, 2007, at A1, A14 (quoting Jesse Jackson as saying "If I were a candidate, I'd be all over Jena" the site of a hate speech controversy involving white high school students hanging a noose in the school yards and black students being severely punished by the local prosecutor as a result of black students beating a white student).

181. The stereotype triggered is that of the angry minority.

182. *See* Stephen L. Carter, *The Confirmation Mess, Revisited*, 84 NW. U. L. REV. 962 (1990).

183. *See generally* WILLIAMS, *supra* note 1.

184. 347 U.S. 483 (1954).

185. WILLIAMS , *supra* note at 336. Senators Thurmond and Ervin, as well as chairman Eastland, powerful Southern Senators, were all opposed. *See also* Carter, *supra* note 182, at 968-72.

186. *Id.* at 966-68.

187. *Id.* at 969.

188. *Id.* at 970.

189. *See supra* note 185.

Senate and the judiciary were virtually all-white institutions, Jim Crow had only recently been vanquished. In Marshall's mind there was surely no ambiguity as to why African Americans were in such dire straits at the time, it was Jim Crow and whites' neglect in addressing these inequalities.[190]

In the end, Thurgood Marshall, one of our greatest Supreme Court Justices, was confirmed after a difficult confirmation process, with only ten Senators voting against him.[191] President Lyndon Johnson, the "master of the Senate," had to engage in "nonstop lobbying" to push through Marshall's confirmation.[192]

Today's confirmation process is even more partisan than in the 1960s. The "confirmation wars" of today involve more Senators who feel less constrained to follow party discipline or to subsume their ideological differences when faced with a highly qualified candidate. There is a more concerted effort, often instigated by interest groups, to derail the opposing party's nominees for ideological reasons. Today's environment of partisan politics increases the chances that minority judicial nominees who stand out because of their views and because of their race will be defeated.

B. Minority Nominees' "Confirmation Wars" During the Clinton and George W. Bush Administrations

The confirmation process is treacherous for all candidates, but it is particularly hard on racial minorities whose records stand out. This Part focuses on controversial minority nominees during the Clinton and George W. Bush administrations. Part IV.B.1 discusses the cases of an African American nominee, Roger Gregory, and two Latina/o nominees, Jorge Rangel and Eduardo Moreno, candidates with proven qualifications who encountered behind-the-scenes roadblocks. The institutional capacity of any single Senator to stop cold the nomination of any candidate, without giving public explanations, makes minority candidates vulnerable to the whims of Senators, who may or may not have legitimate concerns about their candidacies. Part IV.B.2 discusses the confirmation battles of Ronnie White, an African American nominee, and Richard Paez, a Latina/o nominee. Ronnie White was derailed because he was pro-criminal and "easy on crime," and Richard Paez was attacked because he was "too liberal" and "shockingly" sympathetic to illegal immigrants. These labels tie back to racial stereotypes. Otherwise flimsy attacks have more sticking power when they are buttressed by racial stereotypes that everyone carries around in their head. Part IV.B.3 discusses President George W. Bush's nominees, Miguel Estrada and Janice Rogers Brown, who were viewed as too ideological by Democrats. Finally, Part IV.B.4 turns to a minority nominee, Sonia Sotomayor, a Puerto Rican, whose personal narrative of success through adversity diffused racial and ideological opposition.

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190. *Id.*
191. Carter, *supra* note 182, at 968-70.
192. WILLIAMS, *supra* note 1, at 337.

1. A Single Senator Can Stop a Nominee: Roger Gregory and Jorge Rangel

President Bill Clinton had great trouble in getting his judicial nominees confirmed. Political scientists have calculated that Clinton's nominations appointees took longer to be confirmed than those of prior presidents.[193]

During the last years of the Clinton administration, Republican senators used a whole gamut of parliamentarian tactics–blue-slips, the senatorial "courtesy" practice of seeking the approval of Senators from the nominee's home state, [194] not holding hearings on nominees, filibustersto stall, delay, or just plain wear down the resolve of the Clinton White House and minority interest groups. During the 1997 to 1998 session, 35% of Clinton's minority nominees were rejected by the Senate, as opposed to only 14% of his traditional nominations.[195]

The confirmation wars over Roger Gregory and Jorge Rangel are examples of how behind-the-scenes maneuvering can stall and even kill the nominations of minority candidates, who in the process of confirmation acquire the label of being ideological or controversial. Blue-slips give Senators political cover to reject nominees without giving public reasons. Without public scrutiny, objections may be legitimate, partisan, or tinged with racial bias.

President Bill Clinton battled over two terms, invested a great deal of time and political capital, and finally had to use a recess appointment in the waning hours of his presidency, to name Roger Gregory to the Fourth Circuit, which covers Maryland, Virginia, West Virginia, and North and South Carolina, the circuit with the highest proportion of African Americans.[196] Roger Gregory, with a "hard knocks" life story, seemed to be a candidate that would attract both Republican and Democratic support. He was the son of a sharecropper, who had worked his way up to become part of the

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193. Much of this delay appears to have been caused by the 106th Congress. In an article examining confirmations from 1969 to 1998, Roger Hartley found that Clinton's female nominees, during divided government, were confirmed in an average of twenty-six days longer than males. *See* Roger E. Hartley, *Senate Delay of Minority Judicial Nominees: A Look at Race, Gender, and Experience*, 84 JUDICATURE 190, 191-95 (2001). However, he did find that Clinton's white nominees confirmed up to the time of his study were actually delayed on average five days longer than African-American nominees. *See id.* at 194. Latina/o and Asian-American nominees, however, averaged forty-three and 111 days longer, respectively, than white appointees. In addition, Professor Jon Lott's study found that Clinton's district court judges took at least 12% longer and at least 71% longer to be confirmed than the average nominee, and President George W. Bush's district court judges took at least 53% longer and circuit court nominees 103% longer. See Lott, *supra* note 161, at 427.

194. *See* GERHARDT, *supra* note 11, at 144, 147 (describing "blue-slips" and the institutionalized practice of senatorial courtesy dating back to President Madison. The Senate Judiciary Committee sends the home state senator a "blue slip," and if a senator, regardless of party, returns the slip marked "objection," the custom has been that no hearing will be scheduled and the nomination dies).

195. SCHWARTZ, *supra* note 120, at 177; Joan Biskupic, *Politics Snares Court, Hopes of Minorities and Women*, USA TODAY, Aug. 22, 2000, at 1A. In 1997, less than half of Bill Clinton's nominees had been confirmed as compared to historical levels of well over 80%. *See* GERHARDT, *supra* note 11, at 167.

196. Wilson, *supra* note 34, at 42-44.

legal establishment of Richmond, Virginia.[197] However, Senator Jesse Helms of North Carolina, who had been a segregationist and had won his most recent reelection using racially charged political advertising,[198] steadfastly opposed the nomination.[199]

Blue-slips acquired teeth and a partisan edge when under the Republican-controlled 105th Congress,[200] Senator Orrin Hatch, as Chair of the Judiciary Committee, instituted the practice of not reporting out of committee any nominee who had been blue-slipped by a home Senator, particularly a Republican Senator.[201] This practice gave Senator Helms virtual veto power over Gregory's nomination.[202] Although President Clinton entered into extended negotiations with Senator Helms, the Senator's opposition was intractable.[203] President Clinton negotiated to reallocate one of the vacancies to the state of Virginia, and secured the endorsements of Senators John Warner, a Republican, and Charles Robb, a Democrat, of Virginia. [204] As President Clinton's second term was running out, it seemed unlikely that Judge Roger Gregory would be able to get a vote on the Senate floor.[205] President Clinton made unprecedented use of a recess appointment to elevate Gregory to the Fourth Circuit,[206] relying on a highly unusual circumstance in which Democrats would control Senate briefly from January 3 to 20, 2001.[207] In the press conference announcing this appointment, President Clinton depicted the appointment as non-political, as wishing to integrate an all-white court, and thus, promoting justice through diversity. "It is unconscionable that the Fourth Circuit . . . has never had an African-American

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197. *See id.* at 41-43. At one point, President Clinton nominated three African American candidates to the Fourth Circuit. None of these nominations were reported out of the Senate Judiciary Committee.

198. In the 1990 North Carolina contest between Helms and his African American Democratic challenger, Harvey Gantt , the Helms campaign aired a commercial that said, "You needed that job, and you were the best qualified . . . . but it had to go to a minority because of a racial quota." ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 202 (1992).

199. *Id*. at 36-39. Helms at one point claimed that the workload of the Fourth Circuit did not require the filling of the vacancy assigned to his home state. At the close of the Clinton administration there were four vacancies on the Fourth Circuit. All nominees submitted by President Clinton were African American.

200. Jake Tapper, *Holding Court*, SALON, May 10, 2001, http://archive.salon.com/politics/feature/2001/05/10/judiciary/index.html ("The larger question in the past few years is what role these blue slips have played—or are supposed to play. Does one nonreturned blue slip delay a nominee indefinitely?").

201. Maltese, *supra* note 157, at 20-22 (reporting that Hatch "abruptly shifted gears" and developed a new policy that a home-state Republican could overcome the opposition of a home-state Democrat). On the harm to the institution of the Senate from the breakdown of "Senate folkways," see Brannon P. Denning, *Reforming the New Conformation Process: Replacing "Despise and Resent" With "Advice and Consent,"* 53 ADMIN. L. REV. 1 (2001).

202. *See* Tapper, *supra* note 200.

203. *Id*.

204. *Id*.

205. *Id*.

206. Maltese, *supra* note 157, at 20-22.

207. Tapper, *supra* note 200. Not surprisingly, this move provoked great anger among Republican Senators. Neil A. Lewis, *Senator Vows He Will Fight Clinton's Judicial Selection,* N.Y. TIMES, Jan. 2, 2001, at 16.

appellate judge. . . . It is long past time to right that wrong. Justice may be blind but diversity in the courts, as in all aspects of society, sharpens our visions and makes us a stronger nation."[208]

President George W. Bush subsequently renominated Roger Gregory, and another Clinton African-American nominee, Judge Barrington Parker, Jr. The renominations were both symbolic and strategic. By including Clinton's barrier-breaking nominees, Bush countered charges made by Democrats that Republican opposition to Gregory and other minority nominees was racially motivated.[209]

In 2001, because of the support of Republican Senators George Allen and John Warner, Judge Roger Gregory was easily confirmed.[210] In contrast to Jesse Helm's opposition, Republican Senator George Allen was conciliatory. He called upon fellow Senators to forget the racial politics of the past, and characterized Judge Gregory's record as moderate. [211] Ironically, under Clinton, minority groups and the White House had to stage an extraordinary effort just to keep his nomination alive.

Jorge Rangel's nomination to the Fifth Circuit involved another (ab)use of blue slips that was interpreted as covering for racial bias. Rangel would have been only the second Latina/o to serve in this circuit, which contains the second highest Latina/o population. Judge Jorge Rangel's nomination was blue-slipped by both Texas Republican Senators Phil Gramm and Kay Bailey Hutchison, without any public explanation.[212] Rangel was well qualified, had broad support among the Corpus Christi, Texas legal establishment, held a degree from Harvard Law School, and was awarded the highest rating by the ABA. However, the Texas Senators' blue slips effectively meant that Rangel would not receive a hearing. Latina/o leaders put pressure on the White House, but the true object of their ire should have been the Texas Senators.[213] After four years, Rangel withdrew his nomination.[214] President Bill Clinton then nominated state court Judge Enrique Moreno, who also had a well-established reputation in El Paso, Texas, and like Rangel, was highly credentialed with

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208. Wilson, *supra* note 34, at 42.

209. *See* Tapper, *supra* note 200.

210. Notably, Democrat Senator Patrick Leahy gave credit to Senators Warner and Allen for getting Judge Roger Gregory confirmed. Statement of Senator Patrick Leahy, Hearing Before The Judiciary Committee on the Nomination of Judge Terrence Boyle, March 3, 2005, *available at* http://leahy.senate.gov/press/200503/030305a.html.

211. *NewsHour with Jim Lehrer* (PBS Television Broadcast May 8, 2001) (Kwame Holman reporting on the state of diversity on the federal bench), *available at* http://www.pbs.org/newshour/bb/race_relations/jan-june01/justice_05-08.html. The report included the following statement by Senator George Allen: "what I'm trying to do is to get my colleagues, including, in fact, the President and the Bush Administration to look beyond the aggravation of these last-minute appointments and last-minute executive orders and look at Roger Gregory, examine him as the man, as a human being. And I think that they'll come away as impressed and as comfortable with Roger Gregory as I am." *Id.*

212. Carlos Guerra, *Failed Federal Judicial Nominations Offer a Lesson for All*, SAN ANTONIO EXPRESS-NEWS, Sept. 9, 2003, at 1B.

213. *See* Echaveste, *supra* note 104, at 42.

214. *See* Press Release, U.S. Senator Patrick Leahy, Diversity on the Federal Bench: Rhetoric v. Reality (Sept. 5, 2003), *available at* http://leahy.senate.gov/press/200309/090503b.html (containing a copy of Rangel's withdrawal letter).

a degree from Harvard Law School, and judged "highly qualified" by the ABA. [215] Moreno's nomination never got a hearing either, again because of blue slips from Senators Gramm and Hutchinson.[216] This time the Senators pointed to an informal screening committee of Republican lawyers they had convened, which had found Moreno too liberal on the death penalty, abortion, and affirmative action.[217]

The practice of blue slips allow Senators to not have to publicly account for why they oppose nominees. In the case of minorities, that opposition can be ideological, partisan or racially tinged. It is hard to tell what exactly motivates any one Senator's to oppose a minority candidate. At the conclusion of the Roger Gregory battle, all President Clinton could do was to declare Republicans' behavior "outrageous . . . [Republicans] only want people who are ideological purists," and accuse them of targeting racial minorities.[218]

2. Playing the "Race Card": Ronnie White and Richard Paez

At times, the unsavory mix of partisanship and racial politics bursts out in the open from the back corridors of the Senate chambers. This was the case with the confirmation uproar involving Ronnie White, an African-American judge from Missouri, who was nominated for a federal district judgeship by Bill Clinton toward the end of his term, in the midst of the Monica Lewinsky scandal.

Due to a deal cut by President Clinton and Senator Orrin Hatch, then chair of the Senate Judiciary Committee, White's nomination was reported out of committee for a straight up and down vote.[219] White was defeated 54-42, along party lines, the first time in twelve years that a nominee had been defeated on the Senate floor. [220] Then-Senator John Ashcroft, also from Missouri, accused Ronnie White of being "pro-criminal,"[221] having "a tremendous bent toward criminal activity,"[222] who would

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215. Enrique Moreno came to the attention of the White House not through the any Latino organization, but rather, because Moreno had at one time been the former roommate of someone in the Chief of Staff's office. *See* Echaveste, *supra* note 104, at 41

216. SCHWARTZ, *supra* note 120, at 181.

217. *Id.*; *see also* Al Kauffman, *Jurist 'advisory group' is partisan and unfair* SAN ANTONIO EXPRESS-NEWS (May 24, 2000), at 5B (quoting the following critique from Moreno's Texas supporters, "It is fundamentally unfair and improper for the Senate to allow a senator's reliance on this handpicked, closed-session, decision-making body to stand in the way of the Senate Judiciary Committee and Senate considering Mr. Moreno and his qualifications, as the Constitution requires.")

218. SCHWARTZ, *supra* note 120, at 181.

219. According to Professor Schwartz, getting Ronne White a vote on the Senate floor was part of a deal that President Clinton made with Sen. Orrin HatchHatch wanted Clinton to nominate, Brian Stewart to a federal judgeship in Utah, but had been opposed by environmentalists. Sen. Hatch stopped all actions on judicial nominations until Clinton agrees to nominate Stewart to a judgeship, and in return Hatch agreed to report out of committee the nominations of three minorities, Marsha Berzon, Ronnie White and Richard Paez. SCHWARTZ, *supra* note 120, at 170.

220. David Stout, *Senate Rejects Judge Chosen by President for U.S. Court*, N.Y. TIMES, Oct. 6, 1999, at A18.

221. Eric Boehlert, *John Ashcroft's Big Mistake*, SALON, Jan. 8, 2001, http://archive.salon.com/politics/feature/2001/01/08/ashcroft/index.html

substitute "personal politics" for the law and "improperly exercise his will."[223] Ashcroft pointed to White's record on the Missouri Supreme Court on death penalty cases, stating that his record in overturning convictions showed he was "pro-criminal" and soft on crime.[224] The Senator's portrayal of Judge White's record was loudly protested, with a *New York Times* editorial calling it "a baseless smear"[225] and the *St. Louis Post Dispatch* calling it "a shameless battle of character assassination."[226]

Perhaps because the charges leveled at Judge White hewed closely to stereotypes of African Americans as prone, and sympathetic, to criminality,[227] the controversy attracted charges of racism. Reverend B.T. Rice, president of the St. Louis Clergy Coalition, charged that "for this to happen under such frivolous excuses borders on racism and is certainly partisan politics."[228] Another African American St. Louis leader accused Senator Ashcroft of "demoniz[ing] [Ronnie White and] . . . falsifying his record."[229] President Clinton implied racial bias, "by voting down the first African-American judge to serve on the Missouri Supreme Court . . . the Republican-controlled Senate is adding credence to the perception that they treat minority and women judicial nominees unfairly and unequally."[230] Some Republicans claimed that they had not known Ronnie White was African American, and one Republican staff member lamented that "[I]t's just better to kill [minority nominees] in committee."[231]

Richard Paez, Bill Clinton's Latina/o nominee to the Ninth Circuit, was opposed because he was "too liberal."[232] New Hampshire Republican Bob Smithargued that he

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222. Anthony Lewis, *Abroad at Home; What Ashcroft Did*, N.Y. TIMES, Jan. 27, 2001, at 15.

223. SCHWARTZ, *supra* note 120, at 170-71; Boehlert, *supra* note 221.

224. Boehlert, *supra* note 221. In particular Ashcroft focused on two cases, both titled State vs. Johnson, in which Judge White penned a dissent noting that the circumstances of the convictions raised "reasonable likelihood" that there was inadequate legal counsel.

225. Lewis, *supra* note 222.

226. SCHWARTZ , *supra* note 120, at 170.

227. See Sadler & Keesee, *supra* note 52 (ambiguous behaviors undertaken by African Americans were viewed as more aggressive by police officers, and caused them to use deadly force, than the same behaviors undertaken by whites); Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375 (1997) (finding a strong relationship between whites' perceptions of African Americans and judgments of crime); Mark Peffley, Jon Hurwitz & Paul M. Sniderman, *Racial Stereotypes and Whites' Political Views of Blacks in the Context of Welfare and Crime*, 41 AM. J. POL. SCI. 30 (1997) (finding that whites with negative perceptions of African Americans are more likely to judge them as more prone to criminal activity).

228. Ben White, *Deepening Rift Over Judge Vote*, WASH. POST, Oct. 7, 1999, at A03.

229. Boehlert, *supra* note 221 (quoting Yvonne Scruggs-Leftwich, Executive Director of the St. Louis umbrella civil rights group, the Black Leadership Forum).

230. Stout, *supra* note 220; White, *supra* note 228.

231. Herman Schwartz, *Senate Rules Meltdown*, CBS NEWS, Mar. 27, 2005, http://www.cbsnews.com/stories/2005/03/25/opinion/main683182.shtml.

232. *Senate Confirms Liberal Judge after Long Wait*, 56 HUM. EVENTS 23 (2000) (quoting Sen. Jeff Sessions as justifying a "no" vote because Paez's judicial philosophy was simply too liberal to support, saying "He has stated... a philosophy of judging that is the absolute epitome of judicial activism"); *At Long Last, Confirmation*, Editorial, CHI. TRIB. (Mar 31, 2000) at 26 ("Democrats accused Republicans of blocking Paez because he is Hispanic. Conservative senators insisted they opposed Paez because he is too liberal and because he approved a lenient plea bargain for [a] Democratic fund-raiser . . . .").

was an "activist judg[e] . . . out of the mainstream of American thought."[233] Yet evidence presented to support the charge was scant or nonexistent.

Paez had the dubious honor of being the Clinton nominee who had to wait the longest to get a Senate vote.[234] His nomination was stalled principally by Senators Smith of New Hampshire and Sessions of Alabama.[235] In late 1999, Smith blocked a vote on Paez by putting an anonymous hold on the nomination.[236] When Majority Leader Trent Lott would no longer honor the hold, Senator Smith recruited thirteen other Republicans to mount a filibuster, but failed. [237] Finally, as part of a deal that Clinton negotiated with Orrin Hatch, the nomination went to the floor of the Senate along with Ronnie White's nomination.[238]

Richard Paez held the highest possible rating from the American Bar Association, and enjoyed unanimous support form Latino groups.[239] He allegedly made comments to law students on Proposition 187, calling it divisive.[240] He also spoke unfavorably of Proposition 209, which made unconstitutional any racial preferences in the state of California.[241] He later apologized for his remarks, [242] but the harm had been done. Senator Sessions said that Paez's criticism of Proposition 209 was "stunning."[243]

When Paez finally got his up-and-down vote on the floor, he was confirmed 59-39.[244] Because the Senate was then controlled by Republicans, Paez had to get Republican votes. Paez's mother called Senator Harry Reid, a fellow Mormon and the Senate Minority Leader at the time, and asked him to reach out to other members of the church to help her son.[245] Harry Reid agreed to play the "Mormon card," the "Hispanic

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233. Byron York, *The Record: What Sort of Filibustering has taken Place in the Senate, Where Judicial Nominations Are Concerned?* NAT. REV., June 6, 2005 at 20.

234. President Bill Clinton, Statement on Senate action on judicial nominations, Wkly. Compilation of Presidential Documents, Mar. 13, 2000, *available at* 2000 WLNR 4167449.

235. Sessions's own nomination to the court was stonewalled by Democrats eleven years earlier. *See* Neil A. Lewis, *After Long Delays, Senate Confirms 2 Judicial Nominees*, N.Y. TIMES, Mar. 10, 2000, at A16.

236. Schwartz, *supra* note 231.

237. According to Professor Schwartz:

> When [Senator Smiths's] tactics on the Paez and Marsha Berzon nominations (Berzon was filibustered along with Paez, more than two years after her nomination) were challenged, Smith responded with an impassioned floor speech in defense of the judicial filibuster: "Don't pontificate on the floor of the Senate and tell me that somehow I am violating the Constitution of the United States of America by blocking a judge or filibustering a judge that I don't think deserves to be on the circuit court . . . . That is my responsibility. That is my advice and consent role, and I intend to exercise it."

Id.

238. *See* Tapper, *supra* note 200.

239. *See* Clinton statement, *supra* note 234 (noting that Paez had received ABA highest recommendation); Echaveste, *supra* note 104, at 42 (noting support of Latina/o groups).

240. SCHWARTZ, *supra* note 120, at 174.

241. *Id*.

242. *Id*.

243. *Id*.

244. *Senate Finally Confirms Two Judges Nominated by President: GOP Had Contended They were Too Liberal*, ST. LOUIS POST-DISPATCH, Mar. 10, 2000, at A7.

245. Lewis, *supra* note 222, at A16.

card," the "fairness card" and any other card he could think of to get Paez the needed Republican votes. [246] At the end, Paez prevailed.

Paez survived because of extraordinary effort and focus from the White House and Latina/o interest groups.[247] Other minority nominees failed because the White House could not sustain the attention required to combat opponents in the Senate.[248] Paez's record was not out of the ordinary for a Democratic nominee, and certainly not extreme. It appears that Paez's "off the cuff" comments to law students became the sole basis for charges that he was extreme.[249]

Judges White and Paez became racialized; that is, they had somehow triggered negative racial stereotypes, "too soft on crime," "too pro illegal immigrants," or "racial quota" king.[250] The accusation that Paez was "too liberal" was vague, but this charge drew more currency when buttressed by the negative cultural stereotypes. Mud sticks on racial minorities if the mudslinging tracks stereotypes.[251]

3. Hardball Strategies: Miguel Estrada and Janice Rogers Brown

President George W. Bush has mostly played political hardball with Democrats in the Senate.[252] This reflects both strategic politics and personal style. During most of his two terms, Democrats were the minority party in the Senate. Only since 2007 has the Senate been controlled by Democrats. For six years, Democrats could oppose nominees only by threatening a filibuster. Accordingly, the White House concluded

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246. *Id*. The Democrats needed six Republican votes to add to their 45 votes to confirm Paez. Reid persuaded three Mormon Senators -- Orrin Hatch and Robert Bennett of Utah, and Gordon Smith of Oregon -- to vote for Paez. *Id.*

247. The Paez confirmation battle took tremendous attention and energy on the part of the White House and Latina/o organizations, and most likely diverted attention from other deserving minority nominees who never got an opportunity to be confirmed. Here is one insider's description of the political costs:

> To get Paez a vote on the Senate floor forced everyone to expend tremendous amounts of energy. The pressure that Hispanic organizations put on the White House was intense. Perhaps there was need for some of the calls because President Clinton stepped gingerly around drawing a line in the sand for his judicial nominees for fear that such a move would completely shut down the judicial confirmation process.

Echaveste, *supra* note 104, at 41.

248. Sam Paz's nomination for the District Court of California was withdrawn by Clinton when he encountered Republican opposition. President Clinton's nomination of Anabelle Rodriguez to a district court seat was defeated without a vote, after having been pending for 1,000 days. The nomination Hilda Tagle was pending before the Senate for 943 days, before her positive confirmation vote. SCHWARTZ , *supra* note 120, at 142.

249. *See supra* notes 240-43 and accompanying text.

250. *Cf.* Keith Aoki, Steven Bender, & Sylvia R. Lazos Vargas, *Race and the California Recall: A Top Ten List of Ironies*, 16 BERKELEY LA RAZA L.J. 11 (2005) (discussing the candidacy of Bustamante and how he was racialized due to his comments in support of rights for illegal immigrants).

251. *See* Lazos Vargas, *supra* note 137, at Part III.C.

252. *See generally* Goldman *et al*., *supra* note 68, at 284 (quoting Viet Dinh).

that they did not need to negotiate with Democrats and could use Republican votes to push their nominees.[253]

The Bush White House has been media savvy in making its case that Democratic opposition to well-qualified nominees was "obstructionist" and political.[254] It has used the nontraditional status of its nominees for their symbolic and psychological value.[255] For example, George W. Bush's renomination in May 2001 of Judge Roger Gregory[256] and Judge Barrington Parker Jr., two African-American Clinton nominees, signaled an "olive branch" to Democrat Senators.[257] At the same time President Bush made the case that his administration backed diversity values. The slate of eleven was diverse, more than half were nontraditional nominees, and included controversial nontraditional nominees with a clear conservative ideological record.[258] Bush's own slate of nontraditional nominees, such as Janice Rogers Brown, Edith Brown Clement, Deborah Cook,[259] Miguel Estrada, and Priscilla Owen,[260] clearly held conservative views on "hot button" issues such as the right to access to an abortion, affirmative action, and the death penalty.[261] This group of diverse nominees allowed President Bush to plead for a return to civility and at the same time demand swift approval of his worthy nominees, without compromising his ideological views.[262]

Senate Democrats were determined to thwart the ideological push to the right represented by President Bush's judicial nominees. According to news reports, Democratic leadership was urged to oppose all conservative Bush nominees, "even nominees with strong credentials and no embarrassing flaws, simply because the White House was trying to push the courts in a conservative direction."[263] Democratic

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253. As Sheldon Goldman and his coauthors note, whether the White House played hardball or was simply reacting to Democrats being obstructionists may well be a matter of where you sit in this controversy. *See id.* at 288.

254. *See id.*

255. *See supra* Part II.B.

256. *See supra* Part II.B.2.

257. Goldman *et al*., *supra* note 68, at 296-97.

258. *See* York, *supra* note 233.

259. Opponents of Deborah Cook pointed to an opinion she authored as Supreme Court justice of Ohio in which she ruled that a woman could be subject to child abuse laws for harm done to her fetus. *See* PEOPLE FOR THE AMERICAN WAY, OPPOSITION TO DEBORAH COOK'S NOMINATION TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT *available at* http://www.pfaw.org/pfaw/general/default.aspx?oid=7893. Judge Cook was eventually confirmed to the Sixth Circuit. U.S. Senate Roll Call Votes 108th Congress - 1st Session, *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00139.

260. Democrats and liberal interest groups depicted Owen's record in Texas as extreme. In particular, they focused on a parental notification decision in which Judge Owen's dissent denied a minor access to abortion. *See* In re Doe, 19 S.W.3d 346 (Tex. 2000); *see generally* PEOPLE FOR THE AMERICAN WAY, WHY THE SENATE JUDICIARY COMMITTEE WAS RIGHT TO REJECT THE CONFIRMATION OF PRISCILLA OWEN TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (2003), *available at* http://www.pfaw.org/pfaw/dfiles/file_151.pdf.

261. Lewis, *supra* note 117 ("There could have been no clearer signal that Mr. Bush intended to follow the pattern set by his father and President Ronald Reagan of shifting the courts rightward and reaping the political benefit of pleasing social conservatives.").

262. *See* York, *supra* note 233.

263. Neil Lewis reports that Professors Larry Tribe and Cass Sunstein briefed the

Senators on the Judiciary Committee worked closely to determine which nominees might be the most vulnerable and present the most objections.[264] The effort initially focused on nominees with paper records that already had come to the attention of core Democratic constituencies.[265] Racial minority groups, civil rights groups, pro-choice groups, and feminist groups pressured Senators to pay close attention to Bush judicial nominees who were considered extremely ideological.[266]

The showdown over how to stop the torrent of nominees with ideological views at odds with core Democratic constituencies focused on three nontraditional nominees: Miguel Estrada, who was nominated to be the first Latina/o to sit on the D.C. Circuit; Justice Janice Rogers Brown of the California Supreme Court, who was nominated to be the first African-American woman to sit on the D.C. Circuit; and Priscilla Owen of Texas, one of a handful of women to ever sit on the Texas Supreme Court.[267] Democrats' battles with George W. Bush had to be waged in public because as the minority party in the Senate their only weapon was the threat of filibuster. Democrats would also savage candidates in the media.

The first one up was Miguel Estrada, who would eventually withdraw his nomination. His credentials were sterling, a magna cum laude graduate of Columbia and Harvard law, editor of the *Harvard Law Review*, clerk to Justice Anthony Kennedy, all followed by a five-year stint in the Solicitor General's Office. [268]Still, Miguel Estrada was something of a stealth candidate. Unlike most nominees to circuit courts who are successful, Estrada had no judicial experience,[269] and therefore there was no judicial record for Senators to examine. Professors Epstein and Knight have documented that prior judicial experience is a significant factor in the eventual approval of a nominee in a partisan Senate.[270] In Estrada's case, without a record,

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Democratic leadership a weekend retreat in April 2001, see Lewis, *supra* note 117. There was also an element of "tit for tat" after the acrimonious experience of the Clinton years. *See* Maltese, *supra* note 157, at 20-22 (describing the extreme partisanship of both Republicans and Democrats).

264. Memoranda addressed to Senators Kennedy, Durbin dated Oct. 15, 2001; Nov. 6, 2001; Nov. 7 2001; Feb. 28, 2002; Apr. 17, 2002;, Jun. 5, 2002;, Jun. 12, 2002 (on file with the author) [collectively *Leaked Memoranda*]. These are leaked memoranda and their authenticity may be questioned. Nonetheless, the public actions of the Senators closely track the political tactics described in the memoranda.

265. *Id*. The leaked memorandum dated Nov. 6, 2001, addressed to Sen. Durbin mentions a meeting with People for the American Way, NARAL, Alliance for Justice, NAACP Legal Defense and Education Fund, American Association of University Women, National Women's Law Center, and National Partnership.

266. *Id*. The memorandum briefs Sen. Durbin that th groups wanted to meet on "controversial and/or vulnerable judicial nominees" and develop a strategy as to how to block or delay hearings on these nominees.

267. Because this article focuses on racial and ethnic minorities, I will not discuss the Owen nomination further.

268. Jan Crawford Greenburg, *Embattled Judicial Nominee Withdraws*, CHI. TRIB., Sept 5, 2003, at 1.

269. *Id.*

270. *See* Epstein *et al*., *supra* note 66, at 956-59 (documenting that the majority of judicial nominees who are successfully confirmed have judicial experience; the converse is also true, that a candidate who lacks judicial experience will be more likely defeated); *see also* EPSTEIN & SEGAL, *supra* note 11, at 103-16 (documenting the importance of merit, which would include judicial experience, in assisting candidates to be confirmed in the partisan Senate process).

Democrats sought to obtain Estrada's memoranda when he had worked in the Solicitor General's Office that would show his thinking on key public law and constitutional issues.[271] Both the nominee and the Bush White House refused to release legal memoranda.[272] This refusal eventually would be cited by Democrats as justification for their filibuster of the Estrada nomination.[273] Estrada did not help himself when during confirmation hearings he appeared to be less than forth right. When asked his position on *Roe v. Wade*, Estrada testified that he had not had an opportunity to think about whether this important case was correctly decided.[274]

Not all Latina/o groups opposed the nomination, but key players did, and that was enough to make things ugly.[275] The White House trumpeted Miguel Estrada's ethnic background, and tried to portray him as a "rags to riches" story. Estrada was an immigrant who arrived in the United States at the age of sixteen, speaking mostly Spanish, and had eventually gone to the Nation's elite institutions and worked in important justice institutions like the U.S. Supreme Court and the US Solicitor's office.[276] The Puerto Rico Legal Defense Fund (PRLDF) countered this narrative, pointing out that Estrada came from a privileged background and was unlikely to understand the plight of less well-off minorities, because Estrada had lived most of his life outside of the United States as the scion of a wealthy Latin American family.[277] The Mexican American Legal Defense and Education Fund (MALDEF) charged that Estrada would be unsympathetic with the important civil rights of Mexican Americans, and concluded that "[Estrada] would not fairly review matters as a judge on issues that

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271. Crawford Greenburg, *supra* note 268.

272. *Id.*

273. Julie Hirschfeld Davis, *Estrada Withdraws as Nominee for Bench Democrats are Successful in Blocking Bush's Pick for Federal Appeals Court*, BALT. SUN, Sept. 5, 2003 (reporting Senate Minority Leader Tom Daschle as explaining that the "stumbling block to Miguel Estrada's nomination all along was the administration's refusal to allow him to complete his job application and provide the Senate with the basic information it needed to evaluate and vote").

274. Professor Johnson cites this as a key reason why the filibuster of Miguel Estrada was justified. *See* Kevin R. Johnson, *A Defense of the Estrada Filibuster: A Judicial Nominee That the Senate Cannot Judge*, FINDLAW, Feb. 27, 2003 *available at* http://writ.news.findlaw.com/commentary/20030227_johnson.html.

275. *See* Tony Mauro, *Nomination Splits Hispanic Legal Community,* AM. LAWYER, Sept. 2002, *available at* http://www.law.com/jsp/article.jsp?id=1032128587190. The Latina/o groups that supported Estrada, like the Hispanic National Bar Association, were divided from within. *Id*. *See also* Jennifer G. Hickey *Democrats, Hispanics at Odds Over Estrada*, INSIGHT INTO NEWS (Jun. 13, 2003) *available at* http://www.insightmag.com/news/2003/06/24/Politics/Democrats.Hispanics.At.Odds.Over.Estrada-439336.shtml.

276. *See* Crawford Greenburg, note 268.

277. PRLDF issued a sharply worded report disputing the administration's depiction of Estrada's rags-to-riches immigrant story. Estrada, according to PRLDF, came from privileged Honduran family background and "lack[ed] any connection whatsoever" to the lives of most Latina/o defendants who might come before his court. Memorandum of Puerto Rican Legal Defense and Education Fund (PRLDEF) in Opposition To The Nomination Of Miguel Estrada To The DC Circuit Court Of Appeals, *available at* http://www.prldef.org/lib/Estrada_Statement_2-5-03.pdf.

would have a great impact on our community."[278] PRLDEF argued that Estrada had "made strong statements that have been interpreted as hostile to criminal defendants' rights, affirmative action and women's rights," and questioned his judicial temperament.[279] Democratic opposition held; Estrada's nomination was filibustered seven times.[280] Under such pressure Estrada withdrew his nomination.[281] The White House charged that this had been an "unfortunate chapter in the Senate's history" as well as a national "tragedy."[282] Because Estrada's nomination became one of a handful of nominations effectively blocked by the filibuster, public commentary accused Democrats of "Borking" Miguel Estrada.[283]

In such a heated atmosphere, it may not have been surprising that Democrats and Republicans accused each other of playing racial politics. House Majority Leader, Tom DeLay of Texas, called Democrats' derailment of the Estrada nomination a "political hate crime."[284] Senate Republican Majority Leader Bill Frist charged the Democrats with resenting President Bush's commitment to diversity and his desire to promote Latina/o candidates.[285] Frist stated that Democrats' "real motivation" was "the fact that the President has made it clear that his long-term objective would be to elevate a Latino to the Supreme Court,"[286] and Democrats wanted to deny Bush that opportunity by blocking Estrada at the Circuit Court level.[287] Leaked memoranda addressed to

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278. Memorandum of Mexican American Legal Defense and Educational Fund (MALDEF) and Southwest Voter Registration and Education Project (SVREP) Explaining Bases For Latino Opposition to the Nomination of Miguel Estrada totThe DC Circuit Court of Appeals (2003), *available at* http://www.maldef.org/news/latest/est_memo.cfm.

279. *See* Memorandum from the Puerto Rican Legal Defense and Education Fund (PRLDEF) in Opposition tothe Nomination of Miguel Estrada to the D.C. Circuit Court of Appeals, *available at* http://www.prldef.org/lib/Estrada_Statement_2-5-03.pdf. In addition, PRLDEF described Estrada in personal interviews as "arrogant and elitist" and "doesn't listen to other people." PRLDEF noted that "a number of his colleagues have said unequivocally that Mr. Estrada has expressed extreme views that they believe to be outside the mainstream of legal and political thought."

280. Nick Anderson, *Bush Nominee Ends Confirmation Battle*, L.A. TIMES, Sept. 5, 2003, at 1 ("from March to July, Estrada never got more than 55 votes of support, all 51 Republicans backed him, joined by Democrats John B. Breaux, Zell Miller, Ben Nelson and Bill Nelson").

281. Crawford Greenburg, *supra* note 268 at 1 (quoting Estrada's letter stated that he was indebted to President Bush for "offering me the opportunity to serve my adopted country" but concluding the "time has come" to return his full attention to practicing law and making long-term plans for his family.)

282. Neil A. Lewis, *Stymied by Democrats in Senate, Bush Court Pick Finally Gives Up*, N.Y. TIMES, Sept. 5, 2003, at A1.

283. Paul Greenberg, *The Mob Forms Here: The Borking of Miguel Estrada*, L.A. TIMES, Sept. 10, 2003, at A13.

284. Lewis *supra* note 282 . (reporting that Senators were reluctant to say so explicitly, but strongly suggesting that Estrada was opposed by Democrats because of his Hispanic heritage).

285. *Id.* (Frist is quoted as saying that Bush "stood by the side of Hispanics" and hoped to name the first Hispanic Supreme Court justice).

286. Davis, *supra* note 273.

287. The leaked memoranda lend credence to this accusation. In a Januarary 30, 2003 memorandum, caption "members meeting with Leader Daschel," listed four reasons why the the Democratic Caucus should filibuster the nomination of Miguel Estrada:

Democratic Senators on the Judiciary Committee lends credence to this charge that Democrats did not want to be put in a position similar to the one surrounding the Clarence Thomas nomination.[288]

Democrats took the charges of being "anti-Hispanic" seriously, and countered that they were non-factual and "below the belt."[289] Senator Patrick Leahy, the ranking Democrat on the Judiciary committee, issued a press release rebutting one-by-one charges that Democrats were anti-Hispanic, and concluding that "the record clearly shows that Democrats for years have been leading the fight to diversify the federal bench–with nominees from different backgrounds, and from across the political spectrum."[290]

Judge Janice Rogers Brown's confirmation battle was just as hard fought. Brown was no stealth candidate. Instead, her political ideology was much more to the right than that of Democratic Senators. Brown too encountered opposition from Black groups.[291] The NAACP opened the attack by labeling her a "loose cannon,"[292] who was anti-affirmative action and ruled consistently against minority plaintiffs in employment discrimination cases.[293] An admirer of Friedrich Hayek, Brown had expressed hostility to post- New Deal Commerce Clause decisions.[294] In addition,

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> Not to do so would set a precedent, permitting the Republicans to force through all future controversial nominees without answering Senators' questions or proven important information; 2) *Estrada is likely to be a Supreme Court nominee, and it will be much harder to defeat him in a Supreme Court setting if he is confirmed easily now*, 3) the process must be slowed down and the Republicans' attempt to set up an automatic "assembly line" of controversial nominees thwarted, and 4) Democratic base is particularly energized over this issue.

Leaked Memoranda, supra note 264 (emphasis added).

288. *Id.*; *see also* Greenberg, *supra* note 283.

289. Lewis *supra* note 280 (reporting that Sen. Charles Schumer said: "The implication that anyone has blocked this because of Mr. Estrada's background is cheap and low. Republicans can't . . . win on the merits so they resort to below-the-belt tactics.").

290. Press Release, U.S. Senator Patrick Leahy, Diversity on the Federal Bench: Rhetoric v. Reality (Sept. 5, 2003), *available at* http://leahy.senate.gov/press/200309/090503b.html.

291. Mike McKee, *The Battle over Janice Rogers Brown*, THE RECORDER (Oct. 15, 2003) (reporting that "no major black law group backs her" since the National Bar Association and the California Association of Black Lawyers joined the National Association for the Advancement of Colored People in opposition).

292. PEOPLE FOR THE AMERICAN WAY AND THE NAACP, LOOSE CANNON: REPORT IN OPPOSITION TO THE CONFIRMATION OF JANICE ROGERS BROWN TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT (2003), *available at* http://www.pfaw.org/pfaw/general/default.aspx?oid=12531.

293. *See, e.g.*, Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068 (2000) (Brown authored an opinion effectively ending meaningful affirmative action in California and suggesting that affirmative action resembled racist and segregationist laws that predated landmark civil rights laws).

294. *See* Janice Rogers Brown, *"A Whiter Shade of Pale": Sense and Nonsense — The Pursuit of Perfection in Law and Politics, Speech before The Federalist Society of the University of Chicago Law School* (Apr. 20, 2000), *available at* http://www.constitution.org/col/jrb/00420_jrb_fedsoc.htm. Brown described the Supreme Court's decisions upholding New Deal legislation such as minimum wage laws under the Commerce Clause as "the triumph of our own socialist revolution." *Id.* She compares "big government" to "slavery" and an "opiate." *Id.*

opponents argued that her judicial record was hostile to abortion-related privacy rights.[295] Democrats labeled her as "conservative ideologu[e] whose views and writings make [her] unfit to serve in such sensitive, lifetime positions."[296]

Successful threat of a filibuster against Brown and Priscilla Owen led Senate Majority Leader Bill Frist in May 2005 to threaten to use the "nuclear option," [297] which entailed changing Senate procedural rules to eliminate the filibuster. He argued that Democrats were abusing the filibuster in order to block President George W. Bush's well-qualified nominees.[298] Working under an artificial timetable, fourteen Democrat and Republican Senators worked out a compromise.[299] This "Gang of 14" agreed that three nominations–Janice Rogers Brown, Priscilla Owen, and William Pryor, Jr. of Alabama–which had been blocked for almost four years, should receive up- and-down votes on the Senate floor.[300] These fourteen senators further agreed that the filibuster on judicial nominees would henceforth be used only in "extraordinary circumstances,"[301] and agreed to take off the table the "nuclear option" threat to the cherished filibuster.[302] Only because of this extraordinary compromise was Janice Rogers Brown confirmed[303] in a close vote that ran along mostly party lines.[304]

Professor Steven Calabresi has charged that Democrats opposed Brown because of her race.[305] A black, brilliant and boldly conservative Republican who would serve as

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295. *See, e.g.*, Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003) (Brown, J., dissenting) (dissenting from a ruling striking down a parental consent law, she wrote that minors seeking abortions would "dismiss societal values").

296. Charles Babington & Dan Balz, *Senate GOP Sets Up Filibuster Showdown: Two Bush Nominees, Both Women, Sent to Floor for Test Between Republicans and Democrats*, WASH. POST, Apr. 22, 2005, at A01. These charges of extremism were also leveled at Priscilla Owen. *Id*.

297. *Id.* On the arguments as to the power of the majority to do away with the filibuster by simple majority vote, see generally Martin Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J. L. & PUB. POL'Y. 205 (2004). *But see* People for the American Way, Filibuster Action Center, http://www.pfaw.org/pfaw/general/default.aspx?oid=18350&print=yes&units=all (presenting counterarguments concerning the "nuclear option").

298. *See* William Branigin & Dan Balz, *Fourteen Senators Reach Deal on Filibuster: McCain Announces Compromise to Avoid Showdown Over Judicial Nominees*, WASH. POST, May 23, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/05/23/AR2005052301169.html. Bush stated that his nominees "will bring great credit to the bench" and that he has been "consistent with judicial philosophy in my picks. . . . And I expect them to get an up-or-down vote. That's what I expect. And I think the American people expect that, as well. People ought to have a fair hearing, and they ought to get an up-or-down vote on the floor." *Id.*

299. *Id*.

300. *Id*.

301. *Id*.

302. *Id.*; *see also* Babington & Balz, *supra* note 296.

303. *See* Charles Babington, *Senate Set to Vote on Delayed Nominee; But Battle May Reopen over other Judgeships*, WASH. POST, May 25, 2005, at A01.

304. Only two Democrats, Senators Mary Landrieu of Louisiana and Robert Byrd of West Virginia who were part of the "Gang of 14," joined Republicans in voting for Brown's confirmation. *Id.*

305. *See* Steven G. Calabresi, *Minority Rule? How the Democrats Decide Who to Filibuster*,

a circuit judge, Brown would be a conservative "voice of color" that could "expose [that liberal] groups [are] not really speaking for minorities or women." [306] Democrats feared the appointment of judges like Estrada and Brown because they would start articulating an alternative view of what might constitute a conservative version of minority rights. Democrats and left-wing interest groups then would have their "moral legitimacy" questioned.[307] Professor Calabresi raises the interesting point that a conservative "voice of color" can be very effective in the exchange of liberal versus conservative interpretations of civil rights. Agreed, but more needs to be said. In order to have a healthy dialogical exchange on the bench, it is important to not only have both white judges and minority judges, but also both liberal and conservative minority voices of color. It misrepresents racial perspective in America to have only a conservative or only a liberal "voice of color" on the bench. As the work by Dan Kahan and his fellow researchers shows, ideology and race interact evern at the very basic level of perception, how we see the "facts" in ambiguous fact patterns.[308] If only conservative or only liberal minorities serve on the bench, the "voice of color" will be skewed and there will be no balance in judicial outcomes.

Professor Calabresi's explanation is not complete because partisanship, the candidates' ideology, and "merit" qualifications (or lack thereof) also play a role as to why these nominations were so controversial. Based on their empirical research, Professors Epstein and Segal have posited that judges whose ideology is far apart from that of the opposing party will encounter confirmation opposition, [309] and the partisan opposition becomes more obstinate when candidates' merit qualifications are viewed as weak.[310] Epstein andSegal's explanation seems to work here. In the case of Janice Rogers Brown, her judicial interpretive ideology was very conservative and far apart from those of Democratic Senators. [311] Questions about Brown's professional qualifications could also have played a role as the ABA rated her only "qualified" versus "highly qualified" that most nominees receive. [312] Consistent with Epstein and Segal's explanation, Estrada could also be said to have been defeated because of his weak merit qualifications. Estrada's had no prior judicial experience, breaking this strong "merit" norm. [313] In spite of being a stealth candidate, his evasive questions on the continued viability of *Roe v Wade* raised further doubts for Democrats about whether his interpretive ideology on privacy rights might be extreme compared to Democrats'. In addition, Latina/o civil rights groups raised doubts as to whether Estrada's ideological views would pose a threat to civil rights.

WKLY. STANDARD, May 9, 2005, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/005/560nvtge.asp.

306. *Id*.

307. *Id*.

308. Kahan *et al*., *supra* note 48, at 46-47.

309. *See* Epstein et al., *supra* note 66, at 956-59 (documenting that the majority of judicial nominees who are successfully confirmed have judicial experience; the converse is also true, that a candidate who lacks judicial experience will be more likely defeated); see also EPSTEIN & SEGAL, *supra* note 11, at 103-16 (documenting the importance of merit, which would include judicial experience, in assisting candidates to be confirmed in partisan Senate process).

310. EPSTEIN & SEGAL, *supra* note 11, at 103-16.

311. *Id*.

312. *Id*. at 113.

313. *See* Epstein *et al*., *supra* note 66, at 956-59 (explaining the norm of prior judicial experience).

Adding a critical race theoretical perspective to Epstein andSegal's thesis can provide it with even greater explanatory power. In addition to partisanship and merit, racial politics play a significant role in the success or failure of nominations. Even though neither Estrada nor Brown trumpeted race as a reason as to why they should qualify for ascent to the circuit court, [314] partisans deployed racial meanings to their identities as part of their strategy to either defeat or confirm the nominees. The fight over racial meaning goes on -- in spite of the nominees' desires. Race is a social marker that is ascribed, or mapped, onto a racial minority. [315] Even if the candidate does not want her race to be part of the argument as to why he or she should qualify to be on the bench, race becomes salient because of others' beliefs as to what the candidate's race means in the political and partisan-charged context of a judicial nomination. In a partisan process, minority candidates become pawns for each party's political claims as to what each represents with respect to diversity and racial equity.

For the Republicans, the political meaning of the racial identity of these candidates was that it made a symbolic statement about George W. Bush's brand of Republicanism. His own presidential electoral strategy and his view of how the Republican Party could "grow" has hinged on attracting Latina/os, a potential future powerful electorate to the Republican Party.[316] In the Estrada and Brown nominations, the Bush White House counted on the symbolic power of barrier-breaking "firsts" [317] to appeal to this electoral group and make a statement about the inclusiveness of the Republican Party. The civil rights symbolism behind such historical appointments could also be anticipated to cause the Democrats problems in how to fight these nominations without appearing "anti-Hispanic."[318] Polls among Latina/os showed that, although they were only vaguely aware of the Estrada confirmation fight, when asked whether they thought he should be confirmed, four out of five said "*si*," a figure that represents overwhelming support.[319]

The nominees' biographies also boosted their all-important "merit" portfolio. The White House confirmation strategy emphasized their "Horatio Alger" biographies. [320] Their narrative became an argument as to why Democrats should vote for these nominees–their lives symbolized what every minority strives to achieve, the American Dream. Their stories alone were compelling.[321]

Democrats, too, were playing electoral politics around race. Democrats were persuaded by MALDEF, PRLDF and NAACP, liberal civil rights groups, to oppose

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314. In the case of Estrada, he had not previously identified himself with Latina/o issues. *See Estrada Stands Down Politics, Triumphs Over Civility*, MIAMI HERALD, Sept. 8, 2003, at 6B.

315. *See supra* pp.1451-42.

316. *See supra* Pt. II. B.3

317. *See supra* Pt I.B.1

318. *See supra* notes 284-90 and accompanying text.

319. Hickey, *supra* note 275 (" Of the 800 Hispanic adults polled by the Latino Opinions, 65 percent were unaware two years had lapsed since Estrada was nominated and overwhelming majorities believed it was "important" to the Latino community for Estrada to be confirmed.").

320. *See supra* notes 150 & 276 and accompanying text.

321. *See supra* note 150 and accompanying text. *See also* McKee, *supra* note 291 (reporting a Republican strategist as stating that "Brown's life story . . . will work to her advantage . . . . It's an amazing story that appeals to the electorate . . . her story alone will actually be a motivating factor.").

Estrada and Brown. These groups made a decision early that it was more important for a judicial candidate to be ideologically congruent with the policy interests of the civil rights communities they represented than for a powerful symbolic "first" to be achieved. Specifically, MALDEF and PRLDF gave up the possibility of a "first" Latina/o on the Supreme Court in order to forestall the possibility that the only two (Thomas and a Bush Latina/o appointee) "voices of color" on the Supreme Court would be conservative ones. The fear was that this would do much to destroy liberal arguments as to how the Constitution should resolve issues of racial conflict.

In the end, Democratic Senators' opposition to Estrada held because of several interacting factors. Democrats responded to the pressure of the civil rights groups, a core constituency. Democrats relied on their long history of supporting minority candidates to diffuse charges by Republicans that they were "anti-Hispanic" and anti-minority. And racial politics was part of that equation. These nominees' views as to civil rights presented a particularly noxious threat to established liberal core beliefs because the attack would be coming from conservative minority judges.

In sum, negotiating racial meaning in this charged atmosphere represents one more risk and burden that minority nominees must overcome. A nominee must deploy a strategy that plays out his or her racial identity in the confirmation process in a way that does not clue into stereotypes that would render him or her as "too liberal," as was the case of Richard Paez, or too conservative, as was the case of Janice Rogers Brown. Because risks are greater for minority candidates, then we can expect that less will get through the politicized process, and those that do get through will more likely hold judicial views, racial perspectives and ideologies that do not stray too far from the mainstream.

Minority candidates whose racial identity seems to transcend identity group politics and as one journalist put it, personify "an American ideal," [322] have managed to navigate the treacherous confirmation process. Sonia Sotomayor, who was nominated to the Second Circuit under President Clinton, is such an example.

Sotomayor's nomination was being considered at the same time that Clinton and Republicans were fighting over the nominations of Ronnie White, Richard Paez and Jorge Rangel. Yet her nomination, albeit delayed for sixteen months, got an up-and-down vote in the Senate, with an overwhelming 80-11 confirmation vote.[323] Republican Senator Alphonse D'Amato enthusiastically endorsed her and pushed for her floor vote.[324]

Nominee Sotomayor possessed degrees from Princeton (summa cum laude) and Yale (editor of the law journal), prosecutorial "law and order" experience in the Manhattan District Attorney's office, and commercial litigation experience as a partner of a New York law firm.[325] A self-proclaimed "Newyorkrican," her "rags-to-riches" immigrant story is poignant.[326] Her father, a tool-and-die maker, died when she was nine.[327] Her mother, a nurse, raised Sonia and her brother in the housing projects of the

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322. Larry Neumeister, *Judge Finds Humility in Journey from Housing Projects to Bench Success*, LA TIMES, Jan 3, 1999, at A1.

323. *After Delay, Senate Approves Judge for Court in New York*, N.Y. TIMES, Oct 3, 1998.

324. Neumeister, *supra* note 322.

325. *Id*.

326. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87 (2002).

327. Neumeister, *supra* note 322.

Bronx with firm discipline where education was paramount.[328] The family moved to avoid the drug culture.[329] Of her childhood, Sotomayor says, "To the extent that I lived in an environment wrought with poverty and the mixture of responses to it, I had perhaps a much more complex understanding of human nature."[330] She speaks about her empathy for children who grow up in poor, crime-ridden neighborhoods, "there for the grace of God go I."[331]About her Latina identity, Sotomayor believes that, "I became a Latina by the way I love and the way I live my life . . . . My family showed me by their example how wonderful and vibrant life is and how wonderful and magical it is to have a Latino soul."[332]

Sonia Sotomayor is an exceptional lawyer, wonderful role model, and capable judge. Her racial identity did not make whites feel uncomfortable about their own white racial identity. Everyone can identify with her story of success that validates the version of an American Dream that is non-raced.

V. VIEWPOINT DIVERSITY: "VOICE OF COLOR" CAN ONLY BE FAINTLY HEARD

As Part I.C argues, "voices of color" that are conservative and liberal should be present in the dialectical process that is involved when courts struggle with difficult, divisive racial issues. If only one "voice of color" is present, then the benefits of viewpoint diversity are unlikely to be achieved. Rather, a diverse set of viewpoints is required to attain the substantive benefits of diversity on the bench.[333]

There is evidence that a conservative "voice of color" dominates the bench. Judicial behavioralist analysts document which personal attributes shape judges' decisions.[334] Empirical studies have consistently shown that liberal judges–judges appointed by a Democrat president–are more likely to come to a "liberal" outcome; and that conservative judges–judges appointed by a Republican President–are more likely to arrive at a "conservative" outcome.[335] Recently Professor Cass Sunstein led a group of

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328. *Id.*

329. Sotomayor, *supra* note 326.

330. *Id.*

331. *Id.*

332. Sotomayor, *supra* note 326, at 88.

333. *See generally* Lazos Vargas, *supra* note 31.

334. A more familiar term used by behavioralists is "attitudinal model." The scholars most associated with this school of thought are Jeffrey A. Segal and Harold J. Spaeth. *See generally* HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). As defined here and by others, judicial behavioralism is the branch of political science that applies empirical methods to determine if there is a relationship between the personal attributes, such as race, gender, education, experience, and political affiliation, of judges and their rulings. *See* Howard Gillman, *What's Law Got To Do With It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 466-67 (2001).

335. In the words of professor Theresa Beiner: "This model accounts for judicial decision making based not on the neutral application of judicial precedent, but instead on 'each judge's political ideology and the identity of the parties.'" Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH J. GENDER & L., 113, 130 (1999) [hereinafter Beiner, *Diversity on the Bench*] (quoting Frank B. Cross, *Political Science and the New Legal Realism:*

analysts in a comprehensive review of the factors that determine outcomes in federal judicial decision making and "found striking evidence" of a significant correlation between liberal and conservative judges (as defined above) and voting patterns on important questions such as campaign finance reform, disability, discrimination, affirmation action, labor law and much more.[336] The only areas in which there was no evidence that judges followed their own ideological leanings were commerce clause challenges, property takings, punitive damages, criminal appeals, and standing to sue.[337] In contrast, the areas in which judge's ideology most clearly shaped judicial outcomes were the cultural "hot button" issues of abortion and capital punishment.[338]

With respect to the Clinton and Bush appointments that now dominate the active sitting federal judges, some studies report that racial and ethnic minorities do not vote very differently from their white counterparts on civil liberties cases, the very cases where racial "hot button" issues are most likely to arise. In a 2004 study, Professors Carp, Manning, and Stidham found that President George W. Bush's judges are among the most conservative on record, particularly in the area of civil liberties.[339] When comparing George W. Bush's nontraditional judges to their white male counterparts, the voting behavior on civil liberties issues is almost identical.[340]

In the case of President Clinton's judges,[341] two recent studies conclude that trial and circuit court judges are distinctly *more conservative* than judges appointed by Democrats Johnson and Carter.[342] Three studies conclude that Clinton's minorities and women judges are *more* conservative than their white male counterparts.[343] Professors Haire, Humphries and Songer found that white male judges in civil rights cases were one percentage point more likely to vote in favor of the defendant than their minority and female counterparts.[344] Professors Carp, Manning and Stidham found that white

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A Case of Unfortunate Interdisciplinary Ignorance, 92 NW. U. L. REV. 251, 265 (1997)). Professor Beiner explains: "They have tried to explain how factors such as political inclination (i.e. conservative or liberal), political party, appointing president, race, religion, gender, and region of the country affect judicial decision making." *Id.* at 128-29 (citations omitted); *see also* Gillman, *supra* note 336, at 466 (these studies "demonstrat[e] . . . that ideological and political considerations drive [judges'] decision making"). *See generally* Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for A Diverse Bench in the New Millennium,* 36 U.C. DAVIS L. REV. 597 (2003) [hereinafter Beiner, *Elusive Quest*] (summing up empirical studies on gender and racial difference).

336. CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 147 (2006).

337. *Id*. at 149.

338. *Id*.

339. *See* Robert A. Carp, Kenneth L. Manning & Ronald Stidham, *The Decision Making Behavior of George W. Bush's Judicial Appointees*, 88 JUDICATURE 20, 25 (2004). In the important area of civil liberties and rights, Bush's jurists are significantly more conservative than any other president's appointees. *Id*. at 27-28.

340. *Id*. at 28 (Table 2 shows that President George W. Bush's nontraditional judges voted for liberal outcomes in 38% of cases, as compared to George W. Bush's traditional judges who vote for liberal outcomes 35% of the time).

341. *See* Beiner, *Elusive Quest*, *supra* note 336, at 86-87.

342. *See* Carp et al., *supra* note 78, at 288; Susan B. Haire, Martha Anne Humphries & Donald R. Songer, *The Voting Behavior of Clinton's Courts of Appeals Appointees*, 84 JUDICATURE 274 (2001).

343. Carp et al., *supra* note 78, at 286.

344. Haire et al., *supra* note 342, at 279 tbl.4.

male judges were nine percentage points more likely to rule in favor of the plaintiff in civil rights cases than were Clinton's minority and women judges.[345] Professor Jennifer Segal's study concludes that her results:

> [C]learly indicate that despite his apparent intentions, President Clinton's black and female district court appointees are no more likely to serve the policy interest of their own communities than are his white and male appointees. . . . these judges, regardless of their race or gender, are not inclined to support a judicial role that is particularly sensitive to the claims of various out-groups in American society.[346]

In a recent study, Professor Manning focused just on the voting behavior of Latina/o judges in federal courts, and he concluded that Latina/o judges were less likely to cast liberal votes in judicial decisions of all types. [347] With respect to civil liberties cases, Latina/o judges were *slightly more conservative* than their white counterparts, and with respect to criminal cases Latina/o judges were *significantly more conservative* than their white counterparts.[348] Partisan ideology appears to be a more important predictor of case outcomes than ethnicity. For Latina/os as a group, these data indicate that there is no significant difference between this "voice of color" and their white counterparts.

Professors Pat Chew and Robert Kelley's recent study of the link between a federal judge's race and the outcome in Title VII racial harassment cases show a more clear relationship between a judge's race and case outcome.349 African American judges were found to rule in favor of the plaintiff in such cases 46% of the time, while chances of success fell drastically if the judge is white (only 21% success rate) or Latina/o (19% success rate).350 When ideology of judges is considered in addition to their race, results show that Republican white and Latina/o judges rule significantly below the baseline level of likely success. 351 At least with respect to racial harassment cases, drawing a white or Latina/o judge versus an African American judge, as well as judge appointed by a Democrat versus a Republican significantly impacts the chances of plaintiff's success.352

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345. Carp et al., *supra* note 78, at 286.

346. Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES, Q. 137, 147-48 (2000).

347. *See* Kenneth L. Manning, *¿Cómo Decide?: Decision-Making by Latino Judges in the Federal Courts* 8 (Apr. 2004) (unpublished manuscript, on file with author).

348. *Id.* at 7, 9-10.

349 Pat K. Chew & Robert F. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases* (July 2008) (unpublished manuscript, on file with author) (study of 400 federal racial harassment cases from 1981 to 2003).

350 *Id*. at 66-67.

351 *Id*. at 85-87. Latina/o and white judges rule for plaintiff below the 22% overall likely success rate.

352 *Id*. at 92-95. According to this study, if plaintiff draws an African American federal judge, plaintiff's likelihood of winning goes up 3.3 times. *Id*. at 106. Democratic judges are more likely to find for plaintiff (30% success rate) than their Republican peers (17% success rate). *Id.* at 111.

Although a "voice of color" is difficult to measure, these studies show a convergence between judges of color and their white counterparts, except for the small universe of racial harassment T. VII cases where it makes a significant difference to the plaintiff to draw an African American judge. . In the majority of cases heard in federal court, the "voice of color" is hard to hear. Yet the whole motivation for advocating diversity on the bench is the hope that minority judges inject different perspective. That appears by and large not to be happening. If there is a "voice of color" on the federal bench, it is more like a faint whisper.

What explains these results? An explanation consistent with the thesis of this article is that the confirmation process has become highly politicized, and this exacts a cost on diversity on the bench. In the current climate of partisanship, political ideology is a more important attribute in selecting nominees as compared to whether the nominee has a "voice of color" that is robust and could be influential in the dialogical exchange of the judicial decision making process. The safe nominee is a minority who shares views with his or her white counterparts. Minority nominees face greater risks in navigating the confirmation process. The process discourages candidates who stick out, not only in terms of their merit achievements, career paths and ideology, but also with respect to how minorities interpret and "perform" their racial identity. This homogenizing pressure produces judicial candidates who are remarkably similar, both in racial perspectives and political ideologies..

CONCLUSION

The trend in the diversification of the bench has yielded greater descriptive diversity, but less viewpoint or substantive diversity. So, who cares whether judges look "like America" if, because of politics, a "voice of color" has become a "whisper of color"?

One answer is that there is value to descriptive and symbolic diversity. As Part I describes, the primary benefits lie in the statement that barrier-breaking appointments make about the values shared by the majority and minority populations, and the role model communicative dimension of what is achievable for minority children and for our society as a whole. These are solid benefits, but we should not be content with these alone.

If the liberal "voice of color" is hardly noticeable on the bench, as Part V concludes, and if minorities who are most likely to be appointed and confirmed are those who have negotiated a public racial identity that is comforting to white majorities, as Part IV posits, then we are not achieving the substantive benefits of diversity. Having only one type of "voice of color" dominate any institution (particularly one as important as the bench), whether that voice is liberal or conservative, undermines the whole rationale for diversity. Democratic institutions must be inclusive of all of the voices of our society, particularly in areas where we know that racial (or gender, or sexual) viewpoints shape what we view as the relevant facts and influence the pragmatic evaluations that go into fashioning a rule of law. Our processes should not weed out "trouble maker" minority voices, just as they should not weed out judges who are "too conservative," too gifted, or too prone to write down their thoughts.

Law is about conflict and dialogue, and reaching tentative resolutions through the tools of legal analysis. If we can commit to such an integrative process, the rule of law that judges fashion will eventually yield rules and understandings that seem believable

to all members of our society. To get there, we must be willing to structure a selection and confirmation process that purposefully inserts a critical mass of dissenters into the bench, and not be content with a system that homogenizes voices, ideologies, and experiences.

Table 1. Racial and Ethnic Composition of Active Federal Judges[353] as of January 1, 2008

	Total		**Representation in U.S. Population[354]**
	#	**%**	**%**
White (non Hispanic)	654	81.6	66.4
African American	90	11.2	13.4
Latina/o (58 minus the 7 Puerto Rico judges)	51	6.4	14.8
Asian Americans	6	0.7	1.5
Native Americans	0	0	0.3
Total	801	99.9 (0.1 rounding)	

Table 2. Racial and Ethnic Composition of Active Federal Judges[355] by Appointing President as of January 1, 2008

	Total		**W. Bush**		**Clinton**		**Bush**		**Reagan**		**Carter**	
	#	**%**	#	**%**	#	**%**	#	**%**	#	**%**	#	**%**
White (non Hispanic)[356]	654	100	227	34.7	249	38.1	85	13.0	74	11.3	15	2.3
African American	90	100	20	22.2	55	61.1	9	10.0	3	3.3	3	3.3
Latina/o[357]	51	100	23	45.1	17	33.3	5	9.8	4	7.8	1	1.9
Asian Americans	6	100	2	33.3	4	66.7	0	0	0	0	0	0
Native Americans	0	0	0	0	0	0	0	0	0	0	0	0
Total nom.	801		272		326		99		79		19	

353. Excludes the Federal District Court of Puerto Rico.

354. Based on U.S. Census data as of May 17, 2007.

355. Excludes the Federal District Court of Puerto Rico.

356. Four "other"—prior presidential nominations not included in this column to make the total number of white sitting active judges 654.

357. One "other"—prior presidential nomination not included in this column to make the total number of latina/o sitting active judges 51.

Table 3. Active African-American Federal Judges as of January 2008

Name	Court	Nominated By	Year Confirmed	Law School
Adams, Henry Lee Jr.	M.D. Fla.	Clinton	1993	Howard Univ.
Anderson, Percy	C.D. Cal.	W. Bush	2002	UCLA
Armstrong, Saundra Brown	N.D. Cal.	Bush	1991	Univ. San Francisco
Autrey, Henry Edward	E.D. Mo.	W. Bush	2002	St. Louis Univ.
Batts, Deborah	S.D.N.Y.	Clinton	1994	Harvard
Beaty, James A. Jr.	M.D.N.C.	Clinton	1994	UNC
Brown, Janice Rogers	D.C. Cir.	W. Bush	2005	UCLA; UVA
Bryant, Vanessa Lynne	D. Conn.	W. Bush	2007	Univ. of Conn.
Burrell, Garland Ellis Jr.	E.D. Cal.	Bush	1992	Cal. Western
Clay, Eric	6th Cir.	Clinton	1997	Yale
Clemon, U.W.	N.D. Ala.	Carter	1980	Columbia
Clevert, Charles N. Jr.	E.D. Wis.	Clinton	1996	Georgetown
Coar, David	N.D. Ill.	Clinton	1994	Loyola–Chi.; Harvard
Cole, Ransey Guy Jr.	6th Cir.	Clinton	1995	Yale
Collier, Curtis Lynn	E.D. Tenn.	Clinton	1995	Duke
Collins, Audrey	C.D. Cal.	Clinton	1994	UCLA
Collins, Raner Christercunean	D. Ariz.	Clinton	1998	Univ. of Ariz.
Cooke, Marcia	S.D. Fla.	W. Bush	2004	Wayne State Univ.
Cooper, Clarence	N.D. Ga.	Clinton	1994	Emory
Daniel, Wiley Young	D. Colo.	Clinton	1995	Howard Univ.
Daniels, George	S.D.N.Y.	Clinton	2000	UC Berkeley
Davis, Andre Maurice	D. Md.	Clinton	1995	Univ. of Md.
Davis, Legrome	E.D. Pa.	W. Bush	2002	Rutgers
Davis, Michael	D. Minn.	Clinton	1994	Univ. of Minn.
Donald, Bernice	W.D. Tenn.	Clinton	1995	Memphis State Univ.
Duncan, Allyson Kay	4th Cir.	W. Bush	2003	Duke
England, Morrison C. Jr.	E.D. Cal.	W. Bush	2002	Pacific McGeorge
Gaitan, Fernando J. Jr.	W.D. Mo.	Bush	1991	Univ. of Mo.
Giles, James Tyrone	E.D. Pa.	Carter	1979	Yale
Gilmore, Vanessa	S.D. Tex.	Clinton	1994	Univ. of Houston
Graham, Donald	S.D. Fla.	Bush	1991	Ohio State Univ.
Greenaway, Joseph A. Jr.	D.N.J.	Clinton	1996	Harvard
Gregory, Roger	4th Cir.	Clinton	2001	Univ. of Mich.
Haggerty, Ancer Lee	D. Or.	Clinton	1994	UC Hastings
Hamilton, Phyllis Jean	N.D. Cal.	Clinton	2000	Santa Clara Univ.
Haynes, William Joseph Jr.	M.D. Tenn.	Clinton	1999	Vanderbilt
Hibbler, William	N.D. Ill.	Clinton	1999	DePaul Univ.
Holmes, Jerome	10th Cir.	W. Bush	2006	Georgetown
Hood, Denise Page	E.D. Mich.	Clinton	1994	Columbia
Houston, John	S.D. Cal.	W. Bush	2003	Univ. of Miami
Hoyt, Kenneth	S.D. Tex.	Reagan	1988	Texas So. Univ.
Jackson, Carol	E.D. Mo.	Bush	1992	Univ. of Mich.
Jackson, Raymond Alvin	E.D. Va.	Clinton	1993	UVA
Jenkins, Martin	N.D. Cal.	Clinton	1997	Univ. San Francisco
Jones, Richard	W.D. Wash.	W. Bush	2007	Univ. of Wash.
Joyner, J. Curtis	E.D. Pa.	Bush	1992	Howard Univ.
Kennedy, Henry Harold Jr.	D.D.C.	Clinton	1997	Harvard
Lancaster, Gary	W.D. Pa.	Clinton	1993	Univ. of Pittsburgh
Lee, Gerald Bruce	E.D. Va.	Clinton	1998	American Univ.
Lemelle, Ivan	E.D. La.	Clinton	1998	Loyola–New Orleans
Lindsay, Reginald	D. Mass.	Clinton	1993	Harvard
Lindsay, Sam	N.D. Tex.	Clinton	1998	Univ. of Tex.
Manning, Blanche	N.D. Ill.	Clinton	1994	John Marshall; UVA
Marbley, Algenon	S.D. Ohio	Clinton	1997	Northwestern
McDade, Joe Billy	C.D. Ill.	Bush	1991	Univ. of Mich.

McKee, Theodore Alexander	3d Cir.	Clinton	1994	Syracuse
Mickle, Stephan	N.D. Fla.	Clinton	1998	Univ. of Fla.
Miles-LaGrange, Vicki	W.D. Okla.	Clinton	1994	Howard Univ.
Oliver, Solomon Jr.	N.D. Ohio	Clinton	1994	NYU
Parker, Barrington Daniels Jr.	S.D.N.Y.	Clinton	1994	Yale
Parker, Barrington Daniels Jr.	2d Cir.	W. Bush	2001	Yale
Quarles, William D. Jr.	D. Md.	W. Bush	2003	Catholic Univ.
Rawlinson, Johnnie	D. Nev.	Clinton	1998	Pacific McGeorge
Rawlinson, Johnnie	9th Cir.	Clinton	2000	Pacific McGeorge
Roberts, Richard	D.D.C.	Clinton	1998	Columbia
Roberts, Victoria	E.D. Mich.	Clinton	1998	Northeastern
Robinson, Julie	D. Kan.	W. Bush	2001	Univ. of Kan.
Robinson, Stephen	S.D.N.Y.	W. Bush	2003	Cornell
Rogers, Judith Ann Wilson	D.C. Cir.	Clinton	1994	Harvard; UVA
Sands, Willie Louis	M.D. Ga.	Clinton	1994	Mercer Univ.
Seymour, Margaret	D.S.C.	Clinton	1998	American Univ.
Shaw, Charles Alexander	E.D. Mo.	Clinton	1993	Catholic Univ.
Sleet, Gregory Moneta	D. Del.	Clinton	1998	Rutgers
Smith, Lavenski	8th Cir.	W. Bush	2002	Univ. of Ariz.
Spencer, James Randolph	E.D. Va.	Reagan	1986	Harvard
Stewart, Carl	5th Cir.	Clinton	1994	Loyola–New Orleans
Sullivan, Emmet	D.D.C.	Clinton	1994	Howard Univ.
Swain, Laura Taylor	S.D.N.Y.	Clinton	2000	Harvard
Thomas, Clarence	D.C. Cir.	Bush	1990	Yale
Thomas, Clarence	U.S.S.C.	Bush	1991	Yale
Thompson, Alvin	D. Conn.	Clinton	1994	Yale
Thompson, Myron Herbert	M.D. Ala.	Carter	1980	Yale
Townes, Sandra	E.D.N.Y.	W. Bush	2004	Syracuse
Tucker, Petrese	E.D. Pa.	Clinton	2000	Temple Univ.
Tyson, Ralph	M.D. La.	Clinton	1998	La. State Univ.
Walton, Reggie	D.D.C.	W. Bush	2001	American Univ.
Ware, James	N.D. Cal.	Bush	1990	Stanford
Wigenton, Susan Davis	D.N.J.	W. Bush	2006	William and Mary
Williams, Alexander Jr.	D. Md.	Clinton	1994	Howard Univ.
Williams, Ann Claire	N.D. Ill.	Reagan	1985	Notre Dame
Williams, Ann Claire	7th Cir.	Clinton	1999	Notre Dame
Wilson, Charles	11th Cir.	Clinton	1999	Notre Dame
Wingate, Henry Travillion	S.D. Miss.	Reagan	1985	Yale
Wright, Otis D. II	C.D. Cal.	W. Bush	2007	Southwestern

Table 4. Active Latino/a Federal Judges[358] as of January 2008 (58 Total Judges)

Name	Court	Nominated By	Year Confirmed	Law School
Altonaga, Cecilia	S.D. Fla.	W. Bush	2003	Yale
Alvarez, Micaela	S.D. Tex.	W. Bush	2004	Univ. of Tex.
Armijo, M. Christina	D.N.M.	W. Bush	2001	Univ. of N.M.
Bea, Carlos	9th Cir.	W. Bush	2003	Stanford
Benavides, Fortunato Pedro	5th Cir.	Clinton	1994	Univ. of Houston
Benitez, Roger	S.D. Cal.	W. Bush	2004	Western State Univ.
Briones, David	W.D. Tex.	Clinton	1994	Univ. of Tex.
Cabranes, Jose Alberto	D. Conn.	Carter	1979	Yale
Cabranes, Jose Alberto	2d Cir.	Clinton	1994	Yale
Callahan, Consuelo	9th Cir.	W. Bush	2003	Pacific McGeorge
Castillo, Ruben	N.D. Ill.	Clinton	1994	Northwestern

358. Excludes the Federal District Court of Puerto Rico, where there are seven federal judges.

Covington, Virginia M. H.	M.D. Fla.	W. Bush	2004	Georgetown
Crane, Randy	S.D.. Tex.	W. Bush	2002	Univ. of Tex.
Fuentes, Julio M.	3d Cir.	Clinton	2000	SUNY Buffalo
Garcia, Orlando Luis	W.D. Tex.	Clinton	1994	Univ. of Tex.
Garza, Emilio	W.D. Tex.	Reagan	1988	Univ. of Tex.
Garza, Emilio	5th Cir.	Bush	1991	Univ. of Tex.
Gonzalez, Irma Elsa	S.D. Cal.	Bush	1992	Univ. of Ariz.
Guirola, Louis Jr.	S.D. Miss.	W. Bush	2004	Univ. Miss.
Gutierrez, Phillip	C.D. Cal.	W. Bush	2007	UCLA
Guzman, Ronald A.	N.D. Ill.	Clinton	1999	NYU
Herrera, Judith C.	D.N.M.	W. Bush	2004	Georgetown
Hinojosa, Ricardo H.	S.D. Tex.	Reagan	1983	Harvard
Howard, Marcia Morales	M.D. Fla.	W. Bush	2007	Univ. Fla.
Irizarry, Dora	E.D.N.Y.	W. Bush	2004	Columbia
Jordan, Adalberto Jose	S.D. Fla.	Clinton	1999	Univ. of Miami
Linares, Jose	D.N.J.	W. Bush	2002	Temple
Lucero, Carlos F.	10th Cir	Clinton	1995	Geo. Wash. U
Ludlum, Alia M.	W.D. Tex.	W. Bush	2002	Univ. of Tex.
Marrero, Victor	S.D.N.Y.	Clinton	1999	Yale
Martinez, Jose	S.D. Fla.	W. Bush	2002	Univ. of Miami
Martinez, Phillip	W.D. Tex.	W. Bush	2002	Harvard
Martinez, Ricardo	W.D. Wash.	W. Bush	2004	Univ. Washington
Montalvo, Frank	W.D. Tex.	W. Bush	2003	Wayne State
Moreno, Federico A.	S.D. Fla.	Bush	1990	Univ. of Miami
Murguia, Carlos	D. Kan.	Clinton	1999	Univ. of Kan.
Murguia, Mary	D. Ariz.	Clinton	2000	Univ. of Kan.
Otero, S. James	C.D. Cal.	W. Bush	2003	Stanford
Paez, Richard A.	C.D. Cal.	Clinton	1994	UC Berkeley
Paez, Richard A.	9th Cir	Clinton	2000	UC Berkeley
Prado, Edward	5th Cir.	W. Bush	2003	Univ. of Tex.
Prado, Edward	W.D. Tex.	Reagan	1984	Univ. of Tex.
Real, Manuel Lawrence	C.D. Cal.	Johnson	1966	Loyola
Robreno, Eduardo C.	E.D. Pa.	Bush	1992	Rutgers
Rodriguez, Xavier	W.D. Tex.	W. Bush	2003	Univ. of Tex.
Sanchez, Juan Ramon	E.D. Pa.	W. Bush	2004	Penn
Sandoval, Brian	D. Nev.	W. Bush	2005	Ohio State Univ.
Solis, Jorge Antonio	N.D. Tex.	Bush	1991	Univ. of Tex.
Sotomayor, Sonia	S.D.N.Y.	Bush	1992	Yale
Sotomayor, Sonia	2d Cir.	Clinton	1998	Yale
Tagle, Hilda G.	S.D. Tex.	Clinton	1998	Univ. of Tex.
Torruella, Juan R.	1st Cir.	Reagan	1984	Boston Univ.; UVA
Urbina, Ricardo M.	D.D.C.	Clinton	1994	Georgetown
Vazquez, Martha Alicia	D.N.M.	Clinton	1993	Notre Dame
Wardlaw, Kim McLane	C.D. Cal.	Clinton	1995	UCLA
Wardlaw, Kim McLane	9th Cir.	Clinton	1998	UCLA
Zapata, Frank R.	D. Ariz.	Clinton	1996	Univ. of Ariz.

Table 5. Active Asian-American Federal Judges as of January 2008

Name	Court	Nominated By	Year Confirmed	Law School
Chin, Denny	S.D.N.Y.	Clinton	1994	Fordham
Ishii, Anthony	E.D. Cal.	Clinton	1997	Berkeley
King, George	C.D. Cal.	Clinton	1995	USC
Mollway, Susan Oki	D. Haw.	Clinton	1998	Harvard
Sabran, Dana Makoto	S.D. Cal.	W. Bush	2003	Pacific McGeorge
Wu, George	C.D. Cal.	W. Bush	2007	Univ. of Chicago