The number of Asian Pacific Americans (APA) serving as judges in the United States is disproportionate to the number of APAs in both the general population and the number of lawyers nationwide. For example, as recently as 10 years ago, only 6 out of the 877 active federal judges were APAs, constituting .8% of the federal judiciary. At that time, APAs constituted 2.3% of the nation’s over 870,000 lawyers. More recently, as of early 2016, there were 25 APA federal judges, including four at the Court of Appeals level. This constitutes 2.8% of the federal judiciary, but APAs now constitute approximately 4% of the nation’s estimated 1.1 million lawyers. With respect to the general population, U.S. census data reflects that APAs constituted 4.2% of the population in 2000 and 5.6% of the population in 2010.

The rise in the numbers of APA judges is recent. Indeed, for more than 170 years after the founding of the federal judiciary (1789-1961), there were no APA judges in its ranks. Not until 1961 did President John F. Kennedy nominate the first APA judge (Hon. Cyrus Niles Tavares) to a federal court of jurisdiction, namely, the U.S. District Court for the District of Hawaii. It was another 35 years before an APA female was appointed to the federal bench, when President William J. Clinton appointed the Hon. Susan Oki Mollway to the U.S. District Court in Hawaii in 1998.

Given the relatively recent trend of APAs gaining presence in the judiciary, the phenomenon of an APA “First” member of any particular court is a fairly modern occurrence. Today’s panel gathers an array of APA judicial “Firsts” who also represent a diverse range of backgrounds, experience, and personal characteristics in terms of, among other things, APA cultural heritage, gender, sexual orientation, political affiliation, geography, type of court, legal education, and prior legal experience.

HON. JACQUELINE NGUYEN  *(U.S. Court of Appeals, Ninth Circuit)*
- First female APA federal appellate judge (2012)
- First Vietnamese American female judge for California Supreme Court (2002)

HON. AMUL THAPAR  *(U.S. District Court, Eastern District of Kentucky)*
- First South Asian federal judge (2007)

HON. THEODORE D. CHUANG  *(U.S. District Court, District of Maryland)*
- First APA federal judge in Maryland and the Fourth Circuit (2014)

HON. SABRINA S. McKENNA  *(Supreme Court of Hawaii)*
- First openly gay APA to serve on a state court of last resort (2011)

HON. RUPA GOSWAMI  *(Superior Court of California, Los Angeles County)*
- First South Asian American female judge for California Superior Court (2013)
The range of topics and issues to be discussed by the panel include:

- What led each “First” to become a judge
- Whether being a “First” was an asset or liability in becoming a judge
- Whether being a “First” is an asset or liability while serving as a judge
- Stereotypes and related obstacles to overcome as a “First”
- Actual and perceived expectations from the APA community of its “Firsts”
- How one’s APA background affects judicial decision making
- Advice to APAs on how to become a judicial “Second,” “Third,” “Fourth,” etc.
- Predictions and future outlook for APA “Firsts” on other courts and jurisdictions
- How the APA community can support and promote additional “Firsts”

While today’s panel consists of a diverse cross-section of notable judicial “Firsts,” we also celebrate and recognize the various other APA judicial “Firsts” who have paved the way for the appointment and election of other APA judges. With apologies to any APA “First” who was inadvertently overlooked, here is a non-exhaustive list of APA Judicial “Firsts” who have served as exceptional ground-breaking examples for the APA community.

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<tr>
<th>Name</th>
<th>Title and Background</th>
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<tr>
<td>HON. JOHN F. AISÓ</td>
<td>California Court of Appeal First Japanese American appointed as a judge in the contiguous United States (1968)</td>
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<td>HON. JUSTIN S. ANAND</td>
<td>U.S. Magistrate, N.D. Georgia First APA federal judicial officer in Georgia (2012)</td>
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<td>HON. TANI CANTIL-SAKAUYE</td>
<td>California Supreme Court First APA Chief Justice for California (2011)</td>
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<td>HON. PAMELA K. CHEN</td>
<td>U.S. District Court, E.D.N.Y. First APA LGBT on the federal bench (2013)</td>
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<td>HON. DENNY CHIN</td>
<td>U.S. Court of Appeals, 2d Circuit First APA on the Second Circuit (2010)</td>
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<td>First APA federal judge outside 9th Circuit (1994)</td>
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<td>HON. HERBERT Y.C. CHOY</td>
<td>U.S. Court of Appeals, 9th Circuit First Korean American federal judge (1971)</td>
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<td>First APA federal judge Nevada (2012)</td>
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<td>Houston Municipal Court</td>
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<td>First Chinese American female federal judge (2010)</td>
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<th>HON. MARILYN D. GO</th>
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<td>First APA female federal judicial officer (1993)</td>
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<th>HON. ANTHONY ISHII</th>
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<td>First APA judge for U.S Dist. Court in E.D. Cal. (1997)</td>
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<td>First APA California Supreme Court Justice (1989)</td>
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<td>First Chinese American federal judge outside of Hawaii (1987)</td>
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<td>First Filipina judge in the nation (1986)</td>
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<td>Philadelphia Court of Common Pleas</td>
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<td>First APA outside of Pacific coast to preside as judge of a court of general jurisdiction (1975)</td>
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BIBLIOGRAPHY & REFERENCE MATERIALS


Introduction

Judges render decisions that often have a dramatic impact on the lives of other individuals. As a result, it is important to ask whether a judge's background and identity affects the way he or she interprets the law. The presumption is that judges, like all other human beings, are products of their past and thus, their identity acts as an invisible hand guiding their actions. It is also presumed, however, that judges will abide by the twin goals of objectivity and fairness. If a judge's past provokes him or her to stray from these cherished ideals, then a potential conflict may arise.

Nevertheless, the idea that the past may shape the future does not mean that a judge's background will directly influence the outcome of his or her decisions. In fact, most empirical studies that have been undertaken on the behavioral theory of judicial decision-making have resulted in little, if any, correlation between the judge's social background and his or her decisions. Why, then, concern ourselves with the identity of judges? Why do scholars write articles on the importance of having a diverse judiciary? Why do civil rights groups engage in ongoing campaigns for a more diverse bench? I suspect that the answer to these questions--contrary to what the empirical studies have shown--is that identity and social background do play a role in judicial decision-making. Part of this article seeks to test this hypothesis, in the face of statistical evidence to the contrary.

This article aims to examine the issue of identity and judicial decision-making from an Asian American perspective. Currently, 0.8 percent of the federal judiciary consists of Asian Americans. Only six out of the 877 active judges presently sitting on the federal bench are Asian American. Nationally, Asian Americans make up 2.3 percent of the nation's 871,115 lawyers. Thus, comparing the percentage of Asian federal judges (0.8%) to the overall percentage of Asian lawyers (2.3%) demonstrates the underrepresentation of Asian Americans in the federal judiciary. If identity matters, then the dearth of Asian American judges implicates issues of fairness and objectivity in our federal judiciary.

The objective of this article is to explore whether being Asian American affects how a judge analyzes and interprets the law, and if so, whether this difference justifies the pursuit of a more diverse judiciary. To answer these questions, the article will be divided into three parts. Part I will look at the Asian American identity or experience. Does such an identity actually exist? Is there a common thread that runs through the Asian American experience? This section will also consider the biographies of some Asian American judges as a way of deciding whether or not it accords with the Asian American identity.
Part II will examine the narratives of Asian American judges and assess whether identity actually informs their analyses of the law. The narratives have been divided into two distinct categories. The explicit narratives consist of speeches and writings of the judges themselves, while the implicit narratives consist of the judicial opinions of the judges. Both of these types of narratives will be scrutinized to see whether identity and personal experience have an effect on judicial decision-making. This qualitative analysis diverges from the empirical/statistical analyses that others have previously undertaken. By looking at both the explicit and implicit narratives, as opposed to cold statistics, the role of a judge’s identity in his or her decisions may emerge. This section will also engage in a deeper discussion of judicial objectivity and fairness. In this section, we ask: If the Asian American experience informs the judge’s analysis of the law, then does this cut against the ideals of a bias-free, objective judiciary? In addition, what ethical dilemmas does this potential conflict present?

Finally, Part III will move the article into a more practical arena: diversity on the bench. How should one define “diversity”? What are its benefits? Are they merely cosmetic? Or, are there actually substantive benefits that extend beyond perceptions of fairness? Moreover, would the benefits only accrue to our judicial system, or can the Asian American and other communities reap the benefits of a more diverse judiciary?

I. Asian American Identity and Experience

It is difficult, sometimes, to imagine whether an Asian American identity or experience actually exists. When one looks at the legion of distinct Asian ethnicities that currently populates the United States, it is natural to question the explanatory power of broad Asian American categorizations. For example, does a third generation Japanese American citizen genuinely share the same “Asian American identity” as a first generation Chinese immigrant? Differences between such Asian Americans include language, culture, physical features, and the likelihood that one knows America as her home, while the other perceives China as her motherland. On the other hand, some claim that the differences, though real, do not truly define the Asian American identity. These individuals assert that the common experience of being racially oppressed unifies the various Asian American ethnicities. It is the “us against the world” attitude transposed onto the stage of American racial hegemony—a call to the various Asian American ethnicities to unite and rise against the oppressor.

Professor Mari Matsuda, for one, has written extensively on the Asian American identity. She has argued forcefully against the idea that the Asian American identity is “contrived” or “unnecessary.” She has further argued that an Asian American experience exists which transcends horizontally across various Asian ethnicities and vertically through different generations of Asians. To her, the Asian American identity is more than an arranged marriage. The history of race and racism in America does more than just force us together like strangers on a lifeboat. We share a bright spirit of intercultural experience, of resistance, and of proud survival, the theme with variations that greets each successive wave of Asian American immigration.

From her standpoint, Asian Americans' shared path of resistance against a racially oppressive majority creates common ground.

Even those who condemn the construction of an Asian American identity may find it hard to deny this nation's history of racism and xenophobia against Asians. Thus, examining the shared experiences of racism and xenophobia can shed important light on the formation and efficacy of the Asian American identity.
Perhaps no other word captures the Asian American experience and identity better than “foreigner.” Since the inception of Asian immigration, the Asian American community has been plagued by racist laws and judicial decisions catering to the image of the Asian as a foreigner. Congress passed legislation such as the Chinese Exclusion Act with the express intent of deterring, and the implicit hope of eliminating, Chinese immigration altogether. A series of immigration decisions handed down by the Supreme Court essentially provided Congress and the Executive with unreviewable authority over immigration to the detriment of Asians. In Chae Chan Ping v. United States, the Chinese Exclusion Case, the Court did little to mask its prejudices, describing the Chinese as “strangers in the [U.S.], residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living.” The inclusion of descriptions like these links the foundation of this nation's immigration laws and policies to racism and xenophobia. The usage of pronouns such as “our” for white Caucasians and “them” for Asians, underscores the treatment of Asians as outsiders.

The fear of strangers and foreigners did not stop at the border. Not only did the lawmakers of this country shut the gates for Asian immigrants, they also precluded Asians living in the country from becoming citizens. Until 1952, various Asian ethnicities faced legal bars to naturalizing. Moreover, those who resided in the United States confronted laws that prohibited them from owning land, resulting in further relegation to the margins of American society. Thus, Asians were repudiated as foreigners every step of the way. From the denial of entry, to the inability to naturalize, and finally, to the deprivation of ownership rights, the leaders of this country made every effort to minimize and marginalize the presence of Asians.

For those who dismiss the racism and xenophobia experienced by Asians in this country as part of the distant past, a brief refresher of current events shows that discrimination against Asian Americans continues today. In addition, Asian Americans living in this country will attest to having been asked at one time or another, “Where are you from?” with the implication that the individual is not actually from the United States. Mainstream American culture persistently ascribes the image of the foreigner to Asian Americans, even to those Asians who call America their home.

The history of racism and xenophobia against Asian Americans suggests that the thematic thread of “foreignness” makes up the Asian American identity. This thematic thread, however, does not mean that every Asian American has the same experiences and viewpoints or that the Asian American identity is essentialist in nature. Rather, this theme of “foreignness” suggests that Asians have had the unifying experience of being the object of racism and xenophobia in this country.

B. Asian American Judges and Their Asian American Identity

If we posit that treatment of Asian Americans as outsiders has helped produce a common element within the Asian American identity, then what about the identities of Asian American judges? Do their biographies reflect the shared experiences of racism and xenophobia?

Consider that throughout our nation's history, only fourteen Asian Americans have ever sat on the bench as a federal judge. Currently, there are six active judges and two senior judges. Only one sits outside of California or Hawaii. Asian Americans, however, make up approximately 3.7 percent of our nation's population and comprise 2.3 percent of our nation's attorneys. Since Asian Americans represent only 0.8 percent of the federal judiciary, they appear grossly underrepresented in that sector of society. Does this mean that Asian American judges are “atypical” in the sense that...
they come from different social backgrounds than most Asian Americans? In other words, does the inclusion of so few Asian Americans into the elite group of federal judges per se imply that these individuals have managed to escape the phenomenon of being treated as an outsider? Biographical research of the judges appears to indicate otherwise.

Take, for example, Judge Atsushi Wallace Tashima, the only Asian American judge to serve on both the federal district court as well as the federal appellate court. The son of two Japanese natives, Judge Tashima was born in Santa Maria, California in 1934 and uprooted at the age of eight, along with his parents, to the Poston Relocation Center as a result of the Japanese Internment. During his three years at this Arizona internment camp, Judge Tashima’s parents lost their home as a result of the Alien Land Laws, which prohibited aliens from holding title to property. Having experienced the relocation and internment of his family at the age of eight, some of Judge Tashima’s earliest memories involved the treatment of him and his family as foreigners. The fact that they lost their home because of the Alien Land Laws reinforced their status as outsiders.

Judge Tashima was not the only federal judge to experience the Japanese Internment. At the age of eleven, Judge Robert Takasugi and his family were forced to vacate their home in Tacoma, Washington and relocate to an internment camp at Tule Lake, California. Judge Takasugi's father, a commercial fisherman, struggled to cope with his inability to protect and support the family during the internment and died at the age of fifty-seven, after spending two and a half years at the camp. According to Judge Takasugi, “I think he died, if anything, of the stress that was caused [by feeling] he was totally helpless.”

As opposed to Judges Tashima and Takasugi, who were born in the United States but made to feel like foreigners through the internment experience, Judge Denny Chin likely became exposed to the effects of marginalization through the immigration experience. Born in Hong Kong, Judge Chin immigrated to New York with his family at the age of two. Growing up in Hell's Kitchen, where his father worked twelve-hour days as a cook in Chinese restaurants while his mother worked six days a week as a seamstress earning ten cents a garment, Judge Chin and his sister often took charge of caring for their younger brother and maintaining the household. Moreover, Judge Chin's grandfather, whom the family followed from China, originally immigrated to New York by presenting phony documents. In 1916, one of the only ways that a Chinese person could immigrate to the United States was by proving that the individual was the child of someone living in the United States. As a result of this requirement, Judge Chin's grandfather presented fake documents to the authorities and arrived in New York as a “paper son.” Judge Chin's Horatio Alger-like story is the classic immigrant's tale. Judge Chin likely grew up conscious of his status, or at least his grandfather's status, as an outsider.

* Justice Ming Chin, a justice on the California Supreme Court, relates two stories from his childhood that impressed upon him the status of Asians as foreigners. According to Justice Chin, who was born and raised on a small potato farm in Oregon, the following occurred:

> When I was a child, we traveled frequently between Oregon and San Francisco. Occasionally, we would seek overnight accommodations in small towns along the way. I can remember driving to motels with empty parking lots and “vacancy” signs blazing in neon lights, but my family was told there was no room for us in the inn.

Another time:

> I can remember driving through a very nice neighborhood in town. There were large, stately houses with well-manicured lawns. As I gazed out of the car window, I asked my parents, “Wouldn't it be nice to live there?” My father said, “Oh,
no, they don’t let Chinese live there.” Of course, my question was always, “Why?” I’ve never heard a good answer. My father said, “Maybe one day you can do something about prejudice and bias.” 46

In spite of their elite statuses, these judges were not exempt from the perils of racism and xenophobia. 47 This thread of “foreignness” that runs through the fabric of the Asian American identity suggests that perhaps Professor Matsuda correctly asserted that even if the Asian American identity is “unnecessary” or “contrived,” we cannot pretend that the common experience of subordination via racism and xenophobia was forged. Given this backdrop, a serious question arises as to whether this Asian American experience alters the way an Asian American judge interprets or analyzes the law.

II. Asian American Judges & Their Analysis of the Law: What Do the Narratives Tell Us?

Legal scholars who have tested the behavioral model 48 of judicial decision-making have generally produced inconclusive results. The behavioral model, which “states that social background or personal attributes of *101 judges shape personal and policy values that directly influence judicial decisions,” has never been positively affirmed by empirical studies that concentrate on case outcomes. 49 For instance, in the context of race and sex, researchers have found that those characteristics provide little explanatory value for judicial decision-making. 50 Findings such as these have led certain authors to proclaim that “the explanatory power of the sociological background characteristics of [judges] is . . . generally not very helpful,” and have left many others wondering about the viability of the theory. 51

Practical experience, however, makes it difficult to accept the conclusions drawn from these studies. To most individuals, the behavioral model comports with common sense. The notion that our personal backgrounds affect the way we behave and the decisions we make appears incontrovertible. Herein lies the fundamental deficiency with statistical studies of the behavioral model: human beings are complex creatures, and isolating one characteristic to see whether it alters the outcome of a decision disregards other characteristics from our background, as well as other external constraints that may have nothing to do with our personal background. Nowhere is this observation more apropos than in judicial decision-making. When a judge decides a case, race or sex on its own may play a role, but the facts of the case and the law will also constrain the outcomes. Combine that with other sociological background characteristics 52 aside from race and sex, and it is easy to see why empirical studies relying on statistics alone are often inconclusive. 53 When one looks only at the outcomes of cases, the analysis is usually relegated to an all-or-nothing proposition. In other words, being Asian either affected the judge's decision to rule for the petitioner in a habeas corpus case or against him. Thus, in many ways, statistical analyses fail precisely because they attempt to undertake too large of a task--deducing whether a single characteristic had an outcome-determinative effect on the decision. 54

*102 The analysis I apply in this article is much less sweeping in its scope. Rather than assessing whether being an Asian American judge affects the outcome of certain cases by tallying their voting patterns, I have sought to gauge whether a judge's Asian American identity informs his or her interpretation of the law through a qualitative analysis. 55 To accomplish this, I have looked at the judges' narratives, which I have divided into two categories: explicit and implicit narratives. The explicit narrative includes speeches and articles written by the judges themselves or articles written by others who have heard the judges comment first-hand on judicial decision-making. The explicit narrative analysis attempts to divine the judges' personal thoughts on how their identity may have affected their analysis of the law by reviewing what the judges have said themselves.

The implicit narrative includes the actual opinions written by the various judges. While most empirical studies primarily focus their attention on the outcomes of decisions, this study focuses on the language of the opinions, the rationale, and
the methods of analysis, in addition to the final outcome. As previously stated, statistical analyses often try to deduce the influence of an individual's background characteristic, such as race, by looking at the bottom-line decision. This approach often fails to take heed of external constraints, such as the facts and the law. As a result, these studies suggest that identity is a weak predictor of outcomes. In the alternative, by studying the language of a judge's opinions, we may unearth traces of the influence of a judge's identity on his or her decision-making. Whereas statistical studies attempt to measure the influence of identity on an all-or-nothing scale, an analysis of the language of opinions is a more nuanced approach that better takes into account external constraints. Thus, one might find language in an opinion indicating that a judge would have voted a certain way but for the constraints imposed by the facts of the case or the law. This approach attempts to gauge the effect of identity even when the outcome of the case seemingly indicates that identity played no role at all.

Opinions generally consist of the statement of facts, the law, and a discussion applying the facts to the law. Within these tightly structured narratives, however, one may still identify language that would imply that a judge's identity played a role in framing the issue, or perhaps even in deciding the outcome. For example, just as the Supreme Court exposed its prejudices in its description of the Chinese in Chae Chan Ping, an Asian American judge might very well reveal something about his or her background or identity through the language of his or her opinions. These narratives are therefore “implicit” in the sense that the reader is not being given a direct, personal statement from the speaker.

It is important to consider why we should be concerned with the language of a judicial opinion if it does not alter the outcome of the decision. The language itself serves two important functions, even if it has not changed the outcome of the case. First, language in an opinion often provides the losing party with concrete evidence that the judge has not administered justice in a vacuum. For example, when an opinion recognizes the potential impact and hardship of the decision's outcome, a litigant will likely be more satisfied with the judicial process because the judge acknowledges that his or her decision affects the everyday lives of individuals.

Second, the language of the opinion may provide an impetus for change. Although a judge cannot change the law, the judge's opinions serve as a record for legislators to look at and examine when they make policy. Therefore, when a judge is forced to rule a certain way because of the constraints of either the law or the facts, the judge may still express his or her dissatisfaction with the state of the law through the language of the opinion. Both of these reasons reinforce the importance of the language contained within judicial opinions. Whereas the other two political branches communicate more directly to the public, the judicial branch primarily communicates to the public through judicial opinions. Thus, the language that a judge uses, including the tone of the opinion and his or her word-choice, may form the basis of a dialogue between a judge, the litigants, and the public at large.

A. Explicit Narratives

Judge Tashima gave the keynote address at a recent conference remembering the 60th anniversary of Korematsu and the other Japanese Internment cases, in which he said the following:

*104 In my 24 years as a federal judge, both in the trial court and on the appellate bench, it has been my privilege to participate in what I believe to be the primary mission of the federal courts--to uphold the rule of law and to hold the government to its constitutional obligations. Because we are all creatures of our past, I have no doubt that my life experiences, including the evacuation and internment, have shaped the way I view my job as a federal judge and the skepticism that I sometimes bring to the representations and motives of the other branches of government.
The speech, which recounted Judge Tashima's experience of the internment, also served as an admonition to the current federal judiciary regarding its proper function in the War on Terror. Judge Tashima believes that the Japanese Internment occurred “at least in part, because the federal courts, which were supposed to be the bulwark protecting the Constitution from an overzealous Executive, failed in fulfilling their mandate under Article III of the Constitution.” Thus, he argues, courts should view the Executive's claims, sixty years later, regarding the War on Terror with skepticism. One might speculate that had he presided over cases such as Rasul v. Bush and Hamdi v. Rumsfeld, his experience with the internment would likely have influenced him to rule against the government, as the majority did in both those cases. Whereas other judges might have deferred to the Executive during wartime, Judge Tashima's internment experience fostered in him a commitment to the rule of law and civil liberties even during exigent circumstances. Of course, the Supreme Court's rulings in Rasul and Hamdi may indicate that one need not have personally experienced the Japanese Internment to take away the lessons of the internment--those of maintaining civil liberties during times of hysteria and restraint from damnation via racial association. It certainly helps to further the goal of maintaining civil liberties, however, to have individuals such as Judge Tashima who have experienced and been the target of such discrimination first-hand on the federal judiciary. Lessons learned through these personal experiences tend to be more steadfastly held in one's mind and, thus, less likely to be jettisoned at the prospect of war or other similar circumstances.

Judge Tashima made it explicitly clear how his identity and the marginalization of him and his family during the internment has shaped or informed his analysis of the law. These experiences have instilled in him a willingness to view the government's claims with caution as a judge. Other judges have been just as candid as Judge Tashima. Judge Edward Chen, a magistrate judge for the United States District Court in the Northern District of California, has also commented on the effect of his life experiences on his judicial disposition. In a speech addressing the need for diversity on the judiciary, he stated:

I find that my own life experiences inform my understanding and perceptions of the world as a judge, whether I am evaluating evidence and arguments on the bench or communicating with disputants as a settlement judge. For instance, having been a victim of a violent crime has given me invaluable insight into the outrage and anger of crime victims and the importance of delivering justice through the criminal process. Yet, having seen law enforcement excesses in my personal life and in the lives of the many clients I have served, I am sensitized to the need to examine closely, with a healthy skepticism, disputes over law enforcement conduct . . . . Yet, as one who has experienced subtle and not-so-subtle forms of discrimination, I am sensitive to the humiliating and demoralizing effects of discrimination and the importance of having those claims fully and fairly evaluated. In short, my understandings and perceptions, and perhaps my subconscious predilections, are fashioned to a significant extent by my life experiences. And although a judge's duty is to recognize those predilections and control them, it is simply unrealistic to pretend that life experiences do not affect one's perceptions in the process of judging.

Much like Judge Tashima, Judge Chen has faced discrimination that has infused him with skepticism towards law enforcement, as well as receptiveness to claims of discrimination. Judge Chen's work as an attorney for the American Civil Liberties Union (ACLU) before becoming a judge likely reinforced for him the fact that racism and xenophobia continue to exist today. While working for the ACLU, Judge Chen was the co-director of the Language Rights Project and also litigated numerous cases seeking redress for those who suffered from the Japanese Internment. During his time on the Language Rights Project, Judge Chen worked on language-based discrimination cases, including lawsuits challenging “English-only” policies. English-only policies generally consist of rules enacted by employers that prohibit individuals from speaking a language other than English while at work, unless the individual uses the foreign language in the course of his or her employment. Such rules, which have no justifiable business purpose, often target bilingual Hispanics and Asian Americans. These policies remind many Asian Americans that they are considered “foreigners”
and that any vestige of Asian culture that does not conform with the majority's vision of America is not welcome. By confronting racial discrimination from such diverse angles, Judge Chen has acknowledged the effect of the Asian American identity on his judicial disposition.

Explicit proclamations, such as the ones made by Judges Tashima and Chen, reaffirm the behavioral model of judicial decision-making. We know that a judge's past experiences inform the way a judge adjudicates cases because the judge has plainly said so. However, simply because we have been fed information from the horse's mouth does not make the claim true or valuable. One could argue that even if Judge Tashima proclaims skepticism of the government's motives, the lack of statistical evidence demonstrating that he rules against the government more than the average judge would render his proclamation meaningless. Perhaps the most significant benefit gained from these explicit narratives is the dialogue between judges and our citizenry. A judge's proclamation that he or she has had experiences that will ensure our civil liberties will not be curtailed at the government's whim improves the legitimacy of the judicial system by bolstering the public's confidence in the judicial system's ability to uphold our constitutional values.

What should we make of explicit narratives, like those of Judges Tashima and Chen, if the statistical studies correctly conclude that race fails to predict outcomes? These explicit narratives provide some reassurance that the Asian American identity, especially experiences with racism and xenophobia, affects judicial decision-making. However, without some type of empirical support, it is difficult to substantiate the judge's explicit proclamations. The next section, which looks at implicit narratives, attempts to verify these explicit proclamations. Because most empirical studies in this area have proven inconclusive, scrutinizing the language of the opinions, specifically the tone and word-choice of Asian American judges, can help evaluate the veracity of the explicit narratives provided by Judges Tashima and Chen.

*B107  B. Implicit Narratives

Judicial opinions often follow a lockstep approach analogous to a military drill. The opinion will invariably include, in sequential order: a statement of the issue, the facts, the law, the application of facts to the law, and the holding. Democracy demands clarity of the law to put its citizenry on notice. A tightly structured mechanism for delivering the state of the law fulfills this democratic mandate of fairness. Why, then, analyze the opinions of Asian American judges to assess the effect of their identity on judicial decision-making? One might argue that if judicial opinions reproduce the law by rote, then looking at the end result may prove more productive than looking at the language of the opinion.

As prior empirical studies have shown, however, looking only at judicial outcomes is an inconclusive method of assessing the behavioral model. Statistical studies have caused many to believe that “the law--not the judge-- dominates the outcome.” For the most part, the facts and the law of the case constrain outcomes, and opinions consist of straightforward discussions that reveal little, if anything, about matters outside of the case. Occasionally, however, the language used by the judge, including the tone and word choice, may provide insight into his or her background. The hope is to detect the influence of the Asian American identity on the judicial decision-making of Asian American judges by looking at the language of their opinions.

My research of implicit narratives delved into the various areas of the law in which Asian American judges have drafted opinions. The various fields that I looked at include First Amendment, equal protection, criminal procedure, and labor/employment. I tended to focus on areas of the law that would have a greater probability of triggering issues of race. I also looked, however, at cases in other areas such as property, contracts, torts, and securities, which would not appear to trigger these same issues.

An implicit narrative may emerge, for example, when an Asian American judge digresses into a tangent or rhetorical flourish in the opinion. A judge may also weave an implicit narrative, revealing a glimpse of his or her identity, through the normal scope of opinion-writing. My research into the opinions of Asian American judges has revealed
that immigration case law tends to produce language revealing the effect of the judge's Asian American identity more than any other area of substantive law. This is an unsurprising result since racist immigration legislation and judicial decisions have shackled Asian Americans and treated them as foreigners for numerous years. The de jure and de facto alienation of Asians in the immigration context provides a logical nexus as to why Asian American judges might harbor the most sympathy to these cases. Moreover, immigration cases invariably require the judge to explore the life stories of the immigrants, stories that often involve either persecution from the host country or simply the pursuit of greater economic opportunities in America. Because of these factors, the immigrant's life story provides the judge with an opportunity to articulate the harshness of removal or deportation, without deviating from the natural course of the opinion.

For example, some of Judge Chin's immigration opinions contain language that reflects his heightened awareness of the harshness of these cases. One could posit that this heightened awareness was, in part, due to his experience as an immigrant. In Yesil v. Reno, Judge Chin denied the government's motion for reconsideration for a case in which he had previously granted an immigrant's habeas petition to review his final order of deportation. Perhaps compelled by what he deemed to be the government's "display of sheer arrogance," Judge Chin's opinion expressed his holding in particularly strong language. In comparing the equities at stake, he stated:

The Government's mean-spirited relentlessness is difficult to comprehend, in view of the equities of the case. From the Government's point of view, what is at stake is nothing more than giving Yesil a hearing, an opportunity to say "I deserve another chance," an opportunity to present evidence to an Immigration Judge who will fairly examine the circumstances and decide whether Yesil is in fact deserving of a second chance. The Government has not identified any compelling public interest that would be undermined by giving Yesil this simple chance to be heard. On the other hand, from Yesil's point of view, much more is at stake. If he is not given an opportunity to be heard on his section 212(c) application, he will be exiled. He will be banished from what has become his country and home and he will be separated from his family and friends. He will be deported back to a country that he left some 18 years ago, when he was only 16 years old. And the efforts that he has made since he committed his crime in 1987--acknowledging his mistake, pleading guilty, cooperating with law enforcement authorities, risking his life to infiltrate a drug ring, providing leads to a number of arrests and the confiscation of drugs, establishing two legitimate businesses employing hundreds of people, and otherwise becoming a productive and positive member of society--will be swept aside, for no rational purpose and to no apparent end. The law, the facts, and the equities all point to one result: Motion denied.

One could speculate, in light of what we know about Judge Chin's background, that the language in Yesil reflects an understanding of the immigrant's plight, the severity of immigration law, and a distrust of government. Was Judge Chin's use of language triggered by his Asian American identity? One could argue that he simply felt outraged by the way the Government handled the Yesil case. It would not be implausible, however, to attribute Judge Chin's awareness of the inequities involved in that case to his own exposure to the immigration process as an Asian American.

In Henry v. Ashcroft, Judge Chin granted a petitioner's writ of habeas corpus, vacating her removal order. Here, Judge Chin construed a clock-stopping provision in the Immigration and Nationality Act to have an improper retroactive effect and held that, as a result, the petitioner was eligible to apply for cancellation of removal. In this case, Judge Chin imported language from an opinion in a different immigration case authored by Judge Weinstein. It said:

The importance of immigration consequences of pleas in criminal cases cannot be underestimated. Deportation to a country where a legal permanent resident of the United States has not lived since
childhood; or where the immigrant has no family or means of support; or where he or she would be permanently separated from a spouse, children and other loved ones, is surely a consequence of serious proportions that any immigrant would want to consider in entering a plea.  

Judge Chin's decision to incorporate this language into his opinion suggests his awareness of the harsh realities of deportation, an awareness that can be attributed to his own experience as an Asian American immigrant.  

*110 Along with Judge Chin, Judge Takasugi has also provided some compelling implicit narratives in the area of immigration law. In Castillo-Felix v. INS, Judge Takasugi dissented from the majority's holding that an alien must have accumulated seven consecutive years of lawful unrelinquished domicile after their admission for permanent residence to establish eligibility for discretionary relief from deportation. He opened his dissent by declaring that the legislative history was “shrouded in confusion and uncertainty,” and thus he was not surprised that the court reached a conclusion contrary to what other courts have held. But, he declared, “I... am persuaded by the humanitarian aspects and the fact that Congress considered and rejected harsher language.” He continued by quoting Lok v. INS, a Second Circuit case that considered the same issue and reached a contrary conclusion. The Court in Lok v. INS described deportation as “a sanction which in severity surpasses all but the most Draconian criminal penalties. It is the recognition of the devastating impact which is the genesis of discretionary forms of relief enacted by Congress, including § 212(c).”

Judge Takasugi's description of deportation stands in stark contrast with Fong Yue Ting v. United States, which holds that deportation is not punishment by couching its harshness in euphemistic terms. In that case, the Court said:

The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend."

These two characterizations of deportation clearly differ. Judge Takasugi sees deportation as a severe sanction surpassing “all but the most Draconian criminal penalties,” while the Fong Yue Ting Court would not even recognize deportation as punishment. Knowing Judge Takasugi's background and his first-hand experience with the Japanese Internment, one could reasonably speculate that the empathy he demonstrates in his opinion concerning deportation stems from his experience of being completely uprooted with his family from their home and forced to live in an internment camp.

In a similar vein, Judge Takasugi's blistering dissent in Lee v. INS again demonstrates compassion for the immigrant. In Lee, the Ninth Circuit affirmed the Board of Immigration Appeals holding that Dong Hyung Lee, a native Korean, could not obtain adjustment of status because he did not establish “extreme hardship,” despite having lived in the United States for seven years and having a United States citizen son. In his dissent, Judge Takasugi wrote:

Petitioner's present circumstances cannot be divorced from the history of his efforts to attain his current status. Ten years of labor advancing himself from a wandering minstrel to a successful independent proprietor will perish instantaneously upon his deportation. To say that these circumstances, coupled with the separation from his three year old son, do not reach the threshold of extreme hardship is to blind oneself to the reality of human aspiration and to take refuge in verbal illusions.
The language in these opinions reveals an understanding and empathy for the immigrant absent in other immigration cases. It also provides a powerful voice counteracting the rhetoric from older immigration cases, such as Fong Yue Ting, where the judges tended to describe deportation as nothing more than a mere inconvenience to the immigrant. Whether one can attribute this difference to the judges' Asian American identity remains speculative. However, given their personal backgrounds, such speculation has some foundation on which to rest. Of course, this article only examined a small sample of cases from two Asian American judges. Given this small sample size, it is hard to find conclusively that Asian American identity affects judicial interpretation. Thus, in many ways, this mode of analysis falls into the same trap as the statistical mode. Without a larger sample size, and without providing a comparative analysis with what non-Asian American judges have done in similar cases, one cannot offer a definitive conclusion. At the same time, the background stories provide some contextual evidence that Asian Americans may have more sympathy for immigrants because of their exposure to racism and xenophobia.

C. Critique of the Narrative Methodology

There are shortcomings with the narrative method of analyzing judicial decision-making. The first deficiency is that, like statistical studies, I have not arrived at any definitive conclusions about the extent to which identity affects judicial decision-making. Empirical analyses of case outcomes have the force and support of statistics, making their refutation problematic. Furthermore, narrative analysis is subject to criticisms of selective reinforcement. In other words, rather than documenting all the available evidence, as a statistical analysis would do, the narrative approach that I have taken can be manipulated to support a certain claim.

In spite of these criticisms, this type of approach provides a more granular analysis and may provide the only alternative to the all-or-nothing deficiency found in empirical tests. Here, the external constraints of the facts of individual cases and the law can be accounted for while also identifying evidence that a judge's identity may affect his or her judicial decision-making.

Ultimately, the narrative approach attempts to cover ground that statistical analysis, by its nature, cannot. It would be more comprehensive, and perhaps better, to combine the two different approaches, but that task is beyond the scope of this article. As previously stated in the explicit narrative section, the mere fact that a judge claims to be skeptical of government would not be significant unless quantitative results supported those claims. At the same time, a judge may be skeptical of government, but the results may not reflect these tendencies because he or she still cannot overcome external constraints, such as the facts of the case and the law. This suggests that even a joint study may not prove satisfying because of the inherent flaws associated with statistical studies. Recognizing these flaws, the narrative methodology, nevertheless, provides certain insight that statistical studies cannot. It looks at the means rather than just the ends. Sometimes, the means, or the way that a judge reaches a certain result, sheds more light on the judge's mindset than the end itself. Those familiar with judicial opinions recognize that a concurring opinion can act as a dissent in spite of the judge's agreement with the final judgment. Thus, there is value in dissecting the language, word choice, and tone of judicial opinions that cannot be gained through statistical documentation of case outcomes alone.

Having analyzed the narratives of certain Asian American judges, we now move on to discuss whether the influence of identity on judicial decision-making conflicts with the judge's twin goals of objectivity and fairness.

D. Objectivity and Ethical Considerations

Regardless of whether the narratives have provided enough evidence to support the claim that a judge's Asian American identity informs his or her analysis of the law, we are still left with questions concerning objectivity and ethics. If Asian
American background does affect judicial decision-making, then does this influence present problems of objectivity and fairness?

The standard discourse argues that an ideal judge is objective and unbiased.101 The judge should not take into consideration anything other than the facts and the law of the case. Otherwise, the decision would not be based purely on the “merits.” If race or identity somehow influences or colors one's analysis of the law, then it may appear that the judge strayed from his role as an objective arbitrator. However, implicit in this standard discourse is the assumption that there is one universal objective viewpoint.102 In Professor Robert Chang's seminal article calling for more Asian American legal scholarship based on critical race theory and narrative, he makes a convincing argument that in mainstream academic legal discourse, “[t]oo often, the individual used as the model for the universal is a man, and more specifically, a white man.”103 The same may be said of our judicial system. When people argue for completely objective judges, they often presume the existence of a universal and objective standpoint from which to view the facts and the law of the case. This standpoint is often that of a white male.104

*114 To be sure, I do not argue that the judicial system should discard the idea of objectivity for a post-structural system that would render decisions based on the party with the most persuasive narrative.105 Rather, I contend that even when identity does inform a judge's analysis of the law, he or she does not depart from objectivity because a monolithic judiciary which adjudicates cases from one alleged universal viewpoint is vulnerable to blind spots. This argument is premised on “standpoint epistemology,” which is a theory that maintains that objectivity exists. Diverse and numerous perspectives and viewpoints help shed light on blind spots, making the achievement of objectivity possible.106 This theory aligns with the assertion that “interaction of diverse viewpoints best achieves impartiality.”107 In short, when a judge's identity informs his or her analysis of the law, objectivity is ultimately promoted because, traditionally, the standard of objectivity has come primarily from the standpoint of a white male. The additional perspectives brought by Asian American judges and their identity account for blind spots that may otherwise have existed in our judicial system.

III. Diversity on the Bench

Thus far, we have looked at biographies of certain Asian American judges, along with their narratives. These analyses have produced evidence that supports the conclusion that the Asian American identity, which consists primarily of the unified experience of racism and xenophobia, has some effect on the judge's analysis of the law. Some judges have explicitly stated that their Asian American identities affect their analyses, while in other instances, language in their opinions suggests the same. Statistical evidence alone, however, has not supported these claims.108 Should advocates still push for more Asian American judges, even if their identity has no statistical effect on their decision-making?

This section aims to engage in a discussion about diversity on the bench.109 Many people have advocated for a diverse judiciary.110 Yet, *115 what benefits does a diverse judiciary create and to whom do they accrue? In an attempt to illustrate the possible benefits of having more Asian American judges, this part of the article is divided into two sections. The first section will discuss the perception of fairness. The perception of fairness may be defined as the public's belief in a judiciary that treats everyone equally. Even if an Asian American judge's identity does not impact his or her judicial decision-making, his or her presence may advance the perception of fairness. The second section will delve into “substantive fairness.” This is short-hand for a judiciary that provides equal treatment for all of its litigants by ensuring that everyone has equal access to full due process. “Substantive fairness” requires informed decision-making and judges that thoughtfully and knowledgeably delve into the facts, the law, and the context surrounding both the facts and the law, when deciding cases. While racial diversity supports the perception of fairness, it cannot help produce more informed decision-making unless the premise that identity impacts analysis is established.
A. Perception of Fairness

Advocates for a racially diverse judiciary argue that such diversity ensures that the public perceives the system as fair. As Justice Ming Chin has said, A major source of the perception of bias is the lack of diversity among those who play key roles in the justice system. The report acknowledges that diversity is a particularly important issue because the legal system depends on the public's trust in it. A perceived lack of diversity leads to a lack of confidence in the system.

Numerous committees formed to study the relationship of race and the judicial system consistently state the same conclusion: that racial diversity helps promote trust in the system. These committees have reasoned that the visible presence or absence of racial and ethnic minorities among court appointments vitally affects the perception of access by minorities to the federal courts. It also has an impact on the federal courts themselves by influencing the racial and ethnic identity of the voices that are heard in federal courtrooms.

The value of the perception of fairness is not merely cosmetic. If an Asian American distrusts the judicial system, then the individual may decline to bring a lawsuit if, for example, the person faces discrimination by his employer. When this occurs, injustice occurs not just to the individual, but to society as a whole. In order to help eradicate employment discrimination, individuals who face discrimination must play their part by raising their voices. If these individuals perceive the judicial system as failing to provide minorities with a fair shake, then they will often choose not to speak. Thus, the harm flows to multiple parties: first, to the judicial system, which is perceived as unjust; second, to the individual who has experienced discrimination; and third, to society, because discrimination persists without regard to the existence of discrimination laws.

In order to gain the perception of fairness, advocates must seek more racial diversity on the bench. Regardless of whether the Asian American judge's identity informs his or her analysis of the law, an Asian American who sees other Asian Americans serving as judges will perceive the system as more just. “A diverse judiciary signals the public acknowledgment of historically excluded communities and sends an invaluable message of inclusion.” Thus, even gains in the “perception of fairness” would be by no means a pyrrhic victory. Perception itself can serve as a catalyst to substantive justice.

B. Substantive Fairness

Substantive fairness entails informed and just decision-making. Substantive fairness provides for more satisfactory judicial procedures, which allows for both equal treatment of all litigants and more thoughtful outcomes. While racial diversity alone can give the perception of fairness, discerning whether diversity provides for better-informed decision-making requires a showing that identity informs a judge's analysis of the law. If one's racial identity does not inform one's analysis of the law, as the empirical studies seem to indicate, then implementing a racially diverse judiciary may not provide benefits aside from the perception of fairness.

While the investigation into the narratives and biographies of Asian American judges does not conclusively prove that identity affects judicial analysis, anecdotal evidence suggests that a judge's identity or race does impact his or her interpretation of the law. Assuming identity affects judicial analysis, how does a diverse judiciary provide for more substantively fair decisions? First, having a more racially diverse group encourages richer debate and more thoughtful reflection. Judge Harry Edwards noted that:
It is inevitable that judges' different professional and life experiences have some bearing on how they confront various problems that come before them. And in 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 collegiality and 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 and richer evolution of the law. 119

The recent movement for more diverse corporate boards takes its cue from the very idea that better decision-making results from more diverse viewpoints. 120 As Professor Lynne Dallas has written, “[t]he movement to have diversity on corporate boards is intended to sensitize the corporation to the interests of employees and consumers in an increasingly diverse, global society.” 121 In many ways, the people of this nation are comparable to the shareholders of a corporation. As corporations have become international, a need has grown for a more diverse board of directors to both represent their needs and to make decisions that further the interests of all the shareholders, rather than just a select few. The same might be said of our judiciary. The diversity of this nation's population requires a judiciary sensitized and aware of every individual's needs, including those of minorities. 122 Having a more diverse judiciary can develop a greater sensitivity to those needs.

*118 The court in Grutter v. Bollinger reasoned that a racially diverse group of individuals fosters more robust debate and greater perspective, and held that racial diversity on university campuses was a compelling state interest. 123 In an opinion written by Justice O'Connor, the Court pointed to expert studies and reports, which showed that “student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’” 124 Moreover, the Court stated that “[t]hese benefits are substantial . . . the Law School's admissions policy promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’” 125

The rationale for racial diversity in the classroom aptly applies to the judicial context as well. Judge Chen provides a concrete example of how diversity on the bench would promote better decision-making via cross-racial/cultural understanding:

At trial and in evidentiary hearings, judges have to assess the credibility of witnesses. A witness' testimony may seem more credible if it is consistent with the judge's knowledge or experience, and, conversely, less credible if it remains outside the judge's experience. For example, it is commonly assumed within the legal profession that if a witness will not look you in the eye, he or she is untrustworthy. But such an assumption may be blind to cultural differences. In some cultures, meeting the eyes of another is a sign of disrespect under certain circumstances. Averting eye contact in some cultures may thus be a sign of respect rather than untruthfulness. Diversity among those who must make these types of evaluations can significantly reduce occasions of cross-cultural misunderstanding. 126

The example provided by Judge Chen reveals how small culture gaps can make a huge difference in the outcome of a case. A small detail, such as eye contact, might mean the difference between believing and disbelieving the witness. In the context of immigration hearings, it could mean the difference between an individual being granted asylum or being deported. Because of the deference that our judicial system provides to the credibility determinations of immigration
judges, a judicial finding that concludes that a witness is not credible would be extremely difficult to reverse. If an Asian American judge's identity informs his or her analysis of the law, then that judge may apply his or her knowledge that in certain Asian cultures, avoiding eye contact signals respect, rather than dishonesty. This would result in a much more informed and substantively fair decision.

The authority that a judge wields in being able to dramatically alter the lives of individuals underscores the importance of having a diverse group of judges that can shed light on blind spots and cover cultural gaps. This conclusion does not detract from the many wonderful judges who are not minorities. It simply recognizes that regardless of how open-minded certain judges are, they cannot always compensate for lack of experience through that open-mindedness. Given the dreadful history they share of being burdened by racist and xenophobic legal decisions, the Asian American community must push for more representation in the judiciary.

**Conclusion**

Thus far, we only have inconclusive evidence that identity affects judicial analysis. The statistical studies and qualitative analyses have not led to definitive answers. As a result, proof that placing additional Asian American judges on the bench will provide us with more informed judicial decision-making remains elusive. However, having a racially diverse bench can present the perception of fairness, which on its own, seems to provide substantial benefits. Aside from the substantive benefits, the mere presence of diversity may be enough to change the course of history. If diversity on the bench encourages substantive benefits such as better procedures, a more complete process, and fairer outcomes, then advocates should argue for a more diverse judiciary.

At a gathering of Japanese-American judges who experienced the internment, Judge Tashima offered the following: “If the five of us [Japanese-American judges] had been sitting as public officials in 1942, it's hard to conceive that we would have been forcibly removed from the state of California.” Judge Tashima's statement provides perhaps the best summary of the various elements of this article. As a group historically shunned as outsiders, Asian Americans have often remained powerless to fight against the racist laws imposed upon them. Having more Asian Americans serving as judges provides not just a means to ensure that the legislature never passes similar legislation, but also helps eradicate the vestiges of discrimination. Diversity ensures that the law no longer serves as the symbol of “exclusion,” but that of “empowerment.”

Footnotes

2. The dictionary definition of “objective” means “without bias or prejudice; disinterested.” Black's Law Dictionary 491 (2d pocket ed. 2001). Within “objectivity,” I would include “faithfulness or fidelity to the law.”
3. According to Sherrilyn Ifill, most empirical studies that have been performed “focus on case outcomes, not the process of judicial decision-making itself.” Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*,...
57 Wash. & Lee L. Rev. 405, 453 (2000). Thus, when I refer to empirical studies in this article, I am mostly using it as a synonym for statistical studies that chart case outcomes, as opposed to the qualitative analysis that I am seeking to undertake.

See Gregory C. Sisk et al., Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Decision Making, 73 N.Y.U. L. Rev. 1377, 1387 (1998) (finding that empirical studies of behavioral theory of judicial decision-making “have been largely disappointing, leading many researchers to question whether the theory remains viable”). The authors define the “behavioral theory of judicial decision-making” as a theory which “states that social background or personal attributes of judges shape personal and policy values that directly influence judicial decisions.” Id. In other words, the behavioral theory posits that a judge's personal background and experiences will directly influence the way he or she decides cases.


See, e.g., Leadership Conference on Civil Rights Educ. Fund, Turning Right: Judicial Selection and the Politics of Power (2004), available at http://www.civilrights.org/publications/reports/judges/judges_report.pdf (report documenting President George W. Bush's judicial selections and advocating for a judiciary that is more supportive of civil rights). Civil rights groups often do not directly advocate for a more diverse bench. Rather, they often support a more diverse bench as a means of promoting civil rights. See id. at 22 (“As President Bush pursues the confirmation of radical conservatives to the bench, he hardens a more extreme brand of conservative thought and outcome by ensuring less diversity on the bench.”).

See Ifill, supra note 3.


See Keith Aoki, Critical Legal Studies, Asian Americans in U.S. Law & Culture, Neil Gotanda, and Me, 4 Asian L.J. 19, 34-35 (1997) [hereinafter Aoki, Neil Gotanda and Me] (describing Neil Gotanda's speech in one of Professor Aoki's classes, and how Professor Gotanda spoke about the paradox of the “Asian American” category). Professor Gotanda pointed to examples showing how the category exists on some levels, but not on others. Id.


See Aoki, Neil Gotanda and Me, supra note 11, at 19 n.1 (citing Lisa Lowe for the proposition that when constructing the Asian American identity, we “suppress[ ] differences--of national origin, generation, gender, sexuality, class,” and that this presents a risk of supporting racist constructions of “Asians as a homogenous group”).

See, e.g., Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 81 Cal. L. Rev. 1241, 1245-46 n.7 (1993) (stating that the term “Asian American” may be limiting, but it can also serve as a unifying identity based on common experiences of Asian Americans); Mari Matsuda, Keynote Address at the
annual Asian Law Caucus dinner (March 2000), in Planet Asian America, 8 Asian L.J. 169 (2001) (speech about the common experience of racism that unites different groups and generations of Asian Americans).


Matsuda, supra note 14, at 184 n.61.

Id. at 184.


See, e.g., People v. Hall, 4 Cal. 399, 404-05 (1854) (reversing the murder conviction of a white individual because of a California evidentiary rule that barred testimony from a Chinese person, and further describing the Chinese as “a distinct people ... bringing with them their prejudices and national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation”).

Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), repealed by Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600 (prohibiting immigration of Chinese laborers for ten years and stating in the preamble of the legislation that “in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof”).

See Fong Yue Ting v. United States, 149 U.S. 698 (1893) (holding that a law requiring that the testimony of a credible white witness to establish the Chinese laborer's residency did not violate due process, and resulting in the deportation of a Chinese laborer); Nishimura Ekuu v. United States, 142 U.S. 651 (1892) (refusing the entry of a Japanese woman after the Commissioner of Immigration in California determined that she was a public charge and holding that the denial of judicial review of that determination was constitutional); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889) (holding that as a sovereign nation, the U.S. government has the inherent power to exclude whomever it chooses, including Chinese laborers, and that this power of exclusion cannot be restrained).

Chae Chan Ping, 130 U.S. at 595.

See Ozawa v. United States, 260 U.S. 178 (1922) (holding that a Japanese person who had lived in the U.S. continuously for twenty years could not naturalize to become a citizen because he was not a “free white person”).

Congress removed the restrictions against naturalization at different times, depending on the Asian group. See The Chinese Repealer, 57 Stat. 600 (1943) (for Chinese); The Filipino and Indian Naturalization Act, 60 Stat. 416 (1946) (for Asian Indians and Filipinos); The Immigration and Nationality Act, 66 Stat. 163 (1952) (for Japanese and Koreans).

See Keith Aoki, No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment, 40 B.C. L. Rev. 37 (1998) [hereinafter Aoki, Right to Own] (recounting the “Alien Land Laws,” which prohibited aliens who were ineligible for citizenship, specifically Asians, from owning title to land).

See National Asian American Pacific Legal Consortium, 2002 Audit of Violence Against Asian Pacific Americans: Tenth Annual Report, Remembering a ten-year retrospective (2002), available at http://www.advancingequality.org/files/2002_Audit.pdf (documenting in extensive detail the violence and hate crimes that continue to haunt Asian Americans. The executive summary states that there were 275 reported incidents of hate crimes against Asian Americans. Although this was a decrease from the 507 reported incidents in 2001 and the 392 incidents reported in 2000, there is evidence of underreporting. Id. at 2. A notable example involves a 2002 case in Lake Tahoe, Nevada, where a man named Stephen J.
Kinney physically attacked a group of three Chinese families outside of Harrah's Casino. Id. at 14. The man reportedly shouted: “This is America, you fucking Chinks. Do you want some of me?” Id. After attacking the Chinese families, he was restrained by a white security guard, at which point he told the guard: “Hey man, I can respect you. You're an American. Not like these fucking spics and slant-eyes who are just here to take our money.” Id.; see also Pat K. Chew, Asian Americans: The “Reticent” Minority and Their Paradoxes, 36 Wm. & Mary L. Rev. 1 (1994) (documenting the history of discrimination against Asian Americans and debunking the myth that current discrimination against Asian Americans is either minimal or nonexistent); Gabriel J. Chin et al., Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action, 4 Asian Pac. Am. L.J. 129 (1996) (arguing for Asian Americans to support affirmative action by providing a plethora of examples of current discrimination against Asian Americans).

27 See, e.g., Frank H. Wu, Yellow: Race in America Beyond Black and White 79-80 (2002) (writing that when he answers the question: “Where are you from?” by stating that he grew up in Detroit, the individual asking the question will inevitably follow up with the question: “No, where are you really from?”).


29 Id. (Judge Tashima has since become a senior judge.).

30 Judge Denny Chin of the Southern District of New York.


32 See Kosareff, supra note 10.

33 See Ho, supra note 28.


35 Jason Hoppin, Hard Lessons, Recorder, July 23, 2002, at 4; see also Aoki, Right to Own, supra note 25 (detailing the Alien Land Laws).


37 Id.

38 Id.


40 Id.

41 Id.

42 Id. Judge Chin has surmised that his grandfather entered the country through phony documents, due to the fact that the Chinese Exclusion Act was still on the books. However, there is no definitive proof of this.

43 Id.

44 The scarcity of Asian American state judges closely mirrors that of the federal judiciary. In California, Asian Americans make up about 9 percent of the population, but only 2.9 percent of municipal court judges and 2.3 percent of superior court judges. See Ming W. Chin, Fairness or Bias?: A Symposium on Racial and Ethnic Composition and Attitudes in the Judiciary, 4 Asian L.J. 181, 185 (1997) (taking his statistics from the Commission on the Future of the California Courts, Justice In the Balance: 2020, at 20 (1993)). To give even more context to those statistics, Asian Americans make up 6 percent of the California bar. This means that Asian Americans on the California judiciary are underrepresented in comparison to their population, as well

45 Chin, supra note 44, at 182.

46 Id.

47 I am not purporting here that all Asian American judges have had experiences where they have been treated as outsiders or foreigners. I am merely positing that Asian American judges, as a whole, have not been insulated from racist and xenophobic experiences. As a result, some of those judges share the Asian American identity of being racialized and marginalized.

48 See supra notes 3-4 and accompanying text for additional explanation on the behavioral model.

49 Sisk et al., supra note 4. For a comprehensive list of the various empirical studies that have been performed linking judicial decision-making with sociological background characteristics, see id. at 1385-92 nn.24-54.

50 Id. Note, however, that researchers testing the behavioral model have had some limited success. For example, some studies have found that political party affiliation is a significant predictor of judicial voting in cases that are ideologically divisive. Id. at 1388; see, e.g., Cass R. Sunstein et al., Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation, 90 Va. L. Rev. 301 (2004) (concluding that political party affiliation has an affect on judicial voting for ideologically-charged issues and that the effect is magnified when the other two sitting judges are also of the same political party).

51 Sisk et al., supra note 4, at 1387.

52 Examples of other sociological background characteristics may include political party identification, age, place of birth, place where the judge was raised, socioeconomic background, educational background (private v. public schools, religious v. non-religious schools, prestigious v. non-prestigious schools), and religion.

53 Even if empirical studies use econometric analysis to isolate the effect of an individual characteristic, I would maintain that it is still difficult to quantify the influence of that particular characteristic because of external constraints.

54 In addition to those faults, an empirical analysis relying primarily on statistics would likely prove to be statistically insignificant in this case study due to the small sample size of Asian American judges.

55 This includes looking at how the judge perceives the relevant facts, how the judge construes the law, whether the judge believes the litigants were given a fair process in the lower courts, and whether the judge has looked at the potential impact of the decision. One might believe that the last factor is highly controversial, as judges have often been accused of being “results-oriented” for considering the potential impact of the decision. This accusation usually means that a judge has already decided one way or another and is manipulating the facts and the law to support the result. Here, however, I do not believe that a judge who considers the potential impact of the decision is being “results-oriented.” Rather, judges have often considered the potential impact of a decision as a critical, if not decisive, factor in their decision-making. See, e.g., Blakely v. Washington, 542 U.S. 296, 314 (2004) (O'Connor, J., dissenting) (arguing that the Court's holding that a petitioner's sentence violated the Sixth Amendment trial by jury, because the facts enhancing the sentence were neither found by the jury nor admitted, would result in “disastrous” practical consequences).

56 See supra note 22 and accompanying text.

57 In my search for explicit narratives, I looked for speeches and writings from various Asian American judges and how their ethnicity may have affected their judicial decision-making. Because of the dearth of Asian American judges, I did not stumble upon too many writings in this area.


59 See Ex parte Endo, 323 U.S. 283 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943); see also Jerry Kang, Denying Prejudice: Internment, Redress, and Denial, 51 UCLA L. Rev. 933 (2004) (a comprehensive and notable treatment of the Japanese Internment cases, including an analysis of the United States strategy in
litigating these cases, which Professor Kang calls “segmentation”). The analysis also talks about the significance of the coram nobis cases, which followed years later. Id.


61 Id. at 3-4.

62 542 U.S. 466 (2004) (holding that U.S. federal courts have jurisdiction to hear habeas corpus claims of aliens held in Guantanamo Bay, Cuba).

63 542 U.S. 507 (2004) (holding that Congress authorized the President to detain a U.S. citizen as an enemy combatant but that due process requires that the enemy combatant be given a meaningful review process for the detention).

64 Tashima, supra note 60, at 6-12. Judge Tashima's speech criticized the Bush Administration's policies in the War on Terror, and cited Hamdi v. Rumsfeld and Rasul v. Bush as support for this view. Id. Thus, one could probably infer that he would have ruled the same way as the majority, and allowed for a due process hearing for the detainees.

65 Cf. David Cole, Enemy Aliens 100-04 (2003) (stating that we may have learned from the mistakes of the Japanese Internment and thus, we have not had mass internment of Arabs and Muslims post-9/11).

66 David Margolick, Japanese-American Judges Reflect on Internment, N.Y. Times, May 19, 1995, at A27 (In another gathering where Japanese American judges discussed the internment, Judge Tashima, while still a district court judge said “I'm still keenly aware that the Government can make mistakes, and probably more conscious than I otherwise would have been of the persecution of minorities.”).

67 Chen, supra note 44, at 137-38.


70 Id.

71 I do not assert that Judge Tashima disfavors government. Rather, based on his past experiences, Judge Tashima has stated that he is not as inclined to be blindly deferential to government as other judges might be in a time of war. In other words, he is more willing to be skeptical of the government's claims. See Tashima, supra note 60, at 2.

72 Because I did not undertake a statistical analysis of Judge Tashima's opinions, I cannot state for certain whether his record demonstrates that he rules against the government more than the average judge.

73 See Sisk et al., supra note 4.

74 Id. at 1456.

75 One might argue that the facts serve as more of a constraint at the higher appellate levels because appellate courts are, for the most part, extremely deferential to trial courts on their findings of fact. See, e.g., Amadeo v. Zant, 486 U.S. 214, 223 (1988) (“It is well settled ... that a federal appellate court may set aside a trial court's findings of fact only if they are 'clearly erroneous,' and that it must give 'due regard ... to the opportunity of the trial court to judge of the credibility of the witnesses.'”). Conversely, the higher appellate levels are likely to be less constrained by the law because there are less interpretations of the law that bind them.

76 See supra Part I.A.

77 This is often the case because petitions seeking asylum require that the individual show either (1) that his “life or freedom would be threatened” on account of one of the factors listed by the INS, or (2) “that he is unable or unwilling to return to his
home country ‘because of persecution or a well-founded fear of persecution’ in the country to which he would be returned.”

INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987). Thus, adjudication of these types of cases will involve the life stories of the petitioners. In addition, other immigration cases involving adjustment of status and deportation will also consider the hardship that the individual might face if deported. Thus, these cases will also invariably include the life stories of the individuals.

See supra notes 40-44 and accompanying text.


Id. at 374.

Id. The government argued that even if Judge Chin denied their motion for reconsideration, it would proceed to deport Yesil on other grounds which it had not raised. In effect, the government was issuing an ultimatum to the court, saying that either the court could grant the motion for reconsideration, or it would deport Yesil regardless of how the court ruled. Id.

Id. at 384.


Id. at 696.


One might argue that if immigration opinions generally contain sympathetic language demonstrating an awareness of the severity of deportation, then analyzing the language of these opinions has little value. In addition, the fact that a non-Asian judge employed similar rhetoric may undermine the claim that Judge Chin's Asian American identity informs his analysis of immigration law. In response to both arguments, I would offer that it is still useful to look at the language of these opinions because the sympathetic prose itself has value. Simply because other judges have used similar language does not undercut the fact that recognition of the harshness of our nation's immigration law is a step towards a judge understanding the consequences and implications of his or her decision. Moreover, the fact that other judges have a similar understanding of the harshness of immigration cases does not suggest that Judge Chin's Asian American background did not influence his analysis of the law.

601 F.2d 459 (9th Cir. 1979).

Id. at 468.

Id.

Id. (emphasis added).

548 F.2d 37 (2d Cir. 1977).

Castillo-Felix, 601 F.2d at 468 (quoting Lok, 548 F.2d at 39).

Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

Id.

Castillo-Felix, 601 F.2d at 468 (quoting Lok, 548 F.2d at 39).

550 F.2d 554 (9th Cir. 1977). In both this case and in Castillo-Felix, Judge Takasugi was sitting as an appellate judge.
See, e.g., Zadvydas v. Underdown, 185 F.3d 279, 290 (5th Cir. 1999). A resident alien sought habeas relief, arguing that because he was stateless and there was no possibility of his deportation to another country, his continued detention by the INS following the issuance of his deportation order violated his due process rights. Id. The 5th Circuit held that the continued detention of the resident alien did not violate his due process rights because there were reasonable procedures that existed for his parole as well as the periodic review of his detention, and because the possibilities of attaining citizenship in Lithuania, Germany, or Russia had not been exhausted. In holding this, the court cited to Supreme Court cases for the proposition that “deportation itself is not punishment.” Id. at 296. The court also stated that the presence of aliens like the petitioner “in this country is thus a continuing violation of the immigration laws, and if the preferred method of ending this violation is unavailable [deportation], detention [indefinite and ongoing] may be an acceptable alternative mechanism to achieve the ultimate goal.” Id. at 297.

See, e.g., Aharon Barak, The Supreme Court, 2001 Term--Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 Harv. L. Rev. 16, 55 (2002) (The President of the Supreme Court of Israel stating that “[t]he judge must realize his or her role in a democracy impartially and objectively.”); Robert W. Bennett, Objectivity in Constitutional Law, 132 U. Pa. L. Rev. 445, 478 (1984) (“Judicial objectivity is symbolic of the judicial role.”); Beverley McLachlin, The Supreme Court and the Public Interest, 64 Sask. L. Rev. 309, 315-16 (2001) (statement of author, the Chief Justice of Canada) (“The most important practice that assists judges in their primary task of resolving disputes impartially and fairly is the practice of conscious objectivity.”) (emphasis added). “Judging is a special professional pursuit whereby the judge removes herself from the matrix and emotion surrounding the issue or the case and looks at it objectively.” Id.

See, e.g., andre douglas pond cummings, “Lions and Tigers and Bears, Oh My” or “Redskins and Braves and Indians, Oh Why”: Ruminations on McBride v. Utah State Tax Commission, Political Correctness, and the Reasonable Person, 36 Cal. W. L. Rev. 11, 26-28 (1999) (providing the example that judges are often asked to decide cases using a negligence standard that is based on the “objective, reasonable person standard,” and that this standard “perpetuate[s] the viewpoints and biases of white male judges applying that standard”); cf. Cathrine Wells Hantzis, Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr., 82 Nw. U. L. Rev. 541, 590 (1988) (describing Justice Holmes’ rejection of an objective legal order because of “[h]is assertion that there is no viewpoint that can claim precedence on the basis of its presumed objectivity [and that this] gives rise to the question of whose viewpoint is to prevail”). Hence, Justice Holmes repudiated the prevailing view at the time that there was one universal objective viewpoint.

Chang, supra note 14, at 1279.


Chang, supra note 14, at 1279. Chang argues for Asian American legal scholarship in a post-structuralist world that eschews the rational/empirical mode. Id.

Jerry Kang, Visiting Professor of Law, Lecture at Georgetown University Law Center (Oct. 27, 2004); see also Chang, supra note 14, at 1280 (describing standpoint epistemology from a feminist perspective and arguing that the objective, rational empirical mode leaves out the Asian American voice). But see Tracy E. Higgins, “By Reason of Their Sex”: Feminist Theory, Postmodernism, and Justice, 80 Cornell L. Rev. 1536, 1588 n.239 (citing Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829 (1990) as a scholar who repudiates standpoint epistemology).

Ifill, supra note 3, at 458.

See, e.g., Sisk et al., supra note 4.

The term “diversity” means different things to different people. Even within the context of which we speak, namely judicial appointments, the word “diverse” represents a whole host of ideas. Diversity, for example, might refer to: (1) political ideology, see, e.g., Cathy Young, Liberal Bias in the Ivory Tower, Boston Globe, Apr. 11, 2005, at A15 (arguing that there is a need for more intellectual diversity on university campuses and that universities should hire more ideologically conservative professors);
(2) race, see, e.g., Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding University of Michigan Law School's affirmative action program and citing benefits of racial diversity in the classroom); Goodwin Liu, The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions, 100 Mich. L. Rev. 1045 (2002) (debunking certain myths regarding affirmative action); (3) socioeconomic class, see, e.g., Roslyn Arlin Mickelson, Achieving Equality of Educational Opportunity in the Wake of Judicial Retreat from Race Sensitive Remedies: Lessons from North Carolina, 52 Am. U. L. Rev. 1477 (2003) (pushing for strategies advancing socioeconomic diversity as a means of achieving equal educational opportunity); or (4) gender, Report of the Missouri Task Force on Gender and Justice, 58 Mo. L. Rev. 485, 710 (1993) (recommending more gender diversity in the judiciary). To clarify, I am speaking about racial diversity when the term “diversity” is used here. This is, of course, not to say that I would not promote diversity in the other respective areas. However, that is beyond the scope of this article.

See supra note 5.


Chin, supra note 44, at 187.

See, e.g., Special Report: Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias, 64 Geo. Wash. L. Rev. 189 (1996) (reporting findings of a D.C. Circuit Task Force that was assembled to study race and ethnicity within the D.C. Circuit judicial system).

Id. at 195.

Cf. William J. Brennan, Jr., Address of Justice William J. Brennan, Jr., 6 U. Haw. L. Rev. 1, 2 (1984) (In the face of criticism that the nation was becoming too litigious, Justice Brennan spoke of the importance of keeping the courthouse doors open because “the judicial pursuit of equality is in my view properly regarded to be the noblest mission of judges.”). He went on to state the progress that has been made: “For nearly two hundred years of this nation's history, few Blacks, Hispanics, or Asian-Americans ... would have thought of taking their claims to court; they knew they would receive no hearing there.” Id. at 5. It would be unfortunate if having made this progress, minorities lost trust in the court system because of the perception that courts themselves lacked the ability to fairly administer the law.

Chen, supra note 44, at 135.

See supra Parts II.A-II.B.

The discussion that follows assumes that racial identity has an effect on the analysis of the law.

Harry T. Edwards, Race and the Judiciary, 20 Yale L. & Pol'y Rev. 325, 329 (2002); see also Sandra Day O'Connor, A Tribute to Justice Thurgood Marshall, 44 Stan. L. Rev. 1217 (1992) (Justice O'Connor has written about how Justice Thurgood Marshall's stories provided a different perspective from which to see the world.).

See Lynne L. Dallas, Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: The New Managerialism and Diversity on Corporate Boards of Directors, 76 Tul. L. Rev. 1363, 1365-66 (2002) (concluding that “on balance, diverse perspectives on corporate boards of directors are likely to improve the quality of board decision-making” and stating that “the presence of women, minorities, and nonnationals on boards may increase the diversity of perspectives on corporate boards”). I thank Professor Jerry Kang for suggesting the connection between diversity on corporate boards and in the judiciary.

Id. at 1384-85.

The comparison with diverse corporate boards may not work with respect to trial court judges, who are engaged in individual decision-making and thus, do not have the opportunity to discuss cases with other judges. Nevertheless, having a more diverse group of district court judges would still be beneficial because of the perception of fairness. See supra Part III.A.


Id. at 330.

Id.
Chen, supra note 44, at 135-36.

See, e.g., Sylla v. INS, 388 F.3d 924, 926 (6th Cir. 2004) (adverse credibility finding by immigration judge afforded substantial deference).

It might be the case that there are many judges out there who are extremely competent, but this still does not negate the fact that having a more diverse judiciary would enhance their abilities as well.

See supra notes 8-10, 28-32 and accompanying text. Aside from Asian Americans, only about 10 percent of the federal judiciary consists of African Americans and about 7 percent consists of Hispanics. Alliance for Justice, supra note 8.

Margolick, supra note 66.

See supra note 1 and accompanying text.

Jonathan K. Stubbs
A DEMOGRAPHIC HISTORY OF FEDERAL JUDICIAL APPOINTMENTS BY SEX AND RACE: 1789–2016

Jonathan K. Stubbs*

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INTRODUCTION

In 2009, President Barack Obama jettisoned a 220-year-old precedent by
nominating then-Second Circuit Judge Sonia Sotomayor to become a Justice of the
Supreme Court of the United States. No president of the United States had ever
nominated a woman of color for the highest Court.

Not long after Judge Sotomayor’s nomination, a controversy erupted
involving a speech that she had delivered nearly a decade earlier. Speaking to a
distinguished group of legal professionals, law students, and others, Judge
Sotomayor asked a simple question: “what [would it] mean to have more women and
people of color on the bench?”

Being a conscientious jurist, Judge Sotomayor voiced concern about how her own background might impact her impartiality:

I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in
checking my assumptions, presumptions and perspectives and
ensuring that to the extent that my limited abilities and capabilities

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permit me, that I reevaluate them and change as circumstances and cases before me requires.  

In fact, Judge Sotomayor forthrightly acknowledged her human frailty: “I can and do aspire to be greater than the sum total of my experiences but I accept my limitations.” In essence, she showed sensitivity to seeing things not just from her own viewpoint, but also from a variety of perspectives.

During her speech, however, Judge Sotomayor also stated, “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.” This “wise Latina” remark ignited a vigorous discussion—some might say a firestorm—that obscured the central question of Judge Sotomayor’s speech—namely, what the effects would be of having a federal bench that included more women and people of color. She later apologized for making the “wise Latina” statement, a comment many people found offensive.

The controversy surrounding the confirmation of Justice Sotomayor to the Court also shed light upon a misperception that the American federal judiciary boasts more diversity than it actually does. In their insightful article “The Realism of Race in Judicial Decision Making,” Professors Pat Chew and Robert Kelley commented upon this phenomenon: “Given all the media attention dedicated to race, affirmative action, post-racial politics, and political correctness, it would not be surprising that people believe that the judiciary is diverse and that minorities fare well in the judicial system. The reality is more complicated and less heartening.”

With this background, a synopsis of this Article’s three main foci and a few practical illustrations follow. First, this Article assesses America’s progress in its 226-year odyssey to desegregate the originally all-White and all-male federal bench. Thus, the primary diversity focal points involve sex and “race.” Race is placed in quotes because, as Dr. Craig Venter, a chief researcher for the Human Genome Project has reportedly said, “No serious scholar in this field now considers race to be a scientific concept. . . . It doesn’t matter what the genetic trait is, there are few if any of them that are related to what society calls race or ethnicity.” Nevertheless, for 

2. Id. at 93.
3. Id. at 93.
4. See Theresa M. Beiner, White Male Heterosexist Norms in the Confirmation Process, 32 WOMEN’S RTS. L. REP. 105, 136 (2011) (“This narrative reveals Justice Sotomayor to be a humble and thoughtful judge who is willing to check her perspectives when appropriate and engage them when it might be helpful in understanding the perspective of litigants.”); Martha Minow, Justice Engendered, 101 HARV. L. REV. 10 (1987) (discussing the importance of recognizing differences in viewpoint, and the impact of such differences on judicial decision making). In other words, her approach to judging exemplified a sincere effort to treat others the way that she would wish to be treated. Accord Jonathan K. Stubbs, Perceptual Prisms and Racial Realism, 45 MERCER L. REV. 773 (1994).
5. Sotomayor, supra note 1, at 92.
6. Since women come in all complexions, one might more precisely frame the issue as follows: what will be the impact upon the federal judiciary of women of all colors and the impact of men of color.
8. Data derived from the Human Genome project strongly suggests that all human beings originated in Africa, and that about twenty-five thousand years ago, a relatively small number of Africans emigrated to Europe and established the earliest European societies. See David L. Chandler, Heredity Study Eyes European Origins, THE BOSTON GLOBE, May 10, 2001, at A22; Eric S. Lander et al., Linkage
discussion purposes, this Article accepts the current nomenclature that suggests that humans comprise more than one race and that groups like African Americans, Whites, Latin(o/as), Asian Americans, and American Indians constitute discrete racial categories.

For reasons discussed in more detail later, this Article concludes that it may take decades before the federal judiciary more fully reflects the diversity of the American population. Consider a brief example: over the past seven years, President Obama has appointed more women to the federal bench than did any of his predecessors. Nevertheless, even if all of Obama’s successors follow his example and appoint women to the federal bench at the same rate as he did, the United States will never have a judiciary that mirrors the general population because, while most Americans are female, a majority—58 percent—of Obama’s appointees have been male. This unrepresentative 58-42 split is all the more remarkable as the best ratio that any president has achieved.

This Article’s second concern revolves around Justice Sotomayor’s query regarding the practical effect of a more diverse federal bench. Relevant scholarship suggests that a more demographically inclusive federal judiciary will better administer justice. This Article preliminarily agrees that a more diverse judiciary is likely to have a positive, substantive impact. Nevertheless, a caveat is in order: we must avoid stereotyping on the basis of secondary demographic characteristics, like a judge’s sex or racial identity.

To support a more definitive conclusion regarding Sotomayor’s question as to the impact of judicial diversity, this Article concludes that we need more data and analysis of specific judicial decisions. Such analysis should involve discussion of (a) process concerns; and (b) qualitative considerations. Process concerns include how one evaluates the impact of a more inclusive community of judges. Qualitative considerations encompass the criteria for assessing the merit of particular judicial decisions. In addition, a more comprehensive analysis should cover a sufficient time period, so that observers may detect and analyze any relevant decision-making patterns. Such information could help to affirm or disaffirm the Article’s preliminary conclusion that a more diverse judiciary will result in better judicial decision making.

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Disequilibrium in the Human Genome, 411 NATURE 199 (2001); Emma Moss, Europeans Traced to Tiny Group of Africans, THE RECORD, Apr. 21, 2001, at A1; Europeans Descended From Africans – Study a Few Hundred Just 25,000 Years Ago All It Took, Research Finds, Charlestown Gazette, Apr. 21, 2001, at A2. See also Li Jin et al., African Origins of Modern Humans in East Asia: A Tale of 12,000 Y Chromosomes, 292 SCIENCE 1151 (2001) (suggesting that between thirty and ninety thousand years ago, Africans traveled to East Asia and began civilizations there).


10. See FED. JUDICIAL CTR., http://www.fjc.gov (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; then select “Court Type,” “Nominating President,” “Gender” and click “CONTINUE”; next, select “All Courts of General Jurisdiction,” “Barack Obama,” “Male” and click “Search”) (last visited Mar. 16, 2016). Comparing these results to a similar query including both genders yields a result of 58 percent.

11. See, e.g., Susan Haire, Barry Edwards & David Hughes, Presidents and Courts of Appeals: The Voting Behavior of Obama’s Appointees, 97 JUDICATURE 137 (2013) (arguing that the impact of a president’s appellate judicial appointments depends upon factors including the existing composition of appellate courts, the number of judges a president appoints, and the ideological perspectives of the judges). The author of this Article is also researching the impact of President Obama’s judicial appointments on Fourteenth Amendment civil liberties jurisprudence in federal appellate decisions. See Jonathan K. Stubbs, Obama Appeals Judges’ Impact on Fourteenth Civil Liberties
Finally, this Article preempts some common concerns and objections to the diversification of previously segregated institutions like the federal courts. Such concerns include, for example, the assertion that we cannot find enough qualified women and men of color to serve as judges.

Another short illustration: since Ronald Reagan’s presidency, American presidents have appointed, and the Senate has confirmed, 1,567 judges to federal courts of general jurisdiction.12 In other words, American presidents have averaged forty-six appointments per year. One might ask: in 2016, what are the advantages

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12. See FED. JUDICIAL CTR., http://www.fjc.gov (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; then select “Court Type” and “Nominating President” and click “CONTINUE”; next, select “All Courts of General Jurisdiction” and then select each individual president since Ronald Reagan to yield an aggregate of 1,567 judges) (last visited Mar. 13, 2016). Scholars have focused on various aspects of the federal judicial selection process including evaluation of how race and gender have influenced judicial nominations and confirmations. See generally LEE E. EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS (2005) (a thoughtful evaluation of the ideological and political influences on federal judicial selection, particularly in modern times); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997) (analyzing the complex context in which federal judges especially, in the lower courts, were selected between 1933 and 1989) [hereinafter Goldman, PICKING FEDERAL JUDGES]; Theresa M. Beiner, How the Contentious Nature of Federal Judicial Appointments Affects “Diversity” On the Bench, 39 U. CHIC. L. REV. 849, 866–70 (2005) (discussing the difficulty which judges, especially those labeled as liberals, have in ascending the federal bench); Sheldon Goldman et al., Obama’s First Term Judiciary: Picking Judges in the Minefield of Obstructionism, 97 JUDICATURE 7 (2013) (carefully documenting and analyzing President Obama judicial selections and the Senate response(s) including in-depth discussion of the role of diversity in Obama’s appointments); Sheldon Goldman et al., The Confirmation Drama Continues, 94 JUDICATURE 262 (2011) (comprehensively assessing the first two years of the federal judicial selection process of the Obama administration) [hereinafter The Confirmation Drama]; Sheldon Goldman et al., W. Bush’s Judicial Legacy: Mission Accomplished, 92 JUDICATURE 258 (2009) (evaluating President George W. Bush’s success in elevating jurists sharing his political philosophy to the federal bench); Maeva Marcus, Federal Judicial Selection: The First Decade, 39 U. CHIC. L. REV. 797 (2005) (outlining federal judicial appointments, especially to the United States Supreme Court, during the administrations of George Washington and John Adams); Carl Tobias, Postpartisan Federal Judicial Selection, 51 B.C. L. REV. 769, 785–95 (2010) (critically evaluating reasons for delays in the judicial nomination and confirmation process as well as suggesting approaches to alleviate the situation); Carl Tobias, Diversity and the Federal Bench, 87 WASH. L. REV. 1197, 1199–1207 (2010) (describing and evaluating the judicial selection process of the Obama administration as well as the Senate’s response); Russell Wheeler, The Changing Face of the Federal Judiciary, BROOKINGS INST. (2009), http://www.brookings.edu/~media/research/files/papers/2009/8/federal-judiciary%20wheeler/08_federal_judiciary_wheeler.pdf (outlining demographic changes in judicial appointments from the Eisenhower presidency through that of George W. Bush and including data regarding judges’ gender, race and ethnicity as well as professional background).


and disadvantages of seeking to appoint women to at least half of judicial vacancies? Stated differently, at any given time, are there twenty-three women in the United States who are competent, available, and willing to serve as federal judges? For those with open minds, concrete facts can help answer these questions.

This Article proceeds as follows. Part I briefly surveys the constitutional and statutory foundation for the creation of the federal judiciary. It also furnishes data, by sex and race, of the appointment of federal judges to courts of general jurisdiction during each presidential administration from September 24, 1789, through April 11, 2016. Thus, Part I describes the pace of diversification of the federal judiciary. While data regarding other attributes of judges (such as their socioeconomic status) exist, extensive analysis of such characteristics falls outside the parameters of this preliminary analysis. Nonetheless, the Article notes in passing that, since 1989, during each presidential administration, the majority of federal judicial appointees have had a net worth in excess of a half million dollars.

Part II discusses recent scholarship regarding the potential and actual impact on judicial decision making of a more diverse federal judiciary. To facilitate practical policy recommendations, Part II presents contemporary demographic data about sitting federal judges. This Article closes with observations on issues for further discussion and research.

I. HISTORICAL OVERVIEW

This Part provides an overview of several relevant provisions of the United States Constitution and the congressional statute that created the first federal courts. It then outlines federal judicial appointments to courts of general jurisdiction that American presidents made and that the United States Senate confirmed between September 24, 1789, and March 10, 2016. The appointments are grouped by sex and race. This piece specifically scrutinizes the Supreme Court, the federal courts of appeal, and the federal district courts. In addition, the Article’s data include judges of the former United States circuit courts (abolished in 1911 and succeeded by the courts of appeal). Thus, this Article focuses primarily on federal courts of general jurisdiction.

A. Relevant Constitutional Provisions

Articles II and III of the Constitution furnish the primary constitutional bases for the establishment and staffing of the federal judiciary. Article III, Section 1 of the Constitution states, “The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Article II of the Constitution confers upon the President the power to appoint “with the Advice and Consent of the Senate . . . Judges of the supreme Court and all other Officers of the United States, whose Appointments are

13. See e.g., Goldman et al., Obama’s First Term Judiciary, supra note 12, at 40–43; Goldman et al., W. Bush’s Judicial Legacy: Mission Accomplished, supra note 12, at 274–75.
14. Goldman et al., Obama’s First Term Judiciary, supra note 12, at 40–43. In fact, since the advent of the administration of President George H. W. Bush, approximately two-thirds of each president’s federal appellate judges have had a net worth exceeding a half million dollars. Id. at 43.
not herein otherwise provided for, and which shall be established by Law."  

In addition, the President may “fill up all vacancies that may happen during the Recess of the Senate, by granting Commissions.” Thus, the President can make a “recess” judicial appointment that expires at the end of the next session of Congress. The President can (re)nominate such an appointee when the Senate reconvenes, and the Senate has authority to confirm or reject the nomination. These constitutional provisions furnish the process by which federal judges ascend to the bench: the President nominates, and the Senate confirms (or rejects) the nomination.

**B. The Judiciary Act of 1789**

The First Congress passed the Judiciary Act of 1789 and established the Supreme Court, circuit courts, and district courts. The Supreme Court initially consisted of one Chief Justice and five associate justices. Congress expanded the size of the Court to seven justices in 1807, to nine justices in 1837, and to ten justices in 1863. In 1866, Congress reduced the authorized size of the Court to seven justices and provided that no vacancies could be filled until the Court reached the authorized limit. In 1869, Congress authorized the Court’s current size of nine justices.

As to lower courts, Congress created circuit courts under the Judiciary Act of 1789. Two Supreme Court justices and a district court judge constituted the first circuit courts. In this respect, the first circuit courts differed from modern federal appellate courts, whose primary jurisdictional responsibilities focus upon adjudication of appeals from federal trial courts.

Furthermore, the Act gave the circuit courts jurisdiction over trials involving persons from different states, the majority of federal criminal cases, and civil suits in which the United States was the moving party. The circuit courts convened in each of the thirteen judicial districts that Congress initially created.

In 1793, Congress reduced the number of Supreme Court justices required

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17. U.S. Const. art II, § 2, cl. 2.
18. U.S. Const. art. II, § 2, cl. 3.
19. Id. See also NLRB v. Canning, 134 S. Ct. 2550, 2557, 2567 (2014) (holding that the President’s appointment of three members to the National Labor Relations Board during a three day intra session Senate recess was unconstitutional). Among other things, in light of the actual practice of American Presidents and the Senate over an extended period, the time of the Senate’s recess was presumptively too short for the appointments to be effective. Id.
27. Id. at § 4, 1 Stat. at 74–75 (1789).
29. Id.
30. Id. at 78.
to sit with a district judge to constitute a circuit court from two judges to one.\textsuperscript{31} Nearly a century later, in 1891, Congress created the U.S. circuit courts of appeals and assigned existing circuit judges to the new courts.\textsuperscript{32} The U.S. circuit courts continued to try specified types of cases until the Judicial Code of 1911 abolished the circuit courts, leaving the U.S. Circuit Courts of Appeals as the primary intermediate appellate court in the federal judicial system.\textsuperscript{33}

In 1982, Congress created a new court, the United States Court of Appeals for the Federal Circuit.\textsuperscript{34} The Federal Circuit court has jurisdiction over claims formerly heard by the U.S. Court of Customs and Patent Appeals and the U.S. Court of Claims.\textsuperscript{35}

With regards to federal trial courts, in 1789 Congress created thirteen district courts. The original federal district courts consisted of one trial court in each of the eleven states that had ratified the Constitution, plus one court each for Maine and Kentucky.\textsuperscript{36} Congress limited the courts’ jurisdiction to cases arising within the district,\textsuperscript{37} and required the district judge to live within the district over which the judge presided.\textsuperscript{38} As a practical matter, early federal district judges spent much of their time hearing admiralty cases and sitting on circuit court panels within their districts.\textsuperscript{39}

With this brief overview of salient features of the American federal judicial system, we now turn to the demographic profile by sex and race of federal judges throughout the history of the judiciary, beginning with President George Washington’s appointments.

\textsuperscript{31} In 1801, the outgoing Federalist Congress created six federal circuit courts and completely relieved the Supreme Court justices of the responsibilities of sitting on circuit courts. See Act of Feb. 13, 1801, ch. 4, § 6, 2 Stat. 89, 90 (1801); BIOGRAPHICAL DIRECTORY, supra note 20, at 21. While the new circuit courts reduced the workload of the Supreme Court, the supporters of the incoming Jefferson administration perceived those courts as an attempt by the (defeated) Federalist Party to maintain power within the judiciary. See 2 SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE: 1789–RECONSTRUCTION 81–82 (1972) [hereinafter 2 OXFORD HISTORY]; BIOGRAPHICAL DIRECTORY, supra note 20, at 3. Less than two years after the Federalist Congress passed legislation creating the new courts, a new Jeffersonian Republican Congress abolished those courts by repealing the legislation. See Judiciary Act of 1802, ch. 8, § 1, 2 Stat. 132 (1802). Supreme Court justices resumed a number of their previous duties regarding “circuit riding.” See 2 OXFORD HISTORY, supra at 82; see also, BIOGRAPHICAL DIRECTORY, supra note 20, at 3.

\textsuperscript{32} Act of Mar. 3, 1891, ch. 517, § 2, 26 Stat. 826 (1891); BIOGRAPHICAL DIRECTORY, supra note 20, at 57.

\textsuperscript{33} Judiciary Code of 1911, ch. 13, § 289, 36 Stat. 1087, 1167 (1911); BIOGRAPHICAL DIRECTORY, supra note 20, at 21.


\textsuperscript{35} Federal Courts Improvement Act of 1982; BIOGRAPHICAL DIRECTORY, supra note 20, at 57.

\textsuperscript{36} Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73, 78 (1789). In 1789, Maine and Kentucky were still considered part of Massachusetts and Virginia, respectively.

\textsuperscript{37} Id. at § 9.

\textsuperscript{38} Id. at § 3.

\textsuperscript{39} BIOGRAPHICAL DIRECTORY, supra note 20, at 105.
C. Presidential Appointments of Federal Judges

1. George Washington to Herbert Hoover

On April 6, 1789, Congress counted the ballots of the Electoral College and confirmed that George Washington had received all sixty-nine ballots cast for President of the United States. On April 30, 1789, Washington took office. Less than six months after he assumed office, Congress passed the Judiciary Act of 1789. On that same day, Washington nominated five people to the Supreme Court and eight people to the federal district court. The Senate confirmed all five Supreme Court nominees two days later. On September 25, 1789, Washington nominated two more individuals for federal district judgeships for a total of ten district court nominees. On September 26, 1789—two days after Washington had nominated the first eight federal district judges—the Senate confirmed all ten of Washington’s federal district court appointees. The expeditious nomination and confirmation process suggests that both had been planned in anticipation of the first congressional legislation establishing the federal court system. By the end of his presidency, all thirty-eight of Washington’s nominees to the federal judiciary were—surprisingly—White men.

Washington’s appointments to federal courts of general jurisdiction established a national precedent. Over a span of 145 years, the thirty presidents who succeeded Washington made the same sex and race selections. As shown in the table below, the first thirty-one American presidents appointed, and the Senate confirmed, 857 White men to federal courts of general jurisdiction.

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41. 2 Oxford History, supra note 31, at 33.
42. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1801).
44. Francis Hopkinson (District of Pennsylvania), John Sullivan (District of New Hampshire), John Lowell (District of Massachusetts), David Sewell (District of Maine), Richard Law (District of Connecticut), Gunning Bedford, Jr. (District of Delaware), Nathaniel Pendleton (District of Georgia), and Harry Innes (District of Kentucky). See FED. JUDICIAL CTR., http://www.fjc.gov (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Nominating President” and click “CONTINUE”; then select “George Washington” and click “Search”) (last visited Mar. 29, 2015).
45. See id.
46. David Brearley (District of New Jersey) and James Duane (District of New York). See id.
47. See id.
48. FED. JUDICIAL CTR., http://www.fjc.gov (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type” and “Nominating President” and click “CONTINUE”; then select “All Courts of General Jurisdiction” and “George Washington” and click “Search”) (last visited Mar. 15, 2016).
49. Data compiled from the Federal Judicial Center. See id. (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type” and “Nominating President” and click “CONTINUE”; then select “All Courts of General Jurisdiction” and each president individually; then add the judges for each individual president to
Table 1: Federal Judicial Appointments, George Washington–Herbert Hoover

<table>
<thead>
<tr>
<th>President</th>
<th>Number of Confirmed Appointments</th>
</tr>
</thead>
<tbody>
<tr>
<td>George Washington</td>
<td>38</td>
</tr>
<tr>
<td>John Adams</td>
<td>22</td>
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<tr>
<td>Thomas Jefferson</td>
<td>17</td>
</tr>
<tr>
<td>James Madison</td>
<td>13</td>
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<tr>
<td>James Monroe</td>
<td>22</td>
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<tr>
<td>John Quincy Adams</td>
<td>12</td>
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<tr>
<td>Andrew Jackson</td>
<td>23</td>
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<tr>
<td>Martin Van Buren</td>
<td>10</td>
</tr>
<tr>
<td>John Tyler</td>
<td>7</td>
</tr>
<tr>
<td>James Polk</td>
<td>10</td>
</tr>
<tr>
<td>Zachary Taylor</td>
<td>4</td>
</tr>
<tr>
<td>Millard Fillmore</td>
<td>5</td>
</tr>
<tr>
<td>Franklin Pierce</td>
<td>16</td>
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<tr>
<td>James Buchanan</td>
<td>8</td>
</tr>
<tr>
<td>Abraham Lincoln</td>
<td>32</td>
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<tr>
<td>Andrew Johnson</td>
<td>9</td>
</tr>
<tr>
<td>Ulysses Grant</td>
<td>46</td>
</tr>
<tr>
<td>Rutherford B. Hayes</td>
<td>22</td>
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<tr>
<td>James Garfield</td>
<td>5</td>
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<tr>
<td>Chester A. Arthur</td>
<td>21</td>
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<tr>
<td>Grover Cleveland</td>
<td>41</td>
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<tr>
<td>Benjamin Harrison</td>
<td>42</td>
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<tr>
<td>William McKinley</td>
<td>35</td>
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<tr>
<td>Theodore Roosevelt</td>
<td>74</td>
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<tr>
<td>William Taft</td>
<td>56</td>
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<tr>
<td>Woodrow Wilson</td>
<td>71</td>
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<tr>
<td>Warren Harding</td>
<td>52</td>
</tr>
<tr>
<td>Calvin Coolidge</td>
<td>81</td>
</tr>
<tr>
<td>Herbert Hoover</td>
<td>62</td>
</tr>
<tr>
<td><strong>Total Confirmed Appointments</strong></td>
<td><strong>857</strong></td>
</tr>
</tbody>
</table>

obtain the cumulative total (last visited Mar. 10, 2016).
2. The Initial Desegregation by Race and Sex of Federal Courts of General Jurisdiction: Franklin Roosevelt to Jimmy Carter

President Franklin Delano Roosevelt appointed the first woman to serve as a federal judge on a court of general jurisdiction. He also named the first man of color to the federal bench. In doing so, Roosevelt departed—albeit only slightly—from the exclusionary model of judicial appointments as set by his predecessors. At the beginning of his first term, Roosevelt nominated twelve White males to the bench. Following these dozen appointments, on March 6, 1934, President Roosevelt nominated Florence Ellinwood Allen to serve on the United States Court of Appeals for the Sixth Circuit. The Senate confirmed Allen on March 15, 1934, and she received her commission six days later. While Judge Allen became the first woman to receive a lifetime tenure on a federal court of general jurisdiction, she was not the first woman appointed to a federal court—President Coolidge had appointed Genevieve Rose Cline to a lifetime position on the U.S. Customs Court, a specialty court with a limited jurisdiction focused on disputes regarding imported goods and tariff classifications.

Along with breaching the barrier of gender, Roosevelt modestly challenged racial segregation in the federal judiciary. He appointed an African American Harvard Law School graduate, William H. Hastie, to a four-year term as a federal judge in the U.S. Virgin Islands. With his appointment, Judge Hastie became the first man of color to serve on the federal bench. Despite the court’s very limited statutory authority, Hastie’s appointment to a federal judgeship nevertheless represented an important symbol of progress. Practically speaking, however, Judge Hastie’s ascent to the bench had little impact on the federal judiciary. His court had little statutory power and was located in a place where cases with national implications were infrequently decided. Moreover, Judge Hastie served for only two years before accepting an appointment as dean of the Howard University School of Law.

As to courts of general jurisdiction, after nominating Judge Allen, Roosevelt followed the preexisting template. The next 171 judges, nominated by

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50. The judges that Roosevelt appointed were Robert Cook Bell, John Clyde Bowen, Sam Gilbert Bratton, James A. Donohoe, Louis FitzHenry, Francis Arthur Garrecht, William Harrison Holly, James Earl Major, Heartsill Ragon, Patrick Thomas Stone, Phillip Leo Sullivan, and Joseph William Woodrough. See id. (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; then select “Court Types” and “Nominating President” and click “CONTINUE”; next select “All Courts of General Jurisdiction” and “Franklin D. Roosevelt” and click “Search”) (last visited Apr. 1, 2015).
52. Goldman, Picking Federal Judges, supra note 12, at 51; see also Biographical Directory, supra note 20, at 300.
55. Gilbert Ware, Grace Under Pressure, 85–86 (1984); see also Goldman, Picking Federal Judges, supra note 12, at 55, 98 n.v.
56. Ware, supra note 55, at 93.
Roosevelt and confirmed by the Senate, were all White men.57

Harry S. Truman became president upon Roosevelt’s death in 1945. Truman appointed Irvin Mollison, an African American male, to a lifetime tenure on the United States Court of Customs in New York.58 Additionally, on October 21, 1949, President Truman gave William H. Hastie a recess appointment to serve as a judge on the United States Court of Appeals for the Third Circuit. In doing so, Truman shattered a 160-year-old barrier: Judge Hastie—who had earlier become the first man of color ever appointed to a federal court—also became the first person of color appointed to a lifetime position on a federal court of general jurisdiction.59 On January 5, 1950, Truman re-nominated Judge Hastie after Congress had reconvened. After extensive debate, the Senate confirmed Hastie’s appointment on July 19, 1950.60 The controversy surrounding Hastie’s appointment stemmed from several sources, including Hastie’s race and his reputation for his uncompromising work to desegregate American society. His activism caused him to be viewed by segregationists, like Senator James Eastland of Mississippi, and their sympathizers as “subversive.”61 Judge Hastie countered such arguments by stating, “He who will not use his office to fight for the ideals written into our basic law is false to his oath to support that law. He is the true subversive and deserves to be branded as such.”62

President Truman’s attempts to diversify the bench did not end with Hastie. On the same day that he appointed Hastie, Truman also appointed Burnita Shelton Matthews as a federal district judge for the District of Columbia.63 Upon Senate confirmation on April 4, 1950, Judge Matthews became the second woman elevated to the federal bench and the first to serve as a federal trial judge.

On October 13, 1960, President Dwight Eisenhower conferred a recess appointment upon Cyrus Niles Tavares for the federal trial court in Hawaii.64 According to Professor Goldman’s painstaking research, Judge Tavares became the first Asian American male to serve as a judge on a federal court of general jurisdiction.65 Eisenhower also appointed one African American, Scovel Richardson, to the U.S. Customs Court.66 Eisenhower was the last American president to appoint

57. FED. JUDICIAL CTR., http://www.fjc.gov (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; then select “Court Type” and “Nominating President” and click “CONTINUE”; next select “All Courts of General Jurisdiction” and “Franklin D. Roosevelt” and click “Search”)(last visited Apr. 1, 2015).
59. WARE, supra note 55, at 85–86. Franklin Roosevelt had earlier appointed Hastie and William E. Moore to the federal district court for the Virgin Islands, which had very limited jurisdiction and non-lifetime tenure (a ten year term). See GOLDMAN, PICKING FEDERAL JUDGES, supra note 12, at 98, n.v.
61. WARE, supra note 55, at 236.
62. Id. at 232.
65. GOLDMAN, PICKING FEDERAL JUDGES, supra note 12, at 196.
66. Id. at 144; see also Biographical Directory of Federal Judges—Scovel Richardson, FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nGetInfo?jid=3214&cid=999&ctype=na&instate=na (last
only males to federal courts of general jurisdiction during his tenure in office—Eisenhower made 165 federal judicial appointments, which the United States Senate confirmed, and all of them were men.67

President John Fitzgerald Kennedy was the first president to appoint more than two men of color to the federal bench. On March 24, 1961, slightly more than two months after assuming office, Kennedy nominated the first Latino68 candidate to the bench—Reynaldo Guerra Garza. The Senate confirmed him on April 13, 1961.69 President Kennedy then resubmitted Judge Tavares’s nomination, and the Senate confirmed him on September 21, 1961. President Kennedy was also the first president to appoint more than one African American to the bench—he appointed three.70 In addition, he appointed one White woman.71 Kennedy’s appointment of five persons of color and one woman represented a further (modest) break from the existing judicial demographic profile. Still, of Kennedy’s 125 judicial appointees, 124 were men; and of those 124 men, 119 were white.72 Kennedy appointed only one woman.73

Following Kennedy’s tragic assassination, Lyndon Johnson assumed the office of the President. President Johnson nominated, and the Senate confirmed, 167 judges.74 Nearly thirty-five years after Roosevelt ended gender segregation on federal courts of general jurisdiction by appointing Judge Allen—and twenty years after Truman shattered the color barrier by appointing Judge Hastie—Johnson

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67. FED. JUDICIAL CTR., http://www.fjc.gov (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; then select “Court Type” and “Nominating President” and click “CONTINUE”; next select “All Courts of General Jurisdiction” and “Dwight D. Eisenhower” and click “Search”) (last visited Mar. 16, 2016).
68. This article follows the Spanish-language convention, and it uses “Latino” to refer to males of Latin American ancestry and “Latina” to refer to women of Latin American descent.
69. Id. (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Nominating President” and “Race or Ethnicity” and click “CONTINUE”; then select “John F. Kennedy” and “Hispanic” and click “Search”) (last visited Apr. 5, 2015). See LOUISE ANN FISCH, ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE (1996).
70. The three African American Kennedy appointed were Thurgood Marshall, Wade Hampton McCree, Jr., and James Benton Parsons. FED. JUDICIAL CTR., http://www.fjc.gov (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; then select “Court Type,” “Nominating President,” “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction,” “Dwight D. Eisenhower,” “Male,” and “White” and click “Search”) (last visited Mar. 16, 2016). The Federal Judicial Center lists Judge Cyrus Nils Tavares as a White male. See id.
72. See FED. JUDICIAL CTR., http://www.fjc.gov (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” “Gender,” and “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction,” “Dwight D. Eisenhower,” “Males,” and “White” and click “Search”) (last visited Mar. 16, 2016). The Federal Judicial Center lists Judge Cyrus Nils Tavares as a White male. See id.
73. See id. (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” and “Gender” and click “CONTINUE”; then select “All Courts of General Jurisdiction,” “John F. Kennedy,” and “Female” and click “Search”) (last visited Mar. 16, 2016).
74. Id. (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type” and “Nominating President” and click “CONTINUE”; then select “All Courts of General Jurisdiction” and “Lyndon B. Johnson” and click “Search”) (last visited Mar. 16, 2016).
further widened the door of opportunity. Johnson nominated the first woman of color, Constance Baker Motley, to the federal bench on January 26, 1966, and the Senate confirmed her on August 30, 1966. In addition, on June 13, 1967, Johnson nominated Thurgood Marshall to the Supreme Court, and on August 30, 1967, the Senate confirmed him. With his confirmation, Marshall became the first African American to serve on the Supreme Court. Johnson diversified the bench more than any president before him—out of his 167 confirmed judicial appointments, 153 were White males, 8 were African American males, 3 were Latinos, 1 was an African American female, and 2 were White females.

With the advice and consent of the Senate, President Richard Nixon nominated 220 persons to the federal bench: 210 White males, 6 African American males, 2 Latinos, 1 Asian American male, and 1 White female. Nixon became the first American president to appoint an Asian American male to a federal appellate court—on April 7, 1971, Nixon appointed Herbert Young Cho Choy to a seat on the Ninth Circuit. Choy received Senate confirmation on April 21, 1971. Later that year, Nixon nominated a second Asian American male, Shiro Kashiwa, to the Court of Claims. Also known as “The People’s Court,” the Court of Claims had jurisdiction limited to adjudicating lawsuits for damages against the federal government. Originally, the court’s judges served limited terms, but they now have lifetime appointments to the Court of Claims’s successor court. The court was abolished in 1982, and Congress transferred most of its jurisdiction to the U.S. Court of Appeals for the Federal Circuit. Despite the limited jurisdiction of the court, Kashiwa’s nomination nevertheless represented an important step in making the bench more diverse.

Like all of his predecessors, Nixon conferred more than 90 percent of his judicial nominations upon White males. In addition, Nixon’s judicial nominations marked a retreat from the Johnson administration’s increased selection of women and men of color. For example, while Johnson appointed three women and eight African American males, Nixon appointed only one woman and six African Americans.

77. FED. JUDICIAL CTR., http://www.fjc.gov (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” “Gender,” and “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction” and “Lyndon B. Johnson” and click “Search”) (last visited Mar. 16, 2016).
78. Id. (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” “Gender,” and “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction” and “Richard Nixon” and click “Search”) (last visited Mar. 16, 2016).
82. Id. See also BIOGRAPHICAL DIRECTORY, supra note 20, at 299–300.
American males. No women of color were confirmed to the bench under Nixon.

President Gerald Ford ended the entrenched tradition of conferring more than 90 percent of nominations upon White males. In the Ford administration, for the first time in the history of the United States, White males comprised less than 90 percent of an American president’s judicial appointments. During Ford’s administration, 89 percent of judicial appointments were White males. Out of the sixty-two total confirmed judicial appointments, fifty-five were White males, three were African American males, two were Asian American males, one was Latino, and one was a White woman. Under the administrations of Nixon and Ford, only two of the 282 judges confirmed to the bench were women, and none were women of color.

As referenced above, from the administration of George Washington through that of Herbert Hoover, American presidents made 857 appointments to federal courts of general jurisdiction. None were women and none were men of color. From Franklin Roosevelt’s administration through that of Gerald Ford’s, American presidents made an additional 1,042 judicial appointments, eight of which were women. Notably, over a period spanning nearly two hundred years (1789–1976), only one in 1,895 appointees was a woman of color. And only thirty-three of the 1,895 appointments were persons of color: twenty-one were African American males, seven were Latinos, four were Asian American males, and one was an African American female.

President Jimmy Carter significantly broke with prior presidential appointment practices. President Carter’s administration became the first in which less than 90 percent of the confirmed federal judges were White. Of Carter’s 258 confirmed judges, 169 were White males (65.5 percent) and 32 were White females (12.4 percent). Slightly more than 20 percent of Carter’s judges were people of color: 30 African American males (11.6 percent), 15 Latinos (5.8 percent), 7 African American females (2.7 percent), and 3 Asian American males (1.1 percent).

In another significant departure from prior practice, Carter was the first president whose appointees were less than 98 percent male—Carter appointees were approximately 15 percent female. In fact, Carter was the first president to appoint more than three women to the federal bench. Carter appointed forty women: thirty-two White women, seven African American women, and one Latina.

In addition, President Carter made several other noteworthy distinctions. Carter increased the number of women of color on the federal bench from one to nine. Among the nine Carter appointees was Almaya L. Kearse, who, on June 21, 1979, received her commission as the first woman of color to hold a federal appellate judgeship. On May 14, 1980, Carter nominated Carmen Consuelo Cerezo to the federal district court in Puerto Rico. The Senate confirmed her nomination on June 26, 1980, making her the first Latina to serve on the federal bench.

Furthermore, President Carter nominated Frank Howell Seay to serve on the federal district court for the Eastern District of Oklahoma on September 28, 1979. The Senate confirmed the nomination on October 31, 1979, and Judge Seay became the first Native American to serve on the federal bench. Judge Seay is the only Native American male currently serving as a federal judge for a court of general jurisdiction.

Despite President Carter’s progress, President Ronald Reagan’s administration marked a dramatic return to the American tradition of appointing an overwhelming percentage of White persons—particularly White males—to the

89. Id. (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type” and “Nominating President” and click “CONTINUE”; then select “All Courts of General Jurisdiction” and “Jimmy Carter” and click “Search”) (last visited Mar. 16, 2016).

90. See id. (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President” and “Gender” and click “CONTINUE”; then select “All Courts of General Jurisdiction,” “Jimmy Carter” and “Female” and click “Search”) (last visited Mar. 16, 2016).


93. Id.
94. Id.

96. Id.
federal judiciary. Over 90 percent of Reagan’s judicial appointments were White. Under Reagan, 358 judges were confirmed: 308 were White males (86 percent), and 27 were White females (7.5 percent). In contrast, Reagan appointed only thirteen Latinos (3.6 percent), six African American males (1.6 percent), one African American female (0.3 percent), two Asian American males (0.54 percent), and one Latina (0.3 percent).  

Significantly, Reagan nominated Sandra Day O’Connor to be the first woman to serve on the Supreme Court. The United States Senate confirmed the historic nomination, and on September 22, 1981, Justice O’Connor received her commission. Nevertheless, like all of his predecessors, Reagan did not appoint any Asian American women or Native American women to the bench. In addition, more than 90 percent of Reagan’s appointees were men—Reagan appointed 329 men compared to 29 women. 

With the advice and consent of the Senate, President George H. W. Bush made 187 appointments to federal courts of general jurisdiction. Ninety percent of the Bush nominees were White: 137 males (73 percent) and 31 females (16.6 percent). Bush also nominated, and the Senate confirmed, nine African American males (4.8 percent), two African American females (1 percent), five Latinos (2.6 percent), and three Latinas (1.6 percent). Bush’s appointment of three Latinas was the largest number of such appointments until that time. Of Bush’s 187 judicial appointments, thirty-six were females. Like most of his predecessors, Bush did not appoint any Asian Americans or Native Americans to federal courts of general jurisdiction.

President William J. Clinton had 367 confirmed appointments to the federal judiciary. As with all of his predecessors, the majority of Clinton’s judicial appointees were White males—194 of 367 appointments, or 53 percent. Nevertheless, Clinton was the first president who appointed White males to less than
60 percent of federal judgeships.

President Clinton was also the first American president whose female judicial appointees exceeded 20 percent. Twenty-eight percent of Clinton’s judges were women: eighty-three White women (22.6 percent), fifteen African American women (4 percent), five Latinas (1.3 percent), and one Asian American woman (0.27 percent), totaling 104 women in all. During the Clinton administration, for the first time, an Asian American female ascended to the federal bench. On January 7, 1997, Clinton nominated Susan Oki Mollway as a federal district judge for the District of Hawaii; the Senate confirmed her on June 22, 1998.

President George W. Bush appointed 322 persons to the federal judiciary. Eighty-two percent of his appointees were White (264 out of 322), and nearly 10 percent were Latino or Latina (eighteen Latinos and twelve Latinas). Approximately 22 percent of Bush’s appointees were women: fifty White females (15.5 percent), eight African American females (2.5 percent), twelve Latinas (3.7 percent), and one Asian American female (0.3 percent). Bush appointed more Latinas to the bench than all of his predecessors combined. Bush also appointed sixteen African American males (5 percent) and three Asian American males (1 percent). However, he did not appoint any Native Americans to the bench.

President Barack Obama has established a pattern of making more demographically diverse appointments than any of his predecessors. As of April 11, 2016, Obama has appointed, and the Senate has confirmed, 316 persons to the federal bench. Of these, 118 are White males, 88 are White females, 34 are African American males, 26 are African American females, 9 are Asian American females, 11 are Asian American males, 13 are Latinas, and 23 are Latinos. In addition, on April 23, 2013, Derrick Kahala Watson became the first Pacific Islander to receive a commission as a federal judge of general jurisdiction. Obama also nominated, and on May 14, 2014, the Senate confirmed, Diane J. Humetewa, the first Native American woman to serve as judge of a federal court of general jurisdiction. Obama’s female judicial appointees comprise 42 percent of his appointments—a significantly higher percentage of women than any of his predecessors.

103. Id.
105. Id. (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” and “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction,” “George W. Bush” and “American Indian” and click “Search”) (last visited Mar. 16, 2016).
106. For an excellent analysis of President Obama’s efforts to diversify the federal judiciary see Goldman et al., Obama’s First Term Judiciary, supra note 12; Goldman et al., The Confirmation Drama, supra note 12; Tobias, Diversity and the Federal Bench, supra note 12; Carl Tobias, Appointing Asian American Judges in the Obama Administration (2010) (unpublished manuscript) (on file with author).
107. FED. JUDICIAL CTR., http://www.fjc.gov (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” and “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction,” “Barack Obama” and “Pacific Islander” and click “Search”) (last visited Mar. 4, 2016). Judge Watson presides over the trial court of the District of Hawaii.
109. FED. JUDICIAL CTR., http://www.fjc.gov (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court
In slightly more than five years, President Obama appointed more women than the total appointed by Ronald Reagan, George H. W. Bush, and George W. Bush in their combined twenty years in office. Obama has also elevated more Asian American women than all forty-three of his predecessors combined. Moreover, the total number of women of color confirmed to the bench during Obama’s first term was greater than the total of any of his predecessors. President Obama also appointed the first Asian American woman to the federal appellate bench, Judge Jacqueline Hong-Ngoc Nguyen, who ascended to the United States Court of Appeals for the Ninth Circuit on May 12, 2012. In addition, two of his Supreme Court appointees—Justice Sonia Sotomayor and Justice Elena Kagan—were women. As this piece was proceeding through its final edits, Obama nominated Merrick Garland, Chief Judge of the Court of Appeals for the District of Columbia Circuit, to fill the seat vacated upon the passing of Justice Antonin Scalia.

D. Data Summary

For the first 145 years of the American federal judiciary (1789–1934), all 869 confirmed judicial appointees to courts of general jurisdiction were White men. However, in 1934, President Franklin Roosevelt appointed, and the Senate confirmed, the first woman to a lifetime appointment on a federal court of general jurisdiction. Fifteen years later, President Harry Truman appointed the first person of color. From President George Washington through President Dwight Eisenhower (1789–1960), the demographic profile of the American federal judiciary, comprised of 1,337 confirmed judicial appointments, may be depicted as follows: 1,333 White males, two White females, one African American male, and one Asian American male.

Type,” “Nominating President,” and “Gender” and click “CONTINUE”; then select “All Courts of General Jurisdiction,” “Barack Obama” and “Female” and click “Search”) (last visited Mar. 10, 2016).

110. Id.

111. Id. (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” “Gender” and “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction,” “Barack Obama,” “Female,” and “American Asian” and click “Search” (last visited Mar. 4, 2016).


113. See supra tbl. 1. Eight hundred and fifty-seven judges were appointed to courts of general jurisdiction before Franklin Roosevelt assumed office. He appointed twelve judges to the federal bench before nominating Judge Allen. Eight hundred and fifty-seven judges appointed before Roosevelt, plus the twelve judges appointed by Roosevelt before Judge Allen’s nomination, equals eight hundred and sixty-nine.

114. FED. JUDICIAL CTR., http://www.fjc.gov (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type” and “Nominating President” and click “CONTINUE”; then select “All Courts of General Jurisdiction” and select each of the presidents from George Washington to Dwight D. Eisenhower) (last visited Mar. 17, 2016). See also Goldman, Picking Federal Judges, supra note 12, at 144.
For a more modern overview of judicial appointments, consider the following chart (Chart 1) of the past half-century (President Kennedy through President Obama).  

**Chart 1: Federal Judicial Demographic Profile: Kennedy–Obama**

(3/10/16)

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115. FED. JUDICIAL CTR., supra note 12. Chart 1 is based upon data derived from Federal Judicial Center. See http://www.fjc.gov/history/home.nsf (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type” and “Nominating President” and click “CONTINUE”; then select “All Courts of General Jurisdiction” and select each of the presidents from John F. Kennedy through Barack H. Obama) (last visited Mar. 13, 2016). Some jurists classified themselves in more than one racial or ethnic category.
The table which follows sets forth more detailed demographic information regarding the judicial appointments from President Kennedy’s administration through much of President Obama’s second term. (January 20, 1961–March 10, 2016)

Table 2: Judicial Appointments to Federal Courts of General Jurisdiction (John F. Kennedy–Barack H. Obama)

<table>
<thead>
<tr>
<th>Ethnicity</th>
<th>Kennedy</th>
<th>Johnson</th>
<th>Nixon</th>
<th>Ford</th>
<th>Carter</th>
<th>Reagan</th>
<th>GHW Bush</th>
<th>Clinton</th>
<th>GW Bush</th>
<th>Obama</th>
</tr>
</thead>
<tbody>
<tr>
<td>Af. Am. Males</td>
<td>3</td>
<td>8</td>
<td>6</td>
<td>3</td>
<td>30</td>
<td>6</td>
<td>9</td>
<td>46</td>
<td>15</td>
<td>34</td>
</tr>
<tr>
<td>Am. Ind. Males</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>As. Am. Males</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>0</td>
<td>4</td>
<td>3</td>
<td>11</td>
</tr>
<tr>
<td>Latinos</td>
<td>1</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>15</td>
<td>13</td>
<td>5</td>
<td>18</td>
<td>18</td>
<td>23</td>
</tr>
<tr>
<td>Pac. Is. Males</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>White Males</td>
<td>119</td>
<td>153</td>
<td>210</td>
<td>55</td>
<td>169</td>
<td>308</td>
<td>137</td>
<td>194</td>
<td>214</td>
<td>118</td>
</tr>
<tr>
<td>Af. Am. Females</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>7</td>
<td>1</td>
<td>2</td>
<td>15</td>
<td>8</td>
<td>26</td>
</tr>
<tr>
<td>Am. Ind. Females</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>As. Am. Females</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>9</td>
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<tr>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>5</td>
<td>12</td>
<td>13</td>
</tr>
<tr>
<td>Pac. Is. Females</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<td>0</td>
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<tr>
<td>White Females</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>32</td>
<td>27</td>
<td>31</td>
<td>83</td>
<td>50</td>
<td>88</td>
</tr>
</tbody>
</table>
Regarding Justice Sotomayor’s question as to the impact of a more inclusive judiciary, the presidential terms of George W. Bush and Barack H. Obama nearly coincide with the period following Sotomayor’s speech. During that time, when compared to the general population, presidential appointments to the judiciary have continued a disproportionate bias against women and in favor of men. The appointments over the past two administrations can be presented in this manner:

**Chart 2: Judicial Diversity Since Sotomayor’s Speech**

The majority of persons living in the United States are females. However, since Justice Sotomayor’s speech, approximately 68 percent of appointments have been male and 32 percent female. Overall, White males comprised the majority of appointees—52 percent.
II. THE MYTH AND SUBSTANCE OF FEDERAL JUDICIAL DIVERSITY

The data in the preceding pages show that men—and White men especially—have historically dominated and continue to dominate the federal judiciary. This section more closely scrutinizes Justice Sotomayor’s query as to what it will mean to have more women and people of color in the federal judiciary. The conclusions are preliminary because, as stated previously, much more in-depth empirical and qualitative research needs to be done to support broader claims. Nevertheless, for the reasons that follow, a well-founded basis exists for (cautious) optimism regarding the continuation of the diversification (that is, desegregation) of the federal courts, as well as the improvement of judicial decision making.

Because many members of the general public seem to have misperceptions regarding the extent to which the federal judiciary is diverse, we begin with those flawed perceptions.

A. Diversity Mythology

The federal judiciary has been segregated by sex and ethnicity for so long that when the Senate confirms a person of color or a woman to the bench, members of the general public find the event newsworthy. For instance, the recent elevation of Diane Humetewa to the federal bench broke the 225-year precedent of excluding Native American women from federal judicial service. Judge Humetewa’s elevation to the bench exemplifies that while the pace of change is modest, the media often broadly reports breaches of deep-rooted barriers. As Professors Chew and Kelley observed, perhaps such attention at least partially explains the widespread misimpression that the federal judiciary has more diversity than it does. Chew and Kelley stated, “[A]lthough more minority judges sit on the federal bench today than fifty years ago, providing evidence of progress within the last half century, it still is a long way from representing the faces of America.”

Furthermore, in an incisive article on gender equality, Professors Hannah Brenner and Renee Newman Knake stated that “[o]ne explanation for these misperceptions comes from a ‘tendency to overestimate the proportion of a minority group present in a given population;’ this phenomenon has been characterized as ‘visibility bias.’” Citing Professor Rosemary Hunter’s work on discrimination against women barristers in Australia, Professors Brenner and Knake offered the following specific example of such bias: “[O]ne solicitor estimated that between twenty to thirty percent of the barristers he selected in his work were female, when the actual figure was closer to ten percent, which resulted in solicitors believing they were giving women ample opportunities.”

In the United States, such misperceptions are not new. For example, a poll conducted during debates about immigration reform in the mid-1990s revealed a
striking example of visibility bias among White members of the general public:

Percentage of the United States population that White Americans think is Hispanic: 14.7.
Percentage that is Hispanic: 9.5.
Percentage that Whites think is Asian: 10.8.
Percentage that is Asian: 3.1.
Percentage that White Americans think is Black: 23.8.
Percentage that is Black: 11.8.
Percentage that Whites think is White: 49.9.
Percentage that is White: 74.121

Similar observations have been made regarding the status of racial minority groups like Asian Americans, who are perceived as “model minorities” and are perceived as being immune to racial discrimination.122

A more recent perceptive empirical study by Professors Craig and Richeson analyzed the racial attitudes of White Americans who were made aware that America is becoming a nation in which minorities will in the future become the majority. Even though minorities (or people of color) will not become the majority for another quarter-century, the idea of America becoming “majority-minority” evoked increased racially biased attitudes among White Americans participating in the study:

Researchers have argued and found that Whites’ racial hostility peaks in contexts in which racial minority groups make up between 40% and 60% of the population; that is, in situations in which the power or status of the racial groups may be relatively evenly matched and the threat against the current dominant group (i.e., Whites) is at its highest . . . Thus, the information about the 50% “majority minority” tipping point may be especially likely to evoke threat and subsequent racial bias. Consistent with this prior work, the present research offers compelling evidence that the impending so-called “majority-minority” U.S. population is construed by White Americans as a threat to their group’s position in society and increases their expression of racial bias on both automatically activated and self-report attitude measures.123

Craig and Richeson’s work illuminates how contemporary visibility bias


may underlie the common misperception that profound change is taking place regarding the diversity of judicial appointments. To the extent that some Whites feel insecure and threatened by increasing numbers of people of color in American society, the mere fact of appointment of a person of color to a previously segregated federal bench may evoke negative feelings that “they are taking over.” In fact such appointments are, overall, making slow, modest change.

For example, consider the following historical facts. Each of the first forty-three presidents appointed White males to the majority of federal judicial vacancies. President Obama has abandoned this 220-year precedent by appointing White males to 38 percent of judgeships. White males constitute approximately 34 percent of the general population.\(^{124}\) Notwithstanding that women of all races and men of color constitute 62 percent of Obama’s appointments, white males still comprise slightly more than 60 percent of sitting federal judges.\(^{125}\)

However, from the perspective of persons who subconsciously expect that White males will constitute the majority of any president’s judges, President Obama’s 38-percent figure may appear to be a significant departure from prior practice. In fact, before Obama’s administration, the accepted custom was that every president would (and each did) appoint White males to the majority of judgeships. In the minds of persons accustomed to this established pattern of behavior, a subconscious “tipping point” may exist.\(^{126}\) In other words, when persons of color exceed an implicit quota or percentage, some persons inevitably feel threatened.

An early example of such fear of a diverse judiciary is reflected in Commonwealth of Pennsylvania v. Local Union 542.\(^{127}\) In Local Union 542, twelve African American plaintiffs filed a race discrimination claim against the union. After Judge A. Leon Higginbotham, Jr., an African American, was assigned to try the case, the defendant union moved to have Judge Higginbotham recuse himself.\(^{128}\) Fearing racial prejudice against it, the union alleged that Judge Higginbotham was biased because he was (1) a Black judge adjudicating a case involving race discrimination; and (2) he was engaging in scholarship on race relations.\(^{129}\) As further evidence of racial bias, the union cited a speech that Judge Higginbotham had given before a predominantly African-American group of historians.

In an illuminating opinion, Judge Higginbotham denied the defendant’s recusal motion. Regarding his appearance before the group of historians, Judge Higginbotham stated:


\(^{125}\) See infra tbl. 4.

\(^{126}\) Craig & Richeson, supra note 123, at 258. See also Michael W. Giles, Everett F. Cataldo & Douglas S. Gatlin, White Flight and Percent Black: The Tipping Point Re-Examined, 56 Soc. Sci. QTR. 85 (1975) (evaluating the tipping point hypothesis: when a certain number of blacks are present, whites will leave). In the context of public school desegregation in selected Florida jurisdictions, the research indicated that if surrounding jurisdictions were desegregated or desegregating, white flight was diminished because whites who would flee the presence of people of color had fewer options. Giles et al., White Flight, supra at 91–92. To maintain desegregated public schools, the authors also recommended that the population of black public school students be kept below thirty percent. Id. at 92.


\(^{128}\) Id. at 156–57.

\(^{129}\) Id. at 157–58.

\(^{130}\) Id. at 168.
This organization was not a labor group, not an institute of management, not a political party, not the Black Panthers, not any entity which on or off the record has ever had a history antagonistic to those white Americans who believe in equal justice under the law. When compared with the meetings or conventions of labor unions, management associations, political parties or partisan activist groups, a meeting of historians is almost by definition as calm and dispassionate a gathering as one can find on the national convention scene. More often than not, historians suggest tentative hypotheses about social issues by analyzing the ebb and flow of the tides of history. Generally, they do not volunteer precise answers to those specific fact-finding aspects of the litigation process which are partially dependent on issues of the credibility of preferred evidence.\textsuperscript{131}

In addition, Judge Higginbotham countered the arguments that the substance of his speech was objectionable:\textsuperscript{132}

Was it inappropriate for me to suggest that my audience pursue remedies for inequality in forums other than the Supreme Court? How are the interests of defendants disparaged or hurt when a group of historians or blacks are told they cannot rely on the Supreme Court alone in their pursuit of equality? Such an argument would, if anything, aid defendants rather than prejudice them for it recognizes the limited powers of the judiciary as an instrumentality to eradicate some aspects of racial injustice.\textsuperscript{133}

In summarizing the possible claims for the recusal motions, Judge Higginbotham asked, “\textit{[S]ince the motions are presumably filed in good faith, what other rationale could explain why defendants so vehemently assert their claim that I be disqualified in the instant case?}”\textsuperscript{134} Judge Higginbotham surmised that:

Perhaps, among some whites, there is an inherent disquietude when they see that occasionally blacks are adjudicating matters pertaining to race relations, and perhaps that anxiety can be eliminated only by having no black judges sit on such matters or, if one cannot escape a black judge, then by having the latter bend over backwards to the detriment of black litigants and black citizens and thus assure that brand of “impartiality” which some whites think they deserve.\textsuperscript{135}

Judge Higginbotham’s observations are consistent with visibility bias. More judges who are women and people of color might precipitate in some persons an

\footnotesize{\textsuperscript{131}. \textit{Id.} at 166 (footnote omitted).}  
\footnotesize{\textsuperscript{132}. \textit{Id.} at 169–75.}  
\footnotesize{\textsuperscript{133}. \textit{Id.} at 174.}  
\footnotesize{\textsuperscript{134}. \textit{Id.} at 177.}  
\footnotesize{\textsuperscript{135}. \textit{Id.; Craig & Richeson, supra note 123, at 750 (evaluating scholarship that “conceptualizes group status threats as threats to the political and/or economic power of the ingroup (i.e., realistic threats) rather than threats to cultural values . . . [t]hreat is purported to stem from fears that one’s own group will be disadvantaged relative to the minority group”) (citations omitted).}}
“inherent disquietude.” Such persons may erroneously believe that women and men of color comprise either the majority of federal sitting judges or something very close to it. As noted above, though, that is far from the truth.136

Table 3: Federal Sitting Judges: March 10, 2016

<table>
<thead>
<tr>
<th>Classification</th>
<th>Number of Judges</th>
<th>Percentage of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Sitting Judges</td>
<td>1344</td>
<td>100%</td>
</tr>
<tr>
<td>Female Judges</td>
<td>347</td>
<td>25.8%</td>
</tr>
<tr>
<td>Male Judges</td>
<td>997</td>
<td>74.2%</td>
</tr>
<tr>
<td>African American Female</td>
<td>53</td>
<td>4%</td>
</tr>
<tr>
<td>American Indian Female</td>
<td>1</td>
<td>0.07%</td>
</tr>
<tr>
<td>Asian American Female</td>
<td>11</td>
<td>0.8%</td>
</tr>
<tr>
<td>Latina</td>
<td>29</td>
<td>2%</td>
</tr>
<tr>
<td>Pacific Islander Female</td>
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<td>0</td>
</tr>
<tr>
<td>White Female</td>
<td>257</td>
<td>19%</td>
</tr>
<tr>
<td>African American Male</td>
<td>97</td>
<td>7%</td>
</tr>
<tr>
<td>American Indian Male</td>
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<td>0.07%</td>
</tr>
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<td>Asian American Male</td>
<td>18</td>
<td>1%</td>
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<tr>
<td>Latino</td>
<td>68</td>
<td>5%</td>
</tr>
<tr>
<td>Pacific Islander Male</td>
<td>1</td>
<td>0.07%</td>
</tr>
<tr>
<td>White Male</td>
<td>816</td>
<td>60.7%</td>
</tr>
</tbody>
</table>

A revealing analogy to federal judicial diversification exists within the context of American housing desegregation. During the 1960s, and throughout much of the latter twentieth century, when persons of color moved into previously all-White neighborhoods, White persons left in droves.137 Social scientists and other

136. FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nFsearch (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type” and click “CONTINUE”; then select “Sitting Judges” and click “Search”) (last visited Mar. 10, 2016).

137. See, e.g., Otero v. N.Y. City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973), cited in Derrick A. Bell, Jr., Application of the “Tipping Point” Principle to Law Faculty Hiring Policies, 10 NOVA L. J. 319, n.211 (1986); Navasky, The Benevolent Housing Quota, 6 HOW. L.J. 30 (1960), cited in Bell, Application of The Tipping Point Principle, supra at n.12; Giles et al., supra note 126; Craig & Richeson, supra note 123; Charles T. Clotfelter, Are Whites Still Fleeing, 20 J. POL. ANAL. & MANAGEMENT 199, 217 (2001) (“[W]hite losses from urban public schools are not evenly distributed, but rather are systematically related to interracial contact and the ease of avoiding that contact. The kind of systematic avoidance these losses imply was documented in research done in the 1970s. The present paper shows that systematic avoidance remained an important phenomenon in the 1990s.”).
scholars described the mass exodus of Whites as “white flight.” While at least one thoughtful observer has persuasively argued that White flight is not a new historical phenomenon, some social scientists attribute it to the presence of a sufficient number of persons of color—that is, a “tipping point.” Similarly, Professor Derrick Bell hypothesized that a tipping point might exist on law school faculties. Bell suggested that law faculties had an informal quota for faculty of color beyond which no professor of color would be hired, no matter how qualified.

To the extent that some persons, especially some Whites, perceive a threat—perhaps loss of power or control—flowing from a more diverse judiciary, there may also be a tipping-point mindset that could partially explain resistance to diversifying the federal judiciary. White flight from or resistance to judicial diversity is merely another manifestation of some persons’ fears—specifically, the fear of being in the presence of, or on an equal par with, persons of color. That is to say, for some individuals to accept the judiciary as competent, fair, and unbiased, the judiciary must remain disproportionately White and male.

However, as the empirical data discussed above demonstrate, significant sex and racial disparities currently exist on the federal bench. Further, there seems to be a widespread public perception that a more diverse federal judiciary exists than is actually true. What accounts for this misperception? Perhaps media attention plays a role—such as when, for example, historic firsts—like the ascension of Justice Sotomayor to the Supreme Court—occur. In addition, other factors may include visibility bias and a subconscious (tipping-point) phobia that women (of any race) or men of color are becoming too powerful. Accordingly, the appointment of a few judges who reflect modest deviations from the nearly all-White, male historical judicial norm may entice some observers to overestimate diversity. Whether this may be evidence of a latent expectation that White males must be a majority for a

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138. See Bell, supra note 137; Giles et al., supra note 126; Craig & Richeson, supra note 123; Clotfelter, supra note 137.

139. So for instance John Dippel points out that in the years immediately preceding the American Civil War, a hotly contested issue was whether the western territories claimed by the United States would be organized into slave states or all white free states from which blacks were excluded by law.

Not politics or economic clout, but climate and soil were the key factors determining where the slave system would take hold and grow. Almost the entire West was geographically predestined to be “free.” “As a consequence, the more pressing racial question of the day was this: would the rest of the West be reserved exclusively for whites? Once it became clear that the chattel system was unlikely to spread beyond the Mississippi Valley and the Gulf coast, pioneers and prospective migrants began to worry more about the coming of an even more unwanted racial minority—free blacks.


140. Craig & Richeson, supra note 123, at 258; Giles et al., White Flight and Percent Black, supra note 126, at 85; Clotfelter, supra note 137.


142. See Craig & Richeson, supra note 123; Angela J. Bahns, Threat as Justification of Prejudice, Group Processes and Intergroup Relations (2015).

legitimate system to exist is an open question, as is the question of whether some persons have a conscious or subconscious expectation that White males are entitled to dominate the judiciary.

We now turn to further consideration of Justice Sotomayor’s provocative question.

B. Sotomayor’s Unanswered Question

To what extent does a diverse bench impact the process and result of federal judicial decision making? This Section briefly considers some relevant scholarship that addresses the interplay of diversity and processes and outcomes of adjudication. In particular, this Section canvasses the views of some distinguished jurists, respected legal and constitutional scholars, and representatives of the bar. This brief review provides the basis for the preliminary conclusions given in Section C.

Some scholars have argued that the process of decision making differs where federal appeals courts have at least one person on the panel who is a “nontraditional judge.” A “traditional” judge is a White male and a “nontraditional” judge is a woman or a person of color. In some cases, nontraditional judges seem to influence results by making it more likely that claims of racial or sex discrimination will be upheld.

For example, several respected jurists have acknowledged the constructive role that diversity can have on adjudication. Former Chief Judge Harry Edwards of the United States Court of Appeals for the District of Columbia Circuit has stated, “It is inevitable that judges’ different professional and life experiences have some bearing on how they confront various problems that come before them. And in a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better-informed discussion.”

Similarly, in an essay defending legal pragmatism, Judge Richard Posner opined that:

The nation contains such a diversity of moral and political thinking that the judiciary, if it is to retain its effectiveness, its legitimacy, has to be heterogeneous; and the members of a heterogeneous judicial community are not going to subscribe to a common set of moral and political dogmas that would make their decisionmaking determinate.

Other scholarly perspectives, accord with a central point recognized by Judges Edwards and Posner: diversity matters. For instance, Professors Chew and Kelley conducted extensive empirical studies focused on the impact of race, sex, and political affiliation on federal trial court decision making in six different circuits. Chew and Kelley analyzed nearly five hundred federal district court cases decided

144. See Beiner, supra note 4, at 107 n.12 (citing Goldman et al., W. Bush’s Judicial Legacy: Mission Accomplished, supra note 12, at 274); Goldman et al., Obama’s First Term Judiciary, supra note 12, at 18.
145. Goldman et al., Obama’s First Term Judiciary, supra note 12, at 18; Goldman et al., W. Bush’s Judicial Legacy: Mission Accomplished, supra note 12, at 274. See Beiner, supra note 4, at 119–22; Chew & Kelley, supra note 7, at 95.
between 2002 and 2008 that involved alleged racial harassment in the workplace. In each case, Chew and Kelley considered the race, sex, and political affiliation of each judge as well as the race of the plaintiff. They found that (1) Hispanic plaintiffs were the most likely to succeed with a success rate approaching 40 percent;\textsuperscript{149} (2) plaintiffs were more likely to succeed in racial harassment claims before Black judges;\textsuperscript{150} and (3) in any given case, regardless of the gender or race of the judge, the plaintiff’s likelihood of success was less than 45 percent. Indeed, the overall success rate of plaintiffs was less than 25 percent.\textsuperscript{151} Chew and Kelley observed, “Judges of all racial groups favor Hispanic plaintiffs over all other racial groups. This preference is particularly significant for African American judges. After that, however, judges favor their own racial group over the remaining racial groups.”\textsuperscript{152}

Chew and Kelley’s work comports with Professor Nancy Crowe’s earlier analysis of the judicial decision making of federal appellate judges in sex and race discrimination cases. Crowe pointed out that in race discrimination cases decided between 1981 and 1996, White judges were more likely than Black male judges to rule against plaintiffs, regardless of race.\textsuperscript{153} In 1999, when Crowe’s work was written, there were relatively few women of color on the federal appellate bench. Even today, women of color constitute only 4 percent of federal appeals judges.\textsuperscript{154} Accordingly, their impact on decision making at the appellate level was not easy to assess.

Contrasting race and sex discrimination cases, Professor Crowe also found that a stronger correlation existed between the political affiliation of the judge and the outcome in sex discrimination cases. For instance, a judge who identifies herself as a Republican is much more likely to rule against a plaintiff’s claim of sex discrimination than a judge who affiliates with the Democratic Party.\textsuperscript{155} That said, an interesting phenomenon seems to exist: while the political affiliation of the judge may have an impact in sex discrimination cases, Chew and Kelley’s work suggests that race is more important than political affiliation in racial harassment cases.\textsuperscript{156} When compared with race, other factors like political affiliation, sex, age, or experience are less decisive.\textsuperscript{157}

In a thought-provoking article on diversity and the federal judicial confirmation process, Professor Theresa Benier canvassed arguments regarding the positive effects of a more diverse bench on the administration of justice. For example, one argument postulates that a diverse bench signals that anyone in the community has an opportunity to ascend to the bench. In other words, if the judges themselves appear to be representative of the communities that they serve, that sends an important message: no one is excluded from judicial service due to arbitrary

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149. Chew & Kelley, supra note 7, at 99.  
150. Id. at 112.  
151. Id. at 112.  
152. Id. at 110.  
153. Benier, supra note 4, at 120.  
154. FED. JUDICIAL CTR., http://www.fjc.gov (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Gender” and “Limit Query to Sitting Judges” and click “CONTINUE”; then select “U.S. Court of Appeals,” “Female” and “All Sitting Judges” and click “Search”; then repeat by replacing “Female” with “Male” and compare the results) (last visited Mar. 16, 2016).  
155. See also Benier, supra note 4, at 120–22.  
156. Chew & Kelley, supra note 7, at 104–106  
157. Id. at 104–13.
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factors like the color of one’s skin or sex. In such circumstances, members of the general public are more likely to perceive the decisions of judges as being fair.

For instance, in 2008, the Standing Committee on Fairness and Diversity of the Florida Supreme Court issued a report entitled “Perceptions of Fairness and Diversity.” This report pointed out that “[i]nclusion of diverse population groups in the court process, as both participants and decision makers, increases the perception of fairness and the credibility of the justice system. Diversity issues must constantly be addressed to keep pace with the changing profile of our state’s population.” The Standing Committee endorsed the argument that for a legal system to be effective, it must be perceived as fair. As one commentator put it, “If enough ordinary citizens begin to believe that they cannot trust the justice system, or that it will treat them fairly, there is absolutely nothing the government can do to maintain order.”

The symbolic impact of a diverse judiciary has a substantive dimension as well. As Professor Sherrilyn Ifill has pointed out:

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

Diversity on the bench can also inspire higher aspirations among some individuals who share common demographic characteristics with successful judges. Stated differently, “If that judge can do it, so can I.”

In addition, some scholars have pointed out that a diverse bench can result in a potentially salutary outcome—“functional representation.” In other words, a judge from a particular group may be an advocate for positions of others from that group. To be sure, several questionable assumptions underlie the “functional representation” thesis. First, functional representation assumes that persons with similar demographic backgrounds (1) are likely to have similar life experiences; (2) share common perceptions of reality based on their life experiences; (3) have similar approaches to resolving legal controversies; and (4) are likely to decide cases in part to advance what the judge perceives as the interests of her demographic group.

Furthermore, a broad definition of functional representation conflicts with a basic requirement of judging: judges must decide cases on the basis of the state of the law—not on the judges’ preferences regarding societal policies. Judge Higginbotham said it well when he observed:

158. Benier, supra note 4, at 115; see also Scherer, supra note 12, at 597–604.
159. See Benier, supra note 4, at 115; Scherer, supra note 12, at 597–600.
161. Id. at 1.
164. Id. at 116.
There is a dramatic difference between the role which legislators, politicians, and elected officials play in our society, one which is far closer to the cutting edge of policy development, and the role which could be tolerated or expected from a federal judge. I willingly accept those limitations; they are inherent in the judicial process. I am aware that Judge Higginbotham is not Senator Higginbotham, or Mayor Higginbotham, or Governor Higginbotham, but I also know that Judge Higginbotham should not have to disparage blacks in order to placate whites who otherwise would be fearful of his impartiality.

Critics have also asserted that functional representation is “essentialist” and that it stereotypes individuals. For instance, many persons readily acknowledge that men and women often have different life experiences that are based on how persons treat them because of social expectations about gender roles. In a lecture delivered in 1991, Justice O’Connor presciently recognized that sex can impact one’s life when she said:

Women still may face what has been called a “mommy track” or a “glass ceiling” in the legal profession—a delayed or blocked ascent to partnership or management status due to family responsibilities. Women who do not wish to be left behind sometimes are faced with a hard choice. Some give up family life in order to attain their career aspirations. Many talented young women lawyers decide that the demands of a career require delaying family responsibilities at the very time in their lives when bearing children is physically easiest. I myself chose to try to have and enjoy my family and to resume my career path somewhat later.

Regarding the issue of how one’s sex influences judicial decision making, O’Connor assessed the situation as follows: “Do women judges decide cases differently by virtue of being women? I would echo the answer of my colleague, Justice Jeanne Coyne of the Supreme Court of Oklahoma, who responded that ‘a wise old man and a wise old woman reach the same conclusion.’”

Professor Benier has cogently argued that:

It is beneficial to the courts when judges bring differing perspectives to a case that reflect the varying experiences of Americans. It is possible to acknowledge this while also being aware that there are a multitude of perspectives among women as well as members of ethnic and racial minority groups.

Benier’s contentions are consistent with a more limited scope for functional representation. Similarly, in an intellectually provocative essay, Professor Angela Onwuachi-Willig contended that judicial diversity “will enrich the [judicial] decision

168. Id. at 1558.
169. Id. at 117.
making process.\textsuperscript{170} Professor Onwuachi-Willig stated:

Perhaps Justice Ginsburg provided the best answer to this question of why it matters who sits on the Court, when she agreed that Justice Coyne was correct to state that a wise old man and woman do reach the same decision, but declared: “It is also true that women, like persons of different racial groups and ethnic origins, contribute to the United States judiciary what . . . [is] fittingly called ‘a distinctive medley of views influenced by differences in biology, cultural impact, and life experience.’\textsuperscript{171}

Onwuachi-Willig concluded that:

The fact is that one’s background, while it may not determine one’s vote, may affect how one approaches and perceives the issues in a case. This effect of background on decision making even applies to majority judges, who because of the way society is structured with them at the center as the norm, are often viewed as being neutral, objective, and unaffected by their background. In other words, while Justices and judges of different backgrounds - whether a wise old man or a wise old woman - may often reach the same conclusion, the idea of complete neutrality on the bench is a myth.\textsuperscript{172}

On a related but different note, Benier also considered the argument that once enough individuals from varying backgrounds are elevated to the bench, the judicial system has a “critical mass” of judges.\textsuperscript{173} A critical mass helps to alleviate the misconception that members of sparsely represented groups are all alike, usually in a pejorative sense.\textsuperscript{174} Accordingly, judges and people affected by judges’ decisions can better appreciate the commonality and diversity among members of the bench.

In a recent article proceeding along similar conceptual lines, Professor Nancy Scherer evaluated three major propositions favoring judicial diversity. First, judicial diversity may alleviate the present effects of past racial discrimination in the selection of judges.\textsuperscript{175} Second, judicial diversity may provide “descriptive representation”—that is, judges who are “derived from the great body of the society, not from . . . a favored class of it.”\textsuperscript{176} Finally, judicial diversity may facilitate substantive representation—that is, judges from different backgrounds may bring perspectives to the decision-making process that will enhance fair adjudication of disputes involving persons with backgrounds similar to the background of the judge.\textsuperscript{177}

\textsuperscript{170} Angela Onwuachi-Willig, Representative Government, Representative Court? The Supreme Court as a Representative Body, 90 MINN. L. REV. 1252, 1263 (2006).

\textsuperscript{171} Id. at 1261–62.

\textsuperscript{172} Id.

\textsuperscript{173} Benier, supra note 4, at 117.

\textsuperscript{174} Id.

\textsuperscript{175} Scherer, supra note 2, at 590.

\textsuperscript{176} THE FEDERALIST NO. 39, at 241 (James Madison) (cited in Scherer, Diversifying the Federal Bench, supra note 12, at 597).

\textsuperscript{177} Scherer, supra note 12, at 604–10.
Scherer’s depiction of descriptive representation—choosing judges “from the great body of society”—is similar to Benier’s understanding of symbolic representation. As noted previously, descriptive representation is premised upon James Madison’s notion that a republican or representative form of government derives its legitimacy in substantial part from the people’s perception that decision makers will work for the common wealth rather than a narrow self or class interest.178 Madison stated, “It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it.”179 At bottom, such representation is based on an expectation that people with common experiences are likely to have common perceptions of reality. Scherer noted, “A white female judge explained it this way: ‘I think everybody is applying the same law but you [as a minority or female] may be able to see more angles. The more angles, the better the decision.’”180 Or as Judge Edwards said, “[I]n a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better-informed discussion.”181

While Benier’s and Scherer’s analyses of the relevant arguments advocating judicial diversity are similar, some differences exist. Scherer points out that proponents of judicial diversity feel that way in part to address past systemic discrimination.182 Benier’s piece does not highlight the past discrimination issue. Further, unlike Benier, Scherer does not spotlight critical mass. Practically speaking, one can argue that underlying Scherer’s notion of substantive representation is the idea of critical mass. More specifically, both substantive representation and critical mass connote that enough individuals from a particular group are present so that such individuals are not stereotyped. Instead, such persons are sufficiently numerous that the diversity among them can be perceived and appreciated. Intragroup diversity facilitates individuals’ being recognized as individuals and distinguishable from one another. For instance, the ideological gulf between Thurgood Marshall and Clarence Thomas makes it problematic to stereotype African American male judges.

Nonetheless, to the extent that common experiences and perceptions within a particular group exist, judges with common worldviews and experiences can share and act upon them. Benier pointed out that with the advent of more women in the judiciary, gender task forces have been created to deal with perceived gender bias in the conduct of judges, lawyers, court personnel, and others.183 Thus, a heterogeneous or diverse body of judges impacts decision making.

In this context, the Article now offers a brief preliminary assessment of Justice Sotomayor’s question: “what it all will mean to have more women and people of color on the bench.”184

C. A Preliminary Assessment

The short answer to Justice Sotomayor’s query is that it is probably too

179. The Federalist No. 39, supra note 178, at 241; Scherer, supra note 12, at 590–97.
180. Scherer, supra note 12, at 608.
181. Edwards, supra note 147, at 329.
183. Benier, supra note 4, at 118.
184. Sotomayor, supra note 1, at 90.
early to definitively tell what the impact of increased diversity will have on the bench. As the preceding discussion points out, empirical data and persuasive arguments suggest that a more diverse bench is likely to have a number of positive impacts.

For instance, as noted previously, Judges Edwards and Posner have pointed out that judicial diversity matters. Judge Edwards stated that “in a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better-informed discussion.” Judge Posner said “the judiciary, if it is to retain its effectiveness, its legitimacy, has to be heterogeneous; and the members of a heterogeneous judicial community are not going to subscribe to a common set of moral and political dogmas that would make their decision making determinate.”

Likewise, the work of Chew and Kelley demonstrates that racial diversity among judges at the trial level is correlated with the outcomes of racial harassment claims—for instance the lack of success of African-American plaintiffs. Moreover, other scholars have pointed out the positive impact of substantive representation (or having a critical mass) within the judiciary. In fact, a diverse judiciary can facilitate the perception by the general public that the judiciary is a forum in which justice is not only done, but also manifestly seen as being done.

In short, the preceding analysis furnishes evidence that increasing judicial diversity promotes several important values. First, the perception that decisions are fair. Second, substantively, judges will perceive the issues more comprehensively (see “more angles”) as well as reach better reasoned, just results. Finally, an added benefit of a more diverse bench is that it can inspire members of the general public to contribute to society by pursuing a legal career.

Nevertheless, in responding to Sotomayor’s question, significant analytical issues remain. For instance, here is a nonexhaustive list of possible concerns:

1. Process Concerns

What criteria would be most appropriate to use in evaluating whether adjudication by a more diverse bench is qualitatively better than a less diverse one? Suppose for example, that a case involves a low-income, single, pregnant woman who seeks a second-trimester abortion. In those circumstances, here are just a few examples of questions that could arise:

a. To what extent would having a woman interpret existing law be preferable to having a man do so?

b. To what degree would one need to scrutinize the arguments that were advanced before the court? For instance, must we consider each argument or only the ones that we perceive to be significant?

c. How does one decide the weight to give each argument?

d. How should one evaluate situations in which neither the court nor

185. Edwards, supra note 147, at 329.
186. POSNER, supra note 148, at 94.
187. Chew & Kelley, supra note 7, at 101–03.
188. Benier, supra note 4, at 117. See also Hill, supra note 162, at 410; Onwuachi-Willig, supra note 170, at 1263; Scherer, supra note 12, at 604–10.
189. STANDING COMM. ON DIVERSITY & FAIRNESS, supra note 160, at 1; Benier, supra note 4, at 115; Scherer, supra note 12, at 597–600.
the parties raise a particular pertinent contention? For instance, suppose an interested party seeks joinder to the litigation but is excluded?

e. How far would one need to consider the impact of a decision maker’s personal biography (perceptual prism) upon how a decision maker views the facts and law before her? 190

2. Qualitative Queries

Aside from concerns about the process by which we evaluate the decisions of a more diverse bench, we must also consider how we would know substantive justice (fairness?) when or if we see it. To take another contemporary example, how should a court interpret “equal protection of the laws” in a case involving a gay or lesbian person who claims sex discrimination in employment? Again, a few pertinent issues:

a. How much weight should be given to the history and text of the Fourteenth Amendment?

b. How persuasive should a court perceive decisions in analogous cases involving race or religion?

c. To what extent should the judge be sensitive to how her own life experiences (perceptual prisms) affect her perspectives regarding the case? As Justice Sotomayor pointed out:

   I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me requires. 191

d. Stated differently, should a heterosexual judge ask herself a question like, “Suppose I were a gay or lesbian person and knew that heterosexual individuals had recognized rights which protected them from employment discrimination and I did not. How might viewing the law from the perspective of such a gay or lesbian person affect my view of equal protection of the laws?”

e. How might the court’s decision practically impact the societal understanding of what constitutes equal justice?

f. Might a judge need a practical decision-making default? For example, should the judge ask how she might perceive the justice of her decision if she were the plaintiff (or defendant)? If she were one of the lawyers? A member of the general public?

g. How far should empathy matter in interpreting the law—in other words, seeing “more angles.” Another way of posing the question

190. Minow, supra note 4; Stubbs, supra note 4.
191. Sotomayor, supra note 1, at 93.
might be to ask whether equal protection of the laws is a shorthand description of “The Golden Rule.”\textsuperscript{192}

Questions like this could multiply.\textsuperscript{193} They are worthy of some consideration, and could occupy significant time and energy resources. Such questions are beyond the parameters of this Article. Suffice it to say for now that further research is required to explore in depth the impact of judicial diversity upon judging.

**CONCLUSION**

This Article has shown that women and people of color were originally excluded from judicial service in the United States and that such exclusion has subsided somewhat, but that given the overwhelming overrepresentation of men on the federal bench—especially White men—achieving gender equity will take a long time. The Article also furnishes evidence of visibility bias or overestimation of judicial diversity that likely exists because diversity has been so rare historically, that whenever a woman or a man of color ascends to the bench, it frequently becomes an exceptional and newsworthy event. Moreover, the perception in the larger society that America is becoming more diverse may exacerbate the fear of some White Americans that they will lose status, and such fears may limit such individuals’ ability to accurately perceive verifiable, empirical facts (like the overrepresentation of males—especially, White males—on the federal bench).

This Article furnishes data to support efforts to further diversify the federal judiciary, but it cautions against stereotyping based on notions of functional or symbolic representation. People with similar demographic characteristics, like sex or race, do not all think or act alike. One need only recall the example of Justices Thurgood Marshall and Clarence Thomas. Furthermore, judges are called upon to decide cases based on the law and facts before them while applying a good dose of practical wisdom and fairness.

To better answer Justice Sotomayor’s query, more empirical work like the pioneering efforts of Professor Chew and Kelley needs to be conducted. One example of research in this area involves the impact of President Obama’s judicial appointments on Fourteenth Amendment civil liberties jurisprudence.\textsuperscript{194}

In addition, the general public, as well as policy makers in each branch of the federal government, should acknowledge the overrepresentation of males on the federal bench. As a practical matter, the significant sex imbalance on the federal courts will persist indefinitely unless successive presidential administrations appoint more women than men to the bench. The most glaring overrepresentation on the federal bench is that of White males. Special attention should be given to addressing the resulting under-representation of women, and especially women of color, particularly Native American and Pacific Islander women. In fact, Native Americans and Pacific Islanders are barely represented at all, much less at token levels. In the

\textsuperscript{192} Matthew 7:12.

\textsuperscript{193} Indeed, from a legal realist perspective, such attempts at measuring the extent to which an outcome is “just” inherently is limited by one’s own subjectivity.

\textsuperscript{194} Stubbs, supra note 11.
judicial appointment process, leaders in the legal profession, elected officials, and their advisors should seek well-qualified individuals to alleviate existing gross disparities. In doing so, policy makers must remain cognizant of the need for ideological diversity among judges so that, in Judge Posner’s words, the judiciary will be able to retain its “effectiveness” and “legitimacy.”\textsuperscript{195} And, as Judge Edwards explained, “[I]n a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better-informed discussion.”\textsuperscript{196}

In other words, demographic and ideological diversity can spawn opinions that the general public will be more likely to accept and follow due to increased diversity on the bench. Part of the reason for such adherence to judicial decisions stems from individuals being able to identify with the judges and the judges’ decisions. Stated differently, members of the general public are likely to find judicial decisions to be more persuasive if the public can identify with judicial reasoning based on law and the judges’ practical experiences. Thus, judicial examples and analogies based on a broad range of “real world experiences” may ring true with more members of the general public than would be the case if the judges were overwhelmingly drawn from a particular background.

Finally, we must also ask and attempt to answer some difficult questions that fall outside of the scope of this present work. For instance, what is the impact on the administration of justice of an unrepresentative federal judiciary? More specifically, one wonders what is the substantive effect of a judiciary that fails to reflect that females comprise the majority of America’s population? Similar questions can be asked about race. These questions are at the root of Justice Sotomayor’s query. The facts outlined in this Article provide the basis for an informed conversation to address a related issue: what are the long-term costs to American society and the prospects of a representative American democracy where the socioeconomic and political leadership class is overwhelmingly drawn from one sex, race, and socioeconomic minority group? Stated differently, and more to the point, what kind of America will exist in the future if American leaders continue to overwhelmingly look like the Framers of the late 1700s?

\textsuperscript{195} POSNER, supra note 148, at 94.
\textsuperscript{196} Edwards, supra note 147, at 329.