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A Principled Approach to the Quest for Racial Diversity on the Judiciary

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> *Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.*
>
> Judge Jerome Frank[1]

> *Negroes don't have a chance at justice across the boards when all the judges are [W]hite . . . .*
>
> Justice Thurgood Marshall[2]

INTRODUCTION

The public desires—and in many ways demands—a certainty to the law. We all want to believe that the law is definitive and clear so that disputes can be resolved cleanly, objectively, and fairly—or at least with the appearance of fairness to all. However, as any first year law student will tell you, that is not the law as we know it. Far from certain, "the law" evolves to meet changed circumstances, is shaped by judicial philosophies and personalities, and must meet the specific facts and issues of the case at hand.[3]

The formalistic conception of the law as objective and certain is closely related to the myth that, to quote Judge Frank, a judge is a "passionless thinking machine"[4] akin to a computer. Virtually every legal actor understands that a judge's biases, perspectives, and life experiences influence judicial decision-making. Not surprisingly, a judge's racial background shapes her world view and almost inevitably influences her judicial decision-making.

This logic is often applied to juries. Trial lawyers fully understand that the racial composition of a jury may determine the outcome of a case, and the public fully shares this understanding. For example, no rebuke stings more than the concise statement that an "all-White jury" convicted a Black defendant.[5]

Perhaps more important than its tangible impact on the decision in any particular case, racial exclusion of judges or jurors may adversely affect the perceived legitimacy of the judicial process. Decisions are more

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1. *In re* J.P. Linahan, Inc., 138 F.2d 650, 652–53 (2d Cir. 1943) (footnote omitted); *see* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) (observing that judges share prejudices "with their fellow-men").

2. *Quoted in* CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 283 (1993).

3. *See* Kevin R. Johnson, *The Truth and Consequences of the Common Law as Social Propositions*, 23 U.C. DAVIS L. REV. 903, 904 (1990) (book review).

4. *Linahan*, 138 F.2d at 652–53.

5. *See infra* text accompanying notes 178–82.

likely to appear illegitimate if the decision-making body—be it a jury or judge—is homogeneous, exclusive, and not representative of a cross section of the community. The nation's stated commitment to representative juries reflects this understanding and led to a system that, in modern times, is designed to draw jurors from virtually all walks of life. In fact, the law requires that the jury pool include potential jurors from a cross-section of the community.[6]

Unlike the jury selection process, judicial selection at the federal and state levels in the United States generally lacks any institutional structure committed to ensuring diversity. Judges are selected on an ad hoc basis. In many instances, politicians, who by definition are beholden to the majority, select judges with relatively little oversight and without strong pressures to ensure that the judiciary reflects a cross-section of the community. Of course, controversy occasionally surrounds judicial nominees, such as Robert Bork in the 1980s[7] and several of President George W. Bush's nominations in recent years,[8] but those are the exceptions rather than the rule.

In this vein, it must be noted that public opinion has played a role in the judicial nomination process.[9] Diversity has been demanded in the nomination and appointment of state and federal judges, as it has with many political and social institutions in American society. Despite public pressure, there is a glaring lack of diversity among judges in the United States, which troubles judicial observers.[10] Professor Paul Brest has commented that:

> [J]udges, especially federal judges, are far from a representative cross section of American society. They are overwhelmingly Anglo, male, well educated, and upper or upper middle class. They are also members of the legal profession—an affiliation that by definition sets them apart from other members of society. . . .

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6. *See infra* Part III.A.

7. Robert Bork's nomination to the United States Supreme Court failed because of the widespread perception that his conservative political views were too extreme. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); PAUL SIMON, ADVICE AND CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLE (1992).

8. *See* Jeffrey Toobin, *Advice and Dissent: The Fight Over the President's Judicial Nominations*, NEW YORKER, May 26, 2003, at 42.

9. *See, e.g.*, Carl Tobias, *The Bush Administration and Appeals Courts Nominees*, 10 WM. & MARY BILL RTS. J. 103 (2001) (discussing impact of public opinion on judicial nominations).

10. *See, e.g.*, Edward M. Chen, *The Judiciary, Diversity, and Justice For All*, 10 ASIAN L.J. 127 (2003); Maria Echaveste, *Brown to Black: The Politics of Judicial Appointments for Latinos*, 13 BERKELEY LA RAZA L.J. 39 (2002); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2002) [hereinafter Ifill, *Beyond Role Models*].

> Women, [B]lacks, and [H]ispanics are only the groups most notoriously under-represented on the judiciary. There are many others—for example, the poor, lower middle class, and Eastern European ethnics—whose viewpoints are salient to constitutional judgments.[11]

Although made almost twenty years ago, this observation still holds true today. Not surprisingly, this demographic profile has translated into judicial decisions that reflect the shared backgrounds of the judges. As John Hart Ely explained, there is a "systemic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle, professional class from which most judges . . . are drawn."[12]

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11. Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 664, 669 (1985). In Henry Abraham's estimation, "[a] fusing of the background characteristics of the 102 individuals who [up to 1985] have sat on the Court" provides a rather homogeneous picture; he describes them as:

> NATIVE-BORN (there have been but six exceptions, the last two being the England-born George Sutherland and Austrian-born Felix Frankfurter); WHITE (the first non[W]hite, Thurgood Marshall, was appointed in 1967); MAN (there was no woman on the Court until President Reagan's appointment of Sandra Day O'Connor in 1981); GENERALLY PROTESTANT (six Roman Catholics and five Jewish Justices); FIFTY TO FIFTY-FIVE years of age at the time of appointment; FIRST BORN (fifty-six); ANGLO-SAXON ETHNIC STOCK (all except fifteen); UPPER-MIDDLE TO HIGH SOCIAL STATUS; REARED IN A NONRURAL BUT NOT NECESSARILY URBAN ENVIRONMENT; MEMBER OF A CIVIC-MINDED, POLITICALLY ACTIVE, ECONOMICALLY COMFORTABLE FAMILY; B.A. AND LL.B. OR J.D. DEGREES (usually, although not always, from prestigious institutions); SERVICE IN PUBLIC OFFICE; from POPULOUS STATES.

HENRY J. ABRAHAM, JUSTICES & PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 61–62 (2d ed. 1985) (footnotes omitted); *see also* Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 600–03 (2003) (offering recent statistics on diversity of federal courts); Barbara Luck Graham, *Judicial Recruitment and Racial Diversity on State Courts: An Overview*, 74 JUDICATURE 28 (1990) (showing a similar lack of diversity among state court judges); Miguel A. Méndez & Leo P. Martínez, *Toward a Statistical Profile of Latina/os in the Legal Profession*, 13 BERKELEY LA RAZA L.J. 59, 71–75 (2002) (providing statistical information showing the dearth of Latina/o judges in the United States). For a thorough discussion of the backgrounds of federal judges, see Sheldon Goldman, *Federal Judicial Recruitment*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 189, 194–200 (John B. Gates & Charles A. Johnson eds., 1991).

12. JOHN HART ELY, DEMOCRACY AND DISTRUST 59 (1980); *see* Brest, *supra* note 11, at 669 (contending that "judges' attitudes on important social and political issues do not reflect those of the population at large"). *But cf.* Thomas R. Marshall, *The Supreme Court and the Grass Roots: Whom Does the Court Represent Best?*, 76 JUDICATURE 22, 28 (1992) (contending that the Supreme Court "has been relatively evenhanded in representing different social and demographic group attitudes").

Appointments to the United States Supreme Court epitomize the lack of diversity on the federal judiciary. Not until 1967 did President Lyndon Baines Johnson appoint the first African American Justice, Thurgood Marshall, to the Court. Since then, a more diverse group of judges has served on the state and federal courts than throughout much of United States history.[13] Much work remains to be done, however. Only two African Americans have served on the Supreme Court; no Latina/os, Asian Americans, nor Native Americans have *ever* served on the Court.[14] Few African Americans, Latina/os, and Asian Americans and *no* Native Americans serve on the federal bench today.[15]

Although demands for a more diverse judiciary are legion, scholars rarely analyze the concrete impacts that diversifying the judiciary might have on the operation of the courts, including better judicial decision-making and improved public perception of the justice system. Even when advocating for greater diversity among judges, few observers have clearly described the concrete benefits to be gained by appointing and nominating a more diverse cadre of judges.

A notable exception, Professor Sherrilyn Ifill, contends that judicial diversity is essential to ensure impartiality, public confidence, and the perception that all members of society are represented on the bench.[16] Ifill offers at least two distinct rationales for racial diversity in the judiciary:

> First, the creation of a racially diverse bench can introduce traditionally excluded perspectives and values into judicial decision-making. The interplay of diverse views and perspectives can enrich judicial decision-making.... Second, racial diversity on the bench also encourages judicial impartiality, by ensuring that a single set of values or views do not dominate judicial decision-making.[17]

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13. *See* Chris W. Bonneau, *The Composition of State Supreme Courts*, 85 JUDICATURE 26, 27 (2001); Mark S. Hurwitz & Drew N. Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84, 85 (2001).

14. For a discussion of the "representation" of minorities on the Supreme Court, see BARBARA A. PERRY, A "REPRESENTATIVE" SUPREME COURT? THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS (1991).

15. *See* Alliance for Justice, *Demographic Overview of the Federal Judiciary, at* http://www.allianceforjustice.org/judicial/judicial_selection_resources/selection_database/byCourtRaceGender.asp (last visited Oct. 11, 2004). For analysis of the causes of the lack of diversity, see Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153 (2004).

16. *See* Ifill, *Beyond Role Models*, *supra* note 10; Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997) [hereinafter Ifill, *Judging the Judges*].

17. Ifill, *Beyond Role Models*, *supra* note 10, at 410–11 (footnotes omitted).

This Article further explores the substantive impacts that increased racial diversity of judges might have on the decision-making process, as well as whether or not the general public views the courts as fair and impartial tribunals. Building on previous analysis of the possible impacts of the first Latina/o Justice on the United States Supreme Court,[18] this Article examines and evaluates with greater precision how increasing the racial diversity of the judiciary will improve judicial decision-making and lend greater legitimacy to the courts.

Specifically, this Article incorporates fundamental tenets of Critical Race Theory—especially the concept of a "voice of color"—into the analysis of the possible impacts of greater racial diversity on the bench. It further compares judges and juries and contends that pulling a group of judges from a cross-section of the community would both benefit the decision-making process and improve public perception of the impartiality of judicial decision-making, much as increased diversity among juries has done. Indeed, many of the arguments for diversity among jury pools apply with equal force to the judiciary.

This Article concludes by offering a principled position for supporting a racially diverse judiciary that does not demand support for every minority nominee. With juries, we strive to impanel jurors who reflect a cross-section of the community, but we still consider the individual characteristics of prospective jurors in deciding whether they should serve on the jury. We may reject any juror—minority or not—for cause, such as bias against one of the parties or other indications that the person cannot impartially decide the case. The same general approach should apply to judges. Consequently, the evaluation of the ideology of a nominee is critically important in deciding whether he or she might bring new and different perspectives to the decision-making process than those offered by a predominantly White judiciary.

Part I of this Article considers the different voices and perspectives added to the judiciary by the appointment of minorities. Part II analyzes the many impacts of diversity on the bench, including greater judicial impartiality. Part III sets forth the arguments supporting a diverse jury pool and discusses how they inform the analysis of the quest for racial diversity among judges. Part IV outlines a principled approach to the pursuit of judicial diversity.

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18. *See* Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV. LATINO L. REV. 1 (2002) [hereinafter Johnson, *On the Appointment*] (published concurrently in 13 BERKELEY LA RAZA L.J. 1 (2002)).

I. VOICES OF COLOR AND THE JUDICIARY

Critical Race Theorists have written extensively about the "voice of color" among minority law professors. Narrative scholarship, which poses a challenge to traditional legal scholarship,[19] is premised on the understanding that minorities may offer a different perspective than White scholars on civil rights issues.[20] The body of literature regarding the voice of color sheds light on the benefits of racial diversity among judges.

When discussing the voice of color, we wholeheartedly agree with antiessentialists who contend that there is no single voice but instead a multitude of voices of color.[21] The Supreme Court provides a striking example. Although both are African American, Thurgood Marshall and Clarence Thomas approach the law from dramatically different perspectives and could be expected to reach different conclusions in the same cases; both, however, arguably write with a voice of color.[22] Although acknowledging great variation in views among judges of the same race, we also contend that racial diversity among judges in the aggregate would improve the decision-making process as well as the public's perception of the justice system.

This Part discusses critically the notion of a voice of color among African Americans and other racial minorities as judges and applies insights from this concept to the particular voices of Latinas/os. It closes by responding to charges that the representation of these particular voices on the bench may result in judicial bias.

A. *Different Voices*

Critical Race Theory championed the concept of the "voice of color," the claim that minorities speak with a distinct voice or, put somewhat differently, look at the world differently from Whites.[23] Narrative

19. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 37–49 (2001). For a stinging critique of Critical Race Theory with a particularly forceful challenge to narrative scholarship, see DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON (1997).

20. *See* Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

21. *See* DELGADO & STEFANCIC, *supra* note 19, at 56–58; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

22. *See infra* text accompanying notes 29–33, 38–47.

23. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); *see also* Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1284 (2002) ("A central claim of Critical Race Theory . . . is that

stories told through voices of color can destabilize the conventional wisdom and facilitate social change.[24] As Richard Delgado has explained, "[s]tories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place."[25]

A voice of color analysis of the judiciary offers many insights. Judges issue orders, make rulings, and render decisions; minority judges might be expected to approach the law with a distinctive voice or perspective. A diverse group of judges could logically be expected to bring a wide-ranging set of views to bear on cases.

Interestingly, judicial nominees often try to skirt the question whether their race would influence their decision-making. For example, in his confirmation hearings, Justice Clarence Thomas suggested that a judge should dispose of his ideology and "be stripped down like a runner."[26] Such a statement is at odds with the Critical Race Theory concept of a minority voice but entirely consistent with the view that judges are the "passionless thinking machine[s]" to whom Judge Frank referred.[27]

1. Many African American Perspectives

Racial minorities have a history and tradition of speaking in a different voice than their White counterparts as lawyers, law professors, and judges.[28] By all accounts, Justice Marshall, the first African American to serve on the United States Supreme Court, made unique contributions to the Court because of his distinctive voice. Justice Anthony Kennedy titled his tribute to the Justice: "The Voice of Thurgood Marshall."[29] Justice

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antiracist politics and legal theory should be informed by the voices of people 'on the bottom' of discrimination.") (footnote omitted).

24. *See, e.g.*, Matsuda, *supra* note 23, at 398–99.

25. Delgado, *supra* note 23, at 2413 (footnote omitted).

26. *See* Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1201 (1992) (analyzing Thomas's statement).

27. *See supra* text accompanying note 1.

28. *See* George A. Martínez, *Philosophical Considerations and the Use of Narrative in Law*, 30 RUTGERS L. REV. 683 (1999) (justifying use of narrative by outsiders because outsiders offer different perspectives than Whites).

29. Anthony M. Kennedy, *The Voice of Thurgood Marshall*, 44 STAN. L. REV. 1221 (1992); *see* Melvin Gutterman, *The Prison Jurisprudence of Justice Thurgood Marshall*, 56 MD. L. REV. 149, 149 (1997) (observing that Justice Marshall's "special voice advanced the debate" about the humane treatment of prisoners); Michael Scaperlanda, *Justice Thurgood Marshall and the Legacy of Dissent in Federal Alienage Cases*, 47 OKLA. L. REV. 55, 55 (1994) (predicting that Justice Marshall would be most remembered for "the voice he gave to the voiceless").

William Brennan emphasized that what made Justice Marshall unique "was *the special voice* that he added to the Court's deliberations and decisions. His was a voice of authority: he spoke from first-hand knowledge of the law's failure to fulfill its promised protections for so many Americans."[30] According to Justice Byron White, Justice Marshall "characteristically would tell us things that we knew but would rather forget; and *he told us much that we did not know due to the limitations of our own experience*."[31] Justice Sandra Day O'Connor wrote of Justice Marshall's deep influence on the Court and its deliberations.[32] Many of Justice Marshall's opinions—dissents as well as majorities—reflected the sentiments of many African Americans and others outside the mainstream, and no doubt reflected Justice Marshall's life experiences.[33]

Examples abound of minority judges who have brought new and different voices to the judiciary. Judge A. Leon Higginbotham, for example, forcefully criticized racial discrimination against African Americans in the United States.[34] Judge Higginbotham also was an accomplished scholar who wrote about the legal history of African American subordination.[35] Constance Baker Motley, who as a young attorney worked on *Brown v. Board of Education*,[36] is another prominent example of an African American jurist who spoke with a distinctive voice on the civil rights of Blacks.[37]

Perhaps the most controversial contemporary African American judge in the United States, Justice Clarence Thomas also writes with a distinctively African American voice. However, he has a conservative

30. William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 23 (1991) (emphasis added).

31. Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992) (emphasis added).

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

33. *See* Mark V. Tushnet, *The Jurisprudence of Thurgood Marshall*, 1996 U. ILL. L. REV. 1129, 1131 (analyzing how Justice Marshall's experiences influenced his judgment as a Supreme Court Justice); *see also* Gay Gellhorn, *Justice Thurgood Marshall's Jurisprudence of Equal Protection of the Laws and the Poor*, 26 ARIZ. ST. L.J. 429 (1994) (the poor); William Wayne Justice, *The Enlightened Jurisprudence of Justice Thurgood Marshall*, 71 TEX. L. REV. 1099 (1993) (ordinary people); Scaperlanda, *supra* note 29 (immigrants).

34. *See* Clifford Scott Green & Stephanie L. Franklin-Suber, *Keeping Thurgood Marshall's Promise—A Venerable Voice for Equal Justice*, 16 HARV. BLACKLETTER L.J. 27, 35 (2000) (analyzing voice of Judge Higginbotham); Anita F. Hill, *The Scholarly Legacy of A. Leon Higginbotham, Jr.: Voice, Storytelling, and Narrative*, 53 RUTGERS L. REV. 641 (2001) (same).

35. *See, e.g.*, A. LEON HIGGINBOTHAM, SHADES OF FREEDOM (1996) (analyzing role of law in racial oppression); *see also* A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR (1978) (studying role of race in United States law).

36. 347 U.S. 483 (1954).

37. *See* CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY (1998).

perspective with which many African Americans disagree.[38] During his confirmation hearings, Justice Thomas testified that he would speak on behalf of the forgotten, just as Justice Marshall had done.[39] Thirteen years into his tenure on the court, it is far from self-evident that he has done so. For example, Justice Thomas has taken an aggressive anti-crime position, which in the view of some observers has had deleterious impacts on the African American community.[40]

However, Justice Thomas's opinions at times reflect a deep understanding of the African American experience in the United States. Unquestionably exhibiting an African American perspective in *Virginia v. Black*,[41] he observed in dissent that cross burning has historically been used by White supremacists to intimidate African Americans.[42] In analyzing Virginia's criminal law outlawing cross burning, Justice Thomas—a son of the rural South—characterized the Ku Klux Klan as a "terrorist" organization, a characterization that carries especially powerful connotations after the events of September 11, 2001. He further stated that "cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence."[43]

Similarly, Justice Thomas wrote passionately—and with a distinctly African American voice—about affirmative action in the 2003 University of Michigan cases. He quoted African American icon Frederick Douglass

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38. *See* John O. Calmore, *Airing Dirty Laundry: Disputes Among Privileged Blacks—From Clarence Thomas to "The Law School Five,"* 46 HOW. L.J. 175, 191–212 (2003) (discussing boycott by African American law professors of Justice Thomas's visit to the University of North Carolina); *see also* Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. (forthcoming 2005) [hereinafter Onwuachi-Willig, *Just Another Brother*] (analyzing Clarence Thomas's jurisprudence as consistent with Black conservative thought); Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 HOW. L.J. 323 (2004) (making similar arguments). *See generally* KEN FOSKETT, JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS (2004) (offering biography of Justice Thomas, focusing on his intellectual roots).

39. *See* Eric J. Muller, *Where, But for the Grace of God, Goes He? The Search for Empathy in the Criminal Jurisprudence of Clarence Thomas*, 15 CONST. COMMENT. 225, 225–27 (1998) (reviewing Thomas's confirmation strategy).

40. *See, e.g.*, Hudson v. McMillan, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting) (dissenting from majority's holding that the beating of an African American prison inmate violated the ban on "cruel and unusual punishment" under the Eight Amendment); Muller, *supra* note 39, at 228–30 (discussing Justice Thomas's criminal jurisprudence and its impacts on criminal defendants, a group in which African Americans are overrepresented compared to their percentage of the population). In contrast, Justice Marshall was known for his insistence that a civilized society must treat its prisoners humanely. *See* Gutterman, *supra* note 29, at 173–74.

41. 538 U.S. 343, 388 (2003) (Thomas, J., dissenting).

42. *Id.* at 388–90 (Thomas, J., dissenting).

43. *Id.* at 391 (Thomas, J., dissenting); *see* Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?*, 93 GEO. L.J. (forthcoming 2005) (analyzing Justice Thomas's impact on the rest of the Court in its analysis of *Virginia v. Black*).

and stated that "[l]ike Douglas, I believe [B]lacks can achieve in every avenue of American life without the meddling of university administrators."[44] Justice Thomas's views are consistent with his previous statements about how he has personally felt stigmatized by affirmative action.[45] His views also reflect his conviction that self-help is the best strategy for African Americans, a notion with a deep intellectual history in the African American community.[46] Justice Thomas' racial consciousness and conservative views find their roots in those of African American conservatives.[47]

Another controversial African American jurist recently nominated to the federal bench was also attacked for her conservative ideology. However, Janice Rogers Brown, a California Supreme Court Justice nominated by President Bush to the United States Court of Appeals for the District of Columbia Circuit, may have a distinctive voice as an African American woman of humble origins.[48] As an Associate Justice on the California Supreme Court, Brown, like Justice Thomas in the Michigan affirmative action cases, wrote passionately in favor of color-blindness as the fundamental principle underlying the Equal Protection guarantee and, based on this principle, invalidated a public contractor outreach program.[49] The NAACP and the People for the American Way took the extraordinary—extraordinary because Brown is African American and the NAACP, perhaps the leading African American advocacy organization in the United States, generally supports increased racial diversity on the federal judiciary—step of issuing a report strongly opposing Brown's confirmation because she is a "loose cannon."[50]

As this discussion suggests, there is no single voice but instead many voices of color, a fact highlighted by the antiessentialists of Critical Race

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44. Grutter v. Bollinger, 539 U.S. 306, 349–51 (2003) (Thomas, J., concurring in part, dissenting in part); *see* Mary Kate Kearney, *Justice Thomas in* Grutter v. Bollinger*: Can Passion Play a Role in a Jurist's Reasoning?*, 78 ST. JOHN'S L. REV. 15 (2004) (analyzing Justice Thomas's dissent in *Grutter*); *see also* Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. (forthcoming 2005) (arguing that Justice Thomas's professional life offers a justification for affirmative action).

45. *See* Calmore, *supra* note 38, at 191–203.

46. *See* Onwuachi-Willig, *Just Another Brother*, *supra* note 38.

47. *See id.*

48. *See* Neil A. Lewis, *Battle Lines Already Forming Against a Bush Court Selection*, N.Y. TIMES, Oct. 18, 2003, at A8.

49. *See* Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1083–84 (2000) (Brown, J.) (invalidating outreach program designed to increase bids by minority contractors under California Constitution). For general criticism of the colorblind approach to equal protection jurisprudence, see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

50. *See* PEOPLE FOR THE AMERICAN WAY AND NAACP, "LOOSE CANNON": REPORT IN OPPOSITION TO THE CONFIRMATION OF JANICE ROGERS BROWN TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT (2003).

Theory.[51] Internal dissent may exist within groups, and a variety of views exist within minority communities.[52] African Americans may be conservative, such as Justice Thomas and Janice Rogers Brown, or they may be liberal, such as Justice Marshall, Judge Higginbotham, and Judge Motley. There is no reason to believe that Latina/os, Asian Americans, Native Americans, or other minority groups are any different.

2: Other Outsiders

The concept of the voice of color arguably applies to all minorities. Much has been written about Justice Louis Brandeis, the first Jewish person to sit on the Supreme Court.[53] Some claim that his Jewish background and experiences influenced his approach to cases and his desire to protect individuals and small business. One commentator contends that Justice Brandeis had a distinct impact on the evolution of the *Erie* doctrine, a mainstay of the modern civil procedure law that deals with the distribution of judicial power between federal and state courts.[54]

In this vein, Justice Ruth Bader Ginsburg, the first Jewish woman to sit on the Supreme Court,[55] has shown a particular sensitivity to gender issues.[56] Justice Ginsburg herself raised the provocative question of whether a "Jewish seat" exists on the Court,[57] which implicitly acknowledges that the Court is a representative institution similar to a political body.

Similarly, many expect women judges, who have been appointed in greater frequency to the bench since the 1970s,[58] to have a different voice

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51. *See* DELGADO & STEFANCIC, *supra* note 19, at 56–58. For a variety of perspectives of African American judges, see LINN WASHINGTON, BLACK JUDGES ON JUSTICE: PERSPECTIVES FROM THE BENCH (1994).

52. *See* Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001) (analyzing evolution of dissent within various groups).

53. For biographies on Justice Brandeis, see LEWIS J. PAPER, BRANDEIS (1983); PHILLIPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM (1993); PHILLIPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE (1984).

54. *See* Daniel R. Gordon, *Revisiting* Erie, Guaranty Trust, *and* Gasperini: *The Role of Jewish Social History in Fashioning Modern American Federalism*, 26 SEATTLE U. L. REV. 213 (2002). For a critical appraisal of Justice Brandeis's position on race and civil rights issues, see Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859 (2001).

55. *See* Malvina Halberstam, *Ruth Bader Ginsburg: The First Jewish Woman on the United States Supreme Court*, 19 CARDOZO L. REV. 1441 (1998).

56. *See infra* text accompanying notes 68–71.

57. *See* Justice Ruth Bader Ginsburg, *From Benjamin to Brandeis to Breyer: Is There a Jewish Seat?*, 41 BRANDEIS L.J. 229 (2002).

58. *See* Mary L. Clark, *Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other "Human Rights" Record*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1131 (2003).

and perspective than men on many issues, with such differences affecting judicial decisions.[59] Women judges may, in fact, bring different views to bear than men on certain types of cases.[60] Intuition supports the idea that women might well view gender discrimination cases, for example, differently than men.[61] Suzanna Sherry has argued that a feminine voice may inform constitutional adjudication,[62] although it might not influence a woman judge's approach to every case.[63] Justice Sandra Day O'Connor has spoken of the different perspectives of men and women but also about how a "wise" man and a "wise" woman would reach similar conclusions in the same case.[64]

The first two women Supreme Court Justices, Sandra Day O'Connor and Ruth Bader Ginsburg, have had a distinct impact on the Court. For example, Justice O'Connor coauthored a three-Justice opinion re-affirming a woman's right to an abortion.[65] With Justice Ginsburg joining her dissent, Justice O'Connor objected to the Court's refusal to invalidate a provision of the immigration and nationality laws that discriminated against men and favored women on the basis of gender stereotypes.[66] Justice O'Connor wrote forcefully that:

> No one should mistake the majority's analysis for a careful application of this Court's equal protection jurisprudence concerning sex-based classifications. *Today's decision instead represents a deviation from a line of cases in which we have vigilantly applied heightened scrutiny to such classifications to determine whether a constitutional violation has occurred. I trust that the depth and*

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59. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE (1993) (contending that women speak with a "voice" distinct from men).

60. *See* Shirley Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489 (1984) (making this claim); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 SO. CAL. L. REV. 1877 (1988) (same).

61. The available empirical data, however, does not provide strong support for this view. *See* Beiner, *supra* note 11, at 599–603; Elaine Martin, *Women on the Bench: A Different Voice?*, 77 JUDICATURE 126 (1993). *But see* Linda S. Maule, *A Different Voice: The Feminine Jurisprudence of the Minnesota Supreme Court*, 9 BUFF. WOMEN'S L.J. 295 (2000/01) (analyzing decisions of Minnesota Supreme Court, which after 1991 was the first state high court with a majority of women).

62. *See* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

63. *See* ROBERT W. VAN SICKEL, NOT A PARTICULARLY DIFFERENT VOICE: THE JURISPRUDENCE OF SANDRA DAY O'CONNOR (1998).

64. *See* Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1557–58 (1991).

65. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (opinion coauthored by Justice O'Connor).

66. *See* Nguyen v. INS, 533 U.S. 53, 74, 87 (2001) (O'Connor, J., dissenting). Justice Ginsburg joined the dissent. *See id.* at 74.

> *vitality of these precedents will ensure that today's error remains an aberration.*[67]

As an attorney, Justice Ginsburg advocated for women's rights and argued six cases that raised gender issues before the Supreme Court.[68] As a sitting Justice, she has continued her involvement with the National Organization for Women.[69] It is difficult to see how her experiences could *not* affect her views on legal issues in cases that touch on the rights of women. For example, Justice Ginsburg wrote the majority opinion, with Justice O'Connor joining, in *United States v. Virginia*,[70] which invalidated the policy of the Virginia Military Institute ("VMI") that denied women admission; she emphasized that "[t]here is *no* reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the 'more perfect Union.'"[71] One would suspect that, like these women, members of other outsider groups would bring new voices to the judiciary. Racial minorities, however, remain underrepresented as judges.

3. Latina/o Voices

Latina/os, as well as African Americans and other racial minorities, may be expected in the aggregate to have distinctive experiences that might affect their approaches to particular legal issues. Immigration and language regulation are two areas about which Latina/os as a group may be expected to hold different views from Whites and African Americans because the Latina/o experience with these areas of law are unique in certain respects.[72] These two issues have a distinct and, at times, significant

67. *Id.* at 96 (emphasis added). By questioning Congress's judgment regarding a provision of the immigration laws discriminating on the basis of gender, Justice O'Connor implicitly contested the vitality of the plenary power doctrine, which traditionally has immunized Congress's judgments on the substantive admission requirements for immigrants from judicial review. *See, e.g.*, T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 151–81 (2002) (criticizing the plenary power doctrine); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) (same); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (same).

68. *See* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 532–33 (Clare Cushman ed., 1995).

69. Justice Ginsburg's involvement with this advocacy group has spawned controversy. *See* Eric Fettman, *Courting Hypocrisy—Scalia vs. Ginsburg*, N.Y. POST, Mar. 17, 2004, at 31.

70. 518 U.S. 515 (1996).

71. *Id.* at 557 (emphasis added).

72. *See infra* text accompanying notes 77–79 and 87.

impact on the lives of Latina/os in the United States in a way that they do not on other racial groups.

More generally, Latina/o civil rights issues and concerns are most likely to be appreciated by a Latina/o. For example, the Supreme Court in *United States v. Brignoni-Ponce*[73] approved the reliance on "Mexican appearance" in immigration enforcement and stated that it may be employed with other factors to justify the questioning of a person about his or her immigration status.[74] This holding seems incredible to most persons of Mexican ancestry, who appreciate that there is no readily definable "Mexican appearance."[75]

The Court in *Brignoni-Ponce* simply failed to recognize that persons of Mexican ancestry run the gamut of physically diverse appearances. Its decision reflects a missing perspective, lack of information, and misunderstanding of the Mexican American and Mexican immigrant communities in the United States that a Latina/o would be less likely to overlook.[76]

As suggested by the Court's reasoning in *Brignoni-Ponce*, Latina/os in the United States, regardless of their immigration and citizenship status, often are stereotyped as "foreigners."[77] Such stereotyping has led to certain forms of discrimination, such as being subjected to a greater likelihood of immigration stops.[78] A noteworthy example of the foreigner stereotype at

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73. 422 U.S. 873 (1975).

74. *Id.* at 886–87. For criticism of this decision as well as racial profiling generally in immigration enforcement, see Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000). In *Brignoni-Ponce*, the Border Patrol relied exclusively on the "Mexican appearance" of passengers in a motor vehicle to make an immigration stop; although finding that an exclusive reliance on appearance violated the Fourth Amendment, the Court stated that Border Patrol officers may consider "Mexican appearance" in combination with other factors when making an immigration stop. *See Brignoni-Ponce*, 422 U.S. at 884–87.

75. *See* Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1291–93 (1997) [hereinafter Johnson, *Melting Pot*] ("Most [persons of Mexican ancestry, for example,] are of dark complexion with black hair .... But many are blond, blue-eyed and '[W]hite,' while others have red hair and hazel eyes.") (quoting JULIAN SAMORA & PATRICIA VANDEL SIMON, A HISTORY OF THE MEXICAN-AMERICAN PEOPLE 8 (rev. ed. 1993)).

76. *See* Johnson, *On the Appointment*, *supra* note 18, at 7–11.

77. *See* Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 117–29 (1997) [hereinafter Johnson, *Some Thoughts*]. Asian Americans suffer from similar stereotypes. *See, e.g.*, Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1 (1996); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

78. *See, e.g.*, Hodgers-Durgin v. De la Vina, 199 F.3d 1037 (9th Cir. 1999) (denying class certification in case of Hispanic motorists alleging racial profiling in immigration enforcement); Mary Romero & Marwah Serag, *Violation of Latino Civil Rights from INS and Local Police's Use of Race, Culture, and Class Profiling: The Case of the Chandler Roundup in*

work is the treatment of Congressman Luis Gutierrez, who was told by a Capitol Police officer to "go back where he came from" as he attempted to enter his congressional office in Washington, D.C.[79]

As these examples suggest, stereotypes about Latina/os influence the law in ways that often appear to be race-neutral.[80] An awareness of the stereotypes and their impacts in relegating Latina/o citizens to second class citizenship might influence a judge's approach to a variety of areas of law, including the immigration and anti-discrimination laws.[81]

At the same time, Latina/os in certain instances share common cause with other minorities.[82] For example, Latina/os, like African Americans, often suffer as a result of the Supreme Court's requirement that a party must prove a "discriminatory intent" in order to prevail on an Equal Protection claim;[83] they have similar interests in contending that the requirement is too onerous and that a racially disparate impact in certain circumstances should be sufficient to establish a constitutional violation.[84] For these and other reasons, some scholars have claimed that current Equal Protection doctrine fails to adequately protect Latina/os.[85] Courts often have been unable, or unwilling, to find that voter-backed initiatives

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Arizona, 51 CLEV. ST. L. REV. (forthcoming 2004) (analyzing treatment of Latina/os as presumptive foreigners in deportation operation in suburb of Phoenix, Arizona).

79. *See* Johnson, *Some Thoughts*, *supra* note 77, at 118–19 (recounting incident).

80. *See generally* STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAWS, AND THE AMERICAN IMAGINATION (2003) (analyzing Latina/o stereotypes and their impacts).

81. This is not necessarily the case, however. *See* Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) (reviewing LOUISE ANN FISCH, ALL RISE: REYNOLDO G. GARZA, THE FIRST MEXICAN AMERICAN JUDGE (1996)) (suggesting that Judge Garza was not particularly sympathetic to claims of Latina/os, especially Latina/o immigrants).

82. *See* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2002); ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST CIVIL RIGHTS AMERICA (1999); Adrien Katherine Wing, *Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717 (2003). *But cf.* Richard Delgado, *Linking Arms: Recent Books on Interracial Coalition as an Avenue of Social Reform*, 88 CORNELL L. REV. 855, 856–57 (2003) (book review) (criticizing the "preoccupation with interracial coalition" and suggesting that minority groups pursue independent agendas).

83. *See* Washington v. Davis, 426 U.S. 229 (1976).

84. *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (criticizing the intent standard and offering an alternative test); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (same); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004) (same).

85. *See* Eduardo Luna, *How the Black/White Paradigm Renders Mexican/Mexican Americans and Discrimination Against Them Invisible*, 14 BERKELEY LA RAZA L.J. 225 (2003); Juan F. Perea, *Buscando America: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420 (2004).

that discriminate based on immigration status and language proficiency violate the Constitution, even when the evidence strongly suggests that racial animus toward Latina/os largely motivated passage of the laws.[86]

Many Latina/os also view English language regulation, bilingual education, and other issues differently than many Anglos.[87] As the controversy on the issue in states demonstrates, a driver's license is an important civil rights issue to undocumented immigrants, a group that includes many of Mexican origin.[88] For this reason, Latina/o advocacy groups have pressed for legislation in various states that would permit undocumented immigrants to be eligible for driver's licenses.[89] However, driver's license eligibility is not generally a pressing issue for most Anglos, or United States citizens of any racial background, and would not at first glance appear to be a significant civil rights issue.

Similarly, consider the views about the rights of United States citizens living in Puerto Rico. Federal court of appeals Judge Juan Torruella, who is of Puerto Rican ancestry, has written on the legal status of United States citizens who live on the island of Puerto Rico, a United States territory. His account and criticism of the unequal treatment of Puerto Ricans differs substantially from that embraced by the United States Supreme Court,[90] which has been willing to seriously curtail the legal rights of United States citizens living in Puerto Rico.[91] Not surprisingly, Latina/os have written the bulk of the legal scholarship on the status of

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86. *See, e.g.*, Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995) (analyzing racial animus underlying California's Proposition 187, an anti-immigrant initiative); Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2000) (analyzing racial animus that motivated voter passage of California law ending bilingual education in public schools).

87. *See* Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as a Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1364–67 (1997); Johnson & Martínez, *supra* note 86; Rachel F. Moran, *Bilingual Education as Status Conflict*, 75 CAL. L. REV. 321 (1987).

88. *See* Kevin R. Johnson, *Immigration and Civil Rights in the 21st Century: A Case Study—Driver's Licenses and Undocumented Immigrants*, 5 NEV. L.J. 213 (2004) [hereinafter Johnson, *Immigration and Civil Rights*]; Maria Pabon López, *More Than a License to Drive: State Efforts to Regulate Immigration Through Driver's Licenses*, S. ILL. U. L.J. (forthcoming 2005).

89. *See* Johnson, *Immigration and Civil Rights*, *supra* note 88, at 215.

90. *See* Igartua de la Rosa v. United States, 229 F.3d 80, 85 (1st Cir. 2000) (Torruella, J., concurring); JUAN TORRUELLA, PUERTO RICO AND THE CONSTITUTION: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985); *see also* José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391 (1978) (offering analysis of prominent Puerto Rican court of appeals judge on treatment of Puerto Ricans).

91. *See, e.g.*, DeLima v. Bidwell, 182 U.S. 1, 200 (1901); Downes v. Bidwell, 182 U.S. 244, 287 (1901).

Puerto Ricans in the United States,[92] showing the particular interest in this topic by Latina/os.

Latina/os also may, in the aggregate, have distinct views on criminal justice questions.[93] For example, they may be more attuned to the racial profiling of Latina/os and how it operates in both ordinary criminal law enforcement and immigration enforcement.[94] Cruz Reynoso, a former Associate Justice of the California Supreme Court, has written about the disparate impact of the criminal justice system on Latina/os.[95] In addition, not long after being sworn in as a court of appeals judge, Richard Paez wrote an opinion invalidating California's "three strikes" law in a case involving a Latina/o defendant.[96] It hardly seems a coincidence that a Latino judge invalidated a law having a disparate impact on Latina/os in a case involving a Latina/o defendant.

As Justice Marshall's presence on the Supreme Court affected deliberations and the views of other justices, Latina/o judges on the appellate courts might well have similar impacts.

B. *Does a Minority Voice Amount to Judicial Bias?*

The "voices of color" perspective adds much-needed theoretical support to the argument for judicial diversity. The perspectives of minority judges, however, raise the possibility of bias in the eyes of some litigants. In refusing to disqualify himself because of his race from an employment discrimination case, Judge Higginbotham rejected the claim that he was biased because he was African American and emphasized that:

> I concede that I am [the B]lack. I do not apologize for that obvious fact. I take rational pride in my heritage, just as most

92. *See, e.g.*, PEDRO MALAVET, AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO (2004); Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896–1900*, 78 DENV. U. L. REV. 921 (2001); Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437 (2002).

93. *See, e.g.*, Alfredo Mirandé, *Is There a "Mexican Exception" to the Fourth Amendment?*, 55 FLA. L. REV. 365 (2003); Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. U. L. REV. 1081 (2001).

94. *See supra* text accompanying notes 72–81.

95. *See* Cruz Reynoso, *Hispanics and the Criminal Justice System*, *in* HISPANICS IN THE UNITED STATES: AN AGENDA FOR THE TWENTY-FIRST CENTURY 277 (Pastora San Juan Cafferty & David W. Engstrom eds., 2000) (analyzing overrepresentation of Latina/os in all facets of the criminal justice system).

96. *See* Andrade v. Attorney General, 270 F.3d 743 (9th Cir. 2001), *rev'd sub nom.*, Lockyer v. Andrade, 538 U.S. 63 (2003).

> other ethnics take pride in theirs. However, that one is [B]lack does not mean ... that he is anti-[W]hite.... As do most [B]lacks, I believe that the corridors of history in this country have been lined with countless instances of racial injustice....
>
> Thus, a threshold question which might be inferred from defendants' petition is: Since [B]lacks (like most other thoughtful Americans) are aware of the "sordid chapter in American history" of racial injustice, shouldn't [B]lack judges be disqualified per se from adjudicating cases involving cases of racial discrimination?[97]

Judge Higginbotham answered the question whether his race per se made him biased with an emphatic "no." Other minority judges have faced similar disqualification pressures and have refused to acquiesce.[98] We are not aware of disqualification claims made against White judges based on racial bias resting solely on their race.

The claim that minority judges are biased because of their race goes to the heart of the judicial function. Above all else, judges must not be biased but must remain impartial. Similarly, we value diversity on juries, but impermissible bias will disqualify someone from jury service even if she would contribute a diverse perspective.[99] By demanding that juries are drawn from a cross-section of the community and that jurors cannot be barred from service based on race alone, courts have implicitly rejected the notion that a juror presumably is biased solely because of his or her racial identity.[100] In *Holland v. Illinois*,[101] the Supreme Court found that a party could not exercise a peremptory challenge to strike an African American juror based on the assumption that she would be presumptively partial toward African Americans.[102] The same must hold true for the judiciary. We address this critique in further detail in the next part. We also discuss two distinct and important impacts of judicial diversity: improved decision-making in multimember bodies and improved judicial legitimacy.

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97. Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 163–65 (E.D. Pa. 1974) (footnotes omitted); *see* Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325 (2002) (analyzing Judge Higginbotham's decision in this case).

98. *See* MacDraw, Inc. v. CIT Group Equip. Fin., Inc., 138 F.3d 33 (2d Cir. 1998) (Asian American judge Denny Chin), *cert. denied*, *In re* Klayman, 525 U.S. 874 (1998); Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975) (African American judge Constance Baker Motley).

99. *See infra* text accompanying note 168.

100. *See infra* text accompanying notes 159–60.

101. 493 U.S. 474 (1990).

102. *See id.* at 484 n.2.

II. BENEFITS OF RACIAL DIVERSITY ON THE BENCH

Although the appointment of a racially diverse judiciary is frequently extolled as a virtue, little attention has been paid to its concrete benefits. Such diversity is not only important symbolically; a more diverse bench will enrich the decision-making process of multimember courts. A diverse judiciary also holds greater legitimacy with the public than a homogeneous one. Finally, a racially diverse bench would further the goal of judicial impartiality.

A. *Improved Decision-Making on Multimember Courts*

Diversifying the judiciary will improve judicial decision-making by including different perspectives in the process. As Professor Sherrilyn Ifill observed:

> [T]he most important benefit of judicial diversity is its potential to improve judicial decision-making. First, the creation of a racially diverse bench can introduce traditionally excluded perspectives and values into judicial decision-making. The interplay of diverse views and perspectives can enrich judicial decision-making. 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.[103]

Today, the lack of diversity on the courts limits the variety of perspectives in judicial decision-making and limits the input into the judicial function. As previously discussed, one can imagine that different racial groups, in the aggregate, may have different collective views. For example, many racial minorities unfortunately have first hand experience with perceived racial profiling in traffic stops.[104] In addition, African Americans and Latina/os are disparately represented in the criminal justice system, especially in the nation's prisons. This overrepresentation no doubt contributes to these groups' distrust of law enforcement and general cynicism about

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103. Ifill, *Beyond Role Models*, *supra* note 10, at 409–10 (footnotes omitted).

104. *See* Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and* Arvizu, 47 VILL. L. REV. 851 (2002); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 275–88 (1999); Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717 (1999).

the criminal justice system, something reflected in the racially divergent opinions about the O.J. Simpson case on its ten year anniversary.[105]

Concrete examples of missing perspectives are easy to find in Supreme Court decisions.[106] In recent decisions, the Court has afforded great deference to federal law enforcement authorities in allowing them to stop and search automobiles even though such discretion is generally understood by minorities to contribute to racial discrimination in law enforcement.[107] In *United States v. Flores-Montano*,[108] for example, the Court upheld the stop and search of a fuel tank of an automobile at the international border with Mexico.[109] In a concurring opinion, Justice Stephen Breyer stated that "Customs keeps track of the border searches its agents conduct, including the reasons for the searches.... This administrative process should help minimize concerns that gas tank searches might be undertaken in an abusive manner."[110]

Justice Breyer's assumption that abusive searches at the border are unlikely was probably shared by other Justices who also rejected the Latino defendant's Fourth Amendment claim. However, anyone experienced with border enforcement, especially Latina/os who have been subject to lawless conduct at the United States–Mexico border for generations,[111] would not be nearly as confident as Justice Breyer in the ability of self-monitoring to keep the border enforcement officers honest. Stories of abuse of persons at the border by law enforcement officers have been well-documented, yet such abuses continue unabated.[112] Lawless conduct has hardly been kept in check by self-regulation.

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105. *See* Clarence Page, *Our Great Racial Divide*, CHI. TRIB., June 13, 2004, at C11 (stating that a poll conducted on the tenth anniversary of the Simpson case showed that "today 87 percent of [W]hites and only 29 percent of [B]lacks think O.J. Simpson is guilty").

106. *See supra* text accompanying notes 73–76 (discussing the example of *United States v. Brignoni-Ponce*).

107. *See, e.g.*, Thornton v. United States, 124 S. Ct. 2127 (2004); United States v. Arvizu, 534 U.S. 266 (2002).

108. 541 U.S. 149 (2004).

109. *Id.*

110. *Id.* (Breyer, J., concurring) (citation omitted).

111. *See generally* ALFREDO MIRANDÉ, GRINGO JUSTICE (1987) (documenting history of abuse of persons of Mexican-American ancestry by Border Patrol).

112. *See, e.g.*, AMNESTY INT'L, UNITED STATES OF AMERICA: HUMAN RIGHTS CONCERNS IN THE BORDER REGION WITH MEXICO (1998); *see also* AM. FRIENDS SERV. COMM., HUMAN AND CIVIL RIGHTS VIOLATIONS ON THE U.S. MEXICO BORDER 1995–97 (1998). Border operations implemented in the early 1990s have had deadly impacts, with thousands of immigrants dying as they attempted to journey to the United States across deserts and mountains. *See, e.g.*, Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy, 1993–2000*, 27 POPULATION & DEV. REV. 661 (2001); Karl Eschbach et al., *Death at the Border*, 33 INT'L MIGRATION REV. 430 (1999); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121

More generally, the extension of greater discretion to law enforcement by the Supreme Court threatens to make things worse, not better, for racial minorities.[113] Police likely will rely more on unconscious discrimination when given greater discretion than with less.[114] Racial minorities already suffer from the vast, unchecked discretion afforded law enforcement and prosecutors in the criminal justice system, with the greater discretion arguably contributing to the racially disparate results of that system.[115]

As this discussion suggests, a racially diverse group of judges might be expected to bring a variety of different perspectives to the judiciary based on their personal experiences.[116] As Justice Lewis Powell observed, "a member of a previously excluded group can bring insights to the Court that the rest of its members lack."[117] In this way, the benefits of diversity among judges resemble those that the Supreme Court accepted as justifying affirmative action in higher education. In *Grutter v. Bollinger*,[118] the Court found that the University of Michigan Law School's race-conscious affirmative action program, which was designed to ensure that a "critical mass" of racial minorities attended the law school and contributed to a diversity of opinions, passed constitutional muster.[119] As racial diversity improves the education for all students in a university, a diverse judiciary generally improves the decision-making process. Judges interact with one another, which may affect their views of particular cases or, more generally, entire bodies of law. Give-and-take in arguments and deliberations generally sharpens the analysis and affects the final outcome.

These observations are especially true for multimember decision-making bodies, such as appeals courts. The mere presence of a minority in

(2001). The ongoing tragedy is difficult to fathom, with the personal accounts of the death and despair nothing less than heart wrenching. *See, e.g.*, KEN ELLINGWOOD, HARD LINE: LIFE AND DEATH ON THE U.S.-MEXICO BORDER (2004); LUIS ALBERTO URREA, THE DEVIL'S HIGHWAY: A TRUE STORY (2004).

113. *See* Atwater v. City of Lago Vista, 532 U.S. 318 (2001); Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419 (2002).

114. *See* Lawrence, *supra* note 84, at 343–44.

115. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998); Tracey Maclin, Terry v. Ohio's *Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998).

116. *See supra* text accompanying notes 23–25.

117. PERRY, *supra* note 14, at 137; *see* O'Connor, *supra* note 32, at 1217 (asserting that "[a]lthough all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective to the Court" that he offered to his brethren during conference, oral arguments, meetings, and the like); *see also* Goldman, *supra* note 11, at 205 ("[T]he participation of women and minorities on the bench may add a dimension of justice to the courts."); *cf.* Brest, *supra* note 11, at 667 ("[T]he Court sometimes has exhibited a striking insensitivity and indifference to the poor.").

118. 539 U.S. 306 (2003).

119. *See id.* at 325–33.

the deliberations over a case can dramatically change the dynamics of the discussion. One minority jurist sitting on a panel in civil rights case can change the tenor of the discussion by challenging stereotypes, limiting improper discussion, and adding important information. In this regard, it is particularly appropriate to consider the impact of Justice Marshall on the Supreme Court and how he, by all accounts, contributed invaluably to the Court's decision-making process.[120] Other Justices on the Court credited him with adding much to the Court's deliberations due to his experiences as an African American civil rights activist in the days of great upheaval and enduring change to the social fabric of the United States.[121]

Importantly, a racial minority may moderate anti-minority views and offer thoughts and perspectives not provided by other judges. As the presence of a woman will tend to chill inappropriate gender-related comments in social conversation, the same tends to be true of inappropriate race-related comments. The presence of a minority judge can thus be expected to reduce bias toward minorities in the deliberations of the court and to change the entire tone and nature of the discussion. This, in turn, might well influence the ultimate outcomes of cases.

As discussed, however, minorities are not all alike. For example, a minority need not necessarily speak with a particular minority voice.[122] Individual characteristics as well as group membership shape a person, and the qualities of the person will affect his or her impact on fellow judges. As Sylvia Lazos Vargas contends, even though an African American sits on the Supreme Court, no current Justice on the Court pushes the other Justices "to go beyond simplistic understandings of race relations."[123] This is a significant weakness because the Court regularly confronts difficult cases dealing with issues of race and civil rights, such as the recent affirmative action and cross burning cases.[124] Although increased diversity on the Court would not necessarily remedy the absence of a sophisticated understanding of race, over time a "critical mass" of minority group members serving on the bench would be more likely to transform the Court toward a more sophisticated understanding of race and racism in the United States.

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120. *See supra* text accompanying notes 29–32.

121. *See* Johnson, *On the Appointment*, *supra* note 18, at 3–7.

122. *See supra* text accompanying notes 38–52.

123. Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive?: What* Grutter v. Bollinger *Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101 (2004).

124. *See supra* text accompanying notes 41–47.

B. *Enhanced Legitimacy of the Judicial Branch*

By making an important decision-making institution more representative of the greater community, a diverse judiciary fosters the legitimacy of the courts among the public. Such legitimacy enhances public compliance with court rulings. As Justice Frankfurter remarked in his powerful dissent in *Baker v. Carr*[125] in reaction to what he perceived as a grave threat to the Court's legitimacy: "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment ... from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."[126] Similar concerns influenced the Supreme Court's decision in *Planned Parenthood v. Casey*,[127] which refused to retreat from protecting a woman's reproductive freedom, and Justice Stevens' dissent in *Bush v. Gore*,[128] which condemned the Court's apparent lack of impartiality in effectively naming the new President.

The concept of judicial legitimacy plays a crucial role in the public's understanding, appreciation, and acceptance of our judicial system. In order for the public to accept court rulings as binding, the judiciary must be seen as a legitimate institution; there must be public confidence in the courts and their work.[129] Such confidence can be roughly gauged by public support for the Supreme Court.[130]

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125. 369 U.S. 186 (1962) (Frankfurter, J., dissenting).

126. *Id.* at 267 (Frankfurter, J., dissenting); *see* Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. REV. 1103 (2002).

127. 505 U.S. 833 (1992); *see* Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority*, 43 DUKE L.J. 703 (1994).

128. 531 U.S. 98, 123, 128–29 (2000) (Stevens, J., dissenting) ("Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."); *see* ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000, at 5–6 (2001) ("[T]here is ... widespread popular outrage at what the high [C]ourt did.... [And when the Court members] act in an unprincipled and partisan manner—as they did in *Bush v. Gore*—they risk losing respect and frittering away the moral capital accumulated by their predecessors over generations.").

129. *See* ABA REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 10–11 (2003) [hereinafter ABA REPORT]; Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1383 (1987).

130. *See* STEVEN J. ROSENSTONE ET AL., AMERICAN NATIONAL ELECTION STUDY, 1997: PILOT STUDY [computer file] (2nd ICPSR release. Ann Arbor, MI: University of Michigan, Center for Political Studies [producer], 1999. Ann Arbor, MI: Inter-University Consortium for Political and Social Research [distributor], 1999).

Pushed to its logical end, judicial legitimacy ultimately ensures public compliance with judicial decisions regardless of public agreement with the specific rulings in question.[131] If the public does not consider the courts to be legitimate institutions, voluntary compliance with judicial decisions will be more difficult to secure. Massive resistance to the desegregation efforts triggered by *Brown v. Board of Education*[132] is perhaps the most famous example. For that reason, branding a particular court a "kangaroo court" labels it an illegitimate court, one whose rulings do not warrant respect, legitimacy, and adherence.

Racial diversity on the judiciary contributes to judicial legitimacy. In order for this argument to make sense, it requires a belief in courts as having large degrees of discretion to decide cases. It further requires a belief that a "voice of color" in fact exists and must be represented in the judiciary. We previously pushed the latter claim.[133] As to the former, a view of courts as policy-making institutions driven by the ideologies of their members finds much support in the social sciences, where the debate over the attitudinal model rages on.[134]

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131. *See* RICHARD M. JOHNSON, THE DYNAMICS OF COMPLIANCE: SUPREME COURT DECISION-MAKING FROM A NEW PERSPECTIVE 143, 149 (1967) (explaining that the Court engenders the impression of "majestic fairness, reasonableness, and expertness" and that this impression is crucial, for it may lead to compliance with Court rulings even if in disagreement with them); David Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790, 802 (1973) (defining the legitimacy-conferring power of the Court as "creat[ing] acceptance of policy among those who oppose or are neutral about its substance and heighten acceptance among those already committed to its content"); James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC'Y REV. 469, 472 (1989) (explaining that judicial legitimacy asks whether citizens are "likely to comply with [the Court's] decisions even when they are unpopular").

132. 347 U.S. 483 (1954). *See generally* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S (1969) (analyzing resistance to school desegregation after *Brown*).

133. *See supra* Part I.A.

134. The attitudinal model contends that judges, and Supreme Court Justices in particular, decide cases in accordance with their ideological preferences. On this view, "the Supreme Court decides disputes in light of the facts of the cases vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal." JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); *see* Frank B. Gross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1998); *see also* John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345, 471 (1995) ("The Supreme Court's history indicates that legal theories are of far less importance than the political affiliation of the Justices of the Court in determining the outcome of the Supreme Court decisions concerning racial minorities."). Some scholars take this view further and argue that judicial legitimacy in fact demands that courts behave as policy-makers. *See* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 188 (1999) (concluding that "continued legitimacy *demands* that the Court be policy motivated, and

It is for these reasons that racial diversity enhances the legitimacy of our courts. Legitimacy is a special concern when focused on groups that traditionally have been shut out of the justice system. Why would racial minorities respect rulings from institutions that fail to represent them? In the eyes of the unrepresented, such courts are by definition illegitimate.[135]

Even if one agrees that most minority judges decide cases like their brethren,[136] one may nonetheless support a racially diverse judiciary to provide judicial legitimacy.[137] Efforts to diversify the bench must be understood along these lines, with the bottom line being that outsider groups may not consider a homogeneous bench to be legitimate.

C. *Impartiality as the Sine Qua Non of the Judicial Craft*

Above all, a judge must be impartial. Critics of judicial diversity might argue that the demand for judicial diversity compromises the demand for judicial impartiality.[138] After all, why does diversity on the bench matter if judges of color will not be "biased" toward their communities?[139]

We contend that calls for diversity on the judiciary neither compromise nor endanger judicial impartiality. The emphasis on impartiality is grounded in the belief that judges must not pre-judge controversies.[140] Yet

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thus, politically sensitive and responsible in the exercise of its power"); *see also* Thomas W. Merrill, *A Modest Proposal for a Political Court*, 17 HARV. J.L. & PUB. POL'Y 137, 138–39 (1994) ("The legitimacy of the Court would in fact be enhanced rather than diminished if the Court renounced the idea that its decisions are compelled by law, and instead openly acknowledged that it exercises political discretion.").

135. *See* ABA REPORT, *supra* note 129, at 1 ("Within communities of color . . . suspicion of the courts is compounded by a lack of diversity throughout the judicial system."); *cf.* PERRY, *supra* note 14, at 135 (contending that the Court gains public acceptance by not being of a "single image" or a "single mold") (quoting from a personal interview with Justice O'Connor).

136. *See* Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 614 (1985) (concluding that President Carter's unprecedented appointment of women and people of color to the federal bench had little impact, as they find little evidence that "nontraditional judges have assumed a strong advocacy role on behalf of any racial or gender-based interests"). Of course, a well-known exception to this view is found in the career of Justice Thurgood Marshall. When it came to civil rights issues, Justice Marshall may be considered to have represented African Americans during his career as a Justice. *See supra* text accompanying notes 29–33 (discussing impact of Justice Marshall on the Court).

137. *See supra* text accompanying notes 125–35.

138. *See supra* Part I.B.

139. For a discussion of similar issues of bias, see Resnik, *supra* note 60, at 1923–28. Interestingly, most Whites, however, do not see White jurists as serving White interests and thus do not seem much concerned with this possibility.

140. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 776–77 (2002).

arguments for judicial diversity do not hinge on such an understanding of what judges do on the bench. Rather we *do* understand judges as policy-makers with some degree of discretion, taking positions and deciding cases in accordance with their ideological preferences. In this vein, Critical Race Theorists have made a convincing case for the role played by race in the lawmaking process, with personal values and racial sensibilities coming into play.[141] Increased diversity does not mean appointing judges who have predetermined positions but instead judges who have different ways of looking at the world.[142]

In *Republican Party of Minnesota v. White*,[143] the Court rejected the view of impartiality as a "lack of preconception in favor of or against a particular *legal view*."[144] This understanding of impartiality "has never been thought a necessary component of equal justice,"[145] the Court continued, and obviously so. After all, judges will have preconceived ideas about the law before assuming their positions on the bench, and, besides, it would hardly be desirable if they did not. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."[146]

We agree with the Supreme Court that judges will have judicial preconceptions upon assuming their positions on the bench. It is precisely with this understanding that our arguments for judicial diversity make any sense. Because judges' ideas and views about the world and the law will affect how they rule in particular cases, a diverse judiciary is necessary to ensure that the interests of many groups are factored into judicial decision-making.

The recent electoral redistricting cases offer a classic example of this view. In *Shaw v. Reno*,[147] Justice O'Connor wrote for the Court that irregularly-shaped majority minority districts reinforce "the perception that members of the same racial group—regardless of their age, education,

141. *See, e.g.*, GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1993).

142. *See supra* text accompanying notes 116–22; *see also* Deseriee A. Kennedy, *Judicial Review and Diversity*, 71 TENN. L. REV. 287 (2004) (contending that diversity on the judiciary is necessary for judicial review). Public opinion research supports this view. *See, e.g.*, DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS (1996).

143. 536 U.S. 765 (2002).

144. *Id.* at 777. In this case, the Court invalidated on First Amendment grounds a Minnesota judicial conduct standard that limited what a candidate might state publicly about his or her views in a judicial election.

145. *Id.*

146. *Id.* at 778 (citing Laird v. Tatum, 409 U.S. 824, 835 (1972) (memorandum opinion)).

147. 509 U.S. 630 (1993).

economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidate at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes."[148] The Court worried about the messages these districts send to elected representatives: "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole."[149] The injuries described by Justice O'Connor have been characterized as "expressive harms."[150]

And yet, we know that the state of the world is not quite as idyllic as the Court posits. To be sure, the perceptions about which the Court speaks were true for many people in North Carolina in 1993 and might still be true for most Americans today. The Court contends that racially gerrymandered districts exacerbate the problems that already exist. However, one might instead sensibly conclude that irregularly-shaped majority minority districts are necessary in order to combat generations of racial discrimination in voting, as well as the realities of racial bloc voting.[151]

Translating social and demographic facts into judicial doctrines places grave demands on judges. We do not impugn Justice O'Connor and her motives; we instead place the facts in the redistricting cases in a different historical context than she does. Although she may not be partial to some individual litigants over others, she necessarily adheres to her own understandings of the world. In the districting plan in North Carolina, for example, she sees racial balkanization where we see the promise of minority inclusion and integration.[152] In *Metro Broadcasting, Inc. v. FCC*[153] and *City of Richmond v. J.A. Croson Co.*,[154] both of which involved the consideration of race in the award of public contracts, she sees racial spoils where we see the kind of interest group politics to which the

148. *Id.* at 647.

149. *Id.* at 648.

150. *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506 (1993); *see also* Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295, 310–12 & nn.58–59 (2003) (explaining the expressive nature of law and citing leading authorities).

151. *See* Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109 (1994).

152. *See, e.g.*, Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 282 ("To say that either district even remotely resembles 'political apartheid'—especially given that House District 2, where a majority of the *Shaw* plaintiffs lived, was a nearly perfect mirror of the state's overall racial makeup—would be risible if it were not so pernicious.") (footnotes omitted).

153. 497 U.S. 547 (1990) (O'Connor, J., dissenting).

154. 488 U.S. 469 (1989) (O'Connor, J.).

Court has traditionally deferred.[155] Although Justice O'Connor fears expressive harms from the consideration of race in these instances, we appreciate the expressive benefits in the federal government's efforts to eradicate the scourge of racial discrimination from American social life.

Judicial selection methods must ensure that a broad range of voices are represented on the bench to improve judicial impartiality. The backgrounds, perceptions, and understandings of the world serve as powerful social filters of judges that matter a great deal to the judicial function. Thus, in order for our independent judiciary to truly be "one of the crown jewels of our system of government,"[156] it must be racially diverse.

III. LESSONS FROM JURIES

Juries are fundamental to the conception of democracy in the United States. To this point, the analysis of the benefits of racial diversity has been largely divorced from the study of a diverse judiciary. However, the arguments for diverse juries offer insights for those contending that the quest for a racially diverse judiciary is both important and legitimate. As a democratic institution, juries in the United States must be open to all segments of the community to hold any degree of legitimacy among judges, lawyers, and—perhaps most importantly—the public at large.

The nation's commitment to diversity in the jury pool offers important lessons equally applicable to the judiciary. A cross-section approach to juries looks to the inclusiveness of the jury pool and to the general understanding that any individual juror, even if she would add racial diversity to the jury, must be stricken if her views are so extreme that she cannot be expected to fairly decide a case. The same holds true for judges.

Eligibility qualifications for jurors and judges affect efforts at increasing racial diversity. Limits on eligibility for jury service decrease the representativeness of juries, just as informal requirements on judicial nominees reduce the representation of minorities within the judiciary.

A. *A Jury Drawn From a Fair Cross-Section of the Community*

The generally accepted view in the United States is that juries should be drawn from a cross-section of the community rather than

155. *See Metro Broad.*, 497 U.S. at 614 ("Like the vague assertion of societal discrimination, a claim of insufficiently diverse broadcasting viewpoints might be used to justify equally unconstrained racial preferences, linked to nothing other than proportional representation of various races."); *Croson*, 488 U.S. at 510 ("Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics."); Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990).

156. Linda Greenhouse, *Rehnquist Joins Fray on Rulings, Defending Judicial Independence*, N.Y. TIMES, Apr. 10, 1996, at A1.

exclusively from one portion of the community.[157] This policy reflects the view that a jury is a democratic institution[158] and that "representativeness (1) improves the quality of jury decision-making; (2) enhances the jury's political legitimacy as a democratically inclusive institution; and (3) serves to educate jurors from the various represented groups about the nature and importance of civic participation."[159]

The Supreme Court has extolled the virtues of drawing a jury from a diverse cross-section of the community, stating that:

> The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.[160]

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157. *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 23–44 (1977); *see also* Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 949–75 (1998) (analyzing critically the requirement that the jury pool should represent a cross-section of the community).

Federal law states that "[i]t is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries *selected at random from a fair cross section of the community* in the district or division wherein the court convenes." 28 U.S.C. § 1861 (2000) (emphasis added).

158. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 252 (Jacob Peter Mayer & Max Lerner eds., 1969) (discussing juries as part of the commitment of the United States to democracy); VAN DYKE, *supra* note 157, at 1 ("The jury is the most democratic of our institutions.").

159. Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 361 (1999) (footnotes omitted).

160. Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946) (citations omitted); *see* Strauder v. West Virginia, 100 U.S. 303, 308 (1880) ("The very idea of a jury is a body of men composed of peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."). For discussions of the benefits of a diverse jury, see Sandra D. Jordan, *The Criminal Jury Trial: Erosion of Jury Power*, 5 HOW. SCROLL: SOC. JUST.

Although the methods of impaneling juries are designed to ensure that each jury is drawn from a fair cross-section of the community, an impaneled jury need not reflect every part of the community. No quotas control the composition of juries; rather, litigants jockey over which jurors will be impaneled.

The Supreme Court long ago held that racial minorities could not be excluded from grand or petit juries.[161] In *Smith v. Texas*, the Court forcefully explained that "[f]or racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."[162]

Consistent with this view, the Supreme Court has limited the use of peremptory challenges, which parties can ordinarily exercise to strike a prospective juror for almost any reason.[163] Neither racial minorities[164] nor women[165] may be excluded from serving on a jury because of their race or gender through the use of peremptory challenges.

Although the emphasis in jury exclusion cases is on the individual rights of litigants and prospective jurors, claiming that group membership is irrelevant to juries overstates matters. Group representation on juries is important for minority litigants in their feelings of community membership and their beliefs about the legitimacy of the justice system.[166] A prospective juror also has rights at stake, including the right to participate in what effectively is a political decision-making body.[167] In this way, jury service implicates both group and individual rights.

REV. 1, 29–37 (2002); Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659 (2002).

161. *See Strauder*, 100 U.S. at 310; *see also* Hernandez v. Texas, 347 U.S. 475 (1954). For a general discussion of the representation of racial minorities on juries, see HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE (1993).

162. 311 U.S. 128, 130 (1940).

163. *See infra* text accompanying notes 202–03.

164. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Batson v. Kentucky, 476 U.S. 79 (1986); *see also* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990) (contending that Whites should not be allowed to use peremptory challenges to strike African American jurors because to do so would violate the Thirteenth Amendment). For analysis of the possible abolition of peremptory challenges, see Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995).

165. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

166. *See* Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998).

167. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

Despite the commitment to inclusiveness among juries, we, as a society, are ambivalent about how truly representative we want juries to be. Parties may exercise peremptory challenges—striking jurors without offering a reason—and have the right to remove jurors for cause when their views are strong enough to warrant a fear that they may not act impartially.[168] Jury control devices abound, such as the Federal Rules of Evidence, which limit the evidence that a jury will see in a case, summary judgment, judgment as a matter of law, and new trial motions.[169] These devices, among other things, allow the court to intervene when it concludes that a jury exceeded its authority. Various jury control devices have been criticized as anti-democratic, but their existence shows the ambivalence about how closely we want our juries to resemble society.[170]

B. *The Benefits: Better Decision-Making and the Appearance of Impartiality*

The basic idea behind the fair cross-section of the community requirement is that such a system will provide for a variety of perspectives to the jury's deliberations, helping to ensure better decision-making and to enhance the appearance of impartiality. The generalized desire to draw a jury from a cross-section of the community does not mean that any particular juror will be seated. In summarizing a series of jury studies, one commentator states that "[j]ury research shows that racially heterogeneous juries are more likely than single race juries to enhance the quality of deliberations. A number of empirical studies ... show that racially mixed juries minimize the distorting risk of bias."[171]

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168. *See* Curtis v. Loether, 415 U.S. 189, 198 (1974); *see, e.g.*, Flowers v. Flowers, 397 S.W.2d 121 (Tex.App. 1965).

169. *See* FED. R. CIV. P. 50, 56, 59; FED. R. EVID.

170. *See* Fleming James, Jr., *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218 (1961); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Ending Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

171. Hiroshi Fukurai, *Social De-Construction of Race and Affirmative Action in Jury Selection*, 11 BERKELEY LA RAZA L.J. 17, 20 (1999) (footnotes omitted); *see* Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 97–107 (1996); *see also Developments in the Law—Race in the Criminal Process*, 101 HARV. L. REV. 1472, 1557–88 (1988) (scrutinizing the impact of race on jury deliberations); Sheri Lyn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (analyzing studies suggesting bias by White jurors in deciding cases with African American criminal defendants).

As with judges, the evidence is not clear, however, that the race of jurors definitely affects the outcome of any particular case.[172] Acknowledging this basic truth, Justice Marshall nonetheless emphasized that:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[173]

Moreover, a diverse jury pool serves important public values. Namely, society has an interest in protecting the legitimacy of the jury system by impaneling a jury from a cross-section of the community.[174] If the jury reflects a mix of the community, the public will tend to view the final outcome of a jury verdict as more legitimate because it more closely approximates the community; in other words, the jury in that circumstance is more democratic. The idea is that the "best way to minimize bias is to impanel a representative cross section of the community; without such a cross section, doubts about the jury's partiality will persist."[175]

Along these lines, "[t]he representative character of a jury should also enhance its capacity to reach a community consensus with respect to normative, moral, or otherwise subjective judgments."[176] Regardless of the outcome, the decision of a representative jury is more likely to be viewed as legitimate than that of a homogeneous jury.[177]

The need for legitimacy is at its greatest in a highly charged, potentially racially-polarizing case. The all-White jury that acquits White police

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172. *Compare* Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 77–99 (1993) (reviewing evidence of impact of juror's race on outcome) *with* Edward S. Adams & Christian J. Lane, *Constructing A Jury That is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 705 (1998) (footnote omitted) (stating that "the impact of race on jury verdicts cannot be established definitively").

173. Peters v. Kiff, 407 U.S. 493, 503–04 (1972) (footnote omitted) (holding that White defendant could raise issue of exclusion of African Americans from the jury).

174. *See* Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177 (1994).

175. VAN DYKE, *supra* note 157, at 45.

176. Forde-Mazrui, *supra* note 159, at 362; *see* Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 717–23 (1995).

177. *See* Forde-Mazrui, *supra* note 159, at 362–64; Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 504 (1986).

officers who commit violence on an African American (Rodney King, for example), is the archetypal case of this type. As one scholar notes:

> [T]he perception that the composition of the jury affects its verdict is the basis of challenges by defendants to the makeup of juries that convicted them. The all-[W]hite jury trying a [B]lack man, the all-male jury trying a woman, and the jury of the propertied judging the case of a laborer, and the middle-aged deciding the fate of a youth—all these have been challenged for not fulfilling the constitutional guarantee of an "impartial jury."[178]

The public reaction to a diverse jury's conviction of a minority defendant will differ substantially from the public perception of the criminal conviction of an African American by an all-White jury.[179] Indeed, the mere reference to an "all-White jury" amounts to a harsh rebuke of the jury verdict, in large part because it taps into a notoriously ugly history of racism in the criminal justice system in the United States.[180]

Riots followed the all-White jury's acquittal of the Los Angeles police officers who were videotaped beating African American Rodney King.[181] In essence, the African American community believed that the jury did not represent the community as a whole, especially the community primarily affected by the police brutality; that community saw the jury's verdict as illegitimate.[182] These deep-seated feelings contributed to the violent uprisings that followed.

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178. VAN DYKE, *supra* note 157, at 45.

179. *See* Alschuler, *supra* note 176, at 704 ("Few statements are more likely to evoke disturbing images of American criminal justice than this one: 'The defendant was tried by an all-[W]hite jury.' "); Tanya E. Coke, Note, *Lady Justice May Be Blind, But is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 327–31 (1994) (offering examples of controversial verdicts rendered by all-White juries); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895 (2004) (stating that one of the goals of the Reconstruction Amendments was "to protect[] [B]lack victims from all-[W]hite juries").

180. *See* RANDALL KENNEDY, RACE, CRIME AND THE LAW (1997); KATHERYN K. RUSSELL ET AL., RACE AND CRIME: AN ANNOTATED BIBLIOGRAPHY (2000).

181. *See generally* READING RODNEY KING, READING URBAN UPRISING (Robert Gooding-Williams ed., 1993). In the Rodney King case, the trial was moved from downtown Los Angeles to Simi Valley, a White suburb, with a racially unrepresentative jury ultimately hearing the case.

182. The lessons of the Rodney King violence have been grimly summarized as follows:

> Many lessons may be learned from the embers of burned homes and storefronts in South Central Los Angeles. Among the most important is that America's failure to include minorities in judicial decisions that affect their lives is a prescription for chaos. . . . The lesson is not new. Violent reactions to

The legitimacy of the decision-making process thus is fostered by ensuring that juries are diverse.[183] Currently, minorities see a court system in the United States that is predominantly White, with White lawyers and judges the norm.[184] "Nonwhites are underrepresented on juries in the vast majority of courts in this country."[185] The decisions meted out by the justice system are viewed as having racially disparate impacts, with White people dispensing and defining "justice" in cases involving people of color.

Not long after the riots protesting the acquittal of police officers in the Rodney King case in May of 1992, one prominent court of appeals judge pointed to the Presidents' judicial selections and stated the following about the federal courts: "[b]y their [judicial] appointments, Presidents Reagan and Bush have ensured that the federal courts will not be representative. Instead, they are a bastion of [W]hite America."[186] This extreme characterization aptly describes how many minorities may view the judiciary and the justice system as a whole.

C. *Anti-Democratic Tendencies: Limits on Juror Eligibility*

Juries represent the nation's commitment to democracy in our justice system as well as a protection against the arbitrary use of judicial power.[187] There are limits to the nation's commitment to a jury being drawn from a cross-section of the community, with many of the exclusions having racial impacts and adversely affecting the representative nature of the jury. Various eligibility requirements deny segments of the

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> miscarriages of justice by [W]hite judges and all-[W]hite juries are an all-too-common signpost of American history.

Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 516 (footnote omitted).

183.

> The jury system is supposed to establish the legitimacy of the justice rendered—to prevent such mistrust and hostility from occurring. But racially connected misconceptions and prejudice can imperil the impartiality of a jury. Only by balancing this prejudice—which jurors of all kinds feel about issues and people—through a jury composed of a cross-section of the community can impartiality be fostered.

VAN DYKE, *supra* note 157, at 32.

184. *See* Berta Esperanza Hernández-Truyol, *Las Olvidadas—Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 J. GENDER, RACE, & JUST. 353, 373–75 (1998).

185. VAN DYKE, *supra* note 157, at 28.

186. Stephen R. Reinhardt, *Riots, Racism, and the Courts*, 23 GOLDEN GATE U. L. REV. 1, 7 (1993).

187. *See, e.g.*, R.R. Co. v. Stout, 84 U.S. 657, 664 (1874).

community from anything close to proportionate representation on juries and undermine their legitimacy.

Consider some of the limits on the representativeness of juries. Socioeconomic class differences contribute to lower representation on juries by poor and working class people who are less able economically to perform jury service.[188] Racial minorities are underrepresented in jury pools and juries, prompting academics to propose corrective measures.[189] This section analyzes eligibility requirements that dilute the representation of minority groups, particularly Latina/os, on juries.

1. Immigrants

Immigrants who are not United States citizens, even those who have lawfully lived in the United States for many years, may not serve on juries.[190] This requirement has significant impacts on the jury pools in major cities with large immigrant populations, such as Los Angeles, New York City, San Francisco, Chicago, and Miami. The impacts are not limited to major urban centers, however. Large immigrant populations have emerged in rural parts of the country as well, including areas in the South and Midwest.[191]

Given the demographics of the modern immigrant stream, the citizenship requirement for jury service has disparate racial impacts. For example, according to Census 2000, almost thirty percent of the Latina/os in the United States are not United States citizens[192] and thus are ineligible for jury service. In Los Angeles County in the year 2000, more than

188. *See* Mitchell S. Zuklie, Comment, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101, 103–04 n.18 (1996) (citing studies reaching this conclusion).

189. *See, e.g.*, Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 712–19 (1993); *see* Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 977–78 (1995).

190. *See* 28 U.S.C. § 1865(b)(1) (2000) (providing that a person who "is not a citizen of the United States" is not eligible for jury service). Courts have upheld this requirement in the face of the claim that it denies a party the right to an impartial jury. *See, e.g.*, United States v. Toner, 728 F.2d 115, 129–30 (2d Cir. 1984); United States v. Avalos, 541 F.2d 1100, 1118 (5th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977); Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974), *aff'd without op.*, 426 U.S. 913 (1976).

191. *See* Kevin R. Johnson, *The End of "Civil Rights" As We Know It?: Immigration and Civil Rights in the New Millenium*, 49 UCLA L. REV. 1481, 1492–96 (2002) [hereinafter Johnson, *The End of "Civil Rights"*] (discussing Mexican diaspora across the United States).

192. U.S. Census Bureau, *Place of Birth by Citizenship Status (Hispanic or Latino)*, *at* http://factfinder.census.gov/servlet?DDTable?_bm=y&geo_id+D&ds_name+D&_lang+en&mt_name (last visited July 24, 2004).

one-third of the residents were foreign born, most of whom are noncitizens excluded from the jury pool.[193]

"The vast majority of today's immigrants are people of color."[194] The exclusion of immigrants from juries thus has serious impacts on the representativeness of juries and the extent to which they reflect a cross-section of the community. However, the justice system that denies immigrants from serving on juries still resolves their civil and criminal disputes.[195]

Until early in the twentieth century, noncitizens were permitted to vote and serve on juries in many states.[196] Indeed, for centuries, in order to ensure fairness to noncitizens, English law authorized juries *de medietate linguae*—juries of half citizens and half noncitizens—in cases involving noncitizens.[197] Allowing noncitizens, though perhaps only those who have lived in a jurisdiction for a certain length of time, to serve on juries would make juries more representative of the community.

2. English Language Proficiency

Under federal law, to be eligible for jury service, a person must be able to read, write, understand, and speak English.[198] Like citizenship requirements, English language requirements for jury service have disparate impacts on minority communities, particularly Latina/o and Asian immigrants. Many (although by no means all) Latina/os in the United States are primarily Spanish speakers.[199] English may not be the primary language for

193. *See* U.S. Census Bureau, *Los Angeles County Quick Facts from the U.S. Census Bureau*, *at* http://quickfacts.census.gov/qfd/states/06/06037.html (last visited Oct. 31, 2004).

194. Johnson, *The End of "Civil Rights,"* *supra* note 191, at 1505.

195. *See* Amar & Brownstein, *supra* note 166, at 918 (contending that the right to a jury trial, as well as the right to vote, has both group and individual rights dimensions that involve minority representation).

Noncitizens generally can have their disputes resolved in federal, rather than state, courts, the assumption being that federal courts, which have judges with life tenure, are less likely to be biased against foreigners. *See* 28 U.S.C. § 1332 (1993 & Supp. 2004). *See generally* Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1 (1996) (analyzing reasons for alienage jurisdiction). However, noncitizens still cannot sit on juries in federal court.

196. *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397–1417 (1993); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1093–1100 (1977).

197. *See* Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury de Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777 (1994).

198. *See* 28 U.S.C. § 1865(b)(2), (3) (2000).

199. *See* Cameron, *supra* note 87, at 1364–67 (analyzing importance of Spanish language to Latina/o identity).

many Asian immigrants, as well as some Native Americans in areas of the country where indigenous languages are the primary languages of significant portions of the population.[200]

Language requirements tend to reduce the representation of certain minority groups and restrict the degree to which the jury will be drawn from a representative cross-section of the community. In modern American society, language may serve as a proxy for race. "Given the huge numbers of immigrants who enter this country from Asian and Latin American countries whose citizens are not White and who in most cases do not speak English, criticism of the inability to speak English coincides neatly with race."[201]

An example amply illustrates the overlap between language and race. In *Hernandez v. New York*,[202] the prosecutor, claiming that the prospective jurors might disregard official translations, used peremptory challenges to strike bilingual Spanish speakers, thus striking Latina/o jurors in a criminal case involving a Latino defendant. Despite the clear racial impacts, the Supreme Court found reliance on the peremptories to strike bilingual Spanish/English speakers to be a permissible race-neutral reason for exercising the challenges.[203]

As the Court suggested, an English language requirement seems reasonable at first glance. The difficulties of translation of testimony and documents in different languages may appear unwieldy. However, if we truly are committed to the democratic ideal of having the jury pool reflect a cross-section of the community, we should reevaluate whether limiting juror eligibility to English speakers costs more than it benefits the system as a whole. To this point, law- and policy-makers have not engaged in this cost-benefit analysis but simply have reflexively embraced English without considering the racial impacts of the English language requirement for jury service.

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200. *See* Allison M. Dussias, *Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901 (1999).

201. Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 874 (1995).

202. 500 U.S. 352 (1991).

203. For a sampling of criticism of *Hernandez*, see Marina Hsieh, *"Language-Qualifying" Juries to Exclude Bilingual Speakers*, 66 BROOK. L. REV. 1181 (2001); Miguel A. Méndez, Hernandez: *The Wrong Message at the Wrong Time*, 4 STAN. L. & POL'Y REV. 193 (1993); Juan F. Perea, Hernandez v. New York: *Courts, Prosecutors and the Fear of Spanish*, 21 HOFSTRA L. REV. 1 (1992); Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761.

3. Felons

By federal law, convicted felons whose civil rights have not been restored and persons with felony charges pending are excluded from serving on juries in federal courts.[204] Given the racially disparate impacts of the operation of the criminal justice system in the United States,[205] minority groups are overrepresented among those excluded from serving on juries based on felony convictions. For example, more than thirty percent of the potentially eligible African American men in Florida and Alabama are denied the right to serve on juries as well as the right to vote.[206] Nationally, "fourteen percent of African American men are ineligible to vote because of criminal convictions. In seven states, one in four Black men is permanently barred from voting because of their criminal records."[207] In these states, the percentage of Black men permanently barred from voting is much greater than the percentage of Black men as a percentage of the population.

Like African Americans, Latina/os are disparately affected by the disenfranchisement of felons.[208] Overrepresented in the criminal justice system compared to their proportion of the population, Latina/os can be expected to be excluded from jury service in disproportionate numbers due to felony disenfranchisement. This is clearly the case in states such as California, Arizona, New York, Florida, and Texas, which have large Latina/o populations and an even a larger percentage in prison.[209] Far smaller percentages of

204. *See* 28 U.S.C. § 1865(b)(5) (2000).

205. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN JUSTICE SYSTEM (1999); KENNEDY, *supra* note 180; Reynoso, *supra* note 95, at 277; Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

206. *See* John O. Calmore, *Race-Conscious Voting Rights and the New Demography in a Multiracing America*, 79 N.C. L. REV. 1253, 1277–80 & nn.115–16 (2001); *see also Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1945 (2002) ("Florida has disqualified 31.2% of its [B]lack voting-age population—the second highest rate in the nation [Alabama's rate was 31.5%]—on the basis of felony convictions.") (footnote omitted). For discussions of the voting impacts on felon disenfranchisement, see Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004); Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration*, 12 FED. SENTENCING RPT. 248 (2000); Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85 (2004).

207. George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1900 (1999) (footnotes omitted).

208. *See* Reynoso, *supra* note 95, at 294.

209. *See* MARISA J. DEMEO & STEVEN A. OCHOA, MEXICAN AM. LEGAL DEF. & EDUC. FUND, DIMINISHED VOTING POWER IN THE LATINO COMMUNITY: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN TEN TARGETED STATES (Vibiana Andvade ed., 2003), *available at* http://www.maldef.org/publications/pdf/FEB18-LatinoVotingRightsReport.pdf.

Whites than African Americans or Latina/os are declared ineligible for jury service by this rule.

The end results are racially skewed jury pools that tend to produce juries that are demographically different from the community at large. Such juries deny litigants the right to a jury that reflects the richness of the greater community and diminishes the legitimacy of the jury's verdict in the eyes of certain segments of the general population.

D. *Lessons for Racial Diversity on the Judiciary*

Eligibility requirements for jurors significantly impact the racial demographics of juries and reduce their representativeness. The lack of diversity on juries, in turn, has negative effects on the perceived legitimacy of the justice system. Racial skews in the body of decision-makers contribute to the perception of racially biased decisions. In certain instances, the questionable legitimacy of the decision-maker contributes to the potential for civil unrest.[210]

Democratic theory suggests the need for a diverse jury pool that represents the community in meting out justice, and it should apply equally to judges who make judicial decisions affecting society. As has been observed:

> One aspect of democratic theory bears on the representativeness of public officials, including judges. Should not jurists reflect a cross-section of the American people? Should they not mix freely with the community they serve? Perhaps both of these aspects of representativeness are required in order for judges to be in tune with the values of the community.[211]

As a general proposition, a jury should reflect a cross-section of the community because that makes it more likely to reflect a range of community values. Similarly, judges who reflect the diversity of the community are more likely in the aggregate to reflect a range of views in that community.

In any individual instance, however, a racial minority may hold views or have biases that would justify striking that person from a jury.[212] Similarly,

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210. *See supra* text accompanying notes 181–82.

211. Charles H. Sheldon & Nicholas P. Lovrich, Jr., *State Judicial Recruitment*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT, *supra* note 11, at 161, 164 (citations omitted).

212. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 9A FEDERAL PRACTICE AND PROCEDURE § 2483 (2d ed. 1995); *see, e.g.*, United States v. Martinez-Salazar, 528 U.S. 304 (2000) (addressing issues raised in case in which district court erred in denying challenge to juror for cause despite his admission that he would favor the prosecution in a criminal case).

with respect to any individual judicial nominee, an individual may ideologically be so far out of the mainstream that those sympathetic to diversifying the judiciary might well agree that the nominee should be rejected.

A solid representation of minorities on the bench generally would be viewed as a fairer and more impartial system, as well as one that would likely command more public confidence. "[S]tructural impartiality is realized through the interaction of diverse viewpoints on the bench and the resulting decreased opportunity for one perspective to consistently dominate judicial decision-making. As such, racial diversity on the bench would promote, rather than undermine, impartiality."[213]

Limits on juror eligibility are being scrutinized currently because of their consequences on the racial composition of juries. The impacts of informal eligibility requirements for judges, such as previous judicial experience[214] or graduation from an elite law school,[215] resemble formal limits on juror eligibility. Like limitations on juror eligibility, they may be tied to conceptions of "merit" and decisions about who is "qualified" to be a judge. The implicit requirements limit the diversity of the judiciary and undermine the legitimacy of its decisions in the eyes of the public. Consequently, as with juror qualifications, the qualifications demanded of judges deserve consideration to determine whether the benefits of these characteristics to the decision-making process are outweighed by the costs to the diversity of the judiciary.[216]

IV. TOWARD A PRINCIPLED POSITION FOR SEEKING DIVERSITY ON THE BENCH

From Chief Justice William Rehnquist[217] to the American Bar Association,[218] broad agreement exists that there is a pressing need for a diverse judiciary. As the late Chief Justice Warren Burger remarked:

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213. Ifill, *Judging the Judges*, *supra* note 16, at 119.

214. *See, e.g.*, Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 956–60 (2003) (finding that gender and racial diversity of pool of potential Supreme Court nominees was reduced significantly by requirement that all nominees have previous judicial experience); Goldman, *supra* note 11, at 198 (noting trend since Eisenhower administration of nominating federal judges with previous judicial experience).

215. *See* Goldman, *supra* note 11, at 195 (stating that, in 1991, "[c]lose to 85 percent of those appointed to the Supreme Court attended the best law schools or (as was typical of legal education in the nineteenth century) served apprenticeships with prominent lawyers and judges").

216. *See supra* text accompanying note 211.

217. Chief Justice Rehnquist stated that "'[a]ll things being equal,' the President might indeed consider 'representative factors.'" PERRY, *supra* note 14, at 137 (quoting Rehnquist).

218. *See* ABA REPORT, *supra* note 129, at 60.

> The qualifications that I think should be required in the appointment of a federal judge are integrity and professional competence. I do not share the view of a few people that the federal judiciary should be representative in the sense that it should have x number of Hispanics, x number of Negroes, x number of women. By the very nature of things, that will take care of itself, and there should be no quota or anything remotely resembling a quota system in the appointment of federal judges. Undoubtedly, the President of the United States, in appointing a judge in the south-western part of the country, is going to take into account the large Hispanic population; or on the far west coast he would take into account qualified persons who are of Asian extraction; or anywhere in the country, he would take into account members of the bar who are Negroes.[219]

Few would dispute that Justices Marshall and O'Connor were selected in no small part because of their race and gender, respectively.[220] Interestingly, the selections of Chief Justice Melville Fuller and Justices Samuel Miller, Willis Van Devanter, and Joseph McKenna are no different,[221] although their nominations often are not viewed as representative appointments.

To return to the central question raised by this Article, how does one reconcile supporting racial diversity among judges without supporting every judicial nominee who is a person of color? This Part addresses that question, which was raised prominently by the nominations of two conservative minorities, Clarence Thomas and Miguel Estrada, to the federal judiciary.

The analysis of judicial nominations may gain much from the law school admissions process vindicated by the Supreme Court in *Grutter v. Bollinger*[222] as well as from the jury selection literature.[223] Many factors must be considered when appointing an individual to the bench.

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219. GARRY STURGESS & PHILIP CHUBB, JUDGING THE WORLD: LAW AND POLITICS IN THE WORLD'S LEADING COURTS 298 (1988).

220. *See* ABRAHAM, *supra* note 11, at 6; PERRY, *supra* note 14, at 96–102, 121–24; *see also* Thomas R. Marshall, *Symbolic Versus Policy Representation on the U.S. Supreme Court*, 55 J. POL. 140, 140–41 (1993) (contending that "symbolic appointments ... are relatively common").

221. *See* ABRAHAM, *supra* note 11, at 6; DAVID O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 80–92 (3d ed. 1993); *see also* PERRY, *supra* note 14, at 133 (concluding that in the sixteen nominations that she examined, "representativeness" played a role twelve times).

222. 539 U.S. 306 (2003).

223. *See supra* text accompanying notes 119–20 and Part III.A.

In the modern political process of selecting judicial nominees, appointments based strictly on "merit" are largely mythical.[224] However, a loose notion of merit must serve as the floor for any judicial nominee.[225] The need for diversity among the judiciary further requires that an individual's "representativeness," and particularly her race, play a role as well. Rather than simply racial background, ties to the community, ideology judicial philosophy, and other considerations contribute to the view of a candidate as representative of a minority community.

In staking a defense of judicial diversity, however, we decline to take the untenable position of advocating support for any and all people of color nominated to the bench. Minorities should not be expected to support *every* minority, including nominees who will act in a way they generally believe to be antithetical to minority interests. For example, African Americans should not feel compelled to support the nomination of a judge such as Justice Thomas simply because he is an African American.[226] Similarly, Latina/os should not feel forced to support the nomination of someone like Miguel Estrada, an arch-conservative nominee with virtually no ties to the Latina/o community, simply because he is Latino.[227]

Consequently, if racial diversity remains the goal, and if judicial diversity is sought in order to ensure that a variety of perspectives are represented in judicial decision-making, one must defend support for some people of color but not for others. The need to defend this position is poignant in light of our agreement with antiessentialists who proclaim the existence of an amalgam of voices of color.[228] By definition, such a panoply will include many voices that may approach issues differently than a member of the majority group.[229]

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224. *See* O'BRIEN, *supra* note 221, at 65–72; *cf.* Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449 (1997) (criticizing conceptions of "merit" employed in law school admissions).

225. *See* PERRY, *supra* note 14, at 135–38. For an effort to offer objective indicia of merit in evaluating Supreme Court nominees, see Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004).

226. *See supra* text accompanying notes 38–40. Some civil rights groups, such as the Urban League, declined to take a position on the Thomas nomination. *See* TIMOTHY M. PHELPS & HELEN WINTERNITZ, CAPITAL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION 73–80 (1992).

227. *See infra* text accompanying notes 240–45.

228. *See supra* text accompany notes 21–22.

229. For example, Justice Thomas had different approaches to the problems at issue in the Virginia cross burning case as well as the University of Michigan affirmative action cases than did White Justices who shared his bottom line. *See supra* text accompanying notes 41–46.

A. *The Importance of Ideology*

Judicial ideology is relevant to the decision whether to support a judicial nominee who is a person of color. As with jurors, not just any minority will do in seeking a diverse jury. Advocates for a diverse bench, including minority advocacy organizations, can seek a more diverse judiciary but decline to support nominations such as those of Justice Thomas and Janice Rogers Brown on ideological grounds.

Even assuming that these jurists speak with a voice of color, they arguably have ideological predispositions toward deciding cases in a manner antithetical to the generally perceived interests of minorities.[230] Minority activist groups thus should not support judicial nominees—minority or not—who are hostile to minority interests. This is true even if the nominee, like Justice Thomas, speaks with a clear minority voice in some instances.[231]

When impaneling a jury, diversity obviously is a consideration for litigants, especially minority litigants. However, we do not want just any minority on a jury, such as one who may be predisposed against minority interests. Similarly, just because one supports racial diversity on the judiciary does not mean that one should support the judicial nomination and confirmation of every racial minority to achieve a certain "racial aesthetic."[232] Deep material interests are at stake and cannot, or should not, be sacrificed for the sake of racial diversity.

Importantly, minorities in certain circumstances may be tougher on other minorities.[233] A variety of explanations may help us understand this phenomenon. For example, minorities may internalize the stereotypes of others.[234] Alternatively, the embrace of racism against minorities may be part of attempts by some minorities to assimilate into the mainstream.[235] These explanations highlight the ripple effects of the fact that there are voices, not a single voice, of color within minority groups.

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230. *See supra* text accompanying Part I.A.1.

231. *See supra* text accompanying notes 41–47.

232. Grutter v. Bollinger, 539 U.S. 306, 349, 354 & n.3 (2003) (Thomas, J., concurring in part, dissenting in part) (using the phrase "racial aesthetics" to criticize the university's quest for a diverse student body).

233. *See* King, *supra* note 172, at 97 ("[S]tudies suggest that [B]lack jurors and jurors of Mexican descent are more likely to assign harsher sentences to convicted defendants of their own race or ethnicity than [W]hite or Anglo jurors.") (footnote omitted).

234. *See* Laura M. Padilla, *"But You're Not a Dirty Mexican": Internalized Oppression, Latinos & Law*, 7 TEX. HISP. J.L. & POL'Y 59 (2001); Laura M. Padilla, *Social and Legal Repercussions of Latinos' Colonized Mentality*, 53 U. MIAMI L. REV. 769 (1999).

235. *See* Johnson, *Some Thoughts*, *supra* note 77, at 141; Kevin R. Johnson, *Immigration and Latino Identity*, 19 CHICANO-LATINO L. REV. 197, 199–206 (1998).

In short, the ideology of any nominee—racial minority or not—to the courts is critical.[236] Any diversity benefits may be outweighed by the costs to minority communities of nominees with certain ideologies. As in many policy areas, interest groups often make difficult cost/benefit judgments in making judicial selection decisions. Advocacy groups are in the best position to make such difficult political calculations, such as whether having a moderate judge of color is preferable to a liberal White judge.

B. *A Multifactored Test*

We have argued that a diverse bench would improve decision-making in multimember bodies, enhance the legitimacy of the bench as a whole, and render the bench more (and appear more) impartial.[237] When arguing for or against a particular judicial nominee, one must look to these factors before deciding whether a candidate of color is worthy of support. In terms of improving the decision-making process, for example, it seems most important to add judges with different perspectives than those represented in the current judiciary. True, racial minorities who share the world view of the majority might add to the perception of judicial impartiality. However, they are unlikely to add much in the way of ideological diversity and different perspectives that improve the decision-making process.

In evaluating Justice Thomas's performance on the Court, one commentator observed that:

> Other Justices who came to the Court marked as outsiders by race or religion have struggled to define the appropriate scope of their empathy for, in Justice Thomas's words, "the little guy." Justice Felix Frankfurter claimed for himself a unique capacity for empathy with the outsider because of his membership in (in his words) "the most vilified and persecuted minority in history." But Frankfurter never developed a jurisprudence of empathy for the outsider. He became instead, in the words of one commentator, "an overeager apologist for the existing order." On the other hand, Justices Louis Brandeis and Thurgood Marshall more eagerly embraced their status as outsiders in developing judicial philosophies that were more indulgent of the claims of the little guy and more suspicious of the existing

236. *See generally* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY (1985) (calling for careful scrutiny of the ideology of Supreme Court nominees). For similar views, see Erwin Chemerinsky, *Of Course Ideology Should Matter in Judicial Selection*, 7 NEXUS (2002), *at* http://www.nexusjournal.org/2002judicial/chemerinsky.htm.

237. *See supra* Part II.

> order—even though their views often placed them in lonely dissent.[238]

In other words, a minority jurist is not certain to improve the judicial decision-making process based on race alone. Minorities generally do not benefit from judges who are "overeager apologist[s] for the existing order."[239] An individual's ideology, identity, and other characteristics undoubtedly play a role in how he or she will influence the decision-making process. Politicians, interest groups, minority communities, and the public at large therefore must consider such characteristics in determining whether to support or oppose a nominee.

To state the obvious, not every Latina/o will add a new perspective to the courts. Miguel Estrada, the Honduran nominated by President George W. Bush for a coveted position on the United States Court of Appeals for the District of Columbia Circuit, is an example of a nominee who would have added racial but not ideological diversity.[240] An avowed conservative with ties with the Federalist Society, a conservative advocacy organization,[241] Estrada is unlikely to share the views of many Latina/os, a group that as a whole tends to be liberal in outlook on many issues. By his own account, Estrada had a most attenuated connection to the Latina/o community, limited primarily to listening to Hispanic music and reading Spanish language novels.[242] Refusing to answer questions directed at his ideology, Estrada exhibited a subtle disdain for the minority activist groups interviewing him and the Senate committee holding hearings on his nomination.[243]

The goal is for a truly diverse bench, populated with myriad voices and perspectives. Only such a judiciary will prove legitimate in the eyes of all communities. Every new judge of color will add marginally to perceived judicial legitimacy. Whether Clarence Thomas or Thurgood Marshall, Miguel Estrada or Juan Torruella, the appointment of any of these individuals would add some degree of legitimacy to the bench by making the courts more representative of different racial groups.

In this way, the confirmation of Miguel Estrada as a judge would have made the courts a bit more diverse racially and somewhat more le-

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238. Muller, *supra* note 39, at 249.

239. *Id.*

240. *See* Kevin R. Johnson, *Defense of the Estrada Filibuster: A Judicial Nominee that the Senate Cannot Judge*, FINDLAW'S LEGAL COMMENTARY, *at* http://writ.news.findlaw.com/commentary/20030227-johnson.html (Feb. 27, 2003) [hereinafter Johnson, *Estrada*].

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

242. *See* Tony Mauro, *Hispanic Groups Divided Over Estrada Nomination: Conservative D.C. Circuit Pick to Face Senate Panel Sept. 26*, LEGAL TIMES, Sept. 23, 2002, at 1.

243. *See* Johnson, *Estrada*, *supra* note 240.

gitimate. Simply having a person with a Spanish name and surname would add diversity to the federal judiciary and tend to lend greater legitimacy to the federal courts in the eyes of the large, and growing, Latina/o community; such legitimacy would have been magnified in Estrada's appointment because of the prestige and visibility of the United States Court of Appeals for the District of Columbia Circuit. The quest for inclusion and membership helps explain the support of some Latina/o advocacy groups for Estrada's confirmation despite his weak ties to the Latino community and his conservative ideology.[244] Moreover, Estrada's appointment, along with the confirmation of a critical mass of Latina/os, would clearly reveal that Latina/os share a wide diversity of political opinions, just as Anglos, African Americans, Asian Americans, and other groups do.[245]

However, unlike many other potential Latina/o nominees, the symbolic and legitimacy benefits to Estrada's confirmation may well have been outweighed by the impacts that he could have on the law affecting Latina/os, in light of his ultraconservative political ideology. Again, judicial ideology must be weighed in evaluating the Estrada nomination to understand the costs to Latina/os. Such cost/benefit calculations are inherently difficult but must be undertaken by minority activist groups.

The argument for judicial diversity on grounds of institutional legitimacy in fact requires the appointment of people of color to the bench. Debates over judicial diversity often focus solely on numbers and on how few people of color serve on the bench. Looking only at numbers is not enough, however. When considering the racial face of our judiciaries, illegitimacy is a great concern because these institutions do not represent all communities. The quest for judicial diversity is really a quest for the *representation* of myriad voices on the bench.

It thus is not simply about numbers but also about the legitimacy gained through representing many voices and communities. In evaluating the nomination of Miguel Estrada, it became painfully clear that he did not represent—or in any way have any identification with or by—Latina/o communities. In this way, the argument for legitimacy is linked to the argument for improved decision-making. Increasing diversity hopefully means introducing new perspectives that are traditionally absent in the judiciary. These new perspectives will not only promise to improve the judicial decision-making process, but in so doing they will help legitimize the judiciary as well.

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244. *See* Darryl Fears, *For Hispanic Groups, A Divide on Estrada: Political, Geographic Fault Lines Exposed*, WASH. POST, Feb. 20, 2003, at A4; Mauro, *supra* note 242.

245. A similar "critical mass" argument was one of the justifications offered by the University of Michigan Law School for the reliance upon race in its affirmative action program. *See* Grutter v. Bollinger, 539 U.S. 306, 319–20 (2003).

Other Latina/os might pose more difficult questions than Miguel Estrada for Latina/o advocacy groups deciding whether to support or oppose judicial nominees. Conservative Latina/os, such as Attorney General Alberto Gonzales, who testify in good faith and have ties to the Latina/o community would be much more difficult to oppose than someone with few connections to this community, such as Miguel Estrada. Rumors have placed Gonzalez, who appears to hold more moderate political views than Estrada's and has ties to the Mexican American community in Texas, on a list of potential nominees to the Supreme Court by President Bush.[246] His is the sort of nomination that may be expected in the future—and that may be expected to divide Latina/o activist groups.[247]

In sum, the quest for impartiality—and the public perception of legitimacy—suggests the need for a representative judiciary, just as it supports drawing jurors from a cross section of the community. Judges come to the bench with preconceptions about the law. They filter the facts of cases through their own personal lenses. As a result, impartiality demands a diverse bench, so that no one conception of the world dominates all others under the guise of equal application of the law. But diversity means more than mere numbers; rather it must be understood that those appointed do, in fact, have diverse preconceptions about the law and the world. Otherwise, any prospective impartiality will prove illusory.

CONCLUSION

Greater racial diversity on the bench is a laudable goal. The justice system benefits when it is represented by a jury that accurately reflects a cross section of the community because such a jury is perceived as impartial to all racial groups. The system similarly benefits from diversity among judges, and the system's legitimacy is enhanced in the eyes of the public by a more racially diverse bench.

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246. *See* Jonathan Darman, *Alberto Gonzales: Still Working for Bush*, NEWSWEEK, Dec. 19, 2003, *available at* http://www.msnbc.msn.com/id/3751995/site/newsweek; Toobin, *supra* note 8, at 48. In November 2001, President Bush nominated Gonzales for the United States Attorney General post, which created a good deal of controversy—even among Latina/os—before he was confirmed. *See* Eric Lichtblau, *Democrats Expect Gonzales to be Confirmed for Justice Post*, N.Y. TIMES, Nov. 18, 2004, at A28.

247. Gonzales, however, may face opposition based on his legal advice provided in connection with the "war on terror" and in Iraq, *see* Peter Smith, *White House Lawyer Defends U.S. Actions*, COURIER J., Oct. 5, 2004, at 1B, as well as his role in reviewing death penalty clemency requests for President Bush who was then the governor of Texas. *See* Alan Berlow, *The Texas Clemency Memos*, ATL. MONTHLY, July/Aug. 2003, at 91.

However, proponents of diversity on the courts should not feel whipsawed and forced to embrace every minority nominated to serve as a judge. Many individual factors, such as ideology, judicial temperament, and life experience, as well as race, remain relevant to whether one is a suitable for judicial appointment. Just as any minority juror will be judged on factors other than race, so should prospective minority judges.

Put more bluntly, the ideology of a jurist is important no matter what his or her race or gender. Many, perhaps most, African Americans, for example, would rather have nine William Brennans on the Supreme Court than nine Clarence Thomases. The jury selection process helps us understand the dynamics at work. As a general proposition, we support increased racial diversity on juries. However, the individual characteristics of the perspective juror or judicial nominee in fact do matter; the costs of a nominee's ideology may outweigh any benefits achieved by appointing her to diversify the bench if those views are significantly out of step with the community.

It is self evident that an individual nominee's views and ideology must be considered, as well as her race and background. However, racial diversity and ideological diversity often are not separated in the heated debates over Supreme Court nominees. For each individual nomination, careful attention must be given to these separate characteristics. Importantly, an advocate of racial diversity on the judiciary could, as a matter of principle, decide that any benefits offered by a nominee to the judiciary from added racial diversity are outweighed by the costs of the individual's ideological views on important social issues without compromising her support for increased diversity on the bench.