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WHAT WILL DIVERSITY ON THE BENCH MEAN FOR JUSTICE?†

Theresa M. Beiner*

INTRODUCTION

Imagine that you are a student away from home for the first time attending college. Imagine further that you have a scholarship from your employer that helps pay your tuition. As part of the requirements of that scholarship, you have to work part time at the local franchise of your scholarship sponsor—a national fast food chain. During the course of your employment, your supervisor sexually assaults you.¹ You sue your employer for sexual harassment based on this and other offensive insults at work. You come to trial thinking you will finally be vindicated; however, what happens at trial proves to be a further insult.

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¹ The facts described above come from the California Court of Appeal’s decision in Catchpole v. Brannon, 42 Cal. Rptr. 2d 440 (Cal. Ct. App. 1995).
At trial, the judge, who also acts as the fact finder, questions you extensively, asking about your motivations for bringing the case and suggesting that you might have brought the case because you wanted to prove something to your father. He asks you during your testimony if you understand the seriousness of your allegations and the ramifications for your alleged harassers. He asks you if you understand that it is your word against the word of your harasser. Further, the judge is impatient with your case generally, irritably asking your attorney how long the case is going to take. Finally, the judge "deride[s]" the testimony of your rape trauma counselor that you exhibited characteristic behavior of rape trauma syndrome by commenting that the witness "should check and see if they come in with a big 'R' stamped on their forehead in red letters, and then we'll all know." When your counselor concludes her testimony, your attorney asks whether the witness may remain. The judge comments that "[i]f she's excused she can sit here. If she wants to listen to all of this nonsense, she's welcome." It is not surprising, given the judge's general attitude directed toward you and your claim, that he does not find your testimony credible. This describes Marie Catchpole's day in court in her sexual harassment case against her former employer.

The plaintiff in this case was ironically lucky; the judge in her case exhibited obvious bias against both her and her claim, and the Court of Appeals found a basis for reversal on the appearance of his gender bias. Yet, one is left to wonder how many plaintiffs suffer at

2. Catchpole, 42 Cal. Rptr. 2d at 447.
3. Catchpole, 42 Cal. Rptr. 2d at 447.
4. Catchpole, 42 Cal. Rptr. 2d at 448.
5. Catchpole, 42 Cal. Rptr. 2d at 448.
6. Catchpole, 42 Cal. Rptr. 2d at 448.
7. Catchpole, 42 Cal. Rptr. 2d at 446-54.
8. The Court of Appeals concluded that

[i]t the [trial] court's remarks throughout trial show that its conception of the circumstances that may constitute sexual harassment were based on stereotyped thinking about the nature and roles of women and myths and misconceptions about the economic and social realities of women's lives. The average person on the street might therefore justifiably doubt whether the trial in this case was impartial.

Catchpole, 42 Cal. Rptr. 2d at 454. Relying heavily on the Ninth Circuit's Gender Bias Task Force Report, a California appellate court reversed the decision by the trial court for the defendants in a sexual harassment case based on the apparent gender bias of the male trial judge. The court did not reach the issue of whether the judge was actually biased against the plaintiff based on her sex, instead holding that
the hands of judges who misapprehend the nature of society, their claim, or the factual predicament underlying their claim, because of a lack of understanding, empathy, or experience in a similar situation. After reading the trial transcript in the case of Marie Catchpole, I found myself asking whether having a woman judge would have made a difference.

This article is aimed at this general question, the response to which has been elusive: Does the race, gender, or other background characteristics of a judge make a difference in the outcome of cases? The effects of diversity on the bench are just becoming measurable. Many legal scholars have assumed diversity will make a difference. While this conclusion may seem commonsensical, it is important to be able to support such assertions with actual data. The supposition

[where the average person could well entertain doubt whether the trial judge was impartial, appellate courts are not required to speculate whether the bias was actual or merely apparent or whether the result would have been the same if the evidence had been impartially considered and the matter dispassionately decided . . . but should reverse the judgment and remand the matter to a different judge for a new trial on all issues.]

_Catchpole_, 42 Cal. Rptr. 2d at 445.

9. I was one of the attorneys who represented Ms. Catchpole in her appeal.
12. As a professor who teaches classes covering controversial subjects, I have been (and continue to be) a firsthand witness to the effects that the background of my students can have on class discussions as well as my students' analyses of a given issue. For example, in my Employment Discrimination class, I have witnessed the influence of my students' experiences on their approach to legal issues. I recall a student who had taken consistently conservative positions throughout the class arguing in favor of extending Title VII to gays and lesbians. His reasons came from his very positive experience with gays while working at a restaurant. This leads me to wonder how such factors affect judges.
has been that diversity on the bench will take into account differing viewpoints that exist in a multi-cultural society like our own, thereby making justice more fair or, at least, giving it the appearance of being fair. Driven in part by principles of legal realism, this theory has found support through the voices of both legal academics and social scientists. This position, however, is not without its detractors and skeptics. It also begs some fundamental questions: Will diversity on the bench really have an effect on the outcome of cases and in the manner in which justice is administered?

My particular concern is with civil rights cases and, specifically, employment discrimination law. Plaintiffs’ practitioners have become increasingly frustrated with the hostility of the courts to such claims. Civil rights cases, often involving issues of discriminatory mistreatment based on race, sex, or other protected status, is an area in which diversity should have an impact. With the cards being ever increasingly stacked against plaintiffs by the courts themselves—not Congress—it’s important to examine who these judges are who are lessening the enforcement of civil rights laws.

In this article, I begin by looking at the demographics of the federal judiciary. I then look at what political scientists and legal scholars have found about the voting patterns of these judges. While my particular focus is on the federal judiciary, where studies have been conducted that are helpful to my inquiry, I also refer to state judiciar-


14. See Jerome McCristal Culp, Jr., Neutrality, the Race Question, and the Civil Rights Act: The “Impossibility” of Permanent Reform, 45 RUTGERS L. REV. 965, 985 & n.52 (1993)(noting that the success rate of Title VII plaintiffs has declined over time); Overwhelming Majority of ADA Job Suits Fail in Court, Bar Association Survey Finds, 67 U.S. L. Wk. 2005 (7/798)(discussing ABA survey showing that in 92% of ADA cases that result in court rulings, the defendant prevails).

15. For example, Title VII of the Civil Rights Act of 1964 protects against employment discrimination based on race, color, religion, sex, and national origin. See 42 U.S.C. § 2000e-2(a).

16. Indeed, Congress has sought to counteract much of what the courts, and the Supreme Court in particular, have done to this area of the law within the last fifteen years. See Culp, supra note 14, at 983-1005 (describing Supreme Court precedent leading up to the enactment of the Civil Rights Act of 1991).
ies. I emphasize civil rights laws because it is an area that political scientists have studied extensively and that has been the focus of much of my own research. In addition, most of the studies I discuss seek to assess differences in judicial voting based on the gender of the judge rather than the race of the judge. This is because there have been more women judges appointed than minority judges, making it easier for political scientists and legal scholars to find statistically significant sample sizes. I conclude, after reviewing the work of political scientists and legal scholars, that diversity could well lead to better enforcement by the courts of civil rights laws. My bottom line is consonant with what others have said: diversity on the bench is key to promoting the sort of mutual understanding that produces the best results in civil rights cases.

I. WHO Is ON THE BENCH?

A fundamental starting point for any discussion of diversity on the bench is to ask, “Who are the judges?” Political scientists have considered whether the identity of the appointing president is predictive of judicial outcomes. Therefore, I will begin my discussion by looking at judicial appointments, president by president. I begin with the Carter Administration, because it was the first presidential administration to make a concerted and effective effort to diversify the federal bench.

A. The Carter Administration

Until the Carter Administration, there were very few women (a total of eight) and minorities appointed to the federal


17. See infra notes 99-118 and accompanying text.
18. See Donald R. Songer et al., A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals, 56 J. Pol. 425 (1994). The Federal Judicial Center provided statistics showing that 10 women had been appointed to the federal judiciary prior to the Carter Administration. See Federal Judicial History Office, Federal Judicial Center, Memo entitled Women Judges as Percentage of Total Appointments (providing number of women appointed through the end of President’s Clinton’s first term) [hereinafter Federal Judicial History Office, Women Judges as Percentage]. However, it appears that two of these women judges were appointed to the United States Customs Court, and therefore may not have been counted because they were not serving on a federal district court or court of appeals. See Federal Judicial History Office, Memo entitled Women Judges Listed by Nominating President. At the time President Carter took office, six active federal judges were women. See Slotnick, supra note 11, at 271. Of this number, only one sat on a court of appeal. See Robert J. Lipshutz &
The Carter Administration was the first to name a significant number of female and minority judges. Indeed, the Carter Administration actively sought out qualified women and minorities to fill federal judgeships. In addition, it "actively sought to name judges who were liberal, particularly on civil rights issues, to the courts of appeals." With respect to gender diversity, President Carter appointed forty-one women to the bench, or 15.7 percent of judicial appointments during his four years in office, including eleven women to the United States Courts of Appeals and twenty-nine to the federal district courts. President Carter also appointed fifty-five African American judges to the federal bench. Carter appointed the highest percentage of non-white judges to both the district courts and courts of appeals compared to his immediate successors and President Reagan. By the end of his presidency, due in large part to an increase


19. See Slotnick, supra note 11, at 271 (noting that only 22 blacks or Hispanics sat as active federal judges at the time that President Carter took office). Only two African American judges held positions on the eleven federal courts of appeal. See Lipshutz & Huron, supra note 18, at 483.

20. See Slotnick, supra note 11, at 271, 275-77. For additional information describing the manner in which the Carter administration appointed federal judges, see Lipshutz & Huron, supra note 18; Katherine Randall, The Success of Affirmative Action in the Sixth Circuit, 62 JUDICATURE 486 (1979).


22. See Federal Judicial History Office, Women Judges as Percentage, supra note 18 (noting percentage as 15.7%); Tobias, Closing the Gender Gap, supra note 11, at 1238 (noting percentage as 15.9%). Other sources state that Carter appointed 40 female judges. See Elaine Martin, Men and Women on the Bench: Vive La Difference? 73 JUDICATURE 204 (1990) [hereinafter Martin, Men and Women]. In addition, these women came from a variety of non-traditional legal career paths. See Martin, Men and Women, supra. For an interesting discussion of some of the obstacles that African American appointees face due to their differing career paths, see Peter G. Fish, Evaluating the Black Judicial Applicant, 62 JUDICATURE 495 (1979).

23. See Songer et al., supra note 18, at 425.

24. See Martin, Men and Women, supra note 22, at 204.

25. See Sheldon Goldman, Reagan’s Judicial Legacy: Completing the Puzzle and Summing Up, 72 JUDICATURE 318, 322 (1989) [hereinafter Goldman, Reagan’s Judicial Legacy]. In particular, 78.7% of Carter’s district court appointees were white, whereas 92.4% of Reagan’s appointees were white, 88.5% of Ford’s appointees were white, 95.5% of Nixon’s appointees were white, and 93.4% of Johnson’s appointees were white. Among groups represented in the Carter administration, 13.9% of Carter’s district court appointees were African American, 6.9% were Hispanic, and 0.5% were Asian. See Goldman, Reagan’s Judicial Legacy, supra. In terms of Court of Appeals appointments, 78.6% of Carter’s appointees were white, whereas 97.4% of Reagan’s were
in the number of federal judgeships, President Carter had appointed
40 percent of the sitting federal bench\textsuperscript{26} and fifty-six out of 121 active
judges on the United States Courts of Appeal.\textsuperscript{27}

Carter's appointees differed from those of other presidents in
ways aside from their gender and racial backgrounds. For example, in
a study comparing Reagan's appointments to those of his immediate
predecessors (i.e., Carter, Ford, Nixon, and Johnson), Carter had the
highest percentage of appointees to the district courts with previous
judicial experience.\textsuperscript{28} Carter appointed the largest percentage of dis-
trict judges from public-supported undergraduate and law schools.\textsuperscript{29}
In addition, Carter appointed the largest percentage of less wealthy
judges.\textsuperscript{30} Indeed, according to one study, 60.2 percent of Carter's non-
traditional appointees\textsuperscript{31} earned less than $60,000/year before their ju-
dicial appointment, whereas only 43.5 percent of Carter's traditional
appointees earned less than that amount.\textsuperscript{32} Twenty-five percent of
Carter's white males earned over $100,000/year, whereas only 8.8
percent of Carter's non-traditional appointees earned over

\begin{itemize}
  \item white, 100% of Ford's were white, 97.8% of Nixon's were white, and 95% of John-
son's were white. See Goldman, Reagan's Judicial Legacy, supra at 324.
  \item See Thomas G. Walker & Deborah J. Barrow, The Diversification of the Federal
judges. See Sue Davis, President Carter's Selection Reforms and Judicial Policymaking: A
Voting Analysis of the United States Courts of Appeals, 14 Am. Pol. Q. 328, 329
(1986).
  \item See John Gottschall, Carter's Judicial Appointments: the Influence of Affirmative Action
and Merit Selection on Voting on the U.S. Courts of Appeals, 67 JUDICATURE 164, 167
(1983).
  \item See Goldman, Reagan's Judicial Legacy, supra note 25, at 322.
  \item See Goldman, Reagan's Judicial Legacy, supra note 25, at 322, table 2. 57.4% of Car-
ter's appointees to district courts came from public supported undergraduate
institutions, compared to only 35.5% of Reagan's, 48.1% of Ford's, 41.3% of
Nixon's and 38.5% of Johnson's district court appointees. See Goldman, Reagan's
Judicial Legacy, supra.
  \item See Goldman, Bush's Judicial Legacy: The Final Imprint, 76 Judicature 282, 287
(1993) [hereinafter Goldman, Bush's Judicial Legacy]. 35.8% of Carter's district judge
appointees had net worths less than $200,000. Only 10.1% of the Reagan Admin-
istration's district judge appointees had net worths less than $200,000. Of Bush
appointees, only 17.6% had net worths under $200,000. See Goldman, Bush's Judi-
cicial Legacy, supra.
  \item I use "non-traditional" judges to mean those who were not white males, i.e., women
and minority group members. For further discussion of the appointment of these
judges, see Goldman, Should There Be Affirmative Action, supra note 11.
  \item See Slotnick, supra note 11, at 282.
\end{itemize}
$100,000/year.\textsuperscript{33} This is likely a result, in part, of the differing career paths between Carter's traditional and non-traditional appointees. For example, 48.6 percent of Carter's non-traditional nominees came from a public defender/legal aid background, whereas only 23.7 percent of his white male nominees came from that background.\textsuperscript{34} In addition, a higher percentage of Carter's non-traditional nominees came from other judicial positions and a much lower percentage from private practice compared to his traditional nominees.\textsuperscript{35} The majority of Carter appointees had net worths of less than $500,000, whereas the majority of Bush appointees had net worths over $500,000.\textsuperscript{36}

\textbf{B. The Reagan Administration}

The Reagan Administration set out to appoint judges of a particular ideology to the bench.\textsuperscript{37} Reagan sought to appoint judges that held views consistent with his judicial philosophy. "There was the expectation that they would be sympathetic to the social agenda positions of the administration which were a reaction to what the administration saw as judicial legislation of new rights."\textsuperscript{38} As one scholar put it, Ronald Reagan attempted to "appoint judges who supported school prayer, opposed abortion, and favored harsh criminal penalties."\textsuperscript{39} This is reflected in the absence of the appointment of Democrats to the Court of Appeals during the Reagan Administration.\textsuperscript{40}

During the Reagan Administration, few women were appointed. The Reagan Administration gave a dismal 8.3 percent of its judicial

\textsuperscript{33} See Goldman, \textit{Bush's Judicial Legacy}, supra note 30, at 287.
\textsuperscript{34} See Slotnick, \textit{supra} note 11, at 292-93.
\textsuperscript{35} See Slotnick, \textit{supra} note 11, at 293.
\textsuperscript{36} See Goldman, \textit{Bush's Judicial Legacy}, supra note 30, at 287.
\textsuperscript{37} See Goldman, \textit{Reagan's Judicial Legacy}, supra note 25, at 319-320 (asserting that the Reagan Administration "engaged in the most systematic judicial philosophical screening of judicial candidates ever seen in the nation's history"); Tobias, \textit{Gender Gap}, \textit{supra} note 11, at 173.
\textsuperscript{39} George, \textit{supra} note 21, at 1680.
\textsuperscript{40} See Goldman, \textit{Reagan's Judicial Legacy}, \textit{supra} note 25, at 325. Reagan appointed no Democrats to the Court of Appeals, whereas previous Republican administrations were able to find acceptable Democratic judicial candidates. See Goldman, \textit{Reagan's Judicial Legacy}, \textit{supra} note 25, at 325.
appointments to women, or thirty-three out of 399 appointments. Reagan appointed three Supreme Court associate justices, one chief justice, seventy-eight court of appeals judges, and 290 district court judges. Due to retirements and internal appointments, by the end of Reagan's presidency, he had appointed 47 percent of the judges in active service. Reagan also made a larger proportion of his appointments from large law firms than any previous administration. Although Carter appointed the fewest district court judges with Ivy League undergraduate educations, Reagan appointed the lowest proportion overall of Ivy League law school graduates.

Compared with those of his immediate predecessors, Reagan's appointments are of a mixed sort. Although Reagan did not come close to appointing the percentage of women that the Carter Administration appointed, he was second in the percentage of appointments of females in comparison to the Carter, Ford, Nixon, and Johnson Administrations. While he was second, again, only to the Carter Administration in the percentage of Hispanics he appointed, his "record of appointment of African-Americans was the worst since the Eisenhower administration," and his record on Hispanics is somewhat deceiving. He appointed only one African American and one Hispanic judge to the Courts of Appeal.

41. See Federal Judicial History Office, Women Judges as Percentage, supra note 18; Tobias, Closing the Gender Gap, supra note 11, at 1238 (noting the 8.3%, but stating it as 31 out of 372 appointments).
42. See Goldman, Reagan's Judicial Legacy, supra note 25, at 318.
43. See Goldman, Reagan's Judicial Legacy, supra note 25, at 319.
44. See Goldman, Reagan's Judicial Legacy, supra note 25, at 321. In particular, 5.9% of Reagan's district court judges came from 100+ lawyer law firms. This compares to 2% for the Carter Administration, 1.9% for the Ford Administration, 0.6% for the Nixon Administration, and 0.8% for the Johnson Administration. Goldman notes that Reagan made three times the proportion of his appointments from very large law firms compared to the Carter administration. For Court of Appeals appointments, Reagan appointed the highest percentage from 100+ lawyer law firms—in particular, 3.9% compared to Carter's 1.8% and 0% for the Ford, Nixon, and Johnson Administrations. See Goldman, Reagan's Judicial Legacy, supra note 25, at 324. These statistics might well reflect the rise in number of large law firms in the United States.
45. See Goldman, Reagan's Judicial Legacy, supra note 25, at 322. Carter appointed many district judges who were publicly educated. This was offset by the high percentage of Ivy League judges whom Carter appointed to the Courts of Appeals. See Goldman, Reagan's Judicial Legacy, supra note 25, at 324.
46. See Goldman, Reagan's Judicial Legacy, supra note 25, at 322.
47. Goldman, Reagan's Judicial Legacy, supra note 25, at 322.
Also, because of Reagan’s ideological emphasis, the women he did appoint were from a fairly uniform background. Ninety-seven percent of the women Reagan appointed had prior judicial or prosecutorial experience.\textsuperscript{49} This allowed Reagan to assess these candidates’ ideologies based on their judicial or prosecutorial track records.\textsuperscript{50} Drawing from a rather small sample size, one political scientist compared attitudes of Reagan’s first term female appointees to those of Carter’s female appointees.\textsuperscript{51} That study showed that Carter-appointed women had different attitudes on several key women’s issues as compared to Reagan appointees. For example, 95 percent of Carter appointees supported the women’s movement, whereas as only 37.5 percent of Reagan’s appointees did. In addition, almost 75 percent of Carter appointees disagreed with the assertion that it is impossible to combine a career with motherhood, whereas only 57.1 percent of Reagan appointees disagreed.\textsuperscript{52} While it may be unfair to read too much into these statistics because of the small number of female judges appointed by Reagan (only eight responded, which amounted to 73 percent of Reagan’s female appointees during his first term), other studies have suggested that Reagan-appointed women judges were even less supportive of the women’s movement than Republican women politicians.\textsuperscript{53} This suggests that diversity is a much more complex calculus, requiring consideration of a judicial candidate’s background in order to attain more complete diversity. Indeed, this evidence suggests that Reagan successfully appointed conservative women who would not diversify the bench in the same manner that Carter’s appointees did.

Finally, another striking characteristic of Reagan’s appointees is their wealth. Reagan appointed sixty-seven millionaires to the federal


\textsuperscript{50} See Martin, \textit{Gender}, supra note 49.

\textsuperscript{51} See Martin, \textit{Gender}, supra note 49.

\textsuperscript{52} See Martin, \textit{Gender}, supra note 49, at 142. Martin cautions not to “read too much into these responses,” in part because of the small sample size of Reagan judges—only eight. Martin, \textit{Gender}, supra note 49, at 142.

\textsuperscript{53} See Martin, \textit{Gender}, supra note 49 (citing and discussing CARROLL, \textit{Women as Candidates in American Politics} (1985)).
DIVERSITY ON THE BENCH

Only fifty-one of his judicial appointees made less than $200,000 per year. The vast majority made over this amount.

C. The Bush Administration

Like Reagan, President Bush looked for judges with a conservative ideology. At first the Bush Administration’s appointment record on diversity appeared much like that of the Reagan Administration. During his first two years in office, Bush appointed women to only seven out of sixty-eight judicial openings. However, unlike Reagan, President Bush made a commitment to diversity on the bench and eventually appointed an unprecedented percentage of women. In the district courts, he began slowly. During the first two years of his presidency, he appointed 10.4 percent women. However, by his second two years, that percentage rose to 24 percent. The net effect was that Bush appointed thirty-six out of 192 judges who were women, or 18.7 percent of his judicial appointments. In addition, Bush appointed a higher percentage of African American judges than Reagan and a larger percentage of Hispanic judges to the Court of Appeals

56. See Tobias, Closing the Gender Gap, supra note 11, at 1238.
57. Although Bush’s numbers look good, there are a number of factors that make his appointment of women less impressive. For example, there were many more women lawyers (20% of all lawyers) during the Bush Administration than during the Carter Administration (only 7%) from which to choose. See Tobias, Closing the Gender Gap, supra note 11, at 1240–41. In addition, a significant number of Bush’s appointments involved the elevation of female district court judges to appellate levels, whereas this accounted for only one of President Carter’s appointees. See Tobias, Closing the Gender Gap, supra note 11, at 1240–41. Almost one-third of his female judges were selected in the seven month period following the difficult Clarence Thomas nomination hearings, and half of his female appointments came during the year he ran for re-election. See Tobias, Closing the Gender Gap, supra note 11 at 1241. This suggests that his appointment of women was based more on political expedience than a true commitment to diversity. See Goldman, Bush’s Judicial Legacy, supra note 30, at 290 (suggesting that Bush appointed women to counteract alienation of women from his administration due to the Thomas/Hill hearings).
58. See Goldman, Bush’s Judicial Legacy, supra note 30, at 286.
59. See Goldman, Bush’s Judicial Legacy, supra note 30, at 286; Federal Judicial History Office, Women Judges as Percentage, supra note 18; (noting the number as 37 out of 196, or 18.9%). Another source stated that Bush appointed 185 judges—37 court of appeals judges and 148 district court judges. See Robert A. Carp et al., The Voting Behavior of Judges Appointed by President Bush, 76 JUDICATURE 298, 301 (1993).
than even President Carter. On racial diversity, overall Bush fared slightly better than Reagan, but not as well as Carter. Of his district court appointments, 89.2 percent were white. Bush’s appointees are educationally mixed. While a majority of his district court appointees went to private undergraduate institutions, a majority went to public law schools. This compares to Carter’s district court appointees, a majority of whom went to public law schools and public undergraduate institutions.

In spite of gains in diversity as compared to his immediate predecessor, Bush’s approach to judicial selection was very similar to that of President Reagan. Bush increased Reagan’s trend of appointing judges from large law firms. Almost 11 percent of Bush’s district court appointees were from such firms. Both presidents sought judges who were ideologically conservative. As one scholar put it, in the Bush Administration “[l]iberal activists in the tradition of Earl Warren, William Brennan, and Thurgood Marshall were not welcome.” In addition, Presidents Reagan and Bush appointed only six women to the Courts of Appeals. Like Reagan, Bush appointed many wealthy judges—43.2 percent of Bush’s court of appeals appointments went to

60. See Goldman, Bush’s Judicial Legacy, supra note 30, at 293. However, Carter appointed the highest percentage of Hispanics to the district courts. See Goldman, Bush’s Judicial Legacy, supra note 30, at 287. In addition, Reagan appointed a higher percentage of Hispanics than Bush to the district courts. See Goldman, Bush’s Judicial Legacy, supra note 30, at 287.

61. See Goldman, Bush’s Judicial Legacy, supra note 30, at 287.


63. See Goldman, Bush’s Judicial Legacy, supra note 30, at 287. By this statement, I do not mean that they went to both a public undergraduate school and law school. The statistics do not set out the combination. So, a Carter appointee might have gone to a public undergraduate institution and a private law school. The upshot is that a majority of Carter’s judges had public school experience, either in law school or undergraduate school, whereas the same can only be said of Bush’s appointees with respect to law school.

64. See Tobias, The Gender Gap, supra note 11, at 173.

65. See Goldman, Bush’s Judicial Legacy, supra note 30, at 287.

66. See David M. O’Brien, Judicial Roulette 60 (1988)(describing the Reagan Administration’s efforts); Carp et al., supra note 59, at 301; Douglas M. Kmiec, Judicial Selection and the Pursuit of Justice: the Unsettled Relationship Between Law and Morality, 39 Cath. U. L. Rev. 1, 8 (1989); Tobias, Closing the Gender Gap, supra note 11, at 173; Yvette M. Barksdale, Advice and Consent, 47 CASE W. RES. L. REV. 1399, 1409 (1997)(“Presidents Reagan and Bush sought to pack the Court with conservatives at the expense of those to the left and center.”).


68. See Songer et al., supra note 18, at 425.

D. The Clinton Administration

At the time President Clinton took office, only about one in five district court judges and one in four appeals courts judges were appointees of Democratic presidents. However, there were many vacancies in the judiciary. President Clinton vowed to increase gender and racial diversity on the federal bench. Unlike his two immediate predecessors, Clinton did not set out with an ideological agenda, although he did note that he would seek judges who were committed to enforcing constitutional rights. During President Clinton's first term, approximately 30 percent of his federal judicial appointees were women and 28 percent were minorities. All in all, over half of President Clinton's first-term appointments were

69. See Goldman, Bush's Judicial Legacy, supra note 30, at 293.
70. See Carp et al., supra note 59, at 301.
71. See Goldman, Bush's Judicial Legacy, supra note 30, at 286, 292. There is some discrepancy in the statistics. See supra note 59.
72. See Goldman, Bush's Judicial Legacy, supra note 30, at 296.
73. See Goldman, Bush's Judicial Legacy, supra note 30, at 297.
76. See Sheldon Goldman & Elliot Slotnick, Clinton's First Term Judiciary: Many Bridges to Cross, 80 JUDICATURE 254, 256 (1997).
77. See Carl Tobias, Fostering Balance, supra note 74, at 936.
78. See Federal Judicial History Office, Women Judges as Percentage, supra note 18 (61 out of 206 appointments went to women); see also Tobias, Choosing, supra note 74, at 745 (noting the percentage of women as 31% of appointments); Goldman & Slotnick, supra note 76, at 261 (noting percentage of women as 30.2%).
79. See Tobias, Fostering Balance, supra note 74, at 950; Goldman & Slotnick, supra note 76, at 261 (noting percentage of minority appointees, including African American, Hispanic, Asian American, and Native American, as 27.8%).
non-traditional, i.e., women and minorities. By the end of his first term, President Clinton had appointed nearly twice as many female judges as President Reagan, with a little more than half as many judicial appointments as Reagan. He did this without sacrificing quality: "President Clinton's first-term appointees also earned the highest ratings assigned by the ABA since it began evaluating candidates' qualifications in the 1950s."

Clinton's appointees are different in other ways as well. A much higher proportion of Clinton's non-traditional appointees have come from public sector employment either as government lawyers, judges, or lawyers in politics. Compared to his three predecessors, during the first term of his presidency, Clinton appointed the highest percentage of Ivy League graduates to the bench. During his first term, compared to President Carter, Clinton appointed a higher proportion of millionaires and nearly tied the percentage of President Bush. Interestingly, Clinton's millionaires were concentrated in his non-traditional appointee ranks. "Half of the nontraditional appointees were millionaires but less than one fourth of the traditional appointees were in that income bracket."

Given the wealth of Clinton's non-traditional appointees, it is not terribly surprising that he has been criticized for not appointing more politically partisan judges. While he has made significant strides in terms of diversifying the federal bench with respect to gender and race, some commentators have criticized President Clinton's appointments for not being liberal enough to offset the effects of the

80. See Goldman & Slotnick, supra note 76, at 258, 261 (noting that only 47.3% of Clinton's appointees were white males).
81. See Federal Judicial History Office, Women Judges as Percentages, supra note 18 (of 206 appointments, Clinton gave 61 to women; out of 399 appointments, Reagan gave 33 to women).
82. Tobias, Fostering Balance, supra note 74, at 950 (footnote omitted).
83. See Sheldon Goldman & Matthew D. Saronson, Clinton's Nontraditional Judges: Creating A More Representative Bench, 78 JUDICATURE 68, 70 (1994); Goldman & Slotnick, supra note 76, at 258-59.
84. See Goldman & Slotnick, supra note 76, at 261.
85. See Goldman & Slotnick, supra note 76, at 266. 32.4% of President Bush's appointees were millionaires, whereas 32.0% of Clinton's appointees were millionaires. These percentages are higher than those of both Reagan and Carter. Only 4% of Carter's appointees were millionaires. See Goldman & Slotnick, supra note 76, at 266.
86. Goldman & Slotnick, supra note 76, at 271.
Reagan/Bush appointees. Clinton's appointees are not as diverse in other ways—for example, in wealth—as Carter's appointees. The 104th and 105th Congresses, which were dominated by a Republican majority, hampered Clinton's efforts. Thus, Clinton may have felt forced to appoint more moderate judges to assure confirmation. Presidential politics played a role in the end of his first term. Bob Dole, Clinton's opponent during that election year, was responsible for much delay in the appointment process. Being the most recent appointees, Clinton judges have not yet been able to establish a meaningful voting record for purposes of study by political scientists. If the nomination process had not been stalled, it was initially estimated that President Clinton could have nominated half of all sitting federal judges.

As of February 1998, there were still eighty-two federal judgeships vacant. In addition, "Congress has authorized 179 active judges for the United States Courts of Appeals and 649 active judges for the United States District Courts." Because each year judges retire, leave office, or take senior status, the current demographics of the federal judiciary are difficult to determine precisely.

The effect of twelve years of Republican administrations on the judiciary will linger well beyond the Clinton Administration. The judicial legacy of a president lasts well beyond his presidency. For example, an examination done by Sheldon Goldman at the end of the Bush Administration showed that half of Lyndon Johnson's appointees were still in judicial office twenty-four years after his presidency,

87. See Tobias, Choosing, supra note 75, at 746.
88. See Goldman & Slotnick, supra note 76, at 255, 257-58.
89. See Goldman & Slotnick, supra note 76.
90. See Goldman & Slotnick, supra note 76, at 257-58, 271-72.
91. See generally Tobias, Choosing, supra note 75, at 746 (noting that it is too early to conclude what type of judicial service Clinton appointees will render). Recently, political scientist Jennifer A. Segal examined decision making by some Clinton appointees and discovered some differences running along race and sex lines. See Jennifer A. Segal, The Decision Making of Clinton's Nontraditional Judicial Appointees, 80 JUDICATURE 279 (1997). For more on Segal's study, see infra notes 160 to 163 and accompanying text.
92. See Editorial, Jan. 23, 1997 ST. PETERSBURG TIMES 14A.
94. Tobias, Federal Judicial Selection, supra note 93, at 527.
although the majority were on senior status. Twelve years after his presidency, nine out of ten Carter appointees were still on the bench, while two-thirds were in active service. Thus, even though the country is in the midst of a Democratic administration, the effects of appointments by both Presidents Bush and Reagan will be long felt.

II. Measuring the Effects of Diversity

Having assessed the status of diversity on the bench, we can consider the fundamental question of whether diversity is having or will have any effects on real cases. While the reliability of these studies is open to some debate, political scientists and the occasional legal scholar have measured the effects of diversity, where palpable. More recently, the gender bias task force movement has shed light on the potential effects of diversity on the bench.

A. The Theories Behind the Studies

Social scientists and, in particular, political scientists have been tracking the voting patterns and the demographic make-up of both the state and federal judiciaries for some time now. They have tried to explain how factors such as political inclination (i.e. conservative or liberal),

96. See Goldman, How Long, supra note 95, at 295.
97. Interestingly, Clinton’s non-traditional appointees during his first sixteen months in office were, on average, six years younger than his traditional appointees. See Goldman & Saronson, supra note 83, at 71. This means that Clinton’s non-traditional judges in particular may have more of an opportunity to have an impact on the bench.
98. See, e.g., Ashenfelter et al., supra note 13, at 263–65.
99. In some instances, there simply have not been enough women or minorities on the bench to have a large enough sample to analyze.
100. See Jeffrey A. Segal & Albert D. Cover, Ideological Values and the Votes of U.S. Supreme Court Justices, 83 AM. POL. SCI. REV. 557, 558 (1989) (describing studies involving differences between liberal and conservative judges).
political party, appointing president, race, religion, gender, and region of the country affect judicial decision making. Legal scholars, who are to a large extent wedded to the legal method, have on occasion addressed some of the arguments of political scientists. This section discusses both the findings of political scientists and responses of legal scholars. It is not my purpose to provide a thorough analysis of the political science/legal theory debate, but instead to give a general description and criticism of the political science models so that we can better evaluate and understand studies assessing the effects of diversity.


102. See, e.g., C.K. Rowland & Robert A. Carp, Politics and Judgment in Federal District Courts 46 (1996) (pointing out that federal district judges appointed by Democratic presidents are more liberal than their Republican counterparts); Carp et al., supra note 59 (evaluating liberal/conservative voting habits of Bush appointees on several topics); Davis, supra note 26, at 333-334 (showing Carter appointees were more liberal than Johnson appointees); Goldman, Bush's Judicial Legacy, supra note 30; Vicki Schultz & Stephen Petterson, Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, 59 U. Chi. L. Rev. 1073, 1171-1178 (1992) (law professor and sociologist conducting study of particular Title VII defense); Christopher E. Smith & Thomas R. Hensley, Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush, 57 Ala. L. Rev. 1111 (1994); Tate, supra note 101, at 360 (citing and describing such studies).

103. See Gottschall, supra note 27 (measuring the differences between Carter's African American and white appointees to the Courts of Appeals); Walker & Barrow, supra note 26, at 599-600 (recounting several studies).

104. See Tate, supra note 101, at 358 (discussing studies correlating religion to voting behavior in civil liberties and economics cases).

105. See, e.g., Martin, Men and Women, supra note 22; Songer et al., supra note 18.

106. See Stidham et al., supra note 101, at 210 (documenting differences in liberalism between northern and southern judges on racial minority discrimination cases); Tate, supra note 101, at 562 (Supreme Court Justices).

107. I use "legal method" to indicate the neutral application of legal doctrine, whether it be as announced in case law or statute, to the facts of a given case. For more on this distinction, see generally George, supra note 21, at 1642-44.
Political science research on the judiciary has placed increasing emphasis on what has become known as the "attitudinal model." This model accounts for judicial decision making based not on the neutral application of judicial precedent, but instead on "each judge's political ideology and the identity of the parties." This theory is consistent with both the Critical Legal Studies ("CLS") and Legal Realism movements in legal philosophy, although these schools have been criticized as being anecdotal in nature and unsupported by research of any real rigor. Attitudinal political science scholars have attempted to prove their model by applying scientific methods to judicial decision making. There is a significant body of political science research supporting the attitudinal model of decision making at least at the United States Supreme Court level.

How might diversity interact with the attitudinal model? If a judge’s political ideology is shaped in part by his or her life experiences, the attitudinal model, if proven, might suggest that a diverse bench would lead to judges of diverse ideology. If a female judge, for example, understands the world in part based on her experiences as a female, this aspect of her "ideology" should be expressed through her decision making. While attitudinal scholars have focused their attention on political ideology, factoring in whether a judge is a Democrat or Republican, ideologically conservative or liberal, or appointed by a Democratic or Republican president, they are beginning to focus on other background factors, such as race and sex. Their research in this area has been hampered in the past by the small number of non-white male judges, making it difficult to have statistically adequate sample sizes. However, as more and more women and people of color have been appointed, the potential for this research to bear fruit has increased.

Political scientist Elaine Martin provides an example of what sorts of differences in outlook might arise based on the sex of the judge. Martin conducted a mail-out survey of Carter-appointed fed-

108. See Rowland & Carp, supra note 102, at 138-141 (describing the attitudinal model); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model (1993); Cross, supra note 13 (describing the attitudinal model and its genesis); George, supra note 21, at 1646-1655 (describing the development and current attitudinal model); Segal & Cover, supra note 100.

109. Cross, supra note 13, at 265.

110. See Cross, supra note 13, at 274-75.

111. See Cross, supra note 13, at 275.

112. See Cross, supra note 13, at 275-279 (discussing various studies).
eral judges to ascertain whether female and male judges bring different perspectives, based on their life experiences, to the bench. Her study revealed the interesting and often differing perspectives of male and female Carter-appointees. For example, although relatively few of the judges felt a conflict between their career and parenting roles, a majority of women judges (62.9 percent) sometimes or frequently felt conflict when their children were younger, whereas a majority of men (52.9 percent) rarely felt such a conflict. Further, though engaged in the prestigious and time-consuming positions of federal judges, nearly two-thirds of the female judges responding stated that they took primary responsibility for running their households. Tellingly, in describing their "major" problems in law, 81 percent of the women judges surveyed answered by mentioning sex discrimination, whereas only 18.5 percent of men referred to some racial or class-based bias. Martin catalogues the way these differences in perspective might manifest themselves in the role these women play as judges:

113. See Martin, Men and Women, supra note 22. This is a "soft" data approach to political science research into the judiciary. There has been considerable debate among political science scholars regarding the value of such "soft" approaches, such as interviewing judges, as opposed to the "hard" evidence approach, i.e., evaluating the outcomes of cases. There are several interesting articles on this subject. For examples of articles discussing this see, e.g., Lee Epstein, Interviewing U.S. Supreme Court Justices and Interest Group Attorneys, 73 JUDICATURE 196 (1990); John B. Gates, Content Analysis: Possibilities and Limits for Qualitative Data, 73 JUDICATURE 202 (1990); Milton Heumann, Interviewing Trial Judges, 73 JUDICATURE 200 (1990); Charles A. Johnson, Strategies for Judicial Research: Soaking and Poking in the Judiciary, 73 JUDICATURE 192 (1990); H.W. Perry, Jr., Interviewing Supreme Court Personnel, 73 JUDICATURE 199 (1990); S. Sidney Ulmer, Further Reflections on Working in the Papers of Supreme Court Justices, 73 JUDICATURE 193 (1990).

114. Martin reported that 12.8% of men and 21.4% of women either "sometimes" or "frequently" felt conflict between their career and parental roles. See Martin, Men and Women, supra note 22, at 205.

115. See Martin, Men and Women, supra note 22, at 205.

116. See Martin, Men and Women, supra note 22, at 206. As Martin put it,

[T]he women judges appointed by Carter appear to have faced many of the same conflicts in combining family and career as other women. In addition to overcoming greater conflicts between their family and career roles than their male colleagues during the early part of their careers, women judges in this study continue to carry a much heavier burden for the maintenance and operation of their households. See Martin, Men and Women, supra note 22, at 206.

117. See Martin, Men and Women, supra note 22, at 207.
Their differences might influence such things as decisional output, especially in cases involving sex discrimination; conduct of courtroom business, especially as regards sexist behavior by litigators; influence on sex-role attitudes held by their male colleagues, especially on appellate courts where decisions are collegial; administrative behavior, for example, in hiring women law clerks; and as noted in the introduction, collective actions, through formal organizations, undertaken to heighten the judicial system's response to gender bias problems in both law and process.118

Thus, because of their differing life experiences with sex discrimination at work and responsibility for their households, women judges might have a very different view on particular cases and the functioning of the judiciary generally.

Legal scholars have criticized the political science approach as applied to judicial decision making.119 Not surprisingly, many judges have disavowed it as an explanation of judicial decision making.120 The main critique has been that political scientists are either unable to or simply do not take into account the internal workings of the legal

118. See Martin, Men and Women, supra note 22, at 208.
119. See, e.g., Cross, supra note 13, at 280-81.
120. See, e.g., Rowland & Carp, supra note 102, at 147 ("federal trial judges, including those with activist reputations, persistently and adamantly deny that their fact-finding or legal interpretations are motivated by their personal policy preferences"); Harry T. Edwards, Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit, 56 U. COLO. L. REV. 619, 620 (1985); George, supra note 21, at 1695 ("Most judges believe they are classicists and go to great lengths to explain their decisions by reference to existing law."); Jon A. Newman, Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values, 72 CAL. L. REV. 200, 203 (1984). However, several female judges have acknowledged that female judges bring different perspectives to the bench. Justice Christine Durham, of the Utah Supreme Court, explained that women judges "bring an individual and collective perspective to our work that cannot be achieved in a system which reflects the experience of only a part of the people whose lives it affects." Christine Durham, President's Column, 8 NAWJ NEWS AND ANNOUNCEMENTS 1, 3 (1987); see also Shirley S. Abrahamson, The Woman Has Robes: Four Questions, 14 GOLDEN GATE U. L. REV. 489, 492–96 (1984). In addition, New York State Court of Appeals Judge Judith S. Kaye has explained that "after a lifetime of different experiences and a substantial period of survival in a male-dominated profession, women judges unquestionably have developed a heightened awareness of the problems that other women encounter in life and in law; it is not at all surprising that they remain particularly sensitive to these problems." Marion Zenn Goldberg, Carter-Appointed Judges: Perspectives on Gender, 26 TRIAL 108 (April 1990).
system itself. Scholars also argue that the attitudinal model is too selective in its field of study. For example, most studies focus on Supreme Court decision making in controversial civil rights, civil liberties, and criminal cases. Finally, attitudinal scholars identify particular outcomes as “liberal” and “conservative” without a way to control for the effects of the legal model on the outcome of the decision.

In a similar vein, law professors Theodore Eisenberg and Stewart Schwab and economist Orley Ashenfelter have criticized the work of political scientists in assessing outcomes of cases based on a judge’s political party or appointing president. By looking at federal trial dockets, they analyzed case outcomes and argued that such characteristics are not predictors of outcomes in the vast majority of cases. Indeed, they “interpret [their] results as evidence that the individual judge has more modest influence on the outcome of the mass of cases than on the subset of cases leading to published opinions.”

This is not all that surprising. Generally if the outcome of a case is fairly clear, the parties will settle. Difficult cases—in which there are credible facts on both sides of the case and/or difficult questions of law—are more likely to result in a published opinion at the district court level. It is in these cases that the influence of the judge is most likely to be seen. For example, a judge’s ideological predisposition is more likely to be reflected in groundbreaking precedent—where the judge is writing on a clean slate. While this may not have an effect in the vast majority of cases, it may have greater influence on future decisions. These are very important judicial decisions because they set precedent for other courts to obey or, at least, by which to be influenced. Ashenfelter, Eisenberg, and Schwab acknowledge this perspective in their article, but do not account for its impact in their

121. See Cross, supra note 13, at 280-81.
122. See Cross, supra note 13, at 285.
123. See Cross, supra note 13, at 292.
124. See Ashenfelter et al., supra note 13.
125. See Ashenfelter et al., supra note 13, at 260; see also PHILLIP COOPER, HARD JUDICIAL CHOICES 328 (1988) (Cooper’s study of trial judges in remediation cases “indicates that the judges in these cases were by and large more defensive in approach, more interested in resolving cases than in reforming all the ills of American society”).
study, instead choosing to emphasize the outcomes in all cases. However, given that approximately twenty-one to twenty-six percent, for example, of non-prisoner civil rights decisions are actually appealed, their study is important in assessing how the "average" case is resolved and tends to undermine the attitudinal model in the context of district court cases. Indeed, by focusing on the United States Supreme Court, social scientists certainly fail to tell the whole story, especially given that the Supreme Court grants certiorari in only four percent of the cases in which it is requested.

Recently, political scientists themselves have begun to question the applicability of the attitudinal model—at least in the case of district court decision making. C.K. Rowland and Robert A. Carp have argued that social scientists' emphasis on votes comes at the price of ignoring the process of decision making itself, including evaluating the facts, interpreting the law, and applying that law to the facts of that case.

George L. Priest and Benjamin Klein have taken a slightly different approach, developing a selection theory of litigation. Priest and Klein argue that litigants will take the attitude of the judge into account in deciding whether to settle a case or try it. Thus, in actual cases that are tried, ideology should not be reflected in the actual outcome of the decision, because if the judge's ideology would clearly affect the outcome, the parties would settle accordingly. Priest and Klein's research is based on contract and negligence actions, rather than the more controversial and more ideology-implicating civil rights

127. See Ashenfelter et al., supra note 13, at 263, 281.
128. It is difficult to determine the rate of appeals from federal trial court decisions. In a study from 1995, Krafska, Cecil and Lombard approximated that 21-26% of non-prisoner civil rights cases were appealed from 1986 through 1993. Carol Krafska et al., Stalking the Increase in the Rate of Federal Civil Appeals 29 (1995). The rate of civil appeals is growing and generally far outpaces the growth in criminal appeals. See Krafska et al., supra, at 1-3. In 1993, 19% of appeals filed were in non-prisoner civil rights cases. See Krafska et al., supra, at 10.
129. See Christopher P. Banks, The Politics of En Banc Review in the "Mini-Supreme Court," 13 J.L. & Pol'y. 377, 407 (1997); but see George, supra note 21, at 1677 (citing Lee Epstein et al., The Supreme Court Compendium: Data, Decisions, and Developments 81-83 (2d ed. 1996)) (stating that the rate is 7.3%).
130. See Rowland & Carp, supra note 102, at 148-50.
131. See Rowland & Carp, supra note 102, at 149.
132. See George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984). If this theory is accurate, this should have an effect on the studies of political scientists, which emphasize published decisions.
133. See Priest & Klein, supra note 132, at 34-36.
cases that political scientists tend to study. Priest and Klein’s theory has more than facial appeal; there is no doubt, as evidenced by publications such as *Almanac of the Federal Judiciary*, that practitioners want to know who their judges are and believe that this information is relevant to their clients’ cases.

In contrast, Vicki Schultz and Stephen Petterson found no support for Priest and Klein’s selection-effects hypothesis in their study of the lack of interest defense used in Title VII cases. “Contrary to its predictions, judges’ decisions on the lack of interest issue vary substantially depending on their political affiliations.” Schultz and Petterson’s examination of cases showed that “judges appointed by Democratic presidents were significantly more likely to vote for plaintiffs than those appointed by Republicans.”

More recently, some political scientists have begun to incorporate the effects of institutional structures on judicial decision making, using what has been dubbed the “strategic theory” of judicial behavior. Scholars using this theory, while acknowledging that judges attempt to further their own policy goals, argue that judges are also influenced by other “strategic factors, such as interactions with colleagues on the Court (internal dynamics) and reactions to the positions of other

134. See Priest & Klein, *supra* note 132, at 35-36.
135. *Almanac of the Federal Judiciary* (1998)(containing profiles of federal judges, including sections on education, writing, other employment, professional associations, as well as lawyers’ anecdotal evaluations of each member of the federal judiciary). Indeed, as a practicing litigator, one of the first things I did in any case was seek out information about the trial judge to help assess my client’s chances of success.
136. Schultz & Petterson, *supra* note 102, at 1171-72. The lack of interest defense is characterized by *Equal Employment Opportunity Commission v. Sears, Roebuck & Company* 839 F.2d 302, 312-21 (7th Cir. 1988). In that case, Sears argued that the lack of women in higher-paying commission sales positions was not due to any discrimination by Sears, but was in fact the result of a lack of interest on the part of women in such high stress jobs.
137. Schultz & Petterson, *supra* note 102, at 1172. The one exception in the study was Reagan appointees, who voted for sex discrimination plaintiffs on the lack of interest argument only slightly less frequently than Carter appointees. See Scholtz & Petterson, *supra* note 102, at 1172. Scholtz and Petterson were less confident of this result, in part because they studied only five Reagan appointees in reaching this conclusion. See Scholtz & Petterson, *supra* note 102, at 1172. Interestingly, in race discrimination cases, Scholtz and Petterson did not find that Democratic president appointees were more likely to side with the plaintiff when faced with a lack of interest argument by the defense. See Scholtz & Petterson, *supra* note 102, at 1177-78. Indeed, they found that Carter appointees actually had the worst record for siding with race discrimination plaintiffs in this context.
in institutional actors (external forces), and of institutional structure on the justices’ final decisions.”\(^{138}\) For example, a judge might support a particular outcome even though it is not her most preferred, in order to stop a majority from forming on an even less preferred outcome. Based on theories of rational or public choice, “the strategic model suggests that Supreme Court justices are constrained by the behavior of their brethren or actors external to the Court.”\(^{139}\) Although this model has been used mostly to describe Supreme Court decision making, it is beginning to be used in an effort to account for decisions by the Courts of Appeals.\(^ {140}\) George found, in her study of the United States Court of Appeals for the Fourth Circuit, that while many judges did vote based on an attitudinal model, some did employ a more strategic approach; that is, they were influenced by what the majority of their colleagues did or the political shift of the United States Supreme Court.\(^ {141}\) However, the strategic approach appears less applicable to decisions by district courts, which lack panel interaction—although other forces, such as the potential for reversal on appeal, may influence a judge’s decision in a case.\(^ {142}\)

The strategic model, at least in appellate court decision making, recognizes the influence of simply having a woman or person of color on the panel. This might make a fellow judge reconsider his or her position on a particular issue in two ways. First, being confronted with a woman judge across the table when the court is ruling on an issue of, for example, sex discrimination, may quiet some sexist thoughts that might have found expression during discussion of the case. While some might not applaud such a chilling effect, a first step in sensitizing people to the feelings or legal predicaments of others is for them to learn what might offend others. Second, the participation of non-traditional members with firsthand knowledge of discrimination might influence fellow judges in discussions involving issues of

\(^{138}\) George, supra note 21, at 1655-56.

\(^{139}\) George, supra note 21, at 1658-59 (quoting James F. Spriggs, II et al., The Process of Bargaining and Accommodation on the U.S. Supreme Court (unpublished paper, presented at the 1997 annual meeting of the Midwest Political Science Association, Chicago)).

\(^{140}\) See George, supra note 21, at 1665-94 (applying the strategic model to the 4th Circuit’s en banc decision making).

\(^{141}\) See George, supra note 21, at 1686-94.

\(^{142}\) See Rowland & Carp, supra note 102, at 137-38 (criticizing organizational model’s applicability to district courts).
race or gender because these judges might be more persuasive on the issue and lend credibility to the plaintiff's case.

B. Evidence of the Effects of Gender and Race

While there seems to be increasing skepticism with respect to the attitudinal model, it is the model most employed in assessing the effects of diversity on the bench in judicial decision making. Looking at studies that actually measure the effects of race or gender of the judge on the outcome of decision making shows mixed effects based on diversity. Early political scientists' studies on gender difference were inconclusive, often showing little difference between the voting patterns of male and female judges. With the exception perhaps of the sentencing of female defendants in criminal cases, studies conducted in the late 1970s and early 1980s showed that there was no difference in the voting of male and female judges. There were similar results in studies involving race, with the exception of two studies of the United States Court of Appeals in the early 1980s.

As recently as 1985, Thomas G. Walker and Deborah J. Barrow published a study that tended to show little difference between the voting behaviors of male and female judges as well as between white and African American judges. The comparison in this study was

143. See Martin, *Men and Woman*, supra note 22, at 208 (detailing studies prior to 1990); see also Segal, supra note 91, at 279 (noting effects of race or sex are unclear).

144. Interestingly, one study found that female judges were actually tougher in sentencing female defendants than male judges. The authors of that study attributed the difference to male paternalism in which female judges did not engage. See John Gruhl et al., *Women as Policymakers: The Case of Trial Judges*, 25 Am. J. Pol. Sci. 308 (1981). However, an earlier study of a city's judges found no significant difference between male and female judges in sentencing female defendants. See Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtoom: Sex of Judge and Defendant in Criminal Case Disposition*, 14 Soc. Sci. J. 77, 83-84 (1977).

145. Walker and Barrow found a tendency by African American judges to favor defendants in criminal cases. See Walker & Barrow, supra note 26, at 599-600; Gottschall showed that African American Carter appointees favored criminal defendants at a higher rate than white appointees and supported sex discrimination claimants at a higher rate than their white male counterparts. Gottschall also found that white males actually favored race discrimination claimants at a higher rate than African American males. See Gottschall, supra note 27, at 172-73. Davis found no major difference between African American Carter appointees and white male Carter appointees to the Courts of Appeals in several different types of cases. See Davis, supra note 26, at 335.

146. See Walker & Barrow, supra note 26, passim.
among Carter-appointed district court judges. In one instance, the authors found that female judges actually upheld the position of minorities in fewer cases than male judges, were less liberal on personal rights issues, and were more likely to rule for the government in federal regulatory disputes. Their conclusion did not support any significant differences in decision making by groups underrepresented in the judiciary:

There is little in the evidence presented here to substantiate the assertions made by either the supporters or the opponents of [judicial] affirmative action. The assumptions that female and black judges will be more receptive to the demands of the disadvantaged, more sympathetic to the policy goals of women and minorities, and more liberal and activist in the use of judicial power find no support in the decision-making patterns of the judges studied. Similarly, claims that women and blacks are not as qualified as white males and that they lack the personal and professional authority to discharge the duties of a federal judgeship fall in light of the behavior exhibited.

Walker and Barrow acknowledge the limitations of this study—one significant factor being that many of the judges in the study had limited voting records at the time of the study. Although the authors tried to eliminate the influence of other biases already documented (for example, they used only judges appointed by President Carter), elimination of these biases may account for the lack of distinction between male and female judges as well as between white and African American judges. For example, it does not come as a great surprise that males appointed by Carter would have voting records that are as sympathetic to women’s issues as their female counterparts. The result could simply suggest that factors other than sex (in this case, the appointing president or the liberalism in general of the judges appointed) played a more significant role in what influenced the outcome of the cases.

Jon Gottschall, in his earlier study of voting behavior of Carter appointees on the Courts of Appeals, did find some differences be-

147. See Walker & Barrow, supra note 26, at 608.
148. Walker & Barrow, supra note 26, at 614.
149. See Walker & Barrow, supra note 26, at 615.
tween male and female judges as well as between white and African American judges. In particular, Gottschall found that women were more pro-claimant in race and sex discrimination cases than their male counterparts, although there was no meaningful difference in criminal cases. Gottschall found that race played a meaningful role as well. African American males favored the criminal accused and prisoners at a much higher rate than their white male counterparts. African American males also voted in favor of sex discrimination claimants at a higher rate than their white male counterparts. Interestingly, African American males did not vote in favor of race discrimination claimants at as high a rate as their white male counterparts.

More recent studies have begun to paint a different picture. At least one study has shown that there is a statistically significant difference in the way in which male and female appellate judges evaluate discrimination cases. This study, published in 1993, found "[m]ore than 63 percent of the votes cast by women judges supported the plaintiff's claim of discrimination. In contrast, male judges supported the plaintiff 46 percent of the time." Even when the statistics were controlled for the political party of a judge's appointing president, the difference persisted. Sixty-eight percent of Democrat-appointed female judges supported plaintiffs' claims, whereas 54.3% of Democrat-appointed male judges supported plaintiffs' claims. The results for Republican appointees were not statistically significant. The authors of the study suggested one possible explanation for these differences in employment discrimination cases. "[W]omen may tend to support the

150. See Gottschall, supra note 27, at 171-73 & tbl.5.
151. See Gottschall, supra note 27, at 171-72.
152. See Gottschall, supra note 27, at 172. African American male Carter appointees voted for criminal defendants or prisoners 79% of the time, whereas white male appointees voted for these individuals only 53% of the time. See Gottschall, supra note 27, at 172 tbl.6.
153. See Gottschall, supra note 27, at 172. African American male Carter appointees voted for sex discrimination claimants 65% of the time, whereas white male Carter appointees voted for sex discrimination plaintiffs 57% of the time. See Gottschall, supra note 27, at 172 tbl.6.
154. See Gottschall, supra note 27, at 172. Gottschall opined that this may be due to African American judges' desire for "professional acceptance" and reluctance to appear partisan on this issue. Gottschall, supra note 27, at 172-73.
155. See Davis et al., supra note 10, at 131-32.
156. See Davis et al., supra note 10, at 131 (footnote omitted).
157. See Davis et al., supra note 10, at 132 & tbl.5.
claimant in employment discrimination cases simply because they are likely to have experienced such discrimination directly, or have encountered gender-related obstacles in their professional lives, or feel a close affinity with those who have.\(^\text{158}\) This is consistent with what Professor Martin supposed from her survey.\(^\text{159}\) Because some female judges have experienced sex discrimination firsthand, they are more sympathetic or perhaps have a greater understanding of the social phenomenon that underlies such claims.

Most recently, political scientist Jennifer A. Segal examined decisions of twenty-four Clinton appointees to the federal district courts and found some distinctions in voting patterns based on race and sex.\(^\text{160}\) While she examined only a small number of cases, the outcome of her study provides some insight into Clinton appointees. African American judges supported the claims of African American plaintiffs in fifty percent of their decisions, whereas their white counterparts only did so in ten percent of their cases. In addition, African American judges were more supportive of the claims of women than their white counterparts.\(^\text{161}\) The study likewise found that female judges favor the claims of African American plaintiffs half of the time as compared to their male counterparts who find for African Americans only one-third of the time.\(^\text{162}\) Interestingly, Segal noted no significant differences in cases involving women’s issues between male and female judges in her sample.\(^\text{163}\)

Likewise, in a study of state supreme court justices, Allen and Wall found that the majority of women justices that they studied\(^\text{164}\)

\[\text{\footnotesize 158. See Davis et al., supra note 10, at 133.}\]
\[\text{\footnotesize 159. See supra notes 113–18 and accompanying text.}\]
\[\text{\footnotesize 160. See Segal, supra note 91, at 279.}\]
\[\text{\footnotesize 161. See Segal, supra note 91, at 279.}\]
\[\text{\footnotesize 162. See Segal, supra note 91, at 279.}\]
\[\text{\footnotesize 163. See Segal, supra note 91, at 279. Segal notes that the sample size—24 cases—was decidedly small. See Segal, supra note 91, at 272.}\]
\[\text{\footnotesize 164. See David W. Allen & Diane E. Wall, Role Orientations and Women State Supreme Court Justices, 77 Judicature 156 (1993) [hereinafter Allen & Wall, Role Orientations]. This study was based on an analysis of voting by 24 female state supreme court justices. Allen & Wall, Role Orientations, supra, at 159. In an earlier study of only 14 justices, Allen and Wall explained the problem of small sample size in this context. They stated, “[w]e recognize the problem of generalizability in a sample of this size. However, given the extraordinary minimal representation of women on state supreme courts, any sample is bound to be small.” Allen & Wall, Behavior, supra note 10, at 236 (emphasis in original). Others have also criticized this study for its small sample size. See Songer et al., supra note 18, at 427.}\]
exhibited “pro-woman” voting behavior on “women’s issues.” As they explained:

[T]he data in this study indicate that women justices perceive a broad spectrum of women’s issues as a single issue dimension. Sex discrimination, sexual conduct and abuse, medical malpractice, property settlements, and the relationship between child and parent all appear to be viewed as integral parts of an agenda. And while one study demonstrates that the presence of a woman justice on a state supreme court increases the number of pro-women sex discrimination rulings, the research in the present study indicates that even when the majority of the court opposes an expansion of women’s rights, female justices still hold to their beliefs.

165. See Allen & Wall, Behavior, supra note 10, at 239; see also Allen & Wall, Role Orientations, supra note 164, at 165. Allen and Wall describe four role orientations identified by researchers of judicial voting behaviors. One is the “representative role,” in which the female decision maker (or office holder) “incorporates a woman’s viewpoint in legal matters directly impacting on women as a category.” See Allen & Wall, Role Orientations, supra note 164, at 158. Women also may act as “tokens,” whereby they “modify their behavior in order to conform to the dominant majority....” Allen & Wall, Role Orientations, supra note 164, at 158. Another possible role for female justices is that of the “outsider,” who “disregard[s] institutional traditions.” These women have characteristically high self esteem that allows them to break traditional norms. The result is that as judges, they “exhibit comparatively extreme voting behavior.” See Allen & Wall, Role Orientations, supra note 164, at 158–59. The fourth role is that of the “different voice,” based on the findings of differences between men and women by Carol Gilligan in her ground breaking book, In a Different Voice. CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). Female jurists falling into this role would place higher values on community and relational interests, as opposed to individual rights. Research supporting this fourth category has had mixed results. See Allen & Wall, Role Orientations, supra note 164, at 159; see also Davis et al., supra note 10 (studying gender differences in the decision making of the federal courts of appeals based on Gilligan’s thesis). These differences between male and female judicial behavior do not extend to all branches of the judiciary. Two studies of urban trial judges found no differences in sentencing patterns between male and female judges. See Gruhl et al., supra note 144; Kritzer and Uhlman, supra note 144.

166. Allen & Wall, Role Orientations, supra note 164, at 161 (footnote omitted). According to this study, the extreme nature of a female justice’s behavior is not a result of political party affiliation. As Allen and Wall explain, “while a majority of women Democratic justices serve on courts dominated by Democratic males, they still vote in a manner substantially different from their same-party male colleagues.” Allen & Wall, Role Orientations, supra note 164, at 162. In criminal and economic cases, fe-
Specifically in the context of sex discrimination cases, Gryski, Main and Dixon have found that the presence of a female justice increases the likelihood that a female plaintiff will prevail on her civil claim.\(^\text{167}\)

Songer, Davis & Haire conducted another study of federal appellate decision making in cases between 1981 and 1990 involving three issues: (1) employment discrimination; (2) search and seizure; and (3) obscenity.\(^\text{168}\) In the obscenity and search and seizure cases studied, the gender of the judge did not appear to play a part in decision making.\(^\text{169}\) Instead, the type of litigant and nature of the case facts proved to be important predictors of the outcome of obscenity cases.\(^\text{170}\) The existence of a warrant, a finding of probable cause by the trial court, or the trial court's finding that there was an exception to the warrant requirement were predictive in search and seizure cases.\(^\text{171}\) However, in the context of employment discrimination, the gender of the judge appeared to play a significant role in the case outcome.\(^\text{172}\)

In 1971, Professors John Johnston and Charles Knapp published the results of a study of judicial opinions in cases involving sex discrimination.\(^\text{173}\) Looking at a wide variety of judicial opinions and protective legislation, Johnston and Knapp reviewed law over a 100-year period. Their conclusion was "that by and large the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable."\(^\text{174}\) As the professors concluded:

With some notable exceptions, they [judges] have failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served

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168. See Songer et al., supra note 18, at 429.
169. See Songer et al., supra note 18, at 433.
170. See Songer et al., supra note 18, at 432.
171. See Songer et al., supra note 18, at 433.
172. See Songer et al., supra note 18, at 434.
them so well with respect to other sensitive social issues. Particularly striking, we believe, is the contrast between judicial attitudes toward sex and race discrimination. Judges have largely freed themselves from patterns of thought that can be stigmatized as “racist”—at least their opinions in that area exhibit a conscious attempt to free themselves from habits of stereotypical thought with regard to discrimination based on color. With respect to sex discrimination, however, the story is different. “Sexism”—the making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals and social roles solely on the basis of sex differences—is as easily discernible in contemporary judicial opinions as racism ever was.175

Twenty-five years have passed since Johnston and Knapp’s work. Recent work in this area, however, suggests that judicial attitudes and decision making in the sex discrimination area have not changed as much as they should.176 As Professor Robert J. Gregory recently stated, “the case law reveals a judicial tolerance of sexual harassment that has no analog in the area of racial harassment and which leaves working women without the full protection of the law.”177 Gregory opines, as have other scholars, that perhaps this is the result of too few female judges on the bench.178

175. Johnston & Knapp, supra note 173, at 676 (emphasis in original).
176. In an article published last year, Robert J. Gregory uses two Seventh Circuit cases as examples of how courts treat sex discrimination cases differently than race discrimination cases under Title VII, even though both types of cases involve identical legal standards. As Gregory concludes:

In the race context, courts seem particularly receptive to claims that racially harassing behavior has affected the terms or conditions of an individual's employment, resolving any ambiguities in favor of the claimant and de-emphasizing the need for any specific number of instances of harassment.

In the sex context, the judicial reaction seems less solicitous, with courts more often stressing the ambiguities in the conduct at issue and the need for repeated instances of harassing conduct.


177. Gregory, supra note 176, at 743.
178. See Gregory, supra note 176 at 774 & n.208 (stating that as of 1994, 14% of federal judges were women); see also David Benjamin Oppenheimer, Exacerbating the Exas-
Finally, one of the more interesting assessments of the potential for women judges to bring a different viewpoint to the bench is Suzanna Sherry’s article examining the decisions of Chief Justice Rehnquist and Justice O’Connor on establishment clause and discrimination cases. Sherry relies on feminist psychology as well as literary theory to hypothesize that women judges would emphasize community and context as opposed to the atomized individuality that is associated with a more masculine approach to constitutional analysis. Relying in large part on the work of Carol Gilligan, Sherry tests her hypothesis by comparing and contrasting the decisions of the two Justices during Justice O’Connor’s first four years on the Supreme Court. She concludes that in Establishment Clause cases, O’Connor “is less willing to permit violations of what might be termed intersubjective individual rights,” i.e., those rights that tend to deprive someone of full participation in the community. Likewise, although less directly, O’Connor’s decisions in the discrimination area reflected “her greater sympathy for the victims of race or alienage discrimination [as] part of a consistent pattern of protection of the value of full membership in communities.”

Sherry notes a potential problem with characterizing Justice O’Connor’s voice as a “feminine” voice. O’Connor is still squarely in the conservative camp of the Supreme Court on “most issues.” Thus, it could be argued that adding the feminine voice to adjudication does not necessarily help change the outcomes of actual cases. However, Sherry argues that it could have other positive effects on adjudications and jurisprudence generally. Addition of a feminine voice could result in the differences between men and women being acknowledged in constitutional adjudication. She also sees the potential for a feminist

180. Sherry, supra note 179, at 580-91.  
181. GILLIGAN, supra note 165.  
182. Sherry, supra note 179, at 592.  
183. Sherry, supra note 179, at 595.  
184. Sherry, supra note 179, at 596.  
185. Sherry, supra note 179, at 613.  
186. As examples, Sherry cites Roberts v. United States Jaycees, 468 U.S. 609 (1984), and Steele v. Federal Communications Commission, 770 F.2d 1192 (D.C. Cir. 1985), cases in which the courts were unwilling to acknowledge any difference between men and women. Sherry, supra note 179, at 613-14.
DIVERSITY ON THE BENCH

jurisprudence, which at the time she wrote her article was still in its infancy. 187 Finally, she argued that recognizing a unique feminine perspective in and of itself might help lessen the reliance on, as she calls it, "an overly individualist liberal paradigm." 188

Sherry's reliance on allegedly innate differences between men and women is not without its detractors. Acknowledgment of a Gilliganian "different voice" for women has led to judicial outcomes that are oppressive to the rights of women. 189

Along with research about the impact of diversity on actual outcomes of cases, political scientists have long acknowledged the symbolic importance of a diverse judiciary. Walker and Barrow summed it up, "[d]escriptive or symbolic representation refers to the opportunity of groups to have access to position and influence. Participation of this variety has a positive legitimizing effect on the functioning of a democracy. It reflects a degree of openness in the political process." 190

Even in the absence of a trackable difference in voting records, the symbolic recognition of different groups through judicial appointment of members of these groups to the bench lends credibility to the justice these courts render. Judicial decisions have long supported the idea that a judicial proceeding should not only be fair, but should appear fair. 191 In addition, there is a compelling argument that appointing women and minority group members to the bench is a matter of fairness and equal opportunity. 192 These groups have long been shut out of this important public office, and they deserve to have the same opportunities as their white male counterparts.

188. Sherry, supra note 179, at 615.
190. Walker & Barrow, supra note 26, at 597; see also Goldman & Sarson, supra note 83, at 68 ("if federal courts are to have legitimacy among all segments of the American population, no segment should feel excluded on the basis of gender or minority status").
192. See Kritzer & Uhlman, supra note 144, at 77.
Finally, perhaps the most telling information about the status of gender and race in the legal system is the data and anecdotal evidence gathered by the gender, ethnic, and racial bias task forces throughout the country.\footnote{For a history of the gender bias task force movement, see Lynn Hecht Schafran, \textit{Gender Bias in the Courts: An Emerging Focus for Judicial Reform}, 21 ARIZ. ST. L.J. 237 (1989). For a description of the findings of these task forces as they relate to employment discrimination cases, see Theresa M. Beiner, \textit{The Misuse of Summary Judgment in Hostile Environment Cases}, 34 WAKE FOREST L. REV. 71, 126-30 (1999).} The Task Forces of the District of Columbia, Eighth, Ninth, and Second Circuits have detailed bias and perceived bias on the part of judges and lawyers directed at female lawyers, witnesses, and litigants, including bias based on the type of claim involved.\footnote{See Beiner, supra note 193, at 126-30. In particular, the Ninth Circuit task force noted perceived bias against employment discrimination cases. \textsc{Ninth Circuit Task Force on Gender Bias, Executive Summary of the Preliminary Report of the Ninth Circuit Task Force on Gender Bias}, (1992) \textit{available in} 45 \textsc{Stan. L. Rev.} 2153, 2169-70 (1993). The District of Columbia and Eighth Circuits, also documented bias in sex discrimination cases in particular. \textsc{Special Comm. on Gender to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias, Draft Final Report} 98-102 (1995); \textsc{Eighth Circuit Gender Fairness Task Force, Final Report & Recommendations, available in} 31 \textsc{Creighton L. Rev.} 72-73 (1997).} Likewise, state task forces have noted the bias against women in the court system.\footnote{See Beiner, supra note 193, at 130-31.} The Delaware State Bar Association's Section on Women and the Law summed up well the need for women on the bench in its Report to the Gender Bias Committee:

There are serious practical costs to the quality of justice in our society and ultimately to democratic principles in the exclusion of women as decision makers from the judicial system. Such exclusion assures that the process and outcome of justice reflect the views, values and beliefs of only male members of our society—less than half of the population. Decisions regarding the rights and treatment of women within a court system dominated by men often reflect patriarchal beliefs about women's role in society.\footnote{\textsc{Delaware State Bar Ass'n Section on Women and the Law, Report to the Gender Bias Committee 4} (1994).}
Along with empirical studies and suppositions regarding the effects of diversity by social scientists, legal scholars, and gender bias task forces, there is the occasional judicial decision that makes me think, "[i]f a woman or member of a minority group were deciding this, the outcome would be different." While most judges obviously are savvy enough to leave racist or sexist comments out of their written opinions, decisions, and conduct from the bench, there is the occasional judge who has deeply ingrained sexist or racist inclinations, such that they have ceased to be obvious to him or her. The case described at the beginning of this article—Catchpole v. Brannon—is such a case.

When President Carter first set out to diversify the federal bench, critics argued that he would have difficulty finding qualified women and minority candidates. Yet, the example set by the Carter Administration reveals that such criticisms are unfounded. This

197. This is not to say that women are always unbiased. The recent controversy concerning the alleged racist slurs by Michigan Judge Andrea Ferrara only underscores that any member of a particular demographic group may have prejudices. See Orlandar Brand-Williams, Court Removes Ferrara: Action Is Taken Against Wayne County Circuit Judges for Unprofessional Conduct, DETROIT NEWS, June 29, 1998, at 3C.

198. See supra text accompanying notes 1-9.

199. See generally Lipshutz & Huron, supra note 18; Slotnick, supra note 11, at 271. At the time of the Carter Administration's diversity efforts, Sheldon Goldman set out six major objections to an "affirmative action" approach to judicial selection. These objections, which Goldman responded to in turn, included: (1) "[t]he dangers of classifying people;" (2) "[t]he threat of reverse discrimination;" (3) "[t]he error of focusing on group affiliation;" (4) "[t]he need for government neutrality, not favoritism;" (5) "[t]he problem of quotas;" and (6) "[a]n inappropriate program for the judiciary." Goldman, Should There Be Affirmative Action, supra note 11, at 489-94.

200. See Goldman, Should There Be Affirmative Action, supra note 11, at 492-93; Goldman & Saronson, supra note 83, at 72 (noting that most of Carter's initial appointees were rated as well qualified or qualified by the ABA); Elliot Slotnick, The Paths to the Federal Bench: Gender, Race, and Judicial Recruitment Variation, 67 JUDICATURE 370 (1984)(looking at non-traditional Carter appointees); Carl Tobias, Keeping the Covenant on the Federal Courts, 47 SMU L. REV. 1861, 1862-64 (1994)(discussing Carter's success at finding competent female and minority appointees); Walker & Barrow, supra note 26, at 614. In an early article on President Carter's appointments, Elliot Slotnick noted that Carter's non-traditional appointees did not fare as well in the ABA rating system as his traditional appointees did. Slotnick, supra note 11, at 295. Slotnick casts doubt on the validity of the ABA's ranking system, arguing that it might well be biased in favor of the traditional candidate's career path. Slotnick,
criticism is even more unfounded today compared to 1976, when Carter was elected, because there are now far more qualified women and minority attorneys.201

The data compiled by political scientists is not entirely conclusive on the effects of diversity on the bench.202 This is not especially surprising, given the difficulty of assessing all the factors that may play a role in judicial decision making.203 However, with more and more non-traditional judges being appointed to the bench, more recent studies suggest that the diversity they bring to the bench has an actual effect on the outcome of cases. The problem with political science data is that a single study cannot account for all the variables that may impact an individual judge’s view of the law or reality. It is much more complex and involves many categories of information, including such variables as sex, race, religion, upbringing, political partisanship and ideology, judicial ideology, appointing president (where applicable), socio-economic background, region of the country in which the judge was raised or lives, etc.204

pra note 11, at 295–296. It is worth noting, however, that only two of Carter’s non-traditional appointees were rated as “not qualified.” See Slotnick, supra note 11, at 296. See also Martin, Gender, supra note 11, at at 296. See also Martin, Gender, supra note 49, at 138–39 (noting that Carter’s women received the two top ABA ratings at a lower rate than his men, while noting that potential bias of the ABA toward “older, well-to-do, business-oriented corporation attorneys”).

201. See Carl Tobias, Increasing Balance on the Federal Bench, 32 Hous. L. Rev. 137, 146 (1995)(noting that the judges appointed by President Clinton “are apparently very well qualified”).

202. See George, supra note 21, at 1650 (noting limited success of social science studies seeking to account for various background influences on judicial behavior).

203. See James L. Gibson, From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior, 5 Pol. Behav. 7, 8 (1983)(“The most striking deficiency of judicial behavior research is its lack of theoretical decision-making models that (1) comprehensively include the multitude of stimuli affecting decisions and (2) explain or predict a considerable portion of the variation in decision making.”).

204. Judge Richard Posner suggested a laundry list of “inappropriate” influences, including:

personal dislike of a lawyer or litigant, gratitude to the appointing authorities, desire for advancement, irritation with or even a desire to undermine a judicial colleague or subordinate, willingness to trade votes, desire to be on good terms with colleagues, not wanting to disagree with people one likes or respects, fear for personal safety, fear of ridicule, reluctance to offend one’s spouse or close friends, and racial or class solidarity.

Political science research also fails to assess the context in which a case arises. Simply put, the facts matter. The legal theory alleged in the case will also affect the outcome. As one scholar put it, "In short, there is much more to judicial decision-making than [a]ffecting one's political preferences. In fact, the search for a single, universal maximand may be futile." No one study can account for all these variables and their potential implications in a given case. That is not to say that it's not worth conducting studies or that political science research has not supplied some very helpful information. However, I do think the limitations of this research need to be taken into consideration. Fortunately, most political scientists are willing to recognize the limitations of their research. A potential area for additional political science and legal research is a more thorough analysis of actual case files to assess the impact of the many variables that researchers currently do not take into account. In addition, it would be helpful in determining the impact of procedure on particular substantive claims.

In spite of studies supporting the attitudinal model, I remain convinced that many judges attempt to use the legal method in resolving cases. The research of Ashenfelter, Eisenberg, and Schwab supports this and suggests, contrary to findings of political scientists, that in the average case judges use the traditional legal method—look at precedent, and follow it in the case at hand. The result is that case outcomes are fairly consistent. This does not mean that the judge's identity

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205. Tracey George and Lee Epstein found, in a study of death penalty cases decided by the Supreme Court between 1972 and 1991, that an integrated model considering extralegal and legal factors (such as legally relevant facts) better explained the Supreme Court's rulings in this area than a strict application of the attitudinal model. See Tracey E. George & Lee Epstein, On the Nature of Supreme Court Decision Making, 86 Am. Pol. Sci. Rev. 323, 326, 328 (1992). George has noted the difficulties these sorts of integrated models pose for the researcher. See George, supra note 21, at 1650.

206. Cross, supra note 13, at 297.

207. See, e.g., Carp et al., supra note 59, at 299 (acknowledging the argument that political science research cannot consider the factual nuances of each case); see also George & Epstein, supra note 205, at 328.


209. See Ashenfelter et al., supra note 13.

210. Of course, there are notable exceptions. Witness the current debate about the actions of California Appellate Judge J. Anthony Kline, who refused to follow California Su-
has no impact on the outcome of a particular case or on the law itself. Instead, it suggests that, at least in certain types of cases, outcomes are fairly predictable. However, in controversial or precedent-setting cases, one would expect the judge’s background to come into play. Indeed, it is no surprise that Judges Easterbrook and Posner occasionally cast their decisions in economic terms. They have a law-and-economics ideology that at times is reflected in their decisions.

In particular, cases involving vague legal precedent provide an opportunity for a judge’s ideology to come into play. When precedent and plain meaning fail them, judges must look to competing policies. Their particular ideology may influence, if not dictate, which policy argument they will find most compelling. Among more activist judges, whether the meaning is plain or the precedent controlling may be influenced by their ideologies. However, in judging the run-of-the-mill motion to dismiss, the judge can easily determine whether or not the plaintiff has pled enough to state a claim. Barring a complainant attempting a novel extension of the law (which is rare), ideology will likely not affect the decision.

So, what do we want of judges? Who is the ideal judge? Traditionally, lawyers have focused on impartiality, independence, and disengagement as the traits that are required for effective judging. Individual attorneys might prefer that judges be inclined to favor their particular claims. The best judge, however, should be able to see and assess the differing perspectives of the many parties and persons involved in the litigation. This is where diversity becomes important. For example, it is doubtful that a female judge sitting on the panel in Galloway v. General Motors Service Parts Operations would have agreed with Justice Posner’s contention that the terms “bitch” and “sick bitch” were gender-neutral (or were, at least, gender-neutral as a matter of law, which is what Posner effectively ruled) as applied to the Supreme Court precedent, and is now being brought up on charges of judicial misconduct in California. See Nancy McCarthy, Judge Faces Discipline for Opinion, August 1998 CAL. BAR J. at 1, 22.


212. See George, supra note 21, at 1667.

213. See Resnick, supra note 189, at 1881-86.

female sexual harassment plaintiff in that case.\textsuperscript{215} At the least, one would expect a female judge to question such a supposition, especially at the summary judgment stage. Her input might have prompted Judge Posner to reconsider his position and even change his mind on the issue. Therein lies the value of diversity. Perhaps, for a moment, Judge Posner could have stepped into the shoes of Ms. Galloway, as she experienced being called a “bitch” and a “sick bitch” frequently during a four-year period. This may be the most salient advantage that diversity brings to the federal courts.\textsuperscript{216} It allows judges, at least for the purposes of a particular case, to understand that person’s perspective and take it into account in judging.\textsuperscript{217}

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\textsuperscript{215} Galloway, 78 F.3d at 1168.

\textsuperscript{216} Political scientists’ “strategic behavior” model would support such an influence. See supra text accompanying notes 138–142; see also Goldman, \textit{Should There Be Affirmative Action} supra note 11, at 494. As Goldman put it:

\begin{quote}
A judge who is a member of a racial minority or a woman cannot help but bring to the bench a certain sensitivity—indeed, certain qualities of the heart or mind—that may be particularly helpful in dealing with these issues. . . . The presence on the bench in visible numbers of well-qualified judges drawn from the minorities and women cannot help but add a new dimension of justice to our courts.
\end{quote}

See Goldman, \textit{Should There Be Affirmative Action}, supra note 11, at 494. See also Slotnick, supra note 11, at 272–73 (“Indeed the presence and perspective of non-traditional judges would likely increase the sensitivities of already seated white male colleagues in ways which could have a considerably greater impact on the judicial process than the direct contribution of the new judges.”).

\textsuperscript{217} Harper Lee in her classic novel, \textit{To Kill A Mockingbird}, summed up this phenomenon best in a description of her heroine, Scout, on the porch of neighbor Boo Radley’s residence. In this portion of the novel, Scout is trying to grapple with the nature of Radley’s existence.

\begin{quote}
Neighbors bring food with death and flowers with sickness and little things in between. Boo was our neighbor. He gave us two soap dolls, a broken watch and chain, a pair of good-luck pennies, and our lives. But neighbors give in return. We never put back into the tree what we took out of it: we had given him nothing, and it made me sad.

I turned to go home. Street lights winked down the street all the way to town. I had never seen our neighborhood from this angle. There were Miss Maudie’s, Miss Stephanie’s—there was our house, I could see the porch swing—Miss Rachel’s house was beyond us, plainly visible. I could even see Mrs. Dubose’s.

I looked behind me. To the left of the brown door was a long shuttered window. I walked to it, stood in front of it, and turned around. In daylight, I thought you could see to the postoffice corner.
\end{quote}
Daylight... in my mind, the night faded. It was daytime and the neighborhood was busy. Miss Stephanie Crawford crossed the street to tell the latest to Miss Rachel. Miss Maudie bent over her azaleas. It was summertime, and two children scampered down the sidewalk toward a man approaching in the distance. The man waved, and the children raced each other to him.

It was still summertime, and the children came closer. A boy trudged down the sidewalk dragging a fishing-pole behind him. A man stood waiting with his hands on his hips. Summertime, and his children played in the front yard with their friend, enacting a strange drama of their own invention.

It was fall, and his children fought on the sidewalk in front of Mrs. Dubose's. The boy helped his sister to her feet, and they made their way home. Fall, and his children trotted to and fro around the corner, the day's woes and triumphs on their faces. They stopped at the oak tree, delighted, puzzled, apprehensive.

Winter, and his children shivered at the front gate, silhouetted against a blazing house. Winter, and a man walked into the street, dropped his glasses, and shot a dog.

Summer, and he watched his children's heart break. Autumn again, and Boo's children needed him.

Atticus was right. One time he said you never really know a man until you stand in his shoes and walk around in them. Just standing on the Radley porch was enough.

Harper Lee, To Kill a Mockingbird 293-94 (J.P. Lippincott Co. 1960).