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## A Demographic History of Federal Judicial Appointments by Sex and Race: 1789–2016

Jonathan K. Stubbs

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# A DEMOGRAPHIC HISTORY OF FEDERAL JUDICIAL APPOINTMENTS BY SEX AND RACE: 1789–2016

Jonathan K. Stubbs\*

I. Historical Overview .....	96
A. Relevant Constitutional Provisions .....	96
B. The Judiciary Act of 1789 .....	97
C. Presidential Appointments of Federal Judges .....	99
1. George Washington to Herbert Hoover .....	99
2. The Initial Desegregation by Race and Sex of Federal Courts of General Jurisdiction: Franklin Roosevelt to Jimmy Carter.....	101
3. Slow Progress in Federal Judicial Desegregation: Jimmy Carter to Barack Obama .....	106
D. Data Summary .....	109
II. The Myth and Substance of Federal Judicial Diversity .....	113
A. Diversity Mythology.....	113
B. Sotomayor’s Unanswered Question .....	119
C. A Preliminary Assessment.....	124
1. Process Concerns.....	125
2. Qualitative Queries.....	126

## INTRODUCTION

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

Not long after Judge Sotomayor’s nomination, a controversy erupted involving a speech that she had delivered nearly a decade earlier. Speaking to a distinguished group of legal professionals, law students, and others, Judge Sotomayor asked a simple question: “what [would it] mean to have more women and people of color on the bench?”<sup>1</sup> Being a conscientious jurist, Judge Sotomayor voiced concern about how her own background might impact her impartiality:

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

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1. Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERK. LA RAZA L.J. 87, 90 (2002).

permit me, that I reevaluate them and change as circumstances and cases before me requires.<sup>2</sup>

In fact, Judge Sotomayor forthrightly acknowledged her human frailty: “I can and do aspire to be greater than the sum total of my experiences but I accept my limitations.”<sup>3</sup> In essence, she showed sensitivity to seeing things not just from her own viewpoint, but also from a variety of perspectives.<sup>4</sup>

During her speech, however, Judge Sotomayor also stated, “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”<sup>5</sup> This “wise Latina” remark ignited a vigorous discussion—some might say a firestorm—that obscured the central question of Judge Sotomayor’s speech—namely, what the effects would be of having a federal bench that included more women and people of color.<sup>6</sup> She later apologized for making the “wise Latina” statement, a comment many people found offensive.

The controversy surrounding the confirmation of Justice Sotomayor to the Court also shed light upon a misperception that the American federal judiciary boasts more diversity than it actually does. In their insightful article “The Realism of Race in Judicial Decision Making,” Professors Pat Chew and Robert Kelley commented upon this phenomenon: “Given all the media attention dedicated to race, affirmative action, post-racial politics, and political correctness, it would not be surprising that people believe that the judiciary is diverse and that minorities fare well in the judicial system. The reality is more complicated and less heartening.”<sup>7</sup>

With this background, a synopsis of this Article’s three main foci and a few practical illustrations follow. First, this Article assesses America’s progress in its 226-year odyssey to desegregate the originally all-White and all-male federal bench. Thus, the primary diversity focal points involve sex and “race.” Race is placed in quotes because, as Dr. Craig Venter, a chief researcher for the Human Genome Project has reportedly said, “No serious scholar in this field now considers race to be a scientific concept. . . . It doesn’t matter what the genetic trait is, there are few if any of them that are related to what society calls race or ethnicity.”<sup>8</sup> Nevertheless, for

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2. *Id.* at 93.

3. *Id.* at 93.

4. See Theresa M. Beiner, *White Male Heterosexist Norms in the Confirmation Process*, 32 WOMEN’S RTS. L. REP. 105, 136 (2011) (“This narrative reveals Justice Sotomayor to be a humble and thoughtful judge who is willing to check her perspectives when appropriate and engage them when it might be helpful in understanding the perspective of litigants.”); Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987) (discussing the importance of recognizing differences in viewpoint, and the impact of such differences on judicial decision making). In other words, her approach to judging exemplified a sincere effort to treat others the way that she would wish to be treated. Accord Jonathan K. Stubbs, *Perceptual Prisms and Racial Realism*, 45 MERCER L. REV. 773 (1994).

5. Sotomayor, *supra* note 1, at 92.

6. Since women come in all complexions, one might more precisely frame the issue as follows: what will be the impact upon the federal judiciary of women of all colors and the impact of men of color.

7. Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs’ Race and Judges’ Race*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 91, 92 (2012).

8. Data derived from the Human Genome project strongly suggests that all human beings originated in Africa, and that about twenty-five thousand years ago, a relatively small number of Africans emigrated to Europe and established the earliest European societies. See David L. Chandler, *Heredity Study Eyes European Origins*, THE BOSTON GLOBE, May 10, 2001, at A22; Eric S. Lander et al., *Linkage*

discussion purposes, this Article accepts the current nomenclature that suggests that humans comprise more than one race and that groups like African Americans, Whites, Latin(o/as), Asian Americans, and American Indians constitute discrete racial categories.

For reasons discussed in more detail later, this Article concludes that it may take decades before the federal judiciary more fully reflects the diversity of the American population. Consider a brief example: over the past seven years, President Obama has appointed more women to the federal bench than did any of his predecessors. Nevertheless, even if all of Obama's successors follow his example and appoint women to the federal bench at the same rate as he did, the United States will never have a judiciary that mirrors the general population because, while most Americans are female,<sup>9</sup> a majority—58 percent—of Obama's appointees have been male.<sup>10</sup> This unrepresentative 58-42 split is all the more remarkable as the best ratio that any president has achieved.

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

To support a more definitive conclusion regarding Sotomayor's question as to the impact of judicial diversity, this Article concludes that we need more data and analysis of specific judicial decisions. Such analysis should involve discussion of (a) process concerns; and (b) qualitative considerations. Process concerns include how one evaluates the impact of a more inclusive community of judges. Qualitative considerations encompass the criteria for assessing the merit of particular judicial decisions. In addition, a more comprehensive analysis should cover a sufficient time period, so that observers may detect and analyze any relevant decision-making patterns. Such information could help to affirm or disaffirm the Article's preliminary conclusion that a more diverse judiciary will result in better judicial decision making.<sup>11</sup>

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

9. See U.S. CENSUS BUREAU, USA QUICKFACTS, <http://www.census.gov/quickfacts/table/PST045215/00>.

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

11. See, e.g., Susan Haire, Barry Edwards & David Hughes, *Presidents and Courts of Appeals: The Voting Behavior of Obama's Appointees*, 97 JUDICATURE 137 (2013) (arguing that the impact of a president's appellate judicial appointments depends upon factors including the existing composition of appellate courts, the number of judges a president appoints, and the ideological perspectives of the judges). The author of this Article is also researching the impact of President Obama's judicial appointments on Fourteenth Amendment civil liberties jurisprudence in federal appellate decisions. See Jonathan K. Stubbs, *Obama Appeals Judges' Impact on Fourteenth Civil Liberties*

Finally, this Article preempts some common concerns and objections to the diversification of previously segregated institutions like the federal courts. Such concerns include, for example, the assertion that we cannot find enough qualified women and men of color to serve as judges.

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

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*Amendment Jurisprudence: A Preliminary Analysis* (unpublished manuscript).

12. See FED. JUDICIAL CTR., <http://www.fjc.gov> (click on "Federal judicial history," then click on "Judges of the United States Courts," then click on "Select research categories"; then select "Court Type" and "Nominating President" and click "CONTINUE"; next, select "All Courts of General Jurisdiction" and then select each individual president since Ronald Reagan to yield an aggregate of 1567 judges) (last visited Mar. 13, 2016). Scholars have focused on various aspects of the federal judicial selection process including evaluation of how race and gender have influenced judicial nominations and confirmations. See generally LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005) (a thoughtful evaluation of the ideological and political influences on federal judicial selection, particularly in modern times); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997) (analyzing the complex context in which federal judges especially, in the lower courts, were selected between 1933 and 1989) [hereinafter GOLDMAN, *PICKING FEDERAL JUDGES*]; Theresa M. Beiner, *How the Contentious Nature of Federal Judicial Appointments Affects "Diversity" On the Bench*, 39 U. RICH. L. REV. 849, 866–70 (2005) (discussing the difficulty which judges, especially those labeled as liberals, have in ascending the federal bench); Sheldon Goldman et al., *Obama's First Term Judiciary: Picking Judges in the Minefield of Obstructionism*, 97 JUDICATURE 7 (2013) (carefully documenting and analyzing President Obama judicial selections and the Senate response(s) including in-depth discussion of the role of diversity in Obama's appointments); Sheldon Goldman et al., *The Confirmation Drama Continues*, 94 JUDICATURE 262 (2011) (comprehensively assessing the first two years of the federal judicial selection process of the Obama administration) [hereinafter *The Confirmation Drama*]; Sheldon Goldman et al., *W. Bush's Judicial Legacy: Mission Accomplished*, 92 JUDICATURE 258 (2009) (evaluating President George W. Bush's success in elevating jurists sharing his political philosophy to the federal bench); Maeva Marcus, *Federal Judicial Selection: The First Decade*, 39 U. RICH. L. REV. 797 (2005) (outlining federal judicial appointments, especially to the United States Supreme Court, during the administrations of George Washington and John Adams); Carl Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 785–95 (2010) (critically evaluating reasons for delays in the judicial nomination and confirmation process as well as suggesting approaches to alleviate the situation); Carl Tobias, *Diversity and the Federal Bench*, 87 WASH. L. REV. 1197, 1199–1207 (2010) (describing and evaluating the judicial selection process of the Obama administration as well as the Senate's response); Russell Wheeler, *The Changing Face of the Federal Judiciary*, BROOKINGS INST. (2009), [http://www.brookings.edu/~media/research/files/papers/2009/8/federal-judiciary%20wheeler/08\\_federal\\_judiciary\\_wheeler.pdf](http://www.brookings.edu/~media/research/files/papers/2009/8/federal-judiciary%20wheeler/08_federal_judiciary_wheeler.pdf) (outlining demographic changes in judicial appointments from the Eisenhower presidency through that of George W. Bush and including data regarding judges' gender, race and ethnicity as well as professional background).

For a thoughtful proposal to enhance both legitimacy and diversity within the federal judiciary, see Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible*, 105 NW. U. L. REV. 587 (2011). Cf. Carl Tobias, *Justifying Diversity in the Federal Judiciary*, 106 NW. U. L. REV. 283 (2012) (evaluating Professor Nancy Scherer's proposal on diversity and legitimacy). See also Ciara Torres-Spelliscy et al., *Improving Judicial Diversity*, BRENNAN CTR. FOR JUSTICE (2010), [http://www.brennancenter.org/sites/default/files/legacy/Improving\\_Judicial\\_Diversity\\_2010.pdf](http://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf) (analyzing the judicial selection process in ten states which employed commissions to identify candidates for state court judgeships).

For an interesting empirical analysis of the possible impact of the intersection of race and gender on judicial decision-making at the federal appellate level in criminal cases, see Todd Collins & Laura Moyer, *Gender, Race and Intersectionality on the Federal Appellate Bench*, 61 POL. RES. Q. 219 (2008). See also Mark S. Hurwitz & Drew Noble Lanier, *Judicial Diversity in Federal Courts: A Historical and Empirical Exploration*, 98 JUDICATURE 76 (2012), for a broad historical, descriptive analysis of federal appellate judicial diversity from 1801–2012. Hurwitz and Lanier include helpful data regarding religious affiliation and education. See Hurwitz and Lanier, *supra*, at 79.

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

This Article proceeds as follows. Part I briefly surveys the constitutional and statutory foundation for the creation of the federal judiciary. It also furnishes data, by sex and race, of the appointment of federal judges to courts of general jurisdiction during each presidential administration from September 24, 1789, through April 11, 2016. Thus, Part I describes the pace of diversification of the federal judiciary. While data regarding other attributes of judges (such as their socioeconomic status) exist, extensive analysis of such characteristics falls outside the parameters of this preliminary analysis.<sup>13</sup> Nonetheless, the Article notes in passing that, since 1989, during each presidential administration, the majority of federal judicial appointees have had a net worth in excess of a half million dollars.<sup>14</sup>

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

## I. HISTORICAL OVERVIEW

This Part provides an overview of several relevant provisions of the United States Constitution and the congressional statute that created the first federal courts. It then outlines federal judicial appointments to courts of general jurisdiction that American presidents made and that the United States Senate confirmed between September 24, 1789, and March 10, 2016. The appointments are grouped by sex and race. This piece specifically scrutinizes the Supreme Court, the federal courts of appeal, and the federal district courts. In addition, the Article's data include judges of the former United States circuit courts (abolished in 1911 and succeeded by the courts of appeal).<sup>15</sup> Thus, this Article focuses primarily on federal courts of general jurisdiction.

### A. *Relevant Constitutional Provisions*

Articles II and III of the Constitution furnish the primary constitutional bases for the establishment and staffing of the federal judiciary. Article III, Section 1 of the Constitution states, "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>16</sup> Article II of the Constitution confers upon the President the power to appoint "with the Advice and Consent of the Senate . . . Judges of the supreme Court and all other Officers of the United States, whose Appointments are

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13. See e.g., Goldman et al., *Obama's First Term Judiciary*, *supra* note 12, at 40–43; Goldman et al., *W. Bush's Judicial Legacy: Mission Accomplished*, *supra* note 12, at 274–75.

14. Goldman et al., *Obama's First Term Judiciary*, *supra* note 12, at 40–43. In fact, since the advent of the administration of President George H. W. Bush, approximately two-thirds of each president's federal appellate judges have had a net worth exceeding a half million dollars. *Id.* at 43.

15. See Judiciary Code of 1911, ch. 13, § 289, 36 Stat. 1087, 1167 (1911).

16. U.S. CONST. art. III, § 1.

not herein otherwise provided for, and which shall be established by Law.”<sup>17</sup> In addition, the President may “fill up all vacancies that may happen during the Recess of the Senate, by granting Commissions.”<sup>18</sup> Thus, the President can make a “recess” judicial appointment that expires at the end of the next session of Congress.<sup>19</sup> The President can (re)nominate such an appointee when the Senate reconvenes, and the Senate has authority to confirm or reject the nomination. These constitutional provisions furnish the process by which federal judges ascend to the bench: the President nominates, and the Senate confirms (or rejects) the nomination.

### B. *The Judiciary Act of 1789*

The First Congress passed the Judiciary Act of 1789 and established the Supreme Court, circuit courts, and district courts.<sup>20</sup> The Supreme Court initially consisted of one Chief Justice and five associate justices.<sup>21</sup> Congress expanded the size of the Court to seven justices in 1807,<sup>22</sup> to nine justices in 1837,<sup>23</sup> and to ten justices in 1863.<sup>24</sup> In 1866, Congress reduced the authorized size of the Court to seven justices and provided that no vacancies could be filled until the Court reached the authorized limit.<sup>25</sup> In 1869, Congress authorized the Court’s current size of nine justices.<sup>26</sup>

As to lower courts, Congress created circuit courts under the Judiciary Act of 1789. Two Supreme Court justices and a district court judge constituted the first circuit courts.<sup>27</sup> In this respect, the first circuit courts differed from modern federal appellate courts, whose primary jurisdictional responsibilities focus upon adjudication of appeals from federal trial courts.

Furthermore, the Act gave the circuit courts jurisdiction over trials involving persons from different states,<sup>28</sup> the majority of federal criminal cases,<sup>29</sup> and civil suits in which the United States was the moving party.<sup>30</sup> The circuit courts convened in each of the thirteen judicial districts that Congress initially created.

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

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17. U.S. CONST. art II, § 2, cl. 2.

18. U.S. CONST. art. II, § 2, cl. 3.

19. *Id.* See also *NLRB v. Canning*, 134 S. Ct. 2550, 2557, 2567 (2014) (holding that the President’s appointment of three members to the National Labor Relations Board during a three day intra session Senate recess was unconstitutional). Among other things, in light of the actual practice of American Presidents and the Senate over an extended period, the time of the Senate’s recess was presumptively too short for the appointments to be effective. *Id.*

20. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1801). For helpful introductory background reading regarding American federal judicial history, see BERNAN EDITORIAL STAFF, KRAUS ORGANIZATION LIMITED, BIOGRAPHICAL DIRECTORY OF THE FEDERAL JUDICIARY 1789–2000 (2001) [hereinafter BIOGRAPHICAL DIRECTORY]. See also the website for the Federal Judicial Center, <http://www.fjc.gov/history/home.nsf>.

21. Judiciary Act of 1789, ch. 20, § 1, 1 Stat. at 73 (1801).

22. Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 420 (1807).

23. Act of Mar. 3, 1837, ch. 34, §1, 5 Stat. 176 (1837).

24. Act of Mar. 3, 1863, ch. 101, §1, 12 Stat. 794 (1863).

25. Act of July 28, 1866, ch. 210, §1, 14 Stat. 209 (1866).

26. Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44 (1869).

27. *Id.* at § 4, 1 Stat. at 74–75 (1789).

28. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (1789).

29. *Id.*

30. *Id.* at 78.

to sit with a district judge to constitute a circuit court from two judges to one.<sup>31</sup> Nearly a century later, in 1891, Congress created the U.S. circuit courts of appeals and assigned existing circuit judges to the new courts.<sup>32</sup> The U.S. circuit courts continued to try specified types of cases until the Judicial Code of 1911 abolished the circuit courts, leaving the U.S. Circuit Courts of Appeals as the primary intermediate appellate court in the federal judicial system.<sup>33</sup>

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

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

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

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

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

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

34. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified as amended in scattered sections of 28 U.S.C.); BIOGRAPHICAL DIRECTORY, *supra* note 20, at 57.

35. Federal Courts Improvement Act of 1982; BIOGRAPHICAL DIRECTORY, *supra* note 20, at 57.

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

37. *Id.* at § 9.

38. *Id.* at § 3.

39. BIOGRAPHICAL DIRECTORY, *supra* note 20, at 105.

### C. Presidential Appointments of Federal Judges

#### 1. George Washington to Herbert Hoover

On April 6, 1789, Congress counted the ballots of the Electoral College and confirmed that George Washington had received all sixty-nine ballots cast for President of the United States.<sup>40</sup> On April 30, 1789, Washington took office.<sup>41</sup> Less than six months after he assumed office, Congress passed the Judiciary Act of 1789.<sup>42</sup> On that same day, Washington nominated five people to the Supreme Court<sup>43</sup> and eight people to the federal district court.<sup>44</sup> The Senate confirmed all five Supreme Court nominees two days later.<sup>45</sup> On September 25, 1789, Washington nominated two more individuals for federal district judgeships for a total of ten district court nominees.<sup>46</sup> On September 26, 1789—two days after Washington had nominated the first eight federal district judges—the Senate confirmed all ten of Washington’s federal district court appointees.<sup>47</sup> The expeditious nomination and confirmation process suggests that both had been planned in anticipation of the first congressional legislation establishing the federal court system. By the end of his presidency, all thirty-eight of Washington’s nominees to the federal judiciary were—not surprisingly—White men.<sup>48</sup>

Washington’s appointments to federal courts of general jurisdiction established a national precedent. Over a span of 145 years, the thirty presidents who succeeded Washington made the same sex and race selections. As shown in the table below, the first thirty-one American presidents appointed, and the Senate confirmed, 857 White men to federal courts of general jurisdiction.<sup>49</sup>

40. 1 SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE: PREHISTORY TO 1789*, 406–07 (1972) [hereinafter 1 OXFORD HISTORY].

41. 2 OXFORD HISTORY, *supra* note 31, at 33.

42. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1801).

43. *Biographical Directory of Federal Judges—John Jay*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1168> (last visited Mar. 29, 2015); *Biographical Directory of Federal Judges—John Rutledge*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2078> (last visited Mar. 29, 2015); *Biographical Directory of Federal Judges—William Cushing*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=549> (last visited Mar. 29, 2015); *Biographical Directory of Federal Judges—John Blair*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=189> (last visited Mar. 29, 2015); *Biographical Directory of Federal Judges—James Wilson*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2607> (last visited Mar. 29, 2015).

44. Francis Hopkinson (District of Pennsylvania), John Sullivan (District of New Hampshire), John Lowell (District of Massachusetts), David Sewell (District of Maine), Richard Law (District of Connecticut), Gunning Bedford, Jr. (District of Delaware), Nathaniel Pendleton (District of Georgia), and Harry Innes (District of Kentucky). See FED. JUDICIAL CTR., <http://www.fjc.gov> (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Nominating President” and click “CONTINUE”; then select “George Washington” and click “Search”) (last visited Mar. 29, 2015).

45. See *id.*

46. David Brearley (District of New Jersey) and James Duane (District of New York). See *id.*

47. See *id.*

48. FED. JUDICIAL CTR., <http://www.fjc.gov> (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type” and “Nominating President” and click “CONTINUE”; then select “All Courts of General Jurisdiction” and “George Washington” and click “Search”) (last visited Mar. 15, 2016).

49. Data compiled from the Federal Judicial Center. See *id.* (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type” and “Nominating President” and click “CONTINUE”; then select “All Courts of General Jurisdiction” and each president individually; then add the judges for each individual president to

**Table 1: Federal Judicial Appointments, George Washington–Herbert Hoover**

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

## 2. The Initial Desegregation by Race and Sex of Federal Courts of General Jurisdiction: Franklin Roosevelt to Jimmy Carter

President Franklin Delano Roosevelt appointed the first woman to serve as a federal judge on a court of general jurisdiction. He also named the first man of color to the federal bench. In doing so, Roosevelt departed—albeit only slightly—from the exclusionary model of judicial appointments as set by his predecessors. At the beginning of his first term, Roosevelt nominated twelve White males to the bench.<sup>50</sup> Following these dozen appointments, on March 6, 1934, President Roosevelt nominated Florence Ellinwood Allen to serve on the United States Court of Appeals for the Sixth Circuit. The Senate confirmed Allen on March 15, 1934, and she received her commission six days later.<sup>51</sup> While Judge Allen became the first woman to receive a lifetime tenure on a federal court of general jurisdiction, she was not the first woman appointed to a federal court—President Coolidge had appointed Genevieve Rose Cline to a lifetime position on the U.S. Customs Court, a specialty court with a limited jurisdiction focused on disputes regarding imported goods and tariff classifications.<sup>52</sup>

Along with breaching the barrier of gender, Roosevelt modestly challenged racial segregation in the federal judiciary. He appointed an African American Harvard Law School graduate, William H. Hastie, to a four-year term as a federal judge in the U.S. Virgin Islands.<sup>53</sup> With his appointment, Judge Hastie became the first man of color to serve on the federal bench. Despite the court's very limited statutory authority, Hastie's appointment to a federal judgeship nevertheless represented an important symbol of progress.<sup>54</sup> Practically speaking, however, Judge Hastie's ascent to the bench had little impact on the federal judiciary.<sup>55</sup> His court had little statutory power and was located in a place where cases with national implications were infrequently decided. Moreover, Judge Hastie served for only two years before accepting an appointment as dean of the Howard University School of Law.<sup>56</sup>

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

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50. The judges that Roosevelt appointed were Robert Cook Bell, John Clyde Bowen, Sam Gilbert Bratton, James A. Donohoe, Louis FitzHenry, Francis Arthur Garrecht, William Harrison Holly, James Earl Major, Heartsill Ragon, Patrick Thomas Stone, Phillip Leo Sullivan, and Joseph William Woodrough. *See id.* (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; then select “Court Types” and “Nominating President” and click “CONTINUE”; next select “All Courts of General Jurisdiction” and “Franklin D. Roosevelt” and click “Search”) (last visited Apr. 1, 2015).

51. *Biographical Directory of Federal Judges—Florence Ellinwood Allen*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=28&cid=999&ctype=na&instate=na> (last visited March 16, 2016).

52. GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 12, at 51; *see also* BIOGRAPHICAL DIRECTORY, *supra* note 20, at 300.

53. GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 12, at 55; *see also Oral History of Interview of Judge William H. Hastie*, HARRY S. TRUMAN LIBRARY & MUSEUM, <http://www.trumanlibrary.org/oralhist/hastie.htm#transcript> (last visited Apr. 1, 2015).

54. *See* THE BIG BANG, BROWN V. BOARD OF EDUCATION AND BEYOND: THE AUTOBIOGRAPHY OF OLIVER W. HILL (100TH BIRTHDAY EDITION) 129–31 (Jonathan K. Stubbs ed., 2007).

55. GILBERT WARE, GRACE UNDER PRESSURE, 85–86 (1984); *see also* GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 12, at 55, 98 n.v.

56. WARE, *supra* note 55, at 93.

Roosevelt and confirmed by the Senate, were all White men.<sup>57</sup>

Harry S. Truman became president upon Roosevelt's death in 1945. Truman appointed Irvin Mollison, an African American male, to a lifetime tenure on the United States Court of Customs in New York.<sup>58</sup> Additionally, on October 21, 1949, President Truman gave William H. Hastie a recess appointment to serve as a judge on the United States Court of Appeals for the Third Circuit. In doing so, Truman shattered a 160-year-old barrier: Judge Hastie—who had earlier become the first man of color ever appointed to a federal court—also became the first person of color appointed to a lifetime position on a federal court of general jurisdiction.<sup>59</sup> On January 5, 1950, Truman re-nominated Judge Hastie after Congress had reconvened. After extensive debate, the Senate confirmed Hastie's appointment on July 19, 1950.<sup>60</sup> The controversy surrounding Hastie's appointment stemmed from several sources, including Hastie's race and his reputation for his uncompromising work to desegregate American society. His activism caused him to be viewed by segregationists, like Senator James Eastland of Mississippi, and their sympathizers as "subversive."<sup>61</sup> Judge Hastie countered such arguments by stating, "He who will not use his office to fight for the ideals written into our basic law is false to his oath to support that law. He is the true subversive and deserves to be branded as such."<sup>62</sup>

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

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

57. FED. JUDICIAL CTR., <http://www.fjc.gov> (click on "Federal judicial history," then click on "Judges of the United States Courts," then click on "Select research categories"; then select "Court Type" and "Nominating President" and click "CONTINUE"; next select "All Courts of General Jurisdiction" and "Franklin D. Roosevelt" and click "Search") (last visited Apr. 1, 2015).

58. GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 12, at 98, n.v.; *see also* Irvin C. Mollison, JUST THE BEGINNING, <http://www.jtbf.org/index.php?src=directory&view=biographies&srctype=detail&refno=188>.

59. WARE, *supra* note 55, at 85–86. Franklin Roosevelt had earlier appointed Hastie and William E. Moore to the federal district court for the Virgin Islands, which had very limited jurisdiction and non-lifetime tenure (a ten year term). *See* GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 12, at 98, n.v.

60. WARE, *supra* note 55, at 233–41; *Biographical Directory of Federal Judges—William Henry Hastie*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=995&cid=999&ctype=na&instate=na>.

61. WARE, *supra* note 55, at 236.

62. *Id.* at 232.

63. *Biographical Directory of Federal Judges—Burnita Shelton Matthews*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1506&cid=999&ctype=na&instate=na>.

64. *Biographical Directory of Federal Judges—Cyrus Niles Tavares*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2343&cid=999&ctype=na&instate=na> (last visited Apr. 1, 2015).

65. GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 12, at 196.

66. *Id.* at 144; *see also* *Biographical Directory of Federal Judges—Scovel Richardson*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=3214&cid=999&ctype=na&instate=na> (last

only males to federal courts of general jurisdiction during his tenure in office—Eisenhower made 165 federal judicial appointments, which the United States Senate confirmed, and all of them were men.<sup>67</sup>

President John Fitzgerald Kennedy was the first president to appoint more than two men of color to the federal bench. On March 24, 1961, slightly more than two months after assuming office, Kennedy nominated the first Latino<sup>68</sup> candidate to the bench—Reynaldo Guerra Garza. The Senate confirmed him on April 13, 1961.<sup>69</sup> President Kennedy then resubmitted Judge Tavares’s nomination, and the Senate confirmed him on September 21, 1961. President Kennedy was also the first president to appoint more than one African American to the bench—he appointed three.<sup>70</sup> In addition, he appointed one White woman.<sup>71</sup> Kennedy’s appointment of five persons of color and one woman represented a further (modest) break from the existing judicial demographic profile. Still, of Kennedy’s 125 judicial appointees, 124 were men; and of those 124 men, 119 were white.<sup>72</sup> Kennedy appointed only one woman.<sup>73</sup>

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

visited Apr. 1, 2015).

67. FED. JUDICIAL CTR., <http://www.fjc.gov> (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; then select “Court Type” and “Nominating President” and click “CONTINUE”; next select “All Courts of General Jurisdiction” and “Dwight D. Eisenhower” and click “Search”) (last visited Mar. 16, 2016).

68. This article follows the Spanish-language convention, and it uses “Latino” to refer to males of Latin American ancestry and “Latina” to refer to women of Latin American descent.

69. *Id.* (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Nominating President” and “Race or Ethnicity” and click “CONTINUE”; then select “John F. Kennedy” and “Hispanic” and click “Search”) (last visited Apr. 5, 2015). See LOUISE ANN FISCH, *ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE* (1996).

70. The three African American Kennedy appointed were Thurgood Marshall, Wade Hampton McCree, Jr., and James Benton Parsons. FED. JUDICIAL CTR., <http://www.fjc.gov> (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; then select “Court Type,” “Nominating President,” and “Race or Ethnicity” and click “CONTINUE”; next select “All Courts of General Jurisdiction,” “John F. Kennedy,” and “African American” and click “Search”) (last visited Apr. 5, 2015).

71. *Biographical Directory of Federal Judges—Sarah Tilghman Hughes*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1116> (last visited Apr. 5, 2015).

72. See FED. JUDICIAL CTR., <http://www.fjc.gov> (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” “Gender,” and “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction,” “Dwight D. Eisenhower,” “Male,” and “White” and click “Search”) (last visited Mar. 16, 2016). The Federal Judicial Center lists Judge Cyrus Nils Tavares as a White male. See *id.*

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

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

further widened the door of opportunity. Johnson nominated the first woman of color, Constance Baker Motley, to the federal bench on January 26, 1966, and the Senate confirmed her on August 30, 1966.<sup>75</sup> In addition, on June 13, 1967, Johnson nominated Thurgood Marshall to the Supreme Court, and on August 30, 1967, the Senate confirmed him.<sup>76</sup> With his confirmation, Marshall became the first African American to serve on the Supreme Court. Johnson diversified the bench more than any president before him—out of his 167 confirmed judicial appointments, 153 were White males, 8 were African American males, 3 were Latinos, 1 was an African American female, and 2 were White females.<sup>77</sup>

With the advice and consent of the Senate, President Richard Nixon nominated 220 persons to the federal bench: 210 White males, 6 African American males, 2 Latinos, 1 Asian American male, and 1 White female.<sup>78</sup> Nixon became the first American president to appoint an Asian American male to a federal appellate court—on April 7, 1971, Nixon appointed Herbert Young Cho Choy to a seat on the Ninth Circuit. Choy received Senate confirmation on April 21, 1971.<sup>79</sup> Later that year, Nixon nominated a second Asian American male, Shiro Kashiwa, to the Court of Claims.<sup>80</sup> Also known as “The People’s Court,” the Court of Claims had jurisdiction limited to adjudicating lawsuits for damages against the federal government. Originally, the court’s judges served limited terms, but they now have lifetime appointments to the Court of Claims’s successor court.<sup>81</sup> The court was abolished in 1982, and Congress transferred most of its jurisdiction to the U.S. Court of Appeals for the Federal Circuit.<sup>82</sup> Despite the limited jurisdiction of the court, Kashiwa’s nomination nevertheless represented an important step in making the bench more diverse.

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

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75. *Id.* at <http://www.fjc.gov/servlet/nGetInfo?jid=1704&cid=999&ctype=na&instat=na>. See also, CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY 214 (1998).

76. *Id.* at <http://www.fjc.gov/servlet/nGetInfo?jid=1489&cid=999&ctype=na&instat=na>. See also MICHAEL D. DAVIS & HUNTER CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH (1992); LARRY S. GIBSON, YOUNG THURGOOD: THE MAKING OF A SUPREME COURT JUSTICE (2012); CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF THURGOOD MARSHALL (1994).

77. FED. JUDICIAL CTR., <http://www.fjc.gov> (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” “Gender,” and “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction” and “Lyndon B. Johnson” and click “Search”) (last visited Mar. 16, 2016).

78. *Id.* (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” “Gender,” and “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction” and “Richard Nixon” and click “Search”) (last visited Mar. 16, 2016).

79. *Biographical Directory of Federal Judges—Herbert Young Cho Choy*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=426> (last visited Apr. 5, 2015).

80. *Biographical Directory of Federal Judges—Shiro Kashiwa*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2703&cid=999&ctype=na&instat=na> (last visited Apr. 5, 2015).

81. *Court History Brochure*, U.S. COURT OF FED. CLAIMS, [http://www.uscfc.uscourts.gov/sites/default/files/court\\_info/Court\\_History\\_Brochure.pdf](http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf) (last visited Apr. 5, 2015).

82. *Id.* See also BIOGRAPHICAL DIRECTORY, *supra* note 20, at 299–300.

American males. No women of color were confirmed to the bench under Nixon.

President Gerald Ford ended the entrenched tradition of conferring more than 90 percent of nominations upon White males. In the Ford administration, for the first time in the history of the United States, White males comprised less than 90 percent of an American president's judicial appointments. During Ford's administration, 89 percent of judicial appointments were White males. Out of the sixty-two total confirmed judicial appointments, fifty-five were White males, three were African American males, two were Asian American males, one was Latino, and one was a White woman.<sup>83</sup> Under the administrations of Nixon and Ford, only two of the 282 judges confirmed to the bench were women, and none were women of color.<sup>84</sup>

As referenced above, from the administration of George Washington through that of Herbert Hoover, American presidents made 857 appointments to federal courts of general jurisdiction. None were women and none were men of color. From Franklin Roosevelt's administration through that of Gerald Ford's, American presidents made an additional 1,042 judicial appointments, eight of which were women. Notably, over a period spanning nearly two hundred years (1789–1976), only one in 1,895 appointees was a woman of color. And only thirty-three of the 1,895 appointments were persons of color: twenty-one were African American males,<sup>85</sup> seven were Latinos,<sup>86</sup> four were Asian American males,<sup>87</sup> and one was an African American female.<sup>88</sup>

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83. See FED. JUDICIAL CTR., <http://www.fjc.gov> (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” “Gender,” and “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction” and “Gerald R. Ford” and click “Search”) (last visited Mar. 16, 2016).

84. The two women appointed were Cornelia Groefsema Kennedy and Mary Anne Richey. *See id.* (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Nominating President” and “Gender” and click “CONTINUE”; then select “Richard M. Nixon” and click “Search”; after that repeat the same process, substituting “Richard M. Nixon” for “Gerald R. Ford” in the final step) (last visited Mar. 16, 2016).

85. Harry Truman appointed one African American male to the federal bench; John F. Kennedy appointed three; Lyndon Johnson named eight; Richard Nixon elevated six; and Gerald Ford named three. *See* FED. JUDICIAL CTR., <http://www.fjc.gov> (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” “Gender” and “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction,” “Male,” and “African American” then select each president individually) (last visited Mar. 16, 2016).

86. John F. Kennedy appointed one Latino, Lyndon Johnson elevated three, Richard Nixon named two, and Gerald Ford appointed one. *See id.* (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” “Gender” and “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction,” “Male,” and “Hispanic” then select each president individually) (last visited Mar. 16, 2016).

87. Dwight Eisenhower recess appointed one Asian American male who John F. Kennedy re-nominated and the Senate subsequently confirmed. Richard M. Nixon elevated one Asian American male and Gerald Ford appointed two. *See id.* (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” “Gender” and “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction,” “Male,” and “Asian American” then select each president individually) (last visited Mar. 16, 2016).

88. Lyndon Johnson appointed one African American female to the federal bench. *See id.* (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” “Gender,” and “Race or

### 3. Slow Progress in Federal Judicial Desegregation: Jimmy Carter to Barack Obama

President Jimmy Carter significantly broke with prior presidential appointment practices. President Carter's administration became the first in which less than 90 percent of the confirmed federal judges were White. Of Carter's 258 confirmed judges, 169 were White males (65.5 percent) and 32 were White females (12.4 percent). Slightly more than 20 percent of Carter's judges were people of color: 30 African American males (11.6 percent), 15 Latinos (5.8 percent), 7 African American females (2.7 percent), and 3 Asian American males (1.1 percent).<sup>89</sup>

In another significant departure from prior practice, Carter was the first president whose appointees were less than 98 percent male—Carter appointees were approximately 15 percent female.<sup>90</sup> In fact, Carter was the first president to appoint more than three women to the federal bench. Carter appointed forty women: thirty-two White women, seven African American women, and one Latina.

In addition, President Carter made several other noteworthy distinctions. Carter increased the number of women of color on the federal bench from one to nine. Among the nine Carter appointees was Almaya L. Kears, who, on June 21, 1979, received her commission as the first woman of color to hold a federal appellate judgeship.<sup>91</sup> On May 14, 1980, Carter nominated Carmen Consuelo Cerezo<sup>92</sup> to the federal district court in Puerto Rico.<sup>93</sup> The Senate confirmed her nomination on June 26, 1980,<sup>94</sup> making her the first Latina to serve on the federal bench.

Furthermore, President Carter nominated Frank Howell Seay to serve on the federal district court for the Eastern District of Oklahoma on September 28, 1979.<sup>95</sup> The Senate confirmed the nomination on October 31, 1979, and Judge Seay became the first Native American to serve on the federal bench.<sup>96</sup> Judge Seay is the only Native American male currently serving as a federal judge for a court of general jurisdiction.

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

Ethnicity" and click "CONTINUE"; then select "All Courts of General Jurisdiction," "Lyndon Johnson," "Female," and "African American" and click "Search") (last visited Mar. 16, 2016).

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

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

91. *Biographical Directory of Federal Judges—Carmen Almaya Lyle Kears*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1236&cid=999&ctype=na&instate=na> (last visited Apr. 5, 2015).

92. *Biographical Directory of Federal Judges—Carmen Consuelo Cerezo*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=408> (last visited Apr. 5, 2015).

93. *Id.*

94. *Id.*

95. *Biographical Directory of Federal Judges—Frank Howell Seay*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2137> (last visited Mar. 16, 2016).

96. *Id.*

federal judiciary. Over 90 percent of Reagan's judicial appointments were White. Under Reagan, 358 judges were confirmed: 308 were White males (86 percent), and 27 were White females (7.5 percent). In contrast, Reagan appointed only thirteen Latinos (3.6 percent), six African American males (1.6 percent), one African American female (0.3 percent), two Asian American males (0.54 percent), and one Latina (0.3 percent).<sup>97</sup>

Significantly, Reagan nominated Sandra Day O'Connor to be the first woman to serve on the Supreme Court. The United States Senate confirmed the historic nomination, and on September 22, 1981, Justice O'Connor received her commission.<sup>98</sup> Nevertheless, like all of his predecessors, Reagan did not appoint any Asian American women or Native American women to the bench. In addition, more than 90 percent of Reagan's appointees were men—Reagan appointed 329 men compared to 29 women.<sup>99</sup>

With the advice and consent of the Senate, President George H. W. Bush made 187 appointments to federal courts of general jurisdiction.<sup>100</sup> Ninety percent of the Bush nominees were White: 137 males (73 percent) and 31 females (16.6 percent). Bush also nominated, and the Senate confirmed, nine African American males (4.8 percent), two African American females (1 percent), five Latinos (2.6 percent), and three Latinas (1.6 percent). Bush's appointment of three Latinas was the largest number of such appointments until that time. Of Bush's 187 judicial appointments, thirty-six were females.<sup>101</sup> Like most of his predecessors, Bush did not appoint any Asian Americans or Native Americans to federal courts of general jurisdiction.

President William J. Clinton had 367 confirmed appointments to the federal judiciary.<sup>102</sup> As with all of his predecessors, the majority of Clinton's judicial appointees were White males—194 of 367 appointments, or 53 percent. Nevertheless, Clinton was the first president who appointed White males to less than

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97. See FED. JUDICIAL CTR., <http://www.fjc.gov> (click on "Federal judicial history," then click on "Judges of the United States Courts," then click on "Select research categories"; next select "Court Type" and "Nominating President" and click "CONTINUE"; then select "All Courts of General Jurisdiction" and "Ronald Reagan" and click "Search") (last visited Mar. 16, 2016). Note that in 1982, six judges were transferred from the U.S. Court of Claims to the newly created United States Court for the Federal Circuit. Those six judges are listed in the Federal Judicial Center data base as Reagan nominees even though before Reagan assumed office, the judges held their positions as judges of the U.S. Court of Claims. See E-mail from Cathy Cardno, Ph.D., Assistant Historian, to author (May 26, 2010, 05:01 EST) (on file with author).

98. *Biographical Directory of Federal Judges—Sandra Day O'Connor*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1796&cid=999&ctype=na&instate=na> (last visited Apr. 5, 2015).

99. FED. JUDICIAL CTR., <http://www.fjc.gov> (click on "Federal judicial history," then click on "Judges of the United States Courts," then click on "Select research categories"; next select "Court Type," "Nominating President," and "Gender" and click "CONTINUE"; then select "All Courts of General Jurisdiction," "Ronald Reagan" and "Female" and click "Search") (last visited Apr. 5, 2015).

100. Graph based on data derived from Federal Judicial Center. See *id.* (click on "Federal judicial history," then click on "Judges of the United States Courts," then click on "Select research categories"; next select "Court Type" and "Nominating President" and click "CONTINUE"; then select "All Courts of General Jurisdiction" and "George H.W. Bush" and click "Search") (last visited Mar. 16, 2016).

101. *Id.*

102. *Id.* (click on "Federal judicial history," then click on "Judges of the United States Courts," then click on "Select research categories"; next select "Court Type" and "Nominating President" and click "CONTINUE"; then select "All Courts of General Jurisdiction" and "William J. Clinton" and click "Search") (last visited Mar. 16, 2016).

60 percent of federal judgeships.

President Clinton was also the first American president whose female judicial appointees exceeded 20 percent. Twenty-eight percent of Clinton's judges were women: eighty-three White women (22.6 percent), fifteen African American women (4 percent), five Latinas (1.3 percent), and one Asian American woman (0.27 percent),<sup>103</sup> totaling 104 women in all. During the Clinton administration, for the first time, an Asian American female ascended to the federal bench. On January 7, 1997, Clinton nominated Susan Oki Mollway as a federal district judge for the District of Hawaii;<sup>104</sup> the Senate confirmed her on June 22, 1998.

President George W. Bush appointed 322 persons to the federal judiciary. Eighty-two percent of his appointees were White (264 out of 322), and nearly 10 percent were Latino or Latina (eighteen Latinos and twelve Latinas). Approximately 22 percent of Bush's appointees were women: fifty White females (15.5 percent), eight African American females (2.5 percent), twelve Latinas (3.7 percent), and one Asian American female (0.3 percent). Bush appointed more Latinas to the bench than all of his predecessors combined. Bush also appointed sixteen African American males (5 percent) and three Asian American males (1 percent). However, he did not appoint any Native Americans to the bench.<sup>105</sup>

President Barack Obama has established a pattern of making more demographically diverse appointments than any of his predecessors.<sup>106</sup> As of April 11, 2016, Obama has appointed, and the Senate has confirmed, 316 persons to the federal bench. Of these, 118 are White males, 88 are White females, 34 are African American males, 26 are African American females, 9 are Asian American females, 11 are Asian American males, 13 are Latinas, and 23 are Latinos. In addition, on April 23, 2013, Derrick Kahala Watson became the first Pacific Islander to receive a commission as a federal judge of general jurisdiction.<sup>107</sup> Obama also nominated, and on May 14, 2014, the Senate confirmed, Diane J. Humetewa, the first Native American woman to serve as judge of a federal court of general jurisdiction.<sup>108</sup> Obama's female judicial appointees comprise 42 percent of his appointments—a significantly higher percentage of women than any of his predecessors.<sup>109</sup>

103. *Id.*

104. *Biographical Directory of Federal Judges—Susan Oki Mollway*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2784> (last visited Apr. 5, 2015).

105. *Id.* (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” and “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction,” “George W. Bush” and “American Indian” and click “Search”) (last visited Mar. 16, 2016).

106. For an excellent analysis of President Obama's efforts to diversify the federal judiciary see Goldman et al., *Obama's First Term Judiciary*, *supra* note 12; Goldman et al., *The Confirmation Drama*, *supra* note 12; Tobias, *Diversity and the Federal Bench*, *supra* note 12; Carl Tobias, *Appointing Asian American Judges in the Obama Administration* (2010) (unpublished manuscript) (on file with author).

107. FED. JUDICIAL CTR., <http://www.fjc.gov> (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type,” “Nominating President,” and “Race or Ethnicity” and click “CONTINUE”; then select “All Courts of General Jurisdiction,” “Barack Obama” and “Pacific Islander” and click “Search”) (last visited Mar. 4, 2016). Judge Watson presides over the trial court of the District of Hawaii.

108. *Biographical Directory of Federal Judges—Diane Joyce Humetewa*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=3536&cid=999&ctype=na&instat=na> (last visited Mar. 4, 2016). Judge Humetewa presides over the trial court of the District of Arizona.

109. FED. JUDICIAL CTR., <http://www.fjc.gov> (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court

In slightly more than five years, President Obama appointed more women than the total appointed by Ronald Reagan, George H. W. Bush, and George W. Bush in their combined twenty years in office. Obama has also elevated more Asian American women than all forty-three of his predecessors combined.<sup>110</sup> Moreover, the total number of women of color confirmed to the bench during Obama's first term was greater than the total of any of his predecessors. President Obama also appointed the first Asian American woman to the federal appellate bench, Judge Jacqueline Hong-Ngoc Nguyen, who ascended to the United States Court of Appeals for the Ninth Circuit on May 12, 2012.<sup>111</sup> In addition, two of his Supreme Court appointees—Justice Sonia Sotomayor and Justice Elena Kagan—were women. As this piece was proceeding through its final edits, Obama nominated Merrick Garland, Chief Judge of the Court of Appeals for the District of Columbia Circuit, to fill the seat vacated upon the passing of Justice Antonin Scalia.<sup>112</sup>

#### D. Data Summary

For the first 145 years of the American federal judiciary (1789–1934), all 869 confirmed judicial appointees to courts of general jurisdiction were White men.<sup>113</sup> However, in 1934, President Franklin Roosevelt appointed, and the Senate confirmed, the first woman to a lifetime appointment on a federal court of general jurisdiction. Fifteen years later, President Harry Truman appointed the first person of color. From President George Washington through President Dwight Eisenhower (1789–1960), the demographic profile of the American federal judiciary, comprised of 1,337 confirmed judicial appointments, may be depicted as follows: 1,333 White males, two White females, one African American male, and one Asian American male.<sup>114</sup>

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

110. *Id.*

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

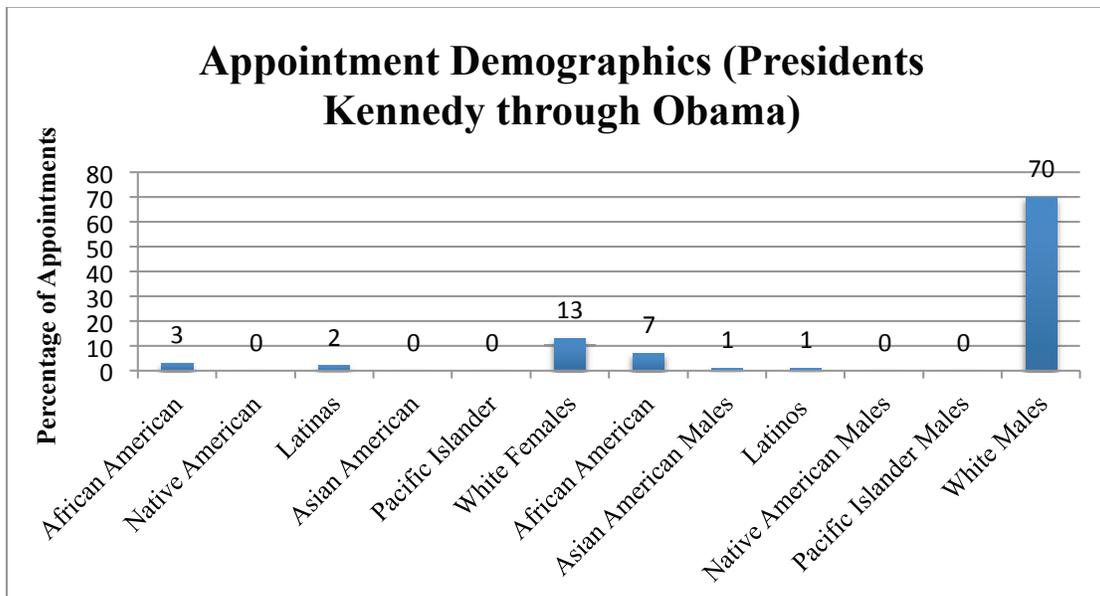
112. Michael D. Shear, Julie Hirschfeld Davis & Gardiner Harris, *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES, Mar. 17, 2016, at A1; Nina Totenberg, *Merrick Garland Has a Reputation of Collegiality, A Record of Republican Support*, NPR, <http://www.npr.org/2016/03/16/126614141/merrick-garland-has-a-reputation-of-collegiality-record-of-republican-support>; Richard Wolf, *Meet Merrick Garland, Obama's SCOTUS Nominee*, U.S.A. TODAY, <http://www.usatoday.com/story/news/2016/03/16/merrick-garland-supreme-court-obama-nominee/81529760/> (Mar. 16, 2016).

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

114. FED. JUDICIAL CTR., <http://www.fjc.gov> (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type” and “Nominating President” and click “CONTINUE”; then select “All Courts of General Jurisdiction” and select each of the presidents from George Washington to Dwight D. Eisenhower) (last visited Mar. 17, 2016). *See also* GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 12, at 144.

For a more modern overview of judicial appointments, consider the following chart (Chart 1) of the past half-century (President Kennedy through President Obama):<sup>115</sup>

**Chart 1: Federal Judicial Demographic Profile: Kennedy–Obama  
(3/10/16)**



115. FED. JUDICIAL CTR., *supra* note 12. Chart 1 is based upon data derived from Federal Judicial Center. See <http://www.fjc.gov/history/home.nsf> (click on “Federal judicial history,” then click on “Judges of the United States Courts,” then click on “Select research categories”; next select “Court Type” and “Nominating President” and click “CONTINUE”; then select “All Courts of General Jurisdiction” and select each of the presidents from John F. Kennedy through Barack H. Obama) (last visited Mar. 13, 2016). Some jurists classified themselves in more than one racial or ethnic category.

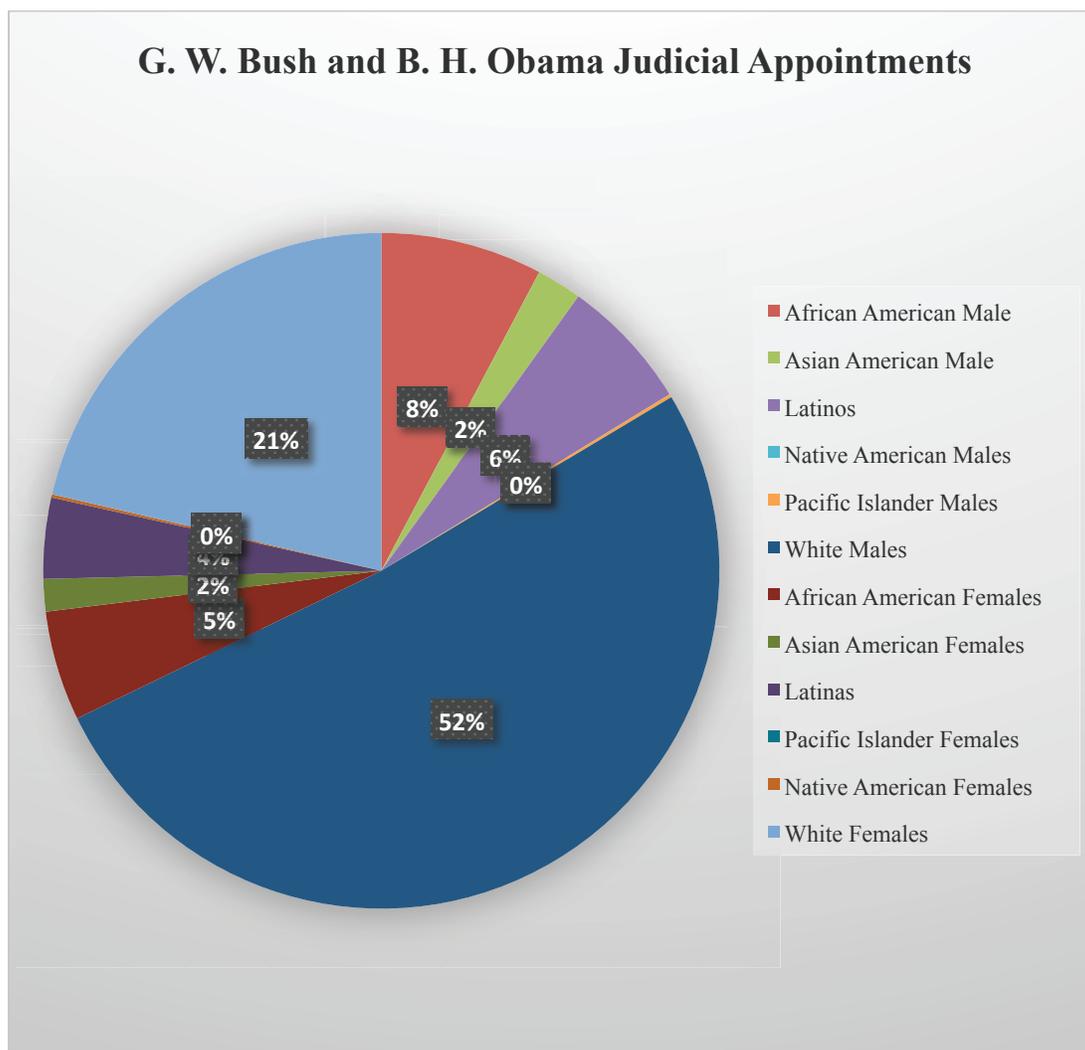
The table which follows sets forth more detailed demographic information regarding the judicial appointments from President Kennedy's administration through much of President Obama's second term. (January 20, 1961–March 10, 2016)

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

Presidential Appointments										
Ethnicity	Kennedy	Johnson	Nixon	Ford	Carter	Reagan	GHW Bush	Clinton	GW Bush	Obama
Af. Am. Males	3	8	6	3	30	6	9	46	15	34
Am. Ind. Males	0	0	0	0	1	0	0	1	0	0
As. Am. Males	1	0	1	2	3	2	0	4	3	11
Latinos	1	3	2	1	15	13	5	18	18	23
Pac. Is. Males	0	0	0	0	0	0	0	0	0	1
White Males	119	153	210	55	169	308	137	194	214	118
Af. Am. Females	0	1	0	0	7	1	2	15	8	26
Am. Ind. Females	0	0	0	0	0	0	0	0	0	1
As. Am. Females	0	0	0	0	0	0	0	1	1	9
Latinas	0	0	0	0	1	1	3	5	12	13
Pac. Is. Females	0	0	0	0	0	0	0	0	0	0
White Females	1	2	1	1	32	27	31	83	50	88

Regarding Justice Sotomayor's question as to the impact of a more inclusive judiciary, the presidential terms of George W. Bush and Barack H. Obama nearly coincide with the period following Sotomayor's speech. During that time, when compared to the general population, presidential appointments to the judiciary have continued a disproportionate bias against women and in favor of men. The appointments over the past two administrations can be presented in this manner:

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



The majority of persons living in the United States are females. However, since Justice Sotomayor's speech, approximately 68 percent of appointments have been male and 32 percent female. Overall, White males comprised the majority of appointees—52 percent.

## II. THE MYTH AND SUBSTANCE OF FEDERAL JUDICIAL DIVERSITY

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

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

### A. Diversity Mythology

The federal judiciary has been segregated by sex and ethnicity for so long that when the Senate confirms a person of color or a woman to the bench, members of the general public find the event newsworthy. For instance, the recent elevation of Diane Humetewa to the federal bench broke the 225-year precedent of excluding Native American women from federal judicial service. Judge Humetewa’s elevation to the bench exemplifies that while the pace of change is modest, the media often broadly reports breaches of deep-rooted barriers.<sup>116</sup> As Professors Chew and Kelley observed, perhaps such attention at least partially explains the widespread misimpression that the federal judiciary has more diversity than it does.<sup>117</sup> Chew and Kelley stated, “[A]lthough more minority judges sit on the federal bench today than fifty years ago, providing evidence of progress within the last half century, it still is a long way from representing the faces of America.”<sup>118</sup>

Furthermore, in an incisive article on gender equality, Professors Hannah Brenner and Renee Newman Knake stated that “[o]ne explanation for these misperceptions comes from a ‘tendency to overestimate the proportion of a minority group present in a given population;’ this phenomenon has been characterized as ‘visibility bias.’”<sup>119</sup> Citing Professor Rosemary Hunter’s work on discrimination against women barristers in Australia, Professors Brenner and Knake offered the following specific example of such bias: “[O]ne solicitor estimated that between twenty to thirty percent of the barristers he selected in his work were female, when the actual figure was closer to ten percent, which resulted in solicitors believing they were giving women ample opportunities.”<sup>120</sup>

In the United States, such misperceptions are not new. For example, a poll conducted during debates about immigration reform in the mid-1990s revealed a

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116. Chew & Kelley, *supra* note 7, at 92.

117. *Id.*

118. *Id.* (footnotes omitted). *Accord* Beiner, *supra* note 4, at 108 (“The federal bench is not particularly diverse.”) (footnote omitted).

119. Hannah Brenner & Renee Newman Knake, *Rethinking Gender Equality in the Legal Profession’s Pipeline to Power: A Study on Media Coverage of Supreme Court Nominees (Phase I, The Introduction Week)*, 84 TEMP. L. REV. 325, 338 (2012) (footnotes omitted).

120. *Id.* at 338 n.66.

striking example of visibility bias among White members of the general public:

Percentage of the United States population that White Americans think is Hispanic: 14.7.

Percentage that is Hispanic: 9.5.

Percentage that Whites think is Asian: 10.8.

Percentage that is Asian: 3.1.

Percentage that White Americans think is Black: 23.8.

Percentage that is Black: 11.8.

Percentage that Whites think is White: 49.9.

Percentage that is White: 74.<sup>121</sup>

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

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

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

Craig and Richeson’s work illuminates how contemporary visibility bias

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121. Priscilla Labovitz, *Immigration – Just the Facts*, N.Y. TIMES, Mar. 25, 1996, at A15. See also Robert Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That is America*, 23 HASTINGS CONST. L.Q. 1115, 1120 (1996).

122. Pat K. Chew & Luke T. Kelley-Chew, *The Missing Minority Judges*, 14 J. GENDER RACE & JUST. 179, 189 (2010); Chew and Kelley, *The Realism of Race*, *supra* note 7.

123. Maureen A. Craig & Jennifer A. Richeson, *More Diverse Yet Less Tolerant? How the Increasingly Diverse Racial Landscape Affects White Americans’ Racial Attitudes*, 40 PERSONALITY & SOC. PSYCHOL. BULL., 750, 758 (2014). For a thoughtful analysis of popular perceptions of the state of the United States, see David Maraniss and Robert Samuels, *The Great Unsettling*, WASH. POST, [https://www.washingtonpost.com/politics/looking-for-america-the-great-unsettling/2016/03/17/e9cb3eaa-e544-11e5-bc08-3e03a5b41910\\_story.html?hpid=hp\\_rhp-top-table-main\\_lookingforamerica%3Ahomepage%2Fstory](https://www.washingtonpost.com/politics/looking-for-america-the-great-unsettling/2016/03/17/e9cb3eaa-e544-11e5-bc08-3e03a5b41910_story.html?hpid=hp_rhp-top-table-main_lookingforamerica%3Ahomepage%2Fstory) (Mar. 18, 2016).

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

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

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

An early example of such fear of a diverse judiciary is reflected in *Commonwealth of Pennsylvania v. Local Union 542*.<sup>127</sup> In *Local Union 542*, twelve African American plaintiffs filed a race discrimination claim against the union. After Judge A. Leon Higginbotham, Jr., an African American, was assigned to try the case, the defendant union moved to have Judge Higginbotham recuse himself.<sup>128</sup> Fearing racial prejudice against it, the union alleged that Judge Higginbotham was biased because he was (1) a Black judge adjudicating a case involving race discrimination; and (2) he was engaging in scholarship on race relations.<sup>129</sup> As further evidence of racial bias, the union cited a speech that Judge Higginbotham had given before a predominantly African-American group of historians.<sup>130</sup>

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

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124. *American Fact Finder*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmm>.

125. *See infra* tbl. 4.

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

127. 385 F. Supp. 155 (1974).

128. *Id.* at 156–57.

129. *Id.* at 157–58.

130. *Id.* at 168.

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

In addition, Judge Higginbotham countered the arguments that the substance of his speech was objectionable:<sup>132</sup>

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

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

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

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

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131. *Id.* at 166 (footnote omitted).

132. *Id.* at 169–75.

133. *Id.* at 174.

134. *Id.* at 177.

135. *Id.*; Craig & Richeson, *supra* note 123, at 750 (evaluating scholarship that “conceptualizes group status threats as threats to the political and/or economic power of the ingroup (i.e., realistic threats) rather than threats to cultural values . . . [t]hreat is purported to stem from fears that one’s own group will be disadvantaged relative to the minority group”) (citations omitted).

“inherent disquietude.” Such persons may erroneously believe that women and men of color comprise either the majority of federal sitting judges or something very close to it. As noted above, though, that is far from the truth.<sup>136</sup>

**Table 3: Federal Sitting Judges: March 10, 2016**

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

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

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

137. See, e.g., Otero v. N.Y. City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973), cited in Derrick A. Bell, Jr., *Application of the “Tipping Point” Principle to Law Faculty Hiring Policies*, 10 NOVA L. J. 319, n.211 (1986); Navasky, *The Benevolent Housing Quota*, 6 HOW. L.J. 30 (1960), cited in Bell, *Application of The Tipping Point Principle*, supra at n.12; Giles et al., supra note 126; Craig & Richeson, supra note 123; Charles T. Clotfelter, *Are Whites Still Fleeing*, 20 J. POL. ANAL. & MANAGEMENT 199, 217 (2001) (“[W]hite losses from urban public schools are not evenly distributed, but rather are systematically related to interracial contact and the ease of avoiding that contact. The kind of systematic avoidance these losses imply was documented in research done in the 1970s. The present paper shows that systematic avoidance remained an important phenomenon in the 1990s.”).

scholars described the mass exodus of Whites as “white flight.”<sup>138</sup> While at least one thoughtful observer has persuasively argued that White flight is not a new historical phenomenon,<sup>139</sup> some social scientists attribute it to the presence of a sufficient number of persons of color—that is, a “tipping point.”<sup>140</sup> Similarly, Professor Derrick Bell hypothesized that a tipping point might exist on law school faculties. Bell suggested that law faculties had an informal quota for faculty of color beyond which no professor of color would be hired, no matter how qualified.<sup>141</sup>

To the extent that some persons, especially some Whites, perceive a threat<sup>142</sup>—perhaps loss of power or control—flowing from a more diverse judiciary, there may also be a tipping-point mindset that could partially explain resistance to diversifying the federal judiciary.<sup>143</sup> White flight from or resistance to judicial diversity is merely another manifestation of some persons’ fears—specifically, the fear of being in the presence of, or on an equal par with, persons of color. That is to say, for some individuals to accept the judiciary as competent, fair, and unbiased, the judiciary must remain disproportionately White and male.

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

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

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

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

JOHN DIPPEL, RACE TO THE FRONTIER: “WHITE FLIGHT” AND WESTWARD EXPANSION 222 (2004).

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

141. Bell, *supra* note 137, at 323–25; see also, Richard Delgado, *Rodrigo’s Roadmap: Is the Marketplace Theory for Eliminating Discrimination a Blind Alley?*, 93 NW. U. L. REV. 215, 226–31 (1998).

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

143. See Barbara Flagg, *‘Was Blind But Now I See: White Race Consciousness & the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993); Sylvia Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 606–07 (1999); Charles Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Russel Summers, *Influence of Affirmative Action on Perceptions of a Beneficiary’s Qualifications*, 21 J. APPLIED PSYCHOL. 1265, 1272–73 (1991).

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

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

### *B. Sotomayor's Unanswered Question*

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

Some scholars have argued that the process of decision making differs where federal appeals courts have at least one person on the panel who is a "nontraditional judge."<sup>144</sup> A "traditional" judge is a White male and a "nontraditional" judge is a woman or a person of color.<sup>145</sup> In some cases, nontraditional judges seem to influence results by making it more likely that claims of racial or sex discrimination will be upheld.<sup>146</sup>

For example, several respected jurists have acknowledged the constructive role that diversity can have on adjudication. Former Chief Judge Harry Edwards of the United States Court of Appeals for the District of Columbia Circuit has stated, "It is inevitable that judges' different professional and life experiences have some bearing on how they confront various problems that come before them. And in a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better-informed discussion."<sup>147</sup>

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

The nation contains such a diversity of moral and political thinking that the judiciary, if it is to retain its effectiveness, its legitimacy, has to be heterogeneous; and the members of a heterogeneous judicial community are not going to subscribe to a common set of moral and political dogmas that would make their decisionmaking determinate.<sup>148</sup>

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

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144. See Beiner, *supra* note 4, at 107 n.12 (citing Goldman et al., *W. Bush's Judicial Legacy: Mission Accomplished*, *supra* note 12, at 274); Goldman et al., *Obama's First Term Judiciary*, *supra* note 12, at 18.

145. Goldman et al., *Obama's First Term Judiciary*, *supra* note 12, at 18; Goldman et al., *W. Bush's Judicial Legacy: Mission Accomplished*, *supra* note 12, at 274.

146. See Beiner, *supra* note 4, at 119–22; Chew & Kelley, *supra* note 7, at 95.

147. Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 329 (2002).

148. RICHARD POSNER, LAW, PRAGMATISM AND DEMOCRACY 94 (2003).

between 2002 and 2008 that involved alleged racial harassment in the workplace. In each case, Chew and Kelley considered the race, sex, and political affiliation of each judge as well as the race of the plaintiff. They found that (1) Hispanic plaintiffs were the most likely to succeed with a success rate approaching 40 percent;<sup>149</sup> (2) plaintiffs were more likely to succeed in racial harassment claims before Black judges<sup>150</sup>; and (3) in any given case, regardless of the gender or race of the judge, the plaintiff's likelihood of success was less than 45 percent. Indeed, the overall success rate of plaintiffs was less than 25 percent.<sup>151</sup> Chew and Kelley observed, "Judges of all racial groups favor Hispanic plaintiffs over all other racial groups. This preference is particularly significant for African American judges. After that, however, judges favor their own racial group over the remaining racial groups."<sup>152</sup>

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

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

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

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149. Chew & Kelley, *supra* note 7, at 99.

150. *Id.* at 112.

151. *Id.* at 112.

152. *Id.* at 110.

153. Benier, *supra* note 4, at 120.

154. FED. JUDICIAL CTR., <http://www.fjc.gov> (click on "Federal judicial history," then click on "Judges of the United States Courts," then click on "Select research categories"; next select "Court Type," "Gender" and "Limit Query to Sitting Judges" and click "CONTINUE"; then select "U.S. Court of Appeals," "Female" and "All Sitting Judges" and click "Search"; then repeat by replacing "Female" with "Male" and compare the results) (last visited Mar. 16, 2016).

155. *See also* Benier, *supra* note 4, at 120–22.

156. Chew & Kelley, *supra* note 7, at 104–106.

157. *Id.* at 104–13.

factors like the color of one's skin or sex.<sup>158</sup> In such circumstances, members of the general public are more likely to perceive the decisions of judges as being fair.<sup>159</sup>

For instance, in 2008, the Standing Committee on Fairness and Diversity of the Florida Supreme Court issued a report entitled "Perceptions of Fairness and Diversity." This report pointed out that "[i]nclusion of diverse population groups in the court process, as both participants and decision makers, increases the perception of fairness and the credibility of the justice system. Diversity issues must constantly be addressed to keep pace with the changing profile of our state's population."<sup>160</sup> The Standing Committee endorsed the argument that for a legal system to be effective, it must be perceived as fair. As one commentator put it, "If enough ordinary citizens begin to believe that they cannot trust the justice system, or that it will treat them fairly, there is absolutely nothing the government can do to maintain order."<sup>161</sup>

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

The creation of a racially diverse bench can introduce traditionally excluded perspectives and values into judicial decision-making. The interplay of diverse views and perspectives can enrich judicial decision-making. Because they can bring important and traditionally excluded perspectives to the bench, minority judges can play a key role in giving legitimacy to the narratives and values of racial minorities.<sup>162</sup>

Diversity on the bench can also inspire higher aspirations among some individuals who share common demographic characteristics with successful judges. Stated differently, "If that judge can do it, so can I."<sup>163</sup>

In addition, some scholars have pointed out that a diverse bench can result in a potentially salutary outcome—"functional representation."<sup>164</sup> In other words, a judge from a particular group may be an advocate for positions of others from that group. To be sure, several questionable assumptions underlie the "functional representation" thesis. First, functional representation assumes that persons with similar demographic backgrounds (1) are likely to have similar life experiences; (2) share common perceptions of reality based on their life experiences; (3) have similar approaches to resolving legal controversies; and (4) are likely to decide cases in part to advance what the judge perceives as the interests of her demographic group.

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

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158. Benier, *supra* note 4, at 115; *see also* Scherer, *supra* note 12, at 597–604.

159. *See* Benier, *supra* note 4, at 115; Scherer, *supra* note 12, at 597–600.

160. STANDING COMM. ON FAIRNESS & DIVERSITY, FINAL REPORT: PERCEPTIONS OF FAIRNESS AND DIVERSITY IN THE FLORIDA COURTS 4 (2008).

161. *Id.* at 1.

162. Sherrilyn A. Iffil, *Racial Diversity on the Bench: Beyond Role Models & Public Confidence*, 57 WASH. & LEE L. REV. 405, 410 (2000).

163. Benier, *supra* note 4, at 117–18.

164. *Id.* at 116.

[T]here is a dramatic difference between the role which legislators, politicians, and elected officials play in our society, one which is far closer to the cutting edge of policy development, and the role which could be tolerated or expected from a federal judge. I willingly accept those limitations; they are inherent in the judicial process. I am aware that Judge Higginbotham is not Senator Higginbotham, or Mayor Higginbotham, or Governor Higginbotham, but I also know that Judge Higginbotham should not have to disparage blacks in order to placate whites who otherwise would be fearful of his impartiality.<sup>165</sup>

Critics have also asserted that functional representation is “essentialist” and that it stereotypes individuals.<sup>166</sup> For instance, many persons readily acknowledge that men and women often have different life experiences that are based on how persons treat them because of social expectations about gender roles. In a lecture delivered in 1991, Justice O’Connor presciently recognized that sex can impact one’s life when she said:

[W]omen still may face what has been called a “mommy track” or a “glass ceiling” in the legal profession—a delayed or blocked ascent to partnership or management status due to family responsibilities. Women who do not wish to be left behind sometimes are faced with a hard choice. Some give up family life in order to attain their career aspirations. Many talented young women lawyers decide that the demands of a career require delaying family responsibilities at the very time in their lives when bearing children is physically easiest. I myself chose to try to have and enjoy my family and to resume my career path somewhat later.<sup>167</sup>

Regarding the issue of how one’s sex influences judicial decision making, O’Connor assessed the situation as follows: “Do women judges decide cases differently by virtue of being women? I would echo the answer of my colleague, Justice Jeanne Coyne of the Supreme Court of Oklahoma, who responded that ‘a wise old man and a wise old woman reach the same conclusion.’”<sup>168</sup>

Professor Benier has cogently argued that:

[I]t is beneficial to the courts when judges bring differing perspectives to a case that reflect the varying experiences of Americans. It is possible to acknowledge this while also being aware that there are a multitude of perspectives among women as well as members of ethnic and racial minority groups.<sup>169</sup>

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

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165. *Pennsylvania v. Local Union 542*, 502 F. Supp. 7, 180 (1979).

166. Benier, *supra* note 4, at 116–17.

167. Sandra Day O’Connor, *Portia’s Progress*, 66 N.Y.U. L. REV. 1546, 1554 (1991).

168. *Id.* at 1558.

169. *Id.* at 117.

making process.”<sup>170</sup> Professor Onwuachi-Willig stated:

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

Onwuachi-Willig concluded that:

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

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

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

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

171. *Id.* at 1261–62.

172. *Id.*

173. Benier, *supra* note 4, at 117.

174. *Id.*

175. Scherer, *supra* note 12, at 590.

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

177. Scherer, *supra* note 12, at 604–10.

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

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

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

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

### C. *A Preliminary Assessment*

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

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178. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961); Scherer, *supra* note 12, at 597.

179. THE FEDERALIST NO. 39, *supra* note 178, at 241; Scherer, *supra* note 12, at 590–97.

180. Scherer, *supra* note 12, at 608.

181. Edwards, *supra* note 147, at 329.

182. Scherer, *supra* note 12, at 590–97.

183. Benier, *supra* note 4, at 118.

184. Sotomayor, *supra* note 1, at 90.

early to definitively tell what the impact of increased diversity will have on the bench. As the preceding discussion points out, empirical data and persuasive arguments suggest that a more diverse bench is likely to have a number of positive impacts.

For instance, as noted previously, Judges Edwards and Posner have pointed out that judicial diversity matters. Judge Edwards stated that “in a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better-informed discussion.”<sup>185</sup> Judge Posner said “the judiciary, if it is to retain its effectiveness, its legitimacy, has to be heterogeneous; and the members of a heterogeneous judicial community are not going to subscribe to a common set of moral and political dogmas that would make their decision making determinate.”<sup>186</sup>

Likewise, the work of Chew and Kelley demonstrates that racial diversity among judges at the trial level is correlated with the outcomes of racial harassment claims—for instance the lack of success of African-American plaintiffs.<sup>187</sup> Moreover, other scholars have pointed out the positive impact of substantive representation (or having a critical mass) within the judiciary.<sup>188</sup> In fact, a diverse judiciary can facilitate the perception by the general public that the judiciary is a forum in which justice is not only done, but also manifestly seen as being done.

In short, the preceding analysis furnishes evidence that increasing judicial diversity promotes several important values. First, the perception that decisions are fair.<sup>189</sup> Second, substantively, judges will perceive the issues more comprehensively (see “more angles”) as well as reach better reasoned, just results. Finally, an added benefit of a more diverse bench is that it can inspire members of the general public to contribute to society by pursuing a legal career.

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

#### 1. Process Concerns

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

- a. To what extent would having a woman interpret existing law be preferable to having a man do so?
- b. To what degree would one need to scrutinize the arguments that were advanced before the court? For instance, must we consider each argument or only the ones that we perceive to be significant?
- c. How does one decide the weight to give each argument?
- d. How should one evaluate situations in which neither the court nor

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185. Edwards, *supra* note 147, at 329.

186. POSNER, *supra* note 148, at 94.

187. Chew & Kelley, *supra* note 7, at 101–03.

188. Benier, *supra* note 4, at 117. *See also* Ifill, *supra* note 162, at 410; Onwuachi-Willig, *supra* note 170, at 1263; Scherer, *supra* note 12, at 604–10.

189. STANDING COMM. ON DIVERSITY & FAIRNESS, *supra* note 160, at 1; Bernier, *supra* note 4, at 115; Scherer, *supra* note 12, at 597–600.

the parties raise a particular pertinent contention? For instance, suppose an interested party seeks joinder to the litigation but is excluded?

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

## 2. Qualitative Queries

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

- a. How much weight should be given to the history and text of the Fourteenth Amendment?
- b. How persuasive should a court perceive decisions in analogous cases involving race or religion?
- c. To what extent should the judge be sensitive to how her own life experiences (perceptual prisms) affect her perspectives regarding the case? As Justice Sotomayor pointed out:

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

- d. Stated differently, should a heterosexual judge ask herself a question like, "Suppose I were a gay or lesbian person and knew that heterosexual individuals had recognized rights which protected them from employment discrimination and I did not. How might viewing the law from the perspective of such a gay or lesbian person affect my view of equal protection of the laws?"
- e. How might the court's decision practically impact the societal understanding of what constitutes equal justice?
- f. Might a judge need a practical decision-making default? For example, should the judge ask how she might perceive the justice of her decision if she were the plaintiff (or defendant)? If she were one of the lawyers? A member of the general public?
- g. How far should empathy matter in interpreting the law—in other words, seeing "more angles." Another way of posing the question

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190. Minow, *supra* note 4; Stubbs, *supra* note 4.

191. Sotomayor, *supra* note 1, at 93.

might be to ask whether equal protection of the laws is a shorthand description of “The Golden Rule.”<sup>192</sup>

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

## CONCLUSION

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

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

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

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

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192. *Matthew* 7:12.

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

194. Stubbs, *supra* note 11.

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

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

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

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195. POSNER, *supra* note 148, at 94.

196. Edwards, *supra* note 147, at 329.