White Male Heterosexist Norms in the Confirmation Process

Theresa M. Beiner, University of Arkansas at Little Rock William H. Bowen School of Law

Available at: https://works.bepress.com/theresa_beiner/1/
Justice Sonia Sotomayor’s confirmation hearing took a controversial turn when commentators picked up on a reference in the *New York Times* to a portion of a speech she gave in 2001. In that speech, then Judge Sotomayor opined that, “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.” That statement, along with her participation in the per curiam decision in *Ricci v. DeStefano*, caused a minor storm during her confirmation. More recently, former Harvard Dean and former Solicitor General Elena Kagan came under fire during her confirmation hearing for supporting her faculty’s position on the military’s treatment of gay, lesbian, and bisexual lawyers and her opposition to “don’t ask/don’t tell.” This led some conservative commentators to speculate that she is a Lesbian. Both Justices Sotomayor and Kagan were attacked for bringing a perspective to the bench that supported minority groups – whether it be Latinas, women, or the Lesbian, Gay, Bisexual, and Transgendered communities. Yet, having judges who understand these perspectives would no doubt add diversity to the bench. Juxtaposing arguments in favor of a diverse bench with the treatment of these two Supreme Court nominees leads one to wonder whether those in public office are really interested in true diversity on the bench. Could it be, instead, that it is only acceptable for a judicial candidate to be “diverse” or have sympathy for minority communities if he or she does not act on them and instead complies with established white male norms? The brouhaha that both Justice Sotomayor’s comment engendered and Justice Kagan’s position created makes one wonder how truly committed to diversity on the bench or protecting minority groups those in public office really are. This article examines the affects of diversity on the bench, the confirmation processes for these two justices and contrasts it with the arguments in favor of a diverse bench. Ironically, these two well-qualified nominees were criticized during the confirmation process for “fear” that they would bring diverse perspectives to the bench and for their ultimate failure to conform to white heterosexist norms.

---

1This essay is based on a paper and panel presentation delivered at DRI’s Diversity for Success Seminar. I am grateful to my co-panelists, Judge Bernice Donald, United States District Court for the Western District of Tennessee, and Judge Zeke Zeidler, Los Angeles County Superior Court, for earlier comments on this article as well as discussion during the panel presentation. In addition, thanks go to my colleague, Adjoa Aiyetoro, for her comments on this article.
Justice Sonia Sotomayor’s confirmation hearing took a controversial turn when commentators picked up on a reference in the *New York Times* to a portion of a speech she gave in 2001. In that speech, she candidly addressed how her background might influence her decision making. Then Judge Sotomayor opined that, “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.” Eight years later a minor storm ensued as a result of this comment as well as the per curiam decision in *Ricci v. DeStefano*, in which Justice Sotomayor participated as a judge on the Second Circuit Court of Appeals. More recently, former Harvard

---


4 *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008).
Dean and former Solicitor General Elena Kagan came under fire during her confirmation hearings for supporting her faculty’s position on the military’s treatment of gay, lesbian, and bisexual lawyers and her opposition to “don’t ask/don’t tell.” This has led some conservative commentators to speculate that she is a Lesbian. Both Justice Sotomayor and newly confirmed Justice Kagan were attacked for bringing a perspective to the bench that supported minority groups – whether it be Latinas, women, or the Lesbian, Gay, Bisexual, and Transgendered communities. Yet, having judges who understand these perspectives would no doubt add diversity to the bench.

While commentators and legal organizations have discussed the importance of diversity in the legal profession and on the bench, the treatment of these two Supreme Court nominees leads one to wonder whether those in public office are really interested in true diversity on the bench. Could it be, instead, that it is only acceptable for a judicial candidate to be “diverse” or have sympathy for minority communities if he or she does not act on them? The brouhaha that both Justice Sotomayor’s comment engendered and Justice Kagan’s position created makes one

\footnotesize{\textit{See infra} notes ___ to ___ and accompanying text.}

\footnotesize{\textit{See infra} notes ___ to ___ and accompanying text.}

wonder how truly committed to diversity on the bench or protecting minority groups those in public office really are.

Ranging from arguments about equal opportunity to the importance of diversity in representing clients effectively, many large legal employers actively seek out diverse lawyers to staff their firms. While the American Bar Association and other organizations have addressed diversity in legal practice, others have focused on diversity on the bench. In particular, political scientists and increasingly law professors have looked at the demographics of the judiciary and the potential effects this diversity might have on justice and the appearance and sometimes actual fairness in case outcomes. Political scientists who study federal judicial appointments refer to judges who are women and/or people of color as "nontraditional" appointees, a term that will be used in this article to refer to women and members of racial and ethnic minority groups. Of course, diversity encompasses more than gender, race, and ethnicity. Sexual orientation, disability, socio-economic status, religion and other personal characteristics or life experiences also inform individual viewpoints and could be characteristics policymakers might consider in diversifying the bench.

8See Brouse, supra note ___, at 850-52.


10See, e.g., Brennan Center for Justice, Diversity on the Bench, http://www.brennancenter.org/content/section/category/diversity_on_the_bench.

This article discusses four things. First, it begins by describing the demographics of the federal judiciary and compares it to relevant population data. Included is a discussion of the common career tracks for nontraditional federal judges. Second, it canvasses some common arguments for a diverse bench to place the debate over the nominations of Justice Sotomayor and Justice Kagan in the overall discussion about the benefits of diversity on the bench. Third, it describes studies that seek to determine whether the backgrounds of judges, such as their gender, race, or ethnicity, correlate with differences in trends in decision making. Anecdotal evidence of differences in approaches to cases and/or outcomes based on differences in perspective will also be discussed. This section discusses the practical implications of a diverse bench not only on case outcomes but also on court policies. Finally, I will discuss the public commentary as well as questioning by the Senate Judiciary Committee members about Justice Sotomayor’s “wise Latina woman” comment, the Ricci case, and Justice Kagan’s position on “don’t ask/don’t tell” in an effort to fully understand the controversies that arose in those hearings and the implications for achieving a truly diverse bench. In the end, the statements and positions that provided negative fodder for those who would argue against the appointment of Justice Sotomayor and Justice Kagan ironically reflect just the types of perspectives that one would want from a diverse bench. Thus, there is a disconnect between the public discourse on individual nominees and the commentary regarding the benefits of diversity in the judiciary.

II. Demographics of the Federal Bench

The federal bench is not particularly diverse. This is in spite of strides women and members of minority groups have made in law school attendance. The numbers of members of racial and ethnic minority groups in law school has increased, although it has not been steady for
certain groups. However, overall, minority enrollment has steadily increased from a low of 6.1% in the 1971-1972 school year to 21.9% in the 2008-2009 school year. When I graduated from law school in 1989, women made up roughly 42% of law students, and the number of women enrolled in law school actually reached over 50% during the 1992-1993 school year.

Yet, over twenty years after I graduated from law school, women’s and members of racial and ethnic minority groups’ presence as law firm partners, law school professors, and members of the federal bench lag behind that of their white male counterparts. A sketch of the demographics of the federal bench provides a sense of just how much.

---


15 See, e.g., Brouse, supra note 7, at 847-48 (detailing the legal profession’s failure to diversify); Marjorie E. Kornhauser, Rooms of Their Own: An Empirical Study of Occupational Segregation By Gender Among Law Professors, 73 UMKC L. REV. 293 (2004). Data collected by the National Association for Law Placement (“NALP”) shows that in 2009, 19.21% of law firms partners were women, 6.05% were members of minority groups, and 1.88% were minority women. NALP, Representation in Some Markets Declines While Others Show Small Gains at tbl. 1 (Oct. 21, 2009), http://www.nalp.org/oct09lawfirmdiversity. In the associate ranks, 45.66% were women, 19.67% were members of minority groups, and 11.02% were minority women. See id.
Over the past thirty years, various presidents have made an effort to diversify the federal bench. Some efforts have been more successful than others, with promising results. By January 1, 2009, the end of President George W. Bush's administration, 25% of United States District Court judges were women and 26.9% of the United States Court of Appeals judges were women. Of course, at that point, there was only one United States Supreme Court justice who was a woman -- Justice Ruth Bader Ginsburg. That number has doubled since the appointment of Justice Sonia Sotomayor by President Barack Obama, and the number of women on the Supreme Court hit one-third with the confirmation of Justice Elena Kagan.\textsuperscript{16} A recent study by the Center for Women in Government & Civil Society at SUNY Albany placed the percentage of women in the federal judiciary at 22% - somewhat lower than the percentage on January 1, 2009.\textsuperscript{17} In terms of racial and ethnic diversity, as of January 1, 2009, 11.4% of United States District Court judges were African American and 8.3% of United States Court of Appeals judges were African American. The percentage of Hispanic judges sitting on both the United States District Courts and United States Court of Appeals was 7.2%. There were only five Asian American judges sitting on a United States District Court - a total of 1.2% of sitting district court judges. At the end of the Bush administration, there were no Asian American judges in active service sitting on a United States Courts of Appeals.\textsuperscript{18}

While there are obviously state to state demographic differences, it is useful to think of this data in terms of the overall population of the United States. According to United States

\textsuperscript{16}Sara Schiavoni, \textit{Diversity on the Bench}, 92 JUDICATURE 276 tbl. 1 (2009).

\textsuperscript{17}Center for Women in Government & Civil Society, Rockefeller College of Public Affairs & Policy, University at Albany, State University of New York, Women in Federal and State-Level Judgeships 1 (Spring 2010).

\textsuperscript{18}Schiavoni, \textit{supra} note 16.
Census Bureau estimates from 2008, 65.6% of the United States population are white not of Hispanic origin (although overall 79.8% are classified as white), 12.8% are African American, 1% are American Indian or Alaskan Natives, 4.5% are Asian, 0.2% are Native Hawaiian or other Pacific Islander, and 15.4% are of Hispanic or Latino origin. In addition, women make up roughly 51% of the United States population. Thus, comparing percentages of judges in the various demographic categories that implicate diversity reveals a discrepancy between the percentage of certain groups in the population and their percent representation on the federal bench. As table 1 below reveals, in both the district courts and courts of appeals, women and members of ethnic minority groups are under-represented based on their numbers in the United States Population.

<table>
<thead>
<tr>
<th>Group</th>
<th>U.S. Census Data</th>
<th>District Courts</th>
<th>Appellate Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>White (non-Hispanic)</td>
<td>65.6%</td>
<td>80.2%</td>
<td>84.5%</td>
</tr>
<tr>
<td>African American</td>
<td>12.8%</td>
<td>11.4%</td>
<td>8.3%</td>
</tr>
<tr>
<td>Native American</td>
<td>1%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Asian</td>
<td>4.5%</td>
<td>1.2%</td>
<td>0%</td>
</tr>
<tr>
<td>Latino/a</td>
<td>15.4%</td>
<td>7.2%</td>
<td>7.2%</td>
</tr>
<tr>
<td>Women</td>
<td>51%</td>
<td>25%</td>
<td>27%</td>
</tr>
</tbody>
</table>

---


21 Derived from data in Schiavoni, supra note 16, at tbl.1 and U.S. Census Bureau, supra note 19. This data is current as of January 2009. There was some discrepancy between Schiavoni’s demographic designations and that of the U.S. Census bureau. For example, the U.S. Census Bureau groups American Indians and Alaskan Natives together. Schiavoni’s category designation was “Native American.” I am uncertain whether these differing designations include the same groups, and am assuming so for purposes of this table.
In addition, in certain jurisdictions, the discrepancy is more glaring. For example, in the First, Second, Fourth, Fifth, Sixth, Eleventh and District of Columbia federal district courts, the percentage of African American judges is less than the general population of African Americans in those jurisdictions. The largest discrepancy is in the District of Columbia district courts, where 55.2% of the general population is African American, and only 33.3% (one third) of the district court judges are African American. Some jurisdictions (specifically the Third, Eighth, Ninth and Tenth) have an "over-representation" of African American district court judges based on a comparison to general population data, although it is not large. For example, the jurisdiction with largest "overrepresentation" is the Eighth Circuit District Court bench, in which 7.6% of the population is African American and 15.8% of the active district court judges are African American.\textsuperscript{22}

In no jurisdiction are Hispanic district court judges "overrepresented" in light of their percentage in the general population. In every jurisdiction except the District of Columbia district courts (where the number of Hispanic federal district court judges mirrors the general population – 8.3%), there are fewer Hispanic district court judges than Hispanic persons present in the general population. In three jurisdictions - the Fourth, Sixth, and Eighth Circuits - there are no sitting federal district court judges who are Hispanic Americans. In some jurisdictions, the difference is substantial. For example, in the Second Circuit, 15.3% of the population is Hispanic American; yet, only 3.3% of federal district court judges are Hispanic American. Similarly, in Ninth Circuit, 28.4% of the general population is Hispanic American; yet, only 9.4% of federal district court judges are Hispanic American. Finally, in the Fifth Circuit, with a

\textsuperscript{22}Schiavoni, \textit{supra} note 16, at 277 tbl. 2.
general population that is 28.3% Hispanic American, only 15.2% of the federal district court judges are Hispanic American.\(^\text{23}\)

The discrepancies with respect to women also are significant. While 2008 U.S. Census Bureau estimates project that women make up nearly 51% of the United States population,\(^\text{24}\) in six jurisdictions they are less than 25% of the sitting federal district court judges. The Fourth Circuit has the fewest women sitting in federal trial courts -- only 16% of its judges are female. The largest percentage of women federal district court judges is found in the Second Circuit, where 35% of active federal district court judges are women.\(^\text{25}\) According to the study by the Center for Women in Government & Civil Society at SUNY Albany, there are only three states where women make up 30% or more of the federal judiciary.\(^\text{26}\) Finally, the dearth of women sitting on the Eighth Circuit Court of Appeals -- there is and only ever has been one -- has led to a movement to increase the number of women sitting on that court of appeals.\(^\text{27}\)

\(^{23}\)Id.

\(^{24}\)See U.S. Census Bureau, State & County Quickfacts (2009), http://quickfacts.census.gov/qfd/states/00000.html.

\(^{25}\)See Schiavoni, supra note 16, at 277 tbl.2.

\(^{26}\)See Center for Women in Government & Civil Society, supra note 17, at 8. Those states are Minnesota, Connecticut, and New Jersey. See id.

\(^{27}\)See Sally J. Kenney, Infinity Project Seeks to Increase Gender Diversity of the Eighth Circuit Court of Appeals, 92 JUDICATURE 131 (2008). The First Circuit likewise only has one female judge. See id. The state courts are demographically similar. The American Bar Association and National Association of Women Judges have gathered demographic information about the number of judges of color and women, respectively, sitting on state courts. Beginning with women judges, 31% of the judges sitting on state final appellate jurisdiction courts are women. Similarly, 31% of judges sitting on state intermediate appellate jurisdiction courts are women. The percentage is less for state general jurisdiction courts, where women make up only 24% of the state judiciary. Finally, women judges make up 30% of the state limited or special jurisdiction courts. National Association of Women Judges, 2010 United States State Court Women Judges, http://www.nawj.org/us_state_court_statistics_2010.asp. The study by the Center for Women in Government & Civil Society at SUNY Albany placed the overall
Some might argue that comparisons to the general population are not appropriate, because the population of those who are lawyers is considerably different. While the population of lawyers is the appropriate comparison group for, for example, an employment discrimination case involving lawyers, the number of lawyers in the United States in any group is much greater than the number of judgeships. For example, there are only nine United States Supreme Court Justices, 179 federal court of appeals judges, 678 federal district court judges, and 9 judges of the Court of International Trade, for a total of 858 Article III judges. Thus, for any given judicial opening, there will be more than enough qualified persons of diverse backgrounds from which to choose. Take, for example, my home federal district court -- the Eastern District of Arkansas. In the last year, we have had two openings in the federal district court. For each position, Arkansas's Senators suggested three candidates. Thus, for example, while African Americans or women lawyers may be fewer in number in the lawyer population in Arkansas than their white male counterparts, there are more than enough qualified women and African

percentage of women on the state bench at 26%. See Center for Women in Government & Civil Society, supra note 17, at 1. In addition, that study noted that in only fifteen states women made up more than 30% of the state judiciary, and in no state did they make up 50% of the judiciary. Id. at 10.

When it comes to judges of color sitting on state courts, only 5.9% of state supreme court justices are African American, 1.5% are Asian/Pacific Islanders, and 2.4% are Latina/o. There are no Native American judges, according to the ABA data, sitting on state Supreme Courts. At the intermediate appellate court level, 6.3% of judges are African American, 1.4% are Asian/Pacific Islanders, and 2.6% are Latina/o. Finally, of judges sitting on general jurisdiction trial courts, 5.3% are African American, 0.9% are Asian/Pacific Islander, 2.6% are Latina/o, and 0.1% (13 judges) are Native American. The total percentage of judges who are racial minorities, for all state courts nationwide, is 10.1%. American Bar Association, National Database on Judicial Diversity in State Courts, http://www.abanet.org/judind/diversity.national.html.


American lawyers from whom to choose for these two positions. Surely there are six well qualified women or members of racial or ethnic minority groups that could be considered. Importantly, the demographics of the lawyer population is less likely to reflect who will appear in front of these judges as litigants than the general population data. As is explained below, who appears in front of judges and the fairness these litigants perceive are very important aspects of having a diverse bench.\textsuperscript{30}

That said, a look at lawyer demographics still might tell something about the discrepancies. Looking at statistics on lawyers in the United States, 31\% of lawyers are women.\textsuperscript{31} The Department of Labor’s 2009 statistics places the number at 32.4\% of lawyers in the United States.\textsuperscript{32} In addition, nationally, women make up 48\% of law school graduates and 45\% of law firm associates.\textsuperscript{33} The latest study of the federal bench places the percentage of federal judges who are female at 22\%.\textsuperscript{34} Thus, even this number does not reflect the percentage of women in the lawyer population, let alone in the general population. In addition, as explained above, there are glaring exceptions in certain jurisdictions where there are very few women. For example, in the Northern District of New York, there are no federal district court judges or

\textsuperscript{30}See supra notes ___ to ___ and accompanying text.


\textsuperscript{33}Center for Women in Government & Civil Society, supra note 17, at 12.

\textsuperscript{34}See id. at 1. This may be because President George W. Bush appointed fewer women that President Clinton. See Kenney, supra note 27, at 131 (noting that 30\% of President Clinton’s appeals court appointments were women, whereas only 20\% of President Bush’s appeals court appointments were women).
magistrates who are female despite a large population of state court judges who are women.\textsuperscript{35} In addition, in my home state, Arkansas, women only make up 15\% of the federal judiciary.\textsuperscript{36} Thus, there are district to district problems. According to the Department of Labor's 2009 statistics, among lawyers, 4.8\% are African American, 4.1\% are Asian, and 2.8\% are Hispanic or Latino.\textsuperscript{37} The data shows that Asian Americans are under-represented in the federal courts. The National Association for Law Placement has been collecting data on the number of GLBT attorneys in practice since 2003. According to its latest data, GLBT lawyers make up 1.36\% of the lawyers in the firms they surveyed.\textsuperscript{38} Yet, there are no openly GLBT federal judges, although there are rumors as to a few.\textsuperscript{39} Thus, there are discrepancies with respect to some groups even when comparing to the lawyer population.

Another statistic worth noting about nontraditional federal judicial appointees is differences in career track between these appointees and "traditional" appointees, i.e., white males. The typical career track for nontraditional appointees is the judiciary. Thus, for example, during his first six years in office, 85.7\% of President George W. Bush's nontraditional appointees to the United States Appeals Courts had judicial experience -- whether in state court or some other federal court. Only 47.4\% of his traditional appointees, on the other hand, had judicial experience. In addition, many nontraditional appointees to the United States Appeals

\textsuperscript{35}See Center for Women in Government & Civil Society, note 17, at 12.

\textsuperscript{36}Id. at 2.


\textsuperscript{38}National Association for Law Placement, Although Most Firms Collect GLBT Lawyer Information, Overall Numbers Remain Low (Dec. 2009), http://www.nalp.org/dec09glbt.

\textsuperscript{39}I will not repeat rumors here. However, a simple Google search for federal judges openly gay or lesbian will reveal the rumors.
Courts had prosecutorial experience -- 33.3% of those appointed. While many of President George W. Bush's United States Appeals Court traditional appointees had prosecutorial experience as well (34.2%), only 4.8% of his nontraditional appointees had neither prosecutorial nor judicial experience. Yet, 36.8% of his traditional appointees did not have experience as a prosecutor or judge.  

The discrepancy in career track for traditional and nontraditional appointees is similar for President George W. Bush's district court appointees. Once again, judicial or prosecutorial experience appears to be the norm among nontraditional appointees, with only 11.8% of them having neither experience. The majority of nontraditional appointees -- 72.9% -- had prior judicial experience. The percentage of his traditional appointees with prior judicial experience was only 42%. This has led some commentators to posit that we might be seeing a trend toward a career judicial track much like that present in civil law countries. Nontraditional district court appointees also had more prosecutorial experience than his Court of Appeals appointees. A majority of his nontraditional district court appointees had prosecutorial experience -- 52.9% -- whereas 44.3% of his traditional appointees had such experience. Once again, nearly a third of his traditional appointees -- 31.2% -- had neither prosecutorial or judicial experience.

---


41 Id. at 275 tbl. 2.


43 Goldman et al., supra note 40, at 275 tbl. 2.
There appears to be a different career track for judges who are women and/or persons of color. Judicial or prosecutorial experience is almost a requirement. While the statistics above are the latest for President George W. Bush's administration, they are consistent with prior administrations.  

III. Arguments in Favor of a Diverse Bench

Having established that the federal bench is not as diverse as the American population and, in some instances, the lawyer population, it is still important to examine why diversity on the bench is a goal worth pursuing. There are a variety of arguments supporting diversifying the judiciary. Political scientists have identified two overarching benefits to a diverse bench. First, a diverse bench provides symbolic representation. This means that diversity provides certain groups with the opportunity to have access to positions of influence so that all members of society will believe in the fairness of the system. This adds legitimacy to the judiciary by making it mirror the population. Thus, the comparison of population data to the demographics of the judiciary earlier in this article is legitimate given this purpose. As Professor Jeffrey Jackson explained, “Judges are not the exclusive province of any one section of society. Rather they

---


must provide justice for all. In order for a judicial section to be considered fair and impartial, it
must be seen as representative of the community.\footnote{Jeffrey D. Jackson, Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System, 34 FORDHAM URB. L.J. 125, 145 (2007).}

Closely related to this idea is that diversity can improve decision making by adding to the
richness of debate and by influencing outcomes of cases by including diverse perspectives. As
Professor Sherrilyn Ifill explains:

[T]he 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.\footnote{Ifill, supra note 7, at 410 (footnotes omitted).}

Professor Ifill also argues that racial diversity leads to greater impartiality because it ensures that
no "single set of value or views" dominates judicial decision making.\footnote{Id. at 411; Sherrilyn A. Ifill, Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts, 39 B.C. L. REV. 95 (1997).}

The second overarching argument for diversity is what is known as the functional or
substantive representation function.\footnote{See Walker & Barrow, supra note 45, at 597.} Under this theory, members of under-represented groups
will advocate for the interests of the group to which they belong once appointed.\footnote{See id.; Elaine Martin, The Representative Role of Women Judges, 77 JUDICATURE 166 (1993).} This means
that judges of differing backgrounds will bring differing perspectives to the bench based on their
own lived experience, which, potentially, could lead to differing results or at the least the
advocating of different results in lawsuits. In addition, scholars have argued that simple fairness supports increasing the numbers of women judges.

Let me note that I'm aware that post-modern legal theorists would call functional representation an essentialist theory. Indeed the very idea that, for example, women will vote a certain way in "women's cases" is essentialist. It assumes a commonality of perspective among women that is likely unjustified; indeed, the diversity of perspectives among women may well explain the studies that show no differences in judging based on the gender of the judge. While some studies support the idea that female judges are more sympathetic to sex discrimination plaintiffs and that African American male judges are more sympathetic to both race and sex discrimination plaintiffs, bear in mind that the vast number of Court of Appeals cases are decided by unanimous opinion upholding the trial court. Much of the time, male and female judges and Democratic and Republican judges agree. However, scholars who have eschewed the essentialism of a common identity that all members of a particular group have still agree that women and racial and ethnic minorities have certain experiences in common. As Professor Hsu said with respect to Asian Americans, although there is not a common "Asian American

---

52 See Ifill, supra note 7, at 412-413; Michael E. Solimine & Susan E. Wheatley, Rethinking Feminist Judging, 70 IND L.J. 891, 896-97 (1995).


55 See infra notes ___ to ___ and accompanying text.

56 See Crowe, infra note 73.

57 See id. at 56.
identity," Asian Americans, like other members of racial and ethnic minority groups, have a common experience of racial oppression that provides common ground, even though there are myriad cultural differences within the group.58 Thus, there is benefit for the courts when judges bring differing perspectives to a case that reflects 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.

Another theory that sometimes is discussed regarding diversity is critical mass theory. Under critical mass theory, in a given group a certain percentage of women or members of a minority group is necessary in order to change stereotypical notions of that group.59 This argument was used in the Michigan law school affirmative action case to support the University's efforts to diversify its law school.60 Indeed, most women judges believe their presence on the bench has made a difference in the way male judges think about professional women.61 In addition, studies suggest that this might have important impacts for Lesbian and Gay people. Studies show that people's views about Lesbian and Gay people change after they get to know them.62 Thus, having members of the Lesbian and Gay community who are open about their sexual orientation on the bench will help change attitudes about Lesbian and Gay people.


61Martin, supra note 53, at 171 tbl. 2 (71.4% of NAWJ members surveyed agreed with this statement).

62See Gregory B. Lewis, Personal Relationships and Support for Gay Rights, at 1, Andrew Young School of Policy Studies, Georgia State University, Working Paper 07-10 (March 2007), http://aysps.gsu.edu/publications/2007/index.htm ("Surveys of both college students and the
Having diverse judges also "provides role models for those historically excluded." Women judges themselves agree that they serve as positive role models for women attorneys. These judges also have encouraged other women to become judges. This might be particularly important for Gay and Lesbian youth, who tragically have higher suicide rates. Having highly regarded Gay and Lesbian role models could help increase self esteem and lead to higher achievement by Gay and Lesbian people.

Diverse judges already have had an impact on the bench by helping revise court policies. For example, women judges were key to the rise of gender bias task forces throughout the United States. In addition, as a result, at least in part, of the task force movement, courts revised the rules governing the conduct of judges, lawyers, and other court employees, and/or developed education programs to train court personnel, judges, and others. The California state court system's Access and Fairness Committee has been particularly active, not only developing programs to enhance gender fairness, but also identifying barriers to the justice system for people general populations confirm that people who know LGBs feel more positively about both LGBs and Gay rights, especially when the person they know is a close friend or family member.


Martin, supra note 53, at 170 tbl. 3 (98% of NAWJ members surveyed agreed with this).

See id. at 171 tbl. 4 (89.9% agreeing with the statement that "since I have been a judge, I have made a special effort to encourage other women to seek judicial office.").

See Ramon Johnson, Gay, Lesbian, Transgender, and Questioning Youth Suicide Statistics, http://gaylife.about.com/od/gayteens/a/gaysuicide.htm (citing study that shows the suicide rate at four times that of their heterosexual peers).

See Martin, supra note 53, at 169.

with disabilities and examining bias based on sexual orientation. In addition, California's Sexual Orientation Fairness Subcommittee specifically noted in its 2001 Report that "[t]here has been a growing awareness of the number of Gay men and Lesbians who are involved in various ways with the court system, as judges, attorneys, court users, and court employees." The Report specifically noted that this has led to court rules prohibiting sexual orientation discrimination. Finally, her study of women judges has led Elaine Martin to opine that "an increase in women judges may have an important impact in broadening the gender attitudes of the judiciary, and that these attitude changes may lead to changes in court operations." This appears to be the case not only for women judges, but in some instances, court policies also reflect the influences of judges of color and judges who are Gay men or Lesbians.

In the end, there are many good reasons to diversify the federal bench. Whether the argument be based on issues of fairness, legitimacy, providing role models, or incorporating a variety of American experiences and perspectives into judicial decision making, the case for a diverse judiciary is strong.

IV. The Influence of a Judge’s Background on Decision Making

The assumptions of those who espouse the theories discussed in the previous section is that a judge’s background will influence how he or she understands cases. Indeed, underlying


72Martin, supra note 53, at 172.
Justice Sotomayor’s “wise Latina woman” comment is the idea that people of different backgrounds will bring different perspectives to the bench that may have an impact on decision making. The effects of race, ethnicity, and gender on decision making in particular are implicated in her remarks. So, was Justice Sotomayor correct? Do these characteristics have an impact on case outcomes? Studies suggest that sometimes they do.

a. Studies of the Impact of Race and Gender of Judge

Early studies on the effect of gender, race or ethnicity of judge on case outcomes showed mixed results -- some studies showed no effect while others showed some effect. However, more recent studies have shown effects based on race and gender, especially in cases involving employment discrimination and certain types of civil rights.

Several studies show that race and gender affect voting patterns of judges in employment discrimination cases. For example, political scientist Nancy Crowe studied race and sex discrimination cases decided in the United States courts of appeals between 1981 and 1996. Her study focused on non-unanimous cases, i.e., those in which the panel disagreed on the outcome. She focused on these cases because they have the most potential for a judge's ideology to play a role, due to apparent room for disagreement. Included in Crowe's study were race, gender, and political party of appointing president. These factors had an impact in several instances. For example, women and African American judges were more likely to vote for a sex discrimination plaintiff than their white male counterparts. The effects for political party were strong for white males judges in particular. Thus, a white male Democrat appointed judge voted for the sex

---

73 Nancy E. Crowe, *The Effects of Judges’ Sex and Race on Judicial Decision Making on the U.S. Courts of Appeals, 1981-1996*, dissertation, Dept. of Political Science, University of Chicago (1999). Crowe did not include female African American judges in her sample because at the time of her study there were an insufficient number of such judges for purposes of statistical analysis.
discrimination plaintiff in these cases 76% of the time, whereas his Republican appointed
counterpart did so 28% of the time.\textsuperscript{74} There was also a partisanship effect for women and
African American male judges. While white female judges and African American male judges
who were appointed by Democrats voted consistently for the sex discrimination plaintiff (white
females - 90%; Black males - 93%), their Republican counterparts were far less likely to vote for
the sex discrimination plaintiff (white female judges - 53%; Black male judges - 61%). Still, the
Republican-appointed white female judges and Black male judges were much more likely to vote
for the sex discrimination plaintiff than their white male counterparts.\textsuperscript{75}

Her findings in race discrimination cases were a bit different. There was little difference
between white men and white women appointed by the same party, but there was a difference for
African American male judges. Thus, white male and white female judges appointed by a
Democrat voted for a race discrimination claimant in 49% and 51% of the cases respectively.
However, their African American male counterparts did so in 85% of the cases. There was a
similar pattern for judges appointed by Republican presidents. Thus, white male judges and
white female judges appointed by Republican presidents voted for the race discrimination
plaintiff 20% and 21% of the time respectively. Their African American male counterparts
voted for the race discrimination plaintiff 60% of the time.\textsuperscript{76} Thus, political party was the
decisive factor for white male and female judges, whereas race correlated for African American
males judges in these cases. Similarly, Songer, Davis, and Haire found in a 1994 study that
women federal court of appeals judges were much more likely than men to support victims of

\textsuperscript{74}Id. at 83, fig. 3.1.

\textsuperscript{75}See id.

\textsuperscript{76}Id. at 114 fig. 4.1.
discrimination. However, gender did not correlate with patterns of decision-making in search and seizure and obscenity cases.  

Other studies are consistent with respect to the gender of appellate judges in sex discrimination cases. In a 1986 study of state supreme court justices, Gryski, Main and Dixon found that the presence of a woman on the court increased decisions in favor of sex discrimination appellants. In addition, recent studies of appellate courts show that the presence of a female judge on a panel increases the likelihood that a male judge will vote for a plaintiff alleging discrimination. Songer, Davis, and Haire found in a 1994 study that women federal court of appeals judges were much more likely than men to support victims of discrimination. However, gender did not correlate with patterns of decision-making in search and seizure and obscenity cases.

More recently, Sarah Westergren looked at sex discrimination decisions from the United States Courts of Appeals during 1994-2000. While the sex of the judge did have an effect in these cases, it did not reach the 0.05 level that would be required for statistical significance. Instead, political party of appointing president and race of the judge were better predictors. Judges who were members of minority groups were more likely to vote for the sex discrimination plaintiff than white judges. In addition, judges appointed by Democrats were


80 Songer et al., supra note 77, at 433-36.
more likely to vote for sex discrimination plaintiffs than those appointed by Republicans.⁸¹ Results such as these have led some to opine that the differences in voting pattern between men and women are better explained by the political party of the appointing president.⁸² There are many articles describing these studies in detail.⁸³

Results have been different for the federal district courts, where political affiliation of appointing president appears to play more of a role. Professor Jennifer Segal also studied the effects of race and gender on judicial decision making, but her study focused on the federal district courts. Unlike Crowe, she focused only on Clinton appointees to see if there were differences in voting behaviors based on race and/or gender of the judge. She ultimately studied 799 cases for gender and 701 cases for race. For sex, she studied "women's issues," including cases about "gender discrimination, sexual harassment, abortion rights and maternity rights, custody battles, and equal pay."⁸⁴ Her race cases included "race discrimination, voting rights, school desegregation, and affirmative action."⁸⁵ In addition, she included ethnic, disability, age, poverty discrimination, alien rights, personal liberty cases, criminal rights cases, and federal economic regulation cases in both the race and gender analyses. She found little difference in cases outcomes based on the race or sex of the district court judge, and where she found

⁸³For more on the social science of judicial decision-making, see Theresa M. Beiner, What Will Diversity on the Bench Mean for Justice?, 6 MICH. J. GENDER & L. 113, 137-146 (1999); Westergren, supra note 81.
⁸⁴Jennifer A. Segal, Representative Decision Making on the Federal Bench: Clinton's District Court Appointees, 53 POL. RES. Q. 137, 143.
⁸⁵Id.
differences, they were often unexpected. For example, she found no statistically significant differences based on the sex of the judge except in cases on women's issues, wherein the men were more supportive of the women's position than the women.\textsuperscript{86} Carp, Manning and Stidham had similar results in a study of Clinton district court appointees in criminal, civil rights and liberties, and labor and economic relations cases.\textsuperscript{87} This study found that Clinton's white male appointees voted liberally more often than his nontraditional appointees.\textsuperscript{88} Thus, while not all studies show a race or gender effects, at least in court of appeals decisions in discrimination cases, race and sex of judge correlate with judges’ voting records. Thus, diversity does appear to make a difference in certain cases.

b. Other Evidence of the Difference Difference Makes

Some judges have acknowledged the difference that differences in background -- including race, ethnicity and gender -- can make in the judiciary. Justice Sotomayor was not the first to make this suggestion. For example, Justice Ruth Bader Ginsburg has noted that "Women bring a different life experience to the table. All of our differences make the judicial conferences better. That I'm a woman is part of it."\textsuperscript{89} Similarly, federal court of appeals judge A. Wallace Tashima explained in a speech that his life experiences, including being evacuated from his home and moved to an internment camp during World War II, "shaped the way I view my job as

\begin{footnotesize}
\begin{footnote}
\textsuperscript{86} Id. at 146 tbl. 3.
\end{footnote}
\begin{footnote}
\end{footnote}
\begin{footnote}
\textsuperscript{88} See id. at 286 & tbl. 3
\end{footnote}
\begin{footnote}
\textsuperscript{89} Center for Women in Government & Civil Society, supra note ____, at 1.
\end{footnote}
\end{footnotesize}
a federal judge and the skepticism that I sometimes bring to the representations and motives of
the other branches of government.”

Justice Sandra Day O'Connor explained the impact of Justice Thurgood Marshall's
background on Supreme Court discussions:

Although all of us come to the Court with our own personal histories and
experiences, Justice Marshall brought a special perspective. His was the eye of a
lawyer who saw the deepest wounds in the social fabric and used law to help heal
them. His was the ear of a counselor who understood the vulnerabilities of the
accused and established safeguards for their protection. His was the mouth of a
man who knew the anguish of the silenced and gave them a voice. At oral
arguments and conference meetings, in opinions and dissents, Justice Marshall
imparted not only his legal acumen but also his life experiences, constantly
pushing and prodding us to respond not only to the persuasiveness of legal
argument but also to the power of moral truth.

Thus, Justice Sotomayor’s comments are not out of the ordinary. Judges from a variety of ethnic
and racial backgrounds have acknowledged that their backgrounds and the backgrounds of their
colleagues can have an impact in a variety of ways on the court system.

Justice O'Connor's own experiences likely affected her judging. Her inability to find a
job as a lawyer after her graduation from Stanford Law School (instead only being offered a job
as a legal secretary) likely made sex discrimination in employment very real to her. This is not
to say that so-called "traditional" judges -- white males -- cannot attain this perspective. Indeed,
Justice Sotomayor in her lecture containing the now infamous "wise Latina woman comment,"
noted that:

90 Hsu, supra note 58, at 104 (quoting A. Wallace Tashima, Play It Again, Uncle Sam, Keynote
Address at the Judgments Judged and Wrongs Remembered: Examining the Japanese American
Liberties Cases of World War II on Their 60th Anniversary Conference (Nov. 6, 2004)).


92 See Rorie L. Spill and Kathleen A. Bratton, Clinton and Diversification of the Federal
I . . . believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable. . . . [N]ine white men on the Supreme Court have done so on many occasions and on many issues including Brown.93

Thus, while traditional appointees certainly can see the perspective of others, it may be easier for those with direct experiences in different communities to understand the perspectives of these communities.

A study of women judges suggests that they perceive themselves as more sensitive to issues of sex discrimination and believe they bring a unique perspective to the bench. In her study of women state court judges, political scientist Elaine Martin asked the judges if they agreed, were neutral on, or disagreed with various statements about the role of women judges. One of the statements was "women judges are probably more sensitive to claimants raising issues of sexual discrimination than are men."94 Of those responding, 67.77% of those who were members of the National Association of Women Judges ("NAWJ") agreed, and 52.7% of those who were non-member women judges agreed as well.95 In addition, 85.37% of NAWJ members and 63.59% of non-member women judges agreed that "[w]omen have certain unique perspectives and life experiences, different from those of men that ought to be represented on the bench by women judges."96 Some NAWJ members also believed that their "presence on the bench has made a difference in the way men judges think about how their decisions will affect

93Sotomayor, supra note 3, at 92.
94Martin, supra note 53, at 169.
95See id. at 169 tbl. 2.
96Id.
women as a group." Finally, 80.3% of NAWJ members who were surveyed agreed that "[w]omen judges work formally and informally within their court systems to heighten the sensitivity of other judges to potential problems with gender bias in the courtroom and in substantive law." Likewise, 76.9% agreed that "women judges have an influence on how their judicial colleagues perceive cases involving women's issues."

Evidence of differences in perspectives among judges of differing backgrounds is likewise supported by the work of gender, race, and ethnic bias task forces. For example, California's Advisory Committee on Gender Bias in the Courts found that 63% of women judges believed that gender bias against women was widespread and apparent or subtle in the California courts, whereas less than 24% of male judges believed this. In addition, 45% of female judicial officers agreed that they on occasion or frequently observed judges make remarks considered demeaning to women in and/or out of the courtroom, whereas only 6.6% of male judicial officers did so. With these kinds of experiences and perceptions, women judges might have more understanding about the circumstances that give rise to a sex discrimination case.

Race and gender likewise play a part in how people are treated by judges. The D.C. Circuit Task Force on Gender, Race and Ethnic Bias found that 33% of minority women lawyers (as well as 33% of African American women lawyers as a subgroup) responded that a federal judge had questioned their status as a lawyer or assumed that they were not a lawyer. While only 9.9% of white women and 10% of minority men reported such behavior, the number is even

97 Id. at 171 tbl. 4.
98 Id. at 170 tbl. 3.
99 Id.
smaller for white men, of whom only 1% reported such behavior.\textsuperscript{101} It is not much of a leap to imagine that, for example, African American women lawyers who have such experiences will treat lawyers of color respectfully in the courtroom. Thus, the experiences of these diverse lawyers, if offered an opportunity to serve on the bench, might lead to more respectful treatment of women and members of minority groups who are litigants, witnesses, and lawyers in the courtroom.

c. The Role of the Diverse Judge

While the statistics and anecdotal evidence above suggest that at least some judges believe that their backgrounds influence how they perceive certain types of cases, perhaps the most compelling evidence of difference comes from judicial decisions themselves. Indeed, how a judge’s background might play appropriately into a case is best demonstrated by looking at real lawsuits involving nontraditional judges. A couple examples provides a sense of how differences in a judge’s perspective might play out in court.

Judge Carlos Lucero is a sitting federal judge on the Tenth Circuit Court of Appeals. Judge Lucero is of a Hispanic background.\textsuperscript{102} In \textit{Vigil v. City of Las Cruces}, Judge Lucero dissented from a denial of a petition for rehearing en banc.\textsuperscript{103} In the case, plaintiff Mary Ann Rocha Vigil had complained about sexual and racial harassment visited upon her by her supervisor. Included in the allegations were that Ms. Vigil’s supervisor “frequently” called

\textsuperscript{101}Special Committee on Gender, Task Force of the D.C. Circuit on Gender, Race and Ethnic Bias, Preliminary Report 75 (May 1994).


\textsuperscript{103}Rocha Vigil v. City of Las Cruces, 119 F.3d 871 (10\textsuperscript{th} Cir. 1997).
Hispanics “wetbacks,” and that he commented that “I didn’t know that Mexicans had rights.”

This same supervisor offered her pornographic software and was constantly asking her to go flying with him in spite of her repeated refusals. The previous panel had held that the above facts were insufficiently severe or pervasive to amount to actionable racial or sexual harassment as a matter of law. Judge Lucero explained why he disagreed with the panel’s assessment of Ms. Vigil’s sexual harassment claim:

In affirming summary judgment for the City of Las Cruces, the panel holds that it is per se unreasonable for a Hispanic worker to consider what she describes as her supervisor’s “frequent” references to “wetbacks” as being hostile or abusive. I am disappointed that the panel reaches that conclusion; more importantly, I can see no legal or factual basis to support it. . . . The term “wetback” is severely degrading. . . . Accordingly, its use hardly needs to be pervasive for a Hispanic employee to find her work environment hostile and abusive – and reasonably so.

Judge Lucero understood how this term could be sufficiently severe to satisfy the standard for sexual harassment. The other judges who sat on the initial panel in this cases did not, holding that “without greater specificity, such conclusory allegations are insufficient to support a finding” of racial harassment.

Did Judge Lucero’s Hispanic background increase his

\[\text{\textsuperscript{104}}\text{Id.}\]

\[\text{\textsuperscript{105}}\text{Id. at 871-72.}\]

\[\text{\textsuperscript{106}Vigil v. City of Las Cruces, 113 F.3d 1247 (10th Cir. 1997) (unpub.), 1997 WL 265095.}\]

\[\text{\textsuperscript{107}Vigil v. City of Law Cruces, 119 F.3d 871, 874 (Lucero, J., dissenting).}\]

\[\text{\textsuperscript{108}113 F.3d 1247, 1997 WL 265095 at *3. Judge Lucero also wrote a compelling dissent to a denial of rehearing en banc in Alexander v. Oklahoma, a civil rights case brought by the survivors and descendants of survivors of a racially based attack that destroyed the African American community in Greenwood, Oklahoma. See Alexander v. Oklahoma, 382 F.3d 1206, 1211 (10th Cir. 2004)(describing facts); Alexander v. Oklahoma, 391 F.3d 1155, 1159 (10th Cir. 2004)(Lucero, J., dissenting). As Judge Lucero argued:}\]

No case in my tenure on the court could be more compellingly described as meeting the Rule 35 en banc standard of presenting a “question of exceptional importance” deserving the attention of the entire court than this. In one of the
understanding of Ms. Vigil’s fact pattern? Certainly someone of a Hispanic background could understand the feelings and reactions that use of a term such as “wetback” would engender in a Latina listener. In addition, it is quite possible that non-Hispanic judges would have less understanding of the implications of such language on a Latina employee.

Other examples include several rather recent cases in which Justice Ruth Bader Ginsburg disagreed (at least in part) with the majority, and, unusually, expressed public exasperation at the positions her fellow Justices took during oral argument. Much of the public discussion came as a result of comments Justice Ginsburg made about being, after the retirement of Supreme Court Justice Sandra Day O’Connor, the only female justice on the Court. Several cases, in particular, made Justice Ginsburg wish for a fellow female justice. One of those cases, *Safford Unified School District v. Redding*, 109 involved the strip search of a thirteen year-old girl to locate ibuprofen, a “drug” that was considered contraband in her school. As Justice Ginsburg told the media with respect to her male colleagues after oral argument in the case, “They have never

more shameful events in our nation’s history, over two hundred African-Americans were slaughtered and a whole section of the City of Tulsa was burned in an uncontrolled riot in 1921. Official government action by the City of Tulsa and the State of Oklahoma fueled this carnage by deputizing and arming the mob, and authorized the National Guard to detain the victims while their forty-two square block of community was razed to the ground. (It is inconceivable that a government investigation of the incident of September 11 would have failed to count every person who perished, yet telling of the attitude that prevailed in Oklahoma in 1921 is that no effort was made to determine officially the number of those who died there.) All subsequent claims raised by the victims fell upon the deaf ears of the courts at the time, and most languished without even a cursory glance at the merits. None of the over one hundred lawsuits filed were successful. In a perversion of justice, a grand jury commissioned by the state exonerated the city and state, and all white rioters, and blamed the victims for the atrocity. This history alone raises a”question of exceptional importance” – the laudable recent investigation of this tragedy the State of Oklahoma compels us to confront it.

391 F.3d 1159 (Lucero, J., dissenting).

been a 13-year-old girl. . . . It’s a very sensitive age for a girl. I didn’t think that my colleagues, some of them, quite understood.”110 While Justice Ginsburg placed herself in the 13 year-old girl’s position, fellow Justice Stephen Breyer likened the search to changing for gym class.111 While the Court ultimately held that the search was unreasonable, a majority agreed that the administrator who ordered it had qualified immunity.112 Dissenting in part, Justice Ginsburg disagreed, arguing that the search violated “clearly established” law and therefore the girl was entitled to a remedy.113 In particular, Justice Ginsburg focused on the continued humiliation of plaintiff Savanna Redding even after school officials found no contraband during their strip search. As she explained, “To make matters worse, Wilson did not release Redding, to return to class or to go home, after the search. Instead, he made her sit on a chair outside his office for over two hours. At no point did he attempt to call her parent. Abuse of authority of that order should not be shielded by official immunity.”114

Similarly, Justice Ginsburg vocally dissented in and publicly commented about both AT&T v. Hulteen115 and Ledbetter v. Goodyear Tire & Rubber Corp.116 – two cases involving


112 Safford, 129 S. Ct. at 2637-38.

113 Id. at 2645 (Ginsburg, J., concurring in part and dissenting in part). Justice Stevens, in a concurrence and dissent in which Justice Ginsburg joined, agreed with this position. See id. at 2644 (Stevens, J., concurring and dissenting) (describing this as a case in which “clearly established law meets clearly outrageous conduct.”).

114 Id. at 2645.

sex discrimination allegations. In *Ledbetter*, the Court held that the decision to set an employee’s pay was a discrete act that triggered the 180-day EEOC filing period for purposes of filing a claim under Title VII.\(^\text{117}\) Lily Ledbetter, a supervisor for Goodyear for nearly twenty years, was paid less than her male counterparts. By the end of her employment with Goodyear, Ledbetter was earning “significantly less” than similarly situated male supervisors.\(^\text{118}\) Because Ledbetter filed her charge of discrimination more than 180 days after Goodyear made the discriminatory decisions, the Court held that her claim was time-barred even though she continued to receive reduced pay compared to her male colleagues within the 180-day charge filing period.\(^\text{119}\)

Dissenting, Justice Ginsburg examined the workplace realities of a woman working in a traditionally male job and read the statute to encompass Ledbetter’s claims. As she explained, “Comparative pay information . . . is often hidden from the employee’s view. . . . Small initial discrepancies may not be seen as meet [sic] for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.”\(^\text{120}\) Justice Ginsburg understood the context in which Ledbetter was working – a rare woman among many men – and took into consideration what might motivate her in such a context. Thus, Ledbetter was reasonable in waiting until these disparities became “apparent and sizable” to complain.\(^\text{121}\)

---


\(^{117}\) 550 U.S. 618, 621.

\(^{118}\) *Id.* at 622.

\(^{119}\) *Id.* at 632.

\(^{120}\) *Id.* at 645 (Ginsburg, J., dissenting).

\(^{121}\) *Id.* at 646.
Reasoning that pay differentials of this sort result from a series of discrete acts, Justice Ginsburg forcefully argued that the standard developed for sexual harassment claims, whereby only one act of continuing harassing behavior need occur within the 180-day charge filing period to be timely, should apply.\footnote{Id. at 648-49.} She also noted that employers gain from sex-based pay discrimination in ways they do not from discrete acts of discrimination, such as a failure to hire or promote. While some other employee will ultimately be hired or promoted, in a pay case, the employer benefits from continually paying women lower salaries than their male counterparts.\footnote{Id. at 650.} Justice Ginsburg also detailed evidence that Ledbetter’s pay differential was indeed based on sex discrimination.\footnote{Id. at 659-60. Included in this evidence were such discrepancies as Goodyear’s suggestion that the pay differential was based on Ledbetter’s poor performance, and yet Ledbetter received a “top Performance Award” in 1996. \textit{Id. at} 659. Toward the end of her career, the plant manager told her that the “‘plant did not need women, that [women] didn’t help it, [and] caused problems.'” \textit{Id. at} 660.} This evidence is absent from the majority opinion. Apparently because of how upset the majority’s holding in this case made her, Justice Ginsburg read her dissenting opinion from the bench, which she ended with a call to Congress to amend the statute to overturn the decision.\footnote{Biskupic, \textit{supra} note 110, at 3; \textit{Ledbetter}, 550 U.S. at 661 (“Once again, the ball is in Congress’ court. As in 1991, the Legislature may act to correct the Court’s parsimonious reading of Title VII.”).}

In \textit{Hulteen}, the Court permitted AT&T to decrease pension benefits for women who took time off for disabilities related to pregnancy (even though other leave for disability did not count
against an employee’s benefits) prior to the enactment of the Pregnancy Discrimination Act, which clearly made such differentials illegal. As Justice Ginsburg explained:

The history of women in the paid labor force underpinned and corroborated the views of the lower courts and the EEOC. In generations preceding – and lingering long after – the passage of Title VII, that history demonstrates, societal attitudes about pregnancy and motherhood severely impeded women’s employment opportunities.

She continues, in the opinion, to place the case in the history of women in the United States – a history that included widespread discrimination against women based on pregnancy. As she further stated, “[c]ertain attitudes about pregnancy and childbirth, throughout human history, have sustained pervasive, often law-sanctioned, restrictions on a woman’s place among paid workers and active citizens.” As the media reported, Ginsburg remarked that oral argument in Hulteen was, “‘just, for me, Ledbetter repeated.’ . . . adding that her colleagues showed ‘a certain lack of understanding’ of the bias a woman can face on the job.” Perhaps summing it up, Justice Ginsburg explained, “You know the line that Sandra [Day O’Connor] and I keep repeating . . . that ‘at the end of the day, a wise old man and wise old woman reach the same judgment’? But there are perceptions that we have because we are women. It’s a subtle influence. We can be sensitive to things that are said in draft opinions that ‘male justices’ are not aware can be offensive.” While she acknowledged that the differences between male and

\[126\] 129 S. Ct. at 1962.

\[127\] Id. at 1974 (Ginsburg, J., dissenting).

\[128\] Id. at 1978.

\[129\] Biskupic, supra note 110, at 2.

\[130\] Id.
female justices is ”seldom in the outcome,” she also noted that “it is sometimes in the outcome.”\textsuperscript{131}

While in each case described above there was at least one male justice who dissented along with Justice Ginsburg, her positions still did not command the majority. In \textit{Safford} a majority did agree with Justice Ginsburg that a strip search of a thirteen year-old girl for ibuprofen was unconstitutional, but the Court still afforded her no relief. Given the positions of the Justices during oral argument,\textsuperscript{132} it would be interesting to know if Justice Ginsburg’s understanding of the position of thirteen year-old girls swayed this outcome.

V. Controversy Surrounding Recent “Nontraditional” Supreme Court Candidates

Both Justice Sonia Sotomayor and Justice Elena Kagan encountered difficulties during their confirmation process because of statements made in academic settings. Ironically enough, their statements suggest that they would bring a diversity of perspective for which those who

\textsuperscript{131} Id.

\textsuperscript{132} In one telling exchange, Justice Breyer likened the search in \textit{Safford} to changing clothes in gym class. As he stated, “I’m trying to work out why is this a major thing to say strip down to your underclothes, which children do when they change for gym, they do fairly frequently, not to -- you know, and there are only two women there. Is -- how bad is this, underclothes? That’s what I’m trying to get at. I’m asking because I don’t know.” Oral Argument in Safford v. Redding, at 13-14, http://www.oyez.org/cases/2000-2009/2008/2008_08_479/argument. Justice Ginsburg was quick to respond: “Mr. Wolf, one thing should be clarified. I don’t think there’s any dispute what was done in the case of both of these girls. It wasn’t just that they were stripped to their underwear. They were asked to shake their bra out, to -- to shake, stretch the top of their pants and shake that out. There’s no dispute, factual dispute about that, is there?” \textit{Id}. Justice Ginsburg also recognized the humiliation the plaintiff might have felt by being left outside the vice principal’s office after the search turned up nothing. Her fellow Justice, responded to Justice Ginsburg’s concerns by explaining, “I assume a school can assign a student to study hall. That's not considered a government seizure. Isn't that an obvious part of the parental supervision that a school exercises, sit here and stay there.” \textit{Id}. at 6.
argue for a diverse bench advocate. However, rather than being embraced for the diversity they would bring, these two Supreme Court nominees were harangued for it. For Justice Sotomayor, the statements that caused controversy were made in a speech given at a law school. For Justice Kagan, it was a position she took as Dean of Harvard’s law school. Examining the statements and how they were characterized by members of the Senate Judiciary Committee and in public commentary reveal the attitudes of some members of the committee and certain members of the media to diversity. It also reveals the prevalence of white male heterosexist norms and the resistance of members of the committee to anyone who challenges these norms.

a. Justice Sotomayor’s Hearing & Public Commentary

Justice Sonia Sotomayor took a great deal of heat during her confirmation hearing as well as in the media for her “wise Latina woman” comment as well as her decision in the Ricci v. DeStefano case. In response to the “wise Latina woman” comment, one commentator explained that “her basic proposition seems to be that white males (with some exceptions, she noted) are inferior to all other groups in the qualities that make for a good jurist.” While this commentator conceded that he also supported diversification of the bench, he asked, “Do we want a new justice who comes close to stereotyping white males as (on average) inferior beings?” In the popular media, Rush Limbaugh noted that Justice Sotomayor “brings a form of bigotry and racism to the Court,” and analogized her nomination to that of David Duke.

---

133 530 F.3d 87 (2d Cir. 2008)(per curiam), rev’d 129 S. Ct. 2658 (2009).


135 Id.
former head of the Ku Klux Klan.\textsuperscript{136} Newt Gingrich tweeted with reference to Justice Sotomayor’s wise Latina woman statement that “new racism is no better than old racism.”\textsuperscript{137}

Similarly, the Republican members of the Senate Judiciary Committee made much of the “wise Latina woman” comment as well as the \textit{Ricci} case. In both their statements and questioning, they suggested that the comment and the \textit{Ricci} case called into question Justice Sotomayor’s fitness as a judge. This excerpt from Senator Jeff Sessions’ statement provides an example:

I want to be clear:
I will not vote for— and no senator should vote for— an individual nominated by any President who is not fully committed to fairness and impartiality toward every person who appears before them.
I will not vote for— and no Senator should vote for— an individual nominated by any President who believes it is acceptable for a judge to allow their personal background, gender, prejudices, or sympathies to sway their decision in favor of, or against, parties before the court. In my view, such a philosophy is disqualifying.
Such an approach to judging means that the umpire calling the game is not neutral, but instead feels empowered to favor one team over the other.
Call it empathy, call it prejudice, or call it sympathy, but whatever it is, it is not law. In truth, it is more akin to politics, and politics has no place in the courtroom.
Some will respond, “Judge Sotomayor would never say it’s acceptable for a judge to display prejudice in a case.” But I regret to say, Judge, that some of your statements that I will outline seem to say that clearly. Let’s look at a few examples.

* * *

And during a speech 15 years ago, Judge Sotomayor said, “I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt . . . continuously to judge when those opinions, sympathies, and prejudices are appropriate.”
And in the same speech, she said, “my experiences will affect the facts I choose to see . . .”
Having tried a lot of cases, that particular phrase bothers me. I expect every judge to see all the facts.


So I think it is noteworthy that, when asked about Judge Sotomayor’s now-famous statement that a “wise Latina” would come to a better conclusions that others, President Obama, White House Press Secretary Robert Gibbs, and Supreme Court Justice Ginsburg declined to defend the substance of those remarks.138

The message from Senator Sessions is clear. By discussing how Justice Sotomayor’s Latina background might impact her decision making, he suggests that Justice Sotomayor is “prejudiced” and unfit to be a judge. She does not see the world in the same way that Senator Sessions does.

Senator Sessions moves on to the Ricci case:

I am concerned by Ricci, the New Haven Firefighters case – recently reversed by the Supreme Court – where she agreed with the City of New Haven’s decision to change the promotion rules in the middle of the game. Incredibly, her opinion consisted of just one substantive paragraph of analysis. Judge Sotomayor has said that she accepts that her opinions, sympathies, and prejudices will affect her rulings. Could it be that her time as a leader in the Puerto Rican Legal Defense and Education Fund, a fine organization, provides a clue to her decision against the firefighters? While the nominee was Chair of that fund’s Litigation Committee, the organization aggressively pursued racial quotas in city hiring and, in numerous cases, fought to overturn the results of promotion exams. It seems to me that in Ricci, Judge Sotomayor’s empathy for one group of firefighters turned out to be prejudice against another.139

Thus, Justice Sotomayor’s statements and experience in a civil rights group dedicated to the concerns of those, like her, who are of Puerto Rican descent, render her once again prejudiced and unfit to be a Supreme Court Justice. That her Latina background might affect how she views a case is disqualifying.

Similarly, Senator Chuck Grassley, a Republican Senator from Iowa, stated:

138Statement of Senator Jeff Sessions.

139Statement of Senator Jeff Sessions.
In yet another speech, you proclaimed that the court of appeals is where policy is made. Your “wise Latina” comment starkly contradicts a statement by Justice O’Connor that a wise old man and a wise old woman would eventually reach the same conclusion in a case.

These statements go directly to your views of how a judge should use his or her background and experience when deciding cases. Unfortunately, I fear they do not comport with what many others believe is the proper role of a judge or an appropriate judicial method.

The American legal system requires that judges check their biases, personal preferences, and politics at the door of the courthouse. Lady Justice stands before the Supreme Court with a blindfold, holding the scales of justice. Just like Lady Justice, judges and Justice must wear blindfolds when they interpret the Constitution and administer justice.

I will be asking you about your ability to wear that judicial blindfold. I will be asking you about your ability to decide cases in an impartial manner and in accordance with the law and the Constitution. I will be asking you about your judicial philosophy, whether you allow biases and personal preferences to dictate your judicial methods.

* * *

I am looking to support a restrained jurist committed to the rule of law and the Constitution. I am not looking to support a creative jurist who will allow his or her background and personal preferences to decide cases.

Senator Grassley also alludes to the “wise Latina woman” statement and contrasts its implications with that of the ideal “lady justice” (blindfolds and all), suggesting that Justice Sotomayor will not be able to fulfill the role of an impartial decision maker. Her background as a Latina is relegated to the status of a “personal preference.”

And, finally, Senator John Kyl, from Arizona, summed up the entire tenor of these remarks well:

With a background that creates a prima facie case for confirmation, the primary question I believe Judge Sotomayor must address in this hearing is her understanding of the role of an appellate judge. From what she has said, she appears to believe that her role is not constrained to objectively decide who wins based on the weight of the law, but rather who in her personal opinion, should win. The factors that will influence her decisions apparently include her gender and Latina heritage and foreign legal concepts that as she said, get her creative juices going.

140 Statement of Senator Grassley.

141 Statement of Senator John Kyl.
Thus, Justice Sotomayor would not, according to Senator Kyl, decide a case based on applying the law to the facts, but instead based on “personal opinion,” influenced by her gender and Latina heritage.

When Senator Sessions raised the issue of the *Ricci* case during his questioning he noted that Judge Cabranes, “himself of Puerto Rican ancestry,” had voted to reconsider the decision en banc.\(^{142}\) He explained that the media reported that Judge Cabranes was concerned with the outcome of that case. Senator Sessions’ comments suggest that he believed that Judge Cabranes, unlike Justice Sotomayor in the *Ricci* case, was acting “appropriately” in suggesting support for the white firefighters’ position. Senator Lindsey Graham, a Republican from South Carolina, also suggested that Justice Sotomayor was not the “right kind of Hispanic.” In his statement, he explained that “[m]y Republican colleagues who voted against you I assure you could vote for a Hispanic nominee. They just feel unnerved by your speeches and by some of the things that you have said and some of your cases.”\(^{143}\) Thus, while Republicans would vote for the “right” kind of Hispanic, Justice Sotomayor, as evidenced by her cases (i.e., *Ricci*) and speeches (i.e., “wise Latina woman”), was not the “right” kind.

Justice Sotomayor’s “wise Latina woman” comment and participation in the *Ricci* case certainly caught the attention of the Senate Judiciary Committee and the media. But was the statement really so controversial, if it is understood in the context in which she said it? A searching look at the speech in which she made the comment suggests that the

\(^{142}\) Statement of Sen. Sessions.

\(^{143}\) Statement of Sen. Graham.
answer is “No.” Justice Sotomayor made the “wise Latina woman” comment during the annual Judge Mario G. Olmos lecture at the University of California, Boalt Hall School of Law. She made it in the context of a frank discussion about the impact her background, including being a woman and a Latina of Puerto Rican heritage, might make in judging. She began her discussion by exploring differences between people who could be characterized as “Latina/o.” In a very non-essentialist manner, Justice Sotomayor explained how some of her family customs would seem strange to a fellow “Latina/o” who was of Mexican heritage. Thus, she acknowledged the range of experience among people who could be called “Latina,” suggesting that there is no universal Latina experience.

Justice Sotomayor explored the ideas of others who have opined on diversity on the bench. For example, she considered a fellow jurist’s position that acknowledging that women may be different than men in their judging leads to the same type of paternalistic thinking that created gender-specific laws. However, she also wondered “whether by ignoring our differences as women or men of color we do a disservice both to the law and

---


145 The speech was reprinted in the Berkeley La Raza Law Journal. Apparently, this was a phrase that Justice Sotomayor used in five or six speeches over the years.

146 Sotomayor, supra note 3, at 88.

147 Id. at 88.

148 Sotomayor, supra note ___, at 90.
Indeed, like her approach to being a Latina, she also agreed that there was no single voice of feminism, but instead a diversity of perspectives among women.\textsuperscript{150} Describing impartiality as an “aspiration” for judges, she explained that “[n]ot all women or people of color, in all or some circumstances or indeed in any particular case or circumstance but enough people of color in enough cases, will make a difference in the process of judging.”\textsuperscript{151} She mentions studies of women judges for support for this position.

Justice Sotomayor considered that white men have, in some instances, made decisions that were helpful to women and racial and ethnic minorities. But, she also noted that many of the important race and gender discrimination cases were brought by lawyers of color and women lawyers.\textsuperscript{152} And, ironically, in the very next paragraph after her “wise Latina woman” comment, she openly acknowledged that white male judges have voted for sex and race discrimination claimants. As she explained, “I . . . believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a

\textsuperscript{149} Id. at 91.

\textsuperscript{150} Id.

\textsuperscript{151} Id.

\textsuperscript{152} Id. at 92; see also Edward V. Heck & Joseph Stewart, Jr., \textit{Ensuring Access to Justice: The Role of Interest Group Lawyers in the 60s Campaign for Civil Rights}, 66 \textit{JUDICATURE} 84 (1982)(discussing the role of lawyers of color and interest groups that engaged lawyers of color).
different group. Many are so capable.”\textsuperscript{153} She used \textit{Brown v. Board of Education} as an example.\textsuperscript{154}

Yet, Justice Sotomayor also explained that people may not take the time and effort to understand the perspectives of others who are not members of their ethnic, gender, or racial group. While accepting that her background will have an impact, she also explained her underlying role as judge:

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 . . . . I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies, and prejudices are appropriate.\textsuperscript{155}

Justice Sotomayor revealed herself 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 a party in a lawsuit.

Interestingly, Justice Samuel Alito made similar comments about his Italian American heritage that received little comment during his hearings. As was raised by Senator Leahy during the Sotomayor hearings, Justice Alito stated during his confirmation hearings that “When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background

\textsuperscript{153}Sotomayor, \textit{supra} note 3, at 92.

\textsuperscript{154}\textit{Id.} at 92.

\textsuperscript{155}\textit{Id.} at 93.
or because of religion or because of gender. And I do take that into account.\textsuperscript{156} Yet, there were no repercussions – either in the media or during the confirmation hearings – as a result of Justice Alito’s discussion regarding how his ethnicity might impact his decision making. Are certain types of diversity okay, while others are not?

b. Justice Kagan’s Position on Gays in the Military

Justice Elena Kagan’s hearing did not focus on her racial background or her gender per se, but instead on the position she took on “don’t ask/don’t tell” and military recruiting on campus while Dean at Harvard Law School. In addition, at least some Senators emphasized aspects of Justice Kagan’s background that put her outside the mainstream. As Senator Kyl put it in his statement, “One recent article noted that Ms. Kagan’s experience draws from a world whose sign posts are distant from most Americans: Manhattan’s Upper West Side, Princeton University, Harvard Law School, and the upper reaches of the Democratic legal establishment.”\textsuperscript{157} This, and her admiration for Justice Thurgood Marshall, made her a questionable candidate for Republican Senators. For purposes of this article, I will be focusing on the colloquy regarding military recruiting on Harvard’s campus during the hearings and in the media to see what it might tell about attitudes toward diversity.

Various Senators questioned Justice Kagan at length about Harvard’s position on military recruiting. Throughout the questioning was the underlying supposition that Kagan was anti-military. As Senator Kyl stated, “her tenure in the academy was marred,


\textsuperscript{157}Statement of Senator Kyl.
in my view, by her decision to punish the military and would-be recruits for a policy, ‘don’t ask/don’t tell,’ and the Solomon Amendment that was enacted by members of Congress and signed into law by President Clinton.”158 Similarly, Senator Sessions characterized Kagan’s treatment of the military at Harvard as a “revers[al]” of Harvard’s existing policy resulting in the military being “kicked . . . out of the recruiting office, in violation of federal law.”159 As he explained, “[h]er actions punished the military and demeaned our soldiers as they were courageous [sic] fighting for our country in two wars overseas.”160

Senator Sessions went on to use Justice Kagan’s own words against her, quoting her as saying “‘I abhor the military’s discrimination [sic] recruitment policy’ . . . I consider it . . . ‘a profound wrong, a moral injustice of the first order.’”161 In response to Kagan’s position that the military was accommodated by using a campus veterans group to arrange interviews, Senator Sessions responded:

The military, you stopped complying [with the Solomon Amendment], and that season was lost before the military realized – frankly, you never conveyed that to them in a straight-up way like I think you should have. You just started giving them a runaround. The documents we’ve gotten from the Department of Defense say that the Air Force and the Army says [sic] they were blocked, they were stonewalled, they were getting the runaround at Harvard. By the time they realized that you had actually changed the policy, that recruiting season was over, and the law was never not in force. I feel like you mishandled that. I’m absolutely confident you did. And – but you continue to persist with the view that

158 Id.

159 Statement of Sen. Sessions.

160 Id. He also asserted that Kagan’s actions as solicitor general threatened the “don’t ask/don’t tell” policy.

somehow there was a loophole in the statute that Harvard did not have to comply with after Congress had written a statute that would be very hard to get around.\textsuperscript{162}

When Justice Kagan tried to explain how she balanced Harvard’s anti-discrimination policy in recruiting, which included a policy that those who used the placement office could not discriminate based on sexual orientation, and the Solomon Amendment’s requirements, Senator Sessions characterized her position as “Well, in fact, you were punishing the military.”\textsuperscript{163} This was a theme taken up by Senator Cornyn, who stated that “the sole . . . result and impact was to stigmatize the United States military on the – on the campus.”\textsuperscript{164} In addition, Senator Sessions explained to Kagan that her actions “helped create a climate that was not healthy toward the military on campus.”\textsuperscript{165} Along with this, Senator Sessions essentially characterized Kagan as a law breaker – someone who acted in direct contravention to the Congressional enacted Solomon Amendment, and, what’s worse, she made the military recruiters who came to her campus pay the price of Congress’ actions.\textsuperscript{166} Justice Kagan’s attempts at explanation fell on deaf ears. In the end, Senator Sessions characterized Kagan’s position as “unconnected to reality.”\textsuperscript{167} Summing up, he explained, “I know what happened at Harvard. I know you were an outspoken leader against the military policy. I know you acted without legal authority to reverse Harvard’s policy and deny those military equal

\begin{flushright}
\textsuperscript{162}Id.
\end{flushright}

\begin{flushright}
\textsuperscript{163}Id.
\end{flushright}

\begin{flushright}
\textsuperscript{164}Question of Senator Cornyn.
\end{flushright}

\begin{flushright}
\textsuperscript{165}Question of Senator Sessions.
\end{flushright}

\begin{flushright}
\textsuperscript{166}
\end{flushright}

\begin{flushright}
\textsuperscript{167}Id.
\end{flushright}
access to campus until you were threatened by the United States government of loss of federal funds. This is what happened.”  

So what did happen with military recruiting at Harvard during Kagan’s tenure as Dean? According to her testimony, prior to her tenure as Dean, Harvard handled balancing the need to provide military access to its students with its own anti-discrimination policy by allowing the military access to students through a campus veteran’s group. This, apparently, was fine with the Department of Defense. However, a change in the position of the Department of Defense prior to her tenure as Dean required Harvard to change its policy and allow the military access through the placement office. During Kagan’s tenure as Dean, the Third Circuit held that the Solomon Amendment was unconstitutional. At that time, Harvard reverted to the policy it had had during prior administrations, whereby students had access to military recruiters through a campus veteran’s group. When the Department of Defense made clear that it intended to appeal the Third Circuit’s decision to the United States Supreme Court, Harvard changed to the policy of allowing access to the military through the placement office. In addition, military recruiting at Harvard actually increased during the period that the veteran’s group handled recruiting – a point that Kagan repeatedly made during the hearing. 

The emphasis on Kagan’s position on “don’t ask/don’t tell” led to speculation among Christian and conservative political pundits about Kagan’s sexual orientation. 

168 Id.

169 Answers of Solicitor General Elena Kagan.

As Peter LaBarbera, President of Americans for Truth about Homosexuality, explained, “Kagan has a strong pro-homosexual record, including, as Harvard dean, fighting to keep military recruiters off the campus because the military bars homosexuals. Americans certainly have a right to know if her activism is driven by deeply personal motivations that could undermine her fairness as a judge.”

Thus, the leap was made from Kagan’s potential status as a Lesbian, or, at the least, her position on “don’t ask/don’t tell” and concomitant sympathy for gays in the military, to Kagan being an unfair judge. Interestingly, Justice Kagan’s sexual orientation first was raised in the media by conservative blogger Ben Domenech, who considered Kagan’s status as openly Lesbian a positive factor for purposes of her judicial nomination. However, conservative Christian groups also picked up on the speculation, demanding to know whether Kagan was a Lesbian. Some made the connection between her sexual

---

171 If Elena Kagan is a Lesbian, She Should Say So because Public Has a Right to Know, Americans for Truth about Homosexuality (May 10, 2010), http://americansfortruth.com/news/if-elena-kagan-is-a-lesbian-she-should-say-so-because-public-has-a-right-to-know.html.


173 See, e.g., Americans for Truth about Homosexuality, supra note 170; Bryan Fischer, Is She or Isn’t She? Let’s Ask Her, Rightly Concerned (May 10, 2010), http://acton.afa.net/Blogs/BlogPost.aspx?id=2147494169.
orientation, her position on “don't ask/don’t tell” and her potential decision making. As the Christian News Wire explains, “Kagan’s private sex life already has, and will directly impact her public Supreme Court decisions, especially on ‘Don’t Ask, Don’t Tell,’ and other issues.” 174

The Obama Administration fiercely denied that Kagan is a Lesbian. 175 Indeed, the only mainstream media source to report it – CBS news on-line – pulled the story, apparently at the insistence of the Obama Administration. Anita Dunn, who was working on the nomination for the Obama Administration, stated that the network was “‘applying old stereotypes to single women with successful careers.” 176 While Dunn has a point, it’s also telling that the Obama Administration felt compelled to respond to the statements by an open denial. This suggests something about the viability of an openly gay candidate for a position on the United States Supreme Court and even an openly gay judicial candidate for any Article III appointment. Indeed, there does not appear to be any Article III judicial candidate who was open about being Gay, Lesbian, Bisexual or Transgendered.

Leaving aside the controversy that rumors about Kagan’s sexual orientation spawned, Justice Kagan’s hearings are still notable for the emphasis they placed on her position against “don’t ask/don’t tell” and the approach Harvard Law School took toward


176 Kurtz, supra note 175.
military recruiters. Solicitor Justice Kagan argued in favor of the position of an out-group – the LGBT community – and paid a price in the hearings for doing so. Justice Kagan defied heterosexist norms by supporting this position. While the Senators framed their arguments as “Kagan is anti-military,” the only evidence supporting this argument was her position on “don’t ask/don’t tell.” The subtext is clear: taking a position against don’t ask/don’t tell is the equivalent of being anti-military – one of most macho institutions in the United States. The public commentary took it one step farther – it made her pro-gay and potentially a Lesbian who would vote in favor of these groups’ positions as a Justice. Yet, Lesbian, Gay, Bisexual and Transgendered people are part of the United States population. Wouldn’t an interest in diversity recommend a judicial candidate who had understanding of the position of these Americans?

VI. Conclusion

Sylvia Lazos Vargas has argued that partisan politics is largely to blame for the difficulties diverse nominees face during the confirmation process. But, I believe that there is also something else going on in this cases. The irony in the flack raised about Justice Sotomayor’s “wise Latina woman” comment and decision in Ricci as well as Justice Kagan’s outspoken position on “don’t ask/don’t tell” is sadly obvious. Looking at the reasons for supporting a diverse bench – whether it be the diversity of perspectives that nontraditional judges bring or the legitimacy a diverse bench brings to the justice system – it becomes obvious that these two nominees were excellent diverse candidates. Yet, it was their diverse perspectives that caused them difficulty in the confirmation process. Both identified with groups that have less or no representation on the federal

bench. Indeed, I am unaware of even one openly gay federal court judge. And, of course, while the diversity of these candidates’ perspectives hindered them, Justice Alito’s perspective as an Italian American passed nearly unobserved.

While the numbers of women and members of minority groups on the federal bench lag behind their numbers in the general population, the attack on these diverse candidates during the confirmation process easily could discourage others of diverse backgrounds from pursuing a career on the federal bench. Indeed, reading what appears to be essentially attacks on the integrity and impartiality of Justice Sotomayor during the confirmation process certainly would discourage anyone who has publicly discussed their backgrounds from engaging in that process. Likewise, the characterization of Justice Kagan during the confirmation process as “anti-military,” and the public speculation about her sexual orientation that ensued certainly might discourage other similarly situated single accomplished women lawyers from seeking a nomination.

Members of the Senate Judiciary Committee and public commentators who attack such nontraditional candidates do the process of judicial confirmation and the goals of a diverse bench a disservice. As Justice Brennan explained, “We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide by someone else’s unfamiliar . . . practice because the same tolerant impulse protects our own idiosyncrasies. . . . In a community such as ours, ‘liberty’ must include the freedom not to conform.”\(^1\)

If one truly understands the importance of a diverse bench to the judiciary’s legitimacy, the irony in the vilification of nontraditional candidates for being, well, “nontraditional,” is

obvious. Bringing persons of differing perspectives to the bench strengthens the court system. It is discouraging that the confirmation process likely undermines this goal.