

DIVERSIFYING THE FEDERAL BENCH: IS UNIVERSAL LEGITIMACY FOR THE U.S. JUSTICE SYSTEM POSSIBLE?

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INTRODUCTION

Federal judicial appointments represent one of the most critical intersections of law and politics. All three branches of government are implicated in the federal appointment process: the President selects judicial nominees who must then seek confirmation from the Senate, and successful nominees go on to decide cases of great political import. The origins of interbranch conflicts over nominations date back to the foundational years of the country. For instance, the Senate rejected President Washington's Supreme Court nominee John Rutledge because of Rutledge's opposition to the Jay Treaty, which was strongly supported in the Federalist-dominated Senate.¹ Beginning in the early twentieth century, diversity nominations

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have similarly encountered great political opposition.² With the implementation of wide-scale initiatives to diversify the bench, the stakes of this ideological and partisan debate have grown exponentially.

When President Jimmy Carter took office in 1977, there were but eight women (1.4% of all federal court judges at that time), twenty African-Americans (3.5%), and five Hispanics (0.9%) on the federal bench (including both active and senior status judges).³ Believing that such imbalance jeopardized the integrity of the entire justice system,⁴ President Carter became the first president to implement a far-reaching appointment strategy with diversity as its cornerstone.⁵ By the end of his term, President Carter had made significant progress towards achieving a diverse bench, appointing forty-one women (15.7% of total Carter appointees and 3.7% of all judges at the end of Carter's term), thirty-seven African-Americans (14.2% for Carter, 5.6% of all judges), and sixteen Hispanics (6.1% for Carter, 2.3% of all judges).⁶

Years later, with racial, ethnic, and gender imbalance still plaguing the federal courts, Democratic presidents have followed President Carter's lead by promising to implement appointment strategies designed to increase di-

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¹ See JOHN A. MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 26–31 (1995).

² For example, when President Woodrow Wilson nominated the first Jewish Supreme Court Justice, Louis Brandeis, he was vehemently opposed by conservative probusiness and anti-Semitic groups. See MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 437–42 (2009). Similarly, white Southern senators fought the confirmation of Thurgood Marshall, the first African-American on the Supreme Court. See JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* 332–38 (2000).

³ I identified these judges through searches of the database available at *History of the Federal Judiciary*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/research_categories.html (last visited Aug. 18, 2011). To identify the percentages of blacks, Hispanics, and women on the bench at the time Carter took office, I searched separately by gender, race, and ethnicity for all judges confirmed before January 1, 1977, and terminated after January 1, 1977. I then identified the total number of judges on the bench on January 1, 1977, by adding together the number of men and women that were confirmed and terminated according to the above criteria. No judges were confirmed between January 1, 1977, and Carter's inauguration.

⁴ See NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* 77–78 (2005).

⁵ The 1976 Democratic Party platform stated: "All diplomats, federal judges and other major officials should be selected on a basis of qualifications. At all levels of government services, we will recruit, appoint and promote women and minorities." *Democratic Party Platforms: Democratic Party Platform of 1976*, AM. PRESIDENCY PROJECT (July 12, 1976), <http://www.presidency.ucsb.edu/ws/index.php?pid=29606> (emphasis added).

⁶ The same database search protocol used with respect to judicial diversity statistics prior to Carter's term, see *supra* note 3, was followed to identify the percentage of blacks, Hispanics, and women on the bench at the end of Carter's term except that the search selected for judges confirmed before January 1, 1981, and terminated after January 1, 1981.

iversity.⁷ President Clinton appointed the lowest percentage of white males (52.2%) to the bench in history.⁸ President Obama appears to be on the same course. In his first two years in office, Obama appointed a total of sixty-two judges to the federal courts; only 29.0% of them were white males.⁹ Reagan, however, did not follow this selection strategy.¹⁰

Beginning with the Reagan Administration, the diversity debate has typically broken down along party lines. This is not altogether surprising given the parties' positions on "affirmative action."¹¹ Thus far, only Democratic presidents—Carter, Clinton, and Obama—have implemented large-scale diversity initiatives for the appointment of judges to the federal

⁷ Although the 1992 and 1996 Democratic Party platforms were silent on Clinton's intended judicial appointment strategy, he promised during the course of the 1992 campaign to make the courts "look like America." Jo Mannies, *Clinton Goes on Attack Here*, ST. LOUIS POST-DISPATCH, Aug. 1, 1992, at 1A. However, the 1992 platform states explicitly that the party supports use of "affirmative action" to end discrimination based on race, ethnicity, and gender. *Democratic Party Platforms: Democratic Party Platform of 1992*, AM. PRESIDENCY PROJECT (July 13, 1992), <http://www.presidency.ucsb.edu/ws/index.php?pid=29610>.

The 2008 Democratic Party platform stated, "For our Judiciary, we will select and confirm judges who are men and women of unquestionable talent and character, who firmly respect the rule of law, who listen to and are respectful of different points of view, and who *represent the diversity of America*." *Democratic Party Platforms: 2008 Democratic Party Platform*, AM. PRESIDENCY PROJECT (Aug. 25, 2008), <http://www.presidency.ucsb.edu/ws/index.php?pid=78283> (emphasis added).

⁸ I obtained this data through the Federal Judicial Center database, see *History of the Federal Judiciary*, *supra* note 3, by searching the categories "race or ethnicity," "gender," and "appointing president" and then dividing the number of judges in each of these categories by the total number of Clinton appointees.

⁹ I obtained this data through the Federal Judicial Center database, see *History of the Federal Judiciary*, *supra* note 3, by searching the categories "race or ethnicity" and "gender" for all Obama appointees.

¹⁰ See SCHERER, *supra* note 4, at 81. The only underrepresented group that fared well during the two Republican Administrations following Carter was women. President Reagan named one woman to the Supreme Court (25% of total Reagan appointments to the Court), six to the courts of appeals (7.2% of total appointments to the appellate courts), and twenty-four to the district courts (8.3% of district court appointments). See *History of the Federal Judiciary*, *supra* note 3 (searching Reagan appointees by gender). Minorities fared much worse. President Reagan appointed no African-Americans or Hispanics to the Supreme Court; one African-American (1.2%) and one Hispanic (1.2%) to the courts of appeals; and six African-Americans (2.1%) and thirteen Hispanics (4.5%) to the district courts. See *id.* (searching Reagan appointees by race and ethnicity). Similarly, President George H.W. Bush appointed one African-American to the Supreme Court (50.0% of total Court appointments); two African-Americans (4.8% of total appellate appointments made), two Hispanics (5.8%), and seven women (16.7%) to the courts of appeals; and ten African-Americans (6.8%), six Hispanics (4.1%), and twenty-nine women (19.6%) to the district courts. See *id.* (searching Bush appointees by gender, race, and ethnicity). Notwithstanding Republicans' opposition to affirmative action, Presidents Reagan, George H.W. Bush, and George W. Bush all considered diversity to varying degrees when making high-profile judicial appointments. See *infra* notes 117–41 and accompanying text.

¹¹ During the 1970s, general remedies were commonly referred to as "affirmative action." Today that term is associated with the concept of fostering racial, ethnic, and gender quotas; the term is thus politically charged. Accordingly, I alternatively refer to affirmative action as a "diversity plan," "diversity initiative," "diversity strategy," and "diversity mandate." I make exceptions only when characterizing conservative arguments because the term "affirmative action" is still widely used in that context.

courts.¹² Republican presidents, on the other hand, have shied away from publicly endorsing diversity strategies for the federal bench and have rejected their use in other contexts as well;¹³ Republicans have typically advocated a “color-blind” system for awarding government benefits and jobs.¹⁴

Democratic proponents of a judicial appointment strategy designed to increase diversity have relied on three principal justifications: (1) diversity helps remedy past systemic discrimination in the judicial selection process,¹⁵ (2) diversity serves as a symbol for the members of groups that have been historically underrepresented on the bench,¹⁶ and (3) diversity ensures that more voices are heard in the decisionmaking process.¹⁷ Republican opponents of an appointment strategy designed to increase diversity also rely on three main arguments, all of which echo arguments made by conservatives in opposition to affirmative action: (1) affirmative action hurts, rather than helps, minorities and women,¹⁸ (2) diversity candidates are

¹² See, e.g., SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 327–35 (1997) (comparing Reagan’s minority and female appointees with Carter’s); SCHERER, *supra* note 4, at 80 (comparing Reagan’s and George H.W. Bush’s lower court diversity appointments with Carter’s). But see SCHERER, *supra* note 4, at 327–34 (noting that, although he did not appear to implement a large-scale initiative, Reagan did appoint several Italian-Americans, fourteen Hispanics, two Asian-Americans, and thirty women to the federal bench, including Justice Sandra Day O’Connor).

¹³ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476 (1989) (showing that George H.W. Bush’s Administration, through an amicus brief, argued against the use of affirmative action programs); Drew S. Days, III, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. REV. 309, 318 & n.47 (1984) (reporting the Reagan Administration’s “position that it will not under any circumstances seek hiring goals and timetables to remedy proven employment discrimination”).

¹⁴ See, e.g., *Republican Party Platforms: Republican Party Platform of 1992*, AM. PRESIDENCY PROJECT (Aug. 17, 1992), <http://www.presidency.ucsb.edu/ws/index.php?pid=25847> (“We believe in the Constitution and its guarantee of color-blind equal opportunity.”); see also LESLIE G. CARR, “COLOR-BLIND” RACISM 122 (1997) (reporting that the “color-blind” position became part of the Republican Party platform beginning with Reagan in 1980).

¹⁵ See Elliot E. Slotnick, *Lowering the Bench or Raising It Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL’Y REV. 270, 272 (1983).

¹⁶ Diversity signals that minorities have equal ability to rule, see Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes,”* 61 J. POL. 628, 628 (1999), and it provides minorities with professional role models to emulate, see ANNE PHILLIPS, THE POLITICS OF PRESENCE 62–63 (1995) (acknowledging the argument that the election of female political candidates sets an example that “raise[s] women’s self-esteem, encourage[s] others to follow in their footsteps, and dislodge[s] deep-rooted assumptions about what is appropriate to women and men”).

¹⁷ Cf. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 83–84 (1967). For example, gay rights issues are more likely to be taken up by the legislature with the presence of gay legislators. Donald P. Haider-Markel, Mark R. Joslyn & Chad J. Kniss, *Minority Group Interests and Political Representation: Gay Elected Officials in the Policy Process*, 62 J. POL. 568, 575–76 (2000).

¹⁸ It is said that affirmative action brands minorities and women with a “badge of inferiority.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment).

actually less qualified than nondiversity candidates;¹⁹ and (3) diversity initiatives constitute reverse discrimination, leading to white backlash.²⁰

I maintain that, when one parses the political rhetoric from the left and right on the diversity issue, there seems to be a previously unidentified point of consensus. Both parties want to maintain and enhance the legitimacy of the federal courts through their respective appointment strategies (diversity versus color-blind selection). The problem is that neither strategy in its current form is capable of conferring universal legitimacy on the federal courts. Research suggests that the Democrats' diversity strategy may raise legitimacy levels according to minorities but decrease it according to whites.²¹ At the same time, the Republicans' color-blind approach maintains the status quo for minorities and whites. Under this strategy, whites continue to dominate the federal bench, leaving whites' levels of legitimacy high and minorities' levels low. I refer to this conundrum as the "paradox of diversity."

The remainder of this Article will be organized as follows. Part I details the principal arguments made by political elites in favor of diversity strategies for judicial appointments, and Part II presents the opposing arguments. I draw on a number of sources, including exclusive face-to-face interviews with sitting district court judges.²² The interviews provide direct

¹⁹ See, e.g., LARRY C. BERKSON & SUSAN B. CARBON, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES 18 (1980) (responding to criticisms that the judicial selection system had produced an "essentially all white, male judiciary[.] Attorney General Griffin Bell has stated that the system's 'deficiencies have been largely that the pool of potential candidates has been very limited and that there has been a general unevenness in the quality of candidates.'" (quoting Griffin Bell, "Merit Selection" and Political Reality, WASH. POST, Feb. 25, 1978, at A15)). Although Griffin Bell was a very conservative Southern Democrat at the time (before the realignment of the South) he would likely be considered a Republican today. Moreover, he was often at odds with the White House he served on the issue of diversity appointments. See GOLDMAN, *supra* note 12, at 239–41, 254, 257. For the Republican criticism that female nominees are not qualified, see *infra* note 155.

²⁰ Republicans and conservatives often maintain that, by prioritizing the selection of minorities and women, more qualified white males are passed over for government appointments. See *infra* text accompanying notes 172–82.

²¹ See Nancy Scherer & Brett Curry, *Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts*, 72 J. POL. 90, 93–94, 101 (2010).

²² I interviewed nineteen district court judges from July to September 2009. The judges hailed from three northeastern urban jurisdictions (and five separate divisions), and they were chosen because of their diversity. All minority judges and women judges in these five divisions were contacted by letter and by telephone to request an interview. Of the ten minority males contacted, four agreed to interviews (40% response rate). Six minority female judges were contacted, and two were interviewed (33.3% response rate). Fourteen white females were contacted, and nine were interviewed (64.2% response rate). In addition to these diversity appointees, thirty white male judges (equal to the number of females and minorities contacted) from these five district court divisions were contacted in the same manner. They were selected in order to vary the jurisdiction and appointing presidents. Five white male judges agreed to interviews (13.3% response rate). Judges interviewed were appointed by Presidents Reagan, George H.W. Bush, Clinton, and George W. Bush.

insight into the views of minority and female judges—themselves diversity appointees—on the benefits and drawbacks of a judicial selection strategy centered on diversity, and the interviews also help to identify whether white male judges harbor any resentment toward such a strategy. Collectively, the interviews help to develop a framework for understanding the contours of the diversity debate as it relates to federal judicial selection.

In Part III, I discuss how both ends of the political continuum have the same goal in designing an appointment strategy: to enhance and preserve the legitimacy of the U.S. justice system in the eyes of the public. In Part IV, I discuss the paradox of diversity and the failure of the political parties' current judicial selection strategies to achieve the goal of universal legitimacy. I also argue that there may be a way to design an appointment strategy that preserves diversification efforts yet still promotes universal legitimacy for the courts.²³ I conclude by offering one hypothesis that may prove fruitful in breaking through the impasse on diversification of the federal bench and allow diversity efforts to continue while maintaining the legitimacy of the federal courts among both whites and minorities.

I. ARGUMENTS FAVORING A DIVERSIFICATION STRATEGY FOR THE FEDERAL COURTS

A. *Remedying Past Discrimination*

In the 1970s, courts and political leaders faced the challenge of crafting meaningful remedies to address the legacy of discrimination against minorities and women.²⁴ Such redress was grounded in principles of equity²⁵ and

Admittedly, this is not a random sample of all district court judges across the nation. Besides being concentrated in one region of the country, participants were those judges willing to sit for interviews, not those chosen by random sampling techniques. Thus, these findings cannot be generalized to all judges on the bench. However, I do not intend to use the interviews to draw broad generalizations about the attitudes of all federal court judges. I instead use interview testimony only to aid in formulating theories about diversity on the bench, and thus the lack of a random national sample is not relevant here. Similar uses of qualitative evidence are common in the social sciences. *See, e.g.*, CARL F. AUERBACH & LOUISE B. SILVERSTEIN, *QUALITATIVE DATA: AN INTRODUCTION TO CODE AND ANALYSIS* (2003); William M.K. Trochim, *Research Methods Knowledge Base: Qualitative Measures*, WEB CENTER FOR SOC. RES. METHODS (2006), <http://www.socialresearchmethods.net/kb/qual.php>.

²³ Note that increasing the number of women on the bench, unlike other minorities, does not seem to lower levels of legitimacy according to males. *See* Nancy Scherer & Brett Curry, *Judges and Gender: Descriptive Representation's Consequences for Judicial Legitimacy* 23–24 (Aug. 30, 2007) (unpublished manuscript) (on file with author) (presented at the 2007 Annual Conference of the American Political Science Association in Chicago, Illinois).

²⁴ *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 5–6 (1971).

²⁵ *See, e.g., id.* at 12 (“In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.” (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 299–300 (1955) (internal quotation marks omitted))). The “root

implemented active measures to ensure equal opportunity for all.²⁶ Some affirmative action plans were implemented under court order,²⁷ and some were adopted voluntarily by Congress or Executive Branch officials.²⁸ But during this period, affirmative action plans were understood to be a means to remedy past discrimination.²⁹ Affirmative action plans could take a variety of forms.³⁰ At one end of the spectrum were government-ordered hir-

idea of equity . . . [is] that law should be administered fairly.” W.S. Holdsworth, *The Early History of Equity*, 13 MICH. L. REV. 293, 293 (1915).

²⁶ ENCYCLOPEDIA OF BLACK STUDIES 3–4 (Molefi K. Asante & Ama Mazama eds., 2005).

²⁷ See, e.g., *Swann*, 402 U.S. 1 (reviewing several cases in which federal courts ordered desegregation and reviewing various school boards’ responses to those orders).

²⁸ See, e.g., *Fullilove v. Klutznick*, 488 U.S. 448 (1980) (holding that Congress could require federal government grantees with public works contracts to award 10% of subcontracting work to minority-owned businesses); William A. Gamson & Andre Modigliani, *The Changing Culture of Affirmative Action*, in EQUAL EMPLOYMENT OPPORTUNITY: LABOR MARKET DISCRIMINATION AND PUBLIC POLICY 373, 373–74 (Paul Burstein ed., 1994) (describing the Philadelphia Plan, by which Labor Department officials established minority hiring plans in the construction industry in major cities).

²⁹ See, e.g., NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY, at x (1987) (“‘Quotas’ or ‘goals and timetables’ became the norm in solving disputes over discrimination or appropriate degree of ‘affirmative action.’”); Gamson & Modigliani, *supra* note 28, at 374 (“The [Philadelphia] plan set specific numerical [hiring] goals for each of the building and construction trades Labor Department officials announced that ‘because of the deplorably low rate of employment among members of minority groups’ in the [construction] industry, they would set up similar plans in other major cities.”); J. Edward Kellough, *Affirmative Action in Government Employment*, ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 1992, at 117, 119 (“All affirmative action programs are intended as a force for justice in employment policy. [Equal employment opportunity] efforts in general are designed to guarantee that people who have historically been barred from employment or promotion because of race, ethnicity, or sex are no longer denied opportunities for such reasons.”); Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961–1996*, in COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA 87, 91 (John David Skrentny ed., 2001) (“The scope of [affirmative action] law expanded through the OFCC’S [Office of Federal Contract Compliance] Order 4 in early 1970, which required employers to submit detailed reports on their employment patterns and explicit plans to remedy inequality.”); Bernard Rosen, *Affirmative Action Produces Equal Employment Opportunity for All*, 34 PUB. ADMIN. REV. 237, 238 (1974) (“Meaningful response is now being made to the problems of those who have not participated in the competition for public employment, or who even now cannot do so successfully because the system may have been designed and operated without taking them into account. The response has taken a variety of approaches, depending on the nature of the problems of the work force and the needs of the employer. Generally, successful equal employment opportunity programs comprise a full range of affirmative actions. These actions are tailored to the problems of those who because of past discriminations are not competing successfully for entry into the system; or who, once on the rolls, are unable to realize their full potential because of gaps in education or skills, also often due to past discrimination.”); Finis Welch, *Affirmative Action and Its Enforcement*, 71 AM. ECON. REV. 127, 127 (“The term, *affirmative action*, was first used in this context in an Executive Order which required federal contractors to take affirmative action to eliminate effects of past discrimination and to protect against current discrimination.”).

³⁰ For example, in *Swann* the Court ordered, among other things, racial quotas and the busing of students to different schools to achieve school integration in the South. 402 U.S. at 22–32. In *Fullilove*, the Court upheld an affirmative action provision in the Carter Administration’s Public Works Employment Act of 1977 that imposed a 10% quota for minority-owned businesses as subcontractors on federal government contracts. 448 U.S. at 453–54, 491–92.

ing quotas for minority and female job candidates.³¹ At the other end were government-ordered task forces charged with examining issues of race or gender equality.³²

A product of his time, President Carter framed his federal judicial selection strategy, the first widespread diversity initiative for the federal courts, as an affirmative action plan.³³ Applying the equitable remedy for past discrimination to the judicial selection process, Carter issued three crit-

³¹ See Gamson & Modigliani, *supra* note 28, at 373–74.

³² See, e.g., Exec. Order No. 12,138, 3 C.F.R. 393 (1980).

³³ See BERKSON & CARBON, *supra* note 19, at 34 (quoting Margaret McKenna, the Deputy Assistant for the White House Office of Legal Counsel, as stating that early in his presidency Carter had a “firm commitment to affirmative action in the judicial selection process and [a] concern that the panels . . . find and recruit minority groups and nontraditional candidates for the federal bench.” (internal quotation marks omitted)); GOLDMAN, *supra* note 12, at 241 (“Carter was personally committed to affirmative action and was concerned that it play out well, particularly for appeals court appointments, which clearly were tied to Carter’s innovative merit selection commission.”); W. Gary Fowler, *A Comparison of Initial Recommendation Procedures: Judicial Selection Under Reagan and Carter*, 1 YALE L. & POL’Y REV. 299, 300 (1983) (characterizing Carter’s judicial selection strategy as focused on “affirmative action”); Jon Gottschall, *Carter’s Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 166–67 (1983); Sarah Wilson, *Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective*, 5 J. APP. PRAC. & PROCESS 29, 37 n.9 (2003). As President Carter’s White House Counsel put it at an address to the D.C. Bar:

The President has two goals in the selection process. Two goals of equal importance. One is to continue to appoint only judges of high quality; the other is to open the selection process to groups, such as minorities and women, which historically have had little representation on the federal bench.

Mary L. Clark, *Carter’s Groundbreaking Appointment of Women to the Federal Bench: His Other “Human Rights” Record*, 11 AM. U. J. GENDER SOC. POL’Y & L. 1131, 1138 n.27 (quoting Robert J. Lipshutz, White House Counsel, Address to the D.C. Bar 4 (Jan. 25, 1979) (on file with the Carter Presidential Library)). President Carter at times also referenced descriptive and substantive representation as benefits flowing from his diversity plan. See SCHERER, *supra* note 4, at 77–78.

Neither President Clinton nor President Obama ever indicated that his diversity plans were intended as remedial actions or that they were “affirmative action” plans. This is perhaps due to the fact that Supreme Court case law after 1980 began applying a strict scrutiny analysis to benign preferences rather than the intermediate scrutiny standard in place during the Carter Administration that gave greater deference to the government to engage in diversity initiatives. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–95 (1989). Clinton and Obama instead relied on descriptive and substantive representation, respectively, to justify using diversity initiatives. See *infra* text accompanying notes 70–81 and 110–16. However, one minority female judge I interviewed suggested that President Clinton, as a white progressive from the South, was likely to have tacitly endorsed the justification of remedying past discrimination for diversity appointments:

I think when you . . . are from the South, you cannot help but think about the inequities [between the races] from the past and [ways to] try and right them . . . [I]f you were just alive [during the Jim Crow era] and had some inkling of law, it is hard not to be cognizant about *Brown v. Board of Education* and what it did to the South[,] . . . [t]he recalcitrance of most [white] folks to any kind of enforcement of the [*Brown* decision]. With regard to Carter and Clinton, I think that [remedying past discrimination] is part of [their justification for diversity appointments].

Interview with Judge E (Aug. 12, 2009). In compliance with the confidentiality agreements I have with all judges interviewed, I assign to each a letter of the alphabet rather than identifying them by name.

ical executive orders aimed at remedying the past systemic exclusion of minorities and women from consideration for judgeships. First, Carter set out to dismantle the traditional method of selecting lower court judges—senatorial courtesy—which had perpetuated the old white boys’ network.³⁴ Second, Carter directed the appellate merit selection committees to make “special efforts” to identify minorities and women for appellate vacancies.³⁵ Third, Carter directed his Attorney General to make “an *affirmative effort* . . . to identify qualified candidates, including women and members of minority groups” for federal judgeships.³⁶

Carter himself also characterized his selection strategy as one meant to redress the lack of women and minorities on the bench. In signing the Omnibus Judgeship Act on October 20, 1978, Carter explained:

This act provides a unique opportunity to begin to redress another disturbing feature of the Federal judiciary: the almost complete absence of women or members of minority groups I am committed to these appointments, and pleased that this act recognizes that we need more than token representation on the Federal bench.³⁷

What form these “affirmative effort[s]” should take was less apparent. President Carter supported the whole spectrum of equitable remedies, including quotas, outside the judicial selection arena.³⁸ As for the federal courts, however, Carter acknowledged that quotas were desirable but unfeasible: “If I didn’t have to get Senate confirmation of appointees, I could

³⁴ Carter issued Executive Order 11,972, which created merit selection committees for all appellate court jurisdictions. 3 C.F.R. 96 (1978), *revoked by* Exec. Order No. 12,059, 3 C.F.R. 180 (1979). The Order wrested from home state senators (overwhelmingly white men) the power to bestow appellate judgeships on their patrons (also overwhelmingly white men). See Larry Berkson, Susan Carbon & Alan Neff, *A Study of the U.S. Circuit Judge Nominating Commission: Findings, Conclusions and Recommendations*, 63 JUDICATURE 104, 105 (1979); Clark, *supra* note 33, at 1139, 1148. Carter believed that these committees could reverse the systemic exclusion of minorities and women from the federal bench. However, Carter was never able to persuade senators to cede power over district court nominations. SCHERER, *supra* note 4, at 79.

³⁵ See Exec. Order No. 12,059, *supra* note 34, at 182 (“Each panel is encouraged to make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees.”), *amended by* Exec. Order No. 12,097, 3 C.F.R. 254 (1979).

³⁶ See Exec. Order No. 12,097, *supra* note 35, at 255 (emphasis added), *revoked by* Exec. Order No. 12,553, 51 Fed. Reg. 7,237, 7,242 (Feb. 25, 1986). It is particularly telling that Carter framed his affirmative action plan in terms of groups rather than individuals. This suggests that Carter’s plan was intended to be a remedy for past discrimination against *groups* rather than *individuals*. In the 1970s, it was deemed acceptable for an affirmative action plan to provide a remedy for past discrimination against certain groups through active steps to help promote members of these groups. See, e.g., Fullilove v. Klutznick, 488 U.S. 448 (1980).

³⁷ Presidential Statement on Signing H.R. 7843 into Law, 2 PUB. PAPERS 1803 (Oct. 20, 1978).

³⁸ See Public Works Employment Act of 1977, Pub. L. No. 95-28, § 102(b), 91 Stat. 116, 117 (codified at 42 U.S.C. § 6701 (2006)) (establishing that no money would be granted to state and local governments unless at least 10% of the projects undertaken with the grant were awarded to minority businesses).

just tell you flatly that 12 percent of all my judicial appointments would be black and three percent would be Spanish speaking and 40 percent would be women.”³⁹ Although interbranch political constraints kept President Carter from initiating strictly enforced quotas, he appears to have had certain minority and gender hiring goals in mind for his appointments.⁴⁰ Carter is also known to have ignored white male senators’ recommendations for district court nominations when they put forth the name of a white man, rather than an available minority or female candidate, for a district court vacancy.⁴¹

White judges (male and female) interviewed for this project uniformly dismissed the notion that diversity appointments should be made in the twenty-first century to remedy discrimination that ended decades ago.⁴² To the contrary, one such judge maintained that minorities today enjoy an *advantage* over whites in garnering federal judicial nominations. Commenting on past discrimination, the judge stated, “I think it’s time to stop feeling guilty. Today, it is just the opposite. If you are a well qualified minority then you are sought after [for a judgeship].”⁴³ A few minority judges concurred that the time for talk about remedying past discrimination has passed, including one minority male judge who explained, “I am not worried historically about what happened—I’m worried presently what will happen in the future.”⁴⁴

A majority of African-American and Hispanic judges interviewed (both male and female), however, were not so quick to dismiss the justification of diversity appointments to remedy past discrimination. When asked about how to address the current underrepresentation of minorities and women on the federal bench, a minority female judge was quick to point

³⁹ SCHERER, *supra* note 4, at 80 (quoting Elliott E. Slotnick, *supra* note 15, at 277 (quoting President Carter)).

⁴⁰ President Carter was said to have promised a group of African-American leaders from the South that he would appoint a black judge to every U.S. district court in the former Confederate states. *See* Wilson, *supra* note 33, at 37 n.9.

⁴¹ *See* GOLDMAN, *supra* note 12, at 260–64 (describing instances in which Carter bypassed a senator’s suggestion of a white male nominee in favor of a minority or female nominee or negotiated with senators in order to achieve racial diversity in the nominations). President Carter’s White House Counsel was often at odds with his Attorney General, Griffin Bell, who insisted that there was a dearth of qualified minority and female lawyers from which to choose jurists for the bench. *See* Clark, *supra* note 33, at 1138.

⁴² Notably, not a single white female judge interviewed saw this justification for diversity appointments as applicable to appointments of women; they instead discussed the past-discrimination remedy only in terms of racial and ethnic discrimination. Justice Ruth Bader Ginsburg has echoed this sentiment when discussing the number of women on the federal bench. Panel, *Women on the Bench*, 12 COLUM. J. GENDER & L. 361, 370 (2003) (remarks of Justice Ginsburg) (“With women in law schools in the fifty percent range, one need not worry about the numbers. Women hold up half the sky and they will do so in our courts. They need no favors.”).

⁴³ Interview with Judge A (July 31, 2009).

⁴⁴ Interview with Judge B (Aug. 12, 2009).

out that any discussion about achieving diversity today must first acknowledge past systemic discrimination against minorities, such as the bar against admission of minorities previously instituted by many law schools.⁴⁵ A male minority judge put it this way:

We are not a fair and just society if we have a portion of the population that is excluded [from serving in a government institution]. . . . Because there had historically been outright discrimination against certain parts of the population, we were not a just society. . . . Remedying past discrimination creates a just society—recasting [the courts] . . . so people do not feel excluded.⁴⁶

B. Descriptive Representation

Descriptive representatives are those who “stand[] for” or are “sufficiently like” constituents who are members of the same racial, ethnic, gender, or other identity group.⁴⁷ In theory, were an institution truly descriptive, it would mirror the demographics of our nation.⁴⁸ The concept that our political institutions should reflect our population’s diverse makeup is as old as the United States. In *Federalist No. 39*, Madison opined that a representative government is only deemed legitimate if its institutions draw from all sectors of the population: “It is *essential* to [a republican] government, that it be derived from the great body of the society, not from . . . a favored class of it”⁴⁹ In modern times, descriptive representation encompasses the idea that “Black legislators represent Black constituents, women legislators represent women constituents, and so on.”⁵⁰

Whereas equitable remedies designed to redress past discrimination are purely instrumental in nature, descriptive representation serves both instrumental and symbolic purposes. Instrumentally, descriptive representation may directly translate into better substantive representation for underrepresented groups.⁵¹ In this way, it helps ensure that ours is a government “of

⁴⁵ Interview with Judge C (Sept. 1, 2009).

⁴⁶ Interview with Judge D (July 17, 2009).

⁴⁷ PITKIN, *supra* note 17, at 80 (citing A. Phillips Griffiths & Richard Wollheim, *How Can One Person Represent Another?*, 34 ARISTOTELIAN SOC’Y (SUPP.) 187 (1960)).

⁴⁸ *See id.* at 73.

⁴⁹ THE FEDERALIST NO. 39, at 210 (James Madison) (E.H. Scott ed., Chicago, Scott, Foresman & Co. 1898). Admittedly, the Framers did not contemplate equality for blacks, women, or the poor, but the *concept* of descriptive representation is at the heart of Madison’s statement. *See* PITKIN, *supra* note 17, at 60 (“A representative legislature . . . ‘should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason and act like them.’” (quoting Letter from John Adams to John Penn, in IV THE WORKS OF JOHN ADAMS 205 (Boston, Little Brown 1851))).

⁵⁰ Mansbridge, *supra* note 16, at 629.

⁵¹ *See, e.g.*, Haider-Markel, Joslyn & Kniss, *supra* note 17, at 573 (finding a correlation between the presence of gay and lesbian officials and the adoption of domestic partner registration programs); Mansbridge, *supra* note 16, at 643–48 (explaining that “[w]hen [voter] interests are uncrystallized, the best way to have one’s most important substantive interests represented is often to choose a representative whose descriptive characteristics match one’s own on the issues one expects to emerge” because “a voter can expect the representative to react more or less the way the voter would have”); Leslie A.

the people, by the people, for the people.”⁵² Symbolically, descriptive representation signals to underrepresented groups that “certain features of one’s identity do not mark one as less able to govern.”⁵³ Moreover, a descriptive representative may serve as a role model who stands as a symbol to others in her group that they too can achieve success at the highest echelons of our government.⁵⁴ Thus, descriptive representation looks not at the historical underpinnings of discrimination against minorities and women, but rather at both the present (which identity groups are currently underrepresented) and the future (how the symbolism of diversity might influence future generations of minorities and women).

Several of the white female judges I interviewed supported descriptive representation on the bench specifically because of its powerful symbolism and cited Justice Sotomayor as an example.⁵⁵ One white female judge stated it this way: “[I]f you work hard, you can achieve. Sotomayor has set an example and created an opportunity for other Hispanics.”⁵⁶ Another white female judge echoed these sentiments, describing Justice Sotomayor’s appointment as “incredibly important” because, for the federal judiciary “to have legitimacy, people have to be able to see it as a place they can aspire to [join], that it is to some extent reflective of the democratic society.”⁵⁷

Minority judges interviewed also tended to focus on the symbolism of descriptive representation though none directly referenced Justice Sotomayor. As one minority male judge stated:

I think [descriptive representation] is a laudable goal, but more important, it’s a realistic goal that is important for the country to see. . . . [I]magine how the country shortchanges itself when it, for instance on gender, says to half the population, we don’t believe you can be in [the U.S. courts]. . . . I can tell you that in the minority community, we were really very proud of Judge [X], the

Schwandt-Bayer & William Mishler, *An Integrated Model of Women’s Representation*, 67 J. POL. 407, 412 (2005).

⁵² Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), available at <http://showcase.netins.net/web/creative/lincoln/speeches/gettysburg.htm>.

⁵³ Mansbridge, *supra* note 16, at 651.

⁵⁴ See Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109, 1116 (2003); Mansbridge, *supra* note 16, at 649; Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1430–31 (2008).

⁵⁵ Once again, white female judges focused not on the underrepresentation of women on the bench but on the underrepresentation of minorities. This is true notwithstanding the fact that I informed each judge that women are the most underrepresented group, comprising 50% of the general U.S. population but only 20% of the federal bench.

⁵⁶ Interview with Judge A, *supra* note 43.

⁵⁷ Interview with Judge F (July 30, 2009); see also Interview with Judge A, *supra* note 43 (“This nomination was positive in two ways. First, there is now someone in a high position who represents Hispanics. Second, [Sotomayor] is someone who went to the best schools and she’s respected across the board.”).

first black and first woman to sit [in this jurisdiction]. . . . [S]he was really . . . a paragon.⁵⁸

A minority female judge saw descriptive representation in similar terms:

The courts are supposed to be for the people . . . and when the community has a certain representation, the bench needs to at least reflect that in some degree because, you know, . . . I think the public deserves that quite honestly. It's not some bastion of elitism that no one can get to except if you are a white male. So I think it's important for the community and for what we're supposed to be here for, which is justice. So it should be for one and for all. So it has to be done by one and all.⁵⁹

Descriptive representation is not without its critics. Many political scholars contend that minority and gender groups are not necessarily served by leaders who are descriptively representative of them but are better served by substantive representatives.⁶⁰ Others argue that descriptive representation incorrectly assumes that all members of a single group are alike.⁶¹ The most cynical of scholars question how far we should take this theory: should "morons" represent "morons"?⁶²

Moving from normative theory to refutable hypotheses, how does the theory of descriptive representation stand up to empirical analysis? Scho-

⁵⁸ Interview with Judge M (Sept. 10, 2009).

⁵⁹ Interview with Judge E, *supra* note 33; *see also* Interview with Judge F, *supra* note 57 ("For the [judicial] institution to have legitimacy, people have to be able to see it as a place they can aspire to . . .").

⁶⁰ *See, e.g.*, CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* 5 (2006) (arguing that increasing the number of black representatives in political offices does not necessarily translate into blacks' substantive interests being better served in Congress); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 87–89 (2000) (arguing that women, among other groups, are not a monolithic group that can be substantively represented by a single female representative); Mansbridge, *supra* note 16, at 629–30 (reviewing scholarship that questions the value of descriptive representation). In fact, some have argued that efforts to increase descriptive representation in Congress actually *decrease* minority groups' overall substantive representation within the institution; concentrating black voters within a single district means more white conservatives are elected in surrounding districts than would be elected if minority voters were dispersed among several districts such that they would elect fewer minorities but more liberal whites. *See* Charles Cameron, David Epstein & Sharyn O'Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 808 (1996). This tradeoff between substantive and descriptive representation is not at issue in the context of allocating federal judicial seats because selection rests not in the hands of voters but in those of the President, whose judicial nominees all tend to lie close to the President on the ideological continuum. *See* SCHERER, *supra* note 4, at 49–73 (demonstrating that judges decide cases in line with the issue positions espoused by their appointing presidents).

⁶¹ *See* Suzanne Dovi, *Preferable Descriptive Representatives: Will Just Any Woman, Black, or Latino Do?*, 96 AM. POL. SCI. REV. 729, 740 (2002) (suggesting that class divisions may make wealthier black representatives poor substantive representatives of lower class blacks).

⁶² REPRESENTATION: YEARBOOK OF THE AMERICAN SOCIETY FOR POLITICAL AND LEGAL PHILOSOPHY 11 n.18 (J. Roland Pennock & John W. Chapman eds., 1968) (Professor A. Phillips Griffiths "disposes effectively of the idea of 'descriptive' representation As he says, no one would argue that morons should be represented by morons." (citing Griffiths & Wollheim, *supra* note 47)).

lars of black political behavior have found that descriptive representation does aid black constituents.⁶³ Of particular interest to scholars of black public opinion is whether a black representative raises blacks' levels of trust in their representatives and the institution of Congress.⁶⁴

Far less work has been done on descriptive gender representation. One study suggests that women are more gender conscious than men in their evaluation of candidates and prefer female candidates over male candidates.⁶⁵ However, there is scant evidence that a descriptive female representative increases a woman's trust in her congresswoman⁶⁶ or that an increase in the overall percentage of women within an institution increases women's trust in that institution.⁶⁷

⁶³ The benefits found to accrue to underrepresented groups include both behavioral and attitudinal changes. On the behavioral side, studies have found that, for African-Americans, having a black descriptive representative leads to better communication between the representative and the constituent, see Susan A. Banducci, Todd Donovan & Jeffrey A. Karp, *Minority Representation, Empowerment, and Participation*, 66 J. POL. 534, 544–46 (2004); greater minority voter mobilization, see D. Stephen Voss & David Lublin, *Black Incumbents, White Districts: An Appraisal of the 1996 Congressional Elections*, 29 AM. POL. RES. 141, 150 (2001) (reporting greater black voting turnout when a black candidate was on the ballot); and greater political activism, see, e.g., FREDRICK C. HARRIS, VALERIA SINCLAIR-CHAPMAN & BRIAN D. MCKENZIE, *COUNTERVAILING FORCES IN AFRICAN-AMERICAN CIVIC ACTIVISM, 1973–1994*, at 4–7 (2006).

As for public opinion, studies have found that African-Americans (1) rate the performance of a black congressman higher than that of a white congressman, see Janet M. Box-Steffensmeier et al., *The Effects of Political Representation on the Electoral Advantages of House Incumbents*, 56 POL. RES. Q. 259, 261 (2003), and (2) experience increased group pride and empowerment when a black official is elected, see PATRICIA GURIN, SHIRLEY HATCHETT & JAMES S. JACKSON, *HOPE AND INDEPENDENCE: BLACKS' RESPONSE TO ELECTORAL AND PARTY POLITICS* 156 (1989).

⁶⁴ Studies examining whether a descriptive representative increases minorities' trust and confidence in a particular political institution have yielded mixed results. Compare Lawrence Bobo & Franklin D. Gilliam, Jr., *Race, Sociopolitical Participation, and Black Empowerment*, 84 AM. POL. SCI. REV. 377, 382–83 (1990) (finding that the presence of black local representatives increases blacks' trust in municipal government), with Claudine Gay, *Spirals of Trust? The Effect of Descriptive Representation on the Relationship Between Citizens and Their Government*, 46 AM. J. POL. SCI. 717, 729–30 & tbl.5 (2002) (concluding that the presence of black congressmen does not increase blacks' trust in Congress). Studies examining whether an aggregate increase in descriptive representation within a particular political institution increases trust for that institution among minorities have also reached conflicting conclusions. Compare L. Marvin Overby et al., *Race, Political Empowerment, and Minority Perceptions of Judicial Fairness*, 86 SOC. SCI. Q. 444, 454 (2005) (finding no change in public trust of the Mississippi state judiciary in response to the presence of black judges), with KATHERINE TATE, *BLACK FACES IN THE MIRROR: AFRICAN AMERICANS AND THEIR REPRESENTATIVES IN THE U.S. CONGRESS* 151 (2004) (finding increased trust in Congress among blacks who believed there to be strong numbers of blacks in Congress), and Scherer & Curry, *supra* note 21, at 97 (finding an increase in minority support when blacks were told that blacks constitute a greater percentage of the federal bench than of the general population).

⁶⁵ See Cindy Simon Rosenthal, *The Role of Gender in Descriptive Representation*, 48 POL. RES. Q. 599, 609 (1995).

⁶⁶ For one such study, see Jennifer L. Lawless, *Politics of Presence? Congresswomen and Symbolic Representation*, 57 POL. RES. Q. 81, 87 & tbl.1 (2004).

⁶⁷ See Scherer & Curry, *supra* note 23, at 22–23.

The theory of descriptive representation is most often debated in the context of Congress—should the composition of black, Hispanic, and female congressional representatives reflect that of the nation? Unelected federal judges, however, do not “represent” constituents in the same way that members of Congress do. Nonetheless, the theory is still applicable to the federal judicial system because of the symbolic messages sent to under-represented groups. Accordingly, scholars have applied the theory of descriptive representation with equal force when studying the federal judiciary despite its unique political nature among the three branches of the national government.⁶⁸ At least one scholar has argued that descriptive representation is even *more* critical in the courts than it is in the elected branches: “Judges have a more direct and irrevocable impact in the lives of many Americans than local or even national legislators. This is particularly true for African Americans, who are disproportionately involved with the judicial system.”⁶⁹

By turning the theory of descriptive representation into actual policy, President Clinton became the first president to make descriptive representation the cornerstone of his judicial selection strategy.⁷⁰ During his 1992 presidential campaign, Clinton promised to make the cabinet and other appointed positions “look like America.”⁷¹ By increasing the number of women, Hispanics, and African-Americans on the bench, Clinton believed that the federal judiciary would better reflect the racial, ethnic, and gender makeup of the general population:

A most troubling aspect of judicial appointments during the Reagan-Bush era has been the sharp decline in the selection of women and minority judges, at the very time when more and more qualified women and minority candidates were reaching the time of their lives where they could serve as judges. While there are many fine women and minority attorneys all over the country who would potentially be superb federal judges, Mr. [George H.W.] Bush’s appointments fail to reflect the breadth and diversity of the bar, much less that of our nation.

....

⁶⁸ See Beverly Blair Cook, *Black Representation in the Third Branch*, 1 BLACK L.J. 260 (1971); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 406–10 (2000); Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law that Is Inclusive?: What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 129–37 (2004); Overby et al., *supra* note 64, at 449–50; Scherer & Curry, *supra* note 21, at 92–93.

⁶⁹ Ifill, *supra* note 68, at 407–08 (footnotes omitted).

⁷⁰ President Clinton appointed to the federal bench 194 white men (52.2% of Clinton appointments), 83 white women (22.3%), 46 black men (12.4%), 15 black women (4.0%), 18 Hispanic men (4.8%), 5 Hispanic women (1.3%), 4 Asian men (1.1%), and 1 Asian woman (0.3%). I obtained this data through the Federal Judicial Center database, see *History of the Federal Judiciary*, *supra* note 3, by searching the categories “race or ethnicity” and “gender” for all Clinton appointees.

⁷¹ Governor William J. Clinton, Statement at the Third 1992 Presidential Debate (Oct. 19, 1992) (transcript available at <http://www.pbs.org/newshour/debatingourdestiny/92debates/3prez3.html>).

The narrow judicial appointments of George [H.W.] Bush have resulted in the emergence of a judiciary that is less reflective of our diverse society than at any other time in recent memory.⁷²

President Clinton's focus on increasing the public's confidence in the courts through diversity appointments is the very definition of descriptive representation. Several of the judges interviewed for this project agreed. One white male judge stated that descriptive representation "just enhances the ability of the populace to feel that [judges] are more *believable* if our makeup is such that it is more similar to what the populace is."⁷³ Another white male judge stated that increased diversity on the bench "instills *confidence* in the system."⁷⁴

Other judges made similar remarks but saw the benefits accruing only to minorities; they believed descriptive representation for minorities made the courts "*fairer*,"⁷⁵ more "satisfact[ory],"⁷⁶ and "friendlier."⁷⁷ As discussed below, the judges' observations about diversity's ability to increase the courts' "believability," "fairness," and "friendliness" as well as "confidence" and "satisfaction" among citizens are all important components of the broader construct of political legitimacy.⁷⁸

⁷² Bill Clinton, *Judiciary Suffers Racial, Sexual Lack of Balance*, NAT'L L.J., Nov. 2, 1992, at 15, 15. Two white female judges I interviewed believed that the relevant comparison group for descriptive representation on the federal bench is not a particular jurisdiction's racial, ethnic, or gender makeup but instead the demographic makeup of our nation's law schools. According to this formulation of descriptive representation, if 7% of law school graduates nationwide are African-American, then only 7% of all district court judges in a hypothetical district court with twenty judges need be African-American even if African-Americans comprise 25% of citizens living within that particular court's jurisdiction. This comparison, however, is not consistent with the theory of descriptive representation, which considers the racial, ethnic, and gender makeup of the community's general population first and foremost. Thus, to satisfy descriptive representation in my hypothetical jurisdiction, five of the twenty judges sitting in that court (25% of the total number of judges) should be African-American. Given that the jurisdiction is likely to have at least five black lawyers qualified to sit on the bench, descriptive representation would require that 25% of the judges be African-American rather than one black judge pursuant to a 7% formulation.

Moreover, to use as the comparison group the percentage of minorities graduating from law school only perpetuates the underrepresentation of minorities on the bench because blacks are also underrepresented in law schools. See William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950–2000*, 19 HARV. BLACKLETTER L.J. 1, 36–40 & charts 9–11B (2003) (arguing that factors other than qualifications have been suppressing law school admissions for blacks); see also Tamar Lewin, *Law School Admissions Lag Among Minorities*, N.Y. TIMES, Jan. 7, 2010, at A22 (reporting that law schools have admitted more students per class between 1993 and 2008 but that of the numbers of African-American and Mexican-American law students declined during that period despite overall increases in grade point averages and LSAT scores among those minority groups).

⁷³ Interview with Judge G (Sept. 10, 2009).

⁷⁴ Interview with Judge H (Sept. 1, 2009).

⁷⁵ Interview with Judge I (July 15, 2009).

⁷⁶ Interview with Judge K (Sept. 8, 2009).

⁷⁷ Interview with Judge J (Sept. 10, 2009).

⁷⁸ Cf. Scherer & Curry, *supra* note 21, at 95–97.

It is not surprising that President Clinton articulated a justification for his diversity initiative that was different from that of his Democratic predecessor, President Carter. Though both presidents wanted to increase diversity on the bench, President Carter served his term during the heyday of affirmative action.⁷⁹ By the time President Clinton ran for president in the early 1990s, a majority of white Americans believed that affirmative action discriminated against white men.⁸⁰ Moreover, unlike President Carter, President Clinton had to walk a fine line so as not to run afoul of Supreme Court doctrine that, after the Carter presidency, had severely restricted the government's ability to implement traditional affirmative action plans on the basis of remedying past discrimination.⁸¹

When asked whether they believed that presidents should strive to make racial, ethnic, and gender diversity on the bench reflect the demographics of the population, most of the judges interviewed for this Article—black, white, male, female—were supportive without referencing any specific hiring goals (or quotas).⁸² One judge did support the idea of pure descriptive representation for individual communities.⁸³

Two white male judges, however, expressed only conditional support for descriptive representation. One believed that descriptive characteristics other than race, ethnicity, or gender should be considered in striving for a bench that mirrors America: “The community in my view should want on the judiciary people who they can look up to and also identify with. And that means taking account of a lot of different factors.”⁸⁴ The other white

⁷⁹ See SAMUEL LEITER & WILLIAM M. LEITER, AFFIRMATIVE ACTION IN ANTI-DISCRIMINATION LAW AND POLICY 2–3 (2002); CAROL M. SWAIN, THE NEW WHITE NATIONALISM IN AMERICA: ITS CHALLENGE TO INTEGRATION 142–56 (2002) (describing affirmative action programs during the Carter Administration).

⁸⁰ BRON RAYMOND TAYLOR, AFFIRMATIVE ACTION AT WORK: LAW, POLITICS, AND ETHICS 141 (1991).

⁸¹ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (establishing strict scrutiny as the standard of review for “federal racial classifications”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989) (holding that state and local governments cannot justify the use of racial quotas based on an “amorphous claim that there has been past discrimination in a particular industry”).

⁸² See, e.g., Interview with Judge G, *supra* note 73 (“I’m of the opinion that certainly efforts should be made whenever possible and without the quality being lowered to embrace diversity. I’m a believer of that.”); Interview with Judge J, *supra* note 77 (“If you’re asking me whether I think that having increased diversity on the bench is a good idea, I think that it is. I think the more diversity on the bench, the better off we are from the standpoint of different life experiences and perspectives that are brought to the bench.”); Interview with Judge O (Aug. 4, 2009) (“It enhances the perception of fairness. And it’s good for the community.”); Interview with Judge Q (Aug. 5, 2009) (“I think so. I think it’s a matter of public confidence. I think different perspectives are good.”).

⁸³ When asked whether the president should increase diversity according to the racial, ethnic, and gender demographics in the population, this judge unequivocally responded, “Yes. . . . [W]hen the community has a certain representation, the bench needs to at least reflect that in some degree because . . . I think the public deserves that quite honestly.” Interview with Judge E, *supra* note 33.

⁸⁴ Interview with Judge L (July 23, 2009).

male judge, while acknowledging that descriptive representation aided minority communities, worried about white backlash:

Without question public confidence [in the courts] is important. It does [exist] in some communities and it does not in others. Communities where it lessens their confidence in the courts may believe that affirmative action candidates [for the bench] have an agenda. But [increasing diversity] is very important for minority communities.⁸⁵

C. *Substantive Representation*

The theory of substantive representation holds that those who represent the public's interests should be responsive to the policy views of their constituents, meaning "acting for others, an activity in behalf of, in the interest of, as the agent of, someone else."⁸⁶ But does the representation of minority and female interests necessarily mean that more blacks, Hispanics, and women must be present in the halls of power? Why, for example, could not a white liberal Democratic judicial appointee substantively represent the views of the black community?

The answer may lie in the very different life experiences that members of certain groups, in this study minority and female judges, have compared to white males.⁸⁷ To the extent that minority and female judges have unique perspectives that influence their decisionmaking according to the theory of substantive representation, their presence on the bench is necessary to ensure that the views of more Americans are considered in the judicial decisionmaking process. If, however, diversity appointees were to decide cases in the same manner as white males (assuming similar political ideologies), then diversity on the bench may not be necessary or sufficient to further the substantive representation of minorities and women.⁸⁸

What does social science research tell us about identity and judging? For some scholars, descriptive representation is the only way to achieve

⁸⁵ Interview with Judge R (July 29, 2009).

⁸⁶ PITKIN, *supra* note 17, at 113.

⁸⁷ See Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 328 (2002) (describing how effects of segregation and racial discrimination may give some blacks a heightened awareness in some areas of the law); Elaine Martin, *Men and Women on the Bench: Vive La Difference?*, 73 JUDICATURE 204, 208 (1990) (explaining that women's uniquely feminine experiences may lead female judges to different outcomes in cases containing issues like sex discrimination); Nancy Scherer, *Blacks on the Bench*, 119 POL. SCI. Q. 655, 658-59 (2004) (describing how blacks' views of legal issues surrounding criminal law enforcement and procedures have been shaped by the disparate impact of the criminal law on blacks).

⁸⁸ At least one political theorist has argued that, even short of distinctive decisionmaking, the mere presence of minority groups and women furthers important goals, including undermining the perception that the courts are run by white male judges. See Virginia Sapiro, Research Frontier Essay, *When Are Interests Interesting? The Problem of Political Representation of Women*, 75 AM. POL. SCI. REV. 701, 712 (1981).

true substantive representation for minorities and women.⁸⁹ There has been substantial research examining whether African-American, Hispanic, and female legislators vote differently even when their political ideologies are held constant; however, the results of these studies vary.⁹⁰

⁸⁹ Elisabeth R. Gerber, Rebecca B. Morton & Thomas A. Reitz, *Minority Representation in Multi-member Districts*, 92 AM. POL. SCI. REV. 127, 127 (1998) (reviewing the argument that a demographic group's lack of descriptive representation makes it highly unlikely that it will achieve substantive representation); Schwindt-Bayer & Mishler, *supra* note 51, at 413.

⁹⁰ For studies and commentary on black substantive representation in Congress, compare TATE, *supra* note 64, at 85, which finds that black congressmen vote differently than white congressmen, with SWAIN, *supra* note 60, at 5, which argues that descriptive representation by blacks in political office is not necessarily accompanied by substantive representation. Additional findings regarding black representation exist. *E.g.*, DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS 143–44 (1999) (suggesting a supply-side theory to redistricting that predicts differences in representational styles based on the type of politician elected and the nature of her campaign); DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 72 (1997) (agreeing that blacks and whites have different policy preferences and finding that racially driven gerrymandering helps elect more minorities to Congress but leaves Congress in the aggregate less responsive to blacks' policy preferences); KENNY J. WHITBY, THE COLOR OF REPRESENTATION: CONGRESSIONAL BEHAVIOR AND BLACK INTERESTS 8–9 & tbl.1 (1997) (delineating certain policy issues about which blacks and whites hold substantially different opinions).

Studies on Hispanic legislators and substantive representation have come to varied conclusions. Compare Brinck Kerr & Will Miller, *Latino Representation, It's Direct and Indirect*, 41 AM. J. POL. SCI. 1066, 1066 (1997) (finding that Hispanic members of Congress vote differently from non-Hispanic members and that Hispanics received at least some substantive representation from liberals in Congress regardless of those officials' ethnic backgrounds), and Susan Welch & John R. Hibbing, *Hispanic Representation in the U.S. Congress*, 65 SOC. SCI. Q. 328, 334 (1984) (finding that the voting records of Hispanic congressmen reflect increased support for liberal programs as compared to non-Hispanics but low descriptive representation, but also suggesting that Hispanics might best secure substantive representation, given their low descriptive representation, through non-Hispanic congressmen who are nonetheless responsive to the interests of Hispanics in their districts), with Rodney E. Hero & Caroline J. Tolbert, *Latinos and Substantive Representation in the U.S. House of Representatives: Direct, Indirect, or Nonexistent?*, 39 AM. J. POL. SCI. 640, 648 (1995) (finding no difference in voting patterns between Hispanic and non-Hispanic congressmen and thus little substantive representation for Hispanic interests).

Studies on female representatives and substantive representation have likewise arrived at multiple conclusions. Compare Kevin Arceneaux, *The "Gender Gap" in State Legislative Representation: New Data to Tackle an Old Question*, 54 POL. RES. Q. 143, 144 (2001) (finding that female legislators vote differently from men on women's issues and introduce legislation relevant to women's issues more often); Kathleen A. Frankovic, *Sex and Voting in the U.S. House of Representatives: 1961–1975*, 5 AM. POL. Q. 315, 328 (1977) (finding that the voting behavior of congresswomen as a group differs from that of their male counterparts); Rita Mae Kelly, Michelle A. Saint-Germain & Jody D. Horn, *Female Public Officials: A Different Voice?*, 515 ANNALS AM. ACAD. POL. & SOC. SCI. 77, 84 (1991) (same); Michele L. Swers, *Are Women More Likely to Vote for Women's Issue Bills Than Their Male Colleagues?*, 23 LEGIS. STUD. Q. 435, 440 (1998) (same); and Arturo Vega & Juanita M. Firestone, *The Effects of Gender on Congressional Behavior and the Substantive Representation of Women*, 20 LEGIS. STUD. Q. 213, 220 (1995) (finding some differences between male and female voting patterns but affirming that party affiliation and district characteristics remain better predictors of decisionmaking), with Susan Welch, *Are Women More Liberal than Men in the U.S. Congress?*, 10 LEGIS. STUD. Q. 125, 131 (1985)

As for the courts, in the years following the Carter Administration, a sufficient number of minority and female judges sat on the bench, thereby enabling researchers to conduct meaningful empirical studies that examined whether the legal decisions of minority and female judges were substantively distinguishable from their white male peers. As in studies of Congress, the judicial political scholars looked for statistically significant differences in voting patterns between male and female judges⁹¹ and between black and white judges,⁹² holding political ideologies and case facts constant. The findings of these studies also varied.⁹³

However, the most recent and sophisticated study on the issue of gender and judicial decisionmaking found that a judge's gender impacted rulings in sex discrimination cases.⁹⁴ Moreover, recent studies on race and judging found that descriptive representation leads to better substantive representation: black judges were found to be more sympathetic to defendants' Fourth Amendment rights than were white judges⁹⁵ and more likely to vote for plaintiffs in race discrimination cases.⁹⁶ These results suggest that, in certain areas of law, specifically those that particularly affect women and minorities, the gender and race of the judges can drive judicial outcomes even apart from the judges' ideology. This belies the notion that the voices of white males are representative of minorities and women.

The judges interviewed for this Article generally acknowledged that personal background plays a role in their decisions. More controversial was whether specifically a judge's race, ethnicity, or gender influences deci-

(finding few gender-attributable effects on voting when party affiliation and constituency ideology are taken into account).

There is also one study on the substantive representation of gay constituents, which found that openly gay legislators in local governments better represent the policy interests of the gay community than heterosexuals do. See Haider-Markel, *supra* note 17, at 575–76.

⁹¹ See Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010) [hereinafter Boyd, Epstein & Martin, *Untangling the Causal Effects*]; see also Web Appendix to Boyd, Epstein & Martin, *Untangling the Causal Effects*, at 2–5 (Oct. 22, 2009), <http://epstein.law.northwestern.edu/research/genderjudgingapp.pdf> (summarizing the findings of studies comparing male and female judicial behavior).

⁹² See Scherer, *supra* note 87, at 660–62 (discussing previous studies on black versus white judicial behavior).

⁹³ See Boyd, Epstein & Martin, *Untangling the Causal Effects*, *supra* note 91, at 390 (finding sex-based individual and panel effects only in cases involving sex discrimination); Scherer, *supra* note 87, at 660–62 (reviewing prior race-effects studies and problems with their designs); see also Deborah Rhode, *In a "Different" Voice: What Does the Research About How Gender Influences Judging Actually Say?*, SLATE (June 10, 2009, 4:20 PM) <http://www.slate.com/id/2220220> (discussing reasons for the variation in the outcomes of studies of male judges' and female judges' decisionmaking).

⁹⁴ See Boyd, Epstein & Martin, *Untangling the Causal Effects*, *supra* note 91, at 390, 401. However, the study reported no sex-based differences in voting in twelve other areas of law. *Id.*

⁹⁵ See Scherer, *supra* note 87, at 668; Nancy Scherer, Banks Miller & Brett Curry, *Race, Ethnicity and Judging* (Apr. 6, 2008) (unpublished manuscript) (on file with author) (presented at the 2008 Annual Conference of the Midwest Political Science Association).

⁹⁶ SCHERER, *supra* note 4, at 101–02 & tbls.4 & 5.

sionmaking.⁹⁷ Only two judges, a white female and a white male, completely rejected the notion that a judge's race, gender, or ethnicity could lead to different judicial outcomes.⁹⁸ The white female judge, echoing Justice O'Connor's famous remark about wise men and wise women,⁹⁹ asked, "What does gender have to do with judging?"¹⁰⁰

The remaining eighteen judges interviewed, a mixture of men and women of different ethnicities, acknowledged that a judge's background plays some role in decisionmaking. They disagreed, however, on the weight to be given race, gender, and ethnicity in the decisionmaking process.

Some judges wholly embraced the theory that descriptive representation leads to better substantive representation. One white female judge explained:

⁹⁷ This controversy is reflected in the differing views of the three women who served on the Supreme Court. Justice O'Connor rejected the theory that gender influences judging, stating that a "wise old man and a wise old woman reach the same conclusion." Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1558 (1991) (quoting Judge Jeanne Coyne of the Supreme Court of Oklahoma in David Margolick, *Women's Milestone: Majority on Minnesota Court*, N.Y. TIMES, Feb. 22, 1991, at B16).

Justice Ginsburg has expressed mixed views on the subject, agreeing with Justice O'Connor's observation about wise men and wise women yet also admitting that "women bring to the table their own experiences, which inform their decision-making." Nina Totenberg, *How Women Changed the High Court . . . and Didn't*, NPR (June 25, 2010), <http://www.npr.org/templates/story/story.php?storyId=128079684>.

Justice Sotomayor famously embraced the notion that gender and ethnicity influence decisionmaking: "Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am . . . not so sure that I agree with the statement. First, . . . there can never be a universal definition of wise. Second, 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." Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002). However, she clarified this statement at her confirmation proceedings. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 327 (2009) (statement of then-Judge Sonia Sotomayor) ("It is clear from the attention that my words have gotten and the manner in which it has been understood by some people that my words failed. They didn't work. The message that the entire speech attempted to deliver, however, remains the message that I think Justice O'Connor meant, the message that prior nominees including Justice Alito meant when he said that his Italian ancestry he considers when he's hearing discrimination cases.").

⁹⁸ See Interview with Judge L, *supra* note 84; Interview with Judge N (Sept. 9, 2009).

⁹⁹ See O'Connor, *supra* note 97, at 1558.

¹⁰⁰ Interview with Judge N, *supra* note 98; *cf.* Interview with Judge L, *supra* note 84 (providing anecdotes about the inconsistencies between his own background and some of his most famous rulings).

One white female judge interviewed for this project cited Justice O'Connor for the opposite proposition about substantive representation: "We all have our backgrounds and it all impacts on how we perceive events, facts—Justice Sandra Day O'Connor, I remember, actually wrote something about how she benefited from having Thurgood Marshall as a colleague. Everybody does it and that's not a bad thing." Interview with Judge E, *supra* note 33 (referencing Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992)).

Who you are does affect your decisionmaking. . . . Your gender informs your decisions. Your race informs your decisions. So clearly the experiences people bring to the bench affect[] their decisions. In a discrimination case where a woman is testifying about being excluded from lunch invitations, golf outings, etc., I'll relate to that. . . . We identify with those experiences.¹⁰¹

Similarly, a male minority judge stated, "I think the more diversity on the bench, the better off we are from the standpoint of different life experiences and perspectives that are brought to the bench."¹⁰² According to him, additional minority judges "are going to bring different perspectives that are not represented across the board at the present time."¹⁰³

For other judges, minority and female voices in the judicial process not only are intrinsically valuable for representing members of their identity groups but also lead to better decisionmaking.¹⁰⁴ A minority male judge explained:

I do know that there is a value to having different people at the table. . . . My perspective is it has just got to be better for the decisionmaking process if you have input from different perspectives. I mean, I can't tell you over the course of my lifetime as a [minority] man in America, how many white guys have said, as we discussed whatever, "I never thought of that," or "I never looked at this simple situation that way."¹⁰⁵

A white female judge explained it this way: "I think everybody is applying the same law but you [as a minority or female] may be able to see more angles. The more angles, the better the decision."¹⁰⁶

There were, however, other judges who cautioned against attributing too much to race, ethnicity, or gender. One minority male judge suggested that minority identity may yield "insights that could inform [a judge's] thinking but [that] it is not going to play a major role."¹⁰⁷ Another white male judge pointed out that other background factors, such as being a parent, may influence a decision.¹⁰⁸

¹⁰¹ Interview with Judge O, *supra* note 82.

¹⁰² Interview with Judge K, *supra* note 76.

¹⁰³ *Id.*

¹⁰⁴ There is, in fact, theoretical and empirical research to support this view. See SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES 314 (2007) (explaining that formal models and data establish that better decisions are made by groups with diverse members); see also CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 11 (2009) (finding that decisions made by those in a homogenous group tend to be more radicalized than moderated).

¹⁰⁵ Interview with Judge M, *supra* note 58.

¹⁰⁶ Interview with Judge Q, *supra* note 82.

¹⁰⁷ Interview with Judge D, *supra* note 46.

¹⁰⁸ Interview with Judge P (Aug. 5, 2009) ("I think gender and race play a role. I think being a parent plays a role.").

Finally, one minority male judge who supported diversity efforts was disappointed that Democratic presidents have not also strived for ideological diversity. He criticized President Clinton for not properly diversifying the courts:

He made it . . . diverse in the context of race, but he didn't make it diverse as far as ideology is concerned. . . . He should have had some screaming liberals in his mix. I resented that he was chicken. . . . And I have a feeling that the new President [Obama] is chicken in this regard. . . . I don't call for just ethnic and racial and gender diversity, I call for intellectual diversity. . . . [B]ut, unfortunately, the Democrats are chicken and the Republicans are not with regard to ideology.¹⁰⁹

Like Presidents Clinton and Carter before him, President Obama seeks to transform a political theory into political policy. Unlike his Democratic predecessors, he is the first president to rely exclusively on the theory of substantive representation to justify his diversity policy for the federal courts.¹¹⁰ During his campaign for president, then-Senator Obama emphasized that we need more judges on the bench with “empathy”¹¹¹ rather than more minority and female judges as his Democratic predecessor had suggested. It was not immediately clear, though, how President Obama planned to identify nominees with empathy. President Obama has defined empathetic judges as those who have struggled in life: “We need somebody

¹⁰⁹ Interview with Judge B, *supra* note 44. Judge B is not alone in his complaints about a lack of ideological diversification. In fact, liberal groups have criticized President Obama about his second Supreme Court nominee, Justice Elena Kagan, claiming that the President should be choosing Justices with established liberal records to counterbalance the conservative Justices appointed by George W. Bush. *See, e.g.*, Peter Baker & Jeff Zeleny, *Obama Said to Pick Solicitor General for Court: Never a Judge, Kagan Faces Wariness*, N.Y. TIMES, May 10, 2010, at A1.

¹¹⁰ President Obama may have moved away from President Clinton's position—descriptive representation—because of its negative association with minority and gender quotas and preferences, which have been overwhelmingly rejected by the public. *See* QUINNIPIAC UNIV. POLLING INST., U.S. VOTERS DISAGREE 3-1 WITH SOTOMAYOR ON KEY CASE (2009), available at <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1307>. Some studies, however, have found that, if the public is asked about “affirmative action” and not about preferences or quotas, public support for diversity efforts is high. *See, e.g.*, S. Plous, *Ten Myths About Affirmative Action*, J. SOC. ISSUES, Winter 1996, at 25, 27 (reporting that a *Time/CNN* Poll found that 80% of the public supports some iteration of affirmative action); Melinda L. Shelton & Diane Minor, *Poll Supports NOW's Affirmative Action Position*, NAT'L NOW TIMES (Nat'l Org. for Women, D.C.), May/June 1995, <http://www.now.org/nnt/05-95/poll.html> (citing poll conducted by the Peter Y. Harris Research Group from March 16 to April 3, 1995, and explaining that those polled supported a referendum that would prohibit the consideration of race, gender, and other characteristics in a state's operation of its public employment, education, and contracting and that support for the referendum declined when the participants were told that it would eliminate affirmative action programs for women and minorities).

¹¹¹ *See* Press Release, White House, Office of the Press Sec'y, Remarks by the President in Nominating Judge Sonia Sotomayor to the United States Supreme Court (May 26, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-nominating-judge-sonia-sotomayor-united-states-supreme-court> (explaining that experiences and empathy, rather than particular identity markers, were what made Justice Sotomayor an ideal Supreme Court appointee).

who's got the heart, the empathy, to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old—and that's the criterion by which I'll be selecting my judges."¹¹² President Obama has suggested that members of marginalized groups are likely to have struggled in life, making them better situated to understand the plights of diverse citizens who come before the courts.¹¹³ In praising Justice Sotomayor's qualifications for the Supreme Court, President Obama emphasized her experience with hardship but did not stress her ethnicity or gender. He noted that she had

[e]xperience being tested by obstacles and barriers, by hardship and misfortune; experience insisting, persisting, and ultimately overcoming those barriers. It is experience that can give a person a common touch and a sense of compassion; an understanding of how the world works and how ordinary people live. And that is why it is a necessary ingredient in the kind of justice we need on the Supreme Court.¹¹⁴

By shifting the focus away from identity politics and toward a neutral standard of empathy, President Obama perhaps hopes to avoid conservative objections to his diversity strategy. President Obama's approach to judicial selection may be gaining traction with the American public; a recent study found that 68% of the public believes that a judge's ability to "empathize with ordinary people" is very important.¹¹⁵

In practice, however, President Obama seems to be engaged in a strategy to further diversify the bench using identity characteristics because of his belief that judges from marginalized groups are likely to possess a greater capacity for the empathy he finds so valuable on the bench. His first two appointees to the Supreme Court are members of groups currently underrepresented on the bench: Justice Sonia Sotomayor is a Hispanic female, and Justice Elena Kagan is a white female. President Obama's lower federal court appointments follow the same pattern.¹¹⁶

¹¹² Edward Whelan, *Obama's Constitution: The Rhetoric and the Reality*, WKLY. STANDARD (Mar. 17, 2008), <http://www.weeklystandard.com/Content/Public/Articles/000/000/014/849oyckg.asp>.

¹¹³ One white female judge I interviewed questioned Obama's premise that empathy is critical to judging: "Does empathy play out? Yes . . . [Y]ou have to say that you understand [the party's position] but in the end you must do what the law requires. You don't want judges who won't apply the law because of empathy." Interview with Judge F, *supra* note 57.

¹¹⁴ See Press Release, *supra* note 111.

¹¹⁵ James L. Gibson, *Expecting Justice and Hoping for Empathy*, MILLER-MCCUNE (June 20, 2010), <http://www.miller-mccune.com/legal-affairs/expecting-justice-and-hoping-for-empathy-17677> (showing public views in a chart entitled "The Characteristics Americans Prefer in Supreme Court Justices").

¹¹⁶ As of January 1, 2011, only 25.0% of President Obama's confirmed appellate judges were white males. In his first two years in office, Obama appointed five African-Americans (31.3% of all Obama appellate judge appointments), two Hispanics (12.5%), six women (37.5%), and one Asian-American (6.3%) to the courts of appeals. At the district court level, 31.8% of Obama's confirmed judges were not white males: eleven blacks (25.0% of all Obama district court appointees), two Hispanic (4.6%), twenty-

II. ARGUMENTS OPPOSING A DIVERSIFICATION STRATEGY FOR THE FEDERAL COURTS

Republican presidents must walk a fine line between satisfying their party's conservative white male base, which strongly opposes any type of affirmative action plan, and appeasing certain identity groups whose political support may be critical in future elections. To balance these competing interests, Republican presidents beginning with President Reagan have pursued a three-pronged strategy.¹¹⁷ First, they publicly oppose quotas and preferential-treatment affirmative action for minorities and women.¹¹⁸ Second, they decline to continue the system-wide diversity plans of their Democratic predecessors, instead advocating a "color-blind" approach to awarding government positions.¹¹⁹ Third, notwithstanding their public opposition to

four women (54.6%), and five Asian-Americans (11.4%). I obtained this data through the Federal Judicial Center database, see *History of the Federal Judiciary*, *supra* note 3, by searching the categories "nominating president," "court type," "gender," and "race or ethnicity."

¹¹⁷ As I argued in Part I, this stands in contrast to the three Democratic presidents starting with President Carter. Though each agreed that the federal bench required increased diversity, there was no agreement between them as to the justification for diversity. See *supra* Part I.

¹¹⁸ For example, the 1984 Republican Party platform states, "Just as we must guarantee opportunity [for minorities and women], we oppose attempts to dictate results. We will resist efforts to replace equal rights with discriminatory quota systems and preferential treatment. Quotas are the most insidious form of discrimination: reverse discrimination against the innocent." *Republican Party Platform: Republican Party Platform of 1984*, AM. PRESIDENCY PROJECT (Aug. 20, 1984), <http://www.presidency.ucsb.edu/ws/index.php?pid=25845>.

¹¹⁹ See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (showing that the Bush Administration advocated a color-blind admissions process for the University of Michigan's law school); NICHOLAS LAHAM, *THE REAGAN PRESIDENCY AND THE POLITICS OF RACE* 73 (1998) (indicating that Reagan was dedicated to achieving a "colorblind society" through "colorblind law"). Many scholars have questioned whether a "color-blind" process is mandated by the Constitution. See Chris K. Iijima, *Swimming from the Island of the Colorblind: Deserting an Ill-Conceived Constitutional Metaphor*, 17 *LOY. L.A. ENT. L.J.* 583, 591 (1997); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 *U. MIAMI L. REV.* 191, 194–95 (1997); see also ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992); CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 67–87 (1997); JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* 28 (1996); Reva B. Siegel, *The Racial Rhetorics of Colorblind Constitutionalism: The Case of Hopwood v. Texas*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 29, 29 (Robert Post & Michael Rogin eds., 1998); David A. Strauss, *The Myth of Colorblindness*, 1986 *SUP. CT. REV.* 99, 100 (arguing that the discrimination prohibition in *Brown v. Board of Education* is not color-blind but rather "deeply race-conscious").

In keeping with this body of scholarship, some have argued that whites come into any selection process with a "[w]hite privilege"—the "pervasive, structural, and generally invisible assumption that white people define a norm and Black people are 'other,' dangerous, and inferior." Sylvia A. Law, *White Privilege and Affirmative Action*, 32 *AKRON L. REV.* 603, 604 (1999) (footnote omitted). "White skin privilege," as Bridgette Baldwin has described it, thus creates a "social construction which creates a racial bureaucracy where whites exist at the top and African Americans are at the bottom." Bridgette Baldwin, *Colorblind Diversity: The Changing Significance of "Race" in the Post-Bakke Era*, 72 *ALB. L. REV.* 863, 874–75 (2009) (citing IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 163 (1996)). Because of white skin privilege, a so-called color-blind process only perpetuates inequality between the races. See *id.* at 873–76.

affirmative action, when selecting judges for the federal courts, Republican presidents in the post-Carter years all engage in the same sort of identity politics of which they accuse Democrats.¹²⁰ However, while Democrats generally “score points” with their diversity appointments, Republican attempts at diversity have been less fruitful. For example, Republicans garnered only 31% of the Hispanic vote in 2008,¹²¹ despite the fact that George W. Bush had appointed more Hispanics to the bench (thirty) than Clinton had (twenty-three).¹²²

During his 1980 presidential campaign, Ronald Reagan addressed the American Bar Association (ABA), stating that he would not choose judicial candidates on the basis of race, ethnicity, or gender.¹²³ Around the same time, however, Reagan promised the American public that he would appoint “the most qualified woman he could find” to become the first female Supreme Court Justice.¹²⁴ He kept this campaign promise by appointing Justice Sandra Day O’Connor.¹²⁵ Though well-respected in her home state of Arizona, few believed that Justice O’Connor was the most qualified woman, let alone the most qualified person, for the job.¹²⁶ Despite Reagan’s attempts to win favor with female voters and an initially positive response to his appointment of Justice O’Connor, his approval ratings among women remained low throughout his presidency.¹²⁷

The most prominent diversity appointment during the presidency of George H.W. Bush was Justice Clarence Thomas, chosen to replace Justice Thurgood Marshall, the first African-American to sit on the Court. President Bush proclaimed that he chose Justice Thomas not because he was African-American but because he was the “best person” for the job.¹²⁸ Justice Thomas, however, was accused by many of lacking the intellectual ca-

¹²⁰ See, e.g., SCHERER, *supra* note 4, at 21–27 (explaining the theory of elite mobilization pursuant to which politicians engage in tactics surrounding judicial appointments, including particular diversity appointments, primarily for the sake of currying favor with an elite constituency of their respective parties).

¹²¹ See Mark Hugo Lopez, *How Hispanics Voted in the 2008 Election*, PEW RES. CENTER (Nov. 7, 2008), <http://pewresearch.org/pubs/1024/exit-poll-analysis-hispanics>.

¹²² I obtained this data through the Federal Judicial Center database, see *History of the Federal Judiciary*, *supra* note 3, by searching by appointing president and by Hispanic race or ethnicity.

¹²³ Remarks at the Annual Meeting of the American Bar Association in Atlanta, Georgia, 2 PUB. PAPERS 1110, 1112 (Aug. 1, 1983) (“[W]e . . . will never select individuals just because they are men or women, whites or blacks, Jews, Catholics, or whatever. I don’t look at people as members of groups; I look at them as individuals and as Americans.”).

¹²⁴ THE REAGAN YEARS: THE RECORD IN PRESIDENTIAL LEADERSHIP 147 (Joseph Hogan ed., 1990).

¹²⁵ Lou Cannon, *Reagan Names Woman to Supreme Court*, WASH. POST, July 8, 1981, at A1.

¹²⁶ See GOLDMAN, *supra* note 12, at 329.

¹²⁷ See Judy Mann, *Gender Gap*, WASH. POST, Jan. 21, 1983, at B1.

¹²⁸ John E. Yang & Sharon LaFraniere, *Bush Picks Thomas for Supreme Court*, WASH. POST, July 2, 1991, at A1.

capacity to sit on the Supreme Court, belying the President's claim.¹²⁹ Moreover, this appointment by President George H.W. Bush failed to improve the Republican Party's standing with black voters.¹³⁰

Later, President George W. Bush tried to build his party's standing with female voters through judicial appointments, but his efforts also failed. When Justice O'Connor announced her retirement, President George W. Bush nominated another woman, Harriet Miers, to fill her seat.¹³¹ This time, it was conservatives, not liberals, who protested that the nominee was unqualified for the position,¹³² causing Miers to withdraw her nomination.¹³³ Although 22.1% of President George W. Bush's judicial appointees were women,¹³⁴ female voters continued to favor Democrats in both the 2004 and 2008 presidential elections.¹³⁵ In 2004, women supported John Kerry more

¹²⁹ See, e.g., Linda Feldmann, *Cautious Thomas Plays Hearing by the Script*, CHRISTIAN SCI. MONITOR, Sept. 13, 1991, at 3 ("The fact is, Clarence Thomas is a hard worker, but he's not an erudite scholar." (quoting Bruce Fein) (internal quotation marks omitted)); Sam Stein, *Obama: I Would Not Have Nominated Clarence Thomas*, HUFFINGTON POST (Aug. 16, 2008, 8:46 PM), http://www.huffingtonpost.com/2008/08/16/obama-i-would-not-have-no_n_119366.html ("I don't think that [Thomas] was a strong enough jurist or legal thinker at the time for that elevation." (quoting then-Senator Barack Obama)); Editorial, *Thomas 'Qualified' The President's Rejoicing over This Lackluster Endorsement Reveals the Cynicism of a Choice Based on Not Credential and Experience but Politics and Race*, POST-STANDARD (Syracuse), Aug. 29, 1991, at A12, available at LexisNexis ("Now the ABA has come up with a luke-warm split decision [of qualified versus unqualified] that at the very least punches holes in the Bush contention he picked the best man for the job. It is ever more apparent his nominee was named primarily because he's a black conservative, not because he'll bring anything close to a superior intellect or significant judicial experience to the bench.").

¹³⁰ Blacks were looking not only for a descriptive representative to replace Justice Marshall but also for a substantive one. See Thomas B. Edsall, *Politics and the Thomas Choice: Building the GOP's Black Elite*, WASH. POST, July 2, 1991, at A7 ("[T]he Thomas nomination 'appears to be yet another step in the ideological hijacking of the Supreme Court by the radical right wing of the Republican party.'" (quoting Democratic National Chairman, Ronald H. Brown)).

¹³¹ Michael A. Fletcher, *White House Counsel Miers Chosen for Court: Some Question Her Lack of Experience as a Judge*, WASH. POST, Oct. 4, 2005, at A1.

¹³² See Charles Babington & Thomas B. Edsall, *Conservative Republicans Divided over Nominee*, WASH. POST, Oct. 4, 2005, at A11; Peter Baker & Dan Balz, *Conservatives Confront Bush Aides: Anger Over Nomination of Miers Boils Over During Private Meetings*, WASH. POST, Oct. 6, 2005, at A1; Sheryl Gay Stolberg, *Some Liberals and Conservatives Find Themselves in Awkward Spots*, N.Y. TIMES, Oct. 4, 2005, at A23.

¹³³ See Robin Toner, David D. Kirkpatrick & Anne E. Kornblut, *Steady Erosion in Support Undercut Nomination*, N.Y. TIMES, Oct. 28, 2005, at A16.

¹³⁴ George W. Bush appointed the greatest percentage of women of any Republican president to date. His two Republican predecessors, George H.W. Bush and Reagan, appointed only 19.3% and 8.1% women, respectively. I obtained this data through the Federal Judicial Center database, see *History of the Federal Judiciary*, supra note 3, by searching for all women judges appointed by each of these presidents and for the total number of appointments made by each president.

¹³⁵ See Lisa Bennett, *Women Voters Maintain Gender Gap in 2004 Elections*, NAT'L ORG. FOR WOMEN (Nov. 12, 2004), <http://www.now.org/issues/election/elections2004/041112womensvote.html>; *Data Points: Gender Gap in the 2008 Election*, U.S. NEWS & WORLD REP. (Nov. 6, 2008), <http://politics.usnews.com/opinion/articles/2008/11/06/data-points-gender-gap-in-the-2008-election.html>.

than men did because women more strongly, and in greater numbers, opposed the war in Iraq.¹³⁶

President George W. Bush also sought to shore up support with Hispanic voters through court appointments. Among his first group of appellate court nominees was Miguel Estrada, nominated to the U.S. Court of Appeals for the District of Columbia Circuit.¹³⁷ If confirmed, Estrada would have been a frontrunner to become the first Hispanic Supreme Court Justice.¹³⁸ Keeping in mind Estrada's compelling personal narrative as an immigrant who overcame poverty to eventually graduate from Harvard Law School, Democrats in the Senate hoped to avoid giving President George W. Bush and the Republicans an electoral opportunity with Hispanic voters by confirming Estrada.¹³⁹ After Democrats stalled his nomination for more than two years, Estrada withdrew his nomination.¹⁴⁰

The Bush Administration did not restrict its diversity efforts only to the Supreme Court and the appellate courts. In fact, one judge I interviewed told me that the Administration made efforts to find diversity candidates for the bench in his jurisdiction. When soliciting names for district court nominations from this judge before he was appointed to the court, the Administration instructed this judge "to start with minority and women candidates."¹⁴¹

Despite their hard-line opposition to affirmative action, Republican presidents have engaged in identity politics, using the judicial appointment process to further party efforts to win over certain groups of voters. However, when Democrats are in the White House, Republicans often maintain that race, ethnicity, and gender should play no role in government appointments, including the selection of judges. In this Part, I address each of their arguments against a diversity strategy for the federal bench.

A. Stigmatization

Political theorists have long debated the place of shame and stigma in a democratic polity.¹⁴² According to this body of scholarship, a democratic government, like a tyrannical government, can engage in "politics of

¹³⁶ See Susan Carroll, *Women Voters and the Gender Gap*, AM. POL. SCI. ASS'N, http://www.apsanet.org/content_5270.cfm (last visited Aug. 18, 2011).

¹³⁷ Amy Goldstein, *Bush Will Nominate 11 as U.S. Judges*, WASH. POST, May 9, 2001, at A1.

¹³⁸ Charles Lane, *Nominee for Court Faces Two Battles*, WASH. POST, Sept. 24, 2002, at A1.

¹³⁹ See *id.*

¹⁴⁰ Neil A. Lewis, *Stymied by Democrats in Senate, Bush Court Pick Finally Gives Up*, N.Y. TIMES, Sept. 5, 2003, at A1.

¹⁴¹ Interview with Judge P, *supra* note 108. I have no evidence of whether other recommenders were given the same instructions.

¹⁴² See, e.g., Christina Tamopolsky, *Prudes, Perverts, and Tyrants: Plato and the Contemporary Politics of Shame*, 32 POL. THEORY 468, 469 (2004) (referencing several historical theories about shame in politics and positing a new theory about the "place of shame in democratic politics").

shame.”¹⁴³ Shaming occurs when the ruling class singles out a group and treats it as the “other” because it poses a threat to prevailing social norms.¹⁴⁴ At certain times in our history, both minorities and women have been shamed by the white male ruling class. In essence, shaming is a form of discrimination.

Prominent conservatives, however, have turned the tables on the politics of shame. Today, when the government affirmatively engages in efforts to increase the presence of minorities and women in government institutions, conservatives maintain that the government is *further shaming and stigmatizing* these groups.¹⁴⁵ Perhaps the most prominent judicial scholar espousing this position is Justice Thomas, the only African-American currently on the Court:

[T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called “benign” discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. . . . These [affirmative action] programs stamp minorities with a badge of inferiority¹⁴⁶

Conservatives claim that those who are most injured by affirmative action programs are well-qualified appointees who nonetheless are stamped with a “badge of inferiority.” Justice Thomas’s concurrence in *Grutter v. Bollinger* poignantly expresses this view:

When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed “oth-

¹⁴³ See *id.* at 469–70.

¹⁴⁴ *Id.* at 470.

¹⁴⁵ See, e.g., TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE 9 (1996); CLARENCE THOMAS, MY GRANDFATHER’S SON: A MEMOIR 74–75 (2007) (describing his anger at realizing that his admission to Yale Law School and his successes there were perceived by whites as tainted or unmerited); *Rush Limbaugh Show, Meritocracy and the Obamas* (radio broadcast Oct. 12, 2010) (transcript available at http://www.rushlimbaugh.com/home/daily/site_101210/content/01125113.guest.html) (“Affirmative action was a lowering of standards. This is why people really didn’t want to be considered affirmative action babies ’cause it was a stigma. You didn’t get there on merit if affirmative action got you there. You got there because the way was paved for you.”). For an argument that color-blind approaches do the same, see SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA 7–9 (1990) (offering the perspective that Reagan’s declaration of his own color-blindness in political selections merely laid the groundwork of innocence necessary to facilitate his use of “government power against black power”).

¹⁴⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring the judgment); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”).

erwise unqualified,” or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.¹⁴⁷

There is some empirical evidence in support of Thomas’s assertion in *Grutter*. Studies show that whites assume whites to be qualified for a particular job, but they perceive that equally qualified minorities are unqualified for the same position; the studies indicate that whites assume that minority hires were awarded their jobs through diversity plans.¹⁴⁸ One federal judge believes that “a significant portion of the white population . . . if they went to two service providers [one a minority, one white] in any subcategory—for example, medicine, law—would say that the service provider [who] was . . . a minority . . . would provide inferior service.”¹⁴⁹ He also recalled the striking reaction of whites to the news that he, an Ivy League-educated minority, was a federal court judge: “[T]hey almost invariably ask me, ‘[W]here did you go to school?’ That’s the first question. Instead of reacting, ‘[W]ow, that’s really cool. You’re a judge. I don’t know any judges. In fact, I’ve never met a federal judge. What do you do?’”¹⁵⁰

Two judges I interviewed agreed with the claim that diversity programs stigmatize minorities. One of them, a white female judge, echoed the sentiment of Justice Thomas that diversity initiatives potentially hurt qualified minorities: “[T]here is an unspoken perception that the minority appointee had lower qualifications and was pushed through even when it is not true.”¹⁵¹ Another white female judge concurred that a stigma attaches to qualified minorities when a diversity program is in place.¹⁵² She also noted that white males sometimes face the same problem as diversity appointees, particularly when appointed because of political connections:

I think there is always that risk. When your criteria are not who [are] the best qualified but something else I think you make these appointments [subject to] questions about competency. It is up to the person to prove his or her competency I think white males have a different issue on how they got

¹⁴⁷ *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part); see also Glenn C. Loury, *Performing Without a Net*, in *THE AFFIRMATIVE ACTION DEBATE* 49, 53 (George E. Curry ed., 1996) (“I am convinced that the long-term interests of African-Americans will be helped, not harmed, by a rational reassessment and reform of current preferential policies.”).

¹⁴⁸ See Rupert Barnes Nacoste, *Sources of Stigma: Analyzing the Psychology of Affirmative Action*, 12 *LAW & POL’Y* 175, 178–79 (1990); Russel J. Summers, *The Influence of Affirmative Action on Perceptions of a Beneficiary’s Qualifications*, 21 *J. APPLIED PSYCHOL.* 1265, 1272–73 (1991). Although most affirmative action efforts sought qualified women for jobs as well as minorities, most of the literature seems centered on minorities. One observer has noted that Sarah Palin seems to suffer from the same stigma with which Justice Thomas believes he is afflicted. See Dahlia Lithwick, *From Clarence Thomas to Palin*, *NEWSWEEK*, Oct. 6, 2008, at 14.

¹⁴⁹ Interview with Judge M, *supra* note 58. This same judge does not think that women are still stigmatized by a diversity strategy as they might have been in the past. *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Interview with Judge N, *supra* note 100.

¹⁵² Interview with Judge F, *supra* note 57.

there. If they are the cousin of “X” or gave a large campaign contribution, people in the know are going to say “[H]mmm . . . that’s interesting.” I don’t think [being] white and male exempts you from prov[ing] competency.¹⁵³

All other judges interviewed (male and female, minority and white) disavowed the principle that diversity initiatives stigmatize judges who are appointed under such policies.

B. Less Qualified Judges

Ever since a diversity strategy was first implemented, conservatives have warned that the overall quality of the federal bench would suffer.¹⁵⁴ In contrast to the argument that qualified minorities and women are stigmatized because people incorrectly assume they are not qualified, conservatives have often claimed that specific diversity nominees are, *in fact*, not qualified.¹⁵⁵ They have argued that since race, gender, and ethnicity have become factors in the appointment process, merit is no longer the standard for choosing federal judges:

The precepts of merit selection dictate that only those possessing the most illustrious credentials will be recommended, without regard to political considerations. However, it is claimed, affirmative action is, by its nature, a political

¹⁵³ *Id.*

¹⁵⁴ For example, during the Carter Administration, a conservative Republican senator’s aide remarked, “Race or sex has nothing to do with it. Carter has gone too far in trying to impose quotas. The whole approach is off base We like the principle of merit selection. We applaud that Yet are they doing that?” Eliot Slotnick, *Reforms in Judicial Selection: Will They Affect the Senate’s Role? (Part II)*, 64 JUDICATURE 114, 117 (1980) (second alteration in original). Since Justice O’Connor’s retirement, conservatives have attacked every single female nominee to the Court as unqualified. For manifestations of these attacks, see *infra* notes 155, 159–60.

¹⁵⁵ Many conservatives made such comments about nominee Harriet Miers. See Patrick J. Buchanan, *Miers’ Qualifications Are ‘Non-existent,’* HUMAN EVENTS (Oct. 3, 2005), available at <http://www.humanevents.com/article.php?id=9444> (“[H]er qualifications for the Supreme Court are non-existent. She is not a brilliant jurist, indeed, has never been a judge. She is not a scholar of the law. Researchers are hard-pressed to dig up an opinion. She has not had a brilliant career in politics, the academy, the corporate world or public forum. Were she not a friend of Bush, and female, she would never have even been considered.”); Ann Coulter, *Does This Law Degree Make My Resume Look Fat?*, ANNCOULTER.COM (Oct. 12, 2005), <http://www.anncoulter.com/cgi-local/article.cgi?article=80> (“The only sexism involved in the Miers nomination is the administration’s claim that once they decided they wanted a woman, Miers was the best they could do. Let me just say, if the top male lawyer in the country is John Roberts and the top female lawyer is Harriet Miers, we may as well stop allowing girls to go to law school.”); Tom Curry, *Some Conservatives Not Thrilled by Miers*, MSNBC.COM (Oct. 4, 2005, 11:53 AM), http://www.msnbc.msn.com/id/9536142/ns/us_news-the_changing_court (quoting Manuel Miranda, a conservative strategist and former aide to Senate Majority Leader Bill Frist, as saying that “[t]he reaction of many conservatives today will be that the president has made possibly the most unqualified choice since Abe Fortas The nomination of a nominee with no judicial record is a significant failure for the advisers that the White House gathered around it.”). On Justices Elena Kagan and Sonia Sotomayor, see *infra* notes 159–60.

goal, and one which directly contravenes the very thrust of merit selection. It submerges quality in order to redress past race and sex discrimination.¹⁵⁶

Misconceptions about qualifications continue to plague diversity candidates. During the confirmation process for Justice Sotomayor, several high-profile conservative pundits accused her of being unqualified to be a Supreme Court Justice, notwithstanding her Yale Law School degree and her judicial experience as a district court and court of appeals judge.¹⁵⁷ For instance, according to Patrick Buchanan, “No one ha[d] brought forth the slightest evidence she ha[d] the intellectual candlepower to sit on the Roberts court.”¹⁵⁸ Similarly, Michael Savage stated that Justice Sotomayor “is as qualified to be a Supreme Court justice as . . . an ordinary lawyer in your town.”¹⁵⁹ Elena Kagan was similarly attacked.¹⁶⁰

Several empirical studies have tested the hypothesis that diversity appointees to the bench are less qualified than their white male peers.¹⁶¹ One

¹⁵⁶ BERKSON & CARBON, *supra* note 19, at 4 (footnote omitted). However, the judicial appointment process has never been based *strictly* on merit. Beginning with President Washington, presidents have always chosen judges from their own party, and in recent years, from their own ideological wing of the party. See LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 26 (2005) (“[T]he simple reality is that both the Senate and the president take into account nominees’ partisanship and ideology, in addition to their professional qualifications, when they make their decisions, and they always have.”); SCHERER, *supra* note 4, at 65–73. Moreover, when patronage appointments ruled the day for lower courts, judges were chosen through the “old boys’ network” and had some kind of personal or political relationship with the home state senator. See SCHERER, *supra* note 4, at 77.

¹⁵⁷ See, e.g., Charlie Savage, *Videos Reveal Sotomayor’s Positions on Affirmative Action and Other Issues*, N.Y. TIMES, June 11, 2009, at A17.

¹⁵⁸ Patrick J. Buchanan, *Miss Affirmative Action, 2009*, WORLDNETDAILY (June 12, 2009, 1:00 AM), <http://www.wnd.com/index.php?fa=PAGE.view&pageId=100835>.

¹⁵⁹ *Sonia Sotomayor Is NOT Qualified for Supreme Court*, SAVAGE NATION at 4:49 (July 13, 2009), <http://www.youtube.com/watch?v=18OJh2PVfa4> (“And I don’t even think she could’ve passed law school without affirmative action.”); cf. *supra* note 129 and accompanying text (describing attacks on Clarence Thomas’s qualifications).

¹⁶⁰ See Ed Whelan, *Supreme Court Nominee Elena Kagan*, NAT’L REV. ONLINE (May 10, 2010, 5:51 AM), <http://www.nationalreview.com/corner/199171/supreme-court-nominee-elena-kagan/ed-whelan> (“Kagan may well have less experience relevant to the work of being a justice than any justice in the last five decades or more. In addition to zero judicial experience, she has only a few years of real-world legal experience. Further, notwithstanding all her years in academia, she has only a scant record of legal scholarship. Kagan flunks her own ‘threshold’ test of the minimal qualifications needed for a Supreme Court nominee.”); *Andrea Mitchell Reports* (MSNBC television broadcast May 11, 2010), available at <http://www.youtube.com/watch?v=eGqTpasrnzE> (interviewing Senator John Cornyn who opined that Miers “had eminently more experience” than Kagan).

¹⁶¹ See, e.g., Susan Brodie Haire, *Rating the Ratings of the American Bar Association Standing Committee on Federal Judiciary*, JUST. SYS. J., Jan. 2001, at 1, 15; James Lindgren, *Examining the American Bar Association’s Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989-2000*, 17 J.L. & POL. 1, 25 (2001); Slotnick, *supra* note 14, at 284–86; Richard L. Vining, Amy Steigerwalt & Susan Navarro Smelcer, *Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees*, POL. RES. Q. (forthcoming 2012) (on file with author). In each article cited above, there is a model containing a control variable for race. Negative values for race mean that blacks receive lower ABA ratings (a metric for quality) than do whites.

early study on President Carter's appointees found that when quality was measured as graduation from an elite law school, there was no aggregate difference between minority and female judges (treated as a single group) and white male judges.¹⁶² When the ABA ratings were used to measure the judges' qualifications, minorities and women were found to be less qualified than white male judges.¹⁶³ This result was thought to be driven by the fact the ABA considers years of legal experience in its rankings.¹⁶⁴ Because of historic barriers to law school entry facing women and minorities and the subsequent difficulty obtaining jobs, President Carter's nominees rarely had the fifteen years of legal experience the ABA decided made nominees well qualified for the bench.¹⁶⁵ Thus, historical discrimination led to minorities and women receiving lower ABA ratings than white men.

Three more recent examinations of quality measured by ABA ratings have examined, among other things, whether minorities and women tend to receive lower qualifications ratings than whites and males.¹⁶⁶ Two of the studies found no statistically significant difference (at $p < 0.05$) between the ABA scores of minority versus white judges, and one found no statistically significant difference for female versus male judges, all at the appellate level.¹⁶⁷

None of the minority judges interviewed believed that the quality of the courts suffers by pursuing a diversity appointment strategy. These judges presumed that all minorities chosen for the federal bench were as qualified as whites on the bench. Most white judges, male and female, agreed with their minority peers by dismissing the notion that diversity appointees are less qualified than white males. One white male judge observed, "The people that I see coming on the bench, especially at the caliber

¹⁶² See Slotnick, *supra* note 15, at 285. However, when minorities and women were disaggregated, minorities were more likely to have attended less elite law schools than whites; there was still no difference between men and women. See *id.* at 286. More recently, I used my own data on Carter and Clinton nominees and found no meaningful difference in the qualifications of blacks or women versus white male judges, using graduation from elite law schools to measure qualifications. (Data on file with author).

¹⁶³ See Slotnick, *supra* note 15, at 295–96.

¹⁶⁴ See Vining, Steigerwalt & Smelcer, *supra* note 161, at 3.

¹⁶⁵ See *id.* at 2 & n.3.

¹⁶⁶ See Haire, *supra* note 161, at 15 (finding that minority and female nominees received lower ABA ratings even after controlling for other factors of judicial qualification, suggesting that the ratings are not good measures of quality); Lindgren, *supra* note 161, at 25 tbl.6; Vining, Steigerwalt & Smelcer, *supra* note 161, at 3–18.

¹⁶⁷ See Lindgren, *supra* note 161, at 25 tbl.6 (showing that few characteristics other than nominating president and judicial experience affected ABA ratings); *Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees*, *supra* note 161, at 17, 29 tbl.1 (finding no statistical difference at the $p < 0.05$ level for race but finding that men were 12.3% more likely to receive a "well-qualified" rating than women).

of the federal bench, merely because they are . . . a minority or a female, . . . aren't any less qualified."¹⁶⁸

Some of the white judges, however, tempered their responses by emphasizing that "qualifications" must be considered first and foremost before considering diversity. These judges were worried that the legitimacy of the federal courts would suffer if unqualified minority candidates were selected. For example, a white female judge stated: "There are some people who are chosen for diversity and not qualifications, but that actually diminishes the public's trust of the courts."¹⁶⁹ A similar sentiment was echoed by another white female judge concerning the judicial appointment process: "[I]n striving for diversity you have to be careful not to dilute the quality. I don't think we should engage in real affirmative action. It is unfair to our public if we can't service them."¹⁷⁰

One white female judge was troubled that the appointment of unqualified diversity candidates would lead to white male backlash, further undermining legitimacy:

If someone is chosen simply to create diversity and they are not as good or up to the task, everyone else figures it out in short order, and it could cause resentment. I don't think that is good for society. I start on the assumption that minorities are not immutably unqualified.¹⁷¹

In sum, while none of the judges believed their minority and female colleagues on the bench to be unqualified, some did intimate that a diversity program for the federal courts could theoretically produce unqualified judges were race, ethnicity, and gender to be given greater weight than a candidate's qualifications.

C. Reverse Discrimination

Conservatives also decry diversity programs because they constitute reverse discrimination.¹⁷² Justice Thomas has warned that these perceptions of reverse discrimination lead to white backlash¹⁷³: "[S]uch programs . . .

¹⁶⁸ Interview with Judge G, *supra* note 73.

¹⁶⁹ Interview with Judge S (July 27, 2009).

¹⁷⁰ Interview with Judge O, *supra* note 82.

¹⁷¹ Interview with Judge A, *supra* note 43.

¹⁷² See *infra* notes 176–82 and accompanying text.

¹⁷³ Most attribute this backlash to feelings among whites that their once-privileged status of superiority is jeopardized by minorities. See, e.g., HUBERT M. BLALOCK, JR., TOWARD A THEORY OF MINORITY-GROUP RELATIONS 154 (1967) ("An increase in minority percentage should result in an increase in discrimination both because of heightened perceived competition and an increased power threat."). Others argue it is a product of racism. See, e.g., FRANTZ FANON, BLACK SKIN, WHITE MASKS 12 (Charles Lam Markmann trans., 1967) ("There is a fact: White men consider themselves superior to black men.").

President Obama has also recognized the existence of white backlash resulting from opposition to racial policies; he believes it stems from whites' feelings that they are being punished for the wrong-

provoke resentment among those who believe that they have been wronged by the government's use of race."¹⁷⁴ According to Gregory Rodriguez of the New America Foundation, white backlash

won't take the form of a chest-thumping brand of white supremacy. Instead, we are likely to see the rise of a more defensive, aggrieved sense of white victimhood [O]ne can hear evidence of white grievance in many corners of the country. And it's not coming just from fringe bloggers. . . . [E]ven though [whites] are still the majority and collectively maintain more access to wealth and political influence than other groups, whites are acting more and more like an aggrieved minority.¹⁷⁵

White backlash to liberal racial policies was first detected at the same time that affirmative action programs began to take hold in the early 1970s.¹⁷⁶ Cases involving legal claims of reverse discrimination, such as *Regents of the University of California v. Bakke*,¹⁷⁷ *DeFunis v. Odegaard*,¹⁷⁸ *J. A. Croson*,¹⁷⁹ *Adarand*,¹⁸⁰ *Grutter*,¹⁸¹ *Parents Involved*,¹⁸² and *Hopwood v.*

doing of their ancestors through affirmative action programs that give preference to minorities. *See* Barack Obama, A More Perfect Union (Mar. 18, 2008) (speech delivered at the National Constitution Center) (transcript available at <http://www.npr.org/templates/story/story.php?storyId=88478467>).

Still others suggest that white backlash might be caused by the perception that government benefits are being awarded according to group membership, which is contrary to American individualism and meritocracy. *See, e.g.,* SKRENTNY, *supra* note 119, at 26–27.

¹⁷⁴ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment); *see also* *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting) (stating that race preferences “contribut[e] to an escalation of racial hostility and conflict”).

¹⁷⁵ Gregory Rodriguez, *The White Anxiety Crisis*, TIME, Mar. 11, 2010, at 7, available at http://www.time.com/time/specials/packages/article/0,28804,1971133_1971110_1971119-1,00.html. The fringe blogger of whom Rodriguez spoke was Glenn Beck, who “suggested that the white man responsible for the worst workplace massacre in Alabama history was ‘pushed to the wall’ because he felt ‘silenced’ and ‘disenfranchised’ by ‘political correctness.’” *Id.* For an account of contemporary white nationalist groups, *see* SWAIN, *supra* note 79, at 339–45.

¹⁷⁶ *See* SWAIN, *supra* note 79, at 150.

¹⁷⁷ 438 U.S. 265, 269–70, 276 (1978) (holding that a state medical school's race-based selection of applicants, excluding white candidates from consideration for a reserved number of “special admissions” slots, was unconstitutional).

¹⁷⁸ 416 U.S. 312 (1974) (per curiam) (considering a white applicant's challenge to the constitutionality of a state law school's preferential treatment of minority candidates in admissions decisions and finding that the case was moot since the applicant, having been admitted after a state supreme court decision in his favor, was completing his final term of law school).

¹⁷⁹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 487, 507–08 (1989) (holding that a city ordinance requiring city contractors to subcontract a set percentage of each job to minority businesses was not sufficiently narrowly tailored to satisfy the Equal Protection Clause of the Fourteenth Amendment).

¹⁸⁰ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204–05 (1995) (remanding to court of appeals with instructions to apply a strict scrutiny standard where a contractor challenged the constitutionality of a federal statute giving monetary incentives to federal government contractors to hire minority-controlled subcontractors).

Texas,¹⁸³ are said to be borne of white backlash to affirmative action.¹⁸⁴ White flight from the Democratic Party is also cited as a manifestation of white backlash against liberal racial policies.¹⁸⁵ More recently, there has been evidence that the Tea Party is rooted in white voters' disapproval of the government's civil rights agenda.¹⁸⁶ However, although conservatives object to diversity efforts as reverse discrimination, some argue that the Republican Party, rather than trying to prevent white backlash, instead tries to exploit it for electoral gain.¹⁸⁷

Does a judicial appointment strategy predicated on diversity, like diversity initiatives in other contexts, lead to white or male backlash? For those judges interviewed who did offer opinions, the responses varied. Some judges seemed outraged by this suggestion. A white female judge responded: "No. I don't think that [diversity efforts will cause a backlash] and I don't care [if it does]."¹⁸⁸ Referring to white males, she stated, "Let them be alienated."¹⁸⁹ Another female judge expressed her frustration this way: "[W]hite males are alive and well and thriving [on the federal bench]. I don't think anyone could say that the white male is getting the shaft [in the appointment process]."¹⁹⁰ Similarly, one white male judge matter-of-factly

¹⁸¹ *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003) (upholding a state university law school's admissions standard that permitted the consideration of diversity benefits when evaluating applicants against a white applicant's challenge that the policy violated the Equal Protection Clause of the Fourteenth Amendment).

¹⁸² *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709–11 (2007) (overturning the assignment plans of two school districts that sought to achieve racial diversity by assigning students to elementary schools based on a series of factors including race).

¹⁸³ 78 F.3d 932 (5th Cir. 1996) (finding that the desire to achieve a more diverse student body does not make affirmative action plans constitutional).

¹⁸⁴ See, e.g., Roy L. Brooks, *American Democracy and Higher Education for Black Americans: The Lingering-Effects Theory*, 7 J.L. & SOC. CHALLENGES 1, 59 (2005) (describing white backlash in response to *Hopwood*); Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150, 263–64 (1999) (describing white backlash in response to *Adarand* and *J.A. Croson*); Genna Rae McNeil, *Before Brown: Reflections on Historical Context and Vision*, 52 AM. U. L. REV. 1431, 1457 (2003) (characterizing *DeFunis* and *Bakke* as early white backlash cases).

¹⁸⁵ See STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 171–77 (1997).

¹⁸⁶ See, e.g., Nicholas Graham, "Tea Party" Leader Melts Down on CNN: Obama Is an "Indonesian Muslim Turned Welfare Thug," HUFFINGTON POST (Sept. 15, 2009, 9:02 AM), http://www.huffingtonpost.com/2009/09/15/tea-party-leader-melts-do_n_286933.html (describing an interview with Tea Party leader Mark Williams and his references to President Obama as an "Indonesian Muslim turned welfare thug" and "a racist in chief" as well as his response that "[u]ntil [President Obama] embraces the whole country what else can I conclude").

¹⁸⁷ See Paul Krugman, Op-Ed, *Republicans and Race*, N.Y. TIMES, Nov. 19, 2007, at A23 (describing how President Reagan politically exploited white backlash in response to the civil rights movement).

¹⁸⁸ Interview with Judge Q, *supra* note 82.

¹⁸⁹ *Id.*

¹⁹⁰ Interview with Judge F, *supra* note 57.

stated that white or male backlash was unlikely to occur: “I think it would be pretty difficult because when you look around . . . the majority [of judges] is still white men.”¹⁹¹

Many of the judges, on the other hand, speculated that diversity programs for the federal bench could cause white backlash.¹⁹² One judge, a minority woman, referenced the fight about identity politics that raged during Justice Sotomayor’s confirmation proceedings: “I think the Sotomayor hearings illustrated the tension that seems to exist between the historically dominant subjects of our population and those who have been historically excluded from the bench.”¹⁹³ Another judge, a white male, made these comments about diversity programs:

A white middle class or even a white working class person, who feels that they are not obtaining what they should obtain on the merits because of affirmative action . . . is going to feel a resentment that is not without justification. . . . I mean, it’s all well and good to say to that person, “[W]ell, this is for the greater good of society,” but he is going to say, “[W]ell, it’s my life, you know.”¹⁹⁴

One minority male judge believes that white backlash is borne of racism; when asked why white males view diversity as a threat, he replied:

Because I think they are hiding under, dare I say . . . a cloak of racism. Racism and gender bias. It’s a question of people having been used to the way [the bench] was, for most of the critics are [in] the majority. . . . I’ve met a judge [who said to me], “It’s about time a white guy got nominated.” And I had to remind this person, who I think very highly of, [that] “this court was founded back in the 1700s and I think that, until recently, the court had only three to four nonwhite males as judges.”¹⁹⁵

Another white female judge disagreed that backlash is driven by racism, stating that she knew many people, “including some who have been on the wrong end of identity politics in the appointment process, who are anything but prejudiced. But they do resent being on the wrong end of identity politics.”¹⁹⁶ She concluded, “I don’t think you should discriminate against white males to increase diversity.”¹⁹⁷

Finally, a minority male judge expressed the hopeful view that white backlash would end within a generation:

¹⁹¹ Interview with Judge G, *supra* note 73.

¹⁹² *E.g.*, Interview with Judge A, *supra* note 43 (“[I]t could cause resentment.”); Interview with Judge F, *supra* note 57 (responding to a question about the prospects of diversity leading to white or male backlash by saying, “Yes, I assume it would”); Interview with Judge P, *supra* note 108 (“I suppose there is some prospect of backlash.”).

¹⁹³ Interview with Judge C, *supra* note 45.

¹⁹⁴ Interview with Judge L, *supra* note 84.

¹⁹⁵ Interview with Judge B, *supra* note 44.

¹⁹⁶ Interview with Judge R, *supra* note 85.

¹⁹⁷ *Id.*

Some white men are going to have some negativity about diversity, but I also think that that is generational. . . . People of my son's generation don't assume that when a black man gets a job, it's because of some affirmative action policy. Particularly when you look at the black men who are out there now . . . [like] Barack Obama.¹⁹⁸

* * *

As we have seen above, scholars, pundits, presidents, and judges from different ends of the political spectrum have advocated very different positions as to whether diversity appointments are beneficial to our judicial system and society. The arguments largely break along partisan and ideological lines. The common belief is that as long as we remain a nation highly polarized on race issues, there is no point of agreement between the two sides of the diversity debate. As one scholar has cautioned:

One product of categorically rejecting colorblindness and likening it to racism is a debate that becomes polarized, with each side entrenched in its own position, unwilling to acknowledge the legitimacy of opposing arguments. The opposing camps do not talk to each other so much as they talk past each other. Lost is the opportunity for persuasion and the identification of common ground. What this means as a practical matter for race and law scholars is that our [prodiversity] preaching may be well received by the choir, but will likely fail to convert the broader population. One is unlikely to persuade people whose positions one has vilified as racist.¹⁹⁹

Trying to move past the hegemonic paradigm that has defined the contours of the diversity debate since the 1970s, I argue that, in fact, people on both ends of the political continuum actually agree on one critical point regarding judicial appointments: a president's judicial appointment strategy should strive to enhance and preserve the legitimacy of our judicial system. In the next Part, I explain how both advocates and opponents of diversity strategies in the judicial selection process conform to normative political theories about building institutional legitimacy.²⁰⁰

¹⁹⁸ Interview with Judge M, *supra* note 58. Judge M also thinks that male backlash against female judges has come to an end with this current generation. *See id.*

¹⁹⁹ Ralph Richard Banks, *Beyond Colorblindness: Neo-racialism and the Future of Race and Law Scholarship*, 25 HARV. BLACKLETTER L.J. 41, 52 (2009).

²⁰⁰ It should be noted that, heretofore, prodiversity advocates have been much more explicit than the color-blind advocates about their theory's potential to enhance the legitimacy of the courts. Indeed, President Clinton unequivocally stated that, without diversity, "the judiciary . . . runs the risk of losing its legitimacy in the eyes of many Americans." Clinton, *supra* note 72, at 15. However, we shall see that conservatives actually share the same legitimacy goal as progressives. *See infra* Part III.

III. THE DIVERSITY DEBATE AND THE LEGITIMACY OF THE FEDERAL COURTS

Political scientists often link “legitimacy” to a “‘reservoir’ of good will” upon which an institution can rely in the short term in the event it issues unpopular decisions.²⁰¹ Legitimacy is long-term, deep-seated support for an institution (also known as “diffuse support”) rather than short-term snapshots of an institution’s popularity (also known as “specific support”).²⁰² Because an institution’s long-term survival is so dependent on this reservoir of good will, our democracy would be in great jeopardy were any key political institution to lose its legitimacy.

As the only unelected branch of our federal government, the federal judiciary is more reliant on its reservoir of good will than the elected branches are; elections are said to replenish the legitimacy of the Executive and Legislative Branches.²⁰³ Moreover, as the only branch lacking purse or sword, the judiciary is more reliant on legitimacy to secure voluntary obedience to its orders.²⁰⁴ Only by ensuring optimal levels of legitimacy for the federal judiciary can we preserve one of the basic tenets of American democracy: the rule of law.

A. A Diversity Strategy Promotes Institutional Legitimacy

1. *Remedying Past Discrimination.*—According to the theory of procedural justice, a person’s perception of the legitimacy of the courts turns not on the *substance* of the outcome but on the *fairness* of the judicial process.²⁰⁵ This theory has been subjected to rigorous empirical analysis, and scholars have consistently found that fair court procedures evincing respect, kindness, and the opportunity to be heard lead to greater legitimacy for the justice system.²⁰⁶ Notably, *all* of the judges interviewed for this project expressed their commitment to the principle of procedural justice.

²⁰¹ See DAVID EASTON, A FRAMEWORK FOR POLITICAL ANALYSIS 124–26 (1965); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 636–37 (1992); Scherer & Curry, *supra* note 21, at 90 (citing EASTON, *supra*).

²⁰² See Caldeira & Gibson, *supra* note 201, at 637–38.

²⁰³ See *id.* at 635.

²⁰⁴ Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 443 (1992).

²⁰⁵ John Thibaut and Laurens Walker originally coined the term “procedural justice” to describe the way in which litigants’ satisfaction with the resolution of their legal dispute is influenced by the fairness of the process rather than the substantive outcome of the dispute. See JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 67–68 (1975).

²⁰⁶ In a large body of scholarship, Tom Tyler and colleagues build on Thibaut and Walker’s work. Tyler and his colleagues demonstrate that procedural justice leads not only to satisfaction with the resolution of a specific case but, much more broadly, to greater satisfaction and trust in the legal system as a whole. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 106–07 (1990) (reviewing studies and concluding that perceptions of procedural justice increase the legitimacy of and, in turn, obedience to the law); Tom R. Tyler, *The Role of Perceived Injustice in Defendants’ Evaluations of Their Courtroom Ex-*

The theory of procedural justice is directly related to the goal of remedying past discrimination. Were a court to find that minorities had been systematically discriminated against, a hollow remedy awarded the victims would certainly be viewed as unfair and, as such, would undermine the court's legitimacy.²⁰⁷ Outsiders, not parties to the case, may also be affected by the ruling and as a result view the judicial process as unfair, jeopardizing the legitimacy not of just one court but of the entire system.

2. *Descriptive Representation.*—Unlike procedural justice, descriptive representation promotes legitimacy not by providing litigants with fair and open procedures but by creating the appearance that a particular governmental institution is open to those from all walks of life. As Justice O'Connor wrote in *Grutter v. Bollinger*, "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."²⁰⁸ Descriptive representation thus rests not on in-court judicial behavior but rather on the provision of a strong symbolic message

perience, 18 LAW & SOC'Y REV. 51, 69 (1984) (finding a correlation between the perception that a legal process was fair and satisfaction with the judicial system); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 128 (1988) (finding that citizens define fairness of process largely based on the behavior of the police and judges).

Procedural justice has also been found to enhance the legitimacy of other political institutions. *See, e.g.*, Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOC'Y REV. 809, 818 & tbl.2 (1994) (finding that the legitimacy of congressional committees and the members on those committees is strongly influenced by perceptions about the fairness of the procedures used by the committees); Tom R. Tyler, Jonathan D. Casper & Bonnie Fisher, *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. POL. SCI. 629, 630 (1989) ("Court experiences spill over to help define the individual's stance toward government institutions and political life in general." (quoting HERBERT JACOB, *DEBTORS IN COURT: THE CONSUMPTION OF GOVERNMENT RESOURCES* 129 (1969)) (internal quotation marks omitted)).

²⁰⁷ There is a body of legal scholarship addressing whether the federal courts' use of broad equitable remedies, including those that redress racial discrimination, enhances or undermines the legitimacy of the federal courts. *See, e.g.*, DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 19–21 (1977) (arguing that the courts' use of broad equitable powers to resolve political issues extends the courts beyond their rightful jurisdiction and entangles them in otherwise political and social policies, thereby threatening to undermine their legitimacy); *see also* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982) (suggesting that judicial case management can also affect perspectives on the legitimacy of the courts). This debate, however, is inapposite to the one discussed herein. As the argument goes, the federal courts' legitimacy is undermined when judges employ equitable remedies to resolve political questions that are not within the courts' Article III jurisdiction. In contrast, here I consider a sort of equitable remedy imposed by the President through a power squarely entrusted to him by both the Constitution and the Legislature: the President's use of his power to nominate and appoint federal court judges with the advice and consent of the Senate. *See* U.S. CONST. art. II, § 2, cl. 2; *see also* Judiciary Act of 1789, ch. 20, 1 Stat. 73 (codified as amended at 28 U.S.C. §§ 511, 513 (2006)) (establishing the lower federal courts). Of course, since President Obama has not adopted this theory to justify diversity on the bench, the argument is moot for now. *See supra* Part I.C.

²⁰⁸ 539 U.S. 306, 332 (2003).

conveyed by the mere act of seating members of underrepresented groups on the bench.²⁰⁹

3. *Substantive Representation.*—Substantive representation may also lead to greater legitimacy for the U.S. courts. By garnering public support through its substantive decisions over a long period of time, an institution can fill its reservoir of good will to protect it in the event it one day makes an unpopular decision.²¹⁰

Maintaining legitimacy among minority groups—interest groups that represent the views of a minority of people and ethnic or racial minority groups—has always been a thorny issue for democratic governments because the voices of the majority can easily drown out those of the minority. James Madison feared such a situation as he drafted the Constitution: “[M]easures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority.”²¹¹ When the voices of a minority group are not engaged in an institution’s decisionmaking process, that institution may be perceived by those excluded as illegitimate. Legal scholars have argued that substantive representation is a way to resolve this “tyranny of the majority” dilemma by ensuring that racial and ethnic minorities’ interests (as well as those of other marginalized groups) are at least considered in the decisionmaking process of any given institution.²¹²

²⁰⁹ See M. Stephen Weatherford, *Mapping the Ties That Bind: Legitimacy, Representation, and Alienation*, 44 W. POL. Q. 251, 251 (1991) (“[E]valuating a political system’s claim to legitimacy depends on the presence of constitutional guarantees of access and equality, properties that can be competently judged by an outside observer.”).

²¹⁰ See, e.g., Anke Grosskopf & Jeffery J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court*, 51 POL. RES. Q. 633, 651 (1998) (claiming that controversial substantive decisions of the Court do not significantly decrease the long-term public support for the institution); Jeffery J. Mondak, *Institutional Legitimacy, Policy Legitimacy, and the Supreme Court*, 20 AM. POL. Q. 457, 471 (1992) (finding that issuing unpopular decisions harms the legitimacy of the Supreme Court); Jeffery J. Mondak, *Substantive and Procedural Aspects of Supreme Court Decisions as Determinants of Institutional Approval*, 19 AM. POL. Q. 174, 183–85 (1991) (finding that “the substance of Supreme Court rulings can exert strong influence on subsequent evaluations of the Court”); Jeffery J. Mondak & Shannon Ishiyama Smith, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1123 (1997) (“[T]he Court’s support is derived from ‘the total impressions made by the Court over a long period of time.’” (quoting Michael Petrick, *The Supreme Court and Authority Acceptance*, 21 W. POL. Q. 5, 11 (1968))); Joseph Tanenhaus & Walter F. Murphy, *Patterns of Public Support for the Supreme Court: A Panel Study*, 43 J. POL. 24, 29 (1981) (showing a strong correlation between support for individual substantive decisions and long-term diffuse support for the Court).

²¹¹ THE FEDERALIST NO. 10, at 54 (James Madison) (E.H. Scott ed., Chicago, Scott, Foresman & Co. 1898).

²¹² See Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 887 (2009) (“If the law has not only rejected [minorities’] view of social reality, but has refused even to permit the articulation of it . . . , those who disagree lack any resources for understanding the law as theirs.”).

B. A Diversity Program Undermines Institutional Legitimacy

The three core conservative arguments against affirmative action are directly tied to political legitimacy.²¹³ In order to make this case, I must first extend conservatives' more general arguments against affirmative action specifically to the judicial appointment process. Taking the conservative arguments against diversity initiatives at face value, a president's use of a diversity strategy to select federal judges undermines the institutional legitimacy of the federal courts in three distinct ways: (1) by stigmatizing diversity judges, thus creating the appearance that they are not qualified to sit on the federal bench; (2) by elevating considerations of race, ethnicity, and gender over merit, thus resulting in the appointment of unqualified judges; and (3) by discriminating against potential white male judicial candidates, thus causing a white or male backlash.

1. Stigmatization.—The theory of stigmatization proposes that diversity initiatives stigmatize those nominees who benefit from the programs, leading the white public to presume that such diversity appointees are unqualified.²¹⁴ If it is true that minority appointees on the bench are branded by the white public as less qualified than they are, and women are characterized by men as less qualified, then a diversity strategy could undermine whites' or men's trust and confidence in the judicial process.

Given some whites' misconceptions about diversity hires and appointees, one could imagine a scenario in which a white litigant appeared before a diversity appointee, lost his case, and then felt that he had not received his fair day in court because a judge whom he perceived as an unqualified diversity appointee decided his case. Extending this litigant's dissatisfaction to white litigants across the country, trust in the judicial process would decline as the number of diversity appointees rises. Moreover, if a decision made by a diversity judge in a high profile case were to contradict popular opinion, then the public might suffer the same loss of trust as actual liti-

²¹³ Similarly, some scholars maintain that only a color-blind process promotes legitimacy and that a process intended to increase the presence of one race or gender undermines the entire process's legitimacy. See, e.g., RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 116 (1996) (explaining that if courts strike down race-based preferential hiring, color-blind class-based preferences will provide an alternative that favors minorities but does not stigmatize the poor, making such preferences more legitimate than race-based preferences). Some have criticized this position as hypocritical. See, e.g., Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289, 1307 (1997) (arguing that color-blind class-based preferences are no more legitimate than race-based preferences urged by progressives). Nonetheless, this theory is consistent with the normative argument that a liberal government's attempt to engage in distributive justice is illegitimate because it amounts to coercion. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 166–68 (1974) (suggesting that government attempts to engage in distributive justice (i.e., to redistribute resources among individuals and groups) are illegitimate because they are a form of coercion over the individual).

²¹⁴ See *supra* notes 147–56 and accompanying text.

gants appearing before the diversity judges. In short, there would be a crisis of confidence in the judicial process.

In sum, pursuant to the theory of procedural justice, the widespread perception that the judicial process is unfair jeopardizes the legitimacy of the entire legal system. Building on the procedural justice body of empirical research, some scholars have also found that when the public perceives that a political institution is operating incompetently, levels of trust and confidence in that institution decrease.²¹⁵ Under these conditions, conservatives could argue that diversity appointments jeopardize legitimacy by creating the appearance of an unqualified, unfair bench.

2. *Less Qualified Judges.*—Conservatives' second theory presumes that judges appointed pursuant to a diversity strategy for the federal bench are, in fact and not just in perception, less qualified than white judicial appointees.²¹⁶ For the same reasons that perceptions about minority judges' qualifications undermine the legitimacy of the courts, so too would the reality that minority judges are less qualified than their white peers undermine confidence and trust in the federal courts.

3. *Reverse Discrimination.*—This argument is grounded in the notion that any consideration of race, ethnicity, or gender in awarding jobs and benefits amounts to racial discrimination against whites, men, or both.²¹⁷ Extending this theory to the judicial appointment process, conservatives could argue that a president's consideration of these factors in choosing judges discriminates against white or male judicial candidates. If one views diversity initiatives as discriminatory, then such programs would violate the sacrosanct principle of all modern liberal democracies—that discrimination by the government is an illegitimate act.²¹⁸ A discriminatory appointment process would thus be an illegitimate process. Moreover, even if such a

²¹⁵ See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 18 (2002); Gary Orren, *Fall from Grace: The Public's Loss of Faith in Government*, in *WHY PEOPLE DON'T TRUST GOVERNMENT* 77 (Joseph S. Nye, Jr., Philip D. Zelikow & David C. King eds., 1997) (concluding that government's failure to live up to citizens' expectations—that is, their wants and anticipations—plays a large role in the public's loss of satisfaction with the government); *supra* notes 206–07 and accompanying text.

²¹⁶ See *supra* notes 155–56 and accompanying text. A few conservatives have also claimed that blacks in the general population are genetically less intelligent than whites. See, e.g., RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* 288 (1994) (finding that whites have higher IQs than blacks). This theory has largely been rejected by mainstream scholars. See, e.g., MARGARET L. ANDERSEN & HOWARD F. TAYLOR, *SOCIOLOGY: UNDERSTANDING A DIVERSE SOCIETY* 433–34 (4th ed. 2006) (arguing that *The Bell Curve* uses faulty methodology); *THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA* (Steven Fraser ed., 1995) (offering a collection of essays dedicated to discussing and primarily discrediting *The Bell Curve*).

²¹⁷ See *supra* notes 173–86 and accompanying text.

²¹⁸ See John Gardner, *Liberals and Unlawful Discrimination*, 9 OXFORD J. LEGAL STUD. 1, 22 (1989) (describing the “single institutional construct which many liberals have aspired to call their own, namely the Anglo-American legislation against discrimination”).

policy did not rise to a level of discrimination that would be actionable by white candidates passed over for judicial appointments, the white public's perception that the process is discriminatory toward potential white judges would lead them to see the appointment process as unfair, thus violating the theory of procedural justice. Under these conditions, the legitimacy of the courts could also be threatened.

IV. IS THERE A JUDICIAL APPOINTMENT STRATEGY THAT CONFERS UNIVERSAL LEGITIMACY ON THE FEDERAL COURTS?

I maintain that both sides of the diversity debate want the judicial appointment process to be used to achieve the same goal: preserving and enhancing the political legitimacy of the federal judicial system. However, Republicans and Democrats are locked in a debate about how to achieve that goal. Empirical evidence on the subject of diversity on the bench does not appear to resolve this debate with respect to minorities.²¹⁹

Pursuant to the contours of the debate as it stands now, we seem to be presented with two options: (1) choose the Democrats' diversity approach, possibly alienating whites just as they are alienated when they believe that preferences are being given to minorities,²²⁰ or (2) choose the Republicans' color-blind approach, maintaining the status quo pursuant to which whites view the courts as much more legitimate than blacks do.²²¹ Neither of these strategies presumably creates a justice system that enjoys high levels of legitimacy across all groups. The status quo threatens legitimacy among minorities; increasing minority presence threatens legitimacy among whites.

This "paradox of diversity" has grave implications. It suggests that universal legitimacy for the U.S. justice system may not be attainable in the current state of partisan politics.²²² As the only unelected branch of the federal government, the federal judiciary is more reliant on its reservoir of good will (i.e., legitimacy) than the elected branches: "The Court lacks an electoral connection to provide legitimacy . . ." ²²³ And with the power of purse and sword, the elected branches are capable of enforcing compliance even without support of the public. The Judicial Branch, on the other hand, unelected and lacking the power of purse or sword, has only its legitimacy

²¹⁹ See *supra* notes 161–67 and accompanying text (describing the conflicting studies).

²²⁰ See Scherer & Curry, *supra* note 21, at 101. I must caution the reader about these findings; because the authors used a population of convenience to conduct their experiments, their findings are not generalizable to the population writ large.

²²¹ James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POL. 1120, 1140 (1992); Scherer and Curry, *supra* note 21, at 97.

²²² No appointment strategy will ever have the approval of everyone in a nation as diverse as ours. So I use the term "universal" to mean that which cuts across racial, ethnic, and gender lines. As for cutting across partisan polarization, there is evidence that legitimacy for the courts does not divide along party lines. See Caldeira & Gibson, *supra* note 201, at 643 (finding no relationship between partisanship and diffuse support for the Supreme Court).

²²³ *Id.* at 635.

to ensure voluntary compliance with its orders.²²⁴ Without universal legitimacy for the courts, the rule of law is jeopardized. The diversity paradox thus threatens the ability of the courts to carry out their mandate.

CONCLUSION

We may have reached a critical impasse as to which of the parties' judicial appointment strategies is better for the long-term stability of our courts. And, in this age of interparty gridlock, there seems little hope that one party can be persuaded to adopt the other's selection strategy. The time has come to consider abandoning current approaches and devise a new appointment strategy that may be capable of achieving universal legitimacy. That new strategy should focus on raising levels of legitimacy among minorities while maintaining the already high levels of legitimacy among whites. Under this scenario, all races could achieve comparable levels of legitimacy.

Diversity must continue to play a role in a reformulated judicial selection plan. Under current membership, we know that minorities' levels of legitimacy remain much lower than whites'. At the same time, this new strategy must also educate majorities about the tangible benefits they receive through diversity programs. Diversity proponents thus far have made little effort to articulate clearly to whites how a diversity strategy has real-world benefits for them. Instead, diversity advocates tend to reference an amorphous public good that only theoretically flows to whites.²²⁵ Failure to make a case about tangible benefits may be one explanation for the decline in levels of legitimacy among whites as more minority judges are appointed to the bench.²²⁶ Absent an articulation of tangible benefits, many whites continue to see a diversity strategy as affording undeserved preferences to blacks at whites' expense and to see whites' historical domination of the judicial system fading away.²²⁷ At least in the current polarized political environment, providing whites' with examples of the tangible benefits of a diversity program may be the best solution to resolving the diversity paradox.²²⁸

²²⁴ See Caldeira & Gibson, *supra* note 201, at 635; Scherer & Curry, *supra* note 21, at 93.

²²⁵ For instance, in *Grutter v. Bollinger*, the University of Michigan argued that everyone benefits from diversity because it aids "cross-racial understanding" and the "break[ing] down [of] racial stereotypes." 539 U.S. 306, 330 (2003).

²²⁶ Cf. Scherer & Curry, *supra* note 21, at 101.

²²⁷ See *supra* notes 173–87 and accompanying text.

²²⁸ Also, President Obama's empathy approach, see *supra* notes 110–15, does have some long-term promise for resolving the diversity paradox. Based on a recent survey of Americans on the kind of Justices they want on the Supreme Court, a majority of Americans, and even a majority of Republicans, favor "empathetic" judges. See Gibson, *supra* note 115. To the extent that President Obama and others can convince a majority of whites that "empathy" is not a code word for "affirmative action," then perhaps Republican leaders will have no choice but to acquiesce to the public's will.

In terms of articulating tangible benefits that whites enjoy from implementing diversity initiatives, I would suggest that Democrats first focus on the relationship between diversity, legitimacy, and crime. There is a body of empirical work finding that raising citizens' levels of legitimacy towards legal authorities, including the police and the courts, makes people more likely to obey the law.²²⁹ This body of work also suggests legitimacy is more successful in achieving obedience to the law than are coercive deterrence measures, such as tough criminal punishments.²³⁰ Were levels of legitimacy raised through diversity efforts, we could see a shift in attitudes with an important impact on crime rates.

In terms of criminal justice, minorities would be most affected by increased legitimacy levels of the courts as long as they remain the majority of criminal defendants in the justice system, as they are now.²³¹ Since diversifying the federal bench has the promise of raising minorities' feelings of legitimacy for the courts, we may be able to induce greater faith in our criminal justice system among groups which are most vulnerable to becoming involved with the criminal justice system (i.e., blacks and Hispanics). Diversity on the bench (and in all walks of life), therefore, has the potential to contribute to the fostering of a more stable, law-abiding society than currently exists.²³²

But whites would benefit as well from this shift in attitudes toward the criminal justice system. Crime remains a salient issue in this country. The

²²⁹ See, e.g., TYLER, *supra* note 206, at 62 (“Citizens who view legal authority as legitimate are generally more likely to comply with the law.”); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 763–64 & tbl.2 (1994) (finding that the public’s willingness to accept Supreme Court authority in a controversial area of law is linked to the Court’s broader institutional legitimacy); Tyler, Casper & Fisher, *supra* note 206, at 647 (“[I]ssues of fair process play an important role in the maintenance of political allegiance.”).

²³⁰ See TYLER, *supra* note 206, at 57–64 & fig.5.1, tbl.5.1.

²³¹ For purposes of this argument, “minorities” refers to African-Americans and Hispanics, which are the groups statistically most likely to be charged with crime. These two groups comprise only 28% of the American population, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (click on “People” then “Ethnic groups”) (last visited Aug. 19, 2011), but they represent 67.5% of all criminal defendants in federal court. See U.S. SENTENCING COMM’N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.4, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/SBTOC09.htm. Greater diversity and greater obedience to the law could also reduce recidivism rates, which remain extremely high in the United States. For example, “67.5% of all prisoners released in 1994 were rearrested within three years” *Reentry Trends in the U.S.: Recidivism*, BUREAU JUST. STAT., <http://bjs.ojp.usdoj.gov/content/reentry/recidivism.cfm> (last visited Aug. 19, 2011).

²³² This is not to suggest that the increased presence of minorities on the bench, standing alone, will reduce crime rates. Resolving disparities in income and education levels across the races is critical to tackling the crime problem. But greater racial diversity across our government’s institutions, I argue, could also be a contributing factor for inducing greater obedience to the law, yet another way to tackle the crime problem, and a solution much easier to carry out than reducing income and educational disparities across the races.

majority of Americans support a law-and-order agenda to reduce crime as well as a willingness to abandon civil liberties for crime prevention.²³³ They mistakenly believe that the crime rate is rising,²³⁴ and they continue to support harsh criminal punishments like the death penalty.²³⁵ The president's use of a diversity strategy to raise legitimacy among minorities could instill greater obedience to the law among the people statistically most at risk to disobey it (minority men). This, in turn, should alleviate whites' concerns about the crime problem in this country—a tangible benefit for whites. But implementing this appointment strategy alone is not sufficient to resolve the paradox of diversity. President Obama and future presidents must also articulate to the white public that their diversity plans are capable of conferring such tangible benefits upon them, making whites *and* blacks stakeholders in the diversity strategy.

Right now, my hypothesis about the tangible connection between crime and diversity on the bench remains just a theory. Whether such theory has a basis in fact remains to be tested. To this end, I urge legal and political scholars, advocacy groups, and politicians to take up this issue and, at the same time, to try to identify through empirical analysis whether additional tangible benefits may flow to white Americans from a diversity appointment strategy.

²³³ See, e.g., Greg M. Shaw et al., *Crime, the Police, and Civil Liberties*, 62 PUB. OPINION Q. 405, 407–09 (1998) (discussing relevant surveys in which a majority of the public was found to support law-and-order policies that would involve curtailing civil liberties in order to fight crime).

²³⁴ See Jeffrey M. Jones, *Americans Perceive Increased Crime in U.S.*, GALLUP (Oct. 14, 2009), <http://www.gallup.com/poll/123644/americans-perceive-increased-crime.aspx>; Press Release, Fed. Bureau of Investigation, FBI Releases 2009 Crime Statistics (Sept. 13, 2010), <http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2009-crime-statistics> (showing decreasing crime rates).

²³⁵ See Lydia Saad, *Americans Hold Firm to Support for Death Penalty*, GALLUP (Nov. 17, 2008), <http://www.gallup.com/poll/111931/americans-hold-firm-support-death-penalty.aspx>.

