IS THERE REALLY A DIVERSITY CONUNDRUM?

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There is consistent agreement among scholars that diversity on the federal bench is a good thing.[1] However, there is some disagreement on the rationale for encouraging this diversity. While some political scientists have focused their research on differences in judges' voting patterns based on each judge's personal characteristics—such as race or sex[2]—others have criticized this approach as a justification for diversifying the bench.[3] While most studies of voting patterns of state and federal judges find no difference or inconsistencies in differences in voting patterns based on these characteristics,[4] there are areas of the law in which they appear to make a difference in judges' approaches, at least in certain types of cases.

This Article begins by canvassing some of the common arguments for diversifying the bench. It also addresses the current demographics of the federal bench, which has become increasingly diverse, thanks in large part to the judicial appointments of President Barack Obama and

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1. *See, e.g.*, Sheldon Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488 (1979); Elaine Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 306, 313 (1982); Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 171–72 (1990).

2. *See, e.g.*, Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 142–44, 145 tbl.2, 146 tbl.3 (2000); Donald R. Songer & Kelley A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750, 751 (2000); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 613–15 (1985).

3. *See, e.g.*, Sally J. Kenney, *Critical Perspectives on Gender and Judging*, 6 POL. & GENDER 433, 436 (2010); Kate Malleson, *Justifying Gender Equality on the Bench: Why Difference Won't Do*, 11 FEMINIST L. STUD. 1, 2 (2003).

4. *See* Theresa M. Beiner, *Female Judging*, 36 TOL. L. REV. 821, 823–29 (2005) (canvassing studies).

earlier Democratic presidents.[5] It then discusses the few areas of the law in which studies have shown some differences in outcomes correlating with the race or gender of the judge. Finally, this Article attempts to address the tension that results from focusing on differences in case outcomes based on the race or sex of the judge in a judicial system that aspires to impartiality.

I. THE VALUE OF A DIVERSE BENCH

Political scientists, law professors, and others have identified a variety of reasons that a diverse bench—in particular, the federal bench—is a good thing. Some arguments emphasize the difference "nontraditional" judges bring to the courts.[6] For example, nontraditional judges contribute an "outsider" perspective—particularly in areas involving sexual preference, race, employment, and constitutional law—that might have an impact on the outcome of a case.[7] This is akin to arguing that women, or members of minority groups, will judge cases differently—what Hanna Fenichel Pitkin refers to as "substantive representation"—"what the representative actually does on behalf of the interests of the group he or she is associated with."[8] Relatedly, nontraditional judges may help narrow and subvert prejudices based on their outsider statuses.[9]

Nontraditional judges also increase public confidence in the courts. Courts that reflect the country—the people who are seeking justice before them—inspire more public trust in the entire judicial system.[10] Indeed, one can easily see how appearing before a judge who cannot relate to one's life experience would lead a person to question the fairness of such a judicial system. Law professor Niemke Grossman

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5. President Jimmy Carter was the first president to make a concerted effort to diversify the bench based on race and gender. *See* Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113, 117–20 (1999). President Clinton made further efforts to diversify the bench. *See id.* at 125–26. For a discussion of President Obama's appointments, see *infra* Part II.

6. I use the term "nontraditional" to refer to women and members of minority groups. This is a commonly used term by political scientists who study judicial appointments.

7. *See* Carl Tobias, *Considering Lesbian, Gay, Transgender, and Bisexual Nominees for the Federal Courts*, 90 WASH. U. L. REV. 577, 583 (2012).

8. *See* Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 301 (2004).

9. *See* Tobias, *supra* note 7, at 583.

10. *Id.*; Malleson, *supra* note 3, at 20–21; *see also* Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT'L L. 647, 664 (2012) (noting that representation is especially important to legitimacy if a group has suffered discrimination in a judicial system).

argues that sex representation, in particular, influences the sociological legitimacy of courts.[11] She explains that if men and women see situations differently and that different perspective results in different outcomes in cases, normatively, this requires both sexes represented or the results run the risk of bias—or at least the perception of bias—in decision making.[12] As the American Bar Association's Commission on the 21st Century Judiciary opined in a report well over ten years ago, "[w]ithin communities of color [in the United States] . . . concern that they receive unequal, inferior treatment in the courts is compounded by a lack of confidence due to the lack of diversity throughout the judiciary."[13]

Closely related to public confidence arguments is the fairness/representation rationale. This is what Pitkin referred to as descriptive representation—"resembling or reflecting the constituent elements of the community that it governs."[14] Such representation strengthens "at least the appearance of judicial impartiality, as well as the judiciary's legitimacy as a democratic institution."[15] As Sally Kenney argued in her book *Gender and Justice: Why Women in the Judiciary Really Matter*, "Justice must not only be done; it must be seen to be done."[16] Judges who represent the community, Kate Malleson posits, increase the judiciary's legitimacy as a political institution.[17] But is the judiciary a representative branch like other branches of the United States government? Analogizing to jury duty cases, Kenney argued that members of minority groups and women are stigmatized and told that they are essentially less than full citizens when this civic duty—being a member of the judiciary—is denied to them.[18] Thus, there is an argument for judicial diversity from an equity perspective as well. As Malleson put it the context of international courts, "it is inherently unfair that men enjoy a near monopoly on judicial power."[19]

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11. Grossman, *supra* note 10, at 652.

12. *See id.*

13. ALFRED P. CARLTON, JR., ABA, JUSTICE IN JEOPARDY: REPORT ON THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST JUDICIARY ix (2003).

14. Farhang & Wawro, *supra* note 8, at 301.

15. *Id.* As Grossman points out, "Sociological research shows that people are more likely to defer to decisions and rules when they view deciding authorities as legitimate." Grossman, *supra* note 10, at 650. Sociological legitimacy focuses more on whether constituencies believe a political body is legitimate. This differs from philosophical or political legitimacy. *See id.* at 651.

16. SALLY J. KENNEY, GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER 127 (2013).

17. Malleson, *supra* note 3, at 18–19.

18. KENNEY, *supra* note 16, at 168.

19. Malleson, *supra* note 3, at 15.

II. PRESIDENT OBAMA'S DIVERSE BENCH

In spite of these arguments, diversification of the federal bench has been slow to develop, beginning with President Jimmy Carter, who was the first president to emphasize diversity in his appointments.[20] While President Bill Clinton also stressed diversity in his judicial nominees,[21] diversity got its biggest boost during President Obama's two terms in office.[22] President Obama was, at first, criticized for his administration's initial slow focus on federal judicial appointments during his first term in office.[23] Since his first term, however, President Obama appointed judges who are the most diverse group in terms of gender, race, ethnicity, and sexual orientation that have ever been appointed.[24] In his first six years in office, he appointed as judges the highest number and proportion of women (40% of district court appointees, 60% of court of appeals appointees), the highest proportion of African Americans (over 20% of district court appointees, 5% of court of appeals appointees), the highest number and proportion of Hispanic Americans (over 11% of district court appointees), and the highest number and proportion of Asian Americans (over 6% of district court appointees, 5% of court of appeals appointees).[25] He also appointed ten openly gay judges in this period.[26] He made diversity on the bench, rather than just judicial ideology, one of the important

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20. *See* Beiner, *supra* note 5, at 117–18.

21. *See id.* at 125–26.

22. Elliot Slotnick et al., *Writing the Book of Judges Part 1: Obama's Judicial Appointments after Six Years*, 3 J.L. & CTS. 331, 335 (2015) ("The numbers and proportions of women appointed by Obama to the federal district bench shatter all previous records;" President Obama appointed a higher proportion of nontraditional judges than President Clinton).

23. *See* Theresa M. Beiner, *The Con Law Professor with Judicial Appointment Power*, 14 J. APP. PRAC. & PROCESS 1, 10–11 (2013); Robert A. Carp et al., *A First Term Assessment: The Ideology of Barack Obama's District Court Appointees*, 97 JUDICATURE 128, 129, 131 (2013) (noting criticism levelled at President Obama for slow nominations). *But see* Slotnick et al., *supra* note 22, at 333 (noting President Obama did appoint two Supreme Court justices during his first term in office).

24. *See* Slotnick et al., *supra* note 22, at 335; Max Ehrenfreund, *The Number of White Dudes Becoming Federal Judges Has Plummeted Under Obama*, WASH. POST: WONKBLOG (Feb. 18, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/18/the-number-of-white-dudes-becoming-federal-judges-has-plummeted-under-obama/?utm_term=.808793248a3e [https://perma.cc/5BU9-NGED].

25. Slotnick et al., *supra* note 22, at 350 tbl.4, 356 tbl.6, 360 tbl.7.

26. *Id.* at 332 (quoting Jeffery Toobin, *The Obama Brief: The President Considers His Judicial Legacy*, NEW YORKER (Oct. 27, 2014), http://www.newyorker.com/magazine/2014/10/27/obama-brief [https://perma.cc/X2KE-GH7Q]).

components of his selection process.[27] But there may be a cost to focusing on diversity.

The appointment process during President Obama's time in office was very slow. Republican senators engaged in delay tactics, even though President Obama's appointees seemingly were not ideologues.[28] Indeed, "judicial selection accounts . . . highlighted the first-term efforts of the [Obama] administration to nominate confirmable moderates to the circuit bench."[29] But still, the process was slow. In the 112th Congress, President Obama had the highest "index of obstruction and delay" (this index includes nominees who were not confirmed and any who took over 180 days to be confirmed) for his district court and court of appeals appointees of any other president.[30] It is thought that this was delay for delay's sake—only 18 of the 250 nominated involved a "sincere real dispute."[31] This, along with delays in appointing judges to the D.C. Circuit, led to Senator Harry Reid's invocation of the "nuclear option"—whereby Senate Democrats changed Senate rules so that the Senate could attain cloture with a simple majority instead of sixty votes.[32] While President Obama had lower rates of success in appointments during his first term, he did very well in the first two

27. *See id.* at 332 (noting importance of diversity); Carp et al., *supra* note 23, at 130.

28. Carp et al., *supra* note 23, at 130–32 ("There is little evidence . . . that Obama has sought to appoint rigid ideologues to the bench.").

29. Susan Haire et al., *Presidents and Courts of Appeals: The Voting Behavior of Obama's Appointees*, 97 JUDICATURE 137, 140 (2013).

30. *See* Slotnick et al., *supra* note 22, at 340 & tbl.2, 343 tbl.3. It's not clear what role race and gender played in this delay. Earlier studies of President George H.W. Bush's and President Bill Clinton's appointments found that delays based on race and gender could be explained by other factors. *See* Thomas Stratman & Jared Garner, *Judicial Selection: Politics, Biases, and Constituency Demands*, 118 PUB. CHOICE 251, 262–65 (2004).

31. Slotnick et al., *supra* note 22, at 341. Most of Obama's appointees were eventually confirmed during his second term. *Id.* at 341–42. Interestingly, delays in appointing women were also found during the Clinton Administration during times of divided government, although there was not a statistically significant delay due to race of nominee. *See* Roger E. Hartley, *A Look at Race, Gender, and Experience*, 84 JUDICATURE 191, 195 (2001). Hartley also found that Clinton's white male nominees had higher ABA ratings than his female nominees. *See id.* A recent study suggests bias in the ABA ratings process with respect to gender. *See* Maya Sen, *How Judicial Qualification Ratings May Disadvantage Minority and Female Candidates*, 2. J.L. & CTS. 33, 34 (2014). Sen found that African American nominees were 42% less likely to receive a high ABA rating than comparable white nominees. *Id.* at 46. Similarly, women were 19% less likely to receive one of the two highest ABA ratings than comparable male nominees. *Id.* This is particularly troubling because Sen's study showed that ABA ratings were one of the most predictive factors in confirmation success. *Id.* at 53. Sen also found no significant differences in a judge's reversal rate based on his or her ABA rating. *Id.* at 56.

32. Slotnick et al., *supra* note 22, at 342.

years of his second term. In the 113th Congress, he had an 88.6% confirmation success rate.[33]

Edward DuMont provides an example of some of the obstruction President Obama ran into during the judicial nomination process. Professor Carl Tobias, one of the organizers of this symposium, wrote an article about the nomination failure of Mr. DuMont, the first openly gay nominee to a federal court of appeal.[34] President Obama's withdrawal of Mr. DuMont's nomination after a year and a half of delay made it clear that the Senate would not confirm his appointment, in spite of his stellar credentials.[35]

Looking at the appointees from his first six years in office, President Obama's nontraditional judges also came from different experiential backgrounds than his white male appointees. Most had judicial or prosecutorial experience.[36] Only 24.7% of his nontraditional appointees lacked such experience.[37] This compares notably to his traditional appointees—40.2% of whom had neither judicial nor prosecutorial experience.[38] A higher percentage of his nontraditional appointees had law degrees from prestigious law schools.[39] In general, President Obama appointed an elite bunch of judges; he had the highest proportion of all five prior administrations of judges receiving an Ivy League undergraduate and law school education.[40]

The emphasis President Obama placed on judicial experience can be problematic for nontraditional nominees. "The Gavel Gap," a recent study by Tracey George and Albert Yoon, shows that women and members of minority groups are under-represented in state court systems—an excellent pipeline for those who would like to obtain the type of judicial experience that would provide a pathway to a federal judicial appointment.[41] Their study showed that white men make up 30% of the population and hold 57% of state trial court judgeships and

33. *Id.* at 339.

34. Tobias, *supra* note 7, at 577.

35. *Id.* DuMont graduated *summa cum laude* from Yale and Order of the Coif from Stanford Law School. *Id.* at 579. He worked in the Solicitor General's office and eventually went into private practice where he practiced mostly Supreme Court litigation. *Id.* at 579–80. He received the ABA's highest rating. *See id.* at 580.

36. Slotnick et al., *supra* note 22, at 352 tbl.5.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 355.

41. *See* TRACEY E. GEORGE & ALBERT H. YOON, AM. CONSTITUTION SOC'Y, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? 8 fig.9 (2014), http://gavelgap.org/ [https://perma.cc/2HX9-YTRS]. As George and Yoon noted, "The very low gender representativeness scores demonstrate that the steady gender balance in law schools has yet to translate to equality in state courts." *Id.* at 8.

58% of state appellate court judgeships.[42] Indeed, the researchers gave twenty-seven states Fs on their courts' gender diversity report card and thirty-two states Fs on racial and ethnic diversity.[43] Thus, if judicial experience is one of the main prerequisites to a federal judicial appointment, this criterion may limit opportunities for women and members of minority groups interested in such appointments. Still, President Obama did a remarkable job appointing a diverse bench.

III. DO WOMEN AND MINORITY JUDGES MAKE A DIFFERENCE?

So, in what ways, if at all, does the race or sex of a judge make a difference in the judiciary? Overall, race and/or gender of the judge have little impact on case outcomes.[44] But in some rare cases, it does make a difference. Studies have shown influences in two different ways: how the judges vote in discrimination cases and their influence on their colleagues in these cases.[45] In addition, at least some judges believe their backgrounds play a part in how they view cases. And, occasionally, the case law appears to bear this out.

In terms of case outcomes, in most cases the race, ethnicity, or gender of the judge does not make a difference or studies at best are mixed that it does.[46] Kenney notes, in particular, that there is little

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42. *Id.* at 7 figs.6, 7 & 8.

43. *Id.* at 8 fig.9, 9 fig.10.

44. *See* Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 610 (2003) (noting inconclusive results of studies of voting patterns of judges based on race and gender); Sally J. Kenney, *Critical Perspectives on Gender and Judging*, 6 POL. & GENDER 433, 436 (2010) (noting few studies showing differences based on judge's sex); Jennifer A. Segal, *The Decision Making of Clinton's Nontraditional Judicial Appointees*, 80 JUDICATURE 279 (1997) (study showing no differences between President Clinton's black federal district court appointees and white appointees in criminal rights, federal economic regulation, and personal liberty issues, but finding differences in claims brought by black plaintiffs and women); Maya Sen, *Is Justice Really Blind? Race and Reversal In US Courts*, 44 J. LEGAL STUD. 187, 190 (2015) (canvassing studies that show race does make a difference where it is a salient factor in the case, but not in other types of cases).

45. *See infra* note 49.

46. *See* Beiner, *supra* note 44, at 607–10 (canvassing studies showing few results suggesting that minority judges or women judges were more progressive); Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390–92 (2010); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1762–64 (2005) (canvassing studies showing inconsistent results based on gender of judge); Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57, 58–60 (2005) (summing up studies of impact of race and sex of judge on case outcomes and concluding that there are not consistent findings). A recent study of President Obama's Court of Appeals appointees found that white male appointees were more likely to support liberal

evidence that male and female judges decide cases differently.[47] For example, with respect to differences based on sex of judge, Christina L. Boyd, Lee Epstein, and Andrew D. Martin's review of the existing research summed it up well: Of the thirty studies of judicial voting behavior based on sex, "roughly one-third purport to demonstrate clear panel or individual effects, a third report mixed results, and the final third find no sex-based differences whatsoever."[48] Results, therefore, are mixed and inconclusive, except for one area of the law that is a particularly important one: sex and race discrimination cases.[49]

Boyd, Epstein, and Martin found no effect in eleven of the twelve areas of the law they studied, but they did find an effect based on sex of judge in Title VII sex discrimination cases. The probability of a woman voting in favor of a plaintiff in the cases they studied was 10% higher than that of a male judge.[50] They also found panel effects. "[W]e observe causal effects ranging from 0.12 to 0.14—meaning that the likelihood of a male judge ruling in favor of the plaintiff increases by 12% to 14% when a female sits on the panel."[51] They opined that this effect may be underestimated because of the many cases that settle.[52]

Political scientist Nancy Crowe found different results than Boyd, Epstein, and Martin in a study of the impact of race and sex of judge on employment discrimination cases decided by the federal courts of appeal between 1981 and 1996.[53] Crowe found that having a woman on the panel had no impact on outcomes, and having an African-American judge actually had a negative impact on white male judges' propensity to rule for a race discrimination plaintiff.[54] These differing results might

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positions than his minority or female appointees. *See* Haire et al., *supra* note 29, at 142. This same study found that President George W. Bush's female and minority court of appeals appointees were more likely to support a liberal position than his white male appointees. *See id*. at 142–43.

47. Kenney, *supra* note 44, at 436; *see also* Fahrang & Wawro, *supra* note 8, at 302–03 (noting inconsistent results in studies of judicial voting patterns based on race and gender).

48. Boyd et al., *supra* note 46, at 392.

49. *See, e.g.*, Pat K. Chew, *Judges' Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions*, 14 J. GENDER RACE & JUST. 359, 365–66 (2011) (examining fourteen studies on the impact of sex on judgments and concluding that female judges decide sex discrimination cases differently); *see also* Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race*, 28 HARV. J. RACIAL & ETHNIC JUST. 91, 94 (2012).

50. Boyd et al., *supra* note 46, at 401.

51. *Id.* at 406.

52. *Id.* at 406 n.35.

53. Nancy E. Crowe, The Effects of Judges' Sex and Race on Judicial Decision Making on the U.S. Courts of Appeals, 1981-1996 (June 1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

54. *Id.* at 156 fig.5.2.

be a result of the cases Crowe studied—all were non-consensual cases. In other words, the panels were all non-unanimous.[55]

Before exploring other findings with respect of panel composition, it's important to note that there is a norm of unanimity in the federal appellate courts. Federal appellate panel decisions are overwhelmingly unanimous; dissent rates range from six to eight percent.[56] So, federal appellate judges' tendency to agree with each other may result in more conservative judges leaning in the direction of his or her more pro-employment discrimination plaintiff female and minority colleagues.

Sean Farhang and Gregory Wawro also found an impact based on panel composition in a study of federal appellate employment discrimination cases decided between 1998 and 1999.[57] Their study found that the presence of a female judge on a federal panel increased the probability that a male judge would vote for a plaintiff in an employment discrimination case by nineteen percent.[58] The addition of a second woman did not have an additional impact.[59] Overall, the addition of one woman to a court of appeals panel increased the probability of a pro-plaintiff outcome by about twenty percent,[60] and ideological composition of the panel had an effect as well.[61] Interestingly, addition of a racial minority judge had no impact.[62]

Similarly, a study by Jennifer Peresie of sexual harassment and sex discrimination cases decided in the federal courts of appeals between 1999 and 2001 found that plaintiffs were twice as likely to prevail when a female judge was on the bench.[63] Unlike Farhang and Wawro's study, however, Peresie found that having a second woman on the panel also

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55. *Id*. at 56; *see also* Peresie, *supra* note 46, at 1764–65 (noting this difference in Crowe's study).

56. Farhang & Wawro, *supra* note 8, at 306. Interestingly, this norm also crosses political lines. Haire, Edwards, and Hughes found that a judge from a party in the minority on a panel tended to acquiesce in his or her colleagues' preferences. *See* Haire et al., *supra* note 29, at 140–41. For example, a Republican appointed judge was more likely to vote liberally when seated with two Democrat appointed judges. *Id.*

57. Farhang & Wawro, *supra* note 8, at 310–11.

58. *Id.* at 320 (study of 400 cases from 1998 and 1999).

59. *Id.*

60. *Id.* at 321. A study of state supreme courts by Gryski, Main, and Dixon found that the presence of a female judge had an impact on outcomes in gender discrimination cases. *See* Gerard S. Gryski et al., *Models of State Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 153 (1986); *see also* Donald R. Songer & Kelly A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750, 755–57 (2000).

61. *Id.* at 327–28.

62. Farhang & Wawro, *supra* note 8, at 321.

63. *See* Peresie, *supra* note 46, at 1761. There was a greater impact in sexual harassment cases than in sex discrimination cases. *Id.* at 1770, 1776.

increased the likelihood of a pro-plaintiff outcome.[64] There was no statistically significant difference between male and female judges who were appointed by a Democratic president.[65] She noted that judicial ideology, as reflected by the political party of the president appointing the judge, was the "most powerful alternative explanation" for her results.[66] Even after controlling for political ideology, she found "both liberal and conservative female judges were more likely than their male counterparts to support plaintiffs."[67]

Other studies have found an impact based on race of judge in employment discrimination cases.[68] In a recent study, Pat Chew and Robert Kelley acknowledged that "a half dozen studies indicate that white judges and African-American judges have different decision-making patterns in employment discrimination cases."[69] Their study, in particular, looked at voting patterns in 473 racial harassment cases.[70] The vast majority of the cases studied, seventy-four percent, were brought by African-American plaintiffs.[71] They found that not only the judge's race related to differences in outcomes, but also the race of the plaintiff correlated with differences in outcomes. There was also an interactive effect—"a general tendency for a judge of one race to find more persuasive the claims of a plaintiff of the same race."[72]

Chew and Kelley found that plaintiffs were most likely to be successful in front of African-American judges. These judges ruled in favor of plaintiffs 42.2% of the time.[73] The baseline—overall plaintiff win rate—was 22.2%.[74] White judges voted for the plaintiffs 20.6% of the time, and Hispanic judges voted in favor of the plaintiff 15.6% of the time.[75] The results show that plaintiffs coming before an African-

64. *Id.* at 1768 tbl.1. The differences were telling. Judges ruled in favor of plaintiffs 17% of the time on all-male panels, 34% of the time on a panel with one woman, and 43% of the time on a panel with two women. *Id.*

65. *Id.* at 1769 tbl.2.

66. *Id.* at 1771.

67. *Id.* at 1777. As Peresie further explained, "In sexual harassment cases analyzed, being female had a more significant effect on the probability of a pro-plaintiff decision than being appointed by a Democratic president, and in sex discrimination cases, being female had as significant an effect as did being a Democratic appointee." *Id.*

68. *See* Chew & Kelley, *supra* note 49, at 94 & n.14 (2012) (citing studies showing differences in voting patterns between white and African American judges in employment discrimination cases); Crowe, *supra* note 55, at 114 fig.4.1.

69. Chew & Kelley, *supra* note 49, at 94.

70. *Id.* at 98.

71. *Id.* at 99.

72. *Id.* at 95.

73. *Id.* at 103.

74. *Id.*

75. *Id.* at 104.

American judge were 2.9 times more likely to be successful than before other judges.[76]

Chew and Kelley also found an effect based on the race of the plaintiff. Hispanics had the highest plaintiff win rate (37.3%), while African Americans only won cases 20.7% of the time.[77] Gender was not statistically significant in this study.[78] There were also interactive effects based on race of judge and race of plaintiff. For example, African-American plaintiffs had a higher success rate before African-American judges—they were successful 47% of the time.[79] They were less successful in front of Hispanic judges (9.5% win rate) and white judges (19% win rate).[80] Interestingly, Hispanic plaintiffs appearing before white judges had the highest success rate of any group before white judges, at 32.5%.[81] Hispanics had the highest rates of success in front of every judge group (they had a 60% win rate in front of African-American judges).[82] White judges ruled for white plaintiffs 28% of the time.[83] All race groups had better outcomes before judges of the same race as compared to the overall success rate in all cases.[84]

Studies have found that the political party of the president appointing the judge generally correlates with judges' voting patterns.[85] However, studies have shown a shift in voting based on the composition of the panel. Studies of the federal circuit courts suggest that judges appointed by the opposite party "tend to acquiesce to their colleagues' preferences."[86] So, a Republican appointee with two Democrat appointees will lean liberal and a Democrat appointee will lean conservative.[87] In their study of federal courts of appeals through 2012, Susan Haire, Barry Edwards, and David Hughes found President Obama's white male judges were more likely to support the liberal position than his minority and/or female judges.[88] The opposite held

76. *Id.*
77. *Id.* at 99.
78. *Id.*
79. *Id.* at 107.
80. *Id.*
81. *Id.* at 107–08.
82. *Id.* at 108.
83. *Id.*
84. *Id.* at 110.
85. *See, e.g.*, Peresie, *supra* note 46, at 1769 tbl.2 (study of sexual harassment and sex discrimination cases showing judicial ideology—whether a judge was appointed by a Democratic or Republican president—had an impact on outcomes).
86. Haire et al., *supra* note 29, at 141.
87. *See id.* at 140–41.
88. *Id.* at 142–43.

true for President George W. Bush's appointees—his minority and/or female judges were more likely to support a liberal position.[89]

Aside from the studies, there are anecdotal examples from judges that suggest their life experiences influenced how they approached cases. Justice Ruth Bader Ginsburg provides a useful illustration, but the same may be said of Justice Sandra Day O'Connor—in *Planned Parenthood of Southern Pennsylvania v. Casey*,[90] for example. This Article uses Justice Ginsburg as an example because the cases involving her approach are more recent and are consistent with her expressed feminist ideology.[91]

Justice Ginsburg's decision and discussion in *Safford Unified School District v. Redding*[92] provides an excellent example.[93] In this case, the Supreme Court of the United States considered whether the strip search of a thirteen-year-old girl to locate ibuprofen and naproxen—"drugs" her school considered contraband—violated Section 1983.[94] The oral argument in the case made it look like the plaintiff would lose.[95] Even Justice Breyer, who is typically sympathetic to civil rights plaintiffs, commented that the strip search was akin to changing for gym class.[96]

After oral argument, Justice Ginsburg commented that her male colleagues "have never been a 13-year-old girl . . . . It's a very sensitive age for a girl. I didn't think that my colleagues, some of them,

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89. *Id.* at 142.

90. 505 U.S. 833 (1992). Justice O'Connor was one of the "co-authors" of the opinion in that case, in spite of being appointed by pro-life President Ronald Reagan. *See* Nancy Scherer, *Viewing the Supreme Court's Marriage Cases Through the Lens of Political Science*, 64 CASE W. RES. L. REV. 1131, 1154 (2014). Yet, prior to that decision, O'Connor had stated that *Roe v. Wade* was "unworkable." *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 454, 459 (1983) (O'Connor, J., dissenting). Justice O'Connor likely would disagree that she judges cases differently. As she writes, "there is simply no empirical evidence that gender differences lead to discernible differences in rendering judgment." Kenney, *supra* note 3, at 436 (quoting Justice O'Connor).

91. *See generally* Lauren R. Eversley, Note, *#JoinTheDissent: Ruth Bader Ginsburg and the* Hobby Lobby *Effect*, 79 ALB. L. REV. 269, 274, 285 (2015–16) (acknowledging Justice Ginsburg's feminist approach).

92. 557 U.S. 364 (2009).

93. *Id.* I made a similar argument about Justice Ginsburg approach in *Safford* and other cases in an earlier article. *See* Theresa M. Beiner, *White Heterosexist Norms in the Confirmation Process*, 32 WOMEN'S RTS. L. REP. 105, 127–30 (2011).

94. *Safford*, 557 U.S. at 368, 371.

95. *See* Robert Barnes, *Justices' Takes on Strip Search Vary*, WASH. POST (Apr. 22, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/04/21/AR2009042103695.html [https://perma.cc/LXW2-UBTN].

96. *Id.*

quite understood."[97] Although the Court ultimately held that the search was unreasonable, a majority of the Court agreed that the administrator who ordered it was protected by qualified immunity because the law was not clearly established that this type of search was unreasonable at the time the school administrator ordered it.[98] Justice Ginsburg, dissenting in part, disagreed, arguing that the search violated "clearly established" law, and therefore school officials were not entitled to immunity.[99] In particular, Justice Ginsburg focused on the continued humiliation of plaintiff Savanna Redding even after school officials found no contraband during their strip search.[100] As she explained,

> To make matters worse, Wilson did not release Redding, to return to class or to go home, after the search. Instead, he made her sit on a chair outside his office for over two hours. At no point did he attempt to call her parent. Abuse of authority of that order should not be shielded by official immunity.[101]

In *Safford*, the majority agreed with Justice Ginsburg that a strip search of a thirteen-year-old girl for ibuprofen and naproxen was unconstitutional, but the Court still afforded the plaintiff no relief.[102] Given the statements of some Justices during oral argument,[103] it would be interesting to know if Justice Ginsburg's understanding of a thirteen-year-old girl's perception swayed some of her fellow justices to agree that, going forward, courts would consider such a search unconstitutional.

In *AT&T Corporation v. Hulteen*[104] and *Ledbetter v. Goodyear Tire & Rubber Co.*,[105] two cases involving sex discrimination, Justice Ginsburg authored dissents. The Court in *Ledbetter* held that the decision to set an employee's pay was a "discrete act" that triggered the 180-day Equal Employment Opportunity Commission (EEOC) filing period for purposes of filing a claim under Title VII, resulting in the

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97. Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY (Oct. 5, 2009, 11:16 AM), http://usatoday30.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm [https://perma.cc/VJS9-PM84].

98. *Safford*, 557 U.S. at 375–79.

99. *Id.* at 381 (Ginsburg, J., dissenting).

100. *Id.* at 381–82 (Ginsburg, J., dissenting).

101. *Id.* (Ginsburg, J., dissenting).

102. *Id.* at 379.

103. *See* Barnes, *supra* note 95 and accompanying text.

104. 556 U.S. 701 (2009).

105. 550 U.S. 618 (2007), *overturned by legislative action*, Lilly Ledbetter Fair Play Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

Court holding that Lilly Ledbetter's pay discrimination claim was untimely.[106] Ledbetter, a supervisor for Goodyear for nearly twenty years, was paid significantly less than similarly situated male supervisors.[107] Because Ledbetter filed her charge of discrimination more than 180 days after Goodyear made the discriminatory decisions, the Court held that her claim was time-barred, even though she continued to receive reduced pay compared to her male colleagues within the 180-day charge filing period.[108]

In her dissent, Justice Ginsburg examined the workplace realities of a woman employed in a traditionally male field and read the statute to encompass Ledbetter's claims.[109] She explained, "[c]omparative pay information . . . is often hidden from the employee's view . . . . Small initial discrepancies may not be seen as meet [sic] for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves."[110] Justice Ginsburg placed Ledbetter's situation in the context in which she was working—a woman among many men—and took into consideration what might cause a delay in addressing her salary concerns.[111] From Justice Ginsburg's point of view, Ledbetter's delay in complaining until these disparities became "apparent and sizable" was reasonable.[112]

Instead of looking at the initial pay decision as the last discriminatory act, Justice Ginsburg reasoned that pay differentials of this sort result from a series of discrete acts, similar to the law developed for hostile environment harassment claims that allows a plaintiff's claim to be timely as long as one act of continuing harassing behavior occurred within the 180-day charge filing period.[113] Justice Ginsburg also noted that the employer continuously benefits from paying a woman lower wages than her male counterparts.[114] Justice Ginsburg detailed the evidence that Ledbetter's pay differential was indeed based on sex discrimination, which was notably absent from the majority opinion.[115] In a somewhat unusual move,[116] Justice Ginsburg

106. *Ledbetter*, 550 U.S. at 628–29.

107. *Id.* at 621–22. In her dissent, Justice Ginsburg noted that by the end of her employment with Goodyear, the pay disparity between Ledbetter and her male colleagues was "stark: Ledbetter was paid $3,727 per month; the lowest paid male area manager received $4,286 per month, the highest paid, $5,236." *Id.* at 643 (Ginsburg, J., dissenting).

108. *Id.* at 628–29.

109. *Id.* at 643, 645 (Ginsburg, J., dissenting).

110. *Id.* at 645 (Ginsburg, J., dissenting).

111. *Id.* (Ginsburg, J., dissenting).

112. *Id.* (Ginsburg, J., dissenting).

113. *Id.* at 648 (Ginsburg, J., dissenting).

114. *Id.* at 650–51 (Ginsburg, J., dissenting).

115. *Id.* at 659–60 (Ginsburg, J., dissenting).

read her dissent from the bench, ending with a call for Congress to amend the statute to overturn the decision.[117] Congress ultimately did amend the law with the Lilly Ledbetter Fair Pay Act.[118]

In *AT&T Corporation v. Hulteen*, the Court addressed whether AT&T's policy of decreasing pension benefits for women who took time off for pregnancy-related disabilities, while not doing so for leave taken for other disabilities, violated Title VII's prohibitions on sex discrimination.[119] Justice Ginsburg dissented from the Court's conclusion that AT&T had not violated Title VII. She placed the discrimination Noreen Hulteen faced in the context of the history of working women in the United States, generally, explaining: "The history of women in the paid labor force underpinned and corroborated the views of the lower courts and the EEOC. In generations preceding—and lingering long after—the passage of Title VII, that history demonstrates societal attitudes about pregnancy and motherhood severely impeded women's employment opportunities."[120] She continued discussing the historical widespread discrimination against women based on pregnancy in the United States, acknowledging, "[c]ertain attitudes about pregnancy and childbirth, throughout human history, have sustained pervasive, often law-sanctioned, restrictions on a woman's place among paid workers and active citizens."[121]

In a rare instance of Justice Ginsburg speaking to the press about a case, she remarked that oral argument in *Hulteen* was, "'just, for me, *Ledbetter* repeated . . . adding that her colleagues showed 'a certain lack of understanding' of the bias a woman can face on the job."[122] Justice Ginsburg explained,

> You know the line that Sandra [Day O'Connor] and I keep repeating . . . that at the end of the day, a wise old man and a

116. *See* Andrew Lowy, *Reading a Dissent from the Supreme Court Bench*, CONST. DAILY (July 18, 2014), http://blog.constitutioncenter.org/2014/07/reading-a-dissent-from-the-supreme-court-bench/ [https://perma.cc/XB43-Q8F4] (noting that it usually "signifies severe disagreement with the majority opinion"); Stephen Wermiel, *SCOTUS for Law Students (sponsored by Bloomberg Law): Dissenting from the Bench*, SCOTUSBLOG (July 2, 2013, 10:34 AM), http://www.scotusblog.com/2013/07/scotus-for-law-students-sponsored-by-bloomberg-law-dissenting-from-the-bench/ [https://perma.cc/BA56-4E5X] (noting that this is unusual).

117. *Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting) ("Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII.").

118. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

119. *AT&T Corp. v. Hulteen*, 556 U.S. 701, 704 (2009).

120. *Id.* at 718 (Ginsburg, J., dissenting) (citations omitted).

121. *Id.* at 724 (Ginsburg, J., dissenting).

122. Biskupic, *supra* note 97.

> wise old woman reach the same judgment? But there are perceptions that we have because we are women. It's a subtle influence. We can be sensitive to things that are said in draft opinions that (male justices) are not aware can be offensive.[123] [Justice Ginsburg noted that while] the differences between male and female justices . . . are seldom in the outcome, it is sometimes in the outcome.[124]

Justice Ginsburg was not alone in her dissents in *Hulteen* and *Ledbetter*. In *Hulteen*, she was joined by Justice Breyer.[125] In *Ledbetter*, she was joined by Justices Stevens, Souter, and Breyer.[126] Thus, it was not only the sole woman on the Court who understood this perspective. Several of her male colleagues shared her view of these cases. It is not that men cannot understand the perspective of women who are faced with sex discrimination. Indeed, all-male courts decided early United States Supreme Court cases with outcomes favoring women in sex discrimination cases.[127] However, as studies suggest, having a woman on the Court may help bring that perspective into focus for men not so inclined to see it for themselves from the start.

IV. PROBLEMS WITH FOCUSING ON DIFFERENCE

This brings me back to the fundamental conundrum in arguing that women and members of minority groups make a difference on the bench. It presents as a typical double-edged sword. By making these arguments, political scientists such as Sally Kenney argue that advocates for a diverse bench fall into an essentialist trap regarding the differences between male and female judging.[128] Discussing these differences assumes that women or particular minority group members, such as Americans of African descent, all view situations similarly.[129] Yet, like initial advocates of legal feminism, it is privileged members of the group whose views are publicly supported. This is especially true of federal judges, who, because of the elite background of most women and members of minority groups who would be good candidates for the federal bench, are less likely, for example, to have working class

123. *Id.* (internal quotations omitted).

124. *Id.* (internal quotations omitted).

125. *Hulteen*, 556 U.S. at 717.

126. 550 U.S. 618, 643 (2007).

127. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973).

128. *See* KENNEY, *supra* note 16, at 29–30.

129. *See* FRANCISCO VALDES ET AL., *Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 1, 2 (2002).

roots.[130] Indeed, even President Obama's very diverse nominees are a rather wealthy and elite group, given their backgrounds.[131]

Arguments suggesting that women and members of minority groups will judge cases differently also appear to conflict with the goal of judicial impartiality.[132] After all, the outcome of a case is not supposed to depend on the background of the judge, but instead on an impartial view of the law and the facts involved in the individual case. One way to avoid this criticism is to question the foundation of what is currently deemed "impartial."[133] Indeed, if a male and a female judge or a white and minority judge view the same fact pattern differently, one would have to make the normative judgment about which judge was being impartial.[134] History and compelling scholarly argument show that many legal rules were and are not impartial with respect to race and gender, at least in their application and impact.[135] The United States Supreme Court itself acknowledged this by raising the level of scrutiny in cases involving race and gender discrimination.[136] Thus, if an impartiality "correction" of sorts is needed, it would be in a direction

130. *See* Malleson, *supra* note 3, at 12. Justice Sonia Sotomayor stands out as an example of a Justice on the Supreme Court of the United States to come from a lower socio-economic status background. *See* SONIA SOTOMAYOR, MY BELOVED WORLD 11–13 (2014); Media Release, Sonia Sotomayor, Associate Justice, United States Supreme Court, A Latina Judge's Voice, Remarks at the UC Berkeley School of Law Symposium titled "Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation" (Oct. 26, 2001), http://www.berkeley.edu/news/media/releases/2009/05/26_sotomayor.shtml [https://perma.cc/96JL-VNK5]; *see also* Sally J. Kenney, *Wise Latinas, Strategic Minnesotans, and the Feminist Standpoint: The Backlash Against Women Judges*, 36 T. JEFFERSON L. REV. 43, 79–80 (2013) (acknowledging Justice Sotomayor's working class background).

131. *See supra* Part II.

132. *See* Malleson, *supra* note 3, at 4–5.

133. *See id.* at 10.

134. *See id.*

135. *See* NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER 2–9 (2006) (describing the history of feminism); GREGORY S. PARK, *Toward a Critical Race Realism*, *in* CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 1 (2008) (explaining that critical race realism includes "a deconstructive element, a systematic, race-based evaluation and critique of the law and legal institutions"); Malleson, *supra* note 3, at 10–11. For a recent example of such an analysis using critical race theory, see Steven L. Nelson, *Different Script, Same Caste in the Use of Passive and Active Racism: A Critical Race Theory Analysis of the (Ab)use of "House Rules" in Race-Related Education Cases*, 22 WASH & LEE J. CIVIL RTS. & SOC. JUST. 297 (2016).

136. *See United States v. Virginia*, 518 U.S. 515 (1996); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). While *Adarand* and *Croson* involved programs designed to help racial minorities, earlier case law made clear that the history of race discrimination in the United States justified strict scrutiny for racial classifications. *See, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

that incorporates the experiences of women and members of minority groups. Otherwise, the worldview that is privileged in judicial decision making is white and male.

Of course, gender and race of judge are clearly not the end all, be all of how judges make decisions, and Kenney and others are wise to caution that these characteristics should not be overemphasized as a justification for appointing a diverse bench. Justice Ginsburg herself expressed skepticism regarding studies suggesting a difference in judging based on gender. As she noted, "I certainly know that there are women in federal courts with whom I disagree just as strongly as I disagree with any man."[137] Indeed, in the examples of cases where Justice Ginsburg's perspective arguably provided a differing view of the case than her fellow male justices, there were always male justices who agreed with her position. A majority of the Court agreed in *Safford* that the strip search of a teenage girl for pain relievers was unconstitutional.[138]

The main case studies that show a consistent difference in voting patterns based on race and/or sex are employment discrimination cases.[139] In addition, a study of voting rights cases found that the addition of an African American judge to a panel resulted in more favorable rulings for plaintiffs than panels that had all white judges.[140] So, maybe that there are few cases with consistent differences in voting patterns is a good enough reason to abandon any talk of different approaches between judges of diverse backgrounds. This would avoid the essentialist trap created by such arguments.

However, employment discrimination cases and voting rights cases are important. Jobs are fundamental to the ability of individuals to feed, clothe, and house themselves and their families. Jobs are also access points to greater economic opportunities. Voting rights provide opportunities for women and members of minority groups to see their interests supported by elected officials. Thus, the differences in these cases is important to acknowledge and think about when considering the advantages of a diverse bench. Otherwise, the judiciary runs the risk of privileging a world view (at least in the critical areas of jobs and voting) that does not reflect the perspectives and understandings of the larger community.

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137. Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES MAG., July 12, 2009, at 22, 25.

138. *See supra* notes 92–103 and accompanying text.

139. *See supra* notes 68–72 and accompanying text. Another study also showed differences in patterns of voting based on the race of the judge in voting-rights cases—another important area of the law. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008).

140. Cox & Miles, *supra* note 139.

Kenney and Malleson have both argued that arguments based on difference are strategically dangerous. Malleson suggests that arguing that women judge a particular way is of a piece with women lawyers being pigeonholed into "women's" law, such as domestic relations work.[141] She further argues that this "difference" often is elided with "better," which results in women suddenly having to be better judges than their male counterparts.[142] Finally, it is likely that any differences will be perceived as "lesser," given that female characteristics consistently have been devalued.[143] Because of the strategic problems with difference arguments, Kenney suggests a representative argument makes more sense and is a more justifiable basis upon which to hang the "diversity on the bench" hat.[144] Ultimately, both Kenney and Malleson rely on judicial legitimacy, including public confidence in the courts, as a better argument that does not depend on what women judges may or may not do in actual cases.[145]

A representative approach is not without its problems when it comes to the federal judiciary, which is not considered a "representative" branch in the traditional sense. The design of the United States Constitution is to keep judges above the political fray by appointing them with guaranteed job security and salaries.[146] Thus, they are not intended to be "representative" in the same sense that legislators and the President of the United States are representative of those who elected them. As Alexander Hamilton pointed out in the *Federalist Papers*, the judiciary was designed as a "distinct and independent bod[y]."[147] Judges were people of "independent spirit . . . essential to the performance of so arduous a duty."[148] Chief Justice Roberts recently underscored this in his opinion in *Williams-Yulee v. Florida Bar*.[149] Justice Roberts, in the context of upholding campaign limitations placed on elected state judges, explained that the state has a "vital" interest in "safeguarding 'public confidence in the fairness and integrity of the nation's elected judges.'"[150] In distinguishing judges from other elected officials, Justice Roberts explained:

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141. Malleson, *supra* note 3, at 13.

142. *Id.* at 13–14.

143. *Id.* at 14.

144. KENNEY, *supra* note 16, at 108–10

145. *Id.* at 175; Malleson, *supra* note 3, at 18–21.

146. U.S. CONST. art. III, § 1.

147. THE FEDERALIST No. 81 (Alexander Hamilton).

148. THE FEDERALIST No. 78 (Alexander Hamilton).

149. 135 S. Ct. 1656 (2015).

150. *Id.* at 1666 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).

> In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors. A judge instead must "observe the utmost fairness," striving to be "perfectly and completely independent, with nothing to influence or control [sic] him but God and his conscience."[151]

Kenney argues that the case for women judges is akin to the case for including women on juries. It's not that they will decide a case differently, but instead that this is a civic function that should be open to all in the community.[152] The same argument works for judges who are members of racial and ethnic minority groups. As Kenney explains, "[t]he best case for a gender-diverse bench does not rest on difference. The most persuasive arguments appeal to democracy and legitimacy, recognize the symbolic role of judges, call for simple nondiscrimination, and draw analogies between gender and geographic representation."[153] As Justice Felix Frankfurter explained over sixty years ago, "justice must satisfy the appearance of justice."[154]

Kenney and Malleson surely are correct that appeals to difference, though common, are likely not the best approach for making the case for a diverse bench. Indeed, there is no evidence of any widespread differences in decision making based on race and/or gender of the judge. However, one should not forget, as Boyd, Epstein, and Martin point out, though a female panel member on a court of appeals panel "rarely" makes a difference, "[r]arely, though, is not never."[155]

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151. *Id.* at 1667 (quoting JOHN MARSHALL, PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, at 616 (1830)).

152. KENNEY, *supra* note 16, at 161, 163.

153. *Id.* at 161.

154. *Offutt v. United States*, 348 U.S. 11, 14 (1954).

155. Boyd et al., *supra* note 46, at 406.