A TALE OF TWO JUSTICES: BRANDEIS, MARSHALL, AND FEDERAL COURT JUDICIAL DIVERSITY

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INTRODUCTION

In this Article, I will focus on the appointment of Louis D. Brandeis to the United States Supreme Court as a significant landmark in the history of the federal judiciary. I explore this topic initially through a comparison of President Woodrow Wilson's 1916 appointment of Louis Brandeis with President Lyndon Johnson's appointment of Thurgood Marshall as a symbolic opening of the federal bench to African-American lawyers. Both Brandeis and Marshall were well-known nationally prior to their appointments, with Brandeis engaged in significant domestic and international activities, including his embrace of Zionism, and Marshall engaged in almost a four-decade long assault on racial segregation and *Plessy v. Ferguson*.[1] Perhaps not ironically, both endured abnormally long waits between nomination and confirmation while their opponents raised substantive objections that thinly veiled the opposition to the placement of a member of their respective groups on the highest court.

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This Article was commissioned and published by "Louis D. Brandeis 100: Then & Now," a celebration at Brandeis University of the 100th anniversary of Louis D. Brandeis' nomination and confirmation to the United States Supreme Court: http://www.brandeis.edu/ldb-100/ [https://perma.cc/V9ZL-LNDD].

1. 163 U.S. 537 (1896).

Although both Brandeis and Marshall opened the door for a more diverse federal judiciary, the debate over the importance of diversity continues. Robust scholarship evidenced the extent of diversity and the difference that diversity makes to both the legitimacy of the judiciary as well as the content and quality of judicial decisions. More recently, a debate over judicial diversity on the federal bench was televised for the nation during the confirmation of Sonia Sotomayor to the United States Supreme Court. In the course of that debate, proponents celebrated her educational qualifications, her professional achievements, and her Horatio Alger-like up-from-poverty story, while detractors suggested that Sotomayor's embrace of her Latina identity would prevent her from following the law. Like Brandeis and Marshall, she was confirmed despite substantial opposition, and, like them, she has already added a distinctive judicial voice to the highest court.

I. BRANDEIS AND MARSHALL: DEFYING SISYPHUS

Though decades passed between Brandeis' confirmation and that of Marshall's, their most well-known characteristics brought heavy odds against the improbable feat of ascension to the High Court.

A. Brandeis

Brandeis would be the first Jewish justice on the Supreme Court, though historians have suggested that another may have been considered in the 19th century.[2] Though he did not deny his Jewish identity, it was not a defining feature of his identity during most of his life and throughout his very visible legal career.[3] He did publicly embrace Zionism[4]—"a belief in the need for a Jewish state and the concomitant duty to 'educate' the American Public about its necessity"[5]—in 1913, becoming a visible leader in 1914[6] through 1916[7]

2. *See* LEWIS J. PAPER, BRANDEIS 212–13 (1983).

3. JEROLD S. AUERBACH, RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION 124–27 (1990); PHILLIPA STRUM, LOUIS BRANDEIS: JUSTICE FOR THE PEOPLE 233 (1984); MELVIN I. UROFSKY, A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM 97 (1971) [hereinafter A Mind of One Piece]; MELVIN I. UROFSKY, LOUIS BRANDEIS: A LIFE 407–08 (2009) [hereinafter A Life].

4. PAPER, *supra* note 2, at 204–08; ELLEN NORMAN STERN, EMBATTLED JUSTICE: THE STORY OF LOUIS DEMBITZ BRANDEIS 117–19 (1971); UROFSKY, A LIFE, *supra* note 3, at 403–04; UROFSKY, A MIND OF ONE PIECE, *supra* note 3, at 100; MELVIN I. UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION 87–88 (1981).

5. STRUM, *supra* note 3, at 229.

6. STERN, *supra* note 4, at 117; STRUM, *supra* note 3, at 225; UROFSKY, A LIFE, *supra* note 3, at 411.

on the virtual eve of Wilson's nomination of Brandeis to the high court in 1916.[8] He continued his involvement after he assumed his role as Associate Justice of the Supreme Court.[9]

But Brandeis became well-known prior to the turn of the century with his article "The Right to Privacy" in the 1890 *Harvard Law Review*.[10] In that article, he and his co-author asked "whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is . . . ."[11] In that article, Brandeis insisted that the right to privacy was not "a matter of mere property rights," but rather the right to "an inviolate personality."[12] Here, Brandeis would lay the foundation for his dissent in *Olmstead v. United States*,[13] in which he argued that government eavesdropping on telephone conversations violated the "right to privacy" and the right "to be let alone."[14] In that same article, he also anticipated Supreme Court doctrine that would develop decades later by proposing an exception to the right of privacy for discourse on "concerns of the public general interests,"[15] as well as remedies for the invasion of that right.[16] The article remains up for a venerable source of discourse on contemporary issues of privacy.[17]

Brandeis was also well-known for his activities on behalf of workers who were powerless in their "economic class conflict" struggle.[18] One of his causes was "constructive legislation designed to solve in the public interest our great social, economic and industrial problems . . . ."[19] A well-known example was his defense of Oregon's legislation protective of women workers, which became *Muller v.*

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7. PAPER, *supra* note 2, at 205; UROFSKY, A LIFE, *supra* note 3, at 417–29; UROFSKY, A MIND OF ONE PIECE, *supra* note 3, at 95.

8. *Biographical Directory of Federal Judges: Brandeis, Louis Dembitz*, Fed. Jud. Ctr., http://www.fjc.gov/servlet/nGetInfo?jid=241&cid=999&ctype=na&instate=na [https://perma.cc/AW3J-DYUK] (last visited Mar. 9, 2017).

9. STRUM, *supra* note 3, at 242–46.

10. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

11. *Id.* at 197.

12. *Id.* at 205.

13. 277 U.S. 438 (1928).

14. *Id.* at 478 (Brandeis, J., dissenting).

15. Warren & Brandeis, *supra* note 10, at 214.

16. *Id.* at 219.

17. *See, e.g.*, Erwin Chemerinsky, *Rediscovering Brandeis's Right to Privacy*, 45 BRANDEIS L.J. 643, 644 (2007).

18. ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 85 (1988); STRUM, *supra* note 2, at 239; Chemerinsky, *supra* note 17, at 45.

19. UROFSKY, A LIFE, *supra* note 3, at 204.

Oregon,[20] and was made problematic by the Supreme Court decision in *Lochner v. New York*,[21] which struck down legislation that protected bakers from excessive exposure to flour inhalation.[22] Nonetheless, Brandeis innovated with a dense and lengthy factual exploration of the dangers women and their children experienced as a result of long employment hours[23] and persuaded the Supreme Court to uphold the Oregon statute.[24] Though Brandeis' arguments[25] and the Court's reasoning based upon female vulnerability and incapacity would haunt women for decades to come,[26] it was judged a brilliant victory in the press and is remembered not merely because "*Muller* became a landmark decision," but also "for the brief that Louis Brandeis filed. The singular and detailed focus on the societal context of a potential legal decision, which came to be known as a 'Brandeis Brief' . . . altered the way that lawyers approached defense of public matters"[27] and burnished Brandeis' reputation as a courageous reformer.[28]

Brandeis had also been a visible opponent of government corruption. He was involved at the turn of the century in disputes over the allocation of railway rights to monopolistic and wealthy interests in Boston,[29] and railway tariffs.[30] He represented the head of the United

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20. 208 U.S. 412 (1908).

21. 198 U.S. 45 (1905).

22. An important issue in *Lochner* was whether the occupation of baker was associated with lung disease. *Id.* at 58.

23. UROFSKY, A LIFE, *supra* note 3, at 216.

24. *Muller*, 208 U.S. 412.

25. UROFSKY, A LIFE, *supra* note 3, at 216–17.

26. *See id.* at 222–23 (discussing subsequent attacks by feminists that Brandeis promoted female inferiority in his defense of Oregon). Subsequent decisions were also grounded in gender issues. For example, *Rostker v. Goldberg*, 453 U.S. 57 (1981) (exclusion of women from involuntary military service constitutional); *Hoyt v. Florida*, 368 U.S. 57 (1961) (exclusion of women from involuntary service on juries constitutional). Compare with *United States v. Virginia*, 518 U.S. 515, 533 (1996) (establishing semi-strict scrutiny of gender classifications to ensure a "proffered justification is 'exceedingly persuasive' . . . and is 'genuine' . . . [not based on] overbroad generalizations about the different talents, capacities, or preferences of males and females").

27. UROFSKY, A LIFE, *supra* note 3, at 219. Lawyers at the NAACP Legal Defense Fund adopted this "Brandeis Brief" approach in the campaign to overturn *Plessy v. Ferguson*. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 251 (1975).

28. UROFSKY, A LIFE, *supra* note 3, at 224–27. Brandeis continued this work in other states including Illinois, Ohio, and California, as well as the service as a vice president of the American Association for Labor Legislation. ALLON GAL, BRANDEIS OF BOSTON 143–45 (1980).

29. ALFRED LIEF, BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL 61–64 (1936).

30. GAL, *supra* note 28, at 175; LIEF, *supra* note 29, at 64–69; PAPER, *supra* note 2, at 215–16, 218.

States Forestry Service, whom President Taft fired to clear the way for private coal deals on valuable public lands.[31] Brandeis was also a visible advisor to President Wilson on antitrust policy during the 1912 election[32] and advised the President on the legislation that created the Federal Trade Commission.[33]

He spoke out on a wide array of topics, amassing a record that would be prodigious in any era. He testified before legislative bodies,[34] gave speeches,[35] and wrote legal briefs[36] and newspaper opinion columns.[37]

Ordinarily, both legal stardom and presidential will are necessary for a nomination to the Supreme Court, but presidential will is sufficient for that honor. In this respect, Brandeis biographers seem to agree that Wilson not only "rewarded and honored Brandeis for the services he had rendered to the President,"[38] but also put him forward as a part of Wilson's ongoing effort to appoint Brandeis to a position commensurate with his energies and abilities.[39] Therefore, although there may be some truth in the notion that Wilson nominated Brandeis to "appeal . . . to certain groups in the electorate whose support Wilson would need in order to be re-elected in 1916,"[40] there is no question that Wilson thought highly of Brandeis and wanted to afford Brandeis an opportunity to serve the nation in an important, official capacity.

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31. Brandeis advised Gifford Pinchot, head of the United States Forest Service, after he was fired by President Taft for his opposition to powerful interests who wished to acquire coal mining rights on land designated for national forest status. By doing so, he opposed powerful interests who were funded by financiers, including J.P. Morgan. GAL, *supra* note 28, at 153; CHAR MILLER, GIFFORD PINCHOT AND THE MAKING OF MODERN ENVIRONMENTALISM 37, 207 (2001).

32. UROFSKY, BRANDEIS AND THE PROGRESSIVE TRADITION, *supra* note 4, at 85–86.

33. *Id.* at 86.

34. GAL, *supra* note 28, at 177 (Sherman Anti-Trust Act).

35. *See* UROFSKY, A LIFE, *supra* note 3, at 202–03 (legal ethics).

36. *See* text accompanying footnotes 21–29.

37. Roy M. Merskey, *Louis Dembitz Brandeis 1856-1941: A Bibliography*, 15 YALE L. LIBR. PUBLICATIONS 19 (1958).

38. *See* EZEKIEL RABINOWITZ, JUSTICE LOUIS BRANDEIS: THE ZIONIST CHAPTER OF HIS LIFE 48 (1968) (discussing Brandeis' service for the president on the United States Commissions on Industrial Relations, as well as "the counsel of Brandeis on trust legislation, currency and labor problems").

39. Previously, Wilson wanted Brandeis to be Chairman of the Commission on Industrial Relations. *Id.* Wilson had also considered the possibility of appointing him to be Attorney General of the United States as well as Solicitor General, but prominent lawyers opposed these possible appointments on anti-Semitism grounds. *Id.* at 51–52; *see also* GAL, *supra* note 28, at 188.

40. UROFSKY, A MIND OF ONE PIECE, *supra* note 3, at 102.

Scholars agree that the opposition to his confirmation was "veiled anti-Semitism,"[41] an anti-Semitism that opponents of his reformer efforts had expressed several years before Wilson's nomination.[42] Provocative headlines and opinion commentary bear this out.[43] But another view is that his opposition to powerful business interest insured that his nomination would be controversial.[44] As one biographer put it, the "nomination became a confrontation of interests and ideologies rather than a display of prejudice."[45] His opponents marshaled both Harvardians and prominent members of the bar to shore up their cause.[46] Brandeis had organized support from the law faculty as well as friends who countered newspaper stories potentially damaging to his confirmation.[47] The hearings on his confirmation focused on several matters opponents relied upon to say that Brandeis was unfit to serve. There were charges that his testimony during 1913 hearings on railroad tariffs before the Interstate Commerce Commission was "a betrayal of his trust relationship"[48] to the detriment of the New Haven Railroad.[49] Other issues that arose included his performance as a lawyer in a matter involving a will,[50] his role as a lawyer and board member for a large shoe company,[51] and a generalized attack on his integrity led by Moorfield Storey, "a highly respected member of the bar . . . [who] had had a distinguished career as a lawyer . . . Harvard Overseer, and president of the American Bar Association."[52] Nonetheless, the Committee on the Judiciary voted out his nomination to the full Senate,

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41. *See* STRUM, *supra* note 3, at 293 (anti-Semitism in a letter opposing Brandeis). Brandeis also shared that belief. *Id.* (quoting Brandeis' journal).

42. GAL, *supra* note 28, at 195–96 (Abbott Lawrence Lowell, the President of Harvard who later supported Jewish quotas there, "notified Wilson immediately after the election that Brandeis did not 'stand very high in the opinion of the best Justices of Massachusetts'").

43. *The Sun* of New York City headlined "Wilson Shocks Congress by Naming Brandeis for the United States Supreme Court." STERN, *supra* note 4, at 132. *The Wall Street Journal* used provocative language inveighing against the nomination, calling him "rabid" and "super extreme." UROFSKY, A LIFE, *supra* note 3, at 440–42.

44. STRUM, *supra* note 3, at 294.

45. *Id.*

46. STRUM, *supra* note 3, at 294, 297; UROFSKY, A LIFE, *supra* note 3, at 445–46.

47. UROFSKY, A LIFE, *supra* note 3, at 446–47.

48. *Id.* at 448.

49. *Id.* at 449; GAL, *supra* note 28, at 198; PAPER, *supra* note 2, at 217.

50. PAPER, *supra* note 2, at 218–20.

51. GAL, *supra* note 28, at 197–98; PAPER, *supra* note 2, at 221–26; UROFSKY, A LIFE, *supra* note 3, at 450–51.

52. UROFSKY, A LIFE, *supra* note 3, at 451–52.

which in turn confirmed him 47–22 a week later.[53] His nomination had lingered in the Senate from January 28, 1916 to June 1, 1916—125 days.[54]

B. Marshall

Thurgood Marshall was as well-known as Brandeis was at the time of Johnson's nomination, but for different reasons. Marshall spent most of his career, including his time as a law student, focused on the battle against Jim Crow.[55] With Charles Hamilton Houston, he mounted a multi-year battle against racial segregation that culminated in the stunning nature of his victory over *Plessy v. Ferguson* in *Brown v. Board of Education*,[56] in which the Supreme Court declared that state-mandated segregation in the nation's public schools was unconstitutional.[57] In 1962, President John F. Kennedy chose Marshall to become the second African American to serve on a United States Court of Appeals,[58] the prestigious Second Circuit.[59] President Kennedy's successor, Lyndon Johnson, plucked Marshall from his seat on the Second Circuit Court of Appeals in 1965 to elevate him to

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53. *Supreme Court Nominations, present-1789*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm [https://perma.cc/B2TT-77K5] (last visited Mar. 10, 2017).

54. *Id.* The next time a nominee had to wait to be confirmed at length was Potter Stewart in 1959, who was nominated January 17, 1959, and confirmed with seventeen no votes on May 5, 1959—117 days.

55. KLUGER, *supra* note 27, at 127–28; *see also* JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 54–59 (1998).

56. 347 U.S. 483 (1954).

57. *Id.* at 495.

58. The first African American to serve on a Court of Appeals was William H. Hastie, whom Truman appointed to the United States Court of Appeals for the Third Circuit in 1949. *Biographical Directory of Federal Judges: Hastie, William Henry*, Fed. Jud. Ctr., http://www.fjc.gov/servlet/nGetInfo?jid=995&cid=999&ctype=na&instate=na [https://perma.cc/6B8G-WSTW] (last visited Mar. 10, 2017); *see also* GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE 225, 240–41 (1984).

59. In 2006, then-Judge Sonia Sotomayor discussed the prestige of the United States Court of Appeals for the Second Circuit. Sonia Sotomayor, *Another Historical Moment*, 53 FED. LAW. 29, 29–30 (2006).

> Throughout the years from 1925 to 1960, historians consider the U.S. Court of Appeals for the Second Circuit to be among America's strongest and most influential courts, mostly due to the quality of its bench, which included Learned Hand, Thomas Swan, Augustus Hand, Charles E. Clark, Jerome Frank, and Harrie B. Chase. In more recent times, we were graced by the presence of Thurgood Marshall, who served on our court from 1961 to 1965, and who later became our circuit justice until his death.

Id. at 30; *see also* John J. Hoeffner, *One Hundred Years of Solitude: Dissent in the Second Circuit, 1891-1991*, 65 ST. JOHN'S L. REV. 875, 934–35 (1991).

Solicitor General of the United States, reportedly to prepare him for a Supreme Court nomination as the first African American to join the Court.[60] In 1967, President Johnson nominated Marshall to serve as an Associate Justice on the Supreme Court.[61]

It was not surprising that Marshall's nomination would face opposition. After all, the record that qualified him for service—thirty-five arguments before the Supreme Court and victories in many important *race* constitutional cases[62]—was the same record that threatened the American racial order, generally, and especially in the South:

> By the time Johnson appointed Marshall to the Supreme Court, his history and his contributions to American constitutional law were fairly well known to Congress and the public. As a co-architect of legal doctrine that eliminated official American apartheid, his work had affected the lives of millions of Americans, and had received editorial notice in major newspapers. President Johnson had indeed prepared Marshall to both withstand criticism and to receive praise.

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60. I noted in my 1989 article on Marshall's confirmation to the Supreme Court that in

> a *New York Times Magazine* article written shortly after [the Solicitor General] appointment, Marshall was asked whether Johnson had such a plan. Marshall answered, 'Look, there's nothing to that; it's the purest of speculation. I can tell you the President made no promises, there were no deals, there was no talk of it. He wanted me for Solicitor General. That's all.' . . . But an aide to Johnson, Jack Valenti, remembers [differently; he remembered] 'a plan' despite public denials by both Johnson and Marshall. . . . [He recalls Johnson saying] 'By God, that son-of-a bitch will have prosecuted more cases before the Supreme Court than any lawyer in America. So how is anybody gonna turn him down?'

Linda Greene, *The Confirmation of Thurgood Marshall to the United States Supreme Court*, 6 HARV. BLACKLETTER J. 27, 29 (1989) (citations omitted).

61. Johnson was determined to bring African Americans into positions of importance.

> Before [he] nominated Marshall [to the Supreme Court, President Johnson] had already appointed Blacks to a number of posts, including Robert Weaver as Secretary of the Department of Housing and Urban Development. Johnson's judicial appointees included Court of Appeals Judges William Hastie (3d Circuit) and Wade McCree (6th Circuit), and Federal District Court Judges Constance Baker Motley (N.Y.), Spottswood Robinson (D.C.), and Leon Higginbotham (Penn.).

Id. at 28–29 n.11 (citing 113 CONG. REC. 17,443-44 (1967) (remarks of Senator Ernest Gruening of Alaska).

62. *See, e.g.*, *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218 (1964); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Smith v. Allwright*, 321 U.S. 649 (1944); *Hansberry v. Lee*, 311 U.S. 32 (1940).

> And the course of his confirmation encompassed both extremes.[63]

Marshall was familiar with what might come. Indeed, Lyndon Johnson, ever colorful when determined, reportedly said that "he was determined that he had to outfit Thurgood Marshall and armor him with the kind of battle plates that no opposition could penetrate."[64] He had a preview of that experience after Kennedy nominated him to the United States Court of Appeals for the Second Circuit in 1962. After a contentious hearing and a wait of eleven months, the Senate confirmed 54–16.[65]

Southern senators on the Judiciary Committee sought to delay his Senate confirmation with their lengthy questioning about judicial philosophy and judicial authority. A team of southern senators—North Carolina's Sam Ervin, Sr., South Carolina's Strom Thurmond, and Arkansas's John McClellan: dominated the hearings, opposing Marshall's confirmation on multiple grounds—that he would be too sympathetic to criminal defendants,[66] that he would be unlikely to exercise judicial restraint,[67] that he was too enamored with the notion of a "living constitution,"[68] that he was insufficiently sympathetic to states' rights,[69] and that he was lacking in basic constitutional knowledge.[70]

The southern senators on the committee voted against his nomination while denying that their opposition was grounded in race. Instead, the erudite Ervin spoke for them, stating that the opposition

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63. Greene, *supra* note 60, at 30 (citations omitted).

64. 133 CONG. REC. 36,163 (1987) (transcript of *Thurgood Marshall, The Man*, Columbia Broadcasting System's one-hour special on Supreme Court Justice Thurgood Marshall).

65. *Senate Accepts House Public Works Bill; Confirms Marshall; Approves Aniline Sale: Passes HR 10; Votes Reserve Callup*, *in* 18 CONG. Q. ALMANAC 686, 686 (Georgianna F. Rathbun ed., 1962) (referencing Senate Vote #175).

66. Greene, *supra* note 60, at 32–33 (McClellan); *Id.* at 34–35 (Ervin).

67. *Id.* at 34 (Ervin).

68. *Id.* at 36–37 (Ervin); *Id.* at 46–48 (Ervin, Holland, Eastland, and Thurmond). Marshall stated during his confirmation, "It is the duty of the Court to keep stability in the law." *Nomination of Thurgood Marshall: Hearing on the Nomination of Thurgood Marshall, of New York, be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 90th CONG. 157 (1967) (statement of Thurgood Marshall, Judge, Supreme Court Justice Nominee) (He went on to testify, "I think [of] the Constitution as a living document [that] needs someone to interpret it. . . . I would hope that my own ideas of fairness are based entirely on the Constitution, and I would not under any circumstance find—where the Constitution says this and my 'personal feelings' say that, I would go with the Constitution. I am obliged to." *Id.* at 158, 160).

69. Greene, *supra* note 60, at 35–36 (Ervin).

70. *Id.* at 38–39 (Thurmond).

was based on the prediction that Marshall "would align himself with the judicial activists now serving on the Supreme Court."[71]

On the Senate floor, there was both praise and outcry. The Judiciary Committee opponents joined other southern senators including John C. Stennis (Mississippi), Spessard Holland (Florida), and Robert Bryd (Virginia) in condemnation of the nomination on activist and stare decisis grounds.[72] And as to the proponents of Marshall, how ironic it is to recall today that during the floor debate Senator Robert Kennedy compared Marshall to the first Chief Justice of the Court as well as Story, Holmes, and Brandeis.

Yet, despite the accolades upon his nomination,[73] was Marshall's race the reason confirmation took so long? To be sure, yes—and no. The confirmation process took seventy-eight days to complete[74]—significantly longer than the eight to twenty-six days taken to confirm the three nominees who preceded him on the Court,[75] but not the Senate's unseemly eleven month delay in the context of Kennedy's nomination of Marshall to the Second Circuit nomination just six years earlier. The opposition to Marshall, like that to Brandeis, was both invidious and ideological. It was significantly grounded in opposition to the change that these two men might bring to judicial doctrine on behalf of the powerless.

As to Marshall, the concern was possible change in the racial status quo in America, but change was clearly already underway:

> [In] the abstract, the opponents did address valid issues of constitutional law, the resolution of which did depend on legal ideology and philosophy.
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> When the opposition to Marshall's nomination is viewed in the context of voting patterns on racial equality legislation . . . the opposition [was] . . . an integral part of the larger pattern of southern opposition to the advancement of civil rights for Blacks. . . .
>
> The opposition to Marshall must be understood in the context of southern opposition to the new doctrines . . . that resulted in meaningful and enforceable equality. Poll taxes, segregated schools, unbridled police discretion, prohibited interracial marriage, absolute states' rights, and strict constitutional construction had the instrumentalities of American apartheid. Their retention had been defended in the courts and the

71. *Id.* at 44 (quoting S. EXEC. REP. No. 90-13, at 16 (1967)).
72. *Id.* at 46–48.
73. *See* 113 CONG. REC. 24,646 (1967).
74. Greene, *supra* note 60, at 30.
75. *Id.* at 49.

> Congress. In 1967, those battles were not yet over, but the handwriting had been on the wall . . . .[76]

II. A JUST ORDER IN THE COURT? DIVERSITY ON THE FEDERAL BENCH AFTER BRANDEIS AND MARSHALL

Since Wilson's appointment of Brandeis 100 years ago and the appointment of Marshall almost fifty years ago, the federal bench has become much more diverse. There is an expanding literature on the characteristics of the federal judiciary. The Congressional Research Service periodically examines the diversity of the federal judiciary as a service to lawmakers in both houses,[77] as well as burgeoning academic scholarship on the topic.[78] The literature has also focused on the relationship between various demographic markers as association of these markers with judicial outcomes.[79]

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76. *Id.* at 49–50.

77. BARRY J. MACMILLION, CONG. RESEARCH SERV. R43426, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS (2014).

78. *Id.*; *see*, *e.g.*, RUSSELL WHEELER, THE CHANGING FACE OF THE FEDERAL JUDICIARY (Brookings Institution ed., 2009); A.E. Dick Howard, *The Changing Face of the Supreme Court*, 101 VA. L. REV. 231 (2015); Rosemary Hunter, *More Than Just a Different Face? Judicial Diversity and Decision-Making*, CURRENT LEGAL PROBS. 119 (2015), http://clp.oxfordjournals.org/content/early/2015/04/27/clp.cuv001.full [https://perma.cc/LBV3-WW5Y] (last visited Mar. 10, 2017); Mark S. Hurwitz & Drew Noble Lanier, *Judicial Diversity in Federal Courts: A Historical and Empirical Exploration*, 96 JUDICATURE 76 (2012); Jonathan K. Stubbs, *A Demographic Snapshot of America's Federal Judiciary: A Prima Facie Case for Change*, U. RICHMOND SCHOLARSHIP REPOSITORY (2011); *see also* DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT 1055 (5th ed. 2010); Gerald S. Gryski et al., *A Bench that Looks Like America? Representation of African Americans and Latinos on the Federal Courts*, 56 J. POL. 1076 (1994).

79. The research has expanded beyond mere demographics such as race, gender, and ethnicity to the relationship between demographics, identity, and experiential attributes and judicial decisions. *See, e.g.*, Nancy N. Crowe, The Effects of Judges' Sex and Race on Judicial Decision-Making on the United States Court of Appeals 1981–1996 (1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with author); Paper prepared by Brenden Higashi for presentation at the Annual Meeting of the Western Political Science Association, Class and Courts: An Analysis of Class Attributes and Judicial Decision-making (Apr. 2, 2015), http://wpsa.research.pdx.edu/papers/docs/Higashi%20Class%20and%20Courts.pdf [https://perma.cc/WA95-ZKJG]. Researchers have also explored the relationship between religious affiliation and legal decision-making. *See* John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998); Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004); Donald Songer et al., *A Reappraisal of Diversification of the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425 (1994); Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507 (1999). In addition, the relationship between diversity of professional experience and the quality of the federal judiciary is also an important

A. Jewish Americans on the Bench Since Brandeis

The Supreme Court has had a small number of Jewish justices in comparison to the history of appointments since 1789, but Wilson's appointment of Brandeis to the Court began a discussion of a "Jewish Seat" on the Supreme Court.[80] The second Jewish justice was Benjamin Cardozo in 1932, but the Senate confirmed him swiftly and without controversy.[81] President Franklin D. Roosevelt nominated Felix Frankfurter to replace Cardozo, who was in turn replaced by Kennedy's Arthur Goldberg, who resigned to become Ambassador to the United Nations.[82] Johnson nominated Abe Fortas to replace Goldberg, but Fortas resigned after just three years from a scandal.[83] In 1987, President Ronald Reagan nominated Douglas Ginsburg, but that nomination was short lived and was never transmitted to the Senate.[84] President Bill Clinton nominated Ruth Bader Ginsberg in 1990,[85] then Stephen Breyer in 1994.[86] President Barack Obama nominated Elena Kagan.[87]

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issue. *See, e.g.*, ALLIANCE FOR JUSTICE, BROADENING THE BENCH: PROFESSIONAL DIVERSITY AND JUDICIAL NOMINATIONS (2016) (discussing the importance of professional diversity); Mark S. Hurwitz & Drew Noble Lanier, *Judicial Diversity in Federal Courts: A Historical and Empirical Exploration*, 96 JUDICATURE 76–77 (2012) (examining federal court nominees' judicial, prosecutorial, and government experience).

80. BRIAN H. BORNSTEIN & MONICA K. MILLER, GOD IN THE COURTROOM: RELIGION'S ROLE AT TRIAL 92–93 (2009).

81. ANDREW L. KAUFMANN, JUSTICE CARDOZO 469–70 (1998).

82. BORNSTEIN & MILLER, *supra* note 80, at 94; *Biographical Directory of Federal Judges: Goldberg, Arthur Joseph*, Fed. Jud. Ctr., http://www.fjc.gov/servlet/nGetInfo?jid=875&cid=999&ctype=na&instate=na [https://perma.cc/LB32-3NAL] (last visited Mar. 10, 2017).

83. THE SUPREME COURT HISTORICAL SOC'Y, THE JEWISH JUSTICES OF THE SUPREME COURT REVISITED: BRANDEIS TO FORTAS (Jennifer M. Low ed., 1994); *Biographical Directory of Federal Judges: Fortas, Abe*, Fed. Jud. Ctr., http://www.fjc.gov/servlet/nGetInfo?jid=783&cid=999&ctype=na&instate=na [https://perma.cc/FL3T-2VC4] (last visited Mar. 10, 2017); *see also* LAURA KALMAN, ABE FORTAS 376–400 (1990).

84. Stephen V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana 'Clamor,'* N.Y. TIMES (Nov. 8, 1987), http://www.nytimes.com/1987/11/08/us/ginsburg-withdraws-name-as-supreme-court-nominee-citing-marijuana-clamor.html [https://perma.cc/P6JW-S9SX].

85. *Supreme Court Nominations, present-1789*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm [https://perma.cc/B2TT-77K5] (last visited Mar. 10, 2017).

86. *Id.*

87. *Biographical Directory of Federal Judges: Kagan, Elena*, Fed. Jud. Ctr., http://www.fjc.gov/servlet/nGetInfo?jid=3289&cid=999&ctype=na&instate=na [https://perma.cc/VZ8N-E2U7] (last visited Mar. 10, 2017).

B. African Americans on the Bench Since Marshall

With respect to African Americans on the federal bench, the life-tenured federal judge that preceded Marshall was William H. Hastie, whom President Truman appointed to the United States Court of Appeals for the Third Circuit in 1949.[88] When Kennedy appointed Marshall to the United States Court of Appeals for the Second Circuit in 1963, Marshall was thus the second African American to serve as Court of Appeals judge. The third was Wade McCree, whom Johnson appointed in 1966.[89]

President Jimmy Carter, though president only four years, would have the greatest influence on diversification of the federal bench, generally, and on opportunities for African Americans to serve, more specifically; the second most influential was Clinton.[90]

As of 2014, there were 21 African-American circuit court judges of 162 circuit court judges.[91] Of all the African Americans who have served as a circuit court judge, 89.7% were appointed after 1977. As of March 7, 2014, there were 76 African-American district court judges out of 603 district court judges in the United States. The number of African-American women who have served as federal judges remains small. Constance Baker Motley was the first in 1966,[92] and Amalya Kearse was the first African-American woman and woman of color to

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88. WARE, *supra* note 58; *Biographical Directory of Federal Judges: Hastie, William Henry*, Fed. Jud. Ctr., http://www.fjc.gov/servlet/nGetInfo?jid=995&cid=999&ctype=na&instate=na [https://perma.cc/6B8G-WSTW] (last visited Mar. 10, 2017).

89. *Biographical Directory of Federal Judges: McCree, Wade Hampton Jr.*, Fed. Jud. Ctr., http://www.fjc.gov/servlet/nGetInfo?jid=1537&cid=999&ctype=na&instate=na [https://perma.cc/GK89-6BB7] (last visited Mar. 10, 2017); *Solicitor General: Wade H. McCree, Jr.,* U.S. DEP'T JUST., http://www.justice.gov/osg/bio/wade-h-mccree-jr [https://perma.cc/Q56X-8WEJ] (last visited Mar. 10, 2017).

90. Stephen Labaton, *President's Judicial Appointments: Diverse but Well in the Mainstream*, N.Y. TIMES (Oct. 17, 1994), http://www.nytimes.com/1994/10/17/us/president-s-judicial-appointments-diverse-but-well-in-the-mainstream.html [https://perma.cc/55JV-5RDN]; Jeffrey 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/Y9PP-FLFF].

91. MCMILLION, *supra* note 77, at 4, 14.

92. *Biographical Directory of Federal Judges: Motley, Constance Baker*, Fed. Jud. Ctr., http://www.fjc.gov/servlet/nGetInfo?jid=1704&cid=999&ctype=na&instate=na [https://perma.cc/686Z-E8KW] (last visited Mar. 10, 2017); *see also* CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW 217 (1998).

serve on a United States Court of Appeals.[93] And the number of African Americans to serve on the Supreme Court is merely two, with Justice Clarence Thomas succeeding Marshall.[94]

III. DEFENDING DIVERSITY ON THE BENCH: THIS DISCUSSION WILL GO ON[95]

The debate about the importance of diversity in the judiciary continues today. Of course, the discussion includes a myriad of viewpoints including the view that background is irrelevant to judging. But there are important perspectives that are worthy of discussion in light of the fact that only a handful of Jewish judges have served on the highest Court, just two African Americans, and no African-American women.

One viewpoint focuses on judicial diversity as a key indicator of the legitimacy of government[96]—a view contested by some.[97] Another rationale for diversity is the symbolic function of judicial diversification.[98] In addition there is a robust body of work on the relationship of the characteristics and experiences of judges to judicial

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93. *Biographical Directory of Federal Judges: Kearse, Amalya Lyle*, Fed. Jud. Ctr., http://www.fjc.gov/servlet/nGetInfo?jid=1236&cid=999&ctype=na&instate=na [https://perma.cc/E2XY-8GN4] (last visited Mar. 10, 2017).

94. *Biographical Directory of Federal Judges: Thomas, Clarence*, Fed. Jud. Ctr., http://www.fjc.gov/servlet/nGetInfo?jid=2362&cid=999&ctype=Na&instate=na [https://perma.cc/8PGB-RY34] (last visited Mar. 10, 2017).

95. In an address on the twenty-first anniversary of the District of Columbia Emancipation Act, Frederick Douglas said that the discussion of race would go on:

> What Abraham Lincoln said in respect of the United States is as true of the colored people as of the relations of those States. They cannot remain half slave and half free. You must give them all or take from them all. Until this half-and-half condition is ended, there will be just ground of complaint . . . . Until the colored man's pathway to the American ballot box, North and South, shall be as smooth and safe as the same is for the white citizen, this discussion will go on . . . .

Frederick Douglass, *The United States Cannot Remain Half-Slave and Half-Free: Speech on the Occasion of the Twenty-First Anniversary of Emancipation in the District of Columbia*, *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 656, 661 (1983). I say, as well, that the discussion of judicial diversity will go on.

96. *See, e.g.*, Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Judicial System Possible?*, 105 NW. U. L. REV. 587, 625 (2011).

97. *Id.* at 628.

98. Sylvia R. Lazos, *Only Skin Deep: The Cost of Partisan Politics on Minority Diversity of the Federal Bench: Why Care Whether Judges Look "Like America" if, Because of Politics, a "Voice of Color" has Become a "Whisper of Color"?*, 83 IND. L.J. 1423, 1430 (2008).

decision-making. Some researchers have concluded that certain background characteristics associated with different outcomes for litigants in particular kinds of cases, such as sexual harassment and sex discrimination cases,[99] employment discrimination cases,[100] as well as cases that implicate religious issues.[101]

Though a deep evaluation of this body of research is beyond the scope of this Article, there are valuable insights about the benefits of judicial diversity. Our common law culture is a flexible one that has historically accommodated—though not without controversy—a range of approaches and methodologies of judicial interpretation. With respect to constitutional interpretation, specifically, the line between experience and judicial decision-making is difficult to draw in light of the fact that "it is a Constitution we are expounding."[102] We may conclude on the basis of this developing body of research that robust judicial diversity may be the very best approach to the continuing development of legal principles across the board. It is inevitable that a judge will draw on her insights and experiences consciously and unconsciously,[103] and that a

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99. *See e.g.*, Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decision-making in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005) ("[G]ender composition of the bench affected federal appellate court outcomes and Title VII sexual harassment and sex discrimination cases in 1999, 2000, and 2001."); *see also* Sean Farhang et al., *The Politics of Opinion Assignment and Authorship on the US Court of Appeals: Evidence from Sexual-Harassment Cases*, 44 J. LEGAL STUD. S59, S59 (2015).

100. *See* Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1117 (2009).

101. BORNSTEIN & MILLER, *supra* note 80, at 86; Sisk et al., *supra* note 79, at 492; Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: the Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507, 507 (1999).

102. *McCulloch v. Maryland*, 4 U.S. 316, 407 (1819).

103. *See generally* GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954); ROSABETH MOSS KANTOR, MEN AND WOMEN OF THE CORPORATION (1977); H. TAJFEL, HUMAN GROUPS AND SOCIAL CATEGORIES (1981); David L. Hamilton, *Illusory Correlation as a Basis for Stereotyping*, *in* COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 115 (1981); David A. Wilder, *Perceiving Persons as a Group: Categorization and Intergroup Relations*, *in* COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 213 (1981); *Implicit Bias*, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, OH. ST. U., http://kirwaninstitute.osu.edu/researchandstrategicinitiatives/#implicitbias [https://perma.cc/W2UX-WLGY] (last visited Mar. 10, 2017) (focusing on "attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner"); *see also* CHERYL STAATS, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, OH. ST. U., STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2014 (2014) (reviewing important research and conferences on implicit bias, the popularity of the topic in mainstream lay media, and university initiatives on the topic). Implicit bias affects judging. *See* Pamela M. Casey et al., *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64, 65 (2013); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1146 (2012).

truly diverse judiciary will bring a cross-section of human experience to the judicial decision-making bench.[104]

Nonetheless, that the legitimacy of conscious commitment to broader judicial diversity remains a contested ideal was clearly demonstrated during the debate over President Obama's nomination of Sonya Sotomayor to be an Associate Justice on the United States Supreme Court. In all likelihood, President Obama did not mean to "throw down the diversity gauntlet" when he nominated Judge Sotomayor, praising her "quality of empathy, of understanding and identifying with people's hopes and struggles."[105] The President had begun his remarks with the well-known quote of Oliver Wendell Holmes that "the life of the law has not been logic but experience."[106] Nonetheless, the nomination was to become a textbook case of opposition to a nominee based upon not only identity and experience, but also concerns about neutrality, merit, and ideology.

IV. DEFENDING DIVERSITY—THE CASE OF JUSTICE SONIA SOTOMAYOR

President Obama began his May 26, 2009 press conference on his nomination of Judge Sotomayor to be an Associate Justice of the United States Supreme Court by focusing on his criteria for judicial nominees:[107]

> While there are many qualities that I admire in judges across the spectrum of judicial philosophy . . . there are few that stand out that I just want to mention. First and foremost is a rigorous intellect—a mastery of the law, an ability to hone in on the key issues and provide clear answers to complex legal questions. Second is a recognition of the limits of the judicial role, an understanding that a judge's job is to interpret, not make, law; to approach decisions without any particular ideology or agenda, but rather a commitment to impartial justice; a respect for precedent and a determination to faithfully apply the law to the facts at hand. . . . And yet,

104. *See, e.g.*, Songer & Tabrizi, *supra* note 79, at 522–23 (concluding that "the decisions of state Supreme Court justices who are evangelicals provide evidence for the claim that their beliefs have an influence on decisions in the areas of gender discrimination, obscenity, and the death penalty").

105. Higashi, *supra* note 79, at 3.

106. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1909).

107. President Barack Obama, Remarks by the President in Nominating Judge Sonia Sotomayor to the United States Supreme Court (May 26, 2009), https://www.whitehouse.gov/the-press-office/remarks-president-nominating-judge-sonia-sotomayor-united-states-supreme-court [https://perma.cc/78QT-92C3].

> these qualities alone are insufficient. . . . as Supreme Court Justice Oliver Wendell Holmes once said, "The life of the law has not been logic; it has been experience." Experience 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.[108]

After the President set forth his criteria, he summarized Sotomayor's legal and experiential qualifications. He noted her undergraduate degree from Princeton summa cum laude, her law degree from Yale, her service on the staff of the legendary District Attorney Robert Morganthau, her partnership in a New York law firm specializing in global transactions, and her service for seventeen years as a District Court and United States Court of Appeals judge.[109] As importantly, the President hailed her as a judge with "a sweeping overview of the American judicial system, but [also] a practical understanding of how the law works in the everyday lives of the American people."[110] Her life and her nomination, he said, were evidence that "no dream is beyond reach in the United States of America."[111] In her remarks, Sotomayor emphasized that her jurisprudence would reflect both a commitment to the "rule of law" tempered by her experience-based understanding of the concerns of litigants who come before the highest Court:

> I firmly believe in the rule of law as the foundation for all of our basic rights. For as long as I can remember, I have been inspired by the achievement of our Founding Fathers. They set forth principles that have endured for more than two centuries. Those principles are as meaningful and relevant in each generation as the generation before. [My] wealth of experiences, personal and professional, have helped me appreciate the variety of perspectives that present themselves in every case that I hear. It has helped me to understand, respect, and respond to the concerns and arguments of all litigants who appear before me, as well as to the views of my colleagues on the bench. I strive never to forget the real-

108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*

> world consequences of my decisions on individuals, businesses, and government.[112]

Between May 26, 2009, when President Obama announced her nomination[113] and July 13, when the Chair of the United States Senate Committee on the Judiciary gaveled her nomination hearings to order,[114] it was clear that the opposition to her confirmation would center on whether her stated determination to temper law with her experience rendered her a jurist unfit to dispense "equal justice under law."[115]

In the course of her hearings and the subsequent Senate debate, it became clear that the opposition to her candidacy never focused solely on her identity, per se. Her opponents acknowledged that her storied career and her nomination were important breakthroughs in the history of the federal opportunity to serve on the judiciary.[116] It was also clear that her objective professional qualifications were exceptional,[117] even

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112. *Id.*

113. *Biographical Directory of Federal Judges: Sotomayor, Sonia*, Fed. Jud. Ctr., http://www.fjc.gov/servlet/nGetInfo?jid=2243&cid=999&ctype=na&instate=na [https://perma.cc/YL39-ZJRW] (last visited Mar. 10, 2017).

114. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 1 (2009) [hereinafter *Hearings*].

115. The statement of Mr. Ensign, 155 CONG. REC. S8822 (August 5, 2009), included reference to the Supreme Court motto. "In conclusion, when thinking back on the phrasing engraved in marble above the entrance to the United States Supreme Court, 'Equal Justice Under Law,' Judge Sotomayor's record and testimony provide uncertainty and doubt that she will rule with a fair and impartial adherence to the rule of law." There were numerous analyses of then-Judge Sotomayor's opinions. These included nonpartisan ones by the Congressional Research Service. These analyses reveal that then-Judge Sotomayor adhered to precedent in her decisions. The result in these analyses depended on whether the group supported her nomination or opposed it. *See, e.g.*, ANNA C. HENNING, & KENNETH R. THOMAS, CONG. RESEARCH SERV. R40649, JUDGE SONIA SOTOMAYOR: ANALYSIS OF SELECTED OPINIONS 1 (2009); JOHN O. SHIMABUKURO, CONG. RESEARCH SERV. R40694, THE NOMINATION OF JUDGE SONIA SOTOMAYOR: A REVIEW OF SECOND CIRCUIT DECISIONS RELATING TO REPRODUCTIVE RIGHTS (2009). There were also extensive analyses by various groups in support of and against the nomination. *See, e.g.*, NAACP LEGAL DEF. & EDU. FUND, REPORT ON THE NOMINATION OF JUDGE SONIA SOTOMAYOR TO THE SUPREME COURT OF THE UNITED STATES 1017 (2009); *Hearings*, *supra* note 114, at 807 (statement of the N.Y. City Bar); *Id.* at 741 (statement of Americans United for Life).

116. *See, e.g.*, *Hearings*, *supra* note 114, at 853 (statement of Sen. John Cornyn) (acknowledging her distinguished career as a lawyer and a judge); *Id.* at 11 (statement of Sen. Orrin Hatch) ("compelling life story and a strong record of educational and professional achievement").

117. The American Bar Association Standing Committee, *Ratings of Article III Judicial Nominees: 111th Congress*, A.B.A. (Dec. 3, 2010), http://www.americanbar.org/content/dam/aba/migrated/2011_build/federal_judiciary/ratings111.authcheckdam.pdf [https://perma.cc/4XG7-JYUR].

though some attempted to promote a disparaging-media argument that she might be "good" but was "not that smart,"[118]—this, despite accolades from the Standing Committee on the Federal Judiciary of the American Bar Association that unanimously rated her "well-qualified."[119] In the end, the opposition sought to link her explicit embrace of her experience[120] to the argument that she harbored impermissible bias[121] and would allow the "empathy" [122] to distort her judging.[123]

The debate over her nomination therefore took a predictable turn; the import, the opponents insisted, was that their opposition was on the basis of her impermissible bias and ideology. The proponents dismissed these views, stressing instead her long judicial service, the absence of controversy about her decisions with a few exceptions,[124] and the importance of expanding the diversity of the highest court.

The official discourse was similar to that during the confirmation of both Brandeis and Marshall with no official opposition to her confirmation on the explicit ground of her race, ethnicity, or gender. Rather, the objection to the appointment was based upon the possibility that the ideology that these justices would bring to the court might

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118. Jeffrey Rosen, *The Case Against Sonia Sotomayor*, NEW REPUBLIC (May 4, 2009), https://newrepublic.com/article/60740/the-case-against-sotomayor [https://perma.cc/764P-RJ82].

119. Ms. Askew reported that the standing committee conducted an "extensive investigation into the personal qualifications of Judge Sotomayor," concluding "that Judge Sotomayor was 'well qualified' to be Associate Justice of the United States." *Hearings*, *supra* note 114, at 770, 772 (statement of Kim J. Askew, Chairman, Standing Comm. on the Fed. Judiciary); *see also* Guy-Uriel Charles et al., *Sonia Sotomayor and the Construction of Merit*, 61 EMORY L.J. 801, 833–34 (2012) ("[Sotomayor] was easily in the top 25% of all of the judges on the Court of Appeals in almost all of the categories that we examined. Moreover, in more than half the categories, she was in the top 10%. These results should at least bring into question the claims of her mediocrity. Indeed, based on our results, there is the strong possibility that she was, during her tenure on the Second Circuit, among the most capable and influential appeals court judges in the country.").

120. *See, e.g.*, *Hearings*, *supra* note 114, at 5–6 (statement of Sen. Jeff Sessions, Ranking Member, S. Comm. on the Judiciary) ("empathy . . . is another step down the road to a liberal activist, results-oriented, and relativistic world where laws lose their fixed meaning [and] unelected judges set policy"); 155 CONG. REC. S8736 (Aug. 4, 2009) (statement of Sen. Sessions) (concerns about her "deep commitment to the ideal of objectivity and impartiality").

121. 155 CONG. REC. S8736 (Aug. 4, 2009) (statement of Sen. Sessions); *see also id.* (statement of Sen. Brownback) ("[U]sing empathy . . . [and] his or her own race and gender to decide the outcome of cases . . . cannot be confirmed by this body").

122. *See Hearings*, *supra* note 114, at 1006 (statement of Sen. John Kyl) ("public statements suggest . . . decision-making based on her biases and prejudices.").

123. As is customary, there were numerous analyses of Sotomayor's performance on the Second Circuit.

124. *Ricci v. Destefano*, 530 F.3d 87 (2d Cir. 2008) (per curiam).

unsettle the doctrinal order. In the case of Brandeis, it was the prediction that his business decisions and labor decisions would disfavor powerful interests and that his decisions would be influenced by potential societal consequences of powerless people.[125] Two days after Johnson nominated Marshall, Senator Strom Thurmond warned that Marshall would vote to expand the right of African Americans to protest racial discrimination[126] and that the addition of Marshall "would make the country decidedly more liberal"[127] as a judicial activist.[128] And as to Sotomayor, of course, the prediction was that she would evaluate claims of racial equality and governmental abuse of power from the perspective of the powerless in society—with empathy[129] and knowledge of the effects of those decisions—a perspective with which she was very familiar despite her improbable professional achievements.

And it is the focus on the value of our varied experiences as Americans that shapes my own thinking about the importance of diversity on the bench, as well as my appreciation of the openings

125. JEFFREY ROSEN, LOUIS D. BRANDIES: AMERICAN PROPHET 91 (2016); Trevor Parry-Giles, *For the Soul of the Supreme Court: Progressivism, Ethics, and "Social Justice: in the 1916 "Trial" of Louis D. Brandeis*, 2 RHETORIC & PUB. AFFAIRS 83, 84 (1999).

126. Greene, *supra* note 60, at 29.

127. 113 S. CONG. REC. 16,381 (2015).

128 Greene, *supra* note 60, at 43 ("Ervin labeled Marshall a judicial activist for several reasons: Marshall's background as an activist litigator, his allegedly expansive view of the Due Process Clause and embrace of right-to-counsel criminal procedure guarantees as a Second Circuit judge, and his endorsement of Supreme Court decisions that approved broad Congressional power to enforce the fourteenth and fifteenth amendments.").

129. For an early discussion of empathy in judging, see Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1574 (1987) (quoting Justice Thurgood Marshall in *United States v. Kras*, 409 U.S. 434, 460 (1973)) ("It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live."). A literature on the definitions and propriety of empathy in judging has thrived before and after Justice Sotomayor's confirmation. *See* Kathyrn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 OHIO N. U. L. REV. 263 (2010); Susan Bandes, *Empathy and Article III: Judge Weinstein, Cases and Controversies*, 64 DEPAUL L. REV. 317, 320 (2015) (quoting Judge Jack B. Weinstein, *The Roles of a Federal District Court Judge*, 76 BROOK. L. REV. 439, 440 (2011)) ("'Sympathy for the poor or well-to-do must not affect substantive results. But empathy is not forbidden: it allows the court to better understand the positions of the parties.' Understanding what is at stake for the parties does not, without more, lead to sympathy for the parties, or to actions on behalf of one party or another. Conversely, sympathy and compassion can exist without empathy—these feelings may rest on misconceptions about the object's thoughts and desires."); Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012) (sustained defense of role of empathy in judging); Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1 (2009).

represented by the elevation of Brandeis, Marshall, and Sotomayor to the highest court of our land.

The work of Scott Page on the importance of diverse workgroups, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies*,[130] is consistent with Holmesian admonition about experience and judging.[131] Our most powerful positions and teams, whether led by head football coaches, university presidents, Fortune 100 CEOs, governors, or presidents remain virtually off limits to women and minorities. As a society, we remain comfortable with the assumption that this exclusion is consistent with the meritocratic ideal.[132] In contrast, Page's work emphasizes the difference that diverse teams make in quality of decision-making. In *The Difference*, Page demonstrates that diverse teams possess the cognitive diversity that allows them to outperform homogeneous teams.[133]

Page examines the sources of cognitive diversity.[134] Those sources are not only in the infinite variety that makes up each representative of human species,[135] but also the differences in our experiences that we accumulate.[136] Our different training experiences influence our approaches to interpretation.[137] Moreover, in addition to these objective differences, our societally constructed identities on which so much of our experience depends—as race, physical ability, gender, sexual orientation, religion, class, and culture—shape our identities, our subjectivities.[138] As a result of our experience with these socially constructed identities, we tell different and diverse stories about others, and ourselves, and about the world as we interpret our and human experience.[139]

Our inherently "plastic" brains, Page argues, are differently shaped by our experiences, and those diverse experiences create diverse cognitive tools that shape our interpretation approaches.[140] Our

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130. SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES xx, xxiii–xxiv (2007) [hereinafter THE DIFFERENCE] ("diversity trumps ability") ("different . . . can improve performance") ("differences . . . provide seeds of innovation, progress and understanding").

131. HOLMES, JR., *supra* note 106, at 1.

132. LANI GUINIER, THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA xii (2015) (traditional merit reproduces privilege).

133. PAGE, *supra* note 130, at 320–27.

134. *Id.* at 300–12.

135. *Id.* at 300.

136. *Id.* at 303–05.

137. *Id.* at 302–03.

138. *Id.* at 305–08.

139. *Id.* at 305–09.

140. *Id.* at 301.

experiences affect our thinking and our strategies. More pointedly, if I may, we still react to men and women differently; we treat them differently. As a result, men and women have different experiences, and they learn to think about identical factual situations differently.[141] So it is as well with African Americans, with Latinos, with gays and lesbians, and differently-abled people.[142] We understand the world differently not because we possess a characteristic, but because the characteristics society deems most significant drive our experiences, map our permitted territory, and determine our worldview. No experience is devalued by these truths.

These differences in understanding are central to what we do as lawyers, and even more importantly to our role as arbiters—as judges. As the Honorable Edward M. Chen said in 2003, "judges draw upon the breadth and depth of their own life experience, upon the knowledge and understanding of people, and of human nature. And inevitably, one's ethnic and racial background contributes to those life experiences."[143]

Race, ethnicity, and religion matter, among other demographic and experiential markers, not because of physical characteristics, or even notions of historical entitlement due to past discrimination, or the unforgiving, limited, and often patronizing attributes (such as result orientation) the privileged often ascribe to judicial insurgents. Rather, in a society in which we may live within a few miles of each other, yet have radically different realities and life prospects,[144] identity often means a different "well" of experience upon which we draw to interpret the language of law and its consequences for people. "It is a constitution we are expounding"[145] for an increasingly diverse America. Judicial diversity will ensure that we share that task in our tricentennial century.

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141. *Id.* at 307.

142. *Id.* at 306.

143. Edward M. Chan, *The Judiciary, Diversity, and Justice for All*, Speech at the California Law Review Annual Banquet (April 2002), *in* 10 ASIAN AM. L.J. 127 (2003); *see also* Luis Fuentes-Rohwer & Kevin R. Johnson, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5 (2004).

144. *Life Expectancy in Baltimore? May Depend on Where You Live, I-Team: Study Finds Dramatic Differences Between City Neighborhoods*, WBALTV (Mar. 1, 2012), http://www.wbaltv.com/Life-Expectancy-In-Baltimore-May-Depend-On-Where-You-Live/11031518 [https://perma.cc/VZ3F-LAQQ].

145. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (the Constitution must be interpreted in light of "its important objects").

CONCLUSION

We celebrate the breakout moments in judicial diversity for several reasons. The appointment of Brandeis and Marshall both lead to greater visibility for the outsider and marginalized in American Society. According to Robert A. Burt, Brandeis contributed by his "extensive recitation of the factual background of the dispute at issue intended to enlarge his colleagues' range of vision to include facts and perspectives outside their ordinary experience."[146] Burt has also stated:

> Brandeis tried, though without explicit acknowledgment, to carve a different social space for himself that confounded the distinction between insider and outsider. He did not thereby attempt to become an insider. Nor did he accept the continued existence of the social status of outsider, as a thoroughgoing pariah would do. Brandeis implicitly sought instead to dissolve the distinction. When Brandeis saw an outsider as such, he would strive to interpret this outsider's needs and concerns to the insiders of the day, to dissolve social boundaries by inspiring sympathy and fellow feeling on both sides. His role was not to speak as a pariah, though he often was heard as such; it was to stand at the boundary of insider status and work toward its dissolution.[147]

Brandeis also "penned . . . the definite judicial pronouncement on the necessity for free speech in a democracy"[148] foundation for the Court's ultimate decision to unequivocally protect unpopular speech.[149]

Likewise, Marshall also cast a bright light on circumstances that other justices thought irrelevant: whether the money the poor might save to file for bankruptcy,[150] or the freedom of an impoverished minority woman to reject the government's offer of childbirth in light of its refusal to pay for an abortion,[151] or the effect of ill-funded schools

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146. ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 90 (1988).

147. *Id.* at 87.

148. Philippa Strum, *Louis D. Brandeis 100: Then and Now Symposium, Panelist*, *in* SPEECH AND DEMOCRACY: THE LEGACY OF JUSTICE BRANDEIS TODAY 4–7 (2015).

149. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (punishment of mere advocacy unconstitutional).

150. *United States v. Kras*, 409 U.S. 434, 451–52 (1973) (Marshall, J., dissenting) (court should waive the filing fee for a bankrupt indigent person with a family of five living on $336 per month).

151. *Harris v. McRae*, 448 U.S. 297, 337 (1980) (Marshall, J., dissenting) (coercive impact on indigent women's reproductive decisions by funding childbirth but not abortion).

on the opportunity of poor Mexican-American children in Texas.[152] Through his illumination of the facts surrounding the existence of outsiders, Marshall, too, argued that a more sweeping examination of the realpolitik of outsider existence was necessary to determine whether the government denied equal protection or fundamental rights. As I wrote in 1989:

> Marshall's confirmation placed on the Court a member whose theoretical understanding of equality had been altered and enriched by exposure to the myriad manifestations of racial subordination. Marshall's confirmation created the possibility that Marshall, indelibly influenced by experiences unique among his fellow justices, might forcefully urge the Court to invest the Equal Protection Clause with content worthy of its aspiration, and with tools equal to its corrective task. After all, the last Supreme Court justice from Marshall's home state of Maryland, Roger Taney, had authored the infamous Dred Scott majority opinion that summed up all that Marshall had worked to correct. Marshall's appointment to the Court broke remaining barriers to inclusion and pluralism in America's highest judicial institution.[153]

The Senate's confirmation of both men also symbolized the possibility that both their groups might hold the highest position of public responsibility in the United States. I imagined that someone might become President Obama one day when I wrote of the significance of Justice Marshall.

Marshall's confirmation led the country to consider the quixotic possibility that exclusion of African Americans from the United States Supreme Court might be unacceptable, indeed, perhaps unthinkable. The confirmation of Marshall signaled a weak spot in "the last remaining color barrier in high public service, save for the Presidency, itself."[154]

So too was Brandeis's confirmation significant as a marker of trust and inclusion for Jewish citizens. Melvin I. Urofsky wrote:

> The Victory cheered the progressives as little else had done for several years, and reform journals and the Jewish press carried one article after another praising "Mr. Justice

152. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 70–71 (1973) (Marshall, J., dissenting) (unequal funding of education imposes unconstitutional burdens on indigent and minority children).

153. Greene, *supra* note 60, at 50.

154. *Id.*

> Brandies." Jacob Shiff predicted that he would become "an adornment" to the bench, and called the confirmation "an honor to our people."[155]

Ironically, at the outset of the Sotomayor hearings, Senator Patrick Leahy referred to the opposition both Brandeis and Marshall faced during their respective confirmation processes:

> Those who break barriers often face the added burden of overcoming prejudice. That has been true on the Supreme Court. Thurgood Marshall graduated first in his law school class, was the lead counsel for the NAACP Legal Defense Fund, sat on the United States Court of Appeals for the Second Circuit, and served as the Nation's top lawyer, the Solicitor General of the United States.
>
> He won a remarkable 29 out of 32 cases before the Supreme Court. But despite all of these qualifications and achievements, when he was before the Senate for his confirmation, he was asked questions designed to embarrass him, questions such as "Are you prejudiced against the white people of the South?" I hope that is a time of our past.
>
> The confirmation of Justice Louis Brandeis, the first Jewish American to be nominated to the high Court, was a struggle rife with anti-Semitism and charges that he was a "radical." The commentary at the time included questions about "the Jewish mind" and how "its operations are complicated by altruism."[156]

How fitting that Senator Leahy would refer to the breakthrough legacies of Brandeis and Marshall during the Sotomayor hearings. Senator Leahy used their examples to show that the opponents of diversity on the Supreme Court have targeted the most accomplished minorities in their quest to maintain a two-class society and a homogenous judiciary. Although I disagree with one who obsequiously called Louis D. Brandeis' bust the "visible manifestation of the greatest legal mind of the past one hundred years,"[157] I would agree with her later statement that he was one of the greatest lawyers of the 20th century;[158] my list would also include Thurgood Marshall and Charles

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155. UROFSKY, A LIFE, *supra* note 3, at 458.

156. *Hearings*, *supra* note 114, at 3.

157. Mary Murphy Schroeder*, The Brandeis Legacy*, 37 SAN DIEGO L. REV. 711, 712 (2000) ("visible manifestation of the greatest legal mind of the past one hundred years").

158. *Id.* at 711.

Hamilton Houston,[159] among others. One author has forcefully argued that the failure of Brandeis to distinguish himself as a lawyer or jurist in the area of racial equality tarnish his legacy, [160] even as his method and approach to litigation set a powerful paradigm that Houston and Marshall would emulate. Justice Marshall distinguished himself as both a writer of majority opinions in areas of his expertise, such as Civil Procedure,[161] as well as a powerful dissenting voice on behalf of African Americans, the poor, the mentally ill, minority women, and death-sentenced inmates. Marshall also wrote significant unanimous opinions in areas not usually associated with his legacy, such as Civil Procedure.

Sotomayor's record is yet young, but she has already written dissents that suggest that she will develop, as did Thurgood Marshall, a jurisprudence of judicial protection for minorities, criminal suspects, and those condemned to death. In *Schuette v. Bamn*,[162] she dissented from the Court's decisions upholding a Michigan ban on race conscious affirmative action in higher education as inconsistent with established precedent that forbade white majorities from structuring political processes to disadvantage minorities.[163] She observed, dryly, that "[t]o know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process."[164] In *Glossip v. Gross*,[165] she wrote the principal dissent from a 5–4 decision that placed the burden on inmates condemned to death to identify an alternative method of execution that would cause substantially less severe risk of pain, characterizing the majority decision as one that would subject the condemned men to "what may well be the chemical equivalent of being burned at the stake."[166] And in *Mullenix v. Luna*,[167] she dissented from the Court's decision to reject civil liability for deadly force when an officer had a less lethal option available, characterizing the Court's decision as

159. Charles Hamilton Houston was the architect of the successful litigation campaign to overturn *Plessy v. Ferguson*. *See generally* RICHARD KLUGER, SIMPLE JUSTICE 115–16 (1975); GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 64 (1983).

160. Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859 (2001) (noting Brandeis' conspicuous, though historically overlooked, evasion of issues affecting African Americans).

161. *See, e.g.*, *Stewart v. Ricoh*, 487 U.S. 22 (1988); *Burlington N.R.R. v. Woods*, 480 U.S. 1 (1987); *Walker v. Armco Steel*, 446 U.S. 740 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

162. 134 S. Ct. 1623 (2014).

163. *Id.* at 1651 (Sotomayor, J., dissenting).

164. *Id.*

165. 135 S. Ct. 2726 (2015).

166. *Id.* at 2781 (Sotomayor, J., dissenting).

167. 136 S. Ct. 305 (2015).

encouragement to a "rogue" officer and the establishment "of the culture . . . to use deadly force for no discernible gain . . . . By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow" she admonished.[168] She has also urged attention to stare decisis[169] and cautioned judicial restraint in cases in which the Court's processes had not permitted the full exploration of the consequences of a sweeping holding.[170]

The lives of these three Justices demonstrate the potential of outsiders to shore up and strengthen our constitutional fabric. Despite their differences and disparate emphases, Marshall and Sotomayor join Langston Hughes—Thurgood Marshall's classmate—in the sentiment Brandeis' life certainly embraced, "Oh, yes, I say it plain, America never was America to me, And yet I swear this oath—America will be!"[171]

168. *Id.* at 313, 316 (Sotomayor, J., dissenting).

169. *Schuette*, 134 S. Ct. at 1654.

170. *Daimler, AG v. Bauman*, 134 S. Ct. 746, 767–73 (2013) (Sotomayor, J., concurring in the judgment).

171. LANGSTON HUGHES, THE COLLECTED POEMS OF LANGSTON HUGHES 191 (Arnold Rampersad & David Roessel eds., 1994).