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Do Female "Firsts" Still Matter?: Why They Do for Women of Color

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DO FEMALE "FIRSTS" STILL MATTER? WHY THEY DO FOR FEMALE JUDGES OF COLOR

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INTRODUCTION

The federal judiciary is a vital part of the United States government and is central to democracy. Like many other segments of our nation's government and society, the demographics of the federal judiciary have not mirrored those of the population in the United States, either historically or

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currently.[1] For centuries, only white men were able to serve as judges on the nation's courts.

Close to the mid-twentieth century, however, the make-up of the federal judiciary slowly began to change. Women, particularly white women, began to receive appointments to the federal bench when President Franklin D. Roosevelt appointed the first female Article III judge, Florence Ellinwood Allen, to the U.S. Sixth Circuit Court of Appeals in 1934 and President Harry S. Truman appointed the second female Article III judge and first female federal district court judge, Burnita Shelton Matthews, to the U.S. District Court for the District of Columbia in 1949.[2] Men of color, too, began to receive appointments to the federal bench, though they began to receive them at a much later date and in slower spurts than white women. The first African American male Article III judge was not appointed to the bench until 1949 when President Truman appointed William H. Hastie to the U.S. Third Circuit Court of Appeals.[3] However, a glaring absence of women of color in the federal judiciary remained. It was not until 1966 that a woman of color was finally appointed to the federal bench. That woman, Constance Baker Motley, was appointed by President Lyndon B. Johnson to the U.S. District Court for the Southern District of New York.[4]

Today, both the percentages of white women and men of color on the federal bench are very low, with white women representing only 22% of all active federal judges on the U.S. District Court, U.S. Court of Appeals, and U.S. Supreme Court and men of color—African American, American Indian, Asian American, and Latino—representing only 15% of all those same judges.[5] Women of color—African American, American Indian, Asian American, and Latina—fall even further behind their proportion of the population in the United States, making up just 9% of all active federal judges on the U.S. District Court, U.S. Court of Appeals, and U.S. Supreme Court.[6]

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1. *See infra* Section I.A.

2. *See* Mary L. Clark, *One Man's Token Is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 492, 504 (2004).

3. Derrick Bell, *Law, Litigation, and the Search for the Promised Land*, 76 GEO. L.J. 229, 229 (1987) (reviewing MARK V. TUSHNET, THE NAACP: LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925-1950 (1987)); Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers As Social Engineers*, 47 STAN. L. REV. 161, 168 (1994) (reviewing J. CLAY SMITH, JR., THE MAKING OF THE BLACK LAWYER, 1844-1944 (1993)).

4. Anita F. Hill, *The Embodiment of Equal Justice Under the Law*, 31 NOVA L. REV. 237, 255 (2007) (citing Clark, *supra* note 2, at 515).

5. *History of the Federal Judiciary*, FED. JUD. CENTER http://www.fjc.gov/history/home.nsf/page/research_categories.html (last visited Sept. 17, 2012) (providing a search engine with results indicating 794 total federal judges, 174 white female judges, and 121 male judges of color). There are currently no active federal American Indian judges, male or female. *Id.*

6. *Id.*

This Article argues that diversifying the federal judiciary with more women and men of color, but particularly with more women of color, is essential to moving forward and strengthening this country's democracy. Specifically, this Article responds to arguments by prominent feminists that having female "firsts" on the bench is not as critical as having the "right" women on the bench—"right" meaning those women who are invested in and supportive of what are traditionally viewed as women's issues.[7] In so responding, this Article acknowledges the appeal of such arguments regarding judicial service from the "right" women, but contends that, while achieving "firsts" (and "seconds" and more) on the bench for white women may not be as important as it was in the past, it is still crucial for women of color, who are nearly absent from the federal bench.[8] Much like the "firsts" of white female judges all over the nation held important symbolic meaning for the advancement of white women and helped to change societal perceptions about who is and should be a judge, so, too, will the same "firsts" for women of color. However, for women of color to have a similar impact on society as their white sisters, appointments of women of color to the federal bench must occur in meaningful numbers; they must represent more than mere tokenism, and they should include women of color with a variety of backgrounds and viewpoints.

Part I of this Article reflects upon the progress that has been made on the federal bench with respect to increasing the number of women on the bench as well as the barriers that women have faced and still face on the bench by examining the history of women's entrance into the federal judiciary. Part II of this Article then examines the limits of that progress, revealing not only that more gender diversity is needed on the bench, but also how progress with gender diversity on the bench has not occurred at equal levels for all women, particularly for women of color, during the last forty years. Finally, Part III of this Article argues that increasing women of color's access to and visibility within the federal judiciary will not only facilitate broader, more well-informed decision making by courts, but also will serve an important symbolic and representative purpose that legitimizes this country's democracy.

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7. Barbara Babcock, Professor, and Nancy Gertner, Judge, Panelists at Association of American Law Schools (AALS) Workshop on Women Rethinking Equality Conference in Washington, D.C. (June 20-22, 2011) (indicating that female "firsts" were no longer crucial and that judicial service by the "right" women on the bench was more important).

8. *See infra* Part III.

I. WOMEN IN THE JUDICIARY: A HISTORY OF CHALLENGES AND PROGRESS

A. The State of Gender in the Federal Judiciary

The federal judiciary is currently one-third female and two-thirds male.[9] This distribution is consistent between the U.S. District Court, U.S. Court of Appeals, and the U.S. Supreme Court.[10] Slightly more than thirty percent—30.83%—of the active federal district court judges are female.[11] Similarly, women make up slightly more than thirty percent—30.54%—of the active judges in the federal courts of appeals.[12] The percentage is slightly higher at the U.S. Supreme Court, at thirty-three percent.[13]

Although women have not yet reached parity with men in terms of their numbers within the federal judiciary, significant progress, especially since President Barack Obama's election, has been made in changing that pattern.[14] However, reaching even this level of gender diversity on the federal bench has been painfully slow. Although the first Article III female judge, Florence Allen, was appointed to the U.S. Sixth Circuit Court of Appeals in 1934, it was not until a decade and a half later in 1949 that a second woman, Burnita Shelton Matthews, joined Allen on the federal bench.[15] In fact, female appointees to the federal bench did not exceed a token level until President Jimmy Carter began making judicial appointments.[16] Prior to President Carter's administration, only eight women had been appointed to an Article III federal judgeship.[17] When President Carter took office in

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9. *Women in the Federal Judiciary: Still a Long Way to Go*, NAT'L WOMEN'S L. CTR. (Jan. 15, 2013), http://www.nwlc.org/resource/women-federal-judiciary-still-long-way-go-1#_edn5 [hereinafter *Women in the Federal Judiciary*].

10. *Id.*

11. *Id.*; *History of the Federal Judiciary*, *supra* note 5.

12. *Women in the Federal Judiciary*, *supra* note 9; *History of the Federal Judiciary*, *supra* note 5.

13. *Women in the Federal Judiciary*, *supra* note 9; *History of the Federal Judiciary*, *supra* note 5; *Members of the Supreme Court of the United States*, SUPREME CT. OF THE UNITED STATES, http://www.supremecourt.gov/about/members.aspx (last visited Feb. 8, 2013) (identifying current female members Ruth Bader Ginsburg, Sonia M. Sotomayor, and Elena Kagan).

14. *Women in the Federal Judiciary*, *supra* note 9.

15. Clark, *supra* note 2, at 492.

16. *Id.* at 493.

17. Lynn Hecht Schafran, *Not from Central Casting: The Amazing Rise of Women in the American Judiciary*, 36 U. TOL. L. REV. 953, 956 (2005); *see also* Clark, *supra* note 2, at 489, 492-93 (identifying the first eight female appointees as Florence Ellinwood Allen in 1934 to the Sixth Circuit by President Roosevelt; Burnita Shelton Matthews in 1949 to the District Court of D.C. by President Truman; Sarah Tilghman Hughes in 1966 to the Northern District Court of Texas by President Kennedy; Constance Baker Motley to the Southern District Court of New York in 1966 by President Johnson; June Lazenby Green in 1968 to the District Court of D.C. by President Johnson; Shirley Mount Hufstedler in 1968 to the

1977, he made the appointment of white women, women of color, and men of color a priority.[18] By the end of his term, President Carter had increased the number of female judges from eight to forty.[19]

Like President Carter's efforts, President Obama's prioritizing diversity amongst judicial nominees has accelerated the progress of having a federal judiciary that more closely resembles the population and litigants it serves in this country. As of early 2013, forty percent of President Obama's judicial nominees have been women,[20] and forty-one percent of confirmed nominees have been women.[21]

B. The Continued Challenges and Difficulties of Being a Female Judge

Although women have made great progress in filling the ranks of the judiciary since the late 1970s, their advancement has not occurred without barriers and challenges. Prior to 1970, women faced significant, explicit barriers to even achieving the credentials that enabled lawyers to obtain Article III judgeships. For example, many women were denied entry to law

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Ninth Circuit by President Johnson; Cornelia Kennedy in 1970 to the District Court of Michigan by President Nixon; and Mary Anne Reimann Richey in 1976 to the District Court of Arizona by President Ford).

18. Schafran, *supra* note 17, at 956.

19. Based on a review of the Federal Judicial Center data, the authors have calculated that President Carter nominated forty-one successful female nominees to the federal bench; however, one of the nominees, Judge Cornelia Kennedy was not new to the bench, but rather was elevated from the U.S. District Court for the Eastern District of Michigan to the U.S. Court of Appeals for the Sixth Circuit. *See History of the Federal Judiciary*, *supra* note 5 (check boxes "Nominating President" and "Gender"; select "Jimmy Carter" and "Female"; press the "Search" button) (resulting in the following list of female judges: Ann Aldrich; Susan Harrell Black; Patricia Jean Ehrhardt Pernick Boyle; Ellen Bree Burns; Carmen Consuelo Cerezo; Barbara Brandriff Crabb; Orinda Dale Evans; Betty Binns Fletcher; Helen Jackson Frye; Susan Christine O'Meara Getzendanner; Ruth Bader Ginsburg; Joyce Hens Green; Norma Holloway Johnson; Shirley Brannock Jones; Amalya Lyle Kearse; Judith Nelsen Keep; Cornelia Groefsema Kennedy; Carolyn Dineen King; Phyllis A. Kravitch; Mary Johnson Lowe; Consuelo Bland Marshall; Gabrielle Anne Kirk McDonald; Diana E. Murphy; Dorothy Wright Nelson; Helen Wilson Nies; Marilyn Hall Patel; Mariana R. Pfaelzer; Sylvia H. Rambo; Mary Lou Robinson; Barbara Jacobs Rothstein; Elsijane Trimble Roy; Mary Murphy Schroeder; Stephanie Kulp Seymour; Norma Levy Shapiro; Dolores Korman Sloviter; Anna Katherine Johnston Diggs Taylor; Anne Elise Thompson; Patricia McGowan Wald; Zita Leeson Weinshienk; Veronica DiCarlo Wicker; and Rya Weickert Zobel); *see also* Mary L. Clark, *Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other "Human Rights" Record*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1131, 1132-33 (2003) (stating that President Carter appointed forty women to the bench).

20. *Women in the Federal Judiciary*, *supra* note 9 (stating that eighty-seven out of President Obama's two hundred and seventeen judicial nominees have been women).

21. *Id.*

school on the basis of their gender alone,[22] and those who were finally admitted to law school faced discrimination, not just during law school, but also after graduation when law firms across the country refused to hire them.[23] Many of these women opened up their own practices, entered into private practice with another woman, or joined a family member's practice.[24]

Even for women who were able to overcome these obstacles to obtain the kinds of credentials that could land appointments to the federal bench, their mere nomination for an Article III judgeship did not come without a battle. First, male, home-state senators usually gave any open judicial seat to another man as a political reward.[25] Furthermore, it was politically difficult to appoint a female judge to judgeships that had previously been held by men (as opposed to the few token women seats) because those judgeships were generally viewed as being reserved for men.[26] Second, women

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22. *See* Ruth Bader Ginsburg, United States Supreme Court Justice, Women's Progress at the Bar and on the Bench: Pathmarks in Alabama and Elsewhere in the Nation, 2004 Albritton Lecture (Feb. 22, 2004), *in* 56 ALA. L. REV. 1, 2 (2004).

23. Clark, *supra* note 2, at 495 (describing the discrimination that Florence Allen faced when attempting to gain employment with Cleveland law firms, which led her to establish her own firm); *id.* at 511 (describing the discrimination that Sarah Hughes encountered trying to gain employment in private practice in Dallas); *id.* at 522-23 (describing the discrimination that Shirley Hufstedler encountered in the Los Angeles job market); Deanell Reece Tacha, *Women and Law: Challenging What Is Natural and Proper*, 31 NOVA L. REV. 259, 273 (2007) ("I, like all women lawyers of my generation, have similar stories, such as the time a partner at a law school interview said to me: 'Deanell, you have a very good record, but don't you know that you have to be better than the men to get hired?' After law school, I ran into similar barriers."); Ruth Bader Ginsburg, *Remarks On Women's Progress In The Legal Profession In The United States*, 33 TULSA L.J. 13, 14 (1997) ("My . . . colleague and counselor, first woman appointed to the U.S. Supreme Court, Justice Sandra Day O'Connor, confirms a report familiar to students who attended law schools in the 1950s, even in the 1960s. Justice O'Connor graduated from Stanford Law School in 1952 in the top of her class. Our Chief Justice, William Rehnquist, was in the same class, and he also ranked at the top. Young Rehnquist got a Supreme Court clerkship—then, as now, a much sought-after job for young lawyers. No opportunity of that kind was open to Sandra Day. Indeed, no private firm would hire her to do a lawyer's work. 'I interviewed with law firms in Los Angeles and San Francisco,' Justice O'Connor recalls, 'but none had ever hired a woman before as a lawyer, and they were not prepared to do so.' (Many firms were not prepared to break that bad habit until years after the U.S. civil rights legislation of the mid-1960s made it illegal.)").

24. *See, e.g.*, Clark, *supra* note 2, at 506 (stating that Judge Burnita Shelton Matthews opened a law firm with two other female attorneys); *id.* at 527 (stating that Kennedy joined her father's firm).

25. *Id.* at 489-90.

26. *Id.* Similarly, Judge Motley opined that sexism prevented her elevation to the Second Circuit. *See* Anna Blackburne-Rigsby, *Black Women Judges: The Historical Journey of Black Women to the Nation's Highest Courts*, 53 HOW. L.J. 645, 671-72 (2010). Motley recounted sexism and racism as barriers that she had to overcome to gain her seat on the district court; however, she cited Justice Thurgood Marshall's prior seat on the Second Cir-

usually had to pass higher standards in order to receive a nomination to the federal bench,[27] and even then, they often received lower ratings from the ABA on their qualifications.[28]

In addition to the barriers imposed on women prior to becoming judges, female judges also encountered gender-specific challenges once they were on the bench, such as cold receptions from colleagues. For example, when Judge Allen joined the U.S. Sixth Circuit Court of Appeals, she was not congratulated by her male colleagues—quite the contrary, they ignored her.[29] Additionally, Judge Allen's colleagues excluded her from group lunches by going to male-only clubs.[30] Similarly, Judge Burnita Shelton Matthews, the first female judge to serve on a federal district court, was "assign[ed] . . . all the 'long motions,' the most technical and least rewarding part of the court's docket," by her colleagues.[31]

Early women on the bench also faced disrespect from attorneys and litigants,[32] lower judicial performance evaluations,[33] requests for recusal on the basis of gender,[34] and much more.[35] For instance, when Judge Constance

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cuit as evidence that "largely" sexism, not racism, prevented her from gaining a seat on the Second Circuit. *Id.*

27. Clark, *supra* note 2, at 540 ("Most importantly, the first eight women judges, taken as an aggregate, had significantly more public and judicial service prior to federal judicial appointment than did their male counterparts. . . . [T]his phenomenon is likely explained by a greater concern for demonstrated temperament, ability and, ultimately, credibility on the part of women by the federal court-appointing powers. Put simply, women candidates were held to a higher standard.").

28. *Id.* at 491-92, 512 (noting the ABA rating of Sarah Tilghman Hughes as unqualified for the federal judiciary because of her age).

29. *Id.* at 499 (quoting Judge Phyllis A. Kravitch, *The Burnita Shelton Matthews Memorial Lecture in Law: Women in the Legal Profession: The Past 100 Years*, 69 MISS. L.J. 57, 63 (1999)).

30. *Id.* at 499.

31. Linda Greenhouse, *Burnita S. Matthews Dies at 93; First Woman on U.S. Trial Courts*, N.Y. TIMES, Apr. 28, 1988, at D27; *see also* Clark, *supra* note 2, at 504, 510 (quoting *id.*).

32. Schafran, *supra* note 17, at 958-59.

33. *Id.* at 960-61 ("Not only did male attorneys rank female judges lower than men on every attribute measured, there were five attributes on which women lawyers ranked female judges significantly lower: compassion, courtesy, satisfactory performance as a motions judge, satisfactory performances as a settlement judge, and overall rating. This list is revealing because it shows that the expectations for women judges by both men and women are that they will be warm and nurturing. A male judge who strictly controls his courtroom runs a tight ship. His female counterpart is a bitch.").

34. Blackburne-Rigsby, *supra* note 26, at 671 (providing Judge Motley's staunch opposition to a request for her to recuse herself from a gender discrimination lawsuit on the ground that she, a black woman, had faced discrimination); *see also* REGINA GRAYCAR & JENNY MORGAN, THE HIDDEN GENDER OF LAW 60 & n.28 (2d ed. 2002) (quoting Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4 (S.D.N.Y. 1975) (opinion of Motley, J.) (providing Judge Motley's argument that all judges have a race and gender, and, if their race and/or

Baker Motley, the first African-American woman on the federal bench, was introduced at a session of new judges' school, the introducer chose to provide a very limited introduction that focused on her work for her church and on the board of the YMCA.[36] That introduction of Judge Motley glaringly omitted her great accomplishments as a state senator and a civil rights litigator who argued on many occasions before the United States Supreme Court.[37]

All of these examples of the difficulties that women have faced both on the way to and on the bench are merely illustrative and certainly not exhaustive, but they do make clear that the road to and on the federal judiciary has not been easy for women, regardless of their race. They also make clear that more work is needed in terms of improving gender diversity on the bench, even as there have been a meaningful number of "firsts" for white women on the federal bench.

II. A BLEAKER LANDSCAPE FOR WOMEN OF COLOR JUDGES

While progress for women on the bench, overall, has been slow, for some groups of women, it has been even slower. Women of color are just beginning to make real inroads into the federal judiciary. Indeed, women of color's access to Article III judgeships has been slow-coming and in small numbers. As noted previously, the first woman of color to serve in an Article III judgeship, Constance Baker Motley, was not appointed until 1966.[38] Furthermore, it was not until President Carter's administration and his deliberate diversity push—which included appointing forty female judges and thirty-seven African-American judges (seven of whom were African-American women)—that an African-American woman was appointed to an appellate judgeship.[39] That woman, Amalya Kearse, was appointed to the U.S. Second Circuit Court of Appeals in 1979.[40] Even so, it took more than forty years from Judge Motley's appointment to the U.S. District Court for

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gender were a valid basis for recusal, then no judge would be able to hear such cases)); Schafran, *supra* note 17, at 959.

35. Clark, *supra* note 2, at 503 ("As for [U.S. Sixth Circuit Court of Appeals Judge Florence] Allen's Supreme Court prospects under Truman, he went so far as to have an administration aide consult Chief Justice Fred Vinson on the possibility of her appointment to the Supreme Court and was told that it would undermine the collegiality of the Court, with justices no longer able to discuss cases with their feet up and robes off."); *id.* at 506 (citing the D.C. Bar Association's denial of admission to Burnita Shelton Matthews and stating that when women were admitted to bar associations, they were denied leadership positions which "impeded women in the federal judiciary since the time of their first appointments").

36. Blackburne-Rigsby, *supra* note 26, at 671.

37. *Id.*

38. Hill, *supra* note 4, at 255.

39. Blackburne-Rigsby, *supra* note 26, at 660, 674.

40. *Id.* at 674.

the Southern District of New York and over thirty years from Judge Kearse's appointment to the U.S. Second Circuit Court of Appeals for a woman of color to be appointed to the U.S. Supreme Court.[41] In 2009, Justice Sonia Sotomayor, a Latina, was appointed to the U.S. Supreme Court by President Barack Obama.[42]

Overall, among the nation's 794 active federal judges, there are now sixty-five women of color serving as active federal judges, including thirty-three African-American women (twenty-six on the District Court and seven on the Court of Appeals), twenty-five Hispanic women (twenty-two on the District Court and three on the Court of Appeals), eight Asian-American women (seven on the District Court and one on the Court of Appeals), and one woman of Hispanic and Asian descent (on the District Court).[43] No American Indian woman currently serves as a federal judge at any level—trial, appellate, or supreme.[44] In the end, only 8.62% of active federal Article III judges are women of color.[45]

In addition to having low numerical representation within the federal judiciary, women of color, much like their white female peers, have faced and continue to face the barriers and challenges that were laid out in Part II. This gender barrier, however, is racialized, which, as Kimberle Crenshaw's theory of intersectionality explains, means that women of color judges encounter gender-related challenges that are distinct from those faced by white female judges.[46] Lynn Hecht Schafran has explained this issue by using the

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41. *See supra* text accompanying notes 38-40.

42. *Biographies of Current Justices of the Supreme Court*, SUPREME CT. OF THE UNITED STATES, http://www.supremecourt.gov/about/biographies.aspx (last visited Feb. 8, 2013).

43. *See History of the Federal Judiciary*, *supra* note 5; *Women in the Federal Judiciary*, *supra* note 9.

44. *Women in the Federal Judiciary*, *supra* note 9.

45. It is unclear whether progress is greater or lesser at the state level because there is not good data on the number of women of color in state judgeships. In collecting statistics, researchers often categorize by gender and race, but ignore the full identity of women of color who are at the intersection of both oppressions. *See* Blackburne-Rigsby, *supra* note 26, at 690. Although there is not great data on women of color in state judgeships as a whole, there is some data on black women judges. *See id.* at 677-78 (stating that black women make up two percent of the state judiciary).

46. *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-44 (1991) (explaining that women of color are at the intersection of race and gender oppression); *see also* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1775 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002) (asserting that intersectionality is "a concept that conveys at least the following two ideas: (1) that our identities are intersectional—that is, raced, gendered, sexually oriented, etc.—and (2) that our vulnerability to discrimination is a function of our specific intersectional identities")). Intersectionality recognizes that power, privilege, disadvantage, and discrimination are influenced by interlocking spectrums of identity. *Id.* at 1775. For example, as Professor Crenshaw highlighted in her article, be-

sociological concept of a "status set." Schafran explicates that a "status set" is used:

> to describe the expectation that an individual who holds one status in the world will also hold certain others. The status set for judges is still white and male. Thus, white women judges are one step removed from the "norm." Women of color judges are two steps removed. This lack of fit with peoples' expectations has many implications for how women judges, particularly women of color, are perceived and treated by a wide array of people.[47]

In general, as Schafran provides, it is more difficult for women than men to gain respect from court employees and litigants, and that problem is exacerbated for women of color.[48] For example, women of color likely face more hostile reception from attorneys and litigants in judicial evaluation surveys.[49] Women of color also encounter race- and gender-based requests for recusal in the courtroom.[50] For example, in one case, the defendant in an employment discrimination lawsuit sought to disqualify Judge Motley from sitting on his case based on the rationale that she, as a black woman, had been discriminated against and would identify with those who have suffered race or sex discrimination.[51] Judge Motley declined to recuse herself, explaining:

> "[I]f background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds."[52]

In other words, although all judges, including white male judges, have a race or a sex that can affect their outlook, judges of color, and especially female judges of color, are primarily the ones who have their ability to be neutral arbiters challenged. These actions reveal how both whiteness and maleness have been defined as the norm in society.

Similarly, while all women are often ranked lower than equally performing men for not conforming to feminine gender stereotypes, such as failing to act lady-like,[53] women of color may be particularly vulnerable to such mistreatment as a result of stereotypes, such as the fiery Latina, the

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cause the identities of black men and black women differ along the intersection of race, class, and sex, black men and black women may have distinct vulnerabilities to violence and discrimination and may actually experience discrimination differently from one another. Crenshaw, *supra*, at 1242-43.

47. Schafran, *supra* note 17, at 957.

48. *See id.* at 958-59.

49. *Id.* at 960.

50. *See id.* at 959.

51. *See* Blackburne-Rigsby, *supra* note 26 at 671.

52. GRAYCAR & MORGAN, *supra* note 34 (quoting Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4 (S.D.N.Y. 1975) (opinion of Motley, J.)).

53. *See* Schafran, *supra* note 17, at 960.

angry black woman, or submissive Asian flower.[54] For example, black women and Latinas may often be assumed to be harsh, rude, and overbearing—all traits that are in line with the stereotype of the Sapphire.[55] Even if a black woman or Latina deliberately "works her identity"[56] to counter and disprove this stereotype, she still may not benefit from her behavior. Rather, attorneys who are responding to the evaluation may be more predisposed to remember the Latina or black woman judge as the Sapphire and may unfairly rate her negatively, regardless of her objective demeanor. For example, consider this lengthy analysis by Professor Darren Hutchinson comparing lawyers' different reactions to Justice Sotomayor, a Latina, and Justice Scalia, a white man, which highlights how, unlike Justice Scalia, Justice Sotomayor has been subjected to the fiery Latina stereotype.[57] In order to highlight how the two Justices are generally viewed differently for similar be-

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54. Asian American women have to contend with stereotypes that are different than those with which black women and Latinas must contend. *See* Pat K. Chew & Luke T. Kelley-Chew, *The Missing Minority Judges*, 14 J. GENDER RACE & JUST. 179, 188-91 (2010) (describing stereotypes of Asian Americans); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 184 (1997).

55. *See* Regina Austin, *Sapphire Bound!*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 426, 426 (Kimberlé Crenshaw et al. eds., 1995); Pamela J. Smith, *Failing to Mentor Sapphire: The Actionability of Blocking Black Women from Initiating Mentoring Relationships*, *in* CRITICAL RACE FEMINISM 120, 120 (Adrien Katherine Wing ed., 2d. ed. 2003) (defining "modern-day Sapphires" as "angry, threatening, intimidating, unintelligent, Black and female").

56. The scholarship that we rely on here contends that every person has a "performance identity"—that every person exercises choices that he or she makes about how to present his or her status marker of difference (status identity) to the world. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 892 (2002) (discussing the decision in *Rogers* and noting that the court used a limited definition of race, largely based on immutable traits expressive of phenotype); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262-63 (2000) (describing the extra "identity work" that minorities must engage in to succeed at work). Other scholars have added to or critiqued this notion that marginalized group members may choose to emphasize or de-emphasize behaviors that are stereotypically understood as belonging to a particular identity group. *See* Marc A. Fajer, *A Better Analogy: "Jews," "Homosexuals," and the Inclusion of Sexual Orientation As a Forbidden Characteristic in Antidiscrimination Laws*, 12 STAN. L. & POL'Y REV. 37, 45-47 (2001) (discussing within the workplace how gays and Jews may engage in "self-censorship" with regard to the traits most commonly associated with their identities); *see also* Angela Onwuachi-Willig, *Undercover Other*, 94 CALIF. L. REV. 873, 885-94 (2006) (discussing the same about Blacks who are engaged in interracial relationships); *cf.* Gowri Ramachandran, *Intersectionality as "Catch 22": Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 301 (2005) (criticizing identity performance demands as giving rise to "slippery slope fears about what will happen to all conformist demands and anti-essentialist fears about what legal condemnation of identity performance demands might symbolize").

57. *See* Darren Hutchinson, *Scalia v. Sotomayor: The Use of Gender-Coded Language to Evaluate a Judge's "Temperament,"* DISSENTING JUSTICE (May 8, 2009, 8:27 AM), http://dissentingjustice.blogspot.com/2009/05/scalia-v-sotomayor-use-of-gender-coded.html.

havior on the bench, Professor Hutchinson contrasted individual comments that several lawyers had made over the careers of the two Justices, both of whom are known for asking many questions from the bench.[58] Hutchinson asserted:

> Rather than being firm, but flexible, detached but engaged, [Sotomayor's] detractors describe her as a fiery Latina tempest waiting to knife and brutalize lawyers in the courtroom. A survey of lawyer comments from the AFJ [Almanac of the Federal Judiciary] report on Sotomayor confirms this view of Sotomayor among some lawyers:
>
> > "Sotomayor can be tough on lawyers, according to those interviewed. 'She is a terror on the bench.' 'She is very outspoken.' 'She can be difficult.' 'She is temperamental and excitable. She seems angry.' 'She is overly aggressive—not very judicial. She does not have a very good temperament.' 'She abuses lawyers.' 'She really lacks judicial temperament. She behaves in an out of control manner. She makes inappropriate outbursts.' 'She is nasty to lawyers. She doesn't understand their role in the system—as adversaries who have to argue one side or the other. She will attack lawyers for making an argument she does not like' . . . .
> >
> > 'She dominates oral argument. She will cut you off and cross examine you.' 'She is active in oral argument. There are times when she asks questions to hear herself talk.' 'She can be a bit of a bully. She is an active questioner.' 'She asks questions to see you squirm. She is very active in oral argument. She takes over in oral argument, sometimes at the expense of her colleagues.' 'She can be very aggressive in her questioning.' 'She can get harsh in oral argument.' 'She can become exasperated in oral argument. You can see the impatience.' 'You need to be on top of it with her on your panel.'"
>
> . . . For Sotomayor, being a sharp interrogator and requiring lawyers to be 'on top of it' are negative qualities. These traits are not negative in most men, certainly not white men.
>
> . . . Compare the lawyer responses to [Justice] Sotomayor with the AFJ comments on Justice Scalia—whom many lawyers consider a tough questioner as well. While lawyers negatively describe Sotomayor's toughness, in Scalia, toughness receives praise, if not awe. Scalia's hazing of lawyers is just part of the understood fun among the brotherhood of lawyers. Although reviewers describe Scalia as tough, this does not make him a dangerous "out-of-control" she-judge. Notice the sporting and friendly hazing metaphors in the AFJ description of Scalia:
>
> > "Never utter the words 'legislative history.' If you do, chances are Scalia will interject with a ridiculing harangue that makes it clear he views legislative history as poppycock. Legislative debates are often contrived and can't trump the actual words of the statute, Scalia insists. But even if you play it safe, you can expect tough, persistent questioning from Scalia, often delivered with an almost gleeful lust for the sport of jabbing and jousting with advocates before him. And Scalia is an equal-opportunity jouster; even when his position seems obvious, Scalia will be just as hard on the lawyer he agrees with as the lawyer he'll oppose. Ever the law

58. *Id.*

> professor, Scalia will sometimes ask questions with no clear relevance, just to see if you are on your toes. In a now-legendary exchange during arguments on a federal rule that barred the advertising of the alcohol content of beer, Scalia asked a lawyer for Coors to define the difference between beer and ale. The lawyer, the late Bruce Ennis, answered without missing a beat, to the amazement of justices and spectators alike, and Coors won the case. But Scalia can be nasty, as well. When a lawyer once paused too long before answering his question, Scalia said sharply, 'You have four choices, counselor: "Yes," "No," "I don't know," or "I'm not telling."' But the most important advice on how to sway Scalia at oral argument or in brief-writing is to buy his new book. . . . [One] tip: Don't use the kitchen sink strategy of throwing at the Court every conceivable argument your legal team can think up. Pick your best three, at most, Scalia and Garner advise. 'Arm-wrestle, if necessary, to see whose brainchild gets cut.'"[59]

Hutchinson finished his analysis by noting that:

> In Scalia, toughness is positive; in Sotomayor, it is nonjudicial. If Scalia asks irrelevant questions, he is just being a dutiful "law professor" trying to hold the attention of his class. If Sotomayor does the same thing, she is just interested in hearing herself talk. When Scalia duels harshly with litigants, the "spectators" watch in amazement. If Sotomayor asks tough questions, she is seen as difficult, temperamental, and excitable. The disparate treatment is too dense to deny.[60]

Such realities in the experiences of women of color on the bench are in part the result of stereotypes about women of color, but they are also in part the result of the near complete absence of women of color from the bench. When women of color are absent from the bench, the implicit messages sent are that women of color lack the competence, temperament, and ability to serve as judges and that, when they act as their white male counterparts do, what they are doing is wrong or unnatural.

III. THE NEED FOR MORE WOMEN OF COLOR IN THE FEDERAL JUDICIARY (WITHOUT REGARD TO POLITICAL AFFILIATION)

Now that there is a critical mass of women on the federal bench, a number of advocates for gender diversity have argued that the mere representation of women on the bench alone is not material. "Firsts" are no longer critical, they say; rather, the focus should be on getting women who are concerned about women on the bench.[61] In effect, these advocates downplay the importance of "firsts" for women on the bench, choosing instead to place an emphasis on getting the "right" women on the courts.[62] However,

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59. *Id.* (emphases omitted) (quoting 2 ALMANAC OF THE FEDERAL JUDICIARY 21-22, 24 (2012)).

60. *Id.*

61. *See supra* note 7 and accompanying text.

62. *See supra* note 7 and accompanying text.

this argument, while very appealing politically, neglects the fact that there is no essential female experience. The argument is, in some sense, essentialist, meaning it implies that there is "a unitary, 'essential' . . . experience [for women that] can be isolated and described independently of [gender,] race, class, sexual orientation, and other realities of experience,"[63] and it ignores Professor Crenshaw's point about intersectionality, which is that different groups may experience events and treatments differently based on the differing intersections of identity-categories—here, race and sex.[64] In other words, the feminist argument against a focus on female judicial "firsts" (and "seconds") is problematic for the same reason that the first two waves of the feminist movement were: failure to account for women of color's experiences.[65] The fact is that women of color have not broken many barriers within the federal judiciary nor have they achieved many "firsts" on the federal bench; consequently, their placement on the bench, particularly as "firsts," would still hold strong symbolic meaning, and it also will likely enrich the process of judging, particularly where panels are involved; instill greater confidence in the courts for all the litigants who come before them; and increase general confidence in the system of democracy in the country.

Great importance should be placed on ensuring intersectional, race and gender (with gender including sexuality) representation when selecting judicial nominees—and for reasons apart from and, more controversially, separate from the political ideology that the nominee may be perceived as advancing. While society has not reached a point where gender representation on the bench is no longer material, it particularly has *not* reached this point with regard to women of color.

A. The Symbolic Value in Seeing Female Judges of Color

Many reasons have been proffered for promoting gender and racial diversity on the bench.[66] The strongest argument for increasing the number of

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63. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (defining essentialism by stating what anti-essentialism opposes); *see also* Emily M.S. Houh, *Toward Praxis*, 39 U.C. DAVIS L. REV. 905, 924-28 (2006) (defining both intersectionality and anti-essentialism).

64. Harris, *supra* note 63; *see supra* note 46 and accompanying text.

65. *See* MEGAN SEELY, FIGHT LIKE A GIRL: HOW TO BE A FEARLESS FEMINIST 59-65 (2007) (noting that a major weakness of the feminist movement is the "divide among women[,] . . . a disconnect that keeps us from unifying our efforts and achieving our collective goals" and cautioning that the third wave's biggest contribution to the movement must be bridging the gap among women along the lines of race, sexuality, class, and disability).

66. *See, e.g.*, Pat K. Chew, *Judges' Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions*, 14 J. GENDER RACE & JUST. 359 (2011) (discussing the difference between the symbolic value of women on the bench and the substantive value and arguing that women's presence on the bench results in substantive differences).

women of color in the judiciary is symbolism. For women of color, "first" appointments to the bench are essential, regardless of political affiliation. The symbolic value of having more women of color serve on the federal bench is significant because it can illustrate to society and the legal community that people who are not white males, or even white females, *are* capable of becoming federal judges and administering justice equitably. It removes from the public's mind what is implied when women of color are absent from the bench. It removes the unspoken statement that women of color are not good enough or competent enough to serve on the bench. Justice Ruth Bader Ginsburg made similar comments about the potential impact of having three female justices now sitting on the U.S. Supreme Court when she said, "When the schoolchildren file in and out of the court and they look up and they see three women, then that will seem natural and proper—just how it is."[67] It is important for our society, too, to readily see that service on the bench by women of color is natural and proper.

But, before the sight of female judges, including women of color, comes to be viewed as natural and proper, there is often an adjustment period for society in experiencing such changes. The very image of more female judges, both white and of color, may be a befuddling experience for spectators. Consider, for instance, former U.S. Tenth Circuit Court of Appeals Judge Deanell Reece Tacha's description of the first time that an all-female judge panel presided over a case in her circuit.[68] Retired Judge Tacha, now the Dean of Pepperdine University School of Law, noted that when the first all-female panel in her circuit was convened, it was thought to be a newsworthy event.[69] Implicit in the press's coverage of the panel was the assumption that an all-female judicial panel was unnatural and foreign. Judge Tacha stated, "The reports in the press were comical for their non-newsworthiness. The press reported comments, such as 'they were very well prepared,' and 'they asked good questions.'"[70] As such commentary illustrates, despite claims and perceptions of gender equality in society, the public may strangely be surprised when women perform a job traditionally reserved for men and do so with the same competence expected from men. However, with time, and increased emphasis and follow-through on confirming more women, particularly women of color, to the bench, their presence will not be noted as extraordinary due to their gender or to their race and gender.

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67. Robert Barnes, *Supreme Court Opens Term with Three Women, Potential for Partisan Divide*, WASH. POST. (Oct. 3, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/02/AR2010100203382.html (quoting Justice Ruth Bader Ginsburg).

68. Tacha, *supra* note 23, at 276.

69. *Id.*

70. *Id.*

In the end, having women of color serve on the federal bench will carry great symbolic value, not just for women and girls of color, but also for white women and girls and men and boys of all races. After all, women of color judges serve as role models through their mere presence, and role models are important because they provide hope and demonstrate to individuals, especially those who see themselves in the models, that such aspirations are within reach for "someone like me."[71] Professor Melinda Molina explains that "role models symbolically challenge the sense of 'otherness' that Latinas and all women of color encounter. A Latina lawyer counters this sense of otherness by conveying a positive message of acceptance and belonging."[72] And, although white men have generally not had a shortage of role models with whom they could align themselves, the same is not true for women, and particularly for women of color. Including women of color in the judiciary is a much-needed signifier to our increasingly diverse populace that "'certain features of one's identity do not mark one as less able to govern.'"[73]

In fact, one can readily see some of the dangers involved in not having this image of women of color as judges through some of Judge Motley's experiences on the U.S. District Court for the Southern District of New York. One of those dangers is the commonly held misperception that women of color cannot be neutral arbiters. The very fact that white men are overrepresented in numbers on the bench has led to assumptions of their inherent neutrality such that no one ever questions their biases, even where they share the race and sex of, for example, the alleged discriminators—defendants—in an employment discrimination case. However, for women of color like Judge Motley, it was not uncommon for them to face requests for recusal from a discrimination lawsuit on the ground that they may identify with those who have suffered from race and/or sex discrimination.[74] Race- and gender-based recusals continue to be submitted by attorneys on behalf of litigants (perhaps even with the former's approval or advice) throughout the country.[75] While sometimes the requests for recusal are made

71. Melinda S. Molina, *Role Models: Theory, Practice, and Effectiveness Among Latina Lawyers*, 25 J. C.R. & ECON. DEV. 125, 138 (2010) (discussing the benefit of role models in general and the likely effect that Justice Sotomayor's appointment to the Supreme Court will have on young Latinas to enter the legal profession).

72. *Id.* at 131.

73. Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 598 (2011) (quoting Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes,"* 61 J. POLITICS 628, 651 (1999)).

74. *See supra* text accompanying notes 51-52.

75. *See, e.g.*, Schafran, *supra* note 17, at 959 (discussing gender-based recusal requests); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 114-17 (1997) (discussing race-based recusal requests).

explicitly on the basis of race, judges of color also recount stories of more thinly-veiled requests for recusal.[76] In general, such race-based recusal requests are most often made by a defendant accused of a race-based or gender-based wrong, such as employment discrimination,[77] but requests for recusal have also been made by organizational parties, such as the Ku Klux Klan, with the rationale that all black people (but implicitly not white people) are biased against the KKK.[78] Additionally, one male litigant submitted a request for recusal, asserting that it would be improper for him as a man to have to defer to a woman in the manner that one is required to do with a judge.[79] Not surprisingly, we are aware of no white woman, woman of color, or man of color who has submitted requests for a judge's recusal on the basis of gender, race, or race and/or gender, respectively, when they drew a white man as the judge in their case, including in a discrimination case[80]—another example that exposes how both whiteness and maleness have been normalized as neutral in society.

Overall, race and gender-based requests for recusal reveal not only that some in society believe that white women, women of color, and men of color are not trusted to be neutral arbiters of justice (who can act with the integrity and impartiality that white men are assumed to possess)[81] but also that the same individuals believe that the outlook of white women, women of color, and men of color on a case is predictable in a way that white men's views are not. Thus, the symbolism of fulfilling women of color judge "firsts" is a significant step in countering both implicit and explicit assumptions that women of color cannot or should not handle the revered task of

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76. *See, e.g.*, Ifill, *supra* note 75, at 114-17 (discussing race-based recusal requests on the basis of black judges' former positions as civil rights attorneys, such as Judge Gabrielle McDonald in *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan* or relationships with other black leaders in the community, such as Judge Damon Keith in *Baker v. City of Detroit*).

77. *See, e.g.*, Schafran, *supra* note 17, at 959 (discussing a case from 2003 where a man requested a female judge to recuse herself because the allegations stated that the defendant used vulgar language toward a female nurse and groped her); Ifill, *supra* note 75, at 114-16 (discussing the "landmark 'race-recusal' case," *Commonwealth of Pennsylvania v. Local Union 5442* and Judge A. Leon Higginbotham, Jr.'s poignant response and denial of the request and also discussing Judge Motley's request for recusal); Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 22-23 (2004).

78. Ifill, *supra* note 75, at 117 (citing Judge McDonald's former employment with the NAACP and the EEOC, as well as her identity as a black person—who must be biased against the KKK—as the basis for her recusal).

79. Schafran, *supra* note 17, at 959 (citing a man's request in San Antonio, Texas).

80. Johnson & Fuentes-Rohwer, *supra* note 77, at 23.

81. Ifill, *supra* note 75, at 118 ("By seeking the recusal of African American judges based on the appearance of bias, these litigants suggest that true impartiality can be exercised only by white male judges.").

administering justice in society because they are uniquely biased against white people or men.

B. Meaningful Numbers

But, simply having a few more female judges of color is not enough. Women of color must join the federal judiciary at rates greater than mere token representation. Having a critical mass of women of color on the bench makes it possible for women of color judges to perform their jobs without being saddled with the additional duty of speaking for all women of color. Judge Anna Blackburne-Rigsby of the District of Columbia Court of Appeals expressed this point when she wrote that "[o]ur varied experiences illustrate the necessity of having a 'critical mass' of black women on our nation's state and federal appellate courts so that no single black woman feels 'isolated or like [a] spokesperson[] for [her] race [and gender].'"[82]

In addition to lessening the burden of being a spokesperson for other women of color, having a critical mass of women of color on the bench helps to ensure diversity of experience and exposure to diversity of experience from the bench.[83] In summarizing her article on black women judges, Judge Blackburne-Rigsby wrote: "I have seen that being both black and female brings an important additional voice to the deliberative process, but that voice is varied because there is no singular 'black woman' perspective."[84] In other words, having a critical mass of women of color on the bench helps to highlight the diversity of thought, perspective, and judicial philosophy among women of color. Shining a light on this diversity of thought serves as an effective tool for dulling the effects of unconscious prejudice and quelling stereotypes about whom a judge should be. For this reason, diversity of political ideology and background amongst female judges of color becomes very important in selection, as such diversity among women of color can further facilitate the breaking down of stereotypes about women of color and their viewpoints by challenging the preconceived notion that all women of color think the same way.

One good example for illustrating this point is the contrast between the only two black U.S. Supreme Court Justices: Justice Thurgood Marshall

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82. Blackburne-Rigsby, *supra* note 26, at 689 (quoting Grutter v. Bollinger, 539 U.S. 306, 318-19 (2003)).

83. Assuming that all women, all black people, or all black women, for example, have the same experiences or viewpoints is known as essentialism. *See supra* text accompanying notes 62-64. The argument that there is not one female or black or black female experience is known as anti-essentialism. *See supra* note 62. For a discussion of the problems inherent in racial essentialism and gender essentialism, particularly as it relates to the discussion of black women, see generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, *in* CRITICAL RACE FEMINISM, *supra* note 55, at 34.

84. Blackburne-Rigsby, *supra* note 26, at 689.

and Justice Clarence Thomas. Both Justices grew up black in the United States and experienced racism; however, one was liberal, and the other is conservative.[85] Both of the Justices' viewpoints were shaped and have been shaped by their racialized experience.[86] They simply had and have two different "voices of color."[87] If one were to rely on an essentialist notion of race, one would have predicted that the two Justices would decide all cases the same or, in the alternative, would attempt to rationalize Justice Thomas's approach by de-blackening him, calling him a race-traitor, or in some way denying him the ability to describe his reality.[88]

A similar contrast exists between two black female judges, Judge Motley and Judge Janice Rogers Brown of the U.S. Court of Appeals for the D.C. Circuit.[89] Although Judge Motley was a civil rights litigator for the NAACP prior to becoming a judge, and Judge Brown was not a civil rights litigator and is in fact conservative, they are both black female judges, and whether their writings invoke their racial backgrounds or not, they both have "voices of color."[90] By seeing contrasts such as Justice Marshall and Justice Thomas and Judge Motley and Judge Brown, litigants will think twice before entering a request to recuse if they draw a female judge of color because they will be less likely to think that her status is outcome-determinative—in sum, stereotypes will be challenged. In the end, with stereotypes breaking down, requests for judicial recusal will diminish, and so

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85. Johnson & Fuentes-Rohwer, *supra* note 77, at 12-16.

86. For an in-depth discussion of Justice Thomas's raced jurisprudence, see generally Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005). *See also* Johnson & Fuentes-Rohwer, *supra* note 77, at 12-16 (comparing Justice Thomas and Justice Marshall).

87. Johnson & Fuentes-Rohwer, *supra* note 77, at 11-12.

88. *See generally* Jacquelyn L. Bridgeman, *Defining Ourselves for Ourselves*, 33 SETON HALL L. REV. 1261, 1265-67 (2005) (discussing terms "Sell-out," "Uncle Tom," "Oreo," "Incognegro," "Traitor to the Race" for policing blackness within the black community, especially as it relates to black conservatives such as Justice Thomas).

89. Johnson & Fuentes-Rohwer, *supra* note 77, at 15-16.

90. *See generally* Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423 (2008) (discussing the concept of "voices of color" and the effect of race on the judicial confirmation of conservative Latina/o and African American judicial nominees and arguing that liberal and conservative racial minority judges must be recognized as voices of color); *see also* Johnson & Fuentes-Rohwer, *supra* note 77, at 13-15 & n.44 (describing Judge Brown as "hav[ing] a distinctive voice as an African American woman of humble origins" and citing commonalities with Justice Thomas in his opposition to affirmative action that was highlighted in his opinions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), as well as Judge Brown's opposition to affirmative action that was illustrated when she invalidated a public contractor outreach program on the basis that it violated the principle of colorblindness, which she stated is central to the Equal Protection Clause); Onwuachi-Willig, *supra* note 86, at 990.

will the notion that women of color are less able than white men to set aside their biases as judges.

Finally, meaningful numbers of women of color on the bench will help to counter the opposition that women of color nominees often face because of race and gender bias.[91] Just increasing the number of women of color judges will make it more difficult for racist and sexist arguments, such as women of color's success being the result of special treatment through affirmative action or exceptionalism, to be put forth. For example, it would become harder to explain Justice Sotomayor as an "exception" to her race, a proclamation that implies that most other Latinas are incompetent or unworthy of being federal judges.[92] In conclusion, women of color with diverse backgrounds and political ideology should be appointed to the federal bench in order to combat racial and gender stereotypes, respect difference, and create a more welcoming, conducive work environment for women of color judges.

C. Ensuring Democracy

Additionally, having women of color on the bench is beneficial because it conforms with our democratic principles of inclusion and participation. A democracy is not at its best if all of its citizens are not included. Courts should reflect the composition of the populations that they serve.[93] Like white women and men of color, women of color, too, must be included within our democracy.

Furthermore, the presence of women of color will benefit all members of the citizenry by strengthening the legitimacy of the judiciary in the eyes of communities of color, communities that are currently more likely to feel (and be) disenfranchised than Whites,[94] for example.[95] Race and gender di-

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91. *See, e.g.*, Molina, *supra* note 71, at 132-33 (citation omitted) (describing the commentary that questioned Justice Sotomayor's qualifications for the U.S. Supreme Court and discussing how those that see her may either continue to question her qualifications or see her as the "exception that proves the rule" that Latina lawyers are incompetent or unworthy).

92. *Id.* at 132.

93. Tacha, *supra* note 23, at 272 ("If we are to be a representative democracy, our governmental institutions must reflect the diverse membership of our society, and we should work especially toward ensuring access for members of historically excluded groups, such as women and racial minorities.").

94. Throughout this Article, we capitalize the word "Black" or "White" when we use them as nouns to describe a racialized group; however, we do not capitalize these terms when we use them as adjectives. Also, we prefer to use the term "Blacks" to the term "African Americans," because the term "Blacks" is more inclusive. Additionally, we find that "[i]t is more convenient to invoke the terminological differentiation between black and white than say, between African-American and Northern European-American, which would be necessary to maintain semantic symmetry between the two typologies." Alex M. Johnson, Jr.,

versity on the bench helps to instill trust in the courts, and in the system of government as a whole. Defendants, plaintiffs, and attorneys of all races and sexes will all have greater trust in a court system that is reflective—at least on its face—of their realities. This is particularly true of the criminal justice system, which many communities of color do not view as a fair and legitimate institution.[96] By increasing the access to and visibility of women of color in the judiciary, the legitimacy of the judiciary, too, will be increased.

D. Improving Decision Making

Finally, creating greater diversity within the federal judiciary by nominating and confirming more women of color will strengthen decision making on affected courts—leading those members of the judiciary to think more broadly about legal issues and to consider more frequently life experiences that are foreign to them. This will enhance the deliberative decision-making process on panels. The ability of a judge to understand an experience provides valuable context for adjudicating issues in an informed manner.[97] One person will not have the experiential knowledge to adjudicate

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Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties, 1992 U. ILL. L. REV. 1043, 1044 n.4 (emphases omitted). Professor Kimberlé Crenshaw, one of the founders of Critical Race Theory, has explained that "Black" deserves capitalization because "Blacks, like Asians [and] Latinos, . . . constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

95. *See* Johnson & Fuentes-Rohwer, *supra* note 77, at 28-30; *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 187-88, 192-95 (2010) (discussing the high rate of disenfranchisement of black men due to disproportionately high felon status, which overwhelmingly results in a loss of voting rights temporarily or permanently).

96. *See, e.g.*, Frank Newport, *Blacks, NonBlacks Hold Sharply Different Views of Martin Case*, GALLUP POL. (April 5, 2012), http://www.gallup.com/poll/153776/blacks-nonblacks-hold-sharply-different-views-martin-case.aspx (finding a large racial divide in the perception of the killing of Trayvon Martin, a young black man, who was shot during an altercation with a non-black man and comparing it with a prior case where there was a large racial divide: the O.J. Simpson case, where Blacks and non-Blacks viewed the trial and lack of criminal conviction of O.J. Simpson for the murder of his non-black, specifically white ex-wife differently; concluding that these cases underscore black distrust of the criminal justice system as a source of justice for black people; and citing a 2008 Gallup Minority Rights and Relations survey, which "found that 67% of blacks said the American justice system was biased against blacks, a viewpoint only 32% of non-Hispanic whites agreed with").

97. *See* Johnson & Fuentes-Rohwer, *supra* note 77, at 8 ("Not surprisingly, this demographic profile has translated into judicial decisions that reflect the shared backgrounds of the judges. As John Hart Ely explained, there is a 'systemic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle, professional class from which most judges . . . are drawn.'" (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 59 (1980))); *see also id.* at 9 ("First, the creation of a racially diverse bench can

every case in an informed manner, but appellate courts provide crucial opportunities for judges to discuss cases, provide insight from their own experience, bring underlying assumptions in parties' arguments to the surface, and ensure that biases do not take the discussion off-track and deny justice to a party. Diversity on the bench encourages all members on an appellate court to think more broadly.[98] Chief Justice Peggy Quince of the Florida Supreme Court, the first black women to serve in this position, said that "[s]he feels that having black women judges at the appellate level makes a difference."[99] She explained:

> "Just your mere presence makes people stop and listen. Your colleagues may not agree and your perspective may not make a difference in the particular case at issue, but it opens the minds of your [colleagues] to different perspectives . . . to the table that would not otherwise have had a voice."[100]

Studies of appellate courts also bear out the tangible effects that a woman or a person of color may have on the outcome of a case. Studies have shown that the presence of one woman on an appellate panel increases the likelihood that a female sex discrimination plaintiff will prevail.[101] Similarly, the presence of an African American on an appellate panel has been found to increase the likelihood that a panel will find in favor of the racial minority who is alleging race discrimination.[102] In many cases, there will not

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introduce traditionally excluded perspectives and values into judicial decision-making. The interplay of diverse views and perspectives can enrich judicial decision-making. . . . Second, racial diversity on the bench also encourages judicial impartiality, by ensuring that a single set of values or views do not dominate judicial decision-making." (quoting Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 410-11 (2000))).

98. Blackburne-Rigsby, *supra* note 26, at 679; *see infra* text accompanying note 103.

99. Blackburne-Rigsby, *supra* note 26, at 679.

100. *Id.* (quoting Chief Justice Peggy Quince).

101. *Women in the Federal Judiciary*, *supra* note 9 ("[W]omen judges can bring an understanding of the impact of the law on the lives of women and girls to the bench, and enrich courts' understanding of how best to realize the intended purpose and effect of the law that the courts are charged with applying. For example, one recent study demonstrated that male federal appellate court judges are less likely to rule against plaintiffs bringing claims of sex discrimination, if a female judge is on a panel." (citing Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390 (2010))).

102. Chew & Kelley-Chew, *supra* note 54, at 194 (citing Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 33-34 (2008); *see also* Nancy E. Crowe, The Effects of Judges' Sex and Race on Judicial Decision Making on the United States Courts of Appeals: 1981-1996, at 153-59 (June 1999) (unpublished PhD dissertation, University of Chicago)). Specifically, Chew and Kelley-Chew explained:

> Even more directly relevant is the provocative emerging research on how increasing the racial diversity of judges—for instance on appellate panels—influences decision-making patterns. These studies find that mixed-race judicial panels (typically defined as panels with at least one African-American judge) in race discrimina-

be a tangible, quantifiable outcome-determinative effect of diversity on appellate courts. Nevertheless, anecdotal evidence suggests that racial and gender diversity on appellate courts is still important.

With respect to race in particular, several U.S. Supreme Court Justices have remarked on the importance of the unique perspective that the late Justice Thurgood Marshall, the first black man to sit on the Court, brought to the bench. For example, Justice Lewis Powell once articulated how Justice Marshall's "unique contribution" to the court derived from "his direct experience with racial segregation in this country."[103]

Additionally, in her tribute to Justice Marshall in the *Stanford Law Review*, Justice O'Connor described how the late Justice "profoundly influence[d]" her, a woman who prior to *Brown v. Board of Education* had not been exposed to racial tensions and "had no personal sense . . . of being a minority in a society that cared primarily for the majority."[104] As Justice O'Connor so vividly explained the effect that Justice Marshall had on the Court:

> Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. *His was the mouth of a man who knew the anguish of the silenced and gave them a voice.* At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.[105]

Similarly, the late Justice Byron White described the impact that Justice Marshall's voice had on him as a jurist, noting:

> Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match. Thurgood could tell us the way it was, and he did so convincingly, often embellish-

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> tion cases have different decision-making patterns than all-White panels. In a study of federal appellate court cases by Adam Cox and of voting rights cases by Thomas Miles, the researchers found that mixed-race panels with at least one African-American judge were more likely to rule for the plaintiffs than all-White panels. Nancy Crowe similarly found that mixed-race panels had different outcomes in race-discrimination cases; once again, the mid-raced panels were more likely to hold for plaintiffs in race discrimination and sex discrimination cases.

Id. at 194.

103. BARBARA A. PERRY, A "REPRESENTATIVE" SUPREME COURT?: THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS 137-38 (1991) (quoting from an interview with Justice Powell in which he argued that diversifying the bench with underrepresented groups can bring new insights to courts).

104. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992).

105. *Id.* (emphasis added).

> ing with humorous, sometimes hair-raising, stories straight from his own past. *He characteristically would tell us things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our own experience.*[106]

Justice Marshall's colleagues' attestations that his insight and experience provided valuable considerations should not be narrowly interpreted to be unique to him. Although he was a remarkable person and Justice, the impact is duplicable. Additional voices on the courts may provide perspectives that the majority did not know, did not want to know, or did not understand. These voices are crucial to have at the table, even when colleagues are not persuaded. Absent such voices, the ultimate reasoning for a case could have been different, or at least the discussion could have gone differently. For example, Justice Ginsburg, particularly while she was the only woman on the Supreme Court, often voiced a uniquely female perspective to her colleagues and the public, on issues of gender discrimination and, specifically in one instance, with regard to why a strip search of a teenage girl by school staff could be traumatizing.[107] In another example, Justice Thomas also provided unique perspectives as a Southern black man, such as when he detailed how affirmative action had left him stigmatized and when he spoke about the statement that a burning cross sends.[108]

At other times, there was not a dissenting voice, but if the judiciary had been more diverse, perhaps there would have been a dissenting voice or a different majority or voice. In the infamous case of *Rogers v. American Airlines*,[109] Judge Abraham Sofaer found that American Airlines' grooming policy, which provided that women's hair had to meet certain professional standards, did not discriminate on the basis of race and gender.[110] However, this case may have been decided differently if the judge presiding over the case were intimately aware of the differences between white women's hair and black women's hair; the burdens that black women must endure to make their hair fit prescribed styles; and the temporal, financial, and physi-

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106. Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992) (emphasis added).

107. Joan Biskupic, *Ginsburg: The Court Needs Another Woman*, USA TODAY, May 6, 2009, at 1A. Justice Ginsburg has articulated her frustrations with being the only woman on the court and how it has affected cases:

> "You know the line that Sandra and I keep repeating . . . that 'at the end of the day, a wise old man and a 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." The differences between male and female justices, she said, are "seldom in the outcome." But then, she added, "[I]t is sometimes in the outcome."

Id. (quoting Justice Ginsburg).

108. Onwuachi-Willig, *supra* note 86, at 995-96, 1003-04.

109. 527 F. Supp. 229 (S.D.N.Y. 1981).

110. *Id.* at 231, 233.

cally painful difficulties that may be necessary to endure in order to achieve the ideal that American Airlines required.[111] Perhaps the case would have turned out differently or more diverse considerations would have been involved, or perhaps the style would not have been attributed to a fad started by white model Bo Derek,[112] if a black female judge had heard the case. Similarly, Dean Kevin Johnson and Professor Luis Fuentes-Rohwer explain how one Supreme Court case may have been decided differently if a person of Mexican descent had sat on the Court. They asserted:

> [T]he Supreme Court in *United States v. Brignoni-Ponce* approved the reliance on "Mexican appearance" in immigration enforcement and stated that it may be employed with other factors to justify the questioning of a person about his or her immigration status. This holding seems incredible to most persons of Mexican ancestry, who appreciate that there is no readily definable "Mexican appearance."
>
> The Court in *Brignoni-Ponce* simply failed to recognize that persons of Mexican ancestry run the gamut of physically diverse appearances. Its decision reflects a missing perspective, lack of information, and misunderstanding of the Mexican American and Mexican immigrant communities in the United States that a Latina/o would be less likely to overlook.
>
> . . . .
>
> As these examples suggest, stereotypes about Latina/os influence the law in ways that often appear to be race-neutral. An awareness of the stereotypes and their impacts in relegating Latina/o citizens to second class citizenship might influence a judge's approach to a variety of areas of law, including the immigration and anti-discrimination laws.[113]

Although points such as this one about *Brignoni-Ponce* may be raised by people of all races, and not just by people who are Latino or, more specifically, of Mexican descent, there is a greater likelihood that they will be made if greater diversity exists on the bench.

Finally, it is important to have diverse appellate courts because a variety of voices and perspectives are more likely to ensure that unconscious biases do not taint the analyses of cases. For example, having a female judge on a sexual harassment case or sexual assault case could help to eliminate unconscious biases about a woman's dress in cases where clothing and appearance are irrelevant.[114] The list could go on and on, but the basic point

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111. *See generally* Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010).

112. *See Rogers*, 527 F. Supp. at 232.

113. Johnson & Fuentes-Rohwer, *supra* note 77, at 19-20; *see also* Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV. LATINO L. REV. 1, 7-13 (2002) (highlighting the different perspectives that a Latina/o Justice might bring on a variety of issues).

114. *See* Tacha, *supra* note 23, at 272-73 ("[I]n my experience, the presence of women in judicial roles has raised awareness within the judiciary concerning the subtle, but powerful, implications of language and the use of particular words in judicial writing. More than

is that diversity still matters, and that, in the case of women of color, who are nearly absent from the federal bench, "firsts" still matter.

CONCLUSION

In conclusion, female "firsts" on the bench in any area and on any court still matter, but especially for women of color. Women of color still have hurdles and obstacles to overcome that their white sisters do not, both in terms of symbolism and numbers.[115] While there may be a need for "feminist" or "womanist"[116] judges, and for good reason, that call is a different one than the call for women of color judges.

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once, as a member of an appellate panel, I have requested very minor changes in opinion language to avoid disparaging sex-based connotations.").

115. *See supra* Sections III.A-B.

116. *See* emmagunde, *Womanism*, A FEMINIST THEORY DICTIONARY (July 17, 2007), http://afeministtheorydictionary.wordpress.com/2007/07/17/womanism/ ("Womanism is a feminist term coined by Alice Walker. It is a reaction to the realization that 'feminism' does not encompass the perspectives [of] Black women.").