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## Essay

# Representative Government, Representative Court? The Supreme Court as a Representative Body

Angela Onwuachi-Willig<sup>†</sup>

Central to our country's idea of fairness within the court system is the notion of the completely neutral arbiter.<sup>1</sup> The archetype adjudicator remains uninfluenced by sources outside the law (which itself is not free from human failings) and is entirely free of bias. Yet, as Judge Jerome Frank once declared, we are well aware that a person does not “cease[] to be human and strip[] himself [or herself] of all predilections” or “become[] a passionless thinking machine” simply “by putting on a black robe and taking the oath of office as a judge.”<sup>2</sup> At a minimum, we recognize the humanness of judges through concepts such as recusal, which “recognize that judges will, from time to time, have biases, prejudices, or interests that prevent truly unbiased decision-making.”<sup>3</sup>

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1. Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 661 (2005).

2. *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652–53 (2d Cir. 1943).

3. Bassett, *supra* note 1, at 658; *see also id.* at 661 (describing the various ways in which bias can arise, including financial interest, favored relationships, and personal bias); Karen Nelson Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 HASTINGS L.J. 829, 830–37 (1984) (describing situations that may warrant judicial disqualification).

The fact is that background—or to put it differently, diversity—matters on judicial bodies. As Chief Judge Harry Edwards of the U.S. Court of Appeals for the D.C. Circuit explained, “[I]t is inevitable that judges’ different professional and life experiences have some bearing on how they confront various problems that come before them.”<sup>4</sup> Thus, judges of all backgrounds bring their own human experience to the bench.<sup>5</sup> For this reason, it is important (as Professors Kevin Johnson, Sherrilyn Ifill, and Luis Fuentes-Rohwer have argued) that courts, especially the Supreme Court, are comprised of individuals who represent a cross section of the country—individuals with differing views that are undeniably influenced by life experience.<sup>6</sup>

This question of demographic representation on the Supreme Court was raised again most recently when President George W. Bush initially nominated John Roberts to replace Justice Sandra Day O’Connor,<sup>7</sup> the first woman to be appointed to the Court and, at the time, one of only two women on the nine-Justice Court.<sup>8</sup> Many, including First Lady Laura Bush,

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4. Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL’Y REV. 325, 329 (2002); see also Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 3 (1994) (asserting that “all judges, as part of basic human functioning, bring to each decision a package of personal biases and beliefs that may unconsciously and unintentionally affect the decisionmaking process”).

5. See Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 10 ASIAN L.J. 127, 136–38 (2003) (describing how one judge’s childhood experience of watching his grandfather be humiliated because of limited English-speaking skills informed that judge’s understanding of language discrimination).

6. See Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality, and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 124–27 (1997) (asserting that racial minorities could seek to compel states to adopt affirmative action judicial selection plans); Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 6, 10 (2004) (analogizing judges to juries and arguing that, much like with diversity of juries, “pulling a group of judges from a cross-section of the community would . . . benefit the decision-making process”).

7. See Elisabeth Bumiller, *As All Washington Guessed, Bush Zeroed In on His Choice*, N.Y. TIMES, July 20, 2005, at A16.

8. WILLIAM D. BADER & ROY M. MERSKY, *THE FIRST ONE HUNDRED EIGHT JUSTICES* 14 (2004) (noting that Justice O’Connor was sworn in as the first female Justice after a confirmation vote of 99 to 0 and that Justice Ginsburg was sworn in as the second female Justice to join O’Connor after a confirmation vote of 97 to 3).

hoped that the President would appoint a woman to take Justice O'Connor's seat.<sup>9</sup>

The stakes were high, apart from mere representation. Liberals worried that a male Justice, especially one with conservative credentials, would not bring the same distinctive female, or rather minority, voice that a conservative Justice O'Connor brought to important issues, such as abortion rights<sup>10</sup> and affirmative action.<sup>11</sup> Conservatives struggled with the potentially damaging political consequences of not naming a woman to the high court when 60 percent of all Americans believed that appointing a woman was important.<sup>12</sup> Even Justice O'Connor remarked, while noting that Roberts himself is "first-rate,"<sup>13</sup> that she was, "disappointed to see the percentage of women on our court drop by 50 percent."<sup>14</sup> Many others agreed that "something is lost when there is only one female voice in the room."<sup>15</sup> As Karen O'Connor, director of Women and Poli-

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9. See Mike Dorning & Andrew Martin, *Nomination Vexes Liberals, Women: Loss of 2nd Female Voice Is Seen as Cause for Concern*, CHI. TRIB., July 21, 2005, at C1. Besides the First Lady urging the President to replace O'Connor with a woman, other Republican women acknowledged the need for more women on the Supreme Court. For instance, Republican Senator Olympia Snowe stated that "it would have been preferable to replace Sandra Day O'Connor with a qualified, capable woman," and Republican Senator Susan Collins declared that, after Roberts's nomination, "[s]he would like to see more women on the Supreme Court." *Id.* (internal quotation marks omitted). Further, Professor Marci Hamilton, a former O'Connor clerk, asserted: "The hope was that this wasn't a one-seat quota, that the number of women on the court would expand." *Id.* (internal quotation marks omitted).

10. See David Stout & Elisabeth Bumiller, *President's Choice of Roberts Ends a Day of Speculation*, N.Y. TIMES, July 19, 2005, <http://www.nytimes.com/2005/07/19/politics/politicsspecial1/19cnd-judge.html> (quoting a spokesperson at NARAL as stating: "If Roberts is confirmed to a lifetime appointment, there is little doubt that he will work to overturn *Roe v. Wade*").

11. Former Justice O'Connor wrote the opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which upheld the constitutionality of the University of Michigan Law School's affirmative action program. *Id.* at 343.

12. Susan Estrich, *Lack of Diversity on Supreme Court*, NEWSMAX.COM, July 24, 2005, <http://newsmax.com/archives/articles/2005/7/23/170018.shtml> (noting that 65 percent of Americans believed that it would be a *good* idea to appoint a woman); *Poll: Supreme Court Pick Matters*, CBS NEWS, July 15, 2005, <http://www.cbsnews.com/stories/2005/07/15/opinion/polls/main709505.shtml> ("Women are more likely than men to say it is *very* important to them that a woman replaces O'Connor; 36 percent of women feel this way, compared to just 13 percent of men.").

13. Dorning & Martin, *supra* note 9 (internal quotation marks omitted).

14. Estrich, *supra* note 12 (internal quotation marks omitted).

15. Dorning & Martin, *supra* note 9. Justice O'Connor once said to the 1996 Women's Olympic Basketball Team, which visited the Supreme Court, "I

tics at American University explained, “While one woman can make the argument when it comes to sex discrimination, Title IX, [equal educational opportunities], [and] reproductive privacy, a second woman in the room helps solidify the positions and makes the men understand some of the ramifications.”<sup>16</sup>

When Chief Justice Rehnquist passed away and Roberts was nominated to fill the position of Chief Justice, the issue of representation became an even stronger topic. Unlike replacing Justice O’Connor with Roberts, the replacement of Chief Justice Rehnquist by the same candidate was perceived as non-controversial, with one white male conservative replacing another. However, the pressure was on again for President Bush to nominate a candidate who could bring a different voice than that of Roberts, specifically another female Justice or a Justice of color.<sup>17</sup> The rationale behind these demands was that the Court, although not directly, is a representative body, and the most effective way of providing a broad range of voices on the most powerful judicial institution in the country is to ensure that people of all backgrounds—race, sex, class, religion, sexuality—are actually represented on the Court.

On October 3, 2005, President Bush responded to pressures concerning the gender and/or racial background of the next potential Justice by nominating Harriet Ellan Miers, White House counsel and his former personal attorney.<sup>18</sup> Noting that Miers would bring a distinctive perspective to the bench while strictly interpreting the Constitution, President Bush defended Miers as the right choice for the seat.<sup>19</sup> Others also noted the unique viewpoints that Miers, a woman, could bring to the Court. For example, Professor Linda Eads of Southern Methodist University Law School explained that while Miers “doesn’t

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can’t tell you how happy I was when she [Justice Ginsburg] got to the court. It makes a night and day difference to have women on the bench.” William C. Rhoden, *A Mission Is Reaffirmed in the Nation’s Capital*, N.Y. TIMES, Dec. 7, 1995, at B23 (internal quotation marks omitted).

16. Dorning & Martin, *supra* note 9 (first alteration in original) (internal quotation marks omitted).

17. Elisabeth Bumiller et al., *Bush Names Counsel as Choice for Supreme Court*, N.Y. TIMES, Oct. 4, 2005, at A1 (“Mr. Bush had been under pressure from interest groups to appoint a woman . . . .”); Michael A. Fletcher & Dan Balz, *Bush Faces Pressure to Diversify Supreme Court*, WASH. POST, Sept. 25, 2005, at A4 (noting that “[a] number of Latino group officials have publicly urged the president to name the first Hispanic to the high court”).

18. Michael Fletcher, *White House Counsel Miers Chosen for Court*, WASH. POST, Oct. 5, 2005, at A1.

19. *Id.*

wear her experiences on her sleeve,” the experience of trying to find legal employment as a woman “affected her and she has to know . . . that not all groups are always treated equally.”<sup>20</sup>

Miers’s nomination to the Court, however, was intensely challenged by conservatives who questioned her record on constitutional law issues and felt that her nomination was pure cronyism.<sup>21</sup> On October 27, 2005, Miers quietly withdrew her nomination for the Court, citing her refusal to release privileged documents concerning her work as the President’s chief counsel as the reason for her withdrawal.<sup>22</sup>

Although First Lady Laura Bush continued to urge the President to nominate a woman,<sup>23</sup> the President instead nominated Samuel Alito,<sup>24</sup> a decision that essentially ensured that Justice Ruth Bader Ginsburg would soon become the only woman sitting on the Court. President Bush’s decision to nominate a man for a second time to replace Justice O’Connor did not receive nearly as much attention as his first selection.<sup>25</sup> However, many politicians and activists continued to comment on how the President’s third choice to replace Justice O’Connor

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20. Todd S. Purdum & Neil A. Lewis, *Hard-Working Advocate for the President*, N.Y. TIMES, Oct. 4, 2005, at A1 (internal quotation marks omitted).

21. Ron Fournier, *Bush Goes Right for Next Nominee*, GRAND RAPIDS PRESS, Oct. 31, 2005, at A1, available at 2005 WLNR 17778861 (“Miers bowed out Thursday after three weeks of bruising criticism from members of Bush’s own party, who argued the Texas lawyer and loyal Bush confidant had thin credentials on constitutional law and no proven record as a judicial conservative.”); see also Randy E. Barnett, *Cronyism*, WALL ST. J., Oct. 4, 2005, at A26 (“Harriet Miers is not just the close confidante of the president in her capacity as his staff secretary and then as White House counsel. She also was George W. Bush’s personal lawyer. Apart from nominating his brother or former business partner, it is hard to see how the president could have selected someone who fit Hamilton’s description any more closely.”) Some questioned whether gender played a role in conservative opposition to Miers. Senator Diane Feinstein remarked, “I don’t believe they would have attacked a man the way she was attacked . . . I don’t think she deserves the treatment she got.” Edward Epstein, *Miers Withdraws as Court Nominee*, S.F. CHRON., Oct. 28, 2005, at A1 (internal quotation marks omitted).

22. Epstein, *supra* note 21.

23. Peter Baker, *Alito Nomination Sets Stage for Ideological Battle*, WASH. POST, Nov. 1, 2005, at A1.

24. *Id.*

25. Although the President chose a man to replace Justice O’Connor, his selection of Alito did not result in any immediate political damage to the party or the nomination, with 54 percent of Americans in December, 2005, agreeing that the Senate should confirm Alito. Jon Cohen, *Poll: Majority Wants Alito on Supreme Court*, ABCNEWS.COM, Dec. 21, 2005, <http://abcnews.go.com/Politics/print?id=1426504>.

reflected a lack of commitment to diversity on the Court. For instance, Senate Minority Leader Harry Reid proclaimed, “This appointment ignores the value of diverse backgrounds and perspectives.”<sup>26</sup> According to Senator Reid, “President Bush would leave the Supreme Court looking less like America and more like an old boys club.”<sup>27</sup> Again, much like with President Bush’s first selection of now Chief Justice Roberts to replace a retiring Justice O’Connor, the decision to fill her seat with Alito would result in replacing a moderate, who was often the swing vote on issues such as affirmative action and abortion (both issues that significantly affect women), with a conservative, white male judge.<sup>28</sup>

This idea of filling a vacancy left by Justice O’Connor with a man was even a concern for some conservative activists, who had expressed a preference for the President to nominate a woman for the position.<sup>29</sup> For example, although the vast majority of conservative activists indicated that neither race nor sex should matter in the President’s selection,<sup>30</sup> others such as Traditional Values Coalition Chairman Louis P. Sheldon asserted the following: “I think we should have a woman this time . . . Isn’t the [Justice] retiring a woman?”<sup>31</sup> In sum, many agreed with Justice O’Connor, who argued before the nomination of Alito: “Women constitute one half of the population in this country. It is critical for women to serve in all branches of government.”<sup>32</sup>

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26. *Bush Nominates Alito to Supreme Court: Conservatives, Liberals Ready for Heated Debate*, CNN.COM, Oct. 31, 2005, <http://www.cnn.com/2005/POLITICS/10/31/scotus.bush/index.html> (internal quotation marks omitted).

27. Baker, *supra* note 23 (internal quotation marks omitted).

28. Liza Porteus, *Bush Taps Alito for Supreme Court*, FOXNEWS.COM, Nov. 1, 2005, <http://www.foxnews.com/story/0,2933,173968,00.html>.

29. *Conservatives Look Past Miers: Leaders Say They Want Justice with Clear Conservative Views*, CNN.COM, Oct. 28, 2005, <http://www.cnn.com/2005/POLITICS/10/28/scotus.next/index.html>.

30. Lanier Swann, the director of government relations for Concerned Women for America declared, “For us it is not about sex, race or creed . . . It is really about their ability to fairly interpret the Constitution.” *Id.* (internal quotation marks omitted)

31. *Id.* (alteration in original) (internal quotation marks omitted). Sheldon then identified Edith Jones, Priscilla Owen, and Janice Rogers Brown as potential choices to replace O’Connor. *Id.*

32. *Supreme Court Watch Resumes*, CBSNEWS.COM, Oct. 30, 2005, <http://www.cbsnews.com/stories/2005/10/28/supremecourt/main989993.shtml> (internal quotation marks omitted).

This Essay contends, quite simply, that diversity matters on the Court and that the Court should be a demographically representative body of the citizens of the United States. Thereafter, building on this notion that diversity is critical to the performance of the Court in its deliberations on cases, this Essay then proposes, as a thinking point, that the number of Supreme Court Justices be expanded to increase the representation of various demographic groups and ensure proper representation of all voices on the most powerful judicial body of our nation.

#### I. WHAT'S THE DIFFERENCE BETWEEN A WISE OLD MAN AND A WISE OLD WOMAN?

*“A system of justice is the richer for the diversity of background and experience of its participants. It is the poorer, in terms of evaluating what is at stake and the impact of its judgments, if its members—its lawyers, jurors, and judges—are all cast from the same mold.”*

Justice Ruth Bader Ginsburg<sup>33</sup>

Under our system of government, elected officials in the legislative and executive branches are to provide adequate political representation for their constituents. On the other hand, the federal judiciary, which is composed of individuals appointed by our President, is not viewed as a representative body. Instead, the federal judiciary, although appointed to the bench and voted on by elected officials, is set up to be free from outside pressures in performing its duties and is to provide a check on, and balance against, other branches of government.

Given the power and influence of the federal judiciary, in particular the Supreme Court, the question is whether that check itself should be checked by a demographically representative cross section of the United States. In other words, in what ways should the judiciary, although not directly, be viewed as representative body of the people?

Judge Richard Posner has maintained,

The nation contains such a diversity of moral and political thinking that the judiciary, if it is to retain its effectiveness, its legitimacy, *has* to be heterogeneous; . . . and the members of a heterogeneous judicial community are not going to subscribe to a common set of moral and

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33. Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 SW. U. L. REV. 189, 190 (2003).



political dogmas that would make their decisionmaking determinate.<sup>34</sup>

At the present moment, however, our federal judiciary does not reflect the rich racial, ethnic, and gender diversity of our nation. For example, as Magistrate Judge Edward Chen of the Northern District of California, the first Asian Pacific American to be named to the federal bench in that district, has asserted, the federal bench is incredibly lacking in racial diversity.<sup>35</sup> As of September 30, 2001, out of nearly 1600 active federal judges, including Article III, magistrate, bankruptcy, and court of claims judges, only 7.2 percent were Blacks, 4.0 percent were Latino/as, 0.8 percent were Asian-Americans, and 0.1 percent were American Indians, while Blacks, Latinos, Asian-Americans, and American Indians respectively constituted 12.3, 12.5, 3.7, and 0.9 percent of the population in the United States.<sup>36</sup> Further, even though women comprise at least half the population, in 2005, they only held roughly a quarter of all federal judgeships.<sup>37</sup>

The Supreme Court, given its size, is arguably more diverse than the lower federal courts with respect to racial diversity. Of its nine Justices, one is a black male, Justice Clarence Thomas, making racial minorities 11 percent of the Court.

With respect to other factors such as education, class, and even religion, the Supreme Court, however, is less diverse. All nine of the Justices on the Court graduated from elite law schools, which in itself placed them in a select category of lawyers who had their choice of jobs early on in their careers, with the exception of Justices Ginsburg and Thomas, who had difficulty finding jobs after law school because of their sex and race, respectively.<sup>38</sup> All of the Justices, except for Justices Ginsburg

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34. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 94 (2003); see also Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive? What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 106–07 (2004) (asserting that “constitutional judgments are visibly biased when the Supreme Court or other courts selectively strip out social and racial context to conform with the identity-based views of the majority”).

35. Chen, *supra* note 5, at 128–29.

36. *Id.* at 129; see also Elizabeth A. Kronk, *Hundreds of Nations, Millions of People: One Senior Judge on the Federal Bench*, FED. LAW., July 2005, at 16, 16 (discussing the consequences of having no active American Indian judges on the federal bench).

37. Marcia Coyle, *Justices Diversity Pool Too Shallow?*, NAT’L L.J., Sept. 26, 2005, at 1.

38. Justice Ginsburg experienced discrimination when she sought em-

and Thomas, grew up in comfortably middle- to upper-class families.<sup>39</sup> Five of the nine Justices are Catholic, with the remainder of the Court consisting of only two Jews, one Protestant, and an Episcopalian.<sup>40</sup> None of the Justices are openly gay, and none of them are of Latino, Asian American, or Native American descent. Yet, the Justices on the Supreme Court are left with the task and enormous responsibility of interpreting the Constitution and laws of the nation for the entire rich diversity of people who reside in the United States.

One may ask, “If the law is simply the law, why does this issue of representation on the Court even matter?” After all, as former Minnesota Supreme Court Justice Mary Jeanne Coyne proclaimed, “[A] wise old man and a wise old woman reach the same conclusion.”<sup>41</sup>

Perhaps Justice Ginsburg provided the best answer to this question of why it matters who sits on the Court, when she agreed that Justice Coyne was correct to state that a wise old man and woman do reach the same decision, but declared: “[I]t is also true that women, like persons of different racial groups and ethnic origins, contribute to the United States judiciary

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ployment after graduation from law school. Despite her excellent credentials, Ginsburg “received no job offers from New York law firms” and was not “able to obtain a clerkship interview with a Supreme Court Justice.” SUPREME HISTORICAL SOC’Y, THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 1789–1995, at 532 (Clare Cushman ed., 1995). Ultimately, District Court Judge Edmund L. Palmieri hired Ginsburg as his law clerk. *Id.* Justice Thomas also experienced racial discrimination upon his graduation from Yale Law School when he was rejected by every law firm in Atlanta. 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, 970–71 (2005). Like Justices Ginsburg and Thomas, retired Justice O’Connor also experienced severe employment discrimination after law school. Even though O’Connor graduated at the top of her class at Stanford Law School, “no private firm would hire her to do a lawyer’s work” after graduation. Ruth Bader Ginsburg, *Remarks on Women’s Progress in the Legal Profession in the United States*, 33 TULSA L.J. 13, 14 (1997) (quoting O’Connor as saying, “I interviewed with law firms in Los Angeles and San Francisco, . . . but none had ever hired a woman before as a lawyer, and they were not prepared to do so” (internal quotation marks omitted)); Sandra Day O’Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1219 (1992) (describing the gender discrimination she experienced “when law firms would only hire [her], a ‘lady lawyer,’ as a legal secretary”).

39. Cf. Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 664 (1985) (asserting that federal judges “are overwhelmingly Anglo, male, well educated and upper or upper middle class”).

40. See Baker, *supra* note 23.

41. Ginsburg, *supra* note 33, at 189 (internal quotation marks omitted).

what . . . [is] fittingly called ‘a distinctive medley of views influenced by differences in biology, cultural impact, and life experience.’<sup>42</sup> The fact is that one’s background, while it may not determine one’s vote, may affect how one approaches and perceives the issues in a case.<sup>43</sup> This effect of background on decision making even applies to majority judges, who because of the way society is structured with them at the center as the norm, are often viewed as being neutral, objective, and unaffected by their background.<sup>44</sup> In other words, while Justices and judges of different backgrounds—whether a wise old man or a wise old woman—may often reach the same conclusion, the idea of complete neutrality on the bench is a myth.

One good example of how the jurisprudence of a Justice may be influenced by her background, specifically her gender, is Justice O’Connor’s jurisprudence on discrimination, the Establishment Clause, the right to abortion, and affirmative action.<sup>45</sup> Professor Suzanna Sherry hinted that Justice

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42. *Id.* (quoting the late Alvin B. Rubin, former judge of the Court of Appeals for the Fifth Circuit); see also Johnson & Fuentes-Rohwer, *supra* note 6, at 6 (“Virtually every legal actor understands that a judge’s biases, perspectives, and life experiences influence judicial decision-making.”).

43. See Lazos Vargas, *supra* note 34, at 134 (noting, for example, that “there is solid evidence that race affects judging”).

44. See Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2013 (1995) (“Thus, white people frequently interpret norms adopted by a dominantly white culture as racially neutral, and so fail to recognize the ways in which those norms may be in fact covertly race-specific.”); Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and The Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 977 (1993) (noting that “[t]he pervasiveness of the transparency phenomenon militates against an unsupported faith by whites in the reality of race-neutral decisionmaking”); Berta Esperanza Hernández Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 372–73 (1994) (“Traditional legal thought—the purportedly objective, rational, neutral legal analysis—constituted the ‘norm,’ the aspirational ‘neutral’ (reasonable) person: a white, formally educated, middle to upper class, heterosexual, physically and mentally able, Judeo-Christian, Western European/Anglo male.”); Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604–05 (1999) (“When people are asked to describe themselves in a few words, [black] people invariably note their race and white people almost never do. Surveys tell us that virtually all [black] people notice the importance of race several times a day. White people rarely contemplate the fact of our whiteness—it is the norm, the given. It is a privilege to not have to think about race.” (footnotes omitted)).

45. See Johnson & Fuentes-Rohwer, *supra* note 6, at 17; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 592–616 (1986).

O'Connor's status as woman, an outsider of sorts, helps to explain "her greater willingness [than former Chief Justice Rehnquist, who was of similar politics] to remedy the effects of race discrimination and discrimination against aliens" and "her reluctance to accept conduct that condemns groups or individuals to outsider status."<sup>46</sup> Similarly, it is rumored that Justice O'Connor, often a swing vote on cases concerning affirmative action, declared the following in response to a tirade by Justice Scalia about the evils of the policy: "But, Nino, if it weren't for affirmative action, I wouldn't be here."<sup>47</sup>

Other Justices on the Supreme Court have been likewise influenced by their backgrounds in their approach to cases. As several Justices have noted, among the strengths that Justice Thurgood Marshall brought to the Supreme Court were his unique perspectives as a result of his life experiences with race and racism. For instance, Justice Brennan once proclaimed: "What made Thurgood Marshall unique as a Justice? Above all, it was the special voice that he added to the Court's deliberations and decisions. His was a voice of authority: he spoke from first-hand knowledge of the law's failure to fulfill its promised protections for so many Americans."<sup>48</sup> In the same vein, the background of Justice Thomas, the only racial minority currently on the Court, has certainly had an impact on the development of his jurisprudence.<sup>49</sup> For example, Professor Mark

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46. Sherry, *supra* note 45, at 595–96.

47. Oyez.org, Antonin Scalia, [http://www.oyez.org/oyez/resource/legal\\_entity/103/biography](http://www.oyez.org/oyez/resource/legal_entity/103/biography) (last visited Apr. 8, 2006) (internal quotation marks omitted).

48. William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 23 (1991); *see also* Anthony M. Kennedy, *The Voice of Thurgood Marshall*, 44 STAN. L. REV. 1221, 1221 (1992) (noting how Justice Marshall reminded the other Justices of their "moral obligation as a people to confront those tragedies of the human condition which continue to haunt even the richest and freest of countries"); O'Connor, *supra* note 38, at 1217 ("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."); Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992) ("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. . . . [H]e told us much that we did not know due to the limitations of our own experience.").

49. *See* Lazos Vargas, *supra* note 34, at 137 ("Justice Thomas reaches his conclusions using both his racial experience and his belief about the permissible role of government in social interventions under the Constitution." (footnotes omitted)); Onwuachi-Willig, *supra* note 38, at 978–1000 (arguing that

Tushnet finds traces of black nationalism in several of Justice Thomas's opinions.<sup>50</sup> Likewise, Professor Guy-Uriel Charles has written about how the idea of racial authenticity has played a role in providing Justice Thomas with a kind of "epistemic authority" on certain racial issues before the Court,<sup>51</sup> and I have written about the role that both race and racism have played in shaping Justice Thomas's judicial philosophies as a black conservative.<sup>52</sup>

As several commentators have noted, even diversity in work experience matters. During the candidacy of former Supreme Court nominee, Harriett Miers, several politicians and scholars highlighted her lack of experience as a judge, or rather her experience as an attorney in the "real world," as a plus factor in her nomination. For instance, Senate Minority Leader Harry Reid stated, "I like Harriet Miers. . . . In my view, the Supreme Court would benefit from the addition of a justice who has real experience as a practicing lawyer."<sup>53</sup> Similarly, Professor Marci Hamilton indicated that she found Miers's background as a player in local and state politics in Texas "crucial" to the Supreme Court—much in the same way that Justice O'Connor's sensitivities as a result of her experience as a state legislator and judge were.<sup>54</sup>

Adding a diversity of voices—whether due to background differences in race, gender, childhood class status, sexuality, religion, or work—will only enrich the decision-making process.<sup>55</sup>

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Justice Thomas's jurisprudence in certain areas is steeped in black conservative thought); Kendall Thomas, *Reading Clarence Thomas*, 18 NAT'L BLACK L.J. 224, 227 (2004–2005) (arguing that some of Thomas's writings on the Court are personal as well as professional).

50. See Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 HOW. L.J. 323 *passim* (2004).

51. See Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Critics?*, 93 GEO. L.J. 575, 608–28 (2005).

52. See Onwuachi-Willig, *supra* note 38 *passim*.

53. Press Release, Senator Harry Reid, Statement of Senator Harry Reid on the Nomination of Harriet Miers to the U.S. Supreme Court (Oct. 3, 2005), <http://reid.senate.gov/record.cfm?id=246777>; see also Molly McDonough, *Harriet Miers' 'Unknown' Story: Colleagues Cite Her Work Ethic, Integrity and Discretion*, 4 A.B.A. J. E-REPORT (2005), <http://www.abanet.org/journal/ereport/oc7sct.html> (noting that like Justice O'Connor, who was a state legislator, Miers's work experience in Texas may be of value to the Court).

54. McDonough, *supra* note 53; see also Lazos Vargas, *supra* note 34, at 132 (citing a study of labor cases that revealed "that prior experience[s] representing management and graduation from an elite college were significant factors in predicting whether a judge would rule in favor of management").

55. See Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle*

A Justice may contribute, depending on his or her or her own life experiences, important insights that others around them lack.<sup>56</sup> In fact, Professor Sylvia Lazos Vargas relies on the reasoning in *Grutter v. Bollinger*<sup>57</sup> to argue that diverse perspectives and the value of diversity in improving learning and education through a robust exchange of ideas apply equally to the judiciary.<sup>58</sup> Just as on college and university campuses, mere token representation of minority groups on the Supreme Court will not result in a sufficient dialogue and exchange among the Justices, who are interpreting the very basis by which all Americans must live.<sup>59</sup> Instead, “[a] critical mass is necessary because what is sought is a dialogic environment where disagreement as to racial perspective can be freely and candidly expressed, forcing majority colleagues to consider perspectives and realities with which they are not familiar.”<sup>60</sup>

Indeed, precisely because of the distinctive perspectives that nominees with differing life experiences may bring to the Court, diversity that reflects the make-up of the population in the United States would add greater legitimacy to the institution in the eyes of the public.<sup>61</sup> Specifically, the rulings of the Court would carry more weight and contain greater authority if they were viewed as coming from a body that was comprised of a cross-section of the nation. Additionally, as Professor Kevin Johnson has noted, the inclusion of more voices of people from underrepresented groups on the Court “would send a powerful message of inclusion” to those who have traditionally been excluded from American discourse<sup>62</sup> or, more importantly, to

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*His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 135–48 (2005) (discussing the value of race diversity on the bench); see also Johnson & Fuentes-Rohwer, *supra* note 6, at 26 (“Give-and-take in arguments and deliberations generally sharpens the analysis and affects the outcome.”).

56. See Onwuachi-Willig, *supra* note 55, at 143–48 (discussing Justice Thomas’s role in recent affirmative action cases).

57. 539 U.S. 306 (2003).

58. Lazos Vargas, *supra* note 34, at 143–48.

59. *Id.* at 145–46.

60. *Id.* at 145.

61. See Johnson & Fuentes-Rohwer, *supra* note 6, at 28; see also Lazos Vargas, *supra* note 34, at 141 (“Inclusive judging provides a reason for minority citizens to continue to trust key governmental institutions and believe that they are neutral rather than political.”).

62. Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 13 LA RAZA L.J. 1, 2 (2002); see also *id.* at 3 (“The nomination of an African American [Thurgood Marshall] alone represented an achievement for the

those who have so often turned to the Court to protect their civil rights when elected officials failed them.<sup>63</sup> Finally, as Professor Ifill notes, “[D]iversity on the bench . . . encourages judicial impartiality, by ensuring that a single set of values or views do not dominate judicial decision-making.”<sup>64</sup> Indeed, no goal should be more important on the Court than ensuring impartiality through this balancing of differing values, views, and voices. For this reason, a Supreme Court that mirrors the population of the United States in all of its diversity is essential.

## II. DOES SIZE MATTER?

*“A necessary step to achieving a judging ethic where differing racial perspectives and realities are part of the judging process is garnering a critical mass of minority judges and those with an ‘outsider’ perspective on key benches.”*

Professor Sylvia Lazos Vargas<sup>65</sup>

To enhance the legitimacy of the Supreme Court and to ensure inclusion of our nation’s diversity of moral and political thinking we must increase the representation of demographic groups on the Court. Therefore, I propose, as a thinking matter, that the number of Supreme Court Justices be expanded from nine to fifteen.<sup>66</sup> As it currently stands, it seems difficult to cul-

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entire African American community, unmistakably signaling that it in fact is an important part of the nation as a whole.”).

63. Lazos Vargas, *supra* note 34, at 102 (noting that “African Americans are . . . the racial group most likely to believe that the United States Supreme Court should serve as the guardian of civil rights for all Americans”); Joan Biskupic, *Thomas Caught Up in Conflict: Jurist’s Court Rulings, Life Experience Are at Odds, Many Blacks Say*, WASH. POST, June 7, 1996, at A20 (noting that Professor Stephen Carter of Yale Law School has described the Supreme Court as “the ultimate place that black people had been able to go to vindicate their rights” (internal quotation marks omitted)).

64. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 411 (2000). Judge Posner echoes this point in his scholarship:

[A] judiciary homogeneous in background, gender, ethnicity, and other factors that, realistically speaking, influence judgment on issues of high policy would be a disaster. It would be unrepresentative, blind to many important issues, adrift from the general culture, quite possibly extreme, and on all four counts deficient in authority and even legitimacy. The only practical means of stabilizing law in our system is . . . to maintain a diverse judiciary . . . .

POSNER, *supra* note 34, at 354.

65. Lazos Vargas, *supra* note 34, at 143.

66. I chose the number fifteen because it is the size of the International Court of Justice, a court on which all fifteen justices work together in reaching

tivate any meaningful type of demographic and substantive representation on the Court with just nine Justices. That low number combined with the rarity of openings on the Court because of lifetime appointments<sup>67</sup> only works to deepen political battles and opposition to Presidential nominees to the Court.<sup>68</sup> The notion of “one black seat” or “two female seats” on the Supreme Court strengthens the likelihood of intense opposition to candidates, especially female and minority candidates who may be viewed as controversial. For example, one must wonder whether opposition to Justice Thomas would have been as strong had there also been another black “Justice Marshall” on the Court to counter the conservative black Justice.<sup>69</sup> As Professor Lazos Vargas has argued, “The lesson from *Grutter* is that to achieve a diverse judicial bench, diversity must be understood to go beyond token appointments of minority judges,

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decisions on cases and which is premised on a formula designed to include “representation of the main forms of civilization and of the principal legal systems of the world.” Statute of the International Court of Justice art. 3, 9, June 26, 1945, 59 Stat. 1055, 1055–56, 3 Bevans 1153, 1179, 1181. One understanding of the court is “that the regional distribution of seats among the Members of the Court should roughly parallel the regional distribution of seats on the Security Council.” ROSENNE’S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 45 (Terry D. Gill ed., 6th rev. ed. 2003).

67. 2 JOAN BISKUPIC & ELDER WITT, GUIDE TO THE U.S. SUPREME COURT 816 (3d ed. 1997).

68. See Johnson, *supra* note 62, at 2 n.6 (“Judicial appointments often provoke pitched political battles.”); Editorial, *The President’s Stealth Nominee*, N.Y. TIMES, Oct. 4, 2005, at A26 (noting how judicial selection has become politicized).

69. Blacks were very divided on the issue of Thomas’s being appointed to the Supreme Court. For example, the National Bar Association, the premier organization of black lawyers, was divided on Thomas’s nomination—128 to oppose, 124 to support, and 31 to take no position. See A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405, 1407 (1995). Although traditional civil rights groups, such as the NAACP, opposed Thomas’s appointment to the bench, polls showed that anywhere from 50 percent to 70 percent of Blacks supported Thomas’s nomination. See Suzanne P. Kelly, *NAACP President Vows to Continue Fight for Civil Rights*, STAR TRIB. (Minneapolis), Oct. 18, 1991, at 2B, available at 1991 WLNR 3716048; Arch Parsons, *Thomas Issue Split Black Leaders from Grass Roots: Consequences of “the Gap” Being Discussed*, BALT. SUN, Oct. 20, 1991, at 1G, available at 1991 WLNR 746599; see also Peggy Peterman, *Most Blacks Glad Thomas Confirmed, Now Want Him to Change*, ST. PETERSBURG TIMES, Oct. 17, 1991, at 13A, available at 1991 WLNR 1928209 (“[M]ore [black people] were for Clarence Thomas than were against him, but it’s close. . . . [A] sizable number of black people say they simply want an African-American on the U.S. Supreme Court. If it’s got to be a tarnished Clarence Thomas, so be it. That’s what happens when it takes so long for a group of people, such as African-Americans, to get recognition.”).



and instead the goal should be to achieve a critical mass of minority judges . . . on [the] bench.”<sup>70</sup> Groups, especially under-represented groups such as Blacks would certainly have a greater appreciation of the diversity in viewpoint and judicial philosophy that a “Justice Thomas” brings if his presence did not necessarily signify to them the exclusion of many of their own voices from the bench.<sup>71</sup>

Because of the way that tokenism currently operates, however, once one minority is on an appellate court, such as the Supreme Court, room is almost never made for another. Once one minority is on the bench, the politicians who hold the responsibility of appointing people to the bench believe their job is done, and they have little political incentive to create further diversity on that court.<sup>72</sup> As Professor Lazos Vargas explains, “After ‘firsts,’ politics as usual takes over, and . . . minorities have not yet been able to gain a sufficient foothold in this political game” concerning appointments.<sup>73</sup> In the end, when push comes to shove, it is often the expectations of racial minorities that are sacrificed.<sup>74</sup> As we recently witnessed with the nominations of Harriet Miers, a white woman, and ultimately Samuel Alito, a white male, to the Supreme Court as opposed to that of Alberto Gonzales (who while opposed by some Latino organizations was supported by others),<sup>75</sup> these days suspected judicial philosophies win over any desire to have racial and ethnic diversity.<sup>76</sup> Were the number of Justices on the Court increased to fifteen, it would certainly create more room and fewer excuses for politicians to fail to truly account for and

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70. Lazos Vargas, *supra* note 34, at 109.

71. *See id.* at 151 (“Battles over judicial nominations like Miguel Estrada’s unfold because we have settled for only a token number of minority judges on key benches. . . . The politics of judicial diversity appointments are vicious because once a minority judge is named to a highly visible bench, it is unlikely that another minority judge will subsequently be appointed.”).

72. *See id.* at 148–51.

73. *Id.* at 149.

74. *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–24 (1980) (describing the principle of interest convergence, in which the rights of blacks are always sacrificed whenever they conflict with white interests).

75. *See* Fletcher & Balz, *supra* note 17; *see also* Lazos Vargas, *supra* note 34, at 150–51 (describing the same split within the Latino/Latina community over Miguel Estrada’s nomination to the D.C. Circuit).

76. Coyle, *supra* note 37 (quoting Professor Sheldon Goldman of the University of Massachusetts–Amherst as stating that “[f]or Bush, diversity is very important but ideology trumps diversity” (internal quotation marks omitted)).

value diversity in their nominations and votes. This is not to say that increasing the number of Justices on the Court will guarantee diversity, just that it would make the possibility of such diversity greater despite politics. As it currently stands, we are so wedded to this notion of which seat is a woman's seat versus a minority seat, that it is hard for politicians to envision seats other than those already filled by women and minorities as seats suitable for minority or female nominees. There appears to be a tipping point at which minorities and women are no longer considered.<sup>77</sup> One must wonder if it were Justice Scalia who was retiring rather than Justice O'Connor whether there would have been any mention at all of diversity—of filling his vacancy with a woman or minority. Adding new seats to the Court would help to alleviate this problem. To the extent there is a tipping point, appointing the second racial minority to the tenth seat on the Court is likely to look and feel different than appointing the second racial minority to the ninth seat.

Furthermore, little in history indicates that the choice to have nine Justices on the Supreme Court is inflexible. Indeed, all factors indicate that the selection of the number nine for the size of the Court is more of a historical accident than a reflection of any conscious decision that nine was the right number for decision making.

The number of Supreme Court Justices at any given time has ranged from five to ten.<sup>78</sup> First, the number of Justices on the Court began at six as mandated by the Judiciary Act of 1789.<sup>79</sup> A few years later, political battles resulted in the passage of the Circuit Court Act of 1801, which reduced that number from six to five.<sup>80</sup> The very next year, Congress repealed the 1801 Act, reestablishing the number of Supreme Court Justices at six.<sup>81</sup> Because of increasing work on the Court for the Jus-

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77. DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 140–161 (1987) (analyzing the tipping point at which no more minority faculty would be hired on a predominantly white faculty); Richard Delgado, *Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 NW. U. L. REV. 215, 226–31 (1998) (analyzing a similar scenario regarding residential segregation).

78. BISKUPIC & WITT, *supra* note 67, at 816–17.

79. *Id.* at 816.

80. *Id.* (noting that the Circuit Court Act was intended to prevent the newly elected president at the time, Thomas Jefferson, from filling any vacancies on the Supreme Court).

81. *Id.*

tices, especially greater burdens caused by growing circuit duties as new circuits were added, Congress enacted the Judiciary Act of 1807, which increased the number of Justices from six to seven.<sup>82</sup> In 1837, two more seats were added, creating nine seats on the Supreme Court.<sup>83</sup> In 1863, Congress passed more legislation increasing the number of Justices to ten.<sup>84</sup> Three years later in 1866, political tensions again played a role in the structure of the Court, cutting its size down to seven because of a desire to prevent President Andrew Johnson from appointing people who would “represent” his views about the unconstitutionality of Reconstruction legislation.<sup>85</sup>

The last adjustment to the Court size would come another three years later, with an increase from seven to nine Justices through the Judiciary Act of 1869.<sup>86</sup> The Act provided: “[T]he Supreme Court of the United States shall hereafter consist of the Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum . . . .”<sup>87</sup> Ever since, the size of the Court has remained at nine.<sup>88</sup> But such permanence did not come without effort. In 1937, President Franklin Delano Roosevelt tried to pack the Court with Justices who would be sympathetic to his New Deal legislative proposals.<sup>89</sup>

In sum, there are no apparent reasons for not increasing the number of Justices on the Supreme Court. Some criticisms about the size of the Court came in 1937 from several Justices themselves, who declared the following in opposition to President Roosevelt’s “court-packing” plan:

“[A] Court of nine is as large a court as is manageable. The Court could do its work, except for writing of the opinions, a good deal better if it were five rather than nine. Every man who is added to the Court adds another voice in counsel, and the most difficult work of the Court . . . is that that [sic] is done around the counsel table; and if you make the Court a convention instead of a small body of experts, you

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82. *Id.* at 816–17.

83. *Id.* at 816.

84. *Id.*

85. *Id.*; see also Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1162 & n.31 (2006) (discussing fluctuations in the size of the Court during Reconstruction).

86. BISKUPIC & WITT, *supra* note 67, at 816.

87. Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44, 44.

88. BISKUPIC & WITT, *supra* note 67, at 816.

89. *Id.* at 817; see also Vermeule, *supra* note 85, at 1156 (outlining Roosevelt’s court-packing plan).

will simply confuse counsel. It will confuse counsel within the Court, and will cloud the work of the Court and deteriorate and degenerate it.”<sup>90</sup>

Although increasing the size of the Court to fifteen may make it more difficult to reach majority decisions and build consensus, especially given the complexity of the cases the Supreme Court decides to review, such factors should not serve as a barrier to providing the full range of voices that can be represented on a larger Court. To my mind, the benefits of increased participation on the Supreme Court—such as greater legitimacy, a stronger dialogue between Justices, and the inclusion of a broader range of values and voices—far outweigh the negatives. Furthermore, there is precedent for such large decision-making judicial bodies on difficult legal issues in circuit court en-banc hearings.<sup>91</sup>

Although en banc review does not come without its criticisms,<sup>92</sup> most of these critiques are irrelevant when applied to the Supreme Court, which unlike en banc courts, consists of Justices who regularly work together in deliberating on and deciding cases. Arguments against the use of en banc proceedings include notions that such proceedings: (1) detract from the efficiency of appellate courts’ decision making by requiring all the circuit judges to engage in, on top of all their usual work, another round of written and oral arguments and deliberations; (2) undermine the finality of three-judge panel decisions; (3) displace resources that would otherwise be applied to non-en banc cases; (4) allow a politicized majority to abuse the process in a way that is designed to advance their own ideologies; (5)

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90. BISKUPIC & WITT, *supra* note 67, at 817 (quoting Charles Evans Hughes’s letter to Congress dated March 21, 1937) (omission in original).

91. See 28 U.S.C. § 44(a) (2000) (encoding the number of circuit judges on each of the several circuits); *id.* § 46(c) (specifying the number of circuit judges who sit during en banc review); FED. R. APP. P. 35(a) (determining when a hearing or rehearing en banc may be ordered); *Textile Mills Sec. Corp. v. Comm’r*, 314 U.S. 326, 335 (1941) (upholding the right of circuit courts to conduct en banc rehearings of prior three-judge panel decisions).

92. See, e.g., Irving R. Kaufman, *Do the Costs of the En Banc Proceeding Outweigh Its Advantages?*, 69 JUDICATURE 7, 7 (1985) (“It is axiomatic that three judges, in an intimate conference, will find the heart of a case more quickly than will eleven.”). En banc review is also not favored by the Federal Rules of Appellate Procedure. FED. R. APP. P. 35(a) (“An en banc hearing or rehearing is not favored and ordinarily will not be ordered . . .”); see also Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 29–30 (1988) (explaining that en banc reviews comprise less than 1 percent of cases decided on the merits).

result in fragmented, ambiguous opinions from the court; and (6) increase the difficulty of decision making among judges by increasing the number of arbiters involved in any decision.<sup>93</sup>

Unlike with circuit courts, however, an increase in the number of Justices on the Supreme Court would not negatively influence the Court by causing additional burdens of work, displacement of resources, or political abuses by majorities who can vote to come together to hear a case and advance their views. Unlike for federal appellate courts, merely increasing the number of Justices does not require any additional hearings that may divert attention from the usual work of the Supreme Court, nor does it create any further potential for ideological majorities to hold special hearings to advance their interpretations of the law. As Professor Michael Solimine has explained, “[T]he Supreme Court always sits en banc.”<sup>94</sup> Furthermore, unlike decisions before circuit courts, the finality of decisions before the Supreme Court would not be disturbed by the implementation of my proposal to enlarge the Court. After all, the Supreme Court is the final word on matters before the judiciary.

Even those criticisms of en banc review that apply to the Supreme Court do not present any serious concerns to my proposal for enlarging the Court. While it is true that having a greater number of Justices on the Supreme Court may result in more frequent authoring of concurring and dissenting opinions—and thus may result in more “ambiguous” decisions from the Court—these factors pose less risk of having any substantial effect on the Supreme Court than on circuit courts. First, because Supreme Court Justices have lifetime appointments and regularly work together to decide cases, they are unlike an en banc court that meets infrequently and are much more skilled at accommodating each other’s views in their work. This argument is supported by the findings of Professors Lewis Kornhauser and Lawrence Sager, who contend that “multi-judge courts are quite capable of behaving consistently. If each judge on a court acts consistently from case to case, so too will the court that they constitute.”<sup>95</sup> Second, unlike three-judge

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93. See Solimine, *supra* note 92, at 30, 32, 38–39; Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 829–51 (1993).

94. Solimine, *supra* note 92, at 49.

95. Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 83 (1986).

panel circuit decisions, the drafting of concurrences and dissents for Supreme Court cases is already a widespread practice and thus presents no real difference to the Court's usual method of resolving cases. Although I realize that there are concerns about the number of separate opinions written by Justices on the Court, I am not convinced that the authoring of these separate opinions is a serious cause for concern in every case. To the extent that these separate opinions ensure the inclusion of another voice, their existence is surely a positive. Additionally, as Professor Michael Stein has argued,

Because multiple opinions generally make individual judges' positions on specific issues more readily comprehensible and predictable . . . they add "considerable rationality, continuity, and legitimacy to the decision making process." This is especially true of dissenting opinions . . . . Consequently, "[s]ome of our greatest jurisprudence has been introduced into the law in the form of dissents and expressions of minority views."<sup>96</sup>

Moreover, while decisions by a fifteen-member Court may lead to more "vague" decisions as a result of the need to build a consensus among a larger number of Justices, it will also certainly lead, if principles of diversity are kept in mind, to the inclusion of a broader range of voices in the decision. If this "difficulty" in achieving uniformity in decisions is the price we must pay as the result of a larger Court, then that price is certainly worth what we would gain through greater inclusion of voices and increased legitimacy of the Court in the eyes of the public. Indeed, one of the benefits of an en banc court is that it "permit[s] the *full complement* of judges to pass on cases of exceptional importance."<sup>97</sup> And, Supreme Court cases are, by definition, of exceptional importance. Increasing the number of Justices to allow a full complement of voices across the United States to be represented in that process can only work to better the decision-making process. As many scholars have argued, "the involvement and interaction of more judges leads to sounder decisions."<sup>98</sup> In fact, Professors Kornhauser and Sager contend that "enlarging the number of judges who sit on a court can be expected to improve the court's performance."<sup>99</sup> Furthermore, just as "an en banc decision is assumed to command

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96. Stein, *supra* note 93, at 840–41 (citations omitted).

97. Solimine, *supra* note 92, at 39 (emphasis added) (internal quotation marks omitted).

98. *Id.* at 40.

99. Kornhauser and Sager, *supra* note 95, at 83.

greater authority and compliance, since it is not simply the product of a three-judge panel,”<sup>100</sup> a Supreme Court decision will command greater legitimacy if it is not simply the product of a narrow set of Justices with like racial, class, gender, work, sexuality, and religious backgrounds.

Finally, because I recognize that appointing six Justices at one time by one President may lead to other types of diversity but not necessarily diversity in general ideology, I recommend that this proposed increase in the size of the Court be phased in, with each addition requiring a supermajority approval by Congress. In other words, I believe that these concerns of diversity should be considered and worked toward over time and with much care. Specifically, I recommend that two Justices be appointed to the bench every three years until the Court reaches the size of fifteen. Thereafter, we could return to our present practice of filling in openings as Justices retire from their lifetime term.

#### CONCLUSION

In conclusion, I believe that diversity matters very much on the Court and increasing the size of the Court may be a means of helping to create true diversity, not just tokenism. As we have seen during the tenure of Justices Marshall, O’Connor, Thomas, and even majority Justices—who as a result of having their privileged status, are viewed as being nonracial, non-gendered, and uninfluenced by background—one’s life experiences certainly affect one’s judicial philosophy.

At the same time, however, I recognize that even similar backgrounds due to race, religion, gender, and other factors may themselves result in different voices among Justices within their own small communities.<sup>101</sup> But our experience with the judiciary leads me to believe that a higher number of differing voices on the bench will lead, not only to better decision making, but also to greater appreciation and acceptance during the appointment process of the full range of voices that may exist within different marginalized communities—that is, if tokenism is not continued in a way that excludes certain underrepresented voices at the expense of others.<sup>102</sup> Finally, a di-

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100. Solimine, *supra* note 92, at 40.

101. See Onwuachi-Willig, *supra* note 55, at 148–53 (describing differences in the judicial thinking of Justices Marshall and Thomas).

102. Cf. Coyle, *supra* note 37 (“[I]t’s not the case that Latino activists

verse, “representative” Court would signal to all members of society that their voices not only matter but are critical to the process of justice and fairness.<sup>103</sup>

In essence, this proposal is not just about the physical/descriptive representation over substantive representation. For the Court to increase its legitimacy and effectiveness, it is necessary to have a broad and fully inclusive range of voices on the bench.<sup>104</sup> As Justice Ruth Bader Ginsburg made clear while commenting on the open position that had been left by Justice O’Connor, it is not so much the physical representation itself that is important, but the representation of voice.<sup>105</sup> Increasing the number of Supreme Court Justices from nine to fifteen is a sound and workable way to achieve that goal.

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groups are going to oppose all conservative Latino nominees. If a conservative is in the mainstream, they will support a Latino because of the benefits of adding diversity to the court.” (quoting Kevin R. Johnson, Associate Dean and Public Interest Professor of Law and Chicana/o Studies at the University of California–Davis School of Law)).

103. Johnson, *supra* note 62, at 12 (indicating that “the appointment of a Latina/o to the Supreme Court would signal a movement toward full membership for Latina/os in American social life”).

104. Johnson & Fuentes-Rohwer, *supra* note 6, at 27, 49–51 (noting that “a ‘critical mass’ of minority group members serving on the bench would be more likely to transform the Court toward a more sophisticated understanding of race and racism”).

105. Nahal Toosi, *Ginsburg: ‘Any Woman Will Not Do’ for Job*, ABCNEWS.COM, Sept. 21, 2005, <http://abcnews.go.com/Politics/wireStory?id=1147816>. Justice Ginsburg proclaimed, “[A]ny woman will not do . . . . [There are] some women who might be appointed who would not advance human rights or women’s rights . . . .” *Id.* (internal quotation marks omitted).