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THE AFFIRMATIVELY HISPANIC JUDGE: MODERN OPPORTUNITIES FOR INCREASING HISPANIC REPRESENTATION ON THE FEDERAL BENCH

By Linda Maria Wayner†

INTRODUCTION

Diverse representation at the most elite levels of the legal profession is a compelling issue for all lawyers of color. Ascending to the ranks of the federal judiciary is a capstone achievement, requiring noteworthy credentials in addition to a serendipitous alignment of fortunate timing, political connections, and in some cases, particular demographic traits.[1] And for as long as there have been appointed federal judges, there have been debates about how they are chosen.[2] This much was especially evident in the course of Justice Sonia Sotomayor's confirmation process, where the overlapping debates surrounding affirmative action, judicial diversity, and the evolving notion of impartial justice all came to a head.

But why is diversity in the federal judiciary, or more specifically, the representation of Hispanics on the bench, important today? After all, we have elected an African-American president who in turn has appointed an African-American attorney general, a female solicitor general, and a Latina associate justice on the U.S. Supreme Court. Such laudable benchmarks must be signs of progress, so perhaps the champions of diversity should take a short break to congratulate themselves on these successes. I, however, believe no such hiatus is in order. By definition, electoral politics are highly impermanent. It is

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1. Ronald Lee Gilman, *Rookie Year on the Federal Bench*, 60 OHIO ST. L.J. 1085, 1085 (1999) (noting that "the permutations in legal experience, political connections, personality, and demographics [on the federal bench] are as varied as multiple views through a kaleidoscope. The only thing that can be said for certain is that, regardless of personal merit, one has to have the good fortune of being in the right place at the right time for the metamorphosis from bar to bench to materialize.").

2. Steven Zeidman, *Careful What You Wish For: Tough Questions, Honest Answers, and Innovative Approaches to Judicial Selection*, 34 FORDHAM URB. L. J. 473, 473–77 (2007) (discussing the challenges faced by state judge appointment commissions tasked with addressing "the multitude of issues encompassed by the call for 'diversity'").

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entirely possible that four years from today we could have a new president, a new attorney general, a new solicitor general, and perhaps revert back to an executive branch entirely lacking in diversity. Justice Sotomayor, notably, isn't going anywhere, which leads me to argue that the federal judiciary's composition continues to require our careful attention. In contrast to the elected branches, Article III federal judges enjoy lifetime tenure and therefore offer continuity in leadership.[3] Lifetime appointments, and the trend toward nominating younger judicial candidates,[4] mean that turnover occurs at a much more gradual rate than congressional representatives, senators, and of course, presidents.

Federal judges are also the gatekeepers and interpreters of a wide range of issues that are of growing importance to Hispanics.[5] Immigration, workplace discrimination, civil rights, voting rights, prisoner rights, access to education, and criminal procedure (including application of the death penalty) are among the legal issues that disproportionally affect the day-to-day experiences of this ethnic demographic. Although federal judges, apart from the U.S. Supreme Court, tend to be a largely anonymous group outside their respective districts and circuits, their rulings still yield far-reaching cumulative impact on significant numbers of individuals. Any institution possessing this much influence deserves an ongoing critical examination of its demography, as shown (for example) by the perpetually keen interest in the composition and psychology of race and jury selection.[6]

3. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

4. The average age of the current sitting Supreme Court justices is sixty-nine. *See* Press Release, Congressman Jeff Fortenberry, The Supreme Court Nomination Process (July 10, 2009), *available at* http://fortenberry.house.gov/2009/07/the-supreme-court-nomination-process.shtml (last visited on Oct. 29, 2009) (stating that the average age of the current sitting Supreme Court justices is sixty-nine. Of all the Supreme Court justices nominated since 1992, only Ruth Bader Ginsburg was in her sixties (she was sixty at the time of her confirmation). The remaining contemporary nominees were forty-three years old (Clarence Thomas); fifty years old (John Roberts); fifty-four years old (Sonia Sotomayor); fifty-five years old (Samuel Alito); and fifty-six years old (Stephen Breyer), *id.*).

5. This article refers to "Hispanics" and "Latinos" interchangeably. There is substantial debate on which should be the preferred moniker, which I do not address here. Due to my affiliation with the Hispanic National Bar Association, I veer toward "Hispanic" for no other reason than general habit.

6. *See* Kevin Johnson, A Principled Approach to the Quest for Racial Diversity on the Judiciary, 10 U. MICH. J. RACE & L. 5, 6 (2004–2005) ("Trial lawyers fully understand that racial composition of a jury may determine the outcome of a case, and the public fully shares this understanding. For example, no rebuke stings more than the concise statement that an 'all-White' jury convicted a Black defendant," *id.*).

There is an abundance of literature on how race shapes, or has the potential to shape, judicial decision-making.[7] Rather than looking to what occurs once a Hispanic judge dons his or her robes, this Article examines the how and why of getting that judge appointed. Part I of this Article will review both the statistics of the general Hispanic population in the United States and examine how demographic changes warrant a renewed commitment to a diversified judiciary, and similarly review the current Hispanic composition serving on the federal bench. Part II will discuss why we should aim for representational parity between the percentage of Hispanics on the federal bench and the percentage of Hispanics residing in the United States. Part III will conclude that the Obama administration has the opportunity and mandate to aggressively promote Hispanic candidates to the federal judiciary, with the goal of continuing the upward trajectory that most recently occurred during the presidential administrations of Bill Clinton and George W. Bush.

PART I: TRENDS IN HISPANIC POPULATION AND FEDERAL JUDICIAL APPOINTMENTS

A. *The Importance of Demography: Post-2000 Hispanic Population Trends*

The 2000 U.S. Census reported that Hispanics at that time represented 12.5 percent of the country's population, or 35.3 million out of 284.1 million residents.[8] This number was particularly remarkable when contrasted against the prior decennial census results: between 1990 and 2000, the Hispanic population grew by an extraordinary 57.9 percent.[9] In the top twenty fastest-growing cities in the United States, Hispanic presence rose by 72 percent during this ten year period.[10] Notably, Hispanic population growth since the year 2000 has been more a product of natural population increase (the net of all births minus all deaths) rather than immigration, signifying a reversal in past trends.[11] Updated population surveys for 2002 indicated a ten percent growth rate within the Hispanic community had occurred in the span

7. *See, e.g.*, Theresa M. Beiner, *Diversity on the Bench and the Quest for Justice for All*, 33 OHIO N.U. L. REV. 481, 484–87 (2007) (discussing the data and findings of political scientist Nancy Crowe's analysis of the influence of judges' race and gender on sex discrimination cases); *see* Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decision Making in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005).

8. BETSY GUZMAN, U.S. CENSUS BUREAU, THE HISPANIC POPULATION: CENSUS 2000 BRIEF 1 (2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf.

9. *Id.* at 2.

10. Eric Schmidt, *Whites in Minority in Largest Cities, Census Shows*, N.Y. TIMES, Apr. 30, 2001, at A1, *available at* http://www.nytimes.com/2001/04/30/national/30CENS.html?pagewanted=1.

11. RICHARD FRY, PEW HISPANIC CENTER, LATINO SETTLEMENT IN THE NEW CENTURY, at i (2008), *available at* http://pewhispanic.org/files/reports/96.pdf.

of only two years (between 2000 and 2002) continuing the "dizzying rise" of the number of Hispanics living in the United States.[12] By 2007, the U.S. Census's American Community Survey found that the percentage of Hispanics in the United States had grown again, now to 15 percent of the entire American population.[13] As we approach the next decennial census, projections for 2010 estimate that the Hispanic percentage of Americans will climb to 16.03 percent.[14] By the year 2050, nearly one in every three Americans will be Hispanic.[15]

These raw numbers only tell one part of the story, because any discussion about Hispanic population growth inevitably raises the question of unauthorized immigration. In other words, if Hispanic population growth has traditionally been driven by unauthorized immigration, then the socio-political characteristics of this group are in many ways distinct from otherwise comparable minority demographic groups whose members generally enjoy all the benefits of American citizenship or permanent residence status. Therefore I would be remiss to ignore this opportunity to help dispel the myth that all or most Hispanics are undocumented. For the purpose of this discussion, it is critical to address the pernicious stereotype that casts all Hispanics (along with individuals of Hispanic appearance) as having dubious immigration status and therefore possessing a lesser entitlement to constitutional rights, political representation, and access to a fair and diverse judiciary. While it is true that the vast majority of undocumented immigrants present in the United States are from Latin America, it plainly does not follow that most Hispanics present in the United States are undocumented immigrants.

As of March 2008, approximately 4 percent of the United States population consisted of undocumented immigrants.[16] As mentioned earlier, statistics for 2007 show that 15 percent of the United States' population is Hispanic, which means that even if *every* undocumented immigrant in the United States were Hispanic, the result would be that fewer than one third of all Hispanics would be undocumented. Of course, we know that not every undocumented immigrant is His-

12. Lynette Clemetson, *Hispanic Population Is Rising Swiftly, Census Bureau Says*, N.Y. TIMES, June 19, 2003, at A22, *available at* http://www.nytimes.com/2003/06/19/us/hispanic-population-is-rising-swiftly-census-bureau-says.html?pagewanted=1.

13. PEW HISPANIC CENTER, STATISTICAL PORTRAITS OF HISPANICS IN THE UNITED STATES, 2007 (2007), *available at* http://pewhispanic.org/files/factsheets/hispanics2007/Table-1.pdf.

14. U.S. CENSUS BUREAU, PERCENT OF THE PROJECTED POPULATION BY RACE AND HISPANIC ORIGIN FOR THE UNITED STATES: 2008–2050 (2008), http://www.census.gov/population/www/projections/tablesandcharts/table_4.xls.

15. Press Release, U.S. Census Bureau, An Older and More Diverse Nation by Midcentury (Aug. 14, 2008), *available at* http://www.census.gov/Press-Release/www/releases/archives/population/012496.html.

16. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, at i (2009) *available at* http://pewhispanic.org/files/reports/107.pdf.

panic, because the top ten states of origin for undocumented immigrants consists of the Philippines, Korea, China, Brazil,[17] and India, in addition to Mexico, El Salvador, Guatemala, Ecuador and Honduras.[18] Relying upon January 2008 statistics from the Department of Homeland Security, it appears that approximately 74 percent of all undocumented immigrants are from Latin American countries.[19] From this we can conclude that roughly three percent of the United States population consists of undocumented Hispanics, and that only 20 percent of the entire Hispanic population is actually undocumented.

Furthermore, the most current research shows more Hispanics are increasingly entering the United States as legal immigrants rather than as undocumented immigrants,[20] likely due to a combination of factors such as declining United States economic conditions and heightened domestic enforcement of immigration regulations. Recent statistics also reveal that a rapidly increasing portion of the Hispanics consist of American-born children of immigrants.[21] As of May 2009, Hispanics now make up 22 percent of all children under the age of eighteen in the United States, compared to only nine percent in 1980.[22] Contrary to widely held public misperceptions that most Hispanic children in the United States are present illegally, of the 16 million Hispanic chil-

17. The United States Census Bureau does not list Brazil among its list of South American countries of origin for Hispanic immigrants, presumably because a commonly accepted factor for Hispanic or Latino classification is usually an affiliation with a Spanish-speaking culture. *See* U.S. CENSUS BUREAU, HISPANIC OR LATINO ORIGIN BY SPECIFIC ORIGIN (2006), *available at* http://factfinder.census.gov/servlet/DTTable?_bm=Y&-geo_id=01000US&-ds_name=ACS_2006_EST_G00_&-mt_name=ACS_2006_EST_G2000_B03001.

18. MICHAEL HOEFER, NANCY RYTINA, & BRYAN C. BAKER, DEP'T OF HOMELAND SECURITY: OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2008, at 4 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf. The Department of Homeland Security lists the following states as the top ten countries of birth for unauthorized immigrant populations as of 2008 in descending order: Mexico (61 percent); El Salvador (5 percent); the Philippines (4 percent); Guatemala (3 percent); Honduras (3 percent); Korea (2 percent); China (2 percent); Brazil (2 percent); Ecuador (1 percent); India (1 percent). *Id.* These top ten countries comprise approximately 83 percent of all undocumented immigrants, with the remaining 17 percent immigrating from all other countries from around the world at rates of 1 percent or less. *Id.*

19. *Id.*

20. *See* JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW, at iii (2008), *available at* http://pewhispanic.org/files/reports/94.pdf (noting that the number of undocumented immigrants from Mexico has leveled off since 2007, and inflow from all other Latin American countries has declined).

21. RICHARD FRY & JEFFREY S. PASSEL, PEW HISPANIC CENTER LATINO CHILDREN: A MAJORITY ARE U.S. BORN OFFSPRING OF IMMIGRANTS, at i (2009), *available at* http://pewhispanic.org/files/reports/110.pdf.

22. *Id.*

dren currently residing in the United States, only 7 percent are undocumented.[23]

Setting aside the empirical evidence demonstrating that most Hispanics are either citizens or possess some form of legal immigration status, an outsider unfamiliar with our nation's history of race relations might return to the question of why this distinction between documented and undocumented Hispanics is relevant to a discussion about diversifying the federal judiciary. It is tempting to rely on the charmingly basic idea that as most Hispanics are legally present in the United States, they are reasonable to expect a judiciary able to recognize and empathize with issues that are of particular concern to minorities in general and Hispanics specifically.[24] The more challenging position, that every Hispanic (regardless of immigration status) is entitled to a fair and diverse judiciary, is politically problematic for obvious reasons, even if it is true as a moral and legal matter. One can hardly imagine defending the complete absence of African-American judges prior to the Civil War with the arguments that most African-Americans at that time were slaves and therefore less entitled to fairness before the law.[25] Yet attitudes toward undocumented immigrants and their right to have full access to the American justice system remains a hot point of contention among politicians and commentators, and thus the nation at large.

On its face, it may seem logically counterintuitive to propose that undocumented immigrants have an equal prerogative to a diverse judiciary when they do not even possess full equal treatment under the law. In immigration proceedings, undocumented immigrants have a largely illusory statutory right and a terribly weak constitutional right

23. *Id.* at ii (citing PASSEL & COHN, *supra* note 16).

24. President Barack Obama's stated intention to appoint a Supreme Court justice "who understands justice isn't about an abstract legal theory" and who possesses the empathy as "an essential ingredient for arriving at just decisions and outcomes" triggered a national debate on whether a truly empathic judge is capable of impartially interpreting the law. Peter Slevin, *Obama Makes Empathy a Requirement for Court*, WASH. POST, May 13, 2009, at A3 (quoting Barack Obama's remarks) *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/05/12/AR2009051203515.html. In her Senate confirmation hearings, now Justice Sonia Sotomayor walked a very fine line that permitted her to simultaneously speak appreciatively of her background and heritage while also comforting critics who feared that a Hispanic judge would allow ethnicity to control her decision-making. *See Confirmation of Sonia Sotomayor: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 3, 6 (2009), *available at* http://latimesblogs.latimes.com/washington/2009/07/sonia-sotomayor-hearing-transcript.html.

25. It took more than seventy years after the Civil War for an African-American to be appointed to the federal bench. *See* American Bar Association, Raising the Bar: Pioneers in the Legal Profession, Black History Month 2003 Profile: William Henry Hastie, (Feb. 2003), http://www.abanet.org/publiced/bh_hastie.html. William Henry Hastie was the first African-American to serve as a district court judge in 1937 and the first to become a federal appellate judge in 1949. *See id.*

to counsel.[26] Undocumented immigrants do not get the benefit of all criminal procedure protections, such as the exclusionary rule, or the full opportunity to defend against illegal searches that might result in deportation, pursuant to the Supreme Court's 1984 ruling in *INS v. Lopez-Mendoza*.[27] In recent years, a number of municipalities have adopted local ordinances which were later found to unconstitutionally infringe upon undocumented immigrants' ability to obtain housing and to work without fear of racial profiling and harassment by local police.[28] Until 2002, undocumented immigrants were entitled to a wide range of rights and remedies under federal workplace protections. The United States Supreme Court dramatically curtailed those rights when it issued its opinion in *Hoffman Plastic Compounds, Inc. v. NLRB*, which stripped undocumented immigrants of the right to pursue back pay claims against employers.[29] Access to state and federal public benefit programs is severely restricted.[30] In most states, undocumented immigrants are not permitted to apply for drivers licenses, even when law enforcement organizations agree that providing such a benefit would serve public safety interests.[31] While many question the wisdom of such measures, for the purpose of this Article—and the current question of whether lesser rights under the law for undocumented immigrants necessarily implies a lesser expectation of a diverse judiciary—it is sufficient to establish that undocumented Hispanic immigrants undoubtedly live in a different legal tier than their legally present counterparts.[32]

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26. *See* Mark T. Fennell, *Preserving Process in the Wake of Policy: The Need for Appointed Counsel in Immigration Proceedings*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 261, 261–72 (2009).

27. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984). Among the various reasons for ruling that immigrants cannot invoke the exclusionary rule during the course of an immigration proceeding was sheer administrative burden. Justice O'Connor stated in the majority opinion that "the average immigration judge handles about six deportation hearings per day. Neither the hearing officers nor the attorneys participating in those hearings are likely to be well versed in the intricacies of Fourth Amendment law. . . Immigration officers apprehend over one million deportable aliens in this country every year. A single agent may arrest illegal aliens every day. Although the investigatory burden does not justify the commission of constitutional violations, the officers cannot be expected to compile elaborate, contemporaneous, written reports detailing the circumstances of every arrest." *Id.* at 1048–49.

28. *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 538 (M.D. Pa. 2007); Doe v. Vill. of Mamaroneck, 462 F. Supp. 2d 520, 559–60 (S.D.N.Y. 2006).

29. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151 (2002).

30. Tanya Broder, *Immigrant Eligibility for Public Benefits*, *in* IMMIGRATION & NATIONALITY LAW HANDBOOK 759 (2005–06 ed. 2005).

31. NAT'L IMMIGRATION LAW CENTER, OVERVIEW OF STATES' DRIVER'S LICENSE REQUIREMENTS (2009), http://www.nilc.org/immspbs/DLs/state_dl_rqrmts_ovrvw_2009-04-27.pdf; NAT'L IMMIGRATION LAW CENTER, DRIVER'S LICENSE FOR ALL IMMIGRANTS: QUOTES FROM LAW ENFORCEMENT (2004), http://www.nilc.org/immspbs/DLs/DL_law_enfrcmnt_quotes_101404.pdf.

32. *See, e.g.*, Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1366–71 (2009) (surveying and analyzing

This premise is relevant to pursuing increased Hispanic representation on the federal bench because it forces our profession to consider the impact of immigration demographics on the law in general and the law as a profession. It also calls into question the dangerous overlap between the legal protections we afford to minorities versus the far more limited set afforded to undocumented immigrants.[33] If there is a public normative association between Hispanics in general and unauthorized immigration, this undoubtedly undermines broader social attempts to diversify elite institutions such as the federal judiciary. And when measuring the progress of Hispanics attempting to propel upward toward a judgeship, we should perhaps consider the equally troublesome notion that undocumented immigrants' inferior legal rights may be partly attributable to the historical lack of diversity on the federal bench, which has only in recent decades begun to approach proportional representation of Hispanics.

B. *Contemporary Hispanic Appointments to the Federal Bench*

There are 768 active federal judges serving today, along with an additional 512 who work under senior status designation, for a total of 1,280 sitting federal judges. Of the 768 active judges, 59 (or 7.68 percent) are Hispanic. Of the 512 senior judges, 12 (or 2.34 percent) are Hispanic.[34] If we combine the two categories, we conclude that 5.55 percent of all sitting federal judges are of Hispanic heritage.[35] If we subtract the seven active judges serving in the district court of Puerto Rico (which traditionally has been an all Hispanic court, and thus does not reflect national trends) the number of active Hispanic judges drops to 52 out of 761, or 6.83 percent of the active totality.[36] Of the 59 active Hispanic federal judges referenced above, 1 serves on the Supreme Court and 11 serve at the circuit court appellate level.[37] This means that of the current 159 active circuit court appellate judges, 7.55 percent are Hispanic. When including senior circuit court appellate judges in the calculation, a mere 2 Hispanics out of 111, the Hispanic

the general decline in rights experienced by undocumented laborers in the United States).

33. For a detailed discussion of the minority/immigrant overlap as it pertains to civil rights, see Kevin Johnson, *The End of "Civil Rights" As We Know It? Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481 (2002).

34. *See* Federal Judicial Center, History of the Federal Judiciary, Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf (follow "Judges of the United States Courts" hyperlink; then follow "The Federal Judges Biographical Database" hyperlink; reader can sort various data regarding federal judges) (last visited Feb. 28, 2010).

35. *See id.* This figure reflects only judges sitting on the U.S. district courts, U.S. circuit courts of appeal, the Court of International Trade, and the U.S. Supreme Court, thus excluding U.S. magistrates and U.S. bankruptcy court judges. *Id.*

36. *See id.*

37. *See id.* This figure includes both the U.S. circuit courts of appeal and the U.S. Supreme Court. *Id.*

percentage drops to 4.8 percent. On the district court side, 47 out of the 593 active judges are Hispanic, or 7.93 percent.[38] Excluding the District of Puerto Rico, the figure drops to 40 Hispanics out of 586, or 6.83 percent.[39]

To be sure, Hispanics—along with women, African-Americans, and Asians—have in recent decades obtained progress toward diversifying the federal bench. Prior to 1976, only thirty-three ethnic minorities had ever been appointed to serve on the federal bench.[40] President Jimmy Carter appointed fifty-five during his single term in office, marking a pronounced expansion of opportunities for minorities to pursue appointments.[41] Since the Carter administration, we have witnessed a surge of Hispanic appointments, followed by a significant dip during the Reagan and George H.W. Bush presidencies, followed by a gradual rise back to Carter-era levels during the Clinton and George W. Bush administrations.[42] Jimmy Carter appointed fourteen Hispanic federal judges during his four years in office, representing 6.9 percent of his judicial appointments.[43] In contrast, Ronald Reagan appointed thirteen Hispanic federal judges during his eight years in office, constituting only 4.8 percent of his appointments.[44] George H.W. Bush followed this declining course, appointing six Hispanics during his four-year term, consisting of 4 percent of his appointments.[45] Bill Clinton returned the numbers almost back to the Carter-era level when he named a then-record of eighteen Hispanic judges during his eight-year term, which made up 5.9 percent of his appointments.[46] George W. Bush had the best record of appointing Hispanics: twenty-six appointees during his eight years as president, or 10 percent of his tenure's total judicial appointments.[47]

While these numbers may paint a cautiously optimistic picture, we must remember that presidential administration appointments in the single or low double-digits do little to influence the percentage of Hispanics represented in the entire federal judiciary, which is composed of nearly 800 individuals.[48] George W. Bush's record 10 percent of Hispanic appointments out of all his confirmed judicial nominees still fell more than 30 percent short of delivering parity for the Hispanic 15

38. *Id.*

39. *Id.*

40. Elliot E. Slotnick, *A Historical Perspective on Federal Judicial Selection*, 86 JUDICATURE 13, 15 (2002).

41. *Id.*

42. Sheldon Goldman, Sara Schiavoni & Elliot Slotnick, *W. Bush's Judicial Legacy: Mission Accomplished*, 92 JUDICATURE 258, 279 (2009).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 278–79.

48. *See* Federal Judicial Center, *supra* note 34.

percent of the American population.[49] Had George W. Bush been willing and able to deliver a Hispanic 15 percent of his judicial appointments, it still would not have resulted in pushing the overall figure (which is currently just under 12 percent) to a level commensurate with the current Hispanic population figures.[50] Looking to the likely results of the 2010 census, for which predictions are that the Hispanic population will expand to 16.03 percent,[51] the proportional gap will continue to grow unless the current and future presidents nominate (and the Senate confirms) a substantially larger group of Hispanic candidates. As lifetime tenure on the bench results in very low turnover,[52] demographic shifts for any group in any direction are apt to be slow. Given that the first Hispanic male federal judge was appointed less than fifty years ago in 1961, and the first Hispanic woman less than thirty years ago in 1980,[53] the urge to hastily compensate for such a long period of absence competes with the conventional wisdom that institutional change usually comes at a frustratingly gradual speed. Advocates for change must—in marathon fashion—patiently push forward with an eye toward the long term, but we will also have to pick up the pace significantly to make up for lost time.

One area that advocates could target in the short term is geographic equity. While it is gratifying to see that, as of late, there are more Hispanic federal judges overall, there are several regions in the United States with higher than average Hispanic populations yet lower than average numbers of Hispanic federal judges. For example, the United States Census reported in May 2009 that New York City's

49. Goldman et al., *supra* note 42, at 278.

50. Rorie Spill Solberg, *Court Size and Diversity on the Bench: The Ninth Circuit and Its Sisters*, 48 ARIZ. L. REV. 247, 248 (2006). In her analysis of the Ninth Circuit Court of Appeals, Solberg succinctly notes that "[a] President may appoint a large number of women or Hispanics to the bench, but if these appointments only replace exiting nontraditional judges, the levels of representation for women and minorities remains stagnant." *Id.*

51. U.S. CENSUS BUREAU, *supra* note 14.

52. Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice— 1789–1992*, 142 U. PA. L. REV. 333, 405 (1993); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1, 36 n.55 (1993). Modern federal judges serve relatively longer tenures, and thus leave office at much lower rates, for a variety reasons, including lengthening life span and higher rates of transitions to senior status. *See* Judith Resnick, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 615–19 (2005).

53. Just the Beginning Foundation, Reynaldo Guerra Garza, http://www.jtbf.org/index.php?src=directory&view=biographies&srctype=detail&refno=98&category=hispanic%20Judges (last visited Feb. 15, 2010). Reynaldo Guerra Garza was the first Hispanic to serve as a federal district court judge in 1961 (in the Southern District of Texas) and the first to serve as a federal appellate judge in 1978 (in the Fifth Circuit). Carmen Consuelo Cerezo became the first female Hispanic federal judge in 1980, named to the District of Puerto Rico where she currently still serves. Just the Beginning Foundation, Carmen Consuelo Cerezo, http://www.jtbf.org/index.php?src=directory&view=biographies&srctype=detail&refno=102&category=hispanic%20Judges.

Hispanic community represented 28 percent of the entire city population.[54] Yet the Southern District of New York (which consists of Manhattan, the Bronx, and several additional nearby counties) only has 1 Hispanic district judge (or 3.7 percent) out of the 27 currently sitting.[55] The Second Circuit Court of Appeals, which presides over New York, Connecticut, and Vermont, also currently has but 1 Hispanic appellate judge (or 4.5 percent) out of 22 active judges.[56] By combining New York, Connecticut, and Vermont's Hispanic populations (3.1 million, 411,000, and 6,000, respectively)[57] and comparing those figures against the estimated entire populations of these states (19.49 million, 3.5 million, and 621,000, respectively),[58] we see that 13.4 percent of the Second Circuit states is comprised of Hispanics.[59] There is a disquieting rift between the face of these courts and the population governed by their pronouncements.

Certain federal appellate circuits are regions where one state has a considerably larger-than-average Hispanic community, versus other states within the circuit possessing lower-than-average Hispanic populations. The result tends to suggest progress by producing federal Hispanic judge statistics that surpass the national population average of 15 percent, but fall short of parity with the local Hispanic populations. For example, the Fifth Circuit today has three Hispanics among its active sixteen appellate judges, translating into 18.75 percent Hispanic representation.[60] Texas, Louisiana, and Mississippi comprise this cir-

54. Sam Roberts, *Hispanic Population's Growth Propelled City to a Census Record*, N.Y. TIMES, May 14, 2009, at A27, *available at* http://www.nytimes.com/2009/05/14/nyregion/14nycensus.html.

55. The Honorable Victor Marrero was nominated by Bill Clinton in 1999 to assume the district court seat vacated by Sonia Sotomayor when she was elevated to the Second Circuit Court of Appeals. *See* Federal Judicial Center, Profile of Victor Marrero, http://www.fjc.gov/history/home.nsf (follow "Judges of the United States Courts" hyperlink; then search "Marrero, Victor") (last visited Jan. 31, 2010).

56. The Honorable José A. Cabranes was nominated by Bill Clinton in 1994. *See* Second Circuit Court of Appeals, Circuit Judges' Biographical Information, http://www.ca2.uscourts.gov/judgesbio.htm (last visited Jan. 23, 2010). Between 1998 and 2009, there were two Hispanics on the Second Circuit, as Sonia Sotomayor served on that bench until her 2009 confirmation to the Supreme Court.

57. Pew Hispanic Center, State and County Databases, http://pewhispanic.org/states (last visited Jan. 23, 2010).

58. U.S. CENSUS BUREAU, TABLE 1: ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2008 (2008), http://www.census.gov/popest/states/tables/NST-EST2008-01.xls.

59. This analysis aggregates the populations of New York, Connecticut, and Vermont, which have widely varying total populations and similarly varying Hispanic percentages (16 percent, 12 percent, and 1 percent). Because the Second Circuit Court of Appeals has jurisdiction over the combined areas, and its opinions control in all three states regardless of the dispute's origin, it is appropriate to approach these statistics cumulatively, rather than on a state-by-state basis.

60. Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1430 (2008) (defining symbolic diversity as communicating values pertaining to "what we stand for as a people and—

cuit, with those states possessing Hispanic populations of 36.5 percent, 3.4 percent, and 2.2 percent, respectively.[61] With a combined population of 31,676,388 within these three states, Hispanics make up 28.62 percent of the population residing in the Fifth Circuit.[62] An even wider gap exists within Texas, the Fifth Circuit state with the largest Hispanic community.[63] Of the forty-six sitting federal district court judges in Texas, eleven (or 23.91 percent) are Hispanic.[64] While 23.91 percent is several percentage points higher than the national average, it still represents a nearly 13 percent disparity between the state population and its presiding federal district courts.[65]

Not all regions share the same lack of Hispanic representation. Most of the states in the Ninth Circuit Court of Appeals have significant Hispanic populations. California's population is 36.6 percent Hispanic, followed by Arizona (30.1 percent), Nevada (25.7 percent), Oregon (11 percent), Idaho (10.2 percent), Washington (9.8 percent), Hawaii (8.7 percent), Alaska (6.1 percent) and Montana (3 percent).[66] A total of twenty-seven appellate judges are active on the Ninth Circuit and six of those are Hispanic.[67] With a collective Hispanic population of 17,291,073 in the Ninth Circuit, and a collective total population of 60,662,044, Hispanics make up 28.5 percent of all the people, and 22.2 percent of the federal appellate judges. A 6.3 percent lag is no cause to celebrate, it is a possible move toward population-judicial parity. The addition of one Hispanic judge (assuming the court remained at a total of twenty-seven judges) would drive the percentage up to 25.9 percent, and the addition of two Hispanic judges would achieve parity by bringing the Hispanic percentage to 29.6 percent.

PART II: REPRESENTATIONAL PARITY IS A WORTHY OBJECTIVE

The legal profession has long acknowledged that it must do more to increase Hispanics within its ranks because, if for no other reason, the swelling Hispanic community needs and deserves to have access to legal officers who are sensitive to the unique blend of legal issues that Hispanics routinely face.[68] Hispanic clients have in the past and will

when carried out through presidential appointments—what ideals presidents and political parties champion.").

61. U.S. Census Bureau, State and Country QuickFacts, http://quickfacts.census.gov/qfd/index.html (select each state from the drop-down menu) (last visited Jan. 31, 2010).

62. *Id.*

63. *Id.*

64. *See* Federal Judicial Center, *supra* note 34

65. *Id.*

66. U.S. Census Bureau, *supra* note 61.

67. Federal Judicial Center, *supra* note 34.

68. For example, if a Hispanic business owner is searching for an attorney to visit with an otherwise straightforward contract matter, that client may require an agreement to be translated into Spanish or have questions about the effect of immigration

continue in the future to approach the legal system with frustration and apprehension if there is a perceived shortage of empathetic and competent attorneys to serve their needs.[69] And while there may well be a sufficient number of non-Hispanic attorneys who are perfectly capable of serving a Hispanic clientele, the mere appearance of excluding Hispanics from the bar perpetuates a latent distrust of legal institutions in general.[70]

These arguments, and more, certainly apply to the cause of diversifying the federal judiciary. Our sense of fairness and trust in the judicial system depend upon impartiality, and judicial accountability (and the accountability of the leaders who appoint and confirm federal judges) turns on the notion of popular representation.[71] With regard to increasing Hispanic presence on the federal bench, I have identified three primary reasons why representational parity—that is, a proportional relationship between the percentage of Hispanics in the United States and the number of sitting Hispanic federal judges—is a worthy objective.[72] First, symbolic representation is ultimately an insufficient tool for promoting systemic change. Second, representational parity will produce the benefits of critical mass, thereby replicating the real world diversity of perspectives that exists within the Hispanic community. Third, representational parity will reinforce the federal judiciary's credibility among Hispanics and society at large. An obvious disparity between the United States Hispanic population versus the number of Hispanics empowered to apply the law at the highest levels of society weakens the federal judiciary's credibility by drawing into

status on the rights of the parties. Hispanic criminal defendants similarly may have, in addition to their specific charge, concerns about racial profiling or, in the cases of non-citizens, access to consular assistance. *See* Renata Ann Gowie, *Driving While Mexican: Why the Supreme Court Must Reexamine* United States v. Brignoni-Ponce, *422 U.S. 873 (1975)*, 23 HOUS. J. INT'L L. 233, 234–35 (2001).

69. *See* Juan Carlos Linares, *Si Se Puede? Chicago Latinos Speak on Law, the Law School Experience and the Need for an Increased Latino Bar*, 2 DEPAUL J. SOC. JUST. 321, 328 (2009) (citing Linweh Mah, *The Legal Profession Faces New Faces: How Lawyers' Professional Norms Should Change to Serve a Changing American Population*, 93 CAL. L. REV. 1721, 1722 (2005)).

70. *See id.* at 331.

71. James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 775 (2004).

72. This article is limited to discussions specific to the Hispanic community, however many if not all of these points could be used to support representational parity for all minority groups. My argument assumes that advocates for increasing the number of Hispanic federal judges would likely be sympathetic toward other minority groups' parallel efforts. I must acknowledge, of course, that there will always be cases where minority candidates may be competing for the same open judicial slots, meaning that one (or more) minorities will be excluded in favor of another. Rather than suggest that minority groups should take adversarial stances against one another, I believe that by encouraging more qualified applicants to actively and strategically pursue federal judgeships we can raise the tide, so to speak, and lift the overall numbers across the board for all minority groups.

question the fairness of an institution that does not proportionally represent its citizenry.

As a principal matter, my call for representational parity is in no way an endorsement of racial quotas. Apart from the Supreme Court's explicit rejection of racial quotas as unconstitutional,[73] the American public clearly has no appetite for a system of selection that hints at promoting under-qualified individuals. For example, there is an enormous difference between the admission process of elite higher education institutions that have historically been vulnerable to accusations of employing quotas, and the selection process for federal judges, which I discuss further below. Essentially, I see quotas and critical mass as two distinct concepts, and for reasons I will subsequently explore, there is truly no need to apply quotas (or any masked version thereof) to achieve Hispanic representational parity on the federal bench.

Historical "firsts" are important. There is a reason why most people can identify the pioneers George Washington, Jackie Robinson, and Sally Ride, along with their groundbreaking accomplishments. Pioneers are an ideal media and schoolbook item because they are so often the product of compelling human interest narratives. For this reason, they are celebrated by journalists, advocacy groups, and educators, and thus become ingrained in our collective consciousness. Who could possibly quantify the amount of media coverage and scholarly analysis devoted to the symbolism of the United States electing its first African-American president? Unsurprisingly, there is enormous pride associated with the shattering of a barrier, both by the group being represented by the pioneer and the country as a whole. Upon Barack Obama's election, African-Americans celebrated this momentous "first" along with many Caucasians, Hispanics, Asians, Native Americans and others who acknowledged the noteworthy progress of a nation that has struggled with race relations since its inception. In the context of democratic government, symbolic diversity assumes powerful significance when a president appoints a "first."[74] Sonia Sotomayor's nomination to the Supreme Court arguably generated more discussion about her Hispanic heritage than her educational history, professional credentials, or jurisprudential record combined.[75]

73. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314–20 (1978).

74. Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND L.J. 1423, 1430 (2008) (defining symbolic diversity as communicating values pertaining to "what we stand for as a people and—when carried out through presidential appointments—what ideals presidents and political parties champion").

75. Sheryl Gay Stolberg, *A Trailblazer and a Dreamer*, N.Y. TIMES, May 27, 2009, at A1; David D. Kirkpatrick, *A Judge's Focus on Race Issues May Be Hurdle*, N.Y. TIMES, May 30, 2009, at A1. Coverage of Sotomayor's heritage and its impact on her professional life was not universally positive. The highly positive acclamations of her rise from a single-parent home in the Bronx to the Ivy League and federal bench were

One of the clear benefits of symbolic minority achievements is the creation of role models. When presidents appoint a "first" woman or minority, they are traditionally expressing an appreciation for diversity and professing a desire to help correct a history of past discrimination.[76] President Barack Obama articulated as much in his announcement of Sotomayor's nomination. "[W]hen Sonia Sotomayor ascends those marble steps to assume her seat on the highest court of the land, America will have taken another important step towards realizing the ideal that is etched above its entrance: Equal justice under the law."[77] Whether or not it is their intended goal, minority pioneers are christened role models for the underrepresented and marginalized, and subsequently must endure the privileges, responsibility, and scrutiny that come with the designation.[78] The public benefit of having such role models is difficult to dispute, as it encourages marginalized groups to pursue the rewards of civic engagement and motivates individuals to aspire to leadership in greater numbers.

I agree that role models are important, but they don't necessarily imply systemic progress for their demographic group. To the contrary, pioneer role models more accurately indicate that a door has just recently opened (whether it be to the White House, the Supreme Court, a baseball field, or a space shuttle), and that it is now theoretically possible for additional minorities to follow, or more realistically, to trickle in. Other scholars even argue that placing minority judges on the role model pedestal serves far more harm than good by making these pioneers mere cosmetic symbols, credited more for their inspirational life journeys instead of their judicial competence and potential to bring a fresh perspective to the bench.[79] Indeed, this was evident in Sonia Sotomayor's confirmation process. Her Hispanic heritage satisfied public calls to bring an underrepresented demographic to the nation's highest court, but it also forced Sotomayor to assure the Senate, and the American public, that her experiences as a Puerto Rican woman would have little or no impact on her performance as a justice.[80] The formal congratulations extended to Sotomayor, particularly by

balanced against speculation that her race-conscious approach to the law might prevent her confirmation. *See, e.g.*, Stolberg, *supra*; Kirkpatrick, *supra*.

76. Vargas, *supra* note 60, at 1430.

77. Remarks on the Nomination of Sonia Sotomayor To Be a Supreme Court Associate Justice, DAILY COMP. PRES. DOCS., 2009 DCPD No. 200900402, at 3.

78. Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1395–97 (1996) (discussing why the concept of the role model increasingly focuses on minorities).

79. Sherilynn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000) ("[Role model] emphasis draws attention to the racial "face" of the judge, rather than to the substance of a judge's decision-making or broadening the scope of the judicial decision-making.").

80. Peter Baker & Neil A. Lewis, *Sotomayor Vows "Fidelity to the Law" as Hearings Start*, N.Y. TIMES, July 14, 2009, at A1, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm.html?_r=1.

Senate Republicans, for her symbolic value as a "first" were disingenuously undermined by the concurrent demand that she check her ethnic identity at the door. Implicitly, the message is that diversity (and any form of race or ethnicity-conscious perspective) must, in the end, concede to an orthodox view of intellectual assimilation.[81] This is the most compelling reason why the symbolic representation of Hispanic federal judges, while necessary, will never serve as the impetus for measurable statistical progress. All too often, political and legal symbols are permitted to look Hispanic or African-American, so long as they facially promise not to think or act like a minority in their professional capacity. Every celebration of a barrier having been broken is an opportunity to examine the general lack of diversity present on the federal bench.[82] Settling for symbolic diversity will only perpetuate this practice. Symbolic diversity satiates the momentary desire for diversity but does not provide sustaining fuel for the long-term objective of appointing more Hispanics to the federal bench. This critique should not be construed as an attempt to devalue the election of our country's first African-American president or the confirmation of our first Hispanic Supreme Court justice. Instead, my plea is that judicial diversity advocates avoid the temptation to myopically focus on symbolic accomplishments and forego the admittedly more arduous challenge of getting substantially more Hispanics appointed to the federal district and appellate courts.

B. *Representational Parity Produces the Benefits of a Critical Mass*

If the Hispanic community were able to achieve representational parity, what would be its effect on the federal judiciary and the public it serves? A goal which only furthers the interests of one demographic, regardless of its size, naturally will inspire skepticism among the remaining stakeholders. Representational parity would yield advantages to both the Hispanic population and the public at large because diversity that goes beyond cursory symbolism will add new dimensions to judicial deliberation. I say "dimensions" in the plural because that goes to the very heart of what critical mass embodies. In *Grutter v. Bollinger*, the University of Michigan Law School case upholding the use of race as a limited consideration in the admissions process, the Law School presented testimony that when a "critical mass of underrepresented minority students is present, racial stereo-

81. *See, e.g.*, Carla D. Pratt, *Way to Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 FORDHAM L. REV. 1409, 1411–14 (2009) (discussing the inclination of black lawyers to retain "dual citizenship" in both the legal profession and the black community by resisting the dominant view that race plays no role in how a lawyer approached their work).

82. Edward Chen, *The Judiciary, Diversity, and Justice for All*, 91 CAL. L. REV. 1109, 1111 (2003) (commenting, as the first Asian-American appointed to the Northern District of California, on the vast underrepresentation of Asian-Americans on the federal bench).

types lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."[83] There is every reason to surmise that a larger contingency of Hispanic judges on the federal bench would equally confer this enhancement.

I should disclose here that I was a student at the University of Michigan Law School, and a member of the Latino Law Students Association, during the *Grutter* district court trial. With the extraordinarily generous support of my law firm, shortly after graduation I co-authored an amicus brief on behalf of a number of student organizations at the Law School.[84] Attending the Law School during this time certainly forced me to contemplate whether critical mass was merely an ephemeral concept constructed to defend the traditionally elite academic goal of racial inclusiveness or was it a discernable classroom benefit worth fighting for? I believe now, as I did then, it is the latter. Certainly, there were students who disagreed with the Law School's admissions policy, and the district trial raised the volume of classroom and hallway debate on affirmative action. During the *Grutter* trial, television reporters would periodically appear on campus in search of a "symbolic" student to interview on camera, contributing to an odd climate on campus. But there is no question in my mind that the litigation created a solidarity of sorts among nearly all the students and faculty to defend the Law School's reputation and the administration's right to include diversity, in the form of critical mass, as part of its educational mission.[85]

Although the mission of the federal judiciary is plainly different than that of a law school, both institutions share professional obligations to promote fairness and oppose practices that intentionally and systematically exclude people on the basis of race, ethnicity, gender, religion, and class.[86] From that general proposition, I argue that those

83. Grutter v. Bollinger, 539 U.S. 319, 319–20 (2003).

84. Jerome S. Hirsch, Joseph N. Sacca, Scott D. Musoff, Mark Lebovitch & Linda M. Wayner, *In the Supreme Court of the United States: Barbara Grutter v. Lee Bollinger et al, Respondents, Brief of the University of Michigan Asian Pacific Law Students Association, the University of Michigan Black Law Students' Alliance, the University of Michigan Latino Law Students Association, and the University of Michigan Native American Law Students Association as Amici Curiae in Support of Respondents*, 10 MICH. J. GENDER & L. 7 (2003).

85. Paul R. Baier, a former faculty member at the University of Michigan, offers a professor's perspective on the *Grutter* opinion and the dissent's pejorative characterizations of critical mass theory. *See* Paul R. Baier, *Of Bakke's Balance, Gratz and Grutter: The Voice of Justice Powell*, 78 TUL. L. REV. 1955, 1971–72 (2004).

86. STANDARDS REVIEW COMMITTEE, ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STATEMENT OF PRINCIPLES OF ACCREDITATION AND FUNDAMENTAL GOALS OF A SOUND PROGRAM OF LEGAL EDUCATION (2009) ("Because legal education serves a profession that is committed to inclusiveness and diversity, it must create and advance opportunities for groups underrepresented in the legal profession."), *available at* http://www.abanet.org/legaled/committees/Standards%20Review%20documents/Principles%20and%20Goals%20Accreditation%205%206%2009.

who control the composition of the federal bench should be mindful that permitting large swaths of the American population to remain underrepresented reduces the variety of viewpoints available during the course of deliberations, thereby reducing the effectiveness of the judiciary. The same could be said, of course, when any president enforces a particular set of philosophical criteria as a precondition to becoming eligible for nomination to the bench. The natural ebb and flow of partisan tides in recent decades, however, has resulted in a relatively balanced spectrum of liberals and conservatives on the Supreme Court. Achieving a similar diversity of gender and race obviously has not occurred on our highest court. Just as the checks and balances of having a philosophically diverse court unquestionably leads to more sophisticated and robust analysis of the most pressing legal issues, the presence of a racially diverse judiciary must rationally also deliver such benefits.[87]

Which brings us to why a critical mass of Hispanics on the federal bench is a worthy objective. In his 2002 article, "On The Appointment of a Latino/a to the Supreme Court," now Dean Kevin R. Johnson of the University of California Davis School of Law described a variety of ways how even one Hispanic voice could bring new and different perspectives to the Supreme Court and its decision-making process.[88] Dean Johnson posited that a Hispanic voice might have influenced the Supreme Court's 1975 ruling in *United States v. Brignoni-Ponce*, which held that Border Patrol officers on roving patrols could consider the racial appearance of a vehicle occupant when deciding whether to stop the vehicle for an immigration enforcement check.[89] The court stated "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."[90] Although the court disqualified the stop at issue because the Border Patrol officer relied exclusively on Mexican appearance, the Supreme Court has not, in the past thirty-four years, revisited this position.[91] Dean Johnson persuasively points out that a

doc; *see also* Code of Conduct for United States Judges 2C (2009), *available at* http://www.uscourts.gov/library/codeOfConduct/Code_Effective_July-01-09.pdf ("A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. . . . A judge should accord to every person who has a legal interest in a proceeding and that person's lawyer, the full right to be heard according to the law.").

87. Beiner, *supra* note 7, at 485–87 (discussing the need to critically view diversity from a variety of angles, lest the federal courts become populated by judges who reflect very similar viewpoints, thus depriving the court of the richness of debate and outcomes that come from diverse perspectives).

88. Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV. LATINO L. REV. 1, 7–13 (2002).

89. United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975).

90. Johnson, *supra* note 88, at 7 (citing United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975)).

91. United States v. Montero-Camargo, 208 F.3d 1122, 1132–34 (9th Cir. 2000) (en banc), *cert. denied*, Sanchez-Guillen v. United States, 531 U.S. 889 (2000)). The Ninth

Hispanic justice would likely have understood why stopping an individual on the basis of Mexican appearance is "a deeply flawed criterion" and perhaps would have been able to share with his or her colleagues personal experiences of Hispanic profiling.[92] This illustration aptly demonstrates the value that more Hispanic district court and circuit court judges would bring to their respective deliberation chambers. A critical mass would permit a broader and healthier range of views. The experiences of a Mexican-American judge versus that of a Puerto Rican judge versus that of a Cuban-American judge, although united in language and certain cultural hallmarks, are also wildly distinct due to varied historical and social backgrounds.

Critical mass is not a modern euphemism for quotas, as the term was defined (and ruled unconstitutional) by the Supreme Court in the 1978 *Bakke* litigation.[93] The history of immigration in the United States shows that the traditional intent behind quotas was to cap or exclude specific ethnic groups from entering our borders.[94] In higher education, quotas were used during the first half of the twentieth century to limit, rather than include, the number of admitted women, Jews, and blacks.[95] In the Civil Rights Era, quotas evolved into a crude device that routinely downplayed merit, designed to cure past discriminatory wrongs.[96] In other words, well-intentioned institutions tried to retool new quotas to cure the symptoms that old quotas were guilty of aggravating. Critical mass, on the other hand, is an attempt at ensuring that there is a meaningful presence of qualified minority individuals within each demographic, as opposed to the occasional,

Circuit Court of Appeals has ruled that Hispanic appearance is an improper factor when electing to make an immigration stop because it is an overinclusive proxy for immigration status. *See* Keith Aoki & Kevin R. Johnson, *Latinos and the Law: Case and Materials: The Need for Focus in Critical Analysis*, 12 HARV. LATINO L. REV. 73, 98 n.123 (citing *Montero-Camargo*, 208 F.3d at 1132–34).

92. Johnson, *supra* note 88, at 9–10.

93. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978).

94. Peter H. Schuck, *The Morality of Immigration Policy*, 45 SAN DIEGO L. REV. 865, 872 (2008) (summarizing common points among immigration authors with regard to the history of quotas).

95. Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 127–28 (2003).

96. *See* Shaw v. Reno, 509 U.S. 630, 647 (1993). The U.S. Supreme Court has demonstrated its frustration with overbroad classifications, many traceable to the Civil Rights Era, based solely on race, as opposed to more tempered schemes which rely on race as just one of many factors. For example, Justice O'Connor compared one race-based redistricting attempt in North Carolina to political apartheid. *See id.* ("A reapportionment program that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.").

isolated symbolic token representative.[97] In the debate of affirmative action in higher education, opponents of critical mass theory decry its vague nature and argue that it is just a new label for impermissible quotas.[98] But critical mass theory is more cognizable as a legitimate concept, utterly divorced from quotas, when applied in certain professional contexts, particularly where there is a satisfactorily sized pool of decidedly qualified minority candidates.[99] The federal judiciary is one such example. It is a small enough institution with such thorough vetting procedures that it is hard to conceive that an objective toward a critical mass would result in truly inferior and unqualified minority candidates surviving the scrutiny that most candidates—of all races and ethnicities—must survive to obtain confirmation.[100]

C. *Representational Parity Reinforces Institutional Credibility*

There are various rationales driving the pursuit of a diverse federal judiciary. Some critics have long argued that democratic institutions should, in the interests of legitimacy, draw their leadership from all sectors they purport to govern.[101] In contemporary terms, one could argue that our federal bench "should look like America" as was the rallying cry of President Bill Clinton, who unapologetically claimed to

97. Grutter v. Bollinger, 539 U.S. 306, 318–19 (2003) (appearing to accept the University of Michigan's definition of critical mass as a meaningful number, or meaningful representation, which encourages underrepresented minority students to participate in the classroom without feelings of isolation, with no specific number or percentage threshold of minority students).

98. *Id.* at 389 (Kennedy, J., dissenting) ("[T]he concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."). Justice O'Connor, who wrote for the majority, replied that "[e]nrolling a 'critical mass' of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional. But the Law School defines its critical mass concept by reference to the substantial, important, and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and the breaking down of racial stereotypes." *Id.* at 330 (majority opinion) (citation omitted).

99. *See, e.g.*, Allan N. MacLean, Note, *The "Critical Mass" and Law Enforcement*, 14 B.U. PUB. INT. L.J. 297, 300–02 (2005).

100. Applicants seeking appointment as a U.S. District Court judge must usually enlist the support of their state's U.S. Senators and undergo a notoriously invasive written application. For example, the Florida Federal Judicial Nominating Commission asks candidates to describe their educational and professional histories, identify all commercial and business interests, disclose their marital status and the identity of their spouse, describe the state of their physical health, list any civic organization they have ever affiliated with, describe all pro bono and community service activities, list all private club memberships, and forecast all anticipated future sources of income. FLA. FED. JUDICIAL NOMINATING COMM'N, APPLICATION FOR U.S. DISTRICT JUDGE OR U.S. ATTORNEY 1–5 (2009), *available at* http://www.flnd.uscourts.gov/Florida%20Federal%20Judicial%20Nominating%20Commission%20Forms/JNC0003.pdf.

101. Vargas, *supra* note 74, at 1427 (quoting THE FEDERALIST NO. 39, at 111–12 (James Madison) (Roy Fairfield ed., 1981)).

factor gender and racial diversity into his selection criteria for major appointments.[102]

Justice Sonia Sotomayor's recent appointment to the United States Supreme Court, and the surrounding debate, brought to light the evolving way our profession addresses the question of racial diversity among the highest ranks of the judiciary. Justice Thurgood Marshall's experience as an African-American brought valuable perspective to the Supreme Court's deliberations. His fellow justices recognized this.[103] Yet when Sonia Sotomayor was quoted as stating that the richness of her experiences as a Latina would help her reach more thoughtful judicial conclusions, opponents rushed to characterize her position as entirely inappropriate for a judge, to the degree that it cost her Senate votes in the confirmation process.[104] This apparent inconsistency is evidence of the changing tone and nature of discussion about racial diversity at all levels, particularly our evaluation of who should be in charge of interpreting and applying our nation's laws at the highest levels. This debate implicitly acknowledges that, regardless of one's opinions, there is a collective societal concern for safeguarding the quality and reputation of the judiciary. While the media and public have become somewhat desensitized to the periodic ethical failings of elected officials, judges are perhaps held to a higher standard because "good judgment" is the very essence of their job. Sonia Sotomayor's confirmation process produced a false dichotomy: one can either be a judge who is influenced by their heritage (or gender, or religion) and therefore be unacceptably partial to a racial constituency, or one can be a neutral judge who is tied to no one in particular, and therefore is capable of impartially ruling in any given case. If impartiality is the trademark characteristic of being a judge, then the tortured conclusion, some argue, is that promoting diversity under-

102. Rorie L. Spill Solberg & Kathleen A. Bratton, *Diversifying the Federal Bench: Presidential Patterns*, 26 JUST. SYS. J. 119, (2005); Dan Freedman, *Judicial Picks Reflect Diversity Clinton Vowed*, TIMES-PICAYUNE, Dec. 30, 1993.

103. *See, e.g.*, Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1219 (1992) ("[T]o those of us who have travelled a different road, Justice Marshall's experiences are a source of amazement and inspiration, not only because of what they reveal about him, but because of what they instill in, and ask of, us.").

104. Dana Bash & Emily Sherman, *Sotomayor's 'Wise Latina' Comment a Staple of Her Speeches*, CNN.com, http://www.cnn.com/2009/POLITICS/06/05/sotomayor.speeches (last visited Jan. 25, 2010); Charlie Savage, *Sotomayor Confirmed by Senate, 68–31*, N.Y. TIMES, Aug. 7, 2009, at A1; Press Release, Senator Jon Kyl Press Office, Jon Kyl Will Oppose Sotomayor Confirmation (July 22, 2009) (citing her "wise Latina" comment in his explanation of his opposition to her nomination), *available at* http://kyl.senate.gov/record.cfm?id=316066; *Confirmation Hearing Before the S. for Sonia Sotomayor*, 111th Cong. Aug. 6, 2009 (statement of Sen. Hatch, Member, S. Comm. on the Judiciary) ("I wish President Obama had chosen a Hispanic nominee whom all Senators could support."), *available at* http://hatch.senate.gov/public/index.cfm?FuseAction=pressReleases.Detail&PressRelease_id=F043650c-1b78-be3e-e09b-0b2b8f4b3380 (last visited on Sept. 15, 2009).

mines impartiality, and therefore erodes the credibility of the judiciary.

I do not believe this is the case. Our federalist structure of government demonstrates a long-standing belief that diverse political approaches to governance produce the most credible policies.[105] Instead of allowing a single national government bureaucracy to dictate law and policy, we trumpet the rich benefits of a tripartite federal system and a decentralized state and municipal governmental infrastructure.[106] The idea of checks and balances, the marketplace of ideas, and a common law adversarial justice system are all examples of how multiple viewpoints, when forced to refine and compete against one another, ultimately lead to better results. And because our country has adopted what we believe is this optimal approach, it leads to a general public confidence in that system.

Students learn in grade school that the federal legislature includes representatives whose jobs are to communicate our views to the national legislature, and they learn that each citizen has a chance to express their opinion in the voting booth to pick a president. This connection between the individual and the institution, no matter how diluted, allows for a sense of participation and therefore legitimacy in government. This sense of public confidence becomes more complex as it is applied to the judiciary. Although we may all live under a growing set of laws that have been interpreted by the federal bench, and some of us may have reason to appear in federal court at some point in our lives, judges (quite appropriately) do not have quite the same direct connection to people who live in their jurisdictions. Federal judges do not have popular constituents, and they are prohibited from engaging in many of the political activities that executives and legislators use to engage with the voters.[107] Judge Diarmuid O'Scannlain of the Ninth Circuit Court of Appeals described the constitutional role of federal judicial interpretation as interpreting the law by way of "a conversation with Congress" regarding legal intent and constitutionality.[108] This characterization is but one example of how the individual, including those who must live with the impact of the federal judge's rulings, is visibly removed from the judicial decision-making process. While litigants and *amici* have a forum to express their points with regard to any particular case or controversy, they signify a statistical drop in the jurisdictional bucket.

105. *See* David Orentlicher, *Diversity: A Fundamental American Principle*, 70 MO. L. REV. 777, 788–90 (2005).

106. *Id.* at 788–89.

107. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES, CANON 5 (2009), *available at* http://www.uscourts.gov/library/codeOfConduct/Code_Effective_July-01-09.pdf (prohibiting federal judges from endorsing political candidates, giving political speeches, or engaging in any other political activity).

108. Diarmuid F. O'Scannlain, *Lawmaking and Interpretation: The Role of a Federal Judge in Our Constitutional Framework*, 91 MARQ. L. REV. 895, 906–07 (2008).

And there is every reason to believe that our country's founders intended this to be so.[109] The designers of the U.S. Constitution decided that lifetime tenure would insulate the judiciary (to a certain extent) from electoral politics and the distractions of campaign life.[110] Some have advocated creative solutions to the divide between judges and the public they serve, such as public performance evaluations.[111] But the tension between judicial independence—that is, the ability to resolve cases without threat of outside influence—versus judicial accountability to the public at large promises to remain constant.[112] Protecting and reinforcing the legitimacy of the judiciary is an ongoing challenge, and there is no shortage of theories on how to better accomplish this goal. Making the selection process more opaque would perhaps prevent judges from being co-opted for political ends.[113] Raising judicial pay is a perennial suggestion.[114] Undoubtedly, there are very good reasons why judges must remain independent, and therefore a bit isolated, from public scrutiny. Supreme Court Justice Ruth Bader Ginsburg has warned against the fashionable trend of criticizing federal judges for failing to consider the opinions of the "home crowd" in their rulings.[115] But this is why permissible steps to instill public confidence, such as promoting a more racially and ethnically diverse judiciary, are vitally necessary. If individuals not only lack a direct connection to the judiciary, but they also perceive it as a culturally foreign institution which bears no resemblance to their community, it should surprise no one that institutional credibility will suffer.

PART III: AN OPPORTUNITY TO RESHAPE THE FEDERAL BENCH

On November 14, 2009, the Hispanic National Bar Association wrote to then President-Elect Barack Obama, requesting that he consider the appointment of Hispanics to the federal judiciary a priority item on his agenda.[116] The letter stated that the shortage of Hispanic

109. Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7, 8 (2008) ("Populist-based accountability for judges is precisely what the Founders feared, and should be avoided.").

110. *See id.* at 7.

111. *Id.* at 22–23.

112. *See generally* Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168 (2006).

113. Rafael I. Pardo, *The Utility of Opacity in Judicial Selection*, 64 N.Y.U. ANN. SURV. AM. L. 633, 633 (2009).

114. *See* Adam Liptak, *How Much Should Judges Make?*, N.Y. TIMES, Jan. 20, 2009, *available at* http://query.nytimes.com/gst/fullpage.html?res=9D06E7DF1539F933A15752C0A96F9C8B63&scp=3&sq=adam+liptak&st=ny.

115. Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L. REV. 1, 7 (2006).

116. Letter from Ramona Romero, National President, Hispanic National Bar Association to Barack Obama, President-Elect (Nov. 14, 2008), *available at* http://data.memberclicks.com/site/hnba/The_Hon_Barack_Obama_11-14-2008-FINAL.pdf.

federal judges "[c]onveys an unfortunate message about the importance of Latinos in the civic life of our Nation and it signals to Hispanics that American society imposes limits on our aspirations."[117] This letter was unquestionably just one of the many entreaties President Obama reviewed as he prepared to develop a cogent plan for judicial appointments. President Obama has the chance, just like all his predecessors, to adopt an approach that will leave a legacy that would last well beyond his administration. As of the date of this Article, President Obama has nominated, in addition to Sonia Sotomayor, two other Hispanic candidates (Judge Albert Diaz from North Carolina and Gloria Navarro from Nevada) to the federal bench.[118] After one year in office, President Obama has been criticized for nominating candidates at an unnecessarily slow pace, and for failing to articulate a clear set of selection criteria, apart from his overall desire for empathetic individuals.[119] Others have applauded the diverse group that President Obama has nominated to date, which includes a substantial number of women, African-Americans, Asian-Americans, in addition to the one Hispanic.[120] It is also clear that the backlog of vacant positions, due in part to confirmation stalemates between President George W. Bush and a Senate controlled by Democrats, has grown to the point where there is a real chance to create a pronounced numeric impact on the federal bench's demography.[121]

Partisans on both sides of the spectrum perhaps have expectations about President Obama's approach to reviewing the ideologies of potential nominees. Analysis on this front has disproportionately focused on Sonia Sotomayor, though I see the lower federal courts as an equally compelling stage for ensuring that the President's political philosophies endure. I wish to stress here, though, that appointing Hispanics (or African-Americans, or Asians, or Native Americans) is not

117. *Id.*

118. *See* Press Release, The White House, President Obama Nominates Judge Albert Diaz and Judge James Wynn to the Fourth Circuit Court of Appeals (Nov. 4, 2009), *available at* http://www.whitehouse.gov/the-press-office/president-obama-nominates-judge-albert-diaz-and-judge-james-wynn-fourth-circuit-cou; *see also* Press Release, The White House, President Obama Nominates Judge Timothy Black, Gloria Navarro for District Court Bench (Dec. 24, 2009), *available at* http://www.whitehouse.gov/the-press-office/president-obama-nominates-judge-timothy-black-gloria-navarro-district-court-bench.

119. Michael A. Fletcher, *Obama Criticized as Too Cautious, Slow on Judicial Posts*, WASH. POST, Oct. 16, 2009, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/10/15/AR2009101504083.html (noting that President George W. Bush sent ninety-five federal judicial nominations to the Senate in the same period that Obama has sent twenty-three).

120. Carl Tobias, Op-Ed., *Diversity on the Federal Bench*, NAT'L L.J., Oct. 12, 2009, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202434429480&slreturn=1&hbxlogin=1.

121. Jeffrey Toobin, *Bench Press: Are Obama's Judges Really Liberals?*, THE NEW YORKER, Sept. 21, 2009, *available at* http://www.newyorker.com/reporting/2009/09/21/090921fa_fact_toobin?currentPage=1.

meant to be code for "liberal." Assuredly, President Obama has the ability to nominate judges who fall in line with his beliefs, but nominating minorities is not necessarily a surefire path to accomplishing that goal. George W. Bush managed to appoint a respectable number of Hispanics to the federal bench, but there is no dispute that his foremost criterion for picking nominees was that they possess a demonstrable conservative judicial philosophy. Bill Clinton appeared to place a greater premium on diversity rather than absolute fidelity to his political worldview. In the post-Sotomayor world, my inclination is that it would be nearly impossible to secure confirmation for a modern-day Thurgood Marshall, for reasons that have little to do with merit. Regardless of President Obama's ideological agenda, designating diversity (and Hispanic representational parity) as an objective is imperative, and it is imperative now. As the first African-American president, Obama is in a uniquely historical position to advocate the benefits of a diverse judiciary, and foregoing this chance would be a tremendous defeat for the legal profession.

One thing is for certain: there is no shortage of well-qualified Hispanic candidates. It is completely within President Obama's power to create momentum toward representational parity. The numbers are not where they ought to be, but there are growing ranks of Hispanic law firm partners, state court judges, and law professors who meet or surpass the level of excellence that the Senate has traditionally demanded as a precondition to confirmation. The Obama administration's decision to rely upon sources beyond the insular Washington D.C. circles, such as the American Bar Association, is a good start. The burden should equally extend to the Hispanic community to identify a larger pool of candidates, groom and vet those candidates, and then strategically promote them. I suspect that there are countless untapped Hispanic lawyers who, with the right counseling and encouragement, would be outstanding candidates and exceptional judges. I have met some of these potential luminaries, and part of the problem is, sadly, that not enough professors and mentors are suggesting this career course at the formative stages of their legal education. Now that the name Sotomayor is part of every Hispanic lawyer and law student's lexicon, the Hispanic legal community must play a more forceful and organized role in helping to reshape the federal judiciary.

CONCLUSION

Against the backdrop of recent groundbreaking achievements, such as the election of Barack Obama and the confirmation of Sonia Sotomayor, proportional representation on the federal bench may still seem like an unachievable target. Given the present rate of population growth for Hispanics in the United States, in a few decades we would be aiming for at least thirty percent of the federal bench, or more than a 400 percent increase in Hispanic judges. This ambition may sound

whimsically unrealistic, but does it seem as shocking to suggest that the United States ought to strive toward a goal of fifty percent representation of women in Congress? In light of the regrettably short history of Hispanics in the federal judiciary, perhaps it is the newness of Hispanics that still presents a cognitive roadblock among the power brokers who are in a position to champion qualified Hispanic candidates. With the appointment of Justice Sotomayor, perhaps a goal of proportional representation on the federal bench is not only more palatable, but it is more achievable now as well.