



Celebrating the 100th Anniversary of Louis D. Brandeis'  
Appointment to the U.S. Supreme Court

## Diversifying the Supreme Court Brandeis, Marshall, Sotomayor

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In this essay I focus—as we all do here—on the Brandeis appointment as a significant landmark in the history of the federal judiciary. I explore this topic initially through a comparison of President Wilson’s 1916 appointment of Louis Brandeis with President Johnson’s 1967 appointment of Thurgood Marshall as a symbolic opening of the federal bench to African American lawyers. Both Brandeis and Marshall were well known nationally prior to their appointments, with Brandeis engaged in significant domestic and international activities including his embrace of Zionism, and Marshall engaged in an almost four-decade long assault on racial segregation and *Plessy v. Ferguson*. Perhaps not ironically, both endured aberrationally long waits between nomination and confirmation while their opponents raised substantive objections that thinly veiled the opposition to the placement of a member of their respective racial and ethnic groups on the highest court.

Although both Brandeis and Marshall opened the door for a more diverse federal judiciary, the debate over the importance of diversity continues. There is a robust scholarship on the extent to which the federal judiciary is more diverse, on the effect of diversity on the outcomes of judicial decisions, and on the contribution of diversity to the legitimacy of the judiciary. More recently, a debate over judicial diversity on the federal

bench was televised for the nation during the confirmation of Sonia Sotomayor to the United States Supreme Court. In the course of that debate, proponents celebrated her educational qualifications, her professional achievements, and her Horatio Alger–like up-from-poverty story, while detractors suggested that Sotomayor’s embrace of her Latina identity would prevent her from following the law. Like Brandeis and Marshall, she was confirmed despite substantial opposition, and like them, she has already added a distinctive judicial voice to the highest court.

### **Brandeis and Marshall: Defying Sisyphus**

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

#### *Brandeis*

Brandeis was the first Jewish Justice on the Supreme Court, though historians have suggested that another may have been considered in the nineteenth century.<sup>1</sup> Though he did not deny his Jewish identity, it was not a defining feature of his identity during most of his life and throughout his very visible legal career.<sup>2</sup> He did publicly embrace Zionism<sup>3</sup>—“a belief in the need for a Jewish state and the concomitant duty to ‘educate’ the American Public about its necessity”<sup>4</sup>—in 1913, becoming a visible leader of the cause in 1914,<sup>5</sup> through 1916,<sup>6</sup> on the virtual eve of Wilson’s nomination of Brandeis to the high court in 1916.<sup>7</sup> He continued his involvement after he assumed his role as Associate Justice of the Supreme Court.<sup>8</sup>

But Brandeis became well known prior to the turn of the century when his article “The Right to Privacy” was published in 1890 in the *Harvard Law Review*.<sup>9</sup> In the article, he and his co-author asked “whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is. . . .”<sup>10</sup> Brandeis insisted that the right to privacy was not “a matter of mere property rights,” but rather the right to “an inviolate

personality.”<sup>11</sup> Here, Brandeis would lay the foundation for his dissent in *Olmstead v. United States*,<sup>12</sup> in which he argued that government eavesdropping on telephone conversations violated the “right to privacy” and the right “to be let alone.”<sup>13</sup> In that same 1890 article, he also anticipated Supreme Court doctrine that would develop decades later by proposing an exception to the right of privacy for discourse on “concerns of the public general interests,”<sup>14</sup> as well as remedies for the invasion of that right.<sup>15</sup> The article remains a relevant source for discourse on contemporary issues of privacy.<sup>16</sup>

Brandeis was also well known for his activities on behalf of workers who were powerless in their “economic class conflict” struggle.<sup>17</sup> One of his causes was “constructive legislation designed to solve in the public interest our great social, economic and industrial problems. . . .”<sup>18</sup> A well-known example was his defense of Oregon’s legislation to protect women workers, which became *Muller v. Oregon*,<sup>19</sup> and was put in jeopardy by the Supreme Court decision in *Lochner v. New York*,<sup>20</sup> which struck down legislation that protected bakers from excessive exposure to flour inhalation.<sup>21</sup> Nonetheless, Brandeis innovated by pursuing a dense and lengthy factual exploration of the dangers women and their children experienced as a result of long employment hours,<sup>22</sup> which persuaded the Supreme Court to uphold the Oregon statute.<sup>23</sup> Though Brandeis’s arguments,<sup>24</sup> and the Court’s reasoning that were based upon female vulnerability and incapacity would haunt women for decades to come,<sup>25</sup> it was judged a brilliant victory in the press and is remembered not merely because “Muller became a landmark decision . . .” but also “for the brief that Louis Brandeis filed. The singular and detailed focus on the societal context of a potential legal decision, which came to be known as a ‘Brandeis Brief’ . . . altered the way that lawyers approached defense of public matters”<sup>26</sup> and burnished Brandeis’s reputation as a courageous reformer.<sup>27</sup>

Brandeis was also a visible opponent of government corruption. He was involved at the turn of the century in disputes over the allocation of railway rights to monopolistic and monied interests in Boston,<sup>28</sup> and railway tariffs.<sup>29</sup> He represented the head of the United States Forestry Service, whom President Taft had fired to clear the way for private coal deals on valuable public lands.<sup>30</sup> Brandeis was also a visible advisor to President

Woodrow Wilson on antitrust policy during the 1912 election,<sup>31</sup> and he advised the president on the legislation that created the Federal Trade Commission.<sup>32</sup>

He spoke out on a wide array of topics, amassing a record that would be prodigious in any era. He testified before legislative bodies,<sup>33</sup> gave speeches,<sup>34</sup> and wrote legal briefs and newspaper opinion columns.<sup>35</sup>

Ordinarily, both legal stardom and presidential will are necessary for a nomination to the Supreme Court, but presidential will is sufficient for that honor. In this respect, Brandeis's biographers seem to agree that Wilson not only "rewarded and honored Brandeis for the services he had rendered to the President,"<sup>36</sup> but also put him forward as a part of Wilson's ongoing effort to appoint Brandeis to a position commensurate with his energies and abilities.<sup>37</sup> Therefore, although there may be some truth in the notion that Wilson nominated Brandeis to "appeal . . . to certain groups in the electorate whose support Wilson would need in order to be re-elected in 1916,"<sup>38</sup> there's no question that Wilson thought highly of Brandeis and wanted to afford Brandeis an opportunity to serve the nation in an important official capacity.

Scholars agree that the opposition to his confirmation was "veiled anti-Semitism,"<sup>39</sup> an anti-Semitism that opponents of his reformer efforts had expressed several years before Wilson's nomination,<sup>40</sup> and provocative headlines and opinion commentary do bear this out.<sup>41</sup> But another view is that his opposition to powerful business interests insured that his nomination would be controversial.<sup>42</sup> As one biographer put it, "[the] nomination became a confrontation of interests and ideologies rather than a display of prejudice."<sup>43</sup> His opponents marshaled both Harvardians and prominent members of the bar to shore up their cause.<sup>44</sup> Brandeis had organized support from the law faculty, as well as friends who countered newspaper stories potentially damaging to his confirmation.<sup>45</sup> The hearings on his confirmation focused on several matters opponents relied upon to say that Brandeis was unfit to serve. There were charges that his testimony during 1913 hearings on railroad tariffs before the Interstate Commerce Commission was "a betrayal of his trust relationship,"<sup>46</sup> to the detriment of the New Haven Railroad.<sup>47</sup> Other issues that arose included his performance as a lawyer in a matter involving a

will,<sup>48</sup> his role as a lawyer and board member for a large shoe company,<sup>49</sup> and a generalized attack on his integrity led by Moorfield Storey, “a highly respected member of the bar . . . [who] had had a distinguished career as a lawyer, . . . Harvard Overseer, and president of the American Bar Association.”<sup>50</sup> Nonetheless, the Committee on the Judiciary voted out his nomination to the full senate, which in turn confirmed him 47–22 a week later.<sup>51</sup> His nomination had lingered in the Senate from January 28, 1916, to June 1, 1916—125 days.<sup>52</sup>

### Marshall

Thurgood Marshall was as well known as Brandeis was at the time of Johnson’s nomination but for different reasons. Marshall spent most of his career, including his time as a law student, focused on the battle against Jim Crow.<sup>53</sup> With Charles Hamilton Houston, he mounted a multi-year battle against racial segregation that culminated in the stunning nature of his victory over *Plessy v. Ferguson*,<sup>54</sup> in *Brown v. Board of Education*,<sup>55</sup> in which the Supreme Court declared that state-mandated segregation in the nation’s public schools was unconstitutional. In 1962, President Kennedy chose Marshall to become the second African American to serve on a United States Court of Appeal,<sup>56</sup> the prestigious Second Circuit.<sup>57</sup> President Kennedy’s successor, Lyndon Johnson, plucked Marshall from his seat on the Second Circuit Court of Appeals in 1965 to elevate him to Solicitor General of the United States, reportedly to prepare him for a Supreme Court nomination as the first African American to join the Court.<sup>58</sup> In 1967, President Johnson nominated Marshall to serve as an Associate Justice on the Supreme Court.<sup>59</sup>

It was not surprising that Marshall’s nomination would face opposition. After all, the record that qualified him for service—thirty-five arguments before the Supreme Court and victories in many important constitutional cases<sup>60</sup>—was the same record that threatened the American racial order generally and especially in the South:

By the time Johnson appointed Marshall to the Supreme Court, his history and his contributions to American constitutional law were fairly well known to Congress and the public. As a co-architect of legal doctrine

that eliminated official American apartheid, his work had affected the lives of millions of Americans, and had received editorial notice in major newspapers. President Johnson had indeed prepared Marshall to both withstand criticism and to receive praise. And the course of his confirmation encompassed both extremes.<sup>61</sup>

Marshall was familiar with what might come. Indeed, Lyndon Johnson, ever colorful when determined, reportedly said that “he was determined that he had to outfit Thurgood Marshall and armor him with the kind of battle plates that no opposition could penetrate.” He had a preview of that experience after Kennedy nominated him to the United States Court of Appeals for the Second Circuit in 1962. After a contentious hearing and a wait of eleven months, the Senate confirmed 54–16.<sup>62</sup>

Southern senators on the judiciary sought to delay his Senate confirmation with lengthy questions about judicial philosophy and judicial authority. A team of southern senators (North Carolina’s Sam Ervin, Sr., South Carolina’s Strom Thurmond, and Arkansas’s John McClellan) dominated the hearings, opposing Marshall’s confirmation on multiple grounds: he would be too sympathetic to criminal defendants;<sup>63</sup> he would be unlikely to exercise judicial restraint;<sup>64</sup> he was too enamored of the notion of a “living constitution;”<sup>65</sup> he was insufficiently sympathetic to states’ rights;<sup>66</sup> and he was lacking in basic constitutional knowledge.<sup>67</sup>

The southern senators on the committee voted against his nomination while denying that their opposition was grounded in race. Instead, the erudite Ervin spoke for them, stating that the opposition was based on the prediction that Marshall “would align himself with the judicial activists now serving on the Supreme Court.”<sup>68</sup>

On the Senate floor, there was both praise and outcry. The Judiciary Committee opponents joined other southern senators, including John C. Stennis (Mississippi), Spessard Holland (Florida), and Robert Bryd (Virginia) in condemnation of the nomination on activist and stare decisis grounds.<sup>69</sup> And as to the proponents of Marshall, how ironic it is to recall today that during the floor debate Senator Robert Kennedy

compared Marshall to the first chief justice of the Court, as well as to Story, Holmes, and Brandeis.

Yet despite the accolades upon nomination,<sup>70</sup> it took over two months to reach the eve of confirmation. Was Marshall's race the reason confirmation took so long? Yes—and, no. The confirmation process took seventy-eight days to complete,<sup>71</sup> significantly longer than the eight to twenty-six days taken to confirm the three nominees who preceded him on the Court,<sup>72</sup> but not the eleven months attributable to the Second Circuit nomination just six years earlier. The opposition to both Brandeis and Marshall was grounded in the change that these two men might bring to judicial doctrine on behalf of the powerless. As to Marshall, the question was change in the racial status quo in America, but I contend that that change was already underway:

[In] the abstract, the opponents did address valid issues of constitutional law, the resolution of which did depend on legal ideology and philosophy. When the opposition to Marshall's nomination is viewed in the context of voting patterns on racial equality legislation the opposition [was] . . . an integral part of the larger pattern of southern opposition to the advancement of civil rights for Blacks. [That] opposition to Marshall must be understood in the broader context of southern opposition to the new legal doctrines . . . that [would] result . . . in meaningful and enforceable equality."<sup>73</sup> thus ending the constitutionality of American apartheid. In 1967, those battles were not yet over, but the handwriting was on the wall . . .<sup>74</sup>

### **A Just Order in the Court?**

#### **Diversity on the Federal Bench after Brandeis and Marshall**

Since Wilson's appointment of Brandeis 100 years ago and the appointment of Marshall almost fifty years ago, the federal bench has become much more diverse. There is an expanding body of literature on the characteristics of the federal judiciary. The Congressional Research Service periodically examines both the diversity of the federal judiciary as a service to lawmakers in both houses,<sup>75</sup> and the burgeoning academic scholarship on the topic.<sup>76</sup> The literature has also focused on the relationship between

various characteristics (e.g. gender, race, religious beliefs) on the outcomes of judicial decisions.<sup>77</sup>

### *Jewish Americans on the Bench since Brandeis*

The Supreme Court has had a small number of Jewish justices relative to the history of all appointments from 1789 to the present, but Wilson's appointment of Brandeis to the Court was unique. It began a discussion of a "Jewish Seat" on the Supreme Court.<sup>78</sup> The second Jewish justice was Benjamin Cardozo in 1932, but unlike Brandeis, the Senate confirmed him swiftly and without controversy.<sup>79</sup> President Roosevelt nominated Felix Frankfurter to replace Cardozo, who was in turn replaced by Kennedy's Arthur Goldberg, who resigned to become Ambassador to the United Nations.<sup>80</sup> Johnson nominated Abe Fortas to replace Goldberg, but Fortas resigned just three years after a scandal.<sup>81</sup> In 1987, President Reagan nominated Douglas Ginsburg, but that nomination was short lived and was never transmitted to the Senate.<sup>82</sup> President Clinton nominated Ruth Bader Ginsberg in 1990,<sup>83</sup> then Stephen Breyer in 1994.<sup>84</sup> President Obama nominated Elena Kagan.<sup>85</sup>

### *African Americans on the Bench since Marshall*

With respect to Blacks on the federal bench, the life-tenured federal judge that preceded Marshall was William H. Hastie, whom President Truman appointed to the United States Court of Appeals for the Third Circuit in 1949.<sup>86</sup> When Kennedy appointed Marshall to the United States Court of Appeals for the Second Circuit in 1963, Marshall was then the second Black to serve as Court of Appeals judge. The third was Wade McCree, whom Johnson appointed in 1966.<sup>87</sup>

President Jimmy Carter, though president for only four years, would have the greatest influence on diversification of the federal bench, generally, and on opportunities for Blacks to serve, more specifically; the second most influential in diversifying the federal bench was Clinton.<sup>88</sup>

As of 2014, there were 21 African American Circuit Court judges, out of a total of 162 Circuit Court judges.<sup>89</sup> Of all the African Americans who have served as a circuit



court judge, 89.7 percent were appointed after 1977. As of March 7, 2014, there were 76 African American District Court judges out of 603 District Court judges in the United States. The number of African American women who have served as federal judges remains small. Constance Baker Motley was the first in 1966,<sup>90</sup> and Amalya Kearsse was the first Black woman and woman of color to serve on the United States Courts of Appeal.<sup>91</sup> And the number of Blacks to serve on the Supreme Court is merely two, with Justice Clarence Thomas succeeding Marshall.<sup>92</sup>

### **Defending Diversity on the Bench: This Discussion Will Go On**<sup>93</sup>

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

One viewpoint on the importance of judicial diversity focuses on diversity as a key indicator of the legitimacy of government—a view contested by some.<sup>94</sup> Another rationale for diversity is the symbolic function of judicial diversification.<sup>95</sup> In addition there is a robust body of work on the relationship of the characteristics and experiences of judges to judicial decision-making. Some researchers have concluded that certain background characteristics are associated with different outcomes for litigants in particular kinds of cases, such as sexual harassment and sex discrimination cases,<sup>96</sup> employment discrimination cases,<sup>97</sup> as well as cases that implicate religious issues.<sup>98</sup>

Though a deep evaluation of this body of research is beyond the scope of this paper, there are valuable insights about the benefits of judicial diversity. Our common law culture is a flexible one that has historically accommodated—though not without controversy—a range of approaches and methodologies of judicial interpretation. With respect to constitutional interpretation specifically, the line between experience and judicial decision-making is difficult to draw in light of the fact that “[it] is a Constitution we are expounding.”<sup>99</sup> We may conclude on the basis of this developing body of research

that robust judicial diversity may be the very best approach to the continuing development of legal principles across the board. It is inevitable that a judge will draw on her insights and experiences consciously and unconsciously,<sup>100</sup> and inevitable as well that a truly diverse judiciary will bring a cross-section of human experience to the judicial decision-making bench.<sup>101</sup>

Nonetheless, that the legitimacy of conscious commitment to broader judicial diversity remains a contested ideal was clearly demonstrated during the debate over President Obama's nomination of Sonya Sotomayor to be an Associate Justice on the United States Supreme Court. In all likelihood, President Obama did not mean to "throw down the diversity gauntlet" when he nominated Judge Sotomayor, praising her "quality of empathy, of understanding and identifying with people's hopes and struggles."<sup>102</sup> The president began his remarks with the well-known quote of Oliver Wendell Holmes that "the life of the law has not been logic but experience."<sup>103</sup> Nonetheless, the nomination was to become a textbook case of opposition to a nominee based upon not only identity and experience but also on concerns about neutrality, merit, and ideology.

### **Defending Diversity—The Case of Justice Sonia Sotomayor**

President Obama began his May 26, 2009, press conference on his nomination of Judge Sotomayor to be an Associate Justice of the United States Supreme Court by focusing on his criteria for judicial nominees:<sup>104</sup>

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

these qualities alone are insufficient. . . . as Supreme Court Justice Oliver Wendell Holmes once said, “The life of the law has not been logic; it has been experience.” Experience being tested by obstacles and barriers, by hardship and misfortune; experience insisting, persisting, and ultimately overcoming those barriers. It is experience that can give a person a common touch and a sense of compassion; an understanding of how the world works and how ordinary people live. And that is why it is a necessary ingredient in the kind of justice we need on the Supreme Court.<sup>105</sup>

After the president set forth his criteria, he summarized Sotomayor’s legal and experiential qualifications. He noted her undergraduate degree from Princeton *summa cum laude*, her Yale law degree, her service on the staff of the legendary District Attorney Robert Morgenthau, her partnership in a New York law firm specializing in global transactions, and her service for seventeen years as a District Court and United States Court of Appeals judge.<sup>106</sup> Equally important, the president hailed her as a judge with “a sweeping overview of the American judicial system, but [also] a practical understanding of how the law works in the everyday lives of the American people.” Her life and her nomination, he said, were evidence that “no dream is beyond reach in the United States of America.”<sup>107</sup> In her remarks, Sotomayor emphasized that her jurisprudence would reflect both a commitment to the “rule of law” tempered by her experience-based understanding of the concerns of litigants who come before the highest Court:

I firmly believe in the rule of law as the foundation for all of our basic rights. For as long as I can remember, I have been inspired by the achievement of our Founding Fathers. They set forth principles that have endured for more than two centuries. Those principles are as meaningful and relevant in each generation as the generation before. [My] wealth of experiences, personal and professional, have helped me appreciate the variety of perspectives that present themselves in every case that I hear. It

has helped me to understand, respect, and respond to the concerns and arguments of all litigants who appear before me, as well as to the views of my colleagues on the bench. I strive never to forget the real-world consequences of my decisions on individuals, businesses, and government.<sup>108</sup>

Between May 26, 2009, when President Obama announced her nomination<sup>109</sup> and July 13, when the Chair of the United States Senate Committee on the Judiciary gave her nomination hearings to order,<sup>110</sup> it was clear that the opposition to her confirmation would center on whether her stated determination to temper law with her experience rendered her a jurist unfit to dispense “equal justice under law.”<sup>111</sup>

In the course of her hearings and the subsequent Senate debate it became clear that the opposition to her candidacy never focused solely on her identity per se. Her opponents acknowledged that her storied career and her nomination were important breakthroughs in the history of the federal opportunity to serve on the judiciary.<sup>112</sup> It was also clear that her objective professional qualifications were exceptional,<sup>113</sup> even though some attempted to promote a disparaging-media argument that she might be “good” but was “not that smart,”<sup>114</sup>—this, despite accolades from the Standing Committee on the Federal Judiciary of the American Bar Association that unanimously rated her well-qualified.<sup>115</sup> In the end, the opposition sought to link her explicit embrace of her experience<sup>116</sup> to the argument that she harbored impermissible bias<sup>117</sup> and would allow the “empathy”<sup>118</sup> to distort her judging.<sup>119</sup>

The debate over her nomination therefore took a predictable turn; the import, the opponents insisted, was that their opposition was on the basis of her impermissible bias and ideology. The proponents dismissed these views, stressing instead her long judicial service, the absence of controversy about her decisions, with a few exceptions,<sup>120</sup> and the importance of expanding the diversity of the highest court.

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

possibility that the ideology that these justices would bring to the court might unsettle the doctrinal order. In the case of Brandeis it was the prediction that his business decisions and labor decisions would disfavor powerful interests, and that his decisions would be influenced by potential societal consequences of powerless people. With respect to Marshall, his opponents predicted that he would bring a skeptical judicial eye informed by history and experience to status quo arguments in equality and criminal system cases. And as to Sotomayor, of course, the prediction was that she would evaluate claims of racial equality and governmental abuse of power from the perspective of the powerless in society—with empathy,<sup>121</sup> and knowledge of the effects of those decisions—a perspective with which she was very familiar despite her improbable professional achievements.

And it is the focus on the value of our varied experiences as Americans that shapes my own thinking about the importance of diversity on the bench, as well as my appreciation of the openings represented by the elevation of Brandeis, Marshall, and Sotomayor to the highest court of our land.

The work of Scott Page, on the importance of diverse workgroups in *The Difference*,<sup>122</sup> is consistent with Holmesian admonition about experience and judging.<sup>123</sup> Our most powerful positions and teams, whether led by head football coaches, university presidents, Fortune 100 CEOs, Governors, or Presidents remain virtually off limits to women and minorities. As a society, we remain comfortable with the assumption that this exclusion is consistent with the meritocratic ideal.<sup>124</sup> In contrast, Page's work emphasizes the positive difference that diverse teams make in quality of decision-making. In *The Difference*, Page demonstrates that diverse teams possess the cognitive diversity that allows them to outperform homogeneous teams.<sup>125</sup>

Page examines the sources of cognitive diversity.<sup>126</sup> Those sources are not only in the infinite variety that makes up each representative of human species,<sup>127</sup> but also the differences in our accumulated life experiences.<sup>128</sup> Our different training experiences influence our approaches to interpretation.<sup>129</sup> Moreover, in addition to these objective differences, our societally constructed identities on which so much of our experience

depends, such as race, physical ability, gender, sexual orientation, religion, class, and culture, shape our identities—our subjectivities.<sup>130</sup> As a result of our experience with these socially constructed identities, we tell different and diverse stories about others and ourselves, and about the world as we interpret our own and human experience.<sup>131</sup>

Our inherently “plastic” brains, Page argues, are differently shaped by our experiences, and those diverse experiences create diverse cognitive tools that shape our interpretation approaches.<sup>132</sup> Our experiences affect our thinking and our strategies. More pointedly, if I may, we still react to men and women differently; we treat them differently. As a result, men and women have different experiences, and they learn to think about identical factual situations differently.<sup>133</sup> So it is, as well, with Blacks, with Latinos, with Gays and Lesbians, and differently abled people.<sup>134</sup> We understand the world differently not because we possess a characteristic, but because the characteristics society deems most significant drive our experiences, map our permitted territory, and determine our worldview. No experience is devalued by these truths.

These differences in understanding are central to what we do as lawyers, and even more importantly to our role as arbiters—as judges. As the Honorable Edward M. Chen said in 2003, “judges draw upon the breadth and depth of their own life experience, upon the knowledge and understanding of people, and of human nature. And inevitably, one’s ethnic and racial background contributes to those life experiences.”<sup>135</sup>

Race, ethnicity, and religion matter, among other demographic and experiential markers, not because of physical characteristics, or even notions of historical entitlement due to past discrimination, or the unforgiving, limited, and often patronizing attributes (such as result orientation) the privileged often ascribe to judicial insurgents. Rather, in a society in which we may live within a few miles of each other yet have radically different realities and life prospects,<sup>136</sup> identity often means a different “well” of experience upon we draw to interpret the language of law and its consequences for people. “It is a constitution we are expounding”<sup>137</sup> for an increasingly diverse America. Judicial diversity will insure that we share that task in our tricentennial century.

## Conclusion

We celebrate the breakout moments in judicial diversity for several reasons. The appointments of Brandeis and Marshall both lead to greater visibility for the outsider and the marginalized in American Society. According to Robert Burt, Brandeis contributed by his “extensive recitation of the factual background of the dispute at issue intended to enlarge his colleagues’ range of vision to include facts and perspectives outside their ordinary experience.”<sup>138</sup> Burt continues: “Brandeis maintained this vision by standing at the social margin between those who were comfortably included and those bitterly outside, and he pleaded for the disappearance of the distinction.”<sup>139</sup> Brandeis also “penned . . . the definite judicial pronouncement on the necessity for free speech in a democracy,”<sup>140</sup> which provided the foundation for the Court’s ultimate decision to unequivocally protect unpopular speech.<sup>141</sup> Likewise Marshall also cast a bright light on circumstances that other justices thought irrelevant: whether the poor ought to be excused from having to save the money to file for bankruptcy,<sup>142</sup> or whether an impoverished minority woman actually has the freedom to reject the government’s offer of paying for childbirth in light of government refusal to pay for an abortion,<sup>143</sup> or whether poor Mexican children in Texas suffered from lack of opportunity as a result of the effect of ill-funded schools.<sup>144</sup> Through his illumination of the facts surrounding the existence of outsiders, Marshall also argued that a more sweeping examination of the realpolitik of outsider existence was necessary to determine whether the government denied equal protection or fundamental rights. As I wrote in 1989:

Marshall’s confirmation placed on the Court a member whose theoretical understanding of equality had been altered and enriched by exposure to the myriad manifestations of racial subordination. Marshall’s confirmation created the possibility that Marshall, indelibly influenced by experiences unique among his fellow justices, might forcefully urge the Court to invest the Equal Protection Clause with content worthy of its aspiration, and with tools equal to its corrective task. After all, the last Supreme Court justice from Marshall’s home state of Maryland, Roger

Taney, had authored the infamous Dred Scott majority opinion that summed up all that Marshall had worked to correct. Marshall's appointment to the Court broke remaining barriers to inclusion and pluralism in America's highest judicial institution.<sup>145</sup>

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

Marshall's confirmation led the country to consider the quixotic possibility that exclusion of African-Americans from the United States Supreme Court might be unacceptable, indeed, perhaps unthinkable. The confirmation of Marshall signaled a weak spot in "the last remaining color barrier in high public service, save for the Presidency itself."<sup>146</sup>

So too was Brandeis's confirmation significant as a marker of trust and inclusion for Jewish citizens. Urofsky wrote: "The Victory cheered the progressives as little else had done for several years, and reform journals and the Jewish press carried one article after another praising "Mr. Justice Brandies." Jacob Shiff predicted that he would become "an adornment" to the bench, and called the confirmation an honor to our people."

Ironically, at the outset of the Sotomayor hearings, Senator Patrick Leahy referred to the opposition both Brandeis and Marshall faced during their respective confirmation processes: "Those who break barriers often face the added burden of overcoming prejudice. That has been true on the Supreme Court. Thurgood Marshall graduated first in his law school class, was the lead counsel for the NAACP Legal Defense Fund, sat on the United States Court of Appeals for the Second Circuit, and served as the Nation's top lawyer, the Solicitor General of the United States":

He won a remarkable 29 out of 32 cases before the Supreme Court.

Despite his qualifications and achievements, at his confirmation hearing, he was asked questions designed to embarrass him, questions such as "Are you prejudiced against the white people of the South?"



[ . . . ]

The confirmation of Justice Louis Brandeis, the first Jewish American to be nominated to the high court, was a struggle rife with anti-Semitism and charges that he was a “radical.” The commentary at the time included questions about “the Jewish mind” and how “its operations are complicated by altruism.”<sup>147</sup>

How fitting that Senator Leahy would refer to the breakthrough legacies of Brandeis and Marshall during the Sotomayor hearings. Senator Leahy use their examples to show that the opponents of diversity on the Supreme Court have targeted the most accomplished minorities in their quest to maintain a two class society and an homogenous judiciary. Although I disagree with one who obsequiously called Louis D. Brandeis the “visible manifestation of the greatest legal mind of the past one hundred years,”<sup>148</sup> I would agree that her later statement that he was one of the greatest lawyers of the twentieth century.<sup>149</sup> My list would also include Thurgood Marshall and Charles Hamilton Houston,<sup>150</sup> among others. One author has forcefully argued that the failure of Brandeis to distinguish himself as a lawyer or jurist in the area of racial equality tarnished his legacy, even as his method and approach to litigation set a powerful paradigm that Houston and Marshall would emulate.<sup>151</sup> Justice Marshall distinguished himself as both a writer of majority opinions in areas of his expertise such as civil procedure,<sup>152</sup> as well as a powerful dissenting voice on behalf of Blacks, the poor, the mentally ill, minority women, and inmates sentenced to death. Marshall also wrote significant unanimous opinions in areas not usually associated with his legacy, such as civil procedure, among others.

Sotomayor’s record is yet young, but she has already written dissents that suggest that she will develop, as did Thurgood Marshall, a jurisprudence of judicial protection for minorities, criminal suspects, and those condemned to death. In *Schuette v. Bamn*,<sup>153</sup> she dissented from the Court’s decisions upholding a Michigan ban on race conscious affirmative action in higher education as inconsistent with established precedent that forbade white majorities from structuring political processes to disadvantage

minorities.<sup>154</sup> She observed dryly, “[T]o know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process.”<sup>155</sup> In *Glossip v. Gross*,<sup>156</sup> she wrote the principle dissent in a 5–4 decision that placed the burden on inmates condemned to death to identify an alternative method of execution that would cause substantially less severe risk of pain, characterizing the majority decision as one that would subject the condemned men to “what may well be the chemical equivalent of being burned at the stake.”<sup>157</sup> And in *Mullenix v. Luna*,<sup>158</sup> she dissented from the courts decision to reject civil liability for deadly force when an officer had a less lethal option available, characterizing the courts decision as encouragement to a “rogue” officer and the establishment “of the culture . . . to use deadly force for no discernible gain . . . By sanctioning a “shoot first, think later” approach to policing, the Court renders the protections of the Fourth Amendment hollow” she admonished.<sup>159</sup> She has also urged the Court to adhere to its prior decisions,<sup>160</sup> and she has cautioned the Court to not to announce new law without full exploration of its consequences.<sup>161</sup>

The lives of these three Justices demonstrate the potential of a diverse judiciary to shore up and strengthen our constitutional fabric. Despite their differences and disparate emphases, Brandeis and Marshall wanted to expand the American dream to outsiders, and Sotomayor has already that she will follow suite. All would join Langston Hughes cry in his poem “Let America be America again.”

“Oh, yes, I say it plain, America never was America to me, / And yet I swear this oath— / America will be!”<sup>162</sup>

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## Notes

1. See Lewis J. Paper, *Brandeis* (1983), 212–13.
2. Melvin I. Urofsky, *Louis Brandeis: A Life* (2009), 407–8; Jerold S. Auerbach, *Rabbis and Lawyers* (1990), 124–27; Phillipa Strum, *Louis Brandeis: Justice for the People* (1984), 233; Melvin I. Urofsky, *A Mind of One Piece: Brandeis and American Reform* (1971), 97
3. Urofsky, *Louis Brandeis: A Life*, 403–4; Paper, *Brandeis*, 204–8; Melvin I. Urofsky, *Louis D. Brandeis and the Progressive Tradition* (1981), 87–88; Ellen Norman Stern, *Embattled Justice: The Story of Louis Dembitz Brandeis* (1971), 117–19; Urofsky, *A Mind of One Piece*, 100.
4. Strum, *Louis Brandeis: Justice for the People*, 229.
5. Urofsky, *Louis Brandeis: A Life*, 411; Strum, *Louis Brandeis: Justice for the People*, 225; Stern, *Embattled Justice*, 117.
6. Urofsky, *Louis Brandeis: A Life*, 417–29; Paper, *Brandeis*, 205; Urofsky, *A Mind of One Piece*, 95.
7. *Judge Louis Dembitz Brandeis*, Biographical Directory of Federal Judges, Fed. Jud. Ctr., <http://www.fjc.gov/servlet/nGetInfo?jid=241&cid=999&ctype=na&inststate=na> (last accessed November 16, 2015).
8. Strum, *Louis Brandeis: Justice for the People*, 242–46.
9. Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy,” *Harvard Law Review* 4 (1890): 193.
10. *Ibid.*, 205.
11. *Ibid.*
12. *Olmstead v. United States*, 277 U.S. 438 (1928).
13. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
14. Warren and Brandeis, “The Right to Privacy,” 214.
15. *Ibid.*, 219.
16. See, for example, Erwin Chemerinsky, “Rediscovering Brandeis’s Right to Privacy,” *Brandeis Law Journal* 643 (2007): 45.
17. Robert A. Burt, *Two Jewish Justices: Outcasts in the Promised Land* (1988), 85; Strum, *Louis Brandeis: Justice for the People*, 239 n.2; Erwin Chemerinsky, “Rediscovering Brandeis’s Right to Privacy,” 45.
18. Urofsky, *Louis Brandeis: A Life*, 204.

19. *Muller v. Oregon*, 208 U.S. 412 (1908).

20. *Lochner v. New York*, 198 U.S. 45 (1905).

21. An important issue in *Lochner* was whether the occupation of baker was associated with lung disease.

22. Urofsky, *Louis Brandeis: A Life*, 216.

23. *Muller v. Oregon*, 208 U.S. 412 (1908).

24. Urofsky, *Louis Brandeis: A Life*, 216–17.

25. See Urofsky, *Louis Brandeis: A Life*, 222–23: discusses subsequent attacks by feminists that Brandeis promoted female inferiority in his defense of Oregon. See also subsequent decisions grounded in female capacity: for example, *Rostker v. Goldberg*, 453 U.S. 57 (1981) (exclusion of women from involuntary military service constitutional); *Hoyt v. Florida*, 368 U.S. 57 (1961) (exclusion of women from involuntary service on juries constitutional). Compare *United States v. Virginia*, 518 U.S. 515, 533 (1996) (establishing semi-strict scrutiny of gender classifications to ensure a “proffered justification is ‘exceedingly persuasive’ . . . and is ‘genuine’ . . . [not based on] overbroad generalizations about the different talents, capacities, or preferences of males and females”).

26. Urofsky, *Louis Brandeis: A Life*, 219. Lawyers at the NAACP Legal Defense Fund adopted this “Brandeis Brief” approach in the campaign to overturn *Plessy v. Ferguson*. See Richard Kluger, *Simple Justice* (1975), 251.

27. Urofsky, *Louis Brandeis: A Life*, 224–27. Brandeis continued this work in other states, including Illinois, Ohio, and California, as well as serving as a vice president of the American Association for Labor Legislation. Allon Gal, *Brandeis of Boston*, (1981), 143–45.

28. Alfred Lief, *Brandeis: The Personal History of an American Ideal*, (1936) 61–64.

29. Paper, *Brandeis*, 215–16, 218; Lief, *Brandeis: The Personal History*, 64–69; Allon Gal, *Brandeis of Boston*, 175.

30. Brandeis advised Gifford Pinchot, head of the U.S. Forest Service, after President Taft fired Pinchot for his opposition to powerful interests who wished to acquire coal-mining rights on land designated for national forest status. By doing so, Pinchot opposed powerful interests who were funded by financiers including J. P. Morgan. Char Miller, *Gifford Pinchot and the Making of Modern Environmentalism*, (2001), 37, 207, 307; Gal, *Brandeis Of Boston*, 153.

31. Urofsky, *Louis D. Brandeis and the Progressive Tradition* (1981), 85–86.

32. *Ibid.*, 86.

33. Gal, *Brandeis of Boston*, 177 (Sherman anti-trust act).
34. See Urofsky, *Louis D. Brandeis: A Life*, 202–3 (legal ethics).
35. Roy M. Merskey, “Louis Dembitz Brandeis 1856–1941: A Bibliography,” *Yale Law Library Publications* (April 1958): 15.
36. See Ezekiel Rabinowitz, *Justice Louis Brandeis: The Zionist Chapter of His Life* (1968), 48 (discussing Brandeis’s service for the president on the United States Commissions on Industrial Relations, as well as “the counsel of Brandeis on trust legislation, currency and labor problems”).
37. Previously, Wilson wanted Brandeis to be Chairman of the Commission on Industrial Relations. Rabinowitz, *Brandeis: The Zionist Chapter*, (1968), 48. Wilson had also considered the possibility of appointing him to be Attorney General of the United States or Solicitor General, but prominent lawyers opposed these possible appointments (*ibid.*, 51–52). See also Gal, *Brandeis of Boston*, 188.
38. Urofsky, *A Mind of One Piece*, 102.
39. See Strum, *Louis Brandeis: Justice for the People*, 293 (anti-Semitism in a letter opposing Brandeis); and, Brandeis also shared that belief (*ibid.*, quoting Brandeis’s journal).
40. Gal, *Brandeis of Boston*, 195–96. Abbott Lawrence Lowell, the president of Harvard who later supported Jewish quotas there, “notified Wilson immediately after the election that Brandeis did not ‘Stand very high in the opinion of the best Justices of Massachusetts’” (*ibid.*, 195–96).
41. *The Sun* of New York City headlined “Wilson Shocks Congress by naming Brandeis for the United States Supreme Court” (Stern, *Embattled Justice*, 132. *The Wall Street Journal* used provocative language inveighing against the nomination, calling him “rabid” and “super extreme” (Urofsky, *Louis Brandeis: A Life*, 440–42).
42. Phillipa Strum, *Louis D. Brandeis: Justice for the People*, 294
43. Strum, *Louis D. Brandeis: Justice for the People*, 294.
44. Urofsky, *A Mind of One Piece*, 445–46; Strum, *Louis Brandeis: Justice for the People*, 297.
45. Urofsky, *A Mind of One Piece*, 446–47.
46. *Ibid.*, 448.
47. *Ibid.*, 449; Paper, *Brandeis*, 217; Gal, *Brandeis of Boston*, 198.
48. Paper, *Brandeis*, 218–20.

49. Urofsky, *A Mind of One Piece*, 450–51; Paper, *Brandeis*, 221–26; Gal, *Brandeis of Boston*, 197–198.

50. Urofsky, *A Mind of One Piece*, 452.

51. *Supreme Court Nominations, present–1789*, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last accessed November 13, 2015).

52. *Ibid.*, (last accessed November 13, 2015). The next time a nominee had to wait as long to be confirmed was in 1959: Potter Stewart was nominated January 17, 1959, and confirmed with 17–0 votes on May 5, 1959—a wait of 117 days.

53. Richard Kluger, *Simple Justice*, 128. See also Juan Williams, *Thurgood Marshall: American Revolutionary*, (1998), 54–59.

54. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

55. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

56. The first African American to serve on a Court of Appeals was William H. Hastie, whom Truman appointed to the United States Court of Appeals for the Third Circuit in 1949. *Judge William Henry Hastie*, Biographical Directory of Federal Judges, Fed. Jud. Ctr., <http://www.fjc.gov/servlet/nGetInfo?jid=995&cid=999&ctype=na&instate=na> (last accessed Dec. 4, 2015). See also Gilbert Ware, *William Hastie: Grace under Pressure*, (1985).

57. In 2006, then-Judge Sonia Sotomayor discussed the prestige of the United States Court of Appeals for the 2nd Circuit (Sonia Sotomayor, “Another Historical Moment,” *Federal Law* 29–30 [2006]: 53). “Throughout the years from 1925 to 1960, historians consider the U.S. Court of Appeals for the Second Circuit to be among America’s strongest and most influential courts, mostly due to the quality of its bench, which included Learned Hand, Thomas Swan, Augustus Hand, Charles E. Clark, Jerome Frank, and Harrie B. Chase. In more recent times, we were graced by the presence of Thurgood Marshall, who served on our court from 1961 to 1965, and who later became our circuit justice until his death” (*ibid.*). See also John J. Hoeffner, “One Hundred Years of Solitude: Dissent in the Second Circuit, 1891–1991,” *St. John’s Law Review* 875, no.934 (1991): 65.

58. I noted in my 1989 article on Marshall’s confirmation to the Supreme Court that in “a *New York Times Magazine* article written shortly after [the Solicitor General] appointment, Marshall was asked whether Johnson had such a plan. Marshall answered ‘Look, there’s nothing to that; it’s the purest of speculation. I can tell you the President made no promises, there were no

deals, and there was no talk of it. He wanted me for Solicitor General. That's all.' But an aide to Johnson Jack Valenti, remembers differently; he remembered 'a plan' despite public denials by both Johnson and Marshall . . . He recalls Johnson saying: 'By God, that son-of-a bitch will have prosecuted more cases before the Supreme Court than any lawyer in America. So how is anybody gonna turn him down.' Linda Greene, "The Confirmation of Thurgood Marshall to the United States Supreme Court," 6 *Harv. Black Letter J.* 27, 29 (1989) (footnotes omitted).

59. Johnson was determined to bring Blacks into positions of importance: "Before he nominated Marshall to the Supreme Court, President Johnson had already appointed Blacks to a number of posts, including Robert Weaver as Secretary of the Department of Housing and Urban Development. Johnson's judicial appointees included Court of Appeals Judges William Hastie (3rd Circuit) and Wade McCree (6th Circuit) and Federal District Court Judges Constance Baker Motley (NY), Spottswood Robinson (DC), and Leon Higginbotham (PA)." See 113 Cong. Rec. H16443-44 (remarks of Senator Ernest Gruening of Alaska); Linda Greene, "The Confirmation of Thurgood Marshall to the United States Supreme Court," 6 *Harv. Black Letter J.* 28-29 (1989).

60. See, for example, *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218(1964); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Smith v. Allwright*, 321 U.S. 649 (1944); *Hansberry v. Lee*, 311 U.S. 32 (1940).

61. Linda Greene, "The Confirmation of Thurgood Marshall to the United States Supreme Court," 6 *Harv. Black Letter J.* 20, 27 (1989).

62. 1962 Congressional Quarterly Almanac 686, Vote #175.

63. Linda Greene, "The Confirmation of Thurgood Marshall to the United States Supreme Court," 6 *Harv. Black Letter J.* 39 (1989) (Ervin).

64. *Ibid.*, 34.

65. *Ibid.*, 36-37 (Ervin); *ibid.*, 46-48. Marshall stated during his confirmation, "It is the duty of the Court to keep stability in the law." He went on to testify, "I think of the Constitution as a living document [that] needs someone to interpret it . . . I would hope that my own ideas of fairness are based entirely on the Constitution, and I would not under any circumstance find where the Constitution says this and my 'personal feelings' say that, I would go with the Constitution. I am obliged to."

66. *Ibid.*, 44 (1989) (Ervin).

67. *Ibid.*, 38–39 (Thurmond).

68. Sen. Rep. No. 13 at 13–14, discussed in detail in Linda Greene, “The Confirmation of Thurgood Marshall to the United States Supreme Court,” 6 *Harv. Black Letter J.* 44 (1989).

69. Linda Greene, “The Confirmation of Thurgood Marshall to the United States Supreme Court,” 6 *Harv. Black Letter J.* 45–47 (1989).

70. *Ibid.*, 30.

71. *Nomination of Thurgood Marshall of New York, to be an Associate Justice of the Supreme Court of the United States*, 90th Cong., 1st Sess. 1 (1967); Linda Greene, “The Confirmation of Thurgood Marshall to the United States Supreme Court,” 6 *Harv. Black Letter J.* 49 (1989).

72. Linda Greene, “The Confirmation of Thurgood Marshall to the United States Supreme Court,” 6 *Harv. Black Letter J.* 38 (1989).

73. *Ibid.*, 49–50.

74. Barry J. MacMillion, *U.S. Circuit and District Court Judges: Profile of Select Characteristics*, Cong. Res. Serv. (Mar. 19, 2014).

75. Barry J. MacMillion, *U.S. Circuit and District Court Judges: Profile of Select Characteristics*, Cong. Res. Serv. (Mar. 19, 2014). See, for example, A. E. Dick Howard, “The Changing Face of the Supreme Court,” *Virginia Law Rev.* 231 (2015): 101; Mark Hurwitz and Drew Lanier, “Judicial Diversity In Federal Courts,” 96 *Judicature* 76 (2012); Russell Wheeler, *The Changing Face of the Federal Judiciary* (Brookings Institution August 2009); Jonathan K. Stubbs, “A Demographic Snapshot of America’s Federal Judiciary: A Prima Facie Case for Change,” U. of Richmond UR Scholarship Repository (2011); Rosemary Hunter, “More Than Just a Different Face? Judicial Diversity and Decision-Making,” *Current Legal Problems* (2015), <http://clp.oxfordjournals.org/content/early/2015/04/27/clp.cuv001.full> (last accessed November 13, 2015). See Russell Wheeler, *The Changing Face of the Federal Judiciary*, Brookings Inst. (August 2009); David G. Savage, *Guide to the Supreme Court* (4th ed. 2004), 910; Gerald Gryski, Gry Zuk, and Deborah Barrow, “A Bench that Looks Like America? Representation of African Americans and Latinos on the Federal Courts,” 56 *J. of Pol.* 1076 (1994).



76. The research has expanded beyond mere demographics, such as race, gender, and ethnicity, to the relationship between demographics, identity, and experiential attributes and judicial decisions. See, for example, Brenden Higashi, “Class and Courts: An Analysis of Class Attributes and Judicial Decision-making” (a paper at the Annual Meeting of the Western Political Science Association in Las Vegas, NV., Apr. 2–4, 2015), <http://wpsa.research.pdx.edu/papers/docs/Higashi%20Class%20and%20Courts.pdf> (last accessed November 13, 2015); Nancy N. Crowe, “The Effects of Judges’ Sex and Race on Judicial Decision-making on the United States Court of Appeals 1981–1996,” unpublished Ph.d dissertation, University of Chicago, 1999, on file with author. Researchers have also explored the relationship between religious affiliation and legal decision-making. See Gregory Sisk, Michael Heise, and Andrew Morris, “Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions,” Cornell Law Faculty Publications (2004), <http://www.scholarship.law.cornell.edu/facpub/729/> (last accessed November 13, 2015); Donald Songer and Susan Tabrizi, “The Religious Right in Court: The Decision-making of Christian Evangelicals in State Supreme Courts,” *Journal of Politics* (1999): 61; John H. Garvey, “Catholic Judges in Capital Cases,” Catholic University of America, Columbus School of Law Scholarship Repository (1998), [http://scholarship.law.nd.edu/law\\_faculty\\_scholarship/527/](http://scholarship.law.nd.edu/law_faculty_scholarship/527/) (last accessed November 13, 2015); Donald Songer, Sue Davis, and Susan Haire, “Reappraisal of Diversification of the Federal Courts: Gender Effects in the Courts of Appeal,” University of South Carolina, Scholar Commons (1994), [http://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1063&context=poli\\_facpub](http://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1063&context=poli_facpub) (last accessed November 13, 2015). In addition, the relationship between diversity of professional experience and the quality of the federal judiciary is also an important issue. See also, for example, “Alliance for Justice, Broadening the Bench: Judicial Nominations and Professional Diversity,” discussing the importance of professional diversity (July 10, 2015); Mark Hurwitz and Drew Lanier, “Judicial Diversity in Federal Courts,” *Judicature* 96 (2012):6, 78, examining federal court nominees’ judicial, prosecutorial, and government experience.

77. Brian Bornstein and Monica Miller, *God in the Courtroom* (2009), 92.

78. Andrew Lewis Kaufmann, *Justice Cardozo* (1998), 455.

79. Bornstein and Miller, *God in the Courtroom*, 94; *Associate Justice Arthur Joseph Goldberg*, Biographical Directory of Federal Judges, Fed. Jud. Ctr.,

<http://www.fjc.gov/servlet/nGetInfo?jid=875&cid=999&ctype=na&instate=na> (last accessed Nov. 13, 2015).

80. *Associate Justice Abe Fortas*, Biographical Directory of Federal Judges, Fed. Jud. Ctr., <http://www.fjc.gov/servlet/nGetInfo?jid=783&cid=999&ctype=na&instate=na> (last accessed Nov. 13, 2015); see also Laura Kalman, *Abe Fortas* (1990), 376–400. See also Jennifer Low, ed., *The Jewish Justices of the Supreme Court* (1994).

81. Stephen Roberts, “Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana Clamor,” *New York Times* (Nov. 8, 1987), <http://www.nytimes.com/1987/11/08/us/ginsburg-withdraws-name-as-supreme-court-nominee-citing-marijuana-clamor.html> (last accessed Nov. 13, 2015).

82. *Supreme Court Nominations, present–1789*, Senate.gov, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last accessed Nov. 13, 2015).

83. *Supreme Court Nominations, present–1789*, Senate.gov, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last accessed Nov. 13, 2015).

84. *Associate Justice Elena Kagan*, Fed. Jud. Ctr., Biographical Directory of Federal Judges, <http://www.fjc.gov/servlet/nGetInfo?jid=3289&cid=999&ctype=na&instate=na> (last accessed Nov. 13, 2015).

85. *Judge William Hastie*, Fed. Jud. Ctr., Biographical Directory of Federal Judges, <http://www.fjc.gov/servlet/nGetInfo?jid=995&cid=999&ctype=na&instate=na> (last accessed Nov. 13, 2015). See also Gilbert Ware, *William Hastie: Grace Under Pressure* (1985).

86. *Judge Wade Hampton McCree, Jr.*, Fed. Jud. Ctr., Biographical Directory of Federal Judges, <http://www.fjc.gov/servlet/nGetInfo?jid=1537&cid=999&ctype=na&instate=na> (last accessed Dec. 4, 2015); *Solicitor General: Wade H. McCree, Jr.*, U.S. Dep’t of Just., <http://www.justice.gov/osg/bio/wade-h-mccree-jr> (last accessed Dec. 4, 2015).

87. Jeffrey Toobin, “The Obama Brief: The President Considers his Judicial Legacy,” the *New Yorker* (Oct. 27, 2014), <http://www.newyorker.com/magazine/2014/10/27/obama-brief> (last accessed Nov. 16, 2015); Stephen Labaton, “President’s Judicial Appointments: Diverse but Well in the Mainstream,” *New York Times* (Oct. 17, 1994),

<http://www.nytimes.com/1994/10/17/us/president-s-judicial-appointments-diverse-but-well-in-the-mainstream.html> (last accessed Nov. 16, 2015).

88. Barry J. Macmillan, *U.S. Circuit and District Court Judges: Profile of Select Characteristics*, Cong. Res. Serv. (Mar. 19, 2014).

89. Judge Constance Baker Motley, Biographical Directory of Federal Judges, Fed. Jud. Ctr., <http://www.fjc.gov/servlet/nGetInfo?jid=1704&cid=999&ctype=na&instate=na> (last accessed Nov. 13, 2015). See also Constance Baker Motley, *Equal Justice under Law* (1998).

90. Judge Amalya Lyle Kearse, Biographical Directory of Federal Judges, Fed. Jud. Ctr., <http://www.fjc.gov/servlet/nGetInfo?jid=1236&cid=999&ctype=na&instate=na> (last accessed Nov. 13, 2015).

91. Associate Justice Clarence Thomas, Biographical Directory of Federal Judges, Fed. Jud. Ctr., <http://www.fjc.gov/servlet/nGetInfo?jid=2362&cid=999&ctype=Na&instate=na> (last accessed Nov. 16, 2015).

92. In an address on the twenty-first anniversary of the District of Columbia Emancipation Act, Frederick Douglas said that the discussion of race would go on. “What Abraham Lincoln said in respect of the United States is as true of the colored people as of the relations of those States. They cannot remain half slave and half free. You must give them all or take from them all. Until this half-and-half condition is ended, there will be just ground of complaint . . . Until the colored man’s pathway to the American ballot box, North and South, shall be as smooth and safe as the same is for the white citizen, this discussion will go on . . .” Hon. Frederick Douglass, “The United States Cannot Remain Half-Slave and Half-Free” (speech on the occasion of the Twenty-First Anniversary of Emancipation in the District of Columbia, April 16, 1883), in *Frederick Douglass: Selected Speeches and Writings*, edited by Philip S. Foner (Chicago, 1999). I say as well that the discussion of judicial diversity will go on.

93. Nancy Scherer, “Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Judicial System Possible,” *Nw. Law Review* 587 (2011): 105.

94. Sylvia R. Lazos, Only Skin Deep: The Cost of Partisan Politics on Minority Diversity of the Federal Bench: Why Care Whether Judges Look “Like America” If, Because of Politics, a “Voice of Color” Has Become a “Whisper of Color”? *Scholarly Works*, Paper 476 (2008), <http://scholars.law.unlv.edu/facpub/476/> (last accessed Nov. 13, 2015).

95. See, for example, Jennifer L. Peresie, “Female Judges Matter: Gender and Collegial Decision-making in the Federal Appellate Court,” *Yale Law Journal* 1759 (2005): 114 (“gender

composition of the bench affected federal appellate court outcomes and title VII sexual harassment and sex discrimination cases in 1999, 2000, and 2001”). See also Sean Farhang, et al., “The Politics of Opinion Assignment and Authorship on the United States Court of Appeals: Evidence from Sexual-Harassment Cases,” *Journal of Legal Studies* S59 (2015): 44, [http://www.princeton.edu/~jkastell/OpinionAssignment/farhang\\_kastellec\\_wawro\\_opinion\\_assignment\\_for\\_web.pdf](http://www.princeton.edu/~jkastell/OpinionAssignment/farhang_kastellec_wawro_opinion_assignment_for_web.pdf) (last accessed Nov. 16, 2015).

96. See Pat K. Chew and Robert E. Kelley, “Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases,” *Washington University Law Review* 1117 (2009): 86, [http://openscholarship.wustl.edu/law\\_lawreview/v0186/iss5/2](http://openscholarship.wustl.edu/law_lawreview/v0186/iss5/2) (last accessed Nov. 16, 2015).

97. Gregory C. Sisk, et al., “Searching for the Soul of Judicial Decision-making: An Empirical Study of Religious Freedom Decisions,” *Ohio State Law Journal* (2004): 65, <http://scholarship.law.cornell.edu/facpub/729/> (last accessed Nov. 16, 2015); Bornstein and Miller, *God in the Courtroom*, 92; Donnell Songer and Susan Tabrizi, “The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts,” *J. of Pol.* 507–26 (1999): 61, [http://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1061&context=poli\\_facpub](http://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1061&context=poli_facpub) (last accessed Nov. 16, 2015).

98. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

99. Gordon Allport, *The Nature of Prejudice* (1954); Rosabeth Moss Kantor, *Men and Women of the Corporation* (1977); H. Tajfel, *Human Groups and Social Categories* (1981); David L. Hamilton, “Illusory Correlation as a Basis for Stereotyping,” in *Cognitive Processes in Stereotyping and Intergroup Behavior*, edited by D. Hamilton 1981), 115; David A. Wilder, “Perceiving Persons as a Group: Categorization and Intergroup Relations,” in *Cognitive Processes In Stereotyping and Intergroup Behavior*, 213. Kirwin Institute at the Ohio State University Implicit Bias Project focuses on attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. Kirwin Inst., <http://kirwaninstitute.osu.edu/researchandstrategicinitiatives/#implicitbias> (last accessed Dec. 10, 2015). See also Cheryl Staats, “State Of The Science: Implicit Bias Review 2014,” Kirwin Inst. (2014) 12 (reviewing important research and conferences on implicit bias, the popularity of the topic in mainstream lay media, and university initiatives on the topic). Implicit bias affects judging. See Pamela M. Casey, Roger K. Warren, Fred L. Cheesman, and Jennifer K. Elek,

“Addressing Implicit Bias in the Courts,” 49 *Ct. Rev.* 64 (2013); Jerry Kang, Mark Bennett, Devon Carbado, et al., “Implicit Bias in the Courtroom,” 59 *UCLA L. Rev.* 1124 (2012).

100. See, for example, Donald R. Songer and Susan J. Tabrizi, “The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts,” 61 *J. Pol.* 507, 507 (1999) (concluding that “the decisions of state Supreme Court justices who are evangelicals provide evidence for the claim that their beliefs have an influence on decisions in the areas of gender discrimination, obscenity, and the death penalty”).

101. Brenden Higashi, “Class and Courts: An Analysis of Class Attributes and Judicial Decision-making” (a paper at the Annual Meeting of the Western Political Science Association in Las Vegas, Nev., Apr. 2–4, 2015), <http://wpsa.research.pdx.edu/papers/docs/Higashi%20Class%20and%20Courts.pdf> (last accessed November 13, 2015).

102. Oliver Wendell Holmes, *The Common Law* 1 (1909),.

103. President Barack Obama, Remarks by the President in Nominating Judge Sonia Sotomayor to the United States Supreme Court (May 26, 2009), <https://www.whitehouse.gov/the-press-office/remarks-president-nominating-judge-sonia-sotomayor-united-states-supreme-court> (last accessed Dec. 9, 2015).

104. Ibid.

105. Ibid.

106. Ibid.

107. Ibid.

108. *Associate Justice Sonia Sotomayor*, Fed. Jud. Ctr., Biographical Directory of Federal Judges, <http://www.fjc.gov/servlet/nGetInfo?jid=2243&cid=999&ctype=na&instate=na> (last accessed Dec. 9, 2015).

109. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. Sess. 1 (2009) [hereafter *Hearings*].

110. The statement of Mr. Ensign, 155 Cong. Rec S8822 (July 14, 2009), included reference to the Supreme Court motto. “In conclusion, when thinking back on the phrasing engraved in marble above the entrance to the United States Supreme Court, ‘equal justice under law,’ Judge Sotomayor’s record and testimony provide uncertainty and doubt that she will rule with a fair and impartial adherence to the rule of law.” There were numerous analyses of then-Judge

Sotomayor's opinions. These included nonpartisan ones by the Congressional Research Service. These analyses reveal that then-Judge Sotomayor adhered to precedent in her decisions. The result in these analyses depended on whether the group supported her nomination or opposed it. See, for example, Anna C Henning, & Kenneth R. Thomas, *Judge Sonia Sotomayor: Analysis of Selected Opinions*, Cong. Res. Serv. (Sept. 15, 2009); John O. Shimabukuro, *The Nomination of Judge Sonia Sotomayor: A Review of Second Circuit Decisions Relating to Reproductive Rights*, Cong. Res. Serv. (July 7, 2009). There were also extensive analyses by various groups in support of and against the nomination. See, for example, the NAACP Legal Defense and Education Fund Inc.'s report on the nomination of Judge Sonia Sotomayor to the Supreme Court (July 10, 2009), *Hearings* at 1015; the Association of the Bar of the City of New York's report on the nomination of Judge Sonia Sotomayor (June 30, 2009); Americans United for Life, "Worse Than Souter: A Comparison Chart," *Hearings* at 741.

111. See, for example, statement of the Hon. John Cornyn, U.S. Sen. From Tex. (July 13, 2009), acknowledging her distinguished career as a lawyer and a judge, *Hearings* at 853; statement of the Hon. Orrin Hatch, U.S. Sen. from Utah, *Hearings* at 11 ("compelling life story and a strong record of educational and professional achievement").

112. The American Bar Association Standing Committee, *Ratings*, [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/federal\\_judiciary/ratings11.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/federal_judiciary/ratings11.authcheckdam.pdf) (last accessed Dec. 9, 2015).

113. Jeffrey Rosen, "The Case Against Sonia Sotomayor," *The New Republic*, May 4, 2009.

114. Statement of Kim Askew concerning the nomination of the Honorable Sonia Sotomayor to be an associate justice of the Supreme Court of the United States before the Committee of the Judiciary United States Senate (July 16, 2009). Ms. Askew reported that the standing committee conducted an "extensive investigation into the personal qualifications of Judge Sotomayor," concluding "that Judge Sotomayor was well qualified to be associate justice of the United States." *Hearings* at 775. See also the analysis by Guy-Uriel Charles, Daniel L. Chen, and Mitu Gulati, "Not that Smart": *Sonia Sotomayor and the Construction of Merit*, [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3039&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3039&context=faculty_scholarship) (last accessed Dec. 9, 2015), concluding "Sotomayor was easily in the top 25% of all of the judges on the Court of Appeals in almost all of the categories that we examined. Moreover, in more than half the categories, she was in the top 10%. These results should at least bring into question the claims of her mediocrity. Indeed, based on our results, there is the strong possibility

that she was, during her tenure on the Second Circuit, among the most capable and influential appeals court judges in the country.” Guy-Uriel Charles, Daniel L. Chen, and Mitu Gulati, “*Not that Smart*”: *Sonia Sotomayor and the Construction of Merit*,” 33, [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3039&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3039&context=faculty_scholarship) (last accessed Dec. 9, 2015).

115. See, for example, statement of William Sessions, U.S. Sen. from Ala., ranking member of Comm. on the Judiciary, *Hearings* at 5, stating that “empathy . . . is another step down the road to a liberal activist, results oriented, and relativistic world where laws lose their fixed meaning [and] unelected judges set policy . . .” *Hearings* at 6; 155 Cong. Rec. S8736 (Aug. 4, 2009) (statement of Sen. Sessions) (“ . . . concerns about her deep commitment to the ideal of objectivity and impartiality”).

116. 155 Cong. Rec. S8736 (Aug. 4, 2009). See also 155 Cong. Rec. S8830 (statement of Sen. Brownback) (“Using empathy . . . [and] his or her own race and gender . . . to decide the outcome of cases cannot be confirmed by this body . . .” 155 Cong. Rec. S8830.

117. See statement of John Kyl, U.S. Sen. From Ariz. (July 11, 2009), *Hearings* at 1005 (“public statements suggest . . . decision-making based on her biases and prejudices”); *Hearings* at 1006.

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

119. Her decision in *Ricci v. Destanfo*.

120. FOR an early discussion of empathy in judging see Lynne N. Henderson, “Legality and Empathy,” 85 *Mich. L. Rev.* 1574 (1986–87), quoting Justice Thurgood Marshall in *United States v. Kras*, 409 U.S. 434, 460 (1973). “It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.” *Id.* A literature on the definitions and propriety of empathy in judging has thrived before and after Justice Sotomayor’s confirmation. See also Susan Bandes, *Empathy and Article III: “Judge Weinstein, Cases and Controversies,”* 64 *DePaul L. Rev.* 317, (2014), quoting Judge Jack Weinstein: “Sympathy for the poor or well-to-do must not affect substantive results. But empathy is not forbidden: it allows the court to better understand the positions of the parties,” 15. “Understanding what is at stake for the parties does not, without more, lead to sympathy for the parties, or to actions on behalf of one party or another. Conversely, sympathy and compassion can exist without empathy—these feelings may

rest on misconceptions about the object’s thoughts and desires” Jack B. Weinstein, “The Roles of a Federal District Court Judge,” 76 *Brook. L. Rev.* 439, 440 (2011); Thomas B. Colby, “In Defense of Judicial Empathy,” 96 *Minn. L. Rev.* 1944 (2012) (sustained defense of role of empathy in judging); “Kathryn Abrams, Empathy and Experience in the Sotomayor Hearings,” 36 *Ohio Northern University L. Rev.* 263 (2010); Arrie Davis, “Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor,” 40 *U. BALT. L.F.* 1 (2009).

121. Scott Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies*, (PUB PLACE: PUB, 2007), xx (“diversity trumps ability”), xxiii (“different can improve performance”), xxiv (“differences . . . provide seeds of innovation, progress and understanding”). Hereafter *The Difference*.

122. Oliver Wendell Holmes, *The Common Law* (1909), 85.

123. Lani Guinier, *The Tyranny of Meritocracy in America* (2015), xii (traditional merit reproduces privilege).

124. *The Difference*, 320–27.

125. *Ibid.*, 300–12.

126. *Ibid.*, 300.

127. *Ibid.*, 303–05.

128. *Ibid.*, 302–03.

129. *Ibid.*, 305–08.

130. *Ibid.*, 305.

131. *Ibid.*, 301.

132. *Ibid.*, 307.

133. *Ibid.*, 306.

134. Edward M. Chan, “The Judiciary, Diversity, and Justice For All,” 10 *Asian Am. L. J.* 127 (2003), <http://scholarship.law.berkeley.edu/aalj/v01110/iss1/11> (last accessed November 16, 2015); See also Luis Fuented-Rohwer and Kevin R. Johnson, “Principled Approach to the Quest for Racial Diversity on the Judiciary,” 10 *Mich. J. Race and L.* 5 (2004).

135. “Life Expectancy In Baltimore? May Depend On Where You Live,” I-Team: Study Finds Dramatic Differences Between City Neighborhoods, Mar. 1, 2012,

<http://www.wbalv.com/Life-Expectancy-In-Baltimore-May-Depend-On-Where-You-Live/11031518> (last accessed Dec. 14, 2015).



136. *McCulloch v. Maryland*, 17 U.S. 316,407 (1819)(constitution must be interpreted in light of “ its important objects . . .”)
137. Robert A. Burt, *Two Jewish Justices: Outcasts in the Promised* (1988), 90.
138. *Ibid.*, 87.
139. Philippa Strum, “Speech and Democracy: The Legacy of Justice Brandeis Today” (2015) (Brandeis Centennial Symposia).
140. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (punishment of mere advocacy unconstitutional).
141. *United States v. Kras*, 409 US 434, 451 (1973) (Marshall, J., dissenting) (court should weigh filing fee for indigent bankrupt with family of five existing on \$336 per month).
142. *Harris v. McRae*, 448 U.S. 297, 337 (1980) (Marshall, J., dissenting) (coercive impact on indigent women’s reproductive decisions by funding childbirth but not abortion).
143. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting) (unequal funding of education imposes unconstitutional burdens on indigent and minority children).
144. Linda Greene, “The Confirmation of Thurgood Marshall to the United States Supreme Court,” 6 *Harv. Black Letter J.* 50 (1989).
145. *Ibid.*
146. *Hearings*, at 1085–86.
147. Mary Murphy Schroeder, The Brandeis Legacy, 37 *San Diego L. Rev.* 711 (2000) (“visible manifestation of the greatest legal mind of the past one hundred years”).
148. *Id.*
149. Charles Hamilton Houston was the architect of the successful litigation campaign to overturn *Plessy v. Ferguson*. See, generally, R. Kluger, *Simple Justice* (1975); Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (1983).
150. Christopher A. Brace, “Louis Brandeis and the Race Question,” 52 *Alabama L. Rev.* 859 (2001), arguing that “Brandeis’s conspicuous, though historically overlooked, evaded of issues affecting African Americans.”
151. See, e.g. *Stewart v. Ricoh*, 487 U.S. 22 (1988); *Burlington Northern RR v. Woods*, 480 U.S. 1 (1987); *Walker v. Armco Steel*, 446 U.S. 470 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977).
152. 134 S. Ct. 1623 (2014).

153. *Id.* at 1651 (Sotomayor, J., dissenting).
154. *Id.*
155. 135 S. Ct. 2726 (2015).
156. 135 S. Ct. 2726, 2780 (Sotomayor, J., dissenting.)
157. 136 S. Ct. 305. 2015.
158. *Id.* at 315 (Sotomayor, J., dissenting).
159. *Schuetz v. Bann*.
160. *Daimler, A. G. v. Bauman*, 135 S. Ct. 746, 767 (2013) (Sotomayor, J., concurring in the judgment).
161. Arnold Rampersad, *The Collected Poems of Langston Hughes* (1994).

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