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DOES A DIVERSE JUDICIARY ATTAIN A RULE OF LAW THAT IS INCLUSIVE?: WHAT *GRUTTER V. BOLLINGER* HAS TO SAY ABOUT DIVERSITY ON THE BENCH

Sylvia R. Lazos Vargas*

INTRODUCTION.....	102
I. THE REHNQUIST COURT'S FORMALISM IN RACE RELATIONS	110
A. <i>Affirmative Action: Grutter v. Bollinger and Gratz v. Bollinger</i>	110
B. <i>Minority Voting Rights: Georgia v. Ashcroft</i>	118
C. <i>You Gotta Have a Theory of Why Race Matters</i>	127
II. DO COURTS THAT "LOOK LIKE AMERICA" CREATE AN INCLUSIVE RULE OF LAW?	128
A. <i>Descriptive Representation: "Where, Oh Where" Are the Judges of Color?</i>	128
B. <i>Substantive Representation: What Does Race Got to Do with Judging?</i>	131
III. DEMOCRACY AND INCLUSION: A PLURALISTIC PROCESS-BASED MODEL OF JUDGING.....	138
A. <i>Pluralistic Judging in an Epistemologically Diverse Democracy</i>	138
1. Getting the Content Right of Minimum Substantive Rights.....	140
2. The Epistemological "Realities" of Both Majorities and Minorities Need to Be Included in the Elaboration of the Rule of Law.....	140
3. Balancing the Court's Role as Ultimate Decision-Maker of Inviolable Rights and Deferring to the Political Process	141
B. <i>Applying Grutter v. Bollinger to the Challenge of Achieving a Pluralistic Process-Based Model of Judging</i>	143
C. <i>Would More Minority Judges Necessarily Lead to a Robust Racial Dialogue?</i>	146
IV. THE GOOD, THE BAD, AND THE UGLY OF INCREASING THE NUMBER OF MINORITY JUDGES.....	148
CONCLUSION	152

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INTRODUCTION

The United States Supreme Court continues to be the focal point of the hopes and aspirations of millions of Americans who believe that the civil rights revolution of the 1960s achieved a great deal but fell short of its promise of racial equality. Polling data, which have taken the pulse of United States race relations for the last six decades, show that racial and ethnic minorities care much more about race relations than do Whites.¹ African Americans, in particular, are pessimistic about race relations.² Yet quixotically, African Americans are also the racial group most likely to believe that the United States Supreme Court should serve as the guardian of civil rights for all Americans.³

These impulses are not contradictory. If polling data reflect reality and not just perception, race relations have not significantly improved in the last decade.⁴ In fact, in daily interactions a racial minority is likely not to be judged by the content of her character or the girth of her pocket book but rather by the color of her skin.⁵ Recent psychological and sociological studies continue to show that on a day-to-day basis, racial minorities suffer discrimination.⁶ Research shows that children as young as toddlers develop negative attitudes towards racial minorities, yet their

1. The Gallup Poll Social Audit, *Black/White Relations in the United States* (2003), reveals that Blacks are more pessimistic than Whites about their political future. Patricia J. Williams, *Aren't We Happy Yet?*, NATION, Aug. 6, 2001, at 11. Further, the poll shows that Blacks are less optimistic regarding race relations than they were thirty-five years ago. *Id.*; see also Ronald Roach, *Gallup's Washington Debut*, BLACK ISSUES HIGHER EDUC., Aug. 2, 2001, available at http://www.findarticles.com/p/articles/mi_m0DXK/is_12_18/ai/77398862 (reporting that Gallup has been conducting the survey since 1997). Additionally, four in ten White Americans, compared to one in ten Black Americans, feel Blacks are treated the same as Whites in the United States. *Id.*

2. Williams, *supra* note 1, at 11.

3. Joan Biskubic, *On Race, a Court Transformed*, WASH. POST, Dec. 15, 1997, available at <http://www.washingtonpost.com/wp-srv/politics/special/affirm/stories/aa121597.htm> (reporting that polls consistently show that the public has more confidence in the judiciary than in Congress or the White House).

4. See Williams, *supra* note 1, at 11.

5. See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1211 (1995) (describing stereotypes as a subset of the "vast array" of structures that comprise human cognition and concluding that discrimination therefore occurs not impulsively but as the result of an accumulation of subtle distortions in perceiving objective data).

6. See, e.g., JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION* (1995) (exploring the question of why, in the face of discrimination and disparate economic circumstances, African Americans believe in the American Dream as strongly as do Whites). The majority of African Americans report experiencing discrimination, and in 1970 one-quarter reported discrimination "almost every day of my life." *Id.* at 57, 60. Hochschild reports that African Americans recognize increasingly that they are the victims of discrimination, which may thwart their ability to succeed. *Id.* at 57, 61.

prejudiced attitudes do not necessarily correlate with their parents' views.⁷ Another study reported that identical résumés, one with "White" names, like Bill or Sue, another with "African American" names, like Tyrone or Tamika, generated a 50% difference in offers for interviews favoring the White names.⁸

Research such as this lends credence to critical race theorists Richard Delgado and Daniel Farber's claim that racism is as hardwired into American society as DNA is to a person's genetic code.⁹ While not all race researchers ascribe to such fatalism, they do subscribe to the views that racial conflict is a part of everyday social and political life and that racial prejudice continues to touch the lives of America's racial minorities.¹⁰ Moreover, clear signs show that racial tensions are on the rise. After the terrorist attacks of September 11, 2001, many Americans viewed certain ethnic and religious minorities as a threat to the safety of the nation.¹¹

The United States Supreme Court has led revolutionary changes in race relations. Consider how important *Brown v. Board of Education*¹² was in guiding American society down the troubled path of racial integration. Consider also how much better off the United States has been for beginning its racial revolution in the 1960s through the judiciary rather than waiting for politicians to take the lead.¹³ One need only think of South

7. Phyllis A. Katz, *Racists or Tolerant Multiculturalists? How do they Begin?*, 58 AM. PSYCHOL. 897 (2003) (stating that by age three, both Black and White children show a mild preference for members of their racial group that increases for White children by age five or six but decreases for Black children; and noting that parental attitudes are only somewhat influential, with many general social environmental facets likely playing a role in the formation of racial attitudes).

8. Lani Guinier, *Saving Affirmative Action*, VILLAGE VOICE, July 2, 2003, available at <http://www.villagevoice.com/news/0327,guinier,45235,1.html> (referring to a January 2003 study conducted by MIT and the University of Chicago).

9. See Richard Delgado & Daniel A. Farber, *Is American Law Inherently Racist?*, 15 T. M. COOLEY L. REV. 361, 373 (1998) (arguing that racism is inherent and intractable, like DNA).

10. For an explanation of the variants of critical race theory, see CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002). See also CRITICAL RACE THEORY: THE CUTTING EDGE xiv-xv (Richard Delgado & Jean Stefancic eds., 1995); ERIC YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 393-94 (1999).

11. See, e.g., Ahan Kim, *Poll Finds Many Want Restrictions on Arab Americans; Nearly Half Said Special Security Checks are Necessary*, SEATTLE POST-INTELLIGENCER, Sept. 19, 2001 (reporting a CNN/USA Today/Gallup poll in which 58% of those polled favored requiring Arabs, including those who are U.S. citizens, to undergo special, more intensive security checks before boarding airplanes in the U.S., and 49% favored requiring Arabs, including those who are U.S. citizens, to carry a special ID).

12. 347 U.S. 483 (1954).

13. See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 77-85 (1994) (supporting the view that *Brown* effected a transformation of the social order). For a more skeptical take on *Brown*, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 49-54, 107-56 (1991),

Africa's post-apartheid troubles to begin to comprehend how costly the delay of just race relations can be to a nation.¹⁴

Nevertheless, there is a noticeable difference between the United States Supreme Court led by Justice Warren in the late 1960s and the Court currently led by Justice Rehnquist. One way to characterize the last fifteen years of race relations jurisprudence under Chief Justice Rehnquist is that a slight majority of the Court—five Justices to be exact—has cut back on the civil rights decisions of the Warren Court. Most notably, this majority has intervened in areas formerly left to the political process. The Rehnquist Court's record in interpreting the Commerce Clause,¹⁵ Tenth Amendment,¹⁶ Eleventh Amendment,¹⁷ and most recently the Equal Protection Clause¹⁸ shows that it is confident that its own in-

which argues that many scholars have overrated the impact of *Brown*. For a recent collection of varying perspectives on *Brown*, see Symposium, *Brown at Fifty*, 117 HARV. L. REV. 1301 (2004).

14. For a general discussion of the progress in race relations in South Africa, see MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

15. See, e.g., *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (holding that the Violence Against Women Act exceeded Congress's Commerce Clause authority because the statute did not constitute regulation of activity that substantially affected interstate commerce); *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (redefining interstate commerce more narrowly than prior case law to encompass only regulation of: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities that have a "substantial relation" to interstate commerce). See generally Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275 (2002).

16. See, e.g., *New York v. United States*, 505 U.S. 144, 175, 177 (1992) (holding that Congress exceeded its regulatory power and violated the Tenth Amendment when it effectively coerced states to take title of nuclear waste).

17. See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356, 372–74 (2001) (holding that Congress lacked authority to abrogate state sovereign immunity from private suits for damages under Title II of the Americans with Disabilities Act); *Alden v. Maine*, 527 U.S. 706 (1999) (extending sovereign immunity to bar private lawsuits by state employees under the Fair Labor Standards Act, reasoning that Congress under its Article I powers could not abrogate state sovereign immunity); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (rejecting the proposition that Congress, acting under its Commerce Clause power, could abrogate state sovereign immunity). The limited effect of the Eleventh Amendment appropriately leads many commentators to question the Court's choice to express federalism values through sovereign immunity. See, e.g., Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 493–94 (2002) ("Sovereign immunity does not restrict the regulatory power of Congress, it seldom bars suits for injunctions to force compliance with federal law, and it does not protect local governments at all. Why, then, has the Court made sovereign immunity a centerpiece of its drive to revive constitutional federalism?").

18. See, e.g., *Bush v. Gore*, 531 U.S. 98, 103, 110 (2000) (per curiam) (halting recount ordered by the Florida Supreme Court that could have determined the winner of the 2000 election by an actual vote count, holding that it violated the Equal Protection Clause). Justice John Paul Stevens in dissent observed, "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the

interpretive judgment should trump the judgments of Congress and state courts and legislatures.¹⁹

The five Justice coalition, made up of Justices Rehnquist, Thomas, Scalia, O'Connor, and Kennedy, has refashioned constitutional law in areas of great import to minorities: from antidiscrimination law²⁰ to affirmative action²¹ to minority voting rights.²² Because these issues are difficult and complex, most members of majority and minority racial groups diverge in how they characterize the problem. This phenomenon is nowhere as clear as in the area of affirmative action. While there is great heterogeneity in Whites' views on affirmative action, with substantial numbers of Whites both opposing and supporting its various forms, support is more uniform among African Americans.²³ This divergence can be traced, in part, to differences in values and political orientation.²⁴ However, data

identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law." *Id.* at 128–29 (Stevens, J., dissenting).

19. Jack Balkin and Sanford Levinson have called this shift in constitutional doctrine a conservative "revolution." See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); see also Larry D. Kramer, *The Supreme Court, 2000 Term, Foreword: We the Court*, 115 HARV. L. REV. 4, 130–58 (2001) (characterizing the Rehnquist Court's conservative jurisprudence as a turn to absolutism).

20. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001) (denying standing to Alabama resident alleging a Title VI violation).

21. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that federal affirmative action programs are subject to strict scrutiny review); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion) (holding that municipal affirmative action programs are subject to strict scrutiny review).

22. See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that reapportionment that is drawn predominantly to group voters of the same race together is unconstitutional under the Equal Protection Clause); see also *Miller v. Johnson*, 515 U.S. 900, 910–15, 920 (1995) (holding that a voting district could be invalidated if, instead of traditional districting principles, race was the motivating factor in drawing district lines, because the Equal Protection Clause protects individual racial dignity of majorities and minorities alike). Continuing the line of reasoning in *Adarand* and *Croson*, the *Miller* Court asserted that when a state assigns voters to voting districts on the basis of race, it engages in racial stereotyping and thereby demeans the individual dignity of the voter. *Id.* at 911–12. To do so means that the decision has been made based on an underlying assumption that voters of the same race "think alike." *Id.* at 912 (quoting *Shaw*, 509 U.S. at 647). Race-conscious gerrymandering is especially disunifying of the polity because it carries the threat of "balkanizing us into competing racial factions." *Id.* at 912 (quoting *Shaw*, 509 U.S. at 657).

23. The Gallup Poll's report on Black/White Relations in the United States showed that 82% of African Americans said that the government should increase or keep affirmative action programs while half that number of Whites said the same. THE GALLUP POLL SOC. AUDIT, BLACK/WHITE RELATIONS IN THE UNITED STATES, EXECUTIVE SUMMARY (May 2001). 70% of Whites believed instead that African Americans should focus on improving themselves. *Id.*; see also ORLANDO PATTERSON, THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS 148–58 (1997) (examining poll data on affirmative action programs).

24. A supra-majority of African Americans identify as Democrats. DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL AND ECON. STUDIES, 2004 NATIONAL OPINION POLL: POLITICS

also show that how one experiences life in America, as either a White person or a racial minority, is a salient determinant in one's view on affirmative action.²⁵ Sophisticated studies on racial attitudes and affirmative action have factored out variables such as ideological values, political orientation, education, and income.²⁶ Although the gap in attitudes on this highly polemical issue is much smaller than previously thought, race remains the single most important variable in accounting for differences in attitudes towards affirmative action.²⁷

These studies demonstrate how racial perspective can determine what side a person takes on issues. However, courts generally do not acknowledge that racial identity may influence the analysis of racial hot-button issues.²⁸ One might argue that a court's decision to ignore the influence of race might be beneficial for society because courts are not competent to make such complex judgments.²⁹ The response to this argument is twofold. First, constitutional judgments are visibly biased

AND THE NATIONAL ELECTION, available at <http://www.jointcenter.org/publications/details/opinion-poll/nop-Politics.pdf>. In 2004, the Joint Center for Political and Economic Studies conducted an opinion poll of 1,642 Black respondents in a national survey and asked whether respondents identified themselves as Democrats, Independents, or Republicans. *Id.* 63% claimed to be Democrats, down from 74% in 2000. *Id.* In 2004, younger African Americans were more likely to identify as Democrats than older African Americans. *Id.* As Professor Terry Smith has argued, a high percentage of Blacks may be Democrats because the Democratic Party supports the ideas and policies in which many African Americans believe. See generally Terry Smith, *A Black Party?* Timmons, *Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1 (1998).

25. See James Kluegel, "If There Isn't a Problem, You Don't Need a Solution": *The Bases of Contemporary Affirmative-Action Attitudes*, 28 AM. BEHAV. SCI. 761, 771 (1985) (finding that the majority of Whites assume a "lack among [B]lacks of the proper motivation and the skills needed to achieve" is the cause for the Black-White difference in socioeconomic status); James R. Kluegel & Eliot R. Smith, *Whites' Beliefs about Blacks' Opportunity*, 47 AM. SOC. REV. 518, 523 (1982) (finding that "a large segment of the [W]hite population views [B]lacks' opportunity as better than average due to reverse discrimination").

26. See, e.g., DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* 53-60, 83-88, 174-82 (1996). Donald Kinder and Lynn Sanders found opinions on affirmative action to be significantly influenced by what Whites as a group perceived to be the impact of affirmative action programs on Whites. Almost 60% of Whites thought that affirmative action had impacted negatively on Whites by reducing job chances, admissions into higher education, and promotions. *Id.* at 83-85. About 40% of Whites believed that affirmative action policies operated to their disadvantage relative to Blacks regarding job opportunities and entry into elite schools for their children. *Id.* at 68. Kinder and Sanders examined the data and concluded that such perceptions were not realistic. *Id.* at 66-68.

27. Kluegel, *supra* note 25, at 771.

28. For elaboration on this point, see Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150, 160-84 (1999) [hereinafter Lazos Vargas, *Democracy and Inclusion*].

29. Cf. Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL'Y 457 (1996) (making same argument in the context of *Brown*).

when the Supreme Court or other courts selectively strip out social and racial context to conform with the identity-based views of the majority. For example, the lesser opportunities that Asian Americans, Latinos, and African Americans have when they enter the labor market because of racial discrimination (remember how much worse off Tamika is than Sue)³⁰ will remain harms for which the law will not afford relief. While colorblindness may be a seemingly neutral constitutional principle, the courts should not arrive at any constitutional rule through a truncated characterization of the salient social and racial contexts.³¹

Second, at some level the Court *does* incorporate a racial perspective even when it claims that racial context does not matter. For example, in overruling the Warren Court's affirmative action decisions, the Rehnquist Court majority fashioned a new constitutional equal protection principle: the right of any individual, regardless of race, to be judged on the basis of her own merit and be free from generalizations based on race.³² The Court is right that this principle reflects cultural values of American society.³³ However, as a constitutional rule of law, this statement takes sides in a debate that splits along racial lines. While most in the White majority tend to emphasize that group identity should not trump individual merit,³⁴ for most racial minorities historical discrimination looms large. African Americans,³⁵ Mexican Americans in the Southwest and California,³⁶ and Asian Americans³⁷ experienced caste-like segregation and

30. See *supra* text accompanying note 8.

31. Lazos Vargas, *Democracy and Inclusion*, *supra* note 28, at 160–84.

32. See *Adarand v. Peña*, 515 U.S. 200, 235–37 (1995) (holding that the federal minority set aside program at issue required strict scrutiny review to determine whether a compelling government interest was furthered by racial classifications and whether the program was narrowly tailored); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (plurality opinion) (holding that Richmond's minority contract set aside program was a rigid racial quota unsupported by any findings of discrimination made by the City).

33. See *Adarand*, 515 U.S. at 211; *Croson*, 488 U.S. at 470 (plurality opinion).

34. ANTHONY P. CARNEVALE & STEPHEN J. ROSE, *SOCIOECONOMIC STATUS, RACE/ETHNICITY, AND SELECTIVE COLLEGE ADMISSIONS* 8 (2003), available at http://www.tcf.org/Publications/Education/carnevale_rose.pdf. According to Anthony Carnevale and Stephen Rose, Americans “strongly associate affirmative action with racial preferences and do not view racial preferences favorably. Among White Americans, 52% say affirmative action should be abolished, and more than 80% oppose preference in hiring and promotions for racial minorities, even when the programs may help compensate for ‘past discrimination.’” *Id.* (citations omitted).

35. See generally JOHN HOPE FRANKLIN & ALFRED A. MOSS, *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* (7th ed. 2003).

36. See generally TOMÁS ALMÁGUER, *RACIAL FAULTLINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* (1994); Ramón Eduardo Ruiz, *Introduction to FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS* (David J. Weber ed., 1973).

37. See generally RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1989).

were systematically stripped of property rights, educational opportunities, and high paying jobs. Such historical caste-like experiences have present effects. Recent studies report that the average middle class White family has seven to eleven times more accumulated wealth than the average African American middle class family.³⁸ Also, racial minorities suffer day-to-day transactional discrimination (again recall Tamika's lot versus Sue's).³⁹

In sum, race matters, but judges and courts have failed to fashion a rule of law that is inclusive of all racial perspectives and realities in the United States. The reason for this dismal performance lies in how predominantly White judges, and therefore courts, conceptualize race. Part I illustrates this proposition by analyzing the Rehnquist Court's recent race relations jurisprudence in three Supreme Court decisions handed down in 2003: *Grutter v. Bollinger*,⁴⁰ *Gratz v. Bollinger*,⁴¹ and *Georgia v. Ashcroft*.⁴² Even as the United States Supreme Court entered increasingly complex areas of race relations, the Court continued to apply a simplistic concept of how race functions. The result is that without theoretical grounding, the development of constitutional doctrine in this controversial and divisive area appears to be ad hoc and arbitrary.

Making the bench more diverse could be an avenue that leads to a better understanding of racial issues by judges and thus could result in an inclusive rule of law that takes into account both majority and minority racial perspectives. Part II examines the empirical literature as to whether greater diversity of the bench actually leads to different rule-making and concludes that the evidence is equivocal. But rather than concluding that gender and racial diversity have no impact on the rule of law, it may be fairer to assert that empirical research simply has not yet been able to adequately test the hypothesis that the presence of more minorities on the bench could lead to an inclusive rule of law.

Part III first proposes a theory of how a pluralistic process-based model of judging could achieve a more inclusive rule of law. In a pluralistic process-based model of judging, courts are charged with: first, getting the

38. ASSET DEVELOPMENT INSTITUTE, ASSET DEVELOPMENT AND WHY ASSETS MATTER (citing MELVIN OLIVER & THOMAS SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1997)), available at <http://www.results.org/website/article.asp?id=735> (last visited Feb. 26, 2005); see also Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003 (1997) (arguing that transactional discrimination provides constitutional justification for affirmative action programs); Spencer Overton, *But Some Are More Equal: Race, Exclusion and Campaign Finance*, 80 TEX. L. REV. 988 (2002) (discussing impact of racial wealth inequality on politics).

39. See *supra* text accompanying note 8.

40. 539 U.S. 306 (2003).

41. 539 U.S. 244 (2003).

42. 539 U.S. 461 (2003).

content “right” of minimum substantive rights; second, ensuring that in the development of the rule of law, the realities of both racial majorities and racial minorities are incorporated; and third, being cognizant that courts must balance their role as ultimate constitutional decision-maker with deference to the political process. The give and take of political disagreement might allow majorities and minorities the opportunity to work out deep disagreements. This model is admittedly difficult to attain in reality.

Nonetheless, Part III then proposes that true diversity on the bench is a minimum prerequisite to achieving such a judicial ethic and that *Grutter v. Bollinger* can be read to support this proposition. *Grutter* holds that it is a legitimate state objective for key democratic institutions, like a public university (or in the instant case a judicial body), to want to achieve discursive diversity.⁴³ A state decision-maker may set a goal that institutional dialogue be inclusive of the different realities of racial majorities and minorities. In the case of a public university, this environment leads to better training of leaders; in the case of a judicial body, a diverse discursive environment could lead to a more inclusive rule of law. The Court observes in *Grutter* that race-conscious selection of participants to achieve a *critical mass* of minorities to engender a robust racial dialogue between majorities and minorities is a “narrowly tailored” means for achieving the goal of creating a diverse discursive body.⁴⁴ The lesson from *Grutter* is that to achieve a diverse judicial bench, diversity must be understood to go beyond token appointments of minority judges, and instead the goal should be to achieve a critical mass of minority judges on each bench. Only then can we expect that minority and majority judicial colleagues will engage in robust racial dialogue that can lead to the fashioning of an inclusive rule of law.

Part IV examines how politics work against achieving a critical mass of minority judges on the bench. In the “real world,” the goal of achieving greater diversity on the bench—let alone achieving a critical mass of minority judges—faces dismal prospects. First, the ugly politics of judicial nominations means that minority appointees can be easily shot down. Second, the reality of how stereotypes work against minorities means that minority candidates in judicial elections often lose.

This Article concludes that political dialogue engendered by controversial minority judicial nominations, like those of Miguel Estrada and Janice Rogers Brown,⁴⁵ could be an avenue to educating the polity as to

43. 539 U.S. at 325.

44. 539 U.S. at 334.

45. Miguel Estrada withdrew his name from consideration for a seat on the United States Court of Appeals for the District of Columbia Circuit after Senate Democrats filibustered for over two years to block his appointment. CNN, *Estrada Withdraws as Judicial Nominee* (Sept. 4, 2003) [hereinafter CNN, *Estrada Withdraws*], at <http://www.cnn.com/2003/ALLPOLITICS/09/04/estrada.withdraws/>. On February 14, 2005, President George W. Bush resubmitted his nomination of Janice Rogers Brown to the United States Court of Appeals for the District of Columbia Circuit to the Senate, which blocked her

why it is important to achieve greater minority representation on the bench. The pluralistic process-based model of judging advocates that a critical mass of diverse judges be achieved, not that the minority judges be liberal rather than conservative, communitarian rather than individualist, or Democrat rather than Republican. The goal is that there be a critical mass of minority judges on benches that make decisions as a group, like circuit courts and supreme courts. This ideal is one towards which pluralist polities must strive.

I. THE REHNQUIST COURT'S FORMALISM IN RACE RELATIONS

In the 2002–2003 Term, the United States Supreme Court handed down three very important cases concerning racial issues. In the area of affirmative action, *Grutter v. Bollinger*⁴⁶ and *Gratz v. Bollinger*⁴⁷ represented the Court's first doctrinal pronouncement since *Regents of the University of California v. Bakke*,⁴⁸ decided twenty-five years earlier. These cases affirmed the legitimacy of affirmative action in public higher education but made it more difficult for public institutions that wish to continue employing affirmative action in higher education to be confident that their programs would withstand constitutional scrutiny. In the area of voting rights, *Georgia v. Ashcroft*⁴⁹ scaled back the Voting Rights Act's ("VRA") hard and fast rule that obliged certain covered jurisdictions not to undermine minority voting power. In both areas, a theoretically grounded racial perspective would have aided the Court in resolving these questions and, just as importantly, would have made it easier to implement the Court's dictates.

A. Affirmative Action: *Grutter v. Bollinger* and *Gratz v. Bollinger*

The affirmative action cases of the 2002–2003 Term were long-awaited. Some hoped that these cases would sound the death-knell of affirmative action everywhere. Instead, in *Grutter v. Bollinger* the Court affirmed that public institutions could continue to use affirmative action

nomination during Bush's first term in office. Associated Press, *Bush Resends 20 Judicial Nominees* (Feb. 15, 2005), at <http://www.cnn.com/2005/ALLPOLITICS/02/15/bush.judges.ap/>. Bush first nominated Brown on July 25, 2003. CNN, *Bush to Resubmit Blocked Judicial Nominees* (Dec. 24, 2004), at <http://www.cnn.com/2004/ALLPOLITICS/12/23/bush.judiciary/>.

46. 539 U.S. 306 (2003).

47. 539 U.S. 244 (2003).

48. 438 U.S. 265 (1978).

49. 539 U.S. 461 (2003).

programs to achieve diverse learning environments.⁵⁰ This result is positive for race relations because it affirms that engaging difficult issues surrounding race relations through pedagogy is a legitimate goal for a public university. However, all of the *Grutter* opinions undertheorized why race-consciousness matters in this context and why diverse discursive environments are important for universities and pluralist democracies.

Both proponents and opponents of affirmative action expected Justice O'Connor's to be the swing vote in both of these hotly contested cases. Thus they cast their arguments in ways they hoped would woo Justice O'Connor's vote.

Prior to the 2002–2003 Term, Justice O'Connor's vision of affirmative action had already been developing and can be discerned through two landmark cases. In 1989, Justice O'Connor wrote the plurality opinion in *City of Richmond v. J.A. Croson Company*⁵¹ that overturned a municipal "set aside" program under which a governmental entity could award designated groups (women and racial or ethnic minorities) "plus points" in competitive bidding programs or could "set aside" a certain percentage of government procurement contracts for members of these groups.⁵² In 1995, in *Adarand v. Peña*,⁵³ she authored the five Justice majority decision that overturned earlier case law that had endorsed federal set aside programs.⁵⁴

Justice O'Connor's *Adarand* opinion, which closely tracked her earlier plurality opinion in *Croson*, set new standards for the review of affirmative action programs. The Court would apply the highest level of scrutiny—strict scrutiny—to affirmative action programs even if the governmental program were attempting to remedy an agency's own past racial harms.⁵⁵ The highest level of scrutiny applied, according to Justice O'Connor, because race-based governmental decision-making is inherently suspect.⁵⁶ Too often stereotypes creep in and limit the opportunities of individuals. She directly cited how stereotypes affected early nineteenth century decisions by state legislatures that barred women from voting and practicing law.⁵⁷ Decisions and policies that are premised on generalizations about

50. 539 U.S. at 325 (finding "student body diversity is a compelling state interest that can justify the use of race in university admissions").

51. 488 U.S. 469 (1989) (plurality opinion).

52. *Id.* at 502, 506 (plurality opinion).

53. 515 U.S. 200 (1995).

54. *Id.* at 204–05.

55. *See id.* at 227 (describing race as a "group classification" subject to strict scrutiny to ensure the "personal right to equal protection") (emphasis omitted).

56. *Id.* at 223–24.

57. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–27, 729–30 (1982) (holding that a gender classification proponent "must carry the burden of showing an 'exceedingly persuasive justification' . . . that the classification serves 'important governmental objectives.'" When lawmakers enact statutes that classify according to gender, the State

supposed characteristics of gender or racial groups perpetuate the very stereotypes that such policies intend to combat.⁵⁸ This type of stereotyping also belittles the dignity of individuals by treating them only as part of a group and consequentially not valuing their individual merit or achievements.⁵⁹

Croson and *Adarand* established that the “fit” between the general purpose of any affirmative action program and the means used to enact it would be carefully scrutinized by the courts.⁶⁰ For example, in *Croson*, the Court found that allowing certain ethnic groups, like Aleuts, to benefit from the set aside program made no sense given the overall purpose of the plan.⁶¹

Finally, the Rehnquist Court held that merely aiming to improve race relations was not a legitimate governmental purpose.⁶² Ongoing racial discrimination was “‘too amorphous,’”⁶³ and remedies aimed at curing historical discrimination had no end in sight.⁶⁴ Given the harms to

must demonstrate a “direct, substantial relationship between objective and means.”) (citations omitted).

58. *Adarand*, 515 U.S. at 229 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)); see also *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting) (arguing that “policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens”); *Croson*, 488 U.S. at 493 (plurality opinion) (noting that “classifications based on race carry a danger of stigmatic harm” because “they may in fact promote notions of racial inferiority”).

59. See *Croson*, 488 U.S. at 493 (plurality opinion) (“To whatever racial group these citizens belong, their ‘personal rights’ to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.”).

60. *Id.* (plurality opinion); see also *Adarand*, 515 U.S. at 227 (finding that such programs must be narrowly tailored so that the remedial program is proportional and addresses the identified injury).

61. *Croson*, 488 U.S. at 506 (plurality opinion) (finding that the inclusion of “Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons” was a gross overinclusion in light of the program’s remedial purpose: to address Jim Crow contracting practices by the city).

62. *Adarand*, 515 U.S. at 227; *Croson*, 488 U.S. at 486 (plurality opinion).

63. *Adarand*, 515 U.S. at 227 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion)); see *Croson*, 488 U.S. at 506 (plurality opinion) (asserting that past harms are “inherently unmeasurable claims” and that courts should not be asked to “‘evaluate the extent of the prejudice and consequent harm suffered’” because “‘such a result would be contrary to . . . equality’”) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 296–97 (1978) (opinion of Powell, J.)).

64. *Croson*, 488 U.S. at 496–97 (plurality opinion) (remedying the effects of societal discrimination may be ageless in its reach into the past) (quoting *Bakke*, 438 U.S. at 307 (opinion of Powell, J.)); *id.* at 498 (plurality opinion) (stating that a “generalized assertion . . . [of] past discrimination . . . ‘has no logical stopping point’”) (quoting *Wygant*, 476 U.S. at 275 (plurality opinion)).

individual Whites, such ill-defined governmental programs could not be constitutionally legitimate.⁶⁵

*Grutter v. Bollinger*⁶⁶ and *Gratz v. Bollinger*⁶⁷ in no way reversed the Rehnquist Court's jurisprudence in the affirmative action area. In *Grutter*, the Supreme Court approved the affirmative action program used in admissions by the University of Michigan Law School ("Law School");⁶⁸ in *Gratz*, the Court struck down the program used in the University of Michigan ("Michigan") undergraduate admissions.⁶⁹ In both decisions, the Court extended the application of the principles that Justice O'Connor announced in *Croson* and *Adarand*.⁷⁰ The Court also affirmed Justice Powell's opinion from *Regents of the University of California v. Bakke*.⁷¹ First, the Court confirmed that it is a legitimate state purpose for public universities to attempt to achieve racial diversity, as the University of Michigan and its law school sought to do with their affirmative action programs.⁷² Under the principles of the split *Bakke* decision, achieving diversity in university admissions is a legitimate state purpose because this choice is protected under academic freedom principles based in the First Amendment.⁷³ In *Grutter*, O'Connor went further than Justice Powell and found

65. See *Adarand*, 515 U.S. at 230 (asserting that "any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be").

66. 539 U.S. 306 (2003).

67. 539 U.S. 244 (2003).

68. 539 U.S. at 337-40.

69. 539 U.S. at 275-76.

70. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 486 (1989) (plurality opinion) (holding plan unconstitutional because of the city's failure to demonstrate a compelling governmental interest justifying its hiring plan and the fact that the plan was not narrowly tailored to remedy effects of prior discrimination); see also *Adarand*, 515 U.S. at 227 (holding that racial classifications imposed by a federal, state, or local governmental actor must be analyzed by the reviewing court under strict scrutiny; in other words, such classifications are constitutional only if they are narrowly tailored measures that further a compelling governmental interest).

71. See 438 U.S. 265, 269 (1978) (opinion of Powell, J.).

72. See *Grutter*, 539 U.S. at 328-34. Justice O'Connor explicitly noted that the Court has "never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination." *Id.* at 328. She then explained that "the Law School's admissions policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races." *Id.* at 330 (alteration in original) (quotations and citations omitted). She further noted the "learning outcomes" associated with diversity, such as better preparing students for an increasingly diverse workforce and society; promoting classroom discussion that is "livelier, more spirited, and simply more enlightening"; and providing the "skills needed in today's increasingly global marketplace." *Id.*

73. See *id.* at 387 (Kennedy, J., dissenting) (citing *Bakke*, 438 U.S. at 312-14 (opinion of Powell, J.)) ("Justice Powell's approval of the use of race in university admissions [in *Bakke*] reflected a tradition, grounded in the First Amendment, of acknowledging a university's conception of its educational mission.").

another basis for diversity in public higher education: that it promoted democratic principles.⁷⁴ In particular, O'Connor noted that in a democracy, "it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."⁷⁵

The difference in outcomes between *Grutter* and *Gratz* is explained by the way each of these programs factored race into the admissions process. The key difference for Justice O'Connor was the fit. In *Gratz*, the Court held that Michigan's undergraduate program failed to meet the ends-means strict scrutiny analysis.⁷⁶ Michigan utilized a point system for admissions, awarding some applicants twenty points for membership in a racial group, being a star athlete, or coming from a poor background.⁷⁷ Legacies, children of alumni, received a one to four point advantage.⁷⁸ Justice O'Connor found this system to be too systemically race-conscious and not sufficiently individualized, and she explained that the undergraduate admissions "policy stands in sharp contrast to the [L]aw [S]chool's admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class."⁷⁹ The Law School's race-conscious admissions program allowed the admissions officer to consider race as one among many factors in determining admissions, rather than as serving as a twenty point trump card as in the undergraduate program.⁸⁰ The Law School process provided the necessary level of individualization and interjected evaluative judgments in the admissions decision that effectively removed race as a defining feature.⁸¹

74. For a full discussion of how Justice O'Connor's majority opinion follows a democratic theoretical justification, see Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gate of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003).

75. *Grutter*, 539 U.S. at 332. Justice O'Connor linked diversity to the institutional mission of higher education: "[O]ur view [is] that attaining a diverse student body is at the heart of the Law School's proper institutional mission." *Id.* at 329.

76. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

77. *Description of University of Michigan Former Undergraduate Admissions Policy*, at <http://www.umich.edu/~urel/admissions/archivedocs/uapolicy.html> (last visited Feb. 26, 2005).

78. *Id.*

79. *Gratz*, 539 U.S. at 279 (O'Connor, J., concurring).

80. *See id.* at 256 (stating that underrepresented minority applicants were automatically awarded twenty points toward the total needed for admission).

81. *Id.* at 279 (O'Connor, J., concurring). Justice O'Connor wrote that admissions policies "must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003). Justice O'Connor cited as proof of the Law School's truly "individualized consideration" the fact that it "seriously weighs many other diversity factors besides race." *Id.* at 338. She approvingly noted the Law School's "highly individualized, holistic review of each applicant's file," emphasizing that "[t]he Law School does not, however, limit in any way the broad range of qualities

The Court also affirmed Justice Powell's *Bakke* opinion by making clear that remedying past discrimination is not the only legitimate state purpose.⁸² The University of Michigan Law School's affirmative action program passed constitutional muster because it aimed to "attai[n] a diverse student body."⁸³ Although Justices Kennedy, Scalia, Rehnquist, and Thomas viewed the mechanics of the University of Michigan Law School's approach to be the functional equivalent of a quota system,⁸⁴ Justice O'Connor accepted the Law School's claim that it wanted to achieve a "critical mass" of minorities in the Law School that would stimulate the robust exchange of racial perspectives in discussions in class and informal settings.⁸⁵ The majority opinion did not define "critical mass" but rather accepted the claim that this functional concept was critical to the Law School's academic goal of achieving a dialogic diverse environment.⁸⁶

Grutter represents an advance in the Court's understanding of race relations.⁸⁷ Justice O'Connor accepted the Law School's arguments that perspectives and experiences of racial minorities should be voiced and acknowledged in the education process.⁸⁸ She acknowledged that elite institutions are gatekeepers to key leadership positions in our society and that affirmative action programs aimed at increasing the diversity of racial experiences that students may encounter provide the skill-set needed in "today's increasingly global marketplace."⁸⁹ Society suffers if access to leadership becomes a gate through which only, or mostly, Whites enter.⁹⁰ Justice O'Connor deferred to the Law School's judgment that a critical mass of minority students, not just a token presence, is necessary to ensure a healthy dialogue on race. Justice O'Connor recognized that having a

and experiences that may be considered valuable contributions to student body diversity." *Id.*

82. *Grutter*, 539 U.S. at 328.

83. *Id.*

84. *Id.* at 379–87 (Rehnquist, J., dissenting).

85. *Id.* at 330. If the Law School were to "assure within its student body some specified percentage," then the admissions program would fail. *Id.* at 329–30 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.)). However, because the law school defined "critical mass" in relation to educational benefits, the program fit within what Powell had found in *Bakke* to be a legitimate state objective: increasing diversity of viewpoints in the classroom. *Id.* at 330.

86. *See id.* at 330.

87. *See* Guinier, *supra* note 74, at 113.

88. *See Grutter*, 539 U.S. at 330 ("[N]umerous studies show that student body diversity promotes learning outcomes. . .").

89. *Id.* at 330–31. Justice O'Connor points out that both Fortune 500 companies and military leaders viewed "diversity" skills and trained minority leaders as essential for the United States to maintain a competitive edge. *Id.*

90. *Id.* at 330–32. Justice O'Connor cites *Sweatt v. Painter*, 339 U.S. 629 (1950), the University of Texas Law School segregation case from the Jim Crow era, when stating that "the path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332.

handful of minority students in a class is not sufficient to promote racial dialogue or understanding among students, or defeat racial stereotypes.

The conclusion that the Court has relaxed strict scrutiny in the context of public education is inescapable. *Grutter* and *Gratz* take a step back from earlier decisions and begin a new doctrinal line of analysis for race relations cases. The strict scrutiny standard, established by *Croson* and *Adarand* for government contracts and benefits, is, in application, very strict.⁹¹ The Court's open skepticism as to proper purpose and proper tailoring makes fashioning government contract set aside programs that benefit minorities under the narrow tailoring standard a daunting task. In *Grutter*, the Court defers to the Law School's public mission and educational goals in the classroom and does not extend its inquiry into how admissions officers make decisions. This more relaxed form of strict scrutiny is justified, one can infer, because racial diversity in elite public education (which leads to leadership roles and prestigious jobs) impacts the civic aspects of our society. All-White leadership in the military, businesses, and the public sector would have a detrimental effect on a citizen's understanding of "work and citizenship"⁹² and the promise that all democratic societies must make the avenues to the upper echelons of society open to all.

At the same time, *Grutter* and *Gratz* maintain the scheme established under *Bakke* that affirmative action programs will receive close judicial scrutiny. University of Michigan policies favoring athletes and children of alumni do not receive any judicial scrutiny as to purpose or fit because they only require rational basis review. By contrast, programs aimed at racial minorities are subjected to strict scrutiny, making these vulnerable to legal change. Public schools must thread the needle between the admissions procedures approved and rejected in *Grutter* and *Gratz*, respectively. This fine line can be walked only by increasing administrative costs to those institutions that wish to pursue affirmative action policies.

In spite of the Court's affirmation of affirmative action as an important tool in the civic and business life of America, the path down which the Court is heading in its affirmative action doctrine is riddled with unanswered questions. *Grutter* makes clear that the key to a constitutionally valid affirmative action program is that each student's file receives individualized review. But should the Court give so much deference to

91. For example, in light of the City of Richmond's Jim Crow past, in *Croson*, Justice O'Connor essentially demanded that the City document how its past discriminatory actions were to be remedied by its contract set aside programs. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-99 (1989) (plurality opinion).

92. See Guinier, *supra* note 74, at 153-54; see also *Grutter*, 539 U.S. at 331 ("We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' This Court has long recognized that 'education . . . is the very foundation of good citizenship.'" (second omission in original) (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

admissions officers in determining which minorities can provide the right critical mass and racial insights that benefit a classroom discussion?⁹³ In *Grutter*, the Court does not look beyond the admissions officer's door to inquire whether the officer's individual review of the files actually utilizes criteria that create a diverse classroom.⁹⁴

The failure to delve into these difficult issues may be commended, because judicial prudence dictates that a court should not go far beyond the case at hand. Addressing these issues, however, would do much to start explaining how and why race matters in higher education.

The Court concluded in *Grutter* that race matters a great deal in democracies.⁹⁵ But the Court held in *Croson* and *Adarand* that race-conscious policies can be constitutionally impermissible.⁹⁶ The chasm between these cases highlights that the Court is hesitant to develop constitutional guidelines as to when and why race matters; we have only pieces that we can attempt to patch together.

The discomfort with *Grutter* and *Gratz* comes from the fact that admissions officers and public universities are free to articulate their own visions of why race matters. Such unbounded discretion nets confusion and anxiety and leaves the impression that affirmative action policies enable naked racial preferences. Should a law school admissions officer give preference to a White Argentinean who has always resided in Latin America and comes from one of the elite families of the country; to a Vietnamese immigrant who survived the fall of Saigon; or to an African American who grew up in the affluent suburbs of Washington, D.C. but whose great grandparents were slaves in Mississippi? Which applicants contribute more or less to the diversity of viewpoints in the classroom? These questions are not answered in any imaginable reading of *Grutter* or *Gratz*. Instead these decisions are left to the discretion of the admissions officer to sort out as best she can. But at this ministerial level, the officer needs to have some working understanding of how the "race" experience of each of these different applicants might add to the diversity goals of the institution.

93. See *Grutter*, 539 U.S. at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.").

94. See *id.* at 393–95 (Kennedy, J., dissenting).

95. See *supra* notes 88–90 and accompanying text.

96. *Adarand v. Peña*, 515 U.S. 200, 229–32 (1995) (holding that rigorous review of federal minority set aside programs is necessary to ensure that racial characteristics are not improperly being used by governmental decision-makers); *Croson*, 488 U.S. at 491–93 (plurality opinion) (holding that race-conscious affirmative action programs are impermissible when governmental decision-makers overly rely on generalizations based on racial classifications and do not narrowly tailor remedial affirmative action programs).

To give clearer guidelines, the Court would have to articulate a theory of why race matters in academic discussion or why disagreements between reasonable people might be centered around different racial perspectives. Race is not only a status or a phenotype but also an experience in modern America. When a racial minority “experiences” race, she experiences discrimination, lesser opportunities, and ascriptions by others of who she is and what she thinks based on demeaning racial stereotypes. A White person experiences race as well, but she experiences her race as “White privilege,” not having to think about possible encounters with discrimination, generally enjoying greater opportunities, and benefiting from positive ascriptions as to her abilities based solely on presumptions of what White people can do.⁹⁷ Such an understanding of race could help guide the admissions officer’s decision-making: the economically privileged White Argentinean is likely never to have experienced the disadvantages of race and therefore should likely not be admitted under a racial affirmative action program. On the other hand, a Vietnamese immigrant and an affluent African American from the suburbs are both very likely to have experienced race as racial minorities, albeit in very different ways because of their class, status, and racial group’s history in this country. Both applicants are more likely to have experienced stereotypes, discrimination, or lesser opportunities in life because of their race. Each has the potential to contribute racially diverse viewpoints born from their diverse racial experiences in America.

Grutter omits such explanation. One reason lies in the awkward contradictions between the *Grutter* and *Gratz* results. In the Court’s own prior “colorblind” jurisprudence in *Croson* and *Adarand*, the Court found race-conscious programs unconstitutional because they impermissibly stereotyped racial minorities by making assumptions of who they were and how they thought. But another reason is more fundamental: the Court is extremely wary of talking about race because it lacks the confidence to make such pronouncements. The Court is essentially a White institution which, despite the presence of Justice Clarence Thomas, lacks a diversity of racial viewpoints.

B. Minority Voting Rights: *Georgia v. Ashcroft*

At the same time the Supreme Court was trimming back affirmative action programs in the public sector, it applied “colorblind” race principles that it had fashioned in the affirmative action area to voting rights jurisprudence. At first glance, this may appear to be an odd

97. See generally RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1993); STEPHANIE M. WILDMAN ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996) (stating that ability to avoid consequences of racial power is a form of White privilege).

transference. However, as Abigail Thernstrom noted a decade ago, the Voting Rights Act of 1965,⁹⁸ as amended in 1982, inserted affirmative action into the voting area.⁹⁹ Enacted by Congressional authority under the Fourteenth and Fifteenth Amendments, the VRA attempted to ensure that minorities were able to elect the “candidates of their choice” to public office.¹⁰⁰ The legislative history and text of the statute make clear that the legislature did not desire proportional representation.¹⁰¹ The problem it identified was the scarcity of minority representatives in Congress, and it determined that federal action was necessary to counteract the political maneuvering of entrenched White politicians that made it difficult for minority representatives to be elected.¹⁰²

The VRA, according to political science studies, has achieved its purpose of increasing minority voices in the political process.¹⁰³ More than any other single factor, litigation under the VRA accounts for the increased representation of racial and ethnic minorities in state legislatures and Congress.¹⁰⁴ In spite of such successes, minority representation in Congress and state houses remains very low. In 2002, thirty-seven African American, twenty-two Latino, and four Asian American representatives served in the House of Representatives.¹⁰⁵ According to recent studies, the number of African American, Latino, and Asian American elected officials stands at about 3% of the nation’s 513,200 total representatives.¹⁰⁶ Essentially, a minority representative will not be elected to a state or national legislature unless she is running in a “majority minority” district—a district where the majority of voters are minorities.¹⁰⁷ This reflects the

98. 42 U.S.C. §§ 1971–1973bb-1 (2003).

99. See generally ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* (1987). An updated version of her critique appears in Abigail Thernstrom, *More Notes from a Political Thicket*, 44 EMORY L.J. 911 (1995).

100. 42 U.S.C. § 1973b.

101. See Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983) (providing a useful compilation of the legislative history of the VRA).

102. *Id.*

103. See Chandler Davidson & Bernard Grofman, *Introduction to QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990* (Chandler Davidson & Bernard Grofman eds., 1994).

104. *Id.*

105. Sylvia R. Lazos Vargas, *The Latina/o and APIA Vote Post-2000: What Does It Mean To Move Beyond “Black And White” Politics?*, 81 OR. L. REV. 784, 826 (2002) [hereinafter Lazos Vargas, *The Latina/o and APIA Vote Post-2000*].

106. See Kim Geron & James S. Lai, *Beyond Symbolic Representation: A Comparison of the Electoral Pathways and Policy Priorities of Asian American and Latino Elected Officials*, 9 ASIAN L.J. 41, 48–49 (2002).

107. DAVID LUBLIN, *THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS* 99–124 (1997). For a summary of the political science work on this issue, see Richard H. Pildes, *The Politics of Race: Quiet Revolution in the South*, 108 HARV. L. REV. 1359 (1995).

general rule that the majority of White voters do not vote for minority candidates.¹⁰⁸

The VRA presents courts with many difficult questions. First, it contains a complex scheme of remedies. Second, while the Court stated in *South Carolina v. Katzenbach*¹⁰⁹ that the VRA was about “rid[ding] the country of racial discrimination in voting,”¹¹⁰ the mechanics of how to attain such a purpose have proven difficult. Fundamentally, the VRA asks the Court to step into the political process when, in the “totality of the circumstances,”¹¹¹ minority representation has fallen short and to determine whether race inappropriately influenced White voters.

Not surprisingly, litigation under the VRA has been fierce. The Court has resolved issues piecemeal and passed on the difficult questions of how racial minorities can achieve fair representation.¹¹² Justice Thomas argued in *Holder v. Hall* that these difficult questions are clearly beyond the institutional role of the Supreme Court.¹¹³ The Court’s failure to articulate a broader vision means that it has adopted a diversity of approaches to minority representation and has left this area confused and muddled.

The Court incorporates into the voting rights area the simplistic analysis of race relations that it adopted in the affirmative action cases.¹¹⁴ The strongest and clearest example of this incorporation is evinced in *Shaw v. Reno*, where the Court scrutinized North Carolina’s 1990 reap-

108. According to the Lublin study, the maximum White vote that a minority can expect, on the average, is around 20%. LUBLIN, *supra* note 107, at 45–48. *But see* Scott L. Malcomson, *An Appeal Beyond Race*, N.Y. TIMES, Aug. 1, 2004, at D5 (noting that United States Senator Barack Obama is a Black representative that has been able to garner some White crossover vote).

109. 383 U.S. 301 (1966).

110. *Id.* at 315.

111. 42 U.S.C. § 1973 (2003); *Thornburg v. Gingles*, 478 U.S. 30, 46–51 (1986) (establishing how the Court would apply the “totality of the circumstances” test in minority challenges to Section Two of the VRA).

112. *See Reynolds v. Sims*, 377 U.S. 533 (1964). *See generally* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666–67 (2001) (explaining the problems with litigation under the VRA).

113. 512 U.S. 874, 892–93 (1993) (Thomas, J., concurring). Justice Thomas said:

[W]e have immersed the federal courts in a hopeless project of weighing questions of political theory. . . . In doing so, we have collaborated in what may aptly be termed the racial “balkaniz[ation]” of the Nation. . . . I can no longer adhere to a reading of the Act . . . that has produced such a disastrous misadventure in judicial policymaking.

Id. (second alteration in original) (citation omitted).

114. *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 500 (1993).

portionment plan and required that redistricting incorporate colorblind principles.¹¹⁵ The Court stated that:

A . . . plan 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 interest, and will prefer the same candidates. We have rejected such perceptions elsewhere as impermissible racial stereotypes.¹¹⁶

With *Shaw v. Reno* and subsequent cases,¹¹⁷ the Court established that race-consciousness in drawing district lines is constitutionally suspect. The Court found that when race was a “predominant factor” in drawing district lines, then those district lines “subordinat[ed] traditional [race-neutral] districting principles to race.”¹¹⁸ The Court requires “strict scrutiny for districting plans ‘predominantly motivated’ by race”¹¹⁹ and will find them unconstitutional unless the state demonstrates that its use of race was “narrowly tailored to achieve a compelling interest.”¹²⁰ Non-racial motivations, which may include raw party politics to protect an incumbent, political gerrymandering to maximize the chances of political success of the current majority party, or the maintenance of geographical boundaries and neighborhoods, are permissible bases on which to draw districts.¹²¹ Like in the affirmative action cases, it is a constitutional wrong for state actors to project onto racial minorities political attributes merely based on the color of their skin.¹²² Political decision-making may be about

115. 509 U.S. 630, 646–51 (1993).

116. *Id.* at 647.

117. See, e.g., *Hunt v. Cromartie*, 526 U.S. 541 (1999) (holding that there could be no challenge to majority minority districting because politics had been the dominant factor); *Bush v. Vera*, 517 U.S. 952 (1996) (plurality opinion) (striking down majority minority districting); *Shaw v. Hunt*, 517 U.S. 899 (1996) (same); *Miller v. Johnson*, 515 U.S. 900 (1995) (striking down a majority minority district and finding that race was the controlling rationale for the drawing of the district).

118. *Bush*, 517 U.S. at 979 (plurality opinion); see also *Abrams v. Johnson*, 521 U.S. 74, 85 (1997); *Miller*, 515 U.S. at 919.

119. *Miller*, 515 U.S. at 945.

120. *Id.* at 904 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); other citations omitted).

121. See *id.*

122. Cf. *Bush*, 517 U.S. at 980 (plurality opinion) (expressing that districting that conveys the message that race can be equated to political identity is impermissible).

power, but at least such decision-making avoids the constitutional harm of being race conscious.

The constitutional rule that race cannot be the predominant factor when drawing district lines has been harshly criticized.¹²³ It seems to force a view that when politicians use race as a basis for drawing district lines, there is a high-level constitutional harm because politicians are implicitly using racial stereotypes or attributing ideological beliefs to a racial minority group. The harm is what Richard Pildes and Richard Niemi have called an “expressive harm,” “one that results from the idea or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about.”¹²⁴ But African Americans vote predictably as a political group favoring Democratic candidates. For example, in the recent California gubernatorial recall vote, 79% of African Americans voted for Democratic Lieutenant Governor Cruz Bustamante, while only 40% of Asian Americans and 60% of Latinos favored the Democratic candidate (in spite of Bustamante being “one of their own”).¹²⁵ In the south, the Democratic party is now so dependent on African American voters as their base that a recent statistical study by Bernard Grofman and Lisa Handley concludes:

[W]hile it used to be true that Democrats had a better than 50 percent chance of winning even those districts where there was minimal [B]lack voting strength, by 1992, it was only in southern districts with more than 10 percent [B]lack population that Democrats were able to win more than half of the seats; and in 1994, it was only in districts with more than 30 percent [B]lack population that Democrats could be sure of winning more than half of the seats.¹²⁶

Grofman and Handley document a trend that has been made increasingly stark in recent elections. In the south, White voters are

123. See, e.g., Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998); Melissa Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603 (2000).

124. Pildes & Niemi, *supra* note 114, at 506–07.

125. See Keith Aoki, Steven Bender & Sylvia R. Lazos, *Race and the California Recall: A Top Ten List of Ironies*, BERKELEY LA RAZA L.J. (forthcoming 2005).

126. Bernard Grofman & Lisa Handley, *1990's Issues in Voting Rights*, 65 MISS. L.J. 205, 267–68 (1995); see Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990*, *supra* note 103, at 335, 337, 343; see also DAVID LUBLIN, *THE REPUBLICAN SOUTH: DEMOCRATIZATION AND PARTISAN CHANGE* (2004) (studying why the opening up of the political process in the south through the VRA has led to dominance by the Republican Party).

increasingly abandoning the Democratic party,¹²⁷ but African Americans remain loyal Democratic voters. In order for political party bosses, whether Republican or Democrat, to continue to draw district lines in ways that will favor their party, they must be race conscious. However, per *Shaw v. Reno*, if it can be shown that race, rather than politics, was the predominant factor in drawing district lines, a constitutional wrong exists.¹²⁸

Many commentators have argued that the *Shaw v. Reno* cause of action seems to shut the Court's eyes to the reality that, at least in the case of African Americans, racial identity and political identity are closely related and difficult to distinguish.¹²⁹ In a 2004 poll, 63% of African Americans identified as Democrats.¹³⁰ A "neutral," non-racial reason for such voting behavior is that African Americans are voting in their self interest. In general, African Americans support programs like affirmative action,¹³¹ which has consistently been supported by the Democratic party. Affirmative action, although not an end-all solution to past and ongoing discrimination, has been a significant avenue for African Americans to gain entry into the middle class, although they are still more vulnerable than Whites to economic slumps.¹³² In addition, recent polls show that African Americans report being economically worse off than their White counterparts,¹³³ which might lead African Americans, feeling economically insecure, to support governmental interventions that support the economically disadvantaged. Thus political behavior can coincide with racial identity.

127. See Bob Moser, *Endangered Species of the American South*, NATION, Oct. 2, 2003, available at <http://www.thenation.com/doc.mhtml?i=20031020&c=1&s=moser> (last visited Feb. 26, 2005).

128. See 509 U.S. 630, 649 (1993).

129. See, e.g., Terry Smith, *Reinventing Black Politics: Senate Districts, Minority Vote Dilution and the Preservation of the Second Reconstruction*, 25 HASTINGS CONST. L.Q. 277, 326 (1998):

The Republican Party, for instance, has few Blacks. Thus, to draw a Republican district is essentially to draw a White district. Under the Court's reasoning, however, this outcome does not matter as long as the legislature is stealthy enough not to state it is acting with the intent of creating a White district. Of course, the legislature need not profess this aim because its intended result will follow from the partisan gerrymander anyway. Thus, the difference between a partisan gerrymander and a racial gerrymander in this context is in name only. And, unlike coincidental racial disproportions in, for example, the level of prosecutions for a particular crime that has a higher rate of commission by a certain minority group, district line drawers affirmatively exploit racial disproportions in voting to achieve their legislative objective—a partisan gerrymander.

130. See BOSITIS, *supra* note 24.

131. See THE GALLUP POLL SOC. AUDIT, *supra* note 23.

132. See Louis Uchitelle, *Blacks Lose Better Jobs Faster As Middle-Class Work Drops*, N.Y. TIMES, July 12, 2003, at A1.

133. The Gallup Poll Social Audit, *supra* note 1.

The *Shaw v. Reno* rule has negatively impacted the already anemic minority representation in Congress and state legislatures. Following the 1990 census, the number of Congressional districts in which African Americans were a majority almost doubled from seventeen to thirty-two.¹³⁴ The Court, however, soon invalidated three such districts and in doing so used harsh language to describe the districts as a result of “political apartheid” and “racial gerrymandering.”¹³⁵ In addition, this constitutional rule limits minority voters from using whatever leverage they may have in state houses to draw district lines that might increase minority voting power. Finally, such a rule breeds confusion. The Court’s promise in *Reynolds v. Sims* to provide meaningful minority representation¹³⁶ means little when overeagerness in ensuring racial minority representation will fail to meet constitutional standards.

In *Georgia v. Ashcroft*,¹³⁷ the Supreme Court took on a preclearance dispute under Section Five of the VRA (“Section Five”).¹³⁸ Under Section Five, covered jurisdictions, like the State of Georgia, must obtain preclearance from the United States Department of Justice when any change in election law might have a “discriminatory effect or purpose.”¹³⁹ The issue raised in *Georgia v. Ashcroft* was whether the new Georgia redistricting plan might be retrogressive with respect to minority voters, either in intent or effect.¹⁴⁰ In other words, the Court wanted to know if the redistricting plan drawn up by a Democratic state legislature would have a discriminatory effect on minority voters. As interpreted by other courts, the non-retrogression principle required that decennial redistricting plans not greatly decrease minority representation from prior levels.¹⁴¹ Georgia’s proposed plan maintained the number of districts with majority African American populations at thirteen, but it reduced the number of districts with more than a 60% African American voting age population by five.¹⁴² The lower court refused to preemptively clear the state senate plan and

134. See LUBLIN, *supra* note 126, at 22–23.

135. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

136. 377 U.S. 533, 565 (1964) (“Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature.”).

137. 539 U.S. 461 (2003). For an excellent discussion of the impact of this case on the VRA, see Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21 (2004).

138. 42 U.S.C. § 1973 (2003).

139. *Id.*

140. 539 U.S. at 466.

141. See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) (requiring preclearance even when change did not dilute minority voting strength).

142. See *Ashcroft*, 539 U.S. at 470–71.

ruled that the State of Georgia had not met its burden of showing that the new district plan did not have a retrogressive effect.¹⁴³

Georgia v. Ashcroft brings to the fore many difficult questions, which Justice O'Connor recognizes in the majority opinion. Should the Court's retrogression analysis be concerned with guaranteeing a floor in the number of minority representatives that are electable? Should the Court include in its calculus the possibility that there might be a cross-racial coalition of voters that could potentially elect a minority representative?¹⁴⁴ In order to ensure "meaningful representation," is it more important for minority voters to ensure that the party of their choice is a majority party in the legislature or that a minority representative be elected?¹⁴⁵ Although it posits these questions, the majority opinion leaves them unanswered, instead trusting that local legislative bodies will appropriately and constitutionally¹⁴⁶ make these tradeoffs and choices.

The Court's statement that "Section 5 leaves room for States to use these types of . . . choices"¹⁴⁷ as to how African American interests may best be represented electorally masks the Court's shifted focus in retrogression challenges. True, the Court has never engaged the issue as to what type of political representation might best ensure that African Americans' interests—whether they be identity, group, or political interests—be incorporated into the American political process. But leaving this question open allows Justice O'Connor to skirt the difficult question of whether backsliding in the anemic gains made by minorities in electing their candidates of choice undermines the goals of the VRA and case law since *Reynolds v. Sims*: to ensure that there is a critical mass of minority representation so that minority voices can be heard in the political process.

Justice O'Connor seems to be taking a reasonable judicial position when she argues for more flexible standards under Section Five. The Court applies a new retrogression standard in *Georgia v. Ashcroft*, that "a court should not focus solely on the comparative ability of a minority

143. *Id.* at 471 (stating that the African American voting age population dropped in the three state senate districts in question from 61% to 50%, 55% to 51%, and 62 percent to 51%).

144. The legal standard under Section Two requires only that a minority group be able to elect "representatives of [its] choice." 42 U.S.C. § 1973. The court observed, however, that Section Five and Section Two serve different purposes. *Ashcroft*, 539 U.S. at 478.

145. *Ashcroft*, 539 U.S. at 481 ("[S]preading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice.").

146. The State of Georgia had argued that the redistricting plan allowed African Americans to "effective[ly] exercise . . . the electoral franchise." *Id.* at 479.

147. *Id.* at 480 ("Section 5 does not [require] . . . one . . . method[] . . . over another. . . . [Each] option . . . present[s] . . . its own array of risks and benefits and presents hard choices.") (quotations and citations omitted).

group to elect a candidate of its choice.”¹⁴⁸ Rather, it is sufficient that minority voters *may have* the ability (in *Ashcroft*, per certain analysts’ calculations, a fifty-fifty chance) to elect the candidate of their choice.¹⁴⁹ This shift in Section Five standards from prior case law under which any erosion in electability or even *potential* electability of minority candidates was actionable means that minority representation in state and national legislatures, already miniscule, will be further diluted.

In *Georgia v. Ashcroft*, the Court was willing to move to a more flexible analysis in retrogression. Black voters could be “unpack[ed] . . . to increase [B]lack[s]’ effective exercise of the electoral franchise in more districts . . . even if it means that in some districts minority voters will face a somewhat reduced opportunity to elect a candidate of their choice.”¹⁵⁰ Greater deference to the judgment of the state political leadership was appropriate in this case, because the court was persuaded that minority voters had the potential to “play a substantial or decisive role in the electoral process.”¹⁵¹ The Court’s willingness to be more flexible and exercise less scrutiny of the political leadership dilutes the litigation remedy under Section Five that has done so much to increase minority representation.

In *Georgia v. Ashcroft*, the Court does begin a more nuanced discussion of whether minority interests are furthered by what some call “substantive representation,” the ability of minority voters to have the party of their choice as the majority party,¹⁵² versus “descriptive representation,” the ability of a minority group to have minority representatives elected.¹⁵³ The Court leaves to state politicians the discretion to weigh these competing goals, stating: “the State’s choice ultimately may rest on a political choice of whether a substantive or descriptive representation is preferable.”¹⁵⁴ But there is much more complexity to these issues than the Court addresses in its terse passages. The lack of full discussion regarding the tradeoffs involved for minority voters between these two very different types of representation allows the Court to avoid grappling with difficult race relations issues. Should the Court trust the political process, Democrats, or Republicans to make the key decisions that will directly impact whether minorities will gain effective representation? Ironically,

148. *Id.*

149. *See id.*

150. *Id.* at 488–90 (quotations and citations omitted) (citing political science studies that show that there has been a tradeoff between minority substantive representation (getting a political agenda passed) and descriptive representation (actual number of minority representatives)).

151. *Id.* at 488.

152. *Id.* at 488–90.

153. For a breakdown of the various concepts of representation, see HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1967). Note that the Voting Rights Act only mandates that minority groups be able to elect a representative of “their choice,” not that minorities be able to elect minority representatives.

154. *Ashcroft*, 539 U.S. at 483.

the *raison d'être* of Section Five retrogression is that the United States Congress did not trust the state political process to desist from manipulating structures and practices in order to exclude minorities from the political process.¹⁵⁵

The hopes for greater minority influence under the new Georgia plan were not borne out in elections after 2000. The new Georgia redistricting, although a nominal triumph for the Democrats, increased neither descriptive nor substantive African American representation. After the 2000 elections, African American descriptive representation decreased, and the preferred party of African American voters, the Democrats, found themselves in the minority.¹⁵⁶ Greater deference to state legislatures' judgment did not in fact result in the hoped for goal of "[B]lack voters . . . play[ing] a substantial or decisive role in the electoral process."¹⁵⁷

Racial dynamics in the electoral process are very complex.¹⁵⁸ Addressing a highly intractable problem by giving greater leeway to politicians without a theory as to why such deference may be warranted is a retreat. Courts may want to avoid areas in which it is difficult to fashion doctrine, but this retreat to the sidelines also means that the law might now allow for schemes that undercut or sacrifice minority representation. The irony is that the Court has shifted to a more deferential stance when it is clear that minority representation in legislatures remains anemic.

C. You Gotta Have a Theory of Why Race Matters

Appearances are important. In the affirmative action cases, the blatant use of race-conscious decision-making violates constitutional principles because the Court views equal protection as an individual right.¹⁵⁹ Judging an individual on the basis of racial attributes is a derogation of personal dignity and jeopardizes the fundamental liberty principles on which a free democratic society is founded.¹⁶⁰

155. See *City of Rome v. United States*, 446 U.S. 156, 182 (1980) ("Congress found that racial discrimination in voting was an insidious and pervasive evil which had been perpetuated in certain parts of the country through unremitting and ingenious defiance of the Constitution.").

156. Karlan, *supra* note 137, at 30–43.

157. *Ashcroft*, 539 U.S. at 485–86.

158. For further discussion of this complex subject, see LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994); CAROL SWAIN, *BLACK FACES, BLACK INTERESTS* (1995); Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383 (2001); Rick Pildes, *Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002).

159. See *supra* note 55.

160. See *supra* notes 58–59 and accompanying text.

In voting rights cases after *Shaw v. Reno*, the Court has found that drawing race-conscious districts is a perpetuation of racial stereotypes, whereby state actors assume that members of a racial minority will vote a certain way merely because of the color of their skin.¹⁶¹ The Court ignores the high correlation between political ideology and racial identity and the commonality of lived experiences and economic circumstances for members of many racial groups. In addition, these voting rights cases permit courts to declare laws unconstitutional in the absence of evidence that these actions subject any identifiable class to harm.

This jurisprudence ignores complex racial and class realities. Without acknowledging the depth of existing disagreement and difference that is part of race relations, any attempts to outline what is or is not permissible based on a superficial measure like race-consciousness are superficial and ineffective.

II. DO COURTS THAT "LOOK LIKE AMERICA" CREATE AN INCLUSIVE RULE OF LAW?

Let us assume for a moment that minority judges, because of their racial experiences, can help work through some of the racial complexities that modern equal protection doctrine poses. If it is important that the judiciary should think and "look like America," how close are we to that goal? Part II.A provides a summary of political science quantitative research which finds that minority representation on the bench is paltry and likely will remain so. Part II.B discusses the work of judicial behavioralist research, which is inconclusive as to whether minority judges are more capable of resolving race relations issues.

A. Descriptive Representation: "Where, Oh Where" Are the Judges of Color?

Both the federal and state benches are overwhelmingly filled with White males.¹⁶² Professor Barbara Graham's study finds that in 2001, judges of color made up only 8.2% of the 30,059 available state judgeships.¹⁶³ African Americans represent 4.4% of state court benches, Latinas/os 3.0%, and Asian Pacific Islander Americans ("APIA") only

161. See *supra* notes 116–20 and accompanying text.

162. *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998) ("The demographics of these judges are startlingly similar, with the vast majority of the federal bench being [W]hite, Protestant, male, politically active, middle-aged, [and] middle- to upper-income...").

163. See Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153, 172, 184 tbl.2 (2004).

0.6%.¹⁶⁴ In certain states, the disparities are even more disturbing. For example, in Nevada, where Latina/os now represent 16.7% of the voting age population, the representation of Latina/os on the bench is only 2.7%.¹⁶⁵ The representation of minorities on the federal bench is only slightly better, representing about 12% of Nevadan judges.¹⁶⁶

At the federal level, the appointment process exacerbates the underrepresentation of judges of color. Specifically, Republican and Democratic presidents pursue different agendas when selecting judicial candidates. Since Richard Nixon, Republican presidents have appointed judges whose political views and judicial interpretive mindsets comported with the political values held by the Republican party.¹⁶⁷ President George W. Bush has stated that he seeks to appoint judges who are “strict constructionists.”¹⁶⁸ Democratic Presidents Carter and Clinton appointed judges who, in President Clinton’s words, “look like America.”¹⁶⁹ In his first term in office, more than half of President Clinton’s judicial nominees were minorities or women.¹⁷⁰ Unfortunately, his attempt to diversify the bench was dampened by Republican senators who were able to block and stall his judicial appointments.¹⁷¹ Notably, the most delayed of President Clinton’s nominations were women and minorities.¹⁷² In fact, at the conclusion of President Clinton’s term, the Senate Judiciary Committee had not reported on fifty-seven of Clinton’s nominees, most of whom were women

164. *Id.*

165. *Id.* at 190 tbl.5.

166. Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84, 90 (2001). African Americans represent 6%, Latinas/os approximately 5%, and APIAs less than 1% of judges on the federal appellate bench. *Id.*

167. Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 U.C. DAVIS L. REV. 695, 698 n.11 (2003) [hereinafter Goldman, *Unpicking Pickering*] (discussing research that showed that White House staff recommended to President Nixon that he “influence the course of national affairs for a quarter of a century after he leaves” through his judicial appointments); Dawn Johnsen, *Tipping the Scale: President Bush Picks Judges Based on Ideology—So Why Shouldn’t Senators Reject Them for It?*, WASH. MONTHLY, July/Aug. 2002, at 15.

168. Johnsen, *supra* note 167, at 16.

169. MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 131 (2000).

170. Sheldon Goldman et al., *Make-up of the Federal Bench*, 84 JUDICATURE 253 (2002); Rorie L. Spill & Kathleen A. Bratton, *Clinton and Diversification of the Federal Judiciary*, 84 JUDICATURE 256, 256–61 (2002) [hereinafter Spill & Bratton, *Clinton and Diversification*].

171. Goldman, *Unpicking Pickering*, *supra* note 167, at 707–17 (discussing tactics and reporting that the highest amount of delay according to the “index of obstruction and delay” occurred during President Clinton’s administration, at the beginning of the 104th Congress); see Maria Echaveste, *Brown to Black: The Politics of Judicial Appointments for Latinos*, 13 BERKELEY LA RAZA L.J. 39, 40–42 (2003) (recounting the travails of the White House in dealing with the Senate in attempting to get minority judicial nominees out of committee).

172. Goldman, *Unpicking Pickering*, *supra* note 167, at 712–15; see also Echaveste, *supra* note 171, at 40–42 (providing anecdotal detail of the costs to individuals).

and minorities.¹⁷³ With the change of Presidents, these nominations lapsed, providing President George W. Bush the opportunity to fill the vacancies already open as well as those occurring in his terms with a Republican-controlled Senate willing to approve the nominations.¹⁷⁴ These vacancies gave President Bush a significant opportunity to influence the federal bench shortly after taking office.¹⁷⁵ Unfortunately for advocates of diversity, President Bush has been *less* likely to appoint African Americans or Latina/os than any of his predecessors¹⁷⁶ and has selected candidates who are ideologically conservative.¹⁷⁷

A key factor affecting why state benches remain mostly White and male may be because most states' judges are elected.¹⁷⁸ Jarvis Hall's study of recent judicial elections in North Carolina shows that African American judicial candidates are not able to raise campaign funds at the same levels as their White counterparts, which significantly impacts their competitiveness.¹⁷⁹ This phenomenon parallels one documented in state and congressional legislative races, where one of the reasons that minority candidates have difficulty competing is that they must draw their campaign funds from communities that are not as affluent as the majority White community.¹⁸⁰ As judicial races become more expensive, the campaign fundraising gap will widen even more. In some states, it is now estimated that it takes close to one million dollars to be competitive in a judicial election race for the state supreme court.¹⁸¹

Many factors are at work when the public goes to the polls to elect their judges. For example, name recognition and political party affiliation

173. Goldman, *Unpicking Pickering*, *supra* note 167, at 712–15.

174. Goldman et al., *supra* note 170, at 253.

175. According to then-White House Counsel Alberto Gonzalez, "President Bush has responded to the vacancy crisis by nominating a record number of federal judges: 90 since taking office, almost double the nominations that any of the past six presidents submitted in the first year." Alberto Gonzalez, *Editorial*, WALL ST. J., Jan. 25, 2002, at A18.

176. Spill & Bratton, *Clinton and Diversification*, *supra* note 170, at 258–61; Rorie L. Spill & Kathleen A. Bratton, *The Diversification of the Federal Bench: Presidential Patterns and Existing Diversity* (Paper presented at the Brennan Center Symposium on Diversity, Impartiality, and Representation on the Bench, Feb. 20–21, 2004).

177. Susan B. Haire et al., *The Voting Behavior of Clinton's Courts of Appeals Appointees*, 84 JUDICATURE 274, 281 (2001) (finding that Clinton appointees were "moderate," putting George W. Bush in a strong position to significantly add to the ranks of conservative federal judges selected during the Reagan–Bush era).

178. Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985); see Graham, *supra* note 163, at 178–79.

179. Jarvis Hall, *Where Do We Go From Here Now: Civil Rights and the Passage of the North Carolina Judicial Reform Act of 2002* (Paper presented at the Brennan Center Symposium on Diversity, Impartiality, and Representation on the Bench, February 20–21, 2004).

180. See generally Overton, *supra* note 38, at 1024–25.

181. See Hall, *supra* note 179, at 8.

are influential.¹⁸² Some voters may be influenced by stereotyping or may not be able to imagine a person of color in the role of respectable and esteemed jurist.¹⁸³ Mark Hurwitz and Drew Lanier's research suggests that backlash may be at work as well, because when voters perceive a state court as too liberal, they are more likely to vote for White judges than for African American judges.¹⁸⁴

In those states where governors appoint judges to the bench, a different dynamic may be at work. When there are no women or minorities on the bench, governors are likely to appoint a woman or minority judge.¹⁸⁵ Once a woman or minority judge is on the bench, the chances that another woman or minority will be added decrease greatly.¹⁸⁶ These realities indicate that a governor may receive a political or symbolic benefit from appearing to support diversity values by making initial appointments of racial minorities. Once that political benefit has been derived, there is less psychological and political pressure on a governor to increase diversity further. Moreover, after that first "token" appointment, an executive may be more cautious of alienating White voters by naming more than one minority judge to the bench.¹⁸⁷

B. *Substantive Representation: What Does Race
Got to Do with Judging?*

Judicial behavioralism is the branch of political science that applies empirical methods to determine if there is a relationship between personal attributes (such as race, gender, education, or experience) and

182. Mark S. Hurwitz & Drew N. Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*, 3 ST. POL. & POL'Y Q. 329, 346 (2003) [hereinafter Hurwitz & Lanier, *Explaining Judicial Diversity*].

183. See *supra* notes 6–8 and accompanying text.

184. See Hurwitz & Lanier, *Explaining Judicial Diversity*, *supra* note 182, at 345–46.

185. In fact, the existence of diversity on the bench is one of the strongest predictors of whether there will be additional judicial diversity. See Spill & Bratton, *Clinton and Diversification*, *supra* note 170, at 256–58.

186. *Id.*

187. Tipping is a form of White backlash. The phenomenon of tipping has been widely studied in the housing context. For its application in the voting context, see Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 312–13 (1997) (characterizing African American influence in voting districts as "curvilinear," because as African American representation grows above 30%, Whites resent Black influence and exhibit backlash voting patterns); Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 462–73 (1999) (discussing White backlash in the context of initiatives and referenda and describing White backlash as the desire of Whites, as the majority group, to have their cultural values dominate).

political affiliation of judges and their rulings.¹⁸⁸ To quote a recent assessment of behavioralist research, these studies “demonstrat[e] . . . that ideological and political considerations drive decision-making” by judges.¹⁸⁹

Of all personal attributes, political ideology seems to be the most influential attribute in predicting a judge’s decisions.¹⁹⁰ For example, a study on judicial sentencing shows that a significant factor in predicting whether judges would strictly adhere to sentencing guidelines is the political party of the president that appointed that judge to the bench.¹⁹¹ A study of labor cases showed that prior experience representing management and graduation from an elite college were significant factors in predicting whether a judge would rule in favor of management.¹⁹² Yet another empirical study found that judges who were former law professors

188. See, e.g., Howard Gillman, *What’s Law Got To Do With It? Judicial Behaviorists Test The “Legal Model” Of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465, 466 (2001). The scholars most associated with this school of thought, also termed the “attitudinal model,” are Jeffrey A. Segal and Harold J. Spaeth. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* (1999).

189. See Gillman, *supra* note 188, at 466.

190. See, e.g., Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298, 300 (1993) (finding significant party-related voting differences in areas of criminal justice, civil rights and liberties, and labor and economic relations); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1651–53 (1998) (finding a significant link between party affiliation and case outcomes); Jon Gottschall, *Carter’s Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 164, 169–71 (1983) (finding significant party-related voting differences in criminal cases and sex and race discrimination cases); Jon Gottschall, *Reagan’s Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48, 51–54 (1986) (finding significant party-related voting differences in civil rights and civil liberties cases); Gerard S. Gryski & Eleanor C. Main, *Social Backgrounds as Predictors of Votes on State Courts of Last Resort: The Case of Sex Discrimination*, 39 W. POL. Q. 528, 534 (1986) (finding significant party-related voting differences on sex discrimination cases); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) (finding significant party-related voting differences); Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals 1955–1986*, 43 W. POL. Q. 317 (1990) (finding significant party-related voting differences on cases involving labor relations, criminal law, First Amendment, and civil rights issues). But see Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995) (concluding that there is no difference between Republican judges and Democrat judges in their treatment of civil rights cases, based on a statistical analysis of 2258 district court cases).

191. See Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1388 (1998) (citations omitted).

192. See James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1680–81 (1999).

were more consistent in their rulings (whether conservative or liberal) and more forceful in making ideological points in their decisions.¹⁹³

Interestingly, empirical works comparing female judges and minority judges to their gender and race counterparts do not always support the hypothesis that a female or racial minority on the bench would lead to outcomes that are more favorable to the interests of women or minorities.¹⁹⁴ A recent study of minority and female district court judges by Jennifer Segal found few differences between minorities and women and their counterparts on issues involving civil rights, criminal rights, economic regulations, and economic liberties.¹⁹⁵ In testing for judicial outcome differences, Segal attempted to eliminate any possible effect of ideology and tested by comparing only judges that had been appointed by President Clinton.¹⁹⁶

Other studies, however, indicate that gender and minority status do have an impact on judging. The most significant and well-cited is Professor Nancy Crowe's study of federal appellate court non-unanimous panels, in which she found that gender and race did correlate with judicial voting behavior in employment discrimination cases.¹⁹⁷ Crowe found that party affiliation, race, and gender significantly influenced whether plaintiffs prevailed in such cases. White female judges were more likely than White male judges to rule for the plaintiff in *gender* discrimination cases¹⁹⁸ but not in *race* discrimination

193. See Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 10, 49 (2001) [hereinafter George, *Court Fixing*].

194. See David W. Allen & Diane E. Wall, *The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?*, 12 JUST. SYS. J. 232, 239 (1987) (examining the behavior of five female state supreme court judges and identifying four of the five as much more liberal than their male counterparts); John Gruhl et al., *Women As Policymakers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308, 308 (1981) (concluding, based on an analysis of one city's criminal courts, that women judges generally did not convict and sentence defendants differently than men judges did, except that women were more likely than men to sentence female defendants to prison time); Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees* 53 POL. RES. Q. 137, 147 (2000) (finding no difference between male and female judges appointed by Clinton).

195. See Segal, *supra* note 194, at 146-47.

196. *Id.* at 137-38.

197. See Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the United States Court of Appeals, 1981-1996* (1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with author). Professor Crowe examined race and sex discrimination cases decided by the United States Courts of Appeals between 1981 and 1996.

198. In sex discrimination cases, Professor Crowe found that White male judges would find for plaintiffs 28% if they were Republican and 76% if they were Democrat. Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 604-05 (2003) (summarizing Professor Crowe's study). Female judges would find for plaintiffs 53% if they were Republican and 90% if they were Democrat. *Id.* Black judges would find for plaintiffs 61% if they were Republican and 93% if they were Democrat. *Id.*

cases.¹⁹⁹ Moreover, female judges were twice as likely to find for a gender discrimination plaintiff than were White male judges if Republican-appointed, and 14% more likely if Democrat-appointed.²⁰⁰ African American male judges, in both race and gender discrimination cases, found much more often in favor of the plaintiff.²⁰¹ Crowe's choice of sampling method—selecting non-unanimous panels—suggests that where the facts and the law make for close cases, judges have an opportunity to insert their own identity experiences into the decision-making process.

These findings by Crowe were confirmed in a recent study by Jennifer Peresie.²⁰² She found that federal female judges were more likely to find for the plaintiff in gender discrimination cases but not likely to rule for the plaintiff in race discrimination cases.²⁰³ David Allen and Diane Wall also found that female state supreme court justices were more likely to support plaintiffs in sexual harassment and gender discrimination cases than were male judges.²⁰⁴

Delineating areas where identity might impact judicial decision-making is key to detecting behavioral differences. A study by Donald Songer and Kelley Crews-Meyer found that women on state supreme courts were less likely to apply the death penalty than their male colleagues.²⁰⁵ Another recent study of appeals court judges found that male judges more frequently took pro-plaintiff stances in criminal procedure and civil rights cases when a female judge was present than when one was not.²⁰⁶

Although sparse, there is solid evidence that race affects judging. Studies suggest that African American judges may be better at recognizing discrimination, more likely to issue sentences to convicted criminal defendants without being influenced by racial stereotypes, and more likely

199. In race discrimination cases, Professor Crowe found that White male judges would find for plaintiffs 20% if they were Republican and 49% if they were Democrat. *Id.* White female judges would find for plaintiffs 21% if they were Republican and 51% if they were Democrat. *Id.* Black male judges would find for plaintiffs 60% if they were Republican and 85% if they were Democrat. *Id.* at 605.

200. *Id.* at 604–05 (summarizing Crowe's study).

201. *Id.*

202. Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (forthcoming 2005) (studying sexual harassment and gender- and race-based employment discrimination cases decided by federal appellate courts from 1999–2001 and concluding that female judges are much more likely to vote liberally in sexual harassment and gender discrimination cases but not in race discrimination cases).

203. *Id.* at 1769.

204. Allen & Wall, *supra* note 194, at 232, 239.

205. Donald R. Songer & Kelley A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750 (2000).

206. Peresie, *supra* note 202, at 1765 (citing Tajuana Massie et al., *The Impact of Gender and Race in the Decisions of Judges on the United States Courts of Appeals* 10–11 (Apr. 25–28, 2002) (unpublished manuscript, on file with author)).

to interpret sentencing guidelines less strictly. The Crowe study found that African American male judges were more likely to find for the plaintiff in both race and gender discrimination cases than their White male and female counterparts.²⁰⁷ Two studies of African American judges in city criminal courts that were conducted twenty years apart found that African American judges were more likely to treat White and African American criminal defendants “more equally” than were their White counterparts.²⁰⁸ An empirical study of sentencing also found that minority judges were more likely to deviate from the sentencing guidelines than their White counterparts, although this difference was not statistically significant.²⁰⁹

Many researchers have interpreted these studies as being inconclusive as to whether gender and race matter in judging.²¹⁰ They believe that current studies are making only a suggestive link between race and judging for several reasons. First, the small number of women and minority judges means that often the sample used is not large enough to achieve statistical significance.²¹¹ Second, behavioral research does a good job of measuring, but just what is being measured remains unclear at times. As Professor Gillman has pointed out, behavioral research is “premised on disputed definitions of key concepts” and claims of what attributes are influencing outcomes “are inevitably interpretive.”²¹² Finally, the strong influence of political ideology on judging²¹³ combined with the great variability among minorities as to their racial perspectives,²¹⁴ make it particularly difficult to untangle what impact “race” perspective as opposed to ideology has on judging. Moreover, ideology may “drown out” perspective effects when the rigors of quantitative analysis are brought to bear. For example, on affirmative action, an issue that is divisive along racial, gender, and political lines, Jennifer Segal found no difference between

207. See *supra* notes 198–201 and accompanying text.

208. See Thomas M. Uhlman, *Black Elite Decision Making: The Case of Trial Judges*, 22 AM. J. POL. SCI. 884, 889 (1978) (finding that Black judges were more likely to find defendants guilty whether Black or White); Susan Welch et al., *Do Black Judges Make A Difference*, 32 AM. J. POL. SCI. 126, 133 (1998) (controlling for sentencing severity and previous incarceration; and finding that Black judges were “fairer” than White judges because “[B]lack judges are more likely than [W]hite judges to sentence [W]hite defendants to prison and to give less severe sentences to [B]lack defendants”).

209. See Sisk et al., *supra* note 191, at 1457.

210. See, e.g., Beiner, *supra* note 198 (summarizing Segal’s and Crowe’s data, stating studies are inconclusive, and falling back on anecdotes and critiques of the studies to justify why she nonetheless continues to believe that racial and gender diversity matter in judging); George, *Court Fixing*, *supra* note 193, at 22–23.

211. See *supra* Part II.A (describing the dearth of minority judges).

212. See Gillman, *supra* note 188, at 495.

213. See *supra* notes 188–93 and accompanying text.

214. See Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5 (2004); Sylvia R. Lazos Vargas, *Can a Popular Genre Make a Serious Academic Contribution to Race Relations?*, 18 J. LAW & INEQ. 419 (2000).

the decisions of White and African American Clinton appointees.²¹⁵ In the area of equal protection, Jilda Aliotta concluded that Justice O'Connor's decisions could be better explained by her political affiliation than her gender.²¹⁶

The interplay between ideology and racial perspective may be so closely related that it will always be difficult to measure how each, on its own, is shaping decision-making. To illustrate, Justice Thomas has consistently voted against the constitutionality of governmental affirmative action programs.²¹⁷ One could argue that this is an ideologically influenced outcome, since the other politically conservative, Republican-appointed Justices—Justices Rehnquist, Scalia, and Kennedy—have also voted consistently against government affirmative action. Nonetheless, Justice Thomas's concurrence in *Adarand*²¹⁸ and his dissent in *Grutter*²¹⁹ show that his judging outcome is influenced by his racial perspective as well. For Justice Thomas, affirmative action is constitutionally prohibited because it racially stigmatizes minority individuals, whom society stereotypes as inferior.²²⁰ By contrast, Justice Scalia believes that it is improper for the government to address past racial discriminatory effects because Whites should not be brought to any accounting for past racial bad acts,²²¹ and he is openly skeptical as to whether ongoing discrimination is so endemic and

215. See Segal, *supra* note 194, at 147.

216. See Jilda M. Aliotta, *Justice O'Connor and the Equal Protection Clause: A Feminine Voice?*, 78 JUDICATURE 232 (1995).

217. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J., concurring in part and dissenting in part); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).

218. 515 U.S. at 240 (Thomas, J., concurring).

219. 539 U.S. at 349 (Thomas, J., concurring in part and dissenting in part). Thomas said: "The American people have always been anxious to know what they shall do with us. . . . I have had but one answer from the beginning. Do nothing with us! . . . I believe [B]lack can achieve in every avenue of American life without the meddling of university administrators." *Id.* at 349–50 (Thomas, J., concurring in part and dissenting in part) (quotations and citations omitted). Professor Guinier calls this perspective "each [B]lack man or woman for himself or herself." Guinier, *supra* note 74, at 182 n.266.

220. See *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part) ("When [B]lack take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement.").

221. Justice Scalia's concurrence in *City of Richmond v. J.A. Croson Co.* makes the argument that to connect past acts of racism to present acts violates the principle of individualism. 488 U.S. 469, 520, 527 (1989) (Scalia, J., concurring):

In the eyes of government, we are just one race here. It is American. . . . [A] racial quota derogates the human dignity and individuality. . . . [It] is a divider of society, a creator of castes. . . . [W]hen we depart from this American principle [of racial neutrality] we play with fire, and much more than an occasional . . . Croson burns.

systemic that any state action should attempt to redress it.²²² On the issue of racism, Justice Thomas believes racial discrimination is part of American society,²²³ perhaps even that racism is “hardwired” into the American psyche as Professor Richard Delgado argues.²²⁴ However, Justice Thomas believes that government action to remedy endemic and structural racism is futile and more harmful than beneficial.²²⁵ Justice Thomas reaches his conclusions using both his racial experience²²⁶ and his belief about the permissible role of government in social interventions under the Constitution.²²⁷

In sum, instead of concluding that gender and race have no impact on judging, it may be fairer to conclude that researchers have not yet figured out how to adequately test the hypothesis.

222. Prior to being appointed to the bench, Justice Scalia wrote in a law review article that he did not believe that White immigrants had any responsibility for past racial harms caused by the institutions of slavery and Jim Crow that pre-existed their arrival to the United States. See Antonin Scalia, Commentary, *The Disease as Cure: In Order to Get Beyond Racism, We Must First Take Account of Race*, 1979 WASH. U. L.Q. 147, 152.

This viewpoint reinforces the myth that racism metamorphosizes and eventually melts away into the White ethnic identity, that it is not a serious injury or harm that can persist through history, and that racism and racist attitudes are not entrenched in current economic structures and social norms. This mythology also supports the view that the law must proscribe only intentional, culpable, and episodic racism, because it is an individual fault that can be overcome. However, such a construction of racism permits its decontextualization, unlinks race from its historical roots, and limits conceptually its current social and economic forms. See Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Narrative and Its Exclusionary Effect*, 72 TULANE L. REV. 1493, 1525 (1998) [hereinafter Lazos Vargas, *Deconstructing Homo[geneous] Americanus*].

223. Cf. *Adarand*, 515 U.S. at 241 (Thomas, J., concurring) (“[R]acial paternalism . . . can be . . . poisonous . . . [B]enign discrimination teaches many that . . . minorities cannot compete with them without their patronizing indulgence.”) (internal quotations omitted).

224. See *supra* note 9 and accompanying text.

225. Cf. *Adarand*, 515 U.S. at 241 (Thomas, J., concurring) (“[Affirmative action] programs engender attitudes of [White] superiority [and] . . . stamp minorities with a badge of inferiority [that] may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”).

226. For a discussion of how race is reflected in Justice Thomas’ jurisprudence, see Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. (forthcoming 2005); Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. (forthcoming 2005).

227. Cf. *Adarand*, 515 U.S. at 240 (Thomas, J., concurring) (stating that “[g]overnment cannot make us equal; it can only recognize, respect, and protect us as equal before the law”).

III. DEMOCRACY AND INCLUSION: A PLURALISTIC PROCESS-BASED MODEL OF JUDGING

The lack of resolution in the empirical work as to whether descriptive racial and gender diversity yields measurably different outcomes leads back to our beginning inquiry. Is greater representation of minority judges on the bench necessary to attain a rule of law that is inclusive? Part III.A explains that the pluralistic process-based model of judging theorizes that inclusion of racial experiential viewpoints on the bench can achieve an inclusive rule of law. Part III.B explains how *Gutierrez* points the way to achieving the pluralistic judging model. Diversity on the bench must go beyond token appointments and instead achieve critical mass so that courts can become pluralistic dialogic institutions. Part III.C acknowledges that the presence of minority judges may not necessarily lead to diverse dialogic environments, because individual minority judges may choose to view their judicial role narrowly. However, a critical mass of minority judges would likely result in a range of minority perspectives as to the judicial role.

A. Pluralistic Judging in an Epistemologically Diverse Democracy

Part I concluded that undertheorizing race leads to doctrinal gaps and confusion for those who must put judicial decisions into operation. Cass Sunstein has argued that constitutional courts should avoid large-scale theorizing and generally should make constitutional law incrementally, leaving areas of high political disagreement undecided in order for the political process to have an opportunity to work through them.²²⁸ Whatever the merits of Sunstein's argument, with respect to race relations, courts should be clear and develop fully articulated reasons as to why race matters in the law. In societies with a great deal of racial, ethnic, and cultural diversity, conflict and disagreement should be expected. Racial and other identity-based conflicts are permanent default conditions that constitutional courts should recognize as facts of life as they fashion doctrine.²²⁹ Ongoing racial and other identity-based conflicts go beyond honest disagreements, because individuals do not understand each other's

228. See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 6-19 (1996).

229. See LAZOS VARGAS, *Democracy and Inclusion*, *supra* note 28, at Part I; see also JOHN RAWLS, *POLITICAL LIBERALISM* xviii (Columbia Univ. Press 1996) (1993); *id.* at 36 ("[D]iversity of reasonable comprehensive . . . doctrines found in modern societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy.").

different experiences. Some believe these lived differences in experience may not be fully comprehensible to others by reason or empathy.²³⁰

A pluralistic process-based model of judging responds to the challenges of judging in an epistemologically diverse society, one that is divided because majorities and minorities have different realities born in identity-based experiences. Under process theory, courts ensure that the democratic process represents *all* members of the polity.²³¹ John Hart Ely believed that courts have a legitimate counter-majoritarian role in policing the functioning of democracy and in ensuring that the rule of law is fashioned as “participation-oriented [and] representation-reinforcing.”²³² Where majorities and minorities do not possess equal power and status, judges should ensure full participation and representation of all members of the polity. A pluralistic process-based model of judging envisions that courts will: i) get the content right of minimum substantive rights;²³³ ii) ensure that, in the development of constitutional doctrine, the “realities” of both majorities and minorities are included;²³⁴ and iii) balance the court’s role as ultimate decision-maker of inviolable rights and defer political disagreements to the political process so that majorities and minorities have the opportunity to work out deep disagreements.²³⁵ The following Sections provide further detail to this model, which *Democracy and Inclusion: Reconceptualizing The Role of the Judge in a Pluralist Polity* more fully elaborates.²³⁶

230. See Richard Delgado, *Rodrigo’s Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 69–71 (1996) (describing “false empathy” wherein Whites “pretend to understand and sympathize with a Black” and the “empathetic fallacy” as a belief that individuals can surmount place and culture and transcend their situations). See generally Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989) (arguing empathy is an inexact concept and not adaptable to principled legal inquiry).

231. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 77 (1980). John Hart Ely argues that judicial review is appropriate wherever the Court might deem that there is “prejudice against discrete and insular minorities.” *Id.*

232. *Id.* Professor Ely simply argued that “we came to recognize that the existing constitutional devices for protecting minorities were simply not sufficient. No finite list of entitlements can possibly cover all the ways majorities can tyrannize minorities, and the informal and more formal mechanisms of pluralism cannot always be counted on either.” *Id.* at 105. As Ely explains, such dynamics “provid[e] the ‘majority of the whole’ with the ‘common motive to invade the rights of other citizens’ that Madison believed improbable in pluralistic society.” *Id.* at 153 (citations omitted).

233. See *infra* Part III.A.1.

234. See *infra* Part III.A.2.

235. See *infra* Part III.A.3.

236. This theory, explained in more detail in Lazos Vargas, *Democracy and Inclusion*, *supra* note 28, applies John Rawls’s Political Liberalism. See RAWLS, *supra* note 229. Rawls posits that pluralist societies have inherent moral disagreements because of the wide array of “comprehensive doctrines” held by individual members. *Id.* at 137.

1. Getting the Content Right of Minimum Substantive Rights

Constitutional courts, as the lead constitutional decision-makers, construct the minimum rights that each member of American society expects to hold. In thinking of epistemologically diverse democracies, Frank Michelman posited that a “respect-worthy” judicial process should first ensure that, to the extent possible, courts “get it right” as to constitutional rights.²³⁷ We often think of these minimum rights as human rights, the rights that should give a minimum content of individual dignity and freedom to all individuals regardless of their status.²³⁸ Minimum rights are important, because history has shown too frequently that majorities may use their social and economic power and privilege to deprive minorities of basic human rights.

2. The Epistemological “Realities” of Both Majorities and Minorities Need to Be Included in the Elaboration of the Rule of Law

“Likes” and “unlikes” must strive to construct terms of coexistence in order for pluralistic societies to have the necessary stability and cooperation that will withstand ongoing and constant identity-based ideological conflict. Discursive practice must take place in ways that are respectful of differences and that legitimize the “realities” of all groups.²³⁹ Ideas (or premises based on epistemologies), regardless of whether they are held by majorities or minorities, are equally legitimate. None are *ex ante* privileged.²⁴⁰ Minorities’ views should not be devalued simply because they do not come from the majority that enjoys privilege, prestige, and political power. If a constitutional court fails to engage minorities’ epistemological “truths,” the court appears to be choosing arbitrarily from among competing “truths.”

237. FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 59 (1999).

238. See ELY, *supra* note 231, at 105 (arguing that there is a function for basic rights); JOHN RAWLS, *A THEORY OF JUSTICE* 136–42 (1971). These are the basic, minimum rights that each member of society is entitled to regardless of his or her circumstance. Lazos Vargas, *Democracy and Inclusion*, *supra* note 28, at 230 (“[R]ights not only reinforce the democratic process, as explained above, but also ensure substantive legitimacy and enforce the polity’s liberal values.”).

239. A constitutional court’s failure to include and engage minority perspectives means that minorities are not meaningfully included in formulating the substantive values of the polity. The Court’s imposition of a majority epistemological perspective on minority members can be seen as an act of oppression towards minorities. Lazos Vargas, *Democracy and Inclusion*, *supra* note 28, at 190 (referring to RAWLS, *supra* note 229, at 137 n.5, 225–26).

240. See *id.* at 207–09.

3. Balancing the Court's Role as Ultimate Decision-Maker of Inviolable Rights and Deferring to the Political Process

Constitutional courts have the potential to educate the polity as to how to disagree in ways that promote cohesion in society.²⁴¹ Courts should assist in framing disagreements that are political and do not infringe on the basic rights of either majorities or minorities to help the political process work out necessary compromises.²⁴² A pluralistic process-based model of judging requires that courts recognize their limitations in being able to fully resolve all difficult identity-based issues and conflicts. A court is just one of the constitutional decision-makers. Courts can reinforce participation in the political process by passing on divisive issues that do not involve basic minimum rights so that they can be resolved by the political process.²⁴³ The political process must allow enough open and equal-footing discursive space for majorities and minorities to work out their differences.²⁴⁴ Ultimately, in a political environment where truth is relative and where multiple perspectives must co-exist in tension, resolution of majority-minority confrontations, which are both ideological and based on different versions of social truth, must be tentative and ongoing.²⁴⁵

This model of judging goes beyond the usual justifications for diversity on the bench. First, this model does not focus merely on the *perception* that fair judging is occurring. Rather, it makes the claim that the inclusion of minority perspectives on the bench has value in and of itself²⁴⁶ and goes beyond perceived greater legitimacy.²⁴⁷ Inclusive judging provides a reason for minority citizens to continue to trust key governmental institutions and believe that they are neutral rather than political. Making a conscious (or

241. See *id.* at 224–38.

242. See *id.* at 228–29.

243. See *id.* at 228–32.

244. See *id.* at 232–34.

245. See *id.* at 216–19.

246. Professor Ifill makes a similar argument. She believes that good judging requires that views from the “traditionally excluded” be part of the judicial decision-making process. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 410 (2000) (“[T]he creation of a racially diverse bench can introduce traditionally excluded perspectives and values into judicial decision-making. The interplay of diverse views and perspectives can enrich judicial decision-making.”).

247. Legitimacy has procedural and substantive aspects. From a substantive perspective, “exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.” RAWLS, *supra* note 229, at 137. From a procedural perspective, “decisions are legitimate . . . because they are enacted in accordance with an accepted legitimate democratic procedure. . . . [T]he outcomes of a legitimate procedure are legitimate whatever they are. This gives us purely procedural democratic legitimacy.” *Id.* at 428. “Legitimacy is a weaker idea than justice and imposes weaker constraints on what can be done. . . . [A decision] may not be just and still be legitimate. . . .” *Id.*

affirmative) effort to include minorities in forming the polity's values ensures that all members have a stake in the polity. In *The Federalist No. 39*, James Madison emphasized that exclusion of significant sectors of a polity "degrades the republican character" of popular government, because "it is essential to a [republican] government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it."²⁴⁸ Trust that institutions can function capably and inclusively is part of what makes it possible for democratic societies to diffuse racial and identity-based conflicts and keep them at tolerable levels.

In a pluralistic process-based model of judging, judges must be able to confront "truths" that are assumed. In other words, judges must be able to question the assumptions of race, gender, and heterosexuality that society has normalized. The goal is not necessarily for judges to understand or empathize with the perspective of the other. Rather, the process of judging needs to acknowledge all viewpoints of the "truth." In their legal reasoning, judges must account for why they have chosen one social truth over another. This mode of discourse is respectful of minority perspectives.

Consciously including minority perspectives in the judicial process has been criticized by Professor Michelman as being so visibly fractious that a judge appears to be a "jousting champion of its identification contenders in divisions where the truth lies."²⁴⁹ But is it not better to make the process of choosing or rejecting social, identity-based truths transparent, rather than manipulating facts or conveniently constructing traditional values so that the doctrinal conclusion is precisely what the judge's preferred "jousting" truth is?

A second response to Professor Michelman's concern is that courts should not necessarily take it upon themselves to resolve identity-based disagreements unless minorities' basic rights are at stake. The burden of working through the truly difficult questions that divide society must be the responsibility of all democratic political institutions, not just courts. For this reason, courts must not trump the political process by developing constitutional rules in areas that are, at their core, perspective disagreements, that is, disagreements based on different lived experiences.²⁵⁰ If courts were to trump the political process, they would abort any further discussion or compromise and limit the opportunity for civic society to learn from outsider perspectives and advance racial understanding.²⁵¹

248. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

249. Frank I. Michelman, *Dilemmas of Belonging: Moral Truth, Human Rights, and Why We Might Not Want a Representative Judiciary*, 47 UCLA L. REV. 1221, 1252 (2000).

250. For example, I have argued that affirmative action is, at its core, a perspective disagreement, and for that reason the Court's constitutional rulings in *Adarand* and *Croson*, which overturned state affirmative action programs arrived at through a process of political compromise, were improper. Lazos Vargas, *Democracy and Inclusion*, *supra* note 28, at 252-64.

251. *Id.* at 264-67.

Courts as “lawgivers” must reign themselves in and provide opportunities for participants who disagree to develop their own rules of co-existence.²⁵²

*B. Applying Grutter v. Bollinger to the Challenge of Achieving
a Pluralistic Process-Based Model of Judging*

A pluralistic process-based model of judging claims to fashion an inclusive rule of law, but it also places a great burden on judges. Judges should be able to understand, and not shy away from, engaging minority viewpoints and bringing them to bear on difficult legal issues. When racial dynamics are at work, judges must be able to articulate why race matters and develop a rule of law that properly takes into account racial tensions without trumping the political process. Yet judges must also identify acts of discrimination and racial hatred that are not worthy of civil democratic society. While judges should stand back with respect to perspective disagreements, judges must also be able to discern where minimum substantive rights are being trespassed by the majority.

This pluralistic ethic of judging is demanding. A necessary step to achieving a judging ethic where differing racial perspectives and realities are part of the judging process is garnering a critical mass of minority judges and those with an “outsider” perspective on key benches. As discussed in Part II, in spite of increasing pools of qualified minority candidates, a diverse bench has not been achieved; in fact, the bench has not evolved past token representation.²⁵³

Grutter v. Bollinger acknowledges that race-conscious inclusion of individual minorities is required to achieve viewpoint diversity.²⁵⁴ *Grutter* recognizes that minorities, as a group and as individuals, contribute unique viewpoints that should be represented in democratic institutions where racial dialogue needs to flow freely.²⁵⁵ A racially diverse environment “enables [students] to better understand persons of different races . . . [and the] discussion is livelier, more spirited, and simply more enlightening and interesting.”²⁵⁶ *Grutter* deferred to the University of Michigan Law School’s expert judgment that to create such a dialogic discursive environment,

252. My focus here is on the judicial role, and for that reason, I am assuming for purposes of this discussion that the political process meaningfully represents minorities. I recognize this is a problematic assumption, as I discussed in Lazos Vargas, *The Latina/o and APLA Vote Post-2000*, *supra* note 105.

253. See *supra* Part II.A.

254. See 539 U.S. 306, 333 (2003).

255. *Id.* at 330 (finding that diversity “policy promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and enables [students] to better understand persons of different races. . . . ‘[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’”) (citations omitted).

256. *Id.* (quotations and citations omitted).

one must move beyond a handful of token minorities and instead seek a critical mass.²⁵⁷

Grutter makes clear that the Constitution does not always condemn a state decision-maker who assumes that there is an equivalence between an individual's racial identity and viewpoint. As long as the decision-maker scrutinizes the individual's credentials on their own merit, there is no constitutional violation.²⁵⁸ The *Grutter* Court deferred to administrators' judgments because in achieving the goal of viewpoint diversity, it is not possible to impose strict formulas or unbending guidelines. As Justice O'Connor recognized, context is key in attaining the goals of equality and diversity.²⁵⁹

Democratic institutions must continue to appear inclusive of all groups.²⁶⁰ All members of society must believe that they have an opportunity to participate in democratic institutions that determine who will have the privilege of occupying positions of leadership and prestige.²⁶¹ To attain diversity in society's leadership, the *Grutter* Court was willing to accept that state decision-makers would use a race-conscious process to achieve a critical mass of minority students.²⁶² These beneficiaries of affirmative action would subsequently have access to positions of leadership within the elite institutions foundational to democratic society, such as the military.²⁶³ As

257. See *supra* notes 84–86 and accompanying text.

258. See *supra* notes 79–81 and accompanying text.

259. *Grutter*, 539 U.S. at 327 (“Context matters when reviewing race-based governmental action under the Equal Protection Clause.”).

260. *Id.* at 330–31. The Court noted: “[M]ajor American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Id.* (citing Brief of 3M et al. as Amici Curiae in Support of Defendants-Appellants Seeking Reversal at 5, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (No. 01-1447); Brief of General Motors Corporation as Amicus Curiae in Support of Defendants-Appellants at 3–4, *Grutter* (6th Cir. 2002)). It further stated: “What is more, high-ranking retired officers and civilian leaders of the United States military assert that, ‘[b]ased on [their] decades of experience,’ a ‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle [sic] mission to provide national security.’” *Id.* (quoting Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 27, *Grutter* (2003)).

261. *Id.* By acknowledging the amicus briefs from the Fortune 500 companies and the elite military institutions, the Court nodded at the claim that neither the military nor top American businesses could function well if they were denied the ability to choose leadership from a pool that was racially and ethnically diverse.

262. *Id.* at 328–34.

263. Retired military leaders asserted that:

[A] highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle [sic] mission to provide national security. . . . [T]he military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.

Id. at 330–31 (quotations and citations omitted); see also *id.* at 332.

well, the *Grutter* Court justified race-conscious admissions because such a method would best ensure the critical mass necessary for viewpoint diversity to be consistently and reliably expressed within the educational context.²⁶⁴ The *Grutter* Court was willing to accept that state decision-makers would sometimes make educated guesses that individual minorities would raise the quality of the debate.²⁶⁵ *Grutter* recognizes that there must be some deference to an administrator who makes a judgment about what an applicant might contribute, both to the training of minorities as would-be leaders and to the viewpoint diversity that educators seek in the classroom.²⁶⁶ Such deference meets the exacting standard of strict scrutiny²⁶⁷ because the ends—attaining the perception that key democratic institutions are accessible to all regardless of their racial status and the pluralistic dialogic environment that contributes to the education of both racial majorities and minorities—are so important yet so difficult to achieve that courts appropriately defer to the good faith efforts of administrators.²⁶⁸

Grutter suggests that there is no exact science to achieving viewpoint diversity. However, increasing the number of minority judges to achieve a critical mass is a rough method for realizing viewpoint diversity. This assertion is based on the argument that in order for a minority judge to have reached her station in life, she must have learned many life lessons about how race impacts minorities in the every day world. Thus, if a judicial candidate has successfully navigated through these race-based life experiences, she likely has formulated a theory of race relations and could be adept at identifying when positive or negative racial dynamics may be impacting a legal issue in a way that is not readily discernible to a majority judge. A critical mass is necessary because what is sought is a dialogic environment where disagreement as to racial perspective can be freely and candidly expressed, forcing majority colleagues to consider perspectives and realities with which they are not familiar. A token number of minorities may not be able to muster a sustained exchange. Individual minority judges might shy away from making their colleagues

264. *Id.* at 329–30.

265. *See supra* notes 84–86 and accompanying text.

266. *Grutter*, 539 U.S. at 316 (finding that a policy will pass constitutional muster when it “seeks to guide admissions officers in producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession”) (quotations and citation omitted).

267. But Justice Kennedy argued in his dissent that such deference renders strict scrutiny non-meaningful. *Id.* at 393 (Kennedy, J., dissenting).

268. *Id.* at 326 (stating that strict scrutiny is not “strict in theory, but fatal in fact”) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)). “Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.” *Id.* at 327.

uncomfortable and choose to “get along” rather than educate them on racial issues, or an individual minority judge’s racial perspectives may not be sufficiently dissimilar from the majorities’ racial perspectives to spur dialogic exchange. The key is that there be sufficient numbers of minorities so that a wide range of views on race can be freely expressed and colleagues will be pushed to rethink assumptions that might be based on stereotypes or privilege.

*C. Would More Minority Judges Necessarily Lead
to a Robust Racial Dialogue?*

Is there any evidence, either empirical or anecdotal, that the presence of minority judges can produce an environment where racial perspectives can be freely exchanged in the judging process? Judges are individuals who make choices as to how they will be judges; as well, minority judges make choices as to how their racial perspectives will affect the judicial decision-making process. Adding more minority judges to the bench will not always increase racial dialogue. A minority judge might choose to remain silent on racial issues, forego confrontations with majority colleagues, or be temperamentally adverse to challenging colleagues’ assumptions.

To illustrate, a corollary to the conclusion in Part I that the Court has not developed a theoretical framework for race is that the only sitting minority Justice on this Court, Justice Thomas, has chosen not to push the Court—which is deeply divided and tends toward conservatism—to go beyond simplistic understandings of race relations. Justice Thomas, who inherited Justice Thurgood Marshall’s seat on the Supreme Court, has only intermittently been a racial conscience for the Court.²⁶⁹ More frequently, Justice Thomas has made clear his antipathy for judicial intervention into the racial thicket of issues such as school desegregation,²⁷⁰ affirmative action,²⁷¹ and minority voting rights.²⁷²

269. See Frank H. Wu, *Taking Thomas Seriously* (Paper Presented at the Brennan Center Symposium on Diversity, Impartiality, and Representation on the Bench, Feb. 20–21, 2004).

270. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring) (asserting that “[p]sychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause”).

271. See, e.g., *Gutter*, 539 U.S. at 349–50 (Thomas, J., concurring in part and dissenting in part).

272. See, e.g., *Holder v. Hall*, 512 U.S. 874, 892 (1993) (Thomas, J., concurring). In his concurrence, Thomas stated:

A review of the current state of our cases shows that by construing the [Voting Rights] Act to cover potentially dilutive electoral mechanisms, we have immersed the federal courts in a hopeless project of weighing questions of

Justice Thomas speaks sparingly on racial issues, but when he does he has great impact. In *Virginia v. Black*, Justice Thomas provided a rich racial perspective that sharply contrasted to the decontextualized analyses offered by his colleagues.²⁷³ Justice Thomas spoke from what appeared to be his and his family's experience in the south and African Americans' fear of Ku Klux Klan violence unchecked by the law.²⁷⁴ Justice Thomas defended Virginia's interest in criminalizing cross burning, because "cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence."²⁷⁵ In *United States v. Fordice*,²⁷⁶ Justice Thomas spoke again from what appeared to be his experience of growing up in the south. He argued that there was a strong case for maintaining traditionally Black colleges: that traditionally Black colleges have great value because of their symbolic inspiration to African American students, the unique educational diversity they offer, and their function as incubators of African American culture.²⁷⁷

Justice Thomas's judging style is individualistic. As Paul Edelman and Jim Chen have recently concluded, Justice Thomas has devoted most of

political theory—questions judges must confront to establish a benchmark concept of an "undiluted" vote. . . . [W]e have collaborated in what may aptly be termed the racial "balkanization" of the Nation.

Id. (citation omitted).

273. Compare the descriptions and allusions to cross-burning in the majority opinion, 538 U.S. 343, 357 (2003) ("[W]hile a burning cross does not inevitably convey a message of intimidation, often the cross burner intends . . . the message [of] fear. . ."), *id.* at 361 ("[C]ross burning is symbolic expression. . ."), *id.* at 365 (stating that banning cross-burning "'would create an unacceptable risk of the suppression of ideas'" (citation omitted), *id.* ("[A] burning cross is not always intended to intimidate. . ."), with Justice Thomas's descriptions in his dissenting opinion, *id.* at 388 (Thomas, J., dissenting) ("In every culture, certain things acquire meaning well beyond what outsiders can comprehend. . . . [C]ross burning is the paradigmatic example of the [profane]."), *id.* at 389 (stating that cross burning is "'a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan'" (citation omitted), *id.* at 390 (stating that to one Black woman, a "burning cross symbolized . . . 'murder, hanging, rape, lynching. Just about anything bad'" (citation omitted)).

274. See Johnson & Fuentes-Rohwer, *supra* note 214, at 14 (characterizing Justice Thomas' position as "unquestionably" speaking from an "African American perspective"); see also Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?*, 93 GEO L.J. (forthcoming 2005) (analyzing Justice Thomas's impact on the rest of the Court in its analysis of *Virginia v. Black*).

275. 538 U.S. at 391 (Thomas, J., dissenting).

276. 505 U.S. 717, 745 (1992) (Thomas, J., concurring).

277. 505 U.S. at 748 (Thomas, J., concurring) ("Despite the shameful history of state-enforced segregation, these institutions have survived and flourished I think it undisputable that these institutions have succeeded in part because of their distinctive histories and traditions; for many, historically [B]lack colleges have become 'a symbol of the highest attainments of [B]lack culture.'").

his intellectual energy to “scoring ideological points.”²⁷⁸ Challenging his brethren to think outside their racial zone of comfort is not the role Justice Thomas sees for himself on the Supreme Court.

Justice Thomas’s choices as to how to be a judge show why courts would benefit from going beyond tokenism and pushing towards a critical mass of minority representation. Justice Thomas has a racial perspective and can reach his colleagues when he feels so moved. But engaging racial issues is unusual for Thomas. He rarely speaks from the bench and declines to engage his colleagues in oral arguments. Historically, dissenters have played a crucial role as the Court’s conscience, challenging conventional wisdom. In the early 1900s, the first Justice Harlan played this role in heroic dissents in *Plessy v. Ferguson*²⁷⁹ and *Downes v. Bidwell*.²⁸⁰ However, Justice Thomas, as the only African American justice, has chosen a judging style that only occasionally challenges the Court’s view on race. An additional minority judge, with a more engaged judging style, could spark a more robust racial dialogue on the Court.

IV. THE GOOD, THE BAD, AND THE UGLY OF INCREASING THE NUMBER OF MINORITY JUDGES

More than individual choices, however, the reality of politics represents the greatest roadblock to the goal of increased minority representation on the bench. Experience has shown that a commitment to diversity on the bench triggers ugly politics. President Clinton’s goal to build a more diverse bench came at the expense of another goal: getting the maximum number of Democratic nominees approved by the Senate and seated on the bench before his term ended.²⁸¹

However, the pressure of the electorate’s changing demographics might hasten the appointments of more minority judges. President George W. Bush is widely expected to name the first Latino Supreme Court Justice with the next vacancy²⁸² as a way of courting the increasing electoral clout of Latinos.²⁸³

Nevertheless, any increase in diversity on the bench through political pressure will be limited. First, there is no reason to expect that

278. Paul H. Edelman & Jim Chen, *The Most Dangerous Justice Rides Again: Revisiting the Power Pageant of the Justices*, 86 MINN. L. REV. 131, 212 (2001) (concluding that Justices Scalia and Thomas do not aim to assemble winning coalitions “and may even be willing to sacrifice an occasional imperfect victory” to maintain ideological consistency).

279. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

280. 182 U.S. 244, 347 (1901) (Harlan, J., dissenting).

281. See *supra* note 169–73 and accompanying text.

282. See Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV. LATINO L. REV. 1 (2002) (published concurrently in 13 BERKELEY LA RAZA L.J. 1 (2002)).

283. See Lazos Vargas, *The Latina/o and APLA Vote Post-2000*, *supra* note 105, at 794.

executives will go beyond token appointments. The benefit of appointing minorities and women to the bench is symbolic; it is a political signal to the electorate of the politician's values.²⁸⁴ After "firsts," politics as usual takes over, and as Part II discussed, minorities have not yet been able to gain a sufficient foothold in this political game.

Second, voters do not seem to focus on the political importance of a diverse bench. A recent poll showed that the majority of Latina/o voters remained unaware of the ongoing battle over the Miguel Estrada nomination.²⁸⁵ In the midst of the Senate Democratic filibuster of Estrada's nomination, less than 20% of those polled had even heard of Miguel Estrada,²⁸⁶ even though President Bush tried to make this nomination a "wedge" issue in his favor. Latina/os did not view the increased diversification of the judiciary to be as immediate a political issue as were others like education, health care, and the economy,²⁸⁷ but 80% in one poll believed it was important for Estrada to be confirmed.²⁸⁸

Finally, the politics of race-conscious judicial appointments are complicated and have become so entangled that there are few rewards, other than symbolic ones, to the executive who attempts to diversify the bench. The high profile cases of President Bush's nominees, Janice Rogers Brown and Miguel Estrada, illustrate the challenge. Both were opposed by minority political interest groups.²⁸⁹ In the case of Janice Rogers Brown, the NAACP issued a thirty-nine page report entitled *Loose Cannon* that accused Brown of being opposed to affirmative action and against minority plaintiffs in employment discrimination cases.²⁹⁰ In an editorial, the National Bar Association's former president, Robert L. Harris, reminded African American attorneys that "[w]e should always remember that a 'White' Justice Stevens . . . is a thousand times better for Black America than a 'Black' Justice Clarence Thomas."²⁹¹ The implication is that Janice Rogers Brown would be similar to Justice Thomas on the bench and vote against affirmative action, voting rights, and school desegregation.

In the case of Miguel Estrada, the Mexican American Legal Defense and Educational Fund ("MALDEF"), Puerto Rican Legal Defense &

284. See *supra* notes 185–87 and accompanying text.

285. Bendixen & Associates, *New Democrat Network Hispanic Project* (2003), available at http://bendixenandassociates.com/ppt/New%20Democrat%20Network_files/frame.htm (last visited Feb. 26, 2005).

286. *Id.*

287. See *id.*

288. See Jennifer G. Hickey, *Democrats, Hispanics at Odds Over Estrada*, INSIGHT MAG., Jun. 13, 2001 (reporting a poll of 800 Latino adults).

289. See *infra* notes 290, 292–95 and accompanying text.

290. See PEOPLE FOR THE AMERICAN WAY AND NAACP, *LOOSE CANNON: REPORT IN OPPOSITION TO THE CONFIRMATION OF JANICE ROGERS BROWN TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT* 9–11, 18–19 (Aug. 28, 2003), available at <http://www.pfaw.org/pfaw/general/default.aspx?oid=12531>.

291. Mike McKee, *Battle Over Janice Rogers Brown*, RECORDER, Oct. 15, 2003.

Education Fund ("PRLDEF"), and the Congressional Hispanic Caucus vigorously opposed his nomination.²⁹² PRLDEF issued a sharply-worded report disputing the administration's depiction of Estrada's rags-to-riches immigrant story.²⁹³ Estrada, according to PRLDEF, came from a privileged Honduran family and "lack[ed] any connection whatsoever" to the lives of most Latina/o defendants who might come before his court.²⁹⁴ MALDEF opposed Estrada based on an extensive analysis of his available legal record.²⁹⁵ MALDEF argued that Estrada would not support the due process and equal protection rights of Latina/os, particularly immigrants and youths who live in barrios and might frequently encounter police harassment.²⁹⁶

However, opposition to Estrada's nomination to the Court of Appeals for the District of Columbia Circuit was not uniform among Latina/o political interest groups. The League of United Latin American Citizens and the National Council of La Raza supported Miguel Estrada's nomination.²⁹⁷

The impending battle over Estrada's nomination was cut off by his withdrawal, as it had gotten personal and ugly.²⁹⁸ His withdrawal was a

292. Tony Mauro, *Nomination Splits Hispanic Legal Community*, AM. LAW. MEDIA, Sept. 2002.

293. Puerto Rican Legal Defense and Education Fund, Position Statement on the Nomination of Miguel A. Estrada to the United States Court of Appeals for the District of Columbia Circuit (Sept. 17, 2002).

294. *Id.* PRLDEF noted that "a number of his colleagues have said unequivocally that Mr. Estrada has expressed extreme views that they believe to be outside the mainstream of legal and political thought." *Id.* Further, Estrada has "made strong statements that have been interpreted as hostile to criminal defendants' rights, affirmative action and women's rights." *Id.* In addition, PRLDEF described Estrada in personal interviews as "arrogant and elitist" and someone who "doesn't listen to other people." *Id.*

295. Patrick Leahy, *Statement of Senator Patrick Leahy On the Nomination of Miguel Estrada to the D.C. Circuit Judiciary Committee Business Meeting*, Jan. 30, 2003, available at <http://leahy.senate.gov/press/200301/013003.html> (quoting from a letter from MALDEF to the Senate Judiciary Committee and the White House; Senator Leahy concluded that he agreed with MALDEF's dissatisfaction over Estrada's lack of full disclosure). Estrada's refusal to provide extensive documentation on his stints in the Department of Justice was a principal bone of contention that the Democrats pointed to in opposing his nomination.

296. Memorandum of the Mexican American Legal Defense and Educational Fund (MALDEF) and Southwest Voter Registration and Education Project (SVREP) Explaining Bases for Latino Opposition to the Nomination of Miguel Estrada to the DC Circuit Court of Appeals (2003), available at http://www.maldef.org/news/latest/est_memo.cfm ("We, therefore, must conclude that based on the record available, he would not fairly review matters as a judge on issues that would have a great impact on our community. We oppose this nomination to the D.C. Circuit Court of Appeals.").

297. See Leahy, *supra* note 295. The Hispanic National Bar Association, the U.S. Hispanic Chamber of Commerce, the Hispanic Business Roundtable, and the Latino Coalition also supported the Estrada nomination.

298. See personal comments made about Mr. Estrada by PRLDEF, *supra* notes 293-94; see also CNN, *Estrada Withdraws*, *supra* note 45.

windfall for Latina/o groups opposing him. Both MALDEF and PRLDEF were spared the tricky challenge of explaining to the public why they opposed “one of their own,” keeping credibility as advocacy groups that represent Latina/os both conservative and liberal. Estrada was clearly qualified, “bright,” and Latino.²⁹⁹ But the Democratic-leaning MALDEF and PRLDEF articulated principled reasons for opposing his nomination. In addition, there might have been a fear that Estrada could become another “stealth” minority nomination to the United States Supreme Court, like Justice Thomas. Groups might have been projecting that Estrada’s individual interpretation of his judicial role, like Thomas’s, would minimize whatever diverse racial perspectives he would bring to the judging process. Finally, there is something highly cynical about nominating to such an important and visible position an exemplary conservative minority not raised in this country and casting him as a racial success story while ignoring the core structural problems that lie at the heart of the racial divide in the United States.³⁰⁰

Battles over judicial nominations like Miguel Estrada’s unfold because we have settled for only a token number of minority judges on key benches. The pluralistic process-based model of judging does not require that a judicial racial perspective be either liberal or conservative. Rather, the proposal that judicial benches contain a critical mass of minority judges would relieve pressure from individual appointments. Then, minority judges could be recognized as individuals who have different individual racial perspectives and ideologies, but who as a group can provide a vigorous challenge to the racial perspective of the majority. The politics of judicial diversity appointments are vicious because once a minority judge is named to a highly visible bench, it is unlikely that another minority judge will subsequently be appointed.³⁰¹

299. Letter from Alberto Gonzalez, White House Counsel, to Dianne Feinstein, United States Senator (Feb. 3, 2003) (on file with author).

300. See Lazos Vargas, *Deconstructing Homo[geneous] Americanus*, *supra* note 222, at 1523–30. Professor Derrick Bell’s caustic commentary below reminds us that the narrative of the lone “superstar” minority can subsume the racial reality of most minorities:

I marvel at how readily this society assimilates the myriad manifestations of [B]lack protest and achievement. In that process, the continuing devastation wrought by racial discrimination is minimized, even ignored, while those who gained some reknown as they worked to end those injustices are transformed into cultural reinforcements of the racial status quo. They become walking proof that even minorities can make it in America through work and sacrifice. For some, it is easy then to conclude that those minorities who do not make it have only themselves to blame.

Derrick Bell, “*Here Come de Judge*”: *The Role of Faith in Progressive Decision-Making*, 51 HASTINGS L.J. 1, 12 (1999).

301. See *supra* notes 185–87 and accompanying text.

CONCLUSION

The goal of a more inclusive mode of judging is elusive, yet it is an ideal towards which pluralist polities must strive. At a doctrinal level, the theoretical gaps as to why race matters in certain contexts and not in others leads to a constitutional minefield for those who must apply the rule of law. Doctrine that lacks a sense of why and when race matters develops in a lopsided fashion, undermining the goals of inclusion and equality that both equal protection doctrine and civil rights statutes seek to establish. Diversity on the bench could help lead to the development of a more transparent conversation of why and when race matters. But it is a fallacy to equate descriptive minority representation with the substance of a deeper racial dialogue on problematic constitutional issues. As empirical data show, judging is a complex process; individual minority judges bring to the judging process multiple insights based not only on their lived experiences as minorities but also on their individual ideologies and political precommitments. Greater minority representation on the bench only increases the chances that a racial dialogue can be developed. As *Gutierrez* notes, establishing an environment in which intellectual diversity can take hold requires complex judgments about how individual minorities will project themselves into conversations about race. But more importantly, the key ingredient is a critical mass of diverse minority judges—conservative and liberal minorities; African Americans as well as Latinos, Asian Americans, and others—who can make theoretically grounded arguments and tell experiential narratives as to why race matters in specific constitutional contexts.

The greatest impediment to achieving this goal is the harsh, elbow-butting reality of the politics of judicial nominations. At both the electoral and executive appointment levels, diversity on the judiciary has not gone beyond the barrier-breaking “first” appointments—the first African American judge or the first Latino judge. While politics have made it very difficult to move beyond the tokenism of “firsts,” the political conversation regarding what kind of diversity should be attained with minority nominees has steadily expanded. For example, the Miguel Estrada conversation forced some Latino advocacy groups to argue that a conservative minority from a privileged class background who was not born and raised in the United States could not truly identify with the racial experiences of the majority of Latinos in this country.

The challenge is for the political dialogue of judicial nominations to not deteriorate into we-they, zero-sum contests. Rather, the political rhetoric might begin to educate the polity as to how and why judges of different racial backgrounds improve the quality and inclusiveness of the rule of law.