

TOWARD A FEMINIST POLITICAL THEORY OF JUDGING: NEITHER THE NIGHTMARE NOR THE NOBLE DREAM

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I am honored to offer some thoughts about feminist judging on the occasion of the publication of *The Feminist Judgments Project*.¹ It is also an honor to be in the great state of Florence Allen² whom, as I have written,³ but for her intimate partner choice of another woman, might have been our first woman Supreme Court justice. I write as a political scientist among legal academics. My most recent work has focused on women judges and, in particular, the efforts of social movements to increase their number. I have worked with women judges from Tbilisi, Georgia, to Cairo, Egypt, to Nairobi, Kenya. And from Minnesota and the Eighth Circuit (with the lowest percentage of women judges) to the great state of Louisiana in the Fifth Circuit (with the highest percentage of women judges).

The Chief Justice of the Supreme Court of Louisiana, Bernette Joshua Johnson, is an African-American woman. Standing in front of the statue of Chief Justice Edward White, who joined the majority in *Plessy v. Ferguson*, Louisiana's former Attorney General, Buddy Caldwell, said at Justice Johnson's investiture, "it's one for the anal[sic] of history."⁴ As one who has studied women judges worldwide; worked to secure confirmation of President

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¹ *The U.S. Feminist Judgments Project*, TEMP. U., <https://sites.temple.edu/usfeministjudgments/> [<https://perma.cc/LTR7-42TK>] (last visited Apr. 12, 2017).

² Florence Allen was the first woman assistant county prosecutor in the United States and "the first woman elected to a judicial office in Ohio. Later, she became the first woman in the nation to be elected to a court of the last resort—the Supreme Court of Ohio—and the first woman appointed to a federal appeals court judgeship." *Florence Ellinwood Allen*, SUP. CT. OHIO & OHIO JUD. SYS. <https://www.supremecourt.ohio.gov/SCO/formerjustices/bios/allen.asp> [<https://perma.cc/6PZ4-AFWU>] (last visited Apr. 12, 2017).

³ Sally J. Kenney, "It Would Be Stupendous for Us Girls": Campaigning for Women Judges Without Waving, in *BREAKING THE WAVE* 209, 211–15 (Kathleen A. Laughlin & Jacqueline L. Castledine eds., 2011).

⁴ *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Obama's nominees as part of the Why Courts Matter movement;⁵ co-founded an organization to secure a more diverse and representative bench in the Eighth Circuit;⁶ co-organized a research network of more than 140 scholars worldwide who study gender and judging;⁷ and brought a comparativist's eye to our deeply troubled politics of judicial selection, I have some thoughts on judging.

When I delivered an earlier version of this essay on October 21, 2016, I believed voters would elect Hillary Clinton President but that Republicans would have a majority in both houses of Congress. At that time, I was profoundly worried about our broken judicial selection system and anticipated that the Senate would continue to obstruct judicial nominees as it had under President Obama. Before I reflect on our current situation now that Donald Trump's nominee, Neil Gorsuch, has been sworn in, let me describe the problem as I saw it on October 21, 2016.

One definition of a cynic is someone who no longer believes but still speaks. The Republican senators who refused to hold hearings to consider President Obama's appointment of Merrick Garland to the U.S. Supreme Court are aptly labeled cynics by that definition. The Senate confirmed Garland to the D.C. Circuit Court of Appeals in 1997 with Republican support by a vote of 76–23 (But Senate Majority Leader Mitch McConnell (R-Ky.) and current Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa) both voted against him).⁸

For years, Senator Grassley, a Republican, and Iowa's Democratic Senator, Tom Harkin, upheld their pact not to sabotage each other's judicial appointments; they were a national model of bipartisan cooperation. The thirty-year bargain served both well. Not that long ago, Grassley supported President Obama's appointment of public defender Jane Kelly to the Eighth Circuit Court of Appeals, only the second woman ever to serve on that court, at a time when he was refusing to support hearings or votes on other nominees.⁹ Sadly, that commitment to turn-taking and recognition of presidential prerogatives even in time of divided government ended when Senator Harkin retired in 2015 and Iowa voters elected Republican Joni Ernst. A coalition of good government

⁵ WHY COURTS MATTER, <https://whycourtsmatter.org> [<https://perma.cc/BHH8-MFAH>] (last visited Apr. 12, 2017).

⁶ INFINITY PROJECT, <http://www.theinfinityproject.org> [<https://perma.cc/4V4D-VQ45>] (last visited Apr. 12, 2017).

⁷ *Collaborative Research Networks: Gender and Judging*, LSA, <http://www.lawandsociety.org/crn.html#32> [<https://perma.cc/FX6W-857W>] (last visited Apr. 12, 2017).

⁸ Alexander Bolton, *McConnell, Grassley Voted Against Garland in 1997*, HILL (Mar. 16, 2016, 10:46 AM), <http://thehill.com/homenews/senate/273217-mcconnell-grassley-voted-against-garland-in-1997> [<https://perma.cc/2SEG-6EM3>].

⁹ As Sarah Binder's research shows, however, senators have been more reluctant to block when the circuit court in question is not equally balanced. Senator Grassley knew that confirming Jane Kelly would do little to change the strong conservative tilt of the Eighth Circuit. Sarah Binder & Forrest Maltzman, *Is Advice and Consent Broken? The Contentious Politics of Confirming Federal Judges and Justices*, in CONGRESS RECONSIDERED 399, 407–08 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 11th ed. 2017).

groups under the moniker Why Courts Matter pursued Grassley around the state with the demand that he “do his job.”¹⁰ Although Garland is a white man, who Obama chose because the judge enjoyed bipartisan support, the Senate’s strategy of obstruction and delay has impeded President Obama’s attempts to make the entire federal judiciary more diverse and representative, which he has done nevertheless. Republicans have stopped confirmations even when home state Republican senators supported the President’s nominees.¹¹

Second in cynicism, or perhaps simply hypocrisy, was Louisiana’s Senator David Vitter. When President Bush was in office and the Democrats controlled the Senate, Senator Vitter declared that every nominee deserved an up or down vote by the Senate.¹² Vitter, too, had praised Garland’s credentials for the federal judiciary when he voted to confirm him for a circuit court judgeship. As a lame duck, Senator Vitter was the member of the Judiciary Committee who denied unanimous consent to hold a hearing. Having failed spectacularly in his run for governor of Louisiana because he was so unpopular within his own party, Vitter (the staunch supporter of family values who was shown to have visited prostitutes)¹³ need not fear his party or primary opponents from the right, unlike senators facing close elections this year, yet he reversed his position and blocked the nomination.

Republican senators invoked the so-called Thurmond rule, arguing that Obama was too late in his term to discharge his constitutional duty to nominate members of the Supreme Court, despite the fact that the Senate has previously confirmed Supreme Court justices including Anthony Kennedy in an election year.¹⁴ Those same senators were easily able to secure the confirmation of President Bush’s nominees late in his term. Bush left office with no pending judicial nominees; while fifty-four of President Obama’s nominations languished.¹⁵

¹⁰ *Tell Senator Grassley: Do Your Job, WHY COURTS MATTER IOWA*, <http://act.progressivewa.org/sign/grassleydoyourjob/> [<https://perma.cc/LS96-3R73>] (last visited Apr. 12, 2016).

¹¹ Binder & Maltzman, *supra* note 9, at 400.

¹² Ed Brayton, *Republicans: Nominees Must Get up or down Vote!*, PATHEOS (Feb. 17, 2016) <http://www.patheos.com/blogs/dispatches/2016/02/17/republicans-nominees-must-get-up-or-down-vote/> [<https://perma.cc/RHL7-2EH3>].

¹³ Senator Vitter’s double standards are even more troubling when we recognize the large number of women and transgender sex workers in Louisiana who have been convicted of felonies for “crimes against nature” and forced to register as sex offenders, while those who seek sex for money are free to run for public office. *See generally, e.g.,* Susan Dewey & Tonia P. St. Germain, *Sex Workers/Sex Offenders: Exclusionary Criminal Justice Practices in New Orleans*, 10 FEMINIST CRIMINOLOGY 211 (2015); Kelsey Meeks Duncan, *A Crime Against Common Sense: How Louisiana’s Implementation of the Adam Walsh Act Exposes the Law’s Most Significant Flaw*, 84 TULANE L. REV. 429, 431 (2009); Joseph Fischel, *Against Nature, Against Consent: A Sexual Politics of Debility*, 24 DIFFERENCES 55, 59 (2015).

¹⁴ Gregor Aisch et al., *Scalia’s Supreme Court Seat Has Been Vacant for More than 400 Days*, N.Y. TIMES (Mar. 20, 2017) <https://www.nytimes.com/interactive/2016/02/15/us/supreme-court-nominations-election-year-scalia.html> [<https://perma.cc/348M-WHWM>].

¹⁵ Philip Rucker & Robert Barnes, *Trump to Inherit More than 100 Court Vacancies, Plans to Reshape Judiciary*, WASH. POST (Dec. 25, 2016), <https://www.washingtonpost.com/poli>

An additional forty-seven vacancies existed where senate obstruction led to no nomination at all.¹⁶ By their logic, Grassley and Vitter, as senators who neared the end of their elected term, should not have participated in the legislative process. Even more cynical was the debate among senators such as New Hampshire's Kelly Ayotte and Arizona's Jeff Flake before the election as to whether they should have quickly confirmed Garland in a lame duck session, fearing that a President Hillary Clinton would nominate someone younger and more progressive.¹⁷ If President Obama's nomination was too late to be legitimate, surely voting on it when he and many senators were lame ducks would have been even less legitimate. But we are no longer operating in the arena of principle.

Tulane Political Science Professor Nancy Maveety's presidential primer *Picking Judges* reminds us that Supreme Court nominations have often been contentious and sometimes the Senate has voted not to confirm.¹⁸ Yet never in our history have senators been so brazenly cynical in refusing to consider a nomination altogether, as opposed to voting against confirming them in committee or as a whole in the Senate. *Politico* refers to it as a blockade.¹⁹ Is it, as Senator Elizabeth Warren suggests, because they denied the legitimate power of our first black president?²⁰ We know, for example, that Senator Richard Burr of North Carolina has engaged in a blockade of African-American nominees for the Eastern District of North Carolina.²¹ Captured by the Tea Party, do Senate Republicans believe that the only legitimate role of a member of Congress is to prevent the government and the judiciary from functioning? Beginning

tics/trump-to-inherit-more-than-100-court-vacancies-plans-to-reshape-judiciary/2016/12/25/d190dd18-c928-11e6-85b5-76616a33048d_story.html?utm_term=.4b127246cbd6 [https://perma.cc/77RR-KZM4].

¹⁶ Burgess Everett & Seung Min Kim, *Judge Not: GOP Blocks Dozens of Obama Court Picks*, POLITICO (July 6, 2015, 8:08 PM), <http://www.politico.com/story/2015/07/payback-gop-blocks-obama-judge-picks-judiciary-119743> [https://perma.cc/8GPF-7PPA].

¹⁷ Seung Min Kim & Burgess Everett, *GOP Supreme Court Blockade Showing Early Cracks*, POLITICO (Mar. 16, 2016, 4:02 PM) <http://www.politico.com/story/2016/03/kelly-ayotte-to-meet-merrick-garland-220868> [https://perma.cc/7M87-GK9U].

¹⁸ See generally NANCY MAVEETY, *PICKING JUDGES* (2016). See also LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES* (1997).

¹⁹ Burgess Everett, *GOP Rallies Around Court Blockade*, POLITICO (May 8, 2016, 4:23 PM), <http://www.politico.com/story/2016/05/gop-supreme-court-merrick-garland-222898> [https://perma.cc/R4BW-8LVM].

²⁰ Michael McAuliff, *Elizabeth Warren Hammers GOP over Supreme Court Obstruction*, HUFFINGTON POST (Mar. 9, 2016, 5:11 PM), http://www.huffingtonpost.com/entry/elizabeth-warren-supreme-court-obstruction_us_56e08863e4b0860f99d7a19d [https://perma.cc/586V-PW72]; OFFICE OF SENATOR ELIZABETH WARREN, *GOING TO EXTREMES: THE SUPREME COURT AND SENATE REPUBLICANS' UNPRECEDENTED RECORD OF OBSTRUCTION OF PRESIDENT OBAMA'S NOMINEES 1* (2016) https://www.warren.senate.gov/files/documents/2016-6-6_Warren_SCOTUS_Report.pdf [https://perma.cc/SM62-GUVJ].

²¹ Anne Blythe, *Burr Vows to Block Obama Nomination to NC Federal Court Seat*, NEWS & OBSERVER (Apr. 28, 2016, 6:51 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article74534012.html> [https://perma.cc/R7Z4-PXFW].

with the contention over the appointment of Robert Bork to the U.S. Supreme Court, we have descended into dangerous times of total war over judicial appointments. Just as our presidential politics have sunk to a new low, I believe our judicial selection process has been in crisis for some time and is now broken.²²

With the recent allegations against Donald Trump that surfaced before and after the second debate, I watched several Trump pundits say that they deplored Donald Trump's propensity toward sexual assault but that they supported him anyway because the future of the Supreme Court was at stake. Better to have a sexual predator for a President than to let the Democrats replace Justice Scalia with a moderate the way Republicans replaced Sandra Day O'Connor with someone more conservative.

Our government of separate branches sharing powers only works if the participants bargain and take turns rather than simply block one another. I once heard Cornell West voice an eloquent criticism of Fidel Castro, imploring him to follow the democratic maxim "you've got to rotate." One hallmark of a democracy is that we hold elections and the losers leave office. In the latter twentieth century, as countries transitioned to democracy in Latin America, Eastern Europe, and Africa, drafters of new constitutions for nations and intergovernmental organizations found courts useful for more than regulating the rules of commerce and deciding who had committed crimes. First, courts provide an important check on the administrative power of a strong executive, which is why even polities historically hostile to judicial review, such as the European Union,²³ the United Kingdom, and France²⁴ came to embrace their distinctive versions of it. Courts insist that the bureaucratic state follow its own rules.

Second, courts increasingly became the guarantor of human rights—whether enumerated in amendments to the constitution, such as our own bill of rights or in international treaty obligations.²⁵ Some legal theorists have valorized courts as a check on the power of democratically-elected majorities to deprive minorities of rights. Others, as the guardians who reinforce representative democracy.²⁶ Lastly, newly democratizing states hoped that judicial review and an independent judiciary would ensure that leaving office after losing an election would not mean permanent exile. Instead, as Cornell West suggested, parties would take turns and "rotate." For a time, Iowa Senators Harkin and Grass-

²² Binder & Maltzman, *supra* note 9, at 400; *see also* SARAH A. BINDER & FORREST MALTZMAN, *ADVICE AND DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY I* (2009).

²³ Mauro Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409, 412 (1980).

²⁴ *See generally* ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE* (1992).

²⁵ *See generally* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); CHARLES R. EPP, *THE RIGHTS REVOLUTION* (1998); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982); WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* (3d ed. 2003).

²⁶ *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

ley understood the principle of turn taking for governing. In October, I argued we were headed for dangerous times because I believed a Republican Senate would simply refuse to act on President Hillary Clinton's judicial nominations. But now I believe the times are even more dangerous as Democrats endeavor to decide how to respond as a minority in the Senate to more than 100 potential Trump nominees, having lost the ability to filibuster future Supreme Court nominees.

Political and legal theorists struggle to elaborate why non-elected judges should wield such enormous political power in democracies, or more accurately, constitutional republics.²⁷ We have on the one-hand, legal formalists arguing that judges merely deductively apply rules or agreed upon hierarchies of principles.²⁸ Of course, the cases that come to the highest appellate courts are often precisely those cases where the objective rule or principle is in dispute or principles conflict with each other. On the other extreme, some, including many political scientists in my subfield of public law—judicial behavioralists—argue that judges simply make policy choices and retroactively cloak their decisions in legal discourse justifying their actions to conceal their exercise of illegitimate power.²⁹ Partisans tend to whipsaw between these two extremes: (1) when a court is dominated by the opposite party, partisans view judges as exercising naked power, imposing their policy choices rather than deferring to elected bodies; or (2) when their own party is in power, a court is merely following the pre-agreed upon rules. H.L.A. Hart called this distinction “the nightmare” and “the noble dream.”³⁰ The problem with the Grassleys, the Vitters, and the Trump supporters is that their inconsistent position has completely eroded any pretense of support for the noble dream of legal determinacy, and we are left with simply the nightmare of judges as wielders of raw undemocratic power.

I reject both positions as well as the hypocritical oscillation between them. I believe in principles and consistency, which is why the law appeals to me, despite its many failures to live up to this aspiration. Alas, my position is more difficult to convey in a tweet or a short political ad. I see law as three things: a system of rules, a discourse, and an arena of contestation. One need not be a legal formalist to recognize law does provide rules for which we have considerable agreement even across ideological differences. To use the sports analogy favored by Chief Justice Roberts, we agree on the strike zone and the question is merely was the pitch in the zone or not.³¹

²⁷ See generally THE POLITICS OF LAW (David Kairys ed., 3d ed.1998).

²⁸ See generally H.L.A. HART, THE CONCEPT OF LAW (3d ed. 2012).

²⁹ Nancy Maveety, *The Study of Judicial Behavior and the Discipline of Political Science*, in THE PIONEERS OF JUDICIAL BEHAVIOR 1, 3 (Nancy L. Maveety ed., 2003).

³⁰ NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM 332 (2004).

³¹ Interestingly, the ABA has recently used the example of umpires refereeing black pitchers in their trainings on implicit bias. Andrea Ciobanu et al., Pub. Educ. Comm., Am. Bar Assoc. Young Lawyers Div., CLE Presentation at the Renaissance Pittsburgh Rhapsody: Practicing Law While Breaking the Confines of Implicit Bias in and Outside the Courtroom (May 17,

To think of law as a discourse is to understand the way that legal adjudication shapes how we think. In order for women or gender minorities to have equal protection rights, for example, they have to draw analogies between their oppression and that of racial minorities. Legal discourse determines the burdens litigants must meet, for example, whether state restrictions on abortion constitute an undue burden is a different question than whether such restrictions deny women dignity or whether such rules violate the fundamental rights of doctors, women, or fetuses. Law as a discourse shapes how we frame disputes. In *Bowers v. Hardwick*, for example, the majority asked whether the Constitution contained the right to sodomy.³² The dissenters began with the framing question: Is there a constitutional right to privacy that encompasses private and consensual adult same-sex sexual practices?

Law as a discourse also requires categorizing things and drawing analogies. Are gay people criminals, like pedophiles, as Justice Scalia argued in his dissent in *Lawrence v. Texas*,³³ or are they minorities whose fundamental privacy and equality rights and dignity need protecting by courts against democratic majorities? Or is the criminalization of gay couples more akin to state bans against interracial marriage that the Supreme court found to be unconstitutional in *Loving v. Virginia*?³⁴ Is sexual orientation like race, immutable, or is it merely a lifestyle choice?

Law is also an arena, a political space where we debate the most important issues of the day. In this arena, all are not equal. Those well versed in legal procedure and discourse have power over those who are not. The rich and the skilled have greater ability to bring evidence to bear. To win, claimants have to make their claims intelligible to the judges and jurors who decide. Those who are different, or less skilled, risk not being heard or understood. Courts are also arenas for raising issues and challenging automatic ways of thinking and social norms, which is why those with less power in electoral arenas resort to them. They help constitute norms and culture as well as simply reflect cultural norms. Yet entrenched tropes, such as that women are liars or temptresses, can go unchallenged in the legal arena, making it virtually impossible for victims to hold rapists accountable, for example.

2014), http://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2014_spring_conference/practicing_law_while_breaking_confines_bias.authcheckdam.pdf [<https://perma.cc/9988-W7EE>].

³² *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

³³ *Lawrence*, 539 U.S. at 599–600. Justice Scalia made this comparison in his dissenting opinion and often since then in public speeches. *See, e.g.*, Liz Posner, *Antonin Scalia Compares Gay Americans to Criminals Again & He Seriously Needs to Stop*, BUSTLE (Nov. 18, 2015), <https://www.bustle.com/articles/124856-antonin-scalia-compares-gay-americans-to-criminals-again-he-seriously-needs-to-stop> [<https://perma.cc/Z2N4-6EJL>]. Yet after I delivered these remarks, I received an anonymous letter for speaking about Justice Scalia in such an offensive way.

³⁴ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

Central to my argument is the distinction between facts and law. The last election revealed that we have a profound disjuncture in our society about basic facts, and now we have alternative facts.³⁵ Was Barack Obama born in the United States? Is our climate changing? Did the Pope endorse Donald Trump? Is Hillary a leader of a pedophile ring in a pizza parlor? Whether abortion providers need hospital admitting privileges to keep their patients safe is a judgment, to be sure, but more on the objective fact side of the spectrum. It is what we call an empirical question. Those who have different views about the morality or constitutionality of abortion can weigh the evidence and agree.

The effect of such rules in Louisiana, Mississippi, and Texas is empirically clear: fewer abortions will occur. Many disputes before the Supreme Court turn on these questions of social facts. One's beliefs about facts often reflect one's interests and preconceptions, to be sure, but the difference is one of degree. The question is not only the narrow one of whether the advances toward Michelle Vinson were welcome or the sex consensual, but what is the context for black women in the workplace faced with harassment by black men, as Angela Onwauchi-Willig demonstrated in her opinion on *Vinson* for the *Feminist Judgments Project*.³⁶ Price Waterhouse's partners are more likely to judge Ann Hopkins through the prism of stereotypes if the workplace is extremely gender skewed. Do we have a system of stopping people for driving-while-black? Do late term abortions make women depressed, a question Shoshona Erlich carefully examined in her paper for this conference.³⁷ Are women more likely to lie about sexual assault than other alleged victims of crime? Should batterers be custodial parents? Or, most famously, is strip searching an adolescent girl unnecessarily traumatic?³⁸ The latter, I call social facts. In their introduction on page 22, the *Feminist Judgments* editors call it the situated perspective of judging.³⁹

To say that law is more than a system of rules, or even that the rules themselves are political, and to recognize law is a discourse that structures political power, and that law is an arena that advantages some over others, or to even say courts should be representative institutions,⁴⁰ is not to say that judges them-

³⁵ Eric Bradner, *Conway: Trump White House Offered 'Alternative Facts' on Crowd Size*, CNN POLITICS (Jan. 23, 2017, 12:38 PM), <http://www.cnn.com/2017/01/22/politics/kelly-anne-conway-alternative-facts/> [<https://perma.cc/8MYL-Q8D8>].

³⁶ Angela Onwauchi-Willig, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), in FEMINIST JUDGMENTS 303, 309–10 (Kathryn M. Stanchi et al. eds., 2016).

³⁷ J. Shoshanna Ehrlich, *Ministering (In)Justice: The Supreme Court's Misreliance on Abortion Regret in Gonzalez v. Carhart*, 17 NEV. L.J. 599 (2017); see also Kimberly Kelly, *The Spread of 'Post Abortion Syndrome' as Social Diagnosis*, 102 SOC. SCI. & MED. 18, 24 (2014).

³⁸ *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2637 (2009).

³⁹ Kathryn M. Stanchi et al., *Introduction to the U.S. Feminist Judgments Project*, in FEMINIST JUDGMENTS, *supra* note 36, at 1, 22.

⁴⁰ See chapter 6 in SALLY J. KENNEY, *GENDER & JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER* (2013).

selves are indistinguishable from legislators, executives, bureaucrats, or other policy makers. So what is a principled and consistent position for feminists about the nature of judging and the politics of judicial selection?

I part company with two groups of allies by arguing that we need equal gender and race representation on courts and that we should advocate for judges with greater feminist consciousness on the bench, but we should recognize those two goals are not one and the same.⁴¹ As an advocate of equal treatment, I do not think it is permissible for Republicans to discriminate against women and minority men in selecting judges from among conservatives. Nor should we use gendered or raced arguments or sit quietly while others do so. To paraphrase Brenda Hale, what matters is not whether women judges are different but the message their absence sends.⁴² It is important to have women and minority men on the bench for the symbolic message about who can sit in judgment over others, who can lead, and who can wield the power of life and death. So I part company with some feminist colleagues and groups who want only progressives on the bench and place little importance on diversity and representation. Perhaps one of the most important roles progressives can play in opposition is to monitor what I call reversals—when women or minority men on the bench are replaced by men or white people. That is not the same thing as saying that women and minority men should receive less scrutiny than others, but we should be consistent in demanding that they not receive more, or be held to a double standard. Women nominees have faced harsher questioning from the Senate Judiciary Committee.⁴³

I also part company with many of my good government allies who favor merit selection under the coalition umbrella of the group Justice at Stake. Caring about gender and racial diversity as I do, I am not persuaded that judicial elections are intrinsically evil and that leaving judicial selection to the legal

⁴¹ *Id.* I would like to write an entire essay on the usage of the phrase, “just because she’s a woman,” as in, “do you support Sonia Sotomayor for the Supreme Court just because she’s a woman,” implying that one could have no reasons other than gender equality to support her. To say that I believe sex discrimination against women conservatives is wrong is not the same thing as saying I support all women equally for judicial positions, or automatically favor women over men.

⁴² Lady Brenda Hale, Baroness Hale of Richmond, Fiona Woolf Lecture for Women’s Lawyers’ Division of the Law Society (Jun. 27, 2014), <https://www.supremecourt.uk/docs/speech-140627.pdf> [<https://perma.cc/C2AW-JC37>].

⁴³ See Christina Boyd et al., The Role of Nominee Gender and Race at Supreme Court Confirmation Hearings, Southern Political Science Association 2017 Annual Meeting (Jan. 9, 2017), <http://spsa.net/wp-content/uploads/2016/04/SPSA-2017-Preliminary-Program-v4.pdf> [<https://perma.cc/4Y7L-K4PN>]. Dancy, Nelson, and Ringsmuth found that the questions senators asked district court nominees had little to do with their qualifications and much to do with institutional and political factors, such as proximity to an election. Logan Dancy et al., *Individual Scrutiny or Politics as Usual? Senatorial Assessment of U.S. District Court Nominees*, 42 AM. POL. RES. 784, 784–86 (2014).

elite will produce better justice.⁴⁴ I have demonstrated that no one judicial selection system is more likely than another to produce a diverse and representative bench.⁴⁵ Rather, we need to educate selectors (and vice presidential candidates) about implicit bias and set an explicit goal of representation.⁴⁶ I believe calling for so-called merit selection does little to foster a diverse and representative bench and obfuscates the nature of judging.

As one who has spent thirty years teaching constitutional law, comparative law, EU law, women and the law, as well as law and policy, I am disillusioned with the progressive positions on both the nightmare and the noble dream. As a board member of Watch,⁴⁷ a court monitoring organization on domestic violence and sexual assault, I argued that we needed to move beyond arguing for so-called merit selection. We needed to argue for more than that judges be well qualified. We needed to know whether they understood the facts about domestic violence and sexual assault. Did they believe boys cannot thrive without their fathers, so much that batterers should retrain custody; are they indifferent to the evidence that joint custody puts mothers at risk? Do they believe women routinely lie about domestic violence in divorce cases? Or sexual assault in general? Do they easily dismiss women's fear of stalkers and harassers? Do they know that police officers and those serving in the military are significantly more likely than the general population to be batterers? What does that fact mean for the policy question of whether batterers deserve to retain their firearms even after threatening intimates? We need to know a lot about judges' views of these social facts to know whether the laws we have passed to protect against intimate partner violence will have any effect. Such inquiries are different from asking judges their policy preferences, although these two are linked. It is different from simply asking whether judges are liberal or conservative or pro-life or pro-choice or whether they believe violence against women violates women's international human rights or is a private matter states can ignore.

To support the Sotomayor nomination, I was part of a group trained by those who developed the media strategy to prevent the U.S. Senate from confirming Robert Bork. They coached us to say that we wanted, *well-qualified* women on the bench, since so few citizens support a gender-diverse bench for its own sake. So many things troubled me about the strategy of focusing simply on merit. Strategists believed we could only succeed by propagating the noble dream—that the qualities of merit we wanted were simple legal credentials.

⁴⁴ See generally CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009) (providing data that judicial elections enhance democracy by intimately linking the electorate with the judiciary).

⁴⁵ Kenney, Sally, GENDER & JUDGING, http://genderandjudging.tulane.edu/?page_id=214 [<https://perma.cc/LX5F-F5G6>] (last visited Apr. 18, 2017).

⁴⁶ Sally J. Kenney, *Which Judicial Systems Generate the Most Women Judges? Lessons from the United States*, in GENDER AND JUDGING 461 (Ulrike Schultz & Gisela Shaw eds., 2013).

⁴⁷ WATCH, <https://watchmn.org/> [<https://perma.cc/6RW4-NMX4>] (last visited Apr. 18, 2017).

Justice Sotomayor, despite being a wise Latina woman and therefore presumed incompetent and biased, *was* well qualified by any standard: she was well educated and had distinguished herself as a lawyer. But so had Robert Bork. I part company with my so-called merit selection colleagues because I care about more than the legal qualifications of prospective judges. I care about their judicial philosophy, and I care about their views on social facts and most importantly, their willingness to subject their views to rigorous empirical examination.

We “dog whistle”⁴⁸ around these issues by talking about experience and background. Working in the domestic violence movement or as a death penalty lawyer or a public defender does shape one’s perspective, but experience and views on social facts are not necessarily connected. We know all too clearly that sex or race cannot be proxy for holding certain values around racism and sexism. Conservatives know better than anyone that Republican governors can be persuaded that segregated schools are unconstitutional,⁴⁹ and corporate lawyers can conclude that the right to choose an abortion is part of a fundamental right of privacy.⁵⁰ They can conclude that the time is not right to overrule *Roe v. Wade*,⁵¹ or declare the Affordable Care Act unconstitutional.⁵² Conservatives’ sabotaging of Harried Miers has demonstrated that they were no longer willing to take any risks about nominees’ policy positions.

So what differentiates my position from Donald Trump’s? Trump has identified the policy positions he wants in a jurist. He wants someone who will declare the Affordable Care Act unconstitutional and overturn *Roe v. Wade* but not, paradoxically, *Obergefell*.⁵³ As on so many issues from immigration to his views on women, Trump is not “dog whistling” when he talks about the Court, as nearly all previous presidential candidates have done. He does not couch his positions in the discourse of original intent, states’ rights, judicial restraint, or privacy. He has completely adopted the discourse of the nightmare, and wants no surprises.

I am deeply troubled that in these times, being empathetic renders one unqualified in the minds of some. I am troubled that calling yourself a feminist or even being an active member of the National Association of Women Judges

⁴⁸ IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS* ix (2014).

⁴⁹ See, e.g., Thomas H. Kuchel, *Earl Warren Chief Justice of the United States*, 64 CAL. L. REV. 2, 4 (1976).

⁵⁰ See, e.g., Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence*, 72 BROOK. L. REV., 147, 174–89 (2006).

⁵¹ Linda Greenhouse, *The Supreme Court: A Telling Court Opinion; the Ruling’s Words Are About Abortion, But They Reveal Much About the Authors*, N.Y. TIMES, July 1, 1992, at A12.

⁵² Josh Gerstein, *Conservatives Steamed at Chief Justice Roberts’ Betrayal*, POLITICO (Jun. 25, 2015, 2:05 PM), <http://www.politico.com/story/2015/06/gop-conservatives-angry-supreme-court-chief-john-roberts-obamacare-119431> [<https://perma.cc/84DY-JL3Y>].

⁵³ Ariane de Vogue, *Trump: Same-Sex Marriage is ‘Settled,’ but Roe v. Wade Can Be Changed*, CNN POLITICS (Nov. 15, 2016, 7:24 AM), <http://www.cnn.com/2016/11/14/politics/trump-gay-marriage-abortion-supreme-court/> [<https://perma.cc/6BCH-STF3>].

might render one unsuitable. President Carter, in contrast, required his women (but not men) judicial nominees to have demonstrated a commitment to equal justice under law. Justice Ginsburg has stated she could probably not be confirmed in the current political climate having been a public interest litigator and having declared her views that the death penalty was unconstitutional and the Constitution protected women's reproductive freedom.⁵⁴ As progressives mulled over who President Obama might nominate to replace Justice Scalia, public defenders such as Jane Kelly or judges who have upheld the rights of the accused were deemed tainted for high judicial office given their vulnerability to right-wing media attacks.⁵⁵

Authors such as Linda Greenhouse in celebrating Justice Blackmun,⁵⁶ or Jeffrey Toobin in valorizing Justice Sandra Day O'Connor, argue the merits of middle-of-the-road judges who "have an open mind."⁵⁷ I cannot understand how having a position on the important issues of our times, such as whether women can control their own bodies or the government should be able to act to minimize the continuing effects of systemic racism somehow makes one a less worthy candidate to be a judge. I do, however, think there is a difference between one's view as to whether the death penalty is unconstitutional because it is cruel and unusual punishment as a matter of thinking about the Constitution as a living document that was a guarantee of rights, not a grant of power to state and federal governments, is a different discussion than whether the death penalty, as applied, is disproportionately leveled against minorities or whether it functions as a deterrent.

I think the virtue we are looking for in judges, beyond their legal philosophy and understanding of social facts, is not open mindedness in the sense of not having a position but instead in having humility and integrity, by which I mean principled intellectual consistency. Political scientist Howard Gillman sets out what that entails in his book, *The Votes that Counted* about *Bush v. Gore*.⁵⁸ He looked for judges who consistently upheld rules even when those rules went against the interests of the political party of the executive who appointed them or their designated political party in a partisan election state, such as Florida. The Supreme Court's majority, by contrast, had to radically switch positions on years of equal protection jurisprudence and rulings on the non-justiciability of election outcomes to side with the party of the president who appointed them. Such behavior supports the views of the cynics as well as those who, unlike me, see nothing distinctive about legal decision making from other public policy choices.

⁵⁴ I would still like to see her recant her historically inaccurate position on *Roe* that, if the Court had more narrowly decided the case, states would have continued to slowly liberalize abortion laws. See generally LINDA HIRSHMAN, *SISTERS IN LAW* (2015).

⁵⁵ HERMAN SCHWARTZ, *RIGHT WING JUSTICE* (2004).

⁵⁶ LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* (2005).

⁵⁷ JEFFREY TOOBIN, *THE NINE* (2007).

⁵⁸ HOWARD GILLMAN, *THE VOTES THAT COUNTED* 8 (2001).

The Senate easily confirmed Merrick Garland to the D.C. Circuit in 1997 with the support of seven Republican senators.⁵⁹ He was recognized as a centrist who was well qualified. President Obama did not think courts should lead social change, which is why he, as a law graduate, turned to community organizing and legislating rather than public interest litigation. In the past, those senators who voted against a nominee had to explain that the nominee was, in their view, unqualified to sit on the Court.⁶⁰ Senators had to explain that the nominee's views were outside the legal mainstream or that they lacked judicial temperament or integrity. They could focus on their views, too, of social facts. Now, it appears, that the senators can "just say no," what Emily Bazelon calls "Supreme Court Hardball."⁶¹ Over the last five years, a progressive coalition of national and state groups under the umbrella name Why Courts Matter sought to hold senators accountable for failing to do their job.⁶² They drew attention to the cynical double standard between how the Senate had treated the nominees of President Obama, President Bush, and every other president in American history.⁶³ They spoke out against senators who left vacancies on the federal courts by refusing to put names forward, particularly in Texas.⁶⁴ They highlighted the number of judicial emergencies in federal courts who did not have enough judges because of vacancies to manage their case load.

What will this movement's strategy be as President Trump enjoys a majority in the Senate? Dahlia Lithwick proposed the answering nihilism with nihilism in *Slate*:

The only proper response from progressives today must be that Donald Trump is a lame-duck president with only four years left in his term, and we must let the people decide the next justice for the Supreme Court. Less fatuously, it must be to obstruct the nomination and seating of any Trump nominee to fill Scalia's seat. We will lose. But that's not the point now. Democrats need to repeat Ted Cruz's lie that eight justices will suffice. If Democrats can muster the energy to fight about nothing else, it should be this, because even if you believe the elec-

⁵⁹ *Nomination of Merrick B. Garland, of Md., to be U.S. Circuit Judge for D.C.: Hearing before the Senate*, 105th Cong. (1997).

⁶⁰ BINDER & MALTZMAN, *supra* note 22.

⁶¹ Emily Bazelon, *Supreme Court Hardball*, N.Y. TIMES (Nov. 8, 2016, 4:44 PM), <https://www.nytimes.com/interactive/projects/cp/opinion/election-night-2016/supreme-court-hardball> [<https://perma.cc/46E6-N68W>].

⁶² WHY COURTS MATTER, *supra* note 5.

⁶³ Presidents before the 1980s enjoyed a 90 percent confirmation rate for judges on district courts and courts of appeals. Between 1981 and the end of Obama's first term, that number declined to 65 percent. President Obama's nominees, however, waited much longer than previous nominees to be confirmed. Binder & Maltzman, *supra* note 9, at 402–03.

⁶⁴ *John Cornyn and Ted Cruz's Texas: A State of Judicial Emergency*, ALL FOR JUSTICE, <http://www.afj.org/our-work/issues/judicial-selection/texas-epicenter-of-the-judicial-vacancy-crisis> [<https://perma.cc/7LN2-BHAQ>] (last updated Sept. 6, 2016).

tion was fair or fair enough, the loss of this Supreme Court seat was not. That seat is Merrick Garland's.⁶⁵

So we should now say all of our arguments about taking turns, judicial emergencies, and do your job were just ploys on our part and embrace the arguments of conservatives that we spend the last six years attacking? Even if we do, and the Democrats filibuster the replacement for Scalia, the most likely outcome as Lithwick recognizes is the end of the filibuster, a mere artifact of Senate rules and conventions. And what of the 100 or so vacancies on lower courts? And the likely need for replacements for Justices Ginsburg (age 83), Kennedy (80), and Breyer (78)?

When I wrote this piece decrying the cynicism of Republicans I anticipated that Hillary Clinton would be President. If all my arguments switch immediately, have I not given into the nightmare? I am not a nihilist nor even a judicial behaviorist. I do not believe Democrats or feminists will ultimately be well served by making unprincipled arguments. But I confess I am confounded by how one plays with a party that does not recognize turn taking. My position is that discourse constrains those of integrity and the response to lack of integrity should not be a race to the bottom or no integrity but the exposure of hypocrisy. To return for a moment to Howard Gillman's book, *The Votes that Counted*, Gilman explains that Gore was hoist on his own petard, so to speak, by taking the position that every vote should count rather than demanding votes count when they were Democratic votes and seeking to throw them out if they were absentee ballots from overseas military that a Republican official had illegally signed.⁶⁶ But that does not mean the answer should be the results-oriented decision of *Bush v. Gore*. A similar scenario confronted the Northern Ireland Women's Coalition in voting in a new Constitution to bring peace to Northern Ireland.⁶⁷ The group's slogan was "Wave Goodbye Dinosaurs." They rejected the arguments of the men in all parties who refused to ever compromise but instead would simply withdraw from negotiations or bring down a coalition government. They wanted a different politics than a politics of "I get my way or I do not play." Instead, they aimed for bargaining. In the end, they were not willing to hold peace in Northern Ireland and a new constitution hostage to their demand for electoral reform. Once they gave in to the demand, their party folded.⁶⁸ But peace remains in Northern Ireland and, most importantly, their position that politics is about compromise, bargaining, and turn taking began to

⁶⁵ Dalitha Lithwick, *Republicans Stole the Supreme Court*, ATLANTIC (Nov. 14, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/11/what_democrats_should_do_about_the_supreme_court.html [<https://perma.cc/PJ6P-VFRT>].

⁶⁶ GILLMAN, *supra* note 58, at 52.

⁶⁷ Sally J. Kenney, *Waving Goodbye to Dinosaurs? Women, Electoral Politics, and Peace in Northern Ireland* (2005) (unpublished comment). <https://www2.tulane.edu/newcomb/upload/casedinosaurs.pdf> [<https://perma.cc/RM83-WFFX>].

⁶⁸ *Id.*

establish new political norms, one of which was the inclusion of women in governance.

As we go forward, we have to explain our position between the nightmare and the noble dream to citizens as well as to the Senate. We need judges who act on legal principles, but understand that legal decision making is not deductive, but do not engage in a results-oriented jurisprudence. Perhaps even more importantly, we need judges who are able to evaluate evidence about social facts. The evidence in the amicus brief by women's historians, for example, is stronger than the Justice Foundation's in *Carhart*.⁶⁹ When it is not our turn to select judges, we need to insist on nominees who understand legal rules and principles and can evaluate evidence fairly. We can probe their views on social facts, as the Senate did with Robert Bork, as well as interrogate judicial philosophy. As postmodern feminist theory teaches us, integrity and feminist consciousness are not necessarily connected to any bodily formation or set of experiences, even as we know that widening the range of experiences of judges could increase the likelihood of a robust interrogation of claims of social facts.

The record does not lead us to be optimistic about the possibilities in the near future. Rather, it shows that the more people know about disputes over judges, the less legitimacy the system has. Binder and Maltzman found that Senate disagreements about judges sends a signal to independents that the judge is immoderate⁷⁰ and contested votes depress support for the judge, even after controls.⁷¹ Gibson and Caldeira's examination of the Alito confirmation showed that deeply contested nominations make citizens question judges judiciousness and that interest group campaigns reinforce a view that the Supreme Court is just another political institution.⁷²

In this time of not simply divided government but polarization, one of the most important issues we can work on is to eliminate partisan gerrymandering, practiced by both parties. We have created a political system where elected officials, particularly Republicans, are more worried about who is going to challenge them in a primary rather than appealing to the political center by winning over independents and supporters from both parties. The Republicans were more worried about being challenged by the Tea Party than interested in compromising with President Obama or their colleagues across the aisle in the Senate. Democrats have more at stake than seeming unprincipled by switching now to a policy of merely trying to blockade.⁷³ Democrats need to show that government can work to solve our collective problems. For the Tea Party, it is

⁶⁹ See generally *Gonzales v. Carhart*, 550 U.S. 124 (2007).

⁷⁰ BINDER & MALTZMAN, *supra* note 22, at 139.

⁷¹ *Id.* at 140.

⁷² JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS 123–25 (2009).

⁷³ I support the work of scholars such as Martin Lipsky, formerly of Demos, who advocate for rehabilitating people's sense of what government can do. See generally DEMOS, <http://www.demos.org> [<https://perma.cc/VN5Y-44QL>] (last visited Apr. 19, 2017).

more important to disrupt government to reduce it than to make it work for everyone.

As feminists, we must not stop working for a diverse and representative bench as we did in 1980 and 2000. We should not lose the momentum we have gained in the last six years. But we must retain our integrity and keep our principles. Like John Rawls's veil of ignorance as a device for determining justice, we need a system that we can honor when we are both in and out of office.⁷⁴ We need to be able to rotate. I happen to think we should have mandatory retirement ages or fixed terms, as many countries do. I think we should consider judges in groups rather than one at a time, drawing on the lessons we know from political science that multimember districts and proportional representation help us manage conflict better than simple majoritarianism. I think we should be able to demand that judges be the most distinguished members of the legal profession (which is not necessarily those who excel at corporate law) without having to turn them into deductive machines or robots or think of them as neutrals. And I think we should look for people of integrity, empathy, and an ability to reason and change their minds when faced with evidence about social facts and persuasive argumentation.

It is incumbent on us as educators now more than ever to not be cynical but to educate the citizenry about what a feminist view of judging is, somewhere between the nightmare and the noble dream. We need women determining the rules and applying them alongside men. We need to recognize the importance of judges as framers of questions and finders of social facts. I am grateful to the authors and editors of this impressive volume of *Feminist Judgments* for showing us what that looks like.

⁷⁴ Binder and Maltzman suggest a number of reforms that would change what they call a "medieval" system of path-dependent institutional choices that might work even in times of intense political polarization. BINDER & MALTZMAN, *supra* note 22, at 145. Their most recent work, however, muses whether we will be able to confirm a Supreme Court Justice if the President and the majority of the Senate are from different parties. *See* Binder & Maltzman, *supra* note 9, at 417–18.