Judging Identity

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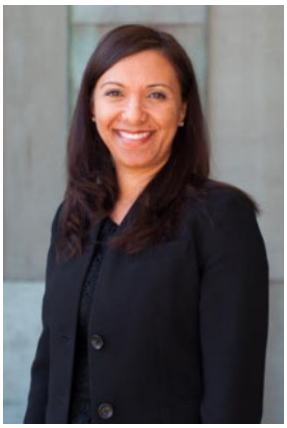
Abstract: *Instead of trying to sanitize judges into an image of neutrality and objectivism, the article is centered on the idea that we need to embrace the reality that judges have conscious and unconscious biases, values and ideologies that influence the way they think about a given legal problem.*



Rezumat: *În loc de a crea o imagine imaculată a neutralității și obiectivității judecătorilor, articolul este centrat pe ideea că trebuie să acceptăm realitatea că judecătorii au prejudecăți, valori și ideologii care influențează modul în care abordează o anume problemă juridică.*

Keywords: *judiciary, judicial decision making process, diversity on the bench, judging identity.*

I. Introduction

With the appointment of Justice Sonia Sotomayor to the United States Supreme Court came many questions, including one about whether her identity as a Latina would affect her decision making on the Court. The question is a legitimate one prompted by a statement Justice Sotomayor made in a speech several years prior to her nomination to the Court. In a lecture given at the University of California at Berkeley (Boalt Hall) in 2001, then-Judge Sotomayor made a comment that suggested that the lived experience of judges is relevant to the process of judicial decision-making.[226]

During the lecture Justice Sotomayor spoke fondly of her Puerto Rican heritage and her identity as a Latina. She also spoke about the need for ethnic diversity in the legal profession and on the bench in particular. She stated, "Justice O'Connor has often been cited as saying that a wise old man and a wise old woman will reach the same conclusion in deciding cases… I am also not so sure I agree with the statement."[227] Citing Harvard Law Professor and feminist scholar Martha Minow she noted, "First, there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better

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[226] Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87 (2002).

[227] *Id.* at 92.

conclusion than a white male who hasn't lived that life."[228] I believe Justice Sotomayor was challenging the theory of sameness - the assumption that women and racial minorities are legitimate candidates for the bench only to the extent that their decision-making processes and outcomes would be the same as that of a white male.[229]

Moreover, Justice Sotomayor was asserting what Dr. Patricia Hill Collins calls the "Outsider Within" phenomenon.[230] Women and people of color on the bench are outsiders in that their presence on the bench is not the norm. Yet they are "within" because they have been placed in a position of power within an existing institutional power structure dominated by white males. According to Dr. Collins, when you are an outsider within, you learn to see the world from multiple perspectives, while those who are insiders are part of the dominant culture and do not necessarily have to learn to see the world from other perspectives.[231] Hence, Justice Sotomayor's comments merely asserted that since a Latina jurist has both the insider and outsider experience, she would expect that a Latina jurist, in some instances, might be able to make a better decision than a wise judge who has not had the experience of being an outsider.

To conclude her point, Justice Sotomayor reminded her audience that wise men such as Justices Oliver Wendell Holmes and Benjamin Cardozo ruled on cases which upheld gender and racial discrimination and that "personal experiences affect the facts that judges choose to see."[232] How many of us have read a legal opinion and felt that the majority got it wrong because they didn't give enough consideration or weight to a particular fact or set of facts? All of us no doubt, so we all know that judging is a highly subjective enterprise. It is a process by which we create a socio-legal reality.

Diversity of judges in our courts will help to ensure that there is diversity of viewpoints in our courts, and that no identifiable political identity within our polity is denied the basic human right of self-determination that we all share.

Nonetheless, Justice Sotomayor's comment sparked a debate about the role of identity in judging. Conservative thinkers, consistent with their historical adherence to colorblind constitutionalism, viewed Sotomayor's recognition of race as improper and even racist.[233] But Justice Sotomayor, in her lecture at Berkeley, rejected the theory of colorblindness by stating that if we truly want to be the nation we proclaim to be - a nation that values diversity - then we need to stop pretending we don't see difference when it's there.[234] To Justice Sotomayor's statement, I would add that we need to stop insisting that lawyers and judges of color adopt what Harvard Law Professor David Wilkins calls a "bleached

[228] See id.

[229] For a discussion of sameness feminism, see Judith G. Greenberg, *Introduction* to MARY JOE FRUG, POSTMODERN LEGAL FEMINISM ix, x-xvii.

[230] *See* Patricia Hill Collins, *Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought*, 33 SOC. PROBS. S14 (1986).

[231] Id.

[232] Sotomayor, *supra* note 1, at 92.

[233] *See generally* Kimberle Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253 (2011) (analyzing modern critical race theory, including the history of the colorblindness doctrine).

[234] *See* Sotomayor, *supra* note 1, at 88, 90-91, 93.

out" theory of legal professionalism.[235] This theory posits that professionals "act white" in the performance of their professional roles in order to assure the dominant culture of their competence, character, and impartiality.[236]

Justice Sotomayor's comments are merely a reminder that no person, judge or not, white or not, is a completely neutral actor divorced of his or her lived experiences. Whether consciously or subconsciously, we all make judgments based on our lived experiences. Judges are called to make decisions, and the decision-making process imports a high level of subjectivity and discretion. This is why Justices on the Supreme Court often do not agree on the answers to legal questions presented to the Court. In law, there are very few purely objective decisions. The lived experience of judges is one of many factors that influence the decision-making process. Rather than pretend that this is not so, we should try to make productive use of this reality.

Instead of trying to sanitize judges into an image of neutrality and objectivism as those terms are defined by the white racial majority, we need to embrace the reality that judges have conscious and unconscious biases, values, and ideologies that influence the way they think about a given legal problem. Once we embrace this reality rather than run from it, we will realize the importance of diverse identities on the bench. Once we embrace the notion that different judges each bring a different set of assumptions and experiences to problem solving, it will become easier to see that diversity is a necessary tool to ensure unbiased, objective judging. Diversity operates as a diffusive mechanism that ensures that not all jurists will have a particular set of biases that cut only one way.[237]

Because research tells us that heterogeneous groups make better collective judgments than homogenous groups,[238] diversity on the bench becomes a mechanism to strengthen the courts' decision-making processes. Meaningful diversity on the bench means having not only racial diversity and gender diversity, it also means having judges whose identities are at the intersection of these subordinated identities. This essay examines the existing literature articulating the importance of gender diversity and racial diversity on the bench, and makes the call for understanding the importance of having judges on the courts whose identities are at the intersection of race and gender.

II. Judging at the Intersection

Justice Sotomayor's experience as a Latina and a woman on the bench is undoubtedly unique. However, this is not to say that all Latina women on the bench share a singular core trait or experience, or that any specific gender or race is internally homogenous. Nonetheless, racial and gender diversity are both significant to judging, and more broadly, self-determination.

A. The Situational Uniqueness of a Latina Judge

Justice Sotomayor's identity is unique not only because of her race, but also because of her gender, which intersects with her race to create a unique identity

[235] David B. Wilkins, Identities and Roles; Race, Recognition, and Professional Responsibility, 57 MD. L. REV. 1502 (1998).

[236] *Id.* at 1571.

[237] Sherrilyn Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 411 (2000) [hereinafter *Racial Diversity*].

[238] *See* Katherine W. Phillips et al., *Is the Pain Worth the Gain? The Advantages and Liabilities of Agreeing with Socially Distinct Newcomers*, 35 PERSONALITY & SOC. PSYCHOL. BULL. 336, 345-47 (2009).

category that has its own set of unique identity contingencies[239] and experiences. Yet when scholars discuss the importance of diversity on the bench, they tend to do so in ways that ignore the significance of intersectionality. Scholars tend to bifurcate judicial identities into race or gender categories as if they were separately distinct identities for judges. This approach to discussing judicial diversity privileges whiteness and maleness as the norm by situating the white male identity as the normative identity for judges.

The result of this normative positioning is that gender diversity is examined from the perspective of the white female judge and racial diversity is examined from the perspective of the male judge of color. This method of studying diversity is understandable because it is the female judge's sex that deviates from the societal norm of the white male judge, and it is the male judge of color's race that deviates from that norm. But this approach to examining the importance of diversity on the bench ignores the reality and significance of intersecting identities on the bench. This essay explores some of the literature that takes this bifurcated approach to race and gender diversity on the bench and argues for a more nuanced assessment of the relevance of identity on the bench.

B. Identity Consciousness Is Not Necessarily Essentialist

The assertion that there is something about Latina/o judges or black judges or Native American judges that distinguishes them from the remainder of judges on the bench understandably arouses suspicion that essentialist conceptions of racial identity are about to be deployed. However, a claim that Latina/o judges make a unique contribution to the deliberative process of judging need not be grounded in the idea that there is some core essence of Latina/o identity that operates to define all Latinas/os. Nor need the claim be grounded in an assertion that all Latinas/os do in fact or should think alike. A claim that a Latina Justice might bring a different viewpoint to the consideration of a legal problem does not mean that she will do so in every case or every context.

Dr. Cornel West eloquently asserts the proposition of the inimitability of blackness as a unique identity when he speaks of blackness as not a state of mind wherein all black people think alike, but rather "the distinct styles and dominant modes of expression found in black cultures and communities. These styles and modes are diverse - yet they do stand apart from those of other groups."[240]

Hence, the claim asserted by Dr. West is the same as that of Justice Sotomayor; it is that a wise Latina justice - that is, a judge with an identity at the intersection of two marginalized identities - can make a unique contribution to the deliberative process of judging because her lived experience will be different from that of a majority of the bench in many ways. Her lived experience situates her between the legal profession with its sophisticated

[239] CLAUDE STEELE, WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US 3 (2010).

[240] CORNEL WEST, RACE MATTERS 28 (2001). Cornel West eloquently asserts this proposition when he speaks of black responses to American racism. He states that "[t]hese responses assume neither a black essence that all black people share nor one black perspective to which all black people should adhere. Rather, a prophetic framework encourages moral assessment of the variety of perspectives held by black people . . . Instead, blackness is understood to be either the perennial possibility of white supremacist abuse or the distinct styles and dominant modes of expression found in black cultures and communities. These styles and modes are diverse—yet they do stand apart from those of other groups (even as they are shaped by and shape those of other groups)." *Id.*

democratic institutions and the lay citizens of the Latina/o community and other subordinated communities that exist at the lower rungs of our socio-economic ladder. This enables her to see some legal problems from the viewpoint of those who are marginalized by race, language, poverty, or other status attributes.

C. The Significance of Race in Judging

Could the racial identity of a judge really equip that judge to serve any unique functions in judging? Law professor Sherrilyn Ifill argues that the racial identity of judges does serve a unique function.[241] Professor Ifill[242] asserts that the Fourteenth Amendment's judicial impartiality mandate requires "*structural* impartiality of the bench as a whole, in addition to the impartiality of individual judges."[243] In other words, Professor Ifill's thesis is that a panel of appellate judges is less impartial structurally if the panel is comprised of a homogeneous group of judges. Professor Ifill contends that structural impartiality is achieved when there is diversity of viewpoint on the courts; race is one identity factor that is relevant to ensuring diversity of viewpoint in the courts.[244] Professor Ifill has also argued that the deliberative effect of substantive representation of racial minorities on the bench is more significant than the institutional legitimization function of corporal representation of racial minorities.[245] According to Professor Ifill, racial diversity on the bench improves the democratic process of deliberation by ensuring that people with perspectives differing from white judges have input into the decision-making process, so that decisions that emerge from the courts are not informed by only the dominant experience of being white in America.[246]

Retired Supreme Court Justice Sandra Day O'Connor, a Ronald Reagan appointee to the Supreme Court in 1991, acknowledged the role of experience and race in judging during her tribute to the legendary Justice Thurgood Marshall in 1992, after his retirement.[247] In her tribute she spoke approvingly of the ways in which Justice Marshall's race-based experiences shaped his jurisprudence and even influenced her own legal thinking. Justice O'Connor's tribute to Justice Marshall is a testament to Professor Ifill's theory of structural diversity in judicial decision-making. Speaking about Justice Marshall, Justice O'Connor said:

[T]he man who would, as a lawyer and jurist, captivate the nation would also, as colleague and friend, profoundly influence me. Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for

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[241] *See Racial Diversity*, *supra* note 12, at 449-55.

[242] *See*, *e.g.*, *id.*; Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV. LATINO L. REV. 1, 5 (2002); Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 MINN. L. REV. 1252 (2005-06).

[243] Sherrilyn A. Ifill, *Judging the Judges; Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. Rev. 95, 98-99 (1997-98) [hereinafter *Judging the Judges*] (italics in original).

[244] *See Racial Diversity*, *supra* note 12, at 495. Other identity factors relevant to judging might include, gender, socioeconomic background, sexual orientation, and (dis)ability status. *Id.*

[245] *Judging the Judges, supra* note 18, at 99.

[246] Id.

[247] Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992).

their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice. At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.[248]

Accordingly, judges of color provide descriptive or corporal representation of minorities in our courts, thereby lending increased legitimacy to the courts and making them appear less biased. In the process of judicial decision-making, these judges also provide substantive representation of racialized citizens in our courts by offering viewpoints, experiences, and values gathered from being socialized in a marginalized community.[249]

Law professor and Dean of the University of California Davis Law School, Kevin Johnson, has also argued that the identity of judges matters in judging.[250] While arguing in favor of an appointment of a Latina/o to the Supreme Court, prior to Justice Sotomayor's appointment, Dean Johnson asserted that although the Latina/o community is heterogeneous, it shares important common experiences.[251] Moreover, Johnson argued that the addition of a Latina/o voice to the Court "holds the promise of improving the decision-making process on constitutional law, civil rights, and other matters."[252] Dean Johnson illustrated his point by arguing that a Latina/o Justice might approach the reliance on physical appearance in immigration stops in a different way than the court did in *United States v. Brignoni-Ponce*.[253] Because of personal experiences, "a Latina/o is more likely than an Anglo to be troubled by the reasoning of *Brignoni-Ponce*."[254]

From the work of scholars like Johnson and Ifill, we learn that while not all judges of color think alike, they do bring a unique and different perspective to the judging process thereby improving the structural impartiality of our courts[255] and providing substantive representation of the viewpoints held by members of marginalized communities. We only need to look back at the lived experiences and decisions of the two Supreme Court Justices of color preceding Justice Sotomayor - Justice Marshall and Justice Clarence Thomas - to see that racial identity does impact judging.

D. The Significance of Gender in Judging

Even if race brings with it a different perspective to judging, does the sex or gender of a judge matter in judging? Do women judges bring a different perspective to judging? Do they decide cases differently from men judges? While most feminists would agree that we need judges who value and respect women and understand gender, not all feminists agree on how to achieve that goal. Radical feminists argue that women are a unique and distinct category and that women see

[248] Id.

[249] *But see*, Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 606-10 (2003) (concluding that in a majority of cases, the race and gender of the judge likely will not affect outcomes) and Jennifer A. Segal, The Decision Making of Clinton's Nontraditional Judicial Appointees, 80 JUDICATURE 279 (1997) (noting that the effects of race and gender on judging are unclear).

[250] *See generally* Johnson, *supra* note 17, at 2.

[251] *See generally id*.

[252] *Id.* at 10.

[253] 422 U.S. 873 (1975). In this case, the Supreme Court stated that Border Patrol Officers could engage in racial profiling by considering the race of the occupant of a motor vehicle as a factor in deciding whether to make an immigration stop. *See id.*

[254] Johnson, *supra* note 17, at 8.

[255] *Judging the Judges*, *supra* note 18, at 99.

things differently from men.[256] Post-modernist thinkers, on the other hand, argue that women are not a distinct group who think or act differently from men, and that couching gender equality arguments in terms of "difference" almost always leads to disadvantage for women.[257]

I tend to align with standpoint-theory feminists who occupy a middle ground by arguing that the experience of living life as a woman matters,[258] but I wouldn't go so far as to say that men cannot be feminists[259] or that all women are feminists. And while I agree that arguments for women's equality that rest on constructing women as "different" from men should not be the exclusive or primary approach to gender equality, I do not see the quest for gender equality as having a singular approach. I do not see the democratic rationale and the difference rationale for inclusion of women on the bench, as mutually exclusive arguments.

Like race, I see gender as relevant to the act of judging in some, but not all contexts. I see gender as relevant - not because women have some core essential trait that make them all think alike, but because women, in large part, have different experiences than men in navigating life as a woman, and those experiences can sometimes be relevant to the process of judging. While women may sometimes see cases through a different lens because of their gender, I agree that the most persuasive argument for including women on the bench is the democratic argument.[260] Since women are roughly half of the U.S. citizenry, they deserve proportional representation in our courts, which are a cornerstone of our structure of democratic government. But, the democratic argument is not mutually exclusive of or divorced from difference. For example, our circuit court system includes judges from the various states that comprise the circuit, not because judges from Iowa decide cases differently than judges from Minnesota, but because each state expects to have proportional representation on the court.[261] Nonetheless, the desire for this corporeal representation of each state is not void of concerns about difference.

The difference that warrants populating the circuit courts with judges from the various states within the circuit is the difference in law from state to state. A Minnesota judge may very well see a legal issue differently from an Iowa judge because the laws of the two states may approach a given public policy issue underlying the law in different ways. Hence, having representation from Iowa and Minnesota ensures not only corporeal representation, but also that the Iowa way of thinking about a legal issue is part of the Eighth Circuit's deliberative process and decision making. In other words, an assumption of difference among the states is inherent in the desire to have representation from each of the states comprising a circuit. Likewise, an

[256] Lindsay Murphy & Jonathan Livingstone, *Racism and the Limits of Radical Feminism,* 26 RACE & CLASS 61, 63 (1985).

[257] SALLY J. KENNEY, GENDER & JUSTICE; WHY WOMEN IN THE JUDICIARY REALLY MATTER 14 (2013).

[258] *Id.*

[259] Feminist bankruptcy scholar Peter Alexander demonstrates that men can be feminists. *See, e.g.,* Peter C. Alexander, *Divorce and the Dischargeability of Debts: Focusing on Women as Creditors in Bankruptcy*, 43 CATH. U. L. REV. 351 (1994); Peter C. Alexander, *Building "A Doll's House": A Feminist Analysis of Marital Debt Dischargeability in Bankruptcy*, 48 VILL. L. REV. 381 (2003) (examining legislative and judicial failures to address problems for women in marital-debt dischargeability cases); Peter C. Alexander, *"Herstory" Repeats: The Bankruptcy Code Harms Women and Children*, 13 AM. BANKR. INST. L. REV. 571 (2005).

[260] KENNEY, *supra* note 32, at 21.

[261] *But see*, *id.*

assumption of some measure of difference for women judges is inherent in the democratic argument for their presence on the bench. If women are in all respects the same as men, then they arguably would be adequately represented by men on the bench and the gender (or sex) of judges would be irrelevant. So the fact that gender does create difference in some contexts bolsters rather than diminishes the democratic argument for including women on the bench.

E. Judging From the Bottom Up: Experience with Marginalization Informs Legal Analysis

The argument that lived experiences shape judicial identity and judging is evident in the jurisprudence of several Justices who have served on our highest Court. Justice Marshall's legacy as a Justice who had empathy for the marginalized has been explored by several scholars. Stanford Law School Professor Deborah Rhode, who clerked for Justice Marshall, wrote a wonderful tribute to the man and his work. In this essay, she posited that, "[a] life history of racism and poverty enabled Marshall to see the world from the bottom up… and informed his understanding of other's life circumstances."[262] Because of his life experiences, he was "far more able than his colleagues to generalize insights about subordination to other groups."[263] Justice Marshall was able to see how law could operate to subordinate not only blacks, but also other racial minorities, women, the elderly, and the poor. Justice O'Connor agreed with Professor Rhode's assessment of Marshall as a Justice who was able to give voice to the experience of those who were subordinated and marginalized, when she described him as a "teller of stories that would not have been told but for his commitment to telling the truth."[264]

While Justice Marshall may not have been a feminist, he was able to eloquently articulate the unconscious bias that women faced in policy making in *Personnel Administrator of Massachusetts v. Feeney*, which involved a veterans' preference plan that gave a lifetime advantage to any former military service personnel who were qualified for a state civil service position.[265] Women challenged the plan as discriminatory since about 98% of the eligible veterans were male.[266] Justice Marshall empathized with the plight of women and understood how a plan that had the practical effect of foreclosing women from government jobs desired by men could be discriminatory.[267] Hence, Justice Marshall argued that where the "foreseeable impact of a facially neutral statute is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme."[268]

That is, Justice Marshall wasn't willing to put the burden on women to prove that the State was intentionally discriminating.[269] The fact that the plan worked to the advantage of men 98% of the time, and the fact that the legislative history revealed that the legislature was aware of this discriminatory impact when it enacted the plan, were enough in Justice Marshall's mind to raise the question of

[262] Deborah L. Rhode, *A Tribute to Justice Marshall: Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1260-61 (1992).
[263] *Id.* at 1263.
[264] O'Connor, *supra* note 22, at 1220.
[265] 442 U.S. 256 (1979).
[266] *Id.* at 270.
[267] *See id.* at 283-84 (Marshall, J., dissenting).
[268] *Id.* at 284.
[269] See id.

discrimination and to put the State to the task of responding to that question.[270]

Being a member of a racially marginalized group likely enabled Justice Marshall's empathy for other marginalized groups. His empathy for the elderly is captured vividly in his dissent in *Blum v. Yaretsky*.[271] He and Justice Brennan dissented from the majority's holding that a privately owned nursing home need not grant due process to patients before deciding to transfer them to a lower level of care facility because such facilities are not state actors.[272] Justices Marshall and Brennan argued that the decision to transfer a nursing home resident to a less costly facility is not merely a medical decision of a doctor void of non-medical considerations.[273]

To the contrary, Justices Marshall and Brennan understood that the medical decisions of doctors who were paid by the state were likely influenced by the state's desire to contain the cost of care and thereby save the state money.[274] Justice Marshall cited the harmful effects of moving the frail elderly and argued that residents of these facilities were totally dependent on the state for their placement and support, and the state was putting its prestige and power behind the facilities.[275] Accordingly, he asserted that the nursing homes were sufficiently entangled with the state to be treated as state actors subject to compliance with due process requirements prior to moving an elderly person.[276]

Justice Marshall's empathy for the poor and his keen understanding of what it is like to live in poverty is evident in *Jackson v. Metropolitan Edison Co.*, wherein a privately owned electric company held a certificate from the State permitting it to deliver electricity to residents.[277] Catherine Jackson, a woman and mother whose electricity had been shut off without notice and an opportunity for hearing argued that she had been deprived due process under the Fourteenth Amendment.[278] The electric company was subject to extensive state regulation and operated under a monopoly granted by the State.[279] Ms. Jackson argued that because the electric company provided an essential public service, it served a public function. It therefore, she asserted, fell within the public function exception to the state action doctrine, making the private electric company subject to the due process clause of the Fourteenth Amendment.[280] The majority concluded that the State was not sufficiently connected with the electric company's action terminating Ms. Jackson's service so as to make the company's conduct attributable to the State and therefore subject to the due process clause.[281]

Justice Marshall understood what it was to be poor and to suffer the plight of coming home to discover that there was no light, no heat, and that the food in the refrigerator that you could barely afford to purchase was now rotting. He likely understood that the opportunity to present one's case of hardship to an impartial board might have prevented the disruption that an already struggling family would

[270] For a discussion of how Justice Marshall thought about gender equality, see, Taunya Lovell Banks, *Thurgood Marshall, The Race Man, and Gender Equality in the Courts,* 18 VA. J. SOC. POL'Y & L. 15 (2010).

[271] 457 U.S. 991 (1982).

[272] *Id*. at 1012 (Brennan, J., joined by Marshall, J., dissenting).

[273] 48. *Id.* at 1014-15

[274] *Id*. at 1014-27.

[275] *See id.* at 1017, 1027-29.

[276] *Id*. at 1027-29.

[277] 419 U.S. 345 (1974).

[278] *Id*. at 347-48.

[279] *Id.* at 350-52

[280] *See id*.

[281] *Id*. at 358-59.

experience by a summary termination of services. Since electric services were still provided by the government in many communities at the time, and the State had approved the company's termination policy, Justice Marshall argued that the provision of these services was a public function.[282] Under this exception to the state action doctrine, the utility company would be treated as a state actor subject to the requirements of the due process clause, thus requiring the company to give the family notice and a hearing before terminating their service.[283]

Justice Marshall's empathy for racially subordinated minorities outside of his own race is evident in his decisions dealing with Federal Indian Law.[284] Justice Marshall is credited with authoring several Supreme Court decisions that solidified the status of tribes as sovereign governments with the right of self-determination.[285] According to a leading Indian Law scholar, "the legacy of Justice Marshall's Indian Law jurisprudence is its recognition and acceptance of the unique status of the Indian nations as separate governments within the federal system and as vital repositories of distinct cultures that are integral parts of America."[286] He authored one of the most controversial cases in Federal Indian Law, which arguably positioned the rights of women against the rights of Indian tribes.[287]

In *Santa Clara Pueblo v. Martinez*, the Court addressed the issue of whether a tribal law that precluded the children of women who married outside of the tribe to be members of the tribe, but permitted the children of men who married outside of the tribe to be members, was a violation of the Indian Civil Rights Act ("ICRA"), which makes certain provisions of the U.S. Constitution applicable to Indian tribes.[288] Writing from a perspective that respects the group rights inherent in tribal sovereignty, Justice Marshall viewed Julia Martinez' individual rights within her tribe to be defined by the tribe.[289] And since Congress had not waived tribal sovereign immunity for purposes of equal protection, the Court held that the tribe maintained the power to exercise its sovereignty in a manner that may be inconsistent with the mandates of the federal Equal Protection Clause.[290]

According to Indian Law scholar Rebecca Tsosie, the key to the decision in this case was Justice Marshall's "choice to treat it as an Indian law case rather than a federal civil rights [gender] case."[291] Marshall undoubtedly understood that tribal sovereignty is at the core of the very existence of native people; without it native people will disappear into the larger society and no longer exist, and that there can be no individual rights of tribal members without protection of the tribe itself.

Justice Clarence Thomas' lived experiences as a black man noticeably influence his judging. During his confirmation hearings for his nomination

[282] *Id.* at 366, 371 (Marshall, J., dissenting).

[283] *See id.* at 349-51 (majority opinion).

[284] Robert Laurence, *Thurgood Marshall's Indian Law Opinions*, 27 HOWARD L.J. 3 (1984) (surveying Justice Marshall's fifteen opinions on principal areas of Indian Law).

[285] *See generally,* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millenium*, 96 COLUM. L. REV. 809, 815-22 (1996) (discussing the trial sovereignty cases collectively known as the "Marshall Trilogy").

[286] Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text; The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 532 (1994).

[287] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[288] *Id.* at 51, 56-57; Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-41 (2006).

[289] *See Martinez*, 436 U.S. 49.

[290] *Martinez*, 436 U.S. at 55-60, 71-72.

[291] Tsosie, *supra* note 61, at 515.

to the Supreme Court, Justice Thomas identified with black men who had been attacked by whites in the past when he responded to the attacks on his character.[292] He stated, "[T]his is a high-tech lynching. I cannot shake off these accusations because they play to the worst stereotypes we have about black men in this country."[293] His statement demonstrates that he is keenly aware of the racial stereotypes ascribed to black male bodies and the damage that stereotypes can do. Growing up in the segregated south in Georgia, Justice Thomas undoubtedly was very familiar with the narrative that black men were promiscuous and therefore subject to being lynched for perceived sexual advances toward white women. His sensitivity to the threat of violence against blacks is evident in his judging on the Court.

In *Virginia v. Black*, respondents were convicted of burning crosses with the intent to intimidate, as proscribed by the Virginia criminal code.[294] A plurality of the Court asserted that the statute could not be interpreted to mean that cross burning by itself could support a conviction without any further evidence of intent.[295] It reasoned that such an interpretation would be an unconstitutional restraint on speech since the actor's intent may be to send a message other than intimidation.[296] Justice Thomas, understanding the singular historical message and purpose of cross burnings, lodged a strong dissent arguing that given this country's history of racial intimidation, cross burnings are a precursor to violence and that to blacks in this country they symbolize the worst form of violence: lynching.[297] He wrote, "In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence."[298] He analogized cross burning to other strict liability crimes, such as statutory rape, where the conduct is "so reprehensible that the intent is satisfied by the mere act committed by a perpetrator. Considering the horrific effect cross burning has on its victims, it is also reasonable to presume intent to intimidate from the act itself."[299]

Justice Thomas abandoned the conservative view of First Amendment absolutism and argued that the First Amendment must give way to other interests at times. He conveyed dismay at the fact that whether the First Amendment must yield depends "not on the harm a regulation in question seeks to prevent, but on the area of society at which it aims."[300] To make his point, he referred to a case wherein the Court upheld a restriction on protests near abortion clinics, finding that the State had a legitimate interest in protecting those seeking abortions from "unwanted advice."[301] Yet when it came time to protect blacks, "the plurality [struck] down the statute because one day an individual might wish to burn a cross but might do so without an intent to intimidate anyone. That cross burning subjects its targets… to extreme emotional distress and… physical threat, is of no concern to the plurality."[302]

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[292] CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 273 (2007).

[293] *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States*, 102nd Cong., 1st Sess. 37-38 (1991) (statement of then-Judge Clarence Thomas, Nominee, United States Supreme Court).

[294] 538 U.S. 343 (2003).

[295] *Id.* at 362-63, 365.

[296] *Id*. at 362-63, 365-68.

[297] *Id*. at 391 (Thomas, J., dissenting).

[298] Id.

[299] *Id.* at 397-98.

[300] *Id.* at 399.

[301] *Id.* at 399-400.

[302] *Id.* at 400.

Sharply, Justice Thomas pointed out that under the plurality's view, physical safety of blacks and their right to be free from intimidation and the threat of physical violence is less valued than the right (of primarily white women) to be free from unwanted communications.[303] In this case, Justice Thomas' status as a black man enabled him to identify more with the feelings of intimidation and fear that blacks would experience from cross burning rather than the right of whites to communicate their speech freely. Hence, while Justice Thomas may have views that differ from the majority of African Americans, he still has the lived experience of being a black man in America, and that experience shapes his analysis of the law.[304]

F. Judging As An Act of Self Determination

The significance of identity to judging is perhaps most evident when one views judging as a component part of the exercise of government sovereignty. Tribal sovereignty incorporates the right of indigenous peoples to govern themselves and exercise self-determination. Thus, at the core of sovereignty is the fundamental concept of the power to self-govern, which includes the power to interpret and apply the laws of the sovereign to the circumstances of the people comprising the polity of the sovereign. Self-determination is at the core of tribal sovereignty, and the Supreme Court has held that this right of self-determination requires that attention be paid to the identity of those entrusted to administer the laws of a sovereign.[305]

In *Morton v. Mancari*, the U.S. Supreme Court held that it was not unconstitutional racial discrimination for the federal government to award a hiring preference to Indians for jobs in the federal Bureau of Indian Affairs.[306] In the absence of a federal hiring preference, whites would comprise the majority of federal workers administering Indian affairs, which would undermine the right of Indian people to govern themselves. To prevent this erosion of tribal sovereignty, the Court sanctioned identity conscious appointments in the executive branch of the federal government that regulates Indian affairs.[307]

The need for identity consciousness to preserve tribal sovereignty also applies to tribal courts. Most tribes give preference to legally trained tribal members in appointing judges to tribal courts and some tribal courts permit non-legally trained tribal members to serve as judges on tribal appellate courts to ensure some tribal representation on the court.[308] This is because tribes recognize that the identity of judges does matter; and that turning over tribal courts to outsiders (non-tribal members) could

[303] *See id.* at 399-400.

[304] Even in areas where Justice Thomas disagrees with the majority of African Americans, such as affirmative action, he posits a conservative black view. *See e.g.,* Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity,* 90 IOWA L. REV. 931, 987-88 (2005); *see also*, Fisher v. Univ. of Tex. at Austin, 133 S.Ct. 2411, 186 L.Ed. 2d 474 (2013) (Thomas, J., dissenting) (wherein J. Thomas refers to the writings of W.E.B. DuBois on the topic of integration and asserts that his view of the Constitution is the view advanced by the black plaintiffs in *Brown*: "No State has any authority under the equal protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." 133 S.Ct. 2428, (citing Tr. Of Oral Arg. In Brown v. Bd. of Educ, O.T. 1952, No. 8, p.7)).

[305] Morton v. Mancari, 417 U.S. 535, 554-55 (1974).

[306] *Id.* at 554.

[307] *See id.* at 555.

[308] The Standing Rock Sioux Tribe permits one member of the Supreme Court to be a tribal member without any formal legal training. SRST Code of Justice Title 1, Ch. 3, Section 1-301, available at: http://www.standingrock.org/data/upfiles /files/ Title%201.pdf.

have deleterious effects on the tribe and its ability to govern its people in accordance with tribal law and customs.

As a tribal court justice on the Standing Rock Sioux Supreme Court who is an outsider, I have learned the importance of having tribal members serving as judges on tribal courts. The presence of tribal members on tribal courts works to ensure that tribal customs are respected in the process of judging and that tribes are truly exercising the self-determination that sovereignty is supposed to guarantee. Presently many tribes with court systems do not have enough legally trained tribal members to serve as judges in the tribal court system.

And while structural diversity on tribal courts can improve tribal court decision-making just as structural diversity on state and federal courts enhances decision making, the key for tribes is to have some tribal voice on the court. For example, the court is sometimes confronted with the question of whether it violates the tribal constitution's equal protection clause to treat tribal members living off the reservation differently than on-reservation members. When the court addresses this question, it is important to have a voice on the court that understands the significance of living on the reservation, both in terms of the sacrifice of the reservation resident and the benefit to the tribe of having members reside on the reservation. Understanding the significance of living on the reservation is crucial to understanding why a tribal government may need to treat tribal members differently depending on whether they reside on or off the reservation.

When a Lakota man is sued for breach of contract for failing to make his car payments on time, it is important to have a tribal judge who understands that a Lakota man who speaks Lakota and very little English, but who signs a contract in English, likely did not understand that he would be subjected to attorney's fees and other liquidated damages in the event that he was no longer able to make his car payment. Hence, the enforcement of these additional damages above and beyond what the average Lakota man would have understood his obligation to be is inconsistent with Lakota ways of doing business and arguably unconscionable under Lakota customs and traditions.

Likewise, when an elderly woman wants to prosecute an adolescent Lakota boy for stealing her car, the Lakota judge can remind the parties to the dispute that stealing a horse was a rite of passage to manhood in the Lakota tradition and that the true root of this young man's offense was his disrespect of an elder. The judge in this case found that stealing the car was not as offensive to Lakota law and tradition as leaving the elder without transportation; so, the judge found the boy guilty of neglecting an elder and sentenced the young man to drive the elderly woman wherever she needed to go for a defined period of time.

These vignettes illustrate how having the lived experience of being Lakota is essential to governing in a way that respects and preserves Lakota tradition. The infusion of Lakota culture into Lakota law is essential to ensuring Lakota sovereignty. While an outsider can seek to learn the Lakota ways in an effort to respect that tradition, there is no better way to carry on and implement Lakota tradition than having Lakota people populate their own courts as judges.

While tribal membership is important in tribal judging, gender diversity on tribal courts is also important. Fortunately, tribal courts generally do not suffer from a lack of women judges. Many women serve as judges on tribal courts, and their presence helps to ensure that gendered stereotypes

that are rejected by contemporary tribal women do not define contemporary tribal law. In many cases, perhaps even most, the gender of a judge will be irrelevant to the analysis and application of the law to a given set of facts. However, there are some cases where the inclusion of a woman judge might invoke a different analysis that an all male bench may not have considered.

For example, in a recent case before the Standing Rock Sioux Supreme Court, a mother of two children appealed a child support decision of the tribal trial court that held that the father could claim both children on his federal income tax return because the father was the parent with the financial obligation to pay child support.[309] Initially my male colleagues failed to see any error in the tribal trial court's decision. However, during our deliberations on the case, I noted that the fact that the father paid court ordered child support to the mother of the children did not mean that the father was the only parent supporting the children financially. The fact that the children resided with the mother and that she provided a home for them, food for them, and their other daily needs, means that both mother and father contribute to the financial support of the children. In fact, the child support guidelines, which provide the formula for calculating child support payments, assign a financial support obligation to each parent in calculating how much support the obligor parent should pay to the obligee parent (the parent receiving child support).

As a result, even the obligee parent contributes financially to the support of the child. In the case before the Standing Rock Supreme Court, the mother's contribution to the support of the children was invisible to the male trial court judge who decided the case below. He was unable to see the mother's financial contribution as well as her contribution of time to the children, which precluded her from pursuing additional financial gains that would increase her financial contribution.

As a woman with the lived experience of being a mother, it was obvious to me that the mother here was also contributing toward the support of her children. The court ultimately concluded that the child support guidelines, which are used to calculate child support, impose a support obligation on both parents and allocate that obligation in accordance with the share of total income that each parent earns.

Accordingly, the tribal law, which required the father to pay the mother child support, acknowledges that the mother has a financial obligation to support the children and does not impose the entire burden of financial support of the children on the non-custodial parent. Hence, we held that it was improper for the tribal trial court to award the father the right to claim the children on his federal income taxes under the assumption that the father was the sole financial support for the children.

Admittedly, one does not have to be a mother to see the flaw in the trial court's analysis in this case, but my lived experience as a woman and a mother, helped me see the lower court's error quickly and clearly. It was this case that made me realize just how very right Justice Sonia Sotomayor was, because as wise women, we can sometimes see injustices that are invisible to others.

[309] Citation to this case has been omitted in an effort to respect the tribal court's practice of protecting the privacy of tribal court litigants. 2013]

III. Conclusion

Justice Sotomayor's statement about a "wise Latina" is consistent with much of the legal scholarship examining the importance of diversity on the bench. It is also consistent with the Court's logic in *Morton v. Mancari*, where the Court concluded that the identity of persons holding decision-making power does matter. If identity matters in the federal governance of tribes and the administration of tribal courts, we cannot logically assert that it doesn't matter in state and federal courts. And if race and gender both matter in the process of judging, we cannot logically assert that the intersection of those identities contributes nothing to our courts. To ensure that all segments of the American polity feel empowered in 0ur democracy, and represented in its institutions, we need to incorporate judges from all identity groups into our courts, including judges with intersecting marginalized identities. Diversity of judges in our courts will help to ensure that there is diversity of viewpoints in our courts, and that no identifiable political identity within our polity is denied the basic human right of self-determination that we all share.

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