

Diversifying the Federal Judiciary and Why It Matters

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INTRODUCTION

Diversity within the federal judiciary took a dramatic plunge under the Trump Administration.¹ That decline represents a serious loss to one of the three branches of government. This Note will argue that diversity brings a myriad of benefits to the federal bench and why society cannot afford to have a homogenous pool of judges. Historically, diverse individuals have been largely been shut out from attaining judgeship.² This Note will also highlight various literature and empirical studies that have found both descriptive and substantive benefits from having diverse judges on the bench.³ To ensure that society can benefit from a diverse judiciary, there must first be an acknowledgement about the impact that diversity can have on the general population and then active efforts must be taken to combat biases that can stem from the lack of diversity. These biases lead to adverse results for both diverse litigants and general members of society.⁴

Part I will give an overview of the current state of the diversity on the federal bench and how the past few years have been devastating for diversity on the federal bench. Part II outlines why having a predominantly non-diverse federal bench, namely white and male judges, negatively affects the judiciary. Part III gives several reasons for how diversity brings benefits to the judiciary such as viewpoint diversity, panel effects, and the impact on equal protection cases. Part IV examines various *Judicial* and *Model Codes* to discern the lack of commitment to diversity and the following harms that have resulted. Part V then offers a few potential solutions that hope to increase overall judicial diversity. This includes public education regarding the impact of the judiciary on their individual

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1. See Rorie Solberg & Eric N. Waltenberg, *As Barrett Hearings Begin, A Look At Trump-McConnell Judge Appointments (Mostly White Males)*, NW. PUB. BROAD. (Oct. 12, 2020), <https://www.nwpb.org/2020/10/12/as-barrett-hearings-begin-a-look-at-trump-mcconnell-federal-judge-record-mostly-white-males/> [<https://perma.cc/G6ZE-AYEJ>].

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

3. See, e.g., Jamillah Bowman Williams, *Maximizing #MeToo: Intersectionality and the Movement*, GEO. L. FAC. PUBL'N AND OTHER WORKS, 28–32 (2020).

4. See, e.g., Williams, *supra* note 3; Edward M. Chen, *The Judiciary, Diversity, and Justice For All*, 91 CALIF. L. REV. 1109, 1115–16 (2003).

lives, strategic messaging to congressional representatives, and organizational efforts whose mission is to further diversity on the federal bench.

I. BACKGROUND

With the passing of Justice Ruth Bader Ginsburg in September 2020, the public's attention immediately focused on who should replace her.⁵ Of the nine justices on the Supreme Court, three are women and two are people of color.⁶ While the public tends to view the Supreme Court as the only court worth paying attention to, an entire court system lies beneath.⁷ The lack of diversity on the high court extends to the entire federal judiciary.⁸ Of the active Article III judges, over seventy percent are white and over sixty-five percent are men.⁹ The predominance of white, male judges underscores the history, norms, and lack of opportunities pervasive in the United States for women and people of color.¹⁰ Diverse attorneys often lack the resources that their white counterparts have access to that can lead them to a position on the federal bench such as influence, finances, and social connections.¹¹

Diversity within the federal courts has always been lacking but the issue has taken on an increasingly prominent role following the election of Donald Trump in 2016 and the judges he has appointed.¹² With the abolition of Senate rules that had encouraged bipartisan confirmation of judges,¹³ the influx of white, male judges onto the judiciary has been astounding. Of President Trump's confirmed nominees, seventy-six percent have been male and eighty-five percent have been white.¹⁴ This contrasts with his predecessors who added greater diversity to the bench.¹⁵ In fact, Donald Trump is

5. See Peter Baker & Maggie Haberman, *McConnell Vows Vote On Ginsburg Replacement As Her Death Upends The 2020 Race*, N.Y. TIMES, Sept. 19, 2020, at A1.

6. See Current Members, <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/9GFB-NQC6>] (last visited Apr. 5, 2021).

7. See *Courts: A Brief Overview*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/courts-brief-overview> [<https://perma.cc/T59W-CZQ2>] (last visited Apr. 5, 2021); cf. Steve Eder, *Most Americans Can't Name A U.S. Supreme Court Justice, Survey Says*, WALL ST. J., (Aug. 20, 2012, 11:56 AM), <https://www.wsj.com/articles/BL-LB-43293> [<https://perma.cc/9MD7-QEKC>] (Even with the increased press of high-profile cases, two-third of Americans struggle to name even a single justice).

8. *Diversity Of The Federal Bench*, AM. CONST. SOC'Y, <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/> [<https://perma.cc/WK7X-5DB5>] (last visited Feb. 19, 2021).

9. *Id.*

10. See Chen, *supra* note 4, at 1113.

11. *Id.* at 1115.

12. See Ian Millhiser, *The Absurd Whiteness Of America's Court System, In 2 Charts*, VOX (Oct. 3, 2019, 8:20 AM), <https://www.vox.com/policy-and-politics/2019/10/3/20893643/whiteness-federal-judiciary-diversity-obama-trump> [<https://perma.cc/DSW4-4Q22>].

13. *Nuclear Option: Why Trump's Supreme Court Pick Needs Only 51 Votes*, CBS NEWS (July 9, 2018, 3:09 PM) <https://www.cbsnews.com/news/nuclear-option-why-trumps-supreme-court-pick-needs-only-51-votes-in-the-senate/> [<https://perma.cc/SC57-9DQV>].

14. AM. CONST. SOC'Y, *supra* note 8.

15. See Nancy Scherer, *Diversifying The Federal Bench: Is Universal Legitimacy For the U.S. Justice System Possible?*, 105 NW. UNIV. L. REV. 587, 588–90 (2011).

the first president in over forty years to have decreased the diversity of Article III judges.¹⁶

While diversity encompasses a vast variety of characteristics such as education, socio-economic background, religion, and geography, this Note will focus on race and gender.

With the Supreme Court now swinging to a six-three conservative majority, talks of court reform have increased.¹⁷ Some of these reforms include imposing term limits, increasing the number of justices, and even limiting the number of justices a president could appoint.¹⁸ However, major structural court reform would require legislation to pass in the Senate, which then subjects such legislation to the filibuster, and doing away with that procedure faces immense obstacles because a rule change in the Senate requires a majority vote and the chance for such reform remains elusive.¹⁹ Therefore, this Note will propose both reforms that focus on more clearly articulating the importance and benefits of diversity and will also outline strategies that will hopefully lead to increased diversity.

II. THE IMPACT OF A PREDOMINANTLY WHITE, MALE FEDERAL JUDICIARY

The foremost question is whether diversity within the federal judiciary bears any benefit. According to research, the resounding answer is yes.²⁰ While many scholars posit numerous reasons, they can generally be grouped into two main theoretical buckets: descriptive representation and substantive representation.²¹ Descriptive representation is achieved when an institution resembles or reflects “the population over which it has authority.”²² Substantive representation is when an institution acts in accordance with the interests of the population over which it presides.²³ Thus descriptive representation here focuses on the outward characteristics

16. See Solberg & Waltenberg, *supra* note 1.

17. See Joan Biskupic, *Biden’s Supreme Court Commission Set To Launch As Some Liberals Are Eager To Pack The Court*, CNN (Jan. 30, 2021, 12:03 PM), <https://www.cnn.com/2021/01/30/politics/supreme-court-biden-commission/index.html> [<https://perma.cc/2H7Q-GD7W>].

18. See, e.g., H.R. 8424, 116th Cong. (2D Sess. 2020).

19. See Molly E. Reynolds, *What Is The Senate Filibuster, And What Would It Take To Eliminate It?*, BROOKINGS (Sept. 9, 2020), <https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it/> [<https://perma.cc/9HGU-MGP8>]; Maria Carrasco, *Manchin Sees ‘No Circumstance’ For Voting To Kill Filibuster*, POLITICO (Apr. 7, 2021, 9:50 PM), <https://www.politico.com/news/2021/04/07/manchin-voting-kill-filibuster-479936> [<https://perma.cc/H4RF-K4BP>].

20. See, e.g., Michael Nava, *The Servant of All: Humility, Humanity, and Judicial Diversity*, 38 GOLDEN GATE U. L. REV. 175 (2008).

21. See Danielle Root, Jake Faleschini & Grace Oyenubi, *Building A More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS at 13–14 (Oct. 3, 2019, 8:15 AM), <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/> [<https://perma.cc/ZE88-BRC8>].

22. *Id.*

23. Danielle Root & Sam Berger, *Structural Reforms To The Federal Judiciary: Restoring Independence And Fairness To The Courts*, CTR. FOR AM. PROGRESS at 4 (May 8, 2019, 12:01 AM), <https://www.americanprogress.org/issuistilless/courts/reports/2019/05/08/469504/structural-reforms-federal-judiciary/> [<https://perma.cc/QY9C-4RG8>].

of federal judges while substantive representation examines the applied effect federal judges wield through their judicial decisions.

A. DESCRIPTIVE REPRESENTATION: A DIVERSIFYING POPULATION VS. A LESS DIVERSE JUDICIARY

Descriptive representation is especially important for the judiciary as it is the branch of government that deals with the normative but ambiguous concepts like “justice” and “rule of law.”²⁴ Presently, the federal judiciary fails to represent the population it governs in terms of both race and gender.²⁵ According to data provided by the U.S. Census Bureau, the white population has continually declined as a share of the population over the years while minority populations have grown.²⁶ In 1980 the percentage of whites was almost eighty percent of the population and then by 2019, this fell further to about sixty percent, a staggering twenty percent decrease.²⁷ Around 2045, the white population will fall to below fifty percent for the first time ever.²⁸ Women currently make up about fifty percent of the current population and that ratio is projected to remain steady.²⁹

When society’s institutions do not reflect the populations that they govern, the population’s trust in those institutions weakens.³⁰ This likely in part stems from the human nature to trust those who are similar to them.³¹ The disparity in trust is especially stark when comparing across different racial groups.³² One 2001 survey study found that Blacks and Latinos consistently have more negative views about the judicial system than white individuals.³³ More specifically, Blacks and

24. Hurwitz & Lanier, *supra* note 2, at 331.

25. AM. CONST. SOC’Y *supra* note 8.

26. William H. Frey, *The Nation Is Diversifying Even Faster Than Predicted, According To New Census Data*, BROOKINGS (July 1, 2020), <https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/> [<https://perma.cc/XCT2-7CF5>].

27. *Id.*

28. Dudley L. Poston, Jr., *3 Ways That The U.S. Population Will Change Over The Next Decade*, THE CONVERSATION (Jan. 2, 2020, 12:22 PM), <https://www.pbs.org/newshour/nation/3-ways-that-the-u-s-population-will-change-over-the-next-decade> [<https://perma.cc/A478-GKFN>].

29. *ACS Demographic And Housing Estimates 2019*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=United%20States&g=0100000US&tid=ACSDP1Y2019.DP05> [<https://perma.cc/496W-R458>] (last visited Apr. 5, 2021).

30. See L. Marvin Overby, Robert D. Brown, John M. Bruce, Charles E. Smith, Jr. & John W. Winkle, III, *Race, Political Empowerment, and Minority Perceptions of Judicial Fairness*, 86 SOC. SCI. Q. 444, 456 (2005) (A survey found that African Americans in Mississippi were “considerably more suspicious of the fairness of the state’s judicial operations than similarly situated white citizens, even after controlling for a variety of other factors.”); Ivan Y. Sun & Yuning Wu, *Citizens’ perceptions of the courts: The impact of race, gender, and recent experience*, 34 J. CRIM. JUSTICE 457, 465 (2006) (finding that racial minorities were more likely than whites to have negative attitudes towards the courts).

31. See Roderick M. Kramer, *Rethinking Trust*, HARV. BUS. REV. (June 2009) <https://hbr.org/2009/06/rethinking-trust> [<https://perma.cc/42ZC-HEA7>].

32. See, e.g., David B. Rottman, *Public Perceptions Of The State Courts: A Primer*, 15 THE CT. MANAGER 9, 13 (2000).

33. David B. Rottman & Randall M. Hansen, *How Recent Court Users View the State Courts: Perceptions of Whites, African-Americans, and Latinos*, NAT’L CTR. FOR ST. CTS. 2, (2001).

Latinos frequently cite their own specific court experiences as unfair in comparison to their white counterparts.³⁴ The distrust extends beyond the general population to practicing attorneys as well and in one survey they were asked to describe the gender and race of the judge that they perceived to have “demeaned, disparaged or unfairly criticized” them.³⁵ Both male and female attorneys cited white male and white female judges as being the most frequent offenders.³⁶ The judges’ offensive behavior included name calling, allegations of biased rulings, and general rude behavior.³⁷ One attorney commented, “I think the old boy network in the judicial system still exists as the judges remain for the most part white males. As a public interest attorney, I often feel that judges have little time for my clients or cases.”³⁸

The above examples only touch on the issues that arise from an unvarying judiciary. By increasing the number of diverse judges and overall descriptive representation, diverse judges can serve as role models for those who look like them and serve as compelling evidence that even individuals and communities who have been historically excluded can achieve a place in the judiciary.³⁹

B. SUBSTANTIVE REPRESENTATION: THE EFFECT OF LIVED EXPERIENCES AMONG JUDGES

Beyond symbolic or physical representation, having a predominately white, male judiciary has substantive impacts as well. The granting of summary judgments in Title VII cases is one of many areas where the impact of a homogenous judiciary is especially egregious.⁴⁰ These cases often involve women and minorities who allege discrimination, harassment, or other forms of inappropriate treatment.⁴¹ The problem with granting summary judgment in these cases is that it strips the jury of their fact-finding role and gives exclusive power to the judge to decide issues of fact.⁴² Instead of a potentially diverse pool of jurors who bring varied life experiences and perspectives that may inform them of what constitutes

34. *Id.* at 5 (finding that only 15% of Blacks and 40% of Latinos view court outcomes as always or usually fair).

35. SUP. CT. COMM. ON WOMEN IN THE CTS., SURVEY ON PERCEPTIONS OF RACE AND GENDER IN THE COURTS 22 (2009), https://www.njcourts.gov/public/assets/wic_report.pdf?c=kFY [<https://perma.cc/93PC-7XUE>].

36. *Id.*

37. *Id.*

38. *Id.* at 35.

39. Chen, *supra* note 4, at 1116; Jason Iuliano & Avery Stewart, *The New Diversity Crisis In The Federal Judiciary*, 84 TENN. L. REV. 247, 255–56 (2018).

40. See Williams, *supra* note 3.

41. Williams, *supra* note 3, at 4 (citing EEOC data that shows “[o]f all EEOC charges filed by women, women of color file 56 percent of claims, despite representing only 37 percent of women in the workforce. Further, harassment in the workplace seems to be declining over time for white women, but not for Black women. While claims of harassment filed by white women dropped by about 30% between 1997 and 2017, claims filed by Black women remained stagnant over the same time period”).

42. Williams, *supra* note 3, at 31.

discrimination or harassment, the plaintiff is left trying to convince a single white, male judge who may never have had experienced either in his lifetime.⁴³ That lost perspective is critical because Title VII cases utilize a “totality of the circumstances” and “reasonableness” standards which draw on an individual’s subjective beliefs informed by their lived experiences.⁴⁴ If white males comprise the vast majority of the lived experiences in the judiciary, then plaintiffs end up pleading their case in an environment where the idea of the workplace centers on the white, male experience.⁴⁵

In *Smith v. Illinois Department of Transportation*, the Seventh Circuit dismissed an appeal from a plaintiff who had brought forward a hostile work environment claim, saying that his supervisor called him the n-word among other harassment.⁴⁶ A hostile work environment claim requires a plaintiff to make both an objective and subjective showing.⁴⁷ The objective prong demands the plaintiff show that a “reasonable person” would have found the workplace to be hostile or abusive as a result of the alleged discriminatory behavior.⁴⁸ Remarkably, the court did not even reach the objective prong because they faulted the plaintiff for failing to prove the subjective prong, meaning that the plaintiff himself did not show that the n-word being directed at him changed his subjective workplace experience.⁴⁹ The three-judge panel consisted of two white males and one white female.⁵⁰

This case attracted national attention and outrage once President Trump nominated then-judge Amy Coney Barrett to fill the late Justice Ginsburg’s seat on the Supreme Court as she authored the *Smith* opinion.⁵¹ At her confirmation hearings, Justice Barrett attempted to explain her decision, telling senators that Smith had not tied the use of the n-word to his hostile work environment claim and stressed that the opinion she authored emphasized that it was possible for an individual to establish a hostile work environment via the use of the n-word “if it were pled that way.”⁵² The NAACP took issue with this characterization and pointed out that Smith repeatedly alleged the use of the n-word and incorporated those facts as part of the evidence for his hostile work environment claim.⁵³ As discussed

43. Williams, *supra* note 3, at 28.

44. *Id.* at 28, 30.

45. *Id.*

46. 936 F.3d 554, 561 (7th Cir. 2019).

47. *Id.*

48. *Id.*

49. *Id.*

50. Federal Judicial Center, *Biographical Directory Of Article III Federal Judges, 1789-present: Advanced Search Criteria*, <https://www.fjc.gov/history/judges/search/advanced-search> [https://perma.cc/4HGH-HS9Q] (last visited Apr. 5, 2021).

51. See, e.g., NAACP, *NAACP Condemns Misrepresentation By Amy Coney Barrett On Racial Justice Ruling, Calls For Judiciary Committee To Pursue*, (Oct. 21, 2020), <https://naacp.org/latest/naacp-condemns-misrepresentation-by-amy-coney-barrett-on-racial-justice-ruling-calls-for-judiciary-committee-to-pursue-2/> [https://perma.cc/AZU5-MTKW].

52. *Id.*

53. *Id.*

above, it appeared that the court itself refused to engage in Smith's claims involving the n-word rather than his failure to integrate it into his claim.⁵⁴

Smith's failure to persuade the judges of his claim highlights how judges will examine these Title VII in the "social context" of the workplace when they review both the objective and subjective prongs of the analysis.⁵⁵ The judges' own experiences in their lived social context invites them to make assumptions regarding offensive language and behavior as either satisfying or not satisfying the requirements of Title VII.⁵⁶

III. BENEFITS OF A DIVERSE JUDICIARY

When diversity is present, substantive representation can benefit the judiciary and its judicial outcomes.⁵⁷

A. VIEWPOINT DIVERSITY

It is often uncomfortable to think about judges as being distinct individuals with varying points of view due to their experiences. Society regularly understands judges as neutral arbiters of the law and this understanding has been codified in the Guide to Judiciary Policy, which acts a code of conduct for United States judges.⁵⁸ But in reality, judges are influenced by a variety of factors, just like any other individual.⁵⁹ For example, judges of a particular racial background are likely to be more familiar and empathize better with the reasoning and experiences that are commonly held within the community that they are part of.⁶⁰ Even if they as an individual do not adhere to that particular view, they possess an increased ability to understand and process the merits of those views and apply them to legal principles and frameworks.⁶¹ Of course individual judges cannot be pigeonholed into particular viewpoints solely due to their race or gender.⁶² But the fact remains that simply having diverse judges will surely bring *different* viewpoints than the ones that are commonly shared among white, male judges and the impact can be substantial.⁶³ For example, a systemic study that examined data from judicial decisions on motions while filtering out extraneous data such

54. See *Smith v. Illinois Dep't of Transp.*, 936 F.3d 554 (7th Cir. 2019).

55. Williams, *supra* note 3, at 28.

56. *Id.* at 28–29.

57. See, e.g., Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges' Sex and Race*, 69 POL. RSCH. Q. 786 (2016).

58. GUIDE TO JUDICIARY POL'Y, Vol. 2A, Ch. 2, Canon 3 (Effective Mar. 12, 2019) (stating "A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently").

59. See Iuliano & Stewart, *supra* note 39, at 257.

60. Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 83 N.Y.U. L. REV. 1206, 1229–30 (2006).

61. *Id.*

62. Iuliano & Stewart, *supra* note 39, at 256–57 (acknowledging for example that judicial voting by women as compared to men are quite similar).

63. See Boyd, *supra* note 57, at 795.

as frivolous cases, found that female judges were fifteen percent more likely to rule in favor for a plaintiff alleging discrimination than their male counterparts.⁶⁴ The same study found that Black judges were thirty-nine percent more likely to decide in favor of race discrimination claims than their white counterparts.⁶⁵ Another empirical study found that Black judges rule to support affirmative actions at a rate of ninety percent.⁶⁶

B. THE PANEL EFFECT

But the impact of diverse judges goes beyond their individual decisions, as non-Black judges who sit on a panel with a Black colleague uphold affirmative action plans by eighty percent.⁶⁷ Because circuit panels are assigned randomly, this indicates that having a Black judge on a panel in an affirmative action case has an immense impact on the outcome of the case.⁶⁸ This effect on their fellow judges is called the panel effect.⁶⁹ The panel effect refers to the effect judges can have when they sit on a panel of judges, as often is the case within the circuit courts.⁷⁰ Research into the panel effect has identified multiple ways into which a diverse judge might affect their colleagues.⁷¹ Although the panel effect itself has been extensively documented, there is no one conclusion that explains why the effect occurs.⁷² One theory supported by research suggests that external considerations might be at play when panels deliberate such as how the panelist perceive where their particular circuit court lands on a specific issue in comparison with their own.⁷³ Another theory more closely examined in this Note hypothesizes that the panel effect can be attributed to more internal-facing factors and can be broken down into three components: presence, lobbying and discussion, and vote bargaining.⁷⁴ Presence refers to the idea that simply having a diverse judge on the panel brings the salience of gendered/racial issues that arise in the legal context to the attention of the other judges.⁷⁵ Perhaps even more powerfully, the judges' presence alone may serve as reminder that discrimination and bias do exist within our legal system.⁷⁶ Lobbying and discussion is simply the judges being able to

64. *Id.*

65. *Id.*

66. Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 179 (2013).

67. *Id.*

68. *Id.*

69. See Pauline T. Kim, *Deliberation and Strategy on the United States Court of Appeals: An Empirical Exploration of Panel Effects*, 3rd Annual Conference on Empirical Legal Studies Papers at 4 (2008).

70. Maya Sen, *Diversity, Qualifications, and Ideology: How Female Judges and Minority Judges Have Changed, or Not Changed, Over Time*, WIS. L. REV. 367, 377–79 (2017).

71. *Id.*

72. Kim, *supra* note 69, at 9.

73. *Id.* at 43.

74. Sen, *supra* note 70, at 377.

75. *Id.*

76. *Id.*

discuss and even persuade their non-diverse colleagues to appreciate points of view that they traditionally might not have considered.⁷⁷ Lastly, vote bargaining entails the diverse judge being able to bargain with their vote in attempt to change their colleagues' minds. This effect is especially pronounced if they are the median judge on the three-judge panel, as the other judges tend to tailor their decisions to the median judge's preferences.⁷⁸

It bears reiterating that the explanation for the panel effect remains difficult to pin down and different methodologies offer competing theories.⁷⁹ This Note does not attempt to single out one theory as being superior to any others but focuses in on an internal deliberations theory as it more closely scrutinizes the dynamic between the panelists.

C. EQUAL PROTECTION DOCTRINE

Diversity also plays a role when it comes to equal protection doctrine.⁸⁰ One qualitative study interviewed various judges on the Ninth Circuit and asked how their racial identities impact equal protection jurisprudence.⁸¹ Although the judges were hesitant to directly link their race to their decision making, there was tacit acknowledgement that a judge's identity can play a role and that it can be a positive one.⁸² One judge noted that having diverse judges may allow a broader perspective on whether a comment may be offensive to a particular group because the judges can offer their own experiences with discrimination.⁸³ Another judge explained that her life experiences allow her to approach each case with "an appropriate sense of humility," as she can understand how intimidating our court system can be.⁸⁴ Whether or not judges admit to it publicly, the imprint of one's life experiences is ever present. Put succinctly, Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia Circuit said it is "inevitable that judges' different professional and life experiences have some bearing on how they confront various problems that come before them."⁸⁵

IV. POTENTIAL SOLUTIONS: IDEALS TO STRIVE FOR

Having touched on few reasons why the federal bench benefits from increased diversity, the question then how can that change be realized. One only needs to look at the current *Judicial Model Codes* that govern the judiciary to see how

77. *Id.*

78. *Id.*

79. Kim, *supra* note 69, at 4.

80. See Kristine L. Avena, *Judges of Color: Examining the Impact of Judicial Diversity in the Equal Protection Jurisprudence of the United States Court of Appeals for the Ninth Circuit*, 46 HASTINGS CONST. L. Q. 221 (2018).

81. *Id.*

82. *Id.* at 230.

83. *Id.* at 239.

84. *Id.*

85. Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV 325, 329 (2002).

even the ideals of diversity are lacking.⁸⁶ While focusing on how these codes define and describe diversity may seem superfluous, Ibram X. Kendi eloquently explains why such work is not meaningless: “Definitions anchor us in principles. This is not a light point: If we don’t do the basic work of defining the kind of people we want to be in the language that is stable and consistent, we can’t work toward stable, consistent goals.”⁸⁷

A. JUDICIAL AND MODEL CODES NEED TO EMBRACE AND CHAMPION DIVERSITY

The U.S. judiciary follows the Code of Conduct for United States Judges (“Code”) that “provide[s] guidance to judges and nominees for judicial office.”⁸⁸ But nowhere does the Code mention diversity in the way this Note discusses it, and the Code itself reads more as aspirations rather than strict rules and is neither binding on judges nor does it contain any enforcement mechanisms.⁸⁹ The Code explicitly denies assessing any civil liability or criminal prosecution and qualifies that not every violation should lead to disciplinary action and that the judges “may reasonably differ in their interpretation” of the Code.⁹⁰ The only reference to diversity falls under Canon 2C which speaks to the organizations in which judges may decide to join.⁹¹ Ironically, the Canon states that a judge joining a non-diverse organization by itself does not demonstrate a violation of the Code “unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination.”⁹² Instead of promoting diversity, the Code gives acceptable explanations for actions that may appear to result from discrimination and a lack of diversity.⁹³ The lack of any substantive guidance on diversity within the Code highlights the stark disparity between the understanding of diversity in present day and how it is viewed in the Code. At minimum, the Code should be updated to more forcefully grapple with the issues alluded to in Canon 3 that states that “[t]he judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased.”⁹⁴ The Code should more explicitly outline how sitting judges should strive to take into account their personal biases that may result from their own lived experiences and to be sensitive to the diversity of both plaintiffs and defendants that step into their court rooms.

86. See, e.g., GUIDE TO JUDICIARY POL’Y, Vol. 2A, Ch. 2 (Effective Mar. 12, 2019).

87. IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 17 (2019).

88. GUIDE TO JUDICIARY POL’Y, Vol. 2A, Ch. 2, Canon 1 (Effective Mar. 12, 2019).

89. KEVIN M. LEWIS, CONG. RSCH. SERV., A CODE OF CONDUCT FOR THE SUPREME COURT? LEGAL QUESTIONS AND CONSIDERATIONS 2 (2019).

90. GUIDE TO JUDICIARY POL’Y, *supra* note 88.

91. GUIDE TO JUDICIARY POL’Y, Vol. 2A, Ch. 2, Canon 2C (Effective Mar. 12, 2019).

92. GUIDE TO JUDICIARY POL’Y, Vol. 2A, Ch. 2, Commentary Canon 2C (Effective Mar. 12, 2019).

93. GUIDE TO JUDICIARY POL’Y, Vol. 2A, Ch. 2, Commentary Canon 2C (Effective Mar. 12, 2019).

94. GUIDE TO JUDICIARY POL’Y, Vol. 2A, Ch. 2, Canon 3 (Effective Mar. 12, 2019).

In contrast, the American Bar Association (“ABA”) does a much better job. In its *Model Code of Judicial Conduct*, Canon 2, Rule 2.3, the Rule instructs judges not to manifest bias or prejudice based on a variety of traits such as sex, race, disability, sexual orientation, and socioeconomic status.⁹⁵ While not referring to the diversity of judges themselves, the ABA acknowledges that judges can exhibit biases and reminds them to be conscious of doing so.⁹⁶

The ABA Diversity Action Plan also explicitly embraces the benefits of a diverse judiciary, stating that it believes “. . . diversity in the judiciary in racial and ethnic, gender identity, sexual orientation, age, disabilities and religion is essential to maintaining public trust and confidence in the legal system . . . [and] supports the appointment and election of highly qualified judges in a manner that reflects the diversity of the community.”⁹⁷ The ABA code provides the better framework for future diversity initiatives and should be taken as concrete goals rather than mere aspirations.

But the legal profession should not be satisfied with updating the various language within the various codes. One area where the codes have egregiously failed is ABA Rule 8.4 which governs the misconduct of lawyers.⁹⁸ In particular, Rule 8.4(g) states that professional misconduct includes “. . . harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status. . . .”⁹⁹ Numerous instances have come to light in which a judge’s behavior clearly violated Rule 8.4(g) but no action was taken against the judge.¹⁰⁰ When one female clerk attempted to explain the pervasiveness of sexual harassment, the judge allegedly screamed at the clerk and said she was “just a stupid little girl.”¹⁰¹ In another case, a judge reportedly emailed hundreds of fellow judges and clerks to share his opposition to Senator Elizabeth Warren’s proposal to rename military bases with Confederate origins stating, “It’s important to remember that Lincoln did not fight the war to free the Slaves.”¹⁰² In a remarkable exchange, one Black clerk replied,

95. MODEL CODE OF JUDICIAL CONDUCT, Canon 2, R. 2.3 (2020).

96. MODEL CODE OF JUDICIAL CONDUCT, Canon 2, R. 2.3 (2020).

97. *Diversity Action Plan*, AM. BAR ASS’N., <https://www.americanbar.org/groups/judicial/committees/scdj/diversity-action-plan/> [https://perma.cc/B8Q6-2M32] (last visited Apr. 5, 2021).

98. MODEL CODE OF PROF’L RESPONSIBILITY R. 8.4 (2018).

99. MODEL CODE OF PROF’L RESPONSIBILITY R. 8.4 (2018).

100. *See, e.g.*, Debra Cassens Weiss, *Former Clerk For Late Judge Stephen Reinhardt Alleges Sexual Harassment And ‘Profane Atmosphere’*, ABA JOURNAL (Feb. 13, 2020), <https://www.abajournal.com/news/article/former-reinhardt-clerk-alleges-he-created-sexually-harassed-her-and-created-profane-atmosphere> [https://perma.cc/CF7P-7CH5].

101. *Id.*

102. Ann E. Marimow, *A Judge’s All-Courthouse Email Sparks Debate Over Removal Of Confederate Symbols*, WASH. POST (June 16, 2020, 4:25 PM), https://www.washingtonpost.com/local/legal-issues/a-judges-all-courthouse-email-sparks-debate-over-removal-of-confederate-symbols/2020/06/16/477f58c4-aff3-11ea-8758-bfd1d045525a_story.html [https://perma.cc/WS2V-UJ6U].

... As people considered to be property, my ancestors would not have been involved in the philosophical and political debates about Lincoln's true intentions, or his view on racial equality ... For them, and myself, race is not an abstract topic to be debated ... so in my view anything that was built to represent white racial superiority, or named after someone that fought to maintain white supremacy ... should be removed from high trafficked areas of prominence.¹⁰³

These incidents highlight how the lack of diversity within the judiciary can foster unacceptable behavior and cement it as a norm.¹⁰⁴ Moreover, the lack of any responsibility and transparency renders Rule 8.4 toothless and only via public revelation does there appear to be any discussion on inappropriate conduct. The judiciary has a long way to go before it can claim true accountability.

V. POTENTIAL SOLUTIONS

A. THE BROKEN POLITICAL CONFIRMATION PROCESS

The current confirmation process for Article III judges relies on two political bodies to fill what is supposed to be an apolitical branch of government.¹⁰⁵ Since then-Senator Harry Reid changed the Senate rules to speed up the confirmation of judges, Senator Mitch McConnell has continued to take advantage of the new process, and federal judges are rammed through the confirmation process on an increasingly party line vote.¹⁰⁶ Although any structural change to the confirmation process would require a constitutional amendment¹⁰⁷ and is thus unlikely, the idea of reforming the process that would not require such an amendment should not be abandoned.

For example, the ABA since 1953 has been tasked with reviewing judges based on their professional qualifications, focusing on criteria such as integrity, professional competence, and judicial temperament.¹⁰⁸ Diversity plays no role in the

103. *Id.*

104. See Dylan Hedtler-Gaudette & Darah Turberville, *Sexual Harassment By Judges Operating With Impunity Shows Courts Need Their Own #MeToo*, THE PROJECT ON GOVT OVERSIGHT (Feb. 19, 2020), <https://www.pogo.org/analysis/2020/02/sexual-harassment-by-judges-operating-with-impunity-shows-courts-need-their-own-me-too/> [<https://perma.cc/X9XY-875M>].

105. U.S. CONST. art. II, § 2, cl. 2.

106. See, e.g., Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed On The Federal Courts*, N.Y. TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> [<https://perma.cc/Y9C7-7W68>]; see also Barry J. McMillion, CONG. RSCH. SERV., JUDICIAL NOMINATION STATISTICS AND ANALYSIS: U.S. DISTRICT AND CIRCUIT COURTS 1977-2018 7-8 (2019) (Historically, the number of confirmed judges increases when the President and Senate are from the same party).

107. U.S. CONST. art. V.; see also Brenda Erickson, [*LegisBrief*] *Amending The U.S. Constitution*, 25 NAT'L CONF. STATE LEGISLATURE, (Aug. 2017), <https://www.ncsl.org/research/about-state-legislatures/amending-the-u-s-constitution.aspx> [<https://perma.cc/Y8SW-332C>].

108. McMillion, *supra* note 106, at 25 (although President George W. Bush and President Donald Trump suspended the ABA process at certain points in their presidency).

analysis.¹⁰⁹ The ABA then rates each judge as “well qualified,” “qualified,” or “not qualified,” but their decisions do not bind the Senate in any way.¹¹⁰

One additional step that the ABA could take is to add additional diversity considerations¹¹¹ and perhaps include an additional rating alongside their professional rating. The ABA could analyze whether the judge in question increases, decreases, or keeps the same the statistical change the judge would have on the diversity of Article III judges. For example, if white male judge were nominated by the president, the ABA would examine the current makeup of the federal courts and calculate how the confirmation of this judge would affect it. Given that the judge is both white and male, they would decrease both racial and gender diversity on the courts. If the judge were female and white, she would increase the gender diversity of the courts but decrease it because she is white. If the nominated judge were female and a person of color, then diversity would increase both racially and by gender. The ABA would then release those findings to be considered alongside their professional rating.

The lack of any diversity considerations in the ABA analysis has already had real ramifications. President Joseph Biden has already signaled that they will not include the ABA in the confirmation process for his nominees, with one concern being that the ABA process is “vulnerable to unintentional negative assumptions and racial or gender stereotyping.”¹¹² Should the ABA embrace a more explicit diversity analysis, this could alleviate some of those concerns.

B. PUBLIC EDUCATION NEEDS TO FOCUS ON THE IMPACT OF THE JUDICIARY

Public education needs to be retooled from simply telling the public about the lack of diversity to how increased diversity can affect them. The United States public pays little attention to even some of the most important judicial cases save for a few exceptions.¹¹³ The challenge to the Affordable Care Act (“ACA”), Arizona’s controversial immigration law which required law enforcement to determine people’s immigration status, and the fight for marriage equality are only a few examples of moments when public attention heightened and focused on the role our courts play in society.¹¹⁴ Therefore, public education can serve as

109. *Id.*

110. *Id.*

111. See Laura E. Little, *The ABA’s Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up On the Lawyers?*, 10 WM. & MARY BILL RTS. J. 37, 65–66.

112. Charlie Savage, *Biden Won’t Restore Bar Association’s Role In Vetting Judges*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2021/02/05/us/politics/biden-american-bar-association-judges.html> [<https://perma.cc/ART5-GBHQ>].

113. See Seth Motel, *What Kinds Of Supreme Court Cases Interest Americans? Not Campaign Finance*, PEW RSCH. CTR. (Apr. 10, 2014), <https://www.pewresearch.org/fact-tank/2014/04/10/what-kinds-of-supreme-court-cases-interest-americans-not-campaign-finance/> [<https://perma.cc/JLY2-ZAAF>].

114. *Id.*

a baseline to ensure that people care about and are aware of the very real impact that diverse judges have on their own rights and freedoms.

During the confirmation of Justice Barrett, Democrats utilized this strategy in an attempt to tie her confirmation to the impact on people's everyday lives.¹¹⁵ They hammered home the possibility that millions of Americans could lose their health insurance if she were confirmed.¹¹⁶ Seizing on the popularity of the ACA, Democrats put up poster-sized photographs of Americans who rely on the ACA for their medical coverage, told stories of those who could not afford care before the ACA, and highlighted the dire consequences if it was struck down.¹¹⁷

These strategies can be extrapolated beyond confirmation hearings to the general public. Linking issues more closely to the judiciary can allow more scrutiny into who the decision-makers are. To be clear, this Note does not advocate increasing diversity to achieve certain judicial outcomes, but rather increasing general awareness as to how diversity can play a role in impacting their day-to-day lives as well as the lives of their family, friends, and fellow Americans.

C. OUTREACH TO REPRESENTATIVES & SENATORS ON THE IMPORTANCE OF JUDICIAL DIVERSITY

Outreach to our representatives in Congress could make an impact as well. There is no lack of citizens wanting to engage with members of Congress and there have been moments where the public has rallied when they believe strongly enough on an issue concerning the court.¹¹⁸ Channeling the same interest, organization, and even outrage, the public can lobby their representatives on the important issue of a diverse federal bench and even lobby their senators on certain judicial nominees. A 2009 study surveyed Americans and found that almost half of the respondents had attempted to contact a member of Congress in the last five years.¹¹⁹

The study also found that the Internet plays a significant role in outreach, with respondents using the Internet as a primary source for learning about and communicating with congressional members.¹²⁰ As the use of social media has undoubtedly skyrocketed since 2009,¹²¹ the reliance of the Internet for advocacy has only

115. Tessa Berenson, *On Day One of Amy Coney Barret's Supreme Court Hearing, Democrats Focus On Health Care*, TIME (Oct. 12, 2020, 3:32 PM), <https://time.com/5899129/amy-coney-barrett-supreme-court-hearing-health-care/> [https://perma.cc/4LJU-2ZWA].

116. *Id.*

117. *Id.*

118. *See, e.g.*, Dakin Andone, 'Do You Believe Survivors?' Activists Descend On Washington To Protest Kavanaugh, CNN (Oct. 5, 2018, 12:59 AM), <https://www.cnn.com/2018/10/04/politics/kavanaugh-protests-washington/index.html> [https://perma.cc/94B3-LGTG].

119. *Communicating With Congress How The Internet Has Changed Citizen Engagement*, CONG. MGMT. FOUND. i, vi, https://www.congressfoundation.org/storage/documents/CMF_Pubs/cwc_citizenengagement.pdf [https://perma.cc/83FT-2D7D] (last visited Apr. 5, 2021).

120. *Id.*

121. *See Social Media Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [https://perma.cc/XR3K-XVAF] (finding that in 2005, five percent of American adults used social media but by 2011, seventy-two percent used social media).

increased.¹²² The ABA has published a primer on how to effectively reach out to congressional members and lists social media in its own separate section, highlighting the variety of ways in which citizens can now connect with their representatives.¹²³ A report by the Congressional Management Foundation surveyed House and Senate Communications Directors, House and Senate Legislative Directors, and Legislative Assistants and found that only thirty or fewer comments on a social media post was enough to get an office's attention.¹²⁴ In the present days of gridlock and partisanship, this Note urges the public not to give up on communication with congressional members.

D. ORGANIZATIONAL EFFORTS TO CHAMPION JUDICIAL DIVERSITY

The creation or bolstering of an existing organization that could rival and compete with organizations like the Federalist Society would build a foundation for which further action and advocacy can be continued. The Federalist Society has had a huge influence on the selection and confirmation of Article III judges.¹²⁵

Organizations with opposing viewpoints to the Federalist Society do exist, such as the American Constitutional Society, but their influence pales in comparison and their advocacy has not been nearly as influential.¹²⁶ Several reasons can be attributed to this disparity, such as the Federalist Society's longer history and increased funding from corporate interests.¹²⁷ But the most prominent factor at play stems from the unity in their ideology which centers around an originalist interpretation of the Constitution.¹²⁸ Critics of originalism contend that method of interpretation often leads to adverse outcomes for women and people of color.¹²⁹ The followers of originalism also tend to be white and male.¹³⁰ Without delving into the intricacies of the debate on originalism, it suffices to say here that other modes of constitutional interpretation may bring more diverse viewpoints from more diverse individuals.¹³¹ The opponents of the Federalist

122. See Nina Hall & Phil Ireland, *Transforming Activism: Digital Era Advocacy Organizations*, STAN. SOC. INNOVATION REV. (July 6, 2016), https://ssir.org/articles/entry/transforming_activism_digital_era_advocacy_organizations [<https://perma.cc/6QPH-279N>].

123. AM. BAR. ASS'N, *How To Lobby Congress Online*, (Mar. 31, 2021), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/march-2021-wl/digital-advocacy-0321wl/ [<https://perma.cc/97AP-LDFP>].

124. #SocialCongress 2015, CONG. MGMT. FOUND., <https://www.congressfoundation.org/projects/communicating-with-congress/social-congress-2015> [<https://perma.cc/A7TX-9SPH>] (last visited Apr. 5, 2021).

125. Caroline Fredrickson & Eric J. Segall, *Trump Judges Or Federalist Society Judges? Try Both*, N.Y. TIMES (May 20, 2020), <https://www.nytimes.com/2020/05/20/opinion/trump-judges-federalist-society.html> [<https://perma.cc/439U-WGC3>].

126. See Evan Mandery, *Why There's No Liberal Federalist Society*, POLITICO MAG. (Jan. 23, 2019), <https://www.politico.com/magazine/story/2019/01/23/why-theres-no-liberal-federalist-society-224033> [<https://perma.cc/454Z-WXUZ>].

127. *Id.*

128. *Id.*

129. See Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 383 (2018).

130. *Id.* at 391, 402.

131. *Id.* at 392 (theorizing that diverse individuals would bring their own biases, life experiences, and expectations to constitutional interpretation and result in varied conclusions).

Society have struggled to come up with an analogue and makes it difficult to relay an easily digestible message.¹³²

The creation or refocusing of an organization on the issue of the federal judiciary may serve as the most effective way to increase diversity. Instead of trying to counter the Federalist Society's ideological mission with one of their own, counter organizations should rally around the diversity of judges and how they can bring more varied, fair, and just perspective to the federal judiciary.

CONCLUSION

Many believe that diversity and diverse representation are inevitable and point to demographic trends showing increased diversity or a number of high-profile women and people of color in an attempt to show that if we wait, diverse representation will undoubtedly take hold.¹³³ But the federal judiciary has demonstrated that diverse representation can just as easily slide backwards in the face of a diversifying world.¹³⁴ Diverse representation within the federal judiciary leads to not just a diversity of bodies but a diversity of ideas. Those ideas translate to judicial opinions which touch on the lives of the everyday individuals. Standing idly by waiting for diverse representation will not suffice to achieve the goals outlined here. Purposeful, goal-oriented strategies and reforms can more effectively achieve the diversity that is due within the federal judiciary.

132. Mandery, *supra* note 126.

133. *But see* Vincent L. Hutchings, *Change or More of The Same? Evaluating Racial Attitudes in the Obama Era*, 73 PUB. OP. Q. 917 (2009); David Cotter, Joan M. Hermsen, & Reeve Vanneman, *The End of the Gender Revolution? Gender Role Attitudes from 1977 to 2008*, 117 AM. J. SOCIO. 259 (2011).

134. *See* AM. CONST. SOC'Y, *supra* note 8.