

## JUDICIAL DIVERSITY: WHERE INDEPENDENCE AND ACCOUNTABILITY MEET

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*A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice . . . . Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so.*

—Justice Anton Scalia<sup>1</sup>

### I. INTRODUCTION

Unquestionably, the subject of judicial selection continues to be a hot topic for legal forums, bar journals, and law reviews. The challenge continues to be how to balance the competing interests of judicial independence and judicial accountability. For while judicial independence connotes an institutional immunity from inappropriate extra-legal pressures in the decisionmaking process, judicial accountability seeks to comport with the democratic ideal of responsiveness to public opinion. Thus, in the federal system, lifetime tenure and salary protection are said to enhance judicial independence, whereas in thirty-nine states, popular elections (partisan, non-partisan, and retention) are thought to further the aim of judicial accountability.

This article makes the argument that in a diverse society, the ideals sought by the independence/accountability dichotomy are dependant upon and subsumed by the attainment of judicial diversity. Fundamentally, judicial independence is predicated on an impartial judge, and judicial accountability is predicated on

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<sup>1</sup> Republican Party v. White, 536 U.S. 765, 777–78 (2002).

notions of popular representation. In the absence of diversity, the goals of obtaining an impartial and representative judiciary are credibly challenged.

As Justice Scalia stated for the majority in *Republican Party v. White*, lack of judicial predisposition is neither desirable, nor possible. Taking that statement as true, it seems evident that a judge's predisposition is inextricably bound to the judge's racial, gender, and ethnic experience. Likewise, a judge's representative capacity is contingent on the ability to hear, understand, and articulate diverse views. Thus, without substantive ideological and narrative judicial diversity, any discussion touting the relative advantages to accountability or independence of elective or appointive judicial selection methods is largely irrelevant. As Deborah Goldberg, Director of the Brennan Center's Democracy Program, notes "[w]hether judicial diversity will be helped or harmed by a movement to non-elective systems is . . . unclear."<sup>2</sup> It is clear, however, that efforts to obtain a diverse bench, whether in a system of merit selection or popular election, foster the complementary interests of judicial independence and judicial accountability.

## II. THE FORCED DICHOTOMY OF INDEPENDENCE AND ACCOUNTABILITY

In the legal literature, judicial independence and judicial accountability are at war.<sup>3</sup> According to this collective history, a fundamental conundrum in our constitutional republic is the method of creating a judicial branch that is both sufficiently insulated from republican concerns—to remain faithful to the

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<sup>2</sup> *State Judicial Selection Methods and Their Impact on Diversity on the Bench: Hearings Before the Coalition of Bar Associations of Color* 2 (2003) (testimony of Deborah Goldberg, Acting Director, Democracy Program Brennan Center for Justice at NYU School of Law), available at [http://www.brennancenter.org/resources/downloads/CBAC\\_Testimony.pdf](http://www.brennancenter.org/resources/downloads/CBAC_Testimony.pdf) (last visited Apr. 16, 2004). Accord Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 741 (2002) (discussing contemporary research revealing that there is "no evidence that women and minorities are more likely to become state appellate judges under merit systems than they are under non-merit systems").

<sup>3</sup> See, e.g., Alex B. Long, "Stop Me Before I Vote for This Judge Again": *Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges*, 106 W. VA. L. REV. 1, 14 (2003) (conceding that "[t]he arguments for and against each selection method have been repeated ad nauseam in academic literature"); Judicial Elections White Paper Task Force, *The Case for Partisan Judicial Elections*, 33 U. TOL. L. REV. 393, 396 (2002) (noting that "[t]he choice between appointment and election is often presented as a choice between judicial independence and judicial accountability").

Constitution—and democratically accountable. This section will describe this groundwork in anticipation of a discussion of judicial diversity.

### A. *Judicial Independence*

Judicial independence is a foundational principle of our Constitution. The two structural arguments for its importance are straightforward. First, in a constitutional republic the judiciary must be independent from the other branches of government. The Constitution serves as the sovereign will of the people: the Constitution is the definition of government.<sup>4</sup> Thus, as often noted, the executive and legislative branches are precluded from acting in the absence of an express or implied constitutional grant of authority. In this system of government, the judiciary is a constitutional priesthood loyal to the sovereign will—the Constitution—in the face of majoritarian excess, executive encroachment, and legislative self-aggrandizement.<sup>5</sup> Although, seemingly, it is counterintuitive to ordain the sovereign will at the expense of the popular will, this is central to a constitutional republic: constitutional guarantees are empty if subordinated to extraconstitutional passions.<sup>6</sup> Thus, judicial independence “advances democracy by ensuring that the majority’s long-term,

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<sup>4</sup> See THE FEDERALIST No. 45 (James Madison); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (explaining that the people’s “original and supreme will organizes the government, and assigns, to different departments, their respective powers”).

<sup>5</sup> Admittedly, the members of the executive and legislative branches take an oath to protect the Constitution. See, e.g., U.S. CONST. art. II, § 1, cl. 7 (Presidential oath); U.S. CONST. art. VI, cl. 3 (constitutional basis for congressional oath); 5 U.S.C. § 3331 (2004) (statutory language). However, the strong incentive for the executive and legislator to curry favor with the electorate (the popular will) has a documented and deleterious effect on their fidelity to the sovereign will. See, e.g., Frank J. Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1354 (1994) (accepting “that ignoring constitutional issues in either the Congress or White House is [not] anything new”). But cf. Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 275 (1995) (arguing that the safeguard of judicial review, in a circular sense, is a root cause for executive and legislative ambivalence to constitutional norms).

<sup>6</sup> A few scholars have argued that state judges require less independence than federal judges. See, e.g., Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DEN. UNIV. L. REV. 65, 68 (2001) (suggesting that “state judges may not require the same degree of independence as federal judges because most civil rights cases are brought in federal court not state court”). However, state judges take an oath to enforce the federal constitution. U.S. CONST. art. VI, cl. 3. Furthermore, in theory, Congress could abolish lower federal courts, which would effectively transfer all federal causes of action to state trial courts. See Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 972 (1996).

constitutive values are represented in the heat of the moment.”<sup>7</sup>

Second, judicial independence is predicated on a neutralizing distance between the judge and the legal dispute. Judicial impartiality is not an abstract notion for litigants. For instance, at the time of this country’s founding, the Declaration of Independence expressly complained of the judiciary’s bias for the crown, lamenting that King George III had “made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.”<sup>8</sup> Thus, under our federal scheme, judicial independence is attained by insulating judges from electoral pressure;<sup>9</sup> indeed, federal judges need not fear losing their jobs or salaries even if their decisions contravene the popular will as expressed in congressional statutes, presidential orders, the press, and/or mass demonstrations.

For proponents of judicial appointments, judicial impartiality in the adjudicative process is the most important aspect of judicial independence. Impartiality is the rule of law. In the words of Supreme Court Justice Anthony M. Kennedy: “The law makes a promise of neutrality. If the promise gets broken, the law as we know it ceases to exist. All that’s left is the dictate of a tyrant, or perhaps a mob.”<sup>10</sup>

### B. *Judicial Accountability*

Throughout the last two centuries,<sup>11</sup> the judiciary’s (hypothetical) ambivalence to the popular will<sup>12</sup> has ignited the populist argument

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<sup>7</sup> Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 767 (1995).

<sup>8</sup> THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

<sup>9</sup> See U.S. CONST. art. III, § 1 (establishing the tenure of federal judges); THE FEDERALIST No. 78 (Alexander Hamilton).

<sup>10</sup> STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS, at vi (July 2001) (quoting Justice Anthony Kennedy, Speech at the ABA Symposium on Judicial Independence), available at <http://news.findlaw.com/hdocs/docs/aba/abajudfinrpt072001.pdf> (last visited Apr. 12, 2004).

<sup>11</sup> For a summary of the deliberative ebb and flow in the judicial appointments versus judicial elections debate, see Kelley Armitage, *Denial Ain’t Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625, 628–37 (2002).

<sup>12</sup> For almost a half-century scholars have documented the strong majoritarian tendencies of Supreme Court decisions. See, e.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293 (1957) (noting that “the Supreme Court is inevitably a part of the dominant national alliance”); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 96 (1993) (finding

that the judiciary's electoral insulation is antithetical to democracy: a remnant of entrenched British aristocracy.<sup>13</sup> A recent article by Pennsylvania's AFL-CIO leadership crystallizes this argument:

[T]he merit selection (political appointment) process [is] a wonderful public relations gimmick for disguising a power shift from the people to an elite crew—a completely undemocratic process that empowers non-elected lawyers and others to select judges with little or no accountability to the people. Our democratic tradition is built on the right to vote and those who seek to abolish that right should be required to meet a heavy burden of overwhelming evidence. If the issue is close it ought to be resolved in favor of this precious right. Not to value this fundamental right highly would present a serious erosion of our democratic form of government.<sup>14</sup>

Furthermore, the proponents of judicial accountability argue that judges are *de facto* political actors. “According to them, judges make policy daily . . . . [and,] with respect to some matters, judges have more political power than legislators, because they have the ability to thwart the will of the majority.”<sup>15</sup> For these scholars, the power of judicial review, coupled with the judiciary's lack of electoral accountability, “threatens the concept of representative democracy.”<sup>16</sup> These arguments have proven successful: thirty-nine states have chosen, through constitutional convention, amendment, or otherwise, to use election as a method of selecting appellate judges.<sup>17</sup>

### C. An Escalation in Hostilities

In the wake of the Supreme Court's decision in *Republican Party v. White*, the tensions between the proponents of judicial appointment and judicial election reached a crescendo. In *White*, the Supreme Court held that the thirty-nine states electing their

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that “a reciprocal relationship appears to . . . exist[ ] between the ideology of the public mood in the United States and the broad ideological tenor of Supreme Court decisions”).

<sup>13</sup> See James Andrew Wynn, Jr., *Judging the Judges*, 86 MARQ. L. REV. 753, 763–64 (2003).

<sup>14</sup> Julius Uehlein & David H. Wilderman, *Why Merit Selection is Inconsistent with Democracy*, 106 DICK. L. REV. 769, 769 (2002).

<sup>15</sup> Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 10 (1995).

<sup>16</sup> Armitage, *supra* note 11, at 642.

<sup>17</sup> Justice at Stake Campaign, *States with Elections* (2004), at <http://faircourts.org/files/StateswithElections.pdf> (last visited Apr. 12, 2004). Of course, the election form varies from partisan and non-partisan to mere retention elections.

judiciary were precluded from prohibiting judges from announcing their views on disputed legal and political issues. Some interpret this holding to mean that states may not make distinctions between the campaign speech of judges and other politicians.<sup>18</sup> Implicitly, this means that in the states with judicial elections, in addition to announcing their views, judges may also pledge their support for controversial issues ranging from abortion, the death penalty, and medical malpractice liability caps.<sup>19</sup> Thus, under an expansive interpretation of *White*, judicial elections are perceived by some to overtly attack the impartiality and separation of powers considerations of judicial independence—at least as historically conceived. This transformation of judicial elections into a form indistinguishable in cost, rhetoric, and partisanship from executive and legislative elections has led many scholars, judges, and court-watchers to condemn the Supreme Court and call for the dismantling of the elective system in favor of judicial merit selection.<sup>20</sup> Of course, advocates of judicial elections note that federal judicial appointments are a modern prisoners' dilemma<sup>21</sup>—lest we forget Fortas, Bork, and Estrada.<sup>22</sup>

### III. JUDICIAL DIVERSITY, INDEPENDENCE, AND IMPARTIALITY

The arguments for judicial appointments are invariably juxtaposed against the danger judicial elections pose to impartiality. Consider, for example, the following analogy:

Umpires are the trial court judges of the baseball diamond. Now imagine if umpires were elected and forced to fundraise. Like lawyers, major league baseball players would have a vested interest to contribute money to the campaigns. Now,

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<sup>18</sup> See Erwin Chemerinsky, *Supreme Court Review*, 51 U. KAN. L. REV. 269, 286 (2003).

<sup>19</sup> See *Pennsylvania: Judicial Elections Get a Little Looser*, EYES ON JUST. (Justice at Stake Campaign, Wash. D.C.), Dec. 17, 2003, available at <http://www.faircourts.org/files/EyesonJusticeDec17.pdf> (last visited Apr. 12, 2004); see also Adam R. Long, *Keeping Mud Off the Bench: The First Amendment and Regulation of Candidates' False and Misleading Statements in Judicial Elections*, 51 DUKE L.J. 787, 788-89 (2001) (noting the increased number of attack advertisements in judicial elections that negatively depict the views of opposing candidates).

<sup>20</sup> See, e.g., Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273 (2002) (criticizing the current state of affairs in judicial elections—in spite of efforts to reform campaign finance and provide certain checks on campaign speech—and recommending that states shift to an appointive system).

<sup>21</sup> See Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667 (2003).

<sup>22</sup> See Gerald Walpin, *Take Obstructionism Out of the Judicial Nominations Confirmation Process*, 8 TEX. REV. L. & POL. 89, 94-96, 100-03 (2003).

let us say your favorite player came to bat and was called out on a questionable third strike. How much confidence would you have in that call if you knew, or later discovered, that the pitcher gave \$10,000 to that particular umpire's election campaign?<sup>23</sup>

To be sure, the simplicity of this analogy implies impartiality is derivative of financial independence. Nonetheless, familiarity is the bedfellow of bias: judicial decisionmaking is subject to being underinclusive when the decision-makers lack diversity.

Indeed, the American judiciary is disproportionately white and male.<sup>24</sup> These white men disproportionately make judgments affecting African-Americans, women, and other minorities.<sup>25</sup> Scholars have detailed how this disparity between the judges and the judged creates a crisis of legitimacy because our courts are perceived by much of the public as biased "instruments of oppression."<sup>26</sup> More important than a perception of bias, however, is that the absence of diversity creates (in fact) a judicial partiality to the values and stories of the groups overrepresented—white men—

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<sup>23</sup> Wynn, *supra* note 13, at 760; *see also* Behrens & Silverman, *supra* note 20, at 276 (arguing that "[a]ppointive systems are not subject to the problems inherent to an elected judiciary [such as] the appearance of impropriety caused by judges taking money from those who appear before them [and] the threat to judicial independence resulting from a judge's dependence on campaign contributions and party support"); Thomas R. Phillips, *Comment*, 61 LAW & CONTEMP. PROBS. 127, 136–37 (1998) (noting the concern that judicial campaign contributions will render judges unable to resist the difficulties that a judge faces through friendships and associations that come before the court).

<sup>24</sup> *See, e.g.*, Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CAL. L. REV. 1109, 1111–14 (2003) (detailing the statistically significant absence of minority judges in the California and federal judiciaries). Although racial, ethnic, and gender diversity in the judiciary is accelerating, neither the state nor federal judiciary is as diverse as our society. As of 1997, the research revealed that only 3.8% of state court judges and only six percent of federal judges were African-American. *See* Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 95, 99 n.19 (1997) [hereinafter Ifill, *Judging the Judges*]. Similarly, research indicated that, as of 1999, only two percent of state courts judges were Hispanic. *See* Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84, 89 (2001). Furthermore, only twenty percent of the federal judiciary, and twenty-six percent of the state judiciary, were comprised of women. *See* Commission on Women in the Profession, American Bar Association, *Current Glance of Women in the Law* (2001), available at <http://www.abanet.org/women/glance.pdf> (last visited Apr. 12, 2004); *see also* Susan Maloney Smith, *Diversifying the Judiciary: The Influence of Gender and Race on Judging*, 28 U. RICH. L. REV. 179, 179–82 (1994) (detailing the statistically significant absence of women on state judiciaries).

<sup>25</sup> *See* Smith, *supra* note 24, at 189; Kenneth L. Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957, 1957 (1988).

<sup>26</sup> Todd D. Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 GEO. WASH. L. REV. 173, 176 (1996); *see also* Ming W. Chin, *Fairness or Bias: A Symposium on Racial and Ethnic Composition and Attitudes in the Judiciary*, 4 ASIAN L. J. 181 (1997) (discussing the perception of bias).

in its midst. Although the vast majority of white male judges are not repositories of racial animus, one commentator notes that they are, nevertheless, “steeped in and bound by narratives which appear not to be narratives at all because they are cloaked in the transparency of whiteness.”<sup>27</sup>

Intuitively, it might seem that the problem of racial bias in the judiciary is best addressed by promoting judicial independence in general, rather than judicial diversity in particular. For instance, if we achieve an independent bench why do we need a diverse bench? Will not an independent judiciary adjudicate without reference to prejudice? Furthermore, and inversely, by actively seeking a diverse bench will we not impair the judiciary’s independence? For what does diversity mean, what is the value of diversity, if it does not represent some form of affirmative partiality, prejudice, or understanding to dependent variables?<sup>28</sup>

However, as Justice Scalia notes in *Republican Party v. White*, judicial impartiality is not predicated on the empiricist notion of a “*tabula rasa*.”<sup>29</sup> Judges are not born and reared in isolation. Rather, judges, like the rest of us, are the product of historical

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<sup>27</sup> Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH & LEE L. REV. 405, 469 (2000) [hereinafter Ifill, *Racial Diversity on the Bench*]. Cultural narratives are “the stories that are familiar in our culture; stories about how things happen and how things are.” *Id.* at 439 (quoting Peggy Cooper Davis, *The Proverbial Woman*, 48 REC. ASS’N B. CITY N.Y. 7, 11 n.15 (1993)). These narratives represent the collective memory, and social and political realities of community. Cultural narratives function at a deep psychological level because they “contain the accumulated historical account of that community’s relationship to other communities and express the community’s values.” Ifill, *Racial Diversity on the Bench*, *supra*, at 439. Invariably, cultural narratives are divided into “master narratives” and “counter-narratives.” Master narratives are not often recognized as narratives—instead a master narrative is the internalized norms of the community as expressed in law and mores. Counter-narratives are the narratives of marginalized groups, like African-Americans and women, which create “different perspectives” generally unavailable to “groups outside that particular [realm of] experience and reality.” D. Soyini Madison, *Oral Narratives Performance, and Black Feminist Thought*, in EXCEPTIONAL SPACES: ESSAYS IN PERFORMANCE AND HISTORY 319, 338 (Della Pollock ed., 1998). These narratives “represent a piece of a greater body of understanding largely unspoken and unheard.” Rivka S. Eisner, *And so There are Pieces: Cuttings from the Life-Memories of a Daughter of Vietnam* (2002) (unpublished Masters thesis, University of North Carolina) (on file with authors). However, as Dr. Madison notes, “[t]o argue that black women create distinct theories and interpretations is not to essentialize black women as on monolithic group,” but rather, to recognize “the fact that black women live a shared history.” Madison, *supra*, at 338.

<sup>28</sup> See MODEL CODE OF JUDICIAL CONDUCT, TERMINOLOGY (2003) (“‘Impartiality’ or ‘impartial’ denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.”), available at <http://www.abanet.org/judind/judicialethics/amendments.pdf> (last visited Apr. 12, 2004).

<sup>29</sup> *Republican Party v. White*, 536 U.S. 765, 778 (2002).

circumstance, personal experience, and accidents. As Justice Cardozo wrote, “[t]he great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.”<sup>30</sup> Thus, judicial impartiality is not the absence of experience but rather the presence of human experience coupled with an open mind. Accordingly, in our pursuit to attain an independent and impartial judiciary, we cannot escape the reality—and consequences—that each judge brings to the bench a sum of life experience.

In American society, life experience and perception are inextricably bound to race, ethnicity, and gender. For example, a vast array of empirical research demonstrates a racial divide on issues as divergent as discrimination,<sup>31</sup> taxes,<sup>32</sup> and the size of the federal government.<sup>33</sup> Although African-Americans are certainly not a monolithic block, Leslie Espinoza and Angela Harris have argued that the African-American experience transcends social class and status because wealthy “as well as poor black people are unable to catch taxis at night, are stopped by the police, and suffer from random racist violence.”<sup>34</sup> For Kenneth Karst, these social conditions produce an African-American perspective that is not “just different points of view” but “different realities, [and] different worlds.”<sup>35</sup>

Judges are not immune from perceptions shaped by race and gender. Kevin Lyles’s 1997 study revealed that eighty-three percent of Caucasian judges believed African-American litigants were treated fairly by the criminal justice system, whereas only eighteen percent of African-American judges held this same belief.<sup>36</sup>

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<sup>30</sup> BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

<sup>31</sup> See *An American Dilemma*, 7 *PUB. PERSP.* 19, 20 (Feb.–Mar. 1996) (revealing that sixty-eight percent of African-Americans, as compared to thirty-eight percent of Caucasians, believe racism is a big problem).

<sup>32</sup> *Id.* at 19 (indicating that sixty-six percent of African-Americans are willing to pay more taxes for more services as compared to thirty-five percent of Caucasians).

<sup>33</sup> See Andrea Stone, *Politics of Race Taking on More Subtle Shades*, *USA TODAY*, Nov. 2, 1994, at 8A (contending that African-Americans stand alone in their desire for an expansive federal government), available at 1994 WL 11072652.

<sup>34</sup> Leslie Espinoza & Angela P. Harris, *Afterward: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 *CAL. L. REV.* 1585, 1601 (1997); see also Ifill, *Racial Diversity on the Bench*, *supra* note 27, at 419–22 (2000) (discussing and synthesizing previous work on the shared identity of African-Americans).

<sup>35</sup> Karst, *supra* note 25, at 1957.

<sup>36</sup> KEVIN L. LYLE, *THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS* 237 (1997); see also Harry T. Edwards, *Race and the Judiciary*, 20 *YALE L. & POL’Y REV.* 325, 328 (2002) (noting that “the long history of racial discrimination and segregation in American society” makes it “safe to assume that a disproportionate number of black [judges]

Likewise, Elaine Martin's survey reveals that eighty-one percent of female judges describe sex discrimination as a major problem in the law, whereas only 18.5% of male judges express the same concern for *any* race, gender, or class based bias.<sup>37</sup> Moreover, these racialized and genderized judicial views have a demonstrable impact on case outcomes. For instance, Professor Nancy Crowe's extensive study of race and sex discrimination cases decided by the United States Courts of Appeals between 1981 and 1996 reveals that women and African-American judges are significantly more likely to rule in favor of discrimination plaintiffs than white male judges.<sup>38</sup> This data is not surprising, for as one scholar notes, "when Sandra Day O'Connor became the first woman Supreme Court Justice, she probably did not forget that when she graduated at the top of her Stanford Law School class in 1952, she was offered a job as a legal secretary."<sup>39</sup>

In recognizing that racial, ethnic, and female experiences create unique lenses of perception, Professor Ifill implores us not to forget that "whiteness' is a constructed group identity as well."<sup>40</sup> This is particularly salient in any discussion of judicial impartiality, because an "elusive benefit of white racial identity is the . . . ability to think of oneself . . . as neutral, unbiased, or impartial."<sup>41</sup> Thus, we need not "condemn wholesale black judges as biased, or condemn wholesale white judges as racist," but it is essential that we

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grow up with a heightened awareness" of the racial issues related to equal protection, discrimination, and the criminal law).

<sup>37</sup> Elaine Martin, *Men and Women on the Bench: Vive la Difference?*, 73 JUDICATURE 204, 207 (1990). Accord Kimberly A. Lonsway et. al, *Understanding the Judicial Role in Addressing Gender Bias: A View from the Eighth Circuit Federal Court System*, 27 L. & SOC. INQUIRY 205, 216-19 (2002) (finding that female judges are more likely than male judges to observe and report instances of gender-related incivility directed at women). Furthermore, Lonsway's study reveals that eighty percent of female judges in the Eighth Circuit, as compared to 32.5% of male judges, report experiencing incivility directed at them from fellow judges. *Id.*

<sup>38</sup> Nancy E. Crowe, *Diversity on the Federal Bench: The Effects of Judges' Sex and Race on Judicial Decision Making on the U.S. Court of Appeals, 1981-1996* (1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with authors); see also Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 606 (2003) (discussing Crowe's study). But see Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137 (2000) (discussing research indicating that the race and gender of the adjudicator is statistically insignificant to decisionmaking), available at 2000 WL 23474691.

<sup>39</sup> Smith, *supra* note 24, at 183.

<sup>40</sup> Ifill, *Racial Diversity on the Bench*, *supra* note 27, at 423.

<sup>41</sup> *Id.* at 424; see also Barbara J. Flagg, "Was Blind But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (describing how society regards whiteness as a transparency).

recognize that the race, gender, and minority experience in America “makes a difference in how judges develop a ‘sense of justice.’”<sup>42</sup>

In *Republican Party v. White*, Justice Scalia—speaking for the Supreme Court—aptly notes that the root meaning of “‘impartiality’ in the judicial context . . . is the lack of bias for or against either party to the proceeding.”<sup>43</sup> At the same time that Justice Scalia concedes that “it is virtually impossible [and undesirable] to find a judge who does not have preconceptions about the law,”<sup>44</sup> he recognizes that the fundamental guarantee of impartiality is “that the judge who hears *his* case will apply the law to *him* in the same way *he* applies it to any other party.”<sup>45</sup> However, if the experience of race and gender influence perception, and perception influences judicial decisionmaking, then a lack of diversity in the judiciary creates a structural bias—a partiality—which is biased against counter-narratives. Thus, for example, the Supreme Court has endorsed the view that the Fourteenth Amendment and Sixth Amendment require structural impartiality in a jury venire.<sup>46</sup> According to the Court in *Taylor v. Louisiana*, the systematic exclusion of women from the jury panel violated the Sixth Amendment’s fair-cross-section requirement.<sup>47</sup> The *Taylor* Court believed that “[t]he broad representative character of the jury . . . [is an] assurance of a diffused impartiality.”<sup>48</sup> Similarly, judicial “[d]iversity promotes impartiality by ensuring that no one viewpoint, perspective, or set of values can persistently dominate legal decision making.”<sup>49</sup>

Judicial independence and judicial impartiality are co-existing dependant concepts. In rendering impartial decisions, judges are required “to rely upon their knowledge, experience and sense of justice.”<sup>50</sup> However, empirical research demonstrates that a judge’s knowledge and sense of justice are “hemmed in, to a certain extent, by life experiences.”<sup>51</sup> The life experiences of judges are

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<sup>42</sup> Ifill, *Racial Diversity on the Bench*, *supra* note 27, at 469.

<sup>43</sup> *Republican Party v. White*, 536 U.S. 765, 775 (2002).

<sup>44</sup> *Id.* at 777–78.

<sup>45</sup> *Id.* at 776 (emphasis added).

<sup>46</sup> *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 530–31 (1975).

<sup>47</sup> *Id.* at 531.

<sup>48</sup> *Id.* at 530 (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

<sup>49</sup> Ifill, *Judging the Judges*, *supra* note 24, at 120.

<sup>50</sup> Ifill, *Racial Diversity on the Bench*, *supra* note 27, at 432–33.

<sup>51</sup> Beiner, *supra* note 38, at 617.

overwhelmingly white, male, and affluent.<sup>52</sup> This homogeneity poses a significant challenge for a judicial system that disproportionately passes judgment on issues affecting African-Americans, women, and other minorities.<sup>53</sup> Ultimately, “the finding and evaluation of facts [as well as legal predispositions, are] affected by our judges’ lack of connection with the judged.”<sup>54</sup> Without diversity, affluent white males have an onerous and lonely challenge to articulate the stories and life narratives of African-Americans alleging police brutality, women claiming sexual harassment, and Native Americans demanding greater autonomy, just to name a few.<sup>55</sup>

If impartiality is the heart and soul of the merit-selection movement, then proponents of judicial appointment must address the enduring home-field advantage of affluence, whiteness, and manhood in the American judiciary.

#### IV. JUDICIAL DIVERSITY, REPRESENTATION, AND ACCOUNTABILITY

The proponents of judicial elections invariably cast judicial appointments as a mechanism for elite entrenchment, threatening representative democracy.<sup>56</sup> For these scholars, the awesome power of judicial review to thwart popular will is antithetical to democracy because judicial appointment is accomplished by elites and special interests. In this vein, Judge Learned Hand questioned the democratic legitimacy of an unelected judiciary’s policymaking:

For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least

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<sup>52</sup> See *supra* note 24 and accompanying text.

<sup>53</sup> See *supra* note 25 and accompanying text..

<sup>54</sup> Karst, *supra* note 25, at 1962.

<sup>55</sup> See, e.g., A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028, 1041 (1993) (arguing that “[t]he danger of a homogenous court is that there is no ‘outsider’ within the court to challenge the biases the dominant group accepts as ‘self-evident’ truths”).

<sup>56</sup> See, e.g., Uehlein & Wilderman, *supra* note 14, at 769; Webster, *supra* note 15, at 16 n.78 (noting that the proponents of election view appointments “not simply [as] undemocratic but essentially anti-democratic . . . [T]he [appointed] judges represent[ ] everything that the old order had been—elitism, corruption, arrogance.”); Lawrence Landskroner, *An Unmeritorious Way to Select Judges*, PLAIN DEALER (Cleveland), Jan. 29, 1994, at 7B (arguing that the advocates of judicial appointment “assume that the voting public is incapable of selecting qualified judges” and that “[t]his is a dangerous and undemocratic premise that would place the selection of judges in the hands of a privileged few”), available at 1994 WL 7222966.

theoretically, some part in the direction of public affairs. Of course, I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.<sup>57</sup>

Like Judge Hand, the proponents of judicial elections are unwilling to permit a politically unaccountable branch of government to “light the way to a saner world.”<sup>58</sup>

The populist argument for judicial election is winning. In America’s state courts, eighty-seven percent of appellate and trial judges are selected in an elective system.<sup>59</sup> This success has magnified the representative function of the judiciary. To this end, the Supreme Court has held that elected judges are subject to the Voting Rights Act,<sup>60</sup> serve representative functions,<sup>61</sup> and affect issues of public importance.<sup>62</sup> Most notably, in *Republican Party v. White*, the Supreme Court expressly found that “the difference between judicial and legislative elections” is exaggerated.<sup>63</sup> Although the *White* Court conceded that the “complete separation of the judiciary from the enterprise of ‘representative government’ might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature,” the Court held that this was “not a true picture of the American system” because “state-court judges possess the power to ‘make’ common law” and “the immense power to shape the States’ constitutions as well.”<sup>64</sup> In the wake of these statistics and decisions, it is apparent to Luke Bierman that there is a “lack of momentum for merit selection.”<sup>65</sup>

Despite the populist success, the Supreme Court’s ringing endorsement, and the failure of legitimate alternatives, judicial elections have not produced the *sine qua non* of accountability: community representation. Elected state judiciaries are less diverse

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<sup>57</sup> LEARNED HAND, THE BILL OF RIGHTS 73–74 (1958).

<sup>58</sup> *Id.* at 70.

<sup>59</sup> See NATIONAL CENTER FOR STATE COURTS, CALL TO ACTION: STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION 7 (expanded ed. 2002), available at [http://www.ncsconline.org/D\\_Research/CallToActionCommentary.pdf](http://www.ncsconline.org/D_Research/CallToActionCommentary.pdf) (last visited Apr. 13, 2004).

<sup>60</sup> See *Chisom v. Roemer*, 501 U.S. 380, 383–84 (1991).

<sup>61</sup> See *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973).

<sup>62</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 466–67 (1991).

<sup>63</sup> *Republican Party v. White*, 536 U.S. 765, 784 (2002).

<sup>64</sup> *Id.*

<sup>65</sup> Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 853 (2002).

than their appointed federal counterparts.<sup>66</sup> This lack of diversity has direct and deleterious impacts on the success of minority litigants, the representative function of the elected judiciary, and, most importantly, the quality of judicial decisionmaking.

On the trial court level, judging is substantially a discretionary affair and “the art of judging begins with the portrayal of the facts.”<sup>67</sup> As Jerome Frank recognized a half-century ago, the entire criminal and civil justice system, from the trial to every appellate level, is predicated on the “uncontrollable power [of trial judges] to choose the facts . . . to believe one witness rather than another.”<sup>68</sup> In this fact-finding process, “judges . . . function as representatives” and “articulate, engage and affirm the [familiar] narratives . . . [that] they share with their constituent communities.”<sup>69</sup> As Justice Byron White conceded, the African-American experience is unfamiliar to many white judges.<sup>70</sup> “Even the most conscientious judge will have difficulty in imagining the thoughts and feelings of people who have grown up in groups that [the judge’s] culture has trained him to see as outsiders.”<sup>71</sup> This racial and gender blind spot makes it difficult for an affluent white judiciary to understand why an African-American male’s flight from the police does not, necessarily, evidence a consciousness of guilt, or why a date rape victim’s failure to immediately contact authorities does not, necessarily, signal regretted consent.<sup>72</sup> Thus, racial, gender, and ethnic “diversity on the bench can enhance judicial decision making by broadening the variety of voices and perspectives in the deliberative process.”<sup>73</sup>

Furthermore, on a pragmatic level, the process of judging

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<sup>66</sup> See Ifill, *Judging the Judges*, *supra* note 24, at 95, 99; Hurwitz & Lanier, *supra* note 24, at 87–90.

<sup>67</sup> Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. REV. 591, 594 (1996).

<sup>68</sup> Ifill, *Racial Diversity on the Bench*, *supra* note 27, at 475 (quoting JEROME FRANK, *LAW AND THE MODERN MIND*, at xiii (1949)). *But see* Kenneth S. Klein, *Unpacking the Jury Box*, 47 HASTINGS L.J. 1325, 1355 (1996) (indicating that appellate courts are systematically displacing the jury and trial courts’ fact-finding function).

<sup>69</sup> Ifill, *Racial Diversity on the Bench*, *supra* note 27, at 468–69.

<sup>70</sup> Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992).

<sup>71</sup> Karst, *supra* note 25, at 1965.

<sup>72</sup> Professor Ifill argues that minority judges do not suffer from the same narrative blind spot, as applied to white litigants, because minority “judges regardless of . . . background will . . . confront and engage the white community perspectives in order to successfully navigate their professional lives as lawyers and often politicians.” Ifill, *Racial Diversity on the Bench*, *supra* note 27, at 470.

<sup>73</sup> Edwards, *supra* note 36, at 329.

ultimately is reducible to judicial choices.<sup>74</sup> For Richard Posner, pragmatism—with its absence of the normative—requires individual judges to decide whether particular values are good or bad in relation to community interests and needs.<sup>75</sup> However, Posner concedes that “different judges, each with his own idea of the community’s needs and interests, will weigh consequences differently.”<sup>76</sup> To avoid unrepresentative judgments, therefore, Posner argues for the establishment of a diverse judiciary because a diverse “judiciary is more representative, and its decisions will therefore command greater acceptance in a diverse society than would the decisions of a mandarin court.”<sup>77</sup>

The representative function of the judiciary is not limited to fact-finding and case outcomes. Even when a litigant is unsuccessful, a judge’s ability to empathize with his or her diverse perception and circumstance is essential to the litigant’s respect for the court’s adverse action.<sup>78</sup> For Ifill, “[t]he core of representation” is “a meaningful *opportunity* for th[e] representative to respond to the people.”<sup>79</sup> In the special case of judicial representation, judges disproportionately “respond” to issues affecting the liberty, property, and civil rights of African-Americans, women, and other minorities. Therefore, to fulfill the “core of representation,” judges must engage in the diverse and disaffected life stories of these groups. To be sure, the absence of diversity in the judiciary does not necessarily mean that nondiverse judges are unable to adjudicate matters fairly and impartially. However, it is generally difficult for a homogenous judiciary of affluent white men to understand and explain the socially diverse realities of poverty, race, and gender. For instance, a recent study of one federal circuit reveals that female judges are more likely than male judges to observe, report, and intervene when instances of gender-related incivility are directed at women.<sup>80</sup> These women judges, because of their gender

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<sup>74</sup> RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 71 (2003).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 120.

<sup>78</sup> When diverse individuals share counter-narratives in courts of law—the institutional enforcers of the master narrative as a norm—they are “more exposed and vulnerable than the scientist in pursuit of . . . grand theory.” Dwight Conquergood, *Storied Worlds and the Work of Teaching*, 42 COMM. EDUC. 337 (1993). For Conquergood, “narrative knowing recalls and recasts experiences into meaningful signposts.” *Id.* In a court, the retelling is “full of risk” because the nondiverse judiciary is unlikely to legitimate the stories and perception of diversity.

<sup>79</sup> Ifill, *Judging the Judges*, *supra* note 24, at 136.

<sup>80</sup> Lonsway, *supra* note 37, at 216–19.

experience, are more adept at identifying the norm of gender bias. As Judge Harry Edwards notes, “just as most of my Jewish colleagues have more than a fleeting understanding of anti-Semitism, the Holocaust, and issues surrounding Israel and Palestine, most blacks have more than a fleeting understanding of the effects of racial discrimination.”<sup>81</sup> Thus, a diverse bench is essential to the judiciary’s representation of inclusion.

If representation is the heart and soul of judicial elections, then the proponents of this method must address the crisis of minority and gender representation in state courts.

## V. CONCLUSION

The debate between judicial merit selection and popular election purports to be a deliberation on the competing values of independence and accountability. In this discussion, independence and accountability are measured by the distance between judges and popular sentiment. This measurement, however, does not account for a fundamental social reality of American society: judicial diversity is indispensable to our hopes of impartiality and our theories of representation. Judicial independence and judicial accountability, defined phraseologically, represent the social value of promoting impartiality in the administration of justice by seeking representation in the decisionmaking process. In a different world, representation might be achieved by seeking out diverse ideologies without reference to race, gender, or ethnicity. In fact, diversity of thought might be inaccessible where the purveyors of cosmetic or facial diversity do not hold substantive views or experiences that will contribute to the ideological representativeness of the bench. Nonetheless, race, gender, and ethnicity provide accurate proxies for the worldviews of insular and discrete American communities and narratives. These proxies are valuable in our goal to achieve judicial diversity, which is indispensable to judicial independence and accountability.

Judicial diversity is a symbolic and representative asset for minorities. There is no doubt, diversity benefits minorities. Unlike the paternalistic implication in *Brown v. Board of Education*<sup>82</sup> that only African-Americans are harmed by segregation,<sup>83</sup> however, the

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<sup>81</sup> Edwards, *supra* note 36, at 32.

<sup>82</sup> 347 U.S. 483 (1954).

<sup>83</sup> WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION 196 (Jack M. Balkin ed.,

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benefits of diversity are not limited to minority communities. In a country where expression is ordained as a First Amendment, the higher truth of deliberative decisionmaking is compromised by viewpoint exclusion, whether intentional or negligent. With that, we conclude with our earlier statement: In the absence of diversity, the goals of obtaining an impartial and representative judiciary are credibly challenged.