

ESSAYS

AN ESSAY ON THE NOMINATION AND CONFIRMATION OF THE FIRST LATINA JUSTICE ON THE U.S. SUPREME COURT: THE ASSIMILATION DEMAND AT WORK

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INTRODUCTION

Historic firsts often provoke memorable – at times, surprising – public responses. Many have long forgotten that, although now deeply revered in the American memory, President John F. Kennedy, the first Roman Catholic President, provoked fears among some Americans during the 1960 Presidential campaign that he might be more loyal to the Pope than to the American people.¹ Barack Obama, the first African American President,² has been the focal point of a number of nagging conspiracy theories, perhaps the most famous one – which continues to rage in some quarters, despite overwhelming evidence to the contrary – being that he was born on foreign soil and is therefore constitutionally ineligible to serve as President of the United States.³

Similarly, over the last 50 years, the U.S. Supreme Court has seen its fair share of historic firsts, at least some of which have resulted in controversy. Indeed, in the last several decades, judi-

1. See Don Janson, *Religion Growing as Primary Issue: Kennedy’s Mother Parley With 3 Wisconsin Pastors Puts It in Spotlight*, N.Y. TIMES, Mar. 27, 1960, at 50; Damon Stetson, *Religious Issue Stirs Wisconsin; Newspaper Ad on Kennedy’s Catholicism Denounced by Both Candidates*, N.Y. TIMES, Apr. 1, 1960, at 16. See generally SHAUN CASEY, *THE MAKING OF A CATHOLIC PRESIDENT: KENNEDY V. NIXON*, 1960 (2009).

2. However, even President Obama’s racial authenticity as African American was at times questioned because his mother was white and his father Kenyan. See Gary Younge, *Is Obama Black Enough?*, THE GUARDIAN (London), Mar. 1, 2007, at 12.

3. Article II, Section I, Clause 5 of the U.S. Constitution provides that “[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of the President.” President Obama’s eligibility for the Presidency has been challenged on the ground that, despite the public records showing he was born in Hawaii, he in fact allegedly was born outside the United States. See Samuel G. Freedman, *In Untruths About Obama, Echoes of a Distant Time*, N.Y. TIMES, Nov. 1, 2008, at A21; Frank Rich, *The Obama Haters’ Silent Enablers*, N.Y. TIMES, June 14, 2009, at WK8; Dana Milbank, *President Alien, and Other Tales From the Fringe*, WASH. POST, Dec. 9, 2008, at A3. There is even a website devoted to the so-called “birther” movement, see <http://www.birthers.org/>, which Lou Dobbs even gave credence to before his departure from CNN. See Michael Shain & David K. Li, *Dobbs Gave Up on \$9M – Nixed CNN Pact in ‘Obama Birther’ Flap*, N.Y. POST, Nov. 13, 2009, at 15.

The first African American President also has been dogged by claims, with little supporting evidence, that he is “anti-white.” See Glenn Beck: *Obama is a Racist*, CBS NEWS, July 29, 2009, available at <http://www.cbsnews.com/stories/2009/07/29/politics/main5195604.shtml>.

cial appointments, even those not involving any kind of “first,” have provoked heated political battles – characterized by some observers as akin to “war” – between the President, Democrats and Republicans in the U.S. Senate.⁴ The fiery confirmation hearings of conservative firebrands Robert Bork and Clarence Thomas to the Supreme Court, which had opposite outcomes (with the U.S. Senate rejecting Bork and Justice Thomas currently sitting on the Court), are two famous modern examples.⁵ Some of President Clinton’s⁶ and President George W. Bush’s⁷ nominees to the federal courts of appeals also generated formidable opposition.

In light of this historical background, one might expect much attention to be generated by anything new and different on the U.S. Supreme Court, the most publicly-prominent legal institution in the United States. Although some evidence supports this expectation, some exists to the contrary. Particularly instructive are the deeply contrasting public and political responses to two relatively recent historic “firsts” on the Court, namely the appointments of Thurgood Marshall, as the first African American

4. See, e.g., Michael J. Gerhardt, *Supreme Court Selection as War*, 50 *DRAKE L. REV.* 393 (2002). See generally MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2003) (analyzing the constitutional history of federal judicial appointments); BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* (2006) (examining the evolution of Senate confirmation hearings to the contentious modern-day variety). Bork’s nomination failed because many senators viewed him as an extreme conservative whose views were outside the mainstream. See Edith H. Jones, *Observations on the Status and Impact of the Judicial Confirmation Process*, 39 *U. RICH. L. REV.* 833, 838 (2005).

5. See generally PAUL SIMON, *ADVICE & CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT’S NOMINATION BATTLES* (1992) (discussing, from a U.S. Senator’s perspective, the controversies over the Robert Bork and Clarence Thomas nominations).

6. See Neil A. Lewis, *After Long Delays, Senate Confirms 2 Judicial Nominees*, *N.Y. TIMES*, Mar. 10, 2000, at A1 (discussing the four year delay in the confirmation of Richard Paez to the U.S. Court of Appeals for the Ninth Circuit); *The 1995 Seven*, *WASH. POST*, Jan. 9, 1998, at A20 (noting lengthy delays in Senate action on numerous federal judicial nominations, including that of UC Berkeley law professor William Fletcher); R. Samuel Paz, *Federal District Court Nomination Process: Smears of Controversy and Ideological Sentinels*, 28 *LOY. L.A. L. REV.* 903 (1995) (offering first person account of unsuccessful confirmation of Latino civil rights attorney to federal bench).

7. See *infra* text accompanying note 102 (discussing controversy surrounding President Bush’s nomination of Miguel Estrada to the U.S. Court of Appeals for the District of Columbia Circuit). Interestingly, Senator Jeff Sessions, a member of the Senate Judiciary Committee who was one of Justice Sotomayor’s most aggressive questioners, had his nomination for a federal district judgeship scuttled by the Senate Judiciary Committee in no small part because of disparaging remarks that he made to colleagues in the U.S. Attorney’s office about the NAACP. See Sarah Wildman, *Closed Sessions*, *NEW REP.*, Dec. 30, 2002, at 12.

Justice,⁸ and Justice Sandra Day O'Connor, as the Supreme Court's first woman Justice.⁹

Merely because Sonia Sotomayor was a woman of color, knowledgeable prognosticators might have expected her nomination to provoke close scrutiny among the public and members of the U.S. Senate.¹⁰ However, her impeccable academic and professional credentials made opposition to her nomination, at least initially, seem unlikely. A graduate of Princeton University and Yale Law School, Sonia Sotomayor began her legal career as an Assistant District Attorney in her hometown of New York City under widely respected District Attorney Robert Morgenthau and subsequently was a partner at a prestigious private law firm. In 1992, Republican President George H.W. Bush appointed her to the federal district court for the Southern District of New York, one of the most prestigious district courts in the entire country. Later, a Democratic President, Bill Clinton, elevated Judge Sotomayor to the U.S. Court of Appeals for the Second Circuit, widely regarded as one of most prestigious circuit courts in the entire United States.¹¹ Precious few federal judges have been nominated by *both* Republican and Democratic Presidents. Moreover, with each nomination, the U.S. Senate overwhelmingly confirmed Sonia Sotomayor without much of a hitch.¹²

With 17 years on the bench, Justice Sotomayor had more judicial experience than any nominee to the Supreme Court in

8. See *infra* Part I.

9. See *infra* Part II.

10. Some observers have suggested that Justice Benjamin Cardozo, the son of Sephardic Jews of Portuguese descent, in fact was the first Latino on the Supreme Court when confirmed in 1932. See, e.g., Antonio Olivo, *Would Sotomayor Really Be The First Supreme Court Latino?*, L.A. TIMES, May 31, 2009, at A8. Whatever Justice Cardozo's blood lineage, he unquestionably was not viewed by Latina/os – then or now – as a Latina/o. Nor is there any evidence that he considered himself to be Latino. For a primer on Latina/o/Hispanic identity, see RUBÉN G. RUMBAUT, *Pigments of Our Imagination: On the Racialization and Racial Identities of "Hispanics" and "Latinos,"* in HOW THE U.S. RACIALIZES LATINOS: WHITE HEGEMONY AND ITS CONSEQUENCES 15 (José A. Cobas, Jorge Duany, & Joe R. Feagin eds., 2009).

11. See Profile of Judge Sotomayor, available at <http://www.ca2.uscourts.gov/judgesmain.htm>. Thurgood Marshall, the first African American on the Supreme Court, also previously had sat on the U.S. Court of Appeals for the Second Circuit before accepting the position of Solicitor General, the U.S. government's lead advocate in the U.S. Supreme Court. See *infra* Part I.

12. Some Republicans, however, delayed the ultimate confirmation of then-Judge Sotomayor to the court of appeals because of conjecture about her possible elevation to the Supreme Court. See Neil A. Lewis, *After Delay, Senate Approves Judge for Court in New York*, N.Y. TIMES, Oct. 3, 1998, at B2. Despite the delay, there was not much of a fight on the merits of her nomination. The opposition was nowhere near what Professor Goodwin Liu, thought of as a possible future Supreme Court nominee, faced when President Obama nominated him for the U.S. Court of Appeals for the Ninth Circuit. See Bob Egelko, *Hope for Stalled Nomination of Lawyer to S.F. Federal Court*, S.F. CHRON., Mar. 18, 2011, at C2.

decades. By comparison, Chief Justice John Roberts, the subject of effusive praise for his professional accomplishments during his Senate confirmation hearings, had barely two years of experience as a federal court of appeals judge before joining the Court – and he joined not simply as an Associate Justice, but as the Chief Justice.¹³ Being an experienced jurist, Justice Sotomayor’s opinions, not surprisingly, reflected the work of a careful, mature jurist deeply attentive to law and precedent,¹⁴ in which some have criticized her technical – some might say lawyerly – style of writing and the narrow focus of her opinions.¹⁵

To complement her sterling credentials, Justice Sotomayor also has an incredible personal story, rivaled only in certain respects by President Obama’s own amazing life. Having grown up in the housing projects of the South Bronx, she made the most of humble beginnings. Indeed, her life story is something akin to a Latina Horatio Algiers – the daughter of parents who came to the mainland United States from Puerto Rico during World War II, battling diabetes since childhood, and reared by her hard-working single mother after her father died when she was only nine.¹⁶ It is hard to come by a more inspirational – and truly American – tale of success attained through sheer hard work and true grit. The icing on the proverbial cake is that Justice Sotomayor is the first Latina/o Justice and the first woman of color Justice, two important milestones in U.S. history, and only the third woman ever, at least at the time, to serve on the Supreme Court.

Doesn’t Sonia Sotomayor, at least at first glance, sound like the perfect nominee to the Supreme Court? Maybe so, but hard-line conservatives on radio talk shows, television, and blogs initially — and loudly — cried foul. Republican senators later nagged, picked, and prodded at Justice Sotomayor and her record through four plodding – and, at times, at least to this Court-watcher, downright irritating — days of hearings on her confirmation before the Senate Judiciary Committee.¹⁷ Few knowledgeable observers could believe that the U.S. Senate had seen anything close to its finest hour.

Not surprisingly, the charges made by opponents to Justice Sotomayor’s confirmation, when examined critically, all centered

13. See Biography of Chief Justice John Roberts, available at <http://www.supremecourtus.gov/about/biographiescurrent.pdf>.

14. See *infra* Part III.A.

15. See, e.g., Adam Liptak, *A Careful Pen With No Broad Strokes*, N.Y. TIMES, May 27, 2009, at 1.

16. See *Sonia Sotomayor*, N.Y. TIMES, available at http://topics.nytimes.com/top/reference/timestopics/people/s/sonia_sotomayor/index.html.

17. See *infra* Part III.

on race and, to a lesser extent, gender. Despite a career marked by judicial moderation – even criticized by some liberals as too conservative,¹⁸ she was charged early and often by Republican Senators, who could muster little evidence in support of the charges, with being objectionable because she was a “judicial activist.”¹⁹ Based on a single line from a speech, which almost certainly struck a nerve because she was Puerto Rican (with her ancestry lending superficial plausibility to the charge), Justice Sotomayor was at least initially attacked for being “anti-white.”²⁰ This claim is neither particularly extraordinary nor surprising; indeed, it is routinely leveled at minorities who have advocated for civil rights.²¹

Moreover in a manner that some observers might characterize as race-baiting, Justice Sotomayor also was criticized repeatedly, vociferously, and (at least in my estimation) unfairly for having served nearly two decades ago on the board of directors of the so-called extremist group, the Puerto Rican Legal Defense and Education Fund (now known as Latino Justice), which is in fact a respected civil rights organization.²² Last but not least, based on little more than a crude combination of racial and gender stereotypes, some influential observers raised questions about whether Justice Sotomayor possessed the proper temperament to serve as a Justice on the Supreme Court.²³

This Essay analyzes the broader lessons of race, gender, and identity that can be gleaned from the nomination and confirmation of Justice Sonia Sotomayor to the Supreme Court. It compares the path-breaking confirmations of Justices Thurgood Marshall, the first African American Justice, and Sotomayor, which are remarkably similar in important respects, and shows how little the nation has actually progressed in recent years in erasing the color line in American society. As we shall see, the two confirmations were very different substantively, as well as qualitatively in tone, from the confirmation (some might call it a coronation) of the first woman on the Supreme Court, Justice Sandra Day O’Connor.²⁴

More than forty years after Justice Marshall’s confirmation, the U.S. Senate callously and disrespectfully treated Sonia Sotomayor in many of the same harsh and unfair, if not outright

18. See *infra* text accompanying notes 112-14.

19. See *infra* Part III.A.

20. See *infra* III.B.

21. See, e.g., *infra* Part I.B. (recounting how Justice Thurgood Marshall was questioned about being “anti-white” during his confirmation hearings).

22. See *infra* Part III.C.

23. See *infra* Part III.D.

24. See *infra* Part II.

racist, ways that he was. We heard, for example, the grossly exaggerated claim that she was some kind of “judicial activist,” which has become political code for embracing so-called “liberal” positions on social wedge, including civil rights, issues. Just as some members of the Senate Judiciary Committee did in the Marshall confirmation hearings, some Senators dissected Sonia Sotomayor’s speeches, distorted her civil rights affiliations to contend that she was some kind of racial extremist, and attempted to paint her as nothing less than anti-white. Finally, as a sign of the nation’s lack of racial progress over four decades, she received *one less vote* in favor of confirmation than Thurgood Marshall did.

During the unprecedented national drama of his confirmation hearings in 1991, Justice Clarence Thomas, the second African-American Justice on the Supreme Court, famously declared that the Senate Judiciary Committee had subjected him to nothing less than a “high-tech lynching” in which minorities who do not toe the party line “will be lynched, destroyed, caricatured by a committee of the U.S. Senate rather than hung from a tree,”²⁵ a

25. In response to questioning before the Senate Judiciary Committee about the allegation that he sexually harassed an African American woman, Anita Hill, Justice Thomas powerfully stated:

[This is] a *high-tech lynching* for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that unless you kowtow to an old order, this is what will happen to you. *You will be lynched, destroyed, caricatured by a committee of the U.S. Senate rather than hung from a tree.*

Nomination of Judge Clarence Thomas To Be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary U.S. Senate, 102nd Cong., 1st Sess., 157-58 (1993) (testimony of Clarence Thomas) (emphasis added). Thomas himself grew up in Georgia, where he suffered racial discrimination. See Hannah L. Weiner, Note, *The Next “Great Dissenter”? How Clarence Thomas is Using the Words and Principles of John Marshall Harlan to Craft a New Era of Civil Rights*, 58 DUKE L.J. 139, 146-49 (2008).

President George W. Bush’s nomination of Justice Clarence Thomas sparked general controversy because of the conservatism – some would say extreme conservatism — of the African American nominee and the surfacing of a serious sexual harassment allegation during the confirmation hearings. See, e.g., A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992); see also Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 481-87 (2000) (contrasting Justices Marshall and Thomas and advocating the analysis of how racial diversity on the judiciary may improve judicial decision-making). See generally TIMOTHY H. PHELPS & HELEN WINTENNITZ, *CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION* (1992) (detailing the history of the Thomas confirmation hearings); RACE-ING, EN-GENDERING POWER: *ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* (Toni Morrison ed., 1992) (offering variety of perspectives on Thomas confirmation hearings).

One observer has contended that Justice Thomas has brought a distinctive brand of Black conservatism to the Supreme Court. See Angela Onwuachi-Willig, *Just Another Brother on the SCT? What Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005). Justice Thomas recently

hotly provocative – if not downright incendiary – statement in light of the super-charged politics and circumstances of that particular confirmation battle.²⁶ Whether or not one agrees with Justice Thomas on the merits of his claim (and I admittedly tend not to), his unequivocal expression of outrage can be explained, in part, by the fact that people of color being considered for the federal bench – and other positions of authority in the United States, such as for high-level governmental posts or, for that matter, law faculties and administrators – often feel subjected to qualitatively different kinds of treatment, inquiries, and attacks – such as that one is anti-white – than similarly-situated whites.²⁷

More generally, the confirmation hearings of all three of the Justices of color in U.S. history might well be characterized, to paraphrase Justice Thomas, as “high-tech lynchings.” The process for a minority Supreme Court Justice has been nothing less than a ritualized hazing of people of color that sends a clear message to the greater national community that racial minorities should be the subject of suspicion. The U.S. Senate has strictly scrutinized the entire lives of the three persons of color nominated to the U.S. Supreme Court, even one as conservative as Justice Thomas. To establish their adoption of mainstream racial sensibilities, Justices Marshall and Sotomayor were required to defeat the unjustified presumption that, as people of color committed to civil rights, they were anti-white and, because of their presumed racial bias, should be disqualified from serving on the Court unless able to produce undisputable evidence rebutting the presumption. Although a well-known conservative deemed ac-

was in the news for his five years of silence at Supreme Court arguments, with that silence sharply contrasting with the other justices often aggressive questioning of the advocates. See David G. Savage, *For Thomas, Silence Remains the Golden Rule*, CHI. TRIB., Feb. 23, 2011, at C12.

26. By referring to a “high-tech lynching,” Justice Thomas tapped into a long history of the lynching of African Americans in the United States as part of the institutional apparatus that policed Jim Crow’s most rigidly enforced racial boundaries concerning interracial intimacy. See generally JAMES ALLEN ET AL., *WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA* (2000) (collecting photographs of lynchings in the United States); 9 PAUL FINKELMAN, *RACE, LAW, AND AMERICAN HISTORY 1700-1990* (1992) (analyzing history of lynching in the United States); David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 *LAW & SOC’Y REV.* 793 (2005) (reviewing history of public lynchings in the United States); see also Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 *HARV. C.R.-C.L. L. REV.* 297 (2009) (analyzing the history of the lynching of Latina/os, especially in the American Southwest). Commentators roundly criticized Justice Thomas’s invocation of the lynching analogy on a variety of grounds. See, e.g., Adrienne D. Davis & Stephanie M. Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 *S. CAL. L. REV.* 1367, 1379-81 (1992).

27. See generally Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 *COLUM. L. REV.* 199 (1997) (reporting results of empirical study of hiring and retention of minority and women law professors).

ceptable by the vast majority of Republican senators, Justice Thomas's confirmation hearings arguably would have been very different – and much less of a spectacle with the public airing of the sensational sexual harassment charges leveled at him – if he were white, not an African-American man, with Black men long the subject of perverse sexual stereotypes in the United States.²⁸

The past confirmations of Justices of color demonstrate that part of the unstated purpose of the modern Senate confirmation process for Supreme Court Justices is to determine if the nominee, when he or she is a racial minority, is sufficiently assimilated into mainstream values on race and civil rights. In effect, although for different reasons, Justices Marshall and Sotomayor, as well as Justice Thomas, were subject to rigorous interrogations to determine whether they were assimilated enough – some critics might say “white enough” – to serve on the Supreme Court. Part of the assimilation test applied to Justices Marshall and Sotomayor was to determine whether they were anti-white. American society often places assimilationist demands on people of color, as well as immigrants, in U.S. social life and complain about those who fail to assimilate.²⁹ It therefore should not be surprising that racial minorities who seek to serve on the nation's highest court are subject to the same assimilationist demand.

28. See Jennifer Wriggins, *Rape, Racism and the Law*, 6 HARV. WOMEN'S L.J. 103, 108 (1983) (noting the stereotype that “Black male sexuality is wanton and bestial”).

29. For analysis of the demand placed upon Latina/os to assimilate into mainstream Anglo culture, see Kevin R. Johnson, “*Melting Pot*” or “*Ring of Fire*”? *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997); George A. Martínez, *Immigration and the Meaning of United States Citizenship: Whiteness and Assimilation*, 46 WASHBURN L.J. 335 (2007); George A. Martínez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997). Interestingly, Linda Chavez, who testified in opposition to the Sotomayor nomination in the Senate confirmation hearings, see *infra* text accompanying note 137, is an ardent proponent of Latina/o assimilation and identified a “Puerto Rican exception” among Latina/o national origin groups to the general pattern of assimilation of Hispanics in the United States. See LINDA CHAVEZ, *OUT OF THE BARRIO: TOWARD A NEW POLITICS OF HISPANIC ASSIMILATION* 139-59 (1991). During his first term, President George W. Bush initially tapped Chavez to be Secretary of Labor in his administration. However, a controversy concerning her employment of undocumented workers in the home scuttled the nomination. See Frank James & Mike Dorning, *Under Fire, Chavez Withdraws*, CHI. TRIB., Jan. 10, 2001, at N1; Steven A. Holmes & Steven Greenhouse, *Bush Choice for Labor Post Withdraws and Cites Furor of Illegal Immigrant Issue*, N.Y. TIMES, Jan. 10, 2001, at A1.

Other nominees who were members of outsider groups have arguably faced similar assimilationist demands and pressures. See Lori A. Ringhand, “*An Assortment of Minor Patriots*”: *The Confirmation of Felix Frankfurter and Sonia Sotomayor*, MICH. ST. L. REV. (forthcoming 2011) (analyzing nomination of Jewish immigrant Felix Frankfurter to the Supreme Court and contrasting his confirmation with that of Justice Sotomayor).

In the end, people of color face an entirely different set of assumptions, presumptions, and barriers to rising to leadership positions in American society, whether it is Barack Obama becoming President of the United States or Sonia Sotomayor being confirmed as a Justice on the U.S. Supreme Court. There are many other examples of the double standards applied to people of color, including two respected minority attorneys, Lani Guinier and Tom Saenz, who were considered for the highest civil rights position within the U.S. Department of Justice by the last two Democratic Presidents.³⁰ The breathtakingly different treatment of those nominations compared to white nominees, including the first white woman to the Supreme Court,³¹ are troubling lessons about lingering racism in the modern United States.

The Sotomayor confirmation process specifically reveals the continuing questioning of, and at times antipathy for, Latina/os. Similar issues surface regularly in the recurrent debates on immigration and immigration reform.³² Moreover, the race *and* gender of Justice Sotomayor proved to be a volatile mix and resulted in Senate confirmation hearings that differed dramatically in tone and substance from those of the first two women Justices.³³ In the end, the contested nature of Sonia Sotomayor's confirmation arguably has little to do with her qualifications to serve on the Supreme Court and much to do about white suspicions of people of color — Latina/os in this instance — in American society.

Even more generally, there is one final lesson to be learned from the Sonia Sotomayor confirmation hearings. Despite the success of President Obama and Justice Sotomayor in climbing to the highest echelons of the U.S. government, the idea of a level-playing field largely remains a far-away dream for people of color in the United States. We should not forget this fundamental fact, especially as the nation continues to engage in massive self-congratulation over these two momentous achievements. Although some have gone so far as to declare that racism is dead in modern America,³⁴ the case of Justice Sotomayor serves as powerful and unequivocal evidence to the contrary.

Part I of this Essay offers a glimpse of the tumultuous nomination and confirmation experience of Justice Thurgood Mar-

30. See *infra* Part III.C.

31. See *infra* Part II.

32. See, e.g., SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY (2004); PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995).

33. See *infra* Part III.

34. See, e.g., Shelby Steele, *Obama's Post-Racial Promise*, L.A. TIMES, Nov. 5, 2008.

shall, who became the first person of color to serve on the U.S. Supreme Court. Part II briefly considers the laudatory, celebratory, and largely perfunctory confirmation hearings encountered by the first woman on the U.S. Supreme Court, Sandra Day O'Connor, as well as the second woman Justice, Ruth Bader Ginsburg. Part III critically analyzes the 2009 nomination and confirmation of Justice Sotomayor.

I. THURGOOD MARSHALL'S APPOINTMENT TO THE SUPREME COURT: CONFIRMATION AS A TEST OF ASSIMILATION

A review of the nomination and confirmation of Justice Thurgood Marshall, the first African-American to serve on the U.S. Supreme Court, offers a benchmark for evaluating how far the U.S. Senate and the nation have progressed – or not – in evaluating the qualifications of a minority nominee for a coveted position on the Court. As we shall see in Part III, the similarities between Justice Sotomayor's 2009 confirmation hearings and Justice Marshall's 1967 confirmation hearings are truly remarkable.

Thurgood Marshall's appointment to the U.S. Supreme Court was a momentous watershed in U.S. history. In announcing Marshall's path-breaking nomination, President Lyndon Johnson proclaimed that it was "the right thing to do, the right time to do it, the right man and the right place."³⁵ But, even assuming all of these declarations to be true, the first African-American nominee encountered a contentious confirmation process, one for which the low-points are worth recounting in evaluating the nation's racial progress over the ensuing years and Justice Sotomayor's confirmation more than four decades later.

Opponents to the nomination of Thurgood Marshall on the Senate Judiciary Committee decided not to "use Marshall's color – at least not explicitly – as the basis for their opposition to him. *Instead, they would try to paint him as a liberal who was soft on crime.*"³⁶ Along these lines, John McClellan of Arkansas registered a minority view to the Senate Judiciary Committee report: "The crime menace is today the greatest internal threat to our Nation's security. . . . Unfortunately, nothing Judge Marshall said during these hearings indicates that his views on the crime issue

35. JOHN P. MACKENZIE, *Thurgood Marshall*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969, at 3064 (Leon Friedman & Fred L. Israel eds., 1969) (quoting President Johnson). For a brief explanation of how the appointment of Thurgood Marshall benefited the U.S. Supreme Court as an institution and the African American community as a whole, see Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, published concurrently in 5 HARV. LATINO L. REV. 1, 3-7 (2002) and 13 LA RAZA L.J. 1, 3-7 (2002), later republished as adapted in 1 HISP. NAT'L B. ASS'N J. L. & POL'Y 20 (2008).

36. MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 272 (1992) (emphasis added).

differ from those of the present majority of the Court. For this reason, . . . I cannot vote for confirmation of Judge Marshall”³⁷

The use of an anti-crime platform as a means to a racial ends should sound familiar.³⁸ The reliance on crime as a proxy for race has long been a convenient and effective political strategy. A year after Thurgood Marshall’s confirmation, Republican Richard Nixon ran for President on a staunch “law-and-order,” anti-crime platform and promised to appoint “strict constructionists” to the Supreme Court, in no small part, in hopes of putting an end to busing as a tool to desegregate the public schools.³⁹ One of the most infamous examples of a politician capitalizing on racial fears associated with crime is the Willie Horton television advertisements employed by George H.W. Bush in his successful campaign for the Presidency in 1988.⁴⁰ Criminal justice continues to this day to implicate deeply contested issues of race, as well as class, in American social life. The national controversy surrounding the July 2009 arrest of Harvard Professor Henry Gates by Cambridge, Massachusetts police is a stark reminder of the racially-volatile nature of criminal law enforcement in the modern United States.⁴¹

37. S. Rep. No. 90-13, 90th Cong., 1st Sess., *Nomination of Thurgood Marshall* 51 (1967) (Additional Minority Views of Mr. McClellan).

38. See Fran Lisa Buntman, *Race, Reparation, and the Supreme Court: Valuing Blackness and Whiteness*, 56 U. MIAMI L. REV. 1, 1 n.2 (2010) (noting the history of discrimination against African Americans in U.S. criminal laws and construction of “blackness” as closely associated with criminal propensity); Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063 (1993) (analyzing history of discrimination against African Americans under criminal laws throughout U.S. history); Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993) (examining critically late twentieth century racial imagery and racialization in U.S. criminal laws).

39. See Reva Siegal, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1521-24 (2004). The Warren Court, which decided *Brown v. Board of Education*, was also known for its pro-defendant criminal procedure decisions, see Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 6-8 (1995) (analyzing how the Warren Court issued groundbreaking decisions in criminal procedure that were informed by the quest for racial equality in the United States), some of which remain controversial to this day.

40. See Richard Dvorak, *Cracking the Code: “De-coding” Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 626-27 (2000); See also Leland Ware & David C. Wilson, *Jim Crow on the “Down Low”*: *Subtle Racial Appeals in Presidential Campaigns*, 24 ST. JOHN’S J. LEGAL COMMENT. 299, 307-14 (2009) (reviewing examples of coded racial appeals in modern Presidential campaigns, including Richard Nixon’s “southern strategy,” Ronald Reagan’s reference to “welfare queens,” and George Bush’s Willie Horton television advertisements). The infamous Willie Horton television advertisement accused Massachusetts Governor Michael Dukakis of being responsible for the furlough of a dangerous African American convict, Willie Horton, who then committed vicious crimes. See *id.* at 312-13.

41. See Bernard E. Harcourt, *Henry Louis Gates and Racial Profiling: What’s the Problem?* (Sept. 17, 2009), unpublished manuscript available at <http://papers>.

Opposition to Thurgood Marshall's nomination was not strictly limited to conservative Senators, however. His nomination also "elevated negative and covertly racist reactions from a number of Eastern, Ivy League lawyers, and their newspaper friends, who 'either on the grounds of his liberalism or because they [felt] Marshall [was] not a sufficiently brilliant legal analyst [. . .],'" opposed confirmation.⁴² In addition, the far left Student Nonviolent Coordinating Committee (SNCC) opposed the Marshall nomination because of his perceived ties with "the establishment,"⁴³ a sign of the turbulent 1960's – a time of considerable discontent and intense social ferment.⁴⁴ Thus, Thurgood Marshall was deemed too liberal by some and not liberal enough for others.

The confirmation hearings of Thurgood Marshall before the U.S. Senate Judiciary Committee lasted five days in July of 1967. The questioning:

ranged from the penetrating to the absurd, from the philosophical to the kind of esoteric found in a law school exam. At one point Marshall was asked, "Do you know who drafted the Thirteenth Amendment to the U.S. Constitution?" He could not remember. At another point he was asked to explain, "Of what significance do you believe it is that in deciding the constitutional basis of the Civil Rights Act of 1866, Congress copied the enforcement provisions of the legislation from the Fugitive Slave Law of 1850?"⁴⁵

ssrn.com/sol3/papers.cfm?abstract_id=1474809; Abby Goodnough, *Harvard Professor Jailed: Officer Accused of Bias*, N.Y. TIMES, July 21, 2009, at A13; Angela Onwuachi-Willig, *An Officer and a Gentleman: A "Post Racial" Arrest*, unpublished manuscript on file. For analysis of the general role of race in law enforcement in two major Supreme Court decisions, see Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010). See generally RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 76-135 (1997) (analyzing history of discrimination against African Americans under the criminal laws in the United States throughout its history); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002) (scrutinizing carefully the relevance of race to the Supreme Court's Fourth Amendment jurisprudence).

42. HOWARD BALL, *A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA* 194 (1998) (footnote omitted).

43. See *id.* at 195.

44. See DAVIS & CLARK, *supra* note 36, at 267-68.

45. *Id.* at 273; See Doug Bend, *A Tireless Journey: An Analysis of Thurgood Marshall's Dedication to Equal Opportunity Fifteen Years After His Retirement from the Court*, 32 T. MARSHALL L. REV. 167, 178-79 (2007) (discussing some of the "'ridiculously specific'" questions asked of Thurgood Marshall at his Senate confirmation hearings). Ironically, Senator Strom Thurmond (R-SC), who asked many of these questions and stridently opposed the appointment of the first African American to the Court, had a daughter by an African American woman, a closely-held secret until his death. See Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black-White Romance*, 84 TEX. L. REV. 739 (2006) (reviewing *ESSIE MAE WASHINGTON-WILLIAMS, DEAR SENATOR: A MEMOIR BY THE DAUGHTER OF*

The Senate Judiciary Committee's report on the Thurgood Marshall nomination conceded that "[t]here probably has never been *any* nominee for *any* judicial position who has received more minute and searching examination."⁴⁶ After careful review, a majority of the committee unequivocally praised Justice Marshall's sterling credentials and professional experience by noting that:

rarely in our history have we had a man who established a national reputation as a leading trial and appellate litigator, who then sat successfully on the Federal appellate bench and then served as the Government's chief appellate litigator in the office of Solicitor General. *There can be no better preparation and qualification for the Supreme Court.*⁴⁷

In the end, the attempts to defeat the confirmation of Thurgood Marshall failed. The U.S. Senate confirmed the nomination by a vote of 69-11, one more vote than Sonia Sotomayor would later receive in 2009.⁴⁸ The ascendancy of Justice Marshall to the high Court undisputedly meant a great deal to African Americans, to the Court as an institution, and to the nation as a whole.⁴⁹ Nonetheless, the charges that the opposition leveled at the first African American Justice reveal much about the importance of race in American society, and the unique demands placed on people of color seeking high posts in the U.S. government.

A. *The "Judicial Activist" Charge*

Critics often level charges of various sorts at Supreme Court nominees who are viewed as supporters of civil rights protections for racial minorities. For several decades, "judicial activism" has served as code for supporters of civil rights, just as "states' rights" once signaled a commitment to racial segregation. It therefore should not be surprising that a group of Senators charged Thurgood Marshall with being a judicial activist.

The minority perspective of Democratic Senator Sam Ervin (D-NC), a member of the Senate Judiciary Committee who for whatever reason felt compelled to emphatically deny that he was a racist,⁵⁰ ominously warned that Thurgood Marshall's confirma-

STROM THURMOND (2005) and the continuing taboo on black/white intimate relationships in the modern United States).

46. S. Rep. No. 90-13, *supra* note 37, at 1 (emphasis added).

47. *Id.* (emphasis added).

48. *See infra* text accompanying note 291.

49. *See infra* text accompanying notes 60-66.

50. *See* S. Rep. No. 90-13, *supra* note 37, at 5 (Minority Views of Mr. Ervin) (stating that "I know that [in opposing Thurgood Marshall's confirmation], I lay myself open to the easy, but false, charge that I am a racist. I have no prejudice in

tion would add to the “judicial activist” majority on the Supreme Court:

Judge Marshall is by practice and philosophy a legal and judicial activist, and if he is elevated to the Supreme Court, he will join other activist Justices in rendering decisions which will substantially impair, if not destroy, the right of Americans for years to come to have the Government of the United States and the several States conducted in accordance with the Constitution.⁵¹

Three other Senators on the Judiciary Committee concurred with Senator Ervin’s ominous views about Justice Marshall’s jurisprudence.⁵²

B. *The “Anti-White” Presumption*

People of color are often presumed to hold very different political views than whites on issues such as discrimination and civil rights, a proposition with which some Critical Race Theorists might agree.⁵³ But also, they are often charged with being racist against whites. Not surprisingly, given that he was an African American who was part of the civil rights movement demanding integration of public institutions and places, Justice Marshall also was charged as being anti-white. The following is one spectacular – and almost certainly fabricated – charge of racism against Thurgood Marshall:

The Lynchburg News began its editorial by supposedly quoting a Marshall speech to black leaders at Howard University in 1961: “*Wait and see what I do when I get on the Supreme Court – I will send every whitey to jail I can.*” The paper added that Marshall belonged to Communist groups and that he will fall in with a clique of “soul brothers” on the high court, namely Earl Warren, Abe Fortas, William O. Douglas, and William Brennan.⁵⁴

It is ironic that the Lynchburg, Virginia newspaper editorial first accuses Justice Marshall of being anti-white and then, in the next breath, expresses fear that he would join forces with the white liberal wing – effectively characterizing these Justices as traitors to their race.

my mind or heart against any because of his race. I love men of all races. After all, they are my fellow travelers to the tomb.”).

51. *Id.* at 13. Similarly, despite a lengthy record of judicial moderation, Justice Sotomayor was accused early and often of being a “judicial activist.” See *infra* Part III.A.

52. See S. Rep. No. 90-13, *supra* note 37, at 50 (Minority Views of Messrs. Eastland, McClellan, and Thurmond).

53. See, e.g., Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991).

54. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 333 (1998) (emphasis added).

Along similar lines, during the confirmation hearings, Chair James Eastland of Mississippi bluntly asked Thurgood Marshall, “‘Are you prejudiced against white people in the South?’”⁵⁵ It is difficult to imagine any other nominee in modern times being asked so pointed a question on such a racially sensitive topic. In and of itself, this damning question suggested disrespect, if not contempt, for the nominee. The future African American Justice politely answered in the negative.

The claim that Thurgood Marshall was anti-white was part of an orchestrated strategy by opponents to derail his nomination. Professor Stephen Carter offered a succinct, yet telling, description of how that strategy played out in the Marshall confirmation hearings:

Naturally, the most vicious confirmation fight in our history was waged to keep a black man off the Supreme Court. They hated him, for the content of his politics and the color of his skin, and so they tried everything. They questioned his intellect and his veracity and the choices he made in his personal life. They made up stories about his ethics. They lambasted him for refusing to answer questions about controversial cases and called him a liar when he said his mind was open. They accused him of disrespect for law and a subversion of the Constitution to fit the political goals of his movement. They warned that he had no respect for long-settled precedents. . . . They challenged the citations in the opinions he wrote as a judge on the federal appeals court and in the briefs he wrote as a practitioner. He lacked the minimum qualifications for the job, they insisted. He was nominated only because he was a crony, they said. Or because the President was packing the Court with ideologues. Or because he was black. *They scrutinized every speech he had ever given for evidence of radicalism and took his words out of context to make him seem scary.* They talked to everyone who knew him, and lots of people who did not, in an effort to dig up dirt. When they found none, they tried to manufacture it.⁵⁶

C. *Affiliation with the National Association for the Advancement of Colored People*

Some members of the Senate Judiciary Committee challenged the propriety of Thurgood Marshall serving on the Supreme Court because of his long affiliation with the National Association for the Advancement of Colored People (NAACP), the preeminent African American civil rights organization in the United States. Apparently, the basic idea was that, due to his

55. *Id.* at 335-36.

56. STEPHEN L. CARTER, *THE CONFIRMATION MESS* 3-4 (1994) (emphasis added).

lengthy affiliation with an organization that advocated for the rights of African Americans, this distinguished Black jurist could not be racially impartial as a Justice on the Supreme Court.

The Senate Judiciary Committee report squarely addressed this claim:

[o]bjection has been raised to the nomination on the ground that Judge Marshall was so closely identified with the National Association for the Advancement of Colored People for so many years. We cannot see how this professional connection, formally severed some 7 years ago, can disqualify an otherwise qualified judicial nominee any more than prior connections with corporations, law firms, and labor unions could have disqualified prior nominees.⁵⁷

Justice Marshall was also probed to determine whether he had any ties to communism, a sign of the times with the Cold War continuing.⁵⁸ During this time in U.S. history, communism was often closely linked to – and blamed for – the active and ongoing struggle for civil rights.⁵⁹

In sum, “Thurgood Marshall was subjected to a degree of racist smear that the confirmation process had not seen before and has not seen since.”⁶⁰ Nonetheless, the appointment of Justice Marshall was critically important to African Americans, as the nation’s racial sensibilities underwent a radical, and at times rocky, transformation. His confirmation represented an unmistakable signal of increasing acceptance of Blacks into the core of U.S. social life.⁶¹

Moreover, Justice Marshall’s appointment moved the Court toward better representation of the African American community on the most powerful legal institution in the nation. As one legal observer succinctly put it, “diversity matters on the [Supreme] Court and . . . the Court should be a demographically representative body of the citizens of the United States.”⁶² The

57. S. Rep. No. 90-13, *supra* note 37, at 3.

58. See Richard L. Revesz, *Thurgood Marshall’s Struggle*, 68 N.Y.U. L. REV. 237, 242-49 (1993).

59. See CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 140-42 (1991) (discussing FBI’s surveillance of Dr. Martin Luther King Jr. and civil rights movement).

60. CARTER, *supra* note 56, at 5. History will judge whether in Sonia Sotomayor’s confirmation hearings, the animus directed at her equaled, if not exceeded, that experienced by Justice Marshall. See *infra* Part III.

61. See generally KENNETH L. KARST, *BELONGING TO AMERICA* (1989) (analyzing efforts by African Americans and other subordinated groups to attain full membership in U.S. society).

62. Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 MINN. L. REV. 1252, 1258 (2006); see also Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 HARV. L.

absence of Blacks from the judicial branch of government had long been – and continues to be – a bone of contention within American society. A desire for fairer racial representation on the judiciary helps explain why, for example, racial minorities have challenged the lawfulness of state judicial election schemes⁶³ and often voice support for minority judicial nominees.

Resistance to such a fundamental change in the most visible American legal institution did not quickly disappear after the confirmation of Thurgood Marshall to the Supreme Court. Some prominent Americans found it difficult to accept an African American at the highest levels of the U.S. government. Several years after Justice Marshall's confirmation, President Richard Nixon, in contemplating future nominees, denigrated in private Justice Marshall's qualifications to serve on the Supreme Court.⁶⁴ Harvard professor (and national Watergate icon) Archibald Cox, who Thurgood Marshall had replaced as Solicitor General, disparagingly stated that Justice “‘*Marshall may not be very bright or hard-working* but he deserves credit for picking the best law clerks in town.’”⁶⁵

Nonetheless, Thurgood Marshall's historic appointment moved African Americans closer to full membership in U.S. society, as “[t]he pride and dignity that Justice Thurgood Marshall has inspired in the black community over his long career is paralleled only by the very real, enormous contribution he has made in ensuring that black Americans enjoy equality of citizenship.”⁶⁶ His appointment, which placed an African American on the Court for the entire world to see, also transformed popular pre-suppositions about who was qualified to sit on the Court.

Just a few years prior to Justice Marshall's nomination, the mere presence of an African American on the Supreme Court was virtually unthinkable. During this time, the nation exper-

REV. 109, 125-32 (1994) (articulating interest group representation theory for evaluating claims under Voting Rights Act).

63. See, e.g., *Lopez v. Monterey County*, 525 U.S. 266 (1999); *Houston Lawyers' Ass'n v. Attorney Gen.*, 501 U.S. 419 (1991); *Chisom v. Roemer*, 501 U.S. 380 (1991).

64. See JOHN W. DEAN, *THE REHNQUIST CHOICE*, 96 (2001).

65. WILLIAMS, *supra* note 54, at 362 (citation omitted) (emphasis added).

66. Robert L. Carter, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 33, 42 (1991); see A. Leon Higginbotham, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 55 (1991) (contending that African Americans and the nation as a whole benefitted from Justice Marshall's achievements); Constance Baker Motley, *Thurgood Marshall*, 68 N.Y.U. L. REV. 208 (1993) (highlighting Thurgood Marshall's positive impacts on the African American and civil rights communities). See generally MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961* (1994) (chronicling Thurgood Marshall's role in the civil rights movement.)

experienced social turmoil as public places were being integrated, often with considerable resistance from some political leaders and members of the public. Justice Marshall's ascendancy to the Court forever changed the racial sensibilities of the United States. Still, Justice Marshall had to survive the indignities of a racial minefield, resist attacks that he was a dreaded "judicial activist," and, despite being a longtime advocate of integration, overcome the presumption that he was anti-white.

II. SANDRA DAY O'CONNOR'S APPOINTMENT: SENATE CONFIRMATION AS CORONATION

A later historic first on the U.S. Supreme Court failed to spark the same controversy and outrage that was seen with the earlier historic confirmation of Justice Marshall⁶⁷ and the subsequent confirmation of Justice Sotomayor.⁶⁸ Indeed, it failed to spark much controversy or debate at all. This comparison tells us much about the barriers facing people of color, and especially women of color, in ascending to positions of power in the U.S. government.⁶⁹

A former Arizona state legislator and Justice on the Arizona Court of Appeals, Sandra Day O'Connor was the first woman Justice on the U.S. Supreme Court. Her confirmation in 1983, the first to be broadcast live on radio and television,⁷⁰ was relatively uncontroversial. It may be hard to imagine today but Justice O'Connor's confirmation hearings were characterized at the time as being "generally cordial."⁷¹ This remained true even though, as later became customary among future successful nominees, Justice O'Connor generally declined to answer questions that probed her views regarding the outcomes of controversial decisions, such as *Roe v. Wade*,⁷² which raised issues that might again come before the Court.⁷³

Although some Senators grouched a bit about her refusal to comment on whether certain cases were correctly decided,⁷⁴ the

67. See *supra* Part I.

68. See *infra* Part III.

69. See *infra* Part III.

70. See Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1213 (1988).

71. *Senate Judiciary Committee Approves O'Connor Nomination to Supreme Court*, FACTS ON FILE WORLD NEWS DIGEST, Sept. 18, 1981, at 670.

72. 410 U.S. 113 (1973).

73. See William G. Ross, *The Questioning of Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 TUL. L. REV. 109, 134-36 (1987); Grover Rees III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 917-23 (1983).

74. See S. Rep. No. 97-22, 97th Cong. 1st Sess., *Nomination of Sandra Day O'Connor* 3-7 (1983) (views of Senators East, Grassley, and Denton).

Senate Judiciary Committee by a vote of 17 in favor, and one vote of “present,” recommended the confirmation of Justice O’Connor. Senator Strom Thurmond, who had badgered Thurgood Marshall about legal minutiae during his 1967 confirmation hearings,⁷⁵ offered a glowing report on O’Connor’s nomination on behalf of the committee, wrote: “Judge O’Connor is extraordinarily well-qualified for the position to which she has been nominated.”⁷⁶ Senator Orrin Hatch (R-Utah), who later voted against Justice Sotomayor’s confirmation, told Justice O’Connor, “I’ll be proud to see you serve on the Supreme Court.”⁷⁷ The one vote on the Senate Judiciary Committee not in favor of her confirmation – the “present” vote — came from Senator Jeremiah Denton (R-Alabama). Even though “he regarded Judge O’Connor as a ‘superior candidate,’ a ‘fine lady,’ and a ‘distinguished jurist,’ he could not vote to confirm her because she had refused to criticize” *Roe v. Wade*.⁷⁸

Debate in the Senate over Justice O’Connor’s confirmation was almost nonexistent. Linda Greenhouse of the *New York Times* commented that “[t]he outcome of the voting . . . was such a foregone conclusion that the Senate chamber was nearly deserted for most of the four hours set aside for debate on the nomination. *The proceedings were debate in name only.*”⁷⁹ The Senate voted 99-0 in favor of Justice O’Connor’s confirmation, an overwhelming show of support for a Supreme Court nominee that has gone unmatched since.

Although Justice Marshall’s⁸⁰ and Justice Sotomayor’s⁸¹ nominations provoked great controversy and heated questioning from the Senators, Justice O’Connor’s warm confirmation hearings did not. As mentioned above,⁸² there existed low-intensity partisan bickering among the senators – little more than background noise – about the nominee’s refusal to answer questions about controversial Supreme Court precedent. However, not much more than that surfaced to create any meaningful controversy, certainly nothing that ever put Justice O’Connor’s confirmation in any kind of real jeopardy.

75. See *supra* note 45 and accompanying text.

76. See S. Rep. No. 97-22, *supra* note 74, at 1.

77. Linda Greenhouse, *Judge O’Connor Wins Praise at Hearing*, N.Y. TIMES, Sept. 11, 1981, at B12 (quoting Senator Hatch).

78. Linda Greenhouse, *Panel Approves Judge O’Connor*, N.Y. TIMES, Sept. 16, 1981, at A16 (quoting Senator Denton).

79. Linda Greenhouse, *Senate Confirms Judge O’Connor*, N.Y. TIMES, Sept. 22, 1981, at A1 (emphasis added).

80. See *supra* Part I.

81. See *infra* III.

82. See *supra* text accompanying notes 72-73.

Moreover, the tone of the O'Connor confirmation hearings differed from those of both Thurgood Marshall and Sonia Sotomayor. During the confirmation hearings, nary a cross word was directed by the senators at the soon-to-be first woman Justice. The all-male Senate Judiciary Committee treated Justice O'Connor with great dignity and respect, if not chivalry. Her leading detractor admitted that she was a "fine lady."⁸³ Filled with pomp and circumstance, the O'Connor confirmation hearing more resembled the *coronation* of the first woman Justice rather than the "wars" over nominees ordinarily seen in the modern era.⁸⁴

A true product of the West,⁸⁵ Justice O'Connor, by many accounts, made important contributions to the Supreme Court.⁸⁶ However, it is difficult to judge the role that gender played in her jurisprudence.⁸⁷ The gender of a Justice at times understandably might make a difference in specific cases.⁸⁸ Justice O'Connor played a pivotal role in preserving the right to choice and abor-

83. See *supra* note 78 and accompanying text.

84. See *supra* notes 4-9 and accompanying text.

85. See Anthony M. Kennedy, *William Rehnquist and Sandra Day O'Connor: An Expression of Appreciation*, 58 STAN. L. REV. 1663, 1667-69 (2006) (discussing Justice O'Connor's roots in the West). See generally SANDRA DAY O'CONNOR & H. ALAN DAY, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST* (2002) (autobiography of Justice O'Connor).

86. See, e.g., Ruth Bader Ginsburg, *Reflections on Arizona's Pace-Setting Justices: William Hubbs Rehnquist and Sandra Day O'Connor*, 49 ARIZ. L. REV. 1, 6 (2007) ("Sandra Day O'Connor, in my view, has done more to promote collegiality among the Court's members, and with counterparts abroad, than any other of the 110."); Ruth Bader Ginsburg, *A Tribute to Justice Sandra Day O'Connor*, 119 HARV. L. REV. 1239, 1241 (2006) ("Each case on the Court's docket attracted Justice O'Connor's best effort and she was never shy about stating her views at Conference or in follow-on discussions."); Kathleen M. Sullivan, *A Tribute to Justice Sandra Day O'Connor*, 119 HARV. L. REV. 1251, 1254-55 (2006) (noting that Justice O'Connor was the only Justice in recent years with previous experience as an elected official); Kent D. Syverud, *Lessons from Working for Sandra Day O'Connor*, 58 STAN. L. REV. 1731, 1733 (2006) (stating, from the perspective of a former clerk, that "Justice O'Connor was a considerate boss").

87. For general studies of the difference that gender makes in judicial decision-making, see Mark S. Hurwitz, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84 (2001); Donald R. Songer & Kelley A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750 (2000); Phyllis Coontz, *Gender and Judicial Decisions: Do Female Judges Decide Cases Differently Than Male Judges?*, 18 GENDER ISSUES 59 (2000); Darrell Steffensmeier & Chris Hebert, *Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?*, 77 SOCIAL FORCES 1163 (1999); *Different Voices, Different Choices? The Impact of More Women Lawyers and Judges on the Justice System*, 74 JUDICATURE 158 (1990).

Some observers have questioned, however, how distinctive Justice O'Connor's jurisprudence was from that of her male colleagues. See, e.g., ROBERT W. VAN SICKLE, *NOT A PARTICULARLY DIFFERENT VOICE: THE JURISPRUDENCE OF SANDRA DAY O'CONNOR* (1998).

88. See Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988); Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489, 492-96 (1984).

tion access in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁸⁹ Along those lines, Justice Ruth Bader Ginsburg reportedly swayed some of her male colleagues, who appeared wholly unconvinced at oral argument in the case, in the 2009 decision holding that a strip search of a teenaged middle school girl, thought (wrongfully as it turned out) to be concealing an over-the-counter pain medication, violated the Fourth Amendment.⁹⁰

Similar to the treatment accorded Justice O'Connor, the Senate Judiciary Committee lauded Justice Ginsburg, the second woman Justice on the U.S. Supreme Court. This may seem somewhat surprising. As an attorney, she advocated tirelessly on behalf of women's rights litigation, yet she underwent only the mildest scrutiny when being probed for bias on women's issues.⁹¹ Indeed, Justice Ginsburg's successful women's rights litigation and commitment to reproductive freedom appeared to raise little concern among the senators.⁹² The Senate approved her nomination by the overwhelming margin of 96-3, a landslide of support only rivaled in modern times by Justice O'Connor's unanimous vote.⁹³

In sum, although she was the first woman nominated to the Supreme Court, Justice O'Connor's nomination unquestionably did not meet anything like the aggressive resistance that marred Thurgood Marshall's or Sonia Sotomayor's confirmations. Neither did Justice Ginsburg's nomination.⁹⁴ The tone of questioning of the white women justices differed dramatically from that directed at past and future Justices of color.

Importantly, the race of Justice O'Connor and Justice Ginsburg for the most part seems to have been simply irrelevant to their confirmations. One reason for this is that there is no assimilationist demand placed on the white women nominees comparable to that which exists for nominees of color. Whether these

89. 505 U.S. 833 (1992). For discussion of Justice O'Connor's role in the Court's reaffirmation of *Roe v. Wade*, 410 U.S. 113 (1973), see Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to "Foreclose the Unanticipated"*, 39 AKRON L. REV. 373, 389-92 (2006).

90. See *Safford Unified School Dist. v. Redding*, 129 S. Ct. 2633 (2009); Joan Biskupic, *Ginsburg: The Court Needs Another Woman*, USA TODAY, May 6, 2009, at 1A; Adam Liptak, *Supreme Court Says Child's Rights Violated by Strip Search*, N.Y. TIMES, June 26, 2009, at A16.

91. See Ellen Goodman, *Radical or Conservative?*, DALLAS MORNING NEWS, July 20, 1993, at 11A.

92. See S. Rep. 79-119, 79th Cong., 1st Sess., *Nomination of Ruth Bader Ginsburg to Be an Associate Justice of the United States Supreme Court* 13-22 (1993).

93. See Joan Biskupic, *Senate, 96-3, Approves Ginsburg As 107th Supreme Court Justice*, WASH. POST, Aug. 4, 1993, at A4.

94. The confirmation of Justice Ginsburg followed the rancorous confirmation hearings that resulted in the rejection of Robert Bork's nomination to the Court, which some have claimed has indelibly politicized the nature of the confirmation process. See *supra* note 5 and accompanying text.

women embraced mainstream values on issues such as gender equality was not an issue of apparent concern to the senators, as their questioning and treatment reflected. Some element of white privilege seemed to overshadow any potential gender concerns.⁹⁵ Only when the Supreme Court nominee is a person of color does race – and the perceived assimilation of the nominees into mainstream values – rise to a level of concern amongst some Senators and certain segments of the public at large.

III. SONIA SOTOMAYOR'S APPOINTMENT TO THE SUPREME COURT: CONFIRMATION AS A TEST OF ASSIMILATION

Census 2000 revealed that Hispanics had increased in numbers to comprise over 12.5 percent of the overall U.S. population, or almost 35 million people, roughly approximating – and soon surpassing – the number of African Americans in the United States.⁹⁶ Latina/os can still be found concentrated in large numbers in California, Texas, Florida, New York, Illinois, Arizona, and New Mexico. However, substantial numbers can also be found today in virtually every state of the Union, including but not limited to Arkansas, Iowa, Nebraska, and North Carolina.⁹⁷

In light of the nation's rapidly increasing Latina/o population, it perhaps was inevitable that we would see a Latina/o Justice on the Supreme Court. With Latina/o voters backing President Obama by a wide margin in the 2008 elections,⁹⁸ their growing political clout was plainly visible, thus increasing the likelihood that a Latina/o would be appointed to the Supreme Court.

However, this kind of breakthrough nomination took an exceedingly long time in coming. Before the nomination of Sonia Sotomayor to the Supreme Court, the possible appointment of a Latina/o Justice to the highest court of the land had been under

95. On white privilege, see generally STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996).

96. See U.S. CENSUS BUREAU, *OVERVIEW OF RACE AND HISPANIC ORIGIN: CENSUS 2000 BRIEF 3* (Mar. 2001) (Table 1); see also Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259, 1266-67 (2008) (summarizing data about growing Latina/o population in the United States).

97. See Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration New Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1492-96 (2002); Lisa R. Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135 (2009).

98. See Laura E. Gómez, *What's Race Got to Do With It? Press Coverage of the Latino Electorate in the 2008 Presidential Primary Season*, 24 ST. JOHN'S J. LEGAL COMMENT. 425, 426-27 (2009); Shirin Parsavand, *Latino Voters Prove Pivotal in Obama Victory*, *UCR Professor Says*, PRESS ENTERPRISE (Riverside, CA), Nov. 8, 2008, at D1.

discussion for well over two decades.⁹⁹ Its emergence as an issue worthy of serious public concern represents an achievement in and of itself, signaling an acknowledgment of the growing Latina/o presence in the United States and, at the same time, a movement away from the historic invisibility of Latina/os in American social life.¹⁰⁰

Importantly, there is considerable diversity of political opinion among Latina/os in the United States that, to a certain degree, is correlated with national origin ancestry. For example, Cuban Americans are generally more conservative than Mexican-Americans and Puerto Ricans.¹⁰¹ The nomination of Sonia Sotomayor by President Obama, a Democrat, avoided the likely controversy that would have surrounded the nomination of a conservative Latina/o by a Republican President. In all likelihood, such a nomination would have, among other things, superimposed national origin cleavages among Latina/os on partisan political concerns. President George W. Bush's nomination of Honduran-born (and unquestionably conservative) Miguel Estrada in 2003 to the U.S. Court of Appeals for the District of Columbia Circuit,¹⁰² often a stepping stone to the Supreme Court, and the nomination of Clarence Thomas to the Supreme Court by President George H.W. Bush,¹⁰³ offered glimpses of the kind of heated controversy that might result from such a nomination. By most accounts, Justice Sotomayor was moderate and not too liberal – indeed, she was not liberal enough for some quarters.¹⁰⁴

Although a heterogeneous community, many Latina/os in the United States share important common experiences that

99. See David G. Savage, *Frustrated Latinos Lobby Clinton for a Place on High Court*, L.A. TIMES, July 28, 1998, at A5 (observing in 1998 that “[f]or almost a decade, White House lawyers under Presidents Bush and Clinton have been quietly searching for a Latino jurist who could be named to the U.S. Supreme Court”).

100. See Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995) (analyzing Latina/o invisibility in U.S. social life).

101. See Johnson, *supra* note 29, at 1293-94 (analyzing the ideological and political differences among persons of Mexican, Cuban, and Puerto Rican ancestry in the United States).

102. See Neil A. Lewis, *Bush Judicial Choice Imperiled by Refusal to Release Papers*, N.Y. TIMES, Sept. 27, 2002, at A28; Kevin R. Johnson, *In Defense of the Estrada Filibuster: A Judicial Nominee that the Senate Cannot Judge*, FindLaw Legal Commentary, Feb. 27, 2003, www.findlaw.com.

103. See *supra* notes 25-28 and accompanying text.

104. See Jeffrey Rosen, *The Case Against Sotomayor*, NEW REP., May 4, 2009, available at <http://www.tnr.com/politics/story.html?id=45d56e6f-f497-4b19-9c63-04e10199a085>; John Schwartz, *Sotomayor's Appellate Opinions Are Unpredictable, Lawyers and Scholars Say*, N.Y. TIMES, May 28, 2009, at A16; Dayo Olopade, *Is Sotomayor Liberal Enough?*, THE ROOT, June 10, 2009, <http://www.theroot.com/views/sotomayor-liberal-enough?>; Amy Goldstein & Paul Kane, *Little for Liberals in Confirmation Hearings*, WASH. POST, July 19, 2009, at A3.

shape their perspectives.¹⁰⁵ Such commonalities suggest that a Latina/o Justice – and, given her life experiences, Justice Sotomayor specifically – may bring a new perspective to the Supreme Court as an institution. Indeed, it is highly plausible that the addition of a Latina voice may add to – and indeed improve – the Court’s decision-making process as it pertains to constitutional law, civil rights, immigration law, and many other types of cases.¹⁰⁶ As has been documented, civil rights litigation has been limited in its ability to fully protect Latina/os from discrimination in the United States.¹⁰⁷

Moreover, just as Justice Thurgood Marshall’s historic appointment in 1967 did for African Americans,¹⁰⁸ the appointment of Justice Sotomayor alone sent a powerful message of inclusion to the millions of Latina/os in the United States.¹⁰⁹ With her confirmation, Latina/os had finally made it to the highest echelons of American society.

Oddly enough, the Senate confirmation hearings on the Sotomayor nomination wholly neglected to focus on the potential benefits of the first Latina Justice. The significance that Justice Sotomayor would be the first Latino or Latina on the Court

105. See Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 127-29 (1997); Ediberto Román, *Common Ground: Perspectives on Latino-Latina Diversity*, 2 HARV. LATINO L. REV. 483 (1997).

106. See Johnson, *supra* note 35, at 3-7. In contending that perspective matters to the judicial function, Judge Jerome Frank more than a half-century ago observed that “[m]uch harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.” *In re J. P. Linahan, Inc.*, 138 F.2d 650, 652-53 (2d Cir. 1943) (footnote omitted).

107. See George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994) (analyzing the failure of civil rights litigation to protect the rights of Mexican-Americans); see also Kevin R. Johnson, *Lawyering for Social Change: What’s a Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 206-15 (1999) (identifying general limits on the ability of litigation to bring forth meaningful social change). For analysis on the limits of law in bringing about social change, see generally RICHARD DELGADO & JEAN STEFANCIC, *FAILED REVOLUTIONS: SOCIAL REFORM AND LIMITS OF LEGAL IMAGINATION* (1994); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* (NYU Press 1993).

The recent controversy over Arizona’s SB 1070, an immigration measure that, among other things, provoked great concern that its implementation would result in increased racial profiling of Latina/os in immigration enforcement, exemplifies the concern that Latina/os have with racial discrimination in modern times. See Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona’s SB 1070 and the Failure of Comprehensive Immigration Reform*, ARIZ. ST. LAW J. SOC. JUST. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1695236.

108. See *supra* text accompanying notes 60-66.

109. See *infra* text accompanying notes 248-90.

(or that she was the first woman of color) was downplayed and all but ignored.

While Justice O'Connor's and Ginsburg's confirmations might be described as coronations of those women Justices,¹¹⁰ those of Justice Marshall and Sotomayor, as well as Justice Thomas, might be described as some kind of ritual hazing of people of color. It began with, just as Thurgood Marshall experienced,¹¹¹ Justice Sotomayor suffering attacks from both extremes of the ideological spectrum. Although Republicans emerged at center stage of the opposition to her confirmation, some liberals initially balked at Justice Sotomayor's nomination as well.

In discussing Sonia Sotomayor's possible nomination, for example, Professor Jeffrey Rosen, writing for the *New Republic*, unleashed a firestorm of controversy in an article entitled "The Case Against Sotomayor," which relied on unnamed former law clerks and other anonymous sources to report that "nearly none of them raved about [Judge Sotomayor]. They expressed questions about her temperament, her judicial craftsmanship, and most of all, her ability to provide an intellectual counterweight to the conservative justices, as well as a clear liberal alternative."¹¹² Rosen, with his collection of anonymous sources, may have hoped to undermine the growing momentum for Sonia Sotomayor's nomination in an effort to improve the chances of the nomination of one of the several white women rumored as possible nominees, including Judge Diane Wood of the U.S. Court of Appeals for the Seventh Circuit, Solicitor General (and former Harvard Law School dean) Elena Kagan,¹¹³ Professor Kathleen Sullivan, and Professor Pamela Karlan.¹¹⁴

That was just the beginning of the confirmation process, with a host of controversies soon bubbling to the surface and then taking center stage. Justice Sotomayor is both a minority and a woman, thereby making her the first woman of color to serve on the Supreme Court, an important milestone in and of itself. The concept of intersectionality,¹¹⁵ one of the rich insights of Critical

110. See *supra* Part II.

111. See *supra* Parts I.A.

112. Rosen, *supra* note 104. Rosen later appeared to backtrack on his apparent opposition to a Sotomayor nomination. See Jeffrey Rosen, *Where Sonia Sotomayor Really Stands on Race*, TIME, June 11, 2009, at 34.

113. In August 2008, the Senate confirmed Elena Kagan as a Justice on the Supreme Court, after a confirmation process that was relatively event-free. See *Senate Votes*, WASH. POST, Aug. 8, 2010, at LZ07.

114. Cf. *infra* text accompanying notes 115-20 (discussing concept of intersectionality as helping to understand the subordination of women of color).

115. See RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 51-56 (2001) (defining the Critical Race Theory concept of intersectionality).

Race Theory, has proven to be an important tool for understanding how membership in more than one marginalized group can often increase the magnitude of – or at least render qualitatively different – the disadvantage facing particular subgroups.¹¹⁶ Generally speaking, women of color, for example, are subordinated in American social life in distinctively different ways than either white women or men of color – groups whose members generally possess only a single subordinating characteristic.¹¹⁷

Intersectionality proves to be a particularly valuable tool in fully evaluating the nomination and confirmation of Sonia Sotomayor, a nominee who faced distinctive challenges linked to her gender as well as her race. Justice Sotomayor is both Puerto Rican and a woman, two characteristics that are important parts of her identity and arguably contribute to the distinctive concerns expressed about her judicial temperament.¹¹⁸ It is difficult to see how serious charges about temperament, based on the sparse evidence adduced against Justice Sotomayor, could ever stick to a white man or woman.¹¹⁹ In a similar vein, former Nixon Administration aide G. Gordon Liddy expressed concern over the possibility that Justice Sotomayor might be menstruating when she was participating in case conferences with other Justices, which would somehow call her judgment into question.¹²⁰ Similar claims do not appear to have been made by well-known public persons in connection with the nominations of Justice O'Connor and Justice Ginsburg, the first two women on the Court.

116. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing structural, political, and representational intersectionality for women of color); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (analyzing similar concepts).

117. See generally CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2d ed. 2003) (collecting foundational readings in the field of Critical Race Feminism, which holds as one of its fundamental tenets the concept of intersectionality); Symposium, *The Future of Critical Race Feminism*, 39 U.C. DAVIS L. REV. 729 (2006) (analyzing the evolution of Critical Race Feminism).

118. See *infra* Part III.D. Justice Sotomayor's infamous comment about the "wise Latina" played on both gender and racial characteristics of her personal identity. See *infra* Part III.B.

119. See *infra* Part III.D.

120. See Ali Frick, *G. Gordon Liddy on Sotomayor: "Let's Hope That the Key Conferences Aren't When She's Menstruating"* (May 29, 2009), available at <http://thinkprogress.org/2009/05/29/liddy-sotomayor-menstruating/>. Justice Sotomayor felt that she was asked questions about topics by senators during the confirmation process – dating, for example — about which her male colleagues were not questioned. See James Warren, *Sonia Sotomayor on Dating, Deciding, and Being the Newest Supreme Court Justice*, ATLANTIC, Mar. 16, 2011, available at <http://www.theatlantic.com/politics/archive/2011/03/sonia-sotomayor-on-dating-deciding-and-being-the-newest-supreme-court-justice/72168/>.

A comparison of the confirmation processes of Justices Sotomayor and Sandra Day O'Connor demonstrates the all-important difference that race can make in American social life. Even though she declined to offer her views on controversial Supreme Court decisions, Justice O'Connor sailed through her confirmation hearings with a unanimous vote and hardly a cross word, and received great deference from the Senators. Moreover, she was afforded great respect by the senators and treated with the utmost dignity throughout the confirmation proceedings.¹²¹ The same can hardly be said of the rough-and-tumble treatment, as well as the tone of the aggressive questioning, afforded by some of the senators to Justice Sotomayor, challenging her so-called "judicial activism," involvement in Latina/o civil rights organizations, and judicial temperament.¹²²

The combination of race and gender contributed to complications in Justice Sotomayor's confirmation not evident, in the least, in Justice Marshall or Justice O'Connor's confirmations. To the extent that her confirmation process resembled one or the other, however, Justice Sotomayor's confirmation process was unquestionably more like Justice Marshall's than Justice O'Connor's. For both Justice Marshall and Justice Sotomayor, race was at center stage throughout the confirmation process. Importantly, both were required to publicly rebut the unstated presumption that, as people of color with affiliations with civil rights organizations, they were anti-white.¹²³

The anti-white presumption is part of a more comprehensive test given by the U.S. Senate to people of color who have been nominated to high posts in the federal government. The confirmation process as implemented by the Senate subtly ensures that the nominees are sufficiently assimilated into the mainstream in terms of their views about race and civil rights. The interrogations of the identities, affiliations, and racial beliefs of all of the nominees of color to the U.S. Supreme Court, to this point in American history, have effectively become tests of their assimilation into, and acceptance of, mainstream values.

As previously alluded to, there were – to put it gently – some bumps in the road of Sonia Sotomayor's ultimately successful confirmation process, the most significant ones touching on volatile issues of race and gender. Indeed, at the conclusion of the hearings, Senate Judiciary Committee Chair Patrick Leahy employed uncharacteristically strong language in extolling Republicans to "stop the racial politics" in the Supreme Court

121. See *supra* Part II.

122. See *infra* Part III A.-D.

123. See *infra* Part III.A.-D.

confirmation process, a fiery response to the persistent suggestions by some Republican senators that Justice Sotomayor's past affiliation with Latina/o civil rights organizations might compromise her impartiality as a Supreme Court Justice.¹²⁴

Analogous questions have not ordinarily been directed at white nominees to the Supreme Court. Indeed, Justice Samuel Alito's claim of empathy for the "little guy" based on his background as the son of an Italian immigrant father, failed to generate much controversy and, in fact, was generally cast in a positive light.¹²⁵ As this comparison suggests, white nominees are not generally presumed to be partial toward whites (and biased against racial minorities) because of their race alone. Nor are they assumed to be unassimilated into mainstream values.

In the end, in both their statements and questioning, the senators on the Judiciary Committee revealed more about themselves, their judicial philosophies, and their temperaments than anything about Justice Sotomayor's qualifications to serve on the Court. We heard senators complain repeatedly about her reference to the "wise Latina" in one line of a speech that she gave at UC Berkeley and ask pointed questions about particular Supreme Court decisions that they dislike, even when they knew from her previous responses that she would not comment about them.¹²⁶ As if all were reading from a script, Republicans generally said what many would have predicted them to say and ask; Democrats were little different.

Like many Latina/os often do on important occasions, Justice Sotomayor opened the hearings by thanking her teary-eyed mother for the many sacrifices she made for her children.¹²⁷ She told of her long journey from a South Bronx housing project to the rarified academic air of Princeton and Yale. Justice Sotomayor expressed pride at mentoring "many godchildren,"¹²⁸ a subtle tip of the hat to an extremely important Roman Catholic tradition that is especially sacrosanct among Latina/os. By so doing, she, in effect, acknowledged to many Latina/os that, "Yes, I am one of you." Linking her humanity to her professional life

124. See CNN Political Ticker, July 19, 2009, available at <http://politicalticker.blogs.cnn.com/2009/07/19/leahy-on-sotomayor-stop-the-racial-politics/>.

125. See Patty Reinert, *Confirmation Hearings: Alito Vows No "Agenda,"* HOUS. CHRON., Jan. 10, 2006, at A1.

126. See *infra* Part III.A.-D.

127. See *Confirmation Hearings on the Nomination of Sonia Sotomayor To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 111th Cong. (2009)* (statement of J. Sonia Sotomayor) [hereinafter *Hearings* (statement of J. Sotomayor)].

128. *Id.*

and demonstrating empathy (without using the word),¹²⁹ Judge Sotomayor admitted that she has “witnessed the human consequences of [her] decisions.”¹³⁰

For the most part, the senators – Democrats and Republicans alike – asked questions and made statements about their own pet hobby horse (the “wise Latina” speech, the New Haven firefighter case,¹³¹ abortion, baseball, trivia about Perry Mason, etc.).¹³² During the hearings, senators used their time, more often than not, to make statements rather than carefully pose insightful questions to the nominee. When senators asked a direct question, they often appeared to show precious little interest in Justice Sotomayor’s clear and informed responses.

The senators’ questioning of the nominee was followed by the carefully scripted testimony of witnesses from the American Bar Association (ABA) and those called by the Democrats and the Republicans. The representatives of the ABA reported that it had found Justice Sotomayor to be “well qualified,” which was not a surprise in the least because the recommendation had previously been publicly announced.¹³³ Moreover, her 17 years on the bench – recall John Roberts had barely two years on the Court of Appeals before being elevated to the Chief Justice of the U.S. Supreme Court¹³⁴ – and solid reputation among judges and lawyers for all intents and purposes made the ABA’s highest rating a foregone conclusion.

The Democratic witnesses at the Senate confirmation hearings included luminaries (most of them white) such as New York City Mayor Michael Bloomberg, Robert Morgenthau, the former District Attorney of New York City, Louis Freeh, former director of the Federal Bureau of Investigation, Ramona Romero, President of the Hispanic National Bar Association, David Cone, former Major League baseball pitcher and player’s union

129. President Obama had expressed the desire to appoint a Supreme Court Justice who possessed “empathy,” see Peter Slevin, *Obama Makes Empathy a Requirement for Court*, WASH. POST, May 13, 2009, at A3, a statement that generated criticism from conservatives, see Alec MacGillis, *Obama Expands on Criteria for New Justice*, WASH. POST, May 24, 2009, at A3.

130. See *Hearings* (statement of J. Sotomayor), *supra* note 127.

131. See *infra* text accompanying notes 203-06.

132. *Hearings* (statement of J. Sotomayor), *supra* note 127. Justice Sotomayor had stated that, as a young person, she was inspired to be a lawyer by the television show “Perry Mason,” see Joan Biskupic & Kathy Kiely, “Perry Mason” Helped “Mold” Sotomayor, GANNETT NEWS SERVICE, July 21, 2009, a subject about which Senator Al Franken (D-MN), a former comedian on the popular television show “Saturday Night Live,” questioned her about in jest.

133. See James Oliphant & David G. Savage, *ABA Gives Sonia Sotomayor its Highest Rating*, L.A. TIMES, July 18, 2001.

134. See *supra* text accompanying note 13.

representative,¹³⁵ and an assortment of other politicians, lawyers, and law professors, almost all of them white.

What is most surprising about the list of Democratic witnesses was glaring omission of Latina/o civil rights groups and Latina/o leaders on the witness list. Indeed, some might see the witness list as intentionally as white as it could be. True, the Senate Judiciary Committee heard testimony from the Hispanic National Bar Association, a mainstream and relatively conservative (the choice “Hispanic” rather than “Latino” in the organization’s name is telling in this regard), group of Latina/o lawyers. The Committee, however, did not hear live endorsements from Latino Justice (formerly the Puerto Rican Legal Defense and Education Fund (PRLDEF)),¹³⁶ the National Council of La Raza, the League of United Latino Citizens (LULAC), or the Mexican American Legal Defense and Educational Fund (MALDEF) – all Latina/o civil rights organizations that publicly voiced strong support for Justice Sotomayor’s confirmation. Surprisingly, not a single Latina/o law professor in the United States testified during the confirmation hearings.

One might logically ask why the witness list was so devoid of anything discernibly Latina/o. Partisan politics – and the political crucible of race – understandably shaped the political theater of the confirmation hearings. Democratic supporters apparently concluded that testimony from Latina/o civil rights organizations and individuals might hinder, not help, the chances of Justice Sotomayor’s confirmation, a sad commentary about the state of American democracy and racial equality. Democrats may have feared that visible expressions of Latina/o support might be interpreted as a sign that the nominee was some kind of racial separatist who was not sufficiently assimilated into the ideological mainstream.

The Republican witnesses included conservative gadfly, and fierce opponent of affirmative action and champion of Latina/o assimilation, Linda Chavez,¹³⁷ the former President of the National Rifle Association of America, two of the plaintiffs in the New Haven firefighters cases (who arguably had little of anything relevant to say about the nominee’s qualifications to sit on the Supreme Court),¹³⁸ a representative of Americans United for

135. As a district judge, Sotomayor had decided a case involving a dispute between Major League Baseball and the players union that some credited with saving the national pastime. See *Silverman v. Major League Baseball Player Relations Comm.*, 880 F. Supp. 246 (S.D.N.Y.), *aff’d*, 67 F.3d 1054 (2d Cir. 1995). David Cone had been active in the Major League Baseball players’ union.

136. See *supra* Part III.C.

137. See *supra* note 29.

138. See *infra* notes 203-06 and accompanying text.

Life (an anti-abortion organization), and an assortment of conservative law professors, attorneys, and others with ideological bones to pick with Justice Sotomayor.

No one could be genuinely surprised by the testimony of the witnesses. Republican witnesses generally opposed confirmation, just as strongly as the Democratic witnesses supported Justice Sotomayor. By the end of the hearings, very few senators were even in attendance as the last witness testified, highlighting for all to see on television and computer screens across the country the Potemkin Village-like quality of the hearings.

Several of the most serious charges leveled at Justice Sotomayor, similar in important respects to those made against Thurgood Marshall, were based on her race and, to a lesser extent, gender. The charges in combination tested the degree to which a woman of color was sufficiently assimilated into mainstream sensibilities and embraced dominant values – two essential characteristics for a minority nominee to demonstrate to be confirmed on the Supreme Court.

A. *The “Judicial Activist” Charge*

Despite the persistent efforts of a handful of Republican senators on the Senate Judiciary Committee, the Sotomayor confirmation hearings were relatively tedious, if not downright boring, to many observers. Most importantly, even though they pressed the nominee, Republican senators failed to uncover a smoking gun demonstrating Justice Sotomayor’s alleged “judicial activism,” a charge leveled at her early and often throughout the confirmation process. Indeed, the available evidence demonstrated her judicial moderation and studious adherence to precedent.

While ostensibly looking to show Justice Sotomayor’s activist tendencies, the real question that the senators answered was whether she would rock the proverbial boat when considering race and civil rights, as well as other hot button social issues. Unable to prove that and related charges in interrogating her, the opposition to the Sotomayor nomination sought, to no avail, to inject high drama into the hearings by, among other things, having Frank Ricci and Ben Vargas (a Puerto Rican), two plaintiffs in the New Haven firefighters case, testify before the Senate Judiciary Committee.¹³⁹

There was, of course, considerable room for legitimate inquiry into Sonia Sotomayor’s long record as a federal judge during the course of the confirmation hearings. Professor Vik Amar

139. See *infra* notes 203-06 and accompanying text.

has succinctly summarized what was, and was not, fair game in the confirmation hearings before the Senate Judiciary Committee.¹⁴⁰ Importantly, legitimate substantive questioning could have been directed at Justice Sotomayor about her philosophy of judging, her lengthy record as a judge, her views about the proper role of a Supreme Court Justice – the position for which she was nominated, and the Supreme Court as the most powerful legal institution in American society.¹⁴¹

Justice Sotomayor's opening statement to the Senate Judiciary Committee attempted to take the wind out of the sails of her Republican detractors who had accused her of being some kind of rogue "judicial activist," a coded charge that a group of senators also had leveled with ferocity at Justice Thurgood Marshall.¹⁴² She emphasized, in a straight-forward manner, that her judicial philosophy "is simple: fidelity to the law. The task of a judge is not to make the law – it is to apply the law."¹⁴³ Simplistic as that characterization of the judicial function might sound to the informed observer, that was Justice Sotomayor's story and she adhered to it throughout the confirmation hearings.¹⁴⁴

As any law professor, judge, and practicing attorney will readily admit, the simple truth is that judges, within constraints, do make law. The task of interpreting the U.S. Constitution, for example, requires nothing less than judgment, interpretation, and the exercise of a certain degree of discretion.¹⁴⁵ In a similar vein, what else could the common law – and there unquestionably is a distinct body of federal common law¹⁴⁶ – be but law made and applied by federal judges, not the legislative branch. Precisely because the judicial function requires the making of law, the justice system needs judges and justices. Applying the law is not a mechanistic function. As a result, a computer – fortunately or

140. See Vikram David Amar, *What is Fair Game for the Sotomayor Hearings*, FindLaw.com, June 19, 2009, available at <http://writ.news.findlaw.com/amar/20090619.html>.

141. See generally LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985) (outlining appropriate role of U.S. Senate in Supreme Court confirmations).

142. See *supra* Part I.A.

143. *Hearings* (statement of J. Sotomayor), *supra* note 127.

144. See *id.*

145. See generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 Nw. U. L. REV. 251 (1997).

146. See RICHARD H. FALLON, JR., DANIEL MELTZER, & DAVID SHAPIRO, HART & WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 685-98 (4th ed. 2003) (describing issues surrounding federal common law making by courts); See, e.g., *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

unfortunately, depending on one's perspective – will not do the trick.

Appellate judges are often called upon to interpret federal statutes that, for a variety of reasons, are somewhat vague and ambiguous.¹⁴⁷ Consider an example: When a statute makes it a crime to “knowingly” steal government property, must the prosecution prove that the defendant knew that the government owned the property that he or she was stealing? Or, alternatively, must the prosecution merely prove that the defendant in fact knew that the property belonged to someone else? Ambiguities in statutes, which often reflect legislative compromises, inevitably require interpretation. Any judicial interpretation necessarily promotes or impairs some policy, which may be either good or bad, depending on the particular observer's policy preferences. Persons favoring the protection of government property generally prefer a broad *mens rea* of the offense while those favoring the protection of individual liberties probably would opt for a more limited definition of the mental state. Either interpretation, however, implicates an inevitable policy judgment, and in effect requires the judicial “making” of law.

But, rather than acknowledge the fact that legislative imprecisions – intentional and otherwise – and statutory texts require judicial interpretation, some Republican Senators accused the soon-to-be first Puerto Rican Justice of being a “judicial activist,”¹⁴⁸ the same charges that had been vehemently leveled at the first African American Justice.¹⁴⁹ At the same time, however, few of the Republicans who opposed Justice Sotomayor's confirmation seemed concerned in the least about the much-publicized conservative activism that Chief Justice John Roberts,¹⁵⁰ and Justices Scalia, Thomas, and Alito, have brought to the Court. As mentioned previously, the phrase “judicial activist” has become code for a justice who will rule as a liberal on the hot button social issues of the day, such as abortion, affirmative action, and gun rights, not conservative activism that constricts individual rights or broadens the power of the states vis-à-vis the federal government.

As a matter of practical politics, candor about the lawmaking power of judges in today's partisan political climate is not a

147. See generally WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY, & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY* (4th ed. 2007) (collecting materials on statutory interpretation).

148. See, e.g., *Confirmation Hearings on the Nomination of Sonia Sotomayor To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *Hearings*].

149. See *supra* Part I.A.

150. See Jeffrey Toobin, *No More Mr. Nice Guy*, *NEW YORKER*, May 25, 2009.

smart move for nominees who seek confirmation by the U.S. Senate. Rather, the public has come to expect nominees to regurgitate the conventional view – at least among legal laypersons and politicians – that legislatures possess the power to make the law, while judges merely apply it. That is the tack followed by Justice Sotomayor, which in the end helped her to gain confirmation.¹⁵¹

Other recent successful nominees have articulated the judicial role in similarly limited terms. In his confirmation hearings, for example, Chief Justice John Roberts famously analogized the role of a Justice to that of a baseball umpire calling “balls” and “strikes,” as opposed to being a player in the game.¹⁵² At the same time, most sports fans understand that umpires have discretion and make close – some might say judgment – calls, with which some fans strongly disagree. And, any baseball fan will tell you that different umpires have different strike zones. Similarly, Justice Clarence Thomas described for the Senate the proper minimalist ideology for a Supreme Court Justice as “stripped down like a runner.”¹⁵³ Both sports analogies drew widespread support and little criticism from the senators and the general public.

The limited notion of judicial power endorsed by successful Supreme Court nominees is an attempt to conform to the demands of the political process and, unlike Robert Bork, to be successfully confirmed.¹⁵⁴ In assessing the qualifications of judicial nominees, politicians often employ simplistic, and quite crude, classifications of judicial philosophies, such as labeling potential judges and justices as “judicial activists” or, in the recent past, as “strict constructionists.”¹⁵⁵ This sound-bite approach to judicial philosophies omits much nuance, but does often successfully play off of the general public’s misperception about the judicial process.

Besides politics, one is left to wonder about the severe disconnect between the Senators and law professors on the fundamental question of judicial function, which after all ought to have

151. See *supra* text accompanying notes 142-44.

152. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of J. John G. Roberts, Jr.).

153. *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong., 1st Sess., pt. 1, 203 (1991); see Martha Minow, *Stripped Down Like a Runner or Enriched by the Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201 (1992).

154. See *supra* note 5 and accompanying text.

155. See *supra* note 39 and accompanying text (describing reasons for President Nixon’s desire to appoint “strict constructionists” to the Supreme Court).

been the central focus of the confirmation hearings for a Supreme Court Justice. The different roles with respect to the law of judges and lawmakers may explain their different perspectives on the law. Lawyers and judges, such as Justice Sotomayor, learn to carefully parse the law, often making precise legal distinctions based on the relevant facts, while politicians often enact laws that are largely guiding principles. Legislators pass laws that tend to enunciate broad principles of law, as exemplified by the Civil Rights Act of 1964,¹⁵⁶ which contains general prohibitions of racial and other forms of discrimination, or the Sherman Antitrust Act, which broadly prohibits restraints of trade.¹⁵⁷ Both laws leave for judges the law's practical application to particular factual situations.

Along these lines, any lawyer or judge knows from experience that the facts are critically important to the disposition of any case and integral ingredients to the process of judging. The role of the facts in judging is well-recognized. Indeed, as the old adage recalls, "bad facts make bad law." Consider a couple of controversial areas of constitutional law in which the law renders the facts especially important in deciding a case. Racial discrimination by the state, for example, may or may not be unconstitutional, depending on whether the totality of the circumstances shows it was negligent or intentional.¹⁵⁸ Similarly, depending on the particularities of an affirmative action program fashioned and employed by a public university, it may or may not violate the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁹ Without having a factual background from which to work, Justice Sotomayor, as have past Supreme Court nominees,¹⁶⁰ found it difficult (as well as politically advantageous not) to opine about how she might decide a hypothetical case.

Nonetheless, although they all in fact know that judging requires application of the law to the specific facts of the case, senators – supporters as well as detractors – repeatedly asked Justice

156. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

157. See Sherman Antitrust Act § 1, 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

158. See *Washington v. Davis*, 426 U.S. 229 (1976) (holding that, to establish a violation of the Equal Protection Clause of the Fourteenth Amendment, the plaintiff must establish that the state actor possessed a racially discriminatory intent, a fact-based inquiry requiring the consideration of the totality of the circumstances).

159. Compare *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding unconstitutional a race-conscious university undergraduate admissions system that, as constructed, in effect failed to require individual review of applications), with *Grutter v. Bollinger*, 539 U.S. 206 (2003) (upholding law school's race-conscious admissions system that required individualized review of each application).

160. See *supra* Parts I-II (discussing the confirmation hearings of Justices Marshall and O'Connor).

Sotomayor for an opinion on the law in a factual vacuum. These questions in all likelihood appeared to cater to certain political constituencies of the senators, rather than an attempt to gather information about Justice Sotomayor's qualifications to serve on the Supreme Court. Still, although the senators routinely demand to know how a nominee will rule on important legal questions, it might well raise legitimate concerns about a nominee's impartiality to state how he or she would rule in a case without having the benefit of a fully developed factual record.

Among other stratagems employed in the effort to establish that Justice Sotomayor was a much-maligned "judicial activist," senators tried to cajole her into revealing how she would rule in future cases, especially those that raise the issue of the continuing vitality of *Roe v. Wade*.¹⁶¹ They did so even after she repeatedly emphasized – as had Justice O'Connor¹⁶² and many other successful nominees had before her – that she would not comment on cases that involved issues that might again come before the Supreme Court. Similarly, senators also directed pointed questions to Justice Sotomayor about her views on the right to bear arms under the Second Amendment and the proper place of international law in American jurisprudence.¹⁶³

In contrast to the Republican senators who labeled Justice Sotomayor a judicial activist, more neutral observers, who scrutinized her long record on the bench, did not express any concern about her approach to judging, much less label her as some kind of rogue "judicial activist." *U.S. Law Week* concluded that Justice "Sotomayor's opinions steer a middle-of-the-road course in many instances, citing judicial precedent and doctrine in ways that tend to negate charges of judicial activism. . . . [P]arties can expect her to favor judicial restraint"¹⁶⁴ This is the description of a judge who sits comfortably in the mainstream, not some kind of activist out to somehow revolutionize the law.

Similarly, a Congressional Research Service report that analyzed Justice Sotomayor's opinions as a federal judge concluded that "[a]s a group, [her opinions] belie easy categorization," but observed that:

the most consistent characteristic of Judge Sotomayor's approach as an appellate judge has been *an adherence to the doctrine of stare decisis* Other characteristics appear to include what many would describe as a careful application of particular facts at issue in a case and a dislike for situations in

161. 410 U.S. 113 (1973).

162. See *supra* Part II.

163. See *Hearings*, *supra* note 148.

164. *Broad Judicial Role, But Also Restraint Show Up in Nominee Sotomayor's Opinions*, 77 U.S.L.W. 2715 (May 26, 2009) (emphasis added).

which the court might be seen as overstepping its judicial role.¹⁶⁵

This description, based on Justice Sotomayor's opinions as a federal judge, suggest that her record as a jurist is far from that of a judicial activist.

It is noteworthy that, rather than focusing on Sonia Sotomayor's hundreds of opinions as a federal judge as *U.S. Law Week* and the Congressional Research Service did, the Republican opponents to her nomination initially seized on remarks that she made at an academic conference in an attempt to brand and discredit her as a judicial activist. At a conference at Duke Law School in 2005, Judge Sotomayor suggested – somewhat in jest but definitely as an aside – in a question-and-answer session following her main presentation that federal courts of appeal make “policy.”¹⁶⁶ This rather innocuous remark suggested not that she was some kind of activist outside the judicial mainstream but that she in fact understood how the judicial process operates. Justice Sotomayor in effect admitted the obvious about the realities of the judicial function,¹⁶⁷ but expressed a view contrary to what the public ordinarily hears from nominees to the Supreme Court.

In any event, despite the senators' questioning about the long-forgotten comments at Duke, Sonia Sotomayor's judicial philosophy can best be judged by scrutinizing her opinions over her nearly two-decade career as a judge, as opposed to focusing on a statement she made during a question-and-answer session to a panel discussion at an academic conference. Her opinions, however, for the most part were not the central focus of the Senate confirmation hearings. The reason is quite simple: unable to unearth evidence that she in fact was outside the judicial mainstream in her opinions, Republican senators resorted to seizing any evidence of “judicial activism” available – no matter how thin – in a misguided attempt to somehow sidetrack the nomination and to capitalize on the public's simplistic (mis)understanding of the judicial function. Such futile efforts suggests that politics – or, to quote Thurgood Marshall, “[p]ower,

165. ANNA C. HENNING & KENNETH R. THOMAS, CONGRESSIONAL RESEARCH SERVICE, JUDGE SONIA SOTOMAYOR: ANALYSIS OF SELECTED OPINIONS, Summary, unpaginated (June 19, 2009) (emphasis added). An analysis of Sonia Sotomayor's immigration decisions as a federal judge concluded that a review of Justice Sotomayor's immigration decisions generally demonstrated impartiality and fairness. See Lauren Gilbert, *The 26th Mile: Empathy and the Immigration Decisions of Justice Sotomayor*, 13 HARV. LATINO L. REV. 1 (2010).

166. See Sam Stein, “Where Policy is Made”: *Sotomayor's Court Comment Explained*, HUFFINGTON POST, May 26, 2009, http://www.huffingtonpost.com/2009/05/26/where-policy-is-made-soto_n_207570.html. To watch Justice Sotomayor's comments during the panel discussion, see <http://www.youtube.com/watch?v+OfC99LitM2Q>.

167. See *supra* text accompanying notes 142-55.

not reason,”¹⁶⁸ now dominate the Supreme Court confirmation process in the U.S. Senate, as the qualifications and true ideologies of the nominees are almost an afterthought to the Senators.

B. *The “Anti-White” Presumption: The Infamous “Wise Latina” Speech*

Soon after President Obama announced the nomination, Sonia Sotomayor’s published comments at, until relatively recently, a long-forgotten scholarly conference in 2001 at UC Berkeley’s law school were resurrected by opponents and sparked controversy. The remarks provoked conservative pundit Rush Limbaugh to rail against her nomination, proclaiming on talk radio broadcasts from coast-to-coast that she is a “reverse racist” and nothing less than “anti-white.”¹⁶⁹ At bottom, the claim, similar to those made against Justice Marshall by his opponents,¹⁷⁰ was that Justice Sotomayor would not be an impartial Justice on race and civil rights issues.

To support the charges of racism against Justice Sotomayor, one comment in one line of a speech that she made about a “wise Latina” was repeated again and again throughout the Senate confirmation hearings.¹⁷¹ Some background about that speech, which in its entirety says nothing remotely controversial but does reveal insight and an understanding of the need for diversity on the judiciary, is in order.

In October 2001, Justice Sotomayor delivered an invited lecture named in honor of Judge Mario G. Olmos, a respected California jurist, at UC Berkeley School of Law.¹⁷² Her remarks kicked off an academic symposium organized by the students of the *Berkeley La Raza Law Journal* entitled “Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation.”¹⁷³ As the symposium title suggests, the conference was devoted to discussing the under-representation of Latina/os on the judiciary. During this general time frame, there was considerable interest in the topic of diversity among the na-

168. *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

169. See Rachel Weiner, *Limbaugh: Nominating Sotomayor Like Nominating David Duke*, HUFFINGTON POST, May 29, 2009, http://www.huffingtonpost.com/2009/05/29/limbaugh-nominating-soto_n_209151.html.

170. See *supra* Part I.B.-C.

171. See *infra* text accompanying notes 172-206.

172. See Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87 (2002).

173. See Symposium, *Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation*, 13 BERKELEY LA RAZA L.J. 1 (2002).

tion's corps of judges – and much thought given to the possible appointment of the first Latina/o to the U.S. Supreme Court.¹⁷⁴

Along with Justice Sotomayor, a group of distinguished Latina/o judges participated in the UC Berkeley conference, including California Supreme Court Justice Carlos Moreno,¹⁷⁵ Judge Richard Paez of the U.S. Court of Appeals for the Ninth Circuit, and New Mexico Supreme Court Justice Patricio Serna. A number of law professors, including Miguel Méndez (then of Stanford, now of UC Davis), Leo Martínez (UC Hastings), Cruz Reynoso (UC Davis and former Associate Justice of the California Supreme Court), Joaquín Avila (Seattle), and others, also participated in the conference.¹⁷⁶

Entitled “A Latina Judge’s Voice,” Justice Sotomayor’s remarks offered some of her personal history, in which she clearly identified with her Puerto Rican ancestry.¹⁷⁷ She proceeded to discuss the importance of a judge’s gender and racial ancestry in deciding cases.¹⁷⁸ Justice Sotomayor also detailed the chronic underrepresentation of women and minorities on the bench, a well-known problem with which few knowledgeable observers would dispute.¹⁷⁹ But the following single statement from the speech is what triggered claims that the distinguished Puerto Rican jurist was nothing less than a racist:

I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.¹⁸⁰

Taken literally, the remark might be read to suggest that Justice Sotomayor believes in some kind of racial – specifically Latina – superiority, a position that is in tension with her other public statements. To understand what she meant in full, however, some context is in order. At a conference devoted to increasing the presence of Latina/os in the judiciary, which had been organized by students (many, if not most, of them Latina/o)

174. In 2001, students at the Harvard Law School held a symposium considering the prospect of the appointment of the first Latino to the Supreme Court. See Symposium, *Toward a Supreme Court Appointment*, 5 HARV. LATINO L. REV. 1 (2002). Diversity on the judiciary also was the subject of a symposium published by University of Michigan law students. See Symposium, *Diversity, Impartiality, and Representation on the Bench*, 10 MICH. J. RACE & L. 1 (2004).

175. Justice Moreno, along with Justice Sotomayor, reportedly was a candidate on President Obama’s short list of potential nominees to the U.S. Supreme Court. See John Schwartz, *Californian Would Add Wide Experience to the Court*, N.Y. TIMES, May 20, 2009, at A18.

176. I moderated a panel at the conference and subsequently published a paper analyzing the possibility of the first Latina/o on the Supreme Court in the symposium issue. See Johnson, *supra* note 35.

177. See Sotomayor, *supra* note 172, at 87-89.

178. See *id.* at 90-92.

179. *Id.* at 89-90.

180. *Id.* at 92.

looking for inspiration, hope, and encouragement,¹⁸¹ Justice Sotomayor in the entirety of her speech stated the obvious. A diversity of perspectives among judges matters. Race matters.¹⁸² Gender matters. Having a Latina/o on the U.S. Supreme Court matters.¹⁸³

The take-home message of Justice Sotomayor's entire speech, which upon delivery provoked little reaction from the audience and received virtually no public attention at the time, was simple: We as a society need to keep working together to diversify the judiciary in terms of women and people of color. Despite the undisputable truth of this general message, during the hearings, Senate Republicans pressed and forced Sonia Sotomayor to retreat from the reference to a "wise Latina" expressed in one line of her speech. In response to the grilling from the senators, she admitted that her choice of words "fell flat."¹⁸⁴ Justice Sotomayor also attempted to deflect the senators' criticism by saying that she was simply giving an inspirational speech to law students.¹⁸⁵

Considered in its proper context, Justice Sotomayor's UC Berkeley speech suggested that diversity of perspectives among judges is likely to lead to better overall decision-making.¹⁸⁶ That is a well-accepted proposition that explains why the U.S. courts have systems in place that strive to have a jury that is drawn from a cross-section of the community.¹⁸⁷ It explains why the much-maligned "all-white jury" that all-too-often convicts the African

181. In this vein, the student organizers of the conference understood the symposium as "serv[ing] as a wonderful opportunity to celebrate the contribution of Latina/os to the law and to bring together Latina and Latino students, scholars, practitioners, and public officials. . . . *The symposium and this issue seek to highlight [the] lack of representation and to foster discussion about how to remedy the problem.*" Introduction to Symposium, *Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation*, 13 BERKELEY LA RAZA L.J. unpaginated (2002) (emphasis added).

182. See generally CORNEL WEST, RACE MATTERS (1993) (analyzing importance generally of race in American social life).

183. See Johnson, *supra* note 35, at 7-14.

184. See *Hearings* (statement of J. Sotomayor), *supra* note 127.

185. See *id.*

186. For analysis of the benefits of racial diversity on the judiciary, see Ifill, *supra* note 25; Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & LAW 5 (2004); Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423 (2008) [hereinafter *Lazos, Only Skin Deep?*]; Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That is Inclusive?: What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & LAW 101 (2004).

187. See 28 U.S.C. § 1861 ("It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."); see, e.g., *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 224-25 (1946); *Smith v. Texas*, 311 U.S. 128, 130 (1940); see also Vikram David

American defendant in a criminal case is criticized and raises inferences of an unfair process and mistaken outcomes.¹⁸⁸ The value of diversity of perspective is also one important reason why the framers of the U.S. Constitution chose for nine – not one, two, or three – Justices to collectively make the decisions of the nation’s highest court. And it is why, by most accounts – including those of their fellow Justices – the first African American, Thurgood Marshall,¹⁸⁹ and the first woman, Sandra Day O’Connor,¹⁹⁰ with distinctive life histories and experiences made distinctive contributions as Justices of the Supreme Court. Diversity among the judiciary may help serve as an antidote to the current bias found in judicial decision-making and created, in part, by the relatively homogeneous group of judges on the bench.¹⁹¹

Nonetheless, some senators suggested that the “wise Latina” comment evidenced some kind of racial bias that disqualified Justice Sotomayor from sitting on the Supreme Court. Absent reading one line from a speech out of context, however, there was precious little evidence that Justice Sotomayor might be racially biased. This is true *unless* one begins with the presumption that all people of color are racially biased and that the nominee must bear the burden of proof in defeating that presumption. Unfortunately, some people do in fact make this assumption about people of color in evaluating their qualifications for leadership positions in U.S. society.

The remainder of Sonia Sotomayor’s speech at UC Berkeley makes it clear that she does not embrace any theory of racial superiority and is not anti-white, a dubious proposition at best but an accusation with which many people of color – especially those committed to civil rights – are all too familiar.¹⁹² Indeed, she emphasized that “we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different

Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995) (analyzing political nature of service on juries).

188. See generally Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1175-76 (2008) (summarizing studies comparing the differences in the deliberations of all-white juries and racially mixed juries).

189. See Johnson, *supra* note 35, at 3-7.

190. See *supra* Part II.

191. See Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009); see, e.g., Mary Foster, *Man’s Halt of Interracial Marriage Sparks Outrage*, S.F. CHRON., Oct. 16, 2009 (reporting on controversy generated by denial of marriage license to an interracial couple by justice of the peace in Louisiana); See also Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (studying impacts on unconscious racism on trial judges).

192. See *supra* Part I.B.

group. Many are so capable.”¹⁹³ Justice Sotomayor specifically acknowledged that “nine white men on the Supreme Court in the past have done so on many occasions and on many issues including *Brown [v. Board of Education]*.”¹⁹⁴

In the UC Berkeley speech, Justice Sotomayor further emphasized that “[n]o one person, judge or nominee will speak in a female or people of color voice. I need not remind you that Justice Clarence Thomas represents a part but not the whole of African-American thought on many subjects.”¹⁹⁵ In these words, Justice Sotomayor made it clear that she expressly rejected any notion of racial essentialism or superiority. At the same time, Justice Sotomayor proceeded to encourage the audience to continue to pursue efforts that ensure that “statistically significant numbers” of women and minorities are appointed to the bench and expressed hope that the judiciary someday will look more like America than it did in 2002.¹⁹⁶

Despite Justice Sotomayor’s overall message about the need for inclusion, the one line about the “wise Latina” in the UC Berkeley speech was interpreted by some senators as a message of racial exclusion and dominated the Senate confirmation hearings. Republican senator after Republican senator on the Senate Judiciary Committee returned to the speech. Appropriately humble, Justice Sotomayor apologized time and again. In the end, little was accomplished.

Senator Lindsay Graham (R-SC), ultimately the lone Republican on the Judiciary Committee to vote in favor of Justice Sotomayor’s confirmation, at one point tellingly railed that a white man could never say something analogous to the “wise Latina” comment without sparking a public uproar.¹⁹⁷ However, when Senator Tom Coburn (R-Oklahoma) in questioning Justice Sotomayor made an oblique – and, on many different levels, patently offensive – reference to Cuban American sitcom character Ricky Ricardo (played by Desi Arnaz) from the 1960’s sitcom “I Love Lucy,” by telling her in faux-broken English that she would

193. See Sotomayor, *supra* note 172, at 92.

194. *Id.*

195. See *id.* at 91 (emphasis added); see also *supra* text accompanying notes & notes 25-28 (discussing controversy over Clarence Thomas nomination).

196. See Sotomayor, *supra* note 172, at 93.

197. *Confirmation Hearings on the Nomination of Sonia Sotomayor To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Sen. Lindsay Graham) [hereinafter *Hearings*] (statement of Sen. Graham)]. Senator Graham’s comments are a variation of the theme that whites, who are “innocent” of any discrimination, are the unwitting victims of the civil rights laws and the efforts to remedy the last vestiges of discrimination in American social life. See Cecil J. Hunt, II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477 (2006).

have some “splaining to do” if she acted as described in a hypothetical question, public criticism was almost nonexistent.¹⁹⁸ If an employer were to say anything comparable to an applicant in a job interview, an employment discrimination claim might well be filed. Indeed, with an African American nominee, can we today imagine a reference by a senator to the catch-line “DY-NOMITE!” from the 1970s sitcom “Good Times” depicting an African American family?¹⁹⁹

Similar to Senator Coburn’s offensive reference to Ricky Ricardo, Chief Justice Roberts years ago used the phrase “illegal amigos” in a Department of Justice memorandum prepared in connection with the case of *Plyler v. Doe*,²⁰⁰ in which the Supreme Court invalidated a Texas law that effectively barred undocumented children – many of them of Mexican origin – from the public schools.²⁰¹ This derogatory reference, which was brought up in Chief Justice Roberts’ confirmation hearings, did not cause much of a stir, certainly not enough to jeopardize his confirmation.

In any event, one would suspect that the most natural place to find evidence of racial bias – if any existed – would be in Justice Sotomayor’s decisions in civil rights cases, many of which naturally raise issues of race and racial discrimination. However, no type of racial bias was evident from Sonia Sotomayor’s civil rights opinions. Indeed, after thoroughly reviewing her record, the Congressional Research Service found itself unable to identify any “particular pattern evident in Judge Sotomayor’s civil rights opinions;” it instead read her body of opinions as sug-

198. See Frank Rich, *They Got Some ‘Splaining’ to Do*, N.Y. TIMES, July 19, 2009, at 10; *Confirmation Hearings on the Nomination of Sonia Sotomayor To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Sen. Tom Coburn).

199. See Sherri Burr, *Television and Societal Effects: An Analysis of Media Images of African-Americans in Historical Context*, 4 J. GENDER RACE & JUST. 159, 165-69 (2001) (analyzing critically stereotypes of African American television shows, including “Good Times,” in 1970s).

200. 457 U.S. 202 (1982).

201. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 260 (2005) (statement of Sen. Schumer) (questioning of John Roberts about reference to “illegal amigos”); see also Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Rule of Enforcement*, 2007 U. CHI. LEGAL F. 27, 56 n. 48 (discussing Chief Justice Roberts’ reference to “illegal amigos”).

Anti-Latina/o slurs have been known to come from the lips of sitting Supreme Court Justices. For example, according to Justice William Brennan’s conference notes, Chief Justice Rehnquist observed that the Court’s conference discussion of *Plyler v. Doe* that “illegal aliens” were “an intractable problem in the southwest. *Webbacks or not, question is validity of Texas’ policy choices.*” Brennan Conference Notes for *Plyler*, in William J. Brennan Papers, Library of Congress, Box I: 554, Folder 2 (emphasis added).

gesting that she was “reasonably balanced” on civil rights issues.²⁰² Such a conclusion obviously fails to support the claim that Justice Sotomayor is a racist or remotely biased in civil rights cases.

One civil rights decision in which Justice Sotomayor participated became the subject of considerable inquiry – at least of the superficial variety – during the confirmation hearings. Republican senators aggressively questioned the nominee’s role in the New Haven firefighters case, in which a 5-4 Supreme Court, just weeks before the confirmation hearings, reversed a *per curiam* Second Circuit ruling, in which Justice Sotomayor joined, which affirmed a detailed district court opinion.²⁰³ That, however, was one of the few controversies in the entire confirmation process relating directly to her record as a judge – and, in my estimation, a subject that constituted fair game for reasonable inquiry in the confirmation hearings. The focus on a single *per curiam* order is surprising, however, given that Justice Sotomayor had written or joined opinions in literally hundreds of cases, including many civil rights decisions.²⁰⁴ The myopic focus on one panel decision that she did not write suggests that the senators hoped to win some kind of political game, rather than reasonably assess Justice Sotomayor’s qualifications to serve on the Court.

The New Haven firefighters case perhaps was worthy of questioning as part of Justice Sotomayor’s judicial record.²⁰⁵ However, it was a decision in which a sharply-divided Supreme Court arguably made new law.²⁰⁶ It seems difficult to criticize

202. HENNING & THOMAS, *supra* note 165, at 17.

203. See *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009). Judge Sotomayor was on the panel of the U.S. Court of Appeals for the Second Circuit that affirmed a district court decision in a “reverse discrimination” case brought by New Haven, Connecticut firefighters. See 530 F.3d 87 (2d Cir. 2008) (*per curiam*). That ruling read, in relevant part, as follows:

We affirm, for the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below. *Ricci v. DeStefano*, 554 F. Supp. 2d 142 (D. Conn., Sept. 28, 2006). In this case, the Civil Service Board found itself in the unfortunate position of having no good alternatives. We are not unsympathetic to the plaintiffs’ expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated. But it simply does not follow that he has a viable Title VII claim. To the contrary, because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected.

Interestingly, if Justice Sotomayor had sided with the plaintiffs in the New Haven firefighter’s case, she might have been alleged to have been biased in favor of the Puerto Rican plaintiff. She thus faced a classic Catch-22 in whatever way she voted in that case.

204. See *supra* Part III.A.

205. See *supra* note 203 and accompanying text.

206. See Linda Greenhouse, *The Court Changes the Game*, N.Y. TIMES, June 30, 2009, at A21.

Justice Sotomayor's role as a court of appeals judge – especially since the three-judge panel was unanimous – given the subsequent divided vote on the Court. Indeed, one is hard-pressed to seriously question as problematic, or out of the judicial mainstream, a court of appeals panel that shared the views of four Justices of the U.S. Supreme Court.

C. *Affiliation with the Puerto Rican Legal Defense and Education Fund*

One of the jarring aspects of the Sonia Sotomayor confirmation process was the barrage of disparaging comments by some Republican senators about the relatively mainstream Latina/o civil rights organizations with which she once had been affiliated. Before she was a federal judge, Justice Sotomayor had been a member of the National Council of La Raza (NCLR) and had served on the board of directors of the Puerto Rican Legal Defense and Education Fund (PRLDEF) (now known as Latino Justice). Both organizations were branded as outside the civil rights mainstream and more along the lines of a race-based, if not downright racist, special interest group. This claim presumably stuck in no small part because of the reference to “La Raza” and “Puerto Rican” in their respective organizations’ names. It is telling that no Senator – not even one of Justice Sotomayor’s Democratic supporters on the Senate Judiciary Committee – stood up to mount much of a defense of the organizations.

Not long after the announcement of the nomination, former member of Congress (and well-known anti-immigrant advocate) Tom Tancredo sensationally characterized NCLR as the Latina/o equivalent of the Ku Klux Klan,²⁰⁷ a notoriously racist organization that brutally terrorized and murdered African Americans for generations after the Civil War. Obviously, such an analogy between a terrorist group devoted to racial segregation, committed to white supremacy, and willing to use violence to achieve those ends, and a respected civil rights organization is misplaced.²⁰⁸ As Professor Sherrilyn Ifill wrote,²⁰⁹ the making of wild accusations by politicians against mainstream civil rights or-

207. See Susan Crile, *Tancredo Claims Sotomayor in “Latino KKK”*, HUFFINGTON POST, May 28, 2009, at http://www.huffingtonpost.com/2009/05/28/tancredo-claims-sotomayor_n_208831.html; Bob Herbert, *The Howls of a Fading Species*, N.Y. TIMES, June 1, 2009, at A23.

208. President Obama previously had named former National Council of La Raza officer, Cecilia Muñoz, to be the Director of the White House Office of Intergovernmental Affairs. See Elissa Silverman & Hamil R. Harris, *Strategy Discussed at NW Gathering*, WASH. POST, Dec. 5, 2008, at B5. That appointment provoked little public comment.

209. See Sherrilyn Ifill, *Sotomayor’s Judgment Day*, THE ROOT, July 13, 2009, at <http://www.theroot.com/views/sotomayors-judgment-day?page=0,1>.

ganizations reveals how vulnerable Latina/os continue to be in American society.²¹⁰

Throughout the confirmation hearings, the entire nation saw the persistent – and deeply troubling – efforts to demonize the Puerto Rican Legal Defense and Education Fund made by Republican senators on the Judiciary Committee. The attacks on Justice Sotomayor, based on her past relationship with PRLDEF, of course, sound eerily reminiscent of the attacks on Thurgood Marshall during his confirmation based on his even-closer relationship with the NAACP.²¹¹ However, the 1967 attacks on Thurgood Marshall for his role in the NAACP’s civil rights litigation (or the attacks on the Federalist Society, the conservative advocacy group that promoted Justices Scalia and Alito as well as Chief Justice Roberts), and long-term affiliation with the NAACP, were arguably more subtle in certain respects than those made against Justice Sotomayor in 2009.²¹²

As they did in the Marshall confirmation hearings, the senators opposed to Justice Sotomayor’s confirmation, in effect, sought to test her assimilation into mainstream values and ideals on all-important issues of race and civil rights. Her affiliations with the PRDLF more than 17 years before the nomination and the speeches that she delivered at law schools, including words wrenched out of context, were scrutinized with a fine-toothed comb and concerted efforts to transform a moderate jurist into some kind of racial extremist.²¹³

The questions posed of the nominee by some senators repeatedly placed PRLDEF in an unfavorable, if not sinister, light. In response to questioning from Senator Lindsey Graham, for example, Justice Sotomayor plainly responded that PRDLF had a goal of promoting the civil rights and equal opportunity for Hispanics.²¹⁴ Senator Graham nonetheless pressed to paint PRLDEF as an extremist group that opposed the death penalty, promoted abortion rights, and allegedly supported “quotas” over tests,²¹⁵ far from fair characterizations of the organization’s posi-

210. See Johnson, *A Case Study of Color-Blindness*, *supra* note 107 (using Arizona immigration law as an example of the vulnerability of Latina/os in the political process).

211. See *supra* Part I.

212. See *supra* Part I.C. This perhaps is a remnant of the Black/white paradigm of civil rights, which tends to view civil rights concerns, and race and racism, as the semi-exclusive domain of African Americans. See Richard Delgado, *Rodrigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997); Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213 (1997).

213. See *supra* Part II.B.

214. *Hearings* (statement of J. Sotomayor), *supra* note 127.

215. *Hearings* (statement of Sen. Graham), *supra* note 197.

tions. This posturing played into popular perceptions of PRLDEF as an “extremist” group, which is even how the Associated Press characterized it.²¹⁶

In this line of questioning, Senator Graham asked a bizarre – at least if one has even a fleeting knowledge of the incredible political and other diversity among the Latina/o community in the United States²¹⁷ – question about whether Justice Sotomayor had ever known any low income Latina/os who supported the death penalty and opposed abortion.²¹⁸ One can only wonder what Senator Graham was thinking. The nominee admitted, as virtually any Latina/o must, that she had; indeed, she had emphasized in the much-maligned “wise Latina” speech at UC Berkeley in 2001 that not all Latina/os think alike,²¹⁹ a statement with which no reasonably informed person could disagree.

In an attempt to demonstrate that Justice Sotomayor in fact supports abortion rights as well as to generally discredit her, Senator Graham badgered her about the position taken in a single PRDLEF brief filed in 1980 involving access to abortion, in a series of cases, while she was a member of the organization’s board of directors.²²⁰ The line in a brief read as follows: “Just as *Dred Scott v. Sanford*²²¹ refused citizenship to Black people, [the Court’s] opinions strip the poor of meaningful citizenship under fundamental law.”²²² The simple point was that the decisions limiting access to abortions, in effect, rendered the poor with second class citizenship. However, the statement set off Senator Graham, who stretched the meaning of this single sentence into a claim that PRLDEF was equating denial of access to abortion to slavery.

To try to diffuse the attack on Justice Sotomayor, based on what an attorney might characterize as a throw-away line from the PRLDEF brief, Senator Sheldon Whitehouse (D-Rhode Island) highlighted the obvious – that Judge Sotomayor’s membership on the PRLDEF board had already fully come to the attention of the U.S. Senate when the senators vetted and confirmed her to serve on both the district court and court of appeals. Senator Whitehouse further emphasized, perhaps more

216. See Julie Hirschfeld Davis, *Republican: Sotomayor Had Ties to Extreme Group*, ASSOCIATED PRESS, July 3, 2009.

217. See generally Johnson, *supra* note 29 (analyzing heterogeneity among Latina/os in the United States).

218. *Hearings* (statement of Sen. Graham), *supra* note 197.

219. See *supra* Part III.B.

220. *Hearings* (statement of Sen. Graham), *supra* note 197.

221. *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

222. Brief of Certain Organizations as Amici and Amicus Curiae in support of Petition for Rehearing, *Diamond v. Zbaras*, 1979 U.S. Briefs 1268; 1980 U.S. S. Ct. Briefs LEXIS 1300, at **13 (July 25, 1980).

importantly, that board members do not ordinarily review legal briefs before they are filed in court.²²³ Nothing was affirmatively said to defend the bona fides of PRLDEF. To try to quell the controversy, PRLDEF felt compelled to submit a written statement to the Senate Judiciary Committee to the effect that members of the board do not ordinarily review briefs filed in litigation.²²⁴

Rather than defend PRLDEF as a respected civil rights organization, supporters attempted to distance Justice Sotomayor as far as possible from the organization, its litigation, and policy positions. No senator at any point in the confirmation hearings stood up to affirmatively defend the exemplary record of this respected civil rights organization. Rather, the charges that the group was on the radical fringes were left entirely unaddressed.

Emphasizing that Justice Sotomayor had said some things that “bugged the hell out of me,”²²⁵ Senator Graham repeatedly chastised Justice Sotomayor for her reference to the “wise Latina” and her affiliation with PRLDEF. When given his turn at the microphone, Senator Orrin Hatch (R-UT) also picked at the bona fides of PRLDEF.²²⁶ Although those senators may claim to oppose racial discrimination, they also apparently object to efforts made by civil rights organizations, through litigation and education, to eliminate racial discrimination and, even worse, they somehow equate those who strive to combat racial discrimination with those who engage in it.

In light of the criticism of Sonia Sotomayor’s service on its board of directors,²²⁷ PRLDEF’s absence from the witness list of those testifying in support of the nomination is dismaying.²²⁸ One also is left to wonder why Latina/o civil rights organizations like PRLDEF are viewed as suspect while conservative activist groups, such as the Federalist Society of which Chief Justice Roberts and Alito were members, are generally not viewed as dangerously subversive.²²⁹ Organizations that focus on issues of civil

223. See *Confirmation Hearings on the Nomination of Sonia Sotomayor To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Sen. Sheldon Whitehouse).

224. See *Confirmation Hearings on the Nomination of Sonia Sotomayor To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of PRLDEF).

225. *Hearings* (statement of Sen. Graham), *supra* note 197.

226. *Confirmation Hearings on the Nomination of Sonia Sotomayor To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Sen. Orrin Hatch).

227. See *supra* text accompanying notes 207-26.

228. See *supra* text accompanying notes 133-38.

229. See Jason DeParle, *Nomination for Supreme Court Stirs Debate on Influence of Federalist Society*, N.Y. TIMES, Aug. 1, 2005, at A12. In 2011, Justices Scalia and

rights and racial discrimination are apparently viewed differently than other ideological groups.

This is not the first time that affiliations with Latina/o civil rights organizations have been used to attack one of President Obama's possible nominees for a high level position in the federal government. Earlier in 2009, after reportedly offering him the post, the Obama administration declined to nominate Tom Saenz, formerly the head of litigation at the Mexican American Legal Defense & Educational Fund (MALDEF),²³⁰ to lead the U.S. Department of Justice's Civil Rights Division. MALDEF pursues litigation seeking to protect the rights of Latina/os in employment, voting, immigration, education, and housing.²³¹ The same Justice Department position was one for which respected law professor Lani Guinier, an African American, had been nominated by the Clinton administration before being summarily dropped after her conservative opponents attacked her mercilessly as a "quota queen."²³² It was reported that the Obama administration's change of heart resulted from growing opposition to the Saenz nomination because of his cutting edge (and successful) litigation at MALDEF to protect the rights of immigrants and Latina/os.²³³ In the opinion of the *New York Times* as well as other newspapers, Saenz would have been an excellent

Thomas were criticized for participating in what some claim were fundraising events for conservative causes. See Nan Aron, *An Ethics Code for the High Court*, WASH. POST, Mar. 14, 2011, at A19.

230. For purposes of full disclosure, I currently serve on the board of directors of MALDEF.

231. See Mexican-American Legal Defense and Educational Fund website, www.maldef.org.

232. See Krista Helfferich, Note and Comment, *The Stress, the Press, The Test, and the Mess with the Lani Guinier Smear: A Proposal for Executive Confirmation Reform*, 28 LOY. L.A. L. REV. 1139, 1151-59 (1995). Similarly, some Latina/o politicians in California, including Los Angeles Mayor Antonio Villaraigosa and former Lieutenant Governor Cruz Bustamante, have been criticized because of their membership as college students in the Chicana/o activist group MEChA. See Steven Bender, Sylvia R. Lazos Vargas, & Keith Aoki, *Race and the California Recall: A Top Ten List of Ironies*, 16 BERKELEY LA RAZA L.J. 11, 12-14 (2005).

Former Yale Law School Dean Harold Koh, a Korean American with impeccable credentials for the post, also experienced opposition to his appointment by President Obama as legal adviser to the State Department. See, e.g., *Koh, No? Critics Decry Obama Nominee for State Department Legal Adviser*, FOX NEWS, Mar. 31, 2009, available at <http://www.foxnews.com/politics/2009/03/31/obamas-appointment-koh-state-department-legal-adviser-stirs-controversy/>. Tarring Goodwin Liu as a liberal, a group of Republican senators have indefinitely held up his nomination to the U.S. Court of Appeals for the Ninth Circuit. See *supra* note 12.

233. Saenz had been the lead attorney in the case leading to the striking down of California's anti-immigrant initiative Proposition 187, see *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995), and a case successfully challenging a local ordinance regulating day laborers; see *Coalition for Humane Immigrant Rights v. Burke*, 2000 U.S. Dist. LEXIS 16520, at *43 (C.D. Cal. 2000) (striking down Los Angeles County ordinance regulating day laborers' solicitation of work).

head of the Civil Rights Division; many observers felt that it was a shame that his successful and admirable civil rights record as an attorney at MALDEF scuttled his nomination.²³⁴

Ironically enough, in today's poisonously partisan political atmosphere, past success in enforcing the civil rights laws through litigation and advocacy on behalf of Latina/os and immigrants apparently disqualifies respected lawyers from heading the federal agency centrally responsible for enforcing the nation's civil rights laws. This means that those who refrain from actively seeking racial equality for all are more likely today to be nominated and confirmed for high governmental positions than those who choose to labor on behalf of victims of discrimination. This incredible turn of events sends an unmistakable message to young lawyers who aspire to participate in the unfinished work of dismantling the deeply entrenched remnants of American apartheid in U.S. social life.

In the end, a MALDEF attorney's success at vindicating the civil rights of Latina/os was used to torpedo a nomination for an extremely important civil rights post in the Obama administration.²³⁵ It is groups like MALDEF that rightly call for the government to respond to racist atrocities in cases such as the 2009 hate killings of Latinos in Shenandoah, Pennsylvania and Patchogue, New York.²³⁶ After being nixed for the Justice Department post, Tom Saenz returned to MALDEF as its President and General Counsel and now leads the organization's efforts to vindicate the civil rights of Latina/os across the United States.²³⁷

Hopefully, the racial smear tactics based on attacks on Latina/o civil rights organizations that we saw in the Saenz nomination and in the Sotomayor confirmation process, will not reappear in the future. Indeed, the quick retreat of mainstream Republicans from some of the early – and most vociferous – race-based attacks on Sonia Sotomayor suggests that certain members of the U.S. Congress recognized the danger that the thinly-veiled, over-the-top attacks on civil rights groups promoting the civil rights of Latina/os would further alienate Latina/o

234. See *Obama Flinches on Immigration*, N.Y. TIMES, Mar. 23, 2009, at A26.

235. The administration ultimately selected another Latino, Thomas Perez, for the post. See *Maryland Official For Civil Rights Post*, N.Y. TIMES, Mar. 14, 2009. The Senate delayed the confirmation of Perez for six months. See Ruth Marcus, *Advise and Stall; Senate Republicans Are Holding Up Key Nominees*, WASH. POST, Oct. 7, 2009, at A25.

236. See Ian Urbina, *After Pennsylvania Trial, Tensions Simmer Over Race*, N.Y. TIMES, May 17, 2009, at A18; Anne Barnard, *Rights Group Accuses U.S. of Failing to Protect Latinos*, N.Y. TIMES, Dec. 19, 2008.

237. See Phil Willon, *Civil Rights Group Taps Key Villaraigosa Advisor*, L.A. TIMES, July 15, 2009, at A8.

voters from the Republican party.²³⁸ One would hope that, in the future, organizations like MALDEF, Latino Justice/PRLDEF, and National Council of La Raza would be viewed as positive contributors to civil rights and social justice in U.S. society, rather than vilified as racial extremists, characterized as far outside the mainstream, and viewed as part of the civil rights problem rather than a part of the civil rights solution.

D. *The Temperament "Problem"*

Race and gender played a prominent role in the Senate confirmation hearings on the Sotomayor confirmation, just as they continue to play an important role in American social life. Sonia Sotomayor's temperament, for example, came under scrutiny even before the announcement of her nomination. The claim that she lacked the proper judicial temperament, which was based on spurious evidence, played on deeply-engrained gender and racial stereotypes.²³⁹ The questioning of Justice Sotomayor's judicial temperament unfortunately seemed to gain traction, at least initially, because the claim tapped into long-held stereotypes of Latina/os as prone to a "hot" temper,²⁴⁰ as promoted by the stereotypical sitcom character Ricky Ricardo.²⁴¹

The challenge to Justice Sotomayor's temperament ultimately boiled down to the claim that, as a federal judge, she was an aggressive questioner of attorneys at oral argument.²⁴² The Senate, however, previously confirmed Justices who are well known as aggressive questioners of attorneys, namely Chief Justice John Roberts²⁴³ and Justice Antonin Scalia, who is notorious for verbally attacking advocates as well as colleagues on the

238. See Steven Thomma, *Fearing Backlash, Conservatives Tone Down Rhetoric on Sotomayor*, KNIGHT RIDDER WASH. BUREAU, June 3, 2009.

239. See generally STEVEN W. BENDER, *GREASERS AND GRINGOS* (2003) (analyzing critically prevailing stereotypes of Latina/os in American culture); Ediberto Román, *Who Exactly is Living La Vida Loca?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 IOWA J. GENDER, RACE & JUST. 37 (2000) (same).

240. See BENDER, *supra* note 239, at 67-72; see also Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 240 (1994) ("The standard description of Latino males as hot-blooded, passionate, and prone to emotional outbursts is legendary.").

241. See *supra* text accompanying notes 198-99. Some of the Senators in opposition to Justice Sotomayor's confirmation expressed concerns with her that they failed to register when she was confirmed by an 80-11 vote for her appointment to the Second Circuit. See Lazos, *Only Skin Deep*, *supra* note 186, at 1471 (noting that, at the time of her confirmation to the court of appeals, Justice Sotomayor's "racial identity did not make whites feel uncomfortable about their own white identity").

242. See Rosen, *supra* note 104.

243. See Toobin, *supra* note 150.

Court who disagree with him.²⁴⁴ The fact that Sonia Sotomayor could put up with days of hostile questioning from the senators, with many of the questions bordering on the ridiculous, while taking each and every questioner and question as seriously as the last, demonstrated a remarkable patience that many fine judges lack. She was generally unflappable in answering the questions, refusing to allow senators to put words in her mouth, and, for the most part, stood calmly by her positions. Justice Sotomayor's supposedly fiery temper never flared in what most others in her position might have found to be an oppressive four days of hearings.

As the Senate confirmation hearings of Justice Sotomayor demonstrate, Latina/os still face hurdles in being taken seriously and fully accepted in the public sphere of American society. Indeed, the Senators seemed flummoxed at times with the proper treatment to accord a Latina nominee. Senator Coburn's seriously out of place reference to Justice Sotomayor, using a line from a stereotypical Cuban-American (not Puerto Rican) sitcom character from the 1960s, is nothing less than an amazing example.²⁴⁵

In the end, it appears that race together with gender proved to be an explosive combination in the Sotomayor confirmation hearings. The hearings of Justices Sandra Day O'Connor and Ruth Bader Ginsburg²⁴⁶ dramatically differed in both tone and substance from Justice Sotomayor's hearings. The senators treated the two white women respectfully, something that cannot be said of the treatment of the only woman of color nominee in U.S. history. The stark contrast suggests that the difference of gender alone in a Justice is generally far less threatening to the status quo than the difference that race *and* gender in one nominee brings to the equation.²⁴⁷ Specifically, a woman of color on the Supreme Court is presumed to be much more suspicious, if not dangerous, than a mere woman.

244. See Joe Conason, *So Who Put the Temper in Judicial Temperament?*, N.Y. OBSERVER, Apr. 3, 2006, at 5 ("Justice Scalia's intellect is too often overshadowed by aggressive bluster and rigid ideology. He suffers from an uncontrollable impulse to give insult and an insufficient respect for the opinions of others. Widely advertised as exceptionally smart, he sometimes does and says things that are extraordinarily stupid.") (emphasis added). A few months into her tenure on the Court, it was reported that Justice Sotomayor fit in well among the Justices in her active questioning of attorneys—and was considerably less critical of the advocates than Justice Scalia. See *No Quiet Time for New Justice*, NAT'L L.J., Nov. 16, 2009, at 1.

245. See *supra* text accompanying notes 195-98.

246. See *supra* Part II.

247. See *supra* Part II.

In the end, despite attacks based in large part on her race and gender, Justice Sotomayor prevailed in the U.S. Senate. The U.S. Senate and the public ultimately rejected the concerted efforts by conservatives seeking to undermine the long-awaited nomination of a Latina to the Supreme Court by resorting to weak claims that she was a judicial activist, anti-white, a member of extremist anti-white organizations, and possessed a temperament unfitting of a Supreme Court Justice.

As in the Thurgood Marshall confirmation hearings, there was little mention during the Sotomayor confirmation about the positives of the appointment of the first Latina on the U.S. Supreme Court. As Marshall's appointment did for African Americans,²⁴⁸ however, the addition of the first Latina/o to the Supreme Court already has had significant impacts on the greater Latina/o community as well as for the Court and the nation as a whole.

Justice Sotomayor's stellar credentials and her unique perspective — informed in part by a combined racial, class, disability, and gender position different from that of any Justice ever to serve on the Supreme Court — will likely positively affect the Court's deliberations and inform and influence her colleagues on the Court, just as Justice Marshall's did.²⁴⁹ Justice Sotomayor will likely bring new and different experiences and perspectives to the Supreme Court and its decision-making process.²⁵⁰ Throughout her adult life, Justice Sotomayor has been active in the Puerto Rican community and, in her own way, has long advocated for Latina/o civil rights.²⁵¹ She will no doubt bring her lifetime of that experience to bear on her work as a Justice on the Supreme Court.

Moreover, a Latina Justice might have positive impacts on the development of certain bodies of law. Immigration law immediately comes to mind. Latina/os generally understand — often based on personal experience — that many non-Latina/o U.S. citizens assume that Latina/os — native born in this country or not — are “foreigners,” and treat them as immigrants and perpetual outsiders to the national community.²⁵² Indeed, some news reports on Justice Sotomayor's nomination — including one in the venerable *Washington Post* — described her parents, who

248. See Johnson, *supra* note 35, at 3-7.

249. See *id.*

250. See Ifill, *supra* note 25 (making a similar the point in advocating for greater inclusion of African Americans in the judiciary).

251. See *supra* Part III.C.

252. See Johnson, *supra* note 105, at 117-29; Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 441-52 (1996). For analysis of Justice Sotomayor's immigration decisions, see Gilbert, *supra* note 165.

were U.S. citizens by birth, as “immigrants” from Puerto Rico.²⁵³ In contrast, no news organization described Chief Justice John Roberts, who was born in New York, as having parents who “immigrated” from the Empire State. While the confusion over the status of Puerto Rico may be understandable to some, it remains true that the deeply-embedded “Latino-as-foreigner” stereotype has indelibly influenced the analysis of U.S. immigration law and enforcement issues, as well as other bodies of law, and continues to significantly impact Latina/os of all immigration statuses living in the United States.²⁵⁴ Discrimination against Latina/os is often justified on their status as foreigners (when most are not), with race often claimed not to be the reason for the discrimination.²⁵⁵

Equally important, a Latina/o on the Supreme Court promises to bring a unique perspective to bear on the analysis of substantive bodies of law in which issues of race and national origin arise more subtly than in U.S. immigration law. Labor and employment law is an area in which a Latina/o voice on the Supreme Court might make a difference in its deliberations. In *Hoffman Plastic Compounds, Inc. v. NLRB*,²⁵⁶ for example, the

253. See, e.g., *The President's Pick*, WASH. POST, May 27, 2009, at A18 (corrected May 28, 2009). Persons born on the U.S. territory of Puerto Rico as a general matter are U.S. citizens. See Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. THIRD WORLD L.J. 159, 176-80 (1998) (summarizing U.S. citizenship rules for residents of Puerto Rico).

254. See, e.g., Elvia R. Arriola, *LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids*, 28 U. MIAMI INTER-AM. L. REV. 246 (1996-97); Sylvia E. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1554-67 (1998); Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981); George A. Martínez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 UCLA CHICANO-LATINO L. REV. 1, 12-13 (1999). On immigration matters, Justice Sotomayor already appears to have made a difference on the Court. See *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009). As the New York Times observed, “Justice Sotomayor’s opinion in the case, . . . marked the first use of the term ‘undocumented immigrant,’ according to a legal database [in a Supreme Court opinion]. The term ‘illegal immigrant’ has appeared in a dozen decisions.” Adam Liptak, *Sotomayor Draws Retort from Fellow Justice*, N.Y. TIMES, Dec. 9, 2009, at A24. Terminology is extremely important in framing the discussion of immigration and immigration law. See Kevin R. Johnson, “*Aliens*” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263 (1996) (analyzing how the term “alien” to refer to noncitizens in the Immigration & Nationality Act adversely affects their treatment and effectively denies them personhood).

255. See, e.g., Johnson, *A Case Study of Color-Blindness*, *supra* note 107 (mentioning Arizona immigration law that arguably could contribute to profiling of persons of Mexican ancestry).

256. 535 U.S. 137 (2002). For a criticism of the lack of legal protections available to Latina/o immigrant workers, see Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447 (2008); Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006).

Court held, in a case involving an undocumented worker from Mexico, that undocumented workers were not entitled to the all-important remedy of backpay for which other workers may recover for the employer's clear violation of federal labor law. Latina/o scholars have sharply criticized *Hoffman Plastic*, in no small part because of the decision's devastating impact on Latina/os and immigrant workers generally.²⁵⁷ A Latina/o Justice might view the impacts of this interpretation of the law on undocumented immigrant workers in a different light than the majority of the Supreme Court did.

Although facially neutral, and therefore presumably a lawful criteria on which to base decisions, language can be employed as a proxy to attack Latina/os or, at a minimum, adversely affect the Latina/o community, which includes a group of native Spanish speakers and bilingual English/Spanish speakers.²⁵⁸ For example, in *Hernandez v. New York*,²⁵⁹ the Court in 1991 held that a prosecutor could constitutionally use peremptory challenges to

257. See, e.g., Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, The New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1 (2003) (analyzing critically the decision in *Hoffman Plastics*); Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103, 104-05 (2003) ("The *Hoffman* decision represents a retrenchment from a trend in which virtually all jurisdictions that had considered the issue found in favor of the workers."); see also David Weissbrodt, *Remedies for Undocumented Noncitizens in the Workplace: Using International Law to Narrow the Holding of Hoffman Plastic Compounds, Inc. v. NLRB*, 92 MINN. L. REV. 1424, 1425, 1434-45 (2008) (positing the need to permit Title VII employment discrimination claims by undocumented citizens in order to conform to international law).

258. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that Spanish-speaking plaintiff could not bring federal civil rights claim challenging Alabama's requirement that driver's license test be given only in English); *García v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (finding that employer's English-only rule in the workplace did not violate Title VII), *cert. denied*, 512 U.S. 1228 (1994); see also Cristina M. Rodriguez, *Language and Participation*, 94 CAL. L. REV. 687 (2005) (analyzing issue of multiple languages spoken in the United States through a participatory lens and advocating greater embrace of bilingualism); Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2000) (contending that language can be employed as a substitute for race and that language discrimination may effectively result in racial discrimination in violation of the Equal Protection guarantee). For analysis of these and related issues, see Steven W. Bender, *Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145 (1997); Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347 (1997), 10 LA RAZA L.J. 261 (1998); Rachel F. Moran, *Bilingual Education as Status Conflict*, 75 CAL. L. REV. 321 (1987); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992).

259. 500 U.S. 352 (1991). The Court previously had held that race could not serve as the basis for the use of peremptory challenges. See *Batson v. Kentucky*, 476 U.S. 79 (1986).

strike Spanish-speaking jurors in a criminal case that required the translation of Spanish testimony into English. With all Spanish-speakers excluded, a Latino defendant was denied a jury that included a single Latina/o and, not surprisingly, was convicted. Latina/o scholars have harshly criticized *Hernandez v. New York* because of its disparate impacts on Latina/os.²⁶⁰

One might suspect that Justice Sotomayor's views of cases involving language, such as *Hernandez v. New York* would be influenced by the fact that she is a native Spanish speaker,²⁶¹ an important characteristic of her Latina identity. Indeed, she is the first native Spanish-speaker ever to serve as a Justice on the Supreme Court. As a federal judge, Justice Sotomayor has addressed the issue of language rights in a Title VII case involving a claim of national origin discrimination and sensitively observed that "[t]he questions in this case are troubling, and the issues and problems are likely to become more pervasive as our society grows increasingly multiracial and polyglot."²⁶² This sensitivity should not be dismissed as mere rhetorical flourish for it is necessary to understand the complexities of an issue in order to address it appropriately.

A Latina Justice might also look differently than those of other backgrounds at various other civil rights issues cases that come before the Supreme Court,²⁶³ including those implicated by criminal law enforcement.²⁶⁴ As a court of appeals judge, Sonia

While sitting on the Third Circuit, Justice Samuel Alito wrote an opinion upholding the striking of Spanish-speaking jurors without questioning and even inquiring about their willingness to defer to a translator. See *Pemberthy v. Beyer*, 19 F.3d 857 (3d Cir.), cert. denied, 513 U.S. 969 (1994).

260. See, e.g., Miguel A. Méndez, *Hernandez: The Wrong Message at the Wrong Time*, 4 STAN. L. & POL'Y REV. 193 (1992-93); Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1 (1992).

261. See Biography of Judge Sonia Sotomayor, <http://www.ca2.uscourts.gov/judgesmain.htm>.

262. See *McNeil v. Aguilos*, 831 F. Supp. 1079, 1081 (S.D.N.Y. 1993). The Supreme Court has addressed language issues in connection with the translation of voting materials into Spanish for Puerto Rican voters. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966); Katherine Culliton-González, *Time to Revive Puerto Rican Voting Rights*, 19 BERKELEY LA RAZA L.J. 27 (2008).

263. See Rachel F. Moran, *Neither Black Nor White*, 2 HARV. LATINO L. REV. 61 (1997) (arguing that civil rights matters that concern the Latina/o community differ from those of special importance to African Americans and other minority groups); Rachel F. Moran, *What If Latinos Really Mattered in the Public Policy Debate*, 85 CAL. L. REV. 1315, 1318-44 (1997) (questioning the similarity of the immigration experiences of Latina/os and Asian Americans in the United States).

264. See Alfredo Mirandé, *Is There a "Mexican Exception" to the Fourth Amendment*, 55 FLA. L. REV. 365 (2003) (discussing disparate arrest rates for African Americans, Latina/os, and Asian Americans); Mary Romero, *State Violence and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Members*, 78 DEN U.L. REV. 1081 (2001) (analyzing how stereotype of Latino criminality affects criminal law enforcement); CRUZ REYNOSO, *Hispanics and the Criminal Justice System*, in HISPANICS IN THE UNITED STATES 277 (Pastora San Juan Cafferty &

Sotomayor, for example, dissented in two Fourth Amendment cases in which she argued for stronger protection from unreasonable searches and seizures than the majority afforded criminal defendants.²⁶⁵ Similarly, writing for the majority as a circuit judge in *Galarza v. Keane*,²⁶⁶ Justice Sotomayor ruled that the district court had failed in its obligations to ensure that peremptory challenges were not improperly used by the prosecution to strike Latina/o jurors in a case, not coincidentally, involving a Latino criminal defendant.

In the well-known, and much-criticized, case of *Brown v. City of Oneonta*,²⁶⁷ Judge Sotomayor joined most of Judge Calabresi's dissent from the denial of a petition for rehearing en banc of a court of appeals decision dismissing a civil rights claim based on an alleged violation of the Equal Protection Clause of the Fourteenth Amendment; in that case, police questioned every African American, including a Black woman, in a small upstate New York town after a crime victim identified the perpetrator of the crime as an African American man.²⁶⁸ As the extreme facts of the *Oneonta* case demonstrate, reliance on race by law enforcement can raise troubling civil rights concerns,²⁶⁹ a fact not lost on Justice Sotomayor.

Importantly, one cannot assume that people of color generally will share similar concerns or perspectives as Latina/os. For example, for all his virtues, Justice Thurgood Marshall at times wrote opinions that arguably disadvantaged Latina/os.²⁷⁰ Nor did he register objection to the Supreme Court's endorsement of the reliance by the Border Patrol on "Mexican appearance" – a vague and ambiguous category of persons if there ever was one that fails to appreciate the great heterogeneity of phenotypes

David W. Engstrom eds., 2000) (scrutinizing the disparate impacts of the U.S. criminal justice system on Latina/os); see also CORAMAE RICHEY MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* 39-44 (1993) (discussing disparate arrest statistics for African Americans, Latina/os, and Asian Americans).

265. See *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225 (2d Cir. 2004); *United States v. Gori*, 230 F.3d 44 (2d Cir. 2000).

266. 252 F.3d 630 (2d Cir. 2001).

267. 195 F.3d 111 (2d Cir. 1999), *cert. denied*, 534 U.S. 816 (2001).

268. See *Brown v. City of Oneonta*, 235 F.3d 769, 779 (2d Cir. 2000) (Calabresi, J., dissenting from denial of rehearing en banc).

269. See R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 *UCLA L. REV.* 1075 (2001).

270. See, e.g., *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (holding that discrimination on basis of immigration status did not violate Title VII of Civil Rights Act of 1964); cf. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (dismissing case by foreign plaintiffs on procedural grounds and suggesting that U.S. courts need not be as open to foreign as to domestic plaintiffs).

among persons of Mexican ancestry – in making an immigration stop.²⁷¹

The rapid emergence of Latina/o civil rights scholarship over the last decade demonstrates that the experiences of Latina/o scholars give rise to civil rights concerns different and apart from those of African American and other racial minorities.²⁷² It

271. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975). To be fair, Justice Marshall, perhaps like the other Justices in the case, in joining the opinion may have focused primarily on the fact that the Court held that the particular stop in question violated the Fourth Amendment because of the Border Patrol's *exclusive* reliance on race in that case. The Court held that the stop violated the Fourth Amendment because the Border Patrol had relied *exclusively* on "Mexican appearance." See *id.* at 884-87. Classifying the intrusion as "sufficiently minimal," the Court a few years later in *United States v. Martinez-Fuerte*, 428 U.S. 543, 563-64 (1976) held that referrals to secondary inspection at fixed checkpoints "made largely on the basis of apparent Mexican ancestry" do not violate the U.S. Constitution. Taken together, *Brignoni-Ponce* and *Martinez-Fuerte* have pernicious impacts on persons of "Mexican appearance," U.S. citizens and lawful immigrants, as well as the undocumented. *Brignoni-Ponce* allows a person's appearance to be one factor in an immigration stop, while *Martinez-Fuerte* effectively permits a Border Patrol officer to direct any and all persons appearing to be of Mexican ancestry to secondary inspection. See KENNEDY, *supra* note 41, at 151; see also Johnson, *supra* note 41, at 1010-45 (criticizing line of immigration enforcement cases beginning with *Brignoni-Ponce*).

For criticism of the decision in *United States v. Brignoni-Ponce*, see Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000); Abby Sullivan, Note, *On Thin ICE: Cracking Down on the Racial Profiling of Immigrants and Implementing a Compassionate Enforcement Policy*, 6 HASTINGS RACE & POVERTY L.J. 101 (2009); Cesar Cuauhtemoc & Garcia Hernandez, *La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 167 (2009); Kristin Connor, Note, *Updating Brignoni-Ponce: A Critical Analysis of Race-Based Immigration Enforcement*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 567 (2008); Renata Ann Gowie, *Driving While Mexican: Why the Supreme Court Must Reexamine United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), 23 HOUS. J. INT'L L. 233 (2001).

272. See, e.g., Symposium, *Latinos and Latinas at the Epicenter of Contemporary Legal Discourses*, 83 IND. L.J. 1141 (2008); Symposium, *Twelfth Annual LatCrit Conference Critical Localities: Epistemic Communities, Rooted Cosmopolitans, New Hegemonies and Knowledge Processes*, 4 FIU L. REV. 1 (2008); Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, 33 U.C. DAVIS L. REV. 751 (2000); Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 U. MIAMI L. REV. 575 (1999); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 CHICANO-LATINO L. REV. 1 (1998); Symposium, *LatCrit Theory: Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997), 10 LA RAZA L.J. 1 (1998); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997). See generally JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS, & STEPHANIE WILDMAN, *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (2d ed. 2007) (analyzing histories of various racial minorities in United States); TIMOTHY DAVIS, GEORGE A. MARTÍNEZ, & KEVIN R. JOHNSON, *A READER ON RACE, CIVIL RIGHTS, AND THE LAW: A MULTIRACIAL APPROACH* (2001) (offering readings on civil rights issues facing multiracial America); *LATINOS AND THE LAW: CASES AND MATERIALS* (Richard Delgado, Juan F. Perea & Jean Stefancic eds., 2008) (collecting materials on Latina/o civil rights concerns). See generally Symposium, *Reflections on Latinos and the Law: Cases and Materials*, 12 HARV. LATINO L. REV. 1 (2009) (essays reviewing *Latinos and the Law* casebook).

therefore should not be surprising that the experiences of Latina/os on the state and federal bench in certain instances have arguably been influenced in their legal analyses by their Latina/o ancestry,²⁷³ a fact that Justice Sotomayor alluded to in her “wise Latina” speech.²⁷⁴

Until Justice Sotomayor’s appointment to the Supreme Court, it as an institution lacked a distinctively Latina/o voice and perspective. Until her confirmation, for example, no Justice has had the personal experiences most likely to bring to the attention of the Court, as Justice Marshall did consistently with respect to the history of racial injustice for African Americans,²⁷⁵ the long history of segregation and discrimination against Mexican-Americans in the Southwest,²⁷⁶ the second class legal status of the U.S. territory of Puerto Rico, or the racism directed at Puerto Ricans on and off the island.²⁷⁷ Such deficiencies in per-

273. See, e.g., *Andrade v. Attorney General*, 270 F.3d 743 (9th Cir. 2001) (Paez, J.) (invalidating California’s “Three Strikes” law); *People v. Trevino*, 39 Cal. 3d 667 (1985) (Reynoso, J.) (reversing murder conviction of Latino defendant because of prosecution’s use of peremptory challenges to strike Spanish surnamed jurors); *Nuñez v. Boldin*, 537 F. Supp. 578 (S.D. Tex.) (Vela, J.) (issuing injunction prohibiting U.S. government from certain conduct in connection with detention of citizens from El Salvador and Guatemala seeking asylum in United States), *dismissed without opinion*, 692 F.2d 755 (5th Cir. 1982); see also Honorable Joseph F. Baca, *Constitutional and Practical Considerations of California Proposition 187*, 78 MARQ. L. REV. 777 (1995) (discussing adverse impact of California voter initiative on immigrants); EDIBERTO ROMÁN, *THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES’ NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS* (2005) (studying constitutional law surrounding U.S. territories, including Puerto Rico); PEDRO MALAVET, *AMERICA’S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE U.S. AND PUERTO RICO* (2004) (analyzing conflict between United States and Puerto Rico); JOSÉ A. CABRANES, *CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS* (1979) (considering critically the law relating to Puerto Rican citizenship); JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985) (studying law concerning Puerto Rico’s relationship to United States). Judge Cabranes, a leading scholar on the legal status of Puerto Rico and Puerto Ricans, was one of Judge Sotomayor’s mentors throughout her legal career. See Andrew Zajac, *Sotomayor was Nudged into Judgeship*, *Associates Say*, L.A. TIMES, June 6, 2009, at A13.

274. See *supra* Part III.B.

275. See Johnson, *supra* note 35, at 3-7.

276. See generally RODOLFO F. ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (6th ed. 2006) (documenting this history).

277. See CABRANES, *supra* note 273; MALAVET, *supra* note 273; ROMÁN, *supra* note 273; TORRUELLA, *supra* note 273; Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000); Ediberto Román, *Empire Forgotten: The United States’s Colonization of Puerto Rico*, 42 VILL. L. REV. 1119 (1997); see also Kevin R. Johnson, *Puerto Rico, Puerto Ricans, and LatCrit Theory: Commonalities and Differences in Latina/o Experiences*, 6 MICH. J. RACE & L. 107 (2000) (calling for additional analysis of status of Puerto Ricans in continental United States); see, e.g., *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam) (holding that U.S. government’s provision of lower level of welfare benefits to Puerto Rico than to recipients of the same program on the mainland United States was constitutional).

spective are more likely to be remedied by a Latina/o Justice than one of any other background.²⁷⁸ Given her own life experiences as well as her professional affiliations with civil rights organizations such as the PRLDF, Justice Sotomayor cannot help but be familiar with the long history of discrimination against Puerto Ricans, and Latina/os generally, in the United States.²⁷⁹

Just as Thurgood Marshall's appointment did for African Americans,²⁸⁰ the appointment of a Latina to the Supreme Court symbolizes in a most visible way a movement toward full membership of Latina/os in American social life. This helps to explain the enthusiasm with which Latina/s of many different national origin ancestries from coast-to-coast greeted Justice Sotomayor's nomination and confirmation.²⁸¹

The naming of a Latina Justice in and of itself demonstrates the growing inclusion of Latina/os in the respectable mainstream, and beyond their presence in the entertainment and sports indus-

278. Of course, one need not necessarily be Latina/o to appreciate the second-class status of Latina/os in American social life. For example, given his experiences in California in which he had seen well-known incidents of discrimination against persons of Mexican ancestry, Chief Justice Earl Warren understood the discrimination against Mexican-Americans in the United States, which appears to have informed his opinion in *Hernandez v. Texas*, 347 U.S. 475 (1954), holding that the Equal Protection Clause of the Fourteenth Amendment protected Mexican-Americans from invidious discrimination. See Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 159-69 (2005). See generally COLORED MEN AND HOMBRES AQUI: *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN AMERICAN LAWYERING (Michael A. Olivas ed., 2006) (compiling various authors offering different perspectives on *Hernandez v. Texas*).

279. See Cesar Perales, *Sonia Sotomayor: Background, Rulings, Ethnicity*, WASH. POST, May 27, 2009; *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 111th Cong. 1009-10 (2009) (letter of support from Latino Justice/PRLDEF).

280. See Johnson, *supra* note 35, at 3-7. In ways similar to Latina/os, Asian Americans also face obstacles to attaining full membership in the national community. See Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395, 10 LA RAZA L.J. 309 (1998); Leti Volpp, "Obnoxious to Their Very Nature": *Asian Americans and Constitutional Citizenship*, 5 CITIZENSHIP STUDIES 57 (2001). For discussion of the need for increasing the number of Asian American judges, see Justice Ming W. Chin, *Fairness or Bias?: A Symposium on Racial and Ethnic Composition and Attitudes in the Judiciary*, 4 ASIAN L.J. 181 (1997); Josh Hsu, *Asian American Judges: Identity, Their Narratives, & Diversity*, 11 UCLA ASIAN PAC. AM. L.J. 92 (2006) (to the same effect).

281. See David Montgomery & Kate Kilpatrick, *For Some Latinos, Hearing is Believing: Sotomayor's Ascension Trickles Down*, WASH. POST, July 14, 2009, at A6. It is noteworthy that, because Mexican-Americans are the largest sub-group of Latina/os in the United States, some Mexican-Americans expressed some reservations about the nomination of a person of Puerto Rican ancestry as the first Latina/o Supreme Court Justice. See Gregory Rodriguez, *The Generic Latino*, L.A. TIMES, June 1, 2009, at A19; Daniel González & Erin Kelly, *Hispanics Laud Choice, But Many Hoped for a Mexican-American*, ARIZ. REP. May 27, 2009, at 1.

tries.²⁸² This development is particularly important to Mexican-Americans and Puerto Ricans, two Latina/o national origin subgroups that historically have suffered a long history of discrimination in the United States and have been denied access to the highest echelons of American society.²⁸³

Unfortunately, messages of Latina/o exclusion in the legal profession in the United States still run rampant, making Justice Sotomayor's appointment to the Supreme Court especially important and necessary. Latina/os are chronically underrepresented in colleges and universities, as well as in law schools across the country.²⁸⁴ Only a handful of Latina/os can be found on the state²⁸⁵ and federal bench.²⁸⁶ Very few Latina/os have served as law clerks to Supreme Court Justices,²⁸⁷ a prestigious credential held by many of the nation's leading attorneys and judges.²⁸⁸ Latina/os also are severely underrepresented in the

282. See Steven W. Bender, *Will the Wolf Survive?: Latino Pop Music in the Cultural Mainstream*, 78 DEN. U.L. REV. 719 (2001) (contending that "Latin Pop" music that emerged in the 1990s reinforced negative stereotypes about Latina/os); Román, *supra* note 239 (analyzing negative stereotypes of Latina/os in popular culture); see also Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992) (analyzing impact of negative stereotypes of various minority groups in mass media). See generally BENDER, *supra* note 239 (offering in-depth critical analysis of stereotypes of Latina/os in popular American culture).

283. See Joseph F. Baca, *Making a Profound Difference: Latinos Ascending to Positions of Power and Influence*, 3 HARV. LATINO L. REV. 163 (1999) (discussing importance of Latina/os entering into positions of prominence and influence in U.S. society).

284. See Jennifer M. Chacón, *Race as a Diagnostic Tool: Latinas/os and Higher Education in California, Post-209*, 96 CAL. L. REV. 1215, 1223-26 (2008) (reviewing statistical information on the underrepresentation of Latina/os in public colleges and universities); see also Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 767-68 (1997) ("At the beginning of [the 1990s], Blacks, Asian Americans, Latinos and Latinas, and Native Americans comprised only twelve percent of the nation's law students, less than eight percent of lawyers, eight percent of law professors, and two percent of the partners at the nation's law firms.") (footnote omitted).

285. See Baca, *supra* note 283, at 163 (stating that, at that time (1999), only five Latina/os served on state high courts); see also John H. Culver, *The Transformation of the California Supreme Court*, 61 ALB. L. REV. 1461, 1483 (1998) (noting that the first African American, Latina/o, and woman were appointed to the California Supreme Court only in the last thirty years); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997) (analyzing impact of lack of racial diversity on state trial court bench).

286. See Delgado, *supra* note 212, at 1197 (observing that entire federal bench at the time included fewer than thirty Latina/os).

287. See Edward S. Adams, *Market-Based Solution to the Judicial Clerkship Selection Process*, 59 MD. L. REV. 129, 136 (2000) (compiling data showing that, at the time, only one percent of law clerks for Supreme Court Justices have been Latina/o).

288. The elite qualifications, such as a Supreme Court clerkship, often required of nominees to the Court suggests that few Latina/os generally are considered eligible for appointment to the Court.

elite corporate law firms.²⁸⁹ In addition, they comprise only about 200 law professors in the United States (excluding Puerto Rico).²⁹⁰

In essence, the traditional paths to the Supreme Court have been unavailable to Latina/os throughout the nation's history. The presence of the first Latina Justice cannot but help but to encourage the fuller integration of the legal profession and send a powerful message that Latina/os do in fact deserve equal treatment as full members of U.S. society.

CONCLUSION

One is left to wonder whether any minds were changed by the four days of Senate confirmation hearings on the nomination of Sonia Sotomayor to the U.S. Supreme Court and, thus, whether the hearings were worth the time and effort. By most accounts, Justice Sotomayor weathered the scrutiny of the Senate Judiciary Committee well. The Senate confirmed her nomination by a vote of 68 to 31, along roughly partisan lines.²⁹¹ She now is an Associate Justice on the Court and appears to already have made a difference on the Court.²⁹² As the smoke clears, a number of lessons can be taken away from the Sotomayor confirmation hearings about the process as well as the place of Latina/os in American social life.

As Stephen Carter's book title *The Confirmation Mess*²⁹³ reminds us, the Senate confirmation process for a Supreme Court Justice is riddled with deficiencies. The process as it exists today – with senators asking questions without listening to answers and nominees cowed from fully developing their judicial philosophies

289. See Linda E. Davila, Note, *The Underrepresentation of Hispanic Attorneys in Corporate Law Firms*, 39 STAN. L. REV. 1403 (1987).

290. See Jennifer M. Chacón, *Latina/o Law Professors 2009-2010*, unpublished document, Sept. 15, 2009 (on file with author); see also Ediberto Róman & Christopher B. Carbot, *Freeriders and Diversity in the Legal Academy: A New Dirty Dozen List?*, 83 IND. L.J. 1235 (2008) (summarizing current difficulties of facilitating the hiring of Latina/o law professors and detailing the small numbers at elite law schools); Michael A. Olivas, *The Education of Latino Lawyers: An Essay on Crop Cultivation*, 14 UCLA CHICANO-LATINO L. REV. 117, 128-38 (1994) (analyzing difficulties in increasing number of Latina/o law faculty). For analysis of the efforts to hire a tenure track Latina/o professor at Harvard Law School, for example, see Luz Herrera, *Challenging a Tradition of Exclusion: The Push for Latino Faculty at Harvard Law School*, 5 HARV. LATINO L. REV. 51 (2002). See generally Miguel A. Mendez & Leo P. Martinez, *Barriers to Latinos and Latinas in Law School: The Need to Increase the Role We Play as Lawyers, Judges, and Professors: Toward a Statistical Profile of Latina/os in the Legal Profession*, 13 BERKELEY LA RAZA L.J. 59 (2002) (analyzing statistical data about Latina/os in legal profession).

291. See Amy Goldstein & Paul Kane, *Sotomayor Wins Confirmation; Senate Votes 68 to 31 for Judge Who Will Be First Hispanic to Serve on High Court*, WASH. POST, Aug. 7, 2009, at A1.

292. See Lauren Collins, *Number Nine*, NEW YORKER, Jan. 11, 2010, at 42.

293. See CARTER, *supra* note 56.

and commenting on significant Supreme Court decisions – is nothing less than an unjustifiable exercise in tedium and futility. There is no true probing of the qualifications and past opinions of the nominee.

The confirmation hearings, as they have evolved, instead boil down to a high stakes game of political “gotcha,” in which partisans in the culture wars attempt to dig up dirt on nominees in a hope that, if angered, frustrated, or embarrassed enough, they will withdraw or their support will evaporate. It is a sad commentary that we learn more about the nominee from how he or she responds to the circus-like atmosphere and the long days of questioning, than we do from the substance of the responses to the senators’ “questions.” The Senate confirmation hearings have unfortunately become a kind of ritual hazing process – symbolically akin to the lynching of African Americans²⁹⁴ – that the nominee of color must endure and survive in order to prevail.

It is clear that reform of the confirmation process for Supreme Court nominees is in order. At a bare minimum, one would hope that all nominees would be treated in a respectful and dignified way. In addition, the questioning of the Senators should be based on the record of the nominees as judges and lawyers, rather than misguided efforts to attack and discredit nominees for partisan political reasons. Judicial philosophies should be scrutinized and interrogated in fair and thoughtful ways. As the “confirmation mess” operates today, the process, nominees, and the senators often are viewed as less legitimate and respected at the completion of the confirmation hearings than they were before.

But, more specifically, where does the confirmation of Justice Sonia Sotomayor to the U.S. Supreme Court leave the nation? The appointment of a Latina Justice to the Court is unquestionably a historic milestone. Just as the appointment of Justice Thurgood Marshall did, a Latina Justice will leave a lasting impression on the Court and the country, with President Obama literally “making history” with the nomination of Sonia Sotomayor. The new Latina Justice will bring fresh perspectives to the Court’s decision-making process.²⁹⁵ Most importantly, a Latina Justice – and a native Spanish-speaker at that – represents a significant step toward full membership and equal citizenship for Latina/os in the United States. It contributes materially to their sense of belonging to the national community, and publicly

294. *See supra* notes 25-265.

295. *See supra* text accompanying notes 248-90.

announces the true arrival of Latina/os into the acceptable mainstream.²⁹⁶

The Sotomayor nomination and confirmation process, however, raises deeper questions about the true place of people of color and Latina/os – and women of color specifically – in the United States. As both Thurgood Marshall and Sonia Sotomayor's confirmation hearings clearly demonstrate, nominees of color face different challenges and questions about their qualifications than other nominees. They are subjected to different, and higher, standards of scrutiny and conduct. Clarence Thomas's powerful reference to a "high tech lynching"²⁹⁷ comes to mind as an apt description of the attacks that a nominee of color can expect to encounter at the confirmation hearings before the Senate Judiciary Committee. Fears about their potential bias as members of outsider groups make their hearings into concerted efforts to ferret out their true nature and racial sympathies – and, at times, force them and their supporters to prove that they are not racists. White nominees face no similar assumptions – such as that they hold animus against people of color – based on their race alone.

Americans generally demand that immigrants and people of color assimilate into dominant society and, for example, conform to the Protestant work ethic, speak English, and reject any appearance of any kind of racial separatism.²⁹⁸ This article has contended that the test of anti-white racism by nominees of color is part of a larger test to determine whether they are sufficiently assimilated into mainstream U.S. society. Some might claim that nominees of color must prove that they are functionally white. The confirmation hearings before the U.S. Senate arguably are simply a very visible incarnation of the assimilationist demand imposed on people of color in the modern United States.

Both Thurgood Marshall and Sonia Sotomayor fought vigorously to rebut the presumption – based on their race and civil rights advocacy – that they are anti-white and thus unassimilated into mainstream values. Supporters calculated that minimizing the nominee's race would improve his or her confirmation chances. Such charges are rarely leveled at white nominees who support (or oppose) civil rights protections. Similarly, white wo-

296. See Johnson, *supra* note 35, at 7-14.

297. See *supra* text accompanying notes 25-28.

298. See *supra* text accompanying note 29-34. See generally Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863 (1993) (analyzing the tensions on people of color to assimilate into mainstream society and the impulse of some racial minorities to maintain a certain degree of separation from whites to avoid discrimination in American social life).

men nominated for the Supreme Court are not presumed to be accused of being anti-male. By permitting the Senators to probe and test the suspect racial sympathies of minority nominees for the nation to see, the Senate confirmation hearings both reinforce the outsider status of people of color in American society and offer a high profile example of how people of color are subject to inquiries and indignities not directed at white people.

Put simply, the Senate confirmation hearings of Thurgood Marshall and Sonia Sotomayor, especially when contrasted with the confirmation process for the first woman Justice, Sandra Day O'Connor,²⁹⁹ unmistakably demonstrate the second-class status of people of color in the contemporary United States. The hearings reveal, in certain respects, what the nation truly thinks of racial minorities generally – presumptively anti-white, the subject of suspicion and derision, and open game for race-based attacks and thinly-veiled racial vilification.³⁰⁰ This unmistakable message from the Senate confirmation hearings will not be lost on prominent persons of color who consider high-level government positions in the future. Nor was it lost on the public, especially people of color.

And, as the Sotomayor hearings showed, women of color face special barriers that men of color and white women do not. The hearings were a textbook example of the concept of intersectionality theorized by Critical Race Theorists.³⁰¹ In this instance, it was the baseless claim about Justice Sotomayor lacking the proper judicial temperament, which played on both racial and gender stereotypes.³⁰²

Despite the lack of any smoke, much less fire, the U.S. Senate forced Sonia Sotomayor to run a gauntlet of baseless charges centering on race and gender because she was a Latina. Only time will tell whether future nominees of color will ever be treated with respect and dignity, as they deserve, by the U.S. Senate.

299. *See supra* Part II.

300. *Cf.* Kevin R. Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 *IND. L.J.* 1111 (1998) (contending that the treatment of immigrants of color reveal how the nation negatively views people of color in the United States).

301. *See supra* text accompanying notes 115-22.

302. *See supra* Part III.D.