JUDGING THE JUDGES: RACIAL DIVERSITY, IMPARTIALITY AND REPRESENTATION ON STATE TRIAL COURTS

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INTRODUCTION

Despite dramatic gains in the legislative arena in the past 20 years,[1] racial diversity on state courts remains a much-lauded but seemingly elusive goal. Only 3.8% of all state court judges are African American.[2] Among state trial court judges, only 4.1% are African American.[3] In jurisdictions with large African American populations, the figures are disturbingly similar. In New York State, for example, only 6.3% of the state's judges were African American in 1991, although African Americans constituted 14.3% of the state's population.[4] In Georgia, where 27% of the population is African American, only 6% of the state's

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[1] *Compare* JOINT CTR. FOR POLITICAL & ECONOMIC STUDIES, BLACK ELECTED OFFICIALS IN UNITED STATES (1970), *with* JOINT CTR. FOR POLITICAL & ECONOMIC STUDIES, NUMBER OF BLACK ELECTED OFFICIALS IN THE UNITED STATES (1990) (showing 168 African American state legislators in 1970 and 406 in 1990, respectively.)

[2] *See* Barbara Luck Graham, *Judicial Recruitment and Racial Diversity on State Courts: An Overview*, 74 JUDICATURE 28, 32 (1990). I focus primarily on African Americans in this Article, but the argument I make is equally applicable to other racial "minorities." *See infra* note 7.

[3] *Compare* AMERICAN BAR ASS'N JUDICIAL DIV. TASK FORCE ON MINORITIES IN THE JUDICIARY, THE DIRECTORY OF MINORITY JUDGES OF THE UNITED STATES (May 1, 1997) (listing all African American federal and state court judges in the United States), *and* NATIONAL CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 1995 95–96 (listing total number of state trial court judges of general and limited jurisdiction).

[4] *See* NEW YORK STATE TASK FORCE ON JUDICIAL DIVERSITY, 1 REPORT 4 & nn.1 & 3 (Jan. 1992).

judges are African American.[5] These figures stand in stark contrast to the gains made by minorities in state legislatures. Those gains—directly attributable to the Voting Rights Act's[6] removal of the structural impediments to meaningful electoral participation by minority voters—have not been mirrored in judicial fora.[7]

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[5] *See* GEORGIA SUPREME COURT COMM'N ON RACIAL & ETHNIC BIAS IN THE COURT SYSTEM, LET JUSTICE BE DONE: EQUALLY, FAIRLY, & IMPARTIALLY 52, 54 (Aug. 1995).

[6] The Voting Rights Act, 42 U.S.C. § 1973c (1994), has been called "the most effective federal civil rights statute." *See* Drew S. Days III & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act, in* MINORITY VOTE DILUTION 164, 167 (Chandler Davidson ed., 1984). Notwithstanding recent litigation defeats which may seriously roll back the gains made by African Americans because of the Act, *see, e.g.*, Bush v. Vera, 116 S. Ct. 1941, 1951 (1996) (striking down Texas's redistricting plan that reconfigured existing districts to create one new majority Mexican American and two new majority African American districts, on the grounds that it constituted racial gerrymandering); Miller v. Johnson, 515 U.S. 900, 905–07, 919–23 (1995) (holding Georgia's congressional districting plan that created three new majority African American districts violated Equal Protection Clause); Shaw v. Reno, 509 U.S. 630, 635–36, 658 (1993) (striking down North Carolina reapportionment plan that created two new majority African American districts in state's south-central and southeastern regions), the Voting Rights Act has been a success story in the legislative arena. *But see* Lani Guinier, *The Triumph of Tokenism*, 89 MICH. L. REV. 1077, 1079, 1101–34 (1991) (arguing that the preoccupation with black electoral success "stifles rather than empowers black political participation").

[7] I use the term "minorities" in this Article when referring to African Americans, Mexican Americans and other racial or ethnic groups which have traditionally suffered from discrimination to indicate their relative population within a jurisdiction. The protection of racial minorities has been a particular focus of statutory efforts, including the Voting Rights Act. *See* 42 U.S.C. § 1973c. The Supreme Court has recognized and upheld the Voting Rights Act's particular protection for racial minorities. *See* Thornburg v. Gingles, 478 U.S. 30, 42–51 (1986). Of course, where discrete racial groups, such as African Americans, constitute a majority of the population in a jurisdiction, their right to be represented on the bench only assumes greater urgency.

Some observers have attributed the low number of African American judges to the comparatively small number of African American attorneys who are eligible to serve as state judges. Only 3.6% of U.S. lawyers are African American. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1996). Until the Supreme Court outlawed the practice, many states did not permit African Americans to attend state-run law schools. *See* Sweatt v. Painter, 339 U.S. 629, 631, 635–36 (1950). Most states require attorneys to be admitted to practice for at least three years before they are eligible to serve as judges. *See, e.g.*, CONFERENCE OF STATE COURT ADM'RS & NAT'L CTR. FOR STATE COURTS, STATE COURT ORGANIZATION, 1987 120–41, 260–70 (1988) (listing the various qualifications necessary to serve on state trial and appellate courts).

A close look at the data, however, refutes this theory. Even in those jurisdictions where many eligible African American lawyers live and where many African American lawyers have sought judicial election, the number of African American judges remains startlingly low. For example, in Harris County, Texas, although there are presently 777 African American attorneys, *see* State Bar of Texas Membership Department Statistics (on file with the author), and qualified African American lawyers consistently run for state trial benches, only one of the county's trial judges is African American. *See* OFFICE OF COURT ADMIN. TEX. JUDICIAL COUNCIL, WOMEN AND MINORITY JUDGES IN TEXAS (Mar. 1, 1996).

Moreover, although women historically have faced significant barriers to legal education, the number of women judges has increased dramatically compared to that of African American judges. *Compare, e.g.*, FEMINIST MAJORITY SURVEY OF STATE COURT ADMIN. OFFICES, FEMINIST LEADERSHIP IN THE LAW (1990), *with* FUND FOR MODERN COURTS, INC., THE SUCCESS OF WOMEN

While lamented by commentators and the bar,[8] the relative paucity of African American judges has rarely been challenged as illegal and never as unconstitutional. Efforts to promote racial diversity on the bench are often couched in the soft language of inclusiveness, public confidence and promoting the appearance of justice.[9] Racial diversity on the courts is almost never discussed in the more forceful language of rights and representation. The tentativeness of the judicial diversity discourse is a product in large part of continued resistance to the very idea that judges are representatives. Indeed, to describe judges as representatives is to invite hostility from both the bench and the bar. Diversity efforts are countered with the argument that judges are impartial and thus need not be representative of particular racial groups.[10] Impartiality, as currently understood, stands as a barrier to achieving racial diversity on the bench.

The importance of detachment, disinterest and impartiality to good judging is so deeply imbedded in our legal mythology[11] that acknowledging judges as representatives can be perceived as a threat to the judicial function. The very suggestion that judges can represent a community counters the traditional view of judges as impartial deci-

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AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS (1985) (documenting changes in some states in percentage of women on state courts of last resort). In Harris County, for example, nearly one-half of the 59 district court judges are white women, while only one district judge is African American. *See* OFFICE OF COURT ADMIN. TEX. JUDICIAL COUNCIL, *supra*; Alan Bernstein, *New Order in the Court: Youth, First Terms Abound*, HOUS. CHRON., Feb. 12, 1995, at 1A. Nevertheless, women continue to be underrepresented on state courts as well. In the State of Texas as a whole, for example, only 72, or 18%, of the State's 396 district court judges are women. *See* OFFICE OF COURT ADMIN. TEX. JUDICIAL COUNCIL, *supra*.

[8] *See* Keith W. Watters, *Behold the Dream*, NAT'L B. ASS'N MAG., May-June 1996, at 1, 1 (arguing that with only three and one-half years until the next millennium, there has been "little or no progress in sight for the standing of blacks" in the judiciary); *see also* Caitlin Francke, *7 Lawyers Proposed for Seat on Bench; Nominating Panel List for District Court Slot Now Goes to Governor*, BALT. SUN, Sept. 20, 1996, at 1B (commenting on Maryland Governor Parris N. Glendening's expressed commitment to achieving diversity on the state bench); Steven Keeva, *Slow Integration*, A.B.A. J., Dec. 1992, at 28, 28 (recounting the struggle to integrate the bench and the lack of progress in African American appointments); Saundra Torry, *Seeing a Chance for Bench That Resembles the District*, WASH. POST, Aug. 9, 1993, at F7 (noting President Clinton's diversity pledge to name a judiciary that "looks like America").

[9] *See* H.T. Smith, *Toward a More Diverse Judiciary*, A.B.A. J., July 1995, at 8 (urging ABA to reevaluate its process of determining nominees for the bench to ensure it is "fostering inclusion").

[10] *See* Chisom v. Edwards, 839 F.2d 1056, 1060 (5th Cir. 1988), *rev'd sub nom.* Chisom v. Roemer, 501 U.S. 380 (1991).

[11] *See, e.g.*, Justice John Paul Stevens, Opening Assembly Address at American Bar Association Annual Meeting 12 (Aug. 3, 1996) (transcript on file with the author); *see also* Arthur T. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B.U. L. REV. 1, 19 (1956). *See generally* Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice (address delivered at the American Bar Association annual convention in 1906), *reprinted in* AMERICAN JUDICATURE SOC'Y, ROSCOE POUND—THE CAUSES OF POPULAR DISSATISFACTION IN THE ADMINISTRATION OF JUSTICE 12–13 (1956).

sionmakers.[12] Reluctance to examine the potential that racial diversity has to enhance judicial decision making often stems from the profound discomfort many judges and lawyers feel in challenging the prevailing notions of impartiality in judicial decision making and in identifying judges as representatives.[13]

Indeed, the right to an impartial judge is guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution.[14] Litigants may seek to disqualify a judge who has an interest in the outcome of the litigation, has actual bias towards one of the parties or has even the appearance of bias.[15] The Fourteenth Amendment has not, however, been interpreted to compel diversity on the bench itself. In this sense, the Fourteenth Amendment impartial judge mandate has been narrowly interpreted to require only the individual impartiality of judges. Under this view, due process is not offended when African American judges are persistently excluded from the bench, nor does due process protect against the homogeneity of interests that a racially exclusive bench perpetuates.

In this Article, I contend that the Fourteenth Amendment's judicial impartiality mandate is violated by the persistent presence of an

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[12] Many proponents of judicial diversity refrain from concretely describing the contribution minority judges can make to adjudication precisely because to describe judging in racial terms contradicts the "impartiality" and "disinterest" that characterize the traditional idealized view of judicial decision making. In a forthcoming article, I explore the effect of racial diversity on judicial decision making. *See generally* Sherrilyn A. Ifill, Racial Diversity on the Bench: Beyond Role Models and Public Confidence (contending that racially diverse state trial bench will enhance the quality of judicial decision making) (work in progress on file with the author).

[13] *See* John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339, 359–61 (1988) ("[S]ome . . . believe judges' decisions should always reflect the will of the majority. Should this idea prevail, however, the ideal of an independent judiciary will disappear."); *see also* LINN WASHINGTON, BLACK JUDGES ON JUSTICE: PERSPECTIVES FROM THE BENCH 132 (1994) (interviewing Federal District Court Judge Constance Baker Motley). Federal District Court Judge Constance Baker Motley reportedly suggested that while African Americans and women do not bring perspectives to the judiciary that are different from those of white men, African American and female presence on the bench is necessary to build public confidence in government. *See* WASHINGTON, *supra*; Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 837–38 (contrasting "principled decisionmaking," with perception of judicial function "as just one more 'political' enterprise").

[14] U.S. CONST. amend. XIV; *see* Tumey v. Ohio, 273 U.S. 510, 522–23, 531 (1927).

[15] 28 U.S.C.A. § 455(a) states that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C.A. § 455(a) (West 1997). The statute includes various instances in which a judge "shall disqualify himself." *See id.* § 455(b)–(f). *See, e.g.*, United States v. Neal, 101 F.3d 993, 998, 999–1000 (4th Cir. 1996) (concluding that while personal integrity of a trial judge was not being questioned, the appearance of fairness and impartiality was best achieved by reassignment of case to another district judge); Jefferson-El v. Maryland, 622 A.2d 737, 744 (Md. 1993) (holding that administration of justice, as well as defendant's right to a fair hearing, demanded that the trial judge recuse himself).

all-white bench[16] in jurisdictions with significant minority populations. The mandate can and should be read to require a *structural* impartiality of the bench as a whole, in addition to the impartiality of individual judges.[17] Structural impartiality exists when the judiciary as a whole is comprised of judges from diverse backgrounds and viewpoints. The interaction of these diverse viewpoints fosters impartiality by diminishing the possibility that one perspective dominates adjudication.[18] In effect, judicial impartiality must be realized both individually and structurally.

The analysis in this Article is intentionally focused in two ways. First, I direct my analysis to racial representation on the state rather than the federal bench. While I recognize the obvious implications of this discussion for application to the federal courts,[19] I deem racial

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[16] Throughout this Article, I refer to the all-white bench because in many jurisdictions, including those with significant minority populations, the bench is all or overwhelmingly white. The presence of one or two non-white judges on a bench does not change the analysis set out in this Article. I direct my analysis to jurisdictions with significant minority populations for obvious reasons. It is in those jurisdictions that racial diversity in legislatures and even in executive offices has been hard fought and won while the bench remains racially unchanged.

[17] I borrow the terms "individual impartiality mandate" and "structural impartiality" from Professor Scott Howe in Scott Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173 (1995).

[18] Justice Thurgood Marshall reportedly said: "Negroes don't have a chance at justice across the boards when all the judges are white . . . ." CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 283 (1993). The importance of such diversity in ensuring impartiality has been recognized by the Supreme Court in the context of jury selection. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 528 (1975); Peters v. Kiff, 407 U.S. 493, 504 (1972).

[19] The percentage of African American judges serving on federal courts also falls well below the percentage of Africans Americans in the general population. Only six percent of the entire federal bench, including full-time and part-time magistrates, are African American. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, STATISTICAL REPORT FOR JUSTICES AND JUDGES OF THE UNITED STATES (Apr. 1, 1997) (supplied to the author on April 15, 1997). For an excellent discussion of the need for racial diversity on the federal bench, see A. Leon Higginbotham, *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028 (1993). Judge Higginbotham argues that racial diversity on the federal bench "is . . . an important virtue, a sine qua non to building a court that is both substantively excellent and also respected by the general population." *Id.* at 1036.

Despite the focus on state courts, Part II of this Article, which examines recusal cases involving questions of racial bias, relies on federal rather than state cases because I find that the most thoughtful opinions on this subject have been written by federal judges. Since most states have adopted nearly identical versions of the federal recusal standards set out in 28 U.S.C.A. §§ 144 and 455 (West 1988 & 1997), federal court opinions are relevant sources. Many state court judges facing recusal motions cite the federal cases discussed in this article as authoritative interpretations of recusal law. *See, e.g.*, American Motor Sales Corp. v. New Motor Vehicle Bd., 69 Cal. App. 3d 983, 988–90 (Ct. App. 1977); Iowa v. Smith, 242 N.W.2d 320, 324 (Iowa 1976); Pennsylvania Human Relations Comm'n v. School Dist. of Phila., 667 A.2d 1173, 1177 (Pa. Commw. Ct. 1995).

diversity on state courts to be of paramount importance for several reasons.

One concern is simply pragmatic: state courts are responsible for resolving most disputes—civil or criminal. In addition, the tradition of electing state courts' judges reflects a tradition of state judges exercising representative functions. Indeed, most states moved from an appointive to an elective system for judges in the mid-nineteenth century because they wanted state court judges to be more representative of the communities they served. Thirty-five states still elect some of their judges.[20] Even those states that appoint their judges require those judges to face the electorate in periodic retention elections.[21] The continuing existence of judicial selection systems that require direct citizen participation evidences the desire of most states to connect explicitly their judges to the communities they serve.[22]

Moreover, the recent movement of power from national to state government has made state government an increasingly important locus of political power.[23] State judges are enjoying increased power as the United States Supreme Court limits opportunities for federal authorities to review or mandate state actions.[24] Increasingly, state

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[20] Only 21 states appoint all of their trial court judges and only 25 appoint their appellate court judges. Virtually all of the southern states elect their judges outright. Virtually all states use some form of electoral approval for judges, either through direct elections or retention elections. *See* DAVID B. ROTTMAN, ET AL., U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION, 1993 32–43, 48–69 (1995). Nevertheless, I do not view racial representation on the bench as an imperative only in those jurisdictions where judges are elected rather than appointed. I strongly support the use of elections for the selection of state judges as the best method of ensuring a meaningful opportunity to create a diverse, representative judiciary. In a forthcoming article, I describe the election methods which I believe afford the best opportunity for full and meaningful citizen participation in the election of judges. *See generally* Ifill, *supra* note 12.

[21] *See* ROTTMAN, *supra* note 20, at 32–43, 48–69. In a retention election, voters simply vote "yes" or "no" to a ballot question that asks whether a particular sitting judge should be "retained" in office.

[22] This is further evidenced by the requirement in most states that elect their judges that judicial candidates reside in the jurisdiction from which they seek election. *See, e.g.*, CONFERENCE OF STATE COURT ADM'RS, *supra* note 7, at 260–70.

[23] The recent welfare reform bill is one example of this trend. *See generally* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (1996) (to be codified in various sections of the U.S.C.). The bill was signed by President Clinton on August 23, 1996. *See* Frances X. Clines, *Clinton Signs Bill Cutting Welfare; States in New Role*, N.Y. TIMES, Aug. 23, 1996, at A1.

[24] *See, e.g.*, Felker v. Turpin, 116 S. Ct. 2333, 2335, 2337–39 (1996) (upholding aspects of new federal law restricting federal court habeas review of state court rulings in death penalty cases); Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114, 1119, 1121, 1131–32, 1133 (1996) (upholding court of appeals decision barring Native American tribe from suing states in federal court); United States v. Lopez, 514 U.S. 549, 551 (1995) (striking down the Gun-Free School Zones Act, which made possessing a firearm in school zones a federal offense, because it exceeded Congress's Commerce Clause authority).

courts will have the final say in determining the rights of their residents. As governmental decision making at the state level becomes more important, the role of state courts as part of the fabric of representative government should be reexamined.[25]

I also focus my analysis on state trial rather than appellate courts.[26] State trial courts are the venue where most legal disputes both begin and end. Most cases disposed of in trial court are not appealed.[27] For many African Americans and other low-income litigants, financial constraints often foreclose the possibility of appealing adverse judgments.[28] Trial court adjudication, therefore, is most often dispositive of the rights of minority litigants.

Moreover, the absence of minority judges on state trial courts contributes to an atmosphere of racial exclusion which, at the very least, marginalizes African American lawyers, litigants and courtroom personnel in many jurisdictions. Much more destructively, some state benches operate within a pervasive atmosphere of racial discrimination. At least twenty states have formed independent commissions to study the prevalence of race and/or gender bias in the state court system.[29] The findings of many of these commissions demonstrate that race and/or gender bias is a common feature within state court systems.[30] The New York State Judicial Commission on Minorities, for example, concluded that "there are two justice systems at work in the

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[25] This reexamination may be most urgent in those states where the bench remains racially homogenous while the legislature becomes more and more racially diverse. In those states, a kind of political disconnect may occur as the homogenous judiciary seeks to interpret laws promulgated by a more diverse legislature. *See* Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 614 (1994) (suggesting that textualism "could dilute the benefits of increased legislative diversity, as an overwhelmingly white male judiciary imposes its own assumptions and views on the work product of a multicultural Congress").

[26] Nevertheless, the percentage of minority judges at the appellate level also reflects gross underrepresentation. African Americans constituted only 3.8% of state appellate judges in 1986. *See* Barbara Luck Graham, *supra* note 2, at 30 tbl.1 (showing distribution of black judges on state bench by level of court).

[27] *See, e.g.*, TEX. OFFICE OF COURT ADMIN., ANNUAL REPORT (1995).

[28] As one African American judge has observed, most African Americans "don't have the money to take their cases to the appellate courts. Therefore, if you're going to get justice, you'd better get it on the trial court level or else you're not going to get it." WASHINGTON, *supra* note 13, at 147 (interviewing Judge George W. Crockett, Jr.). *But see* M.L.B. v. S.L.J., 117 S. Ct. 555, 570 (1996) (holding that Mississippi must waive transcript fee for indigent civil litigant in case involving termination of parental rights).

[29] *See* WASHINGTON, *supra* note 13, at xii. The author has on file 20 reports from such independent commissions.

[30] *See, e.g.*, CALIFORNIA JUDICIAL COUNCIL ADVISORY COMM. ON RACIAL & ETHNIC BIAS IN THE COURTS, FAIRNESS IN THE CALIFORNIA STATE COURTS: A SURVEY OF THE PUBLIC, ATTORNEYS AND COURT PERSONNEL (July 1993); GEORGIA SUPREME COURT COMM'N ON RACIAL & ETHNIC

courts of New York State, one for Whites, and a very different one for minorities and the poor."[31]

While prosecutors,[32] defense attorneys,[33] police officers,[34] official courtroom personnel[35] and others[36] share responsibility for contributing to the existence of bias in the justice system, judges assume a unique role.[37] Trial judges, in particular, must be held accountable for racial bias in the justice system because they exercise considerable direct authority over the other actors in the justice system. Specific and corroborated incidences of judicial bias in state courts throughout the country are well-documented. In some instances, judges have engaged in flagrant and extreme racial bias.[38] In particular, commentators have noted trial judges unequally sentencing similarly situated African American and white youths;[39] disproportionately denying bail to African American offenders;[40] overruling juries' imposition of life in prison by imposing the death penalty for African American defen-

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BIAS IN THE COURT SYSTEM, *supra* note 5; MARYLAND SPECIAL JOINT COMM., GENDER BIAS IN THE COURTS (May 1989); MASSACHUSETTS SUPREME JUDICIAL COURT COMM'N TO STUDY RACIAL & ETHNIC BIAS IN THE COURTS, EQUAL JUSTICE: ELIMINATING THE BARRIERS (Sept. 1994).

[31] NEW YORK STATE JUDICIAL COMM'N ON MINORITIES, 1 REPORT 1 (Apr. 1991).

[32] *See* Angela J. Davis, *Crime and Punishment: Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1671–74 (1996) (reviewing MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995)).

[33] *See* Statement of George H. Kendall, Assistant Counsel, NAACP Legal Defense & Educational Fund, Inc. to Georgia Supreme Court Comm'n on Racial & Ethnic Bias in the Court System (Apr. 8, 1994), at 5 (on file with the author) (describing civil rights lawyer's experience with contract public defender who demonstrated racial bias towards his own clients in capital cases).

[34] *See, e.g.*, Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 214 (1983); Sam Vincent Meddis, *Is the Drug War Racist?*, USA TODAY, July 23, 1993, at 1A; Greg Williams, *Selective Targeting in Law Enforcement*, NAT'L BAR ASS'N MAG. Mar.-Apr. 1996, at 18, 18–21.

[35] *See* NEW YORK STATE JUDICIAL COMM'N ON MINORITIES, *supra* note 31, at 22.

[36] *See, e.g.*, Timothy Egan, *Critics Say Coroner Puts His Morality Before the Facts*, N.Y. TIMES, May 31, 1996, § 1, at 14 (describing practice of the Spokane County Coroner in Washington State of designating the death of homosexuals and African American drug-related homicide victims as suicides).

[37] *See infra* Part IV.D. Even where judges themselves have not engaged in racist conduct, judges often contribute to the existence of racism in the courthouse by failing to curb the racist behavior of other officers of the court. *See infra* Part IV.D.

[38] *See, e.g.*, NEW JERSEY SUPREME COURT TASK FORCE ON MINORITY CONCERNS, FINAL REPORT 41–49 (1992); NEW YORK STATE JUDICIAL COMM'N ON MINORITIES, *supra* note 31, at 21–23, 87.

[39] *See* MINNESOTA SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYS., FINAL REPORT 101–02 (1993); NEW JERSEY SUPREME COURT TASK FORCE ON MINORITY CONCERNS, *supra* note 38, at 167–68.

[40] Anecdotal evidence from lawyers and judges supports the existence of racism in judicial decision making. In New Jersey, for example, 30.7% of all judges surveyed stated that trial judges' bail decisions are sometimes influenced by their racial attitudes. *See* NEW JERSEY SUPREME COURT TASK FORCE ON MINORITY CONCERNS, *supra* note 38, at 79.

dants accused of killing whites;[41] and crediting the testimony of white witnesses while failing to credit the testimony of comparable African American witnesses.[42] Judges have regularly failed to pay African American attorneys public respect comparable to white attorneys.[43] Judges also have made disparaging remarks about racial minorities in open court and in chambers.[44] The absence of African American judges on most state benches permits such behavior to flourish free from the inhibiting effect that the mere presence of significant numbers of minorities can have on these displays of discrimination. In addition, a racially homogenous bench permits judicial decision making to take place in the absence of alternative perspectives and viewpoints which might deepen and enhance the quality of judicial decision making.

Most importantly, trial court decision making, by its very nature, challenges traditional images of judges as detached, disinterested experts applying objective standards to dispute resolution. State trial judges are most often called upon to resolve highly personal, value-laden disputes.[45] Increasingly, state trial judges are replacing juries in representing community values. This is particularly true in criminal matters.[46] Many states permit defendants to waive their right to jury trials in criminal cases and to have their cases heard by judges.[47] In

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[41] Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 760, 765–66 & n.32, 793–94 (1995).

[42] *See* MINNESOTA SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYS., *supra* note 39, at 39–42. The absence of significant numbers of African Americans on state court benches makes it unlikely that African American judges are responsible for these disparities.

[43] *See* NEW YORK STATE JUDICIAL COMM'N ON MINORITIES, *supra* note 31, at 22.

[44] *See id.* at 21–23 (In one instance, a Commission witness testified that in a Housing Court nonpayment proceeding, a judge remarked about an African American female professional who had lost her position with a major university that "maybe she can turn a trick and be able to get the money she needs."); *see also* NEW JERSEY SUPREME COURT TASK FORCE ON MINORITY CONCERNS, *supra* note 38, at 186 (a judge reportedly told a Hispanic juvenile that he was "genetically structured to steal cars").

[45] For example, in the 38 states that require a minor woman to obtain parental consent or notification before obtaining an abortion, most provide for a court bypass procedure. *See* CENTER FOR REPRODUCTIVE LAW & POLICY, REPRODUCTIVE FREEDOM IN THE STATES: RESTRICTIONS ON YOUNG WOMEN'S ACCESS TO ABORTION SERVICES (1996). In those states, minor women who do not wish to involve their parents in their abortion decisions may petition a local judge, who may grant or deny permission for the abortion procedure in lieu of parental consent. The prevalence of judicial involvement in such proceedings exemplifies the urgency and importance of state trial courts reflecting the gender and racial diversity of their surrounding communities.

[46] *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 19 (1986) (observing that juries decide only about eight percent of all criminal cases).

[47] *See, e.g.*, N.Y. CRIM. PROC. LAW § 340.40 (McKinney 1994). Even in cases where the jury determines guilt or innocence (in criminal matters) or liability (in civil matters), trial judges wield

some instances, such as capital punishment sentencing, trial judges are called upon to explicitly express the "community's outrage."[48]

Trial judges also exercise their decision-making authority in closer proximity to the dispute than do appellate judges. Trial judges interact more frequently with litigants, lawyers and the public through witness testimony, hearings, in camera settlement discussions and the attendance of the public at trials. Requiring "detachment" and "disinterest" for judges in these contexts hints at the need for flexibility in describing the kind of impartiality we seek among judicial decisionmakers.[49]

In effect, this Article attempts to juxtapose judicial impartiality as an ideal against the historical and practical reality of state trial judge decision making. The results of this examination reveal the breadth of opportunities for state trial judges to serve a representative function. The representative nature of the trial judge's role suggests that racial diversity on the bench should be framed as more than a mere policy initiative by politicians or bar associations. Instead, racial diversity on the bench should be promoted as a constitutional imperative. In Part I of this Article, I review the efforts of minority voters to challenge the racial homogeneity of the bench in several states by asserting claims brought under section 2 of the Voting Rights Act of 1965.[50] In

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enormous power in determining, through evidentiary rulings, the contours of the case presented to the jury. *See* Stephanie Simon & Jim Newton, *Simpson Civil Case; News Analysis; Jury Heard Much Different Case in Civil Trial; Plaintiffs Learned from the Pitfalls of Criminal Proceeding, but Evidence, Witnesses and the Judge's Rulings Also Set the Second Case Apart*, L.A. TIMES, Feb. 5, 1997, at A15. The O.J. Simpson criminal and civil cases are demonstrative of this point. Superior Court Judge Hiroshi Fujisaki's stern management of the civil case, as contrasted with the style of Superior Court Judge Lance Ito, resulted in some evidence being admitted in one trial and banned in another. *See id.* (detailing different treatment of evidence by two judges).

[48] *See* Spaziano v. Florida, 468 U.S. 447, 457, 460, 461 (1984) (describing death penalty as an expression of the "community's outrage," but upholding right of trial judges to impose death sentence over jury's recommendation of life imprisonment).

[49] Of course, federal court judges and state appellate judges also serve a representative function. They too adjudicate highly personal, value-laden disputes in which they must rely on community standards to make legal determinations. Federal court judges and state appellate judges also bring their perspective, experience and values into their decision making. In one recent unusual case, Federal District Court Judge John Sprizzo acquitted two clergymen of criminal contempt arising from their activities blocking access to a family planning clinic under a theory of nullification. *See* United States v. Lynch, 952 F. Supp. 167, 168, 171–72 (S.D.N.Y. 1997). Judge Sprizzo contended that when a judge "sits as a fact-finder, [he has the] . . . same prerogative of leniency" as a jury. *Id.* at 171.

Nevertheless, for reasons described above, I find issues of judging, representation and diversity to be of greater urgency for state trial court judges. Moreover, my focus on state trial judges is strongly informed by my experiences representing African American voters in their efforts to bring racial diversity to the Texas state trial bench by challenging election schemes that result in all-white trial courts.

[50] *See* 42 U.S.C.A. § 1973 (West 1997). Section 2 of the Voting Rights Act prohibits the use

particular, I discuss *League of United Latin American Citizens Council ("LULAC") v. Clements*,[51] in which the Fifth Circuit Court of Appeals initially resisted acknowledging elected state trial judges as "representatives" within the meaning of the Voting Rights Act—an interpretation later overturned by the Supreme Court—and expressed deep concern about the tension between judicial impartiality and the relief sought by minority voters. Part II explores the impartial judge mandate of the Fourteenth Amendment as it is currently interpreted.[52] In Part III, I argue that the impartial judge mandate has been interpreted too narrowly and should instead be construed to require both individual and structural impartiality for judges.[53] Finally, in Part IV, I examine the role of state judges as representatives.[54] The view of state court judges expressed by the federal appellate court in *LULAC* and other voting rights judges' cases is based on an erroneous and myopic view of both the historical and current reality of the function of state court judges. State judges represent through their role as political leaders and professional role models. More importantly, state trial court judges are as important as jurors in representing the values of the communities they serve. State trial judges, like jurors, represent the communities they serve by reflecting community values in their discretionary decision making.

I. *LULAC v. CLEMENTS* AND THE CASES INVOLVING VOTING RIGHTS IN JUDICIAL ELECTIONS

Beginning in the mid-1980s, African American and other minority voters in some jurisdictions sought to change the reality of all-white state trial courts. They challenged the methods used to elect their state court judges, charging that the election methods violated the Voting Rights Act of 1965.[55] In particular, these voters contended that the use

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of election practices or procedures which deny minority voters an equal opportunity to participate in the political process and to elect candidates of their choice. *See id.* Plaintiffs challenging an election mechanism under § 2 of the Act need only prove that in "the totality of circumstances" the challenged practice results in the diminution of minority voting strength. *See* Thornburg v. Gingles, 478 U.S. 30, 79 (1986). This "results test" requires courts to engage in a "searching practical evaluation of the 'past and present reality.'" *Id.* (quoting S. REP. No. 97–417, at 30 (1982)).

[51] 999 F.2d 831 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994) [hereinafter *LULAC IV*].

[52] *See supra* Part II.

[53] *See supra* Part III.

[54] *See supra* Part IV.

[55] *See, e.g.*, Chisom v. Edwards, 839 F.2d 1056, 1057 (5th Cir. 1988), *rev'd sub nom.* Chisom v. Roemer, 501 U.S. 380 (1991); Mallory v. Eyrich, 839 F.2d 275, 276 (6th Cir. 1988); Brooks v. State Bd. of Elections, 775 F. Supp. 1470, 1472–74 (S.D. Ga. 1989), *motion to dismiss granted with*

of at-large elections to select judges diluted the voting strength of racial minorities and denied them an equal opportunity to elect candidates of their choice to the bench.[56] Despite some early successes by minority litigants in these cases,[57] many of the litigation challenges to judicial election schemes have ultimately failed.[58] Some cases are still pending.[59] Although the plaintiffs in these Voting Rights Act Judges Cases did not couch their claims for representation in terms of an explicit demand for structural impartiality, their effort to dismantle discriminatory judicial electoral methods implicitly questioned the legitimacy of the all-white bench. In this regard, the Voting Rights Judges Cases sought to bring structural impartiality to the bench through racial diversity.

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prejudice (June 6, 1997); Williams v. State Bd. of Elections, 718 F. Supp. 1324, 1325–26 (N.D. Ill. 1989).

· I served as counsel to minority voters challenging discriminatory judicial election schemes in *League of United Latin American Citizens Council ("LULAC") v. Clements*, 999 F.2d 831 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994) (challenging the election of trial court judges in nine counties in Texas); *Robinson v. State*, No. 91-C-468-B (N.D. Okla. June 10, 1993) (consent decree filed) (challenging elections of trial judges in two counties in Oklahoma); and *Hoskins v. Hannah*, Civ. Action No. G-92-12 (S.D. Tex. filed Jan. 10, 1992) (consent judgment and election order filed Aug. 19, 1992) (challenging at-large election of justices of the peace in Galveston County, Texas). I also served on the trial team in *Chisom*, 839 F.2d at 1056 (challenging method of electing judges to Louisiana Supreme Court).

[56] At-large elections can dilute minority voting strength because the electoral district is comprised of the entire jurisdiction. Where African American voters, for example, constitute a minority of the voting population, their votes can be diluted by the votes of the larger and sometimes hostile white electorate. *See* Chandler Davidson, *Minority Vote Dilution*, *in* MINORITY VOTE DILUTION, *supra* note 6, at 1–5. The most often utilized remedy to at-large district vote dilution is the creation of "majority-minority" districts, in which a majority of the voting age population is comprised of members of a racial minority group.

[57] Since 1987, minority voters have won out-right only one Voting Rights Judges Case. *See* Martin v. Allain, 658 F. Supp. 1183, 1204–05 (S.D. Miss. 1987). In six other cases, consent decrees were entered in favor of minority plaintiffs. *See, e.g.*, *Robinson*, No. 91-C-468-B, at 1–2, 23; Hunt v. Arkansas, No. PB-C-89-406 (E.D. Ark. Sept. 24, 1992) (consent decree filed 1991); *Hoskins*, Civ. Action No. G-92-12; Tsosie v. King, No. CIV 91-0905-M (D.N.M. filed Sept. 9, 1991) (consent decree filed 1991); Clark v. Edwards, 725 F. Supp. 285 (M.D. La. 1988), *appeal dismissed*, 958 F.2d 614 (5th Cir. 1992).

[58] *See, e.g.*, Southern Christian Leadership Conference v. Sessions, 56 F.3d 1281, 1283–84 (11th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 704 (1996); Davis v. Chiles, No. TCA 90-40098-MMP (N.D. Fla. July 22, 1996) (unpublished opinion finding at-large elections for Second Judicial Circuit and Leon County Court does not violate the Voting Rights Act), *appeal docketed* No. 96-3547 (11th Cir. filed Aug. 21, 1996); Nipper v. Chiles, 795 F. Supp. 1525, 1550 (M.D. Fla. 1992), *rev'd sub nom.* Nipper v. Smith, 1 F.3d 1171 (11th Cir. 1993), *vacated and reh'g en banc granted*, 17 F.3d 1352 (11th Cir.), *aff'd*, 39 F.3d 1494 (11th Cir. 1994) (en banc), *cert. denied*, 514 U.S. 1083 (1995).

[59] *See, e.g.*, Cousin v. McWherter, 904 F. Supp. 686, 713–14 (E.D. Tenn. 1995), *appeal docketed sub nom.* Cousin v. Sundquist, No. 96-6028 (6th Cir. July 30, 1996).

In the paradigmatic and perhaps most contentiously fought of the "structural" cases—*League of United Latin American Citizens v. Clements* (hereinafter "*LULAC*")[60]—the Fifth Circuit Court of Appeals upheld the legitimacy and impartiality of an all-white bench in Harris County, Texas, although forty-two percent of the population of the county was African American and Mexican American.[61] This decision has left in place a system of selecting judges that virtually precludes meaningful participation by African American and Mexican American voters.[62]

In *LULAC*, African American and Mexican American voters challenged the county-wide system of electing trial judges in the ten most populous counties in the state as violative of section 2 of the Voting Rights Act of 1965, as amended. The plaintiffs contended that minority voters were unable to elect candidates of their choice to the bench because their votes were diluted. Although the trial court ruled in favor of the plaintiffs, the *LULAC* case ultimately went before the Fifth Circuit Court of Appeals four times and was heard once by the Supreme Court. In the first appellate review of the case, *LULAC I*,[63] a panel of the Fifth Circuit reversed the district court's findings of fact on the grounds that the plaintiffs' claims were inapplicable to elections for trial judges. The court based its ruling on the fact that trial judges are autonomous decisionmakers, rather than members of a collegial decision-making body. As such, the court contended, minority voters

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[60] 999 F.2d 831 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994).

[61] Although the suit involved a challenge by Mexican American and African American voters in nine counties in the state, I represented African American voters in Harris County, the largest and most populous county in the State of Texas. No claim was advanced on behalf of Mexican American voters in Harris County. Generally, the references to *LULAC* evidence in this article refer to the claims of African American voters in Harris County. Nevertheless, the analysis in this Article is equally applicable to the exclusion of Mexican Americans, other Latino populations and Asian Americans from the bench nationwide.

[62] The plaintiffs in Harris County determined that African American voters could have elected at least nine judges of their choice using a majority-minority sub-district electoral scheme. Alternatively, the plaintiffs advocated the use of an alternative at-large election scheme, which would remove the dilutive features of the existing system. Cumulative and limited voting, for example, use at-large structures but provide significant opportunities for minority voters to participate meaningfully in elections by removing the "winner-take-all" nature of at-large elections in which 50% plus one members of the electorate can control 100% of the seats. *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 222 (1989). Both cumulative and limited voting have been used effectively to cure racial vote dilution. *See, e.g.*, Dillard v. Town of Cuba, 708 F. Supp. 1244, 1245 (M.D. Ala. 1988); Dillard v. Chilton County Bd. of Educ., 699 F. Supp. 870, 871 (M.D. Ala. 1988), *aff'd. without opinion sub nom.* Dillard v. Chilton County Comm'n, 868 F.2d 1274 (11th Cir. 1989).

[63] 902 F.2d 293 (5th Cir. 1990) [hereinafter "*LULAC I*"].

could not seek representation from one autonomous decisionmaker. The Fifth Circuit, sua sponte, ordered rehearing en banc. A majority of the en banc court in *LULAC II*[64] held that judicial elections—all judicial elections—are exempt from the Voting Rights Act. The Supreme Court granted certiorari and heard the case, now *Houston Lawyers' Ass'n v. Attorney General of Texas*.[65] The Court reversed the Fifth Circuit and held that judicial elections are subject to section 2 of the Voting Rights Act.

On remand, a panel of the Fifth Circuit found in favor of the plaintiffs in *LULAC III*.[66] They credited the findings of the district court that the county-wide election system impermissibly prevented minority voters from electing judges to the trial bench. Again sua sponte, the Fifth Circuit ordered rehearing en banc.[67] During the pendency of briefing and oral argument, the plaintiffs and the State fashioned a settlement and sought the opportunity to have the case remanded to the district judge for a fairness hearing on the proposed consent decree. In *LULAC IV*,[68] the Fifth Circuit denied the request for remand and reversed both the panel and the district court decisions.[69] The en banc court determined that the State of Texas had an overriding interest in maintaining the impartiality of the bench, that the county-wide election system promotes that interest and that the district judge's findings were not supportive of a violation of the Voting Rights Act. The Supreme Court denied the plaintiffs' writ of certiorari.[70]

The county-wide at-large election system had resulted in a nearly all-white judiciary in the most densely populated counties in Texas, even where minority voters constituted a significant percentage of the

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[64] 914 F.2d 620 (5th Cir. 1990) (en banc), *rev'd sub nom.* Houston Lawyers' Ass'n v. Attorney Gen., 501 U.S. 419 (1991) [hereinafter "*LULAC II*"].

[65] 501 U.S. 419 (1991) [hereinafter "*HLA*"].

[66] 986 F.2d 728 (5th Cir. 1993) [hereinafter "*LULAC III*"].

[67] In his dissent to *LULAC III*, Judge Patrick Higginbotham—the author of the majority opinions in *LULAC I* and *LULAC IV*—plainly stated, "[t]he next step must be to vacate the panel opinion and take this case en banc." *Id.* at 842 (Higginbotham, J., dissenting). Higginbotham attached a 32-page proposed majority opinion as an appendix to his dissent. The majority opinion in *LULAC IV* closely mirrored Higginbotham's appendixed "proposed opinion" to *LULAC III*.

[68] 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1071 (1994).

[69] Four justices denounced the refusal of the Fifth Circuit to permit the parties to settle the case. In particular, they challenged the Fifth Circuit's determination that the Attorney General of Texas did not have authority to settle the suit because one of the nominal defendants—the Chief Justice of the Supreme Court of Texas—was not in favor of the settlement. *See id.* at 898–900 (Politz, C.J., dissenting). The dissenters described the majority's action as a "headlong rush to reach the merits" of the case. *Id.* at 899 (Politz, C.J., dissenting).

[70] *See* LULAC v. Clements, 510 U.S. 1071 (1994).

voting population. In Harris County, for example, where African Americans constituted twelve percent of the total population, only four African Americans had ever served as district judges in the county when the minority voters filed their claim.[71] The minority voters' claims in *LULAC* constituted a demand for participation in the administration of justice.[72]

The trial court's findings of fact amply supported the plaintiffs' charges of racially discriminatory exclusion.[73] The court found that African Americans have been historically excluded from the political process in Texas;[74] that voting in state district judge elections in Harris County is racially polarized;[75] and that the relatively low number of minority lawyers "does not explain why well qualified eligible minority lawyers lose judicial elections."[76] Instead, the court found that of the seventeen district judge elections in which qualified African American judicial candidates ran in Harris County between 1980 and 1988, only two African American candidates were elected.[77] Additionally, the trial

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[71] *See* Complaint in Intervention at 16a–17a, *LULAC*, No. 88-CA-154 (W.D. Tex. filed Jan. 19, 1988) (on file with the author). The lack of racial diversity on the state bench is not simply a matter of "numbers." Nevertheless, the plaintiffs in these cases sought more than cosmetic diversity on the bench, of the kind that might be satisfied by the presence of one minority judge. For example, in *LULAC*, African American voters anticipated that they could elect a minimum of nine judicial candidates of their choice if the existing election system were altered. *See LULAC*, No. MO-88-CA-154, slip op. at 15 (W.D. Tex. Nov. 8, 1989) (on file with the author) [hereinafter "Slip Op. at ___".] The significance of this change might have affected more than just the appearance of diversity. Judicial decision making might have been impacted as well. Empirical studies have shown that "[t]he larger the numbers, the greater the likelihood that previously excluded groups will perform well, both in terms of traditional achievement and in their ability to innovate." Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 MIAMI L. REV. 29, 43–44 & n.72 (1987); *see also* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1698 & nn.466–467 (1985) (citing studies showing that at least three minority jurors are needed on a jury panel to overcome the group pressure of the majority). In cases where minority voters' claims were settled, the increase in the number of minority judges elected following implementation of a remedial plan was startling. In Louisiana, 41 new African American trial judges had been elected as a result of the *Clark v. Edwards* case which challenged and successfully changed the way trial judges were elected. *See Attorney: Challenge to Process of Picking Judges is Frivolous*, AM. PRESS, June 5, 1996, at B2. Pursuant to *Hunt v. Arkansas*, eight new African American trial judges were elected. *See* Interview with Arkie Byrd, Plaintiff's Attorney, May 10, 1996 (on file with the author).

[72] They contended that electing judges from majority-minority sub-districts within the county would afford African American voters an opportunity to elect candidates of their choice to serve as district judges. *See* Complaint in Intervention at 19a–20a, *LULAC*, No. 88-CA-154.

[73] The district court's ruling was entered in favor of the minority plaintiffs in each of the nine counties challenged in the lawsuit. *See* Slip Op. at 92.

[74] *See id.* at 69–71.

[75] *See id.* at 29–30.

[76] *Id.* at 75.

[77] *See id.* at 73.

court found that the reasons offered by the State for continuing the use of at-large elections for district judges were not compelling.[78] In sum, the district court found that in the "totality of circumstances,"[79] minority voters were denied an equal opportunity to participate in the election of judges to the Texas trial bench.

Yet, over the course of the four appellate decisions,[80] the Fifth Circuit articulated three principal reasons why the minority voters' claims in *LULAC* had to fail, each bearing on the role of judges as representatives and as impartial decisionmakers: (1) judges are not representatives and therefore the election of judges cannot be challenged under the Voting Rights Act;[81] (2) even if judges are representatives for purposes of the Voting Rights Act, it is impossible to obtain representation from trial judges because they decide cases independently;[82] and (3) altering the at-large method of electing judges to give minority voters a meaningful opportunity to elect judges of their choice from judicial sub-districts would undermine the impartiality of the judiciary.[83]

The appellate court in *LULAC* was initially most troubled by the plaintiffs' implicit claim that elected trial judges are "representatives" as that term is used in the Voting Rights Act. In *LULAC II*, the court offered two possible reasons why the plaintiffs' attempt to be represented on the trial bench should fail. A majority of judges on the court

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[78] *See* Slip Op. at 77. At trial, the State offered three reasons for continuing the use of at-large elections: "(1) judges elected from smaller districts would be more susceptible to undue influence by organized crime; (2) changes in the current system would result in costly administrative changes for district clerk's offices; and (3) the system of specialized courts in some counties would disenfranchise all voters' rights to elect judges with jurisdiction over some matters." *Id.* at 76. The threat to impartiality argument was developed further by the Fifth Circuit on appeal in *LULAC I*, and thereafter assumed primary importance among the State's appellate arguments. *See* 902 F.2d at 293.

[79] In order to assess claims under the "totality of circumstances," courts are guided by a list of objective factors set out in the Senate Report which accompanied passage of the 1982 amendments to the Voting Rights Act. *See* S. REP. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. The Senate Report is recognized as the authoritative source for interpreting amended section 2. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986).

[80] *See LULAC IV*, 999 F.2d at 831; *LULAC III*, 986 F.2d at 728; *LULAC II*, 914 F.2d at 620; *LULAC I*, 902 F.2d at 293.

[81] *See generally LULAC II*, 914 F.2d at 620; *LULAC I*, 902 F.2d at 293. *LULAC II* was struck down by the United States Supreme Court in *HLA*. *See generally* 501 U.S. at 419.

[82] This interpretation was also struck down by *HLA*. *See* 501 U.S. at 425-28.

[83] This holding survived all four *LULAC* decisions. In its final *LULAC* decision, the Fifth Circuit also reversed the district court's finding that voting in judicial elections was racially polarized and found instead that political party affiliation controlled judicial election outcomes in Harris County. *See LULAC IV*, 999 F.2d at 855. Racially polarized voting is "the linchpin" of a claim brought under section 2 of the Voting Rights Act. *See* Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496, 499 (5th Cir. 1987).

held that the Voting Rights Act could not be used to challenge judicial elections because judges "serve[] no representative function whatever: the judge represents no one."[84] At the same time, the majority did find that judges "speak for and to the entire community, [but] never for segments of it . . . ."[85] Five judges concurred in a position articulated by Judge Patrick Higginbotham[86] that plaintiffs could not seek representation on the trial bench because each trial judge "acts alone in wielding judicial power" and as such cannot serve a representative function.[87] Minority voters can only seek representation from officials who serve on a multi-member body.[88] Although Judge Higginbotham conceded that judges serve some representative functions, he concluded, like the majority, that judges cannot represent "a specific constituency" in the community.[89]

Although the Supreme Court ruled in the minority plaintiffs' favor that elected judges are representatives for the purposes of the Voting Rights Act,[90] on remand, the Fifth Circuit ultimately denied plaintiffs' claims on two grounds: that plaintiffs had failed to demonstrate that voting in district judge elections is racially polarized and that the plaintiffs' attempt to obtain representation on the trial bench

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[84] *LULAC II*, 914 F.2d at 625.

[85] *Id.* at 628.

[86] Judge Patrick Higginbotham of the Fifth Circuit Court of Appeals authored most of the *LULAC* opinions I discuss herein.

[87] *LULAC II*, 914 F.2d at 648.

[88] In "traditional" voting rights cases, minority voters challenge the at-large method of electing representatives to a multi-member legislative body, such as a city council. In those cases, minority voters typically seek to change the election system to a single-member district system that would enable a politically cohesive, geographically compact community of African Americans to numerically dominate at least one district and elect a candidate of their choice to sit on the council. Thus, minority voters sought "a seat at the table." *See* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1415–16 (1991) (describing the traditional voting rights representation model as "the right [of minority representatives] to be 'present'" when "the majority acts"). In *LULAC*, plaintiffs challenged the method of electing trial judges who do not, for the most part, exercise their authority as part of a multi-member decision-making body. Judge Higginbotham borrowed from the Second Circuit's analysis in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986), in which that court struck down a minority plaintiff's challenge to the use of run-off elections for primaries for the mayor, city council president and comptroller. In that case, the court held "[t]here can be no equal opportunity for representation within an office filled by one person." *Id.* at 148. In *HLA*, the Supreme Court rejected the notion that "the 'single-member office' theory automatically exempts certain elections from the coverage of § 2." 501 U.S. at 426. This decision would have left in place an earlier Fifth Circuit panel decision upholding the application of section 2 of the Voting Rights Act to the election of appellate court judges. *See* Chisom v. Edwards, 839 F.2d 1056, 1064 (5th Cir. 1988), *rev'd sub nom.* Chisom v. Roemer, 501 U.S. 380 (1991).

[89] *See LULAC II*, 914 F.2d at 636.

[90] *See HLA*, 501 U.S. at 421; Chisom v. Roemer, 501 U.S. 380, 383 (1991).

would undermine "the fact and appearance of judicial fairness" by creating the perception that judges would exercise "bias and favoritism towards the parochial interests of a narrow constituency."[91] This prediction of judicial bias in *LULAC IV* narrowed the Fifth Circuit's earlier assessment of the plaintiffs' goals as seeking "to simply allocate judges, and thus judicial decisions, among various population groups."[92]

Other courts following *LULAC* have turned back minority voter claims based, in part, on the impartiality concern. In *Nipper v. Smith*, for example, the Eleventh Circuit Court of Appeals, relying on *LULAC*, held that the creation of majority African American sub-districts for the election of judges "would be detrimental to [the] pattern of fair and impartial justice."[93]

II. Individual Impartiality and Minority Judges

A. *The Due Process Impartial Judge Mandate*

The Fifth Circuit's concerns about the ability to maintain impartiality among judges who are explicitly elected by a particular racial constituency in the community suggests that the individual impartiality of judges would be compromised by their representative role. Such a conflict would arguably violate an individual litigant's Fourteenth Amendment Due Process right to an impartial judge. Yet, individual judicial bias cannot be assumed merely by the fact that a judge *could* feel beholden to a certain segment of the electorate.[94] Instead, bias must be alleged against an individual judge based on specific facts.

The Supreme Court's decision in *Tumey v. Ohio*[95] firmly established that a defendant cannot be tried before a judge who has a "direct, personal, substantial pecuniary interest" in the outcome of the case.[96] Due process requires not only the absence of actual interest by the trier, but also the absence of any appearance of interest. As the Supreme Court has held, "justice must satisfy the appearance of justice."[97] A judge who cannot satisfy both the fact and appearance of impartiality must be disqualified from hearing the case at issue.

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[91] *LULAC IV*, 999 F.2d at 869.

[92] *LULAC II*, 914 F.2d at 649.

[93] 39 F.3d 1494, 1544 (11th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995).

[94] To assume bias in such a manner would have led inevitably to the conclusion that individual white judges on the bench in Harris County are biased in favor of the white electorate responsible for their judicial success.

[95] 273 U.S. 510 (1927).

[96] *Id.* at 523.

[97] *See* Offutt v. United States, 348 U.S. 11, 14 (1954).

The principal means of ensuring individual judicial impartiality is judicial disqualification, which permits litigants to seek removal of a judge who may be biased from hearing a particular case. Most states and the District of Columbia have adopted the disqualification standards of the ABA Model Code of Judicial Conduct (the "Code").[98] The standard is an objective one, requiring the judge to recuse himself if his "impartiality might reasonably be questioned . . . ."[99] The Code also identifies specific circumstances involving judicial bias which require disqualification, including a judge's knowledge of factual issues in a case, or a judge's economic interest in the outcome of a case.[100]

A federal judge may also sua sponte withdraw from a case in accordance with 28 U.S.C. § 455 ("section 455"). Section 455 was amended in 1972 to incorporate an objective standard identical to that of the Code.[101] Thus, under amended section 455, a judge is to withdraw from any proceeding "in which his impartiality might reasonably be questioned."[102] This standard requires recusal when "a reasonable, objective person, knowing all of the circumstances, would have questioned the judge's impartiality."[103] The amended section 455 also sets out several specific circumstances in which a judge must disqualify himself from hearing a case.[104]

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[98] *See* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 563 (4th ed. 1995).

[99] MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (1990).

[100] The federal system provides two avenues for judicial disqualification from a case. 28 U.S.C. §§ 144 and 455 provide the mechanism for judicial disqualification. *See* 28 U.S.C.A. §§ 144, 455 (West 1988 & 1997). Section 144 requires that a judge be disqualified from a case whenever a party submits an application which alleges with sufficiency that the judge "has a personal bias or prejudice either against him or in favor of any adverse party." 28 U.S.C. § 144 (1988). The judge against whom a § 144 motion and affidavit have been filed can pass on the sufficiency of the affidavit. *See* Berger v. United States, 255 U.S. 22, 30, 32–36 (1921). The facts alleged in the affidavit are taken to be true. *See id.* at 32–34. However, mere conclusory allegations are insufficient to warrant recusal. Instead, the party seeking recusal must allege specific facts showing "a bent of mind that may prevent or impede impartiality of judgment." *Id.* at 33–34.

[101] 28 U.S.C. § 455 had originally used a subjective standard, requiring a judge to recuse himself from a proceeding if "in his opinion" his participation would be improper. *See* 28 U.S.C. § 455 (1970) (amended 1972).

[102] *See* 28 U.S.C. § 455(a) (1994).

[103] Hughes v. United States, 899 F.2d 1495, 1501 (6th Cir.), *cert. denied*, 498 U.S. 980 (1990).

[104] These standards also mirror the specific circumstances set out in the Code which relate to personal bias, financial interest and prior involvement with a case as a lawyer. *See* 28 U.S.C. § 455(b). Because the federal statutory standard now mirrors the Code standard adopted by most states, the federal recusal cases have proven highly instructive to state courts in interpreting recusal standards. *See supra* note 17.

B. *Lessons From the Race-Recusal Cases*

In *LULAC*, the Fifth Circuit initially rejected the minority voters' structural bias claims in part by advancing an individual impartiality analysis.[105] In essence, the court expressed concern that minority judges elected by minority voters would be biased in favor of their constituents, suggesting that in individual cases such judges would not act impartially. The Fifth Circuit's assumptions about the ability of African American judges to be racially "impartial" is not new or unusual. Recusal based upon the question of individual judicial impartiality and the race of the judge has been raised with frequency in "race-recusal" cases.[106] These are cases in which white litigants have sought to disqualify African American judges in cases in which racial discrimination is an issue. The claims of bias asserted by white litigants in these recusal cases have compelled African American judges to question and challenge a racially-constructed definition of "impartiality." As a result of these cases and the opinions written by African American judges, it is now well-settled that a judge's impartiality is not called into question simply by virtue of the shared racial identity of the judge and the litigant.

In the landmark "race-recusal" case, *Commonwealth of Pennsylvania v. Local Union 5442*,[107] Judge A. Leon Higginbotham[108] rejected the efforts of a defendant contractors' union to disqualify him from adjudicating the claims of African American union members who charged that the union discriminated against them.[109] The union based its challenge on a speech Judge Higginbotham made before a group of African American historians.[110] In this non-jury case, the union based their recusal motion on the fact that Judge Higginbotham was African American, that the case would be a bench trial and that Judge Higgin-

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[105] *See LULAC I*, 902 F.2d 293, 296 (5th Cir. 1990).

[106] *See, e.g.*, LeRoy v. City of Houston, 592 F. Supp. 415 (S.D. Tex.), *mandamus denied*, In re City of Houston, 745 F.2d 925 (5th Cir. 1984); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 1017 (S.D. Tex. 1981); Commonwealth of Pennsylvania v. Local Union 5442, 388 F. Supp. 155 (E.D. Pa. 1974).

[107] 388 F. Supp. at 155.

[108] References in this section to Judge Higginbotham refer to Judge A. Leon Higginbotham, Jr., former Chief Judge of the Third Circuit Court of Appeals. Judge Higginbotham, a noted scholar on the history of racism in the United States, left the bench in 1993 and is no relation to Judge Patrick Higginbotham, the author of the *LULAC* opinions.

[109] *See* 388 F. Supp. at 156–57.

[110] *See id.* at 159–60. The union's challenge was made pursuant to 28 U.S.C. § 144, which upon the motion of one of the parties requires a judge to recuse himself if the affidavit accompanying the recusal motion alleges with sufficiency that the judge has a "personal bias or prejudice" in favor of or against a party. 28 U.S.C. § 144 (1994).

botham had used the word "we" in describing African Americans during his speech.[111]

Judge Higginbotham firmly denied the existence of a conflict between impartiality and African American judges' expression of solidarity with their community. He rejected a definition of impartiality in which "white judges will be permitted to keep the latitude they have enjoyed for centuries in discussing matters of intellectual substance . . ." while denying the same latitude to African American judges.[112] He identified and rejected the defendants' claim that "the impartiality of a black judge can be assured only if he disavows, or does not discuss the legitimacy of blacks' aspirations to full first-class citizenship in their own native land."[113] Thus, Judge Higginbotham not only asserted the generalized right of African American judges to be free from suspicion of impartiality based on race, he also insisted on the right of African American judges to openly and affirmatively demonstrate their support for minority civil rights and to embrace cultural connections with the African American community. In a prophetic conclusion, Judge Higginbotham predicted that "[white] litigants are going to have to accept the new day where the judiciary will not be entirely white and where some black judges will adjudicate cases involving race relations."[114]

Other African American judges have found themselves under similar attack in race-recusal cases. Some of the recusal motions in these cases have focused on the judges' background as civil rights

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[111] The defendants' affidavit in support of recusal also alleged:

> 5. [Judge Higginbotham's use of] the pronoun "we" . . . evidences [his] "intimate tie with and emotional attachment to the advancement of black civil rights";
> 6. That by [his] agreement to deliver the speech [he] presented [himself] as "a leader in the future course of the black civil rights movement";
> 7. That [his] speech took place in "an extra-judicial and community context," and not in the course of this litigation;
> . . . .
> 11. That [he] believe[s] "that there has been social injustice to blacks in the United States"; . . . and "that they must be remedied by extra-judicial efforts by blacks, including [himself]";
> . . . .
> 15. That "in view of the applicable federal law," and by reason of [his] "personal and emotional commitments to civil rights causes of the black community, the black community expectation as to [his] leadership and spokesmanship therein, and the basic tenet of our legal system requiring both actual and apparent impartiality in the federal courts," [his] "continuation . . . as trier of fact, molder of remedy and arbiter of all issues constitutes judicial impropriety."

Local 5442, 388 F. Supp. at 157–58.

[112] *Id.* at 165.

[113] *Id.* at 178.

[114] *Id.* at 177.

lawyers or on the judges' acquaintance with African American defendants. At their core, however, these recusal motions challenge the ability of African American judges to behave with impartiality.

For example, African American female judge Constance Baker Motley was the subject of a recusal motion filed by a defendant law firm in a case in which a female lawyer was suing the law firm for gender discrimination under Title VII of the Civil Rights Act of 1964.[115] Judge Motley rejected the defendants' challenge to her impartiality, making the now classic observation:

> if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.[116]

In some instances, recusal motions painstakingly attempt to avoid openly challenging the judge based on his or her race, while at the same time identifying clear racial proxies. In almost all instances, these racial proxies apply disproportionately to African American judges. For example, in *Baker v. City of Detroit*,[117] white police officers challenging the promotion polices of the Detroit Police Department sought to recuse African American judge Damon Keith, ostensibly because he was an acquaintance of one of the nominal defendants, African American Mayor Coleman Young. In rejecting the recusal motion, Judge Keith remarked:

> The reality of life is that only a small number of Black persons have been elevated to positions of responsibility in our national life. It therefore is highly likely, especially in a predominantly Black city like Detroit, that a Black Federal Judge would know, on a friendship basis, a Black Mayor.[118]

Judge Keith identifies the true basis of the recusal motion as premised not on his acquaintance with Mayor Young, but rather on his race:

> The conclusion is inescapable that the likely grounds upon which plaintiffs' motion is based is the fact that I am Black, that Mayor Young is Black, that this action was brought by

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[115] *See* Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 2 (S.D.N.Y. 1975).
[116] *Id.* at 4.
[117] 458 F. Supp. 374 (E.D. Mich. 1978).
[118] *Id.* at 377.

white policemen seeking to challenge the affirmative action program in the Detroit Police Department. . . .[119]

In *LeRoy v. City of Houston*,[120] African American judge Gabrielle McDonald denied a recusal motion on similar grounds. In that case, white defendants in a voting rights case sought to recuse Judge McDonald purportedly because she was a member of the putative class in a Rule 23(b)(2) class seeking injunctive relief.[121] The proposed class was composed of African American voters in the City of Houston. The defendants sought Judge McDonald's recusal even though the class had never been certified, Judge McDonald was not a registered voter, and at the time of the suit, Judge McDonald did not reside in the African American populated areas of the city that potentially would be fashioned into majority-minority districts if the plaintiffs prevailed. Judge McDonald questioned the true underlying grounds for the defendants' recusal motion, remarking: "I find it curious that my race was not alleged to be a basis for recusal in the City's Motion. . . . [T]he City seemingly chose not to assert directly and forthrightly what has come to be the real basis for its Motion To Recuse."[122]

Judge McDonald faced yet another race-based recusal motion in *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan* when the Ku Klux Klan cited Judge McDonald's former employment as an assistant counsel at the NAACP Legal Defense & Educational Fund and at the Equal Employment Opportunity Commission ("EEOC") as evidence of her bias.[123] The defendants also alleged that Judge McDonald's bias was revealed when she asked the plaintiffs whether they would feel intimidated if the defendants wore their Klan robes to depositions. Finally, the defendants alleged their belief that African Americans are "prejudiced against the Ku Klux Klan."[124]

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[119] *Id.*

[120] 592 F. Supp. 415 (S.D. Tex.), *mandamus denied*, In re City of Houston, 745 F.2d 925 (5th Cir. 1984).

[121] *See id.* at 416–18.

[122] *Id.* at 420 n.12. Judge McDonald ultimately denied the motion, holding that her interest in the outcome of the suit was "marginal and temporary" since she neither was a registered voter nor lived in the proposed majority African American electoral district. *See id.* at 422–24.

[123] 518 F. Supp. 1017, 1018 & n.1 (S.D. Tex. 1981). In fact, Judge McDonald had never worked for the EEOC and had only worked at the NAACP Legal Defense Fund for two years following graduation from law school. *See id.*

[124] *See id.* at 1019. Ironically, after leaving the bench to return to private practice, Judge McDonald served with me as co-counsel for the Houston Lawyers' Association in *LULAC*. Judge McDonald now serves on the International Court of Justice presiding over war crimes cases in Bosnia.

These recusal cases demonstrate the pervasiveness of what Judge Higginbotham in *Local 5442* described as "an inherent disquietude" of some white litigants to accept African American trial judges as autonomous legal decisionmakers[125] in cases where race is at issue.[126] By seeking the recusal of African American judges based on the appearance of bias, these litigants suggest that true impartiality can be exercised only by white male judges.[127]

Although Judge Higginbotham and other African American judges have firmly and decisively answered impartiality allegations in race-recusal cases, barriers still exist to the full acceptance of African American judges. African American judges are still expected to pass a "race test" to prove their impartiality.[128] Concern about the impartiality of African American judges regularly finds expression in the judicial selection forum. The appointment or election of African American judges is viewed with suspicion and often seen as a response to narrow, parochial interests rather than as benefitting the judicial system as a whole.[129] So, for example, Judge Patrick Higginbotham expressed his concern in *LULAC* that the impartiality of the Texas bench would be

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[125] In this sense, the impartiality of African American trial judges may be subject to greater challenge because of their autonomous decision-making function. African American appellate judges will generally serve on panels dominated by white judges where minority views may be "balanced" or "screened" by white judges.

[126] *See Local 5442*, 388 F. Supp. at 177.

[127] *See id.*

[128] In a recent editorial in the Jackson, Mississippi NORTHSIDE SUN, the publisher of the paper, Wyatt Emmerich, conducted an informal poll concerning the state's sitting Supreme Court Justices. Emmerich asked "six attorney . . . friends to assess the nine judges" on the bench. Emmerich described the state's only African American Supreme Court judge, Fred Banks, as smart, intellectual, professional and personally impressive. But Emmerich concluded that Judge Banks' "past experience with the NAACP makes him very pro-black on racial issues." Emmerich then quoted a source who claimed that Judge Banks "is intelligent and knows the law but he occasionally flunks *the race test*." (emphasis added). Judge Banks is never described as African American in the article. *See* Wyatt Emmerich, *Attorneys Rate the Supreme Court Judges*, NORTHSIDE SUN, Apr. 18, 1996, at 4A.

[129] In a recent editorial in the BALTIMORE SUN, editors expressed concern that Maryland Governor Parris Glendening would seek to satisfy African American interest groups by elevating sitting Court of Appeals Judge Robert Bell to Chief Judge. *See* Editorial, *Glendening's Big Judicial Appointment*, BALTIMORE SUN, June 17, 1996, at 8A. The Court of Appeals is the highest court in the State of Maryland. Despite earlier news articles in the same paper describing Judge Bell as a highly-qualified candidate with an impeccable professional background, and as a well-respected jurist among both his colleagues on the bench and the legal community at large, the SUN editors cautioned the Governor against taking "the political route on this appointment" by appointing a Chief Judge who will satisfy the "two groups that are important to [the Governor] . . . women and blacks." *Id.* The editors had also cautioned the Governor against elevating Irma Raker, the only woman Court of Appeals Judge to Chief. *See id.* Judge Raker had been recently appointed to the Court of Appeals. Instead, the editors suggested that the Governor "needs to find the best-qualified candidate to run Maryland's court system. Period." *Id.* Several days later the Governor announced that he was broadening his search for a Chief Judge to include candidates who were not already on the bench. All of the non-judge candidates mentioned in the article as

compromised by changing the trial court election system so that African American voters could elect judicial candidates of their choice.[130] This fear reflects continuing and widespread discomfort with minority judges and impartiality.

III. A Racially Diverse Trial Bench—The Case for Structural Impartiality

The plaintiffs' claims in *LULAC*[131] and the other Voting Rights Judges Cases reflected an effort to achieve structural impartiality on the trial bench. The impartiality the plaintiffs sought was not directed to the individual bias of particular judges, but rather to the structural impartiality of the entire judiciary. For the *LULAC* claimants, structural impartiality is realized through the interaction of diverse viewpoints on the bench and the resulting decreased opportunity for one perspective to consistently dominate judicial decision making. As such, racial diversity on the bench would promote, rather than undermine, impartiality.

Many highly-regarded judges have observed that judicial decision making is most effective, conscious and representative when it is informed by the variety of perspectives and qualities that racial diversity necessarily brings to the bench.[132] Such has been realized by some members of the Supreme Court through the diverse and unique contributions of Justice Thurgood Marshall. As Justice Sandra Day O'Connor has written of Justice Marshall:

> Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. . . . Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.[133]

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being considered for Chief Judge were white men. *See* Jane Bowling, *Will Chief Judge Be Outsider?*, Daily Record, June 20, 1996, at 1. Nevertheless, Judge Bell was later elevated to Chief Justice.

[130] *See LULAC I*, 902 F.2d at 296.

[131] *LULAC IV*, 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1071 (1994).

[132] *See* Higginbotham, *supra* note 19, at 1033–41; Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992) (In a tribute to Justice Marshall, Justice O'Connor speaks of the unique and "special perspective" Justice Marshall brought to the Court.); Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 Stan. L. Rev. 1215, 1215 (1992) (remembering Justice Marshall's contribution in bringing to the "conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match").

[133] O'Connor, *supra* note 132, at 1217; *see* Barbara A. Perry, A "Representative" Supreme

The interaction of these perspectives also yields another return—greater impartiality.

A. *The Analogy to Jury Impartiality*

The link between diversity and impartiality has been recognized by the Supreme Court in its jury venire selection cases. Diversity promotes impartiality by ensuring that no one viewpoint, perspective or set of values can persistently dominate legal decision making. Diversity then functions as a check on bias. In the jury venire cases, the Supreme Court has held that structural impartiality on the jury venire is compelled by both the Fourteenth Amendment and Sixth Amendment jury impartiality requirements.[134] According to the Supreme Court, the right to an impartial jury includes not only the right of the litigants guaranteed by the Due Process Clause and the Sixth Amendment[135] to be free from individual bias of jurors, but also the right to select juries from a pool that is representative of the community.[136] Jury venires, therefore, should reflect a "fair cross-section of the community."[137]

The fair cross-section requirement serves the dual purpose of promoting both the representative nature and the impartiality of the jury. Impartiality, according to the Supreme Court, is best assured

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COURT?: THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS 137–38 (1991) (citing an interview with Justice Powell in which he argued that diversifying the bench with previously excluded groups can bring new insights to the court, and noting how Justice Marshall's "unique contribution" to the court derived from Marshall's "direct experience with racial segregation in this country").

[134] *See* Morgan v. Illinois, 504 U.S. 719, 727 (1992) (stating that "due process alone has long demanded that, if a jury is to be provided to the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment").

[135] The Sixth Amendment guarantees a criminal defendant "the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed* . . . ." U.S. CONST. amend. VI. (emphasis added).

[136] Individual impartiality ensures the litigant's right to face a jury in which each juror is unbiased and free from pre-trial prejudices toward the defendant. Like judges, who must be disqualified from hearing cases in which they have an interest, so the Due Process Clause permits the defendant to remove for cause those jurors who evidence a bias against the defendant. *See* Taylor v. Louisiana, 419 U.S. 522, 526–28 (1975) (explaining that the Sixth Amendment's provision for jury impartiality is made binding on the states by virtue of the Due Process Clause of the Fourteenth Amendment).

[137] *See* Witherspoon v. Illinois, 391 U.S. 510, 524, 528 (1968) (Douglas, J., writing separately) (citing Fay v. New York, 332 U.S. 261, 299–300 (1947) (Murphy, J., dissenting) in that "there is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. . . . It is a democratic institution, representative of all qualified classes of people.").

when the jury selection system ensures that diverse viewpoints have an opportunity to interact in juror deliberations.[138] To increase the likelihood that this balanced exchange of viewpoints will occur in jury deliberations, petit juries should be selected from a diverse group of potential jurors in the venire. Group-based exclusion from the jury venire is sufficient to establish a prima facie showing that the jury is biased.[139] Conversely, bias is implicitly defined by the Court as *the absence of diversity.* In *Peters v. Kiff*,[140] for example, the Court struck down the conviction of a white defendant in a criminal case in which African Americans had been excluded from the jury pool. Writing for the majority, Justice Marshall explained: "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."[141]

The Supreme Court has identified the exclusion of African Americans, Mexican Americans and women from the jury venire as damaging to the impartiality of the jury venire.[142] In finding that the exclusion of these groups imperils jury impartiality, the Court has not ascribed to those groups a particular ideology, nor has it required proof that members of these groups will cast their jury votes in a certain way. Instead, the Court has reasoned implicitly in these cases that race (and gender) can serve as proxies for diversity of perspective.[143] It may also be true that the alternative perspectives that racial minorities can potentially bring to legal decision making are not limited solely to those informed by race. Given the subordinated role of racial minorities in the social, economic and political life of our country, increasing racial diversity among legal decisionmakers may also result in the inclusion of additional alternative perspectives reflective of other kinds

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[138] Hans & Vidmar have suggested that "[b]iases for and against the defendant, if evenly distributed on the jury, may cancel each other out." HANS & VIDMAR, *supra* note 46, at 50.

[139] *See Taylor*, 419 U.S. at 530–31 ("The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.") (quoting Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

[140] 407 U.S. 493 (1972).

[141] *Id.* at 503.

[142] *See, e.g., Taylor*, 419 U.S. at 524–25, 538 (holding that exclusion of women from jury service results in jury pools that are not reasonably representative of the community and denies due process to criminal defendant).

[143] *See id.* at 531 ("[W]omen are sufficiently numerous and distinct from men and that if they are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section requirement cannot be satisfied.").

of subordination—such as class and/or economic subordination—which often are closely aligned with racial subordination.[144]

B. *Applying the Jury Impartiality Argument*

Can structural impartiality on judicial benches be constitutionally compelled? Although the Supreme Court has most often described the mandate for structural impartiality of juries as derived from the Sixth Amendment, the Supreme Court has indicated that the Fourteenth Amendment also compels structural impartiality on jury venires.[145] If the Court reads the Fourteenth Amendment to compel independently the full measure of impartiality described in the Sixth Amendment, then so too should the Fourteenth Amendment require such impartiality for judges. A racially homogenous bench carries with it all of the dangers of a racially exclusive jury venire.[146]

A Fourteenth Amendment challenge to the racial homogeneity of the bench could be made using similar evidence as that offered in the jury venire cases. Such a hypothetical case would challenge as racially discriminatory the system used to select judges for the bench. Modelling the jury cases, plaintiffs could make out a prima facie case of discrimination in judicial selection cases by proving three elements. First, in accordance with the test set for juror impartiality in *Duren v. Missouri*,[147] a racially homogenous bench would fail the impartiality test if the plaintiffs proved that the racial group excluded is a distinct group. Second, the plaintiffs need to show that the under-representation of this group on the bench is unreasonable given the presence of that group in the community.[148] To satisfy this prong, the plaintiffs could show that African Americans have not served as judges over an extended period of time.[149] Finally, the plaintiffs would have

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[144] *See, e.g.*, Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 JOURNAL OF POLITICS, 596, 598 (1985) (finding that President Carter's African American and female federal judicial appointees "were younger, less affluent and lower on measures of localism than the traditional white male candidates for the bench"); *see also* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1086 (1991). Aleinikoff persuasively argues that "recognition of a nonmajority presence may also provide important perspectives on matters not generally associated with race" because minority perspectives help us critique and understand the culture of domination in general.

[145] *See, e.g.*, Morgan v. Illinois, 504 U.S. 719, 727 (1992) (indicating that due process compels structural impartiality on jury venires).

[146] *See* Higginbotham, *supra* note 19, at 1036 ("More often than not, judicial homogeneity and exclusivity are deterrents to, rather than promoters of, equal justice for all.").

[147] 439 U.S. 357 (1979).

[148] *See id.* at 364.

[149] *See* Castaneda v. Partida, 430 U.S. 482, 484, 494, 500 (1977) ("key-man" grand jury selection system struck down for excluding Mexican Americans).

to prove that the severe under-representation on the bench was caused by the systematic exclusion of minority candidates from the judicial selection process. In Harris County, for example, an African American plaintiff could offer similar evidence to that offered in *LULAC*—namely that race was the primary determinant of district judge elections.[150] In addition, our hypothetical plaintiff could demonstrate the effect of the at-large judicial election system on the ability of minority candidates to campaign successfully, obtain vital endorsements and win district judge elections.

Like the juror impartiality test, this Fourteenth Amendment test would be less burdensome than the stringent requirements set out for plaintiffs in *Washington v. Davis*[151] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[152] Instead, the judicial impartiality inquiry, like that for jury venire selection, would fall within the *Yick Wo v. Hopkins*[153] category of cases, in which the extent of the impact creates an inference of purposeful discrimination. Indeed, *Arlington Heights* suggests that evidence supporting discrimination in the selection of the jury venire need not even rise to the level of the disparity found in *Yick Wo*.[154] Instead, stark disparities between the level of racial minorities in the community and those serving on the venire could support a prima facie case.[155] Similar evidence of racial disparities

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[150] At trial, the plaintiffs demonstrated, ultimately unsuccessfully, that race was the primary determinant of the outcome of district judge elections in Harris County. Not even political party affiliation affected the ability of minority candidates to be elected. Instead, a gross disparity existed between the success rates of white and African American judicial candidates. For example, between 1980 and 1988, 52% of white Democratic candidates won contested district judge elections, while only 12.5% of African American Democratic candidates enjoyed similar success. *See* Trial Transcript at 4–60, *LULAC*, MO–88–CA–154 (W.D. Tex. Sept. 21, 1989) (on file with the author).

[151] 426 U.S. 229 (1976) (holding that evidence of racially disparate impact of District of Columbia police hiring policy practices was insufficient to support claim of equal protection violation).

[152] 429 U.S. 252 (1977) (setting out circumstantial and direct evidence relevant to proof of intentional discrimination in violation of Equal Protection Clause).

[153] 118 U.S. 356 (1886). In *Yick Wo*, the disproportionate impact on Chinese laundries of a facially neutral statute was sufficient to support a finding of intentional racial discrimination in violation of the Fourteenth Amendment. *See id.* at 361–63, 374.

[154] In *Arlington Heights*, the Court suggested a prima facie case of discrimination in jury selection could be supported "even when the statistical pattern does not approach the extremes of *Yick Wo*." 429 U.S. at 266 n.13. Similarly, in *Washington v. Davis*, the Court suggested that "in the selection of juries . . . the systematic exclusion of Negroes is itself such an 'unequal application of the law . . . as to show intentional discrimination.'" 426 U.S. at 241 (quoting Akins v. Texas, 325 U.S. 398, 404 (1945)). For a more detailed discussion of the *Yick Wo* standard as applied to jury-selection cases, see Johnson, *supra* note 71, at 1684–85.

[155] *See Duren*, 439 U.S. at 364.

on the bench would suffice to support the plaintiffs' prima facie cases involving judicial elections.

At this point, the burden would shift to the state to provide a legitimate reason for the exclusion of minorities from the bench. This inquiry would require the state to do more than make mere general assertions of nondiscrimination.[156] Unlike in *LULAC*, the state's justification for the use of its system must be proven rather than assumed. The tradition of using an at-large system for electing judges would not satisfy the defendant's burden. Nor would the Fifth Circuit's unproven impartiality concern overcome the plaintiffs' interest in structural impartiality. Rather, the state would have to demonstrate "that a significant State interest [will] be manifestly and primarily advanced" by the challenged system.[157] Most importantly, using a Fourteenth Amendment challenge based on the jury venire model, the plaintiffs' interest in structural impartiality on the bench would be explicitly rather than implicitly advanced, as it was in the voting rights cases. In effect, minority claimants would directly challenge the constitutional legitimacy of the all-white judiciary, rather than merely advance the right of voters to elect judicial representatives.

C. *An Affirmative Action Impartiality Strategy*

Plaintiffs could also challenge the impartiality of the racially homogenous bench using one other Fourteenth Amendment litigation strategy. Racial minorities could seek to compel states to adopt affirmative action judicial selection plans in accordance with *Regents of the University of California v. Bakke*.[158] In that case, the Supreme Court recognized that viewpoint diversity and background can be a compelling interest which justifies the use of race-conscious measures. In the context of professional school admissions in *Bakke*, the Court found that a university's First Amendment right to create an educational atmosphere characterized by the "robust exchange of ideas" is a "countervailing constitutional interest" to the Fourteenth Amendment's prohibition of the use of racial classifications for the acceptance of students.[159] One must be quick to add that given the Court's current composition and the numerous challenges to graduate school admissions programs,[160] the *Bakke* view of the value of diversity in educational

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[156] *See* Alexander v. Louisiana, 405 U.S. 625, 632 (1972).

[157] *Duren*, 439 U.S. at 367–68.

[158] 438 U.S. 265 (1978).

[159] *See* 438 U.S. at 313.

[160] *See, e.g.*, Hopwood v. State of Texas, 78 F.3d 932, 934, 944–45 (5th Cir.), *cert. denied*, 116

institutions may not survive.[161] Nevertheless, a judicial impartiality mandate could and should similarly be viewed as a "countervailing constitutional interest" requiring diversity on the bench.

In *Bakke,* the Court specifically recognized the importance of diversity to law and medicine. The Court described a heterogenous learning environment as important because each of these professional groups is likely to serve a heterogenous population in the course of their professional work. A diverse law student body prepares lawyers to address "the interplay of ideas and the exchange of views with which the law is concerned."[162] Diversity among professional school students brings "experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."[163] The Court's analysis with respect to the importance of diversity applies with special force to trial judges, the environments in which they must work and the heterogenous populations they, by definition, will serve. In its representative function, the trial bench, no less than the jury venire, should reflect the diverse values and perspectives of the community it serves.

Finally, in most jurisdictions—particularly those in the South—an affirmative action initiative for judges could even withstand the proof of remediation for historical discrimination required by the Supreme Court in *City of Richmond v. J.A. Croson Co.*[164] In that case, the Court

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S. Ct. 2580 (1996) (criticizing *Bakke* and holding that the University of Texas Law School's admissions program, which provided preferences to minority students applying for admission, violated equal protection); Podberesky v. Kirwan, 38 F.3d 147, 151, 153 (4th Cir. 1994), *cert. denied,* 514 U.S. 1128 (1995) (holding that University of Maryland's program that administered merit scholarships for African American students violated equal protection). The Supreme Court has chosen to review neither *Hopwood* nor *Podberesky.*

[161] *See Hopwood,* 78 F.3d at 944 (relying for the most part on the decision in *Adarand Construction v. Pena,* 515 U.S. 200 (1995), as holding that pursuing a diversity interest was no longer compelling, and that "[n]o case since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis").

Indeed all forms of state-sponsored voluntary affirmative action might have been struck down if the Supreme Court decided *Taxman v. Board of Education,* 91 F.3d 1547 (3d Cir. 1996), *cert. granted,* 117 S. Ct. 2506 (1997). In that case, a white New Jersey school administrator had challenged the Piscataway School Board's decision to fire her and retain an equally qualified African American school administrator. The school board had based its decision on its desire to promote diversity. *See* Brief for Petitioner at 2–3, Bd. of Educ. v. Taxman, No. 96-679, October Term 1996 (Aug. 25, 1997) (on file with the author), *available in* 1997 WL 525717. The case was settled before the Supreme Court made its decision. *See, e.g.,* Jan Crawford Greenburg, *Civil Rights Groups Pay Teacher to Avoid Court; Coalition Feared Adverse Ruling by High Court Would Damage Affirmative Action,* CHI. TRIB., Nov. 22, 1997, at 1.

[162] *Bakke,* 438 U.S. at 314 (quoting Sweatt v. Painter, 339 U.S. 629, 634 (1950)).

[163] *Id.*

[164] 488 U.S. 469 (1989).

struck down a minority set-aside program for construction contracts in the City of Richmond, Virginia in part because the Court found that the City failed to provide specific evidence demonstrating the existence of historical discrimination against minority contractors in Richmond.[165] Evidence demonstrating purposeful historical discrimination against African Americans in the legal profession, by contrast, would be readily available in many jurisdictions and would support a judicial affirmative action scheme. For example, among its many historically discriminatory practices, the State of Texas denied African Americans access to the State's law school until the practice was challenged and struck down by the Supreme Court in 1950.[166] Texas also systematically excluded African Americans from participation in political party primaries.[167] These two forms of de jure discrimination alone effectively negated the ability of African Americans to be elected as state court judges in Texas. Thus, even under a *Croson* standard, affirmative action for state court judges in Texas could be upheld.

D. *Arguments Against Structural Impartiality*

The advantages of the Fourteenth Amendment litigation challenge are clear. It raises directly the importance of racial diversity to the integrity of the judicial system itself—not just to minority voters. Yet, compelling racial diversity of the trial bench as a constitutional imperative may raise at least two important concerns: one about the role of race and perspective, the other about the administration of our legal system. First, requiring structural impartiality on the bench through racial diversity need not stigmatize nor essentialize the viewpoints of either white or African American judges. Equating racial diversity with increased impartiality does not brand any particular white judge as racially biased. As the Supreme Court suggested in the jury context, one need not assume that all-white juries actually exercised biased decision-making.[168] Instead, the fact of jury pool homogeneity, combined with the systematic exclusion of identifiable groups

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[165] The Court held that "[w]hile the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." *Id.* at 504.

[166] *See Sweatt*, 339 U.S. at 629.

[167] *See, e.g.*, Terry v. Adams, 345 U.S. 461, 469–70 (1953) (holding unconstitutional exclusion of blacks from Democratic Party association); Smith v. Allwright, 321 U.S. 649, 663–66 (1944) (holding that rule of Texas Democratic Party excluding blacks from voting in primaries violated the Fifteenth Amendment).

[168] *See* Peters v. Kiff, 407 U.S. 493, 503–04 (1972).

that may hold alternative perspectives or views, creates the potential to undermine the impartiality of the jury.[169] In exactly the same way, the possibility of bias is increased by an all-white bench uninformed by the "varieties of human experience," as compared to that of a racially diverse bench.[170] Of course, racial diversity on the bench will also change the existing racially homogenous environment on many state benches in which judges can engage in blatantly racist conduct with impunity, as described in some state bias commission reports.[171]

Nor does viewing racial diversity as a key element of impartiality require one to "essentialize" the viewpoints of African American judges—to believe that African American jurists would share the same views or decide cases in particular ways. In the jury context the Supreme Court has advised: "It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."[172] The mere potential of racially exclusive jury pools to exclude alternative perspectives is sufficient to implicate the Fourteenth Amendment. The same is true of a racially homogenous trial bench. Nevertheless, it is likely that the perspective and experiences of African American judges will bring new insights to judicial decision-making.[173]

A second concern or argument against structural impartiality is the contention that African American judges would be required to hear the cases of African American litigants. Not so. Ensuring structural impartiality on the trial bench by promoting racial diversity would not require that African American litigants appear before African American judges, or even that African American judges be assigned to adjudicate racially sensitive cases.[174] Nor does it require that African American judges recuse themselves from such cases.[175] Just as the jury impartiality mandate does not guarantee litigants a right to have a particular petit jury in a particular case reflect the racial make-up of the community,[176] the requirement of a racially diverse judiciary does

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[169] *See id.*; *see also* Taylor v. Louisiana, 419 U.S. 522, 531–33 (1975).

[170] *See Peters*, 407 U.S. at 503.

[171] *See supra* notes 29–44.

[172] *Peters*, 407 U.S. at 503–04.

[173] *See supra* notes 132–34.

[174] *See* Higginbotham, *supra* note 19, at 1037 ("Pluralism does not mean that only a judge of the same race as a litigant will be able to adjudicate a case fairly.").

[175] *See* discussion of race-recusal cases *infra* Part II.B.

[176] *See, e.g.*, Holland v. Illinois, 493 U.S. 474, 482–84 (1990); Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

not mean that African American defendants are entitled to have their cases heard by judges of the same race. Instead, the pool of potential judges who may be assigned to a particular case—like the jury venire—must reflect the communities from which they are selected. The interaction of a racially diverse group of trial judges will increase the opportunity for all of the judges—both African American and white—to adjudicate cases with racial dimensions with greater sensitivity, information and exposure to the diverse values and perspectives that exist within the community.[177]

IV. Defining Representation for State Court Judges

A. *Historical Perspective*

Without question, the jury occupies a central role in ensuring that the community is represented in the administration of justice.[178] As such, racial diversity in jury venires is of particular importance to ensuring fundamental fairness. Racial diversity among judges is no less important. Historically, state judges have also served a representative function, and increasingly state judges exercise powers traditionally reserved for the jury.

Nevertheless, judicial diversity efforts are often hampered by an almost universal resistance to recognizing state trial judges as representatives. We cling to a view of judges as independent decisionmakers who act without regard to the public will and outside of the political arena. This is all the more surprising in light of the rough and tumble, quid pro quo world of electoral and appointive politics from which judges are selected. This view of judges is based largely on the idealized conception of the judicial role in the federal judiciary and is at odds with the historical role of state court judges.

The framers viewed an independent federal judiciary as essential to the integrity and success of the American republic. The experience of the colonial judge's allegiance to the King highlighted the importance of independence in the federal judiciary. The independence of

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[177] As part of collegial decision-making bodies, the dynamics between trial judges on the same court are different—less structural, less frequent—than that of appellate judges. Nevertheless, they do interact with each other in ways sufficient to reap the rewards of racial diversity. *See* discussion *infra* Part IV.D.

[178] *See* Phoebe A. Haddon, *Rethinking the Jury*, 3 Wm. & Mary Bill of Rts. J. 29, 29 (1994) (describing the jury as the "quintessential democratic institution"). The Supreme Court has described the right to trial by jury as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

the judiciary would complete the balance of the new tripartite form of government. Separation of powers among the executive and legislative branches of government could not be achieved without a judiciary sufficiently detached from both branches and from the whims of the populace. The framers thus consciously armed federal judges with the tools needed to remain independent—lifetime tenure and removal only by impeachment.[179] Removing the threat of dismissal in the wake of unpopular decisions arguably would ensure that the judges would feel free to decide cases without regard to the approval of the politically powerful.

Federal judges, however, constitute only a small percentage of the nation's judges. The majority of judicial officers serve on state judiciaries with a history far different from that of the federal bench. Nevertheless, prevailing perceptions about the appropriate role of judges derive principally from the federal model. Describing a desire for "independence" of state judges in the same way as that of federal judges is one example of this phenomenon. Historically, state court judges were never viewed as pure independents. State court judges could not be independent because their service lacked two qualities deemed essential to judicial independence at that time: appointment and lifetime tenure.[180]

In fact, the independence of the federal judges and the scope of their authority was created in part to counter the perceived partiality of state court judges. One example is the creation of diversity jurisdiction in federal courts. State judges were viewed as representatives of their own state residents. At the very least, state judges were expected to favor the interests of the residents of their own state in disputes with residents of other states.[181] As such, state judges were expected to act "in accordance with their rational self-interest,"[182] and "apply the laws unequally to residents and nonresidents in some types of case."[183] In *The Federalist* No. 80, Alexander Hamilton argued that state land grant

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[179] It was widely believed that lifetime tenure for judges was essential "to secure a steady, upright, and impartial administration of the laws." THE FEDERALIST No. 78, at 396–97 (Alexander Hamilton) (Max Beloff ed., 1948).

[180] A number of states, including New York, Massachusetts, New Hampshire and Delaware, did afford judges lifetime tenure "during good behavior" in the late 1700s. Others, such as Pennsylvania, New Jersey and Georgia, provided fixed terms for judges. *See* Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1153–55 (1976).

[181] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 173 (1985) ("[I]t is not a surprise that the terms of employment of state judges (most of whom are elected) are indeed less conducive to judicial independence than those of federal judges.").

[182] *Id.* at 172.

[183] *Id.* at 176.

claims were the kind of case in which federal jurisdiction would be necessary because "[t]he courts of neither of the granting states could be expected to be unbiased . . . . [I]t would be natural that the judges, as men, should feel a strong predilection to the claims of their own government."[184]

Other historical accounts suggest that diversity jurisdiction was created not to address pro-resident bias, but instead was designed to undercut a perceived pro-debtor bias of state courts.[185] Commercial interests, therefore, sought to ensure access to a federal forum for cases in which they needed to assert claims in courts of other states.[186] In effect, federal diversity jurisdiction was created to provide a forum in which claims could be heard by judges who ostensibly represented no special interests. The selection of federal question jurisdiction may have been similarly influenced by the perceived partiality of state court judges. In *The Federalist* No. 81, Hamilton cited the fact that many state judges did not have lifetime tenure as a strong basis for securing federal jurisdiction for cases involving federal law.[187]

The move during the mid-1800s by most states from an appointed to an elected judiciary reflects the states' own acknowledgment that their judges are representatives. Inspired by ideas of the Jacksonian Democracy, states during this period sought to make their judges more representative of the public by subjecting judges to popular elections.[188] The move to select state judges by popular election rather than by appointment was a "highly self-conscious choice of policy."[189] Jacksonians argued that appointed state judges were selected disproportionately from the wealthy and aristocratic classes.[190] While judicial independence was an important goal, it was simultaneously

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[184] THE FEDERALIST No. 80, *supra* note 179, at 408–09.

[185] *See* POSNER, *supra* note 181, at 142 (citing Judge Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928)).

[186] *See id.*

[187] *See* THE FEDERALIST No. 81, *supra* note 179, at 415 ("State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.").

[188] *See* EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 80–101 (1944); *see also* David Adamany & Philip Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731, 769 (1976) (describing states' judicial selection methods as of 1976).

[189] *See* JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW 140 (1950). The move to elect state judges was also an express rejection of the federal model of judicial selection, which had been greatly criticized since *Marbury v. Madison*. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 715 (1995).

[190] *See* Franklin S. Spears, *Selection of Appellate Judges*, 40 BAYLOR L. REV. 501, 503 (1988); Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966).

necessary to ensure that state judges were aware that they were responsible to all of the people of the state.[191] The switch to an elective system, it was hoped, would make judges more representative of the entire community. Between 1846 and the outbreak of the Civil War, twenty-four states adopted partisan election for judges.[192] Texas adopted an elective system for choosing its judges in 1850.[193]

Despite some initial success in diversifying the judiciary, judicial elections soon were themselves deemed problematic. Rather than producing judges with greater accountability to the public, the elected judiciary had become increasingly controlled by local political machines.[194] By the turn of the twentieth century, many states began to adopt features designed to alter the recently adopted judicial election system.[195] In 1906, Roscoe Pound delivered a now-historic address in which he described the election of judges as "putting courts into politics."[196] During the next decade, a hybrid appointive/elective system was devised by Pound's colleagues at the American Judicature Society. Under that scheme, which came to be known as the Missouri Plan, the governor appointed a judge from among one of three lawyers selected by a judicial nominating commission. After the first year in office, the candidate would run for election and was subsequently subjected to periodic retention elections.[197] In turn, the Missouri Plan has been criticized for entrusting the selection of judges to "elitist" panels and for producing an unrepresentative judiciary.[198] Although twenty-two states have adopted some form of the Missouri Plan, a majority of states continue to elect judges.[199] Studies have shown that most

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[191] *See* Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 45 HISTORIAN 337, 348–49 (1983).

[192] *See* Hill, *supra* note 13, at 346.

[193] Texas has demonstrated a particularly strong policy in favor of public participation in the selection of judicial candidates. Despite repeated attempts to reintroduce an appointive system of selecting judges since the creation of its constitution in 1876, the Texas legislature has consistently refused to adopt even a limited appointive system for the selection of judges. *See id.* at 350–54; *see also* Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 53, 56–57 (1986). Texas switched back to an appointed judiciary upon joining the Confederacy in 1861. By the time it adopted its constitution in 1876, however, Texas returned to an elective judiciary in response to dissatisfaction with "carpetbag" judges appointed by the Reconstruction government. *See* Hill, *supra* note 13, at 347.

[194] *See* Patrick Winston Dunn, *Judicial Selection in the States: A Critical Study with Proposals for Reform*, 4 HOFSTRA L. REV. 267, 286–93 (1976); *see also* Winters, *supra* note 190, at 1083.

[195] *See* Dunn, *supra* note 194, at 280.

[196] *See* Pound, *supra* note 11, at 24.

[197] *See* Dunn, *supra* note 194, at 283.

[198] *See id.* at 298–301.

[199] *See id.* at 323–53.

voters would oppose a pure appointive system for selecting judges.[200] In retaining electoral features for judicial selection, the states continue to express the view that judges perform an important representative function.[201]

B. *The Supreme Court's View*

The Supreme Court has, for the most part, recognized that state court judges perform at least a limited representative function. In *Sugarman v. Dougall*,[202] the Court recognized that "persons holding state elective or important nonelective executive, legislative, and *judicial positions* . . . perform functions that go to the heart of representative government."[203] Yet the Court has been unable, or perhaps unwilling, to define the nature of representation exercised by state court judges.

In *Chisom* and *LULAC*, the Court was squarely faced with deciding whether elected judges are representatives within the meaning of the Voting Rights Act.[204] In response, the Court answered the question narrowly and mechanically—when judges are elected, they are representatives for purposes of the Voting Rights Act.[205] The Court declined to examine the function and performance of judges to determine how judges in fact *act* as representatives.[206] Instead, the Court limited its analysis, concluding that elections confer representative status upon judges. Implicitly, the Court suggested that where state trial judges are

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[200] *See id.* at 317. Voters in Texas, in particular, have expressly rejected efforts to change to an appointive system for judicial selection. *See* Spears, *supra* note 190, at 519–20 (citing referenda and polls in which Texas voters voted overwhelmingly to continue electing state's judges). Only two states, Massachusetts and Rhode Island, grant lifetime appointments to their appellate judges. *See* ROTTMAN, *supra* note 20, at 20.

[201] In *LULAC I*, Judge Patrick Higginbotham conceded:

> The history of electing judges and the political impulses behind that choice are powerful evidence of considered decisions to keep judges sensitive to the concerns of the people and responsive to their changing will. . . . [T]his reality belies the bold assertion that judges are in no sense representatives.

902 F.2d 293, 295–96 (5th Cir. 1990).

[202] 413 U.S. 634, 635–36, 646 (1973) (holding that a New York statute barring nonresident aliens from civil service jobs was unconstitutional).

[203] *Id.* at 647 (emphasis added).

[204] *See* Chisom v. Roemer, 501 U.S. 380, 383–84 (1991); *LULAC I*, 902 F.2d 293, 295 (5th Cir. 1990).

[205] "When each of several members of a court must be a resident of a separate district, and must be elected by the voters of that district, it seems both reasonable and realistic to characterize the winners as representatives of that district." *Chisom*, 501 U.S. at 401.

[206] But the Court has commented in another context that "[j]udges who stand for reelection run on their records." Craig v. Harney, 331 U.S. 367, 377 (1947). Justice Scalia, who dissented in

appointed, they cease to be representatives. Indeed, the Court tacitly advised that states could avoid exposing their judiciaries to the requirements of the Voting Rights Act by appointing their judges.[207]

Yet in a case decided on the same day as *Chisom*, the Supreme Court implicitly acknowledged the role of appointed judges as state policymakers by describing state judges' power to "exercise . . . discretion concerning issues of public importance."[208] In *Gregory v. Ashcroft*, the Court determined that a Missouri statute requiring mandatory retirement for judges at age seventy does not violate the Age Discrimination in Employment Act.[209] The Court, relying on *Sugarman*, held that the power of states to decide the qualifications of their official decisionmakers—including judges—"lies at the heart of representative government."[210]

The Supreme Court has also described the representative function of state judges by emphasizing that judges are not representatives in the same way as legislators. In *Wells v. Edwards*,[211] for example, a federal court in Louisiana held that judicial electoral districts need not satisfy the one-person, one-vote requirement of *Baker v. Carr*, because "[t]he State judiciary, unlike the legislature, is not the organ responsible for achieving representative government."[212] A divided Supreme Court affirmed this decision, but failed itself to define why the elected judiciary is not an important feature of state representative government. Moreover, the Court in *Wells* failed to address squarely how the lower court's position contrasts with the Court's own description of the role of judges in representative government in *Sugarman*.

Chisom and *HLA*, failed to shed any additional light on this question. Justice Scalia simply stated "the word 'representative' connotes one who is not only *elected by* the people, but who also, at a minimum, *acts on behalf* of the people. Judges do that in a sense—but not in the ordinary sense." *Id.* at 410 (Scalia, J., dissenting) (emphasis in original). Justice Scalia, however, tells nothing about this "sense" in which judges act on behalf of the people.

[207] According to the Court, appointed judges can be "indifferent to popular opinion." *Chisom*, 501 U.S. at 401.

[208] Gregory v. Ashcroft, 501 U.S. 452, 466–67 (1991). The judges at issue in Missouri were first appointed then subject to retention elections. *See id.* at 455.

[209] Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (1994).

[210] *See Gregory*, 501 U.S. at 463 (internal quotations omitted). The state of Missouri in *Gregory* explicitly acknowledged the representative function of its state judges: "[j]udicial decision-making . . . is an expression of public policy, no less, and perhaps more, compelling than the modes of expression available to the legislative and executive branches of government." Brief for the Respondent at 19, Gregory v. Ashcroft, 501 U.S. 452 (1991) (No. 90-50).

[211] 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973).

[212] *Id.* at 454, 456 (quoting New York State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148, 153 (S.D.N.Y. 1967)).

C. *The Nature of Representation*

Representation can be defined in many ways. At bottom, representation may only mean what the represented want it to mean.[213] Philosopher Hanna Pitkin has identified three forms of representation: formal, descriptive and symbolic. Pitkin also attempts to identify how representatives "act for" others.[214] Under the formalistic view of representation, the representor and the represented contract with one another to establish the representation relationship. This transaction gives rise to the representative's authority to act. Yet, subsequent to the formation of the representational relationship, the representative has some autonomy. In this regard:

> Representation is a kind of "black box" shaped by the initial giving of authority, within which the representative can do whatever he pleases. If he leaves the box, if he exceeds the limits, he no longer represents. There can be no such thing as representing well or badly; either he represents or he does not.[215]

Descriptive representation is perhaps the most familiar in the political context. Representatives under this view should "be an exact portrait, in miniature, of the people at large, as it should think, feel, reason and act like them."[216] Here, representation may simply be "a mere second-best approximation" of direct democracy, in which representatives act as the people would have done.[217] Symbolic representation posits the representative as a symbol, which "stands for" a set of feelings or expressions—like the flag symbolizing the country or a set of scales symbolizing justice.[218] In both descriptive representation and symbolic representation, Pitkin contends that the representative

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[213] *See* Martha L. Minow, *From Class Actions to Miss Saigon: The Concept of Representation in the Law*, 39 CLEV. ST. L. REV. 269, 280–84 (1991). Thomas Hobbes describes the representative as something akin to an "artificial person," one who "acteth by authority" or "personate[s]." *See* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 14–20 (1972). In Hobbes's view, the representative's actions are "owned by those whom they represent." *Id.* at 20. Yet Hobbes also suggests that the representative has considerable freedom to act outside the authority conferred upon him by those who seek representation. *See id.* at 21. One German theorist contends that a representative "acts for the group with the result that his behavior is ascribed to the group." *See id.* at 40. *See generally id.* at 38–47.

[214] *See* PITKIN, *supra* note 213, at 112–43.

[215] *Id.* at 39.

[216] *Id.* at 60 (quoting Letter from John Adams to John Penn).

[217] *See id.* at 84.

[218] *See id.* at 95–100.

is reduced to "an inanimate object. . . . [H]e represents by what he is or how is he regarded. He does not represent by doing anything at all . . . ."[219] Finally, Pitkin attempts to describe the "activity of representing."[220] In this regard she seeks to identify "the substance or content of acting for others, as distinct from its external or formal trappings."[221] Pitkin finds four essential analogies which describe representative action: (1) "agent[s] . . . acting for"; (2) "taking care of another"; (3) "substitution" of another; and (4) "being sent" for another (as with a message).[222]

Reservation about the representative status of judges tends to focus on the fear that judges will act as descriptive representatives. For many, descriptive representation is the kind of representation ideally practiced by legislative representatives. Some judicial diversity advocates have contributed to the view that minority judges would be expected to function as descriptive representatives. For example, "we want judges who look like us" suggests the desire for a descriptive representative in that it uses the visual identity of the judge as a proxy for the perceived similarity of values and thus decision making between the judge and the constituent. Additionally, as Pitkin notes, some may be concerned principally with *how* a judge will "act for" or represent a community or constituency. Critics of judges as representatives fear that judges will be guided by popular will in their actions.[223]

But representation, whether exercised by legislators or judges, is a more complex and textured exercise of authority than a mere knee-jerk response to the electorate. Constituents choose representatives at least in part because of their faith in that representative's ability to exercise judgment and leadership. For this reason, even legislators do not represent simply by responding mechanically to the will of their constituents—even assuming a detectable and uniform constituent will. Legislators, like all elected representatives, have the potential to perform a leadership function for their constituents by voting on issues in a way that reflects the legislators' own moral, political and legal sense of what is best for their community.

Lawmakers do not cease being representatives because they have voted in a manner contrary to the wishes of their constituency. Indeed, within the give and take of political dealing, legislators sometimes vote

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[219] PITKIN, *supra* note 213, at 113.
[220] *Id.* at 114–15.
[221] *Id.* at 114.
[222] *Id.* at 121.
[223] *See id.* at 117–18.

in ways that are contrary to the will of their constituents. Legislators may "cut deals" in order to gain the support of their legislative colleagues for other issues of greater importance or for access to avenues of greater power through which to serve the community.[224] When constituents believe that their legislator has nevertheless "brought home the bacon," they may continue their support and view him as their representative even when he votes contrary to their will. Because a representative is potentially a leader, he may, through his actions and efforts, sway his constituents to join his view. Alternatively, the electorate has the option of voting the representative out of office if they disagree strongly enough with the position he has taken. "Leadership, emergency action, action on issues of which the people know nothing are among the important realities of representative government. They are not deviations from true representation, but its very essence."[225] The core of representation may rest, therefore, in the existence of a method of selecting representatives that provides a meaningful *opportunity* for that representative to respond to the people, but does not require that the representative in all instances in fact follow the wishes of the community.[226] Similarly, representative judges are also not compelled to adjudicate cases in the way the public would wish.[227]

For judges, representation is an even more complex undertaking. Judges represent multiple constituencies and thus may be guided in their actions by several factors or influences.[228] Judges represent, at once, the legal system, justice, the communities they serve, as well as their own moral values. Judges seek to preserve the authority and consistency of the legal system by respecting precedent and uniformity

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[224] Obtaining powerful or strategically important committee assignments may permit a legislator to represent his community more effectively than a vote on a particular issue.

[225] PITKIN, *supra* note 213, at 163.

[226] Representation can include "an obligation both to the wishes of [the] constituent[] and to the best policy as [the representative] sees it . . . ." *Id.* at 148.

[227] Indeed, as the Supreme Court has observed, "the judge is often called upon to . . . defy . . . popular sentiment." Chisom v. Roemer, 501 U.S. 380, 400 (1991). During the Civil Rights Movement, some southern judges insisted on enforcing federal law protecting the right of African Americans to register to vote, even when to do so was at odds with the strong feelings of the white community that had elected the judge. For an account of the courageous action of some of these judges, see generally CHARLES V. HAMILTON, THE BENCH AND THE BALLOT: SOUTHERN FEDERAL JUDGES AND BLACK VOTERS (1973).

[228] Pitkin notes:

> A judge who represents group pressures is a judge conceived as responding to group pressures, through whom such pressures act. A judge who represents justice is one whose actions are governed by or in accord with justice (which requires that he be free from other restraints). This is not a matter of who authorizes the judge or who is bound by his pronouncements. Nor is it a matter of whom (or what) the judge

in applying legal principles.[229] Because they are human, judges also represent their own legal, moral and political visions.[230] Judges also represent the values of the communities they serve. A sophisticated electorate ostensibly selects a judge because it trusts the judge to blend and balance these considerations appropriately in the exercise of his inevitable discretionary power.[231] If a community elects a judge, it need not demand that he demonstrate slavish submission to the community's demands. Instead judges may be entrusted to accurately assess and interpret the community's standards and to apply those standards in ways that promote fairness to the disputing litigants, consistency of legal principle and what is best for the community.[232]

The reality of state court judicial power and decision making reveals that state judges do engage in all of the representation forms identified by Pitkin. They are at once symbolic, descriptive and formal representatives who "act for" several constituencies. In this regard, judges can and do represent in the legitimate exercise of their authority. These opportunities for representation further support the right of minority groups to gain access to representation on state courts.

D. *Areas of State Trial Judge Representation: Symbolism, Patronage and Political Opportunity*

Judges perform a variety of representative functions that can be identified and that are particularly relevant to the issue of racial diversity on the bench. For example, much of the effort to bring diversity to both state and federal benches has centered around the symbolic value of a diverse bench. Plurality on the bench enhances the appear-

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> symbolizes or stands for. There is no reason why even a judge whose discretion is narrowly defined could not be a symbol of justice. What we have here is representation as the substance, or content, or guiding principle of action.

PITKIN, *supra* note 213, at 117–18.

[229] *See* Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 56 (1977) (describing judicial decision making as "a complex balancing of the equities of a specific 'just' result against the system's need for uniformity of decision").

[230] *See* Higginbotham, *supra* note 19, at 1040–41; Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 20 (1994); Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. REV. 591, 595 (1996).

[231] *But see* Dunn, *supra* note 194, at 286–95 (describing low voter interest in judicial elections and continued control of political parties in judicial election process). Nevertheless, judicial elections still have the potential to provide opportunities for representation and principled judicial decision making. I explore this topic in a forthcoming article. *See generally* Ifill, *supra* note 12.

[232] The Supreme Court has determined that a judge brings to adjudication "a well-considered judgment of what is best for the community." *Chisom*, 501 U.S. at 399 n.27 (quoting Gregory v. Ashcroft, 501 U.S. 452, 466 (1991)).

ance of inclusion and participation. A sense of participation leads more readily to the appearance of justice, which in turn engenders public confidence in the justice system.[233] With public confidence in the justice system plummeting,[234] many argue that racial diversity on the bench will help disaffected racial minorities, in particular, to believe that they have a voice in the administration of justice. The value of promoting such "confidence" among minority voters without assurances of *actual* racial fairness in the justice system may be questionable.[235]

At a more pragmatic level, judges represent by virtue of their role as political and community leaders. Achieving state judicial office is often the stepping stone to attaining other political offices. In *LULAC*[236] and other cases challenging at-large judicial elections, the plaintiffs as well as African American lawyers practicing in the local jurisdictions articulated this reason for focusing their efforts on access to state trial courts.[237] They observed that minority state trial judges are key players in the development of African American leadership in the state. Minority state trial judges are in the pipeline to be selected for higher state courts, for federal court judgeships or to serve in other important leadership positions in the community. Thus, denying access to state trial judgeships for minorities closes off an important avenue to political power in the community.

Trial judges also have opportunities to represent their constituents through their administrative functions. For example, trial judges often serve on judicial committees comprised of judges sharing specialized dockets such as family law, domestic violence or juvenile justice cases. During monthly meetings, judges assigned to those dockets discuss new

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[233] *See* PERRY, *supra* note 133, at 135 (citing Justice O'Connor's comment that to "gain public acceptance, [the Supreme Court] must not be of a 'single image' or a 'single mold'" and Justice Brennan's observation that "the sole end of making the Court diverse and reflective of America's heterogeneity was to foster legitimacy for it in the eyes of the American people") (footnotes omitted).

[234] The infamous Rodney King case, in which four white Los Angeles police officers were found not guilty of beating an African American motorist, marked an all-time low of public confidence in the justice system. According to USA TODAY polls conducted after the verdict, 86% of whites and 100% of African Americans interviewed said the verdict was wrong; 58% of whites and 59% of African Americans who thought the verdict was wrong blamed the legal system as opposed to societal racism in general. *See Agreement on King*, USA TODAY, May 1, 1992, at 4A; Tony Mauro, *Experts, the Public Ask Why; Verdict Baffling to Most*, USA TODAY, May 1, 1992, at 4A.

[235] I question the value of efforts to promote public confidence in a system that continues to deny meaningful opportunities for minority participants to select judges and to participate on juries.

[236] *LULAC IV*, 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 501 U.S. 1071 (1994).

[237] *See infra* Section I.

issues in the law, approaches to difficult issues and problems arising from the management of their specialized caseloads.[238] These meetings provide opportunities for judges to expose their colleagues to alternative perspectives and viewpoints about substantive legal issues. Judges also share decision making on issues of administration such as adoption of local rules, assignment of cases, docket control or election of administrative judges.[239]

Judges can also represent through patronage and quasi-patronage appointments of bailiffs, secretaries, law clerks and other court personnel. In this regard, state judges differ little in their representative capacity from other elected officials. Women judges have often been responsible for hiring the first female judicial clerks on some courts.[240] Similarly, the presence of African American judges often corresponds to a marked increase in the hiring of African American court personnel.[241] The importance of these opportunities should not be underestimated. In the context of gender diversity in the courts, Judith Resnik has suggested that when judges "visit with other judges at lunch, ride judges' elevators and never or rarely see a woman judge," judges may be insulated from exposure to the complexity and relevance of women's issues.[242] A racially homogenous work environment may similarly permit judicial indifference to minority racial perspectives and issues. A racially diverse work environment for judges may have exactly

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[238] Judges in many jurisdictions utilize such meetings. *See, e.g.*, WASHINGTON, *supra* note 13, at 213 (interviewing South Carolina Family Court Judge Abigail R. Rogers); Interview with Baltimore Circuit Court Judge Mabel Houze Hubbard (March 12, 1996) (notes on file with the author).

[239] In Texas, for example, district judges in each county adopt local rules of administration, which govern assignment of cases and the docketing and transfer of cases. *See LULAC I*, 902 F.2d 293, 305 (5th Cir. 1990). Trial judges within each county, along with statutory judges, also come together to elect by majority vote a local administrative judge. *See id.* at 304. Moreover, because cases "can be freely transferred between judges and . . . any judge can work on any part of a case including preliminary matters," district judges in Texas sometimes work together on the same cases. *Id.* at 304; *see* TEX. R. CIV. P. 330(e)–(i). These opportunities for collegial interaction between district judges in Texas provide more formal occasions for the interchange of ideas and perspectives.

[240] *See* Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 FORDHAM L. REV. 281, 285 (1995).

[241] *See, e.g.*, MICHIGAN SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE COURTS, CONCLUSIONS AND RECOMMENDATIONS 11 (1989) (noting that "[t]here are few instances in the Michigan judiciary of majority jurists employing minority law clerks, judicial assistants, or commissioners"); WASHINGTON, *supra* note 13, at 205 (interviewing Judge Charles Z. Smith describing his role in hiring racial minorities as law clerks in Washington state courts); Vernon E. Jordan, Jr., *Dedication to the Honorable Nathaniel R. Jones*, 63 U. CIN. L. REV. 1519, 1522 (1995) (describing Sixth Circuit Judge Jones's chambers with African American law clerks and secretaries).

[242] *See* Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts,*

the opposite effect. Moreover, if "courthouses belong to the people who come to them daily—as workers,"[243] a more racially balanced court workforce may change the entire culture of the courthouse.[244]

Trial judges also serve a representative function by helping to alleviate segregation in the bar. For example, many minority lawyers have described the virtual exclusion of African American lawyers from among those chosen by white judges for appointment to cases.[245] Instead, white judges tend to appoint lawyers they have known in their former practices to fill appointments. These lawyers also tend overwhelmingly to be white. As a result, minority lawyers fail to garner potentially lucrative representation opportunities from state courts and remain professionally marginalized compared to their white counterparts.[246] Through appointments of ad litems, special masters, mediators and public defenders, minority judges have the dual opportunity to increase professional opportunities for minority lawyers and for exposing the mainstream bench to the minority bar.

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66 N.Y.U. L. REV. 1682, 1709 (1991). Resnik describes this phenomenon as "acute occupational segregation." *Id.*

[243] *Id.* at 1700.

[244] *See* TEXAS COMM'N ON JUDICIAL EFFICIENCY, 1 REPORT—GOVERNANCE OF THE TEXAS JUDICIARY: INDEPENDENCE AND ACCOUNTABILITY 3 (Nov. 1996) (recommending increased efforts to promote diversity among court personnel because "[j]udicial branch personnel who understand and are sensitive to the cultural reference points of the disputants who come before the court are more likely to administer, and, importantly, be perceived to administer, impartial justice").

[245] *See* MICHIGAN SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE COURTS, *supra* note 241, at 3 (noting "evidence that minority attorneys do not receive an equitable share of available appointments . . . nor do they have the same access as majority attorneys to cases which are more serious in nature, higher profile or more economically rewarding"). Although many lawyers in states where I have litigated Voting Rights Judges Cases have shared this view with me, none wished to be identified with this statement. All expressed their continued efforts to garner court appointments from white judges as the reason for their insistence upon anonymity.

[246] The consequence of this exclusion was felt directly by minority lawyers in their ability to garner clients. Minority lawyers contended that the absence of racial diversity on state trial courts effects the ability of African American lawyers to retain the confidence of potential clients from the minority community. Instead, the exclusion of African American judges from the trial bench encourages minority litigants to believe that African American attorneys lack the same influence and access to power in the justice system as their white counterparts. As a result, potential clients may choose to be represented by white attorneys in order to maximize their access to power in the judicial system. *See, e.g.*, GERALDINE R. SEGAL, BLACKS IN THE LAW: PHILADELPHIA & THE NATION 103 (1983) (reporting from a survey of African American lawyers that "businessmen and other members of the black community are still hesitant to use the services of black lawyers, for they believe 'that the black client and/or lawyer will not fare as well as the white client and/or lawyer.' If the lawyer is black, '[judges or juries] are more apt to [render] diminished judgments in civil trials.'").

E. *Discretion As Representation*

Most importantly, judicial discretion provides judges with significant opportunities to perform a representative function in their approach to substantive law. At least in some instances, judges must depart from legal materials and formal rules to exercise judicial discretion.[247] While some scholars argue that judicial discretion exists in an extremely narrow set of "hard" cases[248] or where the "open texture" of statutory language leaves some cases without a clear resolution,[249] others contend that judges exercise discretion throughout the process of adjudication.[250] Critical scholars have argued that judges are "situated actors,"[251] whose decision making is driven by culture, social background and context.[252] Choosing among two possible theories of law to support a decision, deciding whether a litigant has standing, what is a nuisance, what is "obscene," when a search is "unreasonable," which witnesses are credible and which are not, all require judges to exercise discretion. In exercising their discretion, judges may attempt deliberately to discern and apply the values of the community they serve, or less cognitively may express internalized values and

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[247] Discretion may be exercised by judges when "judges must go outside authoritative *legal* sources in making their pronouncements." David Jennex, *Dworkin and the Doctrine of Judicial Discretion*, 1992 DALHOUSIE L.J. 473, 474. Discretion can also be defined as "the power to choose between two or more courses of action each of which is thought of as permissible." HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 162 (1958).

[248] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81–84 (1977); *see also* Edwards, *supra* note 13, at 855 (conceding judicial discretion is exercised at least in "very hard" cases).

[249] *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1963) (a judge "fills the open spaces in the law"); H.L.A. HART, THE CONCEPT OF LAW 124–33 (1961); *see also* Higginbotham, *supra* note 19, at 1037 (describing need for exercise of judicial discretion because of "the many interstitial zones in the adjudicative process . . . where there is no clear controlling precedent, or sufficient legislative direction . . .").

[250] *See* Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1426 (1995) (noting that the Supreme Court has nearly unlimited discretion in making standing determinations); *see also* Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 359–61, 372–86 (1975); Nugent, *supra* note 230, at 3–20; Pollock, *supra* note 230, at 599.

[251] *See* Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1956–57 (1991).

[252] In fact, there is almost universal agreement that judicial decision making is affected, in some measure, by a judge's background, experience and moral values. *See* Edwards, *supra* note 13, at 854 (While first disagreeing "that judicial results invariably flow from judges' politics, rather than from legal principles," Judge Edwards concedes that when the "court is confronted with a 'very hard' case—i.e. one in which there is no discernable 'right answer'—it may be true that a judge's views are influenced by his or her political or ideological beliefs."); Kenneth L. Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957, 1957 (1988); Spann, *supra* note 250, at 1495–97.

impulses.[253] Regardless, with the exercise of judicial discretion, trial judges serve a "representative" function, by articulating values and infusing them with the weight of legal authority. Throughout, trial judges are given wide latitude to exercise their discretionary authority, at times free from exacting appellate review.

The breadth of state trial judges' discretionary power increases considerably their opportunities to represent through adjudication. Indeed, certain highly discretionary areas of law are deemed to be within the exclusive purview of state trial judges. Family law matters and criminal sentencing are two specific examples. More generally, the entire trial process—from the articulation of claims or the appointment of counsel through final judgment—is fertile discretionary ground.

In the family law area, federal courts have insisted upon deference to state courts, carving out a kind of "abstention" from domestic matters. Federal courts have credited state trial courts with having particular authority and expertise to adjudicate family law matters.[254] This family law exception to federal court jurisdiction leaves state trial court judges with almost exclusive authority over familial disputes. State trial judges have "almost unlimited authority to shape the lives of a family in distress."[255] The vast majority of these decisions require judges to exercise considerable discretion.[256]

In this capacity, state court judges make important value judgments that influence the lives of not only the litigants before them, but also the community at large. For example, in Escambia County, Florida, a judge removed an eleven-year-old girl from the custody of her mother Mary Ward and granted custody to her father because the girl's mother was a lesbian.[257] The judge granted custody to the father although he

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[253] *See* Higginbotham, *supra* note 19, at 1037.

[254] For a critique of this deference to state courts in so-called "domestic relations" matters, see Resnik, *supra* note 242, at 1747–51.

[255] Jan Hoffman, *New Custody Rules Complicate the Task of Judges*, N.Y. TIMES, March 28, 1996, at B5; *see also* Maner v. Stephenson, 677 A.2d 560, 560, 564 (Md. 1996) (upholding right of trial judges to determine visitation rights of grandparents); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1926 (1988) (describing adjudication as "an effort at accommodation"). One recent report on New York State's new rules regarding judicial determination as to whether relocating custodial parents in child custody cases should be required to relinquish custody of minor children described the law as requiring "that from now on [judges have] to use common sense." *See* Hoffman, *supra*, at B5.

[256] For an example of how family law judges can exercise discretion when making child support decisions even within the seemingly rigid confines of Maryland's child support guidelines, see Karen Czapanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1, 18–20 (1990).

[257] *See* Stephanie Salter, *A Cruel Close to the Case of Mary Ward*, SAN FRANCISCO EXAMINER,

had served a sentence for the second-degree shooting murder of his first wife. The judge reportedly cited the girl's right to "be given the opportunity and the option to live in a non-lesbian world."[258] In Michigan, a trial court removed a child from the custody of his mother after determining that it was more beneficial for the child to be cared for by his paternal grandmother, rather than be in day-care while the mother attended the University of Michigan.[259] In that case, the parents of the boy had never been married and the then four-year-old child had always lived with his mother.[260] These two cases vividly illustrate the broad implications of trial court judges' discretionary decisions in family law cases. In both instances, trial judges made important value judgments with potentially far-reaching effects. Both decisions, if upheld, would have the likely effect of influencing the behavior of mothers who face or fear custody battles in those jurisdictions. Some would be faced with deciding whether to hide their homosexuality, others with the choice between educating themselves and raising their children. Upon what basis did the judges in these cases make these discretionary decisions? What standards did the judges call upon to reach their conclusions about what was best for these children? Even if expert psychological testimony supported their conclusions, both decisions most likely reflect those judges' interpretation of societal values as well as their own perceptions and values.

Similarly, imposing the death penalty may be the most powerful example of the trial judge's role in representing community values. Given the absence of conclusive data supporting the deterrent value of the death penalty, imposition of a death sentence is often instead "an expression of community outrage."[261] The Supreme Court, however, has upheld the right of trial judges to articulate this outrage on behalf of the community, even over a jury's recommendation of life imprisonment.[262] Not surprisingly, imposition of the death penalty is an area of trial judge decision-making authority that is often cited as subject to racial discrimination. Although both juries and judges share responsibility for the appalling racial disparity in the imposition of the

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Jan. 28, 1997, at A-11. The judge's decision was upheld by the Florida First District Court of Appeals. Mary Ward died of a heart attack while her petition for rehearing was pending before that court. *See id.*

[258] *See id.*

[259] *See* Marcia M. McBrien, *Child Care Not a Factor in Custody Decision*, MICH. LAW. WKLY., Nov. 20, 1995, at 1.

[260] *See id.* The trial court's decision was reversed on appeal. *See id.*

[261] *See* Spaziano v. Florida, 468 U.S. 447, 461 (1984).

[262] *See id.* at 457, 460, 464.

death penalty, numerous studies document specific instances of trial judges exhibiting racial bias in capital cases.[263]

Beyond the capital case context, sentencing is one of the areas in which state trial judges exercise the greatest and most independent authority.[264] State trial judges have wide latitude to impose sentences, particularly where mandatory guidelines do not exist. Increasingly, some state trial judges have chosen to experiment by imposing unique sentences rather than traditional incarceration or probation, particularly for juveniles or first time offenders.[265]

Increasing emphasis on efficiency has also increased the power of trial judges rather than juries to decide liability issues in criminal cases. One manifestation of this concern has been the decreased role of juries in deciding criminal matters. In many metropolitan jurisdictions, judges have taken the place of grand juries in deciding whether to issue felony indictments, as states abolish mandatory grand jury indictment in order to save time, money and juror resources.[266] In some jurisdictions, the motivation of prosecutors in avoiding the grand jury may be related to the refusal of jurors in some majority African American and Latino jurisdictions to fully credit police testimony offered by prosecutors.[267] Thus, prosecutors can use a predominantly white trial bench to undermine the power of African American and Hispanic juries. Several states permit criminal defendants to waive their right to jury trial and

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[263] *See* Statement of George H. Kendall, *supra* note 33, at 3–4, 15–27.

[264] "Deciding upon the appropriate sentence for a person who has been convicted of a crime is the routine work of judges." *Spaziano*, 468 U.S. at 476; *see* People v. Superior Court, 917 P.2d 628, 630, 647 (Cal. 1996) (finding that California's "Three Strikes" law does not prevent a court from striking prior convictions or reducing sentences). *But see* Joan Biskupic & Mary Pat Flaherty, *Loss of Discretion Fuels Frustration on Federal Bench; Most District Judges Want Shift in Sentencing Rules*, WASH. POST, Oct. 8, 1996, at A1 (referring to federal judges who feel the federal sentencing guidelines have "transferred discretion and authority from the court to prosecutors—who in effect decide the sentence in advance by deciding what the charge will be").

[265] *See, e.g.*, WASHINGTON, *supra* note 13, at 51. Among others, convicted defendants have been required to write book reports, register to vote or permit a crime victim to take items from a convicted thief's home, and "slumlords" have been sentenced to "do time" in the substandard housing they own. *See id.*; John J. Goldman, *Sentence Called a Vacation for Landlord*, L.A. TIMES, Feb. 17, 1988, at 4. Judges have imposed upon convicted defendants some rather unique and controversial sentences as well, for example: agreeing to voluntary castration of sex offenders, *see* Bryan Denson, *Drastic Measures; Parlor to Prison, Debate Continues*, HOUS. POST, June 5, 1994, at A1; ordering defendant to erect a sign warning passersby he is a convicted felon (sentence later rejected by Illinois Supreme Court), *see* Dave McKinney, *State Supreme Court Rejects Shaming Penalty for Farmer*, CHI. SUN-TIMES, Apr. 18, 1997, at 24; ordering defendant to stand on a street corner for hours a day carrying a sign stating "I'm a convicted thief," *see* Associated Press, *Shame-Wielding Judge Has Burglar Wear Sign*, CHI. TRIB., Apr. 16, 1997, at 17.

[266] *See* Jan Hoffman, *No Longer Judicially Sacred, Grand Jury is Under Review*, N.Y. TIMES, Mar. 30, 1996, at A1.

[267] *See* Jeb Bush, *Common Ground Will Help Heal Racial Rift*, SUN-SENTINEL (Fort Lauder-

have an entire criminal case heard before a judge rather than a jury.[268] In these cases, judges stand in the place of juries as the community of peers determining the guilt or innocence of a defendant.

Trial judges enjoy largely unfettered discretion in decisions relating to the conduct of trials. Trial judges control the courtroom and the actors in it, be it the appointment of attorneys for indigent defendants, the treatment of the parties in the court, controlling the behavior of counsel, identifying racist use of peremptory challenges, accepting pleas, the handling of witnesses or judicial commentary during sentencing or ruling.[269] Trial judges' discretionary power includes control over the balance of power exercised by the participants in litigation. The quality of counsel appointed to represent indigent defendants, for example, particularly in capital cases, has long been viewed as the strongest factor affecting the outcome of criminal cases.[270] Numerous instances have been cited when the lack of competent counsel has resulted in a death sentence for a defendant in a capital case.[271] The experience or inexperience of counsel can be easily determined by the appointing judge. The competence or incompetence of prospective capital case counsel, while more difficult to quantify, is still well within the trial judge's ability to assess.[272]

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dale), Oct. 22, 1995, at 1H; Adam Pertman, *The Race Angle in the Simpson Case*, BOSTON GLOBE, Oct. 16, 1994, at 2.

[268] Such states include New York, California, Michigan, Pennsylvania, Florida and Illinois. Although most states with jury-waiver laws require the consent of both the prosecutor and judge, *see, e.g.*, N.Y. CRIM. PROC. LAW § 340.40 (McKinney 1994), some states permit defendants to waive jury trial unilaterally. *See, e.g.*, TEX. CRIM. P. CODE ANN. § 1.14 (West 1997).

[269] During the Civil Rights Movement, activists described the effect that the behavior of judges in the courtroom had on their activism. A trial judge's decision to announce an order in open court requiring recalcitrant southern registrars to comply with federal laws protecting the rights of African Americans to register to vote, was viewed by some as a signal from the judge to African American spectators that a particular judge would be vigilant and public in protecting minority voting rights. *See* HAMILTON, *supra* note 227, at 155–56.

[270] *See, e.g.*, Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 302–05 (1983). Appointment of indigent counsel by trial judges can also be a critical factor in the outcome of custody cases in which children have been removed by the state or city from homes in which abuse or neglect has been charged. *See* William Wesley Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 LOY. U. CHI. L.J. 195, 200–23 (1996).

[271] *See* Bright & Keenan, *supra* note 41, at 800–03.

[272] In one particularly egregious case, a trial judge appointed the Imperial Grand Wizard of the Ku Klux Klan to defend an African American man accused of killing an elderly white woman in Georgia. *See* Testimony of George H. Kendall, *supra* note 33, at 4. Trial judges in Houston have been criticized for repeatedly appointing one lawyer known for sleeping during trial to defend clients charged in capital cases. *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 760, 802 (1995). The Georgia case was initially affirmed. *See generally* Ross v. State, 326 S.E.2d

Trial judges also control the process by which attorneys select jurors from the venire for trial. In some jurisdictions, the judge himself, not the attorneys, conducts voir dire.[273] In other jurisdictions, trial judges control the depth and length of voir dire conducted by trial counsel. As some legal observers increasingly have criticized lengthy voir dire conducted by some attorneys, judges may be assigned even more controlling roles in the voir dire process.[274]

Challenges to the racial use of peremptory strikes are adjudicated initially by trial judges. When a defense lawyer, for example, challenges a prosecutor's strike of African American venire persons, the trial judge determines whether the excuse offered by the prosecutor for the strike is a pretext for discrimination. The failure of many judges to enforce vigilantly the constitutional prohibition against racially biased peremptories has been well-documented and is often a central issue in appeals of capital convictions.[275] Trial judges may also permit bias to infect attorneys' exercise of "for cause" juror strikes.[276]

Trial judges may determine the length of witness testimony, whether some witnesses will be permitted to provide live testimony rather than written testimonial summaries or reports, and even if prospective witnesses are permitted to testify at all. Similarly, in response to overloaded dockets, many jurisdictions strongly encourage trial judges to promote settlement of cases and to play a more active role in promoting settlement among parties.[277] Trial judges are powerful in their own right and highly influential on others. Strong evidence

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194 (Ga. 1985) (affirming Georgia conviction on direct appeal). *But see generally* Ross v. Kemp, 393 S.E.2d 244 (Ga. 1990) (ordering new trial in Georgia case because of gross ineffectiveness of counsel). In the Texas "sleeping lawyer" case, the trial judge reportedly responded to the capital defendant's complaint about his lawyer by pointing out "[t]he Constitution doesn't say the lawyer has to be awake." *See* John Makeig, *Asleep on the Job?; Slaying Trial Boring, Lawyer Says*, HOUS. CHRON., Aug. 14, 1992, at A35.

[273] *See* Morgan v. Illinois, 504 U.S. 719, 722 (1992) (In Illinois, the trial judge, rather than the attorneys, conducts voir dire.).

[274] *See Streamlining Jury Service, At Last*, N.Y. TIMES, Nov. 8, 1995, at A24 (describing new voir dire rules in New York State requiring judges to exert greater control over the process).

[275] For a discussion of race-based peremptory challenges, and the failure of judges to enforce the *Batson v. Kentucky*, 476 U.S. 79 (1985), principle, see Bright & Keenan, *supra* note 272, at 795–96. *See also* United States v. Clemmons, 892 F.2d 1153, 1159–63 (3d Cir. 1989) (Higginbotham, J., concurring) (citing cases and articles demonstrating judges' dereliction in enforcing the constitutional prohibition against racially-based peremptories).

[276] In one instance, a judge in a wage and sex discrimination case refused to excuse a potential juror for cause although that juror stated that under no circumstances would he allow his wife to work outside the home. *See* THE JUDICIAL COUNCIL ADVISORY COMM. ON GENDER BIAS IN THE COURTS, ADMINISTRATIVE OFFICE OF THE COURTS JUDICIAL COUNCIL OF CAL., ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS (DRAFT REPORT) § 4, 25 (1990).

[277] Although this movement has been strongest at the federal level, evidence exists suggesting

suggests that trial judges' own biases may infect the responses of other courtroom participants. Jurors in particular may be influenced by judicial bias.[278] Trial judges have the power to control the dynamic of the courtroom that is often the locus of racially charged behavior. In fact, judges are required by the Model Code of Judicial Conduct to exercise their authority over the courtroom to ensure that no one engages in bias.[279] When judges do not purge racial bias from their courtrooms, they affirmatively engage in bias themselves by failing to acknowledge the important connection between the presence of racism in the courtroom and the legitimacy of the legal process.[280]

Finally, trial judges' discretionary decisions are virtually unreviewable and can only be reversed if they are clearly erroneous.[281] This high standard of review is premised on the perceived proximity of the trial judge to the intensity and dynamic of the live dispute. The trial judge is viewed by the appellate court as being in the best position to assess the interaction among lawyers and potential jurors, the demeanor of witnesses and the physical evidence offered. The trial judge serves as the eyes and ears of the dispute to all other subsequent reviewers of the case. The record, the authoritative account of the legal dispute, is

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that states are moving in a similar direction. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342–46, 1387–91 (1994). Many noted scholars have criticized efforts to promote a pro-active role for judges in settlement as undermining the power of litigation. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–87 (1984) (arguing that settlement deprives courts of ability to explicate law); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 380, 443–45 (1982).

[278] *See* Nugent, *supra* note 230, at 57–58 and sources cited therein. This is not surprising. Jurors, untutored in the law and court procedures, focus on the judge, who holds a position of authority and expertise. Jurors may unconsciously pick up cues from judges' verbal and non-verbal communication which affects their view of lawyers, witnesses and parties.

[279] Canon 3(B)(4) of the 1990 MODEL CODE OF JUDICIAL CONDUCT requires a judge to be patient, dignified and courteous to litigants, jurors, witnesses and lawyers and to exact similar conduct of his staff, court officials and others subject to his direction and control. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(4) (1990). The Code further directs a judge to be unswayed by partisan interests and imposes a duty to hear all proceedings fairly. *See* Canon 3(B)(2) & cmt.

[280] One illustration from the Gender Bias reports makes the point clearly. In Minnesota, only 28% of male judges surveyed thought it was highly objectionable for an attorney to address a female witness by her first name while addressing male witnesses by their last names. *See* MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, FINAL REPORT 94–95 (1989). Where a judge fails to acknowledge the obvious connection between the respect accorded witnesses by attorneys and the jury's response to the credibility of that witness, the responsibility for bias falls not only on the attorneys that treat male and female witnesses differently, but on the judge, who by neglecting to curb this behavior, endorses bias in the court himself.

[281] *See* Anderson v. City of Bessemer City, 470 U.S. 564, 573–81 (1985) (holding that in applying "clearly erroneous" standard to findings of district court, appellate courts must give great deference and constantly bear in mind that their function is not to decide factual issues de novo); Patton v. Yount, 467 U.S. 1025, 1031 (1984) (noting that trial court's findings are overturned only for manifest error).

controlled by the trial judge's decisions as to what evidence, arguments and testimony will be heard and admitted. Thus, the trial judge permanently imposes his vision onto the dispute. The state trial judge's factual decisions are entitled to particular deference by a federal reviewing court.[282]

In essence, the reality of state trial court decision making reveals the many explicit and affirmative instances in which trial judges function as representatives in adjudication. Racial diversity in this context becomes more than a "symbolic" exercise in participation. Instead, the exclusion of racial minorities from the trial bench hints at a larger measure of exclusion of racial minorities from full citizenship participation in their democratic state government. The result of this exclusion, particularly given the disproportionate power exercised by the justice system in regulating the lives of minority citizens,[283] is that African Americans have diminished opportunities to control their communities.

CONCLUSION

Recognizing the role of judges as representatives opens up the diversity debate to more vigorous and honest exchange. Accepting the representativeness of judges permits us to center the discussion not on whether we can appoint one or two minority judges to increase the facial legitimacy of the bench, but more appropriately on dismantling judicial selection systems which maintain the exclusion of racial minorities from an entire branch of government. To that end, states that use either appointive or elective systems to select their judges should work in concert with the citizenry and the bar to construct selection methods that satisfy the requirements for representation compelled by our democratic form of government.

Much of the work will have to be done by the organized local and national bar and judges themselves, many of whom remain highly invested in preserving an historical, inappropriate and false depiction of judges as "anointed priests set apart from the community . . . ."[284] Similarly, diversity advocates will need to pursue plurality on the bench

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[282] 28 U.S.C. § 2254 has been interpreted to require that federal courts reviewing state trial proceedings accord the trial judge's factual findings a "presumption of correctness." *See* Wainwright v. Witt, 469 U.S. 412, 426–29 (1985).

[283] For example, recent figures from the Bureau of Justice Statistics shows that 51% of the nation's state and federal prison population is African American. *See* MARC MAUER, INTENDED AND UNINTENDED CONSEQUENCES: STATE RACIAL DISPARITIES IN IMPRISONMENT 3 (1997).

[284] Landmark Communications v. Virginia, 435 U.S. 829, 842 (1978) (quoting Bridges v.

as a right rather than as a discretionary policy. If racial diversity is a right, efforts to achieve diversity must include the willingness to challenge—with litigation if necessary—the continued exclusion of full participation by racial minorities on state benches throughout the country. Additionally, judicial diversity advocates will need to face head-on questions that focus on the role of race in judicial decision making. If diversity, as I suggest, increases impartiality by bringing together differing perspectives in the community, then my analysis assumes that the varying racial experiences of judges may affect their viewpoints.[285] While I believe that taking this analytic step is both inevitable and important, the adoption of this view conflicts with prevailing notions of "colorblindness" adhered to by many civil rights advocates and further challenges the "impartiality" ideal as applied to judges.

Finally, identifying effective methods of selecting state court judges remains a difficult and thorny task. The methods chosen ideally should ensure the selection of qualified judges, create opportunities for maximum citizen participation and produce racial diversity. In order to achieve these aims, a wholesale dismantling of currently used selection methods may be necessary. Judges, civil rights advocates, the bar, politicians, political parties and the citizenry itself will all need to participate in this effort. The marshalling and participation of these varied groups may prove an insurmountable obstacle to real reform efforts, but the lessons of the last century may prove helpful. Over a thirty-year period, the movement to change the way judges were selected swept the country. The result was a new method of judicial selection that would, it was hoped, bring the judiciary closer to the people. Reform efforts to bring meaningful racial diversity to the bench may only be at the very beginning of a thirty-year push. The results may, however, complete the efforts of those judicial reformists a century ago who recognized the importance of representation on the bench.

California, 314 U.S. 252, 291–92 (1941) (Frankfurter, J., dissenting)). The Supreme Court in *Landmark Communications* cautioned against portraying judges in this manner. *See id.*

[285] *See* Ifill, *supra* note 12, at 87–92.