

# COURT SIZE AND DIVERSITY ON THE BENCH: THE NINTH CIRCUIT AND ITS SISTERS

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## INTRODUCTION

Diversity on the bench is not a new topic. Proponents of diversity stress the importance of heterogeneous panels for several reasons. First, there are some who argue that the presence of women and minorities bolsters the legitimacy of our legal institutions.<sup>1</sup> Descriptive representation increases perceptions of fairness and access to our judicial institutions because judges as officials mirror the characteristics of group identification. Second, individuals come to the bench with personal preferences and particular experiences that often affect their perspective on the law. Simply put, women and minorities may provide perspectives that differ from their male and white counterparts.<sup>2</sup> While debate continues regarding the factors that influence judicial decisionmaking, it is generally agreed that the person who occupies a seat on the bench will have an impact on the outcome of a case. Third, as the number of women and minorities on the bench increases, it is possible that their colleagues may become more amenable to the interests of women and minorities. Thus, diversification may reap effects beyond the vote of the individual minority or women judges.

Scholars have carefully documented the progress of both women and minorities as their numbers grow on both the federal and state benches.<sup>3</sup> As each President leaves office, a careful accounting of his appointments in terms of

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1. See, e.g., Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000).

2. *Id.* at 409–10.

3. See generally FUND FOR MODERN COURTS, INC., *THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS* (1985); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997); Mark S. Hurwitz & Drew Noble Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*, 3 ST. POL. & POL'Y Q. 329 (2003).

diversity often follows, and credit is often allocated to Presidents based upon the final numbers. While the final score in any sports competition reveals who won and who lost, as any fan will attest, this score often masks the true nature of the match. Similarly, when discussing diversity on the federal bench, the final tallies of each President may not provide a true picture of the intersection of federal appointments and diversification. A President may appoint a large number of women or Hispanics to the bench, but if these appointments only replace exiting nontraditional judges, the levels of representation for women and minorities remain stagnant. Similarly, if the nominations are focused in certain areas of the country rather than generally across the bench as a whole, the credit granted to Presidents may be overstated.

Disaggregating the diversification of the prestigious U.S. Courts of Appeals, with a particular focus on the highly diverse Ninth Circuit in comparison to its sisters, is the primary purpose of this Article. First, the diversification of the bench, in the aggregate, is analyzed. Next, because some Presidents may appoint a number of minority or female judges without increasing the representation of these groups in the courts, the replacement strategies of Presidents, from Jimmy Carter through George W. Bush (G.W. Bush), are analyzed to discern any patterns in the appointment of nontraditional judges to the bench by administration. Last, a comparison between the Ninth Circuit and the pre-1980 Fifth Circuit is conducted. The Fifth Circuit, before it was split into the Fifth and Eleventh Circuits, represents the circuit most similar to the Ninth in many of the factors critical to diversification.

Research concerning diversity within the judiciary began in earnest in the late 1970s and 1980s, as the numbers of women and minorities on both state and federal courts began to increase beyond token levels. Initially, scholarly inquiry focused more on the output of diversified courts.<sup>4</sup> The scholarship addressed the critical questions regarding whether nontraditional (minority and/or women) judges decided cases differently than their white and male counterparts. This line of research produced mixed results.<sup>5</sup> Additionally as nomination battles became the norm,<sup>6</sup> scholars looked more closely at the confirmation process, with some scholars noting the additional burdens minorities and women faced in this process. For example, women and minorities are more likely to be delayed—and delayed

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4. See, e.g., Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985).

5. See David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156, 164–65 (1993); Jennifer Segal, *The Decision Making of Clinton's Nontraditional Judicial Appointees*, 80 JUDICATURE 279, 279 (1997); Donald R. Songer, Sue Davis & Susan Haire, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 436–37 (1994); Walker & Barrow, *supra* note 4, at 604–11.

6. See Gregory Caldeira & John R. Wright, *Lobbying for Justice: The Rise of Organized Conflict in the Politics of Federal Judgeships*, in CONTEMPLATING COURTS 44 (Lee Epstein ed., 1995); Roger E. Hartley & Lisa M. Holmes, *The Increasing Senate Scrutiny of Lower Federal Court Nominees*, 2 POL. SCI. Q. 259, 270 (2002).

for a longer period of time—when seeking a seat on the federal bench.<sup>7</sup> Women and minorities are also less likely to receive the highest ratings from the American Bar Association, all other things equal, which can impede their progress to the bench.<sup>8</sup>

The research most germane to this project asks a more explicit question regarding women and minority judges: Under which conditions will a court diversify? Rather than questioning whether nontraditional judges behave differently or whether the process of nomination differs for these judges, scholars are looking at the confluence of factors that produce diversity on the bench. These questions have direct implications for descriptive representation and the perceived legitimacy of the courts among discrete populations. Studies of both state and federal courts and trial and appellate benches reveal some structural obstacles and some political impediments that prevent courts from “looking like America.”<sup>9</sup>

### I. FACTORS AFFECTING DIVERSIFICATION

Factors influencing diversification are many. First, debate continues on whether the type of selection system affects the likelihood of a woman or minority obtaining a seat on a state bench.<sup>10</sup> In the federal system questions regarding the formal selection system are moot, as all federal judges are appointed under the same system whereas there are five different types of selection systems operative in the states. However, the federal system does function differently depending upon the level of court. The norm of senatorial courtesy exists for appointments to the district courts, but its power dissipates as we move up the judicial ladder. Individual senators will have less influence, while the proclivities of the Senate chamber and the President (party and liberalism) may have a greater influence on the nomination of women and minorities. Evidence supports this conclusion since the conservatism of the President and the partisan composition of the Senate affects the selection of both female and minority district court judges.<sup>11</sup> Therefore, it is expected that diversification will be more prominent across all the courts of

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7. See Roger E. Hartley, *Senate Delay of Minority Judicial Nominees: A Look at Race, Gender, and Experience*, 84 JUDICATURE 190, 191–95 (2001).

8. Susan Brodie Haire, *Rating the Ratings of the American Bar Association Standing Committee on Federal Judiciary*, 22 JUST. SYS. J. 1, 8 (2001).

9. See generally Nicholas O. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 71 SOC. SCI. Q. 315 (1990) [hereinafter Alozie, *Distribution of Women*]; Nicholas O. Alozie, *Selection Methods and the Recruitment of Women to State Courts of Last Resort*, 77 SOC. SCI. Q. 110 (1996) [hereinafter Alozie, *Selection Methods*]; Chris Bonneau, *The Composition of State Supreme Courts, 2000*, 85 JUDICATURE 26 (2001); Kathleen A. Bratton & Rorie L. Spill, *Moving Beyond Tokenism: The Effect of Existing Gender Diversity on the Selection of Women in State Supreme Courts*, 83 SOC. SCI. Q. 504 (2002) [hereinafter Bratton & Spill, *Tokenism*]; Hurwitz & Lanier, *supra* note 3; Rorie Spill Solberg & Kathleen Bratton, *Diversifying the Bench: Presidential Patterns*, 26 JUST. SYS. J. 119, 128–31 (2005) [hereinafter Solberg & Bratton, *Diversifying*].

10. See Hurwitz & Lanier, *supra* note 3, at 331–32; Bratton & Spill, *Tokenism*, *supra* note 9, at 504, 507–08 (concluding that appointment systems are more likely to create diversity).

11. See Solberg & Bratton, *Diversifying*, *supra* note 9, at 128.

appeals during unified government and when the President and the Senate are more liberal.

Second, selecting nominees to fill vacancies on the bench requires a pool of viable candidates. The size of the eligible pool has been demonstrated to have an effect on the selection of minority and female judges.<sup>12</sup> Generally speaking, the eligible pool of candidates for the courts of appeals tends to be larger. For seats on the district courts, norms require judges to reside instate and even within the district. For the courts of appeals, the pool technically expands to the region covered by the entire circuit. This presents a wider array of individuals available for nomination, although norms have developed here as well. For example, seats are allocated by tradition to states. For some circuits, this expansion brings significant minority populations into the pool and presents greater pressures for diversification. For other circuits the coupling of several states does little to increase the racial or ethnic diversity of potential nominees, and calls for diversification are likely less ardent. For example, the Fourth Circuit contains West Virginia, with a population that is 95% white, but it also contains South Carolina, which is much more diverse with a population that is only 67% white.<sup>13</sup> An all-white bench in West Virginia may not seem outrageous, but an all-white Fourth Circuit would. In fact, the composition of the Fourth Circuit has elicited serious criticisms regarding diversification. The larger geographic areas covered by the jurisdictions of the courts of appeals allow for greater diversity in the candidate pool and create pressure for greater descriptive representation due to circuit demography.<sup>14</sup> The eligible pool of women is not as affected by region, and as time has progressed, this variable has become less and less of an obstacle.<sup>15</sup> Given the consistency of this finding, it should not be surprising that the courts with the largest and more diverse populations tend to lead to more diverse benches.

The numerical size of the circuit is also important to the diversification of the bench in many ways. The size of the circuit may affect the pace and scope of diversity on the bench. The size of the bench may expedite or impede diversity. Larger institutions diversify more rapidly.<sup>16</sup> Generally speaking, the larger the court the more likely there will be a vacancy that provides a President the opportunity to diversify the bench. Additionally, over time courts grow by the addition of new seats. It is often thought that new seats are frequently used to

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12. See Alozie, *Distribution of Women*, *supra* note 9; Alozie, *Selection Methods*, *supra* note 9, at 113–14, 123; Bratton & Spill, *Tokenism*, *supra* note 9, at 511–12; Hurwitz & Lanier, *supra* note 3, at 342; Solberg & Bratton, *Diversifying*, *supra* note 9, at 126.

13. See U.S. Census Bureau, State & Country QuickFacts, <http://quickfacts.census.gov/qfd> (last visited Apr. 10, 2006).

14. Rorie Spill Solberg, *Diversity and George W. Bush's Judicial Appointments: Serving Two Masters*, 88 JUDICATURE 276, 283 (2005).

15. *Id.* at 282–83.

16. See SUSAN J. CARROLL, WOMEN AS CANDIDATES IN AMERICAN POLITICS 106–12 (1985); IRENE DIAMOND, SEX ROLES IN THE STATE HOUSE 8 (1977); Nicholas O. Alozie & Lynne L. Manganaro, *Black and Hispanic Council Representation: Does Council Size Matter?*, 29 URB. AFF. Q. 276 (1993); Alozie, *Selection Methods*, *supra* note 9, at 114–15; Kathleen A. Bratton & Rorie L. Spill, *Moving Up the Judicial Ladder: The Nomination of State Supreme Court Justices to the Federal Courts*, 32 AM. POL. RES. 198 (2004).

diversify the bench; when filling a new seat, the addition of a woman or minority will not come at the “expense” of the majority. This strategy was clearly noted in the Carter Administration. As President Carter awaited the final version of the Omnibus Judgeship Act,<sup>17</sup> he received a memo, which stated:

[The new judgeships] will constitute a critical part of the legacy of your Administration. Equally important, the process of filling these judgeships provides an instrument to redress an injustice: of the 525 active Federal judges, only twenty are black or Hispanic and only six are women. By using the Omnibus Judgeship Act to appoint a substantial number of qualified minority and female lawyers, as well as capable white males, the Administration will begin to bring some balance into this area.<sup>18</sup>

These types of statements bolster the supposition that new seats are a vehicle for diversity. Solberg and Bratton, however, found that while new seats are correlated with diversification of the district courts, the effect is not significant for any President from Carter through G.W. Bush.<sup>19</sup> In other words, the conventional wisdom regarding new seats may be overstated. Since the Carter Administration, seventy seats have been added across the courts of appeals.<sup>20</sup> These seats have provided ample opportunity for diversification and a sufficient number of new seats to investigate the relationship between adding seats and diversification.

Lastly, the prestige of an institution may influence the pattern of diversification. Women and minorities have a more difficult time obtaining seats in more prestigious institutions. Research on city councils, mayoral positions, and state legislatures suggests that this subtle discrimination may also be at work in the judiciary.<sup>21</sup> Seats on the courts of appeals are considered more prestigious than seats on the district courts, but there is a hierarchy of prestige among the circuits as well. Therefore, the pattern of diversification among the circuits might be related to the prestige of the individual courts rather than the size. The complication is that prestigious institutions also tend to be smaller institutions, and we have already noted that the Ninth is not a small circuit. Circuit prestige is often measured by aggregating citations of individual judges within opinions (inter- and intracircuit), though this measure is by no means perfect.<sup>22</sup> Citation, however, is only one indicator of reputation, and the ranking produced by this methodology should be viewed with caution.

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17. Omnibus Judgeship Act, H.R. 7843, Pub. L. No. 95-486, 92 Stat. 1629 (1978).

18. GOLDMAN, *supra* note 3, at 242.

19. Solberg & Bratton, *Diversifying*, *supra* note 9, at 128.

20. See Federal Judicial Center, History of the Federal Judiciary, <http://www.fjc.gov/history/home.nsf> (last visited Aug. 15, 2005).

21. See CARROLL, *supra* note 16, at 202 n.20; DIAMOND, *supra* note 16, at 8–11; Albert K. Karnig & Susan Welch, *Sex and Ethnic Differences in Municipal Representation*, 60 SOC. SCI. Q. 465 (1979).

22. Cf. William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 271–73 (1998).

## II. THE NINTH CIRCUIT

It is expected that the Ninth Circuit will be at the forefront of diversification. The Ninth Circuit represents a confluence of the factors that catalyze diversity. Since 1979 it has been the largest federal court of appeals. The Ninth Circuit exploded to twenty-three judges during the Carter Administration and then increased again, to its current twenty-eight, during the Reagan years.<sup>23</sup> Since 1978, fifteen seats have been added to the Ninth Circuit, more than doubling its size.<sup>24</sup> No other court has seen that much growth. The two closest competitors are the First Circuit, which doubled from three to six judges from 1978 to 1984, and the Fifth Circuit, which gained eleven seats before being split into two courts in 1980.<sup>25</sup> By this measure, then, we would expect that the Ninth Circuit would diversify more quickly and thoroughly than its sisters.

Additionally, most of the states comprising the Ninth Circuit are considered to be moralistic under Daniel Elazar's political culture scale.<sup>26</sup> State culture has a large effect on the ideology of its citizens.<sup>27</sup> Moralistic cultures tend to be more progressive and demand attention to issues of fairness and representation that promote diversity.<sup>28</sup> Additionally, the larger states in the circuit remain "blue," or Democrat-oriented, states, and among the states comprising the Ninth Circuit there are significant populations of women, African-Americans, Hispanics, Asian-Americans, and Native Americans.<sup>29</sup> Finally, while seats on prestigious institutions are more competitive, and research suggests that these institutions diversify more slowly, the Ninth Circuit consistently ranks lower in prestige among the circuits.<sup>30</sup> Thus, we would not expect that prestige would impede the appointment of nontraditional judges to this court.

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23. Federal Judicial Center, *supra* note 20.

24. *Id.*

25. *Id.*

26. DANIEL ELAZAR, CITIES OF THE PRAIRIE: THE METROPOLITAN FRONTIER AND AMERICAN POLITICS 256-81 (1970).

27. Robert S. Erikson, John P. McIver & Gerald C. Wright, Jr., *State Political Culture and Public Opinion*, 81 AM. POL. SCI. REV. 797, 803 (1987).

28. Charles A. Johnson reexamined Elazar's scales. In his analysis, California, Idaho, and Oregon are moralistic, but Washington and Montana, which are categorized as "moral" by Elazar, are considered individualistic. Even so, individualistic cultures would still support diversification since government should respond to public demands. Diverse populations would demand greater descriptive representation in public institutions. Both moralistic and individualistic cultures would be more amenable or demanding of diversity versus traditional cultures, which prefer the status quo. See Charles A. Johnson, *Political Culture in American States: Elazar's Formulation Examined*, 20 AM. J. POL. SCI. 491 (1976).

29. See U.S. Census Bureau, *supra* note 13.

30. *Supra* note 21.

### III. DATA

Data on courts of appeals judges' gender, race, and ethnicity were gathered from the biographic database housed by the Federal Judicial Center.<sup>31</sup> Data concerning the population density of various states comes from the 2000 Census.<sup>32</sup> To determine the ideological position of Presidents and senators, I employed Poole's Common Space Data,<sup>33</sup> which provides scores for both Presidents and members of Congress on a continuum from -1 (most liberal) to 1 (most conservative).

To determine whether Presidents generally increased or decreased the diversity on the bench, each President is compared with the record of his immediate predecessor. President Gerald Ford serves as our baseline, although President Franklin D. Roosevelt appointed the first woman to the courts of appeals, and President Harry S. Truman appointed the first minority to the appellate bench. The beginning of President Jimmy Carter's Administration is a reasonable starting point given the dearth of appointments of both women and minorities during the intervening years from the first appointment until Carter. In the intervening thirty-four years, from the appointment of the first diverse judge to the courts of appeals until the beginning of the Carter Administration, only six nontraditional judges were appointed to the appellate bench—an average of only one for every 5.7 years. The appointment of women and minorities to the federal appellate bench is simply too rare of an occurrence to investigate empirically prior to the mid-1970s.<sup>34</sup>

### IV. DIVERSIFICATION: A DESCRIPTION<sup>35</sup>

It should be noted that there are questions about how to evaluate diversity and the appointment of nontraditional judges. Should women still be considered nontraditional judges given the gains they have made in appointments to the appellate bench? Should minorities be counted together or separated by race? Can we count women and minorities together? The answers are best left to the philosophers who are better able to grapple with these important questions. Clearly the more we aggregate our analyses of nontraditional judges, the better each President and court will fare.

President Carter was clearly committed to diversifying the bench, particularly after the passage of the Act adding new seats to the federal bench.<sup>36</sup>

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31. Federal Judicial Center, *supra* note 20. I include only active judges as of this writing (Aug. 25, 2005) in my analysis.

32. U.S. Census Bureau, *supra* note 13.

33. See Common Space Data, <http://voteview.com/readmeh.htm> (last visited Aug. 15, 2005).

34. Sheldon Goldman's account and assessment of presidential judicial selection to the federal trial and appellate courts from FDR to Reagan is an excellent resource regarding potential nominations of women and minorities throughout this time period. See GOLDMAN, *supra* note 3.

35. The Author has an additional table of all minority appointments by year, which is available upon request.

36. See Omnibus Judgeship Act, H.R. 7843, Pub. L. No. 95-486, 92 Stat. 1629 (1978); GOLDMAN, *supra* note 3, at 352-53.

Presidents Clinton and G.W. Bush also made diversity a priority, although President Bush seems more concerned with increasing Hispanic representation on the bench than with overall diversity.<sup>37</sup>

If we consider nontraditional appointments over time, it is clear that the appointment of women and minority judges did not become commonplace until the 1990s.<sup>38</sup> While Carter did make a significant number of such appointments, the trough during the Reagan years suggests that there was not enough pressure for this trend to continue. During Reagan's eight years in office, only eight nontraditional judges were appointed to the courts of appeals.

Additionally, comparing the appointment of women to the appointment of racial and ethnic minorities shows that the appointment of women to the bench became more routine a few years earlier than the appointment of minorities. By 1989, at least one woman was appointed to the appellate bench each year, with multiple women often obtaining seats in a single year. In contrast, in 2004 there were no Hispanic or African-Americans named to the courts of appeals, and at this writing no Asian-American actively serves and no Native American has ever served on the appellate bench.<sup>39</sup> While women are still facing discrimination when seeking positions of power and prestige, they have made faster and greater gains on the bench than other nontraditional judges.

As anticipated, the Ninth Circuit's diversification came faster than in other circuits. Women and minorities received multiple seats on the Ninth Circuit before some courts were diversified at all. Additionally, from 1979 until 1994, the Ninth Circuit was the only circuit that had judges of both genders and multiple races or ethnicities serving at the same time. In 1979, three white women, two African-American males, one Hispanic male, and two Asian-American males served simultaneously.<sup>40</sup> To date, no other circuit has been as heterogeneous, although the Fifth Circuit came close before it split in 1981. It took thirteen years before the Fifth Circuit again had African-American and Hispanic judges sitting alongside women. In 1994, President Clinton appointed an African-American male (Carl Stewart) along with a Hispanic male (Fortunato Benavides) to the Fifth Circuit, where two women (Edith Jones and Carolyn King) and one Hispanic male (Emilio Garza) then served, thus providing descriptive representation to the

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37. Solberg, *supra* note 14, at 282. See generally Rorie L. Spill & Kathleen A. Bratton, *Clinton and Diversification of the Federal Judiciary*, 84 JUDICATURE 256, 256 (2001) [hereinafter Spill & Bratton, *Clinton and Diversification*].

38. The Author has summary tables displaying the data summarized here. These are available upon request.

39. In early February 2006, President G.W. Bush nominated Sandra Ikuta, an Asian-American female, to fill the seat of James Browning, a white male. Pamela A. MacLean, *Two Lawyers Get Nod for Bench: Bush Names Ikuta for 9th Circuit, Wallace for 5th*, NAT'L L.J., Feb. 13, 2006, at 6. As of April 2006, the Senate had not yet acted on her nomination.

40. From October 1993 until January 1996, no Asian-American actively served on the Ninth Circuit; however, there were both African-American and Hispanic judges serving.

significant black and Hispanic populations of Texas, Louisiana, and Mississippi.<sup>41</sup> In 1994, President Clinton appointed a Hispanic male (Jose Cabranes) to the Second Circuit, joining an African-American female (Amalya Kearsse). This brought a broader range of representation to the circuit covering demographically diverse New York City and its environs. Finally, in 2000 Clinton appointed a Hispanic male (Julio Fuentes) to the Third Circuit. Judge Fuentes joined a bench partially composed of five white females and one African-American male. To date, the other circuits have yet to achieve this level of diversity of multiple races and both genders.

### V. DIVERSIFICATION: RELEVANT FACTORS

While description can only go so far toward discerning the determinants of diversification, we can draw some conclusions with confidence. First, if we consider the role of new seats, it is evident that both African-Americans and women would not necessarily have made their earlier gains onto the appellate bench without the increase in the overall size of the appellate bench. The seventy seats added to the courts of appeals since 1978 were clearly a boon to women and minorities. A fair share of these new seats went to the Ninth Circuit. Given the growth in the number of seats on the courts of appeals, there has been a fair opportunity to diversify these courts without hurting the “slice of the pie”<sup>42</sup> that is usually allocated to whites and males. The increase in the size of the bench overall was clearly an important pathway to diversification. As the Ninth Circuit grew to become by far the largest circuit in the nation, we see the effect of the addition of multiple seats to this circuit—it is the only circuit to have multiple women, Hispanics, and African-Americans appointed to its bench within the same year. Diversification on the Ninth Circuit began early and continued apace as new seats were added. However, it must be noted that as Hispanics have made gains on this bench, it seems to have come at the expense of African-Americans, whose share of seats on the Ninth Circuit did not grow much above token status and remains at 3.5% today,<sup>43</sup> and Asian-Americans, who currently have no active representation on any of the courts of appeals.<sup>44</sup>

President Carter, as noted above, utilized new seats to increase diversity across the bench. This is evident in the Ninth and Fifth Circuits, whose large size clearly provided more opportunity for diversification. Currently, there are no

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41. According to the 2000 Census, African-Americans comprise 11.5% of the population of Texas, 36.3% of Mississippi, and 32.5% of Louisiana. Persons of Hispanic or Latino origin comprise 32% of the population of Texas, 1.4% of Mississippi, and 2.4% of Louisiana. U.S. Census Bureau, *supra* note 13.

42. Delbert Taible, *Minority Representation on City Councils: The Impact of Structure on Blacks and Hispanics*, 59 SOC. SCI. Q. 142 (1978).

43. This observation holds for much of G.W. Bush’s appointments. While he has appointed a record number of Hispanics to the bench, he has also increased the number of whites. The gains made by one minority come at the expense of another. See Solberg, *supra* note 14, at 282.

44. A. Wallace Tashima was appointed by President Clinton in 1995 and confirmed in 1996. He took senior status in June of 2004. His seat remains vacant, but on February 14, 2006, Milan D. Smith, the brother of Senator Gordon Smith of Oregon, was nominated to fill it. As of April 2006, no hearing had yet been scheduled.

courts of appeals that approach the Ninth in scale; however, before it was split in 1981, the Fifth Circuit had twenty-three active judge seats. To underscore the importance of size for diversity, I compared the levels of diversification on these two courts. Both courts diversified earlier and more broadly than their sisters. By 1979, there were female, Hispanic, and black judges serving on both circuits. As noted above, no other court of appeals reached this level of integration until the mid-1990s. Once the Fifth Circuit was split, the diversification fell in the new Fifth and Eleventh Circuits. Interestingly, the movement of the nontraditional judges somewhat reflected population density among the two new circuits.<sup>45</sup> One of the female judges moved to the new Eleventh Circuit, as did the African-American judge. One of the female judges stayed with the Fifth, as did the Hispanic judge. Given the geographic regions covered by these two circuits, the allocation of these nontraditional judges makes sense and suggests the importance of the constituency served by the circuit and the size of the eligible pool as diversification begins.

Still, the increase in seats does not wholly explain diversification. While Carter did make good use of the new seats provided by Congress,<sup>46</sup> his strategy did not become the norm. Overall, new seats have not been utilized to continue the trend started in the late 1970s. Of the seventy new seats added to the courts of appeals since 1978, white males filled forty-six, or 65.7%, and 87%, or sixty-one, of the new seats went to whites. Only nine (almost 13%) racial or ethnic minorities received their position via a new seat and only sixteen (22.8%) women began their tenure on the courts of appeals in a new seat.

	<b>Male</b>	<b>Female</b>	<b>Total</b>
<b>White</b>	46	15	61
<b>African-American</b>	5	1	6
<b>Latino</b>	3	0	3
<b>Asian-American</b>	0	0	0
<b>Total</b>	54	16	70

45. See *supra* note 7 and accompanying text.

46. The 1978 Judges Bill created thirty-five of these seats, Omnibus Judgeship Act, H.R. 7843, Pub. L. No. 95-486, 92 Stat. 1629 (1978), and President Carter successfully appointed judges to fill thirty-four of the new seats.

	White Male	White Female	African-Am. Male	African-Am. Female	Hispanic Male	Hispanic Female	Asian-Am. Male	Tot.
Carter	21	8	3	1	1	0	0	34
Reagan	20	4	0	0	1	0	0	25
G.H.W. Bush	4	1	0	0	0	0	0	5
Clinton	1	2	2	0	1	0	0	6
G.W. Bush	0	0	0	0	0	0	0	0
Total	46	15	5	1	3	0	0	70

Circuit size is not the only important factor. The ideology of past Presidents clearly played a role. The difference in the ideology of Presidents Carter and Reagan is generally well known. Figure 1 shows that the two Presidents credited with increasing diversity (Carter and Clinton) were much more liberal than their Republican counterparts (Reagan and George H.W. Bush (G.H.W. Bush)), and so the progress made by women and minorities during their administrations is not unexpected. President Reagan was simply not as concerned with diversity as much as with changing the bench ideologically.<sup>47</sup> While he did appoint the first woman to the Supreme Court, in contrast to Clinton or G.W. Bush he did not reach out to female or minority constituencies through his appointment strategy.<sup>48</sup> While G.W. Bush is by no means liberal,<sup>49</sup> as time progresses, the presence of women and minorities in the judiciary became more regularized, and some of the effect of party and ideology diminished.<sup>50</sup> Additionally, it became easier for Presidents to find qualified conservative minority and women candidates for the bench as the pool of both women and minorities entering the legal profession continued to grow.<sup>51</sup> These days we expect Presidents of both parties to make efforts to appoint women and minorities to high-level positions.

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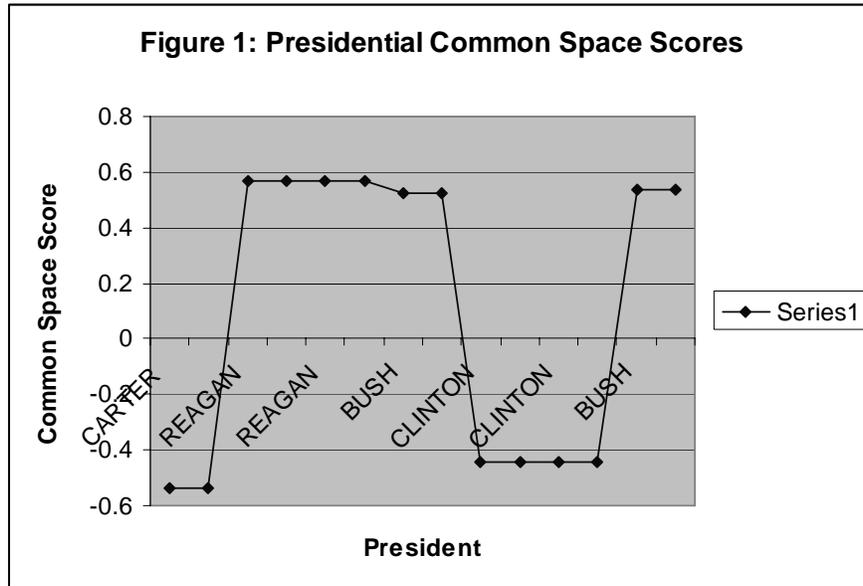
47. See fig.1.

48. GOLDMAN, *supra* note 3, at 352–53.

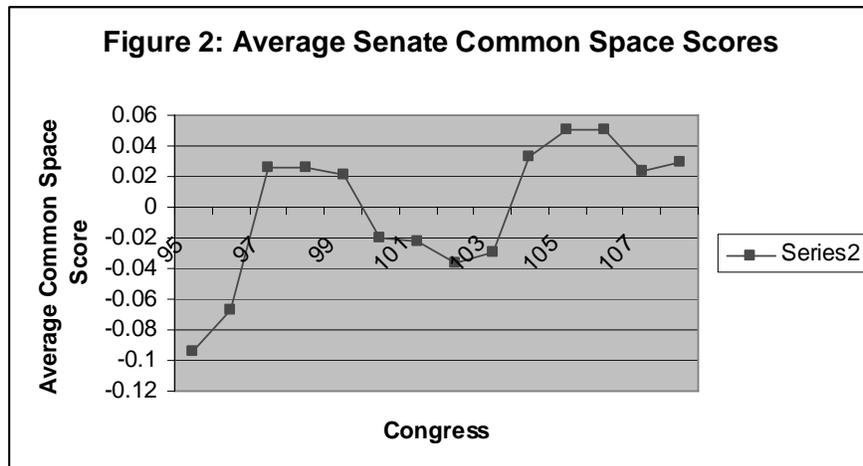
49. See fig.1.

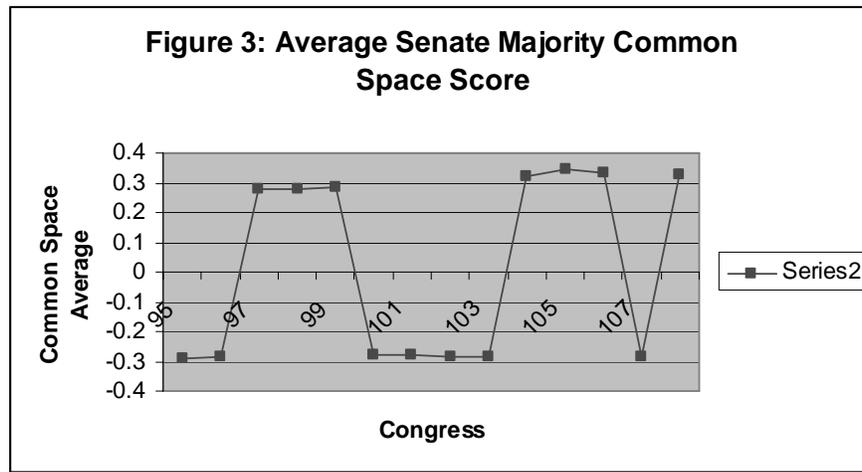
50. Bratton & Spill, *Tokenism*, *supra* note 9, at 515. See generally Solberg & Bratton, *Diversifying*, *supra* note 9, at 130.

51. Bratton & Spill, *Tokenism*, *supra* note 9, at 515; Solberg & Bratton, *Diversifying*, *supra* note 9, at 122, 129–30.



The ideology of the Senate and the Senate majority during this time period (1977 through 2005) somewhat mirrors the changes seen in the White House. During the Carter Administration the Senate was much more liberal than it has been since. During much of the Reagan Administration the Senate flipped to the conservative side, and then moderated somewhat during both the G.H.W. Bush and the first Clinton Administrations before moving strikingly conservative. Thus, the Senate under Carter was ideologically more amenable to a policy that stressed diversification than during the Reagan and G.H.W. Bush years. By the mid-1990s the effects of time institutionalized the presence of women and minorities in such positions, as noted above.





## VI. PRESIDENTIAL REPLACEMENT PATTERNS

This Article will now examine Presidents' replacement patterns and the final consequences of their appointments for diversity on the courts of appeals.<sup>52</sup> If Presidents replace nontraditional judges with nontraditional or white male appointees, the levels of diversity on the appellate bench may remain stagnant or even decline despite an increase in the total numbers of women or minorities appointed by that administration.

As the first large wave of nontraditional judges were appointed by Carter, very few were ready to leave the bench during the subsequent Reagan and G.H.W. Bush Administrations, so the bulk of this analysis must focus on Presidents Clinton and G.W. Bush. Carter did not have much opportunity to replace any nontraditional judges. There were few minorities or women sitting on the bench before he took office and only one African-American and one female judge left and were replaced during his Administration. President Carter replaced the outgoing black judge with another black judge, but replaced the woman with a male. Carter's strides in increasing diversity were only accomplished through the new seats granted to him by Congress. During his tenure, he appointed eleven women, but only two replaced men, and he appointed twelve ethnic or racial minorities, but only six replaced whites.

It is also difficult to assess any pattern to Reagan's appointments, beyond the lack of diversity during his two Administrations. Few minorities (only two) left active status and were replaced, and no women left active service during his tenure. His lone African-American appointment to the courts of appeals replaced an outgoing white judge, and his only Hispanic appointee filled a new seat. He replaced no women, and all the women he appointed to the courts of appeals filled new seats. Clearly, Reagan did not stir the waters by reducing the dominance of whites or males on any of the circuits.

52. See *infra* tbls.2a, 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2i, 2j.

By G.H.W. Bush's Administration, the novelty of women judges was beginning to wane, and we began to see women filling the seats of outgoing men. Minorities, during this administration, were more likely to fill the seats of whites, but the number of women and minorities appointed to the courts of appeals during this administration were so small that conclusions about them must be made with caution.

The Clinton years give us a first look at a period when there were departing nontraditional judges, but the numbers remained small. Clinton was somewhat likely to replace outgoing black judges with another minority appointment. Women leaving the bench, on the other hand, were not replaced by women; instead most incoming female judges took seats formerly held by men. Research suggests that during the mid and late 1990s, gender diversity became less anomalous. Recent studies of diversification of state supreme courts and federal district courts show that while a woman being selected for the bench when a woman is already serving is not likely, the effect of existing gender diversity decreases over time.<sup>53</sup> Racial and ethnic minorities are still hampered by existing diversity, and this pattern is somewhat apparent in the limited data from the Clinton years.

G.W. Bush, unlike Clinton, shows little tendency to replace the few departing minority and female judges with similar judges, but again the number of departing nontraditional judges is quite small. Currently, there are thirteen vacant seats on the courts of appeals<sup>54</sup> with additional seats likely to come open during the final years of his second term. Thus, conclusions regarding his diversification efforts on the appellate bench must wait. However, the trends suggested by the available data on the courts of appeals for these two Presidents (Clinton and G.W. Bush) are more apparent and substantiated when replacement patterns for the district courts are examined.<sup>55</sup>

It is difficult to discern patterns of replacement with so few judges being replaced during any given administration. Still, throughout their tenure, each President under study had the opportunity to make at least one appointment to each circuit.<sup>56</sup> Therefore, each President had the opportunity to increase or decrease diversity in each court. Additionally, the pattern of replacement when examined across the circuits reveals whether the total number of female and minority appointments actually increased the presence of these groups on the bench. Once again using Ford as a baseline, we assess whether Carter, Reagan, G.H.W. Bush, Clinton, and G.W. Bush increased or decreased overall diversity on the courts of appeals.

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53. Bratton & Spill, *Tokenism*, *supra* note 9, at 514–16; Solberg & Bratton, *Diversifying*, *supra* note 9, at 128.

54. As of this writing (Aug. 25, 2005), there was one vacancy in the First Circuit, two in the Third, two in the Fourth, one in the Fifth, two in the Sixth, one in the Seventh, and four in the Ninth.

55. See Solberg, *supra* note 14, at 280–82. See generally Spill & Bratton, *Clinton and Diversification*, *supra* note 37, at 259–61.

56. Clearly, Carter did not have any opportunity to appoint judges to the Eleventh Circuit as it was not created until 1980; however, he did have an opportunity to appoint judges to all existing appellate courts during his service as President.

As anticipated, Carter diversified a great number of circuits. He increased gender and racial-ethnic diversity on eight of eleven courts while decreasing diversity on none. Given Carter's proclivities, the abundance of new seats, and the baseline under which eight of eleven circuits were all white and ten were all male, this result is not surprising. Reagan, although he appointed few women and minorities, managed to increase gender and racial-ethnic diversity on five courts. However, his appointments also led to a decrease in racial-ethnic diversity on two circuits. Overall, the assessment of the Reagan era as one where white males continued to dominate the judiciary is not overstated.

Often, President G.H.W. Bush is also considered to have followed the Reagan model in his appointments, and this may be true. He was concerned with continuing to move the courts ideologically to the right, and he is not often lauded for the number of nontraditional judges he appointed. Nevertheless, his appointments had an impact on the representation of women across the appellate bench. Gender diversity was increased in seven of the now twelve circuit courts, but in terms of racial-ethnic diversity, he did not fare as well. Like Reagan, G.H.W. Bush increased diversity on two courts, but decreased diversity on two others. Overall, the representation of minorities on the bench during these twelve years of Republican Presidents did not improve markedly when we look at the effect of the distribution of appointments.

Both Clinton and G.W. Bush stressed diversity in their appointments.<sup>57</sup> Clinton increased gender diversity on all but one of the circuit courts and increased racial-ethnic diversity on eight. As important, his appointments decreased the levels of diversity on only one of the appellate benches, so the gains made under Clinton, like those under Carter, were real gains in overall representation on the bench. Thus far, G.W. Bush seems to be following the Clinton mold. His appointments are increasing diversity on the bench without reducing the overall levels of diversity. His appointments have increased gender diversity on seven courts and racial-ethnic diversity on three. His replacements have reduced the number of women on one circuit and the number of minorities on another, but the overall impact has been a growth in the number of seats held by women and minorities on the courts of appeals.<sup>58</sup>

### CONCLUSION

Overall, the critical factors—large size, low prestige, heterogeneous demographic base, and amenable presidential and senatorial ideologies—were in place to ensure that the Ninth Circuit would lead the way in diversification, and it continues to do so. It also seems clear that these days no circuit court will be without a female judge for long, and most boast multiple women judges. In fact since the early 1990s, all of the courts of appeals have had female representation.

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57. Bratton & Spill, *Tokenism*, *supra* note 9, at 505–06; Solberg, *supra* note 14, at 276–78.

58. It should be noted that the gains in terms of minority representation have not necessarily come at the expense of whites. Hispanics have increased their representation on the federal bench during the past five years, but so have whites. For more information about this trend, see Solberg, *supra* note 14, at 279–80.

However, token representation is still often the norm for Hispanic, Asian-American, and black judges, and many courts (eight of the twelve) have *either* a black or a Hispanic judge(s), but not both.<sup>59</sup> As noted above, no Asian-American or Native American currently sits on our federal appellate bench as an active judge. These two demographic groups lag well behind other minorities in attaining seats on the courts of appeals. Minorities, it seems, still face additional obstacles to greater representation on the bench. Examination of the critical juncture between race and gender underscores this fact. While fifty-seven women and forty-eight minorities have been appointed over the years to service on the courts of appeals, only nine of the minority judicial appointments were also women. Franklin D. Roosevelt appointed the first white woman, while Carter appointed the first African-American woman in 1979. More importantly, the second minority woman was not appointed to the courts of appeals until 1994. In fact, eight of the nine minority women were appointed after 1993, and no Hispanic woman served on the courts of appeals until 1998. This dearth of minority women on the courts of appeals possibly represents an interaction effect of gender and racial prejudices.<sup>60</sup> While both women and minorities are making inroads into our political institutions, women of color still lag far behind.

In terms of presidential replacement patterns, any analysis of diversity effects must concentrate on more recent administrations because earlier Presidents (Carter, Reagan, and G.H.W. Bush) simply did not have the opportunity to replace many nontraditional judges. President Clinton seemed to follow a tit-for-tat strategy when replacing minorities but not when replacing women. This perhaps reflects the reality that appointing and replacing women is no longer a novelty. It is more difficult to assess the patterns of G.W. Bush because, as of this writing, he has made relatively few replacements and has not filled thirteen vacancies. Based on his district court appointments,<sup>61</sup> one would cautiously conclude that he is not likely to replace women with women or minorities with minorities. This supposition was further supported by his first nomination (Chief Justice John Roberts) to fill Justice Sandra Day O'Connor's Supreme Court seat; however, in the end he did briefly attempt to replace O'Connor with another female, although that nomination ultimately failed. It is possible in light of his reduced political support that he may begin to bow to pressure to place an Asian-American on the Ninth Circuit, which is the only circuit that has provided representation for that important and significant minority group.<sup>62</sup>

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59. The First, Fourth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits only have representation from one minority group.

60. Ifill, *supra* note 1, at 451; see also Julissa Reynoso, *Perspectives on Intersections of Race, Ethnicity, Gender and Other Grounds: Latinas at the Margins*, 7 HARV. LATINO L. REV. 63, 64–66 (2004) (discussing intersection effects); Sherri Sharma, *Beyond "Driving While Black" and "Flying While Brown": Using Intersectionality to Uncover the Gendered Aspects of Racial Profiling*, 12 COLUM. J. GENDER & L. 275 (2003) (discussing intersection effects of gender and racial prejudices).

61. Solberg, *supra* note 14, at 5. See generally Solberg & Bratton, *Diversifying*, *supra* note 9.

62. This prediction proved accurate. *Supra* note 32 and accompanying text.

**Table 2A: Racial Breakdown of James E. Carter's Courts of Appeals Appointees and Their Predecessors**

Appointee	Predecessor						
		White	African-American	Latino	Asian	New Seat	Total
	White	15	0	0	0	29	44
	African-American	4	1	0	0	4	9
	Latino	1	0	0	0	1	2
	Asian	1	0	0	0	0	1
	Total	21	1	0	0	34	56
* These numbers reflect those judges who left the bench <u>and</u> were replaced by James E. Carter.							

**Table 2B: Gender Breakdown of James E. Carter's Courts of Appeals Appointees and Their Predecessors**

Appointee	Predecessor				
		Male	Female	New Seat	Total
	Male	19	1	25	45
	Female	2	0	9	11
	Total	21	1	34	56
* These numbers reflect those judges who left the bench <u>and</u> were replaced by James E. Carter.					

**Table 2C: Racial Breakdown of Ronald Reagan's Courts of Appeals Appointees and Their Predecessors**

Appointee	Predecessor						
		White	African-American	Latino	Asian	New Seat	Total
	White	50	0	1	1	24	76
	African-American	1	0	0	0	0	1
	Latino	0	0	0	0	1	1
	Asian	0	0	0	0	0	0
	Total	51	0	1	1	25	78
* These numbers reflect those judges who left the bench <u>and</u> were replaced by Ronald Reagan.							

<b>Table 2D: Gender Breakdown of Ronald Reagan's Courts of Appeals Appointees and Their Predecessors</b>					
Appointee	Predecessor				
		Male	Female	New Seat	Total
	Male	53	0	21	74
	Female	0	0	4	4
	Total	53	0	25	78
*These numbers reflect those judges who left the bench <u>and</u> were replaced by Ronald Reagan.					

<b>Table 2E: Racial Breakdown of G.H.W. Bush's Courts of Appeals Appointees and Their Predecessors</b>							
Appointee	Predecessor						
		White	African-American	Latino	Asian	New Seat	Total
	White	27	2	0	0	4	33
	African-American	1	0	0	0	1	2
	Latino	2	0	0	0	0	2
	Asian	0	0	0	0	0	0
	Total	30	2	0	0	5	37
* These numbers reflect those judges who left the bench <u>and</u> were replaced by G.H. Bush.							

<b>Table 2F: Gender Breakdown of G.H.W. Bush's Courts of Appeals Appointees and Their Predecessors</b>					
Appointee	Predecessor				
		Male	Female	New Seat	Total
	Male	25	0	5	30
	Female	7	0	0	7
	Total	32	0	5	37
*These numbers reflect those judges who left the bench <u>and</u> were replaced by G.H. Bush.					

<b>Table 2G: Racial Breakdown of William J. Clinton's Courts of Appeals Appointees and Their Predecessors</b>							
Appointee	Predecessor						
		White	African-American	Latino	Asian	New Seat	Total
	White	40	1	0	1	3	45
	African-American	4	3	0	0	2	9
	Latino	5	1	0	0	1	7
	Asian	0	0	1	0	0	1
	Total	49	5	1	1	6	62
	* These numbers reflect those judges who left the bench <u>and</u> were replaced by William J. Clinton.						

<b>Table 2H: Gender Breakdown of William J. Clinton's Courts of Appeals Appointees and Their Predecessors</b>					
Appointee	Predecessor				
		Male	Female	New Seat	Total
	Male	35	3	4	42
	Female	17	1	2	20
	Total	52	4	6	62
*These numbers reflect those judges who left the bench <u>and</u> were replaced by William J. Clinton.					

<b>Table 2I: Racial Breakdown of G.W. Bush's Courts of Appeals Appointees and Their Predecessors</b>							
Appointee	Predecessor						
		White	African-American	Latino	Asian	New Seat	Total
	White	29	4	0	0	0	33
	African-American	4	0	0	0	0	4
	Latino	2	0	1	0	0	3
	Asian	0	0	0	0	0	0
	Total	35	4	1	0	0	40
* These numbers reflect those judges who left the bench <u>and</u> were replaced by G.W. Bush.							

Appointee	Predecessor				
		Male	Female	New Seat	Total
	Male	28	3	0	31
	Female	8	1	0	9
	Total	36	4	0	40
*These numbers reflect those judges who left the bench <u>and</u> were replaced by G.W. Bush.					