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The Importance of Diversity in the Federal Judiciary

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Today's hearing is about diversity in the federal judiciary. As a preliminary matter there may have been a colorable argument that it would be salutary to increase the number of, say, black state court judges in years ago when racial discrimination had been rampant. It is at least defensible to argue that the presence of black judges might help build confidence among black litigants that their matters would be fairly and impartially adjudicated. But even then, any inclination toward expanding judicial diversity should have been consistent with the overriding principle of non-discrimination.

Today, some continue to urge that we should diversify the federal judiciary in order to increase the "legitimacy" of the courts among the public. Taken to its logical conclusion, however, this might actually undermine public confidence in the judiciary. It suggests, whether subtly or overtly, that unless one appears before a judge who shares your skin color and ethnic background, you cannot trust that your case will be fairly adjudicated. Perpetuating that notion derogates public faith in the judicial system.

Some may respond that that people need to see themselves represented among members of the bench. However, the average citizen is unaware of the identities of most, if not all, of the federal judges in the district or circuit, and even less aware of the racial composition of such courts. Most only know the race of a federal judge before whom they happen to appear. If we encourage the belief that you need to "see yourself" represented on the bench, we are only going to undermine faith in the fairness of judicial decisions overall.

I am concerned that some of those who advocate for a more racially diverse federal judiciary do so because they believe judges should issue decisions based on perceived racial or ethnic interests. For example, in 2019 the Center for American Progress issued a report entitled, "Building a More Inclusive Federal Judiciary." It cautioned:

There is a common misconception that descriptive and substantive representation are intrinsically linked. The theory goes that by improving descriptive representation, better substantive representation will automatically follow. But this is not always the case. . . . [C]onsider Justice Clarence Thomas, the second African American judge confirmed to the Supreme Court. . . . he has been a staunch opponent of affirmative action programs and has voted to eliminate important voting rights protections that were designed to protect people of color from voter suppression. Justice Thomas offers a good lesson against making assumptions about the viewpoints and jurisprudential approaches of judges of color or those from other underrepresented groups. He also presents a good reminder that when it comes to improving the diversity of members of the bench, the United States needs judges who represent underrepresented groups both descriptively and substantively.

Apparently, the argument is that Justice Thomas does not share typical progressive views of the law and, therefore, he does not "substantively" represent African-Americans. This attitude has

contributed to the dearth of minority judges on the federal bench. For example, we might have had a Hispanic Supreme Court justice years before Justice Sotomayor's nomination, but Senate Democrats subjected Miguel Estrada to a no-holds-barred confirmation fight, fearing that if he was confirmed to the federal bench he would soon be nominated to the Supreme Court.

Well intended but misguided policies have contributed to a supposed dearth of diverse judges in another way. There is a profound academic achievement gap between black and Hispanic students on the one hand and white and Asian student on the other. This gap begins early in students' academic careers. It is because of this gap that universities and law schools give admissions preferences to black and Hispanic students. Those preferences end up harming many of the beneficiaries, who are "mismatched". They struggle in law school, which makes it more difficult for them to obtain the clerkships and other prestigious positions in law firms and government that are necessary if one wishes to become a federal judge.

I am unaware of any credible studies that show that a more "diverse" judiciary would yield "better" decisions. It is unclear how one would even try to measure that. One could compare rates of reversals, but that will not be particularly helpful. For example, according to the Center for American Progress, the Ninth Circuit is the most reversed appellate circuit, but it has neither the greatest disparity between the percentage of white judges compared to the population in its circuit, nor the smallest disparity.

It also seems unlikely to me that diversifying the federal judiciary would lead to appreciably different outcomes, even if one believes that judges' decisions are influenced by explicit or implicit bias. The decisions of federal appellate judges, in particular, tend to pertain to highly technical questions. Do white judges and black judges have different interpretations of standing requirements, Section 1 of the Sherman Act or Section 8 (a)(3) of the National Labor Relations Act

There is a possibility that white judges and black judges could, on average, come to different decisions in some cases. Is that because of their race, or because black judges may be more likely to have, say, progressive political views? Perhaps black judges are more disposed toward black plaintiffs in a discrimination case, but perhaps they would be more likely to be inclined toward *any* plaintiffs in a discrimination case

It might be argued that even if, e.g., black judges are more likely to give a lenient sentence to defendants because of the judges' progressive views and not out of concern for black defendants, blacks will still benefit. But which black people? The black gang member who is on trial? Or the black mother maimed in a drive-by shooting?

Increasing the diversity of the federal bench should not override equal treatment under the law, nor should it trump proficiency and excellence. Casting a wide net in the application process to insure as many diverse candidates as possible are vetted is consistent with the imperative of nondiscrimination while increasing the probability of selecting more diverse candidates.