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Arrie W. Davis
Former Judge, Maryland Court of Special Appeals

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ARTICLE

THE RICHNESS OF EXPERIENCE, EMPATHY, AND THE ROLE OF A JUDGE: THE SENATE CONFIRMATION HEARINGS FOR JUDGE SONIA SOTOMAYOR

By: The Honorable Arrie W. Davis*

Since the Senate confirmation hearings of Judge Robert Bork, Supreme Court nominees have rarely been forthcoming in answering questions about their personal views on controversial topics, including how expansive a judge's role is in deciding cases. In recent years, the now

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* Senior Judge, Maryland Court of Special Appeals, author of approximately 1,900 opinions, of which 275 are published opinions of the Court since 1990; trial judge on the District Court for Baltimore City and Circuit Court for Baltimore City from March, 1981 to December, 1990; Faculty Member, Maryland Judicial Institute. Many of the themes developed in this article have been lifted from a course that I teach annually to Maryland judges appointed within the preceding year. My thanks go out to my former law clerk, Ranya Ghuma, for her invaluable assistance in the preparation of this article. I also wish to acknowledge two colleagues and special friends, Chief Judge of the Court of Appeals, Robert M. Bell and former Chief Judge of the Court of Special Appeals, Joseph F. Murphy, who, by their careers, have provided inspiration for many of the perspectives provided herein and who will celebrate with me our fortieth anniversary as members of the Maryland Bar on December 19, 2009.

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Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of the Government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is—and is often the only—protector of the individual rights that are the heart of our democracy.


The Reagan White House, stunned by the rapid response to Kennedy's "Robert Bork's America" speech, did not respond for two and a half months. Miranda, supra. The Senate confirmation hearings began on September 15, 1987 and Bork's nomination was ultimately defeated after a hotly contested debate in the United States Senate. Id.; see also James Reston, WASHINGTON, Kennedy and Bork, N.Y. TIMES, Jul. 5, 1987, § 4, at 15 (discussing contentious nature of the Judge Bork's nomination proceedings).

The first use of the term "Borked" as a verb was possibly by the Atlanta Journal-Constitution on August 20, 1987, when it "referred to the way Democrats savaged Ronald
familiar “kabuki dance” of Supreme Court nominees could be best characterized by scholars who spoke of Thomas Jefferson as never being in a state of “verbal undress.” Supreme Court nominees appearing for confirmation before the Senate Judiciary Committee are understandably circumspect in responding to questions designed to uncover their political and ideological perspectives because, to do so, exposes them to the charge that their decision-making will be based on such perspectives. That such a concern is warranted is borne out by the statement of Senator Lindsey Graham of South Carolina in addressing Judge Sotomayor during the confirmation hearing:

The reason these speeches [made to groups of law students] matter and the reasons elections matter is because people now understand the role of the court in modern society when it comes to social change. That’s why we fight so hard to put on the court people who see the world like us. That’s true from the left, and that’s true from the right.

Senator Graham’s statement is emblematic of the respective positions of warring political and cultural factions whose goal is nothing less than a Supreme Court constituted by nine justices, all reflective of the point of view of the respective factions.

President Barack Obama’s public announcement that his ideal nominee for the Supreme Court should possess empathy provided the opportunity for those who opposed the appointment of Judge Sonia


In an August 11, 2006, interview conducted by David Brancaccio of PBS, when asked about the language of politicians, actress and playwright, Anna Deveare Smith responded: “It was a Jefferson scholar who told me that Jefferson could never be found in verbal undress.” NOW: Show 232 (PBS television broadcast Aug. 11, 2006) (transcript available at http://www.pbs.org/now/transcript/232.html).


Sotomayor to the Supreme Court to question whether Judge Sotomayor could be dispassionate in her decision-making. The process surrounding Judge Sotomayor’s confirmation reflects the perennial debate as to whether, and to what extent, a judge’s personal experiences should influence his or her adjudication of disputes. The questions posed by the members of the Senate Judiciary Committee and Judge Sotomayor’s responses provide the framework for the instant analysis of the proper role of a judge. Rather than an examination of Judge Sotomayor’s judicial philosophy, as reflected in her seventeen-year career as a judge on the United States District Court for the Southern District of New York and the Second Circuit Court of Appeals, the focus of this article is on where we are in the public conversation regarding the role of a judge.

As background, Part I consists of an explication of various theories of judicial philosophy, i.e., whether a judge’s role is restricted solely to applying the letter of the law or whether, under certain circumstances, judges may rely on policy factors to ensure that the application of the law reflects and serves important societal interests. In Part II, the article considers the extent to which a judge’s personal experiences, ideology, identity, and world view should influence his or her decision-making. The role of empathy and collegiality in judicial decision-making is also addressed. Part III anchors the discussion with a reminder of the importance of precedent and the rule of law. Finally, the conclusion makes the case for why it is important that there be justices or judges with divergent views on the Supreme Court (or any appellate court) facilitating a crucible of robust debate, out of which emerge decisions properly tested by perspectives representative of the broad societal spectrum.

I. FORMALISM, REALISM, AND WHAT LIES IN BETWEEN: THE REALITIES OF JUDICIAL DECISION-MAKING

During her confirmation hearing, Judge Sotomayor was roundly criticized by various members of the Senate Judiciary Committee for what they perceived to be indicia of Judge Sotomayor’s bias and inability to be impartial and the prospect that her decisions would be rooted in “identity politics.” Particular emphasis was placed on comments made

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by the judge in a 2001 lecture for a symposium entitled *Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation*, during which she stated that she “would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.” Senator Jon Kyl, a Republican from Arizona, further asked the

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[A] wide range of political activity and theorizing founded in the shared experiences of injustice of members of certain social groups. Rather than organizing solely around belief systems, programmatic manifestoes, or party affiliation, identity political formations typically aim to secure the political freedom of a specific constituency marginalized within its larger context.


Hon. Sonia Sotomayor, *Judge Mario G. Olmos Memorial Lecture: Latina Judge’s Voice*, 13 La Raza L.J. 87, 92 (2002). It is helpful, for purposes of context, to reproduce here the statements made by Sonia Sotomayor that preceded and followed the now infamous “wise Latina” comment:

> Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging. Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes that line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.

> Let us not forget that wise men like Oliver Wendell Holmes and Justice Cardozo voted on cases which upheld both sex and race discrimination in our society. Until 1972, no Supreme Court case ever upheld the claim of a woman in a gender discrimination case. I, like Professor Carter, believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable. As Judge Cedarbaum pointed out to me, nine white men on the Supreme Court in the past have done so on many occasions and on many issues including *Brown*.

However, to understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Others simply do not care. Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench. Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.

nominee to account for additional comments made in that same lecture, in which she remarked:

[B]ecause I accept the proposition that, as Judge Resnik describes it, “to judge is an exercise of power” and because as, another former law school classmate, Professor Martha Minnow of Harvard Law School, states “there is no objective stance but only a series of perspectives—no neutrality, no escape from choice in judging,” I further accept that our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that—it’s an aspiration because it denies the fact that we are by our experiences making different choices than others.9

In his opening comments, Senator Kyl attacked President Barack Obama’s comments, made during the confirmation hearing for Chief Justice John Roberts, where then-Senator Obama articulated that adherence to legal precedent would dispose of ninety-five percent of the cases but that, in those five percent of truly difficult cases before the Supreme Court, where constitutional text does not directly govern, what matters in a nominee is “what is in the judge’s heart.”10 In Senator Kyl’s opinion, the foregoing comments by Judge Sotomayor suggested that she adhered to this “new model of judging,” rather than one emphasizing impartiality and the application of the law, placing her and President Obama, in Senator Kyl’s view, “outside the mainstream.”11 Senator Kyl was not alone in pursuing this line of questioning.12 Conservative senators on the Judiciary Committee premised their questions on the assumption that, notwithstanding Judge Sotomayor’s professed “fidelity to the law,” her prior speeches and public statements reflected the view that it was a proper function of federal circuit court judges to “make” law.13 The views expressed by many of the senators manifested their
concerns regarding whether Judge Sotomayor’s view of her role as a judge was more expansive than appropriate and whether, as a member of the Court, she would propagate an ideology culturally unacceptable to them.14

Judge Sotomayor, for her part, emphatically rejected any attempt to paint her as a judge motivated by bias rather than guided by impartiality. During her opening comments, Judge Sotomayor characterized her judicial philosophy as simply “fidelity to the law . . . . The task of a judge is not to make law. It is to apply the law.”15 In response to questioning by Senator Kyl, Judge Sotomayor disagreed with comments made by then-Senator Obama regarding “what is in the judge’s heart” as the “critical ingredient” in determining hard cases.16 According to Judge Sotomayor, “[i]t’s not the heart that compels conclusions in cases, it’s the law.”17 As for the “wise Latina” comment, Judge Sotomayor argued that “[t]he context of the words that I spoke have created a misunderstanding,” adding:

To give everyone assurances, I want to state upfront, unequivocally and without doubt, I do not believe that any ethnic, racial or gender group has an advantage in sound judging. I do believe that every person has equal opportunity to become a good and wise judge, regardless of their background or life experiences.18

When asked whom she considered worthy of emulation, Judge Sotomayor cited Benjamin Cardozo, who served on the Supreme Court

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14 See, e.g., Sen. Grassley Questions Judge Sotomayor at Supreme Court Nomination Hearings, WASH. POST, July 16, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071602214.html (questioning Judge Sotomayor about her commitment to applying precedent and whether she believes the Supreme Court should fill vacancies in the law left by Congress); Sen. Graham Questions Judge Sotomayor at Supreme Court Nomination Hearings, supra note 4 (“The reason these speeches matter and the reasons elections matter is because people now understand the role of the court in modern society when it comes to social change. That’s why we fight so hard to put on the court people who see the world like us. That’s true from the left, and that’s true from the right.”); Chairman’s Opening Statements, Cornyn Questions Sotomayor at Supreme Court Nomination Hearings, WASH. POST, July 15, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/15/AR2009071501255.html.
17 Id.
18 Id.
from 1932 to 1938,\(^{19}\) for his “great respect for precedent . . . and deference to the Legislative Branch.”\(^{20}\)

Despite Judge Sotomayor’s attempts to establish her \textit{bona fides} as an impartial judge committed to deciding cases fairly and promoting the rule of law, Senator Jeff Sessions, the senior Republican on the Senate Judiciary Committee, concluded that, “[i]n speech after speech, year after year, Judge Sotomayor set forth a fully formed . . . judicial philosophy that conflicts with the great American tradition of blind justice and fidelity to the law as written.”\(^{21}\) Senator Sessions joined five other Republican senators in voting against Judge Sotomayor’s confirmation.\(^{22}\) Thirteen members of the Senate Judiciary Committee, including twelve Democrats and Republican Senator Lindsey Graham, voted in favor of confirmation.\(^{23}\)

Certainly, the picture of how a judge approaches his or her role is more complicated than either the questions or the responses articulated at Judge Sotomayor’s confirmation hearings represent. Is it credible, as Senator Sessions suggested at the confirmation hearings, that the ability to empathize with victims of injustice or to identify with marginalized groups “conflicts” with “blind justice” and the rule of law?\(^{24}\) Or, does

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\(^{19}\) Columbia University, Justice Cardozo’s alma mater, writes:

Considered one of the great legal thinkers in American history, Benjamin Cardozo was especially known as a spokesman on sociological jurisprudence and the relationship between law and social change. He exerted his wide influence from two prominent positions: first as a judge, and later chief judge, of the New York State Court of Appeals; then, from 1932 until his death, as an associate justice of the U.S. Supreme Court. There he joined with Louis D. Brandeis and Harlan Fiske Stone (1898 Law) to uphold early New Deal legislation. Cardozo expounded his philosophy of law and the judicial process in three classics of jurisprudence: \textit{The Nature of the Judicial Process} (1921), \textit{The Growth of the Law} (1924), and \textit{The Paradoxes of Legal Science} (1928).

\(^{20}\) See Jeffrey Rosen, \textit{What’s Wrong with Judges Legislating from the Bench?}, \textit{Time}, July 16, 2009, http://www.time.com/time/politics/article/0,8599,1910714,00.html. As Rosen points out, ironically, it was Justice Cardozo who wrote that judges, like legislators, must get their experience from life and, in cases where the law is unclear, that a judge must sometimes “pronounce judgment . . . according to the rules which he [or she] would establish if he [or she] were to assume the part of a legislator.” \textit{Id.}


\(^{23}\) \textit{Id.}

\(^{24}\) \textit{Id.}
justice require that the judiciary include judges who can empathize with those subject to their dispensation? More to the point, is it possible for a judge, tasked with the role of applying the law in a wide range of discretionary contexts, to act without regard to the perspectives and experiences informing that judge’s background? If not, what personal qualities, training, and ideological perspective render one best suited to the process of adjudication?

In his keynote address to a Boston University School of Law symposium on the *Role of the Judge in the Twenty-First Century*, Judge Richard Posner described three categorical conceptions of a judge’s approach to the judicial process. These categories, which constituted, in Posner’s view, three “points of an equilateral triangle,” were identified by Posner as “formalism, politics, and pragmatism.” Others addressing the subject of methodological approaches to legal reasoning have similarly identified three “discrete forms of legal analysis,” described at different times as “deduction,” “analogy,” and “practical reasoning,” or “formalism,” “analogy,” and “realism.” In other instances, judicial decision-making has been organized in terms of the “legal” model, the “political” model, the “strategic” model, and the “litigant-driven” model.

Volumes have been written about the nuances contained within each of these approaches and their relative strengths and weaknesses. No matter the characterization, two key strands emerge from the literature. These involve the degree to which a judge regards the law as the sole source from which the “truth” emerges versus the degree to which a judge integrates his or her ideological, social, or political preferences into decision-making. The contradistinction between reliance solely on literal law and integration of the judge’s personal perspective, in the preceding statement, intimates that, for many commentators, these two approaches, which, respectively, are often associated with a “formalist” or “realist” approach to legal decision-making, are viewed as mutually exclusive.

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26 Id.
28 Huhn, supra note 27, at 308.
This article embraces the thesis that a judge, in reality, often applies both approaches. As support for that proposition, and to apply it to the following examination of Judge Sotomayor’s confirmation hearings, a brief explanation of both formalism and realism is required.

Neither formalism nor realism is susceptible to uniform definition. Formalism, for example, has been used to describe both the classical roots of the doctrine along with its modern variants. Rather than provide a definitive synopsis of the literature and theory defining these two doctrines, it suffices for purposes of this article to set forth broad distinctions between what has become generally known as “formalism” and the countervailing “realist” approach.

Classical formalism, at its core, is generally understood as the “traditional” or “conventional” conceptualization of appropriate judicial decision-making. Sometimes described as a “Langdellian” approach to legal reasoning, formalism treats the law as a set of scientific formulae or principles that are derived from the study of case law. These principles


The terms “legal formalism” and “legal realism” have a long history in legal thought. Over the years they have accrued so many meanings and valences that each has become an all-purpose term both of approbation and of disapprobation, surpassing in this respect even “judicial self-restraint” and “judicial activism.” “Formalist” can mean narrow, conservative, hypocritical, resistant to change, casuistic, descriptively inaccurate (that is, “unrealistic” in the ordinary-language sense of the word), ivory-towered, fallacious, callow, authoritarian—but also rigorous, modest, reasoned, faithful, self-denying, restrained. “Realist” can mean cynical, reductionist, manipulative, hostile to law, political, left-wing, epistemologically naive—but also progressive, humane, candid, mature, clear-eyed. These usages reflect the polemical character of so much writing about law. Legal realism is also used to refer to the work of particular academic lawyers, mainly on the Yale and Columbia faculties during the 1920’s and 1930’s, and to specific (and diverse) ideas held by those men. Legal formalism refers to the work of judges and academic lawyers whom the legal realists attacked and who attacked the realists in turn.


32 See, e.g., Richard H. Pildes, Roots of Formalism: Forms of Formalism, 66 U. CHI. L. REV. 607 (1999). Professor Pildes emphasizes that modern formalisms differ sharply in structure and in underlying justifications, rendering it difficult to view them as forming part of a coherent or unified vision of modern legal formalism. See id.

33 See Posner, The Role of the Judge in the Twenty-First Century, supra note 25, at 1051.

34 See Pildes, supra note 32, at 608-09. Pildes explains that modern American legal formalism manifests in various modes and that classical formalism represented a “scientific system of thought” that “meant more than legal decisionmaking as rule-applying and deductive reasoning”—concepts applicable to any system of law—but rather envisioned a scientific system of rules and institutions that were complete in that the system made right answers available in all cases; formal in that right answers could be
create an internal analytical framework which, when applied to a set of facts, leads the decision-maker, through logical deduction, to the correct outcome in a case.35 Defenders of formalism posit that it "proffer[s] the possibility of an 'immanent moral rationality'"36 based on careful study of the law:

In the formalist conception, law has a content that is not imported from without but elaborated from within. Law is not so much an instrument in the service of foreign ideals as an end in itself constituting, as it were, its own ideal. Rather than being an exclusively positivist transformation of the non-legal into the juridical, law can involve the recognition of that which already has an inchoate juridical significance. The paradigmatic legal function is not the manufacturing of legal norms but the understanding of what is intimated by juridical arrangements and relationships. Legal creativity here is essentially cognitive, and it is most naturally expressed in adjudication conceived more as the discovery than as the making of law.37

In light of the foregoing discussion, it should come as no surprise that Supreme Court Justice Antonin Scalia adopts, on many issues, a formalist approach.38 For example, Justice Scalia is a staunch proponent of "originalism"39 and "textualism."40 For obvious reasons, a formalist approach lends itself prophetically to an emphasis on textual analysis that strives to discover the objective or "plain meaning" of the "legal text."41 For Justice Scalia, when judges stray from the application of "rules" and engage in policymaking or when they apply discretionary authority, they sacrifice predictability and fairness in the legal process and threaten

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37 Id. at 956.
39 Id. at 531, 537 (explaining that Justice Scalia’s “basic argument is that the Constitution’s meaning is set not by the original intention but by the original meaning of its text”).
40 Id. at 534-35.
41 Huhn, supra note 27, at 309-11.
democratic values by imposing judge-made law.\textsuperscript{42} It is thus that Justice Scalia proclaimed: "Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, of course it's formalistic! The rule of law is about form. . . . Long live formalism. It is what makes a government a government of laws and not of men."\textsuperscript{43}

The formalist approach has been criticized by many legal thinkers, including those who are proponents of the doctrine of legal realism.\textsuperscript{44} Legal realism surfaced in the early twentieth century as a counterweight to formalism.\textsuperscript{45} Generally, legal realism "implores the recognition of the use of social condition as a variable in decision making, in lieu of mere reliance on legal rules which may advance outdated or dysfunctional policies."\textsuperscript{46} Legal realists did not reject the application of rules \textit{in toto}.\textsuperscript{47} Professor Joseph William Singer explains that, for the legal realists, a reliance on legal rules \textit{alone} was misplaced, because rules often contained concepts such as "reasonableness" that were subject to varied interpretations.\textsuperscript{48} Moreover, to the realist, a case "could be read in at least two ways: it could be read broadly to establish a general rule applicable to a wide range of situations, or it could be read narrowly to apply only to the specific facts of the case."\textsuperscript{49} Legal realists recognized that, given the abstract nature of many legal concepts, legal precedent could be appealed to in "competing" and "contradictory" ways to resolve, in one way or another, a particular legal dispute.\textsuperscript{50} Thus, a judge's ideology could sway or influence that judge's view of what facts or law were pertinent to the


\textsuperscript{44} Richard A. Posner, \textit{What has Pragmatism to Offer Law? in PHILOSOPHY OF LAW AND LEGAL THEORY: AN ANTHOLOGY}, 180-83 (Dennis Patterson, ed., 2003) (identifying Oliver Wendell Holmes, Benjamin Cardozo, and Jerome Frank as three of the leading proponents of legal realism).

\textsuperscript{45} See Huhn, \textit{supra} note 27, at 309-18.


\textsuperscript{47} \textit{Id.}


\textsuperscript{49} Singer, \textit{supra} note 48, at 470 (citing Andrew Altman, \textit{Legal Realism, Critical Legal Studies, and Dworkin}, 15 PHIL. & PUB. AFF. 205, 208 (1986)).

\textsuperscript{50} \textit{Id.} (citing Altman, \textit{supra} note 49, at 209).
resolution of the dispute or, more to the point, how to interpret the pertinent facts or law.\(^{51}\) Professor Singer further explains:

The realists did not believe, however, that the indeterminacy of legal rules meant that all generalizations are meaningless and that decisions are controlled only by the psychological make-up of the judge. Social context, the facts of the case, judges' ideologies, and professional consensus critically influence individual judgments and patterns of decisions over time. The realists felt that study of such factors could improve predictability of decisions. Moreover, they sought to develop new kinds of general rules that would be useful in predicting legal outcomes and in shaping the law better to serve the needs of society. One goal of realism was to make rules more specific, for example, by creating different rules for contracts between merchants and contracts with consumers. Another way was to replace formalistic deduction of consequences from abstract concepts with explicit policy, moral, and institutional analysis. The realists thought that restructuring law and legal reasoning along these lines would both make the legal system more predictable and make the rules better conform to social needs.\(^{52}\)

Whether informed by realism or not, it is worth noting that the Supreme Court has repeatedly rejected the idea that judges are "mere machines," mechanically applying legal doctrines.\(^{53}\)

The idea that a judge must necessarily be all formalist or all realist in approach, relying on "just the law" or being guided solely by personal ideology, does not reflect the day-to-day reality of judicial decision-making, nor does it represent the desired approach. For Judge Posner, the judicial approach most descriptive of appellate judges in the American judiciary is the "pragmatic" approach, which compels the judge to "decide cases with reasonable dispatch, as best one can ..."\(^{54}\) In many

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\(^{51}\) See, e.g., Sylvia R. Lazos Vargas, Essay, Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity, 58 Md. L. Rev. 150, 197, 199 (1999) (explaining that the realist or Critical Legal Studies approach recognizes that judges’ "ideologies," or the "unstated assumptions of their common sense of the world, will shape which context judges find relevant in difficult cases") (citations omitted).

\(^{52}\) Singer, supra note 48, at 470-71 (internal citations omitted).

\(^{53}\) See Lee Anne Fennell, Between Monster and Machine: Rethinking the Judicial Function, 51 S.C. L. Rev. 183, 195 & n.45 (1999) (citing to several Supreme Court opinions and various dissents using language critical of mechanical considerations or approaches).

\(^{54}\) Posner, The Role of the Judge in the Twenty-First Century, supra note 25, at 1053. Posner has also written about "pragmatism" in other venues. See, e.g., Richard Posner, Pragmatic Adjudication, 18 CARDOZO L. REV. 1 (1996); Richard Posner, What Has Pragmatism to Offer Law, 63 S. Cal. L. Rev. 1653 (1990). In this article, I do not wish to express an opinion, one way or the other, as to whether "pragmatism" is the philosophy by
cases, a judge’s political leanings as a “conservative” or a “liberal” is a predictor in that judge’s resolution of a dispute. In other cases, a judge rules inconsistent with his or her “politics”—a reality underlined by unanimous decisions on politically charged issues. In other words, a judge may, in some instances, apply “formalistic” approaches while, in other instances (or even, at times, simultaneously), be guided by ideological preferences relevant to what the judge believes will advance a particular societal interest. Professor Wilson Huhn argues that formalism, analogy (or reasoning by example), and realism should not be viewed as isolated doctrines but, rather, as “stages of legal reasoning.” Professor Huhn further posits that “examination of judicial opinions in hard cases reveals that courts progress from formalism, to analogy, to realism, in resolving difficult questions of law.”

Moreover, Professor Chemerinsky rightly denounces the “false allure of formalism” as promising “largely discretion-free judging,” when the exercise of judicial discretion is a crucial part of a judge’s role. The myth of “discretion-free judging” does not, in Chemerinsky’s view, take into account the fact that judges are often called upon to balance competing interests, e.g., a criminal defendant’s right to a fair trial against the freedom of the press, or the President’s interest in executive privilege and secrecy against the need for evidence at a criminal trial, in order to render a decision. Similarly, the concept of originalism, which espouses which judges should ideally guide their decision-making. Rather, I cite to Posner’s discussion to demonstrate that there are models that recognize the interplay between formalistic and realistic approaches in the dispatch of a judge’s duties.

55 Posner, The Role of the Judge in the Twenty-First Century, supra note 25, at 1052 (citing, inter alia, Cross, supra note 29, at 1479-82). Cross discusses how judicial self-reporting “provides persuasive support for the political model of . . . decisionmaking,” a model which is based on the principle that “judges are dedicated to advancing their own personal ideological preferences, which generally fall along a conventional liberal-to-conservative continuum.” Cross, supra note 29, at 1471, 1479.

56 See also Cross, supra note 29, at 1482 (explaining that “while the empirical evidence on the political model may conflict with the legal model, it is not so strong as to demonstrate that the legal model has no practical importance”).

57 See Posner, The Role of the Judge in the Twenty-First Century, supra note 25, at 1053. See also Fennell, supra note 53.

[D]iscretionary and rules-based approaches to judging can each be dangerous in isolation. Yet both approaches are indispensable to judging, and are not mutually exclusive. Instead of quibbling over the relative merits of the worldviews and philosophical positions that each approach suggests, legal theorists should focus their efforts on arriving at a workable synthesis.

Id. at 209.

58 Huhn, supra note 27, at 305.

59 Id. Huhn is careful to assert that these “stages” do not reflect a hierarchy, such that any one “stage” is superior to another. Id. at 306.

60 Chemerinsky, supra note 48, at 1070-72.

61 Id. at 1071-72.
constitutional interpretation "divorced from the value of individual judges," is, in Chemerinsky's view, flawed, because the original intent of the framers of the Constitution cannot be divined without resort to discretion by judges in deciding that intent.\textsuperscript{62} Citing as an example, the Ninth Circuit's decision in \textit{Silveira v. Lockyer}\textsuperscript{63} and the Fifth Circuit's decision in \textit{United States v. Emerson},\textsuperscript{64} which arrived at opposing conclusions as to whether the original meaning of the Second Amendment was to protect an individual's right to possess and bear arms, Professor Chemerinsky points out that historical quotations may be found in support of either side of almost any argument regarding constitutional construction.\textsuperscript{65}

The argument that "discretion-free" judging, devoid of the influence of one's identity or experiences, is implausible in a profession populated by human beings, and not machines, is compelling and shared by many others who have had occasion to pontificate on the matter, including this author. Judge Shirley S. Abrahamson, Chief Justice of the Wisconsin Supreme Court, aptly stated:

Judging requires more than such a mechanical application of pure reason to legal problems. To be sure, legal principles and logic necessarily influence the outcome of every case. But though they alone will determine many cases, in other cases they will not suffice. Principles may admit of more than one interpretation, conflicting principles may apply, or the application of principles to the facts may be unclear. In cases such as these, the blindfolded judge who is blind to the real world in which the parties live is blind indeed, bereft of a basis on which to make an intelligent, let alone fair, decision.\textsuperscript{66}

Notably, Supreme Court justices, on numerous occasions, have expressed how social identification is \textit{relevant} to their consideration of a case. During his confirmation hearings, in response to a comment by Republican Senator Tom Coburn that Justice Alito had, during the hearings, been "unfairly criticized" as not caring about the "less fortunate," the "little guy," or the "weak or the innocent,"\textsuperscript{67} Justice Alito, in a poignant expression of empathy, stated:

\textsuperscript{62} \textit{Id.} at 1072-73.  
\textsuperscript{63} 312 F.3d 1052 (9th Cir. 2002).  
\textsuperscript{64} 270 F.3d 203 (5th Cir. 2001).  
\textsuperscript{65} Chemerinsky, \textit{supra} note 48, at 1072-73.  
\textsuperscript{67} \textit{Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong.} 475 (2006).
[W]hen a case comes before me involving, let’s say, someone who is an immigrant, and we get an awful lot of immigration cases and naturalization cases, I can’t help but think of my own ancestors, because it wasn’t that long ago when they were in that position. And so it’s my job to apply the law. It’s not my job to change the law or to bend the law to achieve any result. But when I look at those cases, I have to say to myself, and I do say to myself, this could be your grandfather. This could be your grandmother. They were not citizens at one time, and they were people who came to this country.

When I have cases involving children, I can’t help but think of my own children and think about my children being treated in the way that children may be treated in the case that’s before me. And that goes down the line. When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account. When I have a case involving someone who’s been subjected to discrimination because of disability, I have to think of people who I’ve known and admired very greatly who had disabilities and I’ve watched them struggle to overcome the barriers that society puts up often just because it doesn’t think of what it’s doing, the barriers that it puts up to them.

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So those are some of the experiences that have shaped me as a person. 68

Justice O’Connor also recognized that the “revolution in the legal profession,” in terms of the representation of women as law school graduates, lawyers and judges, was “due in large part to the explosion of the myth of the ‘True Woman’ through the efforts of real women and the insights of real men.” 69 According to Justice O’Connor, “[t]his change in perspective has been reflected, as most social change eventually is, in the Supreme Court’s jurisprudence.” 70 Even Justice O’Connor’s statement that a “wise old man” and a “wise old woman” may reach the same conclusion, as articulated, reflected her understanding that wisdom may be attained through the diversity of struggles that face people of various backgrounds:

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68 Id.
70 Id. at 1549.
Do women judges decide cases differently by virtue of being women? I would echo the answer of my colleague, Justice Jeanne Coyne of the Supreme Court of [Minnesota], who responded that “a wise old man and a wise old woman reach the same conclusion.” This should be our aspiration: that, whatever our gender or background, we all may become wise—wise through our different struggles and different victories, wise through work and play, profession and family.  

Justice Ginsburg adds:

Judge Jeanne Coyne, who was on the Supreme Court of Minnesota, which I think was the first state Supreme Court to have a majority of women, once said, “A wise old man and a wise old woman will reach the same judgment.” I think that is true. But we also bring to the table our life’s experience, which is different. A very important difference: Are you male? Are you female? Are you a girl from the golden west? Or are you a kid who grew up in Brooklyn? All of those differences, I think, make the Supreme Court bench, make all the benches in the country, ever so much better than they were when only one kind of person sat in the seat of judgment.

II. WHY PERSONAL EXPERIENCES MATTER: THE ROLE OF EMPATHY AND COLLEGIALITY IN JUDICIAL DECISION-MAKING

As the foregoing discussion demonstrates, the purported aversion to the incorporation of Judge Sotomayor’s background and experience into her decision-making, as expressed by those who opposed Judge Sotomayor’s confirmation, reveals a view of the judge’s role that is disproportionately influenced by principles often associated with strict formalism. Because a judge will typically apply approaches identified both with formalism and realism, it follows that the denigration of relying exclusively on one’s personal experiences in judicial decision-making is not borne out by what actually takes place. Simply put, it represents a point of view that does not comport with the reality of being a judge.

More importantly, this author postulates that the ability to tune into one’s personal background and life experiences and the associated ability

72 O’Connor, supra note 69, at 1558 (emphasis added).
to empathize with the circumstances and world-view of others is, indeed, integral to a judge's ability to reach an appropriate conclusion in a given case. In the context of judicial decision-making, empathy, which, at its core, involves the ability to understand the life experiences or emotions of another person, need not mean "intuition" nor should it be perceived as injecting the "mystical" into the ordered resolution of disputes. Rather, as Professor Lynne Henderson explains, "empathy enables the decisionmaker to have an appreciation of the human meanings of a given legal situation," ultimately aiding the judge both in the process of reaching a legal conclusion and in justifying that conclusion "in a way that disembodied reason simply cannot." Moreover, the fact that a judge has the ability to empathize with human beings involved in a legal dispute does not mean that the judge is, thus, unable to decide the case in a fair and impartial manner. Professor Catherine Gage O'Grady explains:

Although empathy is sometimes used interchangeably with compassion, sympathy, and pity, empathy as a component of judicial decisionmaking does not mean experiencing sympathy or pity for another and allowing that sympathy to shape an outcome. Empathy in judging is not predictive of outcome—it is part of a process, but it does not carry the day. When a judge proceeds to apply the law and judicially assess a case that is empathically understood, the fact that the judge has achieved empathic understandings may or may not affect the eventual outcome of the case. With respect to judicial decisionmaking, empathy is an important part of the process, not because it may have an impact on the result, but because the incorporation of empathy in judicial

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74 Professor Lynne Henderson, describes the word "empathy" as encompassing three basic phenomena:

(1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another (hence the confusion of empathy with sympathy and compassion). The first two forms are ways of knowing, the third form a catalyst for action.


75 Henderson, supra note 74, at 1576.

76 Id.
decisionmaking will provide a judge with new understandings and enhanced knowledge of context with which to assess a case.\textsuperscript{77}

That we all perceive through the prism of our own unique experiences is beyond cavil. The proper exercise of empathy, for those who exercise authority and wield power over others, in no sense diminishes their ability to make provident, even harsh, decisions. On the other hand, the inability of judges to empathize with individuals subject to their judgment, may, in some instances, result in decisions that reflect only the cloistered perspective of a jurist, disconnected from the everyday experiences of the less fortunate.

\textit{A. The Power of Dissent: Experiences with Poverty and Discrimination}

The dissents of distinguished Supreme Court Justice Thurgood Marshall reflect a judge’s ability to impart to his or her colleagues an understanding of the disparate realities of litigants before the Court, thereby fostering decisions more sensitive to the realities of the litigants and, at times, resulting in outcomes altered by the dissenting view. For example, in \textit{United States v. Kras},\textsuperscript{78} Justice Marshall challenged the majority’s denial of an indigent bankruptcy petitioner’s argument that the imposition of filing fees violated his due process rights.\textsuperscript{79} Kras, beset by poverty and misfortune, resided in a two and one-half bedroom apartment with his wife, two children, his mother, and his mother’s child.\textsuperscript{80} His eight-month old child was undergoing medical treatment for cystic fibrosis.\textsuperscript{81} He was unemployed, after having been discharged by a life insurance company when the premiums collected by him were stolen from his home.\textsuperscript{82} He and his family survived on $366 in monthly public assistance, all of which was expended for rent and basic necessities.\textsuperscript{83} Among his assets, which were of negligible value, Kras owned a couch in storage, for which a six-dollar payment was due monthly.\textsuperscript{84} Kras sought a discharge from his debts in bankruptcy and asked for a waiver of the


\textsuperscript{78} 409 U.S. 434 (1973).


\textsuperscript{80} \textit{Kras}, 409 U.S. at 437-38.

\textsuperscript{81} \textit{id.} at 437.

\textsuperscript{82} \textit{id.}

\textsuperscript{83} \textit{id.} at 438.

\textsuperscript{84} \textit{id.}
$50 bankruptcy filing fee, which the United States District Court for the Eastern District of New York granted, in part, on the grounds that the imposition of such a fee violated his due process rights.\(^8\) Five justices of the Supreme Court disagreed with Kras, in an opinion authored by Justice Blackmun.\(^8\) In his dissent, Justice Marshall cited census figures pertaining to the annual incomes of the poor and derided the majority for the ease with which they assumed a person in Kras’ position could obtain additional income:

It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have—like attempting to provide some comforts for a gravely ill child, as Kras must do.

It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.\(^8\)

Justice Marshall was undoubtedly motivated by his personal background and experiences with the poor to remind a majority of the Court of the disconnect between the Court’s tone and the realities of those in Kras’ position.

So, too, was Justice Stevens motivated in his dissenting opinion in California v. Hodari D.,\(^8\) a dissent joined by Justice Marshall, to question the majority’s “gratuitous quotation” to Proverbs 28:1 (“The wicked flee when no man pursueth”), when the majority, notwithstanding the government’s concession that an officer in that case lacked reasonable suspicion to stop Hodari, stated, without deciding the point: “That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and

\(^8\) Id. at 435-36, 440-41.
\(^8\) Kras, 409 U.S. at 435-50.
\(^8\) Id. at 460 (Marshall, J., dissenting).
arguably contradicts proverbial common sense."\textsuperscript{89} According to the dissent, the majority’s assumption that an innocent person would not run upon sight of a police officer represented an "ivory-towered analysis of the real world" that failed to take into account the experience of many people, particularly minorities.\textsuperscript{90}

The foregoing is indicative of how the presence of those with perspectives informed by direct or indirect experiences with poverty or racial discrimination, and the ability to empathize with litigants as a result of those experiences, are critical to a robust debate on the Court.\textsuperscript{91} Indeed, "racial homogeneity on the bench may limit the depth and scope of judicial decision-making."\textsuperscript{92} Justice Marshall’s ability to empathize and to remind his colleagues on the Court when their failure to do so rendered their decisions less sound, was invaluable. In recognition of the impact that Justice Marshall’s moral clarity had on the court, Justice O’Connor proclaimed:

Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.

At oral arguments and conference meetings, in opinions and dissents, 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.\textsuperscript{93}

According to Justice White, Justice Marshall “brought 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,” such that he would “tell us things that we knew but would rather forget; and he told us much that we did not know due to the limitations of

\textsuperscript{89} Id. at 621 n.1,  
\textsuperscript{90} Id. at 630 n.4 (Stevens, J., dissenting).  
\textsuperscript{92} Sherrilyn A. Ifill, Racial Diversity on the Bench: Beyond Role Models and Public Confidence, 57 WASH. & LEE L. REV. 405, 434 (2000).  
our own experience. Other colleagues on the Court shared these perspectives.

On a more personal note relevant to the importance of experience and empathy in the role of a judge, the prism through which African-Americans have peered over the years, notwithstanding gains never thought to be possible just a few years ago, is one which is certainly different from those of the majority society, African-Americans being the only citizens subjected to racial discrimination sanctioned by the so called "Jim Crow" laws. Although I am aware of no studies of the influence of the life experiences of African-American judges on their decision-making and I would never presume to have an insight as to any such relationship, examples from the experiences of Justice Marshall, my experiences, and the experiences of two former members of my Court provide support, I submit, for the proposition that such experiences serve to sensitize minority judges to issues growing out of their personal experiences without compromising their ability to decide cases in a fair and impartial manner, anchored by the rule of law.

David T. Mason, the first African-American judge appointed to the Maryland Court of Special Appeals, while an attorney, refused to submit to a "frisk" by a Baltimore City police officer as he, two male, and two female friends sat at a table in a local nightclub on Sunday, February 15, 1953, at 1:30 in the morning. Complying with an order by a Baltimore City police sergeant to stand, Mason reiterated his refusal to be searched, but was frisked over his objection. After a Baltimore City trial judge entered judgment in favor of the police sergeant on Mason’s claims of assault and battery and false imprisonment, the Maryland Court of Appeals reversed the judgment of the lower court, mandating, however, only nominal damages. On another occasion, in clearly a triumphant moment, Judge Mason returned as the head of the Maryland Employment Security Administration, an agency that had just a few years before, because of the racial policies of the agency, ordered that he not, as an employee, have contact with the public.

95 See Gellhorn, supra note 79, at 452 nn.164-65, 453 n.166.
97 But see Cook, supra note 91.
98 Frederick N. Rasmussen, David Mason, 88, Cabinet Secretary, First Black Appellate Judge in Md., BALT. SUN, Nov. 18, 2003, at 7B.
100 Id.
101 Id. at 489, 109 A.2d at 132.
102 At a memorial service held by the Court of Special Appeals on January 27, 2004, on the occasion of Judge Mason’s death, over which the writer of this article presided, former
In 1961, at the age of sixteen, Robert M. Bell, currently the Chief Judge of Maryland's highest Court, the Court of Appeals, was arrested, along with eleven other protesters, for trespass on private property as a result of engaging in a sit-in demonstration at Hooper's Restaurant in downtown Baltimore, Maryland. The defendants were fined ten dollars by the Criminal Court of Baltimore. After appeals filed by Tucker R. Dearing and civil rights attorney Juanita Jackson Mitchell, who were joined by Thurgood Marshall and Jack Greenberg on the brief, the Court of Appeals rejected the appellants' contention that, once an owner has opened his or her property to the general public, resort to the Maryland Criminal Trespass Statute, constitutional on its face, was an unconstitutional application of the law. These events were the impetus for the Equal Accommodations Law enacted by the Maryland General Assembly in 1964. Because of the new statute, which was enacted prior to the deliberations on this case, the Supreme Court of the United States, which had granted certiorari, ultimately declined to consider the petitioners' constitutional arguments and vacated the judgments, remanding to the Court of Appeals of Maryland for reconsideration of the convictions in light of the new law. Although the protagonists in Bell v. State did not prevail in the Court of Appeals' second consideration of their case, their efforts were more than pyrrhic. While the Court of Appeals' second consideration of Bell v. State affirmed the judgments against the protestors, the protestors' petition for rehearing, filed approximately one month after the Court affirmed the judgments on remand, was granted. On April 9, 1965, the Court reversed the

Governor Marvin Mandel recounted how Judge Mason had endured the ignominy of being told that, because of racial policies of the agency, he was not to have contact with the public, including processing applications or taking complaints over the phone, as an employee of the Maryland Employment Security Administration, and how he returned triumphantly, as the head of that agency, having been appointed by Governor Mandel.


Bell, 227 Md. at 303-04, 176 A.2d at 771.

Id. at 303-05, 176 A.2d at 771-72.


Bell, 378 U.S. at 239-40, 242; see also Bell, 236 Md. at 358, 204 A.2d at 55.

Bell, 236 Md. at 369, 204 A.2d at 61.

Reynolds, supra note 103, at 793.

When I got this far in my reading for this Article, I realized that I had missed something. The decision by the Court of Appeals discussed in the proceeding paragraphs had affirmed the convictions. But I knew that the convictions had been
judgments.\textsuperscript{110} Justice Marshall, long before his elevation to the Supreme Court in 1967, represented a young 1934 graduate of Amherst College, Donald G. Murray, who had sought—but was denied—admission to the University of Maryland School of Law.\textsuperscript{111} The Law School appealed from an order by the Baltimore City Court, directing the issuance of a writ of mandamus and ordering the Law School to admit Murray.\textsuperscript{112} Citing the State's legal obligation to offer equal treatment in the discharge of its function of educating its citizens, the Court of Appeals ordered that Murray be admitted.\textsuperscript{113} Ironically, a few years earlier, because the University of Maryland School of Law did not admit African-American applicants, Justice Marshall himself had not sought admission.\textsuperscript{114} Over forty years later, still vexed by the Law School's refusal to admit African-Americans, Justice Marshall would decline an invitation to a dedication ceremony, in which the newly constructed University of Maryland School of Law Library was named after him.\textsuperscript{115}

I d. overturned; or, at least, so went local lore. Obviously, my research assistant, a very able student, I might add, had not pulled all of the cases. So, I Shepardized the case myself. To my astonishment, there was no further decision by the Court of Appeals, no reversal following a petition for rehearing.

Eventually, I read the official report of the decision in the Maryland Reporter. (I had been using an online printout of the case from the Atlantic Reporter.) Still nothing. Finally, however, a meticulous re-reading discovered the following. In the Maryland Reporter, the report of the decision on remand lists, as it always does, counsel for the parties; that listing is followed by the date of the decision and the opinions themselves. But if the reader looks very carefully at the report of Bell v. Maryland, she will find the following unusual if not unique entry (reprinted in full):

\begin{quote}
Decided October 22, 1964

\end{quote}

This entry is missing from the report of the remand in the Atlantic Reporter. A researcher, in other words, would know of the reversal only from a very careful reading of the Maryland Reporter, an event most unlikely to happen.

\textsuperscript{110} Id. at 794.
\textsuperscript{111} Pearson v. Murray, 169 Md. 478, 480, 182 A. 590, 590 (1936).
\textsuperscript{112} Id., 182 A. at 590-91.
\textsuperscript{113} Id. at 489, 182 A. at 594.

The University of Maryland Law School was just a few blocks from Marshall's home in Baltimore. Tuition rates were low, and it had a good reputation as a public
The above accounts of notable African-American judges are illustrations of resort to the legal process occasioned by violations of civil rights disproportionately experienced by African-Americans and other minorities, in light of the history of segregation and institutionalized racism in this country. Who better to be an umpire than contestants who have zealously competed within the framework of the rules and have changed those very rules? The most prominent example of such contestants, who demonstrated remarkable skill in utilizing the rules of the game, *i.e.*, the legal system, thereby becoming eminently qualified to be decision-makers, was the legal team assembled by Charles Hamilton Houston, including former President and Dean of the Howard University School of Law, James Nabrit, Spotworth Robinson and Robert Carter. Notably, the team, which ultimately produced such noted jurists as Justice Marshall, A. Leon Higginbotham, and William Hastie, of course, devised the groundbreaking strategy in the presentation of the petitioners' case in *Brown v. Board of Education*. Aside from the need to resort to the legal process, virtually every person of color can recount dozens of instances in which he or she has been stereotyped by strangers according to the degree of exposure to and familiarity within their communities. Other experiences rooted in one's socioeconomic status may also impact the experiences of African-Americans more severely. African-American judges will, accordingly, bring these experiences to the bench.116 As Professor Sherillyn Ifill has observed, the notion that the rest of society is subject to cultural and ideological influences regarding race while judges are passed by is an anomaly.117 For example, while the African-American community is by no means monolithic,118 African-American judges are arguably more likely to have been “exposed to more varied experiences across race and class lines than their white counterparts,” as

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116 Ifill, supra note 92, at 434-36.
117 Id. at 431-32.
118 Id. at 414, 420-21.
African-American communities are disproportionately impacted by poverty. As such, the chances are that the African-American judge has a greater familiarity with litigants in distressed economic circumstances and persons living in single-parent households.

This is not to suggest that sensitivity to issues of race and class is the exclusive province of African-Americans or other traditionally marginalized groups. For members of the majority community, however, predisposition to serve the interests of that community and one’s own interests may, if not otherwise tempered by competing viewpoints, interfere with the proclivity to be sensitive to issues that affect others. The comments of Justice Marshall’s colleagues on the Supreme Court, which are quoted supra, illustrate this point. More recently, Justice Ginsburg was motivated to publicly state that, during the course of the deliberations in Safford Unified School District #1 v. Redding, some of her male colleagues on the bench, in the view of Justice Ginsburg, seemed unable to appreciate the sensitivity of a thirteen-year-old girl who was strip-searched by school authorities on suspicion that she was hiding ibuprofen in her underwear. In an eight-to-one decision, the Court ultimately held that the search violated the Fourth Amendment. Apropos, Justice Ginsburg expressed her preference that a woman be appointed to the seat vacated by retiring Justice Souter.

Nor does the foregoing discussion suggest that those sensitive to these experiences are unable to judge cases fairly and impartially, a point made

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119 Id. at 429-32, 469.
120 Professor Ifill references a survey of black and white federal judges, where “83% of white judges surveyed believe that black litigants are treated fairly in the justice system, while only 18% of black judges share that belief.” Id. at 436 (citing KEVIN L. LYLES, THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS 21, 237 (1997)).
121 See supra Part II.A.
124 Safford Unified School District #1, 129 S. Ct. at 2644. One wonders whether the matter of the justices' sensitivity to the humiliation of a thirteen-year-old girl in these circumstances would ever have become public if Justice Ginsburg’s colleagues had demonstrated, from the outset, what, in Justice Ginsburg’s view, was the appropriate degree of sensitivity to the issue. Ultimately, the Court determined that the search of the thirteen-year-old did constitute a violation of her Fourth Amendment rights. Without having been within those hallowed walls, we cannot know the effect of Justice Ginsburg’s public expression of concern on the Court’s final outcome.
by Professor Ifill in her discussion of diversity and impartiality.\textsuperscript{126} In the interest of full disclosure, Judge Mason was a mentor and close friend until his passing at eighty-seven years of age and my association with Chief Judge Bell extends over a period in excess of forty years. Nevertheless, an examination of the decisions that Judge Mason authored reveals that his decisions are all grounded on settled law and do not reflect any tendency, in the absence of a sound legal basis, to favor defendants in criminal appeals, notwithstanding what he referred to, in submissions to the Court of Appeals in \textit{Mason v. Wrightson},\textsuperscript{127} as an \textquotedblleft humiliating\textquotedblright experience.\textsuperscript{128} The same may be said of Chief Judge Bell, whose opinions, while often in dissent, are a model of clarity and supported by sound legal authority.\textsuperscript{129} The salient point is that their personal experiences and their experiences as lawyers in employing the very legal system that had proven to be a barrier to realizing justice rendered them more sensitive than most to other points of view. Their personal experiences, like those of Justice Marshall, indeed served to

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\textsuperscript{126} See Ifill, \textit{supra} note 92, at 458-62.
\textsuperscript{127} 205 Md. 481, 109 A.2d 128 (1954).
\textsuperscript{128} Id. at 489, 109 A.2d at 132.
\textsuperscript{129} See, e.g., Chief Judge Bell’s dissenting opinions in: Conaway v. Deane, 401 Md. 219, 932 A.2d 571 (2007) (dissent challenging the application of rational basis review to the State’s marriage statute pointing out that the court had previously held that sex-based classifications are entitled to the same review as race-based classifications and that it has been determined that marriage is a fundamental right that should not be denied based on the historical denial of the right to certain groups); Sussemm v. Lamonc, 383 Md. 697, 862 A.2d 1 (2004) (rejecting the majority’s conclusion that “the procedure for electing [court] judges remains [in Maryland] a partisan one in form and in substance” and thus voters unaffiliated with established political parties are not permitted to vote in primary elections for judicial candidates, the dissenting opinion posits that, to preserve the integrity judicial elections, such selections are nonpartisan and, had the argument been made that Article I, Section 1 precludes the exclusion of unaffiliated registered voters from primary elections for circuit court judges, it would have been “persuasive.”); Langston v. Riffe, 359 Md. 396, 754 A.2d 389 (2000) (dissent challenging the majority’s departure from the legislative history of the statute and the Court’s past position of protecting the finality of declarations of paternity and serving the best interest of the child in holding that a legislative amendment entitles all with an order declaring paternity prior to October 1, 1995 without a genetic test to reopen proceedings and demand a blood test to determine paternity); Ayers v. State, 335 Md. 602, 645 A.2d 22 (1994) (In a hate crime case, the Court of Appeals affirmed the convictions and Chief Judge Bell dissented, challenging the majority’s decision upholding the admission of “other crimes evidence” of defendant’s exchange of racial epithets with a group of African-American men several days before the crime. In dissent, Chief Judge Bell challenged the admissibility of the evidence, explaining that the hate crimes statute proscribes selection of a victim on the basis of race and not bigotry itself. Although the testimony regarding the earlier incident may have been probative of the defendant’s bigotry, its probative value was not outweighed by its prejudicial effect because the evidence was not offered to prove motive, but rather, to prove defendant’s bigotry, which is not an element of the crime. Moreover, the dissent challenged the admissibility of the other crimes evidence rebuttal evidence as it did not explain, directly apply to or contradict any new matter material to the issue before the trial court.).
\end{flushleft}
enhance perspectives particularly suited to employment of the established judicial process in “making” law and in keeping with contemporary societal norms.

For most African-Americans, the repeated occurrences of such incidents over a lifetime are troubling. Nonetheless, tempering and balancing the inevitable and justifiable feelings of injustice and resentment are the positive relations borne out of familiarity with members of other ethnic, religious and professional backgrounds, and socioeconomic strata, including, of course, particularly, in the case of African-American judges, other judges and law enforcement officials. More importantly, as will be developed more thoroughly in Part III of this article, a judge’s personal experiences and the ability to empathize based on experiences of discrimination or injustice shared by those whose cases they judge must be anchored by adherence to, and respect for, the rule of law. It is imperative that the rule of law, in the final analysis, have relevance to all who must be governed by it.

B. Judge Sonia Sotomayor’s Record and Ricci v. DeStefano

The impetus of this article is the degree to which Judge Sonia Sotomayor was maligned by some for her previous comments reflecting her identification with the Latino experience of discrimination based on ethnic and class background and the criticism of President Obama’s pronouncement that he would appoint a Supreme Court Justice who would employ the quality of “empathy” in his or her judicial decision-making.\(^{130}\) The preceding section is an explication of how a judge brings to the process of adjudication his or her personal experiences and the ability to empathize; and that introduction into judicial deliberations provides a perspective that encourages colleagues to give consideration to views at odds with their own. As Justice Marshall’s jurisprudence demonstrates, we may learn as much about the merits of a decision by the majority opinion as we may by the dissent.\(^{131}\) We may also learn about the motivations behind our own decisions or the soundness of our own legal reasoning by testing it against competing viewpoints.

No one has suggested, during Judge Sotomayor’s confirmation or the aftermath, that she is not eminently qualified, by scholarship, legal training, and judicial experience, to be a Supreme Court Justice. Moreover, the efforts to make the case for how Judge Sotomayor’s socioeconomic background and previous comments as to the role of a judge affect her ability to be impartial are unsustainable. In fact, those

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\(^{131}\) See supra Part II.A.
who opposed Judge Sotomayor's confirmation may be affected by what Professor Chemerinsky argues to be the false allure of formalism,\textsuperscript{132} so much so that they incorrectly attributed the Second Circuit's decision in \textit{Ricci v. DeStefano}\textsuperscript{133} to what they perceived to be Judge Sotomayor's lack of impartiality, concluding incorrectly that the panel decision demonstrated her bias. I offer the following amplification.

In questioning Judge Sotomayor regarding her seventeen-year judicial record, the decision which received the greatest scrutiny was \textit{Ricci v. DeStefano}, termed by some in the media as a "reverse discrimination" case.\textsuperscript{134} The focus of the scrutiny was not only on her participation in the decision of the panel of the United States Second Circuit Court of Appeals in ruling against the eighteen firefighter protagonists (seventeen of whom were white and one of whom was Latino), but also what some of the members of the Judiciary Committee deemed the dismissive manner in which the panel simply adopted the decision of the District Court and then voted to deny plaintiffs' motion for a rehearing of the circuit court's opinion.\textsuperscript{135}

The genesis of the \textit{Ricci} case was a promotional test administered to firefighters.\textsuperscript{136} After the test at issue was administered, City of New Haven officials invalidated the test, believing it to have had a disparate racial impact since none of the African-American firefighters who took the test scored high enough to qualify for promotions.\textsuperscript{137} The City argued that it would be in violation of Title VII of the Civil Rights Act to certify these test results because of their disparate impact on minority firefighters.\textsuperscript{138} The eighteen firefighters described above challenged this action on the grounds that they were improperly denied promotions on the basis of race, in violation of the disparate treatment provisions in Title VII of the Civil Rights Act and their Equal Protection rights under the

\textsuperscript{132} Chemerisnky, supra note 48, at 1070-73.

\textsuperscript{133} 530 F.3d 87 (2d Cir. 2008), reh'g denied en banc, 530 F.3d 88 (2d Cir. 2008), rev'd, 129 S. Ct. 2658 (2009).


\textsuperscript{136} \textit{Ricci}, 129 S. Ct. at 2664.

\textsuperscript{137} \textit{Id.}


\textsuperscript{139} The Court explained in \textit{Ricci}: "Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')." \textit{Ricci}, 129 S. Ct. at 2672.

\textsuperscript{140} \textit{Id.}
Fourteenth Amendment. The United States District Court granted summary judgment against the firefighters and a three-judge panel of the Second Circuit Court of Appeals, which included Judge Sotomayor, affirmed this ruling in a summary order, without issuing a separate opinion. After a judge on the Circuit requested an *en banc* hearing for the case, the panel withdrew its summary order and issued a one-paragraph, *per curiam* opinion affirming the District Court. A few days later, the Court of Appeals, in a seven-to-six vote, denied a rehearing *en banc*. That decision was opposed in a dissent authored by Chief Judge Cabranes.

The United States Supreme Court, in a five-to-four decision authored by Justice Kennedy, concluded that the City of New Haven violated Title VII of the Civil Rights Act. According to the Court, a “race-based action like the City’s in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.” While the District Court and the Second Circuit held that the City's invalidation of the test results could not be found to have violated the disparate treatment provisions of Title VII because the City was motivated to do so by its belief that the test had a racially disparate impact, the Supreme Court held that the City's actions would violate the disparate treatment provisions absent a valid defense. In so ruling, the Court announced a “strong-basis-in-evidence” standard related to resolving what the majority determined to be competing disparate-impact and disparate-treatment provisions, allowing violation of the latter in order to avoid the former only in “certain, narrow circumstances.”

The dissent by four of the justices, authored by Justice Ginsburg, (1) outlined the history of racial discrimination and the decades of efforts under Title VII to “open firefighting posts to members of racial minorities,” (2) challenged the majority’s determination that there was a conflict between the disparate-impact and disparate-treatment provisions, (3) asserted that both provisions aimed to “end[] workplace
discrimination and promot[e] genuinely equal opportunity,” and (4) characterized the majority’s ruling, that an employer changing an employment practice in an effort to comply with Title VII disparate impact provisions acted because of race, as paying little attention to the purpose behind the Act.¹⁵³ The dissent further criticized the “newly announced” standard for drawing upon inapposite Equal Protection precedents.¹⁵⁴

An in-depth analysis of the factual and legal complexities of this case is beyond the scope of this article. Suffice it to say that Judge Sotomayor’s decision, as part of a three-judge panel in the Ricci case, affirming the decision of the District Court, was supported by a number of distinguished jurists.¹⁵⁵ I take no position as to whether the position taken by Judge Sotomayor reveals that she was influenced by anything other than the facts of the case; she, for her part, denied any partiality.¹⁵⁶ Other colleagues on the Second Circuit, in voting to deny a rehearing, argued that the District Court’s decision, and the Second Circuit’s summary affirmance, was consistent with well-established precedent in the circuit.¹⁵⁷ More importantly, even if her vote in the Ricci case reflected Judge Sotomayor’s world view, there is no indication that her decision in Ricci, shared by her other panel members, or that Justice Ginsburg’s dissent, shared by three other distinguished justices of the Court, were the product of a lack of impartiality or fell outside the realm of reasoned and thoughtful jurisprudence based on the applicable precedent and the rule of law. Rather, reasonable minds differed as to the interpretation of applicable law; that the Supreme Court announced a new standard, as a result of the case, is undisputed.¹⁵⁸ The process illustrated the contest of diverse viewpoints which were challenged and ultimately resolved by the Supreme Court. Thus, the insistence of Judge Sotomayor’s opponents on ascribing to the Ricci case evidence of her lack of impartiality was, in light of her seventeen-year record, nebulous at best.

¹⁵³ Ricci, 129 S. Ct. at 2699.
¹⁵⁴ Id. at 2700-01.
¹⁵⁵ Ricci, 530 F.3d at 87. Judge Pooler and Judge Sack joined Judge Sotomayor on the panel, affirming the decision of the District Court. Id.
¹⁵⁶ See Shapiro, supra note 16.
¹⁵⁷ Ricci, 530 F.3d at 88-90 (2d Cir. 2008) (Barrington, J., concurring) (referring to Second Circuit precedent for the proposition that: (1) “a public employer, faced with a prima facie case of disparate-impact liability under Title VII, does not violate Title VII or the Equal Protection Clause by taking facially neutral, albeit race-conscious, actions to avoid such liability”; (2) “[b]ecause there was no racial classification, the plaintiffs bore the burden of persuasion on the issue of discriminatory purpose”; and (3) it was appropriate for the panel to have adopted the reasoning set forth in the District Court opinion).
¹⁵⁸ See supra note 149 and accompanying text.
C. Collegiality and the Diversity of Opinion

As a final note to this section, it should not be assumed that the diversity of perspectives of judges with diverse backgrounds, and the extent to which the soundness of a decision is tested by such diversity by exposing it to competing points of view, will ultimately lead to chaos and confrontation on the courts. That the perspectives gained by Judge Sotomayor’s unique experiences with poverty or discrimination would inevitably lead to a result based, not on the facts of the case, but on such experiences, cannot be divined from her responses to questioning before the Senate.

The existence of competing viewpoints need not be manifested through adversarial relations on the court. Judge Harry T. Edwards, in an essay focusing on the importance of collegiality to decision-making in the federal circuit courts, makes the point that collegiality does not mean “friendship,” “homogeneity,” or “conformity” amongst the members of a court, but rather, that “judges have a common interest, as members of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect.” 159 In fact, it is through collegiality that diverse viewpoints—which I posit is one characteristic of a healthy and robust judiciary—may be voiced and considered. 160 In short, “because of collegiality, judges can admit and recognize their own and other judges’ fallibility and intellectual vulnerabilities.” 161

My own experience as an appellate judge over the past nineteen years has driven home the importance of a diverse bench, our production and efficiency enhanced by a spirit of collegiality. The Maryland Court of Special Appeals, the State’s intermediate appellate court, was created in 1966; its jurisdiction, at its inception, limited only to criminal appeals. 162

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160 Id. at 1645.
161 Id. at 1650.
162 The Maryland State Archives provides a detailed account of the progression of the Court of Special Appeals of Maryland, from its inception to its current composition:

The Court of Special Appeals was created in 1966 by constitutional amendment (Acts of 1966, ch. 11, 12). Originally, five judges served on the court. Each was elected from a special appellate circuit. In 1970, special appellate circuits were abolished and one judge then was elected from each of the first five appellate judicial circuits, two from the Sixth Appellate Judicial Circuit representing Baltimore City, and two from the state at large (Acts of 1970, ch. 99).

The number of judges on the Court of Special Appeals has increased several times: from five to nine in 1970, from nine to ten in 1972 (Acts of 1972, ch. 361), from ten to twelve in 1974 (Acts of 1974, ch. 706), and from twelve to thirteen in 1977 (Acts
The first female was appointed to the Court of Special Appeals in 1972 and the first African-American was appointed to the Court in 1974. Currently, there are three women and two African-American judges on the thirteen-member Court. The legal backgrounds of the judges are diverse: six members, including myself, have come to the Court having served as trial court judges; two members were formerly government lawyers; and five judges were formerly private practitioners. In addition, judges retired from the Court, including a nationally renowned constitutional scholar, currently sit on panels with the thirteen active members of the Court and are available with their wealth of appellate experience to provide additional points of view and legal counsel on complex issues. Collaboration between these judges who have

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of 1977, ch. 252). Currently, six of the thirteen judges are elected from the state at large.

The chief judge of the Court of Special Appeals is chosen by the governor from among those judges elected to the Court (Acts of 1966, ch. 11, 12).


163 Rita C. Davidson was the first female judge appointed to the Court.
164 The first African-American appointed to the Court was David T. Mason. Rasmussen, supra note 98 and accompanying text.
165 The three women currently serving on the Court are the Honorable Ellen Lipton Hollander, the Honorable Deborah S. Eyler, and the Honorable Kathryn Grill Graeff. The two African-American judges currently serving are the Honorable Alexander Wright, Jr. and myself, Arrie Wilson Davis.
166 The former trial judges on the Court are the Honorable Ellen Hollander, the Honorable James P. Salmon, the Honorable Patrick L. Woodward, the Honorable Alexander Wright, Jr., and the Honorable Albert J. Matricciani.
167 Former government lawyers currently on the Court include the Honorable Robert A. Zarnoch and the Honorable Kathryn Grill Graeff.
168 The Honorable James R. Eyler, the Honorable Deborah S. Eyler, the Honorable Timothy E. Meredith, the Honorable Christopher B. Kehoe, and the Honorable Peter Krauser.
169 The Honorable Charles E. Moylan, Jr., the longest-serving member of the Court from July 1, 1970 until his retirement on December 14, 2000, has been nationally recognized as the eminently renown scholar in criminal law and constitutional law dating back to his tenure as the Baltimore City State's Attorney in the 1960's. Renowned for his expertise in insurance and property law, the Honorable Lawrence F. Rodowsky, currently shares chambers with Judge Moylan, after distinguished service on the Court of Appeals from January 25, 1980 until his retirement on November 10, 2000. The Court is indebted to Judges Moylan and Rodowsky, who combined, as retired judges, author opinions, annually, equal to the number of opinions authored by a full-time member of the Court. Other retired members of the Court include the Honorable Paul E. Alpert, the Honorable James A. Kenney, III, the Honorable J. Frederick Sharer, the Honorable Raymond G. Thieme, Jr., the Honorable James S. Getty and, until the last moments of his life, our beloved nit picker, whose labor of love in spotting split infinitives and assorted errors befell Judge Hollander upon his retirement, the Honorable Theodore G. Bloom. The number of appeals having exploded exponentially during the past twenty years, these retired judges perform an invaluable service in facilitating the issuance of thorough and well-reasoned decisions with dispatch.
backgrounds in different areas of expertise has been beneficial to the Court. Indeed, oft times, members of the Court decide cases in a manner that one would not consider compatible with their cultural or socioeconomic moorings. It is noteworthy that, with the exception of the Honorable Lynne Battaglia, who was appointed to the Court of Appeals on December 21, 2000, the remaining six judges currently serving on the Court of Appeals were formerly members of the Court of Special Appeals.\textsuperscript{170} The result is that, while the High Court has preserved its most revered traditions and formalities, the alumni of the Intermediate Appellate Court, many of whom had previously served together, have merely continued their collegial working relations.

As noted earlier, the benefits to be derived from a diverse court cannot be realized without collegiality and open lines of communication between its members, which has been a central focus of Maryland's appellate courts. From its inception, the policy of the first chief judges of the Court—Chief Judges Robert Murphy, Charles Orth, Jr., and Richard Gilbert—was that associate judges, as constitutional officers, were to remain duty bound and render their best independent judgments as to issues before them, but that, just as trial judges admonish jurors during their deliberations to consider opposing views, so too should members of the Court be open to giving serious consideration to the views of their colleagues. The late Chief Judge Gilbert, my predecessor, instituted a tradition that judges have lunch together after hearing oral argument and, as a reminder, mounted a poster on the wall of the conference room to the effect that it is difficult to remain disagreeable with those with whom we break bread. During our monthly conferences, each successive chief judge, for the most part, has continued the tradition of reigning above the fray, reserving until our robust discussion and debate in controversial cases ebb, to interject the imprimatur of his considered judgment; all of these deliberations are carried out in a spirit of congeniality. And, of course, once the final vote is cast as to the ultimate decision or on any issue, the Chief Judge, in the tradition of the Court, graciously accepts the will of the majority, exacting no manner of vindictiveness against members holding opposing views. Collegiality is also fostered by attendance at formal ceremonies and interaction in social settings. In sum, the mix of judges with the divergent perspectives of former practitioners, former government attorneys, former trial judges, and

\textsuperscript{170} The remaining six judges on the Court of Appeals, in order of seniority, are Chief Judge Robert M. Bell, appointed May 5, 1991, the Honorable Glenn T. Harrell, Jr., appointed on September 10, 1999, the Honorable Clayton Greene, Jr., appointed on January 7, 2004, the Honorable Joseph F. Murphy, Jr., appointed on December 4, 2007, the Honorable Sally D. Adkins, appointed on May 27, 2008, and the Honorable Mary Ellen Barbera, appointed on August 7, 2008.
judges who have retired from the Court provides an invaluable resource of experience in the different areas of expertise.

III. THE RULE OF LAW AND THE CONTINUED APPLICABILITY OF THE "UMPIRE" ANALOGY

As noted in the previous section, the focus of this article should not be read as supporting the notion that a judge should render decisions based solely on his or her own ideological bend. The influence of a judge’s personal experiences on his or her approach to the resolution of legal issues exists, as it must, within a well-established model and in the construct of the rule of law and precedent; i.e., reference to the prior application of common law to similar or identical facts and the interpretation of statutes and Constitutional provisions in like manner to previous constructions. A consideration of the role of the judge begins with the relationship between the judiciary and the other two branches of government. Unlike a member of the executive and legislative branch who proposes and implements governmental actions, the role of a judge is reactive. A statute is enacted or a cause of action accrues and it is the judiciary which must construe or determine the constitutionality of the statute or adjudicate the merits of the cause of action. Thus, notwithstanding the debate as to whether judges should render decisions according to the letter of the law, there is no debate that the role of a judge is restricted, at least in the sense that judges do not initiate legal proceedings.

Moreover, although the debate as to the proper role of a judge, most recently typified by Judge Sotomayor’s confirmation hearings, has been often framed, ideologically and politically, in terms of conservative versus liberal judges, that the “rule of law”—whatever we determine it to be—is the anchor of a stable society, has not been a subject of that debate. The bedrock of the rule of law are the principles of stare decisis and precedent which provide, inter alia, the guideposts as to the outer limits of conduct that is legally permissible and establishes legal relationships and the rights and obligations attendant thereto. Without reference to the body of law established by prior decisions and deference to the legal reasoning undergirding those decisions, there can be no continuity in the evolvement of the law, even in instances in which legal precedent is deemed to be unsustainable in light of changes in social, political or other circumstances. In other words, abandonment of precedential authority is justified only where the reasons therefore are sound and enduring.
With this in mind, there is continued vitality in what has been termed the “umpire” analogy.\textsuperscript{171} This analogy was espoused by Chief Justice Roberts during his confirmation hearings:

Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them. The role of the umpire and a judge is critical. They make sure everyone plays by the rules but it is a limited role. Nobody ever went to a ball game to see the umpire.\textsuperscript{172}

The “umpire” analogy has been viewed favorably by some and criticized by others.\textsuperscript{173} No single theory can adequately capture the role of the judge in democratic government and, in that sense, the analogy between the roles of judges and umpires is imperfect.\textsuperscript{174} The comparison is flawed, in the first instance, because, contrary to the proposition that the role of an umpire is purely mechanical, the conception of the role of an umpire breaks down in light of the broad discretion exercised every time an umpire renders a decision as to what constitutes the strike zone, a judgment that varies, often widely, from one umpire to the next and may even vary from one pitch to the next.\textsuperscript{175} Is the outcome of a baseball game affected by whether the strike zone is expansive or limited in a contest between a team whose batters constitute the proverbial Murderer’s Row and another team of mediocre hitters? Of course it is. Nonetheless, for purposes of this article, the analogy offers a compelling reminder that judges are not the “stars” of the show. They are the arbiters of the law. Given the universal precepts of equal justice under the law and of the symbol of blindfolded Lady Justice, analogizing the role of a judge to an umpire, while imperfect, provides a vibrant way of conceptualizing an important consideration as to the proper role of judges, provided that this analogy is tempered by an understanding that judges often must render discretionary decisions that require a judge to do much more than merely “call balls and strikes.”


\textsuperscript{172} Id.

\textsuperscript{173} Id. at 530.

\textsuperscript{174} Id. at 527.

\textsuperscript{175} Id. Chemerinsky goes further than finding the analogy “flawed”; in his view, it is “disingenuous” and “tremendously arrogant,” in light of the discretionary decisions inherent to the role of a judge. Chemerinsky, supra note 48, at 1069-70, 1077.
IV. CONCLUSION

Judge Sotomayor, who was ultimately confirmed by a Senate vote of sixty-eight to thirty-one to join the Supreme Court of the United States as its first Latina justice\textsuperscript{176} and was subsequently sworn in at an August 8, 2009, ceremony in the Supreme Court conference room, may confound the prognosticators who believe that she will be a mainstay of the liberal bloc of Justices Stevens, Breyer and Ginsburg. Or, she may rule in a manner consistent with commentators who have analyzed her opinions and suggest that she will not join the conservative bloc on decisions involving cultural or civil rights. The future of her role on the Court remains to be seen. From her confirmation process, however, and based on the foregoing, the following is what I distill.

First, contrary to the view of strict formalists and proponents of a discretion-free role for judges, the ability to empathize is integral to the deliberative process in fostering a better understanding of the context and societal impact of the issue under review and facilitates a mindset that allows for due consideration of points of view of the judge’s colleagues, framed by an environment respecting difference and promoting collegiality. The basis and the raison d’être of the controversy before the court, in the first instance, is informed, not only as to the party who should prevail, but also as to the course to be pursued in fashioning the appropriate remedy.

Second, the literal definition of “empathy” denotes no consequential manifestation of “the capacity to experience feelings of another”\textsuperscript{177} on the judge’s ultimate decision. Having empathized with one or more parties or a particular situation or point of view, the judge must then conclude that, in the overwhelming majority of cases in which there is no rationale that would justify disregarding precedent, empathy should play no role. With respect to the ultimate decision, empathy, in the proper case, plays a role where an overriding societal interest is at stake. The pillar, however, always has been and remains the rule of law—the product of precedent and well-reasoned legal analysis. A judge, accordingly, functions essentially within the framework of an “umpire,” fastidiously examining the law and applying the relevant law to the facts before the judge in order to arrive at just, well-reasoned and well-supported decisions.

Finally, the judicial selection process must begin with the sober reality that not everyone possesses the personal qualities, particularly the temperament, to be a judge. Few professions, positions, or callings demand a higher personal fidelity to serve the best interest of society in a


\textsuperscript{177} See supra note 74.
manner that is unimpeachable and beyond reproach. The most important quality is the ability to engage in introspection and constant self-analysis, and a corresponding ability to set aside, not only biases and prejudices, but deeply entrenched preconceived views that prevent fair and objective consideration of opposing views, irrespective of whether the judge actually adopts those views. At the same time, the awesome authority that a judge—especially a trial judge—wields over the fate of his or her fellow citizens demands no less than that he or she be ever mindful of the maxim: "There but for the grace of God go I." And, as difficult as it may be to empathize with one who has visited great harm on his or her fellow citizens, empathy, in the sense that a judge should vicariously inculcate the intimidating experience of standing before the Bar of Justice, whether the outcome is likely to be life altering or less serious, is critical in order to accord the parties—and more importantly the Court—the proper solemnity, even in cases which call for the ultimate penalty as the appropriate judgment.

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178 The Supreme Court of Florida expressed this point of view best in In re Eastmoore:

Socrates is reported to have expressed the same proposition (edicts of the Florida Code of Judicial Conduct) in his day as follows: Four things belong to a judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially.

As this Court said in State ex rel. Davis v. Parks, 141 Fla. 516, 520, 194 So. 613, 615 (1939):

It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

The public can have little confidence in the impartiality of a decision when the litigant is cut short in the presentation of her case and the decision maker's demeanor bears all the indicia of prejudice and a closed mind.

We take this opportunity to remind ourselves as judges that tyranny is nothing more than ill-used power. We recognize that it is easy, especially under the stress of handling many marital matters, to lose one's judicial temper, but judges must recognize the gross unfairness of becoming a combatant with a party. A litigant, already nervous, emotionally charged, and perhaps fearful, not only risks losing the case but also contempt and a jail sentence by responding to a judge's rudeness in kind. The disparity in power between a judge and a litigant requires that a judge treat a litigant with courtesy, patience, and understanding. Conduct reminiscent of the playground bully of our childhood is improper and unnecessary.

504 So. 2d 756, 757-58 (Fla. 1987) (emphasis added).
It is this quality that separates the manner in which judges perform their roles from every other profession or calling, *i.e.*, the ability to render an appropriate, even the most severe judgment, while treating the object of that judgment in the manner that the judge would wish to be treated were the positions reversed. While such a view may seem lofty, altruistic, and naive, particularly when dealing with those whose acts may be deemed depraved or despicable, it is precisely what is demanded of us.