

Judges of Color: Examining the Impact of Judicial Diversity in the Equal Protection Jurisprudence of the United States Court of Appeals for the Ninth Circuit

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For too many people . . . law is a symbol of exclusion rather than empowerment.

– Former Attorney General of the United States, Eric Holder, 2002

Introduction

Article III, section 1 of the Constitution states, “[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”¹ This imperative provision of the Constitution establishes the judiciary branch and maintains the balance of powers within the federal government. At a time when the executive branch is banning religious minorities from traveling into the country² and stripping children away their parents at the U.S.-Mexico border,³ the courts have become the last resort for many during this critical period of history. However, for much of America’s history, the legal system has been devoid of the compassion and empathy needed for judges to fully

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1. U.S. CONST. art. III, § 1.

2. Josh Gerstein, *Appeals Court Rules Against Trump Travel Ban 3.0*, POLITICO (Dec. 22, 2017), <https://www.politico.com/story/2017/12/22/trump-travel-ban-appeal-block-317892>.

3. Salvador Rizzo, *The Facts About Trump’s Policy of Separating Families at the Border*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border/?utm_term=.2524c5c5f7f7.

comprehend the impact of their decisions on ordinary people.⁴ People of color, who have historically faced unique experiences because of racial discrimination and its legacy, are often victims of this need for empathy.⁵ Thus, much like the fundamental equality that emanates from a diverse Congress,⁶ the participation of diverse judges in the judiciary is vital to the assurance of fairness, legitimacy, and due process in decision-making.

From slavery to civil rights to affirmative action, America's history has been plagued with the issue of race. The federal bench is no exception. For almost two centuries, the highest court of the nation did not represent the public that it served. It was not until 191 years after the founding of America that the U.S. Supreme Court bench enjoyed the presence of a diverse judge with Justice Thurgood Marshall.⁷ Then in the 1970s, due mainly to President Jimmy Carter's initiative to appoint more minority judges, the racial composition of the federal judiciary began to diversify significantly.⁸ However, while the number of minority judges increased in the past two centuries, the federal courts still do not reflect today's society. The total composition of Article III judges currently includes: 3.4% Asians, 10.6% Hispanics, and 14.2% African Americans, compared to 72% Whites.⁹ This composition is still less diverse than the current population of the United States, which is 6% Asian, 18% Hispanic, 12% African American, and 61% White.¹⁰ In fact, a study by political science Professors Rorie Solberg and Eric N. Waltenburg reveals that the federal bench is becoming less diverse even as the United States is growing more diverse.¹¹

4. Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decision-making*, 85 S. CAL. L. REV. 313, 351 (2012).

5. *Id.* at 326, 350–51.

6. Sheryl Estrada, *The 115th Congress Not a Model for Diversity*, DIVERSITY INC. (Jan. 4, 2017), <https://www.diversityinc.com/news/115th-congress-not-model-diversity>; James Jones, *Racial Representation: A Solution to Inequality in the People's House*, THE HILL (May 10, 2017), <http://thehill.com/blogs/pundits-blog/civil-rights/332790-racial-representation-a-solution-to-in-equality-in-the-peoples>.

7. DeNeen L. Brown, *LBJ's Shrewd Moves to Make Thurgood Marshall the Nation's First Black Supreme Court Justice*, WASH. POST (Oct. 2, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/10/02/lbjs-shrewd-moves-to-make-thurgood-marshall-the-nations-first-black-supreme-court-justice/?utm_term=.44ae6dded661.

8. SUSAN B. HAIRE & LAURA P. MOYER, *Diversity Matters* 3–4 (2015).

9. Goodwin Liu, et al., *A Portrait of Asian Americans in the Law* 24 (Yale Law School & National Asian Pacific American Bar Association 2017), available at <https://ssrn.com/abstract=3045905>.

10. KAISER FAM. FOUND., KAISER FAMILY FOUNDATION ESTIMATES BASED ON THE CENSUS BUREAU'S MARCH CURRENT POPULATION SURVEY (CPS: ANNUAL SOCIAL AND ECONOMIC SUPPLEMENTS) (2017), <https://www.kff.org/other/state-indicator/distribution-by-raceethnicity/>.

11. Rorie Solberg & Eric N. Waltenburg, *Trump's Presidency Marks the First Time in 24 Years That the Federal Bench Is Becoming Less Diverse*, THE CONVERSATION (June 11, 2018),

Diversity of judicial nominees by president

The data below show what proportion of each president's appointees to the federal judiciary made the bench more diverse, did not affect diversity and decreased diversity in terms of women and people of color. The total number of confirmed appointments for each president is noted in parentheses.

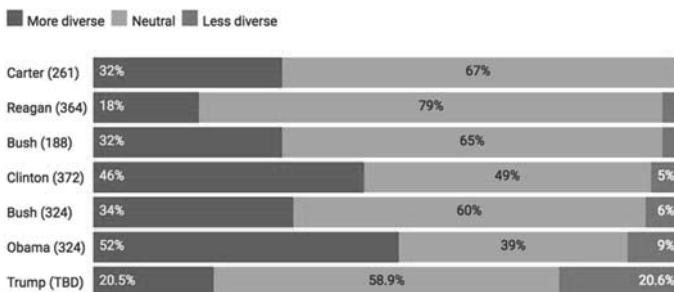


Chart: The Conversation, CC-BY-ND • Source: Federal Judicial Center • Get the data

Exhibit A. *Chart illustrating how previous Presidents have increased judicial diversity in the past two decades, but President Trump's nominees are resulting in a less diverse judiciary.*

This Note aims to determine how the presence of minority judges on the United States Court of Appeals for the Ninth Circuit impacts Equal Protection doctrine.¹² The Ninth Circuit, which consists of Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington,¹³ is the largest and most diverse federal appellate bench in the nation.¹⁴ This Note shows that a Ninth Circuit judge's race is important in providing procedural and substantive contributions to the federal bench. Diverse judges use their life experiences to ensure that every person is heard and treated fairly, thereby instilling public confidence in the legitimacy of the court and educating their colleagues on the panel on the unique issues that minority groups encounter. However, this Note also proves that race alone does not influence the court's equal protection jurisprudence due to two major factors: the Ninth Circuit, as an appellate court, is bound by the decisions of the U.S. Supreme Court, and judges are committed to their duty to "faithfully and impartially" uphold the Constitution.¹⁵

<https://theconversation.com/trumps-presidency-marks-the-first-time-in-24-years-that-the-federal-bench-is-becoming-less-diverse-97663>; See Exhibit A for judicial diversity chart.

12. For purposes of this study, the terms "minority" and "diverse" judge are used interchangeably.

13. Map of the Ninth Circuit, https://www.ca9.uscourts.gov/content/view.php?pk_id=000000135.

14. Russell Wheeler, *The Changing Face of the Federal Judiciary*, BROOKINGS INST. 1, 4–5 (Aug. 17, 2009), <https://www.brookings.edu/research/the-changing-face-of-the-federal-judiciary/>.

15. See 28 U.S.C. § 453 (1990) (stating the Judicial Oath "I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties

This Note applies the definition of a “minority” from the Equal Employment Opportunity Commission (“EEOC”).¹⁶ According to the EEOC, a minority is “the smaller part of a group.”¹⁷ These groups consist of: American Indian or Alaskan Natives, Asian or Pacific Islanders, Blacks, and Hispanics.¹⁸ Currently, there are 11 racially diverse judges out of 41 judges on the Ninth Circuit: Carlos Tiburcio Bea, Consuelo María Callahan, Jerome Farris, Ferdinand F. Fernandez, Mary H. Murguia, Jacqueline H. Nguyen, Richard A. Paez, Johnnie B. Rawlinson, A. Wallace Tashima, Kim McLane Wardlaw, and Paul J. Watford.¹⁹ Approximately 27% of the 41 judges on this federal appellate bench are diverse, thus comprising of three African Americans, two Asians, and six Hispanics. Individually, these judges have unique life experiences that they bring to the bench—Judge Bea faced the threat of deportation,²⁰ Judge Nguyen fled her home country as a refugee during the Vietnam War,²¹ and Judge Tashima was interned as a Japanese American during World War II.²² This Note addresses the impact that those distinctive life experiences bring to the bench.

Part I of this Note begins by reviewing the impact of race on the equal protection doctrine. Part II provides an overview of past research and methodology, and how it differs from this Note. Next, Part III evaluates and compares personal interviews with four Ninth Circuit judges with the outcomes of eight equal protection cases regarding criminal, education, voting, and immigration claims. Last, Part IV discusses the implications of this study and the benefits of a diverse judiciary.

I. Equal Protection Doctrine

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution states, “[n]o State shall . . . deny to any person within its jurisdiction

incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.”).

16. This Note also uses the term “diverse” to describe judges who fall within the EEOC’s definition of a racial minority.

17. *EEO Terminology*, NATIONAL ARCHIVES, <https://www.archives.gov/eo/terminology.html>.

18. *Id.*

19. *See The Judges of this Court in Order of Seniority*, UNITED STATES COURTS FOR THE NINTH CIRCUIT, https://www.ca9.uscourts.gov/content/view_seniority_list.php?pk_id=0000000035; A.B.A. STANDING COMMITTEE ON MINORITIES IN THE JUDICIARY, A.B.A. DIRECTORY OF MINORITY JUDGES (4th ed. 2008).

20. *See* David Lat, *Benchslap of the Day: Say My Name, Say My Name*, ABOVE THE LAW (Feb. 16, 2012, 6:18 PM) <https://abovethelaw.com/2012/02/benchslap-of-the-day-say-my-name-say-my-name/>.

21. *See* Casey Tolan, *How Jacqueline Nguyen Went From a Vietnamese Refugee to a Potential Supreme Court Nominee*, SPLINTER NEWS (Feb. 18, 2016, 4:45 PM) <https://splinternews.com/how-jacqueline-nguyen-went-from-a-vietnamese-refugee-to-1793854865>.

22. *See* Sakura Kato, *Judge A. Wallace Tashima: A Judge Who Looks Like Us*, DISCOVER NIKKEI (Aug. 6, 2014) <http://www.discovernikkei.org/en/journal/2014/8/6/judge-tashima/>.

the equal protection of the laws.”²³ This study focuses on equal protection because it was designed to ensure that the Constitution protects minorities from prejudice in the political process.²⁴ The case law encompasses a broad range of civil rights issues, including racial discrimination, election law, and criminal justice. When analyzing an equal protection claim, courts apply either a standard of heightened scrutiny, which includes both strict scrutiny and intermediate scrutiny, or they apply rational basis review.²⁵ Heightened scrutiny applies when a court has reason to “suspect” a classification reflects prejudice against a “discrete and insular” minority, rather than an informed policy choice.^{26, 27}

There are two situations where one might see the impact of a judge’s race on equal protection claims. First, in order to pass strict scrutiny, a classification must be the least discriminatory means or narrowly tailored to serve a compelling interest.²⁸ Therefore, although there are prior examples of how the U.S. Supreme Court has applied this standard of review, its ambiguous and broad language gives judges much flexibility in its application. Second, if there is a classification that has not yet been established by law, judges have the authority to apply specific factors to determine whether a group constitutes a “suspect” class before applying strict scrutiny.²⁹ Judges have the discretion to assess the following factors: historical and current discrimination, political power, immutability of the characteristic, Congress’ sensitivity to the classification, and whether the trait correlates to an ability.³⁰ This area of undeveloped law is discussed further when comparing the interviews of Ninth Circuit judges to how they decided particular cases.

II. Background and Methodology

Past research on judicial decision-making has focused on the impact of a variety of factors, but not on the impact of race alone. There are countless studies examining the role of intersectionality or gender on the federal bench,³¹ decision-making in state courts or federal circuit courts as a whole,³² and judicial voting

23. U.S. CONST. amend. XIV, § 1.

24. *U.S. v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

25. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

26. *Carolene Prods. Co.*, 304 U.S. at 144.

27. Rational basis review, on the other hand, allows a court to uphold a classification as long as any rational legislator could think the classification could advance any legitimate purpose.

28. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, No. 1, 377 F.3d 949, 960–61 (9th Cir. 2004).

29. *Cleburne Living Ctr.*, 473 U.S. at 440.

30. *Frontiero v. Richardson*, 411 U.S. 677, 684–88 (1973).

31. See Todd Collins & Laura Moyer, *Gender, Race, and Intersectionality on the Federal Appellate Bench*, 61 POL. RES. Q. 219–27 (2008).

32. See Jonathan P. Kastellec, *Panel Composition and Voting on the U.S. Courts of Appeals over Time*, 64 POL. RES. Q. 377–391 (2011) [hereinafter Kastellec 2011]; see also Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167–83 (2013) [hereinafter Kastellec 2013].

patterns in favor or against a plaintiff or defendant.³³ These studies have found that a judge's race only has an impact on particular issues. For example, black judges are more sensitive to issues relating to racial discrimination because of their racial identity and firsthand experiences with racial discrimination.³⁴ In addition, Latino judges are more sympathetic in immigration cases not due to racial discrimination, but rather to "the shared view of opportunities that life in the United States presented to their immigrant families."³⁵ Similarly, Asian judges are also more sympathetic to immigrants because of their firsthand experiences with racism and xenophobia.³⁶ Among others, one consistent result is that minority judges are more sympathetic to civil rights issues such as gender and racial discrimination.³⁷

This Note differs from prior studies because it focuses specifically on the Ninth Circuit and includes the added benefit of four interviews to the case analysis. This Note is limited to the Ninth Circuit because of its substantial diversity and size compared to the other ten federal circuits. It differs from previous studies in that it is not restricted to one race alone, but rather all groups of racial minorities according to the EEOC. Although people of different racial backgrounds may have different experiences, racial discrimination is one common thread that is unique to identifying with a minority group.

The theory underlying this analysis is substantive representation, which posits that "when circumstances and discretion allow, public officials will act to benefit members of groups of which they are a part."³⁸ A limitation of this theory with respect to appellate judges is that they are unelected and accorded life tenure, so they are not easily affected by public opinion.³⁹ Therefore, while this political insulation may lead some to do more to benefit their group, others may hide behind such safeguards and maintain the status quo. Additionally, Supreme Court scholars Harold Spaeth and Jeffrey Segal's attitudinal model connects with this study's focus on judicial decision-making. The attitudinal model claims that judges decide cases based on personal ideology rather than adherence to the law.⁴⁰ However, a major limitation of the attitudinal model is its assumption that ideology and legal interpretation are mutually exclusive in judicial decision-making. Thus, merely

33. See Jeff Yates, *'For the Times They Are A-Changin': Explaining Voting Patterns of U.S. Supreme Court Justices through Identification of Micro-Publics*, 28 *BYU J. OF PUB. L.* 117–143 (2013).

34. HAIRE & MOYER, *supra* note 8, at 18–22.

35. *Id.* at 25.

36. Josh Hsu, *Asian American Judges: Identity, Their Narratives, & Diversity on the Bench*, 11 *ASIAN PAC. AM. L.J.* 92, 106, 112 (2006).

37. Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, *J.L. ECON. & ORG.* 303 (2004).

38. Collins & Moyer, *supra* note 31, at 220.

39. Kastellec 2013, *supra* note 32, at 168–69.

40. Howard Gilman, *What's Law Got to Do With It? Judicial Behavioralists Test the Legal Model of Judicial Decision Making*, 26 *L. & SOC. INQUIRY* 465, 467 (2001).

because a judge's ideology impacts one's decision does not mean that their ideology conflicts with the law.

This research focuses on whether Ninth Circuit judges fit into these theoretical models by examining their personal testimony, statements, and written opinions. It derives its findings from two main sources: personal interviews and published opinions. Over the course of three months, I conducted interviews with four diverse Ninth Circuit judges. I also evaluated Ninth Circuit equal protection jurisprudence, which consists of thirty cases written by minority judges. This case law supplements these interviews by connecting the judges' testimony to their written opinions and dissents.

III. Findings

A. Testimony from Personal Interviews and Questionnaires

A substantial component of this study incorporates interviews with Ninth Circuit judges. Despite the apparent limitations of personal interviews, the judges' insight is valuable in discerning the impact of race on their decision-making. I conducted interviews in person and telephonically, which lasted between 30 minutes to one hour. The interviews adhered to a specific structure. First, I informed the judges of my topic and granted anonymity if they desired. Second, I asked questions about their methods of persuasion and judicial decision-making. Third, we discussed the Ninth Circuit's equal protection jurisprudence, with a particular focus on the opinions and dissents they have written. Fourth, I inquired about the judges' specific life experiences and diversity on the federal bench.

1. *Institutional Impact as a Federal Appellate Court*

Appellate court decision-making is distinguishable from trial court decision-making due to the institutional structure of the three-judge panel.⁴¹ Thus, it would be a disservice to discount the institutional dynamics of panels when evaluating the impact of race on decision-making. Research has consistently shown that appellate judges are more receptive to the preferences of the other members on the panel.⁴² As such, the role of minority judges in these small panel sizes encourages impartiality "by ensuring that a single set of values or views do not dominate judicial decision-making."⁴³ In addition, federal appellate court decisions are almost always unanimous.⁴⁴ Thus, due to the small size of the group, an atmosphere of collegiality, and panel unanimity, the role of minority judges in the

41. See generally Federal Rules of Appellate Procedure, Ninth Circuit Rules, Circuit Advisory Committee Notes.

42. HAIRE & MOYER, *supra* note 8 at 88.

43. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 411 (2000).

44. Farhang & Wawro, *supra* note 37.

Ninth Circuit can be a particularly vital one due to a greater potential to influence other nonminority judges on the panel.

When meeting with the Ninth Circuit judges individually, I asked, “[w]hat methods do you use in persuading your colleagues on the panel when there are disagreements?” One judge stressed the importance of being knowledgeable about her colleagues in order to persuade them more effectively.⁴⁵ For instance, it was helpful to know what they have written, published, and were interested in. Another judge adopted a more formalistic approach and described how he used a “method of analysis” when persuading his colleagues.⁴⁶ A third judge noted that the panels try to reach “consensus whenever possible” when they confer.⁴⁷ Finally, one judge emphasized that interrelationships are important, but ultimately it comes down to the issues.⁴⁸ An interesting commonality I found amongst the judges was the respect they shared for one another. Despite the disagreements amongst the judges in terms of interpreting the law, their interactions illustrate the collegiality and impartiality within the Ninth Circuit.

2. *Impact of Party Affiliation on Judges’ View of Their Judicial Role*

Diversity on the bench can be extremely partisan between Republicans and Democrats. Although the Constitution permits the President to appoint and the Senate to confirm federal judges,⁴⁹ politics influences the choices for the federal bench.⁵⁰ This delicate intersection between the law, judicial activism, and political affiliation is significant because it can mean the difference between a confirmation or no confirmation.⁵¹

After interviewing two Ninth Circuit judges who were appointed by Republican Presidents and two judges who were appointed by Democratic Presidents, I found that judges of each party stressed the importance of remaining impartial in order to apply the law faithfully. However, I also noticed that party affiliations influenced these judges’ ideas about what it meant to “apply the law faithfully.”⁵² Specifically, Republican-appointed judges seemed to view the judicial branch as an extension of the executive and legislative branches and emphasized the

45. Telephone Interview with Judge Consuelo M. Callahan, Ninth Circuit Judge (Nov. 7, 2017).

46. Confidential Interview with Ninth Circuit Judge, in San Francisco, Calif. (Oct. 17, 2017).

47. Interview with Judge Mary H. Murguia, Ninth Circuit Judge, in San Francisco, Calif. (Nov. 15, 2017).

48. Telephone Interview with Judge Jacqueline H. Nguyen, Ninth Circuit Judge (Dec. 5, 2017).

49. See U.S. CONST. art. II, § 2, cl. 2.

50. Opinion, *Judges Shouldn’t Be Partisan Punching Bags*, N.Y. TIMES, Apr. 8, 2018, <https://www.nytimes.com/2018/04/08/opinion/judicial-independence.html>.

51. See Carl Hulse, *G.O.P. Blocks Judicial Nominee in a Sign of Battles to Come*, N.Y. TIMES (May 19, 2011), <http://www.nytimes.com/2011/05/20/us/politics/20congress.html>.

52. See 28 U.S.C. § 453 (1990).

importance of judicial deference to those branches accordingly.⁵³ In contrast, Democratic-appointed judges expressed that they were more likely to view the other branches' actions critically and emphasized their roles as public servants, not as guardians of the determinations of the other branches. However, I offer these conclusions with skepticism due to the extremely small sample size of four judges.

Furthermore, I found that despite the adverse backgrounds of particular diverse Ninth Circuit judges, they were committed to applying facts to the law rather than advocating for their idea of justice. For instance, Judge Nguyen, who came to the U.S. as a refugee from the Vietnam War, stated that her obligation is to “faithfully apply the law regardless of who the litigants are, which includes rich or poor, men or women, and people of any ethnic origin or nationality.”⁵⁴ Additionally, Judge Murguia, who grew up in Kansas with six siblings, had a low socioeconomic status, and was raised by Mexican immigrants, admitted that the hardest thing she does as a judge is rule contrary to her personal opinions.⁵⁵ She highlighted the necessity of separating her personal viewpoints from the law when reaching a decision and reiterated her judicial responsibilities according to the oath she took under the Constitution.⁵⁶

Judge Murguia's experiences prior to joining the Ninth Circuit bench are noteworthy because she excused herself from the *Melendres v. Arpaio* case when she served as a U.S. District Court judge in 2009.⁵⁷ She faced much pressure to recuse herself from the case because her twin sister is the head of the largest Hispanic civil rights organization in the nation, National Council of La Raza, and made disparaging remarks against Sheriff Joe Arpaio. In “an abundance of caution,”⁵⁸ Judge Murguia decided to uphold the integrity and independence of the judiciary to the public.⁵⁹ Judge Murguia's actions prove that some judges actively strive to separate their personal connections from their decisions. Even with politically charged issues such as Sheriff Arpaio's practice of racially profiling Latinos, Judge Murguia's ability to maintain an impartial stance is significant due to her extremely disadvantageous background. As the daughter of Latino immigrants who grew up

53. *But see* City and County of San Francisco v. Trump, 9th Cir., Aug. 1, 2018, No. 17-17478 (2018) WL 3637911 (two Democratic-appointed nonminority judges holding that executive branch may not withhold federal grants from sanctuary cities without congressional authorization and the sole Republican-appointed minority judge dissenting that the case is not ripe for review).

54. Telephone Interview with Judge Jacqueline H. Nguyen, *supra* note 48.

55. Interview with Judge Mary H. Murguia, *supra* note 47.

56. *Id.*

57. Stephen Lemons, *Joe Arpaio Scores: Judge Mary Murguia Recuses Self from Racial Profiling Lawsuit Against Joe Arpaio*, PHX. NEW TIMES (July 16, 2009), <http://www.phoenixnewtimes.com/news/joe-arpaio-scores-judge-mary-murguia-recuses-self-from-racial-profiling-lawsuit-against-joe-arpaio-6498674>.

58. Interview with Judge Mary H. Murguia, *supra* note 47.

59. See CODE OF CONDUCT FOR UNITED STATES JUDGES, Canons 1 and 2 (Mar. 20, 2014), <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#b>.

poor,⁶⁰ she likely connected with the plaintiffs in this case. This impartiality is even more impressive because she decided to recuse herself from a position where she could have potentially corrected a wrong.⁶¹ Thus, Judge Murguia contradicts both the substantive representation and attitudinal models because she values her judicial role more than her personal ideology.

Another remarkable judge is Judge Tashima, a 1996 Clinton appointee.⁶² Given his personal experience of living in an internment camp during World War II,⁶³ Judge Tashima acknowledged the impact that his racial identity and historical mistreatment have made on his decision-making.⁶⁴ In a journal article describing his experience in a Japanese American internment camp, Judge Tashima wrote:

Because we are all creatures of our past, I have no doubt that my life experiences, including the evacuation and internment, have shaped the way I view my job as a federal judge and the skepticism that I sometimes bring to the representations and motives of the other branches of government.⁶⁵

This critical eye to government action is further evidenced by Judge Tashima's opinions on equal protection claims. For instance, he has criticized the government's race-based actions "in the name of science and medicine."⁶⁶ He has also written a significant number of equal protection opinions since being appointed, compared to his Ninth Circuit colleagues. Judge Tashima's political beliefs and strong connection to his racial identity represent a telling example of how a minority judge's experiences have informed his decision-making.

3. *Impact of Race on Judicial Decision-Making*

When asked, "[w]hat role, if any, do you think your ethnic background plays in your decision making," several of the judges became defensive. One judge went so far as to say, "race is irrelevant" to the benefit versus burden analysis in equal protection.⁶⁷ Another judge stressed that she is not "agenda-driven," and judges work hard to be impartial.⁶⁸ Nevertheless, both judges acknowledged that race does have an impact in particular situations. One judge admitted that judges who have had experiences with police officers or the criminal justice system "cannot help but

60. Manny Lopez, *Raising the Bar*, KAN. CITY BUS. J. (Feb. 11, 2001), <https://www.bizjournals.com/kansascity/stories/2001/02/12/focus1.html>.

61. Lemons, *supra* note 57.

62. *See* The Judges of this Court in Order of Seniority, *supra* note 19.

63. Kato, *supra* note 22.

64. A. Wallace Tashima, *Play It Again, Uncle Sam*, 68 L. & CONTEMP. PROBS. 7, 8 (2005).

65. *Id.*

66. *Mitchell v. Washington*, 818 F.3d 436, 444 (9th Cir. 2016).

67. Confidential Interview with Ninth Circuit Judge, in San Francisco, Calif. (Oct. 17, 2017).

68. Telephone Interview with Judge Consuelo M. Callahan, *supra* note 45.

be influenced by where they come from.”⁶⁹ Furthermore, a judge stated that “the door might easily open to believing a minority discrimination claimant by a member of that same minority,” and that it is a “human fallibility.”⁷⁰ Finally, another judge noted that her unique experiences have “given her more context” and allowed her to see the law in a different lens, but she is uncertain that this perspective has affected her decision-making.⁷¹

These observations reinforce some scholars’ reluctance to interview judges because, at times, these direct questions will place them in a tense position between appearing as an objective interpreter of the law⁷² and advocating for their perception of justice. Because of this cognitive dissonance, judges may make statements that do not reflect their actions even without intentionally lying. In fact, two leading scholars on the Supreme Court explained that “asking judges whether their attitudes reflect policy preferences or opinions about the law would not be very useful. ‘Self-deception, social desirability effects, and flat-out lying would mar any such analysis.’”⁷³

However, regardless of the political insulation that Article III judges enjoy, they are inevitably placed in a political position. As federal judges, they must be conscious of their role within the federal government, the polarized nature of political parties, and the political ramifications of their decisions. This objective to be impartial and committed to precedent is further illustrated in judicial confirmation hearings, where the Senate carefully scrutinizes the past statements and actions of judicial appointees.⁷⁴ Therefore, at times, federal judges are forced to adopt a formalistic position that disregards the role that their personal background plays in their thought processes.

Furthermore, judges’ reluctance to consider the impact that their diverse life experiences might have on their decisions can be attributed, at least in part, to the position of the federal appellate court in comparison to the U.S. Supreme Court. Hierarchically, the Ninth Circuit is positioned below the U.S. Supreme Court, so Ninth Circuit judges have a natural tendency to refrain from exhibiting any disagreement or discontent about the precedents set forth by the highest court of the nation. Unsurprisingly, every judge I interviewed stressed that they must abide by the decisions of the U.S. Supreme Court.

Likewise, the Ninth Circuit is also placed in a unique position compared to the federal district courts. For example, in immigration cases, the Ninth Circuit reviews cases from the immigration court and Board of Immigration Appeals with a

69. Telephone Interview with Judge Consuelo M. Callahan, *supra* note 45.

70. Confidential Interview with Ninth Circuit Judge, in San Francisco, Calif. (Oct. 17, 2017).

71. Interview with Judge Mary H. Murguia, *supra* note 47.

72. See CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 59, at Canon 2.

73. Gilman, *supra* note 40, at 476.

74. See S. COMM ON THE JUDICIARY, 106TH CONG. RESPONSES OF MARY H. MURGUIA NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT TO THE WRITTEN QUESTIONS OF SENATOR JEFF SESSIONS, <https://www.judiciary.senate.gov/imo/media/doc/MaryMurguia-QFRs.pdf>. [hereinafter RESPONSES OF MARY H. MURGUIA NOMINEE].

deferential standard of review. This illustration of respectful deference was present in all of the interviews I conducted with Ninth Circuit judges and exemplifies the constraints that limit appellate court judges in their decision-making. Therefore, Ninth Circuit judges must accord proper deference not only to the U.S. Supreme Court but also to the fact-finding responsibilities of the federal district courts. This unique position greatly inhibits federal appellate judges from exercising their discretion.

Despite judges' adherence to impartiality and precedent, a common thread among the interviewed judges was the value they placed on professional experiences, education, and overcoming adversity in helping them obtain their prestigious post. For instance, Judge Callahan, who is the first lawyer in her family, highlighted that "education is the great equalizer."⁷⁵ Moreover, Judge Murguia expressed a sense of triumph when describing how the American dream came true for her and her siblings.⁷⁶ She reiterated this pride during her confirmation hearings to become a Ninth Circuit judge and wrote, "your intellect and your character contribute in defining who you are, but I also think that your heritage and your culture is key, and that's what makes the person who is the judge."⁷⁷

Finally, Judge Nguyen highlighted that even though she feels a "special responsibility" as the first Asian American judge to serve in a federal appellate court, she stressed that this responsibility does not "translate into bending or shaping the law in favor of any group."⁷⁸ However, she did express that she takes her responsibility seriously in "being a role model, mentor, accessible to the community" and "maintaining equal opportunities and professional advancement for individuals who have been disadvantaged in the past."⁷⁹ Therefore, while the judges were uncertain about the effect that race plays in their thought processes, their responses highlight the connection they feel to overcoming substantial obstacles while growing up. This powerful connection to their self-worth is a significant and unique aspect of who they are as judges of color in one of the highest courts in the nation.

B. Case Law

To discern the influence that minority judges play in equal protection jurisprudence, I employed a matching method. This statistical technique compares minority and nonminority panels by determining if there is a difference between four panels with two or more minority judges and four panels of three nonminority judges. The eight cases were selected at random by utilizing a legal research database and filtering the proper jurisdiction, legal issue, and judges. I supplemented

75. Telephone Interview with Judge Consuelo M. Callahan, *supra* note 45.

76. Judge Murguia, Video Oral History with Ninth Judicial Circuit Historical Society, (July 7, 2017), <https://www.youtube.com/watch?v=CMX1wvtfgoM>.

77. RESPONSES OF MARY H. MURGUIA NOMINEE, *supra* note 74.

78. Telephone Interview with Judge Jacqueline H. Nguyen, *supra* note 48.

79. *Id.*

the matching method by examining particular opinions, dissents, and statements from minority judges during oral arguments.

1. Institutional Impact as a Federal Appellate Court

Deference to the U.S. Supreme Court was also apparent in case law that includes panels of minority judges. For example, in *Latta v. Otter*, both Judge Rawlinson and Judge Bea dissented from the denial of rehearing en banc for a same-sex marriage claim. In a dissent written by Judge O’Scannlain, a nonminority judge, and joined by Judge Rawlinson and Judge Bea, they wrote, “[w]e are a Court of Appeals, not the Supreme Court, and our obligation is to adhere to” the Supreme Court’s views.⁸⁰ The dissent continued to criticize their Ninth Circuit colleagues by arguing, “[t]he panel’s opinion . . . disregards binding Supreme Court precedent, intrudes on democratic self-governance, and undermines our Constitution’s commitment to federalism.”⁸¹ These sentiments highlight the value that appellate judges place on their responsibility to apply precedent. Rather than engaging in policymaking, the *Latta* dissent makes clear that specific Ninth Circuit judges are cognizant of the separation of powers established by the Constitution.

80. *Latta v. Otter*, 779 F.3d 902, 907 (9th Cir. 2015) (O’Scannlain, J., dissenting).

81. *Id.* at 914.

2. *Using a Matching Method to Analyze the Connection Between Equal Protection Jurisprudence and Judicial Racial Diversity*

Nonminority Panels (3 nonminority judges)	Minority Panels (2+ minority judges)
<i>Harrington v. Scribner</i> , 785 F.3d 1299 (9th Cir. 2015) (Thomas, O’Scannlain, Mckeown)	<i>Byrd v. Maricopa County Sheriff’s Dept.</i> , 565 F.3d 1205 (9th Cir. 2009) (Minority: Fernandez, Callahan) (Nonminority: Ikuta)
<i>Johnson v. State of Cal.</i> , 207 F.3d 650 (9th Cir. 2000) (Fletcher, Nelson, Brunetti)	<i>A.C.L.U. of Nevada v. City of Las Vegas</i> , 466 F.3d 784 (9th Cir. 2006) (Minority: Paez, Tashima) (Nonminority: Thomas)
<i>Coalition for Economic Equity v. Wilson</i> , 122 F.3d 692, 703 (9th Cir. 1997) (O’Scannlain, Leavy Kleinfeld)	<i>Parents Involved in Community Schools v. Seattle School Dist. No. 1</i> , 426 F.3d 1162 (9th Cir. 2005) (Minority: Bea, Dissent; Callahan joins Dissent; Rawlinson concurring in opinion) (Nonminority: Schroeder, Pregerson, Kozinski, Kleinfeld, Hawkins, Fletcher, Fisher, Tallman)
<i>Garza v. County of Los Angeles</i> , 918 F.2d 763 (9th Cir. 1990) (Schroeder, Nelson, Kozinski)	<i>U.S. v. Navarro</i> , 800 F.3d 1104 (9th Cir. 2015) (Minority: Tashima Opinion, Callahan also on panel) (Nonminority: Reinhardt)

i. Racial Discrimination in Criminal Claims

A diverse panel does not necessarily guarantee the success of a criminal defendant. In *United States v. Navarro*, a panel which included Judge Tashima and Judge Callahan ruled against the defendant. The panel held that the government met the lowest standard of review, rational basis, in delaying the implementation of a sentencing guideline amendment for one year.⁸² Additionally, in *Byrd v. Maricopa County Sheriff’s Dept.*, the panel consisted of two minority judges, Judge Fernandez and Judge Callahan. The panel held that a strip search by a female officer did not

82. *U.S. v. Navarro*, 800 F.3d 1104, 1113 (9th Cir. 2015).

violate a prisoner's equal protection rights.⁸³ The court reasoned that the inmate "'failed to allege that defendants' acts or omissions were motivated by discriminatory animus toward' male prisoners.'"⁸⁴ These cases are interesting examples because they consisted of panels of two minority judges who voted against a criminal defendant. Although in *Navarro*, the minority panel provided a clearer precedent to follow, *Byrd* was more vague in determining whether a law enforcement official genuinely had a discriminatory motive. Thus, *Navarro* and *Byrd* suggest that minority identity does not improperly influence the law, even in racial discrimination claims.

On the same note, a Ninth Circuit panel decided that police officers violated a Korean victim's right to equal protection after they failed to investigate her perpetrator's sobriety or charge him with a DUI. Judge Callahan, being the only minority judge on the panel, wrote a separate partial dissenting opinion.⁸⁵ She highlighted the deference that must be given to police officers regarding the manner and time in which they conduct their investigations and expressed concern over the majority's broad language.⁸⁶ Judge Callahan's dissenting opinion contradicts the notion that minority judges are more sympathetic to criminal defendants.⁸⁷ Although her desire to give officers deference may likely be attributable to her extensive professional experience as a district attorney,⁸⁸ her desire to differentiate herself from her nonminority colleagues supports the conclusion that race is not a determinative factor in criminal justice equal protection claims.

In contrast, full nonminority panels have ruled in favor of criminal defendants. In *Johnson v. State of California*, an all-White panel held that a prison inmate's allegation regarding racial discrimination in prison housing was sufficient to bring a claim under the Equal Protection Clause.⁸⁹ The criminal defendant was successful in alleging the wardens' awareness of race-based housing and how the policy failed to advance any penological purpose.⁹⁰ Furthermore, in *Harrington v. Scribner*, a full panel of nonminority appellate court judges sought to protect a prison inmate's rights in his jury instructions.⁹¹ The nonminority panel held that the inmate's jury instructions erroneously applied too much deference to state actors.⁹² They stressed that "racial classifications in prisons are 'immediately suspect' and subject to strict

83. *Byrd v. Maricopa County Sheriff's Dept.*, 565 F.3d 1205, 1212 (9th Cir. 2009), *on reh'g en banc*, 629 F.3d 1135 (9th Cir. 2011).

84. *Id.* at 1212.

85. *Elliot-Park v. Manglona*, 592 F.3d 1003, 1009 (9th Cir. 2010).

86. *Id.*

87. HAIRE & MOYER, *supra* note 8, at 18–22.

88. Biography of Callahan, Consuelo Maria, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/judges/callahan-consuelo-maria>.

89. *Johnson v. State of Cal.*, 207 F.3d 650, 655 (9th Cir. 2000).

90. *Id.*

91. *Harrington v. Scribner*, 785 F.3d 1299, 1306 (9th Cir. 2015).

92. *Id.*

scrutiny.”⁹³ *Johnson* and *Harrington* illustrate how nonminority panels have protected the rights of prison inmates in egregious cases. Therefore, these cases prove that, on the surface, a judge’s race does not seem to play a role in equal protection criminal claims.

ii. *Racial Discrimination in Education Claims*

Judicial diversity with respect to equal protection claims in education also prove inconclusive. In 2005, the Ninth Circuit heard *Parents Involved in Community Schools v. Seattle School Dist. No. 1* en banc.⁹⁴ While one minority judge, Judge Rawlinson, joined the majority opinion, two minority judges, Judge Bea and Judge Callahan, dissented from the majority opinion. The Court held that a school district did not engage in racial balancing when they employed a race-based tiebreaker in assigning students to public high schools.⁹⁵ Judge Bea’s and Judge Callahan’s statements during the interviews were consistent with their dissenting opinion. During their interviews, they stressed that their responsibility is to apply the law objectively without favoring one racial group over another.⁹⁶ Their dissent illustrates their conviction to faithfully apply the law even in controversial circumstances. Furthermore, their actions contradict the substantive representation model because their interpretation of the law transcended beyond their racial identity.

iii. *Racial Discrimination in Voting and Public Accommodation Claims*

There are minimal differences between nonminority and minority panels in voting and public accommodation equal protection cases. First, in *Garza v. County of Los Angeles*, a nonminority panel ruled in favor of Hispanic plaintiffs.⁹⁷ This nonminority panel held that the redrawing of certain districts in Los Angeles constituted intentional discrimination against Hispanic voters.⁹⁸ In contrast, Judge Bea wrote the opinion for *Feldman v. Arizona Secretary of State’s Office*, which upheld the constitutionality of an Arizona law which disparately impacted minority voters.⁹⁹ While Judge Bea did express concern over whether the law imposed a significant or minor burden on minority voters during the case’s oral argument, he

93. *Harrington*, 785 F.3d at 1306.

94. *Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1166, 1184 (9th Cir. 2005), *rev’d and remanded*, 551 U.S. 701, 127 S.Ct. 2738 (2007), *vacated*, 498 F.3d 1059 (9th Cir. 2007).

95. *Id.*

96. Telephone Interview with Judge Consuelo M. Callahan, *supra* note 45; Confidential Interview with Ninth Circuit Judge, in San Francisco, Calif. (Oct. 17, 2017).

97. *Garza v. Cty. of L.A.*, 918 F.2d 763, 769 (9th Cir. 1990).

98. *Id.*

99. *Feldman v. Ariz. Sec’y of State’s Office*, 842 F.3d 613, 628 (9th Cir. 2016), *reh’g en banc granted*, 840 F.3d 1164 (9th Cir. 2016).

ultimately decided that the impact on racial minorities was only disparate, or incidental.¹⁰⁰ In fact, Chief Judge Thomas, a nonminority judge, wrote a dissent arguing that the law imposes a substantial burden on minority voters and thus requires a stricter standard of review.¹⁰¹ These two cases challenge the assumption that diverse judges tend to side with minority litigants when deciding their cases.

On the other hand, equal protection claims in public accommodations have slightly aligned with conclusions from prior studies regarding diverse judges' sympathy towards minority groups. For example, in *Coalition for Economic Equity v. Wilson*, a full nonminority panel held that California Proposition 209, which prohibited gender and racial discrimination in public programs, was constitutional.¹⁰² However, a panel consisting of minority Judge Paez and Judge Tashima held that a tabling ordinance, which prohibited solicitation in certain areas in Las Vegas, violated the American Civil Liberty Union's Equal Protection rights in *A.C.L.U. of Nevada v. City of Las Vegas*.¹⁰³ Thus, equal protection claims in voting and public accommodation cases have been inconsistent and do not provide much insight in discerning how a judge's race may impact their decisions.

iv. Racial Discrimination in Immigration Claims

Although not part of the matching method analysis, I conclude the case law analysis with a discussion a few of Judge Nguyen's and Judge Bea's opinions in immigration claims due to their unique personal experiences with immigration into the United States. During my interview with Judge Nguyen, she admitted to having personal viewpoints regarding how open the U.S. should be to immigrants that stem from her experience of fleeing her home country as a refugee during the Vietnam War.¹⁰⁴ In fact, she has even written an op-ed detailing her views on the important role that immigrants play in U.S. society:

Like my family, many immigrants view America from a unique vantage point . . . those who personally faced hardships like war, poverty, and persecution bring a fresh and powerful appreciation of America's ideals of liberty and justice.¹⁰⁵

However, in *Valencia v. Lynch*, she denied a Mexican immigrant's petition for a labor certification and deferred to the Attorney General's interpretation of the

100. Oral Argument at 38:28, *Feldman v. Ariz. Sec'y of State's Office*, 842 F.3d 613 (9th Cir. 2016) (No. 16-16698), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010385.

101. *Feldman*, 842 F.3d 613 (Thomas, C.J., dissenting).

102. *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 701 (9th Cir. 1997), *as amended on denial of reh'g and reh'g en banc*, (Aug. 21, 1997), *as amended*, (Aug. 26, 1997).

103. *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 800 (9th Cir. 2006).

104. Telephone Interview with Judge Jacqueline H. Nguyen, *supra* note 48.

105. Tolan, *supra* note 21.

immigration statute instead.¹⁰⁶ While this decision may contradict Judge Nguyen's personal viewpoints, it is consistent with her statements during the interview. She emphasized her obligation as a federal appellate court judge to apply the proper level of deference to the immigration courts and officials, even if doing so would challenge her personal beliefs about immigration.¹⁰⁷ Judge Nguyen's ability to separate her opinions from the law is even more noteworthy, considering the severe hardships she had to overcome as a refugee.

Likewise, Judge Bea faced immigration conflicts when he was a law student at Stanford.¹⁰⁸ He had been ordered deported by the Hearing Officer, who is the equivalent of an Immigration Judge today. Luckily, the chairman of the Board of Immigration Appeals was a fan of Judge Bea's basketball skills, reversed the order, and reinstated his resident visa.¹⁰⁹ In an address to the Board of Immigration Appeals and Immigration Judges, Judge Bea remarked, "[e]very immigrant has a story. You see before you an immigrant who was once under an order of deportation."¹¹⁰ Thus, one would assume that Judge Bea's experience of almost being deported would make him more likely to rule in favor of deportees who seek relief, but that does not seem to be the case. In *Young Sun Shin v. Mukasey*, Judge Bea denied an alien's petition for review of her removal order because she overstayed her visitor's visa and obtained a fraudulent green card.¹¹¹ Furthermore, in *U.S. v. Arizona*, Judge Bea concurred in part and dissented in part to the majority's invalidation of Arizona's controversial S.B. 1070.¹¹² He ruled that section 2, which allows local officers to stop a person if they have probable cause that the person may be deportable, and section 6, which "effect[s] warrantless arrests based on probable cause of removability,"¹¹³ should not be preempted by federal law.¹¹⁴ Therefore, despite Judge Bea's ability to empathize with immigrant litigants, his immigrant experience has informed and enriched his understanding of immigration law.

Judge Nguyen and Judge Bea's decisions challenge prior studies' findings that minority judges are more likely to grant relief to immigrant litigants. Although these

106. *Valencia v. Lynch*, 811 F.3d 1211, 1213 (9th Cir. 2016).

107. Telephone Interview with Judge Jacqueline H. Nguyen, *supra* note 48.

108. Terry Nagel, *U.S. Court of Appeals Judge Carlos Bea to Focus on Religion in Constitution Day Lecture on Monday*, STANFORD LAW SCHOOL PRESS (Sept. 12, 2014), <https://law.stanford.edu/press/u-s-court-of-appeals-judge-carlos-bea-to-focus-on-religion-in-constitution-day-lecture-on-monday/>.

109. *Id.*

110. Address by the Honorable Carlos T. Bea Judge, U.S. Court of Appeals for the Ninth Circuit to the Board of Immigration Appeals and Immigration Judges (Aug. 10, 2007), (transcript available at http://lawprofessors.typepad.com/immigration/files/bea_address_to_bia_and_ij_2007_annual_convention.pdf).

111. *Young Sun Shin v. Mukasey*, 547 F.3d 1019, 1022 (9th Cir. 2008).

112. *U.S. v. Arizona*, 641 F.3d 339, 369 (9th Cir. 2011), *aff'd in part, rev'd in part and remanded*, 567 U.S. 387, 132 S.Ct. 2492 (2012).

113. *Id.* at 361.

114. *Id.* at 391.

decisions may be the product of participating in a mixed panel of three judges or detaching their personal experiences as immigrants from the law, Judge Nguyen's and Judge Bea's opinions contradict the Spaeth and Segel attitudinal model. Despite their strong connections to the plight of immigrants, they can still apply the law objectively without sticking to their personal proclivities. Consequently, the Ninth Circuit's equal protection jurisprudence suggests that judges of color have an extraordinary ability to encourage impartiality and thus, enrich the judiciary, by utilizing their racial perspectives to inform the court's decisions.¹¹⁵

IV. Discussion

A. Common Themes

Despite the inherent tension of discussing race as a federal judge, some themes are present in my research. First, the judges exhibited a willingness and excitement to speak about the impact of their professional and life experiences on their career, but not on their decision-making. From being the first in their family to become an attorney to competing as a basketball player in the Olympics, these judges were eager to share their ability to overcome adversity. As judges of color, they understandably displayed a sense of pride in excelling in their career despite the obstacles that minorities encounter within the legal profession.

Second, while judges did not explicitly discuss the impact of race in their decision-making, they implied that having a diverse bench positively impacts equal protection doctrine in specific situations. When asked, "[i]n which way, if any, do you think the presence of minority judges improves the court's equal protection jurisprudence," the Ninth Circuit judges mainly alluded to cases involving racial discrimination and criminal justice. For example, one judge noted that he would take race into account when it was "prudent[ial]" to do so.¹¹⁶ He provided an example of having an informant of the same race as a gang member in an FBI investigation in order to serve a compelling government interest.¹¹⁷ Moreover, Judge Callahan highlighted the benefit of having diverse judges when analyzing whether a comment may be offensive to a particular group because these judges can provide a different lens to the situation based on their personal experiences with discrimination.¹¹⁸ Finally, during Judge Nguyen's confirmation hearing in front of the Senate Judiciary Committee, she told members that "her life experience . . . gives [her] an appropriate sense of humility when [she] review[s] the facts of each case. [She] ha[s] an understanding and appreciation of how intimidating the court system

115. Ifill, *supra* note 44.

116. Confidential Interview with Ninth Circuit Judge, in San Francisco, Calif. (Oct. 17, 2017).

117. *Id.*

118. Telephone Interview with Judge Consuelo M. Callahan, *supra* note 45.

can be.”¹¹⁹ She also highlighted that diversity is especially imperative at the circuit court level because the structure of panels creates a more improved “end product . . . as a result of that dialogue.”¹²⁰

Finally, and most importantly, the interviews and cases both suggest that while racial diversity matters, the law matters more. Although the judges articulated that racial diversity plays a significant role in the court’s reputation with the public, they consistently reiterated their duty to faithfully apply the law. When addressing the value of diversity on the bench, Judge Nguyen expressed that it is “critically important” to have a judiciary that is reflective of the population that we serve.¹²¹ She explained that the Ninth Circuit’s credibility as a public institution depends on the trust that the public has in the judges’ decision-making.¹²² Thus, if a judiciary is comprised of all white men from corporate law firms, she explained, this would erode the public’s trust.¹²³ This advantageous perspective is unique to diverse judges and exemplifies the circumstances, although limited, in which a diverse judge can incorporate his or her experiences into judicial decision-making. It coincides with Judge Nguyen’s belief that “diversity is absolutely critical to the viability of the judiciary as an institution.”¹²⁴ Conversely, even though judicial diversity is imperative to the credibility of the bench, the interviews and case law tend to prove that the law influences minority judges more than their experiences. This is perhaps due to the tremendous obligation that diverse judges feel to implement the law impartially.¹²⁵

B. Limitations of the Study

Although this study provides valuable insight on particular Ninth Circuit judges, it is limited in terms of its scope and message. First, the Note’s focus is primarily on 11 federal judges on the Western coast of the United States in a circuit that has the reputation of being the most liberal.¹²⁶ Likewise, the personal interviews consisted of an even smaller sample size of four judges. These small sample sizes are not representative of the broad ideological composition and decision-making of all federal judges. Thus, it is important to refrain from generalizing the findings of this study to all federal circuit courts or the federal judiciary in general.

119. Kitty Felde, *Southern California Judge Questioned by Senate Judiciary Committee*, SO. CAL. PUB. RADIO (Nov. 2, 2011), <http://www.scpr.org/news/2011/11/02/29683/southern-california-judge-questioned-senate-judiciary/>.

120. Telephone Interview with Judge Jacqueline H. Nguyen, *supra* note 48.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *See generally* CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 59, at Canon 2; 28 U.S. Code § 453 (1990).

126. Gene Johnson, *How ‘Liberal’ Reputation of 9th Circuit Court of Appeals is Overblown*, *Scholars Say*, ORANGE COUNTY REG. (Feb. 6, 2017), <http://www.ocregister.com/2017/02/06/how-liberal-reputation-of-9th-circuit-court-of-appeals-is-overblown-scholars-say/>.

Second, the study can be improved by crafting more open-ended questions for the interviews. For example, some questions that I asked did not elicit substantial or extensive responses from the judges because some may have viewed any controversial implications as politically charged. These included questions such as, “What role, if any, do you think your ethnic background plays in your decision making?” and “Do you perceive a difference between minority and nonminority judges in deciding equal protection cases?” Therefore, the interview questions could have been developed in a manner that encouraged honest responses while still abiding by the judges’ ethical duties of fairness.¹²⁷

Third, it is extremely difficult to control the factor of race in any study. For example, a prior research study examining the effect of black counter judges illustrated the difficulty of isolating the factor of race because of how infrequent it was to have a panel of judges that is entirely black.¹²⁸ Similarly here, despite the diversity of the Ninth Circuit bench compared to the other federal circuits, there have only been a few equal protection panels that consisted of all diverse judges. In addition, it is difficult to discern whether a judge’s decision is driven by race alone, or a variety of different factors such as precedent, personal experience, or ideology.

Fourth, the conferences of the Ninth Circuit panels are confidential.¹²⁹ Therefore, it is difficult for a researcher to inquire into the robust discussions that the panel engages in prior to its decision. This confidentiality is detrimental to researchers because some of the points made during personal interviews will not be easily seen in the case law. Another limitation relating to confidentiality is the Ninth Circuit’s process of assigning cases.¹³⁰ While the Ninth Circuit publicizes that they employ a method of random selection to assign cases,¹³¹ the specific procedure is largely left unknown to the American public.¹³² These restrictions make it challenging to thoroughly evaluate judges’ thought processes and the factors they take into consideration when evaluating an equal protection claim.

Last, the main limitation with the personal interviews is the reality that the judges’ responses were most likely censored, even if unconsciously. To address this limitation, I have sought to fill in the gaps by using case law, newspaper articles, and official statements to supplement the judges’ responses. Because Ninth Circuit judges enjoy a prestigious position within the legal system, they may be more inclined to respond in a certain manner due to ethical and political considerations.

127. See CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 59, at Canon 2.

128. Kastellec 2013, *supra* note 32 at 176; *see also* Kastellec 2011, *supra* note 32, at 377–391.

129. Confidential Interview with Ninth Circuit Judge, in San Francisco, Calif. (Oct. 17, 2017).

130. Ronald D. Rotunda, *The Mystery of Case Assignment in the Ninth Circuit*, JUSTIA (Dec. 1, 2014), <https://verdict.justia.com/2014/12/01/mystery-case-assignment-ninth-circuit>.

131. *See generally* 9TH CIR. APP. P. Circuit Advisory Committee Notes.

132. Rotunda, *supra* note 130.

C. Future Studies

Judicial diversity is an exciting subject that could benefit from more research. While equal protection doctrine does encompass a wide variety of issues, future research can focus on other legal issues that may produce more conducive or different results. For example, studies can investigate the impact of judicial diversity on intellectual property, torts, or first impression cases. Another study can distinguish between the impact of diverse judges on state versus federal courts within the hierarchy of courts at the district, appellate, and Supreme Court levels.

Additionally, future studies can discover the impact of minority Justices on the U.S. Supreme Court when more diverse Justices are appointed. This dynamic may produce different results because of the larger group size of the panel, the prestigious status of the Justices, and the greater policy implications of their decisions. In fact, *The New York Times* reported on this issue and wrote, “a Washington lawyer, cautioned against extrapolating to the Supreme Court from studies of appeals courts. ‘Maybe one out of nine is different from one out of three.’”¹³³ Therefore, an analysis of the U.S. Supreme Court may be more beneficial in discerning the impact of race because the Justices may be more willing to speak about their individual decision-making due to the fact that they are not bound by the decisions of a higher court. This independence differs markedly from the constraints that appellate judges face, such as their responsibility in applying precedent from the U.S. Supreme Court.

Conclusion

The current Administration has exhibited an indifference to the value that a diverse judiciary brings to a legitimate government structure.¹³⁴ Because judicial diversity is not a priority on President Donald Trump’s political agenda, the number of racial minorities on the bench may decline.¹³⁵ This detrimental shift against judicial diversity is evidenced in President Trump’s recent federal judicial nominees, which have been 91% White and 81% male.¹³⁶ President Trump’s choice of nominees starkly contrasts President Barack Obama’s legacy of diversifying the courts, as President Obama “was the first President for whom nontraditional nominees comprised a majority (69%) of all those he appointed as circuit court

133. Adam Liptak, *The Waves Minority Judges Always Make*, N.Y. TIMES (May 30, 2009), <http://www.nytimes.com/2009/05/31/weekinreview/31liptak.html>.

134. See generally Carrie Johnson, *One Year In, Trump Has Kept A Major Promise: Reshaping the Federal Judiciary*, NPR (Jan. 21, 2018), <https://www.npr.org/2018/01/21/579169772/one-year-in-trump-has-kept-a-major-promise-reshaping-the-federal-judiciary>.

135. Catherine Lucey & Meghan Hoyer, *Trump Choosing White Men as Judges, Highest Rate in Decades*, CHI. TRIB. (Nov. 13, 2017), <http://www.chicagotribune.com/news/nationworld/politics/ct-trump-blacks-judges-20171113-story.html>.

136. *Id.*

judges.”¹³⁷ In contrast, President Trump’s nominees to the Ninth Circuit,¹³⁸ along with his hostile perception of the federal circuit court,¹³⁹ foreshadows a possible unfortunate decrease in judicial diversity in the coming years.

By demonstrating the invaluable contributions that judicial diversity brings to the judicial branch, this Note suggests that failing to diversify judicial appointments comes at a cost. Although judicial diversity does not play a significant role in influencing equal protection doctrine, the value that minority judges bring to the federal judiciary should not be overlooked. Minority judges exhibit a “heightened awareness” of the issues that disadvantaged people face.¹⁴⁰ Due to this special perspective, diverse judges are more able to fully comprehend the impact of their decisions on the people they serve and give credence to a “color-blind” Constitution.¹⁴¹ As judges of color, they bring a greater quality to the Ninth Circuit that was absent for centuries. Their ability to faithfully interpret the law, despite its tension with their closely-held personal beliefs, adds a vital layer of legitimacy and democracy to the United States Court of Appeals for the Ninth Circuit.

137. Barry J. McMillion, *U.S. Circuit and District Court Judges: Profile of Select Characteristics*, CONG. RES. SERV., Summary (2017).

138. Judicial Vacancies and Nominations, UNITED STATES COURTS FOR THE NINTH CIRCUIT (Aug. 21, 2018), https://www.ca9.uscourts.gov/content/view_db.php?pk_id=0000000899.

139. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 10, 2018, 6:11 AM), <https://twitter.com/realDonaldTrump/status/951094078661414912>; *id.* at (Apr. 26, 2018, 3:20 AM), <https://twitter.com/realDonaldTrump/status/857177434210304001>; *id.* at (Apr. 26, 2018, 3:38 AM), <https://twitter.com/realDonaldTrump/status/857182179469774848>.

140. Kastlelec 2013, *supra* note 32.

141. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
