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JUSTIFYING DIVERSITY IN THE FEDERAL JUDICIARY

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INTRODUCTION

Professor Nancy Scherer has offered a proposal to maximize diversity *and* legitimacy in the federal judiciary, a profound enigma that vexes judicial selection.[1] This is important because the selection process involves the very core of law and politics:[2] the President chooses nominees whom the Senate approves; once confirmed, these judges resolve controversial political issues.[3] Scherer proceeds by first examining rationales for and against a court-appointment strategy that would enhance diversity. She observes that both champions and critics of diversity share the goal of increased judicial legitimacy, although they obviously differ on how best to achieve it. Scherer then suggests a new solution, predicated on this common ground, to resolve the disagreement—urging diversity advocates to articulate the concrete benefits that expanding diversity can afford majorities and to collect and synthesize empirical information confirming these advantages.

This Essay descriptively and critically reviews Scherer's article. Although her account provides valuable insights into increasing diversity and legitimacy, it understates the crucial influence of politics. Indeed, the growing politicization of the selection process, which implicates the debate over diversity, could seriously undermine judicial legitimacy. However, President Barack Obama's approach to judicial appointments elucidates the issue and could point the way forward. This Essay thus scrutinizes Obama's judicial selection effort, which confirms many ideas that Scherer espouses while showing how political deficiencies in the modern selection process erode diversity and legitimacy, and perhaps Scherer's provocative solution. This response ultimately discusses some promising measures beyond Scherer's recommendation that could enhance diversity and legitimacy in

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[1] Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?,* 105 NW. U. L. REV. 587 (2011) (link).

[2] *Id.* at 587.

[3] *Id.*; *see also* Neil A. Lewis, *Move to Limit Clinton's Judicial Choices Fails*, N.Y. TIMES, Apr. 30, 1997, http://www.nytimes.com/1997/04/30/us/move-to-limit-clinton-s-judicial-choices-fails.html (discussing attempts by senators to increase their influence in the federal appeals court appointment process because these courts are "more influential in shaping the law") (link).

light of the threat that politicization poses.

I. DESCRIPTIVE ANALYSIS

Scherer illuminates the puzzle at the heart of judicial selection, a process that involves each branch of government. In exploring how to improve diversity and legitimacy, Scherer initially evaluates the possible benefits of a diversification strategy. This strategy could remedy discrimination, which historically restricted the number of minority, female, and lesbian, gay, bisexual and transgendered (LGBT) judges;[4] afford "descriptive representation," so that courts better mirror the nation's demographics;[5] and directly promote "substantive representation" by offering different perspectives on contested legal questions.[6] Scherer then examines the challenges inherent in an effort to diversify the judiciary. The diversification strategy is said to have a detrimental impact on persons of color and women,[7] yield judges who may seem less qualified,[8] and generate reverse discrimination that results in stronger white males being passed over for judicial appointments, fueling backlash.[9]

Scherer finds that both champions and opponents of judicial diversity claim that their strategy best advances legitimacy,[10] but she concludes that neither group actually wins the debate.[11] Scherer then considers other strategies that may be more successful. She implores supporters of diversification to enunciate the advantages that additional diversity could provide the majority, focusing on the nuanced relationship among diversification, crime, and legitimacy.[12] Scherer hypothesizes that expanding diversity will improve perceptions of legitimacy by reducing

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[4] Scherer, *supra* note 1, at 592–97. Scherer defines diversity as racial, ethnic, and gender difference, which encompasses African Americans, Hispanics and women, but she does not include LGBT individuals. *See id.* "Minority" means nonmajority ethnicity, gender, and sexual orientation here.

[5] *Id.* at 597–604; *see* Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109, 1117 (2003) (link); Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1442 (2008) (link).

[6] Scherer, *supra* note 1, at 604–10; *see* Theresa M. Beiner, *The Elusive (but Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 610–17 (2003) (link); Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV 769, 788 (2010) (link).

[7] Scherer, *supra* note 1, at 615–18; George F. Will, *The Unintended Consequences of Racial Preferences*, WASH. POST, Nov. 30, 2011, http://www.washingtonpost.com/opinions/the-unintended-consequences-of-racial-preferences/2011/11/29/gIQAbuoPEO_story.html (link).

[8] Scherer, *supra* note 1, at 618–21; Charlie Savage, *Ratings Shrink President's List for Judgeships*, N.Y. TIMES, Nov. 22, 2011, http://www.nytimes.com/2011/11/23/us/politics/screening-panel-rejects-many-obama-picks-for-federal-judgeships.html?pagewanted=all (link).

[9] These arguments echo contentions against affirmative action. Scherer, *supra* note 1, at 591, 620–24.

[10] *Id.* at 591, 625–30; *see supra* notes 4–9 and accompanying text.

[11] Scherer, *supra* note 1, at 591.

[12] *Id.* at 631–32; *see* Carl Tobias, *Diversity and the Federal Bench*, 87 WASH. U. L. REV. 1197, 1205–06 (2010) (link).

crime and cultivating a law-abiding society, thus presenting minorities *and* majorities with numerous benefits, as each are clear stakeholders in diversity.[13] Acknowledging that her premise remains a theory, she encourages legal academics, political scientists, court interest groups, and politicians to empirically validate the gains that this strategy could offer.[14]

II. CRITICAL ANALYSIS

Scherer pinpoints a real conundrum: how to improve both diversity and legitimacy in the federal court system. She recognizes that both proponents and critics of diversification pursue strategies intended to increase legitimacy, and Scherer believes that this common ground would rectify disagreements regarding diversity. She thus calls on advocates to show how expanded diversity realizes improved legitimacy.

However, certain questions receive either minimal assessment or none at all. Scherer only nominally examines President Obama's judicial selection initiative, which supplies empirical data on minority and female candidates as well as a number of tools for enlarging diversity. A related critical matter, also lacking full analysis, is the politics-driven selection process that has dramatically worsened during the Obama Administration. Since Judge Robert Bork's failed Supreme Court nomination in 1987, charges, recriminations, paybacks, and sustained partisanship have corroded the appointments process, seriously undercutting legitimacy and directly expanding the influence of politics, especially with respect to the role of diversity. These counterproductive dynamics bear greater responsibility for the putative subversion of legitimacy than stigmatization, less qualified designees, and reverse discrimination, all of which critics wrongly assign to diversification, capitalizing on it to enhance their political authority.

Scherer's remedy is not clearly the sole or most efficacious approach to diversification, which she candidly admits by characterizing her premise as a hypothesis and calling for greater empirical verification. Perhaps legitimacy could fail to justify diversification, advantages would resist quantification, or further study would yield insufficient data to convince opponents. Thus, selection participants might want to adopt her creative solution and other promising concepts, while tolerating differences regarding diversity.

In short, Scherer's article does much to strengthen one's appreciation

[13] Scherer explains that presidential "use of a diversity strategy to raise legitimacy among minorities could instill greater obedience to the law among the people statistically most at risk to disobey it (minority men) [and should concomitantly] alleviate whites' concerns about the crime problem in this country—a tangible benefit for whites." Scherer, *supra* note 1, at 633; *see* STEPHEN PINKER, THE BETTER ANGELS OF OUR NATURE (2011); *see also* Charles Lane, *Taking a Bite Out of Crime*, WASH. POST, Dec. 26, 2011, http://www.washingtonpost.com/opinions/taking-a-bite-out-of-crime/2011/12/22/gIQAa0LTJP_story.html (noting that decreased crime rates in the US has led to psychological, political, and economic payoffs for the country) (link).

[14] Scherer, *supra* note 1, at 633.

for court appointments, diversification, legitimacy, and ways to resolve the dilemma, but individual facets of her proposal warrant a more critical examination. Scherer understates how much bitter partisanship in the confirmation process erodes court legitimacy and thus her prescription may not maximize diversity and legitimacy as long as such rampant partisanship exists.

III. IMPROVING SELECTION

Scherer astutely recognizes "interbranch conflicts over nominations date" back to our nation's founding,[15] but the process worsened substantially after Judge Robert Bork's failed Supreme Court nomination.[16] Allegations, countercharges, paybacks, and divisiveness have since plagued the process when the party lacking White House control delayed and even obstructed selection. The GOP employed "pocket vetoes" to stymie minority and female nominee confirmations across much of President Bill Clinton's tenure,[17] and Democrats relied on filibusters in stalling many of President George W. Bush's picks.[18] This Section examines President Obama's effective efforts to improve diversity and legitimacy by nominating many well-qualified, minority and female candidates, although mounting politicization limited his ability to swiftly fill vacancies with excellent minority and female judges, a phenomenon exacerbated during his Administration.

A. Obama's Judicial Selection

Obama depended on a sizeable White House Counsel's office[19] and

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[15] *Id.* at 587; *see also* MICHAEL GERHARDT, THE FEDERAL APPOINTMENTS PROCESS, at xvii (2003) ("[T]he framers expected (even hoped) that conflicts would ensue from [the federal appointments process] design.").

[16] *See generally* MARK GITENSTEIN, MATTERS OF PRINCIPLE (1992) (documenting Judge Bork's failed nomination process).

[17] *See* Sheldon Goldman & Elliot Slotnick, *Picking Judges Under Fire*, 82 JUDICATURE 265, 281–88 (1999); Carl Tobias, *Choosing Judges at the Close of the Clinton Administration*, 52 RUTGERS L. REV. 827, 828–29 (2000) (link).

[18] *See* Press Release, White House, Office of Press Sec'y, President Bush Says Senate Filibuster Decision a "Disgrace" (Mar. 6, 2003), http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030306.html (link); Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 477–79 (2011) (link); Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303 (2011) (link). For more 1987–2008 analysis, see generally NANCY SCHERER, SCORING POINTS (2005); AMY STEIGERWALT, BATTLE OVER THE BENCH (2010).

[19] *See* Sheldon Goldman et al., *Obama's Judiciary at Midterm*, 94 JUDICATURE 262, 264 (2011); Jeffrey Toobin, *Bench Press*, NEW YORKER, Sept. 21, 2009, http://www.newyorker.com/reporting/2009/09/21/090921fa_fact_toobin (link); Jon Ward, *Obama Beefs Up Legal Staff*, WASH. TIMES, July 21, 2009, http://www.washingtontimes.com/news/2009/jul/21/white-house-beefs-up-legal-staff/print/ (link).

Vice President Joe Biden's extensive Judiciary Committee experience[20] in his approach to judicial selection. The President also assumed major responsibility for selecting circuit judges,[21] and to a lesser extent for selecting district judges, and had the Department of Justice (DOJ) prepare nominees for Senate hearings and votes.[22] He consulted Republican *and* Democratic elected officials from states with vacancies before making official nominations.[23] Most officials have commissions that investigate and forward a number of very qualified minorities and women to the politicians, who concomitantly send them to President Obama for nomination.[24]

Obama has rigorously emphasized diversity.[25] The President has implemented many special initiatives to foster diversity that resulted in the nomination of numerous minority and female prospects. He contacted traditional sources like the American Bar Association (ABA),[26] as well as nonconventional sources like minority and women's advocacy groups that know skilled candidates. Obama has pursued salient aid from minority and female lawmakers, who have identified capable candidates and helped them navigate the appointment process. He has requested that selection commissions and officers undertake concerted attempts to locate female and minority candidates.[27] Under this request, committees[28] and legislators have

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[20] Keith Koffler, *Biden Staff to Play Key Role in Sotomayor Confirmation*, ROLLCALL, May 26, 2009.

[21] They cover multiple states, have fewer, more critical openings, are courts of last resort in virtually all cases, and treat controversial issues. RICHARD A. POSNER, THE FEDERAL COURTS (1996); Lewis, *supra* note 3.

[22] Goldman, *supra* note 19; Tobias, *supra* note 6, at 777. The Office of Legal Policy (OLP) leads.

[23] GOP senators sent names. *See* Gary Martin, *The Battle over Obama's Federal Judges in Texas Heats Up*, HOUSTON CHRON., Oct. 8, 2009, http://blog.chron.com/txpotomac/2009/10/the-battle-over-obamas-federal-judges-in-texas-heats-up/ (link).

[24] *See* Tricia Bishop, *City Judge Nominated for Court of Appeals*, BALT. SUN, Apr. 3, 2009, http://articles.baltimoresun.com/2009-04-03/news/0904020105_1_district-court-court-of-appeals-davis (link); Joe Ryan, *President Barack Obama Nominates Federal Judge in Newark to U.S. Appeals Court*, N.J. STAR-LEDGER, June 19, 2009, http://www.nj.com/news/index.ssf/2009/06/president_barack_obama_nominat.html (link); Carol J. Williams, *Obama Names Four New Federal Judges for California*, L.A. TIMES, Aug. 9, 2009, http://articles.latimes.com/2009/aug/09/local/me-judges9 (link).

[25] Goldman et al., *supra* note 19, at 288; Tobias, *supra* note 12, at 1203–06. For President Obama's nominations that demonstrate his emphasis on diversity, see *111th Congress—Judicial Nominations*, U.S. DEP'T OF JUST. ARCHIVES (Aug. 2011), http://www.justice.gov/archive/olp/judicialnominations111.htm (link); *112th Congress—Judicial Nominations*, U.S. DEP'T OF JUST., http://www.justice.gov/olp/judicialnominations112.htm (last visited Apr. 2, 2012) (link).

[26] Obama reinstated ABA analysis *before* nominations; this helped to discover concerns, which saved embarrassment and time. Terry Carter, *Do-Over*, A.B.A. J., May 2009, at 62 (link); Tobias, *supra* note 6, at 777; Savage, *supra* note 8.

[27] *See* Goldman et al., *supra* note 19, at 288; Tobias, *supra* note 12, at 1203.

[28] For example, the Texas Federal Judicial Evaluation Committee sent five Latinos for Texas Districts. *See* Press Release, Kay Bailey Hutchison, Sens. Hutchison, Cornyn Applaud Confirmation of Marmolejo to Southern District Judgeship (Oct. 3, 2011), *available at*

searched for, reviewed, and proposed competent minorities and women for nomination.[29]

Obama has cultivated, suggested, and confirmed a number of fine minority and female persons; a substantial percentage of them are federal or state court judges.[30] His 181 nominees include 32 African Americans, 20 Latinos, 12 Asian Americans, 75 women, and 4 LGBT individuals.[31] Obama has even recommended minority and female candidates whom Republican members support,[32] including Republican appointees—notably Justice Sonia Sotomayor—and considered many others with direct GOP links.[33] The ABA awarded its highest ranking to four African American, three

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http://www.hutchison.senate.gov/?p=press_release&id=810 (discussing the recommendation and confirmation of Marina Garcia Marmolejo) (link); Press Release, Kay Bailey Hutchison, Sens. Hutchison, Cornyn Applaud Nomination of Guaderrama to Western District Judgeship (Sept. 15, 2011), *available at* http://www.hutchison.senate.gov/?p=press_release&id=778 (discussing recommendation and nomination of David Campos Guaderrama) (link); Press Release, Kay Bailey Hutchison, Sens. Hutchison, Cornyn on Senate Approval of Nelva Gonzales Ramos as Federal Judge (Aug. 3, 2011), *available at* http://www.hutchison.senate.gov/?p=press_release&id=732 (discussing confirmation of Nelva Gonzales Ramos) (link); Press Release, Kay Bailey Hutchison, Sens. Cornyn, Hutchison Recommend Costa & Guaderrama for the Federal Bench (Jul. 19, 2011), *available at* http://www.hutchison.senate.gov/?p=press_release&id=678 (discussing nomination of Gregg Costa) (link); Press Release, Kay Bailey Hutchison, Texas Senators & Congressman Applaud Senate Approval of Diana Saldana for Federal Judge in South Texas (Feb. 7, 2011), *available at* http://hutchison.senate.gov/?p=press_release&id=114 (discussing confirmation of Diana Saldana) (link); *111th Congress—Judicial Nominations*, *supra* note 25; *112th Congress—Judicial Nominations*, *supra* note 25.

[29] Officials from eleven states sent minority circuit court candidates whom senators later confirmed. *See, e.g.*, *supra* note 24; *infra* note 69.

[30] *See supra* note 24. Senators have approved federal judges, who have accessible records and undergo prompt ABA review. Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 752 (1997) (link); Neil Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES, Apr. 10, 1990, http://www.nytimes.com/1990/04/10/us/bush-picking-the-kind-of-judges-reagan-favored.html?pagewanted=all (link).

[31] ALLIANCE FOR JUSTICE, JUDICIAL SELECTION SNAPSHOT 6 (2012) [hereinafter AFJ SNAPSHOT], *available at* http://www.afj.org/judicial-selection/judicial-selection-snapshot.pdf (link); Chris Geidner, *Michael Fitzgerald, Approved on 91–6 Vote, Will Be First Out LBGT Federal Judge Outside New York*, METRO WEEKLY, Mar. 15, 2012, http://metroweekly.com/poliglot/2012/03/michael-fitzgerald-approved-on.html#.T24CcYx1uNg.email (link). For data on the appointees of previous presidents, see Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living Up to Them?*, 7 FORUM 1 (2009).

[32] Home state GOP senators favored Judges Beverly Martin, Mary Murguia, and Jane Stranch. 156 CONG. REC. S17 (daily ed. Jan. 20, 2010) (link); *id.* at S10,986 (daily ed. Dec. 22, 2010) (link); *id.* at S7009 (daily ed. Sept. 13, 2010) (link).

[33] Neil A. Lewis, *After Delay*, *Senate Approves Judge for Court in New York*, N.Y. TIMES, Oct. 3, 1998, http://www.nytimes.com/1998/10/03/nyregion/after-delay-senate-approves-judge-for-court-in-new-york.html (link); *see* Carl Tobias, *The Federal Appellate Court Appointments Conundrum*, 2005 UTAH L. REV. 743, 770 (link); Sheryl Gay Stolberg, *Sotomayor, a Trail Blazer and a Dreamer*, N.Y. TIMES, May 27, 2009, http://www.nytimes.com/2009/05/27/us/politics/27websotomayor.html?pagewanted=all (link).

Latino, and two Asian American circuit nominees.[34]

During the nomination and confirmation processes, the Administration cooperated with Senator Patrick Leahy (D-VT), the Judiciary Committee chair; Senator Harry Reid (D-NV), the Majority Leader; and their counterparts, Senators Jeff Sessions (R-AL) and Mitch McConnell (R-KY).[35] However, Sessions and many of his Republican colleagues found certain minority nominees—such as Professor Goodwin Liu and Judges Andre Davis, Edward Chen, and Bill Martinez—to be controversial, even though they were considerably less liberal than some Bush appointees were conservative. Sessions contended that Liu pursued a radical agenda—invoking a "living Constitution" and "empathy-standard"[36]—and further noted that Davis was "reversed quite a number of times,"[37] and that Chen and Martinez would not serve as "neutral umpires."[38] Senator Sessions summarized: Obama's nominees manifest a "common and concerning DNA—the ACLU chromosome."[39]

The Senate did not vote on any of Obama's judicial nominees—some of whom he nominated that spring—until September 2009. This was partly because Sotomayor's appointment consumed three months in which negligible effort was devoted to lower court nominees.[40] That year,

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[34] *See Ratings for Judicial Nominees*, A.B.A., http://www.americanbar.org/groups/committees/federal_judiciary/resources/ratings_for_judicial_nominees.html (last visited Apr. 2, 2012) (link); Savage, *supra* note 8.

[35] *But see infra* notes 36–45, 52–64 and accompanying text. Leahy sets hearings and votes, and Reid, floor action. *See* sources cited *supra* note 19. In 2011, Senator Charles Grassley (R-IA) replaced Sessions.

[36] Press Release, Jeff Sessions U.S. Senator for Alabama, Senate Rejects Extreme Nominee (May 19, 2011), *available at* http://sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord_id=09e6b685-9489-1554-c8fc-5bdb46cdf15d&Region_id=&Issue_id=ecaf7068-9f22-0909-73d6-ca29cc5d2533 (link); *see infra* notes 52–57.

[37] 155 CONG. REC. S10,754 (daily ed. Oct. 27, 2009) (link); Michael A. Fletcher, *Obama Criticized as Too Cautious, Slow on Judicial Posts*, WASH. POST, Oct. 16, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/10/15/AR2009101504083.html (link); Doug Kendall, *The Bench in Purgatory*, SLATE, Oct. 26, 2009, http://www.slate.com/articles/news_and_politics/jurisprudence/2009/10/the_bench_in_purgatory.html (link).

[38] 155 CONG. REC., *supra* note 37 (discussing Chen); Chen, *supra* note 5. For statements regarding Martinez, see U.S. Sen. Comm. on the Judiciary, Webcast of Executive Business Meeting (Apr. 15, 2010), http://www.judiciary.senate.gov/resources/webcasts/index.cfm?changedate=04-11-10&p=all (link); 156 CONG. REC. S10,868 (daily ed. Dec. 21, 2010) (statement of Sen. Sessions) (link).

[39] U.S. Sen. Comm. on the Judiciary, Webcast of Executive Business Meeting (Oct. 15, 2009). The GOP tactic is to "delay and conquer": if Democrats "get out aggressively pushing back[,] . . . they can create a perception that we're delaying a lot of nominees, and [so] it will be harder for us to delay." Dan Friedman, *Nomination Battle Begins Affecting Unopposed Judges*, NAT'L J. DAILY, Oct. 28, 2009, http://www.nationaljournal.com/member/daily/nominations-battle-begins-affecting-unopposed-judges-20091028?mrefid=site_search (link).

[40] Justice Sotomayor was confirmed in August 2009. Alex Leary, *Supreme Court Seat Not Only One Empty*, ST. PETERSBURG TIMES, Aug. 6, 2009; *see* Tobias, *supra* note 6, at 780, 782–83.

McConnell agreed to few nominee Senate votes, and the GOP placed holds on a number of consensus candidates. This conduct slowed review and necessitated the Democrats' cloture petitions.[41] Meanwhile, Republicans sought substantial debate time and roll call votes for nominees they ultimately favored.[42] Minorities and women—including Fourth Circuit Judges Davis and Barbara Keenan—waited on ballots for protracted periods, even though the court had numerous vacancies.[43]

The 2010 approval of Justice Elena Kagan stalled appointments for lower courts, which explains in part why one appellate nominee had floor consideration across a ninety-day timeframe, while members only confirmed six 2010 appellate nominees between Kagan's appointment and the year's conclusion, and merely nine throughout 2011.[44] Openly gay nominee Edward DuMont waited interminably for a hearing.[45]

Obama has made 181 nominations in all, with the Senate approving 136 of them, including 2 Supreme Court Justices, 26 circuit judges, and 105 trial judges.[46]

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[41] 155 CONG. REC. S10,752 (daily ed. Oct. 27, 2009) (statement of Sen. Sessions) (link); *id.* at S11,421 (daily ed. Nov. 17, 2009) (Judge David Hamilton cloture vote) (link); 156 CONG. REC. S908 (daily ed. Mar. 2, 2010) (Judge Barbara Keenan 99–0 cloture and merits votes) (link). Cloture gives opponents 30 debate hours, devouring scarce time. Senate Rule XXII (2010), *available at* http://www.senate.gov/reference/reference_index_subjects/Cloture_vrd.htm (link).

[42] The GOP sought an hour for Martin and two hours for Roberto Lange but overwhelmingly approved both in minutes. 155 CONG. REC. S10,601 (daily ed. Oct. 21, 2009) (regarding Judge Lange) (link); 156 CONG. REC., *supra* note 32 (regarding Judge Martin).

[43] *See supra* notes 37, 41, *infra* note 45. *But see* 155 CONG. REC., *supra* note 41, at S10,753 (statement of Sen. Sessions) (link).

[44] Paul Kane & Robert Barnes, *Senate Confirms Elena Kagan's Nomination to Supreme Court*, WASH. POST, Aug. 6, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/08/05/AR2010080505247.html?nav=emailpage (link); 157 CONG. REC. S8770 (daily ed. Dec. 17, 2011) (link); 156 CONG. REC. S6971 (daily ed. Aug. 5, 2010) (link). Stranch and Albert Diaz waited thirteen months, even with their GOP senators' support. 156 CONG. REC. S7009 (daily ed. Sept. 13, 2010) (link); *id.* at S10,667 (daily ed. Dec. 18, 2010) (link). The Senate confirmed thirteen in 2010 and nine in 2011. *111th Congress—Judicial Nominations*, *supra* note 25; *112th Congress—Judicial Nominations*, *supra* note 25. In late 2011, the Senate recessed without voting on twenty-one nominees who had Judiciary Committee approval, and the GOP returned eight nominees to Obama. 157 CONG. REC. S8772 (daily ed. Dec. 17, 2011) (link).

[45] Press Release, White House, Office of the Press Sec'y, President Obama Nominates Edward C. DuMont for the United States Court of Appeals for the Federal Circuit (Apr. 14, 2010) (link); Letter from Edward DuMont to President Barack Obama (Nov. 4, 2011) (on file with author) (link). A striking 2012 example of obstruction was the 89–5 cloture and 94–5 merits vote on Judge Adalberto José Jordán. 158 CONG. REC. S558 (daily ed. Feb. 13, 2012) (link); *id.* at S673 (daily ed. Feb. 15, 2012) (link).

[46] The Judiciary Committee reported 34 circuit and 121 district picks. *111th Congress—Judicial Nominations*, *supra* note 25; *112th Congress—Judicial Nominations*, *supra* note 25. More than half of the Obama appellate and district nominees are presently sitting judges. AFJ SNAPSHOT, *supra* note 31, at 8. This elevation within the judiciary suggests a career judiciary. RUSSELL WHEELER, BROOKINGS INST., THE FEDERAL JUDICIARY'S CHANGING FACE 7–9 (2009), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/08_federal_judiciary_wheeler/08_federal_judiciary_wheeler.pdf (link); Goldman et al., *supra* note 19, at 300.

Obama's diversity efforts have produced significant benefits. He has surpassed prior administrations in swiftly nominating people of color, women, and LGBT individuals. Persistent consultation with home-state politicians has led to the nomination and confirmation of able candidates, restricting somewhat the incessant divisions and paybacks that have undermined the selection process.[47] Most critically, additional cooperation has directly facilitated appointments while improving citizen regard for the process and court legitimacy.[48]

Obama's strategy for expanding diversity provides numerous benefits, especially for increasing judicial legitimacy. The numerous minority and female candidates, many of whom possess superb qualifications and ABA rankings, illustrate the arguments in favor of greater diversity—remedying past discrimination and expanding representation, both substantive and descriptive.[49] The candidates correspondingly address opponents' most prominent concerns—the nominees are highly competent, are not stigmatized upon reaching the bench, and undermine claims of reverse discrimination.

Even though Obama's initiatives have provided benefits, several features warrant improvement. A core metric for measuring the efficacy of judicial selection is the speed of confirmation. Slow appointments erode legitimacy by leaving many judgeships empty and delaying access to justice. For example, in 2009, only a dozen picks—including seven individuals of color and five women—secured confirmation. The next year, merely twenty people of color and twenty-five women were appointed.[50] Obama bears some responsibility for the delayed nominations. While aggressively consulting lawmakers and minimizing divisiveness through comprehensive pre-nomination evaluations were efficacious strategies,

[47] *Compare supra* notes 23–24, 35–45 and accompanying text (discussing President Obama's consultation with party leaders during the judicial appointments process, which was still stalled at times by the Senate), *with* Tobias, *supra* note 6, at 773–76 ("Bush's nominal consultation with the Senate delayed the expeditious appointment of his nominees, while the minimal review granted to nominees of President Clinton triggered paybacks."). *See also supra* note 41 (ten GOP senators favored cloture on Hamilton as President's nominees merit votes); *supra* note 43 (other examples of nominees who waited on ballots for protracted periods).

[48] *See* Tobias, *supra* note 6, at 779; Tobias, *supra* note 33, at 767–68.

[49] Minority and female judges provide substantive representation by helping colleagues understand and evaluate a range of controversial legal issues such as employment discrimination, civil rights, immigration, and criminal law. Beiner, *supra* note 6, at 610–17; Chen, *supra* note 5; Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 19–21 (2001); Madhavi McCall, *Structuring Gender's Impact: Judicial Voting Across Criminal Justice Cases*, 36 AM. POL. RES. 264 (2008) (link). *But see* Stephen Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504 (2011) (link). This list is not exhaustive. A bench that resembles the nation also remedies past discrimination and provides descriptive representation, instilling public confidence. *See* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000) (link); *supra* notes 4–5 and accompanying text.

[50] No LGBT nominees won approval. Goldman, *supra* note 19.

these activities imposed temporal costs.[51]

The GOP, on the other hand, bears more responsibility for the slow confirmations. The party held over numerous minority and female nominee committee ballots; actions apparently meant to stall for partisan gain.[52] However, the Senate floor was the primary bottleneck. The Senate did not vote on six appellate candidates the panel reported in 2009 and hardly picked up the pace in the years following. McConnell and his GOP colleagues effectively disregarded Reid's importuning; numerous senators placed holds on exceptional, uncontroversial nominees while seeking hours for debate when only minutes were required.[53] Democrats rarely pressed Senate ballots or deployed cloture to force votes because this would have ultimately proved counterproductive by infuriating Republicans and exacerbating delay.[54]

Liu, whom the GOP found controversial, is Asian American.[55] Sessions organized a committee ballot against the nominee,[56] and Liu waited fifteen months for an up-or-down Senate vote that never materialized because merely one Republican favored cloture.[57] Another person of color, Judge Diaz—who sparked absolutely no controversy, possessed an enviable record, mustered a 2009 nomination in the Fourth Circuit, and secured a unanimous January 2010 panel ballot—only garnered floor consideration

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[51] He did not always tap expeditiously or consult. Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2190–91 (2011) (link). Senate use of panels to review and send names, assessing and choosing picks, and negotiating took time. *See supra* note 24 and accompanying text.

[52] *See supra* notes 36–39 and accompanying text.

[53] McConnell agreed to few votes and none before Sotomayor's. *111th Congress—Judicial Nominations*, *supra* note 25; *112th Congress—Judicial Nominations*, *supra* note 25; *supra* note 40; Goldman, et al., *supra* note 19; Tobias, *supra* note 19. Holds were traditionally rare. Nan Aron, *GOP Senators Perfect Art of Stalling*, POLITICO, Feb. 2, 2010, http://www.politico.com/news/stories/0210/32342.html (link); James Oliphant, *Obama Losing Chance to Reshape Judiciary*, L.A. TIMES, Mar. 15, 2010, http://articles.latimes.com/2010/mar/15/nation/la-na-obama-judges15-2010mar15 (link). For debate time, see *supra* note 42.

[54] *See supra* notes 36–45 and accompanying text.

[55] Maura Dolan, *Goodwin Liu Confirmed to California Supreme Court*, L.A. TIMES, Sept. 1, 2011, http://articles.latimes.com/2011/sep/01/local/la-me-0901-goodwin-liu-20110901 (link); Press Release, *supra* note 36.

Liu and Chen are two of ten Asian American nominees, compared to only five percent of Latino nominees considered to be controversial. Chen waited two years for approval. 157 CONG. REC. S2831–32 (daily ed. May 10, 2011) (link); *supra* note 38.

[56] Linda Greenhouse, *Rock Bottom*, N.Y. TIMES, Dec. 14, 2011, http://opinionator.blogs.nytimes.com/2011/12/14/rock-bottom/ (link); *see supra* text accompanying notes 36, 39.

[57] *See* 157 CONG. REC. S3146 (daily ed. May 19, 2011) (link); Press Release, *supra* note 36. D.C. Circuit nominee Caitlin Halligan's process was similar. 157 CONG. REC. S8346–47 (daily ed. Dec. 6, 2011) (link); Press Release, White House, Office of Press Sec'y, Statement by the President on Republican Filibuster of Caitlin Halligan, Dec. 6, 2011 (link).

that December.[58]

These partisan activities, which are essential to understanding Scherer's concerns regarding legitimacy, posed acute disadvantages. In particular, they unnecessarily lengthened selection, damaged whatever civility remained in the process, and propelled confirmation wars. The behavior sent nominees into prolonged limbo, discouraged remarkable prospective candidates, and denied courts crucial resources.[59] These phenomena, in turn, undermined public respect both for the judicial selection process and for the government, with an especially strong negative impact on court legitimacy.

The Senate approved a mere twenty-six people of color during Obama's initial half-term.[60] Circuit appointments have consumed nine months,[61] and the confirmation rate of Obama's nominees is the lowest documented.[62] Phenomena over which the President lacks complete power that affect the nomination and confirmation process may partly explain his record.[63]

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[58] *See* Jim Morrill, *Diaz Confirmed to 4th Circuit*, CHARLOTTE OBSERVER, Dec. 19, 2010, http://www.ongo.com/v/158586/-1/062F4803065DEF23/diaz-confirmed-to-4th-circuit (link); *See also* 156 CONG. REC. S10,667 (daily ed. Dec. 18, 2010) (link); *supra* note 44 and accompanying text.

[59] It slows civil, and even criminal, cases. Gary Fields & John R. Emshwiller, *Criminal Case Glut Impedes Civil Suits*, WALL ST. J., Nov. 10, 2011, http://online.wsj.com/article/SB10001424052970204505304577001771159867642.html (link); *Judicial Emergency Declared in Arizona*, THIRD BRANCH, Feb. 2011, at 3. (link). The Speedy Trial Act requires that criminal cases receive precedence, but even these are now delayed by judicial vacancies. *See* Speedy Trial Act, 18 U.S.C. §§ 3161–74 (2006) (link).

[60] 157 CONG. REC. S7899 (daily ed. Nov. 28, 2011) (statement of Sen. Leahy) (link); ALLIANCE FOR JUSTICE, THE STATE OF THE JUDICIARY: PRESIDENT OBAMA AND THE 111TH CONGRESS 22 (2011) [hereinafter STATE OF THE JUDICIARY], *available at* http://www.afj.org/judicial-selection/state_of_the_judiciary_111th_congress_report.pdf (link). The Senate confirmed fewer jurists during Obama's first year than for any other Chief Executive during the last half century, although the confirmation process has since improved. *See* 158 CONG. REC. S1711–12 (daily ed. Mar. 15, 2012) (statement of Sen. Leahy) (link).

[61] David Fontana, *Going Robe*, NEW REPUBLIC, Dec. 17, 2009, http://www.tnr.com/article/environment-energy/going-robe (link); *see 111th Congress—Judicial Nominations*, *supra* note 25; *112th Congress—Judicial Nominations*, *supra* note 25.

[62] Carol J. Williams, *Legal Logjam Leaving Judges' Seats Empty in Federal Courts*, L.A. TIMES, Aug. 30, 2010, http://articles.latimes.com/2010/aug/30/nation/la-na-judicial-logjam-20100831 (link). *But see* 157 CONG. REC. S7898 (daily ed. Nov. 28, 2011) (statement of Sen. Grassley) (link).

[63] Naming Justices expeditiously was crucial but slowed other action. *See supra* notes 33, 44. Obama met with "start-up" costs in instituting his appointed government. *See* Peter Baker, *Obama Team Lacking Most of Top Players*, N.Y. TIMES, Aug. 24, 2009, http://query.nytimes.com/gst/fullpage.html?res=9E0DE7DA103EF937A1575BC0A96F9C8B63&pagewanted=all (link); Al Kamen, *Here Come Judges? Maybe Not*, WASH. POST, Oct. 18, 2011, http://www.washingtonpost.com/politics/looking-for-a-seat-on-the-federal-bench-fuhgeddaboutit/2011/10/18/gIQAalHOvL_print.html (link). He faced fiscal and overseas dilemmas. Peter Baker, *Could Afghanistan Become Obama's Vietnam?*, N.Y. TIMES, Aug. 22, 2009, http://www.nytimes.com/2009/08/23/weekinreview/23baker.html?pagewanted=all (link); Charles Krauthammer, Op-Ed, *Who Lost Iraq?*, WASH. POST, Nov. 3, 2011, http://www.washingtonpost.com/opinions/who-lost-iraq/2011/11/03/gIQAUcUqjM_story.html (link).

In short, Obama nominated sixty-five persons of color, seventy-six women, and four LGBT individuals—all of them very qualified—while the Senate has confirmed only forty-nine people of color, sixty–one women and three LGBT persons. Although the Senate has used dynamic procedures to speed review, partisanship has slowed numerous appointments. This Essay thus turns to promising new ideas that will facilitate the confirmation of additional nominees and address Scherer's diversity concerns.[64]

B. Measures for Improving the Process, Diversity, and Legitimacy

Obama has adopted goals for increasing diversity, implemented effective practices to realize them,[65] and set records for nominating talented women and people of color early in his presidency,[66] but he might realize even greater success. His efforts have been responsive to Scherer's concerns about a diversification strategy because they have improved the judiciary's diversity, quality, and legitimacy. In general, Obama should proceed cautiously as before, though he ought to consider the changes suggested.[67] For instance, the Administration might reassess the devices it uses, better calibrate or jettison less productive endeavors, redouble certain actions, canvass and deploy constructive solutions previously employed, and perhaps rely on innovative efforts.[68]

While the White House has tapped numerous qualified minorities and women, it has been less successful in confirming these judges to specific appellate and district courts. Thus, Obama should urge prompt confirmation of these nominees and propose more. If commissions or politicians suggest too few qualified candidates,[69] the Administration should urge them to furnish more,[70] particularly for nondiverse courts.[71] Obama has submitted

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[64] Some notions have already received consideration. *See, e.g.*, Goldman et al., *supra* note 19; Tobias, *supra* note 12; *infra* note 91 and accompanying text.

[65] Merit was the touchstone. He consulted officials and steadily nominated minority and female candidates, several of whom GOP lawmakers favored. *See supra* notes 19–35 and accompanying text.

[66] *See supra* notes 31, 47 and accompanying text.

[67] Obama has not stated diversity goals in a national forum, which would increase transparency and inform selection officers and citizens. Carl Tobias, *Dear President Bush: Leaving a Legacy on the Federal Bench*, 42 U. RICH. L. REV. 1041, 1049 (2008) (link).

[68] Courts, the source of many fine minority and female nominees, are instructive. Obama must keep using them and related fruitful sources, such as civil and criminal bar association members and scholars.

[69] Some senators referred one prospect. *See, e.g.*, Alan Cooper, *Webb, Warner Invoke McDonnell on Keenan's Behalf*, VA. LAWS. WKLY., Feb. 25 2010, http://valawyersweekly.com/vlwblog/2010/02/25/webb-warner-invoke-mcdonnell-on-keenan%E2%80%99s-behalf/ (link); Bishop, *supra* note 24 (discussing the appointment of a Fourth Circuit judge); Ryan, *supra* note 24 (discussing the appointment of a Third Circuit judge).

[70] *See supra* notes 19–29 and accompanying text. Predecessors asked senators to refer more persons of color and women. Tobias, *supra* note 12, at 1199.

[71] Critical sources include minority and women's bar associations and political groups and officers; they pursue, analyze, and promote fine picks. *E.g.*, NAT'L ASIAN PAC. AM. BAR ASS'N, http://www.napaba.org/napaba/showpage.asp?code=home (last visited Apr. 3, 2012) (link); HISPANIC

minority and female Republican confirmees and other nominees the party favors, yet he could adjust this strategy by choosing additional GOP appointees[72] or candidates with party ties.[73] Obama might even improve his work by nominating such candidates more quickly, including those such as Judge Jacqueline Nguyen, a 2009 Obama district court appointee.[74] Past presidents have implemented analogous strategies to great effect, from Jimmy Carter adopting a Circuit Judge Nominating Commission to George H.W. Bush and Bill Clinton asking legislators to forward more women.[75]

Obama should continue applying cooperative, nuanced policies, as missteps may erode his credibility and stall confirmations. This is especially true because Obama has made bipartisanship the cornerstone of his presidency. If this approach—including robust consultation and a meritocratic selection process—lacks efficacy because the GOP neglects to cooperate, he may assess less conciliatory avenues. Should the GOP keep slowing nominee floor action, Obama could invoke the bully pulpit to embarrass and criticize the party, make the unfilled seats an election issue, nominate candidates for all eighty-one current vacant posts, or make recess appointments.[76]

Obama ought to carefully articulate how diversifying the courts addresses the views of both champions and critics and helps the country, though he may find that the record numbers of female and minority nominees speak for themselves.[77] For example, recent Asian American

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NAT'L BAR ASS'N, http://www.hnba.com/ (last visited Apr. 3, 2012) (link); *see supra* notes 19–24 and accompanying text.

[72] For instance, Bush appointed twenty-six Latino district judges. Goldman, *supra* note 31, at 5.

[73] Full communication before and after the nominations consolidates efforts. Tobias, *supra* note 6, at 785.

[74] Press Release, White House, Office of the Press Sec'y, President Obama Nominates Judge Jacqueline H. Nguyen to Serve on the United States Court of Appeals (Sept. 22, 2011) (link). Elevation is a venerated tool. *See supra* note 30. While the President should nominate more quickly, he must still fully consult. *See* 157 CONG. REC. S7898, *supra* note 62.

[75] Tobias *supra* note 67, at 1052–53; *see supra* notes 24–29 and accompanying text.

[76] *See* David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1902–06 (2008) (book review) (link); Tobias, *supra* note 33, at 772. All dramatize how the large number of judicial openings delays justice. Since 1980, four judges were recess appointments. *See* U.S. CONST. art. II, § 2, cl. 3 (link); Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004) (link); William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515 (2004) (link). Obama's recent Executive Branch recess appointments inflamed many GOP senators, but it remains unclear whether this will affect judicial selection. Charlie Savage, *Obama Tempts Fight Over Recess Appointments*, N.Y. TIMES, Jan. 4, 2012, http://thecaucus.blogs.nytimes.com/2012/01/04/obama-tempts-fight-over-recess-appointments/?ref=recessappointments (link); Jonathan Weisman, *Republican Vow of Revenge Falls Short*, N.Y. TIMES, Feb. 9, 2012, http://thecaucus.blogs.nytimes.com/2012/02/09/senate-g-o-p-vowed-to-oppose-all-obama-choices-but-nominee-gets-bipartisan-confirmation/ (link).

[77] *See supra* notes 31, 47 and accompanying text. Justice Sotomayor was the major exception to his rare articulation of rationales for his choices vis-à-vis diversification. Obama praised her for surmounting barriers that "can give a person . . . a sense of compassion; an understanding of how . . . ordinary people live." Press Release, White House, Office of the Press Sec'y, Remarks by the President

confirmees and Fourth Circuit minority and female appointees are helping to rectify prior discrimination and improve representation, especially descriptive and perhaps substantive. Their consummate abilities correspondingly allay concerns regarding stigmatization, dilution of qualifications, and reverse discrimination.[78] Both parties instituted effective concepts for increasing diversity and should continue implementing them to fill vacancies.[79] Politicians may reinstate a few traditions—namely conducting expeditious Senate ballots for qualified, uncontroversial trial-level candidates—while exercising more deference to home-state colleagues and President Obama, who has rigorously consulted lawmakers, indulged their preferences, and even nominated some individuals suggested by Republicans.[80]

Despite the use of these procedures, the Senate was the bottleneck for confirming numerous minorities and women.[81] The GOP ought to cease stymieing nominees and cooperate.[82] Committee analysis has minimally slowed confirmation,[83] yet GOP members should quit regularly holding over votes seven days absent clear justification.[84] Venerable practices and

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in Nominating Judge Sonia Sotomayor to the United States Supreme Court (May 26, 2009) (link); *supra* note 33. His successors should follow these ideas.

[78] The number of Asian Americans nominated by Obama that the Senate confirmed equals the number of sitting Asian American judges at Obama's election. *See* AJF SNAPSHOT, *supra* note 31, at 6; STATE OF THE JUDICIARY, *supra* note 60, at 22; Tricia Bishop, *Conservative Federal Appeals Court Shifts Left*, BALT. SUN, Nov. 19, 2011, http://articles.baltimoresun.com/2011-11-19/news/bs-md-fourth-circuit-20111119_1_federal-appeals-ilya-shapiro-4th-circuit (link); *supra* text accompanying notes 36–37, 41, 44, 55. The President and researchers could also collect and scrutinize more data related to other benefits that a diversity program can supply and clearly enunciate these advantages.

[79] One concept is panels that aid, but slow, the approval process. Officials may refine them, if needed, vis-à-vis earlier panels. *See supra* notes 23–24. For cooperation with Obama, see *supra* notes 24–29; *supra* text accompanying notes 32–35, 46. Issues did arise, so senators may reassess and adjust ideas used, analyze prior ideas, and canvass new ones. *See supra* note 68 and accompanying text.

[80] *See, e.g.*, 157 CONG. REC. S8770–72 (daily ed. Dec 17, 2011) (statement of Sen. Leahy) (link); Kendall, *supra* note 37; *supra* text accompanying notes 23–24, 32–33; Scott Wong, *Bob Menendez Denies Judge Block Reports*, POLITICO, Jan. 6, 2012, http://www.politico.com/news/stories/0112/71159.html (link).

[81] Republicans should remember that when they held the Executive, Democrats confirmed more judges, and citizens may blame them for vacancy problems. *See* Tobias, *supra* note 33, at 756. *But see* Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J. L. & PUB. POL'Y 1035, 1037–39 (2009) (link).

[82] Members should proffer helpful guidance when consulted and suggest other candidates when Obama's are unacceptable, while swiftly approving qualified, uncontroversial nominees.

[83] If this occurs, approval may be accelerated by shorter review of able, consensus nominees. Helen Dewar, *Republicans Push Speedy Action on Court Picks*, WASH. POST, Jan. 30, 2003, at A7; *see* Tobias, *supra* note 33, at 766, 774.

[84] One example was holding over nominees so a newly elected senator could assess them. *See* U.S. Sen. Comm. on the Judiciary, Webcast of Exec. Business Meeting (Feb. 3, 2011), http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da166247a (link).

customs suggest nominees warrant hearings and ballots,[85] and the paucity of floor consideration best explains the dearth of appointments.[86] Republicans must sharply curtail routine use of holds to stall votes, in particular for talented, uncontroversial minority and female district court nominees. McConnell could also halt or restrict uncooperative actions, including eschewing time agreements, which slow approval while provoking cloture. If the GOP actively keeps applying filibuster equivalents through holds, Democrats may reinstitute some ideas, essentially those of the "Gang of 14," which limit this conduct by adopting compromises acceptable to centrist politicians. Democrats may also offer more drastic reforms, as Congress did in abandoning anonymous holds, or capitalize on some of the aggressive tactics recounted above.[87]

In the end, senators ought to carefully balance the need for thorough investigation of judicial prospects against the need to fill vacancies promptly and confirm skilled female and minority nominees. The parties must reduce their emphasis on ideology, as Obama has cautiously done.[88] Article II contemplates that senators will consider ability, character, and temperament,[89] but they should not inquire into how nominees would resolve cases because doing so could erode judicial independence.[90] One

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[85] *See* 156 CONG. REC. S5836 (daily ed. July 14, 2010) (statement of Sen. McConnell) (link); Michael J. Gerhardt, *Merit vs. Ideology*, 26 CARDOZO L. REV. 353 (2005) (link); Tobias, *supra* note 33, at 764, 774.

[86] Reid must set floor votes faster after panel approvals and set more debates for controversial nominees. *See*, *e.g.*, 143 CONG. REC. S2515–38 (daily ed. Mar. 19, 1997) (showing debate among senators on the confirmation of Judge Merrick Garland) (link); 155 CONG. REC. S11,411–21 (daily ed. Nov. 17, 2009) (showing the debate regarding Judge David Hamilton's confirmation) (link).

[87] *See*, *e.g.*, 157 CONG. REC. S296–305 (daily ed. Jan. 27, 2011) (abandoning anonymous holds) (link); MICHAEL GERHARDT & RICHARD PAINTER, AM. CONST. SOC'Y, "EXTRAORDINARY CIRCUMSTANCES": THE LEGACY OF THE GANG OF 14 AND A PROPOSAL FOR JUDICIAL NOMINATIONS REFORM (2011) (discussing Gang of 14 ideas and anonymous holds) (link); *Text of Senate Compromise on Nominations of Judges*, N.Y. TIMES, May 24, 2005, http://www.nytimes.com/2005/05/24/politics/24text.html (discussing how Gang of 14 ideas related to "pending and future judicial nominations") (link); *supra* note 76 and accompanying text (discussing assertive ideas). *But see supra* note 57 and accompanying text (showing how "extraordinary circumstances" may lack meaning because Liu and Halligan received only one GOP vote each for cloture).

[88] Serving groups or writing opinions or articles that members oppose must not drive the approval process. The overemphasis on ideology is as futile as attempting to detect whether nominees would be "judicial activists." *See* STEFANIE LINDQUIST & FRANK CROSS, MEASURING JUDICIAL ACTIVISM (2009); *The Judicial Nomination and Confirmation Process: Hearings Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 107th Cong. 4–8, 262–64 (2001) (statements of Sen. Sessions & Prof. John McGinnis) [hereinafter *Hearings*].

[89] *Hearings*, *supra* note 88; Douglas Laycock, *Forging Ideological Compromise*, N.Y. TIMES, Sept. 18, 2002, http://www.nytimes.com/2002/09/18/opinion/forging-ideological-compromise.html (link).

[90] *See* THOMAS O. SARGENTICH ET AL., CITIZENS FOR INDEP. CTS., UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS 1–75, 121–205 (2000) (link); Symposium, *Judicial Independence and Accountability*, 72 S. CAL. L. REV. 315 (1999). The ideas aptly apply to Chen, Davis, Liu and Martinez, who received vigorous criticism that unfairly denigrated their records. *E.g.*, sources cited *supra* notes 36–39, 55–58.

efficacious solution for all of these concerns may be the presumption that able, uncontroversial nominees—including individuals of color and women—secure floor votes.[91]

CONCLUSION

Professor Scherer broadens our understanding of appointments, especially with regard to ideas for increasing court diversity and legitimacy. Yet her valuable article only nominally reviews the ways that sheer partisanship skews efforts to confirm minority and female candidates. President Obama's special initiatives to enhance diversity are illustrative. The Chief Executive appointed numerous talented people of color and women, but political gamesmanship caused the selection process to function more slowly than it should have. He must now confirm additional competent minority and female nominees and carefully articulate convincing rationales to improve diversity. Legislators should be receptive to the White House's efforts and cooperate with Obama and congressional colleagues. If each party directly applies these recommendations, the federal court system could benefit from enhanced diversity and legitimacy.

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[91] For example, ten GOP senators favored cloture on Hamilton, even though nine voted against him on the merits. *See supra* note 41 (cloture vote); 155 CONG. REC. S11, 544, 11, 552 (daily ed. Nov. 19, 2009) (merits vote). For ideas that Obama and senators may use, see Goldman et al., *supra* note 19; Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783 (2006); Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527, 552–73 (1998). The presidential election in 2012 will slow selection even further. Goldman et al., *supra* note 19; Al Kamen, *Judicial Nominees*: *Beware the Thurmond Rule*, WASH. POST, Feb. 3, 2012, http://www.washingtonpost.com/blogs/in-the-loop/post/judicial-nominees-beware-the-thurmond-rule/2012/01/31/gIQAV4fFlQ_blog.html (link); *see also* JOHN G. ROBERTS, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010), *available at* http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf (link); Greenhouse, *supra* note 56; George Packer, *The Empty Chamber*, NEW YORKER, Aug. 9, 2010, http://www.newyorker.com/reporting/2010/08/09/100809fa_fact_packer (link).