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COMMENTS

WHAT DOES A WISE LATINA LOOK LIKE? AN INTERSECTIONAL ANALYSIS OF SONIA SOTOMAYOR'S CONFIRMATION TO THE U.S. SUPREME COURT

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INTRODUCTION

On May 26, 2009, President Barack Obama announced Sonia Sotomayor's nomination to replace Justice David Souter of the U.S. Supreme Court.¹ In his remarks, President Obama noted that Sotomayor "would bring more varied experience on the bench than anyone currently serving on the United States Supreme Court had when they were appointed."² Sotomayor's "varied" experiences, however, were not the focus of the debate that ensued around the confirmation of the country's first woman of color and Hispanic nominee to the Supreme Court. While it is unmistakable that her appointment to the Supreme Court is historical in that it altered the gender and racial composition of the U.S. Supreme Court in an unprecedented way, the constant focus on Sotomayor's racial identity drew the focus away from her distinguished career.³ Weeks before her confirmation hearing, the U.S. Supreme Court decided the case of *Ricci v. DeStefano*, in which Sotomayor, then a member of the Second Circuit Court of

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1. Barack Obama, U.S. President, Remarks at the Nomination of Judge Sonia Sotomayor to the Supreme Court of the United States, (May 26, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayor-to-the-United-States-Supreme-Court/.

2. *Id.*

3. Immediately following her nomination, the media picked up remarks that Sotomayor made at U.C. Berkeley School of Law in 2001, in which she made reference to the "wise Latina." See Sonia Sotomayor, *A Latina Judge's Voice*, Remarks at the UC Berkeley School of Law Symposium titled "Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation" (Oct. 26, 2001), *available at* http://www.berkeley.edu/news/media/releases/2009/05/26_sotomayor.shtml.

Appeals, voted to affirm a federal district court's summary judgment against firefighters contending that the city of New Haven, Connecticut was engaging in affirmative action-like promotional assessments.⁴ Around the same time, Frank Ricci, the named plaintiff in the case, emerged as the archetypal victim of "reverse discrimination" policies purportedly advanced by the City of New Haven.⁵ The narrative worked to frame Sotomayor's nomination as a form of virtual "affirmative action" and figure her a racist.⁶

Close attention to the narratives that followed Sotomayor's nomination draws into question the media's capacity and willingness to convey to the public a rich and robust conception of her experiences, or interrogate the routine polarization between her supporters and detractors. Within editorial rooms, across channels in the blogosphere, from the lips of stakeholders in the Washington political Beltway to the ears of those in the mainstream—the very places where rhetorical structures are built and power, politics, and community identities are negotiated—the public's ability to hear and recognize a talented woman of color was diminished. Lost in the narrative were dimensions of Sotomayor's identity that were simultaneously raced and gendered, becoming a story not about "varied experiences," but of how two seemingly different people were pitted against each other to exhibit opposing views of racial and gender beliefs and value choices. This was the genesis of Sotomayor's misperception, the very location that prevented her from becoming, to use her famed remarks, a "wise Latina" judge all in one discursive moment.

The figuring of Sotomayor and Ricci can be conceptualized as intersectional. In her seminal work on intersectionality titled, *Demarginalizing the Intersections*, Kimberlé Crenshaw states, "[I]ntersectionality captures the way in which the particular location of black women in dominant American social relations is unique and in some senses unassimilable into the discursive paradigms of gender and race domination."⁷ An intersectional analysis is useful because it centers the analysis on interpretative conflicts that bear on the particular ways realities are understood. Intersectionality analyzes questions of identity politics

4. Cheryl Harris & Kimberly West-Faulcon, *Reading Ricci: White(ning) Discrimination, Race-ing Test Fairness*, UCLA School of Law Research Paper No. 09-30; Loyola-LA Legal Studies Paper No. 2009-49, 1, 5 (Nov. 16, 2009), available at SSRN: <http://ssrn.com/abstract=1507344>.

5. *Id.*

6. *Id.*

7. See, Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U.C.H. LEGAL F. 139, 140 (1989).

from normative and positive levels. On the normative level, the theory posits that because racism is thought to chiefly affect men of color, while sexism is normatively conceived from the white female's perspective, conventional anti-discrimination or anti-sexism discourse cannot consummately attend to the experiences of women of color, who experience racism and sexism indivisibly.⁸ On the positive level, the intersectional analysis views stereotypes as confirmation of perceptions of groups as interrelated and mutually constitutive.⁹

Consider *Whose Story is it Anyway?*, in which Crenshaw critiques the gender and race paradigms that shaped perceptions of Anita Hill. Hill, who was a black female lawyer, raised allegations of sexual harassment against Justice Clarence Thomas at his 1992 confirmation hearing to the U.S. Supreme Court.¹⁰ Hill's allegations of sexual misconduct against Justice Thomas helped the nominee rise to the level of martyr status among African American leaders. His support among African Americans paralleled the increasingly negative view that the community had of Hill. Leaders of the African American community as well as the mainstream media vilified Hill by accusing her of airing the community's dirty laundry.¹¹ At the same time, feminists used Hill's testimony to impugn Thomas by raising the specter of the mythic black rapist.¹² In turn, Thomas accused Hill's backers of modern day lynching.¹³ Ultimately, Thomas was confirmed by razor-thin votes. However, the controversy exposed a chasm anti-racists and feminists and revealed hesitancy by both to recognize any legitimacy in the other.¹⁴ The vitriol surrounding Hill's testimony overlooked the history of unpunished sexual violence against African American women. The debate demonstrated the inability of African American women to achieve full recognition

8. *Id.* at 140.

9. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1283 (1990). Crenshaw argues, "an intersectional analysis argues that racial and sexual subordination are mutually reinforcing, that Black women are commonly marginalized by a politics of race alone or gender alone, and that a political response to each form of subordination must at the same time be a political response to both."

10. See, KIMBERLÉ CRENSHAW, *Whose Story Is It Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in *RACE-ING JUSTICE ENGENDERING POWER* 403 (Toni Morrison ed. 1992).

11. *Id.* at 403. Crenshaw argues that during Thomas' Supreme Court confirmation hearing, Hill "was situated within two fundamental hierarchies of social power, the central disadvantage that Hill faced was the lack of available and widely comprehended narratives to communicate the reality of her experience as a black woman to the world."

12. *Id.* at 406 ("both feminist and antiracist told tales on Anita Hill, tales in which she was appropriated to tell everybody's story but her own.")

13. *Id.*

14. *Id.*

in each community.¹⁵ Because polarized views of gender-based and race-based discrimination made it nearly impossible for Hill to invoke a narrative that would have allowed her to convey the more nuanced experience of sexual assault as an African American woman, Hill was silenced in a way that is common to women in her position.¹⁶

This Comment uses Crenshaw's intersectional framework to demystify popular depictions of Sotomayor and challenge popular conceptions of misconceptions of Sotomayor to illustrate moments of political prerogative and resultant disempowerment. The Comment argues that common conceptions of race or gender domination cannot explain the seemed naturalness to which Sotomayor's "wise Latina" remarks were viewed as evidence of inherent racial bias. Echoing Crenshaw's work, the Comment argues that our common understanding of discrimination handicaps our ability to think critically about Frank Ricci's narrative of victimhood.¹⁷ The coercive and silencing power of the media disabled Sotomayor to be understood as a multi-dimensional public figure. The relentless effort by her detractors to cast her as unfit to don the black robe of a Supreme Court Justice demonstrates the common obstacles that women of color endure when they work to be seen as equals.¹⁸

This Comment will proceed in four parts. Part I introduces the intersectional framework. Part II discussed the historical context in which Sotomayor and Frank Ricci emerged. Specifically, Part II chronicles Sotomayor's life experiences that are simultaneously raced and gendered. Part II also briefly applies the intersectional framework to *Ricci v. DeStefano* to posit that Ricci emerges as the paradigmatic victim of race-based discrimination to the detriment women and people of color. As a result, the case inoculated his credibility as well as divisive race and gender norms that were estranged from reality. Part III posits that popular depictions of Ricci and Sotomayor as archrivals should be understood as co-constitutive. Part III argues that Sotomayor's and Ricci's societal statuses were central features of the prevailing conceptions. Prefiguring Sotomayor a racist and intellectually subpar further legitimized Ricci's victimhood and presented her as a threat to non-minorities. Part IV examines the shared consequences of a discourse that removes the possibility of context and

15. *Id.* at 404.

16. *Id.* at 405.

17. *Id.* at 404-05.

18. Katherine Franke, *Becoming A Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *YALE J.L. & HUMAN.* 251, 253 (1999) (Franke provides a historical analysis on the obligations imposed on women and women of color to achieve legal and moral citizenship).

recommends alternative narratives to counter misperceptions and generate different configurations of communalities. In doing so, Part IV argues that we should understand Sotomayor's experience as emblematic of the experience women of color endure when entering male-dominated professions with stellar race and gender "neutral" qualifications. The Comment concludes that while Sotomayor's identity became the site of political retrenchment and disempowerment, it too could have served as a well-spring for cross-community coalition building. The conclusion sees her nomination as an opportunity to learn, not lament. It invites us to rethink of what constitutes a "wise judge" in a profession that has yet to take full advantage of the benefits of diversity. It presents her nomination as an opportunity that democratizes a static legal system and innovates our collective approach to thinking about the role of a judge's life experiences in decision making.

I. THE INTERSECTIONAL FRAMEWORK: A SAMPLE APPLICATION

Intersectionality is a theoretical framework used to comprehend the unique ways individuals experience multiple forms of discrimination and examine how socially constructed categories systemically interact in mutually supporting ways to create social inequality.¹⁹ While the term was first coined by law Professor Kimberlé Crenshaw in her seminal piece *Demarginalizing the Intersection of Race and Gender* in 1989,²⁰ the concept's genesis can be traced back to the 1970's black feminist movement.²¹ This movement, spearheaded by women of color in sociological circles, challenged the essentialist view among Western feminist that women shared universal experiences.²² Black feminists argued that mainstream feminist prerogatives excluded the conditions of black women's lives because they were conceived from the perspective of white middle class women.²³

In keeping with the spirit of black feminism, Crenshaw built on what was previously a critique of mainstream feminism to the

19. Crenshaw, *supra* note 7.

20. *Id.*

21. SUSANNE KNUDSEN, *Intersectionality—A Theoretical Inspiration in the Analysis of Minority Cultures and Identities in Textbooks*, in *CAUGHT IN THE WEB OR LOST IN THE TEXTBOOK* 61–76 (2007).

22. BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER*. (2nd. Cambridge, Massachusetts: South End Press) (1984).

23. *Id.* The concept of intersectionality's also parallels the notion of "simultaneity," a concept first articulated during the 1970s by black lesbian feminists, who declared that systems of oppression, including racism, sexism, homophobia, and classism operate in "interlocking" ways. See *Combahee River Statement* (1978), available at <http://circuitous.org/scraps/combahee.html>.

antidiscrimination framework. She contends that “in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women.”²⁴ Furthermore, “this focus on the most privileged group members marginalizes legal claims by those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination.”²⁵ After exploring the influence of a single-axis antidiscrimination framework in Title VII employment discrimination court cases, Crenshaw concluded that black women are only protected to the extent that their experiences mirror those of black men or white women.²⁶

As the concept of intersectionality gained prominence in sociological circles, key methodological concepts emerged.²⁷ Researcher and sociologist Patricia Hill Collins used the concept of intersectionality to show how systems of discrimination are both bound by social classifications, such as race, gender, class, sexual orientation, and ethnicity, and work dichotomously.²⁸ She states that race in the U.S. is typically understood in black or white terms and one’s gender is commonly understood as either male or female.²⁹ Because these categories are inherently unstable, rarely equal, and seldom neutral, experiences binding individuals along these categories are contingent.³⁰ The instability and inequality that inhere in societal distinctions affect the way people perceive reality, which in turn influences behavior.³¹

An example will clarify these concepts. Firefighting jobs have long been dominated by white men in virtually every fire department across the country.³² In 1972, Title VII was amended to prohibit sex and race discrimination in public employment.³³ Still, fire departments resisted compliance with Title VII and, as a result, were subjected to numerous lawsuits by white women and racial minorities.³⁴ Fire departments, especially those in urban settings, lethargically responded to the slew of civil rights

24. Crenshaw, *supra* note 7, at 140.

25. *Id.*

26. *Id.*

27. S.A. MANN & D.J. HUFFMAN, THE DECENTERING OF SECOND WAVE FEMINISM AND THE RISE OF THE THIRD WAVE, *SCIENCE AND SOCIETY*, 56-91 (Vol. 69, 1).

28. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (2000).

29. Crenshaw, *supra* note 7.

30. COLLINS, *supra* note 28.

31. *Id.*

32. *See, e.g.*, CAROL CHETKOVICH, *REAL HEAT: GENDER AND RACE IN THE URBAN FIRE SERVICE* 40-67 (1997).

33. Ann C. McGinley, *Ricci v. DeStefano: A Masculinities Theory Analysis*, 33 *HARV. J.L.&GENDER* 581, 588 (2010).

34. *Id.*

suits by enacting modest changes in their hiring practices.³⁵ Despite these modest changes, women and minorities remain disproportionately underrepresented in fire departments.³⁶ Sociologists credit the meager number of women and people of color in firefighter jobs to not only facially benign fire department policies and practices that produce disparate racial and gender effects, but also a culture of overt hostility towards women and people of color.³⁷

A national survey of African American and white female firefighters illustrates the insufficient training, hostility from colleagues, constant supervision and punishment that women often experience in fire departments.³⁸ One black female reported that she had been denied materials for a promotional exam, while another black female was routinely told that she was unfit for the job.³⁹ Although both white and black women were subject to negative stereotypes, the tenor of the stereotypes differed. White women were perceived fragile, while black women were branded “welfare queens” and “beasts of burden.”⁴⁰ To rebut these stereotypes, white women concealed injuries and black women accepted heavier chores.⁴¹

The study explains the intersectional view that gender and race discrimination are experienced inseparably. When asked to divine the discriminator’s intent, black women reported that they could not characterize the discriminator’s motive as gender or race based because they experienced discrimination as women and as racial minorities.⁴² This confirms the critique of the anti-discrimination intent doctrine as failing to attend to modern forms of discrimination. While white women recognized their gender disadvantage, few were able to identify their racial privilege.⁴³ White women, namely those who were married or related to a white firefighter, were able to dodge the effects of racial discrimination.⁴⁴ Even black men gained an advantage from the relatively disadvantaged position of black women, in that the presence of black women enabled black men to coalesce with white men in show of male solidarity.⁴⁵ The authors concluded

35. *Id.*

36. *Id.*

37. CHETKOVICH, *supra* note 32, at 70-71.

38. Janice D. Yoder & Patricia Aniakudo, “*Outsider Within*” the Fire House: Subordination and Difference in the Social Interactions of African American Women Firefighters, 11 GENDER & SOC’Y 324, 327 (1997).

39. *Id.* at 332.

40. *Id.*

41. *Id.*

42. *Id.* at 335-36.

43. *Id.*

44. *Id.*

45. *Id.*

that white women traded on whiteness just as black men traded gender to bond with white men and mitigate being targets of prejudice.⁴⁶ Unfortunately, black women's inferior status not only made it virtually impossible to dodge coercive discrimination, but also enabled black men's and white women's strategic choices.⁴⁷

II. HISTORICAL CONTEXT AND CAST OF CHARACTERS

A. *Sonia Sotomayor's Road to the U.S. Supreme Court*

Like the African American female firefighters, Sonia Sotomayor and Frank Ricci's rise to prominence must be understood intersectionally. Sonia Sotomayor was born in The Bronx, New York City on June 25, 1954, a month after the landmark U.S. Supreme Court case *Brown v. Board of Education* was decided.⁴⁸ Sotomayor's parents were both working class migrants from Puerto Rico.⁴⁹ Sotomayor, who grew up in an ethnically diverse working-class public housing project in the South Bronx, was diagnosed with type 1 diabetes and to this day continues to take insulin injections.⁵⁰ Sotomayor's mother Celina instilled the great value of education and purchased the Encyclopedia Britannica for her children, an unusual read for children living in housing projects.⁵¹ In 1972, Sotomayor attended Princeton University on a full scholarship and at a time when there were no more than 20 Latino students and few women overall.⁵² Her thirst for education and desire to practice law brought Sotomayor to Yale Law School, where she again would encounter few women and Latinos.⁵³

46. *Id.* at 335.

47. *Id.* at 334.

48. Sotomayor, *supra* note 3.

49. *Id.* Her mother, Celina Sotomayor, first worked as a telephone operator and later a practical nurse and her father, who spoke no English, was a tool and die worker. When Sotomayor was nine years old her father died of heart problems.

50. Judge Sonia Sotomayor's bio, WABC Television, *available at* <http://abclocal.go.com/wabc/story?section=news/politics&id=6831739>. It was during these early years that Sotomayor was inspired to pursue higher education and a legal career.

51. Judge Sonia Sotomayor's Biography, WABC Television, *available at* <http://abclocal.go.com/wabc/story?section=news/politics&id=6831739>.

52. *Id.* At Princeton, Sotomayor got her first taste of social justice activism. As a student leader, she lobbied the university to hire more faculty of color, diversify its curriculum, and increase its admission of students of color. Her advocacy for marginalized communities also inspired Sotomayor to run an after-school program for local children and lend her Spanish-speaking skills to Latino patients at the Trenton Psychiatric Hospital.

53. Greg B. Smith, *Judge's Journey to Top: Bronx' Sotomayor Rose From Projects to Court of Appeals*, NEW YORK DAILY NEWS (Oct. 24, 1998) *available at* http://www.nydailynews.com/archives/entertainment/1998/10/24/1998-1024_judge_s_journey_to_top____.html.

At Yale, Sotomayor became an editor of the Yale Law Journal and developed a mentorship with Professor Jose Cabranes, with whom she later shared a seat on the United States Court of Appeals for the Second Circuit.⁵⁴ After law school and with Cabranes' recommendation, Sotomayor worked as an assistant district attorney for the New York County District Attorney.⁵⁵ During her tenure as an ADA, Sotomayor was keenly committed to prosecuting Latino-on-Latino crimes and child pornography.⁵⁶ Then in 1984, Sotomayor was hired at a New York City law firm where she practiced intellectual property, litigation, international law, and arbitration.⁵⁷

While practicing law, Sotomayor became involved with several public service organizations. She served on the State of New York Mortgage Agency, which helped indigent people obtain mortgages and provided AIDS hospices insurance coverage.⁵⁸ As a board member, she was instrumental in directing more funds to low-income homeowners and supported the right to affordable housing.⁵⁹ Sotomayor was also a board member of the Puerto Rican Legal Defense and Education Fund (now Latino Justice PRLDEF), where she worked on issues relating to police misconduct, the death penalty, and voting rights.⁶⁰

Sotomayor left private practice in 1992, when she was nominated by President George H. Bush and appointed to the District Court for the Southern District of New York.⁶¹ Sotomayor became the first Latino federal judge to serve in New York State and the first Puerto Rican woman to serve as a federal court judge.⁶² Sotomayor's reputation for intelligence, assertiveness, and organization helped her secure a nomination by President Bill Clinton to United States Court of Appeals for the Second Circuit.⁶³ Rumors that she would smoothly sail through the confirmation process were quickly put to rest when Republicans

54. David D. Kirkpatrick, *Judge's Mentor: Part Guide, Part Foil*, N.Y. TIMES (June 21, 2009), available at <http://www.nytimes.com/2009/06/22/us/politics/22mentors.html>.

55. *Id.*

56. Benjamin Weiser & William Rashbaum, *Sotomayor Is Recalled as a Driven Rookie Prosecutor*, N.Y. TIMES (June 7, 2009), available at <http://www.nytimes.com/2009/06/08/us/politics/08prosecutor.html>.

57. *Id.*

58. Michael Powell & Serge Kovalski, *Sotomayor Rose on Merit Alone, Her Allies Say*, N.Y. TIMES (June 4, 2009), available at <http://www.nytimes.com/2009/06/05/us/politics/05judge.html>.

59. *Id.*

60. *Id.*

61. Smith, *supra* note 53.

62. *Id.*

63. Neil A. Lewis, *After Delay, Senate Approves Judge for Court in New York*, N.Y. TIMES (Oct. 3, 1998), available at <http://query.nytimes.com/gst/fullpage.html?res=9B01E5D61338F930A35753C1A96E958260>.

blocked Sotomayor's confirmation out of fears that the appointment would place her on a fast track to the U.S. Supreme Court.⁶⁴ Republicans eventually lifted the hold on Sotomayor's nomination, but only after a year of petitioning by supportive Republicans and Latino organizations.⁶⁵ This momentous event was dulled by an embroiling confirmation process that left Sotomayor somewhat jaded.⁶⁶ Still, the expending confirmation process could not overcast the voluminous judicial record that she built before her ascension to the U.S. Supreme Court. During her tenure as a judge on the Second Circuit, Sotomayor heard more than 3,000 cases and authored the opinion of over 380 cases.⁶⁷ Over the years, Sotomayor became one of the most influential appellate judges during her tenure.⁶⁸ One study shows that her rulings were among the most cited by law review articles and judges.⁶⁹ She also gained a reputation for vigorously questioning lawyers and upbraiding ill-prepared lawyers.⁷⁰

As a court of appeal judge, Sotomayor also maintained an active public role. In October 2001, she delivered the annual Judge Mario G. Olmos lecture at the Berkeley La Raza Law Journal symposium titled "Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation."⁷¹ What would later become uproar over Sotomayor's choice of words eclipsed the significance of her speech, her recount of Judge Olmos' venerable legacy, and the theme that the symposium sought to advance. At the conference, experts from around the country gathered to discuss the state of diversity within the judiciary and devise strategies for change.⁷² In her delivery of the annual lecture, Sotomayor discussed the larger context of race and gender in the judiciary.⁷³ She stated, "I intend tonight to touch upon the themes that this conference will be discussing this weekend and to talk to you about my Latina identity, where it came from, and the influence I perceive it has on my presence on

64. *Id.*

65. *Id.*

66. *Id.* She went so far as to suggest that her Latina identity was the implicit basis upon which assumptions of character were made. "That series of questions, I think, were symbolic of a set of expectations that some people had [that] I must be liberal. It is stereotyping, and stereotyping is perhaps the most insidious of all problems in our society today."

67. Sheryl Gay Stolberg, *Woman in the News: Sotomayor, a Trailblazer and a Dreamer*, N.Y. TIMES (May 27, 2009), available at <http://www.nytimes.com/2009/05/27/us/politics/27websotomayor.html>.

68. *Id.*

69. *Assessing Sotomayor's Influence*, N.Y. TIMES (May 28, 2009), available at <http://www.nytimes.com/interactive/2009/05/28/us/politics/0529-judge-graphic.html>.

70. *Id.*

71. Sotomayor, *supra* note 3.

72. *Id.*

73. *Id.*

the bench.”⁷⁴ Sotomayor discussed the genesis of her identity and experience. “I became a Latina by the way I love and the way I live my life. My family showed me their example how wonderful and vibrant life is and how wonderful and magical it is to have a Latina soul. They taught me to love being Puerto Riqueña and to love America and value its lesson that great things could be achieved if one works hard for it.”⁷⁵ But she cautioned, “achieving success here is not easy accomplishment for Latinos or Latinas, and although that struggle did not and does not create a Latina identity, it does inspire how I live my life.”⁷⁶

The struggle to achieve parity is seen in the numbers. Sotomayor noted, “as of September 1, 2001, the federal judiciary . . . was about 22% women,” up from 13% in 1992.⁷⁷ The growth of Latino representation during the same period is even more anemic. At the time there were no Latino or Latina Supreme Court justices and only “10 of the 147 active Circuit judges and 30 of 587 active district court judges” were Latino.⁷⁸ Furthermore, African-American women comprised 1.56% of the federal judiciary, while Latinas comprised only 1%.⁷⁹ These paltry numbers do not convey the complete picture. Latino and Latina nominees, like African-American nominees, have endured greater and invidious scrutiny as compared to non-black or non-Hispanic nominees.⁸⁰ Sotomayor concluded that “these figures demonstrate that there is a real and continuing need for Latino and Latina organizations and community groups throughout the country to exist and continue their efforts of promoting women and men of all colors in their pursuit for equality in the judicial system.”⁸¹ But, as discussed below, it was not the entire speech, its context, or those experiences that informed Sotomayor’s perspective that defined her or her chief opponents. Rather, it was a mere 32 words and a tersely worded opinion that served as the lynchpin of she was perceived.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* Take Sotomayor’s reference to Judge Paez, who “has had the dubious distinction of having had his confirmation delayed the longest in Senate history” and was finally confirmed four years after his nomination by President Clinton and only after Vice President Al Gore interrupted his 2000 presidential campaign to cast the tie-breaking vote.

81. *Id.*

B. *Barack Obama's Election and Parents Involved: Watershed Moments that Set the Stage for Ricci v. DeStefano*

The case of *Ricci v. DeStefano* and its chief complainant, Frank Ricci, emerged as culminations of swift yet wayward developments in Supreme Court's and public's views of race relations. Modern day views on race relations can be traced to *Brown v. Board of Education* and its progeny, which ushered at the national level what one theorist dubbed the "Civil Rights Era" and "Racial Remediation."⁸² During this era, society and courts vigorously fought to eliminate formal inequality.⁸³ Society, with the aid of federal courts, sought to render Jim Crow segregation an artifact of a distant past.⁸⁴ Eliminating formal societal and jurisprudential evils served to improve the courts' and society's own self-perceptions and help achieve redemption in an age of formal equality ushered by *Brown v. Board*.⁸⁵ Still, some courts and judges resisted instituting formal equality. In *Bakke v. Regents of California*, by a single plurality vote, Justice Lewis Powell struck down a race conscious admissions policy at the University of Davis Medical School that aimed to correct racial disparity on the basis that such a program constituted reverse discrimination against white applicants.⁸⁶ After *Bakke*, the U.S. Supreme Court curtailed a series of government-sponsored racial remediations in the name of the colorblind principle, the notion that race is irrelevant whether or not the law or program uses race for corrective or subversive ends.⁸⁷

The U.S. Supreme Court imposed a modest levee on the tide against race conscious remediation in *Grutter v. Bolinger*, where in a 5-4 vote the Court upheld the use of diversity in public university admissions policies as a compelling governmental interest.⁸⁸ However, with every new justice, a new court is created. In *Parents Involved*, the U.S. Supreme Court, with the newly minted justices Samuel Alito and John Roberts in the majority, found a voluntary integration program in the Seattle and Louisville public schools unconstitutional.⁸⁹ The Supreme Court found the program unconstitutional after subjecting it to strict scrutiny analysis, finding that the means were not narrowly tailored and infringed on the rights and expectations of white students and

82. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1611 (2008).

83. *Id.*

84. *Id.* at 1605.

85. *Id.* at 1612.

86. *Id.* 1617.

87. *Id.* The Supreme Court's sounding embrace of this principle has stymied racial and class progress among communities of color, as evidenced by the dearth of minority judges and lawyers within the legal profession.

88. *Id.*

89. *Id.* at 1618.

parents.⁹⁰ Elevating the mantra of colorblindness to a constitutional proviso, Justice Roberts declared, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁹¹ In the Supreme Court’s view, the civil rights movement is morally equivalent to Jim Crow segregation.⁹²

Despite the Court’s nail in the civil rights’ coffin, society’s longing for parity along racial lines remains unfilled.⁹³ On November 2, 2008 the country elected its first black President into office.⁹⁴ For some within the African-American community, “Obama’s victory is a watershed moment in that it has debunked the myth that an African American cannot hold a national office as high as that of President of the United States.”⁹⁵ While Obama’s victory and what it emblemizes to people of color who see themselves in his compelling life story should not be trivialized, the discourse that framed his election strategy and the significance of his election vis-à-vis all Americans has shaped the White House’s messaging. A key component of his political strategy involved using his life story as a “blank screen.” He stated, “I serve as a blank screen on which people of vastly different political stripes project their own views.”⁹⁶ To mobilize a coalition that cuts across racial groups, Obama adopted a strategy that appealed to race-neutral prerogatives and projected an idealized “vision of post-racial America,” that is a nation that sees race merely as skin color.⁹⁷ By doing so, Obama appealed to the interests of a variety of voters, including white voters who were seen as disinclined to vote for a black candidate.⁹⁸ This strategy had special appeal to those voters because it told them what they most wanted to hear, that America has contained the evil of racism.⁹⁹ Although Obama’s election and the Supreme Court’s decision in *Parents Involved* gave that message a resounding effect, the perennial career obstacles that women and women of color

90. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007).

91. *Parents Involved*, 127 S.Ct. at 2743.

92. *Id.*

93. Cho, *supra* note 82, at 1621.

94. Charles Olgetree, *Beyond the Final Frontier: A “Post-Racial” America?: Anniversary Forewords: The Role of The Journal, Then and Now: From Dred Scott to Barack Obama: The Ebb and Flow of Race Jurisprudence*, 25 HARV. BLACK L.J. 1, 35 (2009).

95. *Id.*

96. BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* (2006).

97. Cho, *supra* note 82, at 1621.

98. *Id.*

99. Shelby Steele, *Obama’s Post-Racial Promise*, L.A. TIMES (Nov. 5, 2008), available at <http://www.latimes.com/news/opinion/opinionla/la-oe-steele5-2008nov05,0,6049031.story>. In running for President in a nation where non-minorities constitute a majority, it may be understandable and reasonable for Obama to adopt this form of electoral strategy.

endure in institutions largely composed of male and white shows that the message was loosely based on reality. It was this loose relationship with truth that enabled Frank Ricci to legitimize his claim of discrimination before the courts of law and public opinion.¹⁰⁰

C. *Ricci v. DeStefano and How It Inhered Credibility In Its Plaintiffs*

In 2006, Eighteen male firefighters sued the City of New Haven, Connecticut alleging that the city racially discriminated against them in invalidating a promotional examination.¹⁰¹ The firefighters, seventeen white men and one Hispanic male, had all passed the test for promotions to management.¹⁰² Among these firefighters, the most notable included Frank Ricci, who suffered from dyslexia and quit a second job to study for the exam, and Ben Vargas, the lone Hispanic plaintiff.¹⁰³ Once the results showed that white firefighters outperformed minority candidates, the City hired a third party to review the efficacy of the exam. It was then determined that the exam proved to be a less valid means of measuring job performance, there were less discriminatory and more valid means of measuring job performance. This led the City of New Haven to invalidate the examination out of a legitimate fear of a lawsuit over the test's disparate impact on minorities.¹⁰⁴ In turn, the 18 firefighter plaintiffs alleged that the city denied their promotions on the basis of their race in violation of Title VII and the Equal Protection Clause of the 14th Amendment.¹⁰⁵ In defense, the City asserted that the certification would have disproportionately hurt Latino and Black fire fighters.¹⁰⁶ Since the exam proved to be a poor predictor of performance, validation would have been violative of Title VII of the Civil Rights Act of 1964.¹⁰⁷ Sotomayor was one of three judges to hear the case on appeal, which in a *per curiam* opinion, affirmed the trial court's finding that the City was fulfilling its obligations under Title VII.¹⁰⁸ The case was later heard and reaf-

100. Cho, *supra* note 82, 1621-27.

101. Ricci, 129 S.Ct. at 2658.

102. *Id.*

103. Ricci, 129 S.Ct at 2671.

104. *Id.*

105. The city administered the exam for promotions in November 2003 pursuant to a contract between the city and fire fighter's union. Of the 118 fire fighters that took the exam, the pass rate for black candidates was half of the corresponding rate of white candidates. The city discarded the results because certification would disparate impact liability. Ricci v. DeStefano, 554 F. Supp. 2d 142, 145 (D.Conn. 2006).

106. *Id.*

107. Ginsburg Dissent, Ricci, 129 S.Ct. at 2690.

108. Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008).

firmed en banc with Sotomayor in the majority in a tersely worded opinion.¹⁰⁹

Justice Kennedy, writing for a 5-4 majority opinion, found that the City engaged in express race-based decision making in declining to certify the results.¹¹⁰ The Court found that once the tests were completed, because the City decided to discard the results the injury arose from the expectations of the candidates who had participated in the testing process.¹¹¹ The Court held that absent a strong basis in evidence that validating the results would disparately impact minority test takers, discarding the exam constituted prohibitive disparate treatment under Title VII.¹¹² At the heart of the legal issue, was the tension between the two anti-discrimination formulas disparate treatment and disparate impact.¹¹³ The first theory finds fault when an individual has been treated unfairly by another on the basis of an interdicted category.¹¹⁴ The second theory infers fault from a statistical pattern, even though responsibility for that pattern has not been assigned.¹¹⁵ Before *Ricci*, disparate treatment and disparate impact were two distinct litigation tools used to weed out employment discrimination.¹¹⁶ In addition, the Supreme Court had never previously ruled nor found that Congress intended that one method of discovery took precedence over the other.¹¹⁷ In

109. *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008). While the author of the *per curiam* opinions has yet to be publicly identified to date, Sotomayor was widely cast as his chief author and invariably cast as *Ricci*'s discriminator.

110. *Ricci*, 129 S.Ct. at 2672. In looking to analogous Equal Protection cases, Kennedy reached the statutory construction that in conflicts between disparate-treatment and disparate-impact provisions, justifications for disparate treatment must be grounded in strong-basis-in-evidence standard. Based on this standard Justice Kennedy concluded the City of New Haven had not met its burden in justifying its action and dismissed the city's assertion that potential lawsuit from black and Hispanic fire fighters justified dispensing the test results.

111. *Id.*

112. *Id.*

113. Justice Kennedy cited Justice Powell's plurality opinion in *Wygant v. Jackson Board of Education* to recognize the tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other.

114. *See Washington v. Davis*, 426 U.S. 229 (1976).

115. *Griggs v. Duke Power Co.*, 401 U.S. 424 91 S.Ct. 849 (1971).

116. *Harris West-Faulcon*, *supra* note 4, at 11.

117. *Harris West-Faulcon*, *supra* note 4, at 12. Despite the Court's professed concern for fairness, the case encourages unfair employment practices that will not only burden minority test takers, but also employers and the public at large. Under the strong basis in evidence standard, employers will have less an incentive to correct invalid assessment exams or settle disparate impact claims and minorities will have a weaker footing in proving the animus that disparate impact is designed to smoke out. Should an employer discard invalid discriminatory test results sans a strong basis in evidence, those employees that stand to lose will be less burdened in claiming disparate treatment. Because most test takers that fair well on invalid discriminatory assessment exams are and have historically been white men, it stands to reason that white men as a class have gained a procedural windfall. However, it isn't just minor-

reaching these unprecedented conclusions, the Supreme Court relied on timeworn narratives that placed Ricci in the unassailable position of the victim.

In framing Ricci's innocence and the fairness of the exam, the Court made race a salient feature. The court cast Reverend Boise Kimber, an African American community leader who advocated for the discarding of the exam, a demagogue and political kingmaker. This characterization of the case was explicitly invoked in Justice Alito's concurrence. Alito saw the New Haven's assertion of disparate-impact liability as illegitimate pretext and credited Frank Ricci's account that the City wished "to placate a politically important racial constituency."¹¹⁸ Indeed, Alito saw Reverend Kimber as a politically powerful "kingmaker," who exerted political pressure on New Haven and resorted to alleged threats of litigation should the City certify the examination results.¹¹⁹ In the process, Alito linked Reverend Kimber to tropes that have historically depicted black men as connately perilous and incorrigible.¹²⁰ At the same time, Alito, like the majority, did not account for the probable fact that the exam was a poor predictor of job performance.¹²¹

The City's assertion that it aimed to comply with Title VII and refashion a fairer and more valid assessment exam was likened to affirmative action.¹²² In the plaintiffs' motion requesting cert to the Supreme Court, the plaintiffs relied on post-*Bakke* cases that framed affirmative action programs or interventions as inherently suspect, harmful to innocent whites, and detrimental

ity test-takers who have reason to be concerned. Because the majority presumed that the city's post-testing decision was based entirely on race and not on the validity of the exam, it constrains employers' ability to identify the best candidates for the job. It is fathomable that few New Haven residents would want a poorly vetted fire chief to come to respond to a home fire.

118. Ricci, 129 S.Ct. at 2673.

119. *Id.*

120. Alito noted that in a prior incident Reverend Kimber allegedly sought to incite a racial riot during the murder trial of a black man arrested for killing a white man and that the Reverend also engaged in allegedly illicit conduct. *Id.* at 2675.

121. Harris & West-Faulcon, *supra* note 4 at 13. "In treating the tests at issue in *Ricci* as presumptively valid even absent evidence that they actually measured job performance, were appropriately weighed and used, or that less discriminatory alternative selection criteria were considered, the decision ignores the central question—one that was key to New Haven's assessment of whether the firefighter exams should be certified: Did candidates' scores on the tests correlate to job performance and thus identify the best candidate for the job?" Had the Court dutifully questioned whether the exam was the best available measure of job performance, not only would this have inveighed against Ricci's assertion that he was meritorious, but this also would have understood the City's action as race neutral.

122. Harris & West-Faulcon, *supra* note 4, at 12, "calls for employers to adhere to incontrovertible race-neutral and long-standing psychometric best practices are viewed suspiciously as racial preference policies in disguise."

to settled expectations.¹²³ As Harris and West-Faulcon observed, “minority firefighters’ claims that the New Haven exams were poor measures of job-related merit have been ‘race-ed’ as a claim of entitlement to racially proportionate test results,” or “virtual affirmative action.”¹²⁴ By equating the City’s decision to discard the exam results to affirmative action, Ricci simultaneously positioned himself as meritorious and victim of the City’s seeming racial discrimination.¹²⁵ In essence, the racial tropes of villainy and laziness that have historically been used to assail minorities, worked to portray that City as beholden to politically powerful minorities¹²⁶ and thus the decision to discard the exam as race-based and not race neutral.¹²⁷

Ricci’s gender also helped him access narratives that won over the Court’s sympathy. Ann McGinley, a Feminist Theorist who wrote on the gender narratives that provided Ricci a veneer of sympathy, stated that “that although men as a group are powerful, and have historically oppressed outsiders, individual men do not always feel powerful.”¹²⁸ According to McGinley, the sense of disempowerment derives from competition among men to adhere to “hegemonic” ideals of masculinity.¹²⁹ Ricci, like most men, “cannot achieve [the masculine ideal] because of []

123. Harris & West-Faulcon, *supra* note 4, at 81, citing the U.S. Equal Employment Opportunity Commission, Commission Meeting on Race and Color Discrimination, Remarks of Jocelyn Frye, General Counsel, National Partnership for Women and Families and Co-Chair, Leadership Conference on Civil Rights Employment Task Force, Apr. 19, 2006 [hereinafter EEOC, Commission Meeting on Race and Color], available at <http://www.eeoc.gov/abouteeoc/meetings/archive/4-19-06/frye.html> (noting that whites’ claims of discrimination are more successful in court than nonwhites’). See Cecil J. Hunt II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477, 477 (2006) (discussing “use of the rhetoric of White innocence in the context of the Court’s concern with protecting ‘innocent’ Whites in affirmative action cases”); David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 325 (2003) (noting that a majority of the prevailing plaintiffs in recent race discrimination cases have been white). See also, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S.Ct. 2097; *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007); and *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003), which focused on whites as the alleged victims of reverse discrimination.

124. Harris & West-Faulcon, *supra* note 4, at 12-13.

125. *Id.*

126. Framing the City’s decision as politically dubious because of the involvement of minority stakeholders is similar to the line of reasoning deployed in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), where the court invalidated an affirmative action policy enacted by a majority-minority city council and expressed concern that the city council would enact policies that would infringe on the rights of white residents.

127. CRENSHAW, *supra* note 10 at 407. Despite anti-discrimination law’s treatment of the seminal white as the remedial baseline, images of race and gender victimization applied to Ricci because of the tendencies of anti-racist and feminist discourse of essentializing disempowerment as purely gender or purely race-based.

128. McGinley, *supra* note 33, at 614.

129. *Id.* at 586.

class, race, age, sexual orientation,” because he possesses traits that deviate from the ideal. As a result, he is perceived as weaker from the pack and therefore vulnerable.¹³⁰ To negate this perception, Ricci relied on traditional masculine-centric ideals to paint himself as worthy of esteem and support. Ricci, “tapped into the ‘the man as breadwinner’ concept of masculinity which views the man as the head of the family whose main responsibility is to provide for his family.”¹³¹ His effort to take up a profession, such as firefighting, which is generally regarded as a noble male-centric profession, and study diligently for an exam that was presumed fair and valid, were attempts to achieve masculine ideals. The City’s decision to discard the exam and thus deny the promotions amounted to failed atonements.¹³² Saddled with this failure, Ricci was able to enjoy the impunity that comes with occupying a position of perceived powerlessness.¹³³ Even Justice Ginsburg in dissent observed, “the white firefighters who scored high on New Haven’s promotional exams understandably attract this Court’s sympathy.”¹³⁴

An intersectional analysis also brings forward different configurations of oppression into the fold, highlights the multitude realities that anti-discrimination law, in its current iteration, cannot attend to, and reconciles a doctrinal dilemma of the Court’s own fictive making. The prevailing debate preceding *Ricci v. DeStefano* raised questions of whether disparate treatment and disparate impact formulas are inherently incomparable.¹³⁵ This consequence partly stems the Court’s tendency in anti-discrimination jurisprudence to subordinate law to facts and an aspiration to treat racial differences as the normative equivalent to

130. *Id.* at 614.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* In an act of interest convergence, Vargas traded on his gender to align himself with Ricci, in exchange for providing Ricci’s decision to file a claim a veneer of race neutrality. Vargas had a story that did not square with a narrative that continually focused on Ricci as additively disempowered by virtue of his race, gender, and disability. Vargas, who was of a working class background, emigrated from Puerto Rico in search of life chances. Vargas testified that he took time away from his family to study for the exam. Vargas, like Ricci, asserted that he only wanted to be treated equally. Because Ricci relied on a line of cases that placed whites as the paradigmatic victims of affirmative action policies, Vargas necessarily banked on other intersections, such as gender and class, to avoid undermining Ricci’s characterization of the City’s decision as race-based. However, this rendered Vargas’ story unrecognizable. It is no surprise that media coverage of the case left Vargas’s story unknown, which left him in dissymmetry vis-à-vis Ricci, who gained prominent visibility.

135. Charles Krauthammer, *The Meaning of Ricci*, REAL CLEAR POLITICS (July 3, 2009), available at realclearpolitics.com/articles/2009/07/03/the_meaning_of_ricci_97283.html.

meaningless physical differences.¹³⁶ If the evidentiary mix included the absence of women of color and LGBT within the fire department, the relative disadvantage of other Latino groups, the perpetual underclass status of Latinos, or the lack of employment opportunities for other disadvantaged groups, or even a recognition of Ricci's disability as a factor that would set him apart from the 17 other fire fighters—in essence a fluid and robust conception of multiple and interlocked forms of oppression—then perhaps a medley of narratives would have retold the City's decision to discard the results.¹³⁷

These observations are critical because they show how dominant conceptions of discrimination make it virtually impossible to articulate alternative intersectional experiences. The narratives that lent Ricci credibility relied on disoriented views of his status within an established hierarchy of racial and gender oppression. Consider again the African American and white female firefighters in the previously mentioned studies, who reported incidents of work place discrimination that Ricci improbably would have endured. In this sense, the outcome in *Ricci* has to do with the interaction of race and gender and those experiences deemed worthy of recognition. This highlights the ways in which certain frameworks render certain narratives cognizable and others incognizable. The Supreme Court's myopic understanding of discrimination decontextualized the City of New Haven's decision to discard an examination that proved to be faulty. Whether or not Ricci studied hard, was a sympathetic plaintiff, or suffered from a disability is immaterial with respect to the City's decision. That these facts were deemed material helped the case be popularly understood as one where the City of New Haven discriminated against the fire fighters on the basis of race. In due course, the case was also used to discredit Sotomayor's legal acumen and misperceive as racist.

III. POPULAR CONCEPTIONS OF SOTOMAYOR AND FRANK RICCI AS MUTUALLY CONSTITUTED

Intersectionality provides that because concepts are defined by what they are not, depicting Frank Ricci as deserving, innocent, and idyllic upon the basis of race and gender requires an antithesis.¹³⁸ That antithesis was Sotomayor.¹³⁹ After she was announced as the candidate to replace Souter, a debate on the question of whether qualified or harbored racial bias against

136. Franke, *supra* note 18, at 1235.

137. Crenshaw, *supra* note 9, at 1242.

138. *Id.*

139. *Id.* See also, Franke, *supra* note 18.

Ricci quickly ensued. Her opinions and speeches were combed for evidence that she was an intellectual lightweight. At the Senate hearings, she was asked repeatedly to renounce what became her famous “wise Latina” speech at U.C. Berkeley. Frank Ricci was invited to testify at her hearings as a character witness. And polls taken throughout the nomination process demonstrated the public’s acute reactions to these assailments. The narrative that emerged not only called into serious question whether Obama’s election truly spelled the end of racism’s evils, but also highlighted the media’s role in inciting the debate.

The following sections discuss the gender and race-based tropes used to prefigure Sotomayor’s public image. The plausibility that Sotomayor would occupy or be conceived in the role of a subpar nominee depended upon the degree to which both her race and gender contributed to her ideological placement. It was neither her race nor gender identity alone, rather the confluence of both elements that made such an image possible because women of color are typically cast in that role.¹⁴⁰ Popular conceptions of Sotomayor’s race and gender worked together to vilify her just as Ricci’s societal status worked to insulate his innocence and elevate him to folk hero status.¹⁴¹ Put differently, a project to paint Ricci as the paradigmatic victim of reverse discrimination made sense if, and only if, Sotomayor was cast as a purposefully racist judge and vice versa. In this sense, their public personas can be understood as symbiotic or co-constitutive.

A. *Sotomayor: The Intellectual Lightweight and Racist Tropes*

When Sotomayor first emerged as a leading candidate to replace Justice Souter, an article titled, *The Case Against Sotomayor*, by a George Washington University law professor, Jeffrey Rose, prefaced the divisive debate¹⁴² around Sotomayor’s “wise Latina” statement, which in turn gave rise to questions about whether women or people of color made better judges than white men.¹⁴³ In quoting undisclosed former federal law clerks and prosecutors who purported to be familiar with Sotomayor, Rosen stated, “her opinions, although competent,

140. Crenshaw, *supra* note 7, at 409.

141. CRENSHAW, *supra* note 10 (arguing that during Clarence Thomas’ Supreme Court confirmation hearing, Hill “was situated within two fundamental hierarchies of social power, the central disadvantage that Hill faced was the lack of available and widely comprehended narratives to communicate the reality of her experience as a black woman to the world.”).

142. Jodi Kantor & David Gonzalez, *For Sotomayor and Thomas, Paths Diverge at Race*, N.Y. TIMES, June 7, 2009.

143. Jeff Rosen, *The Case Against Sotomayor*, THE NEW REPUBLIC (May 4, 2009), available at <http://www.tnr.com/article/politics/the-case-against-sotomayor?id=45d56e6f-f497-4b19-9c63-04e10199a085>.

are viewed by former prosecutors as not especially clean or tight, and sometimes misses the forest for the trees.”¹⁴⁴ Rosen also cited Judge Cabranes’ dissent in *Ricci v. DeStefano* to undermine Sotomayor’s legal acumen and intellect.¹⁴⁵ Despite Rosen’s admission that he had not “read enough of Sotomayor’s opinions to have a confident sense of them,” Rosen concluded that Sotomayor was “not that smart and kind of a bully on the bench.”¹⁴⁶

Rosen’s piece circulated widely among reporters, commentators, and news outlets such as Fox News, CNN, and NPR.¹⁴⁷ As one report noted, “Rush Limbaugh read aloud from Rosen’s piece, saying Sotomayor, ‘sometimes missed the forest from the trees’.”¹⁴⁸ CNBC’s Larry Kudlow alluded to Rosen’s piece to say, “she is not penetrating, not well-prepared” and Fox News’ Fred Barnes echoed Rosen’s charges against Sotomayor in calling her, “basically just an average appeals court judge.”¹⁴⁹

Decontextualized fragments of the speech Sotomayor delivered at University of Berkley Law School were used to paint Sotomayor a “racist.”¹⁵⁰ Her detractors cited 32 of her 3,929-word lecture to assail the nominee.¹⁵¹ Recall that her speech concerned diversity within the judiciary, yet what drew attention were 32 words: “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.” Her detractors wedded her “wise Latina” remarks with the outcome in *Ricci v. DeStefano* to make the argument that Sotomayor showed nothing but antipathy towards Ricci.¹⁵² This led to accusations that Sotomayor was “anti-white” and “light-weight,” on the implicit inference that only an inept racially biased judge would stray from the ideals of colorblindness

144. *Id.*

145. *Id.*

146. *Id.*

147. David Folkenflik, *Blog Entry Sparks Furor Over Sotomayor*, NPR (May 31, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=104754798>.

148. Glenn Greenwald, *Jeff Rosen, TNR, and the Anonymous Smears Against Sotomayor*, SALON (May 5, 2009), available at http://www.salon.com/news/opinion/glenn_greenwald/2009/05/05/tnr (stating, “The amazing speed with which so many people who know absolutely nothing about her are willing, indeed eager, to assume that she’s stupid and doesn’t deserve her achievements — based on the fact that she’s Puerto Rican and female and Rosen published some trashy, unaccountable gossip feeding that perception — is really remarkable.”).

149. Folkenflik, *supra* note 147.

150. Linda Lowen, *The ‘Racist’ Uproar Over Sotomayor’s ‘Wise Latina’ Comment*, ABOUT.COM WOMEN’S ISSUES BLOG (May 27, 2009).

151. *Id.*

152. Robert Tracinski, *Lady Justice Loses Her Blindfold*, REAL CLEAR POLITICS (July 13, 2009), available at http://www.realclearpolitics.com/articles/2009/07/13/lady_justice_loses_her_blindfold_97429.html.

enshrined with the Constitution.¹⁵³ Others vociferously opposed the nominee declaring that, “if a white man racist nominee would be forced to withdraw, then a Latina woman racist should also withdraw.”¹⁵⁴ These remarks were sustained with a fusillade of radical commentaries, including a doctored picture of Sotomayor in KKK-like robe and remarks from Republican Chairman Michael Steele suggesting that Sotomayor has racist tendencies.¹⁵⁵

Ironically, these repudiations drew on colorblind norms. These norms posit that white and non-white should not intentionally discriminate against one another on the basis of race, use overt references to race, or engage in conduct that creates racial hostility.¹⁵⁶ However, the colorblind principle placed no limit on the behavior of Ricci or Sotomayor’s detractors. Consider an interview with Pat Buchanan who stated:

[T]his is the white man’s country and we should be proud of it. White men were the founding fathers, they wrote the constitution, they tamed the West, they were inventors and scientists and philosophers. European civilization is what made America great. White men should be proud of this fact. But, with identity politics and the rise of multiculturalism white men are made to feel ashamed as we are written out of history. These Sotomayors and others don’t want to assimilate. Even her name and membership in such racist groups as La Raza smack of an unwillingness to enter the American mainstream. What about the great story where people come here, integrate, and lose all of that ethnic baggage. Geez, by now, Sotomayor if she were a real American interested in being in the mainstream of American society, would have renamed herself Jones or Smith or something respectable like that.¹⁵⁷

That Buchanan was not charged on the same count of violating the colorblind norm is evidence of the asymmetrical relationship between Sotomayor and her detractors. Because that the colorblind norm only worked to police Sotomayor’s remarks and allowed Buchanan to invoke overt racial animus with impunity,

153. Pat Buchanan, *Obama’s Idea of Justice* (May 29, 2009), available at <http://www.creators.com/opinion/pat-buchanan/obama-s-idea-of-justice.html>.

154. Andy Barr, *Rush Limbaugh: Sonia Sotomayor A Reverse Racist, Hack*, POLITICO (May 26, 2009), available at <http://www.politico.com/news/stories/0509/22983.html>.

155. Michael Steele Interview with Campbell Brown, CNN (June 9, 2009), available at <http://archives.cnn.com/TRANSCRIPTS/0906/09/ec.01.html>.

156. See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991); Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).

157. Pat Buchanan, *We Are Respectable Negroes News Network, An Exclusive Interview With Pat Buchanan, the Future of America, and the New Racism Against White Men* (July 17, 2009), available at <http://wearerespectablenegroes.blogspot.com/2009/07/exclusive-interview-with-pat-buchanan.html>.

one is left to conclude that the principle operates as a color conscious burden.¹⁵⁸

Charges that Sotomayor was an unqualified candidate invariably led to further charges that Obama, like the City of New Haven, engaged in affirmative action hiring. One rational underlying this charge provides, “because many fewer women than men went to law school in the 1970s and 1980s, and more women drop out of legal practice to care for their families than men do, the pool of judicial candidates is dominated by men. It stands to reason that if male judicial candidates are passed over in favor of women, less qualified people will be selected.”¹⁵⁹ However, an indictment of preferential treatment is also historically rooted in race and gender stereotypes that portray people of color, especially women of color, intellectually inferior.¹⁶⁰ It was not a neutral or uniform standard by which Sotomayor’s voluminous opinions, varied remarks, or diverse life experiences were fairly evaluated. Rather, it was race and gender-contingent standard that recognized a mere 32 words and an unsigned per curiam opinion as the only relevant basis upon which her nomination and performance should be evaluated.

B. *The Lambasting of Sotomayor At her Confirmation Hearings*

Republicans on the Senate Judiciary Committee capitalized from the prefiguring of Sotomayor as a racist and intellectual lightweight by inviting Frank Ricci and Ben Vargas to testify.¹⁶¹ Republican Senators were cautioned to tread carefully in their handling of the historic nominee on the premise that heavy-handed attacks would provoke ire among the monolithic Latino community and cost the party support among Latinos.¹⁶² Republicans too feared a loss of support among women, notwithstanding that the warning also treaded on boilerplate views of women as a vulnerable and fragile.¹⁶³ However, while Republican Sena-

158. Carbado & Gulati, *infra* note 160, at 1287 (stating that “the colorblind norm operates as a color conscious burden . . . it regulates the workplace association of people of color, but not those of white people.”).

159. Stephen Choi, Mitu Gulati, Mirya Holman, & Eric Posner, *Do Women Make Better Judges?*, SLATE (Oct. 2, 2009), available at <http://www.slate.com/id/2231166/>.

160. Devon Carbado & Mitu Gulati, *Discrimination and Inequality Emerging Issues Working Identity*, 85 CORNELL L. REV. 1259, 1267-1271 (2000).

161. Dana Milbank, *Firefighters But No Brimstone*, THE WASH. POST (July 17, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071603767.html>.

162. Alexander Burns & Josh Gerstein, *White House To Sonia Sotomayor Critics: Be Careful* (May 27, 2009), available at <http://www.politico.com/news/stories/0509/23016.html>.

163. Maureen Dowd, *White Man's Last Stand*, N.Y. TIMES, July 14, 2009.

tors did not embrace the sharp tenor of the charges launched against the nominee by fringe conservatives, accusations of racial bias and intellectual unfitness shaped the confirmation hearings.¹⁶⁴

Her Republican detractors sought to wed her “wise Latina” remarks with the outcome in *Ricci v. DeStefano* to make the argument that Sotomayor showed nothing by antipathy towards Ricci.¹⁶⁵ At her confirmation hearings, instead of testifying on the substance of her judicial opinions, Sotomayor was asked to insistently explain and renounce her “wise Latina” remark.¹⁶⁶ The inquiry provoked Sotomayor to say during her hearing, “no words I have ever spoken or written have received so much attention,” describing them as “a rhetorical flourish that fell flat.”¹⁶⁷ She stressed, “It was bad because it left an impression that I believe that life experiences command a result in a case . . . but that’s clearly not what I do as a judge.”¹⁶⁸ Even though her choice of words were “bad, because it left an impression that [she] believed that life experiences commanded a result in a case,” she explained that the speech was meant to suggest the importance of having more judges on the bench with varied life experiences, not fewer white men.¹⁶⁹

Republican Senators routinely questioned Sotomayor’s involvement with PRLDEF.¹⁷⁰ During the confirmation hearings, Republican Senator John Cornyn seized on statements made by a senior partner at a law firm Sotomayor had worked prior to becoming a judge.¹⁷¹ The senior partner was quoted as saying, “I can guarantee [Sotomayor will be] for abortion rights.”¹⁷² In response, Sotomayor stated, “I have no idea why he’s drawing that conclusion . . . If he was talking about the fact that I served on a

164. Associated Press, *Critics Turn Up Heat on Sotomayor* (July 7, 2009), available at <http://www.msnbc.msn.com/id/31778283/> (quoting Senator Mitch McConnell, “It is a troubling philosophy for any judge — let alone one nominated to our highest court — to convert empathy into favoritism for particular groups.”).

165. Robert Tracinski, *Lady Justice Loses Her Blindfold*, REAL CLEAR POLITICS (July 13, 2009) available at http://www.realclearpolitics.com/articles/2009/07/13/lady_justice_loses_her_blindfold_97429.html.

166. Deborah Tedford & Maria Godoy, *Senate Moves Closer to Sotomayor Vote*, NPR (July 16, 2009) available at <http://www.npr.org/templates/story/story.php?storyId=106662720>.

167. Josh Gerstein, *Sonia Sotomayor Contradicts Obama on Judges*, POLITICO (July 14, 2009) available at <http://www.politico.com/news/stories/0709/24909.html>.

168. *Id.*

169. *Id.*

170. Adam Serwer, *Meet the Cast of the Sotomayor Hearings*, THE AMERICAN PROSPECT (July 13, 2009), available at http://www.prospect.org/cs/articles?article=meet_the_cast_of_the_sotomayor_hearings.

171. Amy Goldstein, Paul Kane and Robert Barnes, *Sotomayor Avoids Pointed Queries*, THE WASH. POST (July 16, 2009), available at <http://www.washingtonpost.com/wpdyn/content/article/2009/07/15/AR2009071501114.html>.

172. *Id.*

particular board that promoted equal opportunity for people, the Puerto Rican Legal Defense and Education Fund, then you could talk about that being a liberal instinct, in the sense that I promote equal opportunity in America and the attempts to ensure that. But he has not read my jurisprudence for 17 years.”¹⁷³ Although a nominee’s view on abortion rights has been treated as a litmus test for confirmation-worthiness, this moment is unique. It signaled an instance where her commitments to civil rights and anti-sexism were melded to further discredit the judge. When Sotomayor was a policy maker for PRDLEF for 12 years, the organization worked on a variety of issues, including bringing bilingual education to public schools and voting redistricting.¹⁷⁴ At that time, she also served on another agency that provided mortgage insurance coverage to low-income housing and AIDS hospices.¹⁷⁵ However, among the plethora of advocacy work that Sotomayor championed, it was the convergence between PRDLEF’s commitment to civil rights and its work on an abortion case, a small component of the overall work she engaged in, that garnered attention.¹⁷⁶

Frank Ricci and Ben Vargas were also called on by Republicans as a character witness at Sotomayor’s confirmation. This is significant because it illustrates how *Ricci v. DeStefano* was understood as an impeachment on Sotomayor’s legal acumen. Although it was a twist of fate that the Supreme Court decided *Ricci v. DeStefano* in the political thicket of Sotomayor’s confirmation process, some saw it as an opportunity to vet Sotomayor’s fitness.¹⁷⁷ When the Supreme Court granted cert, only a few days before President Obama was inaugurated, the case was relatively unknown outside the legal community.¹⁷⁸ Sotomayor was a judge on the Second Circuit panel that heard *Ricci v. DeStefano* on appeal and en banc.¹⁷⁹ It was not until after the case was decided in Ricci’s favor, thus reversing the Second Circuit’s holding, that Republicans sought to cast Sotomayor as the chief author of the

173. *Id.*

174. Raymond Hernandez & David W. Chen, *Nominee’s Links With Advocates Fuels Her Critics*, N.Y. TIMES (May 28, 2009), available at http://www.nytimes.com/2009/05/29/us/politics/29puerto.html?_r=2&hp.

175. *Id.*

176. Associated Press, *Senator Attacks Sotomayor’s Links to PRLDEF* (July 3, 2009), available at <http://latinousa.kut.org/2009/07/03/senator-attacks-sotomayors-links-to-prldef/>.

177. David Paul Kuhn, *Obama, Sotomayor, Ricci and White Male Privilege*, REAL CLEAR POLITICS (May 28, 2009), available at http://www.realclearpolitics.com/articles/2009/05/28/obama_sotomayor_ricci_and_white_male_privilege__96703.html.

178. Peter Baker & Jeff Zeleny, *Obama Chooses Hispanic Judge for Supreme Court Seat*, N.Y. TIMES, May 27, 2009, at A1.

179. *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008).

per curiam opinion. To them, the Supreme Court's reversal constituted evidence that she was an inept jurist and racially biased.

Wearing his firefighter uniform, Ricci told to the committee that for the exam, he "studied harder than I ever had before, reading, making flashcards, highlighting, reading again, [and] all the while listening to prepared tapes."¹⁸⁰ To compensate for his dyslexia, Ricci studiously read from prepared text.¹⁸¹ Ricci told the panel that because he worked hard to overcome his disability and pass the exam, he deserved the promotion. Ricci further testified that the Court of Appeals, by affirming the trial court's summary judgment did not treat him fairly. Like Ricci, Vargas testified that he too studied diligently. He stated that he carried his books everywhere for three months and even went to a hotel room to avoid distraction. To overcome solitude and maintain emotional stamina, Vargas carried pictures of his three sons to remind himself that the sacrifice was for them. Like Ricci, Vargas testified that he was shocked by the City's and Court of Appeal's decision. Consistent with the Supreme Court's framing of the City's action, Vargas stated: "I became not Ben Vargas, the fire lieutenant who proved themselves qualified to be captain, but a racist statistic. I had to make decisions whether to join those who wanted promotions to be based on race and ethnicity or join those who would insist on being judged solely on their qualifications and the content of their character."¹⁸²

In likening his unfair treatment by the City of New Haven to the outcome of his case on appeal, Ricci suggested that the Court of Appeals, and by extension Sotomayor, treated the men differently because of race. The testimony moved Democratic Senator Alren Specter to ask: "Do you have any reason to think that Judge Sotomayor acted in anything other than good faith in trying to reach a fair decision in the case?"¹⁸³ To his chagrin, Ricci stated, "the Court of Appeals panel disposed of our case in an unsigned, unpublished summary order that consisted of a single paragraph."¹⁸⁴ In chorus, Vargas stated that the Court of Appeals rendered an unfavorable decision because of race.¹⁸⁵ "The focus should not have been on me being Hispanic. The focus should have been on what I did to our new promotion to captain and

180. *Id.*

181. The discussion is partly based on the videotape of the Senate Judiciary Hearings, Day 4, Minority Issues Panel of the Sotomayor Hearings before the Senate Judiciary Committee. Ricci, Vargas, and others testified. Sotomayor Confirmation Hearing, Day 4, Minority Issues Panel (CSPAN television broadcast July 16, 2009), available at <http://www.c-spanarchives.org/program/287762-104>.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

how my own government and some courts responded to that. In short, they didn't care. I think it important for you to know what I did, that I played by the rules and then endured a long process of asking the courts to enforce those rules."¹⁸⁶

Like Sotomayor's detractors in the media, the men testified that despite overcoming great odds, the Court of Appeals, including Sotomayor, failed to dignify their diligent work and efforts with a comprehensive opinion.¹⁸⁷ With a phalanx of white male firefighters in the audience, Ricci told the panel that 100 firefighters die each year on the line of duty.¹⁸⁸ Despite what the men viewed as individual and shared sacrifices, the Second Circuit panel summarily deprived them of the opportunity to tell their story. Because of these sacrifices, the firefighters deserved a thorough opinion and a day in court. In their minds, the men were rewarded with a 5-4 Supreme Court decision for their undeterred vigilance and determination. Democratic Senator Ben Cardin thanked Ricci for his public service and "belief in our nation" just as Democratic Senator Herb Kohl criticized outside groups that challenged Ricci's credibility.¹⁸⁹ Interestingly, the collective accolade that the two witnesses received from the panel starkly differed with the discordant responses Sotomayor received with respect to her "wise Latina" remarks.

The accolade that Ricci received demonstrated the power of his testimony. The pertinence of his testimony also showed the extent to which his credibility was bolstered by the Supreme Court's holding in *Ricci v. DeStefano* and the media.¹⁹⁰ Indeed, by Ricci's own account, the media played a critical role in shaping perception of the case and prefiguring his favorability.¹⁹¹ Ricci's merit, just like the black and Latino firefighter's laziness, was presumed.¹⁹² This paralleled the stark absence of minority and female firefighters from the host of white male firefighters in the audience. Like Sotomayor, the minority and female firefighters too had compelling stories and shared sacrifices that were relegated to obscurity. Absent in the hearings was a meaningful engagement with the judge on the subject and substance of her speech at U.C. Berkeley. Missing was a discussion on the long

186. *Id.* Invoking the norms of colorblindness, Vargas avoided association with Sotomayor, who possessed negative race and gender traits, and associate with Ricci, who possessed positive race and gender traits.

187. Ricci and Vargas testimony, *supra* note 181.

188. *Id.*

189. Milbank, *supra* note 161.

190. Harris & West-Faulcon, *supra* note 4, at 5.

191. Sean Hannity, *Interview With Frank Ricci*, REAL CLEAR POLITICS (July 16, 2009) available at http://www.realclearpolitics.com/articles/2009/07/16/interview_with_senator_john_barrasso_97513.html.

192. Harris & West-Faulcon, *supra* note 4.

history of discrimination against women and people of color in fire departments, a fact that bears relevance to the necessity of laws like Title VII and jurisprudence that led the Second Circuit to decide *Ricci* the way it did. These asymmetries suggest that the rights of minorities and women deserved little recognition, which in effect rationalizes the oppression of minorities and a flagging of civil rights.¹⁹³

C. *The Public's Response to the Polarizing Debate*

Conceding that Sotomayor's nomination, barring some unforeseen circumstance, had little chance of derailment, her detractors sought to heighten Sotomayor's racial salience. This reinforced an illusion of unity through an oppositional force of a symbolic other.¹⁹⁴ Polls taken of the nominee before and after the confirmation process illustrate this effect. The Pew Research Center Publication's Project for Excellence in Journalism (PEJ), maintains a weekly news coverage index that tracks news outlets including print, online, network TV, cable and radio.¹⁹⁵ The PEJ released a study that examined the stories and topics covered by the media and various news platforms. In one of its early reports after Obama announced his nomination of Sotomayor, the PEJ indicated that between May 26th and 29th stories on Sotomayor dominated the news with 24% of the coverage.¹⁹⁶ For a period of seven weeks, this number remained relatively unchanged at 22% between July 13th and 19th, the week of her confirmation hearing.¹⁹⁷

These numbers are significant. Consider the fact that coverage of Sotomayor's nomination during the week of May 25th to the 31st, as measured by the Pew Center, exceeded North Korea's nuclear test (12%), the economic recession (9%), General Motor's impending bankruptcy (7%), and California's Supreme

193. Pat Buchanan interview with Rachel Maddow, Rachel Maddow Show for Thursday July 16 (July 16, 2009), available at <http://www.msnbc.msn.com/id/31963761/> (responding to a question from Maddow Buchanan states, "White men were 100% of the people that wrote the Constitution, 100% of the people that signed the Declaration of Independence, 100% of the people who died at Gettysburg and Vicksburg, probably close to 100% of the people who died at Normandy. This has been a country built basically by white folks.").

194. Pat Buchanan interview with We Are Respectable Negroes News Network, An Exclusive Interview With Pat Buchanan, the Future of America, and the New Racism Against White Men (July 17, 2009), available at <http://wearerespectablenegroes.blogspot.com/2009/07/exclusive-interview-with-pat-buchanan.html>.

195. Pew Research Center, *First Impressions of Sotomayor Mostly Positive* (June 4, 2009), available at <http://pewresearch.org/pubs/1242/first-impressions-sotomayor-mostly-positive>.

196. *Id.*

197. *Id.*

Court ruling affirming Proposition 8 (5%).¹⁹⁸ In terms of individuals that made news, during the week of May 25-31, Sotomayor generated the most news at 14%, twice the coverage as anyone other than President Obama in the months following his inauguration.¹⁹⁹ The next highest was former Illinois governor, Rod Blagojevich, who made 7% of the news during the week he was removed from office. During the same period, President Obama captured 7% of the coverage, the lowest since he took office.²⁰⁰ In the months preceding Sotomayor's nomination, the swine flu outbreak in April was the only story other than Obama's inauguration or the economic meltdown to exceed coverage of the nominee.²⁰¹

The study also found race and heritage were predominant factors in the coverage. The report indicates that 40% of the stories about Sotomayor's nomination referenced her race, heritage, or ethnicity.²⁰² In statistic parlance, 25% of the stories in the news hole were about Sotomayor's race.²⁰³ As the report suggests, her supporters and detractors, quickly defaulted into narratives that offered different views on the race of nominee.²⁰⁴ The report partly attributes this result to the White House's emphasis on the judge's Bronx-Born Latina's up from the bootstrap biography.

Polls conducted during the nomination process illustrate the disparity in public opinion. One of the first polls released after Obama's announcement found that 54% approved of Sotomayor, 24% disapproved, while 22% remained undecided.²⁰⁵ A Gallup poll conducted between May 29th and the 31st found that 21% had no opinion of the judge, while a poll conducted between July 10th and 12th found that 17% had no opinion.²⁰⁶ Yet, the initial Gallup poll also found that 61% believed that Sotomayor's 17 years of experience on the bench was important to Obama, while the same poll indicated that two-thirds believed that her gender and race were important to Obama's decision.²⁰⁷ A CBS poll conducted between June 12th and 16th found that 22% had no opinion, while a poll conducted

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. Quinnipiac Poll (May 31, 2009), available at http://www.realclearpolitics.com/politics_nation/2009/05/polls_find_americans_approve_o.html.

206. See Gallup Poll (May 31, 2009), available at http://www.realclearpolitics.com/politics_nation/2009/05/polls_find_americans_approve_o.html.

207. *Id.*

between July 9th and 12th found 23% reported no opinion.²⁰⁸ On July 13, 2009, on the first day of the hearings and two weeks after the *Ricci* decision, a Gallup poll found that 53% supported Sotomayor's confirmation, 33% opposed her nomination, while 13% held no opinion.²⁰⁹ That poll, however, differs with another survey released on that same day, which found that only 23% of adults had a favorable view of Sotomayor, 15% had a negative view, while 60% said that they did not know enough to form an opinion about the nominee.²¹⁰

Despite differences between polls, the reports demonstrate that the public's unyielding fascination with the nominee's racial and ethnic identity caused an up-tic in the number of respondents who had negatives views after the *Ricci* decision.²¹¹ Paradoxically, over two-thirds favored the idea of having a woman on the court, while only 53% support the notion of having a Latino on the Supreme Court.²¹² And, although the number of respondents who reported having no opinion of Sotomayor was comparable to past male nominees, including Justice Roberts, Justice Alito, Justice Thomas, and Justice Souter, those opposing her nomination were almost two times the number.²¹³

D. *The Underlying Narratives Informing the Debate*

Within a rhetorical structure that made context impossible, Ricci's innocence and merit gained prominence at the very moment Sotomayor's race and gender identity gained salience. The racialization of the nominee in large part fueled intense dissatisfaction among disgruntled opponents because, to them, it signified an "opportunity lost."²¹⁴ Illustrating this symbolic "opportunity lost" was one commentator, Paul Kuhn, whose statements typified those who exalted Ricci's heroic status and decried Sotomayor's nomination. According to Kuhn, her nomination hastened the demise of a class whose privilege is increasingly waning. "The ebb of white male privilege is seen in education where women make up the large majority of college students . . . to boys, who are for example twice as likely to be identified as having a learning disability like Ricci."²¹⁵ Kuhn concedes that while "working class women still make less than work-

208. CBS Poll (July 12, 2009), available at <http://www.cbsnews.com/stories/2009/06/17/opinion/polls/main5094591.shtml>.

209. *Id.*

210. CBS Poll (July 13, 2009), available at http://www.cbsnews.com/htdocs/pdf/poll_sotomayor_071309.pdf?tag=contentMain;contentBody.

211. *Id.*

212. *Id.*

213. *Id.*

214. Kuhn, *supra* note 177.

215. *Id.*

ing class men . . . between 1979 and 2003, those women's earnings advanced 12 percent while men's earnings declined 8 percent."²¹⁶ At a time of diffused economic anxiety, an effort to maintain a framing of the issues as a Ricci vis-à-vis Sotomayor narrative helped remove the stigma of the weak white male and augmented racialized anxiety.²¹⁷ "Amid this financial crisis, when adjusted for inflation, white men generally make less in 2009 than they did in 1969."²¹⁸ Because achieving gender and racial parity would make it difficult for white men to compete on in the market on equal footing, Ricci and the class he has come to represent deserve sympathy.²¹⁹ In terms of political power, Kuhn admits, "white men are still overwhelmingly represented in positions of power" as evidenced by the fact that in 2007 approximately 75% of members of congress were white males.²²⁰ But he demurs, "that is the same ratio as white men's sacrifice on another end of government."²²¹

Just as Sotomayor became a target of race-based anxiety, Ricci's disability and class status, the genesis of his problems, became stand-ins for innocence and individualized disempowerment. This narrative painted Ricci as an ordinary figure transformed to mythic hero upon responding to a perceived social injustice.²²² As one writer put it: "a man's legal rights must be acknowledged and respected, even if you despise him. But Judge Sotomayor has stated that she believes such objectivity is impossible."²²³ With her nomination, Obama introduced "the threat that justice will be administered differently for politically favored groups than for politically unfavored groups."²²⁴

As noted earlier, the falsehoods underwriting the Sotomayor and Ricci spectacle reinforced a sense of community and shared

216. *Id.*

217. McGinley makes a similar point. "While the black and all female firefighters were made invisible by the case and testimony, the fact that Ricci's and Vargas' testimony lionized a particularly traditional form of heterosexual masculinity was also invisible. Masculinity research explains that because masculinity is considered natural, the practice of masculinity is often invisible . . . Those narratives placed men at the head of their families, in the traditional role as breadwinner and protector." Moreover, "because masculine practices include the many behaviors, visible and invisible, that make it more difficult for women and non-conforming men to achieve promotions in the fire department," narratives that advance traditional notions of masculinity reify these practices. McGinley, *supra* note 33 at 618.

218. *Id.*

219. "In the past year, according to the Bureau of Labor statistics, white men's unemployment rate increased 96 percent. That's only a hair more than black men. But white men's unemployment rate increased about a third more than the rate of white women and about twice the rate of black women." Kuhn, *supra* note 177.

220. *Id.*

221. *Id.*

222. Krauthammer, *supra* note 135.

223. Tracinski, *supra* note 152.

224. Kuhn, *supra* note 177.

hardships.²²⁵ Ian Haney Lopez explains the role of group-based stereotypes in procuring a sense of oneness among discrete groups.²²⁶ Haney Lopez states that “racial fabrication changes communities by emphasizing or even creating commonalities while eroding previously relevant differences.”²²⁷ He explains, “the construction of certain morphological features as racially meaningful and the resultant racially mediated discrimination serve to shape communities by providing a common experience to people who earlier or in a different context may not have seen themselves as similar.” Ricci, despite his learning disability, resonated among those who identified with him, especially those who saw themselves as lacking political and economic clout.²²⁸ Accusations of racial bias against Sotomayor created a sense of urgency among these individuals, including those who enjoyed relative class privileges vis-à-vis Ricci. Consider one media commentator who noted, “with the president launching so many plans for his direct, personal intervention in the economy—firing CEOs, decreeing mergers, dictating the details of giant business deals—we urgently need the courts to serve as an impartial counter-balance.”²²⁹

This form of “racial fabrication” rendered Ricci’s intersectional identity less visible. Consider again the fact that Ricci suffered from dyslexia and quit a second job to study for the promotional exam.²³⁰ His disability was not recognized as a trait that set him apart from the 17 other white firefighters or Chief Executive Officers of large corporations. Had Ricci been gay, a black female, or Latina judge, it is unlikely he would have generated accolades or sympathy among those who begrudged Sotomayor’s nomination. This observation is significant because women of color are often positioned as the unqualified test takers or unworthy of esteem.²³¹ As Crenshaw notes, once “ideologically informed character traits are made, ‘the story’ tells itself.”²³²

225. See Rachel Moran, *Race, Representation, and Remembering*, 49 UCLA L. REV. 1513, 1516 (2002) (exploring “the conundrum of the uneasy distance between law and history and [arguing] that there are genuine benefits to be derived from acknowledging the strong resonance between these two areas of study”). See also Ian F. Haney Lopez, *Social Construction of Race*, 29 HARV. C.R.-C.L.L. REV. 1, 54-58 (1994).

226. *Id.* at 55.

227. *Id.*

228. Tracinski, *supra* note 152.

229. *Id.*

230. Ricci, 129 S.Ct. at 2671.

231. Crenshaw, *supra* note 9.

232. *Id.*

IV. WHAT CAN WE LEARN FROM THE DISCOURSE SURROUNDING SOTOMAYOR'S NOMINATION

A debate that pitted Sotomayor and Ricci had three notable lessons. One, the debate prevented the emergence of a robust intersectional narrative that could have powerfully rebutted unfounded accusations against Sotomayor. Two, the debate was illustrative of the types of challenges women of color encounter in institutions that have yet to take full advantage of the benefits of a diversity of thought, experience, and habits. And, three, the debate fostered intra-community dispute and fractured association among Latinos along gender lines.

A. *An Intersectional-less Defense*

The White House's defense strategy was a replay of President Obama's presidential win. Some have dubbed this strategy "post-racial," that is, a discourse that, much like the colorblind principle invoked by Ben Vargas, sees racial significance as relic of the past.²³³ The White House, which sought to replicate aspects of this tactic from inception, had a three-point strategy: one, emphasize Sotomayor's inspiring upbringing as an "only-in-America" narrative; two, cast her as a "law and order" jurist by stressing her prosecutorial bona fides; and, three, accent her respect for precedent and pragmatic legal approach.²³⁴ However, despite the tactical possibilities that this strategy afforded the country's first black male president, it posed a challenge in generating wide support for the first woman of color to the Supreme Court.²³⁵

The strategy placed Sotomayor at competing overwhelming crosscurrents: one current propelled Sotomayor towards the category of the racial other while a competing vortex pulled her towards the category of post-racial. Early in the process, the Whitehouse expressly responded to the claim that Sotomayor lacked a common bond with non-stigmatized people, whose iden-

233. *Id.* His win was largely credited to a broad coalition of communities and political contingencies brought together by a strategy that sought to soften Obama's racial salience and emphasize commonalities.

234. Glenn Thrush, *What to Watch In Confirmation Hearings*, POLITICO.COM (July 13, 2009), available at <http://www.politico.com/news/stories/0709/24850.html> (Thrush reporting on a playbook distributed and produced by the White House to Senate Judiciary Committee Democrats outlining Sotomayor's defense).

235. David Savage & Christi Parsons, *Sotomayor's Record Sets Off Few Ideological Alarms*, L.A. TIMES (May 27, 2008), available at <http://articles.latimes.com/2009/may/27/nation/na-court-nomination27> (discussing Sotomayor's judicial philosophy and quoting former Yale School Law School Dean Judge Guido Calabresi, "[W]e have some judges on the left end of the spectrum. Sonia's well in the middle . . . Activism has a meaning — judges who reach out to decide things that aren't before them. Sonia simply doesn't do that").

tity and interest have been defined in opposition to hers.²³⁶ To lend narrative support to this message, Sotomayor was asked to resist wearing large hoop earrings or using bright red nail polish to elude the image of a Latina from the South Bronx.²³⁷ At her confirmation preparatory sessions with administration officials and closed-door meetings with senators, she spent more time explaining her two-dozen words than any case she has heard during her 17 years on the federal bench.²³⁸ When asked to comment on Sotomayor's "wise Latina" speech, the White House Press Secretary, Robert Gibbs, told reports, "I think if she had the speech to do all over again, I think she'd change that word."²³⁹ Just as Sotomayor was asked not to look too Latina, the words "woman," "her," and "Latina" were also figuratively stricken from the judge's speech. Yet, in an interview with NBC's Brian Williams, President Obama stated, "I'm sure she would have restated it. But if you look in the entire sweep of the essay that she wrote, what's clear is that she was simply saying that her life experiences will give her information about the struggles and hardships that people are going through—that will make her a good judge."²⁴⁰ Oddly, efforts to subdue Sotomayor's ethnic salience stood in sharp contrast with a routine focus on her racial identity.

It was not enough that Sotomayor was forced to retract her remarks at her hearing and vilified for her work at PRLDEF. The failure by Senate Democrats to muster the moral authority to impeach sympathetic depictions of Ricci demonstrated the extent to which the White House's strategy contributed to a skewed rhetorical playing field.²⁴¹ As Harris and West-Faulcon recognize, "not only was [Ricci's] narrative favorably received by Senator's on the Judiciary Committee opposing Sotomayor; [but] many who supported her nomination did not directly challenge Ricci's characterization of his case as one that sought to protect valid standards of merit and defended important principles of civil rights law."²⁴² With respect to Sotomayor's involvement in the case, Democrat's defense of Sotomayor rested on the assertion that her decision adhered to the law as it existed at the time, "not that her decision was substantively correct."²⁴³ The false im-

236. John Dickerson, *Sonia Is Great But Not Better: The White House Issues A Clarification*, SLATE (May 29, 2009), available at <http://www.slate.com/id/2219169/>.

237. Shani Saxon-Parrish, *Her Honor: A Portrait of Justice Sonia Sotomayor*, LATINA MAGAZINE (Nov. 11, 2009), available at <http://www.latina.com/lifestyle/news-politics/her-honor-portrait-justice-sonia-sotomayor>.

238. Thrush, *supra* note 234.

239. *Id.*

240. Dickerson, *supra* note 236.

241. Harris & West-Faulcon, *supra* note 4, at 5.

242. *Id.*

243. *Id.*

pression that as an appellate judge Sotomayor had no role in creating or settling ambiguous areas of case law, constituted a tacit acquiescence to the unwarranted charge that she was an inexperienced and biased. That no viable rebuttal to Ricci was seriously pursued left his credibility intact. This afforded Sotomayor's detractors a unique opportunity to benefit from the public's growing preoccupation with her identity.

As incoherent as the messaging appears, efforts to intermittently play up or soften Sotomayor's racial salience revealed an illusion of necessity. As some would argue, this illusion was shaped by a host of trepidations gripping Obama's strategy team even before he took office.²⁴⁴ That is, a fear that the public would question the legitimacy of her nomination and by extension his presidency. Considering the unsettled beliefs that Obama was not legitimately born American, the fear of being perceived as illegitimate was real.²⁴⁵ The White House's strategy exposed other fears. A fear of backlash against institutions once perceived as sympathetic to the demands of people of color. A fear that Obama's and Sotomayor's rise through the ranks of power would have substantiated the view that policies once used to advance the interests of communities of color are no longer needed. A fear that challenging the myths underwriting Ricci's rise to fame or the assailment of diversity in the judicial decision-making process, would have revealed the inherent contradictions of Obama's political strategy and his concomitant promise to unify a country fractured by inequality. Because Sotomayor's nomination, like Obama's presidency, helps lift a formal barrier that has marginalized women of color and produced the cultural designation of "other," these fears are well grounded. Nevertheless, ignoring the structural conditions that explain the significance of Sotomayor's life, impressions, and experiences, while relegating Ricci to nothing more than a mere contrivance, did little to place her within comprehension. These tactics muzzled on other intersectional narratives that could have challenged invidious assumptions about Sotomayor and women of color. In the process, the

244. Charles Blow, *Racism and The Race*, N.Y. TIMES (Aug. 8, 2008), available at http://www.nytimes.com/2008/08/09/opinion/09blow.html?_r=1&oref=slogin (observing, "Welcome to the murky world of modern racism, where most of the open animus has been replaced by a shadowy bias that is difficult to measure. As Obama gently put it in his race speech, today's racial 'resentments aren't always expressed in polite company.' However, they can be — and possibly will be — expressed in the privacy of the voting booth").

245. Elliott C. McLaughlin, *Before Birther Row, Lt. Col. Lakin Racked Up Medals as Flight Surgeon*, CNN (Aug. 6, 2010), available at http://articles.cnn.com/2010-08-06/justice/terrence.lakin.birther.bio_1_birther-movement-president-obama-birth-certificate?_s=PM:CRIME.

White House did little to explain the import of diversity in the Supreme Court as a function of a democratic society.

B. *Sotomayor's Nomination as Emblematic of The Experience of Women of Color Writ Large*

Aside from her initial introduction as Obama's nominee, Sotomayor made no presentations before the media. Even after she was confirmed, she gave few interviews to speak about her confirmation experience. Her uncommunicativeness demonstrated the silencing effect that the discourse had on Sotomayor's ability to name her experience and bespoke of the experiences that typify the lives of professional women of color.²⁴⁶ Consider an article in *Latina Magazine*, in which a Latina author, Shani Saxon-Parrish, expressed less interest in Sotomayor's identity *per se*. Instead, Saxon-Parrish uses Sotomayor's experiences and journey to the Supreme Court as an exemplar on finding meaning and happiness in male-centric spaces.²⁴⁷ Saxon-Parrish discussed the visual ways in which the White House sought to soften Sotomayor's racial salience by advising her to keep her nails a neutral shade and avoid wearing hoop earrings, an accessory that Saxon-Parrish maintains is popular among Latinas across America.²⁴⁸ The narrative also spoke of the constraints imposed on a woman of color within the workforce and the fear that the perceptions held by others will be used to reinforce negative stereotypes against them. In this sense, Sotomayor's retraction of her "wise Latina" remarks could be seen as a necessary career choice. A choice that can be understood as a form of "identity negotiation" through a "denial of self."²⁴⁹ This was a moment, probably like many other moments in Sotomayor's career, where she compromised on one aspect of her identity to make others feel at ease with perceived differences. In effect, this left those who see themselves unlike her with undisturbed idealized no-

246. In *Becoming Gentlemen*, Lani Guinier similarly discusses the experiences of women of color in law school and the legal profession. The work consists of essays which tell the story of women's experiences with legal education "as a way to begin a wider conversation in which we rethink conventional norms." The research cited in the essays consisted of statistical evidence and personal accounts of female law school students at the University of Pennsylvania Law, who entered law school with credentials comparable to male counterparts. These women often reported a performance gap vis-a-vis white male students. Guinier argues that such a differential can be explained by a law school environment hostile to the needs of women and minorities, a law school pedagogy that is male-centric, and performance criteria with poor predictive value. See, Lani Guinier, Michelle Fine, & Jane Balin, *BECOMING GENTLEMEN*, 1, 27 (1997).

247. Saxon-Parrish, *supra* note 237.

248. *Id.*

249. Carbado & Gulati, *supra* note 160, at 1289.

tions of the self.²⁵⁰ The experience of having to placate others to advance a career interest may have resonated among professional women of color like Saxon-Parrish, who often have to make similar career choices to get ahead.²⁵¹

Compromising on one's self to achieve common ground with others can hinder one's ability to project images generally viewed as worthy of esteem.²⁵² Consider an account by Anita Hill in which she discusses Sotomayor's hearings with less of a focus on the relevance of identity on the confirmation process and more on diverse experiences as an element of success.²⁵³ In Hill's words, "I think the people deserve more. You've got a large body of work out there that she has been involved in as a court of appeals judge. The people really want to know about her jurisprudence, her judicial philosophy, her work. And I think that's what they deserve."²⁵⁴ Hill's attempt to shift the discussion away from race and gender to Sotomayor's career highlights the irony of a discourse that shifted sporadically between deraced/hyper-racialized gendered/degendered conceptions of Sotomayor. As Hill's account demonstrates, race-based and gender-based tropes were deployed against Sotomayor to impeach her credibility at the very moment that race- and gender-neutral narratives were made inaccessible. Rather than expounding the significance of Sotomayor's race or ethnicity as it translates into inequality between communities, Hill centered on Sotomayor's travels through adversity as a basis of diversity. Hill's account implicitly and powerfully rebuts the claim that women of color are categorically less qualified than men. As evidenced by the polls that illustrated the public's captivation with Sotomayor's race rather than qualifications, Hill's powerful rebuttal may have fallen upon deaf ears.

C. *Intra-Community Dispute Along Gender Lines*

Omitting those narratives that could have problematized the way that Sotomayor was understood may have frustrated a possible advancement of a pan-ethnic cross-community coalition that could provide Sotomayor the public support she needed. While conventional wisdom provided that the demonization of

250. *Id.* (stating that "identity performance can become a denial of self. As we explain later, identity negotiations often function to make insiders feel comfortable and at ease with the outsider's difference.").

251. *Id.*

252. *Id.*

253. Anita Hill, *Anita Hill Speaks Out On Supreme Court Nominee Sotomayor*, ESSENCE (May 29, 2009), available at http://www1.essence.com/news_entertainment/news/articles/anita_hill2/.

254. *Id.*

Sotomayor would have galvanized Latinos as a whole, a narrative that failed to link the intersections led some Latino male commentators to question Sotomayor's ability to represent the community writ large. One such commentator, Gregory Rodriguez, wrote that Sotomayor's nomination could "spell the end of the very idea that there is such a thing as Latino."²⁵⁵ To Rodriguez, her nomination bore marginal import in advancing a collective Hispanic interest, chiefly the welfare of Mexican Americans.²⁵⁶ "Because the media and the political elites make no distinction among Latino groups, Mexican Americans may find themselves waiting a very long time for one of their own to be nominated to the Supreme Court."²⁵⁷ The assertion seems to be that because Sotomayor's Puerto Rican identity provides her inadequate standing to represent the Latino community writ large, she undermines the community's collective voice.²⁵⁸ However, if Rodriguez were truly concerned about the effects the debate would have on how the Latino community would be perceived by others, a critique linking the inaccessibility of narratives would have helped his cause. Such a critique would link Sotomayor's inability to explain her robust experiences to narratives that essentialize the richness of the Latino/a community. Rodriguez would have avoided the very totalizing power of race-centered narratives that his critique of Sotomayor reproduces. Juxtaposing Rodriguez' complaint to the commentaries lodged by Latinas and other women of color, one gets the sense that Rodriguez is more concerned with intra-community power differentials than overcoming trivial differences.

V. CONCLUSION: BUILDING CONTEXT AND COALITIONS BY EMBRACING THE INTERSECTIONS

The debate pitted against two seemingly different people, Sonia Sotomayor and Frank Ricci, exhibits opposing views of gender and race and illustrates stark value choices. The narrative worked to lift Frank Ricci to heroic status at the very moment that Sonia Sotomayor was cast a villain. This is because dominant conceptions of discrimination are inscribed with images that are incapable of exhibiting context.²⁵⁹ Because anti-discrimination is conceived from the view point of men of color, while gender discrimination is conceived from the view point of white women, it can be said that Sotomayor's identity as a woman and Latina left

255. Gregory Rodriguez, *The Generic Latino: What Does the Nomination of Sonia Sotomayor Really Say?*, L.A. TIMES, June 1, 2009.

256. *Id.*

257. *Id.*

258. *Id.*

259. Crenshaw, *supra* note 7, at 167.

her unrecognizable within this framework.²⁶⁰ It was either that Sotomayor's experience popularly conceived a quintessentially Hispanic or female, but not both. Thus, it isn't insignificant that Sotomayor was a woman of color at very moment that Ricci was introduced, since her identity was used to underwrite the fictional conflict between the two. In this sense, Sotomayor was the template onto which the legal recognition of Ricci's injury was inscribed.

A strategy that intermittently played on disparate aspects of Sotomayor's identity not only legitimized negative implicit expectations, but also created distrust and increased the risk that she may be viewed as inauthentic. As Devon Carbado and Mitu Gulati argue, "when multiple interconnected stereotypes operate simultaneously, the risk that taking steps to negate one kind of stereotype will activate some other negative stereotype."²⁶¹ Rather than fortifying the nominee against a barrage of race-based attacks, the White House's emphasis on Sotomayor's upbringing, law and order approach, and pragmatism triggered a myriad of interrelated stereotypes. That is, Sotomayor's defense partly legitimized the very stereotypes that the strategy sought to counter. At the very moment that the White House sought to shift focus away from Sotomayor's "wise Latina" remarks and reduce her racial salience, the public became increasingly fascinated with her racial identity and convinced that Sotomayor ruled against Ricci because of his race. Attempts to emphasize Sotomayor's hard work and expansive judicial record were met with charges that her nomination was akin to affirmative action hiring. Asserting Sotomayor's law and order credentials stemmed from the need to counter stereotypes of people of color who are beneficiaries of affirmative action as "lazy" and intellectually subpar. The fix would have been a rich narrative that embraces the multiple intersections that marked the concrete reality of Sotomayor and similarly situated women of color.²⁶² Such showcase of the hardships and life stories would have been a forceful rebuttal of Frank Ricci and *Ricci v. DeStefano*.²⁶³ Consider again that no women and few minority fire fighters were seen at the hearings. Nothing was said about the black or white female fire fighters who would benefit from a robust application of anti-discrimination law.

260. *Id.*

261. Carbado & Gulati, *supra* note 159, at 13.

262. Damien Cave, *In Puerto Rico, Supreme Court Pick With Island Roots Becomes A Superstar*, N.Y. TIMES (May 29, 2009), available at http://www.nytimes.com/2009/05/30/us/politics/30puerto.html?_r=1 (quoting a man from Sotomayor's mother's hometown, "It's a point of pride for all of us because she's risen up from the bottom . . . not many of us do.")

263. McGinley, *supra* note 33, at 226

An alternative strategy that can fruitfully sustain itself, bridge communities, and serve as catalysis for meaningful change must seize on complex experiences. As Crenshaw notes, if the efforts begin, "with addressing the needs and problems of those who are most disadvantaged and with restructuring and remaking the world where necessary, then others who are singularly disadvantaged would also benefit."²⁶⁴ Rather than forcing Sotomayor to distance herself from her remarks at U.C. Berkeley, the White House would have done itself justice by embracing her message that the ills of discrimination are in large part rooted in the law. As Sotomayor reminds us: "Let us not forget that wise men like Oliver Wendell Holmes and Justice [Benjamin] Cardozo voted on cases which upheld both sex and race discrimination in our society."²⁶⁵ Certainly, this message negates the view of social inequality as a necessary or incurable evil.

A forceful and explicit portrayal of the Supreme Court as an institution that should reflect society's composite, including those individuals stationed in society's fringes, would also help influence how we think about discrimination. This is the message Sotomayor sought to deliver at U.C. Berkeley. By labeling herself wise, Sotomayor deconstructs the image of the Latina in the minds of others by rejecting the images of docility and ineptness that have long been deployed against women of color. In coupling wise to Latina judge, Sotomayor asked for inclusion in the American political imagination just as she subverted society's logic of worthiness against itself. She is wise not because she is Latina *per se*, but wise because she demonstrated the wisdom necessary to look beneath the prevailing conceptions of discrimination and challenged the hopelessness that often accompanies this endeavor.

264. Crenshaw, *supra* note 7, at 167

265. Sotomayor, *supra* note 3.