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Identity Politics Not New to Supreme Court

By **David Paul Kuhn**

W.E.B. Du Bois was quick to endorse the appointment of Louis Brandeis to the Supreme Court. "As a Jew," Du Bois said, quoting Isaiah, Brandeis knows the experience of "being despised and rejected of men."

Supreme Court appointments have long been wrapped up in the weight of their symbolism. The resignation of Justice David Souter has renewed the debate over identity politics and high court nominations. Most glaringly, only one of nine Supreme Court justices is a woman. Other groups, like Hispanics, are seeking their first on the court.

The influence of identity politics on Supreme Court nominations tends to be described as a break from more meritocratic days. Yet this brand of politics has long shaped the court. What may now be race was once region.

Abraham Lincoln nominated justices from Ohio, Illinois and Iowa with an eye on his reelection. President Taft elevated Edward White to chief justice in part because it was thought White's Confederate past symbolized cohesion. Franklin Roosevelt factored Wiley Rutledge and William O. Douglas' western background into his decision.

"People thought region or state of origin had to do with interests that should be represented on the court," said Mark Tushnet, a Supreme Court historian at Harvard Law School. "At the time those things were not called identity politics, but I don't think there is any difference between those interests and today."

Richard Nixon was the last president to consider region a defining factor. He nominated South Carolina's Clement Haynsworth and reached deep into the fracturing Democratic South. The senate killed the nomination over civil rights concerns. Nixon told advisor Harry Dent, "I want you to go out this time and find a good federal judge further south and further to the right." Florida's G. Harrold Carswell followed. Carswell had supported segregation. His bid failed as well. Nixon, always the rhetorical pugilist, termed the senate's actions "regional discrimination."

At one time, Nixon seriously considered placing the first woman on the court. Pat Nixon told one reporter, "If he doesn't appoint a woman, he's going to have to see me." Mildred Lillie was on her way to the high court until the American Bar Association ruled that she was unqualified. Her nomination soon scuttled.

Race, gender and ethnicity are now common filters for potential justices. This too is not new. Dwight Eisenhower had electoral politics on his mind when he selected an unknown Irish Catholic New Jersey justice, William Brennan.

Lyndon Johnson's appointment of Thurgood Marshall was the personification of LBJ's push for civil rights reform.

The first woman, Sandra Day O'Connor, didn't join the court until 1981. O'Connor resigned in 2006. Ruth Bader Ginsburg is the only woman currently serving on the court.

Diversity has not always aided candidates. Herbert Hoover's administration hesitated to nominate Benjamin Cardozo in 1932 because it was thought controversial to have two Jews, or



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perhaps two New Yorkers, on the high court. But Cardozo's qualifications won out. There has generally been a "Jewish seat" thereafter.

The so-called "Catholic seat" stretches back to Andrew Jackson. It would not be until late in the 19th century that a second Catholic, White, would sit on the court.

Ronald Reagan, like Eisenhower, had his eye on white Catholic constituencies when he nominated Antonin Scalia, the first Italian Catholic on the court.

Of course, nominations do not always earn the backing of their bloc. The NAACP opposed the nomination of conservative Clarence Thomas, confronting one local branch in Compton, Calif., that backed the second black justice.

It now comes to the first black president to determine how much emphasis race or gender deserve. Barack Obama said empathy should be a factor. Few justices come from hardscrabble backgrounds. Thomas and Douglas are the only justices of the past century who have experienced poverty.

"I don't believe in identity politics but I think that somebody who has known poverty brings something to the court," said Lucas Scot Powe, of Texas Law School whose book "The Supreme Court and the American Elite" was published last year. Powe once clerked for Douglas.

"We should have judges on the court who have had a broad experience in American life rather than the narrowing experience of being on the court of appeals," Powe added. All the justices on the high court today were appellate judges.

Obama's next nominee will likely be a woman. Ginsburg, 76, has pancreatic cancer, leaving her ongoing tenure in question.

There are now 47 female judges serving on the federal appellate bench, double the portion serving when Ginsburg was chosen. One top prospect is federal appellate judge Sonia Sotomayor, a 54-year-old Hispanic woman. Michigan Governor Jennifer Granholm, a former prosecutor, could be a candidate for the nomination should Obama look outside the appellate courts.

For all the emphasis on diversity, its impact remains intangible. One recent study of judges on the federal court of appeals found that gender did not influence rulings, with one exception--sex discrimination cases. Women were about 10 percent more likely to rule for the discriminated party. And the men seated beside them? They were 15 percent more likely to do the same.

Ginsburg herself believes gender shapes some rulings. Last month at Ohio State University, she said a woman's background "brings a life experience" that men cannot always grasp.

"There I am all alone," Ginsburg said, "and it doesn't look right."

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