

The Federalism Argument for Judicial Diversity

Author : Nancy Leong

Date : January 23, 2015

Sharon E. Rush, [Federalism, Diversity, Equality, and Article III Judges: Geography, Identity, and Bias](#), 79 *Mo. L. Rev.* 119 (2014).

For the past several years, commentators have discussed the importance of diversity in the federal judiciary. Yet in at least some respects the federal judiciary is becoming less diverse, not more. Consider the current Supreme Court. Five of the justices—Ruth Bader Ginsburg, Antonin Scalia, Samuel Alito, Sonia Sotomayor, and Elena Kagan—are from the Northeast, and two others—Chief Justice John Roberts and Justice Clarence Thomas—went to law school on the East Coast and have spent the vast majority of their professional lives in Washington, D.C. Only Justices Stephen Breyer and Anthony Kennedy, who both grew up in California, are from the West Coast. We have no sitting justice from the Northwest or the Midwest, nor do we have a justice who assumed the bench directly from a position in the South.

To the ongoing conversation about diversity in the federal judiciary, [Sharon Rush](#)'s recent article offers an intriguing argument in favor of geographic diversity. She explains that the principles of federalism embedded in Article III favor consideration of geographic diversity in federal judicial appointments. Even the simple structure of the judiciary that we take for granted reflects the concern that different geographical regions are adequately represented: the circuits are designed by geography, each state has at least one federal district court judge, and no district combines multiple states. This organization, Rush persuasively explains, "is partly due to efficiency concerns, but is also a result of federalism and state participation in protecting individual liberties." While Article III does not require this structure, its concern for federalism explains why the judiciary has been designed as it has.

Indeed, the concern for geographic diversity rooted in federalism is in many instances interpreted to *require* attention to a judge's geographical origins. Federal district court judges must live in the state in which they sit: "[i]t would be unimaginable to have a Kansas resident sitting as a federal judge in Nebraska even if the Kansas resident lived closer to the courthouse than the Nebraska resident." Seats on the courts of appeals are allocated by state, with the requirement that an active circuit judge occupying that seat reside in that state. Again, this organization reveals that principles of federalism give rise to the concern that every state should be adequately represented.

Deeply-rooted doctrines such as diversity jurisdiction likewise reflect a view of individual states as distinct and deserving of unique consideration. One premise of diversity jurisdiction is that a litigant from state A should not have to grapple with the bias of a state judge from state B. Of course, the federal judge would still be from state B, but the litigation would proceed under federal rules and the judge would be at least somewhat shielded from the idiosyncrasies of state B's judicial system, including the pressures of state judicial elections. As Rush explains in more detail, while in theory Congress could abolish diversity jurisdiction, in practice such a move is unlikely. Our sense that diversity jurisdiction serves valid concerns related to state residency is likely to trump more recent arguments that, for example, it encourages forum-shopping.

After outlining this interesting background about Article III sensitivity to state interests, Rush offers a persuasive and original connection between geographic diversity and the principles of equality that diversity jurisdiction is intended to advance. The policies of diversity require not only a federal forum, but federal decisionmakers reflecting that geographic diversity. She explains: "[B]ecause each state is independently sovereign and has its own identity, the absence of a state resident as an Article III judge on the appellate bench unconstitutionally excludes that state's right to bring its experiential and fair state-identity bias to the decision-making process."

An intriguing issue that the piece raises, but does not fully address, is whether geographic diversity enhances the diversity of views on the federal bench independent of the ideological tendencies of various states and regions. Put differently, is it important to have federal judges from the South because the South is on average more conservative and it is important to have conservative judges on the bench? Or is it important to have federal judges from the South because they represent particular concerns that do not map neatly onto either liberal or conservative positions?

As with any interesting scholarship, I would have enjoyed further exploration of a few additional avenues. I would be interested to hear Rush's thoughts on how various considerations relating to diversity should be ranked—all else equal, is it preferable to appoint a judge from the Northeast who is an underrepresented racial minority, or a white judge who is from a geographically underrepresented area? Likewise, Rush's discussion of geographic diversity focuses on non-regional courts (such as the Supreme Court) and on the federal judiciary as a whole. I would have enjoyed further discussion of how geographic diversity matters on regional trial and appellate courts, or how we might analyze it differently. Certainly the Eleventh Circuit must include judges from Florida, Georgia, and Alabama, but does it also matter where these judges grew up, attended school, and began legal practice? Finally, a few more concrete examples of how judges from different geographical areas might decide specific kinds of cases differently would help to persuade readers that geographic diversity deserves substantially more attention.

These, however, are minor points. Rush makes a persuasive and original case for geographic diversity on the bench—one that those who already advocate for various forms of diversity should welcome, and one that should enhance the value of diversity for those who think that credentials alone (whatever that means) are the only valid metric. As President Obama, his successors, and other stakeholders weigh prospective nominees to the federal bench, they should think carefully about geographic diversity and the different life experience that in many instances it signifies.

Cite as: Nancy Leong, *The Federalism Argument for Judicial Diversity*, JOTWELL (January 23, 2015) (reviewing Sharon E. Rush, *Federalism, Diversity, Equality, and Article III Judges: Geography, Identity, and Bias*, 79 **Mo. L. Rev.** 119 (2014)), <http://courtslaw.jotwell.com/the-federalism-argument-for-judicial-diversity/>.