often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes that line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, 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.

Let us not forget that wise men like Oliver Wendell Holmes and Justice Cardozo voted on cases which upheld both sex and race discrimination in our society. Until 1972, no Supreme Court case ever upheld the claim of a woman in a gender discrimination case. I, like Professor Carter, believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable. As Judge Cedarbaum pointed out to me, nine white men on the Supreme Court in the past have done so on many occasions and on many issues including Brown.

However, to understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Others simply do not care. Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench. Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.

I also hope that by raising the question today of what difference having more Latinos and Latinas on the bench will make will start your own evaluation. For people of color and women lawyers, what does and should being an ethnic minority mean in your lawyering? For men lawyers, what areas in your experiences and attitudes do you need to work on to make you capable of reaching those great moments of enlightenment which other men in different circumstances have been able to reach. For all of us, how do change the facts that in every task force study of gender and race bias in the courts, women and people of color, lawyers and judges alike, report in significantly higher percentages than white men that their gender and race has shaped their careers, from hiring, retention to promotion and that a statistically significant number of women and minority lawyers and judges, both alike, have experienced bias in the courtroom?

Each day on the bench I learn something new about the judicial process and about being a professional Latina woman in a world that sometimes looks at me with suspicion. I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me requires. I can and do aspire to be greater than the sum total of my experiences but I accept my limitations. I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate.

There is always a danger embedded in relative morality, but since judging is a series of choices that we must make, that I am forced to make, I hope that I can make them by informing myself on the questions I must not avoid asking and continuously pondering. We, I mean all of us in this room, must continue individually and in voices united in organizations that have supported this conference, to think about these questions and to figure out how we go about creating the opportunity for there to be more women and people of color on the bench so we can finally have statistically significant numbers to measure the differences we will and are making.

I am delighted to have been here tonight and extend once again my deepest gratitude to all of you for listening and letting me share my reflections on being a Latina voice on the bench. Thank you.

Mr. BROWNBACK. I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BROWN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BROWN. Mr. President, I ask unanimous consent to speak as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Ohio is recognized.

Mr. BROWN. I thank the Chair.

(The remarks of Mr. BROWN pertaining to the introduction of S. 1343 are printed in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

Mr. LUGAR. Mr. President, today the Senate considers the nomination of Harold Koh to be Legal Adviser to the Department of State. After reading his answers to dozens of questions, attending his hearing in its entirety, meeting with him privately, and reviewing his writings, I believe that Dean Koh is unquestionably qualified to assume the post for which he is nominated. He has had a distinguished career as a teacher and advocate, and he is regarded widely as one of our Nation's most accomplished experts on the theory and practice of international law. He also has served ably in our government as a Justice Department lawyer during the Reagan administration and as Assistant Secretary of State for Democracy, Human Rights, and Labor from 1998 to 2001.

The committee has received innumerable letters of support for the nominee attesting to his character, his love of country, and his respect for the law. He enjoys support from the lawyers with whom he has worked, as well as those including former Solicitor General Kenneth Starr—whom he has litigated against.

Both in private meetings and in public testimony, Dean Koh has affirmed that he understands the parameters of his role as State Department Legal Adviser. He understands that his role will be to provide policymakers objective advice on legal issues, not to be a campaigner for particular policy outcomes. He also has affirmed that as Legal Adviser, he will be prepared to defend the policies and interests of the U.S. Government, even when they may be at odds with positions he has taken in a private capacity. In applying laws relevant to the State Department's work, he has stated clearly that he will take account of and respect prior U.S. Government interpretations and practices under those laws, rather than considering each such issue as a matter of first impression.

Finally, I believe Dean Koh respects the role of the Senate and the Congress on international legal matters, especially treaties. He has promised to consult with us regularly and fully, not just when treaties come before the Senate, but also on the application of treaties on which the Senate has already provided advice and consent, including any proposed changes in the interpretation of such treaties.

Absent extraordinary circumstances, President Obama and Secretary of State Clinton should be able to choose the individuals on whom they will depend for legal analysis, interpretation, and advice. Given Dean Koh's record of service and accomplishment, his personal character, his understanding of his role as Legal Adviser, and his commitment to work closely with Congress, I support his nomination and believe he is well deserving of confirmation by the Senate.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. KAUFMAN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. BENNET). Without objection, it is so ordered.

Mr. KAUFMAN. Mr. President, I ask unanimous consent to speak as in morning business for 18 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

SHORT SELLING

Mr. KAUFMAN. Mr. President, I rise again to speak out about the problems in the financial markets caused by abusive short selling activities, which includes naked short selling and rumor mongering. It can also include abuse of the credit default market by planting false suggestions that an issuer's survival is in doubt. My focus today, however, is on the first element—naked short selling.

Let me be clear about my main point. The public believes and the SEC has yet to discount that the effects of abusive naked short selling practices helped cement the demise of Bear Stearns and Lehman Brothers, as well as made it significantly harder for banks to raise critical capital in the throes of this financial crisis. It is no exaggeration to say that abusive short

selling at a critical moment further endangered our financial system and economy and thereby help lead to taxpayer bailouts that have totaled hundreds of billions of dollars. We are still waiting for the SEC's enforcement response. It is likely we will continue to wait, as I will discuss, because current rules are ineffective and unenforceable.

There is still a critical need for better SEC regulations that would help the enforcement division to do its job and stop naked short selling that is abusive and manipulative dead in its tracks.

Yes the SEC in April proposed five versions of a return to the uptick rule, which I believe never should have been repealed in the first place, at least without putting something effective in its place. The uptick rule, which simply required stock traders to wait for an uptick in price before continuing to sell a stock short, was in effect for 70 years—that is 7–0 years—until it was repealed in June of 2007. The comment period for the reinstatement of some form of the prior uptick rule is complete, and it is disappointing, but not surprising, to see that many on Wall Street now oppose that modest step. I continue to urge the SEC to move forward on that front.

As I have consistently maintained in my communications with the SEC, however, reinstating some form of the uptick rule alone puts too narrow a frame on the problems associated with naked short selling. The problem at its root is that the current rules against naked short selling are both inadequate and impossible to enforce. A strict preborrow requirement would address the problem and end it once and for all. Yet the SEC still has done nothing to propose a preborrower rule. If we end up with no uptick rule and no preborrow requirement, the SEC will be bending to the will of an industry that has shown recklessness but clearly lacks remorse.

There is a fierce urgency to fix this problem. Today, the financial markets are teetering on the brink of either continuing with a bull market rally or falling back substantially in what would be the continuation of a severely painful bear market. If the markets of certain stocks fall back precipitously again and if the bear market raiders act again using abusive naked short selling practices to damage and possibly destroy the stocks of banks and other companies, the SEC will have a lot of explaining to do—unless we see responses from the agency in the near term.

I have been writing the SEC and talking about this issue on the Senate floor since March 3. It is now June 24, and the SEC has still done nothing. It is time for the SEC to act.

Let me review the history of this issue and the evidence.

Naked short selling occurs when a trader sells a financial instrument short without first borrowing it or even ensuring it can be borrowed. This converts our securities and capital markets into nothing more than gambling casinos since the naked seller purports to sell something he doesn't own, and may never own, in the expectation that prices of the instruments sold will decline before ever settling the trade. Because this activity requires no capital outlay, it also inspires naked short sellers to flood the market with false rumors to make the prediction a self-fulfilling one.

This practice often leads to fails to deliver. If the seller does not borrow the security in time to make delivery to the buyer within the standard 3-day settlement period, the seller ''fails to deliver.'' Sometimes fails to deliver can be caused by human or mechanical errors, but those types of fails are only a small portion of the actual number of fails to deliver our markets confront continually.

Selling what you do not own and have not borrowed gives a seller a free ride. It effectively says: Show me the money now and you will get your stock sometime in the future. By analogy, it is very much like giving access to the Super Bowl on the day of the game—in other words, giving someone a ticket to the Super Bowl on the day of the game—in return for a promise that the spectator will ultimately produce a ticket long after the big event has occurred.

It is well known that abusive short selling has been linked to the downfall of two major financial firms—Bear Stearns and Lehman Brothers.

According to Bloomberg News:

> Failed trades correlate with drops in share value, enough to account for 30 to 70 percent of the declines in Bear Stearns, Lehman, and other stocks last year.

Let me repeat that. ''Failed trades,'' according to Bloomberg News, ''correlate with drops in share value, enough to account for 30 to 70 percent of the declines in Bear Stearns, Lehman, and other stocks last year.''

The huge increase in naked short selling exacerbated the financial crisis. Listen to this. In January 2007, 550 million shares failed to deliver. By January 2008, 1.1 billion shares failed to deliver. And in July of 2008, 2 billion shares failed to deliver.

These fails to deliver drove stock value down further than the market would have done by diluting stock prices. According to Clinton Under Secretary of Commerce Robert Shapiro in his recent comprehensive study:

> Before Bear Stearns collapsed, its fails to deliver went from less than 100,000 to 14 million, significantly diluting the values of its stock.

As the Coalition Against Market Manipulation stated:

> Just as counterfeit currency dilutes and destroys value, these phantom shares deflate share prices by flooding the market with false supply.

For example, according to EuroMoney, on March 14, 2008, ''128 percent of Bear Stearns' outstanding stock was traded.'' Let me repeat that. On March 14, 2008, 128 percent of Bear Stearns outstanding stock was traded. How can more than 100 percent be traded? It can only occur because of the absence of required borrowers and naked short selling. Without a preborrow requirement, in 1 day, multiple locates allow the same single share of a stock to be sold over and over. And without effective rules or enforcement, millions of shares of stock are sold short and not delivered as required.

Lehman Brothers also faced a similar abnormal increase in fails to deliver before its collapse.

According to Bloomberg:

> As Lehman Brothers struggled to survive last year, as many as 32.8 million shares in the company were sold and not delivered to buyers on time. . . .That was more than a 57-fold increase over the prior year's peak of 567,518 failed trades . . .

Many banks that help to drive the U.S. economy are particularly at risk from abusive short selling practices due to the importance of investor confidence in maintaining their capital.

On September 19, 2008, the SEC implemented a temporary emergency order barring all short selling to protect 799 financial companies, which included many banks, because of the damage naked short selling had done in destroying their company and investor values. But barring all short selling is like throwing the baby out with the bathwater. Proper short selling provides the marketplace with greater liquidity and the prospect of meaningful price discovery.

Naked short selling practices led to market disequilibrium and the SEC recognizing that the only way to protect these companies from unnecessary devaluation was to implement a ban. Many of these companies later moved under the Troubled Assets Relief Program, TARP.

While new regulations issued by the SEC last fall were the first steps to protect companies, the SEC has not done nearly enough. If naked short selling is not policed and rules against market manipulation are not enforced effectively, naked short selling will continue to harm TARP banks and companies. If stronger regulations are not implemented, abusive short selling will impair the government's ability to invest taxpayer money into TARP banks and return them to health and thus limit the effects of the government's economic recovery plan.

The SEC began addressing these issues 10 years ago with a concept release that eventually became known as Regulation SHO, a set of rules that has been amended several times. But a price extracted by Regulation SHO was the elimination of the 70-year-old uptick test.

Reg SHO intended to curb naked short selling by requiring would-be short sellers to have merely a reasonable expectation they can deliver the stock when it must be delivered and imposing a post-trade requirement that would-be short sellers actually

preborrow securities for future trades only if too many fails have already occurred. This is somewhat akin to a ''one free bite at the apple'' approach, something regulators attempt to avoid. The reason is because, in practice, it turns out to be a ''free bite at the apple'' each time a manipulative trader switches brokers—something a manipulative trader can easily do with no penalty.

But this rule has proved effectively unenforceable according to former SEC Commissioner Roel Campos and others. Current SEC regulations allow traders to short a stock if the trader ''reasonably believes that it can locate and borrow the security by the settlement day.''

Reasonableness includes merely glancing at a list of easy to borrow stocks, with no need to continue to locate even if the list is faulty. Let me repeat. Reasonableness includes merely glancing at a list of easy to borrow stocks, with no need to continue to locate even if this list is faulty. That rule, the mother of all loopholes, is much too vague to have any real effect. Any trader who passed Finance 101 could provide proof that he or she ''reasonably believed'' the shorted stocks could be located. In fact, the provision of a false locate is beneficial for generating commissions on the trade.

Ultimately, many commentators and I believe the SEC cannot bring cases against the gravest violators of this rule, because it does not have the means to prove intent. The rule is, in effect, unenforceable. The SEC has, in fact, not brought a single enforcement case for naked short selling. We must change the rules so the SEC Enforcement Division can do its job.

Even former SEC Chairman Christopher Cox said the SEC is:

. . . concerned that the persistent failures to deliver in the market for some securities may be due to loopholes in Regulation SHO.

It is too difficult to prove a trader's motives necessary for proving a fraud violation. I strongly believe the SEC needs to strengthen its rules, surveillance, and the enforcement regarding naked short selling to prevent market manipulation and loss of investor confidence.

Again, according to Robert Shapiro:

. . . there is considerable evidence that market manipulation through the use of naked short sales has been much more common than almost anyone has suspected, and certainly more widespread than most investors believe.

Furthermore, indicators the SEC typically uses to determine the effects of abusive short selling do not accurately reflect the extent of the problem. The so-called Threshold List provided by the SEC tracks sustained fails to deliver of over 10,000 shares, accounting for at least 5 percent of a company's outstanding shares.

According to Shapiro, this list does not capture the naked short sales that occur frequently that are under this threshold, and it does not capture the large volume of short interests that can spike during the 3-day settlement period. Nor does it capture any trades that occur outside of the Depository Trust and Clearing Corporation, so-called ex-clearing trades.

Let us look to other countries. Other countries have taken proper steps to make sure rules that prevent naked short selling are clear and easy to enforce. According to EuroMoney, naked short selling is:

. . . a situation specific to the U.S. markets.

Alan Cameron, head of clearing, settlement and custody client solutions at BNP Paribas Securities Services in London, says he has seen little to indicate similar instances of fails to deliver in Europe. Some European countries such as Spain impose strict fines on failures to deliver. It's not an issue here in Europe.

Therefore, I strongly believe that the SEC must adopt new policies in order to protect the damage to investor confidence and, yes, the damage to our economic recovery that is being caused by naked short selling.

Today, along with Senators ISAKSON and TESTER, and Representative CAROLYN MALONEY, who cochairs the Joint Economic Committee, I wrote to SEC Chairman Mary Schapiro on this subject. Our letter urged that the Commission establish a pilot program to study whether a strict preborrow agreement would work effectively to end the problem of naked short selling. Such a pilot program would lead to the collection of data about stock lending and borrowing and the costs and benefits of imposing a preborrow requirement on all short sales.

Recently, Senators LEVIN, GRASSLEY, and SPECTER, in connection with the release of a General Accountability Office study analyzing recent SEC actions to curb abusive short selling, called for the SEC to consider imposing a strict preborrow requirement on short sales as the best way to end abusive short selling.

I strongly agree. As I have said, a preborrow requirement would address the problem at its most fundamental level and it should be urgently considered by the SEC as it rethinks its regulations and enforcement approach in this area.

Moreover, the system by which stocks currently are loaned and borrowed can and should be greatly improved, improving efficiency and producing cost savings. For example, centralized systems for loaning and borrowing stocks might better enable the SEC to impose fair rules on stock loans and borrowers in connection with short sales as well as enhance the SEC's ability to provide regulatory oversight to prevent naked short selling.

As one commentator has written in EuroMoney in December 2008, the:

. . . SEC knows it has to introduce the preborrow rule if it wants to eliminate fails to deliver for good. As long as there are companies on the Regulation SHO list, then the problem is not being solved. The only sustainable solution to making naked short-selling is a rule requiring both pre-borrow and a hard delivery. . . . for Bear Stearns: only a pre-borrow could put a brake on the naked short-selling.

I urge the SEC to invite a balanced group of commentators, including members of the investing public, to air these issues publicly as it continues efforts to draft and promulgate additional rules to end abusive short selling.

I know there are critics of a preborrow requirement who claim it would limit liquidity. This is not so, and there is no meaningful evidence to support this argument. Indeed, the recent study by Robert Shapiro disproves the claim. Other knowledgable sources, such as Harvey Pitt, former SEC Chairman and founder of LendEQS, an electronic stock loan transaction firm, believe the opposite would occur, because lending would increase.

In Hong Kong, the imposition of a preborrow requirement has been quite successful. Hong Kong implemented the preborrow rule after the Asian financial crisis of 1997 to 1998, when its markets collapsed. In late 2008, while the United States saw an exponential increase in fails to deliver, Hong Kong avoided large spikes in short sales almost completely. Other countries, such as Australia and many other EU members, have also successfully maintained preborrow requirements for years. The United States must urgently address the issue of abusive short selling. If we want to protect our markets, investors, and companies from caustic manipulation, we need better rules.

In closing, I urge the SEC to act decisively, both by following through and reimposing the substance of the prior uptick rule and through a pilot program to study the effects of a strict preborrow requirement. It is way past time to put an end to naked short selling, once and for all.

Mr. President, I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

MORNING BUSINESS

Mr. REID. I ask unanimous consent we proceed to a period of morning business with Senators permitted to speak therein for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

15TH ANNIVERSARY OF THE PROGRESSIVE LEADERSHIP ALLIANCE OF NEVADA

Mr. REID. Mr. President, I rise to call to the attention of the Senate the 15th anniversary celebration of the Progressive Leadership Alliance of Nevada, also known as PLAN. PLAN is a