

# THE NEW DIVERSITY CRISIS IN THE FEDERAL JUDICIARY

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*For much of its history, the federal judiciary was characterized by a complete lack of surface-level (i.e., demographic) diversity. Over the past fifty years, efforts to promote surface-level diversity have yielded significant gains and the modern judiciary now looks more like the citizenry it serves than it has at any other point in history. Although this particular diversity crisis has abated, a new one has taken shape.*

*Today, deep-level diversity is at an all-time low. This type of diversity denotes those attributes that are non-demographic in nature. It includes characteristics such as work experience, values, attitudes, and educational background. Given the salience of educational background in recent Supreme Court nominations, we focus on this dimension. Based on more than two hundred years of data on the legal education of judges, our analysis reveals that graduates of a smaller and smaller number of law schools are capturing a larger and larger share of federal judgeships. This trend is emblematic of a broader decline in the judiciary's deep-level diversity and speaks to the emergence of a new diversity crisis.*

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## INTRODUCTION

Imagine a federal judiciary that is a mirror image of America. The percentage of male and female judges parallels the percentage of men and women in the U.S. population. The same goes for the percentage of Whites, African Americans, Hispanics, and Asian Americans. In short, picture a group of federal judges that is, along every demographic dimension, an exact replica of America.

This hypothetical judiciary looks quite diverse. But now, imagine that each of these judges is identical along every non-demographic dimension. They all came from the same socioeconomic class, attended the same law schools, and worked at the same firms. Such a judiciary—although laudable with respect to its demographics—lacks many important components of diversity. This scenario may seem extreme, but it is not that far from reality.<sup>1</sup>

In this Article, we show that today’s federal judges are quite diverse when it comes to demographic measures but extremely homogenous with regard to less visible characteristics. In the parlance of the diversity literature, the federal judiciary scores highly on surface-level diversity but fares very poorly on measures of deep-level diversity.

Because both forms of diversity confer important benefits upon the judiciary, insufficient variation along either dimension is a significant problem. Surface-level diversity, for instance, serves a legitimizing function.<sup>2</sup> It shows the American people that individuals from any race or gender can aspire to a federal judgeship.<sup>3</sup> President Obama highlighted this benefit when he said, “I think there are some particular groups that historically have been underrepresented—like Latinos and Asian-Americans—that represent a larger and larger portion of the population. And so for

1. See *infra* Part II.

2. See Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes,”* 61 J. POL. 628, 628 (1999) (arguing that diversity both signals to minority groups that they have an “ability to rule” and “increas[es] the polity’s de facto legitimacy in contexts of past discrimination”).

3. See Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 598 (2011) (noting that “a descriptive representative may serve as a role model who stands as a symbol to others in her group that they too can achieve success at the highest echelons of our government”).

them to be able to see folks in robes that look like them is going to be important.”<sup>4</sup>

Deep-level diversity, by contrast, enhances the decision-making process. Groups of individuals with diverse values, life experiences, and educational backgrounds are more likely to approach problems from novel perspectives and to question their initial assumptions.<sup>5</sup> This deliberative process leads to better, more reasoned judicial decisions.<sup>6</sup>

Although surface-level diversity and deep-level diversity are distinct forms of diversity that provide distinct benefits, legal scholars often group the two together.<sup>7</sup> They suggest that a judiciary that “looks” like America will also “think” like America.<sup>8</sup> To a limited extent, this argument is true.<sup>9</sup> There are, after all, certain life experiences that people of a specific race or gender are much more likely to share.<sup>10</sup> However, drawing too strong of a connection between surface-level and deep-level diversity fails to account for the myriad other aspects of deep-level diversity that are unrelated to

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4. Jeffrey Toobin, *The Obama Brief*, THE NEW YORKER, Oct. 27, 2014, <http://www.newyorker.com/magazine/2014/10/27/obama-brief>.

5. See *infra* Part I.B.

6. See, e.g., Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference? The Promise and Reality of Diverse Teams in Organizations*, 6 PSYCHOL. SCI. PUB. INT. 31, 34 (2005) (reviewing the literature and concluding that deep-level diversity has “typically been shown to improve performance through vigorous debate that leads to creativity and improved problem solving”).

7. See Scherer, *supra* note 3, at 597 (arguing that “descriptive representation may directly translate into better substantive representation for underrepresented groups”).

8. See *id.* For a critique of this “congruence assumption,” see Mannix & Neale, *supra* note 6, at 44.”

9. See Alice H. Eagly & Jean Lau Chin, *Are Memberships in Race, Ethnicity, and Gender Categories Merely Surface Characteristics?*, 65 AM. PSYCHOL. 934, 934–35 (2010) (arguing that surface-level diversity and deep-level diversity are connected in a variety of ways); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 405 (2000) (arguing that “[t]he lack of racial diversity on our nation’s courts threatens both the quality and legitimacy of judicial decision-making”).

10. See Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 599 (2003) (noting that “it seems reasonable to believe that nontraditional judges would have a different viewpoint on certain legal issues because of their differing life experiences”); Eagly & Chin, *supra* note 9, at 934 (observing that one way “in which surface-level characteristics link to individual psychological characteristics derives from the experiences that people have because of these characteristics”).

demographic characteristics.<sup>11</sup> Moreover, doing so disregards the extensive literature showing that the connection between surface-level and deep-level diversity is modest, at best.<sup>12</sup> Nonetheless, most legal scholars continue to speak only of surface-level diversity.<sup>13</sup> This emphasis has had the desirable effect of increasing minority representation on the bench, but it has also devalued the importance of diversity of experience.

In this Article, we chart the rise in surface-level diversity and the concomitant decline in deep-level diversity. The data for this investigation comes from the Federal Judicial Center's Biographical Directory of Federal Judges.<sup>14</sup> This database contains detailed biographical information of all Article Three federal judges who served between 1789 and the present day.<sup>15</sup> It catalogs information as varied as the judge's birthplace, race, gender, law school, previous work experience, and date of nomination to the federal judiciary.<sup>16</sup> The database's comprehensiveness makes it the perfect resource to examine diversity trends in the federal judiciary.

In Part I, we detail the benefits of surface-level and deep-level diversity and discuss how the legal literature has neglected the latter. In Part II, we show that surface-level diversity has increased markedly over the past fifty years and that, along this dimension, today's judiciary closely resembles America. Part III turns to deep-level diversity. In measuring deep-level diversity on the bench, we focus on the educational background of judges. We use this characteristic for three reasons. First, educational background is one of the most widely studied characteristics of deep-level diversity in the literature.<sup>17</sup> Second, it is an objective measurement. And, third,

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11. Peter Sung Ohr, *Letter on the Social Justice Perspective*, 8 DEPAUL J. FOR SOC. JUST. 169, 169–70 (2015) (“Often the default system of checking-off boxes for race and ethnicity provides only a surface level diversity that does not equate to in-depth perspectives.”).

12. See *infra* Part I.B.

13. See K.O. Myers, *Merit Selection and Diversity on the Bench*, 46 IND. L. REV. 43, 44 (2013).

14. See *History of the Federal Judiciary*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Oct. 17, 2016).

15. For an example of biographical information contained in the database, see *Biographical Directory of Federal Judges: Kagan, Elena*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=3289&cid=999&ctype=na&instate=na>.

16. See *id.*

17. See, e.g., Joyendu Bhadury, E. Joy Mighty & Hario Damar, *Maximizing Workforce Diversity In Project Teams: A*

the lack of educational diversity on the Supreme Court has been a source of intense debate.<sup>18</sup>

Drawing from 225 years of data on the educational backgrounds of federal judges, we find that today—more than any other point in history—a small number of law schools dominate the federal judiciary.<sup>19</sup> This is true for both federal judges and their law clerks.<sup>20</sup> Ultimately, we argue that these educational trends provide evidence of declining deep-level diversity in the federal judiciary.

### I. REDEFINING DIVERSITY IN THE LAW

Diversity in the judiciary is important—that much is undeniable. However, despite having emphasized the value of diversity for decades, legal scholars have focused on only part of the concept.<sup>21</sup> When they speak of diversity, it is almost always with regard to race or gender.<sup>22</sup> Although demographic variation along these dimensions is certainly an important part of diversity, it is not the whole of it. This limited definition that has been adopted in the legal literature fails to recognize that diversity encompasses many other characteristics. We seek to reframe the discussion on this topic by introducing two conceptions of diversity to the legal discourse: surface-level diversity and deep-level diversity.

Both of these terms are widely used in the business school literature—a place that is home to some of the most extensive

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*Network Flow Approach*, 28 OMEGA: INT'L J. MGMT. SCI. 143 (2000) (conducting an experiment to determine the optimal way for managers to build diverse teams and using educational background and gender as a proxy for diversity).

18. See *infra* Part III.

19. See *infra* Part III.A.

20. See *infra* Part III.B.

21. See Beiner, *supra* note 10, at 598 (noting that “[l]egal scholars have long lauded diversity on the bench as a necessary and beneficial aspect of a just judicial system”).

22. See *id.* at 603–10 (discussing judicial diversity in the context of race and gender); Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153, 158–61 (2004) (discussing racial diversity in the judiciary); Ifill, *supra* note 9, at 417–24 (discussing racial diversity in the judiciary); Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV. LATINO L. REV. 1, 1 (2002) (discussing the benefits a Hispanic justice would bring to the Supreme Court); *but see* Timothy P. O’Neill, “*The Stepford Justices*”: *The Need for Experiential Diversity on the Roberts Court*, 60 OKLA. L. REV. 701, 726–34 (2007) (emphasizing the importance of “experiential diversity” on the Supreme Court).

research on how diversity affects group interactions.<sup>23</sup> Unlike legal academia, the business field starts with a very broad conception of diversity. There, “[t]he generally accepted definition of diversity refers to differences between individuals on any attributes that may lead to the perception that another person is different from the self.”<sup>24</sup>

Given the expansiveness of this definition, business scholars normally divide diversity into several smaller categories.<sup>25</sup> The most common division involves splitting diversity into two parts: surface-level diversity and deep-level diversity.<sup>26</sup> Whereas the former relates to demographic differences, the latter concerns non-demographic variations.<sup>27</sup> This distinction is valuable and, as we will argue, has utility in legal scholarship. In the next two sections, we examine surface-level and deep-level diversity, respectively.

#### A. *Surface-Level*

Surface-level diversity refers to differences that are immediately observable and typically unchangeable.<sup>28</sup> Examples include race, gender, ethnicity, age, and physical disability.<sup>29</sup> Surface-level

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23. See, e.g., Mannix & Neale, *supra* note 6.

24. Marie-Élène Roberge & Rolf van Dick, *Recognizing the Benefits of Diversity: When and How Does Diversity Increase Group Performance?*, 20 HUM. RES. MGMT. REV. 295, 296 (2010); see also Mannix & Neale, *supra* note 6, at 33 (defining diversity “as variation based on any attribute people use to tell themselves that another person is different”). *But see* THE PROMISE OF DIVERSITY (Elise Y. Cross et al. eds., 1994) (arguing that the definition of diversity should be limited to demographic variation).

25. See Mannix & Neale, *supra* note 6, at 35–37 (discussing two-factor and multi-factor subdivisions of diversity).

26. See *infra* Parts I.A. & I.B.

27. See *infra* Parts I.A. & I.B.

28. See David A. Harrison, Kenneth H. Price & Myrtle P. Bell, *Beyond Relational Demography: Time and the Effects of Surface- and Deep-Level Diversity on Work Group Cohesion*, 41 ACAD. MGMT. J. 96, 97 (1998) (Surface-level “characteristics [are] generally immutable, almost immediately observable, and measurable in simple and valid ways.”).

29. See Niclas L. Erhardt, James D. Werbel & Charles B. Shrader, *Board of Director Diversity and Firm Financial Performance*, 11 CORP. GOVERNANCE 102, 102 (2003) (providing examples of surface-level diversity); Mannix & Neale, *supra* note 6, at 35–36 (same).

diversity is similar to “demographic diversity,” and the two terms are often used interchangeably.<sup>30</sup>

Frequently, legal scholars who argue for increased surface-level diversity in the judiciary do so on the ground that it will improve decision making in the courts.<sup>31</sup> Extensive literature in the business field, however, shows that this surface-level diversity, by itself, does not improve group decision making and, in fact, may have the opposite effect.<sup>32</sup>

In a comprehensive review of the business literature, Elizabeth Mannix and Margaret Neale found that:

Studies on diversity in teams from the last 50 years have shown that surface-level social-category differences such as race/ethnicity, gender, or age tend to be more likely than underlying differences to have negative effects on the ability of groups to function effectively, in terms of variables such as performance, commitment, and satisfaction.<sup>33</sup>

These findings prompted researchers to explore why surface-level diversity impairs group performance. Their conclusion: surface-level differences increase group conflict and fail to bring diverse insights to bear on group decision making.<sup>34</sup>

This latter point is particularly important. As business scholars have emphasized, individuals who differ along surface-level dimensions do not necessarily differ in their viewpoints.<sup>35</sup> Because

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30. See, e.g., Susan Mohammed & Linda C. Angell, *Surface- and Deep-Level Diversity in Workgroups: Examining the Moderating Effects of Team Orientation and Team Process on Relationship Conflict*, 25 J. ORG. BEHAV. 1015, 1015 (2004) (equating “surface-level diversity” with “demographic diversity”).

31. See Myers, *supra* note 13, at 45–46.

32. See, e.g., Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1150 (2008) (observing that research on diversity “indicates that social category information can negatively affect team processing and decision-making, all due to the demographics of work groups”).

33. Mannix & Neale, *supra* note 6, at 43.

34. See Karen A. Jehn, *Managing Workteam Diversity, Conflict, and Productivity: A New Form of Organizing in the Twenty-First Century Workplace*, 1 U. PA. J. LAB. & EMP. L. 473, 478–79 (1998).

35. See Barbara S. Lawrence, *The Black Box of Organizational Demography*, 8 ORG. SCI. 1, 8–15 (1997) (showing that the empirical data do not support the claim that demographic differences reliably signal viewpoint differences); Mannix & Neale, *supra* note 6, at 44 (arguing that “[t]here are two major issues” with “the assumption

viewpoint differences are central to enhancing decision making, surface-level diversity, standing alone, often fails to improve group performance.<sup>36</sup> This finding has largely been affirmed by the research on judicial decision making.<sup>37</sup> We will return to this literature shortly, but first we want to emphasize that, even though surface-level diversity may not improve judicial outcomes, it nonetheless serves a critical function.

Specifically, surface-level diversity confers legitimacy on the judiciary. It does this by strengthening people's faith in the legal system.<sup>38</sup> For the public to accept the judiciary's decisions as legitimate, it is crucial that those who are making the decisions share the demographic characteristics of those who are impacted by the decisions.<sup>39</sup> In dispensing justice to all citizens, the legal system cannot allow one demographically homogenous group to hand down decisions while other racial and ethnic groups bear the brunt of those decisions. Such a process opens up the judiciary to accusations of bias and discrimination.<sup>40</sup>

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that visible traits (such as gender, race, or age) are reasonable substitutes for, and predictors of, underlying differences (such as cognitive style, values, or beliefs”).

36. See Don Knight et al., *Top Management Team Diversity, Group Process, and Strategic Consensus*, 20 STRATEGIC MGMT. J. 445, 459 (1999) (finding that “the general impact of [surface-level] diversity on strategic consensus was negative”); Mannix & Neale, *supra* note 6, at 43; Katherine Y. Williams & Charles A. O'Reilly, III, *Demography and Diversity in Organizations: A Review of 40 Years of Research*, 20 RES. ORG. BEHAV. 77, 78–80 (1998) (reviewing forty years of research and finding no consistent connection between surface-level diversity and group performance).

37. See *infra* notes 49–52 and accompanying text.

38. Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 2D 45, 48 (2009) (arguing that “diversity on the bench promotes public confidence in the legitimacy of the courts”).

39. See CIARA TORRES-PELLISCY ET AL., BRENNAN CTR. FOR JUSTICE, IMPROVING JUDICIAL DIVERSITY 4 (2d ed. 2010) (“Diversity on the bench is intimately linked to the American promise to provide equal justice for all.”).

40. Even when there is no bias, lack of diversity will undermine the public's faith in the judiciary. As Sherrilyn Ifill explains, “It's not that a judge from Iowa is biased in favor of Iowa litigants. It's that if all the judges on the Circuit are from Iowa, then Minnesota litigants or Arkansas litigants might lose confidence in the fairness of the court.” Ifill, *supra* note 9, at 48; see also Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 47, 49 (2008) (noting that a diverse judiciary “enhances the appearance of impartiality for litigants who appear before the court and for the public at large”).

Increased surface-level diversity helps to address this problem.<sup>41</sup> As Edward Chen—the first Asian Pacific American to serve as a federal judge in northern California—noted, his appointment was significant because his district has long been an entry point for millions of Asian-American immigrants<sup>42</sup> and has been home to some of the most important cases for Asian Americans, such as *Korematsu v. United States* and *Lau v. Nichols*.<sup>43</sup> Given the number of immigration and citizenship cases coming before today's courts, this element of judicial legitimacy is particularly relevant for Hispanic Americans.<sup>44</sup> When the courts make decisions that have a disproportionate effect on racial and ethnic minorities, it is essential that members of these groups be represented on the bench.<sup>45</sup>

Another way in which surface-level diversity strengthens the legitimacy of the judiciary is by showing that the path to a judgeship is accessible to members of minority groups.<sup>46</sup> Specifically, the

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41. Neil A. Lewis, *Clinton Names a Black Judge; Skirts Congress*, N.Y. TIMES, Dec. 28, 2000, <http://www.nytimes.com/2000/12/28/us/clinton-names-a-black-judge-skirts-congress.html> (As President Clinton said when he used his recess power to appoint Roger Gregory, “It is unconscionable that the Fourth Circuit has never had an African-American appellate judge . . . . It is long past time to right that wrong. Justice may be blind, but we all know that diversity in the courts . . . makes us a stronger nation.”).

42. See Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109, 1110 (2003).

43. See *id.* (citing *Korematsu v. United States*, 323 U.S. 214 (1994) and *Lau v. Nichols*, 414 U.S. 563 (1974)).

44. See Mary Dolores Guerra, *Latina and Latino Judges: Changing the Complexion of the Bench*, 9 FLA. A & M U. L. REV. 145, 173–77 (2013) (showing the importance of a diverse judiciary through interviews with Hispanic judges); Linda Maria Wayner, *The Affirmatively Hispanic Judge: Modern Opportunities for Increasing Hispanic Representation on the Federal Bench*, 16 TEX. WESLEYAN L. REV. 535, 536 (2010) (noting that federal judges are currently “gatekeepers and interpreters of a wide range of issues that are of growing importance to Hispanics”).

45. See Cynthia Mares, *Is Anybody Listening? Does Anybody Care? Lack of Diversity in the Legal Profession*, FED. LAW., 36, 39 (Jun. 2015) (arguing that diversity is more fundamental in law than in other professions “because the diversity of our legal profession reflects something profound about our system of justice”); Note, *The Case for Black Juries*, 79 YALE L.J. 531, 531 (1970) (arguing that integrated juries are crucial to the legitimacy of judicial processes); *Statewide ‘Diverse Judiciary’ Campaign Kicks Off with Public Forum*, VOTER (League of Women Voters, Topeka, Kan.), Oct. 19, 2009, at 9 (“Communities that lack a diverse judiciary risk a crisis of confidence among their citizens.”) (address of Mary G. Wilson).

46. See, e.g., Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390 (2010) (referring to

presence of diverse judges on the bench indicates that open, merit-based avenues to the bench exist for individuals from all demographic backgrounds.<sup>47</sup> As Sylvia Lazos Vargas observed, “A descriptively diverse judiciary facially corrects for past racial and gender exclusion from participation in the adjudicative system.”<sup>48</sup>

When it comes to actual judicial decisions, however, surface-level diversity appears to have minimal substantive effect.<sup>49</sup> As Susan Haire and Laura Moyer concluded after conducting a comprehensive review of studies examining the effects of gender and race on judging, apart from a handful of issues, “all effects are modest” and “judicial voting by women and men [is] quite similar.”<sup>50</sup> Likewise, as Sally J. Kenney wrote in her review of the empirical literature on judicial decision making: “We should not use sex as a variable as part of a misguided quest to uncover essential sex differences. Differences mostly do not exist, or small differences become mistakenly framed as universal and dichotomous . . . .”<sup>51</sup>

As these scholars have observed, the literature on diversity shows that the impact of surface-level diversity is limited to decision making in a narrow set of cases that bear directly on issues of race or gender.<sup>52</sup> For instance, with respect to gender, consistent differences in judging between male and female judges have been observed in cases involving sexual harassment. In these cases,

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this value as “social legitimacy”); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 301 (2004) (calling the presence of women and minorities on the judiciary “descriptive representation”).

47. See Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton’s District Court Appointees*, 53 POL. RES. Q. 137, 138 (2000) (“The concept of representation has at least two dimensions. One is symbolic, provided by the similarity of personal characteristics between the representative and the constituents he/she serves; representatives who ‘look’ like their constituents deliver symbolic representation.”) (internal citations omitted).

48. Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1429 (2008).

49. See, e.g., SUSAN B. HAIRE & LAURA P. MOYER, DIVERSITY MATTERS: JUDICIAL POLICY MAKING IN THE U.S. COURTS OF APPEALS 128 (2015); SALLY J. KENNEY, GENDER & JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER 42 (2013).

50. Laura P. Moyer & Susan B. Haire, *Trailblazers and Those that Followed: Personal Experiences, Gender, and Judicial Empathy*, 49 LAW & SOC’Y REV. 665 (2015).

51. KENNEY, *supra* note 49.

52. See *id.*

women appear to appreciate the circumstances in ways that their male peers cannot.

Consider the 2009 case of *Safford Unified School District # 1 v. Redding*.<sup>53</sup> Here, the Supreme Court had to decide whether school officials violated a middle school student's Fourth Amendment rights when they forced her to submit to a strip search.<sup>54</sup> During the proceedings, Justice Ruth Bader Ginsberg felt that her status as the only woman on the Court rendered her significantly more sympathetic to the young girl than were her male colleagues.<sup>55</sup> When asked why the male Justices took a different tone during oral arguments, she noted, "They have never been a 13-year old girl."<sup>56</sup> Justice Ginsburg went on to explain that "there are perceptions that we have because we are women. It's a subtle influence. We can be sensitive to things that are said in draft opinions that (male justices) are not aware can be offensive."<sup>57</sup>

Empirical legal scholars have found that Justice Ginsburg's experience is illustrative.<sup>58</sup> Although minority judges do not generally decide cases differently than their white male counterparts, surface-level diversity is correlated with differences in judicial reasoning in certain cases where race or gender is highly salient.<sup>59</sup> A substantial body of empirical literature supports this conclusion.<sup>60</sup>

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53. 557 U.S. 364 (2009).

54. *Id.* at 364.

55. Joan Biskupic, *Ginsberg: Court Needs Another Woman*, USA TODAY, May 5, 2009, [http://usatoday30.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg\\_N.htm](http://usatoday30.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm).

56. *Id.*

57. *Id.*

58. See, e.g., Farhang & Wawro, *supra* note 46; Greg Goelzhauser, *Diversifying State Supreme Courts*, 45 LAW & SOC'Y REV. 761 (2011).

59. See Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 328 (2002) ("Because of the long history of racial discrimination and segregation in American society, it is safe to assume that a disproportionate number of blacks grow up with a heightened awareness of the problems that pertain to [equal opportunity and discrimination, standing, and criminal law]."); Goelzhauser, *supra* note 58, at 761–62 (finding that "the inclusion of black and women judges on panels may affect how other judges decide cases").

60. See, e.g., Farhang & Wawro, *supra* note 46; Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005); Laura P. Moyer & Susan B. Haire, *Trailblazers and Those that Followed: Personal Experiences, Gender, and Judicial Empathy*, 49 LAW & SOC'Y REV. 665 (2015).

For instance, one study conducted by Sean Farhang and Gregory Wawro indicated that the presence of a woman on three-person court of appeals panels was a strong predictor of rulings in sexual discrimination cases.<sup>61</sup> A subsequent empirical analysis of federal appellate cases found that plaintiffs were twice as likely to win a sexual harassment case and nearly three times as likely to win a sex discrimination suit if there was at least one female judge on the bench.<sup>62</sup> Scholars have argued that the impact of having a female judge on the bench for such cases is significant because it increases the likelihood that a judge will possess a relevant personal understanding of sex discrimination.<sup>63</sup> These studies suggest that the presence of a female judge on the bench impacts judicial decision making in certain narrow circumstances. With the exception of sex discrimination cases, however, women and men appear to decide cases in the same manner.<sup>64</sup>

Just as the presence of female judges can influence case outcomes for issues particular to women, there are times when the presence of minority judges on the bench influences the application of the law as it relates to racial minorities.<sup>65</sup> The 2015 case of *Walker v. Sons of Confederate Veterans, Inc.*, is an illustrative example.<sup>66</sup> Siding with the Court's four liberal Justices, Clarence Thomas ruled that Texas's refusal to print a specialty license plate bearing the confederate flag was not unconstitutional.<sup>67</sup> In doing so, Thomas

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61. See Farhang & Wawro, *supra* note 46, at 324–28; see also Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) (“[A] judge’s vote (not just the panel outcome) is greatly affected by the identity of the other judges sitting on the panel.”).

62. See Peresie, *supra* note 60, at 1776–78 (finding “that in Title VII sexual harassment and sex discrimination cases . . . a judge’s gender and the gender composition of the panel mattered to a judge’s decision”).

63. See Moyer & Haire, *supra* note 60, at 665 (finding that female judges “who attended law school during a time of severe gender inequality” are more likely to side with female plaintiffs in sex discrimination cases and concluding that the “effect of gender as a trait is tied to the role of formative experiences with discrimination”).

64. See KENNEY, *supra* note 49, at 42 (reviewing numerous empirical studies analyzing judging differences between men and women and concluding that differences are rare and minor).

65. See Danielle Sollars, Note, *Gender Balance in the Judiciary: Why Does it Matter?*, 36 WM. MITCHELL L. REV. 1721, 1730 (2010). (quoting Justice Sotomayor as saying, “Our gender and national origins may and will make a difference in our judging”); Maryka Omatsu, *The Fiction of Judicial Impartiality*, 9 CAN. J. WOMEN & L. 1, 7–8 (1997).

66. 135 S. Ct. 2239 (2015).

67. *Id.* at 2253.

broke with his four conservative colleagues who signed onto a stinging dissent that criticized Texas's refusal as "blatant viewpoint discrimination."<sup>68</sup> Despite his history as a strong defender of First Amendment rights, Thomas rejected this argument.<sup>69</sup> As the only black Justice, he was uniquely positioned to understand the racial implications of the case, and it seems likely that this perspective played a role in his decision.

Long before *Walker*, Thomas had made clear that his race occasionally informed his judging.<sup>70</sup> In the 2002 case *Virginia v. Black*, the Court considered whether an ordinance prohibiting cross burning was content-based viewpoint discrimination.<sup>71</sup> During oral argument, as the state was defending the law as a regulation of "true threats," Thomas interrupted to ask:

[A]ren't you understating . . . the effects of . . . the burning cross? . . . [W]e had almost 100 years of lynching and activity in the South by the Knights of Camellia—and the Klu Klux Klan, and this was a reign of terror and the cross was a symbol of that reign of terror . . . . [I]sn't that significantly greater than intimidation or a threat?<sup>72</sup>

A lawyer representing the cross burners later recalled Thomas's interruption:

I have never seen the atmosphere in a courtroom change so quickly. Justice Breyer, who sat next to Justice Thomas, put his arm on him, as if to say "I feel your pain." Justice Scalia was staring at Thomas with extraordinary intensity—the sense of empathy and support was virtually palpable. Justice Scalia's eyes left his friend Justice Thomas and he looked down and scowled at me, as I was only minutes from getting up to make my argument, and I immediately knew, from his look, that his views on the entire case had just pivoted, and

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68. *Id.* at 2254–56.

69. *Id.* at 2253.

70. *Virginia v. Black*, 538 U.S. 343 (2003).

71. *Id.* at 347.

72. Garrett Epps, *Clarence Thomas Takes on a Symbol of White Supremacy*, THE ATLANTIC, June 18, 2015, <http://www.theatlantic.com/politics/archive/2015/06/clarence-thomas-confederate-flag/396281>.

that he was about to come after me—which proved entirely prescient.<sup>73</sup>

Although Justice Thomas does not decide most cases on different grounds than his conservative colleagues, his status as a black judge gives him a perspective that has influenced his views on certain issues regarding the legacy of racism. As *Walker v. Sons of Confederate Veterans, Inc.* and *Virginia v. Black* illustrate, surface-level diversity can provide benefits in specific types of cases.<sup>74</sup>

Social science research further supports this conclusion.<sup>75</sup> Specifically, work in this area indicates that African Americans possess a shared sense of political destiny that is derived from their historical experience of slavery and their struggles with discrimination in the twentieth century.<sup>76</sup> Perhaps this is why, when asked whether African Americans are treated fairly in the criminal justice system, eighty-three percent of white judges said that they were, but only eighteen percent of black judges said the same.<sup>77</sup>

These racial differences in perspective can, at times, have tangible impacts in court. Some social science analysis suggests that black judges may be more sensitive to the impact of crime and

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73. *Id.*

74. See Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 328 (2002) (noting that there are cases “in which black judges may sometimes bring a unique vision to the judicial deliberative process”).

75. See, e.g., PAULA MCCLAIN & JOSEPH STEWART JR., “CAN WE ALL GET ALONG?” RACIAL AND ETHNIC MINORITIES IN AMERICAN POLITICS (2006)

76. See *id.* at 110–14 (“Regarding closeness, 93 percent of the black respondents in the 1984 NBES data reported being close to other blacks in terms of feelings and ideas . . . and a majority felt that what happens to the group affects them personally.”).

77. KEVIN L. LYLES, THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS 237–38 (1997). This difference is observed throughout the white and black populations more broadly. See Monica Anderson, *Vast Majority of Blacks View the Criminal Justice System as Unfair*, PEW RES. CTR. (Aug. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/08/12/vast-majority-of-blacks-view-the-criminal-justice-system-as-unfair> (When asked whether “blacks in their community were treated less fairly than whites [in the courts],” sixty-eight percent of blacks agreed but only twenty-seven percent of whites agreed.); John Sides, *White People Believe the Justice System is Color Blind. Black People Really Don't.*, WASH. POST: WONKBLOG (July 22, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/07/22/white-people-believe-the-justice-system-is-color-blind-black-people-really-dont> (When asked whether it was a “serious problem” in their community that police “stop and question blacks far more often than whites” or that police “care more about crimes against whites than minorities[,]” . . . 70 percent of blacks, but only 17 percent of whites, considered these serious problems.”).

disruption within the black community, leading to different patterns of sentencing among black and white judges.<sup>78</sup> In workplace racial harassment cases, the differences in judgments delivered by white and black judges are notable. A study conducted by Pat K. Chew and Robert E. Kelley found that plaintiffs in racial harassment cases who appear before black judges had a 45.8% chance of success—more than twice the 20.6% success rate of those who appeared before white judges.<sup>79</sup>

Although race seems to inform a judges' decisions on certain racially salient issues, these cases make up a small part of the entire docket. As with female judges, black judges do not consistently rule differently from their white male counterparts. Notably, this does not mean we should fail to pursue surface-level diversity. To the contrary, given that surface-level diversity confers substantial legitimizing benefits on the judiciary and influences a subset of decisions, it should remain an important component in judicial nominations.<sup>80</sup> However, legal scholars must be careful not to overstate its effect on judicial outcomes. Doing so only serves to obscure the need for deep-level diversity.

### B. Deep-Level

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78. See Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749, 761–62 (2001) (finding that black judges were somewhat more likely to sentence both black and white defendants to prison and concluding that black judges display a greater sensitivity to “the social and personal costs of serious crimes and drug-related crimes, especially within black communities”).

79. Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1141 (2009). The success rate of plaintiffs who appeared before black judges was also found to be higher than that of plaintiffs who appeared before judges of any other race and was twice as high as the baseline average of twenty-two percent. *Id.* The greater likelihood of black judges to rule with the plaintiffs in workplace race discrimination cases has been demonstrated in other studies. See, e.g., Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the U.S. Courts of Appeals, 1981–1996* 134 (June 1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

80. See Myers, *supra* note 13, at 46 (“Public confidence, impartiality (both in appearance and practice), inclusivity, and equality are all qualities that any responsible judiciary should strive for, and the value of diversity as an enhancement of those qualities makes it a goal worthy of aspiration.”).

Deep-level diversity denotes differences that are not immediately observable.<sup>81</sup> Examples of deep-level diversity include a person's attitudes, personality, beliefs, values, knowledge, educational background, and life experiences.<sup>82</sup> Although the political interest in deep-level diversity runs low today, this was not always the case. Historically, some of America's most notable politicians emphasized its importance.<sup>83</sup> Many of the Founding Fathers, for instance, recognized that deep-level diversity is an essential component of any well-functioning republican government.<sup>84</sup>

As John Adams wrote in 1776, "[T]he representative assembly should be an exact portrait, in miniature, of the people at large . . . it should think, feel, reason, and act like them . . . ."<sup>85</sup> A decade later at the Constitutional Convention, James Wilson embraced this view, stating, "The Gov[ernment] ought to possess . . . the *mind or sense* of the people at large."<sup>86</sup> And, in *The Federalist* 39, James Madison endorsed a similar sentiment when he wrote, "It is *essential* to [a republican government] that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of

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81. See Harrison et al., *supra* note 28, at 98; David A. Harrison et al., *Time, Teams, and Task Performance: Changing Effects of Surface- and Deep-Level Diversity on Group Functioning*, 45 ACAD. MGMT. J. 1029, 1031 (2002) (noting that deep-level diversity is discovered through interactions over time); Mannix & Neale, *supra* note 6, at 35–36 (describing deep-level diversity as differences that are "nonvisible").

82. See Erhardt et al., *supra* note 29, at 102 ("[E]xamples of non-observable diversity are knowledge, education, values, perception, affection and personality characteristics."); Harrison et al., *supra* note 28, at 98 ("Heterogeneity at a deep level includes differences among members' attitudes, beliefs, and values."); Hui Liao, Aichia Chuang & Aparna Joshi, *Perceived Deep-Level Dissimilarity: Personality Antecedents and Impact on Overall Job Attitude, Helping, Work Withdrawal, and Turnover*, 106 ORG. BEHAV. & HUM. DECISION PROCESSES 106, 112 (2008) (using "personality attributes, personal values, work attitudes, education, and lifestyle" as measures of deep-level diversity); Mohammed & Angell, *supra* note 30, at 1015 (noting that deep-level diversity refers to "differences with respect to attitudes, personality, and values").

83. See, e.g., Note from Patrick Henry, Jr. to John Adams (May 20, 1776), in 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES (Charles Francis Adams ed., 1851); JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (1966) (1840); THE FEDERALIST NO. 39 (James Madison) (Clinton Rossiter ed., 1961).

84. See Note from Patrick Henry, Jr. to John Adams, *supra* note 83; JAMES MADISON, *supra* note 83; THE FEDERALIST NO. 39, *supra* note 83.

85. Note from Patrick Henry, Jr. to John Adams, *supra* note 83, at 201, 205.

86. JAMES MADISON, *supra* note 83, at 74 (quoting James Wilson) (emphasis in original).

it . . .”<sup>87</sup> Although the founders were referencing representation in Congress, their ideas are equally applicable to the judiciary.

Recent research on group decision making has confirmed the founders’ belief that deep-level diversity is important.<sup>88</sup> In the seminal work on the topic, Richard Hoffman examined how individual personality differences affect group performance.<sup>89</sup> He found that, on complex decision-making tasks, groups comprised of individuals with diverse personality types outperformed homogenous groups by a wide margin.<sup>90</sup> Hoffman theorized that groups with deep-level diversity reach higher-quality solutions because they are able to draw from a broader range of knowledge, expertise, and perspectives.<sup>91</sup>

A long line of subsequent research in this area has both reinforced and extended Hoffman’s early conclusions.<sup>92</sup> Scholars have, for instance, found that the presence of deep-level diversity

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87. THE FEDERALIST NO. 39, *supra* note 83, at 241 (James Madison) (emphasis in original).

88. See, e.g., L. Richard Hoffman & Norman R.F. Maier, *Quality and Acceptance of Problem Solutions by Members of Homogenous and Heterogeneous Groups*, 62 J. ABNORMAL & SOC. PSYCHOL. 401 (1961); L. Richard Hoffman, *Homogeneity of Member Personality and its Effect on Group Problem-Solving*, 58 J. ABNORMAL & SOC. PSYCHOL. 27 (1959).

89. See Hoffman, *supra* note 88, at 28–32.

90. See *id.* at 30 (“When the results of all the groups were combined, only 3 (23%) of the 13 Homogeneous groups exceeded the median score for the total distribution, whereas 12 (71%) of the seventeen Nonhomogeneous groups surpassed that score.”); Hoffman & Maier, *supra* note 88, at 405 (finding “that heterogeneous groups are relatively superior to homogeneous groups in problem solving ability”).

91. See Hoffman & Maier, *supra* note 88, at 406 (concluding that, “given relatively equally able people, the greater the differences in perceptions among the group members, the higher the quality of their problem solving”); Hoffman, *supra* note 88, at 31 (“The results imply that a multiplicity of perceptions of a problem are productive of creative solutions.”).

92. See, e.g., Susan E. Jackson, Karen E. May & Kristina Whitney, *Understanding the Dynamics of Diversity in Decision Making Teams*, in TEAM EFFECTIVENESS AND DECISION MAKING IN ORGANIZATIONS 204 (Richard A. Guzzo & Eduardo Salas eds., 1995); Susan E. Jackson, *Team Composition in Organizational Settings: Issues in Managing an Increasingly Diverse Work Force*, in GROUP PROCESS AND PRODUCTIVITY 138 (Stephen Worchel, Wendy Wood & Jeffrey A. Simpson eds., 1992); Harry C. Triandis, Eleanor R. Hall & Robert B. Ewen, *Member Heterogeneity and Dyadic Creativity*, 18 HUM. REL. 33 (1965); Donald C. Pelz, *Some Social Factors Related to Performance in a Research Organization*, 1 ADMIN. SCI. Q. 310 (1956).

along a variety of other dimensions—such as expertise,<sup>93</sup> values,<sup>94</sup> and attitudes<sup>95</sup>—also has a positive effect on group performance.<sup>96</sup>

Interestingly, empirical work shows that, as groups collaborate over time, the negative effect of surface-level diversity on team outcomes grows weaker and the positive effect of deep-level diversity becomes much stronger.<sup>97</sup> Scholars theorize that this occurs because surface-level characteristics are much easier to observe and, thus, are more salient during initial group interactions.<sup>98</sup> However, as individuals spend time working together, they learn about each others' actual values and abilities. Eventually, this information replaces the surface-level observations that influenced early group interactions.<sup>99</sup>

Whereas surface-level diversity does not, in general, improve decision making, deep-level diversity does.<sup>100</sup> Scholars believe that

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93. See Jackson, *supra* note 92, at 145–47 (noting that diverse expertise can increase group performance when such diversity increases the likelihood that at least one individual will know the correct answer).

94. See Pelz, *supra* note 92, at 315–16 (finding that “scientists benefit by frequent opportunities to exchange ideas with persons having different values” but do not similarly benefit from increased contact with individuals who have values similar to their own).

95. See Triandis et al., *supra* note 92, at 52 (presenting results from four experiments and concluding that groups with members who have heterogeneous attitudes are more creative than groups with members who have homogeneous attitudes).

96. Jackson et al., *supra* note 92, at 223–24 (discussing studies which show that “team heterogeneity [along many dimensions of deep-level diversity] improves performance in terms of decision quality”).

97. See Harrison et al., *supra* note 81, at 1040–43 (discussing how the effects of surface-level diversity weaken over time and the effects of deep-level diversity strengthen); Harrison et al., *supra* note 28, at 96 (same).

98. See Harrison et al., *supra* note 81, at 1041–42 (finding that “outward differences in groups are quickly perceived and used to make judgments”) (emphasis omitted); Anne S. Tsui, Terri D. Egan & Charles A. O'Reilly III, *Being Different: Relational Demography and Organizational Attachment*, 37 ADMIN. SCI. Q. 549, 570–75 (1992) (presenting empirical findings that show these initial observations of surface-level differences affect group interactions).

99. See Harrison et al., *supra* note 81, at 1040–43 (finding “that collaborating or getting together frequently to perform tasks can reduce the impact of demographic differences”); Priscilla M. Elsass & Laura M. Graves, *Demographic Diversity in Decision-Making Groups: The Experiences of Women and People of Color*, 22 ACAD. MGMT. REV. 946, 965–67 (1997) (theorizing that group resources, such as time, “will affect whether group members obtain individuating information” about other members of the group and that this, in turn, will affect member interactions).

100. See Tony Simons & Lisa Hope Pelled, *Understanding Executive Diversity: More than Meets the Eye*, 22 HUM. RESOURCE PLANNING 49, 49–51 (1999) (finding

exposure to deep-level differences encourages group members to view problems from alternative perspectives and to reexamine their initial lines of thought.<sup>101</sup> This, in turn, leads groups to reach better, more reasoned solutions.<sup>102</sup>

Although research has focused on non-judicial actors, there is strong reason to believe that the judiciary also benefits from deep-level diversity. First, judges normally defend their rulings via written opinions. This is a practice that forces them to engage with precedent and refine their own views. By participating in this process, all judges become part of a discourse in which they influence—and are influenced by—their peers.

A second reason that deep-level diversity could benefit the judiciary applies mainly to judges on the courts of appeals and Justices on the Supreme Court. At these levels, judges deliberate with each other prior to reaching a decision. Although any member of a court may disagree with her colleagues, she is expected to first listen to and understand their reasoning. By engaging in this manner, judges—just like the individuals in the studies discussed above—are exposed to new perspectives and forced to reevaluate their initial conclusions. Deep-level diversity increases the likelihood that judges will confront diverse values, attitudes, and experiences during their discussions.

Despite these important findings, legal scholars are almost wholly concerned with surface-level diversity.<sup>103</sup> One article by K.O. Myers provides a definition that is standard for the field: “A ‘diverse’ judiciary reflects the demographic characteristics of the population it serves, in terms of gender, race and ethnicity, religious faith and

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that diversity improves strategic decision making); *see also* Martha L. Maznevski, *Understanding Our Differences: Performance in Decision-Making Groups with Diverse Members*, 47 HUM. REL. 531, 538–45 (1994) (arguing that diverse groups that exhibit high levels of integration and communication perform better than homogeneous groups).

101. *See* Charlan Jeanne Nemeth, *Differential Contributions of Majority and Minority Influence*, 93 PSYCH. REV. 23, 28 (1986) (noting that individuals “exposed to persistent majority views tend toward convergence of thinking and to an unreflective acceptance of the majority position” but that “individuals exposed to persistent minority views are actually better decision makers in that they attend to more aspects of the situation and they examine and reexamine premises”); Triandis et al., *supra* note 92, at 33 (theorizing that “heterogeneous groups have access to more potential solutions to a problem having multiple solutions[,] [and] [e]ven when only one solution is correct, heterogeneous groups are more likely to ‘hit’ this solution than are homogeneous groups”).

102. *See* Nemeth, *supra* note 101, at 28.

103. *See, e.g.,* Myers, *supra* note 13.

non-faith, sexual orientation, etc.”<sup>104</sup> Although this conception captures surface-level diversity quite well, it ignores the importance of deep-level diversity.

This failure is not especially surprising. It arises from an assumption in the legal literature that deep-level diversity is a necessary consequence of surface-level diversity.<sup>105</sup> The thought is that, if presidents nominate judges who collectively look like America, then the judiciary will think like America.<sup>106</sup>

This mistaken idea is also present in the popular discourse.<sup>107</sup> When politicians discuss the importance of diversity in the judiciary, they express concern only for surface-level diversity.<sup>108</sup> Consider, for instance, Bill Clinton’s campaign pledge to ensure that his presidential appointees “look like America.”<sup>109</sup> During his time in office, President George W. Bush also voiced a strong desire to bring demographic diversity to the courts.<sup>110</sup> And most recently, President Obama has focused on race and gender in the judiciary.<sup>111</sup>

In contrast with the legal literature and political discourse, scholars in other disciplines warn against placing too much emphasis on surface-level diversity.<sup>112</sup> They have found that fixating

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104. *Id.* at 44. *But see* Ifill, *supra* note 9, at 416 (discussing the importance of bringing “substantive rather than cosmetic racial diversity to the bench”).

105. *See, e.g.*, Wayner, *supra* note 44.

106. *See, e.g., id.* at 546–57 (arguing that Hispanics should reach “representational parity” within the judiciary because such diversity “would permit a broader and healthier range of views” and “reinforce institutional credibility”).

107. *See, e.g.*, Toobin, *supra* note 4; Michael A. Fletcher & Dan Balz, *Bush Faces Pressure to Diversify Supreme Court*, WASH. POST, Sept. 25, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/24/AR2005092401265.html>; Stephen Labaton, *President’s Judicial Appointments: Diverse, but Well in the Mainstream*, N.Y. TIMES, Oct. 17, 1994, <http://www.nytimes.com/1994/10/17/us/president-s-judicial-appointments-diverse-but-well-in-the-mainstream.html>; Mitchell Locin, *Clinton Finishes Cabinet of Diversity*, CHICAGO TRIBUNE, Dec. 25, 1992, [http://articles.chicagotribune.com/1992-12-25/news/9204270273\\_1\\_chicago-banker-william-daley-cabinet-rank-bill-clinton](http://articles.chicagotribune.com/1992-12-25/news/9204270273_1_chicago-banker-william-daley-cabinet-rank-bill-clinton).

108. *See, e.g., id.*

109. Labaton, *supra* note 107 (noting that President “Clinton has been true to his campaign pledge to appoint judges of more diverse backgrounds”); Locin, *supra* note 107.

110. *See* Fletcher & Balz, *supra* note 107; *see also* Lazos Vargas, *supra* note 48, at 1442–48 (discussing how President Bush sought out appointees from diverse backgrounds who shared his “strict constructionist” interpretation of the Constitution).

111. *See* Toobin, *supra* note 4.

112. *See, e.g.*, Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 397

on surface-level diversity alone can actually lead to the underrepresentation of minority interests.<sup>113</sup> This may occur because surface-level characteristics are not reliable indicators of an individual's deep-level commitments, such as her values, attitudes, and opinions.<sup>114</sup> In other words, there is not a single "female" or "black" perspective.<sup>115</sup> Accordingly, one cannot rely on surface-level diversity to capture the diverse range of viewpoints within demographic groups.<sup>116</sup>

Sylvia Lazos Vargas makes a compelling argument for why surface-level diversity does not lead to deep-level diversity on the bench.<sup>117</sup> Specifically, she maintains that presidents actively seek out minority candidates who will think like white judges.<sup>118</sup> As Lazos Vargas writes,

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(2014) (observing that "some commentators have questioned the extent to which demographic diversity brings relevant diversity in perspectives"); Lawrence, *supra* note 35, at 2–5; Andrew M. Pettigrew, *On Studying Managerial Elites*, 13 STRATEGIC MGMT. J. 163, 175 (1992) ("Demographic forms of analysis alone move researchers further and further away, both empirically and theoretically, from the actual mechanisms underlying observed relationships.") (internal quotations omitted).

113. See, e.g., Lawrence, *supra* note 35, at 2–5; Pettigrew, *supra* note 112, at 175 (1992); Rhode & Packel, *supra* note 112, at 397.

114. See GERARD P. HODGKINSON & PAUL R. SPARROW, *THE COMPETENT ORGANIZATION: A PSYCHOLOGICAL ANALYSIS OF THE STRATEGIC MANAGEMENT PROCESS* 160–92 (2002) (criticizing studies that use demographic characteristics as proxies for an individual's attitudes and beliefs); Lawrence, *supra* note 35, at 2–5 (arguing that there is a lack of congruence between demographic characteristics and more subjective concepts such as attitudes and values); Mansbridge, *supra* note 2, at 629 (noting that "most normative democratic theorists have rejected descriptive representation"); Pettigrew, *supra* note 112, at 175–76.

115. See, e.g., IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 87–89 (2000) (arguing that women, among others, are not a monolithic group; each demographic group manifests substantial diversity and accordingly should be represented by individuals with diverse viewpoints); Ifill, *supra* note 9, at 414 (It is not the case "that the African American community is monolithic in its configuration, views, or values, or that only one 'black perspective' exists. Essentializing African American communities or judges denies the richness and complexity of African American political thought.").

116. See Anthony P. Thompson & Andrew McGrath, *Subgroup Differences and Implications for Contemporary Risk-Need Assessment with Juvenile Offenders*, 36 LAW & HUM. BEHAV. 345, 352 (2012) (noting that demographic characteristics "are indicators of surface-level diversity and may not map well onto deep-level diversity").

117. Lazos Vargas, *supra* note 48, at 1474.

118. *Id.*

The safe nominee is a minority who shares views with his or her white counterparts . . . . The [confirmation] process discourages candidates who stick out, not only in terms of their merit achievements, career paths and ideology, but also with respect to how minorities interpret and “perform” their racial identity. This homogenizing pressure produces judicial candidates who are remarkably similar, both in racial perspectives and political ideologies.<sup>119</sup>

Studies in other areas provide further support to this hypothesis.<sup>120</sup> For instance, in a comprehensive analysis of black Americans in Congress, Carol Swain found that “[m]ore black faces in political office . . . will not necessarily lead to more representation of the tangible interests of blacks.”<sup>121</sup> And in subsequent research, other scholars theorized that class differences can override demographic similarities and make wealthy minorities poor representatives of lower-income minorities.<sup>122</sup>

Again, these findings do not mean that surface-level diversity is unimportant. As we noted, surface-level diversity has tremendous symbolic value and helps promote judicial legitimacy.<sup>123</sup> And, as *Redding* and *Walker* illustrates, there are some occasions when it does improve judicial decision making.<sup>124</sup> The research on deep-level diversity, however, shows that surface-level diversity is insufficient.<sup>125</sup> The goals of diversity are not met merely because an institution looks like the people it serves. Deep-level diversity is also necessary.

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119. *Id.*

120. See, e.g., CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS (1993); Suzanne Dovi, *Preferable Descriptive Representatives: Will Just Any Woman, Black, or Latino Do?*, 96 AM. POL. SCI. REV. 729 (2002).

121. SWAIN, *supra* note 120, at 5.

122. See, e.g., Dovi, *supra* note 120, at 740 (“One should not assume that class ‘perspectives’ are necessarily better represented if ethnicity, race, and gender are better represented in legislatures.”).

123. See *supra* Part I.A.

124. *Walker v. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); *Safford Unified School District # 1 v. Redding*, 557 U.S. 364 (2009).

125. See Ifill, *supra* note 9, at 415 (“Some African American judges will be unfamiliar with or unwilling to engage the values and perspectives of African Americans in their judicial decision-making. While these judicial aspirants may make excellent judges and receive support if they are qualified to serve, they cannot satisfy the goals of diversity.”).

## II. MEASURING SURFACE-LEVEL DIVERSITY

In recent years, the United States has made extraordinary strides in achieving judicial diversity on the basis of race and gender. Throughout his term, President Barack Obama appointed nominees to the judiciary that mirror the gender, racial, and ethnic dimensions of America in an unprecedented way.<sup>126</sup> Of President Obama's nominees, only one quarter are white males.<sup>127</sup> The diversity of his selections even exceeds that of his predecessors, who themselves had made significant progress: thirty-three percent of George W. Bush's nominees were women or minorities as were forty-eight percent of Bill Clinton's nominees.<sup>128</sup>

A. *Female Judges*

For the first 140 years of its existence, the federal courts were entirely composed of white males.<sup>129</sup> In 1934, Florence Allen became the first woman to serve on the federal judiciary when Franklin D. Roosevelt nominated her to the U.S. Court of Appeals for the Sixth Circuit.<sup>130</sup> During her time on the court, Allen dined alone at lunch while her male colleagues frequented private social clubs that did not admit women.<sup>131</sup> The personal discrimination she encountered was indicative of the larger forces of exclusion that had characterized the judiciary since its inception and that would continue to do so for several more decades.

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126. See Toobin, *supra* note 4.

127. See *id.*; Mark Duell, *Only One in Four New Judges Is a White Male as Obama Pushes for More Women and Ethnic Minorities on the Bench*, DAILY MAIL (Sept. 14, 2011), <http://www.dailymail.co.uk/news/article-2036887/Obamas-push-diversity-bench-leads-surge-female-minority-judges.html>.

128. Duell, *supra* note 127.

129. *Id.*

130. See JEANETTE E. TUVE, *FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN*, at v (1984) (noting that Florence Allen "was the first woman to be elected as a state supreme court judge, the first woman to be appointed a federal court judge, and the first woman candidate for appointment to the United States Supreme Court"); Ruth Bader Ginsburg & Laura W. Brill, Address, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 *FORDHAM L. REV.* 281, 283 (1995).

131. See Moyer & Haire, *supra* note 60, at 666.

Although Allen's appointment was a landmark event, subsequent progress came slowly.<sup>132</sup> Another female judge was not seated until 1949—fifteen years after Allen assumed her position.<sup>133</sup> This time, it was Burnita Shelton Matthews who was nominated to the U.S. District Court for the District of Columbia.<sup>134</sup> Following Matthews's appointment, it would be another twelve years before the next woman—Sarah Tilghman Hughes—was confirmed to a federal judgeship.<sup>135</sup>

Figure 1 charts the gender composition of the federal judiciary from 1960 through 2014. As the graph shows, through the 1960s and early 1970s, the rate of female appointments was low. During their presidencies, John F. Kennedy, Richard Nixon, and Gerald Ford each nominated just one female judge.<sup>136</sup> Lyndon Johnson fared only marginally better—nominating three.<sup>137</sup> It was not until Jimmy Carter became president that politicians translated their rhetoric of judicial diversity into action. During his single term, Carter appointed forty women to the federal judiciary.<sup>138</sup> This accounted for sixteen percent of all his judicial appointments and was more than four times the number of female judges appointed by all of his predecessors combined.<sup>139</sup> During his presidency, Clinton increased the percentage of female judicial appointees even further to twenty-nine,<sup>140</sup> and under President Obama, that number has climbed all the way to forty-two percent.<sup>141</sup>

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132. Ginsburg & Brill, *supra* note 130, at 284.

133. *Id.*

134. *Id.*

135. See Mary L. Clark, *One Man's Token is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 492–93 (2004) (discussing the first eight women appointed to federal judgeships).

136. See Mary L. Clark, *Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other "Human Rights" Record*, 11 J. GENDER, SOC. POL'Y & L. 1131, 1132 (2003).

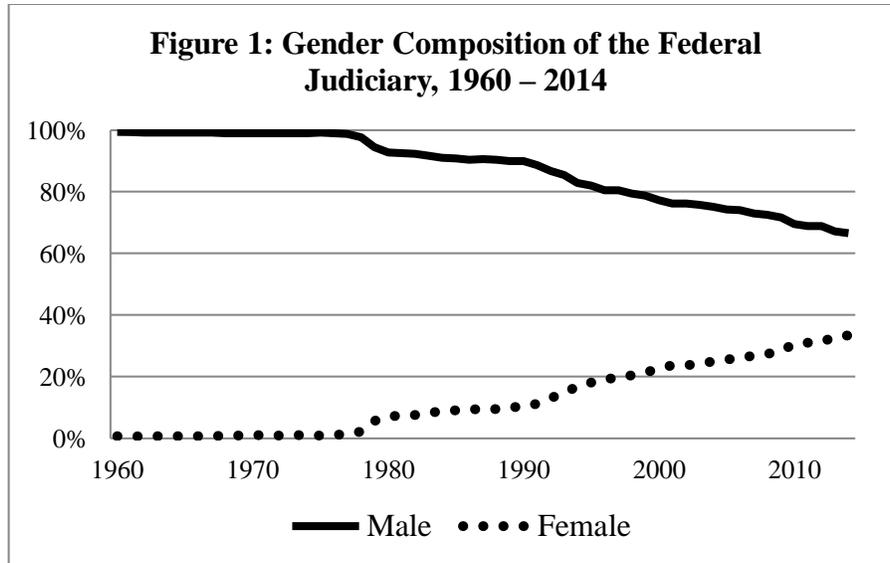
137. *See id.*

138. *See id.* at 1133 ("Carter's appointment of forty women constituted a clear break with the tokenism of his predecessors.").

139. *See id.*

140. Toobin, *supra* note 4.

141. *Id.*



Due to decades of imbalanced appointments, active federal judges continue to be disproportionately male. However, the gender ratio of recent judicial nominees is approaching parity, and if current trends hold, the country should soon be represented by equal numbers of men and women on the federal judiciary.

### *B. Minority Judges*

Like female judges, African American judges have experienced a slow path towards equality. In 1937, William Henry Hastie Jr. became the first black U.S. district judge when he was confirmed to a seat in the Virgin Islands.<sup>142</sup> Hastie enjoyed a long, illustrious career practicing and teaching law and, in 1949, was elevated to serve on the U.S. Court of Appeals for the Third Circuit.<sup>143</sup> Even though Hastie was one of only a handful of black judges serving in the judiciary at that time, he did not view himself as an outsider. During a speech at Temple University, Hastie responded to a black student who called him an apologist for the establishment by

142. *Biographical Directory of Federal Judges Hastie, William Henry*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=995&cid=999&ctype=na&instate=na>.

143. See Louis H. Pollak, *William Henry Hastie*, 125 U. PA. L. REV. 1, 1–2 (1976).

replying, “I am not a spokesman for the establishment. I am not an apologist for the establishment. I am the establishment.”<sup>144</sup>

Despite Hastie’s embrace of his role, the rate of appointments of African-American judges remained low throughout much of the twentieth century. It was not until the Carter Administration that black appointments increased to an appreciable level, reaching fourteen percent. And although the rate fell slightly under the Reagan and Bush years, it climbed to seventeen percent under Bill Clinton and maintained that level under Obama. Today, the percentage of sitting black judges (thirteen percent) is equal to the percentage of African Americans in the U.S. population.<sup>145</sup>

Asian Americans, too, have made substantial gains in their representation on the judiciary. For them, however, progress came much later. It was not until 1971 that the first Asian American federal judge—Herbert Choy—was confirmed to the U.S. Court of Appeals for the Ninth Circuit.<sup>146</sup> Even after Choy’s confirmation, barriers remained. Although Asian Americans make up five percent of the U.S. population, only one president appointed them at a rate higher than one percent. The exception is President Obama; he appointed Asian Americans at a rate of six percent, and today, following this uptick, Asian Americans hold three percent of all federal judgeships.

Like Asian Americans, Hispanics have only recently made gains regarding their representation in the judiciary. Prior to the George W. Bush Administration, the rate of Hispanic appointments had never surpassed six percent, and even under President Obama, the number (ten percent) lagged behind the proportion of the U.S. population that is Hispanic (sixteen percent).<sup>147</sup> Yet given how much the Hispanic population of the United States has increased over the last few decades,<sup>148</sup> this disparity might be a function of rapidly

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144. *Id.* at 4.

145. See United States Census Bureau, *The Black Population: 2010*, <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

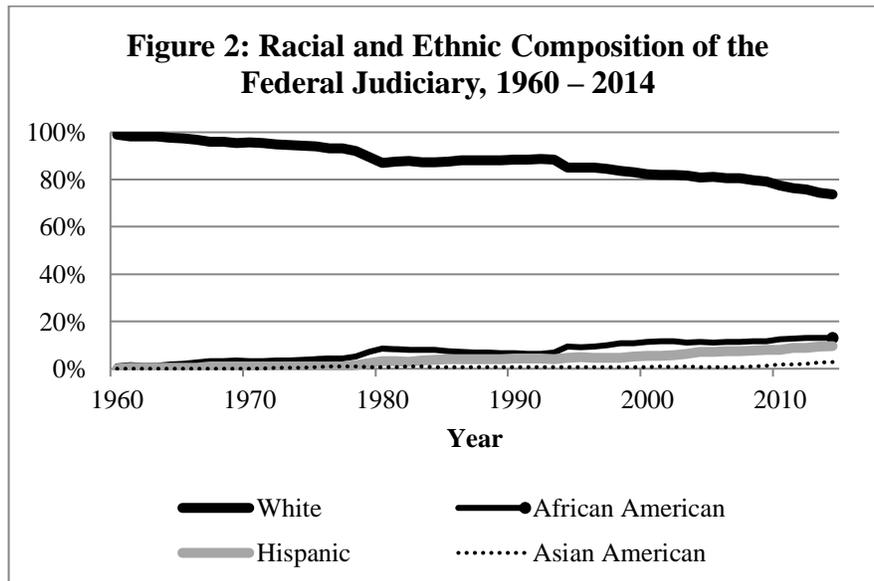
146. See *Herbert Choy, 88; First Asian American to Serve as a Federal Judge*, L.A. TIMES, Mar. 11, 2014.

147. See United States Census Bureau, *The Hispanic Population: 2010*, <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>.

148. The Hispanic population in the United States has increased markedly since the 1970s. According to US Census data, Hispanics or Latinos comprised 4.5% of the total U.S. population in 1970. See U.S. Census Bureau, *Population Distribution by Hispanic Origin: 1970–2010*, [https://www.census.gov/newsroom/cspan/1940census/CSPAN\\_1940slides.pdf](https://www.census.gov/newsroom/cspan/1940census/CSPAN_1940slides.pdf) (last visited Oct. 5, 2016). By 1990, that figure had grown to

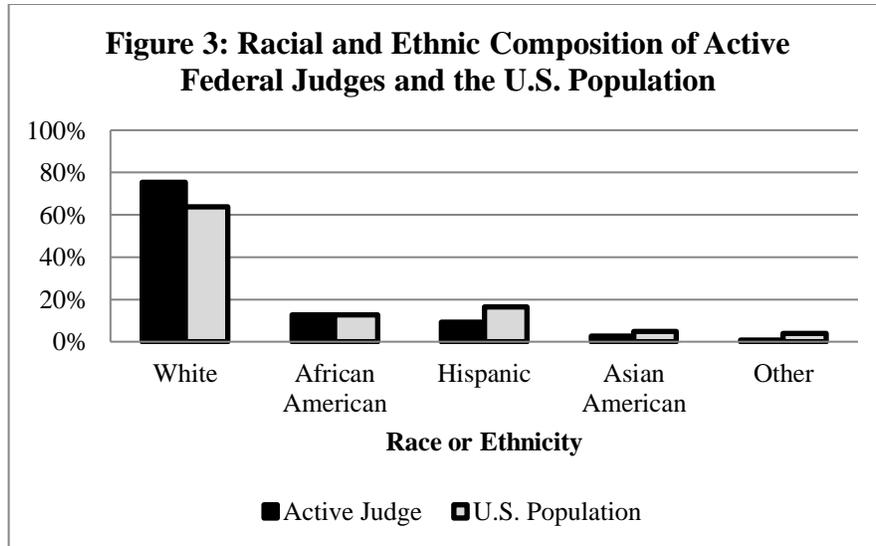
changing national demographics rather than a failure of the appointment process. Indeed, current trends indicate that Hispanic judges are on their way to achieving proportional representation in the judiciary.

Figure 2 charts the increase in the percentage of minority judges in the federal judiciary from 1960 through 2014. And Figure 3 compares the racial and ethnic composition of active federal judges with that of the entire U.S. population. As these graphs show, minorities have achieved substantial gains in the federal judiciary over the past fifty years. Today, the judiciary more closely resembles the demographic makeup of the broader U.S. population than it has at any point in history.




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nine percent. *Id.* As of 2010, Hispanics and Latinos made up 16.3% of the US population, a four-fold increase since the 1970s. *Id.*



Although these victories are critical and should not be understated, the qualities that render a judiciary diverse do not turn on race and gender alone. Unfortunately, in creating a judiciary that mirrors America on its surface-level characteristics, presidents have failed to nominate judicial candidates who bring deep-level diversity to the bench.<sup>149</sup>

### III. MEASURING DEEP-LEVEL DIVERSITY

To measure deep-level diversity, we look at the educational background of judges. We use this characteristic for three reasons. First, educational background is one of the most well-studied aspects of deep-level diversity.<sup>150</sup> Second, each time there is a Supreme Court vacancy, the lack of educational diversity among the Justices engenders significant debate.<sup>151</sup> And third, educational background is an objective measurement. This feature avoids problems that would occur if we attempted to assess other, subjective aspects of deep-level diversity, such as an individual judge's values, beliefs, or personality traits.

149. See Sabina Nielsen, *Top Management Team Diversity: A Review of Theories and Methodologies*, 12 INT'L J. MGMT. REVS. 301, 308 (2010) (conducting a twenty-two year review of articles that examine diversity in firm management and finding that educational background is one of the most studied dimensions).

150. See *infra* Part III.A.

An extensive literature shows that educational diversity has a positive effect on group performance.<sup>152</sup> One notable study examined the educational backgrounds of top-level management teams at nearly 200 banks and found that more innovative banks had higher levels of educational diversity.<sup>153</sup> Similarly, another study showed that groups with higher degrees of educational diversity are more likely to consider problems from different perspectives.<sup>154</sup> The authors found that these discussions positively influence group performance by leading group members to develop more innovative solutions.<sup>155</sup> Given these results, it is not surprising that educationally diverse teams are more likely to initiate creative, strategic changes.<sup>155</sup>

These studies are representative of the broader literature on educational diversity and group performance.<sup>156</sup> Scholars have consistently found that groups comprised of individuals with diverse educational experiences outperform more homogeneous groups.<sup>157</sup> Unfortunately, educational diversity is lacking in the federal judiciary.

#### A. Educational Background of Federal Judges

Every sitting Justice on the Supreme Court attended law school

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151. See, e.g., Karen A. Jehn, Gregory B. Northcraft & Margaret A. Neale, *Why Differences Make a Difference: A Field Study of Diversity, Conflict, and Performance in Workgroups*, 44 ADMIN. SCI. Q. 741 (1999); Karen A. Bantel & Susan E. Jackson, *Top Management and Innovations in Banking: Does the Composition of the Top Team Make a Difference?*, 10 STRATEGIC MGMT. J. 107 (1989).

152. See Bantel & Jackson, *supra* note 151, at 107, 114 (“[I]nnovation is positively correlated with team heterogeneity with respect to . . . education.”).

153. See Jehn et al., *supra* note 151, at 743 (observing that “differences in educational background . . . increase the likelihood that diverse perspectives and opinions exist in a workgroup”).

154. See *id.* at 753 (finding that “[i]nformational diversity [as measured by differences in education and functional background is] positively related to actual work-group performance”).

155. See Margarethe F. Wiersema & Karen A. Bantel, *Top Management Team Demography and Corporate Strategic Change*, 35 ACAD. MGMT. J. 91, 111 (1992) (concluding that “educational specialization heterogeneity [is] significantly associated with [corporate] strategic change”).

156. See, e.g., Ken G. Smith et al., *Top Management Team Demography and Process: The Role of Social Integration and Communication*, 39 ADMIN. SCI. Q. 412 (1994)

157. See, e.g., *id.* at 427–29 (finding that educational diversity is associated with higher returns on investment and increased sales).

at Harvard or Yale.<sup>158</sup> The last holdout was John Paul Stevens, a graduate of Northwestern.<sup>159</sup> But when Justice Stevens stepped down in 2010, President Obama used the opportunity to nominate Harvard Law graduate Elena Kagan, thereby completing an “Ivy League clean sweep.”<sup>160</sup>

Over the last decade, many scholars have questioned the propriety of a Supreme Court that is composed entirely of justices from two schools. Jonathan Turley, a professor at George Washington University Law School, has been one of the most vocal critics.<sup>161</sup> As he has argued, “exclud[ing] all but two of the nation’s 160 law schools as sources for justices . . . not only reduces the number of outstanding candidates but guarantees a certain insularity in training and influences on the court. This bias is not only elitist but decidedly anti-intellectual.”<sup>162</sup>

Turley is far from alone in holding this sentiment.<sup>163</sup> Columbia Professor Nicholas Lemann has expressed similar worries that the Court’s current composition is indicative of “a resurgent elitism in American society.”<sup>164</sup> According to Lemann, the dominance of Harvard and Yale graduates “really represents an unstated but quite powerful consensus that there is a narrow channel through which you have to pass to be a Supreme Court justice.”<sup>165</sup> He argues that this singular path to the Court reduces the amount of diversity among the Justices.<sup>166</sup> Even Justice Thomas has agreed that “we

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158. Although Justice Ruth Bader Ginsburg graduated from Columbia Law School, she completed her first two years of legal education at Harvard. Sarah Kaufman & Dan Zak, *The Justice League: Elena Kagan’s Nomination Shows that Ivy Roots Run Deep*, WASH. POST, May 12, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/11/AR2010051104605.html>.

159. Larry Abramson, *The Harvard-Yalification of the Supreme Court*, NPR: WEEKEND EDITION (May 16, 2010, 9:01 AM), <http://www.npr.org/templates/story/story.php?storyId=126802460>.

160. *Id.*

161. Jonathan Turley, *Evidence of a Supreme Court Bias*, L.A. TIMES, May 12, 2010, at A17.

162. *Id.*

163. For instance, Dan Farber, a law professor at Berkeley, noted the oddity of a Harvard-Yale Court when he said, “It does seem kind of weird that Stanford—which is ranked right up there with Yale—doesn’t have that kind of representation.” Abramson, *supra* note 159.

164. *Id.*

165. *Id.*

166. *See id.* (“Lemann says that the Kagan nomination points to a growing lack of diversity when it comes to background and experience.”). A *Time Magazine* article explored this issue when it asked whether recent presidents’ “apparent obsession

should be concerned that virtually all of us are from two law schools . . . . I'm sure Harvard and Yale are happy, but I think we should be concerned about that."<sup>167</sup>

If there were legitimate reasons for favoring Harvard and Yale at the expense of other schools, this reduction in deep-level diversity could be a worthwhile tradeoff. Christopher Edley, Jr., the former Dean of Berkeley Law, endorsed a position along these lines when he wrote:

At the Supreme Court level, it's all about finding oracles for Olympus . . . . [W]hat matters is intellectual horsepower, not office-chat charm. It is wisdom and analysis, not personal experiences. If a judge's life is elite in the sense of excellence, that's fine. In fact, that may be the point.<sup>168</sup>

On one level, Edley's argument is correct. After all, society benefits when courts are staffed with the most brilliant legal minds of the day. On another level, however, Edley's conception of legal brilliance is too restrictive. There is no reason to think that top students at many excellent schools are incapable of competing with the best graduates from Harvard and Yale.<sup>169</sup> Surely neither Justice

with the Harvard-Yale pedigree also risk[s] undermining our high court's intellectual diversity and encourage the kind of elitism that's anathema to a democracy." Tim Padgett, *Is the Supreme Court Too Packed with Ivy Leaguers?*, TIME, May 12, 2010, <http://content.time.com/time/nation/article/0,8599,1988877,00.html>.

167. Associated Press, *U.S. Supreme Court Justices Clarence Thomas, Sonia Sotomayor: Court Needs Diversity*, THE TIMES-PICAYUNE (Oct. 25, 2014, 10:19 PM), [http://www.nola.com/politics/index.ssf/2014/10/us\\_supreme\\_court\\_justices\\_clar.html](http://www.nola.com/politics/index.ssf/2014/10/us_supreme_court_justices_clar.html).

Justice Kagan also observed the lack of educational diversity, noting: [P]eople always think about racial and ethnic diversity, and people always think about gender diversity and sometimes people talk in the Court about religious diversity as well, but there is this way in which the Court is an incredibly undiverse institution . . . . [It has] to do with where we all went to law school. *A Conversation with Justice Elena Kagan*, KALTURA (Nov. 20, 2014), [http://www.kaltura.com/index.php/extwidget/preview/partner\\_id/1449362/uiconf\\_id/26354192/entry\\_id/1\\_ozd2231q/embed/auto?](http://www.kaltura.com/index.php/extwidget/preview/partner_id/1449362/uiconf_id/26354192/entry_id/1_ozd2231q/embed/auto?) (1 hour 11 minute mark).

168. Christopher Edley Jr., Opinion, *Why Elites Do Belong on the Supreme Court*, WASH. POST, May 16, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/14/AR2010051403641.html>.

169. See Turley, *supra* note 161 ("[T]here is no objective basis for favoring these two schools. Annual rankings from law schools on publication or reputation or student scores show relatively small differences in the top 20 law schools. The actual scores of the small pool of students in the top tier vary by only a few points. While Harvard and Yale are routinely ranked in the top spots, the faculties and student

Stevens's Northwestern degree nor Justice O'Connor's Stanford degree made them lesser jurists or limited their impact on the Court. As Professor Turley writes: "The favoritism shown Harvard and Yale should be viewed not just as incestuous but as scandalous. It undermines educational institutions across the country by maintaining a clearly arbitrary and capricious basis for selection. It also runs against the grain of a nation based on meritocracy and opportunity."<sup>170</sup>

Although critics focus on the educational elitism of the Supreme Court, we show that these concerns are also applicable to the lower federal courts. In the following subparts, we document the extent to which judges from a small number of law schools dominate every level of the federal judiciary. We find that, although this type of educational elitism dates back more than a hundred years, the problem is worse today than ever before.

We divide our analysis into three sections. In the first, we look at the educational pedigree of federal judges who served between 1789 and 2014. Here, we present the aggregate data for the entire federal judiciary and specific data for each court level. In the second section, we present time-series educational data. These graphs show that elite schools have captured a larger and larger share of the judicial seats over time. Finally, in the third section, we adjust the data to correct for two possible confounding variables: the percentage of judges who attended law school and the number of law schools in operation. When these adjustments are made, the graphs further illustrate the extent to which a small number of law schools dominates the federal judiciary.

### 1. Aggregate Data

Since the founding of the United States, 3532 people have served as federal judges. Of these individuals, 2917 (eighty-three percent) graduated from law school.<sup>171</sup> Since there are 251 law schools

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bodies are not viewed as manifestly superior to such competitors as Stanford, Chicago, Michigan or other top schools."); *see also* Patrick J. Glen, *Harvard and Yale Ascendant: The Legal Education of the Justices from Holmes to Kagan*, 58 UCLA L. REV. DISCOURSE 129, 130–31 (2010) (lamenting the unfortunate reality that "candidates who received their legal education in a locale other than Cambridge or New Haven [must] lower their aspirations").

170. Turley, *supra* note 161.

171. Of the remaining judges, 541 obtained their legal training by "reading law," and seventy-four could not be categorized because the FJC database lacked sufficient information regarding their education.

operating in the United States today<sup>172</sup>—and even as far back as 1900, there were more than eighty—it would be reasonable to think that these judges came from a wide variety of schools. That, however, is not the case. Our analysis—summarized in Table 1—reveals that a small number of elite universities dominate the federal judiciary.

No school is more dominant than Harvard. Nearly ten percent of federal judges who attended law school received their legal education there. Yale sits in a somewhat distant second place, having trained slightly more than four percent of the federal judges. Close behind Yale are Michigan (3.7%), Texas (3.2%), and Columbia (3.1%). In total, one quarter of federal judges who attended law school graduated from one of these five programs. Adding in the next five most represented law schools (Virginia, Georgetown, Pennsylvania, George Washington, and Stanford) increases that number all the way to thirty-five percent. Finally, include the top twenty schools,<sup>173</sup> and the percentage climbs to forty-eight.

TABLE 1: TWENTY MOST REPRESENTED LAW SCHOOLS IN THE FEDERAL JUDICIARY

Ranking	Law School	Judges	Percent of Total
1	Harvard	286	9.8
2	Yale	124	4.3
3	Michigan	107	3.7
4	Texas	93	3.2
5	Columbia	91	3.1
6	Virginia	84	2.9
7	Georgetown	82	2.8
8	Pennsylvania	59	2.0
9 (Tie)	George Washington	51	1.7
9 (Tie)	Stanford	51	1.7

172. The American Bar Association approved two hundred and five of these schools. See Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, *ABA-Approved Law Schools*, [http://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools.html](http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html) (last visited Oct. 17, 2016).

173. The schools ranked eleven to twenty are as follows: NYU (1.6%), Berkeley (1.6%), Florida (1.5%), Chicago (1.4%), Louisiana State (1.2%), Alabama (one percent), Tulane (one percent), Arkansas (one percent), Northwestern (one percent), South Carolina (one percent).

11 (Tie)	Berkeley	48	1.6
11 (Tie)	NYU	48	1.6
13	Florida	46	1.6
14	Chicago	43	1.5
15	Louisiana State	36	1.2
16	Alabama	31	1.1
17 (Tie)	Tulane	30	1.0
17 (Tie)	Arkansas	30	1.0
19 (Tie)	Northwestern	29	1.0
19 (Tie)	South Carolina	29	1.0

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Given what the data reveal about the top schools, it should come as no surprise that graduates from the least represented law schools rarely obtain federal judgeships. What should be alarming, however, is the sheer number of schools that fall into the “least represented” category. Take, for instance, the one hundred law schools at the bottom of representation in the federal judiciary. In the entire history of the United States, just fifty-one graduates from these schools have become federal judges. In percentage terms, this means that forty percent of the law schools hold just 1.7% of the federal judgeships. Harvard, alone, accounts for more than five times that number.

To match Harvard’s placement, one would need to add together all the judges from the bottom sixty percent of law schools. Notably, this is not an example of Harvard outpacing competitors that are incapable of producing qualified judicial candidates. Rather, the bottom sixty percent includes many well-regarded and long-standing law schools such as Rutgers, George Mason, Brigham Young, San Diego, and Florida State.

The statistics presented so far reflect the entire federal judiciary. Although such information is helpful for identifying general patterns, it does not indicate whether elite schools are overrepresented at all levels of the judiciary to the same degree. To get at this problem, we break out the data for district courts, courts of appeals, and the Supreme Court.

TABLE 2: TEN MOST REPRESENTED LAW SCHOOLS ON THE  
U.S. DISTRICT COURTS

Ranking	Law School	Judges	Percent
1	Harvard	206	8.5
2	Michigan	86	3.5
3	Yale	85	3.5
4	Texas	77	3.2
5	Columbia	71	2.9
6	Georgetown	69	2.8
7	Virginia	68	2.8
8	Pennsylvania	49	2.0
9 (Tie)	Florida	44	1.8
9 (Tie)	Berkeley	44	1.8

Table 2 ranks the ten most represented law schools at the district court level.<sup>174</sup> A comparison of Table 1 and Table 2 shows a strong degree of overlap.<sup>175</sup> The top eight schools remain the same—albeit with some minor changes in position. Most prominently, Michigan inched ahead of Yale to take the number two spot. Also, in the final two slots, Florida and Berkeley replaced George Washington and Stanford. This is not too much of a change, however, as George Washington and Stanford laid claim to the eleventh and twelfth spots, respectively, in the district court rankings.

Next, we turn to the United States Courts of Appeals. Table 3 shows that elite schools are represented on the courts of appeals at even higher rates than on the district courts. The largest increases come at the top, where Harvard and Yale both roughly double their district court percentages. Although the same schools populate the top five, they now account for thirty-five percent of the total. The top ten also see their combined contribution rise to forty-seven percent.<sup>176</sup> Finally, expanding to the top twenty increases the total

174. This data is based on known law school information for 2423 district court judges.

175. Since there are far more district court judges than courts of appeals judges or Supreme Court Justices, the overall results are skewed towards the district court level. Therefore, this strong similarity is expected.

176. For this calculation, we count only one of the schools tied at tenth place. This allows for an easier comparison with the other top-ten figures.

another twelve points to fifty-nine percent.<sup>177</sup> These figures show that there is a far larger degree of consolidation on the courts of appeals than on the district courts. In fact, the concentration at the top schools is so extreme that more than half of all law schools have never had a single graduate sit on a federal appellate court.

TABLE 3: TEN MOST REPRESENTED LAW SCHOOLS ON THE U.S. COURTS OF APPEALS

Ranking	Law School	Judges	Percent
1	Harvard	104	8
2	Yale	52	4
3	Michigan	26	2
4	Texas	20	1
5	Columbia	19	1
6	Virginia	19	1
7	Georgetown	17	1
8	Chicago	16	1
9	Stanford	14	1
10 (Tie)	George Washington	11	1
10 (Tie)	Pennsylvania	11	1

Perhaps even more striking is the extent to which a single school dominates the process. Harvard, alone, has trained as many court of appeals judges as the bottom eighty percent of law schools. This is particularly concerning given that many good law schools find themselves among this group. Some striking examples include Baylor, the University of Arizona, the University of Wisconsin, and Washington and Lee University.

Finally, we turn to the educational background of Supreme Court Justices. Table 4 shows that elite schools capture an even larger share at this judicial level. Of those Supreme Court Justices who earned law degrees, thirty percent graduated from Harvard, twelve percent graduated from Yale, and ten percent graduated from Columbia. Together, these three schools trained more than half of the Supreme Court Justices.

Although the door to the Supreme Court is not locked to graduates of the remaining 250 law schools, it is, at the very least,

177. George Washington University and the University of Pennsylvania are tied at tenth place. The schools ranked twelve to twenty are as follows: NYU (1.6%), Iowa (1.3%), Notre Dame (1.3%), South Carolina (1.3%), Tulane (1.3%), Boston University (1.1%), Fordham (1.1%), UCLA (1.1%), USC (1.1%).

tightly shut. Besides Harvard, Yale and Columbia, only five schools have placed more than one graduate on the Supreme Court. These five schools—each of which produced two Justices—are Cincinnati, Cumberland, Michigan, Northwestern, and Stanford. Finally, thirteen other schools have sent a single Justice to the Supreme Court.<sup>178</sup> Of particular note, no school has been added to this list since 1972, when Richard Nixon nominated William Rehnquist, a graduate of Stanford.

TABLE 4: LAW SCHOOLS WITH MORE THAN ONE  
U.S. SUPREME COURT JUSTICE

Ranking	Law School	Justices	Percent
1	Harvard	15	30.6
2	Yale	6	12.2
3	Columbia	5	10.2
4 (Tie)	Cincinnati	2	4.1
4 (Tie)	Cumberland	2	4.1
4 (Tie)	Michigan	2	4.1
4 (Tie)	Northwestern	2	4.1
4 (Tie)	Stanford	2	4.1

In keeping with prior comparisons, we end this section by pointing out that Harvard has had more representation on the Supreme Court than the bottom ninety-five percent of law schools combined. This is simply astonishing given that this category includes such prestigious institutions as Chicago, NYU, Pennsylvania, Duke, Berkeley, Virginia, Cornell, and Georgetown.

## 2. Time-Series Data

In the previous section, we identified the law schools that have produced the most federal judges throughout the entirety of U.S. history. In this section, we build on that information and explore the extent to which those elite schools have dominated the federal judiciary at different points in time. We focus on three groups in

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178. The other schools that have placed a single Justice on the Supreme Court are the College of Law of Central University, Howard University, Indiana University Maurer School of Law, New York Law School, University of Alabama, University of California–Berkeley, University of Colorado, University of Missouri-Kansas City, University of Pennsylvania, University of Texas, University of Virginia, Washington and Lee University, and William Mitchell College of Law.

particular: the top five, the top ten, and the top twenty most represented law schools:<sup>179</sup>

- Top 5: Harvard, Yale, Michigan, Texas, and Columbia
- Top 10: Top 5 plus Virginia, Georgetown, Pennsylvania, George Washington, and Stanford
- Top 20: Top 10 plus Berkeley, NYU, Florida, Chicago, Louisiana State, Alabama, Tulane, Arkansas, Northwestern, and South Carolina

Figure 4 charts the percentage of sitting district court judges<sup>180</sup> from 1789 to 2014 who graduated from a top law school. For the first fifty years the rate was zero percent. There is a simple explanation for this lack of representation. Few law schools existed at the time. The first to open its doors was the William and Mary Law School, which did so in 1779<sup>181</sup>; Transylvania University followed with its own law school in 1799,<sup>182</sup> and Harvard Law School came next in 1817.<sup>183</sup>

Given the scarcity of law schools and the fact that most lawyers of the era received their legal education by “reading law”—a process akin to an apprenticeship—it should come as no surprise that the first two judges to hold law degrees were not confirmed until 1840.<sup>184</sup> However, following their appointments, the educational landscape shifted quickly, and by 1854, twenty law schools were training students.

179. See Table 1 for a more detailed ranking.

180. We count a judge as “sitting” in a calendar year if he or she held active or senior status for at least one day that year.

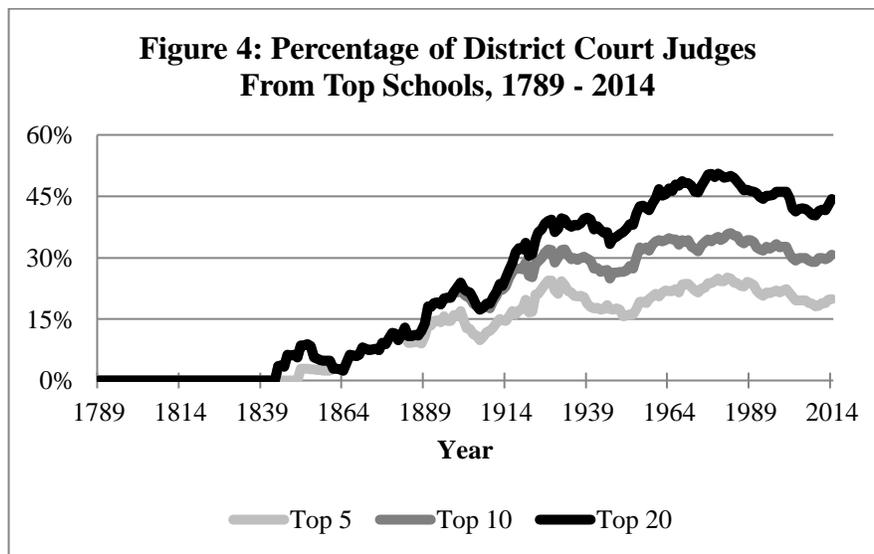
181. William & Mary Law Sch., *About*, <https://law.wm.edu/about/> (last visited Oct. 17, 2016).

182. Transylvania Univ., *About Transylvania: Our History*, <http://www.transy.edu/about/our-history> (last visited Oct. 17, 2016).

183. Harvard Law Sch., *About: A Brief Timeline of Our First Two Centuries*, <http://hls.harvard.edu/about/history> (last visited Oct. 6, 2016). The University of Maryland chartered its law school in 1816, a year before Harvard, but it did not begin classes until 1824. *Id.*

184. The judges were Isaac Pennybacker and John Nicoll, graduates of Winchester Law School and Litchfield Law School, respectively. See *Biographical Directory of Federal Judges: Pennybacker, Isaac Samuels*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1867&cid=999&ctype=na&instate=na>; *Biographical Directory of Federal Judges: Nicoll, John Cochran*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1762&cid=999&ctype=na&instate=na>.

During that time, graduates of top schools began obtaining judgeships. The first to do so was James Halyburton, a graduate of the University of Virginia School of Law.<sup>185</sup> He took a seat on the District Court for the Eastern District of Virginia in 1843. Alumni from Harvard soon followed and, by 1880, the Top 5 schools accounted for nearly twelve percent of the district court judgeships. The shift had begun, and for the next one hundred years, the percentage of seats held by graduates of top schools followed a consistent upward trend.

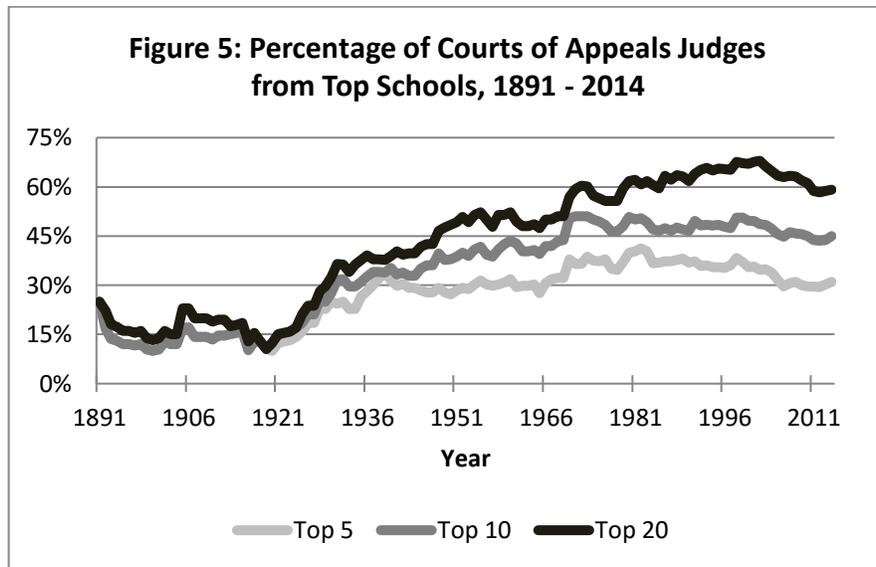


In 1982, the Top 5 hit its peak at twenty-five percent, and the Top 10 and Top 20 reached theirs the following year at thirty-six percent and fifty percent, respectively. Since then, there has been a mild downward shift, and as of 2014, the percentages stand at twenty percent for the Top 5, thirty-one percent for the Top 10, and forty-four percent for the Top 20. This decrease in overall percentage, however, should not be viewed as a sign of waning dominance among the top schools. In the following section, we control for two other factors (the decline in judges without law degrees and the increase in the total number of law schools) and find

185. See *Biographical Directory of Federal Judges: Halyburton, James Dandridge*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=955&cid=999&ctype=na&instate=na>.

that the dominance of elite schools is actually becoming more pronounced.<sup>186</sup>

For now, though, we turn to the next level in the federal judiciary. Figure 5 documents the percentage of courts of appeals judges between 1891 and 2014 who held a law degree from a top school. The chart begins at 1891 because that is the year Congress created the modern appellate court system.<sup>187</sup> Although federal circuit courts had existed prior to then, they did so sporadically and had few active judges.<sup>188</sup>



As Figure 5 shows, the Top 5, Top 10, and Top 20 categories started around twenty-five percent in 1891. Over the next thirty years, the groups trended down, ultimately hitting an all-time low around twelve percent in 1921. Following that year, however, momentum shifted and the market share of top schools consistently rose. All three groups peaked in the early 2000s, with the Top 5 at thirty-six percent, the Top 10 at fifty-one percent, and the Top 20 at

186. See *infra* Part III.A.3.

187. See Judiciary Act of 1891, ch. 517, 26 Stat. 826.

188. See Judiciary Act of 1869, ch. 22, 16 Stat. 44; Act of Mar. 2, 1855, ch. 142, 10 Stat. 631 (establishing a single circuit court judgeship in California); Judiciary Act of 1801, ch. 4, 2 Stat. 89 (creating twenty-two judgeships in six judicial circuits). This Act was repealed the following year, eliminating all of the judgeships it had created. See Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

sixty-eight percent. In the past decade, there has been a slight downward shift, and today, each group sits a few percentage points below its all-time high. Despite this recent decline, the trend over the past century is abundantly clear: Elite law schools are capturing a larger and larger share of the courts of appeals' judgeships.

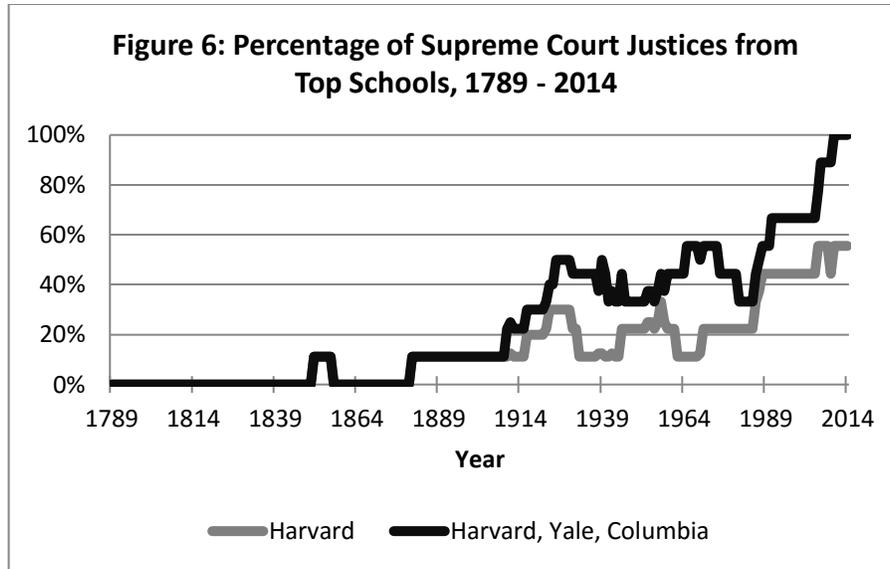
Finally, we turn to the United States Supreme Court. Because the Supreme Court Justices are so educationally homogeneous, we dispense with the Top 5, Top 10, and Top 20 categories. Instead, we focus on just three schools: Harvard, Yale, and Columbia. Figure 6 demonstrates the extent to which these three schools have dominated the Supreme Court. Since 1881, the Court has never been without a Harvard Law graduate, and for most of that period, it has had more than one. As of the start of the October 2015, there were five (Chief Justice Roberts, and Justices Scalia, Kennedy, Breyer, and Kagan), and if Judge Neil Gorsuch is confirmed, that number will hold.

With three sitting Justices (Thomas, Alito, and Sotomayor), Yale has also done well. The only Justice on the Court who did not receive her degree from one of these two schools is Ruth Bader Ginsberg (she spent two years at Harvard before transferring to Columbia to finish her degree).<sup>189</sup> At present, just three schools hold all the seats on the Supreme Court, a distribution that Professor Turley has described as "a perfectly incestuous academic cartel."<sup>190</sup>

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189. Despite graduating from Columbia, Ginsburg spent her first two years of law school at Harvard. See Kaufman & Zak, *supra* note 158.

190. Padgett, *supra* note 166.



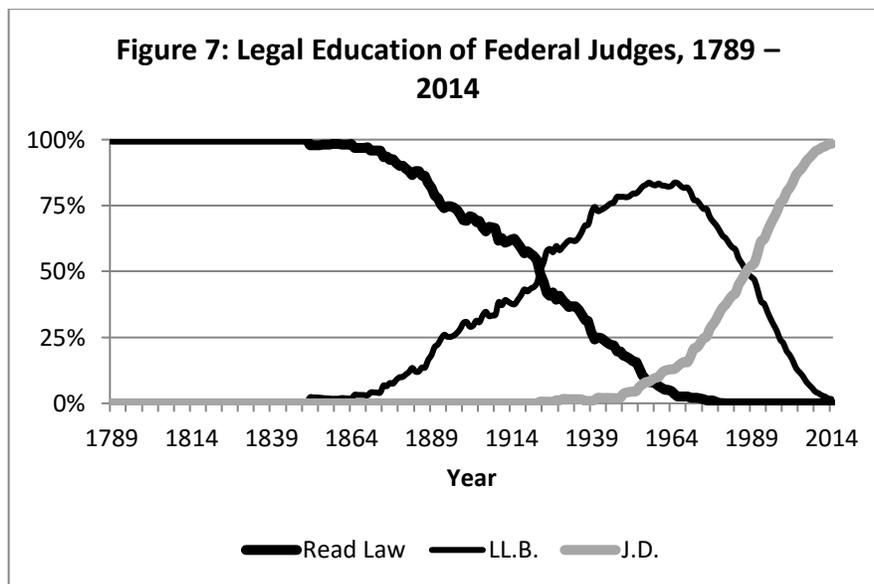
### 3. Representation Ratio

Although the preceding graphs illustrate the increasing dominance of elite schools, they do not fully capture the extent of overrepresentation on the courts. To better illustrate this issue, we developed a measure called the “Representation Ratio.” As its name suggests, the Representation Ratio documents the extent to which a school or group of schools is represented on the federal courts. Specifically, it is the ratio of the number of judges from a given school to the average number of judges from each school.

For instance, suppose there are five hundred sitting judges and one hundred law schools. In this scenario, the average number of judges from each school is five. Accordingly, a school that had five judges on the bench would receive a Representation Ratio of one—indicating that the school had exactly as many judges as average. Likewise, a school that had ten judges would receive a Representation Ratio of two—indicating that the school had twice as many judges as average.

To compile the Representation Ratio, we made two adjustments to the original data shown in the previous section. First, we eliminated all judges who did not earn a law degree. We took this step to alleviate a potential concern—namely, that the upward trend observed in the preceding graphs does not actually suggest top schools are more dominant but, rather, merely reflects the fact that more judges are earning law degrees.

Figure 7 documents the shift in legal education. Specifically, it shows the percentage of sitting judges throughout U.S. history who read law, who earned an LL.B., and who earned a J.D. As the diagram indicates, throughout the nineteenth century, reading law was the primary method of legal instruction. It was not until 1923 that sitting judges with law degrees outnumbered those without degrees.<sup>191</sup> Although the number of judges without degrees continued to decline steadily after 1923, the last holdouts remained on the bench until 1981.<sup>192</sup> Restricting the dataset to judges who earned a law degree eliminates the possibility that this shift in legal education is driving our findings.



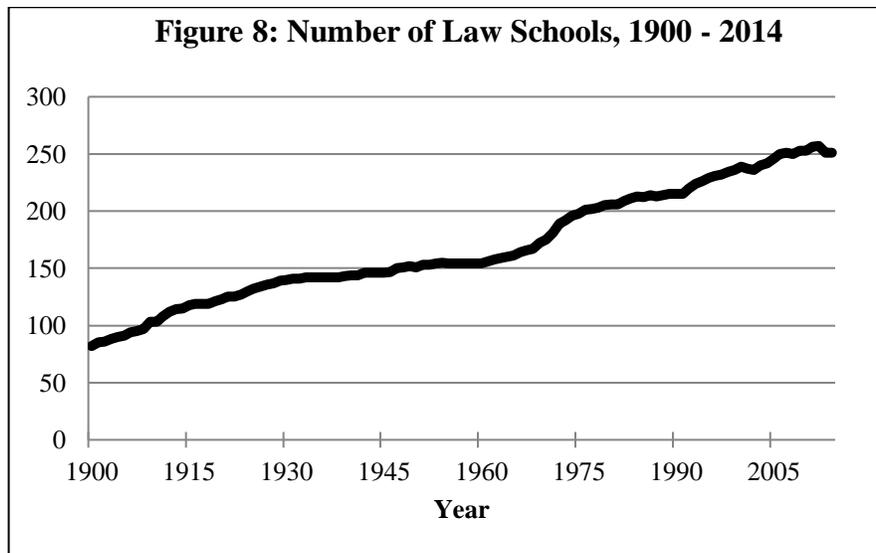
The second adjustment controls for the number of law schools operating over time.<sup>193</sup> Figure 8 illustrates this upward trend. As the

191. The percentage of judges with LL.B.'s continued to increase until its peak in 1960 at eighty-four percent. Since then, that figure has declined to about one percent. And as of 2014, more than ninety-eight percent of all judges held a J.D. as their primary law degree.

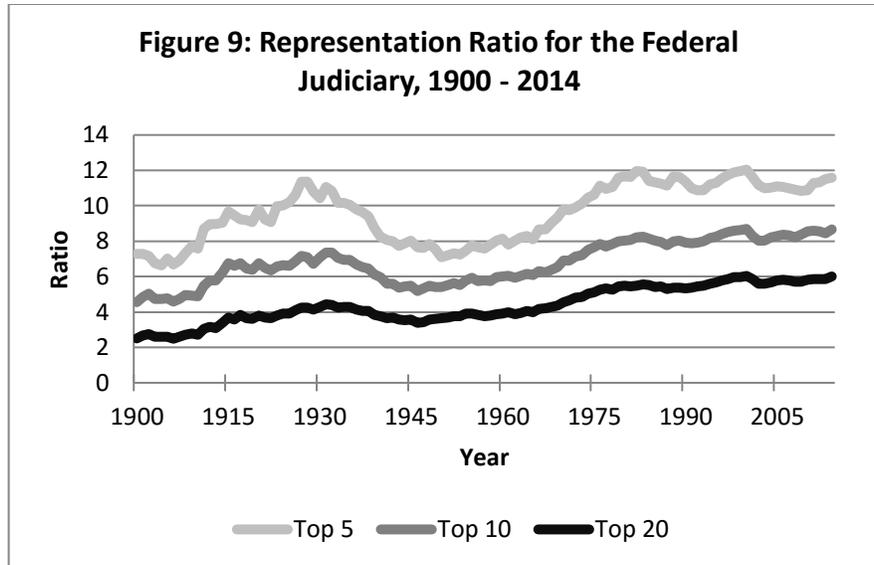
192. Richard Kellam, a judge for the Eastern District of Virginia, was the last sitting judge without a law degree.

193. See Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, *ABA-Approved Law Schools by Year*, [http://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/by\\_year\\_approved.html](http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html) (last visited Oct. 6, 2016).

chart shows, in 1900, there were eighty-two law schools. By 1950, that number had grown to 151, and by 2014, there were 251 degree-granting law schools in the United States. Due to this massive increase, a school that holds five percent of all judgeships today is actually far more overrepresented than a law school that held ten percent of all judgeships in 1900. Accordingly, it is impossible to obtain a complete picture simply by comparing percentages across time. The Representation Ratio solves this problem. By controlling for the number of law schools, the ratio makes it possible to compare the dominance of elite schools throughout history.



With these adjustments complete, we turn to Figure 9. This graph depicts the Representation Ratio for top schools in the entire federal judiciary from 1900 to 2014. During that period, the ratio increased substantially for all three groups of schools. Law schools in the Top 5 went from holding seven times the average number of seats in 1900 to more than eleven times the average number of seats in 2014. That represents more than a fifty percent increase. The Top 10 almost doubled from a low in 1900 of 4.5 to a high in 2014 of 8.7. Finally, schools in the Top 20 experienced an increase of more than one hundred percent. In 1900, their Representation Ratio was 2.5, and by 2014 that number had grown to six. These figures are quite revealing; they show that elite schools are significantly more overrepresented on the federal judiciary today than they were one hundred years ago.



Although the current Representation Ratios are troubling, we do not mean to suggest that every school should have a ratio of one. Law schools vary in terms of their educational quality. Given this, variance in the Representation Ratio is not necessarily a bad thing. The best schools should send the most graduates to the federal judiciary. After all, on average, these schools produce better lawyers. We certainly do not adopt the position of Senator Roman Hruska who famously said, “[T]here are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they . . . ?”<sup>194</sup>

What we find concerning, however, is the degree to which a small handful of schools dominate the process. The group at the top is so small that many excellent law schools are left out. Schools such as UCLA, the University of Southern California, and Cornell are substantially underrepresented on the federal judiciary, relative to their status in the broader legal community. They place judges at less than one-tenth the rate of the very top schools. Many great law schools have it even worse and are virtually excluded from the process. William and Mary, for instance, placed just two percent as many judges as Harvard.

There is substantial value in educational diversity, but when judges are selected from such a narrow range of law schools, the

194. DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION 278–79, n.21 (1999).

judicial system misses out on these benefits. At a direct level, not all law schools train their students the same way. Their different points of emphasis produce lawyers with distinct perspectives of the law. For instance, Lucas Powe, a law professor at the University of Texas, expressed fear that the lack of educational diversity promotes “an ignorance of certain parts of the law.”<sup>195</sup> He noted, for example, that “the country’s Sunbelt growth in recent decades has made water rights a more important area of case law, one that many top schools ‘west of I-95’ tend to teach more thoroughly than northeastern schools.”<sup>196</sup>

At a more indirect level, different law schools attract students with different life experiences. Although most law schools pride themselves on their diversity, the range of diversity at a single school or small group of schools cannot capture the entire scope of diversity. A historically black law school and a religiously-affiliated law school, for example, attract students with different backgrounds. And both attract student bodies that differ from those found at secular law schools in the Pacific Northwest.

With respect to education, deep-level diversity in the federal judiciary is non-existent. When making their judicial appointments, presidents should take this factor into consideration. Nominating judges from a wider variety of schools would increase deep-level diversity and, consequently, improve the decision-making quality of the courts. As Professor Turley has observed, the status quo is “deleterious to the court . . . because it artificially limits the pool of candidates and inevitably removes better qualified candidates.”<sup>197</sup>

### *B. Educational Background of Law Clerks*

Following a 2009 address in D.C., Justice Scalia took a few questions from the audience.<sup>198</sup> One of these questions came from an American University law student who wanted to know what she should do to be “outrageously successful.”<sup>199</sup> After telling the student to “work hard,” Justice Scalia opined on her prospects for becoming a Supreme Court clerk.<sup>200</sup> His answer: “Not good.”<sup>201</sup>

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195. Padgett, *supra* note 166 (quoting Professor Lucas Powe).

196. *Id.* (quoting Professor Lucas Powe).

197. *Id.* (quoting Professor Jonathan Turley).

198. Adam Liptak, *On the Bench and Off, the Eminently Quotable Justice Scalia*, N.Y. TIMES, May 11, 2009, at A13.

199. *Id.*

200. *Id.* (quoting Justice Antonin Scalia).

201. *Id.*

Scalia explained this unfortunate reality by recounting a story from his first year on the bench.<sup>202</sup> That term, Scalia did not select his own law clerks; instead, he inherited them from Lewis Powell, the Justice whom he succeeded.<sup>203</sup> One of these initial clerks was Jeffrey Sutton, a person whom Scalia described as “[o]ne of my former clerks whom I am the most proud of” and “one of the very best law clerks I ever had.”<sup>204</sup> Despite this praise, Scalia said that he never would have hired Sutton.<sup>205</sup> The reason: “For God’s sake, he went to Ohio State!”<sup>206</sup>

Justice Scalia’s story suggests that no matter how hard the American University student works, she will never be Supreme Court clerk material. She simply lacks the educational pedigree. Scalia’s statement cannot be disregarded as the opinion of a single Justice. Instead, sixty-five years of clerkship data are consistent with his observation. Quite simply, Supreme Court Justices favor students from a small number of elite schools and almost never hire elsewhere.

The one exception to this rule is Justice Clarence Thomas.<sup>207</sup> Although himself a graduate of Yale, Thomas actively seeks out law clerks who did not attend top schools.<sup>208</sup> Speaking of his recruitment strategy, he said, “There are smart kids every place. They are male, they are female, they are black, they’re white, they’re from the West, they’re from the South, they’re from public schools, they’re from public universities, they’re from poor families, they’re from sharecroppers, they’re from all over.”<sup>209</sup> When hiring clerks, Thomas professes to “look at the kid who shows up [and ask] [i]s this a kid that could work for me[.]”<sup>210</sup> Despite the reasonableness of this position, other members of the Court do not share his sentiment.

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202. *Id.*

203. *Id.*

204. *Id.* (quoting Justice Antonin Scalia).

205. *Id.*

206. *Id.* (quoting Justice Antonin Scalia).

207. See Lucille A. Jewel, *Merit and Mobility: A Progressive View of Class, Culture, and the Law*, 43 U. MEM. L. REV. 239 (2012); Staci Zaretsky, *When It Comes to Hiring SCOTUS Clerks, Clarence Thomas Doesn’t Care About the U.S. News Rankings*, ABOVE THE LAW (Sep. 24, 2012, 12:52 PM), <http://abovethelaw.com/2012/09/when-it-comes-to-hiring-scotus-clerks-clarence-thomas-still-doesnt-give-a-damn-about-the-u-s-news-rankings>.

208. See Jewel, *supra* note 207, at 315–16.

209. Zaretsky, *supra* note 207.

210. *Id.*

They, like Justice Scalia, seem to believe that the only people qualified to serve as law clerks are graduates of a handful of schools.

This Part proceeds in two sections. In the first, we examine the troubling lack of educational diversity among Supreme Court law clerks from 1950 to 2015. In the second section, we turn our focus to clerks on the lower federal courts and show that a similar problem exists there.

Before tackling those issues, however, we briefly discuss why educational diversity matters with respect to law clerks. The first reason is future-oriented. Today's clerks are tomorrow's judges. Based on our review of judicial biographies, we found that more than one-third of current federal judges had previously served as law clerks. Moreover, this figure has been rising consistently over the past three decades and is up from ten percent in 1980. Given this trend, it seems clear that serving as a law clerk is becoming an increasingly important step in obtaining a federal judgeship. Limiting this valuable opportunity to students from elite schools ultimately makes it harder for graduates of other law schools to become federal judges. A current lack of diversity among law clerks will only exacerbate the absence of diversity among judges in the future.

The second reason diversity in this context matters is that law clerks have a substantial effect on the judges they serve. Scholars have found that Supreme Court clerks influence three key parts of the judicial process: (1) the cert decision,<sup>211</sup> (2) the merits vote,<sup>212</sup>

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211. See Timothy R. Johnson, David R. Stras & Ryan C. Black, *Advice from the Bench (Memo): Clerk Influence on Supreme Court Oral Arguments*, 98 MARQ. L. REV. 21, 29 (2014) (reviewing recent empirical work and concluding that “the combination of the descriptive and systematic analyses [of these studies] suggests that clerks can and do play a role in the Justices’ decisions about which cases to take”); David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 993–95 (2007) (book review) (finding that the Justices agreed with the cert pool memo recommendation in nearly ninety-nine percent of all cases and concluding “that the recommendations of the cert pool are indeed related to the final decisions of the Justices on petitions for certiorari”); see also Ryan C. Black & Christina L. Boyd, *The Role of Law Clerks in the U.S. Supreme Court’s Agenda-Setting Process*, 40 AM. POL. RES. 147, 164 (2012) (finding that clerk recommendations “can lead to justice voting that we would not otherwise expect”); Saul Brenner & Jan Palmer, *The Law Clerks’ Recommendations and Chief Justice Vinson’s Vote on Certiorari*, 18 AM. POL. Q. 68, 74 (1990) (finding that Chief Justice Vinson followed his law clerks’ cert recommendations eighty-six percent of the time); William H. Rehnquist, Opinion, *Who Writes Decisions of the Supreme Court*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74 (arguing that cert memoranda are

and (3) the written opinion.<sup>213</sup> To cap it off, recent work has shown that clerks have become even more influential over time.<sup>214</sup> Given the significant impact that clerks have on the judicial process, it is important that they come from diverse backgrounds.

### 1. Supreme Court

The clerkship list we use for this section comes from Wikipedia.<sup>215</sup> To minimize concerns regarding the reliability of

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influenced by the unconscious biases of law clerks and that this, in turn, influences the Justices' votes).

212. See, e.g., EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT* 262–87 (2005) (detailing his experience as a Supreme Court clerk and observing that clerks wielded “very significant power”); Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 70–75 (2008) (In this study, the authors found that the partisanship of a Justice's clerks had a strong effect on the Justice's votes, even after controlling for the Justice's own ideology. Discussing the size of the impact, they noted that a Justice who shifted from all Republican clerks to all Democratic clerks would be thirteen percentage points more likely to cast a liberal vote in any given decision.) Jan Palmer & Saul Brenner, *The Law Clerks' Recommendations and the Conference Vote On-the-Merits on the U.S. Supreme Court*, 18 JUST. SYS. J. 185, 190 (1995) (finding that Justice Burton agreed with his law clerks' recommendations more frequently than he agreed with any of his eight colleagues).

213. See, e.g., ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 198 (2006) (observing that law clerks are “able to change their justices' minds about the content and style of opinions”); Johnson et al., *supra* note 211, at 29–33 (reviewing the literature and concluding that “research suggests clerks, to varying degrees, influence both the substantive decisions made by Justices and the opinion-drafting process”); Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 CORNELL L. REV. 1307, 1337 (2011) (conducting linguistic analysis of Supreme Court opinions and finding that “Justices are increasingly relying on their clerks in the opinion-writing process” and that swing Justices are the most likely to delegate opinion-writing responsibilities). See generally TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 145–205 (2006) (discussing law clerks' duties on the Supreme Court and their role in drafting opinions).

214. WARD & WEIDEN, *supra* note 213, at 198 (concluding that clerks on the Vinson Court had less influence than those on the Warren Court, who, in turn, had less influence than those on the Burger Court, and that the clerks on the Rehnquist Court had the most influence of all).

215. We use Wikipedia because it is the only source that contains a comprehensive list of Supreme Court law clerks. Although some academics consider it inappropriate to cite to Wikipedia, many others view it as a reliable source. See,

Wikipedia's entry on Supreme Court clerks, we randomly selected one hundred people from the list and searched for independent evidence that each person had served as a law clerk for the Supreme Court. In every case, we found strong corroborating evidence.

Although the data go as far back as the late 1800s, a comprehensive record does not appear until the 1950s. In line with this, our analysis begins with October Term 1950 and goes through October Term 2014. Over that period, Supreme Court Justices hired a total of 1751 law clerks. Table 5 presents the ten law schools that are most represented among this group of clerks.

Once again, Harvard takes first place with 434 clerks (24.8% of the total). Its dominance here is even more absolute than it is regarding federal judgeships. Over the last six decades, Harvard has produced more Supreme Court clerks than the bottom ninety-seven percent of law schools combined. Harvard even outpaces many top schools by huge margins—placing more than ten times the number of clerks as NYU and the University of Pennsylvania, twenty times more than UCLA and Duke, and forty times more than Cornell.

Harvard, however, is not the only law school to do very well in the Supreme Court clerkship market. Yale comes in second with 333 clerks (19%), and Chicago sits at number three with 143 clerks (8.2%). Together, Harvard, Yale, and Chicago account for more than fifty percent of all the Supreme Court law clerks hired since 1950. By comparison, this figure makes the federal judiciary seem like an educationally diverse institution.

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*e.g.*, EUGENE VOLOKH, *ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, SEMINAR PAPERS, AND GETTING ON LAW REVIEW* 152 (4th ed. 2010) (“Wikipedia entries tend to be relatively accurate, probably no worse and possibly better than the typical newspaper article.”); Noam Cohen, *Courts Turn to Wikipedia, but Selectively*, N.Y. TIMES, Jan. 29, 2007, at C3 (discussing the rise of Wikipedia citations in court opinions and quoting Judge Richard Posner as saying, “Wikipedia is a terrific resource”). One study in *Nature* found that Wikipedia is about as accurate as the *Encyclopedia Britannica*. See Jim Giles, *Internet Encyclopaedias Go Head to Head*, 438 NATURE 900, 900–01 (2005) (of the “eight serious errors” identified during the study, four were in the *Encyclopedia Britannica* and four were in Wikipedia entries). A subsequent study determined that Wikipedia's entries on cancer were as accurate and detailed as articles in a database maintained by the National Cancer Institute. See Malolan S. Rajagopalan et al., *Patient-Oriented Cancer Information on the Internet: A Comparison of Wikipedia and a Professionally Maintained Database*, 7 J. ONCOLOGY PRAC. 319, 321 (2011) (finding that “[t]here was no difference in the combined depth and accuracy of content between” Wikipedia and the National Cancer Institute database).

TABLE 5: SUPREME COURT LAW CLERKS, 1950–2015

Ranking	Law School	Clerks	Percent of Total
1	Harvard	434	24.8
2	Yale	333	19.0
3	Chicago	143	8.2
4	Stanford	118	6.7
5	Virginia	98	5.6
6	Columbia	96	5.5
7	Michigan	73	4.2
8	Berkeley	48	2.7
9	NYU	44	2.5
10	Pennsylvania	37	2.1

Broadening the group slightly reveals further clustering. The top ten collectively account for eighty-one percent of the Supreme Court clerkships. And, if we expand to the top twenty, that figure rises all the way to ninety-three percent. At the other end of the spectrum, the bottom ninety percent of law schools fare very poorly. They held just seven percent of the clerkships. As for the bottom seventy-five percent, their graduates accounted for a mere one percent.

## 2. Lower Federal Courts

Every year, the American Bar Association releases law school placement statistics.<sup>216</sup> Included among this information is the number of federal clerkships obtained by each school's graduating class.<sup>217</sup> Using this data, we compiled a list of the schools that produced the most federal law clerks. To smooth out short-term anomalies, we aggregated the data from 2010 through 2014. During this period, there were approximately 6400 federal clerks. Table 6 presents the ten most represented schools in this category.

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216. Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, *Employment Summary Report*, <http://employmentsummary.abaquestionnaire.org> (last visited Oct. 7, 2016).

217. *Id.*

TABLE 6: FEDERAL COURT LAW CLERKS, 2010–2014

Ranking	Law School	Clerks	Percent of Total
1	Harvard	479	7.5
2	Yale	337	5.3
3	Stanford	261	4.1
4	Virginia	224	3.5
5	NYU	211	3.3
6	Michigan	174	2.7
7	Texas	170	2.7
8	Columbia	159	2.5
9 (Tie)	Berkeley	135	2.1
9 (Tie)	Duke	135	2.1

The first thing to note is the similarity between this group of schools and the schools that produce the most judges.<sup>218</sup> Harvard and Yale, again, claim the number one and number two spots. Virginia, Michigan, and Texas also do quite well in both rankings. All told seven of the top ten schools are the same. The new additions are NYU, Berkeley, and Duke, which replaced Georgetown, Pennsylvania, and George Washington.

The similarities do not end there. With regard to both judgeships and clerkships, the top five schools account for an identical twenty-four percent of the market. Turning to the top ten, the numbers remain comparable: thirty-five percent for judgeships and thirty-six percent for clerkships. These figures show that clerkships are subject to the same representation problem that plagues judgeships. A handful of law schools dominate the process and, in doing so, exclude many qualified candidates from non-elite schools.

#### CONCLUSION

For the past fifty years, presidents have worked to increase surface-level diversity in the federal judiciary. Their efforts have been successful, and today, the judiciary looks more like the people it serves than it has at any other point in history. For the first time, women, African Americans, Hispanics, and Asian Americans sit on the federal judiciary at rates that are roughly equivalent to their demographic representation in the United States. This is a

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218. Compare Table 6 with Table 1.

significant milestone that has increased the representative legitimacy of the judiciary.

Despite these gains in surface-level diversity, however, the judiciary has actually lost ground when it comes to deep-level diversity. Drawing upon the Federal Judicial Center Biographical Database, we found that the educational diversity of federal judges is at an all-time low. Over the past century, a smaller and smaller number of law schools have claimed a larger and larger share of judgeships and clerkships. This extreme degree of educational homogeneity is illustrative of a new diversity crisis in the federal judiciary.

By focusing exclusively on surface-level diversity and failing to identify nominees who also bring deep-level diversity to the courts, presidents have deprived the judiciary of an important mechanism for improving judicial decision making. As future judicial nominations arise, we should all take some time to reflect on whether the educational elitism and lack of deep-level diversity that characterize the modern judiciary is consistent with American principles of democracy.<sup>219</sup>

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219. Padgett, *supra* note 166 (finding it “concern[ing] . . . that our Presidents keep drawing from the same, ultra-exclusive law school well . . . [and asking whether] their apparent obsession with the Harvard-Yale pedigree also risk[s] undermining our high court’s intellectual diversity and encourag[ing] the kind of elitism that’s anathema to a democracy”).

