

DIVERSITY, QUALIFICATIONS, AND IDEOLOGY: HOW FEMALE AND MINORITY JUDGES HAVE CHANGED, OR NOT CHANGED, OVER TIME

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Ever since the Carter Administration began appointing female and minority judges in large numbers, scholars have sought to measure their impact. In this Article, I focus on a different, but equally important question: what is the background and ideology of female and minority judges and how has this changed over time? I address this issue empirically by analyzing quantitative data on United States district court judges from Presidents Lyndon Johnson through Barack Obama. My findings are twofold: First, I show that the professional and educational characteristics of female and minority judges have historically differed from those of white male judges, but these differences have narrowed over time, particularly when it comes to education. Second, I present evidence showing that, even though professional and educational differences have narrowed, female and minority judges still bring a different ideological viewpoint than do white male judges, being on average more left-leaning in their ideology. These findings reframe existing discussions about descriptive representation in the courts and suggest that female and minority judges more than ever tend to share professional and educational backgrounds with white or male judges, but still bring a different, albeit more liberal, perspective.

Introduction	368
I. The Importance of Diversified Courts.....	371
II. The Educational and Professional Characteristics of Diverse (and Non-Diverse) Judges.....	379
III. Analysis of Professional, Educational, and Ideological Characteristics of United States District Judges Over Time ...	382
A. Data Sources	382
B. Appointments by Presidential Administration	383
C. Professional Characteristics and Variation Over Time	385
D. Educational Characteristics and Variation Over Time	389
E. Ideology and Variation Over Time.....	391
IV. The Importance of these Trends for Descriptive and Substantive Representation.....	395
Conclusion.....	398

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INTRODUCTION

In 1961, President John F. Kennedy made a telephone call that changed the trajectory of the United States Court system. The call he placed was to a man named James Parsons, and the proposition that Kennedy made was to name Parsons a United States District Court Judge for the Northern District of Illinois.¹ Parsons later recalled a jovial conversation in which the two men referenced their shared military past.² In accepting Kennedy's offer, Parsons joked, "As a former naval officer, aye, aye, sir."³ Kennedy responded with the equally appropriate "Carry on, then."⁴

We wouldn't ordinarily pay much attention to this routine exchange between a president and a presumptive judicial nominee. The importance here, however, was that Parsons was African American, and he was not only Kennedy's first African-American nominee but also only the second African American named to the federal courts.⁵ Indeed, Parsons' appointment also made him the first African-American district court judge,⁶ the first African American to sit on the federal bench in Chicago (a city where fourteen percent of the population at that time was African American),⁷ the first African-American United States district court chief judge (1975–1981),⁸ and the first African-

1. Eric Pace, *James Parsons, 81, A Black Trailblazer As a Federal Judge*, N.Y. TIMES (June 22, 1993), <http://www.nytimes.com/1993/06/22/obituaries/james-parsons-81-a-black-trailblazer-as-a-federal-judge.html> [https://perma.cc/89RX-HNFR].

2. Jerry Thornton, *James B. Parsons, 1st Black U.S. Judge*, CHI. TRIB. (June 21, 1993), http://articles.chicagotribune.com/1993-06-21/news/9306210011_1_james-benton-parsons-john-marshall-law-school-black-federal-district-judge [https://perma.cc/L9SW-5G6H].

3. *Id.*

4. *Id.*

5. The first African-American judge was William Henry Hastie, nominated to the United States Court of Appeals for the Third Circuit by Harry Truman in 1950. *Judge William Hastie, 71, of Federal Court, Dies*, N.Y. TIMES, Apr. 15, 1976, at 36, http://www.nytimes.com/1976/04/15/archives/judge-william-hastie-71-of-federal-court-dies.html?_r=0 [https://perma.cc/XJX7-XT59] [hereinafter *Judge William Hastie*].

6. Thornton, *supra* note 2.

7. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, For Large Cities and Other Urban Places in the United States* (U.S. Census Bureau, Working Paper No. 76, 2005), <https://www.census.gov/population/www/documentation/twps0076/twps0076.pdf> [https://perma.cc/U9AV-WFEB].

8. *Parsons, James Benton, 1961-1981*, N. DIST. ILL. CT. HIST. ASSOC., www.ilndhistory.uscourts.gov/Judges/Parsons.html [https://perma.cc/TC38-2MS8] (last visited Feb. 3, 2017).

American judge to serve as a liaison to the Judicial Conference of the United States.⁹

Thanks in part to people like Judge Parsons, the federal courts—once a uniform bloc of white men—have opened up to women, Latino/as, and African Americans. Today, the United States not only has the most diverse federal bench to date, but also one of the most diverse populations of judges compared to other western democracies,¹⁰ with the Obama Administration being a particularly strong proponent of diversity.¹¹ As of 2009, of the 768 federal judges in service, 26% were women, 11% African-American, and 7% Hispanic.¹² However, this move toward diversity has not been uniform. For example, fewer than 1% were Asian American¹³ and, even today, there is only one federal judge who self-identifies as Native American.¹⁴

Not only have the courts changed over time in terms of their composition, but judges themselves have changed over time. Today's judiciary is more political, more professionalized, and more experienced than ever before. For example, with one exception (Elena Kagan), all Justices of the United States Supreme Court were former court of appeals judges, and all current Justices (including Kagan)

9. *Administrative Offices and Agencies*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/admin_01_01_01.html [https://perma.cc/5KV4-QD8N] (last visited Mar. 9, 2017).

10. For information regarding the United Kingdom, see Afua Hirsch, *Judges' Lack of Diversity Harms Court System, Report Warns*, GUARDIAN (Feb. 24, 2010), <http://www.guardian.co.uk/uk/2010/feb/24/judges-diversity-neuberger-report> [https://perma.cc/A9XL-PM2J] (reporting that in the United Kingdom “only 19% of judges were women, and 4.5% from ethnic minority backgrounds”). The United Kingdom contains a lower percentage than the United States. See RUSSELL WHEELER, THE CHANGING FACE OF THE FEDERAL JUDICIARY, https://www.brookings.edu/wp-content/uploads/2016/06/08_federal_judiciary_wheeler.pdf [https://perma.cc/2YWG-28NG].

11. The commentary on this point is voluminous. For representative news coverage on this debate, see John Schwartz, *For Obama, a Record on Diversity but Delays on Judicial Confirmations*, N.Y. TIMES, Aug. 6, 2011, at A17, <http://www.nytimes.com/2011/08/07/us/politics/07courts.html> [https://perma.cc/WL73-6Q6A] (“[Obama’s] administration has placed a higher percentage of ethnic minorities among his nominees into federal judgeships than any other president.”).

12. WHEELER, *supra* note 10, at 1.

13. *Diversity on the Bench: Asian American Judges on the Federal Courts*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nDsearch?race=Asian+American> [https://perma.cc/YUF5-93E2] (last visited Feb. 25, 2017) [hereinafter *Diversity on the Bench*] (as of February 2017, there are thirty-seven Asian American judges serving on the federal courts).

14. Michael Kiefer, *First Native American Woman Confirmed as Federal Judge*, USA TODAY (May 16, 2014, 1:06 AM), <http://www.usatoday.com/story/news/nation/2014/05/16/first-native-american-woman-confirmed-as-federal-judge-9160947/> [https://perma.cc/7X7Q-TPG3].

attended either Harvard or Yale Law Schools.¹⁵ There is also good reason to think that this trend extends to minority and female judges as well. Indeed, at the time of James Parsons' appointment, African Americans were unable to attend many top law schools and women were only starting to break into the ranks at elite universities such as Yale and Harvard; neither group was welcome at top law firms or by judges looking to hire law clerks. Today, although the playing field is by no means equal, African Americans, Latino/as, and women have significantly greater opportunities than they did when they first started entering the judiciary in the 1960s and 1970s. This raises several important questions. First, how have the characteristics of these judges changed over time from the era of James Parsons through today? Second, how might these changes alter the ideological make-up of the judiciary?

In this Article, I address these issues empirically through the use of quantitative data on the United States District Courts, which are drawn from the federal government's Federal Judicial Center. First, I evaluate the professional backgrounds and education of district court judges since 1960. I show that the backgrounds of the early female and minority judges (those appointed in the 60s and 70s) differ in systematic and important ways, with women and minorities being less likely to come from private practice and more likely to come from academia and from government positions. However, these characteristics have shifted over time and through presidential administrations. Since the 1990s, female, Hispanic, and African-American judges have come to more closely resemble "traditional" white, male judicial candidates in terms of attending elite law schools and having previous experience within the judiciary.

Second, I also investigate the political ideology of these judges over time, from Presidents Ronald Reagan to Barack Obama. This investigation reveals a different pattern, which is that female and minority judges tend to not only be more liberal than their white, male counterparts (even when appointed by the same president), but that this ideological gap has remained fairly sizeable over time and extends even to more recent Obama appointments. As others have noted, ideology translates meaningfully into how judges vote on cases before the courts, particularly on important, policy-salient cases.¹⁶ For this reason, this investigation suggests that, even though female and minority judges

15. See SUP. CT. HIST. SOC'Y, <http://supremecourthistory.org/history-of-the-court/> [https://perma.cc/Y3HM-XRLH] (last visited Mar. 10, 2017).

16. See, e.g., LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); CASS SUNSTEIN ET AL., *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006).

have, over time, come to more closely resemble white, male judges in terms of their professional and educational profiles, they nonetheless bring a different, more progressive ideological perspective. Thus, we have strong reasons to think that female and minority judges make important contributions to descriptive *and* substantive representation, although the normative implications of their substantive representation still remain to be explored.

This Article proceeds as follows. Part I explores the possible substantive and descriptive benefits of having a diverse, nationally representative judiciary, laying the theoretical groundwork for the empirical inquiry. Part II provides a discussion of the data, which come from the Federal Judicial Center, and the key summary statistics. These involve a comparison and discussion of judges' (1) professional experience, (2) educational backgrounds, and (3) political ideologies. Part III discusses the implications of the findings for descriptive and substantive representation. Part IV concludes with thoughts on future research.

I. THE IMPORTANCE OF DIVERSIFIED COURTS

Diversity on the United States courts is a relatively new phenomenon. The first African American to the federal bench, William Henry Hastie, was appointed in 1950,¹⁷ but it was not until 1961 that the second African American, James Parsons, was named.¹⁸ By comparison, the first woman, Florence Ellinwood Allen, was appointed in 1934, and it was not until 1949 that the second woman, Burnita Shelton Matthews, was appointed.¹⁹ The first Mexican-American judge was appointed in 1961, but no Puerto Rican or Cuban-American judges were appointed until 1979 and 1992, respectively.²⁰ Thinking about intersectional identities, it was not until 1966 that any women of color

17. *Judge William Hastie*, *supra* note 5.

18. Thornton, *supra* note 2.

19. Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 *FORDHAM L. REV.* 281, 283–84 (1995).

20. Dennis McLellan, *Reynaldo Garza, 89; First Latino Named a U.S. District Judge*, *L.A. TIMES* (Sept. 17, 2004), <http://articles.latimes.com/2004/sep/17/local/me-garza17> [<https://perma.cc/T74J-97WA>]; *Biographical Directory of Federal Judges: Cabranes, Jose Alberto*, *FED. JUD. CTR.*,

<http://www.fjc.gov/servlet/nGetInfo?jid=344&cid=999&ctype=na&instat=na> [<https://perma.cc/G89P-HUPV>] (last visited Feb. 25, 2017); *Biographical Directory of Federal Judges: Robreno, Eduardo C.*, *FED. JUD. CTR.*, <http://www.fjc.gov/servlet/nGetInfo?jid=2033&cid=999&ctype=na&instat=na> [<https://perma.cc/P5FZ-D7G5>] (last visited Feb. 25, 2017).

was appointed—the first being Constance Baker Motley.²¹ Even today, the federal judiciary has only a handful of Asian-American or Pacific-Islander judges²² and only one Native-American judge (as of 2017).²³

The movement toward bringing in more female and minority judges only established itself with President Jimmy Carter, who had the explicit goal of making the judiciary more reflective of the population as a whole.²⁴ Thus began a great experiment in remixing of the federal judiciary. The introduction of female and African-American judges and of other judges of nontraditional backgrounds happened quickly. According to Nancy Scherer,

Where fellow Democrat Johnson appointed only two blacks (5 percent of all Johnson appellate court appointments) and one woman (2.5 percent) to the courts of appeals and five blacks (4.1 percent of all Johnson district court appointments) and two women (1.6 percent) to the district courts, Carter appointed nine blacks (16.1 percent of all Carter appellate court appointments) and eleven women (19.6 percent) to the courts of appeals and twenty-eight blacks (13.9 percent of all Carter district court appointments) and twenty-nine women (14.4 percent) to the district courts.²⁵

Thus, the proportion of African Americans and women serving on the federal courts nearly tripled in the course of just one administration. As Ruth Bader Ginsburg later commented, “Although this number may not seem large to us today, in its time it was unprecedented—a startling change from the way things were”²⁶ and that “[o]nce President Carter

21. *Constance Baker Motley Papers, 1948-1988: Biographical Note*, FIVE C. ARCHIVES & MANUSCRIPT COLLECTIONS, http://asteria.fivecolleges.edu/findaids/sophiasmith/mnsss51_bioghist.html [https://perma.cc/983Y-S95F] (last visited Mar. 10, 2017).

22. *Diversity on the Bench*, *supra* note 13; *Diversity on the Bench: Pacific Islander Judges on the Federal Courts*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nDsearch?race=Pacific+Islander> [https://perma.cc/RW4B-MJHL] (last visited Feb. 25, 2017).

23. Diane Humetewa, a member of the Hopi tribe, was appointed to the District of Arizona by Barack Obama in 2014. Kiefer, *supra* note 14.

24. See NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVITIES, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 76–77 (2005); 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, 1141 (2003); Ginsburg & Brill, *supra* note 19, at 287; Sheldon Goldman, *Carter’s Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344 (1981).

25. SCHERER, *supra* note 24, at 80.

26. Ginsburg & Brill, *supra* note 19, at 287.

opened the federal judiciary to all who were qualified, there was no turning back.”²⁷

What reasons did the Carter Administration have for promoting diversity? Existing scholarship draws the distinction between at least two theories developing the importance of diverse representation: *descriptive representation* and *substantive representation*.²⁸ The more straightforward of the two is descriptive representation, or the idea that having the courts resemble the greater population is by itself normatively desirable.²⁹ Descriptive representation builds on the idea that the importance of having a diverse bench does not necessarily come from the fact that women and minorities behave differently once appointed (although evidence of this exists); to the contrary, their importance attaches with the mere fact that they are *present*, as this lends the courts a stronger sense of legitimacy and authority.³⁰ For example, Nancy Scherer and Brett Curry have found that those from minority groups attach more importance and greater legitimacy to court opinions when they know that the courts are comprised of a diverse, more reflective population.³¹ Empirical evidence for this extends to other bodies of government—for example, Congress³² and state and local governments.³³

27. *Id.*

28. *See generally* SAMUEL KRISLOV, REPRESENTATIVE BUREAUCRACY (1974); HANNAH F. PITKIN, THE CONCEPT OF REPRESENTATION (1967); Jane Mansbridge, *Should Blacks Represent Women? A Contingent “Yes,”* 61 J. POL. 628 (1999); Nancy Scherer & Brett Curry, *Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts,* 72 J. POL. 90 (2010).

29. *See* KRISLOV, *supra* note 28; PITKIN, *supra* note 28; Mansbridge, *supra* note 28, at 629.

30. For additional discussion, see, for example, Mansbridge, *supra* note 28, at 651 (“This feeling of inclusion in turn makes the polity democratically more legitimate in one’s eyes.”).

31. Scherer & Curry, *supra* note 28, at 101.

32. The literature on this point is robust. *See, e.g.,* WILLIAM T. BIANCO, TRUST: REPRESENTATIVES AND CONSTITUENTS 149 (1994) (arguing that constituents want representatives who match their own characteristics, such as race or religion). *But see* Claudine Gay, *Spirals of Trust?: The Effect of Descriptive Representation on the Relationship Between Citizens and Their Government,* 46 AM. J. POL. SCI. 717, 721–29 (2002) (arguing that African Americans and whites value descriptive representation differently, that whites are more likely to seek out their representatives and make contact, and that African Americans feel equally well represented by both African-American and white representatives).

33. Frank D. Gilliam Jr., *Exploring Minority Empowerment: Symbolic Politics, Governing Coalitions, and Traces of Political Style in Los Angeles,* 40 AM. J. POL. SCI. 56, 63–76 (1996) (finding that individual opinion of a minority governing coalition depends on how much one cares about minority empowerment and also whether one is a part of the controlling minority group); *see* Lawrence Bobo & Frank D. Gilliam Jr., *Race, Sociopolitical Participation, and Black Empowerment,* 84 AM.

There is evidence that simply trying to make the judiciary more reflective of American population was a key factor behind the Carter Administration's push toward increasing the numbers of women and people of color in the federal courts.³⁴ As summarized by Attorney General Griffin Bell, the Carter Administration held the position that

[t]he governing institutions of a democracy should reflect the spectrum of interests of the governed and this is done by dispersing the power to govern among representatives of diverse groups. In short, it is assumed that a national judiciary should resemble its national demographic constituency. Therefore, large groups which have been denied extensive representation in government should now be given a greater degree of representation.³⁵

On the other hand, justifying the push toward diversity on these grounds led to significant opposition, including criticisms from some Republicans and Southern Democrats who felt the Carter Administration's attempts to diversify the federal bench were nothing more than thinly disguised "quotas." Senator Harry Byrd, a Democrat from Virginia, said about an African-American United States district court nominee, "I can't imagine anything worse for the American people than to have a quota system for federal judges."³⁶

Others have criticized administrations that have appointed women and minorities without considering the need for diversity of viewpoints and opinions.³⁷ In this regard, a second approach to diversity's benefits is that descriptive representation can and should have the effect of bringing in individuals who have different attitudes, experiences, and political beliefs. That is, descriptive representation can, and should,

POL. SCI. REV. 377, 380–89 (1990) (finding that African Americans in areas with "high empowerment," i.e. with an African-American mayor, are more active politically).

34. See SCHERER, *supra* note 24, at 77 ("The Carter administration justified its diversity strategy on both normative grounds . . . to achieve descriptive *and* substantive representation of the nation's diverse demographic groups on the federal bench.").

35. *Id.* at 77–78.

36. Stephen J. Lynton, *Carter's Choice of Black Judge Angers Byrd; Carter Names Black Va. Judge Over Opposition of Sen. Byrd*, WASH. POST, Apr. 10, 1980, at A1; see also Ben A. Franklin, N.Y. TIMES, Apr. 11, 1980, at A10. I discuss these sorts of critiques in greater depth below, *infra* note 39 and accompanying text.

37. See, e.g., Jennifer Segal Diascro & Rorie Spill Solberg, *George W. Bush's Legacy on the Federal Bench: Policy in the Face of Diversity*, 92 JUDICAURE 289, 300–01 (2009) (critiquing the George W. Bush Administration as "less auspicious than first meets the eye. While he valued diversity and considered it—seriously, at times—Bush's legacy is more accurately described as one that emphasized ideological and policy considerations").

result in *substantive* representation.³⁸ Those who earn a seat at the table can share and represent the political, legal, moral, and popular interests of African Americans, women, Asian Americans, and Latinos that might not otherwise be heard.³⁹ Justice Sotomayor perhaps made the most famous statement on this topic when she said in a speech predating her days on the Court that she “would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life”⁴⁰

Even though she retreated from this claim later on,⁴¹ many empirical studies over the years have suggested that Justice Sotomayor was partially correct: research shows that minorities and women on average vote differently than whites or males who are comparable in terms of legal philosophy, partisanship, and professional background. For example, looking at African-American judges, the relevant literature shows that African-American judges vote differently than comparable white judges on issues related to civil rights—including voting on affirmative action cases, cases involving the Voting Rights Act, and also instances involving criminal defendants. For example,

38. See KRISLOV, *supra* note 28, at 71–72, 81.

39. SCHERER, *supra* note 24, at 74–75; see also Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390 (2010); Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 167–68 (2013). Of course, descriptive representation is not a prerequisite to, or a necessarily condition of, substantive representation: the interests of women, African Americans, and other racial and ethnic minorities can actually be represented by people not from those groups. Within the courts, a recent example in the context of the “empathy wars” of the 2000s has been of Justice John Paul Stevens, of whom it has been written that

[h]e grew up white, male, heterosexual, Protestant, and wealthy. At no point in time was he a prisoner at Guantanamo Bay or a frightened teenage girl. And yet, over the decades, his rulings and written opinions repeatedly showed us that he could see the world through the eyes of those with very different life experiences from his own.

Dahlia Lithwick & Sonja West, *The Unsung Empathy of Justice Stevens*, SLATE (Apr. 9, 2010, 6:03 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/the_unsung_empathy_of_justice_stevens.single.html#pagebreak_anchor_2 [https://perma.cc/567X-4FZM].

40. Charlie Savage, *A Judge’s View of Judging is on the Record*, N.Y. TIMES, May 14, 2009, at A21.

41. Amy Goldstein et al., *Sotomayor Emphasizes Objectivity, Explains ‘Wise Latina’ Remark*, WASH. POST (July 15, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071400992.html?sid=ST2009071401130> [https://perma.cc/YWL7-HJBL] (“On the second day of her confirmation hearings, [Sotomayor] stressed the primacy of legal precedents and distanced herself from her most controversial public remark, saying her line that a ‘wise Latina’ judge might reach better decisions than a white man was ‘a rhetorical flourish that fell flat.’”).

Jonathan P. Kastlelec finds that African-American judges are more likely to vote in favor of affirmative action plaintiffs,⁴² while Adam B. Cox and Thomas J. Miles find that African-American judges are more likely to find violations of the Voting Rights Act.⁴³ Another body of literature finds similar effects in related areas. For example, Daniel Pinello demonstrates that African-American judges are more likely to side with LGBT plaintiffs,⁴⁴ while Elaine Martin and Barry Pyle find that African-American judges are more likely to rule in a liberal direction in cases that involve discrimination on the basis of gender.⁴⁵ Within the criminal context, a handful of studies have found that African-American and white judges differ in their voting, but mostly do so when civil-rights procedural claims are brought by African-American defendants. For example, Scherer demonstrates that African-American judges are more favorable to African-American defendants' claims of police misconduct,⁴⁶ while Susan Welch, Michael Combs, and John Gruhl and Jon Gottschall find that African-American judges are less likely to mete out punitive sentences to African-American defendants than are white judges.⁴⁷ A parallel literature yields similar findings when comparing female judges to male judges.⁴⁸

42. Kastlelec, *supra* note 39, at 177–79.

43. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, COLUM. L. REV. 1, 30–32 (2008).

44. DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW 28 (2003).

45. Elaine Martin & Barry Pyle, *Gender, Race, and Partisanship on the Michigan Supreme Court*, 63 ALB. L. REV. 1205, 1232–33 (2000).

46. Nancy Scherer, *Blacks on the Bench*, 119 POL. SCI. Q. 655, 659 (2004).

47. Susan Welch et al., *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126, 131–34 (1988); *see also* Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 172 (1983). Note, however, that a handful of studies have found no statistically significant differences in decision making between African-American and white judges in other areas, including in criminal cases. Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 606–08 (1985). *See also* Gottschall, *supra*, at 172.

48. *See* Lisa Baldez et al., *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35 J. LEGAL STUD. 243, 262–68 (2006); Boyd et al., *supra* note 39, at 406; *see also* NANCY E. CROWE, THE EFFECTS OF JUDGES' SEX AND RACE ON JUDICIAL DECISION MAKING ON THE U.S. COURTS OF APPEALS, 1981-1996, at 66–100 (1999); Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 129–33 (1993); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1776–79 (2005); Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 140–42 (2000). Others have, however, found little or no effects associated with a judge's gender. Cox & Miles, *supra* note 43, at 43–44; *see also* Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 275 (1995); Carol T. Kulik et al., *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, 27 L. & HUM.

Importantly, the literature on substantive representation raises the possibility that the influence of female and minority judges extends beyond their own votes. Specifically, several papers have documented the existence of “panel effects,” or the influence that a single judge could have over his or her colleagues.⁴⁹ Such “panel effects” provide yet another tangible substantive benefit stemming from descriptive (or substantive) representation, as it becomes possible for female and minority judges to influence their colleagues directly. This could work in several ways.⁵⁰ First, the votes of women and minorities, or threatened votes, could provide a bargaining chip to change their colleagues’ votes. (This would be particularly true if the female judge operated as the “median judge”—as often was the case for Justice Sandra Day O’Connor.⁵¹) Second, women and minorities could engage in lobbying or discussions in judicial chambers, which could lead male and/or white colleagues to realize different points of view or different positions.⁵² Or, third, simply being present could alert white and/or male colleagues to the possibility and salience of gendered and race-based issues. That is, the very presence of women and minorities may serve to remind their colleagues about the history of discrimination and bias that could present legally salient issues. As Justice Antonin Scalia remarked about his former colleague Justice Thurgood Marshall, “Marshall could be a persuasive force by just sitting there. . . . He wouldn’t have had to open his mouth to affect the nature of the conference and how seriously the conference would take matters of race.”⁵³

BEHAV. 69, 73, 80 (2003); Kenneth L. Manning et al., *Does Age Matter? Judicial Decision Making in Age Discrimination Cases*, 85 SOC. SCI. Q. 1, 15–18 (2004).

49. SUNSTEIN ET AL., *supra* note 16, at 7. See also Boyd et al., *supra* note 39.

50. See Kastlelec, *supra* note 39, at 169–70, for a discussion of the possible mechanisms explaining how African-American judges can influence and persuade their colleagues.

51. Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1276–83 (2005); see also Roger D. Congleton, *The Median Voter Model*, in THE ENCYCLOPEDIA OF PUBLIC CHOICE: VOLUME I 707–10 (Charles K. Rowley & Friedrich Schneider eds., 2003); Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 98 (2008) (arguing that the median justice inherently retains a significant amount of power because other justices tailor their decisions to the median justice’s preferences).

52. On this point, see, for example, Justice Souter’s dissent in *Calderon v. Thompson*: “[A]nyone who has ever sat on a bench with other judges knows that judges are supposed to influence each other, and they do. One may see something the others did not see, and then they all take another look.” 523 U.S. 538, 570 (1988) (Souter, J., dissenting).

53. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 388–89 (1998).

Although the benefits of descriptive and substantive representation are well-known among scholars and policymakers, it would perhaps be naïve to conclude these concerns are the exclusive reason why presidents and other political actors seek to nominate women and minority candidates. No doubt many presidents claim, or have claimed, political credit on the basis of whom they nominate to the nation's high courts.⁵⁴ Thus, a very real and tangible benefit (to politicians, at least) associated with appointing women and racial and ethnic minorities is *political*. For example, in a possible attempt to convince skeptical female voters,⁵⁵ then-Governor Ronald Reagan publicly proclaimed in a campaign press event on October 14, 1980, that “one of the first Supreme Court vacancies in my administration will be filled by the most qualified woman I can find, one who meets the high standards I will demand for all my appointments. It is time for a woman to sit among our highest jurists.”⁵⁶ The nomination of Sandra Day O'Connor was later cited by Reagan as fulfilling that promise.⁵⁷ Other presidents have also named diverse candidates to high courts and have pointed to these appointments when communicating to representative communities. For example, after successfully nominating Justice Sonia Sotomayor, the nation's first Latino/a Justice, in 2009, Barack Obama used her image in 2012 campaign ads targeting Florida Latino/a voters.⁵⁸

54. See SCHERER, *supra* note 24, at 77.

55. Doug Willis, *Reagan Says He'd Seek "Most Qualified Woman" for High Court*, ASSOCIATED PRESS, October 14, 1980 (“Reagan’s announcement that he would appoint the first woman to the Supreme Court was obviously intended to blunt the vociferous opposition of women’s rights groups to his candidacy. At almost every campaign appearance across the country in recent weeks, Reagan has been picketed by women carrying pro-ERA signs.”).

56. *Governor Reagan's News Conference, October 14, 1980*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=85232> [https://perma.cc/M3T9-8ZY5] (last visited Mar. 11, 2017).

57. As Reagan stated during his short speech naming O'Connor:

As the press has accurately pointed out, during my campaign for the Presidency I made a commitment that one of my first appointments to the Supreme Court vacancy would be the most qualified woman that I could possibly find. Now, this is not to say that I would appoint a woman merely to do so. That would not be fair to women nor to future generations of all Americans whose lives are so deeply affected by decisions of the Court. Rather, I pledged to appoint a woman who meets the very high standards that I demand of all court appointees. I have identified such a person.

Remarks Announcing the Intention to Nominate Sandra Day O'Connor to be an Associate Justice of the Supreme Court of the United States, July 7, 1981, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=44042> [https://perma.cc/XF38-W7AT] (last visited Mar. 11, 2017).

58. Peter Wallsten, *Obama Uses Sotomayor in Ads*, WASH. POST: WASH. POL. BLOG (Sept. 14, 2012), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/09/14/obama-hopes-justice-sotomayor-boosts-him-with-key-florida-puerto-rican-voters> [https://perma.cc/G473-VT3Y].

Unknown at this point is whether these references are effective in persuading the public;⁵⁹ however, this has not stopped political actors from trying to frame the issue to their advantage.⁶⁰

II. THE EDUCATIONAL AND PROFESSIONAL CHARACTERISTICS OF DIVERSE (AND NON-DIVERSE) JUDGES

How do female and minority appointments to the federal courts differ from male or white appointments? From the perspective of descriptive representation, the question is of comparatively limited importance: after all, descriptive representation posits that the mere presence of these individuals by itself brings significant benefits. The issue is, however, more important for substantive representation. Substantive representation infers that women and minorities bring with them different experiences rooted in their identity; hence, they will have different viewpoints. If female and minority judges have very similar professional and educational background to male or white judges, would they still have different legal or policy preferences?

In investigating this question, noting how differences in professional and educational opportunities have shifted, and perhaps narrowed, over time becomes important. The early Carter female and African-American nominees broke many barriers as they entered the courts, but they faced a number of substantial challenges. Indeed, systemic differences in opportunity meant that racial and ethnic minorities and women were denied the educational, professional, and political opportunities afforded to white male judicial candidates. For example, many early African-American judges were barred by Jim Crow segregation from attending many top law schools throughout the South.⁶¹ For women, the situation was also severe: even though fewer

59. See Scherer & Curry, *supra* note 28, at 101 (finding that presenting African Americans with a hypothetical judiciary that has an increased African American presence has the effect of increasing African Americans' sense of perceived judicial legitimacy).

60. See *id.* at 97–101 (discussing how diversity affects the public's view of the courts' legitimacy).

61. This list includes the University of Texas (desegregated in 1950 after *Sweatt v. Painter*, 339 U.S. 629, 636 (1950)), the University of Virginia (desegregated in 1950), the University of Mississippi (desegregated in 1963 after *Meredith v. Fair*, 306 F.2d 374, 386–87 (5th Cir. 1962)), the University of Alabama (desegregated in 1963 after *Lucy v. Adams*, 350 U.S. 1, 2 (1955)), the University of Louisiana (desegregated in 1954 after *Constantine v. SLI*, 120 F. Supp. 417, 421 (D. La. 1954)). The list also includes the University of Maryland, which was Baltimore-native Thurgood Marshall's dream school. He attended Howard Law School instead. See Williams, *supra* note 53, at 52. However, Marshall did go on to successfully challenge the University of Maryland's segregation policies as NAACP Legal Defense Fund counsel in *Pearson v. Maryland*, 182 A. 590 (1936).

schools formally barred their entrance,⁶² many law schools at the time made life unpleasant for female law students, thereby setting up *de facto* barriers to equal educational and professional opportunities. Of her experience at Harvard Law School in the 1950s, Justice Ruth Bader Ginsburg commented that the few women in attendance were divided into

four sections, so that meant most of us were in a room with just one other woman. If we were called on, we worried that if we failed, if we didn't give the right answer, we would be failing not just for ourselves, but for all women. It is somewhat similar to people saying, when a car takes a wrong turn, 'What would you expect? It's a woman driver.'⁶³

Women and racial and ethnic minorities were also at times effectively barred from judicial clerkships and jobs at top law firms and government agencies—which, as I discuss in greater depth below, are steps that many judges have taken. To take one instance, after graduating at the top of her class from Columbia Law School, Justice Ginsburg was recommended by Columbia's dean for a clerkship with Justice Felix Frankfurter; Frankfurter demurred and inquired whether the dean had any qualified men that he could recommend instead.⁶⁴ In law firms, too, African-American and female law students—even those graduating at the top of their classes—struggled to get jobs, with overt discrimination being a significant factor. In 1963, for example, the *Harvard Law Record* fielded a survey to 430 top law firms about those characteristics in new attorneys that they would find desirable.⁶⁵ According to the results,

62. Yale Law School began admitting women in 1918, Columbia in 1926, and Harvard in 1950. LINDA EISENMANN, HISTORICAL DICTIONARY OF WOMEN'S EDUCATION IN THE UNITED STATES 244 (1998).

63. *Interview: Ruth Bader Ginsburg, Justice of the U.S. Supreme Court*, ACAD. ACHIEVEMENT, <http://prodloadbalancer-1055872027.us-east-1.elb.amazonaws.com/autodoc/printmember/gin0int-1> [https://perma.cc/U89D-95GY] (last updated Nov. 11, 2013).

64. Justice Ginsburg would later reveal that

Justice Frankfurter, like his colleagues, was just not prepared to hire a woman. Now these were pre-Title VII days, so there was nothing unlawful about discriminating against women. And gentlemen of a certain age at that time felt that they would be discomfited by a woman in chambers, that they might have to watch what they say, they might have to censor their speech. It was surprising that Frankfurter had that typical—in those days—reaction, because he was the first justice to hire an African American as a law clerk some years before. But as I said, like many other federal judges of the time, he just wasn't prepared to hire a woman.

Id.

65. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 83 (1981).

[w]omen, blacks, and Jews, and those candidates with rural backgrounds or fathers in blue-collar occupations, all were considered undesirable by law firms of varied sizes in all parts of the country. The survey confirmed the common knowledge that most firms were prejudiced against candidates whose backgrounds were considered of low status in American society. . . . [And] of all the “deviant” statuses, females drew the most negative rating⁶⁶

Thus, even if they were lucky enough to attend the same schools as white men, the in-classroom experience of “deviant” women and minorities was markedly different, as were the professional and networking opportunities made available to them following graduation.

An important point here is that these systematic denials in opportunity then created a historical perception that finding “qualified” women and minority candidates to the courts was (and perhaps continues to be) extremely difficult—a kind of self-fulfilling prophecy that fueled opposition to attempts to diversify the courts. In summarizing this view with regard to female candidates, Stephen Choi, Mitu Gulati, Mirya Holman, and Eric Posner note that this reasoning

suggests that the pool of stellar female candidates for the judiciary is smaller than the pool of stellar male candidates, which provides ammunition for the conservative argument that President Obama’s choice of Sotomayor, or another female justice, involves affirmative action in favor of women. If female judges are chosen on the basis of sex rather than ability, they must be less talented than male judges, the theory goes. If they were just as good, it would not be necessary to put a thumb on the scale in their favor when evaluating judicial candidates.⁶⁷

There is also evidence that this reasoning affected how government officials approached early nominations. For example, despite being sympathetic to the appointment of women and minorities, Carter’s attorney general Griffin Bell “insist[ed] that there are not many minority members and women to choose from because they make up only a small percentage of the total number of lawyers”⁶⁸ and that “a

66. *Id.* (emphasis omitted).

67. Stephen Choi et al., *Do Women Make Better Judges?*, SLATE (Oct. 2, 2009, 10:15 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2009/10/do_women_make_better_judges.html [https://perma.cc/456S-Z24X].

68. Clark, *supra* note 24, at 1138 n.28.

great number of white female lawyers have been in practice less than eight years, so they are not regarded as qualified for the bench.”⁶⁹

III. ANALYSIS OF PROFESSIONAL, EDUCATIONAL, AND IDEOLOGICAL CHARACTERISTICS OF UNITED STATES DISTRICT JUDGES OVER TIME

The previous discussion centered on the roadblocks that could explain professional and educational differences between female and minority judges and those who are male or white. But do these differences exist? And if so, how have they changed over time?

I address this by looking at judges confirmed to the United States district courts. Federal courts make for a particularly appropriate study of these questions for several reasons. First, appointments to the federal courts are well documented, meaning that we have a wealth of quantitative data. Second, the federal courts are free of some of the idiosyncrasies of the states’ court systems, including possible differences between systems that rely on the elections of judges and those that rely on executive or legislative appointments. Thus, to the extent that we see patterns arise with regard to gender, race, or ethnicity, it may be both most important and most straightforward to detect them in the federal courts.

Within the federal courts, I choose the United States district courts as my main empirical focus. I do so primarily because the size and number of these courts makes it more straightforward to detect differences in professional and educational backgrounds and ideology. Indeed, with 94 currently operating courts, more judges (678)⁷⁰ sit on the United States district courts than on the United States appeals courts (179)⁷¹ and the United States Supreme Court (9 Justices) combined.

A. Data Sources

To address the relationships between gender, diversity, and background characteristics, I gathered data on the personal and professional characteristics of federal judges appointed to the United States district courts, starting on January 1, 1960 and ending the last day of Barack Obama’s term, January 19, 2017. (As noted, the first African-American nominee to a United States district court was named

69. *Id.*

70. *How the Federal Courts are Organized: Federal Judges and How they Get Appointed*, FED. JUD. CTR., <http://www.fjc.gov/federal/courts.nsf/autoframe?openagent&nav=menu3c&page=/federal/courts.nsf/page/A783011AF949B6BF85256B35004AD214?opendocument> [https://perma.cc/44A8-CJRS] (last visited Mar. 11, 2017).

71. *Id.*

in 1961;⁷² thus, there is no support for cross-race, and little support for cross-gender, comparisons before 1960.) For this data, I relied on the judges' official federal biographies, which are collected and reported by the Federal Judicial Center (FJC).⁷³ The FJC also reports a wealth of information on every federal court judge, including demographic data (such as age, race, gender), American Bar Association qualification ratings, and information pertaining to education and legal training (such as the law school attended and clerkship experience).⁷⁴ The FJC also provides a few sentences detailing each judge's professional experiences.

To convert these FJC biographies into quantitative data, I used automated content analysis to code for each judge whether he or she had ever served as (1) a law clerk to another judge, (2) a United States or assistant United States attorney, (3) a public defender, (4) a solicitor general, deputy solicitor general, or assistant solicitor general, (5) any other kind of government lawyer, or (6) a law professor or law school dean.⁷⁵ I also coded each judge's gender, race or ethnicity,⁷⁶ age, and law school attended. This rendered a collection of quantitative information on each federal judge that is fairly comprehensive across previous educational, professional, and judicial experience.

B. Appointments by Presidential Administration

I begin by examining how the patterns of diversity vary across presidential administration, from Lyndon Johnson to Barack Obama.⁷⁷ The basic summary of the appointments is presented in Table 1, which

72. See Thornton, *supra* note 2.

73. *History of the Federal Judiciary: Biographical Directory of Federal Judges, 1979-present*, FED. JUD. CTR. [hereinafter *History of the Federal Judiciary*], <http://www.fjc.gov/history/home.nsf/page/judges.html> [<https://perma.cc/C8QR-3LPV>] (last visited Mar. 11, 2017).

74. See generally *id.*

75. This data was coded and analyzed using the R statistical software language.

76. The Federal Judicial Center (FJC) considers "Hispanic" to be an exclusive categorization. Where is this data? Thus, the comparison groups are non-Hispanic whites, non-Hispanic African Americans, and Hispanics of any racial self-identification. There are too few Asian Americans, Native Americans, or Native Hawaiian or Pacific Islanders to make any meaningful intra-group distinctions, and they are omitted from the table. See *History of the Federal Judiciary*, *supra* note 73.

77. Thus, this analysis includes nine administrations: Lyndon Johnson, Richard Nixon, Gerald Ford, Jimmy Carter, Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama. Of these, Ford and Bush served only one term in office, while Richard Nixon served just shy of a term and a half (1969–1974, when he resigned from office). The number of appointments these men made thus varies accordingly, with Ford and H.W. Bush making comparatively fewer appointments than those Presidents serving two terms. *Id.*

shows the number of district court appointments made during each administration, as well as the share of these appointments that were (1) “White,” (2) “African American,” (3) “Hispanic,”⁷⁸ and (4) Female.

Table 1: Racial/ethnic and gender distribution of judicial nominees by President (through Barack Obama)⁷⁹

President	White Men	African Americans	Hispanics	Women	<i>N</i>
Barack Obama	68.8%	20.7%	10.5%	41.2%	260
George W. Bush	82.8%	6.9%	10.3%	20.3%	266
William J. Clinton	75.1%	18.1%	6.9%	30.1%	329
George H.W. Bush	88.8%	6.8%	4.3%	20.5%	161
Ronald Reagan	93.2%	2.1%	4.8%	10.4%	338
Jimmy Carter	78.9%	13.9%	7.2%	15%	213
Gerald Ford	89.7%	6.9%	3.4%	1.7%	59
Richard M. Nixon	94.7%	4.1%	1.2%	0.6%	171
Lyndon B. Johnson	92%	6%	2%	2%	100

The Table clarifies several important patterns. First, the share of district judges who are female or who come from diverse backgrounds fluctuates over time and through presidential administrations. For example, 92% of Lyndon Johnson’s district court appointments were white men; by the time of Barack Obama’s appointments, this number fell to 68%—a substantial change. Although not at parity in terms of population shares, this does speak to sustained, and successful, attempts by political actors to introduce diversity into the federal courts.

Second, not only do these patterns suggest an increase in diversity overall, but they also suggest that the party of the appointing president (and, by extension, ideology) plays an important role in the nature of judicial appointments. For example, 30% of Barack Obama’s district court appointments have been non-white; by contrast, 18% of George W. Bush’s were. The pattern is similar for women: 40% of Barack Obama’s district court appointments were women; by contrast 21% of George W. Bush’s were. Overall, Democratic presidents are more

78. Race or ethnicity is reported by the Federal Judicial Center as six mutually exclusive categories: “African American,” “American Indian,” “Asian American,” “Hispanic,” “Pacific Islander,” and “White.” *Id.* I use the FJC’s reporting throughout, although for sake of efficiency, I present analyses pertaining only to “African American,” “Hispanic,” and “White.”

79. I obtained this data from the Federal Judicial Center. *See generally History of the Federal Judiciary*, *supra* note 73.

likely to appoint women and minorities to the United States district courts than are Republican presidents.

Why might this be the case? As many observers have noted, a majority of African Americans in the general population lean toward the Democratic Party;⁸⁰ the same is true for Latinos⁸¹ and—to a lesser extent—for women.⁸² This could mean that Republican presidents have fewer diverse candidates from which to draw when considering their judicial appointments. Another explanation could potentially be partisan interests, with Democratic presidents being more sensitive to core constituent groups and, perhaps more simply, being more progressive on race and gender concerns. Any of these pathways could help explain the patterns we see in Table 1.

C. Professional Characteristics and Variation Over Time

I now turn to examining the professional characteristics of these judges and how their backgrounds have changed over time, starting from the 1960s and moving forward. As noted above, many opportunities were closed to women and minorities through the 1960s and, indeed, many remained closed (or have remained closed) well after. We would expect that female and minority judges thus have, *on average*, different professional profiles than do male or white judges—and particularly so for judges who were appointed earlier in this time frame. However, the professional opportunities available to women and to minorities have shifted—starting around (roughly) the 1960s when the post-World War II “Baby Boomer” generation entered colleges and universities. Starting with the Civil Rights Act of 1964 and the end of segregation across elite public universities and law schools,⁸³ more and more women and minorities started attending elite law schools. In addition, with the Supreme Court’s upholding of affirmative action in *Regents of University of California v. Bakke*,⁸⁴ and with the slow opening of doors to women and minorities into elite law firms, female and minority lawyers began to benefit from increased professional and educational opportunities.⁸⁵ We would therefore expect to see more and

80. See, e.g., Samantha Smith, *A Deep Dive Into Party Affiliation: Sharp Differences by Race, Gender, Generation, Education*, PEW RES. CTR. (Apr. 7, 2015), <http://www.people-press.org/2015/04/07/a-deep-dive-into-party-affiliation/> [<https://perma.cc/2K5X-JGA5>].

81. *Id.*

82. *Id.*

83. See *supra* note 61 and accompanying text.

84. 438 U.S. 265 (1978).

85. Although there has been positive movement on these issues, it is important to note that progress has not been swift and that women and minorities are still underrepresented in American law firms. See, e.g., David B. Wilkins & G. Mitu

more women and minorities coming from private practice and having some sort of judicial experience—for example, as a magistrate judge. In other words, we would expect that, as women and minorities have opportunities that are more similar to those historically enjoyed by white men, the gap in professional backgrounds between these groups would narrow.

In order to investigate these patterns, I examine the professional characteristics of the men and women who have been appointed to the district courts from Lyndon Johnson to Barack Obama.⁸⁶ I divide the sample into two groups: pre-Clinton judges (district judges appointed from 1960 to 1992) and post-Clinton judges (judges appointed from 1992 moving forward). This is a dichotomous distinction aimed at capturing the differences in educational and professional opportunities enjoyed by the two groups. Specifically, the pre-Clinton group would capture pre-Baby Boomer judges, including women and minorities who entered higher education and the professional working force at a time when opportunities for these women and for minorities (particularly African Americans) were more limited. By contrast, the post-Clinton group would capture Baby Boomer judges and younger. For minority judges, this would mean those who attended law school after the enactment of the Civil Rights Act in 1964 and during the early years of affirmative action. For women, this would mean those who were able to benefit from increased opportunities to attend elite law schools and seek out top clerkships. Important to note is that the opportunities for women and for minorities did not equalize suddenly and, even today, may by no means be equal. For example, as noted above, Ruth Bader Ginsburg, a Clinton nominee, was only one of a handful of women in her class at Harvard Law School (before she transferred to Columbia), and she was famously unable to secure a prestigious clerkship due to her gender. Even so, delineating a boundary between pre- and post-Baby Boomers (proxied by pre- and post-Clinton appointments) is useful.

Gulati, *Why Are There So Few Black Lawyers at Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996); Paula Patton, *Women Lawyers, Their Status, Influence, and Retention in the Legal Profession*, 11 WM. & MARY J. WOMEN & L. 173 (2005).

86. This data comes from the Federal Judicial Center and is explained in Table 2 below. See generally *History of the Federal Judiciary*, *supra* note 73.

Table 2: Demographics of U.S. District Court nominees named from 1960-1992 (Pre-Clinton) and from 1993-2016 (Post-Clinton)⁸⁷

	White Men Pre-Clinton	White Men Post-Clinton	Blacks Pre-Clinton	Blacks Post-Clinton	Latinos Pre-Clinton	Latinos Post-Clinton	Women Pre-Clinton	Women Post-Clinton
Avg Age at Investiture	49.9	52.1	48.0	48.8	46.4	48.4	45.5	49.1
Female	-	-	16.9	32.8	13.3	33.8	100	100
Top Three Law School	13.7%	13.8%	13.8%	19.2%	11.1%	12.2%	16.2%	13.1%
Law Clerk	13.4%	35.7%	6.2%	26.4%	11.1%	18.9%	36.2%	39.2%
Law Professor	5.2%	4.8%	16.9%	7.2%	8.9%	2.7%	7.6%	6.5%
Private Practice	97.2%	92.5%	75.4%	76.8%	91.1%	75.7%	78.1%	84.6%
U.S. Attorney	10.7%	6.3%	3.1%	4%	11.1%	2.7%	4.8%	6.2%
Justice Department Lawyer	4.7%	7.7%	10.8%	8%	4.4%	8.1%	9.5%	6.5%
Public Defender	1.1%	7.5%	3.1%	17.6%	8.9%	20.3%	1.9%	7.7%
U.S. Magistrate	4.0%	11.3%	1.5%	12.8%	4.4%	18.9%	8.6%	21.5%
State Judge	37.5%	33.5%	58.5%	50.4%	48.9%	52.7%	47.6%	38.5%
Years of Practice	17.3	18.5	11.0	10.4	12.8	12.5	9.1	12.5
<i>N</i>	917	442	65	125	45	74	105	260

This analysis is presented in Table 2, which examines the professional characteristics of district court appointments across (1) racial and ethnic groups, (2) gender, and (3) pre- and post-Clinton judges. Setting aside the issue of trends, the data roughly suggest two “types” of United States district court candidates.⁸⁸ One is a “more traditional” kind of judicial nominee: a graduate of a top law school and a former law clerk, with experience in private practice and, possibly, some experience as a federal prosecutor. The other is a “less traditional” kind of judicial nominee: a former government lawyer

87. I obtained this data from the Federal Judicial Center. *See generally id.*

88. Note that candidates to the United States district courts might differ systematically from the kinds of nominees named to the United States courts of appeals.

(such as public defender) or academic without clerkship or private practice experience.

In the pre-Clinton period, women and minorities were more likely to come from this latter nontraditional profile. Whereas 97.2% of white male appointees in the pre-Clinton period came from private practice, just 75.4% of African Americans and 78.1% of women did—perhaps a testament to the fact that the doors of big law firms were closed for much of the 20th century to members of these groups. In addition, 10.7% of white males were former United States Attorneys, some of the more prestigious government positions. By contrast, only 3.1% of African American and 4.8% of women held this position (although 11.1% of Hispanics did). (By contrast, African Americans and women are more likely to have reported some sort of employment at the Department of Justice than white males—10.8% and 9.5%, respectively, compared to white males' 4.7%.) Clerkship experience suggests more variation. In the pre-Clinton period, 13.4% of white men came to the bench with clerkship experience pre-Clinton, only 6.2% of African Americans did, but 36.2% of women did. (The large share of women coming to the bench with previous clerkship experience is puzzling and worthy of future study.⁸⁹) Interestingly, one area of discrepancy is state judgeships—that is, whether the judge had ever served on a state court, including on state supreme courts. In the pre-Clinton period, approximately 37.5% of white males had some sort of state court experience; by contrast 58.5% of African-American judges, 48.9% of Hispanic judges, and 47.6% of female judges had this kind of experience. These are large differences suggesting that African Americans, women, and, to a lesser extent, Latinos/as were more likely to secure appointments by having previous judicial experience, government service, and experience in academia; white males were more likely to secure appointments via private practice or elite government service (such as serving as a United States Attorney).

Looking at the Clinton Administration and moving forward, the Table suggests some different patterns—patterns that ultimately point to convergence in certain professional characteristics, particularly between men and women. For example, consider the share of judges coming from private practice. For white males, the share coming from private

89. For example, one possibility is that women assumed less desirable clerkships in lieu of private practice experience, perhaps because they were turned away from corporate law firms. (However, this would not explain the discrepancy between African-American judges and female judges in terms of clerkship experience, as African Americans were also turned away from private firms during this time period.) Perhaps a more likely possibility is that white males held more prestigious clerkships (for example, at the Supreme Court or on the United States courts of appeals) while women held clerkships that more closely resembled administrative positions—keeping in line with cultural expectations of female workforce participation.

practice declined slightly, from 97.2% to 92.5%; for women, the share rose, from 78.1% to 84.6%. Although more men than women still come from private practice, the share of female judges with this kind of background has risen markedly, showing convergence. The same convergence is also true for African-American judges, although the degree of convergence is less.

The same convergence is also true for those who previously served as United States Attorneys. For white males, the share who previously served as United States Attorneys was previously around 10.7%, declining slightly to 6.3%; this is actually comparable to the post-Clinton share for women (6.2%) and also African Americans (4%). In terms of clerkship experience, the share of white male judges having clerkship experience rose from 13.4% pre-Clinton to 35.7% post-Clinton; this rise is mimicked closely by African Americans (the percent of whom previously clerked rose from 6.2% to 26.4%) and Hispanics (6.2% to 26.4%). (For women, the share having clerkships was already high in the pre-Clinton period (36.2%) and remains high in the post-Clinton period (39.2%).) Lastly, for those coming from state judgeships, there is some convergence as well, although the demographics still differ. For white males, the share who served previously as a state judge decreased slightly from 37.5% to 33.5% post-Clinton. This latter figure is closer (though still smaller) than the share of post-Clinton African-American judges (50.4%, down from 58.5%) and women (38.5%, down from 47.6%) who previously served as judges; in addition, with the exception of Latino/a judges, these figures have all moved closer together over time.

D. Educational Characteristics and Variation Over Time

Table 2 illustrates several important points about the professional backgrounds of United States district court judges, suggesting some (though not complete) convergence over time between the characteristics of white male judges and African-American, Hispanic, or female judges. However, a key component in judicial profiles is education. Specifically, many African-American and, to a lesser extent, female, judges were systematically denied opportunities to study at top law schools. This raises an important question: how do these patterns vary by education?

To analyze the educational cleavages both over time and across time, Table 3 presents an analysis similar to the previous analysis, but focused on education. As before, I divide all United States district judges into (1) pre-Clinton and (2) Clinton and moving forward, so as to capture the divide delineated by the rise of the Baby Boomers. The Table also distinguishes between private versus public law schools, which is an important historical distinction as, up until the 1950s, many

African Americans were prevented by racial segregation from attending top law schools—particularly in the South. The table also distinguishes between graduates of the Top 14 law schools, which are the most elite law schools, and graduates of universities outside of the Top 100, which are more likely to be regional or state law schools. Lastly, the Table also highlights the percentage of judges who attended two particularly important law schools: Harvard Law School and Howard Law School. I single out Harvard Law School because it is the modal law school attended by district court judges according to the data; that is, more judges attended Harvard Law School than any other law school. I single out Howard Law School because a large share of African-American judges attended Howard in the pre-Clinton period and because of its towering status in furthering the careers of lawyers involved in the civil rights movement (including its dean Charles Hamilton Houston and future Justice Thurgood Marshall).

Table 3: Educational Profiles of U.S. District Court nominees named from 1960-1992 (Pre-Clinton) and from 1993-2016 (Post-Clinton)⁹⁰

	White Men Pre-Clinton	White Men Post-Clinton	Blacks Pre-Clinton	Blacks Post-Clinton	Latinos Pre-Clinton	Latinos Post-Clinton	Women Pre-Clinton	Women Post-Clinton
Private Law School	47.2%	47.5%	66.2%	63.2%	31.1%	39.2%	53.3%	54.6%
Top 14 Schools	30.3%	29.0%	30.8%	31.2%	17.8%	28.4%	29.5%	30%
Outside Top 100	13.7%	13.8%	13.8%	19.2%	11.1%	12.2%	16.2%	13.1%
Harvard	8.6%	7.7%	4.6%	11.2%	2.2%	5.4%	7.6%	8.1%
Howard	0.1%	-	15.4%	6.4%	-	-	2.9%	1.2%
<i>N</i>	917	442	65	125	45	74	105	260

Table 3 presents these summary statistics. The patterns here are quite striking. First, looking at white male judges, the educational characteristics are consistent over time—a similar share of white male judges have attended schools in the Top 14 before and after Bill Clinton (30.3% to 29%) and schools outside of the Top 100 (13.7% to 13.8%). In addition, a roughly similar percent have attended private law schools

90. I obtained this data from the Federal Judicial Center. *See generally History of the Federal Judiciary, supra* note 73.

(47.2% versus 47.5%) and the modal law school, Harvard Law School (8.6% to 7.7%).

While the temporal patterns for white males have remained fairly constant, other groups have experienced sharp changes. For African-American judges, the single most important pattern is the sharp drop in the percentage of judges who attended Howard Law School—from 15.4% to 6.4%. That so many early African-American judges attended Howard is not surprising: its law school is not only one of the nation's most prestigious historically black law schools, but also the intellectual home of many of the lawyers affiliated with the legal push for civil rights—including Thurgood Marshall and Charles Hamilton Houston. In addition, Howard's location in Washington, D.C., provided a home for many aspiring African-American lawyers barred from attending segregated law schools throughout the southeastern United States. However, the marked drop-off in the Clinton years and moving forward is surprising. As the Table shows, following the Clinton era, a larger share of African-American judges has attended Harvard Law School (11.2%) than Howard Law School (6.4%). The former statistic is one that puts post-Clinton African-American district judges ahead of their white male counterparts (7.7% of whom attended Harvard).

The patterns regarding women are also illuminating, suggesting for the most part that post-Clinton appointments who are female are educationally comparable to male judges. Just as the share of African-American judges being trained at Harvard Law has increased (4.6% to 11.2%), so too has the share of Harvard-trained female judges also risen (albeit more slightly, 7.6% to 8.1%), putting them on par with white males (7.7%). In addition, the share of women being trained at a Top 14 program has risen slightly from 29.5% to 30%, comparable the share of men trained at such programs (29%). Lastly, the share of female judges who have gone to a law school outside of the Top 100 has decreased, from 16.2% to 13.1%. This latter figure now corresponds closely with the share of white male judges who have graduated from a law school outside of the Top 100 (13.8%).⁹¹

E. Ideology and Variation Over Time

The previous analyses have focused on the professional and educational characteristics of judges. However, these analyses leave open a key contributor to the way judges decide cases: ideology. A

91. An interesting statistic is that the share of African-American judges trained at schools outside of the Top 100 schools has actually increased. This may be a function of the fact that several historically black law schools are ranked outside the Top 100. Future research could more closely track this particular pattern. *See supra* Table 3.

number of studies have demonstrated that political ideology is highly predictive of how a judge will decide cases once on the bench.⁹² This extends not just to the justices of the Supreme Court, but also to lower-court appointments. For example, in a sweeping study of the United States courts of appeals, Cass Sunstein and collaborators show that judges who are appointed by Republicans are more likely to vote in a conservative direction than are judges appointed by Democrats, particularly among cases having an important constitutional dimension (such as First Amendment cases).⁹³ Fewer papers have examined district court judges, the judges I investigate here; however, those studies that have looked at district court judges have found similar patterns suggesting that ideology (usually operationalized as partisanship) is predictive of rulings.

One methodological issue is that estimating the ideology of lower-court judges is difficult, owing to the fact that judges do not run for political office or vote as a group on highly politicized bills the way Congressional representatives do. Nonetheless, scholars have found ways to estimate ideology of judges.⁹⁴ In this analysis, I leverage a fine-grained measure of judicial ideology, which was developed by Adam Bonica and Maya Sen (2017) and extensively validated against other measures of lower-court ideology and also to measures that have been widely used for Supreme Court justices.⁹⁵ These “CFscores” rely on campaign finance contributions made by judges and place all judges on a unidimensional ideological scale, from liberal to conservative. (In the

92. EPSTEIN ET AL., *supra* note 16; SEGAL & SPAETH, *supra* note 16; SUNSTEIN ET AL., *supra* note 16.

93. See SUNSTEIN ET AL., *supra* note 16, at 20–21.

94. For example, at the Supreme Court, Martin-Quinn scores—which place the judges on a one-dimensional ideological scale (from liberal to conservative)—have been shown to be highly predictive of voting coalitions on the high court. See Ward Farnsworth, *The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, with Special Attention to the Problem of Ideological Drift*, 101 Nw. U. L. REV. 143, 148 (2007). For the Court of Appeals, many studies examining the influence of ideology on decision making have either looked at the party of the appointing President (for example, as is done in Sunstein et al.) or by using Judicial Common Space (JCS) scores. See SUNSTEIN ET AL., *supra* note 16, at 6. JCS scores operate by assigning the judge the ideology of either the president or, in the event that the president and the home-state Senator(s) are of the same party, an average of the two. See Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 306 (2007).

95. Adam Bonica & Maya Sen, *A Common-Space Scaling of the American Judiciary and Legal Profession* (forthcoming 2017), <http://scholar.harvard.edu/files/msen/files/judges-scaling.pdf> [https://perma.cc/5YRY-RH7E]. For additional examples of the use of these ideology scores, see Adam Bonica et al., *The Political Ideology of American Lawyers*, 8 J. LEGAL ANALYSIS 277, 279 (2016); Adam Bonica et al., *The Political Ideology of Law Clerks*, AM. L. & ECON. REV. (forthcoming Spring 2017); Adam Bonica et al., *Measuring Judicial Ideology Using Law Clerk Hiring*, AM. L. & ECON. REV. (forthcoming Spring 2017).

CFscore scale, most liberal corresponds to -2.0, while most conservative corresponds to 2.0.) To give some context, former President Barack Obama, a center-left politician by American standards, has a CFscore of -1.65, while former Secretary of State (and 2016 Democratic Presidential Nominee) Hillary Clinton has a CFscore of -1.16; Governor Scott Walker (R-WI), a conservative politician, has a CFscore of 1.28 and Senator Ron Paul (R-KY), conservative-libertarian, has a CFscore of 1.57.

Note that, unlike professional experience and educational backgrounds—which tend to be uniformly high for judicial appointments across Republican and Democratic administrations—ideology is a trait that correlates highly with partisanship. For that reason, we would expect, quite unsurprisingly, that judges appointed by Republicans will on average be more conservative in terms of their CFscores than judges appointed by Democrats. For that reason, I present the statistical summary by disaggregating judges not by whether they are pre- or post-Clinton (as above), but simply by individual president. These data are presented in Table 4, which displays the average district judge CFscore by president for (1) white men, (2) African Americans, (3) Hispanics, and (4) women. Again, a more negative number indicates a more liberal ideology, while a more positive number indicates a more conservative ideology.

Table 4 clarifies several important patterns. First, and unsurprisingly, the judges appointed by Republican Presidents (Ronald Reagan, George H.W. Bush, and George W. Bush) are more conservative overall and across all of the demographic characteristics than are judges appointed by Democratic presidents (here, Bill Clinton and Barack Obama). For example, the average CFscore for a George W. Bush district judge who is white and male is around 0.649 (approximately the same CFscore as Governor John Huntsman (R-UT)), while the average CFscore for a white and male judge named by Barack Obama is around -0.559 (approximately the same CFscore as Governor Andrew Cuomo (D-NY)). The differences in average ideology between Republican and Democratic appointments, moreover, appear to be increasing. For example, looking at white male judges, the ideological difference between appointments made by George H.W. Bush and Bill Clinton is approximately 1.049, while the difference between similar (white and male) appointments made by George W. Bush and Barack Obama is around 1.208. This appears to suggest a widening polarization in the federal courts, a topic for future scholars and policymakers to consider.

Second, in terms of the relationship between ideology and diversity, the Table demonstrates that *African American, Latino/a, and female judges are more liberal than white, male judges*. This is the case even conditional on the president who appointed them. Thus, for

example, looking exclusively at Ronald Reagan's appointments, white male judges have an average CFscore of 0.622, while Hispanic judges (average CFscore of 0.513), female judges (CFscore of 0.183), and especially African-American judges (CFscore of -0.039) are all more liberal on average. More recently, white males appointed by George W. Bush have an average CFscore of 0.649, while women (CFscore of 0.275), Hispanics (0.477), and African Americans (0.130) are also more liberal on average. The differences are even apparent among Democratic presidents. Among Obama's appointments, for example, white males have an average CFscore of -0.559, while African Americans (-0.859), Hispanics (-0.761), and women (-0.778) are on average more liberal. Moreover, the differences between these groups are larger in the Obama era compared to the Bush era, but the difference is comparable to the Clinton era. This in turn suggests varying trends that are explained by partisan changes in the White House and not necessarily by secular time trend. In other words, there is little convergence here: women, African-American, and Hispanic judges are on average more liberal than their white male counterparts, and these differences appear to have persisted over time.

Table 4: CFscores (Ideology Scores) of U.S. District Court nominees named from Ronald Reagan through Barack Obama⁹⁶

	White Men	Blacks	Hispanics	Women	Total
Ronald Reagan	0.622	-0.039	0.513	0.183	338
George H.W. Bush	0.554	0.026	-0.086	0.275	161
Clinton	-0.495	-0.769	-0.475	-0.734	329
George W. Bush	0.649	0.130	0.477	0.475	266
Barack Obama	-0.559	-0.859	-0.761	-0.778	260
<i>Total</i>	1,359	190	119	365	2,033

As a final note, an important caveat here is that this analysis does not extend to decision-making, meaning that these differences could simply be ideological and not necessarily predictive of how these judges adjudicate cases. However, given the existing literature on ideology and decision-making (and in tandem with scholarship showing a relationship between descriptive characteristics and decision making), there is good reason to think that these ideological differences extend to, and influence, eventual decision making.

96. I compiled this information from two different sources. See Bonica & Sen, *supra* note 95; *History of the Federal Judiciary*, *supra* note 73.

IV. THE IMPORTANCE OF THESE TRENDS FOR DESCRIPTIVE AND
SUBSTANTIVE REPRESENTATION

I now return to some of the normative questions I posed at the outset. Why might these trends matter? How do they speak to issues of descriptive and substantive representation?

To frame this discussion, the rhetoric surrounding “diverse” nominees is worth considering. For example, a newspaper editorial at the time claimed that the Clinton Administration was “using race as a wedge to pressure Senate Republicans into lowering their standards for these nominees, confirming those who might be unacceptable if they were white.”⁹⁷ Another commentator cautioned about the Obama Administration that “[i]f they’re talking about achieving [diversity] through aggressive identification of minority candidates, then that’s their prerogative. . . . If they’re talking about doing it through preferences, having a lower threshold of qualifications for minorities, then I don’t approve. And it’s hard to know which they’re doing.”⁹⁸ In terms of specific candidates, the nominations of Harriet Miers⁹⁹ and Justices Sonia Sotomayor, Sandra Day O’Connor, and Clarence Thomas¹⁰⁰ were all at some point attacked on the basis that they were

97. Thomas L. Jipping, *The Judiciary in Black and White: Democrats Play Race Card Again*, WASH. TIMES, Oct. 11, 1999, at A19.

98. Philip Rucker, *Obama Pushing to Diversify Federal Judiciary Amid GOP Delays*, WASH. POST (Mar. 3, 2013), https://www.washingtonpost.com/politics/obama-pushing-to-diversify-federal-judiciary-amid-gop-delays/2013/03/03/16f7d206-7aab-11e2-9a75-dab0201670da_story.html?utm_term=.8aca566ae6f2 [<https://perma.cc/8EW6-3RDY>].

99. See, e.g., Emily Bazelon, *Let-Down Lady: Harriet Miers Isn’t Just No John Roberts. She’s No Sandra Day O’Connor.*, SLATE (Oct. 3, 2005, 4:35 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/10/letdown_lady.html [<https://perma.cc/9DD7-Y9ER>] (commenting of Miers: “Can anyone really imagine that she’d be the nominee if she weren’t a woman and the president’s friend and loyal adviser? Cronyism and affirmative action: It’s a nasty mix”); see also Suzanne Fields, *Beware Identity Politics*, ALB. TIMES UNION, October 11, 2005, at A11 (“Can anyone believe that if Harriet Miers was Harry Miers, he would have been nominated?”).

100. See, e.g., Eugene Robinson, *Witness for the Persecution*, WASH. POST (Oct. 2, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/01/AR2007100101332.html> [<https://perma.cc/RQ3V-6XQ5>] (“I believe in affirmative action, but I have to acknowledge there are arguments against it. One of the more cogent is the presence of Justice Clarence Thomas on the U.S. Supreme Court.”); see also Joe Conason, *Sonia Sotomayor Is Not Clarence Thomas*, SALON (May 29, 2009, 5:24 AM), http://www.salon.com/2009/05/29/clarence_thomas_2/ [<https://perma.cc/U6UC-JHMK>] (“Far from being the ‘most qualified,’ Thomas was a nominee with no experience on the bench beyond the 18 months he had served on the U.S. District Court of Appeals. He had never written a significant legal brief or article. He had achieved no distinction in private practice or law enforcement. He had never even argued a case in federal court, let alone at the U.S. Supreme Court. Indeed, his entire career had

less “qualified” than plausible non-minority or male candidates or that they were selected solely because of their race or gender. For example, with regard to Sotomayor, commentators argued that in choosing her, “Obama opted for biography over brain. As a legal mind, Sotomayor is described in portraits as competent, but no Louis Brandeis. Nor is Sotomayor, often described as an abrasive jurist, likely to be the next Earl Warren.”¹⁰¹ Another critic complained that “[i]n picking Sonia Sotomayor, President Obama has confirmed that identity politics matter to him more than merit. While Judge Sotomayor exemplifies the American Dream, she would not have even been on the short list if she were not Hispanic.”¹⁰²

The analyses in this Article challenge these stereotypes in important ways. First, these analyses suggest that female and minority judges have increasingly come from top law schools and increasingly arrive to the federal bench with private practice and law clerk experience comparable to that of their white male colleagues. Although some important gaps still exist in terms of professional and educational backgrounds, there is no question that female and minority judges are coming to the federal bench with increasingly commensurate profiles to their white male colleagues. Thus, to the extent that stereotypes exist regarding the qualifications of female and minority judges being on average inferior to those of male or non-minority judges, they are increasingly without support. There is, in other words, increasingly limited evidence that “identity politics matter . . . more than merit” when it comes to the appointments of female and minority judges.¹⁰³

Second, however, these considerations are intimately tied with the issue of ideology and judicial leanings. As noted above, a possible important objective of increased diversity is for it to translate meaningfully into the sharing and expression of different, complementary, and alternate points of view; these are the attributes

resulted from affirmative action”); Jami Floyd, *Opinion: Justice Thomas’ 20 Years on Bench—Still Unqualified After All These Years*, WNYC (Oct. 24, 2011, 1:00 PM), <http://www.wnyc.org/story/166550-opinion-anita-hill-and-ginnis-politics-aside-clarence-thomas-unqualified/> [https://perma.cc/D3CY-EEXB] (“My feeling at the time of his nomination—before Anita Hill surfaced—was that Clarence Thomas was not qualified for the post, not because of anything Hill alleged, but because Thomas had not yet proven himself a jurisprudential thinker of the caliber required for service on the U.S. Supreme Court.”).

101. Dana Milbank, *But Will She Suit Up With the Washington Nine?*, WASH. POST, May 27, 2009, at A02.

102. Ilya Shapiro, *Commentary: Sotomayor Pick Not Based on Merit*, CNN POLITICS, http://www.cnn.com/2009/POLITICS/05/27/shapiro.scotus.identity/index.html?iref=n_extin [https://perma.cc/5YQZ-W5Y6] (last updated May 27, 2009, 9:18 AM).

103. *Id.*

underlying the idea of *substantive* representation.¹⁰⁴ Under this idea, having female and minority judges be different in some capacity from white male judges—particularly in terms of women’s and minorities’ beliefs and rulings—is normatively desirable. In other words, we should be choosing, confirming, and recognizing the differences in female and minority judges precisely because they represent and hold beliefs that stand in contrast, complement, or otherwise present alternatives to those of white males. In this regard, the analysis does demonstrate that female and minority judges do appear to bring with them different beliefs, as proxied by political ideology. Specifically, female and minority judges are more liberal on average than white male judges, even when both sets of judges are appointed by the same president. This in turn suggests, possibly, that the interests of women and of minorities are being represented, even as the professional and educational profiles of female and minority judges appear to slowly be converging toward the Ivy League, private-practice oriented experience of white male judges.

I do note a very important limitation of the analysis of ideology and of its implications. First, the analyses do not ascribe normative importance per se to a liberal or progressive ideology; the benefits of substantive representation assume no specific ideological leaning, meaning that the interests of women and of minorities could be just as well (or better) represented by conservative representation. There is, in other words, nothing inherently representative about a liberal ideology when it comes to women and minorities. The analyses show, quite simply, that differences exist in the ideologies of female and minority judges versus their white male colleagues. That said, given ample evidence from public opinion suggesting that women and minorities (particularly African Americans) are, on average, more liberal and more likely to identify with the Democratic Party than are men or whites, these findings are perhaps unsurprising.¹⁰⁵ Second, other studies have shown that ideology is a good predictor of a judge’s eventual rulings, but it is not perfect nor without idiosyncratic variation.¹⁰⁶ Indeed, studies have shown that female and minority judges appointed by the same presidents still rule differently on cases having a

104. See *supra* note 28 and accompanying text.

105. See, e.g., Frank Newport, *Democrats Racially Diverse; Republicans Mostly White*, GALLUP (Feb. 8, 2013), <http://www.gallup.com/poll/160373/democrats-racially-diverse-republicans-mostly-white.aspx> [https://perma.cc/PH49-46ZT]; Samantha Smith, *A Deep Dive Into Party Affiliation: Sharp Differences by Race, Gender, Generation, Education*, PEW RES. CTR. (Apr. 7, 2015), <http://www.people-press.org/2015/04/07/a-deep-dive-into-party-affiliation/> [https://perma.cc/2K5X-JGA5].

106. EPSTEIN ET AL., *supra* note 16, at 383; SEGAL & SPAETH, *supra* note 16, at 434; SUNSTEIN ET AL., *supra* note 16, at viii.

substantive gender or race dimension.¹⁰⁷ For female judges, this includes cases involving reproductive rights and gender discrimination;¹⁰⁸ for African-American judges, this includes cases involving voting rights and affirmative action.¹⁰⁹ Thus, there is a component to decision-making clearly linked to, but distinct from, political ideology.

CONCLUSION

Ever since the Carter Administration started appointing female and minority judges in large numbers, scholars have tried to understand these judges' possible impact. Most of the scholarship in this area has explored whether these judges vote differently from white and/or male judges. The findings presented here address a very different, but equally important dimension: how do the backgrounds of these judges differ from white, male judges, and how has this differed over time? As this study shows, the professional and educational backgrounds of female and minority judges have indeed changed over time and, in many important respects, have been converging toward the professional and educational profiles of white male judges. In terms of ideology, however, female and minority judges differ systematically in important ways, with the analysis here suggesting that they tend to be more liberal on average than comparable white male judges. While there are limitations with using political ideology as a proxy for a comprehensive worldview, the analysis nonetheless serves as an important reminder that representation encompasses not just descriptive representation, but substantive representation as well. To this extent, possible concerns associated with the convergence of professional and educational characteristics are ameliorated, at least from the perspective of substantive representation.

The analyses presented in this Article are just a starting point in examining these issues. Indeed, the study here represents a "large N" approach, relying on approximately one thousand observations. However, each of these observations is at its core an individual—with different lived experiences, professional accomplishments, and educational achievements. In addition, many of the judges in this analysis were named during the Carter and Clinton years and are starting to retire in large numbers. The time is now for scholars and researchers to engage substantively with these female and minority

107. See, e.g., Boyd et al., *supra* note 39, at 401; Cox & Miles, *supra* note 43, at 1; Kastellec, *supra* note 39, at 176.

108. See, e.g., Boyd et al., *supra* note 39, at 389.

109. E.g., Cox & Miles, *supra* note 43, at 1; Kastellec, *supra* note 39, at 167.

judges and to investigate how and to what extent their personal and professional experiences have differed from their white male colleagues and how these may translate into decision making.

Second, the other avenue of future research is one that invites a closer, more nuanced analysis, leveraging our discipline's ability to engage with legal text and writing. The professional, educational, and ideological characteristics explored here clearly have the potential to translate into meaningful differences in jurisprudence, legal reasoning, and legal analysis. This in turn raises important questions. Do opinions written by African Americans and women differ from those written by whites? Do minority or female judges write more forcefully on issues pertaining to civil rights or affirmative action? Although the quantitative evidence suggests that the answers to these questions might be yes, there still may be important differences embedded within the content of these opinions. A useful analysis would be to review systematically opinions written by different kinds of judges to ascertain more fully the way that descriptive representation translates into substantive representation.