

Judicial Diversity on State Supreme Courts

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ABSTRACT

State courts of last resort are, in many ways, the primary expositors of law in the United States. Much of the law that affects people on an everyday basis—criminal law, contracts, family law, wills, trusts, and estates, just to name a few—fall within their purview. And yet we know surprisingly little about just *who* sits on these courts. Indeed, state supreme court judges have been aptly described as “perhaps the most important and least written about group within the judicial system” of the United States. There is little information regarding the composite characteristics of the jurists on state courts of last resort, and the last study on the characteristics and experiences of the state supreme court justices is twelve years old.

In this Article, we present the findings of a comprehensive examination of the demographic and experiential characteristics of all judges on the courts of last resort of the fifty states. The most important part of this examination was a survey developed for this project and submitted to every state supreme court justice in the country. In this survey, we asked the justices to self-report information regarding race, gender, religion, schooling, prior work experience, community involvement, bar association membership, and pro bono experience. The raw data we collected through this survey, augmented by publicly available resources, are presented throughout and as addenda to this Article.

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I. INTRODUCTION

The nomination of Sonia Sotomayor to the Supreme Court of the United States was, in many ways, a culmination of two historic trends: the rise of racial minorities in American government and law, and the rise of female attorneys to the highest reaches of the judiciary. Nominated by the first African-American president, Justice Sotomayor's confirmation as the first Hispanic Justice—and only the third female Justice—was hailed by many as a watershed moment in American legal history.

And yet, Justice Sotomayor's nomination was in many respects not very remarkable at all. In ways less noticeable to the naked eye, Justice Sotomayor is utterly typical. Like every Justice on the Supreme Court today (save one), she attended an Ivy League law school.¹ Like every Justice on the Court today, she sat on a United States circuit court when nominated to the high court.² Like many Justices in the recent past, she spent time as a prosecutor and had significant experience in private practice.³ And, like five of her colleagues on the Court, she is Catholic.⁴

What we can take from Justice Sotomayor's elevation to the Supreme Court is that the demographic and experiential characteristics of the American judiciary are more complex than they first appear. And we learn (or at least we should learn) that easy heuristics can be deceiving and, perhaps, irrelevant. For instance, is it more salient that a particular jurist is, say, Hispanic, or that she spent many years in private commercial practice? Does it matter more that a jurist is male or that he went to a local college and law school? Does it matter where on the political spectrum a judge places himself? Does any demographic characteristic matter more than a judge's prior legal or professional experience? And, of course, the

¹ Biographies of Current Members of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Jan. 10, 2010) [hereinafter Official Biographies]. The lone exception, Justice John Paul Stevens, graduated from Northwestern University School of Law. Like three of her colleagues, Justice Sotomayor also attended an Ivy League undergraduate institution. *Id.* Three of her non-Ivy League colleagues attended Georgetown or Stanford as undergraduates. *Id.*

² *Id.*

³ Press Release, The White House, Judge Sonia Sotomayor, (May 26, 2009), available at http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sonia-Sotomayor/.

⁴ Laurie Goodstein, *Sotomayor Would Be Sixth Catholic Justice, but the Pigeonholing Ends There*, N.Y. TIMES, May 31, 2009, at A20.

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question of ultimate concern: does any of this have any significant effect on how judges decide cases?

One thing is certain—it is impossible to approach these questions unless we know just *who* populates the American judiciary. Once one moves beyond the easy categories of race and gender and tries to dig down into the less obvious characteristics of religion, schooling, prior work experience, voluntary associations, and ideological orientation, it is surprisingly difficult to find out just who the individuals are underneath the robes. But without at least some level of appreciation of these types of characteristics, it would be impossible to even attempt to describe the American judiciary in any reasonably complete (or interesting) way.

Much information has long been available on the characteristics of federal judges. While the federal bench is vast,⁵ it is relatively well understood. Two factors are largely responsible for this. First, the requirement of Senate confirmation for federal judges tends to elicit a fair degree of public disclosure of information about the nominee. Second, the perceived importance of the federal judiciary (and the focus on federal issues in legal scholarship and legal teaching) leads to more attention given to federal courts, at least in comparison to their state counterparts. The increased focus on the ideological shifts of the federal bench as a result of changing presidential administrations has led to several recent efforts to catalogue the federal bench and quantify the characteristics of those who sit on it.⁶

Such has not been the case for the state judiciary. Historically, little attention has been paid to the aggregate characteristics of state courts of last resort. In some sense this is understandable. There are, depending on how one counts, approximately 350 justices on state

⁵ The federal judicial system is composed of thirteen circuit courts, ninety-four district courts, and ninety-four bankruptcy districts. U.S. Courts, Courts of Appeals, <http://www.uscourts.gov/courtsofappeals.html> (last visited Jan. 10, 2010); U.S. Courts, District Courts, <http://www.uscourts.gov/districtcourts.html> (last visited Jan. 10, 2010). In addition, the United States Tax Court is composed of nineteen presidentially appointed members. U.S. Tax Court, About the Court, <http://www.ustaxcourt.gov/about.htm>.

⁶ See generally Theresa M. Beiner, *Diversity on the Bench and the Quest for Justice for All*, 33 OHIO N.U. L. REV. 481 (2007) (discussing different ways of defining diversity in the judicial appointment context); Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5 (2004) (analyzing the benefits of increased racial diversity on the bench); Rorie Spill Solberg, *Court Size and Diversity on the Bench: The Ninth Circuit and its Sisters*, 48 ARIZ. L. REV. 247, (2006) (analyzing diversity on the bench with an emphasis on the United States Court of Appeals for the Ninth Circuit).

courts of last resort,⁷ and excepting a few prominent courts (such as the California Supreme Court, Delaware Supreme Court, New Jersey Supreme Court, and New York Court of Appeals), most are overlooked by legal commentators.⁸

This is an unfortunate gap in knowledge. State supreme court justices⁹ have been referred to as “perhaps the most important and least written about group within the judicial system in this country.”¹⁰ State courts of last resort have been, and continue to be, primary expositors of the areas of law that affect Americans in an “everyday” fashion; contract, criminal, estate, and family law are just some of the areas that are largely defined by state courts.¹¹ These courts’ influence goes beyond just “state law” issues; for instance, federal courts (and the Supreme Court in particular) are often fond of “nose

⁷ As of the date of publication, and for our purposes, there are 342 state supreme court justices in the United States sitting on the fifty-two courts of last resort in the United States, as determined via a review of each state’s official court rosters. Oklahoma and Texas have two courts of last resort. Each has a Supreme Court and a Court of Criminal Appeals. See The Oklahoma State Court Network, <http://www.oscn.net/applications/oscn/start.asp?viewType=Courts> (last visited Jan. 10, 2010); Texas Courts Online, <http://www.courts.state.tx.us/> (last visited Jan. 10, 2010). While the District of Columbia Court of Appeals functions as a “state” court of last resort, it stands apart from other such courts in that its members are appointed by the President of the United States. See Inez Smith Reid, *From Birth to the Bench: A Quiet but Persuasive Leader*, 68 ALB. L. REV. 215, 220 (2005). For this reason, we have not considered it in this Article.

⁸ To be sure, some have focused attention on state courts of last resort, with interesting results. See Stephen Choi et al., *Which States Have the Best (and Worst) High Courts?* (Univ. Chi., John M. Olin Law & Econ. Working Paper No. 405, 2008), available at <http://ssrn.com/abstract=1130358> (ranking the courts of all fifty states). However, there has generally been very little comprehensive study of the state judiciary.

⁹ Throughout this Article we use the phrase “supreme court justice” to identify those jurists who sit on their respective state’s court of last resort. The reader should be aware that not all such jurists are “justices” and not all state high courts are “supreme courts.” For example, the New York court of last resort is the Court of Appeals, which is populated by seven “judges.” Nevertheless, for simplicity’s sake, we will generally refer to such jurists as supreme court justices.

¹⁰ John Wefing, *State Supreme Court Justices: Who Are They?*, 32 NEW ENG. L. REV. 47, 49 (1997) (citing Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 WIDENER J. PUB. L. 25, 53 (1993)).

¹¹ Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153, 171–72 (2004) (“For most of the cases filed in our nation’s courts, state courts are the ultimate arbiters in a range of legal, political, and economic disputes.”).

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counting” state court decisions in order to identify legal norms and trends.¹²

Some effort has been made to understand the character of the state judiciary. In 1997, Professor John B. Wefing published the results of a comprehensive study of justices on state courts of last resort.¹³ Going beyond the publicly available data on state supreme court justices, Professor Wefing circulated a survey to every justice in the nation, eliciting information about gender, race, religion, political affiliation, and prior legal experience. What resulted was a composite picture of the state supreme court judiciary, a picture that shed significant light on our understanding of just who was manning the state high courts. Professor Wefing’s results filled a significant gap in our understanding of the state judiciary.

But Professor Wefing’s research has never been updated—until now. In this Article, we present the findings of a comprehensive examination of the demographic and experiential characteristics of all judges on the courts of last resort of all fifty states. The most important part of this examination was a survey developed for this project and submitted to every state supreme court justice in the country.¹⁴ In this survey, we asked the justices to self-report information regarding race, gender, religion, schooling, prior work experience, community involvement, bar membership, and pro bono experience. Where available, the raw data we collected through this survey was augmented by publicly available resources.¹⁵ A copy of the survey is presented in Appendix A.

¹² Corinna Lain, *The Unexceptionalism of Evolving Standards*, 57 UCLA L. REV. (forthcoming Dec. 2009) (“[T]he Supreme Court routinely—and explicitly—bases constitutional protection on whether a majority of states agree with it.”).

¹³ Wefing, *supra* note 10.

¹⁴ While researching and preparing this Article, the roster of state supreme court justices was a moving target. Elections, deaths, and retirements made for a dynamic roster of justices. Nevertheless, we endeavored to keep abreast of the changing population and regularly sent surveys to newly appointed or elected jurists.

In total, 342 state supreme court justices received surveys, and 153—about 45%—responded. There seems to be an effective limit of about 45% to 55% response rate on a survey like this, which was the range both we and Professor Wefing achieved. *See* Wefing, *supra* note 10, at 51. We did not discern any apparent trends in the response rate (such as geography), and therefore are reasonably confident that we have captured a representative sample of state high court justices as a whole.

We are greatly indebted to the responding justices for their time and consideration.

¹⁵ In addition to the sources cited throughout this Article, each state supreme court’s official Web page was relied on for judicial biographies, as were news accounts and other publicly available, reliable sources.

In this Article, we discuss and highlight our findings, dividing the analysis by area of interest: race, religion, gender, party affiliation, general political attitude, prior judicial experience, prior legal experience, community involvement, and education. We have further divided the sections on race and gender into two sub-sections. In the “background” sub-sections, we set the stage for our discussion by briefly recounting historical trends and by reviewing what scholarship, if any, exists, regarding the state supreme judiciary and the American bench at large.¹⁶ It is in these sections that we owe a great debt to Professor Wefing’s work, which provided us with a benchmark against which we place our findings in empirical context. In the “findings” sections, we set forth the data from our research, presenting the most salient (and, in many cases, the most surprising) findings.¹⁷ Tables presenting the full measure of the collected data are presented throughout the Article and in Appendices B through E.

We found that the “average” state supreme court justice is a Caucasian, Protestant male with experience as both a civil litigator in private practice—most likely at a small firm of fewer than ten attorneys—and a public servant. The “average” state supreme court justice has previously served as a judge in some capacity, and has been heavily involved in both the bar and the greater local community, often having given his time to pro bono clients, charitable organizations, and/or bar associations. Community ties run deep, as the “average” justice likely spent some portion, if not all, of his undergraduate and law school days at a school in the state over which he would eventually preside. Although a self-proclaimed Democrat, the “average” justice considers himself slightly right-of-center.

¹⁶ Our intention in reviewing the historical trends on race and gender in the American judiciary is to offer a baseline of understanding for those who may be less familiar with the history of diversity on the bench. Those who are well-versed in these subjects may consider proceeding directly to our research results.

¹⁷ A note about our philosophy in presenting this data: as authors, we have attempted to keep any personal feelings or biases about the relative merits of “diversity,” as that term is commonly understood, out of this Article. We express no opinion as to whether it is “better” or “worse” to have a given level of representation of any group on the state supreme court bench. We express no opinion as to whether the current levels of representation, and the trend lines associated with those levels, are “good” or “bad.” Similarly, we express no opinion as to whether any particular prior legal, professional, educational, or other experience (or lack thereof) is beneficial to the character of an individual jurist, or to the judiciary as a whole.

There is much diversity (not only demographic, but also experiential) among the 342 state supreme court justices we studied. Some very interesting findings have emerged. For example, all Asian state supreme court justices preside in either California or Hawaii. Additionally, only a small handful of state supreme court justices have practiced at “Big Law” firms, with the large majority of high court jurists having experience only with firms of fewer than fifty attorneys. Further, although most justices still affiliate with the Democratic party—a consistent trend over the last thirty years—an increasing number of justices now identify themselves as independents or as unaffiliated with a political party. A majority of justices rate their general political attitude as being right-of-center. We also found that female justices are more likely than their male colleagues to have been members of bar associations prior to their election or appointment to the state high court.

II. RACE

A. Historical Background

Because it “may be of import within the judicial system and the larger political structure,”¹⁸ minority representation on state supreme courts (and the federal and state judiciary generally) has been studied and quantified extensively over the last two decades.¹⁹ Data indicate that racial minorities²⁰ are, unsurprisingly, not represented on state supreme courts in proportion to their presence in the United States population at large.²¹ But numbers, which we will

¹⁸ 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); see also Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 424–31, 439–44 (2000) (arguing that focus on judicial diversity should center on how judges represent minority communities’ values rather than strictly on diversity of judges). Some scholars contend that there is value to diversity beyond any decisional differences. Hurwitz & Lanier, *supra* note 18, at 49 (noting that commentators posit that the mere presence of minority jurists “enhances the appearance of impartiality for litigants”); see also James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 775 (2004) (“[I]n a diverse society, the ideals sought by the independence/accountability dichotomy are dependent upon and subsumed by the attainment of judicial diversity.”).

¹⁹ See *infra* notes 56–64 and accompanying text.

²⁰ For purposes of this Article, “racial minority” includes all non-Caucasians, including Hispanics.

²¹ In 2000, Hispanic Americans constituted 12.6% of the United States population, African-Americans constituted 12.3%, and Asian/Pacific Islanders made up 3.7%. U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS:

discuss below, do not tell the whole story. Behind the numbers lie rich tapestries of individual experiences, a few of which we will recount here.

The first minority judge to serve on a state supreme court was Jonathan Jasper Wright,²² an African-American attorney elected to the Supreme Court of South Carolina in 1870.²³ Prior to his election, Justice Wright was a state legislator and one of the first three African-Americans admitted to the South Carolina bar.²⁴ When a vacancy arose on the South Carolina Supreme Court, Wright and another African-American attorney, William James Whipper, were considered the top candidates.²⁵ Although Whipper and Wright were both “well-educated, freeborn northerners” who relocated to South Carolina after the Civil War, their politics differed considerably.²⁶ Whipper was a “radical Republican” who advocated for “progressive, egalitarian measures” that garnered the support of newly freed slaves and other downtrodden constituencies.²⁷ Justice Wright, on the other hand, was a strict legal and political conservative who was supported by the white population.²⁸ Justice Wright was elected but later stepped down

2000 CENSUS OF POPULATION AND HOUSING 1 (2001), *available at* <http://www.census.gov/prod/cen2000/dp1/2kh00.pdf>. By contrast, 2005 data indicates that Hispanics constituted approximately 3% of state supreme court justices, African-Americans constituted approximately 8% and Asian/Pacific Islanders judges constituted approximately 1.2%. *See infra* note 64 and accompanying table.

²² Caleb A. Jaffe, *Obligations Impaired: Justice Jonathan Jasper Wright and the Failure of Reconstruction in South Carolina*, 8 MICH. J. RACE & L. 471, 472 (2003). In 1865, Wright became the first African-American lawyer admitted to the Pennsylvania bar. Donna Gerson, *A Work in Progress: Gender and Race Issues Continue to Confront Pennsylvania Lawyers*, 25 PA. LAW. 12, 12 (2003). One century later, in 1965, Juan Silva became the first Hispanic lawyer admitted to the Pennsylvania bar. *Id.*

²³ Jaffe, *supra* note 22, at 479 (citation omitted).

²⁴ The other two African-American attorneys admitted to the South Carolina bar were Robert Elliott, a member of the U.S. House of Representatives, and William James Whipper. Jaffe, *supra* note 22, at 479 & n.52 (citing John Oldfield, *The African-American Bar in South Carolina*, in AT FREEDOM'S DOOR: AFRICAN-AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA 127 (James Lowell Underwood & W. Lewis Burke, Jr. eds. 2000) [hereinafter AT FREEDOM'S DOOR]).

²⁵ Jaffe, *supra* note 22, at 479.

²⁶ *Id.* at 478.

²⁷ *Id.* at 479–80.

²⁸ *Id.* at 481. Wright's jurisprudence was characterized by an “unwavering deference to the binding authority of precedent’ and [a] willingness to yield to the legislature in matters of statutory construction.” *Id.* at 477 (quoting J. Clay Smith, Jr., *The Reconstruction of Jonathan Jasper Wright*, in AT FREEDOM'S DOOR, *supra* note 24, at 79–80).

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while under investigation for official misconduct.²⁹ Historians have argued that these charges were likely “trumped-up in order to drive Wright from office.”³⁰

Despite Justice Wright’s groundbreaking election, nearly a century passed before Justice Otis Smith became the next African-American to serve on a state supreme court when he was appointed to the Michigan Supreme Court in 1961.³¹ Similarly, eighty years passed between Justice Wright’s election and the appointment of the first African-American federal judge.³² In 1949, Judge William Henry Hastie became the first minority judge to serve on the federal bench when he was appointed to the United States Court of Appeals for the Third Circuit.³³ In addition to serving as a judge and governor of the Virgin Islands,³⁴ Judge Hastie also served as Special Adviser to the Secretary of War during the early years of World War II, where he was the highest-ranking African-American in the federal government.³⁵ Judge Hastie resigned from that position in 1942, however, to protest segregation in the armed forces.³⁶ Perhaps his greatest contribution was working alongside Charles Hamilton Houston and Thurgood Marshall³⁷ to develop and litigate the legal strategy to overturn *Plessy v. Ferguson*³⁸ and the system of segregation it sanctioned.³⁹ On the

²⁹ *Id.* at 474 (quoting 2 HISTORY OF SOUTH CAROLINA 898 (Snowden ed. 1920)).

³⁰ *Id.* (citing R.H. Woody, *Jonathan Jasper Wright: Associate Justice of the Supreme Court of South Carolina, 1870–77*, 18 J. NEGRO HIST. 114 (1933)).

³¹ Walter J. Walsh, *Speaking Truth to Power: The Jurisprudence of Julia Cooper Mack*, 40 HOW. L.J. 291, 294–95 (1997). Prior to his appointment, Justice Smith served as the Michigan Public Service Commissioner and later as auditor general. Naseem Stecker, *A Trailblazing Leader*, MICH. BAR J., June 2006, at 18. After serving the remainder of the term to which he was appointed, Justice Smith lost his 1966 re-election bid. *Id.* at 19.

³² See A. Leon Higginbotham, Jr., *Judge William Henry Hastie—One Who Changed the Immutible*, 24 HOW. L.J. 259, 263 (1981).

³³ *Id.*

³⁴ Louis H. Pollak, *William Henry Hastie*, 125 U. PA. L. REV. 1, 1 (1976).

³⁵ *Id.*

³⁶ Higginbotham, *supra* note 33, at 266. Hastie could not tolerate the “incongruity of a nation fighting abroad against Hitler’s Aryanism but tolerating racism at home, even as the victim’s of that racism fought and died for their country on far-flung battlefields.” *Id.*

³⁷ See *infra* notes 39, 48 and accompanying text.

³⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

³⁹ Pollak, *supra* note 34, at 1–2. Houston studied law at Harvard Law School, became the first African-American member of the *Harvard Law Review*, and would eventually serve as special counsel for the NAACP. Am. Bar Ass’n, *Raising the Bar: Pioneers in the Legal Profession*, Charles Hamilton Houston, <http://www.abanet.org/publiced/chh.html> (last visited Jan. 10, 2010). Judge Hastie also attended Harvard Law School, where he became the second African-American

bench, Judge Hastie was highly regarded and received serious consideration for appointment to the U.S. Supreme Court when Justice Charles Whittaker retired in 1962.⁴⁰ In the end, Judge Hastie was not nominated, in part because Chief Justice Earl Warren and Justice William Douglas viewed him as too conservative.⁴¹

Of course, Thurgood Marshall became the first African-American to serve on the Supreme Court in 1967. Justice Marshall's legal career began at Howard University School of Law where he studied under Charles Houston.⁴² He then launched a solo practice⁴³ and later worked for the NAACP, becoming its Chief Counsel in 1938.⁴⁴ In that position, he represented African-American clients seeking to ban "white primaries" in *Smith v. Allwright*,⁴⁵ and eradicate racial barriers to interstate commerce in *Morgan v. Virginia*.⁴⁶ In addition to arguing the iconic *Shelley v. Kraemer*,⁴⁷ in which the Supreme Court outlawed private restrictive covenants, and *Brown v. Board of Education*,⁴⁸ in which the Supreme Court prohibited segregation in public schools,⁴⁹ Marshall also helped draft the

member of the *Harvard Law Review*. Am. Bar Ass'n, Raising the Bar: Pioneers in the Legal Profession, William Henry Hastie, http://www.abanet.org/publiced/bh_hastie.html (last visited Jan. 10, 2010). Hastie advised the NAACP on litigation strategy and served on its Board of Directors. *Id.* As noted below, Justice Marshall studied under Houston at Howard Law School. Marshall would become Chief Counsel for the NAACP. The Marshall-Houston-Hastie triumvirate was responsible for some of the most significant civil rights decisions of the twentieth century. See *infra* notes 45–49 and accompanying text.

⁴⁰ Note, "Just One More Vote for Frankfurter": Rethinking the Jurisprudence of Judge William Hastie, 117 HARV. L. REV. 1639, 1640–41 (2004).

⁴¹ *Id.* at 1640.

⁴² Justice Marshall also applied to the University of Maryland Law School but he was rejected. Lewis F. Powell, Jr., *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1229, 1229 (1992). Justice Marshall began volunteering his services to the NAACP, and, in 1936, he represented an African-American applicant to the University of Maryland Law School. Marshall won the case, and his client was the first African-American law student at the University. *Id.*

⁴³ Owen Fiss, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 49, 51 (1991).

⁴⁴ *Id.*

⁴⁵ 321 U.S. 649 (1944).

⁴⁶ 328 U.S. 373 (1946).

⁴⁷ 334 U.S. 1 (1948).

⁴⁸ 347 U.S. 483 (1954).

⁴⁹ Powell, *supra* note 42, at 1229. As a private lawyer, Justice Marshall argued fourteen cases before the Supreme Court. Robert L. Carter, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 33, 44 (1991). He argued eighteen more as Solicitor General of the United States. *Id.* He won twenty-nine of his thirty-two cases. Mark Tushnet, *Lawyer Thurgood Marshall*, 44 STAN. L. REV. 1277, 1277 (1992).

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Constitution of Kenya, served on the United States Court of Appeals for the Second Circuit, and served as Solicitor General of the United States.⁵⁰

In 1961, Vice President Lyndon Johnson played an integral role in persuading President John F. Kennedy to appoint Reynaldo Garza to serve on the federal district court in Texas, thereby becoming the first Hispanic-American judge on the federal bench.⁵¹ After graduating from the University of Texas School of Law,⁵² Judge Garza opened his own law office in Brownsville, Texas, where he would build a reputation as a “nearly unbeatable” litigator.⁵³ He served as a district judge (and eventually Chief Judge of the Southern District of Texas) until 1979, when President Jimmy Carter elevated him to the United States Court of Appeals for the Fifth Circuit. This appointment was another first, making Judge Garza the first Hispanic- or Latino-American to serve on the Court of Appeals.⁵⁴

⁵⁰ Fiss, *supra* note 43, at 50.

⁵¹ Fed. Judicial Ctr., Milestones of Judicial Service, http://www.fjc.gov/history/home.nsf/page/milestones_bdy (last visited Jan. 10, 2010); see also LOUISE ANN FISCH, ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE ix (1996). Judge Garza’s nomination was the first judicial nomination of President Kennedy’s administration. *Id.* Luis Rovirá became the first Hispanic American to serve on a state supreme court when he was appointed to the Colorado Supreme Court in 1979. MART MARTIN, THE ALMANAC OF WOMEN & MINORITIES IN AMERICAN POLITICS 2002, at 304 (2001).

⁵² Of the 175 law students attending the University of Texas when Judge Garza enrolled, only three were female and two were Hispanic. FISCH, *supra* note 51, at 29. At the same time Judge Garza was enrolled as a Longhorn, Texas state law prohibited African-Americans from enrolling at the law school. The University of Texas did not admit African-American students until Thurgood Marshall argued and won *Sweatt v. Painter*, 339 U.S. 629 (1950).

⁵³ FISCH, *supra* note 51, at 62. In 1946, he represented a number of families who lost loved ones when a train collided with a car at an unguarded crossing. *Id.* at 55. His adversary was so impressed with Judge Garza’s work that he offered Garza a job. *Id.* at 56. Thereafter, he joined a prestigious south Texas law firm as a name partner, where his practice began to include more complex corporate law issues. *Id.* at 54–56, 61.

⁵⁴ *Id.* at 149–54. After winning the election in 1976, President-elect Carter began assembling his Cabinet. In doing so, he offered the position of Attorney General to Judge Garza. *Id.* at 143–45. The judge declined President Carter’s offer, opting instead for the small border town of Brownsville and the security of life tenure as a federal judge. *Id.*

During the confirmation process for his appointment to the Court of Appeals, a senator asked Judge Garza about what steps could be taken to increase representation of women and minorities on the bench. Judge Garza responded:

“[President Kennedy] told me [when I was appointed to the district court] that my actions on the bench would mean a lot toward whether other Hispanics like myself would have this opportunity.” Garza then

B. Findings

Recent studies have shown that state supreme courts have higher levels of minority representation than state courts as a whole (including all trial and appellate benches).⁵⁵ A 2004 study found that minority judges constitute roughly 8% of 30,059 state judges.⁵⁶ By contrast, as of 2005, roughly 12% of all state supreme court justices belonged to a minority group.⁵⁷ The data suggest that greater minority representation on state supreme courts is a recent trend. Table 1 shows disaggregated data of state supreme court justices over the past thirty years:⁵⁸

quipped, “It took eighteen years to get one on the Fifth Circuit, so I do not know what kind of job I did, Senator.”

Id. at 152.

⁵⁵ See *infra* notes 59–60 and accompanying text.

⁵⁶ Graham, *supra* note 11, at 172. The federal judiciary includes a slightly higher proportion of minority judges, with roughly 13% of federal judges belonging to a minority group. *Id.* at 179–80. In comparison, racial minorities constitute roughly 30% of the American population. *Id.* at 178.

⁵⁷ Hurwitz & Lanier, *supra* note 18, at 53.

⁵⁸ Some researchers have claimed that the growing presence of minority judges may actually reduce the likelihood of continued increases in the presence of minority jurists on state supreme courts. Kathleen A. Bratton & Rorie L. Spill Solberg, *Diversifying the Federal Bench: Presidential Patterns*, 26 JUST. SYS. J. 119, 130–31 (2005) (finding that, in the context of appointments to the federal district courts, “[o]nce a modicum of female or racial diversity is achieved, any interest in diversifying wanes”).

	1975 ⁶⁰	1977 ⁶¹	1985 ⁶²	1997 ⁶³	2005 ⁶⁴	2009
African-American	1	5	9	25	29	26
Hispanic	—	—	0	4	11	11
Asian/Pacific Islander	—	—	4	6	4	5
American Indian/Alaska Native	—	—	0	2	0	1
Multiracial/Other	—	—	—	—	—	3
Total	—	—	13	37	44	44 ⁶⁵

Our data show substantial changes in the racial composition of state supreme courts since 1975, when a single minority jurist served on a state supreme court.⁶⁶ In 2005, there were forty-four minority state supreme court justices.⁶⁷ Our data reveal that in 2009, the number of minority judges has remained constant at forty-four—representing 12.8% of state supreme court justices. Today, there are six minority chief justices.⁶⁸

⁵⁹ As this table shows, there is a “virtual exclusion” of Asian/Pacific Islanders and American Indian/Alaska Native judges. Graham, *supra* note 11, at 175. Research, however, provides no insight into why Asian/Pacific Islanders are underrepresented nationally. *Id.* African-Americans, Latinos, and women are the primary groups studied. *Id.*

⁶⁰ SUSAN P. FINO, THE ROLE OF STATE SUPREME COURTS IN THE NEW JUDICIAL FEDERALISM 52 (1987).

⁶¹ *Id.*

⁶² Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 231 (1987).

⁶³ Wefing, *supra* note 10, at 58.

⁶⁴ Hurwitz & Lanier, *supra* note 18, at 53.

⁶⁵ The total number of minority justices (44) is less than the sum of the individual minority groups (46) because respondents who identified as “multiracial” were able to select more than one minority group.

⁶⁶ FINO, *supra* note 60, at 52.

⁶⁷ Hurwitz & Lanier, *supra* note 18, at 53. In addition to the gains on state supreme courts, minority judges increased their presence in state appellate courts between 1999 and 2005. “In real numbers, there were 92 minority judges in 1999 and 153 in 2005.” *Id.* at 54. Minority judges represented approximately 1% of all state appellate court judges in 1985. *Id.* at 54–55. This increased to approximately 5% in 2005. *Id.* at 55.

⁶⁸ The state supreme courts presided over by non-Caucasian presiding or chief justices are Florida, Hawaii, Maryland, Mississippi, Texas, and Virginia.

Table 2 disaggregates this national data by geographic region:

	Total No. of Judges	African-American	Asian	Hispanic	Multi-racial or Other	Caucasian
Northeast	56	4 7.1%	— —	2 3.6%	— —	50 89.3%
South	130	16 12.3%	— —	2 1.3%	3 2.3%	112 ⁷⁰ 86.2%
Midwest	78	5 6.4%	— —	— —	— —	74 94.9%
West	78	1 1.3%	5 6.4%	7 9.0%	1 1.3%	65 83.3%
Nationwide	342	26 7.6%	5 1.5%	11 3.2%	4 1.2%	299 87.4%

The data reveal some stark differences between the regions. For example, Asian-American judges serve only on state supreme courts in western states—specifically, California and Hawaii. Also, there are more African-American supreme court justices in the South than there are in the Northeast, Midwest, and West combined.⁷¹ More Hispanic judges serve in the West than in all other regions combined.

⁶⁹ Regions are defined by reference to United States Census guidelines. U.S. Census Bureau, *Census Regions and Divisions of the United States*, http://www.census.gov/geo/www/us_regdiv.pdf (last visited Jan. 10, 2010). The regional breakdown is as follows:

Northeast: Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.

South: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

Midwest: Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin.

West: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

⁷⁰ Because responding justices were permitted to indicate more than one race, the percentages in the table do not always add up to 100% and the sum of the distinct races may be greater than the total number of justices in a region.

⁷¹ Although the Southern states have the most state supreme court justices as a whole, Southern states still outpace the rest of the country in terms of African-American representation on state supreme courts as a percentage.

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Only one judge self-identified as American Indian, and no judges self-identified as native Hawaiian, Middle Eastern, or Southeast Asian.

Notably, like representation levels on state high courts, the levels of minority representation in the nation's largest law firms and corporations are significantly lower than their representation in the population at large.⁷² The data reflect higher African-American and Hispanic representation in nonprofit or civil rights organizations.⁷³

Despite these disparities, some indications suggest that minority representation on the bench and in the bar may be on an upswing. Minority enrollment in law schools, particularly for Hispanic, Asian/Pacific Islander, and American Indian/Alaska Native students, has increased dramatically over the past thirty years.⁷⁴ Rising law school enrollment rates are generally considered to be associated with increased representation on the bench, as “[t]he rise in numbers of political minorities who are lawyers affords more available and qualified candidates to fill a [judicial] vacancy.”⁷⁵ In fact, Asian/Pacific Islander enrollment has increased over twenty-fold

⁷² The degree of minority underrepresentation in the legal profession stands in contrast to minority representation in other professions. Overall, minorities constitute slightly less than 10% of all attorneys, “compared to 20.8% among accountants and auditors, 24.6% among physicians and surgeons, and 18.2% among college and university teachers.” AM. BAR ASS’N, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 1 (2004), available at http://www.law.harvard.edu/programs/plp/pdf/Projects_MilesToGo.pdf (executive summary). This is based on 2000 U.S. Census data. *Id.*

As of 2004, minorities constituted 4.4% of the partners at the nation's 250 largest law firms. *Id.* at 3. “Since 1999, national minority representation among partners has increased only 0.7 percent.” *Id.* Evidence suggests that African-American and Latino attorneys are making inroads into the partnership ranks at large firms. In 1981, African-American and Hispanic attorneys constituted 0.7% of law firm partners; that number increased to 1.7% in 1991. Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005, 1009 (1997) (citing Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 862–63 (1995)). The situation is similar among corporate general counsel of Fortune 1000 companies. *Id.* Minorities constitute 4.3% of corporate general counsel for Fortune 1000 companies. *Id.*

⁷³ Kornhauser & Revesz, *supra* note 72, at 1009–10; see also Bratton & Spill Solberg, *supra* note 58, at 122 (finding that female judges, African-American judges, and Hispanic judges are more likely to have experience in legal aid or civil rights institutions); see also *infra* Table 10 and accompanying text.

⁷⁴ See *infra* notes 78–81 and accompanying text.

⁷⁵ Mark S. Hurwitz & Drew N. Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*, 3 ST. POL. & POL'Y Q. 329, 333 (2003). One study shows that “the size of the eligibility pool emerged as the single most important factor in the appointment of Hispanic judges.” Bratton & Spill Solberg, *supra* note 58, at 131.

since 1971, and now constitutes the largest minority group of students attending ABA-approved law schools.⁷⁶ Enrollment of Hispanic and American Indian/Alaska Native students has grown eight-fold in the same timeframe;⁷⁷ African-American enrollment has more than doubled.⁷⁸

	Enrollment in 1971–1972	Enrollment in 2007–2008	Change in Enrollment
African-American	3,744	9,483	253%
Hispanic ⁸⁰	1,156	8,782	874%
Asian/Pacific Islander	480	11,176	2328%
American Indian/Alaska Native	140	1,216	869%

⁷⁶ See *infra* Table 3.

⁷⁷ See *infra* Table 3.

⁷⁸ While some of this growth is doubtless due to the greater absolute number of students attending law school, Hurwitz and Lanier note that “the rate at which women and minorities currently earn law degrees is nearly on par with their proportion of the population.” Hurwitz & Lanier, *supra* note 75, at 330. Importantly, Glick and Emmert found that except in the South, a majority of judges appointed to the bench have at least fifteen years of experience, indicating that the time lag associated with appointment or election could portend a sharp upswing in female and minority representation on the bench in the coming decades. Glick & Emmert, *supra* note 62, at 233 tbl.2.

⁷⁹ Am. Bar Ass’n, Legal Education Statistics, Enrollment and Degrees Awarded 1–2 <http://www.abanet.org/legaled/statistics/charts/stats%20-%201.pdf> (last visited Jan. 10, 2010). The ABA site includes a wide range of statistics tracking total law school enrollment, graduation, and other data disaggregated by a number of minority groups and by gender. *Id.* Of course, these numbers should be considered in light of increases in law school enrollment generally, but nevertheless, the trend is striking.

⁸⁰ The ABA disaggregates this group into Mexican American, Puerto Rican, and Other Hispanic. The statistics are aggregated here for ease of comparison to other studies that do not disaggregate.

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III. GENDER

A. *Historical Background*

Since 1978, the percentage of women in law school has increased from 28% to 46%, and women now account for over 25% more of the legal profession than they did in 1975.⁸¹ Female representation on the bench, both state and federal, has correspondingly increased. Most famously, three women have joined the Supreme Court of the United States since 1980,⁸² and the percentage of women on state high courts has increased tenfold since the mid-1970s.⁸³

These gains stand in stark contrast to the protracted and often challenging route that women traveled to the highest levels of the American judiciary during the first three-quarters of the twentieth century. The first of these women was Florence Ellinwood Allen, who in 1922⁸⁴ won a statewide election to the Ohio State Supreme Court.⁸⁵

⁸¹ Am. Bar Ass'n, *supra* note 79, at 1–2. In 1975, women accounted for 7% of American lawyers. Barbara H. Wootton, *Gender Differences in Occupational Employment*, MONTHLY LAB. REV., Apr. 1997, at 15, 17. In 2008, 31.6% of lawyers were women. COMM'N ON WOMEN IN THE PROFESSION, AM. BAR ASS'N, A CURRENT GLANCE AT WOMEN IN THE LAW 2008, at 1 (2008), <http://www.abanet.org/women/CurrentGlanceStatistics2008.pdf> (last visited Jan. 10, 2010).

⁸² Amy Goldstein & Paul Kane, *Sotomayor Wins Confirmation*, WASH. POST, Aug. 7, 2009, at A1.

⁸³ See *infra* Table 4.

⁸⁴ By way of comparison, Justice Wright was elected to the South Carolina Supreme Court as the first minority justice more than fifty years earlier. See Jaffe, *supra* note 22, at 479.

⁸⁵ MARTIN, *supra* note 51, at 133. She was re-elected to the bench in 1928 by over 352,000 votes. Percilla Lawyer Randolph, *Judge Florence Allen*, WOMEN LAW. J., Winter 1932, at 15, 15 (1931).

In a fascinating quirk of history, although Judge Allen was the first female state supreme court judge, for a fleeting moment in 1925, Texas had an all-female supreme court. The case of *Johnson v. Darr* concerned a land dispute involving the fraternal organization Woodmen of the World, and all three justices on the Texas Supreme Court were members of that organization. Alice McAfee, *The All-Woman Texas Supreme Court: The History Behind a Brief Moment on the Bench*, 39 ST. MARY'S LAW. J. 467, 471 (2008). The governor of Texas tried to assemble a panel of special justices to hear the case, but every male judge or attorney that the governor attempted to appoint had to decline due to his own membership in the Woodmen of the World. *Id.* at 472–73. The governor concluded that his only choice was to appoint women, who could not be members of that organization. *Id.* at 473. This proved to be a difficult task, because fewer than ten of the approximately thirty female attorneys in Texas were qualified for a supreme court appointment. *Id.* But the governor eventually located three qualified female attorneys, and Hortense Sparks Ward, Hattie Leah Henenberg, and Ruth Virginia Brazzil unanimously voted to affirm the court of appeals' ruling in favor of the Woodmen of the World. *Id.* at 473, 478–79. One newspaper reported that the proceeding was “no freak affair, but

Allen worked in private practice for six years,⁸⁶ where she briefed and personally argued the East Cleveland Municipal Woman Suffrage Case—which gave women the right to vote in Cleveland, Lakewood, and Columbus (prior to the enactment of the Nineteenth Amendment)—before the Ohio State Supreme Court.⁸⁷ Allen was later appointed assistant prosecutor of Cuyahoga County, Ohio.⁸⁸ On November 6, 1920, only ten weeks after the Nineteenth Amendment was enacted,⁸⁹ Judge Allen was elected to the Court of Common Pleas in Cuyahoga County.⁹⁰ Following her election, she refused

a tribunal thoroughly competent to sit in judgment and reach a conclusion just as sound as a decision might have been made with all the Mr.'s since Adam stacked behind it.” *Id.* at 478 (quoting John William Stayton, *The First All-Woman Supreme Court in the World*, HOLLAND'S MAGAZINE, Mar. 1925, at 5, 73).

While Judge Allen was indisputably the first (regular) state supreme court justice, some confusion exists as to who was the first female American judge. According to some sources, it was Kathryn Sellers, who was appointed to the juvenile court in Washington, D.C., in 1918. MARTIN, *supra* note 51, at 133. But other sources (including markers on the site of South Pass City, Wyoming) suggest that Esther Morris, who served as South Pass City's justice of the peace for eight months in 1870, was the nation's first female judge. Marilyn Aitken, *The Legend of Esther Morris*, 35 LITIGATION, Winter 2009, at 47, 47–49.

⁸⁶ Harold N. Stephens, *Tribute to Judge Allen*, WOMEN LAW. J., Winter 1949, at 3, 4 (1949).

⁸⁷ *Id.* at 5.

⁸⁸ Randolph, *supra* note 85, at 16.

⁸⁹ Marrion J. Harron, *In Memoriam: Honorable Florence Ellinwood Allen*, 52 WOMEN LAW. J. 145, 175 (1966).

⁹⁰ *Id.* Of course, the Nineteenth Amendment extended suffrage to women. See U.S. CONST. amend. XIX. Judge Allen was elected by the greatest margin of any judicial candidate for the Cuyahoga Court of Common Pleas. Randolph, *supra* note 85, at 15.

Only six years after Judge Allen's election to the Ohio State Supreme Court, Genevieve Cline was named to the United States Customs Court, making her the first woman appointed to the federal bench. MARTIN, *supra* note 51, at 133. Judge Cline did not begin her career as an attorney. Rather, she studied business in college and worked for a manufacturing firm in Cleveland, Ohio. Genevieve Rose Cline Biography, www.galenet.com/servlet/BioRC/?q=mnparrow&p=123gotgg (subscription required) (last visited Jan. 10, 2010) [hereinafter Cline Biography]. Judge Cline's brother encouraged her to study law and she earned her L.L.B. in 1921. *Id.* She joined her brother's practice upon her graduation from law school, but soon thereafter President Warren G. Harding appointed her United States appraiser at the Port of Cleveland. *Id.* Judge Cline became interested in customs law when her brother took her to a lecture on tariffs. David G. Wittels, *Alice-in-Wonderland Court*, SATURDAY EVENING POST, Nov. 24, 1945, at 14, 86. In 1927, Judge Cline's supporters persuaded President Calvin Coolidge to appoint her to the opening on the Customs Court. Cline – Biography, *supra*. Judge Cline's confirmation was delayed, however, because of the reluctance some senators had expressed about a woman on the federal bench. *Id.* Cline was ultimately confirmed without even testifying after the Senate Judiciary Committee received the

assignment to the Domestic Relations Court, stating, “I told them I didn’t see why I should sit on the Domestic Relations Bench, when I am an old maid, and there are many fathers on the Bench.”⁹¹ Judge Allen later became the first woman to serve on a federal court of appeals when President Franklin D. Roosevelt appointed her to the Sixth Circuit in 1934.⁹² She became chief judge in 1958.⁹³

Judge Allen’s achievements were extraordinary but did not portend a dramatic change in the gender composition of the judiciary during her time. In the mid-twentieth century, less than 5% of all American judges were female.⁹⁴ This was due in large part to the relatively small number of women enrolled in law school. For example, in 1963–1964, only 1739 (3.72%) of the 46,666 students enrolled in ABA-approved law schools were women.⁹⁵ But a decade later, that percentage had quadrupled, with women accounting for 16,303 of the 101,675 American law students—16.03%.⁹⁶ That rapid increase in the number of female law students corresponded with an increase in the number of female judges, although, as one might expect, there was a time lag.⁹⁷ In 1975, Julia Cooper Mack became

endorsements of many lawyers and judges familiar with Judge Cline’s work as an appraiser. *Id.*

⁹¹ Randolph, *supra* note 85, at 16.

⁹² MARTIN, *supra* note 51, at 133.

⁹³ *Reprint of Congressional Record: Eighty-first Birthday Anniversary of Judge Florence Ellinwood Allen*, 51 WOMEN LAW. J. 60, 60 (1965). In 1965, on the occasion of Judge Allen’s eighty-first birthday, Senator Frank J. Lausche of Ohio described her as “one of the most able and distinguished jurists of our time.” *Id.* at 60.

⁹⁴ Susan Moloney Smith, Comment, *Diversifying the Judiciary: The Influence of Gender and Race on Judging*, 28 U. RICH. L. REV. 179, 179 (1994).

⁹⁵ American Bar Association, *supra* note 79, at 2.

⁹⁶ *Id.*

⁹⁷ Nor did women ascend to the judiciary at a rate proportionate to female enrollment in law school on a time-lag basis. As Susan Moloney Smith writes, in 1978, political scientist Beverly Blair Cook found that the proportion of women judges matched the proportion of female attorneys in the previous decade. Smith, *supra* note 94, at 179 (citing Beverly B. Cook, *Women Judges: The End of Tokenism*, in WOMEN IN THE COURTS 84, 84 (Winifred L. Hepperle & Laura Crites eds., 1978). Cook predicted that because approximately 15% of law students in the 1970s were women, the same percentage of judges would be women in the 1980s. *Id.* Writing in 1994, Smith suggested that “[t]ime has proven Cook’s predictions overly optimistic.” *Id.* She noted that in 1988, only eighty-one of 833 intermediate appellate state judges were women, less than 10%; and in 1991, thirty-six of 356 judges on state courts of last resort were women, slightly more than 10%. *Id.* at 180. Similarly, women held only 216 of 2618 federal judicial positions in 1989, 8% of the total. *Id.*

But the number of women in law school does not match the number of women in the legal profession. For example, women today constitute 46.7% of law students, but only 34.4% of attorneys. Bureau of Labor Statistics, Household Data Annual Averages 2008, <http://www.bls.gov/cps/cpsaat11.pdf> (last visited Jan. 10, 2010);

only the eighth woman—and the first woman of color—appointed to any American state court of last resort when she joined the District of Columbia Court of Appeals (the District’s equivalent to a state supreme court).⁹⁸

Six years after Judge Mack’s appointment, President Ronald Reagan nominated Sandra Day O’Connor to be the first female United States Supreme Court Justice. Some have credited her appointment as the cause for “a greater number of women subsequently being selected to state benches throughout the land.”⁹⁹

COMM’N ON WOMEN IN THE PROFESSION, *supra* note 81, at 2. The reasons for this disparity are outside the scope of this Article, but if this difference of twelve percentage points is taken into consideration, the representation of women in the judiciary is almost proportionate to female representation in the profession.

⁹⁸ Walter J. Walsh, *Speaking Truth to Power: The Jurisprudence of Julia Cooper Mack*, 40 HOW. L.J. 291, 295 (1997). Judge Mack joined Catherine B. Kelly on the District of Columbia Court of Appeals. *Id.* at 297. Judge Kelly had been a member of that Court since 1971. *Id.* As noted above, in 1959, Justice Rhoda Lewis became the second woman to serve on an American court of last resort when Hawaii joined the union. *Id.* In 1961, Justice Lorna Lockwood joined the Arizona Supreme Court, and in 1962, Justice Suzie Sharp joined the North Carolina Supreme Court and Anne X. Alpern was briefly appointed to the Pennsylvania Supreme Court. *Id.* In 1975, Janie L. Shores joined the Alabama Supreme Court, and Elsjane Trimble Roy briefly served on the Arkansas Supreme Court. *Id.*; see also Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504, 504 (2002) (“[W]omen are much more likely to be appointed to an all-male court than to a gender-diverse court.”).

This disproportionately small number of female judges was echoed in the federal courts. In 1977, when President Carter moved to diversify the federal courts, only eight women had previously served as federal judges. Donald R. Songer, Sue Davis & Susan Haire, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 425–39 (1994). President Carter’s efforts resulted in the appointment of eleven women to the U.S. Courts of Appeals and twenty-nine to the Federal District Courts. *Id.*

⁹⁹ Hurwitz & Lanier, *supra* note 18, at 49. According to Justice O’Connor: President Reagan’s decision to put a woman on the Supreme Court really made a difference. It opened doors for women across this country and, frankly, across the world. And it was not because it was me; it was because we went 191 years without a woman on the Court. When I went to law school, about 1 percent of law students were women, and today it is around 50 percent. But I was an anomaly on the Court for a number of years, and I was the subject of intense scrutiny because of that, with people going as far as digging through my garbage and hiding microphones at cocktail parties to get my private thoughts. And that did not change until we got the second woman on the Court. Then all of a sudden we were fungible justices. And that is progress, even though I am still hoping that more women will be appointed sooner rather than later.

Elaine E. Bucklo & Jeffrey Cole, *Thoughts on Safeguarding Judicial Independence: An Interview with Justice Sandra Day O’Connor*, LITIGATION, Spring 2009, at 6, 9.

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In the nearly three decades that have passed since Justice O'Connor's appointment, the proportion of women serving on state supreme courts has increased by more than 20 percentage points.¹⁰⁰ In 1985, only seventy-two women—6.81% of the judiciary—were serving on state courts of last resort and intermediate courts of appeals.¹⁰¹ By 1993, women accounted for 15% of the justices on state courts of last resort, although fifteen states still had no female justices.¹⁰² Just six years later, women composed 24% of those courts, and only three states had all-male courts.¹⁰³

Today the percentage of female lawyers—31.6%—is only slightly greater than that of women on state courts of last resort.¹⁰⁴ In fact, women are better represented on the judiciary than in the top positions at law schools,¹⁰⁵ at private law firms,¹⁰⁶ and in corporations.¹⁰⁷

¹⁰⁰ Compare Bratton & Spill, *supra* note 98, at 512 fig.1 (demonstrating that in 1981, approximately 8% of state supreme court justices were female) with Nat'l Ass'n of Women Judges, United States State Court Women Judges, http://www.nawj.org/us_state_court_statistics_2009.asp (last visited Jan. 10, 2010) (stating that in 2009, 29% of state supreme court justices are female).

¹⁰¹ See Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84, 89 tbl.4 (2001); see also Hurwitz & Lanier, *supra* note 18, at 53 tbl.2, 60 tbl.4. Specifically, twenty-three women served on state supreme courts in 1985. Glick & Emmert, *supra* note 62, at 231. Five years earlier, that number was between ten and fourteen. See *id.*; Donald R. Songer and Kelley A. Crews-Meyer, *Does Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750, 750 (2000).

¹⁰² Bratton & Spill, *supra* note 98, at 512.

¹⁰³ *Id.*

¹⁰⁴ COMM'N ON WOMEN IN THE PROFESSION, *supra* note 81, at 1.

¹⁰⁵ In 2007–2008, 19.8% of law school deans were women, but women account for 46.2% of associate/vice/deputy deans and 66.5% of assistant deans. Ass'n of Am. Law Schools, 2007–2008 AALS Statistical Report on Law Faculty, <http://www.aals.org/statistics/2008dlt/gender.html> (last visited Jan. 10, 2010).

¹⁰⁶ See *infra* note 119 and accompanying text.

¹⁰⁷ As of May 2008, 18.4% of the general counsel positions at Fortune 500 companies were occupied by women, and 15.6% of those positions at Fortune 501–1000 companies. Rachel Ray & Patrick Folliard, *MCCA 2008 Survey of Fortune 500 Women General Counsel*, DIVERSITY & B. (Minority Corp. Counsel Ass'n, Wash., D.C.) July–Aug. 2008, <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1766>.

B. Findings

Today, 109 women serve on state courts of last resort, constituting 31.9% of the total number of justices.¹⁰⁸ That represents a marked increase of 11.7 percentage points from Professor Wefing's study.¹⁰⁹ The Wisconsin Supreme Court boasts a female majority,¹¹⁰ as does the Tennessee Supreme Court.¹¹¹ Some states, including Idaho and Indiana, have all-male supreme courts.¹¹²

	1975 ¹¹³	1977 ¹¹⁴	1980 ¹¹⁵	1997 ¹¹⁶	2009
Male	98.3%	96.7%	96.9%	79.9%	68.2%
Female	1.6%	3.3%	3.1%	20.1%	31.8%

As Table 5 highlights, our findings reveal that, proportionally, there are more female state supreme court justices in the Northeast and Midwest than nationwide, and fewer in the South and West:

¹⁰⁸ NAWJ, *supra* note 100. Additionally, 279 women served on intermediate state courts of appeals, comprising 30.12% of the 926 intermediate court of appeals judges. *Id.*

¹⁰⁹ See Wefing, *supra* note 10, at 57.

¹¹⁰ Wis. Court Sys., Supreme Court Justices, <http://www.wicourts.gov/about/judges/supreme/index.htm> (last visited Jan. 10, 2010).

¹¹¹ Tenn. Supreme Court, Biographies, <http://www.tsc.state.tn.us/geninfo/Bio/Supreme/Biosc.htm> (last visited Jan. 10, 2010).

¹¹² See Idaho State Judiciary, <http://www.isc.idaho.gov/> (last visited Jan. 10, 2010); Ind. Supreme Court, Justice Biographies, <http://www.in.gov/judiciary/supreme/bios.html> (last visited Jan. 10, 2010). Five men sit on the highest court in Idaho, but one of the three justices on the Idaho Court of Appeals is a woman. National Association of Women Judges, *supra* note 100. The five justices on the Indiana Supreme Court are all men, although four of the fourteen justices on the intermediate appellate court are women. *Id.*

¹¹³ FINO, *supra* note 60, at 52.

¹¹⁴ *Id.*

¹¹⁵ Henry R. Glick & Craig F. Emmert, *Stability and Change: Characteristics of State Supreme Court Judges*, 70 JUDICATURE 107, 108 (1986).

¹¹⁶ Wefing, *supra* note 10, at 57.

Table 5		
Gender Distribution of State Supreme Court Justices by Geographic Region		
	Male	Female
Nationwide	233 (68.1%)	109 (31.9%)
Northeast	35 (62.5%)	21 (37.5%)
South	87 (70.7%)	36 (29.3%)
Midwest	57 (67.1%)	28 (32.9%)
West	54 (69.2%)	24 (30.8%)

Significantly, in July 2008, women held nineteen of the fifty-three chief justice positions on state high courts.¹¹⁷ According to our data, seventeen women currently preside as a chief justice.¹¹⁸ In fact, the highest ranks of the judiciary have better female representation than the top of the legal profession in the private sector, where only 18.3% of partners at top private law firms are female.¹¹⁹

IV. RELIGION

Although not studied as extensively as race and gender, religion remains an important component of judicial diversity. Like women and racial minorities, under-represented religious groups have historically endured discrimination within the legal community. But unlike women and racial minorities, some religious minorities—though not all—have achieved a level of representation on state supreme courts roughly equal to, and in many cases substantially greater than, their representation among the nation's population.¹²⁰

¹¹⁷ COMM'N ON WOMEN IN THE PROFESSION, *supra* note 81, at 3 (citing NAT'L CTR. FOR STATE COURTS, JUDICIAL SELECTION AND RETENTION MEMBERSHIP ON STATE COURTS OF LAST RESORT, BY SEX (2008)).

¹¹⁸ Female chief or presiding justices sit in Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, Maine, Massachusetts, Michigan, North Carolina, South Carolina, Tennessee, the Texas Court of Criminal Appeals, Utah, and Wisconsin.

¹¹⁹ In contrast, in 2007, women accounted for 45.1% of associates at private law firms. COMM'N ON WOMEN IN THE PROFESSION, *supra* note 81, at 1 (citing NAT'L ASS'N FOR LAW PLACEMENT, MINORITY WOMEN STILL UNDERREPRESENTED IN LAW FIRM PARTNERSHIP RANKS—CHANGE IN DIVERSITY OF LAW FIRM LEADERSHIP VERY SLOW OVERALL (2007)).

¹²⁰ Glick & Emmert, *supra* note 115, at 110 (observing how religious minorities have made more significant inroads in judicial diversity than women and racial minorities); see also Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 152 n.159 (1997) (observing that the U.S. Supreme Court “has been more religiously diverse than racially diverse”).

Particularly enlightening is the experience of Jewish and Catholic attorneys over the course of the last century, specifically their representation on and relationship with the U.S. Supreme Court. To date, seven Jewish Justices have sat on the U.S. Supreme Court, including current Justices Ruth Bader Ginsburg and Stephen Breyer.¹²¹ The presence of Jewish jurists across our nation is well recognized.

That, however, was not always the case. Justice Louis D. Brandeis, the first Jewish attorney to accept a nomination to the Supreme Court,¹²² faced significant anti-Semitism both at the time of his nomination and after his investiture. Indeed, Justice Brandeis's nomination to the Court in 1916 prompted the first public hearing by a Senate committee on a Supreme Court nomination.¹²³ That hearing partially contributed to a delay of more than four months between his nomination and confirmation—a delay that remains a record today.¹²⁴

¹²¹ The seven Jewish Justices who have served on the U.S. Supreme Court are Louis D. Brandeis, Benjamin Cardozo, Felix Frankfurter, Arthur Goldberg, Abe Fortas, Ginsburg, and Breyer. See Ruth Bader Ginsburg, *From Benjamin to Brandeis to Breyer: Is There a Jewish Seat?*, 41 BRANDEIS L.J. 229, 233–35 (2002). Notably, the Supreme Court was without a Jewish member from 1969, when Justice Fortas resigned, until Justice Ginsburg's 1993 confirmation. See Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1058 n.32 (1990).

¹²² Justice Brandeis was not, in fact, the first Jewish attorney considered for the Supreme Court. In 1853, President Millard Fillmore nominated Judah P. Benjamin to the Court, but Benjamin declined. Ginsburg, *supra* note 121, at 230–33.

Also, Justice Brandeis was not the first Jewish judge to sit on a court of last resort within the United States. The first Jewish member of the California Supreme Court, Henry Lyons, was appointed in 1849, and Solomon Heydenfeldt was elected to the California Supreme Court in 1851. Albert M. Freidenberg, *Solomon Heydenfeldt: A Jewish Jurist of Alabama and California*, in 10 PUBLICATIONS OF THE AMERICAN JEWISH HISTORICAL SOCIETY 129, 132 (1902). But see Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years*, 31 HASTINGS CONST. L.Q. 141, 143 (2004) (naming Heydenfeldt as the first Jewish justice to sit on the California Supreme Court, without mention of Lyons' religion). It took considerable time, however, for some other states to follow suit. It was not until 1936 that Horace Stern became the first Jewish jurist to sit on Pennsylvania's high court. See Phila. Bar Ass'n, *Legends of the Bar*, <http://www.philadelphiabar.org/page/AboutLegends> (last visited Jan. 10, 2010).

¹²³ Matthew J. Franck, *The Unbearable Unimportance of the Catholic Moment in Supreme Court History*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 447, 448–49 (2006) (citing HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE UNITED STATES SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 135 (new & rev. ed. 1999)).

¹²⁴ *Id.* (citing ABRAHAM, *supra* note 123, at 135). Historians disagree over how much importance Justice Brandeis' religion played in the atypical treatment of his nomination. *Id.* at 449 (citing ABRAHAM, *supra* note 123, at 136; PHILLIPPA STRUM,

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Once confirmed, Justice Brandeis faced open anti-Semitism from his colleague Justice James Clark McReynolds. Whenever Justice Brandeis spoke during the Court's conferences, Justice McReynolds "would rise and leave the room."¹²⁵ Further, the Supreme Court did not take an official photograph in 1924 "because [Justice] McReynolds refused to sit next to [Justice] Brandeis."¹²⁶ Justice Brandeis was not the only recipient of such harsh treatment. When Benjamin Cardozo joined the Supreme Court as the second Jewish Justice, Justice McReynolds treated him with similar disdain; he refused to speak to either of his Jewish brethren.¹²⁷

Animosity, or the threat of it, persisted. Particularly telling is an *amicus curiae* brief filed by Philip Perlman—the first Jewish Solicitor General—in *Shelley v. Kraemer*,¹²⁸ a landmark case in which the Supreme Court held that racially restrictive covenants on real property are unconstitutional.¹²⁹ That brief was written by four attorneys, all of them Jewish.¹³⁰ All four of those attorneys' names, however, were stricken from the brief by Perlman's principal assistant, Arnold Raum, who was Jewish himself.¹³¹ Raum reasoned that the required presence of Perlman's name was bad enough and that inclusion of the other four names would merely signal that the United States' position was "put out by a bunch of Jews."¹³²

Despite those challenges, Jewish jurists continue to increase their numbers on state supreme courts. According to a study published in 1972, 3.6% of state supreme court justices were Jewish during the mid-1960s.¹³³ That percentage remained relatively static

Louis D. Brandeis, in THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1995, at 331, 334 (Clare Cushman ed., 2d ed. 1995)).

¹²⁵ Ginsburg, *supra* note 121, at 233.

¹²⁶ *Id.* Based on seniority, Justice Brandeis' and Justice McReynolds' seats were next to each other for the Court portrait. *Id.*

¹²⁷ Franck, *supra* note 123, at 449 (citing ABRAHAM, *supra* note 123, at 133–34).

¹²⁸ 334 U.S. 1 (1948).

¹²⁹ *Id.* at 22–23.

¹³⁰ Ginsburg, *supra* note 121, at 234.

¹³¹ *Id.*

¹³² *Id.* Notably, this anti-Semitism was not limited to conduct of the federal government. In the 1950s many law firms were only beginning to hire Jewish attorneys. Malvina Halberstam, *Ruth Bader Ginsburg: The First Jewish Woman on the United States Supreme Court*, 19 CARDOZO L. REV. 1441, 1446 (1998) (quoting LYNN GILBERT & GAYLEN MOORE, PARTICULAR PASSIONS 158 (1981)).

¹³³ See Glick & Emmert, *supra* note 115, at 108 (citing Bradley C. Canon, *The Impact of Formal Selection Process on the Characteristics of Judges – Reconsidered*, 6 LAW & SOC'Y REV. 579, 579–93 (1972)). The numbers we use in our discussion of the Canon

into the mid-1970s; a 1975 study revealed that 4.4% of state supreme court justices were Jewish.¹³⁴ Just five years later, Jewish representation on state supreme court benches spiked, with Jewish judges accounting for 11.6% of the state supreme judiciary.¹³⁵ That percentage dropped significantly to 5.7% by 1997.¹³⁶ Based on our findings,¹³⁷ today at least 6.3% of state supreme court justices are Jewish.¹³⁸ Although less than a one percentage point increase from Professor Wefing's findings, this percentage is substantially higher than the 1.7% of the United States population that is Jewish.¹³⁹

Catholic jurists have also overcome historical discrimination to rise to positions of prominence.¹⁴⁰ In 1836, President Andrew Jackson appointed Roger Taney to be the first Catholic Justice on the U.S. Supreme Court,¹⁴¹ a nomination that led to criticism of Justice Taney's appointment due to "widespread anti-Catholic hostility."¹⁴²

study (which itself was conducted between 1961 and 1968) are based on a recalculation of the Canon study done by Glick and Emmert in 1981.

¹³⁴ FINO, *supra* note 60, at 52.

¹³⁵ Glick & Emmert, *supra* note 115, at 108.

¹³⁶ Professor Wefing compiled his data based on his ability to identify the religion of 230 of the then 327 state supreme court justices. *See* Wefing, *supra* note 10, at 63. Notably, 1990 census data revealed that 2% of the U.S. population was Jewish. *Id.*

¹³⁷ Our data on religion is based on the self-identifying responses made, if any, in the 149 completed surveys we received, as well as any publicly available information. For example, some justices on the North Carolina, Tennessee, and West Virginia Supreme Courts identify their religion in their biographies posted on those courts websites. *See, e.g.,* Tennessee Supreme Court, *supra* note 111. In total, we compiled the religious affiliation of 165 justices.

¹³⁸ Of those justices whose religion could be identified, we identified eleven as Jewish.

¹³⁹ *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2009, at 59 (2008), available at <http://www.census.gov/compendia/statab/tables/09s0074.pdf>. (citing THE PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 11 (2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>).

¹⁴⁰ *See* Levinson, *supra* note 121, at 1056 ("Even a cursory look at the historical record involving Catholic Justices certainly reveals the presence of overt anti-Catholicism.").

¹⁴¹ Christine L. Nemacheck, *Have Faith in Your Nominee? The Role of Candidate Religious Beliefs in Supreme Court Selection Politics*, 56 *DRAKE L. REV.* 705, 715 (2008).

¹⁴² Sheldon Goldman, *The Politics of Appointing Catholics to the Federal Courts*, 4 *U. ST. THOMAS L.J.* 193, 196 (2006) (citing CARL B. SWISHER, ROGER B. TANEY 317 (1935)). Justice Joseph McKenna, the third Roman Catholic appointed to the Court, similarly experienced anti-Catholic hostility during his 1898 confirmation process. *Id.* at 197 (citing BARBARA A. PERRY, A "REPRESENTATIVE" SUPREME COURT? 28–29 (1991)). Anti-Catholic animosity also contributed to hostility during the confirmation proceedings of Justice Pierce Butler; the Ku Klux Klan openly opposed his nomination. *Id.* (citing ABRAHAM, *supra* note 123, at 188–89 and DAVID J. DANIELSKI, A SUPREME COURT JUSTICE IS APPOINTED 165–66 (1964)). In addition, the

It was not until 1894—nearly sixty years after Justice Taney’s confirmation and thirty years after his death—that Edward D. White became the second Catholic appointed to the Court.¹⁴³ Since Justice White took his seat on the Supreme Court, there has been at least one Catholic on the Supreme Court, save for a seven-year gap before Justice William Brennan’s 1956 confirmation.¹⁴⁴ The prominence of Catholics on the Court is underscored by its current makeup. The confirmation of Justice Samuel Alito created, for the first time, a Catholic majority on the Court,¹⁴⁵ a majority that expanded to six with Justice Sotomayor’s confirmation.¹⁴⁶

Similar to the increase in Jewish justices, the percentage of Catholic jurists sitting on state supreme courts has also risen markedly over the last half century. In the 1960s, approximately 16% of state supreme court justices were Catholic.¹⁴⁷ By 1975, that percentage increased to 18.2%.¹⁴⁸ Just five years later, that percentage jumped to 23.9%.¹⁴⁹ Over the next decade and a half, Catholic representation on state high courts again rose, with 29.6% of all such jurists identifying as Catholic in 1997.¹⁵⁰

Today, Catholics represent the largest single religious denomination among state supreme court justices. Catholics, according to our data, represent at least 48 (27.6%) of the state high court bench members whose religion we could identify. Although a far cry from the majority representation on the United States Supreme Court and a modest decline from Professor Wefing’s study,

Women’s Auxiliary of the Ohio State Good Government Association rebuked President Warren Harding over his nomination of Justice Butler, whom they described as “un-American.” See Levinson, *supra* note 121, at 1056–57 (citing DANIELSKI, *supra*, at 92).

¹⁴³ Goldman, *supra* note 142, at 196. Notably, Justice White was not President Grover Cleveland’s first choice. President Cleveland’s first two nominees were defeated in the Senate. *Id.*

¹⁴⁴ Franck, *supra* note 123, at 448.

¹⁴⁵ Goldman, *supra* note 142, at 193. The Catholic Justices are Chief Justice John Roberts, and Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, Samuel Alito, and Sonia Sotomayor. Goodstein, *supra* note 4.

¹⁴⁶ See *id.*

¹⁴⁷ Glick & Emmert, *supra* note 115, at 108 (recalculating statistics of Canon, *supra* note 133, at 579–93).

¹⁴⁸ FINO, *supra* note 60, at 52.

¹⁴⁹ Glick & Emmert, *supra* note 115, at 108.

¹⁵⁰ Wefing, *supra* note 10, at 63. Notably, 1990 census data revealed that 25% of all Americans identified themselves as Catholics. *Id.*

that percentage still equates to greater representation than in the populace at large; 23.9% of the nation self-identify as Catholic.¹⁵¹

Protestants (collectively defined) remain the majority faith on state high courts, though a decreasing majority.¹⁵² Bradley Canon's 1972 study revealed that in the mid-1960s, more than 75% of state supreme court justices were Protestant.¹⁵³ That number remained relatively constant in the mid-1970s, as evidenced by Fino's finding that nearly three of every four state supreme court justices were Protestant.¹⁵⁴ By 1980, the numbers shifted significantly, with Protestants accounting for 60.2% of state supreme court justices.¹⁵⁵ The decrease in Protestant representation continued throughout the 1990s. In 1997, 58.7% identified as Protestants¹⁵⁶—a marked decrease from the 1970s.

Our data reveal that representation of Protestants on state supreme courts has remained stable. One hundred one (58%) of the state supreme court justices surveyed identify as Protestant. Although seven percentage points higher than their representation in the United States populace as a whole,¹⁵⁷ this still represents a significant decrease for Protestants on state high courts when compared with Canon's and Fino's findings.

¹⁵¹ See U.S. CENSUS BUREAU, *supra* note 139.

¹⁵² Cf. Yang, *supra* note 120, at 152 n.159 (noting that the Supreme Court of the United States "used to be the province of 'white' Protestant men").

¹⁵³ Glick & Emmert, *supra* note 115, at 108 (recalculating statistics of Canon, *supra* note 133, at 579–93).

¹⁵⁴ See FINO, *supra* note 60, at 52 (finding that 74% of state supreme court justices were Protestant).

¹⁵⁵ Glick & Emmert, *supra* note 115, at 108.

¹⁵⁶ Wefing, *supra* note 10, at 63.

¹⁵⁷ See U.S. CENSUS BUREAU, *supra* note 139.

	Mid-1960s ¹⁵⁸	1975 ¹⁵⁹	1977 ¹⁶⁰	1980–1981 ¹⁶¹	1997 ¹⁶²	2009
Protestant	80.3%	74.0%	71.3%	60.2%	58.7%	58%
Catholic	16.1%	18.2%	20.0%	23.9%	29.6%	27.6%
Jewish	3.6%	4.4%	4.1%	11.6%	5.7%	6.3%

Nevertheless, and despite the notable percentage of Jewish and Catholic jurists on state supreme courts, the representation of other minority religions is limited—and often non-existent. For example, our research did not reveal any state supreme court justices who identified as Buddhist, Muslim, or Hindu.¹⁶³ One justice self-reported as Mormon. Notably, 3.6% of our data pool identified themselves as “other” when asked for their religion, and 3.6% identified themselves as “atheist/agnostic.”

	Census Representation ¹⁶⁴	Representation on State Supreme Courts
Protestant	51.3%	58%
Methodist	6.2%	13.2%
Presbyterian	2.7%	12.6%
Anglican/Episcopal	1.5%	10.9%
Baptist	17.2%	10.3%
Catholic	23.9%	27.6%
Jewish	1.7%	6.3%
Buddhist	.7%	—
Muslim	.6%	—
Hindu	.4%	—

¹⁵⁸ See Glick & Emmert, *supra* note 115, at 108 (citing Canon, *supra* note 133, at 579–93).

¹⁵⁹ See FINO, *supra* note 60, at 52.

¹⁶⁰ *Id.*

¹⁶¹ See Glick & Emmert, *supra* note 115, at 108.

¹⁶² See Wefing, *supra* note 10, at 63.

¹⁶³ Given that these results are based only on survey respondents and publicly available information, it is of course possible that a non-responding justice identifies with one of these religions.

¹⁶⁴ See U.S. CENSUS BUREAU, *supra* note 139.

V. PRIOR JUDICIAL EXPERIENCE

The value and importance of prior judicial experience for nominees to the U.S. Supreme Court has been the subject of scholarly debate for at least five decades.¹⁶⁵ From 1869 (when Congress established separate judgeships for the United States Courts of Appeals) through 1952 (the last year of President Harry S. Truman's administration), prior experience as a federal appellate judge was something of a rarity. In fact, of the sixty-two nominees to the Supreme Court during that period, a mere 16% previously sat on federal courts of appeals.¹⁶⁶

President Eisenhower created a sea change in that practice, declaring that he "would use an appeals court appointment as a stepping stone to the Supreme Court."¹⁶⁷ Future presidents followed suit; roughly two out of three nominees to the Supreme Court since 1953 sat on a federal circuit prior to nomination.¹⁶⁸ That percentage has increased dramatically in recent years. Currently, all nine Justices on the Supreme Court have prior federal appellate experience.¹⁶⁹ Since 1986, only one Supreme Court nominee, William H. Rehnquist, has been confirmed without federal court of appeals experience.¹⁷⁰

The debate over prior judicial experience continues¹⁷¹ and need not be repeated here. Nevertheless, prior judicial experience among state supreme court justices remains an interesting data point. In the mid-1960s, Canon found that 57.8% of state supreme court justices had previous judicial experience.¹⁷² That percentage increased in the

¹⁶⁵ See William G. Ross, *The Ratings Game: Factors that Influence Judicial Reputation*, 79 MARQ. L. REV. 401, 420 (1996) (noting Eisenhower administration as line of demarcation in judicial experience debate).

¹⁶⁶ Lee Epstein et al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PA. L. REV. 833, 839 (2009).

¹⁶⁷ SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 115 (1997).

¹⁶⁸ See Epstein et al., *supra* note 166, at 839.

¹⁶⁹ See Official Biographies, *supra* note 1.

¹⁷⁰ See Epstein et al., *supra* note 166, at 835. President George W. Bush's nomination of Harriet Miers and the significant criticism directed at her lack of judicial experience illustrates the state of affairs. See *id.* at 835-36.

¹⁷¹ See Epstein et al., *supra* note 166, at 836-37 (collecting citations).

¹⁷² See Glick & Emmert, *supra* note 115, at 108 (citing Canon, *supra* note 133, at 579-93).

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mid-1970s, rising to 67.1% in 1975, but falling to 65.1% in 1977.¹⁷³ Prior judicial experience remained relatively stagnant in the early 1980s; Glick and Emmert found that 62.9% of state supreme court justices in 1980–1981 had prior judicial experience.¹⁷⁴ Finally, in his 1997 study, Professor Wefing found that 67.6%—or 221 then-sitting justices—had “significant” judicial experience, which he defined as “service on a court where [the justice was] full-time and had some significant range of cases.”¹⁷⁵

In carrying out our study, we did not distinguish based on the significance of prior judicial experience, as did Professor Wefing. But we similarly found that prior experience on the bench was a common trait. Two hundred seventeen—or 63.5%—of state supreme court justices had some level of prior judicial experience. Notably, the percentage of state supreme court justices who have previously sat on the bench noticeably increases for female justices and justices who are members of racial minorities:

Table 8 Prior Judicial Experience: Gender and Race	
Male	60.5%
Female	69.7%
Caucasian	61.2%
Racial Minority	75.6% ¹⁷⁶
Nationwide	63.5%

Regional disparities also exist in terms of prior judicial experience:

¹⁷³ See FINO, *supra* note 60, at 52. Notably, however, roughly 43% of supreme court justices reported that their “primary” pre-supreme court career was as a judge. *Id.* at 53.

¹⁷⁴ See Glick & Emmert, *supra* note 115, at 108.

¹⁷⁵ Wefing, *supra* note 10, at 80.

¹⁷⁶ In whole numbers, 141 male justices, 76 female justices, 183 Caucasian justices, and 34 racial minority justices had prior judicial experience.

Table 9 Prior Judicial Experience Across Geographic Regions	
Northeast	67.9%
South	68.7%
Midwest	61.5%
West	52.6%
Nationwide	63.5%

As Table 9 demonstrates, justices in the Western states are somewhat less likely to have prior judicial experience than other regions, with the greatest spread being a difference of approximately sixteen percentage points between Southern justices with prior experience on the bench and Western judges with similar experience.

VI. PRIOR LEGAL / PROFESSIONAL EXPERIENCE

Prior judicial experience is, of course, not the only relevant experience for state supreme court justices (or any judge, for that matter). Former Justice Daniel O’Hern of the Supreme Court of New Jersey observed that an “important quality in a court is a breadth of perception, the residue of human experience that enables a judge to place issues in perspective.”¹⁷⁷ According to Justice O’Hern:

Judicial experience is a factor to be considered in supporting nominees to the [c]ourt, but should not be the determinative factor. For example, trial experience is often regarded as an important qualification for [the] bench. Yet, Learned Hand, generally regarded as the greatest judge never to have sat on the U.S. Supreme Court, was an ineffective and somewhat inexperienced trial lawyer. The point is simply this: Experience is not the best predictor of performance.¹⁷⁸

Although an analysis of what background characteristics best predict the acumen of a justice is outside the scope of this Article (and would be largely subjective anyway), our results revealed (or confirmed, depending on one’s viewpoint) that state supreme court justices arrive at the bench with a wide spectrum of prior

¹⁷⁷ Daniel J. O’Hern, *What Makes a Court Supreme: The Wilentz Court from Within*, 197 N.J.L.J. 16, 17 (2009).

¹⁷⁸ *Id.*

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experience.¹⁷⁹ The most common, by far, of these past experiences was private practice, a résumé line that 82.6% of survey respondents identified. Although female justices were least likely to have practiced privately prior to their appointment or election, nearly three out of every four female justices who responded to our survey had prior private practice experience. Further, nine out of ten responding justices who identified themselves as members of a racial minority group had prior experience as private practitioners, far outpacing Caucasian respondents.

	Nationwide	Caucasian	Racial Minority	Male	Female
Government	51.0%	48.8%	65%	54.5%	41.0%
Private Practice	82.6%	81.4%	90%	85.4%	74.4%
Civil Litigators	65.1%	65.1%	65%	69.1%	53.8%
Public Criminal Defense	15.4%	14.7%	20%	17.3%	10.3%
Private Criminal Defense	28.2%	28.7%	25%	31.8%	17.9%
Government Prosecutor	32.9%	32.6%	35%	34.5%	28.2%
Legal Aid or Civil Rights/Liberties	11.4%	9.3%	25.0%	10.0%	15.4%

The second most common experience prior to appointment/election was as a civil litigator; 65.1% of respondents had at least some civil litigation experience. Male respondents reported prior civil litigation experience at a rate that was 15 percentage points higher than that of female respondents, and the percentage of racial minorities mirrored the national percentage. Past experience as a government attorney was also typical among responding justices; more than half reported prior government attorney experience (at any level of government). Interestingly, non-Caucasian justices outpaced their Caucasian peers in government

¹⁷⁹ The data in this section relies solely on the 149 responses received on this subject.

¹⁸⁰ The percentages in this chart represent the percentage of survey respondents (of each particular characteristic) who indicated that they had the particular prior work experience.

service by more than 16%. Also, whereas male responding justices had prior government experience more than half the time, only approximately one in four responding female justices had prior government service.

Our results amply demonstrate that some type of public service at the state level was very common, with nearly 70% of justices with prior governmental experience having worked at the state level.

Federal Government	19.8%
State Government	69.7%
County Government	38.2%
Local Government	18.4%

A number of other findings are noteworthy. First, the disparities among criminal defense attorneys along gender lines is striking. Whereas approximately 17% of male responding justices had previously served as public criminal defense attorneys, that percentage drops to around 10% for female justices. Similarly, in the private sector, 31.8% of male responding justices were retained as private criminal defense attorneys, while less than 18% of female respondents reported such experience.

Second, there is a wide disparity along racial and gender lines in respect of prior employment at legal aid or civil liberties organization. One out of four responding justices who identified as a member of a racial minority had such a prior experience, compared to less than one in ten of their non-minority peers. Similarly, female responding justices outpaced their male counterparts by more than five percentage points with respect to prior legal aid or civil rights employment.

When the data are disaggregated for geographic regions, as demonstrated in Table 12, a variety of interesting trends emerge:

	Nationwide	Northeast	South	Midwest	West
Government	51.0%	56.5%	54.2%	57.1%	40.0%
Private Practice	82.6%	65.2%	87.9%	82.1%	85.0%
Civil Litigators	65.1%	65.2%	60.3%	67.9%	70.0%
Public Criminal Defense	15.4%	8.7%	17.2%	3.6%	25.0%
Private Criminal Defense	28.2%	13.0%	32.7%	25%	32.5%
Government Prosecutor	32.9%	34.8%	32.8%	50.0%	20.0%
Legal Aid or Civil Rights/Liberties	11.4%	13.0%	10.3%	10.7%	12.5%

Western state supreme court justices who responded to our survey were least likely to have previous government experience, with only two in five survey respondents indicating prior public legal experience. In addition, justices in the Northeast were least likely to have experience in private practice. Approximately 65% of Northeastern justices indicated that they had prior private practice experience, more than seventeen percentage points off the national average.

Other interesting trends exist when looking at criminal law experience. For example, justices in the Northeast are not particularly likely to have been members of the criminal defense bar; the percentage of Northeastern judges who had experience as public or private criminal defense attorneys prior to appointment/election—8.7% and 13.0%, respectively—is roughly half that of the national average (15.4% and 28.2%, respectively). Experience as a government prosecutor is much more prevalent among justices in the South and Midwest, with over half of all justices in those regions having previously represented the state in criminal matters.

Finally, state supreme court justices with prior private practice experience come from a diverse set of law firms, ranging from internationally renowned large firms—so-called Big Law—to small

¹⁸¹ The percentages in this chart represent the percentage of survey respondents (of each particular characteristic) who indicated that they had the particular prior work experience.

firms and solo practitioners. More than two-thirds of responding state supreme court justices with prior private practice experience worked at law firms of ten attorneys or fewer. In fact, responding supreme court justices who previously worked at firms of fewer than ten attorneys outnumbered attorneys who previously worked at Big Law, firms of fifty to 200 attorneys, and firms of ten to fifty attorneys, *combined*.

Table 13 shows that supreme court justices in the Northeast, where Big Law firms are concentrated, are most likely to have worked in law firms with fifty or more attorneys. Conversely, Southern justices (where such firms are less concentrated) are most likely to have worked in smaller law firms. In fact, almost four out of five responding Southern justices with private practice experience worked at a firm of ten attorneys or fewer, and just 14% of all responding Southern justices with private practice experience had never worked in a firm of fewer than fifty attorneys.¹⁸²

	Nationwide	Northeast	South	Midwest	West
Less than 10 attorneys	67.5%	60.0%	76.4%	65.2%	58.9%
10–50 attorneys	22.8%	20.0%	17.6%	17.4%	32.4%
50–200 attorneys	12.2%	33.3%	7.8%	13.0%	8.8%
More than 200 attorneys	5.7%	13.3%	5.9%	4.3%	2.9%

VII. POLITICAL AFFILIATION AND IDEOLOGICAL SELF-IDENTIFICATION

Historically, state supreme court justices have leaned Democratic. According to Fino's 1975 study, 72.6% of state supreme court justices identified themselves as Democrats, 25.5% of justices

¹⁸² When responding to law firm size, justices were asked to check, and many did check, all categories that applied. Therefore, the sum of the percentages in Table 13 is greater than 100%.

The finding that state supreme court justices previously worked at small firms is consistent with prior studies. Specifically, Glick and Emmert found that of the state supreme court justices sitting in 1980–1981, 26.1% had hung their own shingles, while 54% had worked for firms with two to four partners. See Glick & Emmert, *supra* note 115, at 109.

¹⁸³ The percentages in this chart represent the percentage of survey respondents (of each particular characteristic) who indicated that they had the particular prior work experience.

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identified themselves as Republicans, and 1.9% identified themselves as Independent.¹⁸⁴ Fino's 1977 study reported substantially similar results.¹⁸⁵ A 1980–1981 study similarly revealed that state supreme court justices were, by and large, Democrats, a finding that was consistent across geographic regions.¹⁸⁶

Professor Wefing's 1997 study concluded that while Republican representation on state supreme courts had increased, "the Democratic party is still the dominant party."¹⁸⁷ According to his survey and other publicly available data, as of 1997, 56% of state supreme court justices were Democrat, 37.9% were Republican, and 5.6% were Independent.¹⁸⁸

In the years since Professor Wefing's study, the percentages of both Republican and Democratic state supreme court justices have decreased, while the number of Independent justices has increased. We found that 38.9% of justices identified themselves as Democrats, 26.8% identified themselves as Republicans, and 8.7% identified themselves as Independents. 19.5% indicated that they had no political affiliation.

	Mid-1960s ¹⁸⁹	1975 ¹⁹⁰	1977 ¹⁹¹	1980–1981 ¹⁹²	1997 ¹⁹³	2009
Democrat	57.4%	72.6%	74.2%	67.0%	56.0%	38.9%
Republican	—	25.5%	24.2%	—	37.9%	26.8%
Independent	—	1.9%	1.6%	—	5.6%	8.7%

When disaggregated by region, as seen in Table 15, more than half of the justices in the Northeast self-identified as Democrats. Interestingly, the Northeast was the only region in which a majority of

¹⁸⁴ FINO, *supra* note 60, at 52.

¹⁸⁵ *See id.* (74.2% Democratic and 24.2% Republican).

¹⁸⁶ Glick & Emmert, *supra* note 62, at 233. According to Glick and Emmert, 53.3% of justices in the Northeast, 50.6% of justices in the Midwest, 90.8% of justices in the South, and 64.4% of justices in the West affiliated with the Democratic Party. *Id.*

¹⁸⁷ Wefing, *supra* note 10, at 66.

¹⁸⁸ *Id.*

¹⁸⁹ *See* Glick & Emmert, *supra* note 115, at 108.

¹⁹⁰ *See* FINO, *supra* note 60, at 52.

¹⁹¹ *Id.*

¹⁹² *See* Glick & Emmert, *supra* note 115, at 108.

¹⁹³ *See* Wefing, *supra* note 10, at 66.

justices self-identified with any one political party. Midwestern responding justices self-identified as Republicans with the greatest frequency and indeed, the Midwest was the only region in which responding Republican justices outnumbered responding Democratic justices. Responding Western justices when combined, were most likely to either identify themselves as Independents or to not claim any party affiliation:

	Nationwide	Northeast	South	Midwest	West
Democrat	38.9%	52.2%	32.2%	32.1%	45%
Republican	26.8%	30.4%	30.5%	39.3%	12.5%
Independent	8.7%	13.0%	6.8%	7.1%	10.0%
No Affiliation	19.5%	4.3%	22.0%	17.9%	25.0%
Other	0.7%	—	—	—	2.5%
No Response	5.4%	—	8.5%	3.6%	7.5%

When disaggregated along racial and gender lines, state supreme court justices in all categories are more likely to self-identify as Democrats than as Republicans. Although female justices were somewhat more likely to self-identify as Democrats than men, the most dramatic (but perhaps most unsurprising) differential is along racial lines. Sixty percent of minority justices who responded to our survey self-identified as Democrats, compared to just 35.7% of Caucasian respondents. Only 15% of minority justices self-identified as Republicans. This is consistent with the low level of minority identification with the Republican party, historically and currently.

	Democrat	Republican
Male	36.2%	26.4%
Female	41.0%	28.2%
Caucasian	35.7%	28.7%
Racial Minorities	60.0%	15.0%

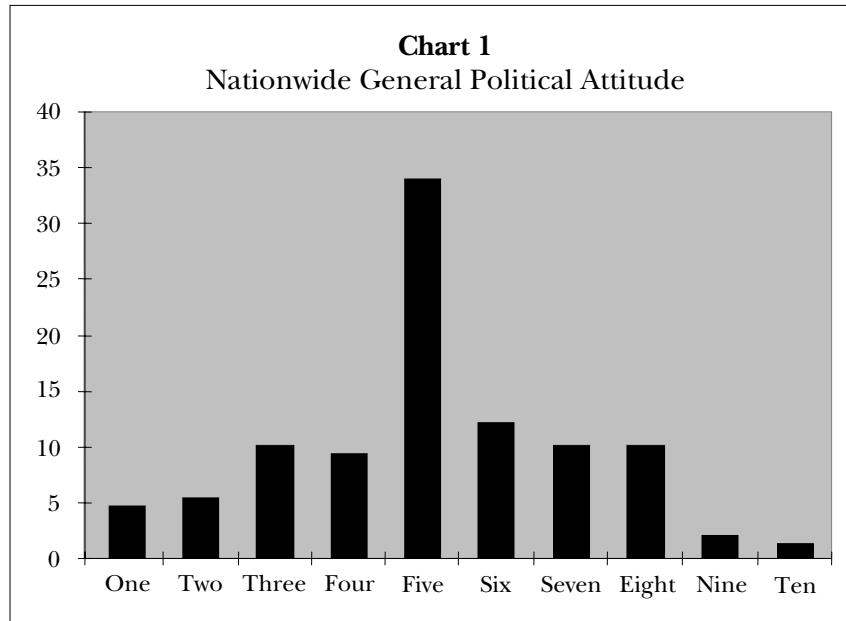
We also asked justices to rate their “general political attitude” along a scale of one to ten, defining “one” as “very liberal,” “five” as

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“moderate,” and “ten” as “very conservative.” The results of that question appear in Chart 1.¹⁹⁴



As Chart 1 demonstrates, more than one-third—34.2%—of survey respondents identified themselves as a “five,” or a “moderate.”¹⁹⁵ Although justices who self-identified as Democrats outnumbered Republican self-identifiers, 36.3% of justices categorized themselves as being right of center (i.e., rated their general political attitude somewhere between “six” and “ten”), but only 29.5% of responding justices labeled themselves as left of center (i.e., rating their general political attitude somewhere between “one” and “four”).¹⁹⁶ The mean response was 5.16.

¹⁹⁴ Some responding justices opted not to rate their general political attitude.

¹⁹⁵ The breakdown of all responses is as follows: 4.1% identified themselves as “one”; 5.5% as “two”; 10.3% as “three”; 9.6% as “four”; 34.2% as “five”; 12.3% as “six”; 10.3% as “seven”; 10.3% as “eight”; 2.1% as “nine”; and 1.4% as “ten.”

¹⁹⁶ We find this result to be particularly telling despite the fact that justices had more “right-of-center” options (five) than “left-of-center” options (four). Likely, responding justices used “five” as the middle-of-the-road baseline and adjusted accordingly. The disparity in choices, however, may explain why so few justices indicated that they were “very conservative” (i.e., “nine” or “ten”) when compared with those responding justices who identified themselves as “very liberal” (i.e., “one” or “two”).

When examined geographically, the data reveal that responding justices in the Northeast and South are “right of center” and responding Western judges self-identify as being significantly “left of center.” Responding Midwestern judges are evenly divided among “left of center,” “moderate,” and “right of center.”

	Nationwide	Northeast	South	Midwest	West
Left of Center	29.5%	19.0%	15.3%	33.3%	53.8%
Moderate	34.2%	33.3%	37.3%	33.3%	30.8%
Right of Center	36.3%	47.6%	47.5%	33.3%	15.4%

Regional results appear in Chart 2.¹⁹⁷

¹⁹⁷ The breakdown of all responses by region is as follows:

Northeast: 0% as “one”; 4.8% as “two”; 4.8% as “three”; 9.5% as “four”; 33.3% as “five”; 14.3% as “six”; 9.5% as “seven”; 23.8% as “eight”; 0% as “nine”; and 0% as “ten.”

South: 3.4% as “one”; 5.1% as “two”; 3.4% as “three”; 3.4% as “four”; 37.3% as “five”; 11.9% as “six”; 16.9% as “seven”; 11.9% as “eight”; 3.4% as “nine”; and 3.4% as “ten.”

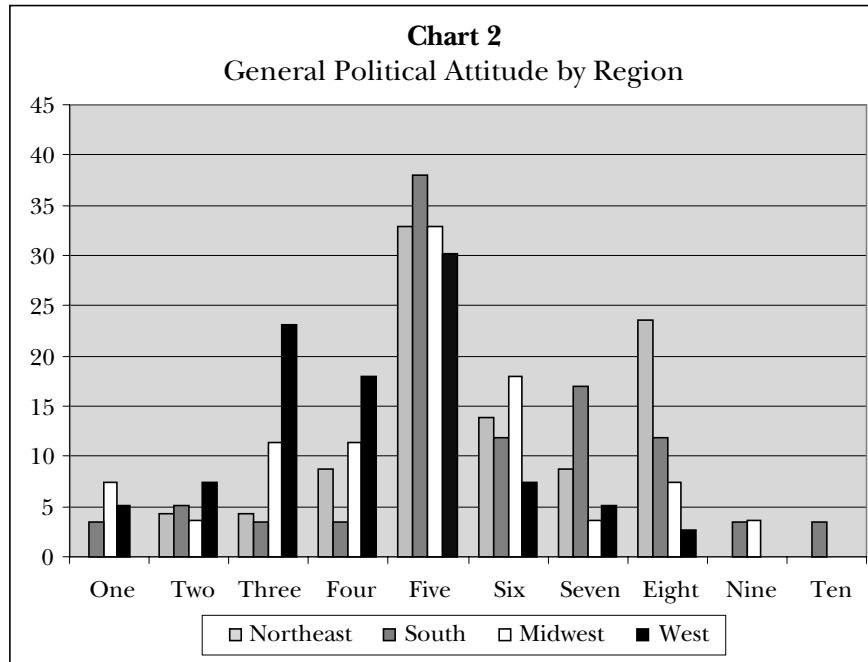
Midwest: 7.4% as “one”; 3.7% as “two”; 11.1% as “three”; 11.1% as “four”; 33.3% as “five”; 18.5% as “six”; 3.7% as “seven”; 7.4% as “eight”; 3.7% as “nine”; and 0% as “ten.”

West: 5.1% as “one”; 7.7% as “two”; 23.1% as “three”; 17.9% as “four”; 30.8% as “five”; 7.7% as “six”; 5.1% as “seven”; 2.6% as “eight”; 0% as “nine”; and 0% as “ten.”

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VIII. EDUCATIONAL BACKGROUND

Past studies have demonstrated a strong geographic correlation between the states in which supreme court justices sat and the states in which they earned their undergraduate and law school degrees. For example, in 1975 and 1977 studies, Fino concluded that “[m]ost [state supreme court justices] attended in-state colleges and law schools, and nearly half (48.1% in 1975 and 46% in 1977) were born and educated, both college and law school, in their native states.”¹⁹⁸

Professor Wefing’s 1997 study returned substantially similar findings. Specifically, he found that 48.6% of state supreme court justices “attended both undergraduate and law school in the state where they would eventually serve as justices.”¹⁹⁹ Just over 60% of justices in 1997 attended undergraduate institutions in the state where they would eventually sit on the bench, and 59.9% of the justices attended law school in the state they eventually served.

Our data reveals similar results. If anything, the correlation between in-state schooling has weakened somewhat. Today, 53.6% of

¹⁹⁸ FINO, *supra* note 60, at 50.

¹⁹⁹ Wefing, *supra* note 10, at 81. Professor Wefing was only able to identify the undergraduate educational institution of 316 justices and the law school of 322 justices. *Id.*

justices earned their bachelor's degrees at in-state institutions, nearly a 7 percentage-point drop since 1997. A drop also occurred in the percentage of justices who attended both in-state law schools and undergraduate institutions from 48.4% to 44.4%, a 4 percentage-point decline. But in-state legal studies increased modestly from Professor Wefing's 1997 study.²⁰⁰ Today, 62.2% of state supreme court justices attended law schools in the state in which they would eventually preside.²⁰¹

When disaggregated geographically, as demonstrated in Table 18, some interesting trends emerge:

	In-State Undergraduate	In-State Law School	In-State Undergraduate and Law School
Northeast	42.8%	39.3%	28.6%
South	58.0%	69.6%	48.3%
Midwest	64.1%	73.1%	51.2%
West	43.5%	48.7%	33.3%
Nationwide	53.6%	62.2%	44.4%

State supreme court justices in the South and Midwest are much more likely to earn degrees—both bachelor's and juris doctorates—from in-state institutions. Justices in the Midwest are the most likely to attend in-state educational institutions, attending in-state colleges and universities at a rate 11.1 percentage points greater than the national average and 12.1 percentage points greater than the national average for in-state law schools. Moreover, 12% more Midwestern judges earned both their degrees in their home states than the national average.

The lack of significant change over time for Northeast justices is notable. In the 1970s, Northeast justices were least likely to be educated in their home state.²⁰² Today, the Northeast still has the smallest percentage of justices who attended law schools in their

²⁰⁰ One hundred fifty-two justices graduated from both a law school and undergraduate institution in the state in which they would later sit.

²⁰¹ In total, 213 justices attended law school in the state in which they would later preside; 183 justices graduated from an undergraduate institutions in the state where they would later sit on the bench.

²⁰² FINO, *supra* note 60, at 56 (“The North also has . . . the smallest percentage of justices born and educated in the same state.”).

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home state, as well as the smallest percentage of justices who attended both in-state undergraduate institutions and law schools.

When the data are disaggregated by race and gender, more trends emerge:

	In-State Undergraduate	In-State Law School	In-State Undergraduate and Law School
Male	56.7%	61.4%	45.5%
Female	47.7%	64.2%	42.2%
Caucasian	54.8%	62.5%	45.8%
Racial Minority	44.4%	57.8%	31.8%
Nationwide	53.8%	62.3%	44.4%

Minority jurists are less likely to have earned their bachelor's degrees at in-state institutions and less likely to have gone to both in-state undergraduate institutions and law schools. Similarly, female state supreme court justices were less likely to have attended an in-state undergraduate institution. They were, however, slightly more likely than their male peers to have attended an in-state law school.

We also found great diversity among the educational backgrounds of state supreme court justices. Unlike the U.S. Supreme Court, where eight of nine justices attended an Ivy League law school,²⁰³ state supreme court justices were much more likely to attend a wide variety of schools. That is not to say that the Ivy League law schools were not well represented—they were. In fact, thirty-one state supreme court justices (9%) attended Ivy League law schools, with Harvard boasting fourteen alumni on state supreme courts.²⁰⁴

The top fourteen (or “T14”) law schools²⁰⁵ are also well represented among the ranks of state supreme court justices. Indeed,

²⁰³ Official Biographies, *supra* note 1. The Ivy League consists of Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, Princeton University, the University of Pennsylvania, and Yale University. Princeton Univ., Ivy League, http://etcweb.princeton.edu/CampusWWW/Companion/ivy_league.html.

²⁰⁴ Yale and Columbia tied for second, each placing six law school alumni on state supreme courts with six each. Three Cornell graduates and two University of Pennsylvania graduates currently sit on state high courts.

²⁰⁵ “T14” refers to fourteen law schools which, with remarkable consistency, remain atop the U.S. News and World Report rankings annually. They are, in alphabetical order, Columbia University Law School, Cornell Law School, Duke

seventy-two—or more than one in five—state supreme court justices attended a T14 law school. Every T14 law school has at least one alumnus on a state high court, and Harvard Law School and the University of Virginia School of Law have the most, with fourteen graduates on the bench.

Columbia Law School	6
Cornell Law School	3
Duke University School of Law	3
Georgetown University Law Center	8
Harvard Law School	14
New York University School of Law	1
Northwestern University Law School	2
Stanford Law School	2
University of California Berkeley School of Law	3
University of Chicago Law School	7
University of Michigan Law School	1
University of Pennsylvania Law School	2
University of Virginia School of Law	14
Yale Law School	6

This is not to say that only T14 law schools were well represented. Sixty-six non-Ivy League and non-T14 schools may claim multiple state supreme court justices. The University of Mississippi is at the head of the class with nine sitting justices. A full list of the non-Ivy League and non-T14 schools with multiple justices and their numerical representation appears in Appendix B.

In total, 122 different law schools can claim a state supreme court justice. A full list of non-Ivy League and non-T14 law schools boasting at least one supreme court alumnus appears in Appendix C.

Undergraduate institutions varied even more. Ivy League and T14 schools were well represented; twenty-three state supreme court justices—or 6.7%—attended Ivy League undergraduate institutions,

University School of Law, Georgetown University Law Center, Harvard Law School, New York University School of Law, Northwestern University Law School, Stanford Law School, University of California Berkeley School of Law, University of Chicago Law School, University of Michigan Law School, University of Pennsylvania Law School, University of Virginia School of Law, and Yale Law School. *See Best Law Schools*, U.S. NEWS & WORLD REP., available at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/rankings> (last visited Jan. 10, 2010).

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with Dartmouth leading the pack with five. Cornell, Harvard, Princeton, and Yale were also well represented, with four alumni each.²⁰⁶ T14 undergraduate alumni were again popular on state supreme courts, with thirty-nine—or more than one in ten—on the bench. In fact, each T14 school save the University of Pennsylvania was represented. Stanford University leads all undergraduate institutions with eight alumni on state high court benches.

Columbia University	1
Cornell University	4
Duke University	5
Georgetown University	1
Harvard University	4
New York University	1
Northwestern University	1
Stanford University	8
University of California Berkeley	1
University of Chicago	2
University of Michigan	1
University of Pennsylvania	0
University of Virginia	6
Yale University	4

Again, a wide variety of non-Ivy and non-T14 colleges and universities have placed multiple justices on state high courts. Fifty-nine non-Ivy League and non-T14 colleges and universities count multiple state supreme court justices among their alumni, the leaders among them being Ohio State University, Trinity College, and the University of Washington, each with a half dozen. A full list of non-Ivy League and non-T14 undergraduate schools with multiple justices on state supreme courts, and their numerical representation, appears in Appendix D.

Not surprisingly, there is more diversity among undergraduate institutions than among law schools. In total, 181 non-Ivy League and non-T14 different undergraduate colleges and universities are represented on state supreme courts. Full lists are presented in Appendices D and E.

²⁰⁶ Brown and Columbia each have one alumnus on state supreme courts.

Finally, it should be noted that at least twenty-one state supreme court justices—or more than 6%—earned LL.Ms at the University of Virginia. That high percentage is likely due to the institution's program in judicial studies.²⁰⁷

IX. INVOLVEMENT IN THE BAR AND THE COMMUNITY

Survey responses also established three fairly unsurprising trends. First, participation in bar and other legal related associations and organizations was extremely common. Prior to taking their oaths of office, 81.9% of survey respondents were members of local, state, or national bar associations.²⁰⁸ Almost 68% of sitting state supreme court justices maintain their affiliation with those bar associations.²⁰⁹

Although past bar association membership was a fairly common characteristic of all state supreme court justices, survey respondents from the West were least likely to have previously been members of local, state, or federal bar associations; 72.5% reported such activity, compared to the nationwide rate of 81.9%. That trend continued with respect to current bar association membership, with 62.5% of Western survey respondents maintaining their membership in bar associations, again significantly less than their peers in the Northeast, South, and Midwest, who maintained bar association membership at a rate of approximately 70%.

²⁰⁷ Professor Wefing similarly found that in 1997, thirty-three state supreme court justices had completed Virginia's LL.M program. Wefing, *supra* note 10, at 85. In addition to Virginia's LL.M program, one justice noted in his survey response that he received an advanced "Degree of Hard Knocks."

²⁰⁸ One hundred twenty-two of 149 survey respondents indicated that they were, in the past, members of bar associations. The data in this section is based purely on survey responses.

²⁰⁹ One hundred and one survey respondents indicated that they were presently members of a local, state, or national bar association.

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Table 22		
Past and Present Bar Association Membership by Geographic Region		
	Past Bar Association Membership	Current Bar Association Membership
Northeast	82.6%	69.6%
South	86.2%	70.7%
Midwest	85.7%	67.9%
West	72.5%	62.5%
Nationwide	81.9%	67.8%

In addition, the data revealed fairly significant discrepancies between male and female justices with respect to both past and current bar membership. Whereas 79.1% of male survey respondents indicated that they were previously members of a bar association, 89.7% of female justices were previously a member of a bar association. That disparity was virtually erased with respect to current bar membership, as 68.2% of male justices and 66.7% of female justices reported maintaining their bar membership while on the bench.

The divergence of past and current bar membership along racial lines was not particularly stark. Over 81% of responding Caucasian justices were previously members of bar associations. That percentage increased to 85% for minority respondents. Somewhat surprisingly, 69% of Caucasian respondents maintained their bar association ties, while only 60.5% of minority respondents indicated current membership.

Not surprisingly, involvement in the legal community was not limited to bar associations. Prior to investiture, 47% of state supreme court justices were affiliated with legal-related organizations.²¹⁰ Unlike bar association membership, a significant portion of state supreme court justices renounced or let their affiliations with such organizations lapse upon taking the bench, as only 20.8% of survey respondents indicated current affiliation with a legal related organization.²¹¹

²¹⁰ By way of example, the survey sent to the state supreme court justices listed the Federalist Society, the American Constitution Society, and the American Trial Lawyers Association as examples of the type of non-bar legal associations in which we were interested.

²¹¹ Thirty-one survey respondents indicated current affiliation with a legal related organization.

Results also indicated that many respondents engaged in some form of pro bono work prior to appointment or election. Excluding justices whose prior experience included only public service,²¹² 65% of respondents engaged in some degree of pro bono work.²¹³ Charitable efforts typically extended beyond pro bono representation. Almost 88% of survey respondents indicated that prior to appointment or election they engaged in charitable, philanthropic, or volunteer activities.²¹⁴

These responses happily demonstrate that some level of community involvement (be it through representation of clients on a pro bono basis, membership in a bar association, affiliation with a legal related organization, or charitable, philanthropic, or other volunteer activity) is an almost universal characteristic among state supreme court justices.

X. CONCLUSION

Our intention with this Article was twofold. First, we sought to present interested readers with a composite picture of state supreme court justices for purposes of general edification. Second, we endeavored to provide scholars with data to use in future studies. We hope we have succeeded.

Of course, as soon as we completed our data set, we immediately began to think of additional questions that should have been asked. For instance, it would have been fascinating to know about judges' military experience, which would have allowed us to discover whether that experience correlates with state, region, party affiliation, or ideological self-identification (and whether it correlates in the same ways as it does in the general population). We also regret not asking about some of the usual demographic queries, such as marital status and children. Other oversights include omitting inquiries into past in-house legal experience and prior experience as a judicial clerk. Of

²¹² In analyzing this data, we excluded survey respondents who worked solely for the government prior to their appointment or election to the bench because government employees are often barred from offering pro bono representation. When excluding government attorneys, former private practitioners accounted for 123 survey responses.

²¹³ In whole numbers, eighty survey respondents with prior private practice experience had previously represented pro bono clients. This figure does not include one justice who cheekily responded that "sometimes my clients did not pay their bills."

²¹⁴ Encouragingly, 131 of 149 respondents responded affirmatively to having engaged in charitable, philanthropic, or volunteer activities prior to sitting on the bench. When asked to briefly describe this activity, many of those responding justices indicated that they were involved in church and/or religious organizations.

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course, space considerations had to be taken into account, as well as considerations of propriety and the risk that judges would feel uncomfortable answering our questions (and therefore not return our surveys). We are certain there are other questions that we could have or should have asked. When this study is next updated, we will be certain to include them. Suggestions are welcome.

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Appendix A
Survey Sent to Supreme Court Justices

Court: _____

1. Gender: Female Male

2. Race: African-American Asian Caucasian
 Hispanic / Latino Middle Eastern Multiracial
 Native Hawaiian / Pacific Islander
 Southeast Asian Other: _____

3. Religious Affiliation:

Catholic Muslim Jewish Hindu Buddhist
 Unitarian/Universalist Atheist/Agnostic
 Other: _____

Protestant:

Anglican/Episcopal Baptist Lutheran Pentacostal
 Presbyterian Methodist Congregationalist Church of God
 Unaffiliated/Other

4. Political Affiliation: Democrat Republican Independent
 None Other: _____

5. Please rate your general political attitude on the following scale, with 1 being “very liberal,” 5 being “moderate” and 10 being “very conservative:

1	2	3	4	5	6	7	8	9	10
---	---	---	---	---	---	---	---	---	----

Very Liberal

Moderate

Very
Conservative

6. Prior experience (please check all that apply):

Elected office Appointed office
 Prior judicial experience Legal teaching
 Government Private practice
 Civil litigator/attorney Private criminal defense
 Public criminal defense Regulatory agency
 Legal aid or civil-rights / liberties institutions
 Other (please describe any post-college experience briefly):

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7. If you checked "Private Practice" in response to Question 6, how large was the firm(s) at which you practiced (please check all that apply):

- Solo practitioner / less than 10 attorneys 11 to 50 attorneys
 50 to 200 attorneys 200 + attorneys

8. If you checked "Government" in response to Question 6, were you a (please check all that apply):

- Government prosecutor Government-appointed defense counsel
 Other government attorney (please describe briefly)
-
-

9. Also, if you checked "Government" response to question 6, were you employed by (please check all that apply):

- Federal Government State Government
 County Government Local Government

10. Prior to your election/appointment to your current position, were you involved in bar association activities, such as American Bar Association or state bar association?

- Yes No

11. If you answered "Yes" to Question 10, do you currently maintain those associations?

- Yes No

12. Prior to your election/appointment to your current position, were you involved in legal related societies (i.e. Federalist Society, American Constitution Society, American Trial Lawyers Association)?

- Yes No

13. If you answered "Yes" to Question 12, do you maintain those associations?

- Yes No

14. Current age: _____

15. Age at first appointment/election: _____

16. Prior to appointment, what, if any, charitable, philanthropic, or volunteer activities did you take part in (please describe briefly)?

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17. Prior to appointment, what, if any, pro bono legal services did you engage in (please describe briefly)?

18. Undergraduate Institution: _____

19. Law School: _____

20. Other Advanced degrees (please include institution name):

Thank you very much for your time.

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Appendix B Non Ivy-League and Non-T14 Law Schools with Multiple Alumni on State High Courts	
Arizona State University	3
Boston College	5
Boston University	4
Catholic University	2
College of William and Mary	2
Creighton University	2
Drake University	3
Duquesne University	3
Emory University	2
George Washington	3
Gonzaga University	5
UC Hastings College of the Law	4
Indiana University	2
John Marshall University	3
Loyola University	3
Louisiana State University	4
Marquette University	2
Northeastern University	2
Oklahoma City University	2
Rutgers University-Newark	2
Southern Methodist University	2
St. John's University	2
St. Mary's University	2
Suffolk University	6
Tulane University	2
University of Alabama	3
University of Arkansas	7
University of California-Davis	2
University of Colorado	4
University of Connecticut	6
University of Detroit	2
University of Georgia	3
University of Idaho	3
University of Iowa	5
University of Maryland	6
University of Minnesota	4
University of Mississippi	9
University of Missouri	3

University of Montana	3
University of North Dakota	4
University of Nebraska	3
University of New Mexico	3
University of Notre Dame	4
University of Oklahoma	7
University of Richmond	2
University of San Diego	2
University of Santa Clara	2
University of South Carolina	6
University of South Dakota	6
University of Tennessee	2
University of Texas	5
University of Tulsa	2
University of Utah	3
University of Washington	4
University of Wisconsin	4
University of Wyoming	4
University of North Carolina	7
University of Southern California	2
Vanderbilt University	3
Washburn University	5
Washington and Lee University	2
Wayne State University	2
West Virginia University	3
Wilamette University	2
William Mitchell College of Law	2

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Appendix C		
Non-Ivy League and Non-T14 Law Schools with One Alumnus on State Supreme Courts		
Albany Law School	Jones School of Law	University of Cincinnati
American University	Mercer University	University of Denver
Antioch University	New York Law School	University of Florida
Baylor University	Pacific McGeorge School of Law	University of Houston
California Western School of Law	Penn State University	University of Illinois
Cleveland State University	Pettit College of Law	University of Louisville
Cleveland Marshall College of Law	Rutgers University-Camden	University of Maine
Cumberland School of Law	Seattle University School of Law	University of South Texas
University of Detroit Mercy	South Texas College of Law	University of the Pacific
Florida State University	Stetson University	University of Toledo
Franklin Pierce Law Center	The State University of New York at Buffalo	Valparaiso University
Golden Gate University	Syracuse University	Villanova University
Hamline University	Temple University	Washington University
Chicago-Kent College of Law	Texas Tech University	

Appendix D	
Non-Ivy League and Non-T14 Undergraduate Institutions with Multiple Alumni on State High Courts	
Amherst College	2
Auburn University	4
Bowdoin College	3
Coe College	2
Creighton University	3
College of the Holy Cross	3
College of William and Mary	2
Drake University	2
Emory University	2
Florida State University	2
Gonzaga University	3
Haverford College	2
Howard University	2
Loyola University	2
Louisiana State University	2
Michigan State University	2
Millsaps College	2
Mississippi State University	4
Montana State University	2
Murray State University	2
Northeastern University	3
Ohio State University	6
Providence College	3
Rutgers University	2
Smith College	2
St. Norbert College	2
Syracuse University	2
Texas Tech University	2
Trinity College	6
Tufts University	3
University of Alabama	2
University of Arkansas	4
University of Colorado	3
University of Florida	2
University of Georgia	2
University of Idaho	2
University of Illinois	3
University of Iowa	5

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University of Kansas	4
University of Maine	2
University of Maryland	2
University of Minnesota	4
University of Notre Dame	4
University of Oklahoma	4
University of Oregon	2
University of Pittsburgh	3
University of South Dakota	4
University of Southern Mississippi	3
University of Tennessee	3
University of Texas	2
Sewanee: The University of the South	2
University of Washington	6
University of Wyoming	5
University of North Carolina	2
Washburn University	2
Wayne State University	2
Wellesley College	4
Whittier College	2
Wofford College	2

Appendix E Non-Ivy League and Non-T14 Undergraduate Institutions with One Alumnus on State Supreme Courts		
Agnes Scott College	LaSalle University	St. Joseph's College
American University	Lawrence University	St. Mary's University
Arizona State University	LeMoyne College	State University College at Oneonta
Arkansas State University	Lee College	Swarthmore College
Austin Peay State University	Lincoln University	Towson State College
Barnard University	Macalester College	Troy University
Baylor University	Madonna University	Truman State University
Boston College	Margrove College	Tuskegee University
Boston University	Meredith University	University of Albuquerque
Brandeis University	Minnesota State University Moorhead	University of Arizona
Brigham Young University	Morgan State	University of California-Davis
Bucknell University	Morningside College	University of California Irvine
California State University, Long Beach	Nebraska Western University	University of Connecticut
California State University, Fresno	Newcomb College Institute	University of Delaware
Centenary College	Nicholls State University	University of Detroit
Chatham College	North Dakota State University	University of Hawaii at Manoa
College of Idaho	Northeastern State University	University of Kentucky
College of St. Katherine	Northwestern University	University of Louisville
College of St. Thomas	New York University	University of Nevada
Converse College	Oberlin College	University of New Mexico
DePaul University	Ohio Northern University	University of Rochester

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JUDICIAL DIVERSITY

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DePauw University	Ohio University	University of San Francisco
Delta State University	Ohio Wesleyan University	University of South Carolina
East Central State University	Oklahoma City University	University of Toledo
East Texas State University	Pikeville College	University of Tulsa
Eastern Michigan University	Portland State University	University of Utah
Eastern New Mexico University	Purdue University	Union College
Florida Atlantic University	Rice University	University of Southern California
Florida Southern College	Ripon College	Virginia Polytechnic and State University
Franklin and Marshall College	Rollins College	Washington and Lee University
Franklin Pierce University	Samford University	Washington State University
Georgetown University	San Diego State University	Webster University
Gustavus Adolphus College	Seton Hill College	Weber State University
Hampden-Sydney College	South Carolina State University	Weslyan University
Hampton University	Southern Oregon University (formerly South Oregon State University)	West Virginia University
Holy Names College	Texas State University-San Marcos (formerly South Texas State University)	Western Carolina University
Hope College	Southern Illinois University	Western Michigan University
Hunter College	Southwestern State College	William Jewell College
Indiana University	Spellman College	Williams College
Kent State University	St. Augustine's College	University of the Witwatersrand
Kentucky State University	St. John's University	