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# **The Importance of a Diverse Federal Judiciary**

## **HEARING TESTIMONY**

*House Committee on the Judiciary*

*Subcommittee on Courts, Intellectual Property, and the Internet*

*Thursday, March 25, 2021, 2:00 p.m.*

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## **I. Introduction**

Chairman Johnson, Ranking Member Issa, and distinguished members of the Subcommittee: Thank you for the opportunity to testify today regarding “The Importance of a Diverse Federal Judiciary.” My name is Stacy Hawkins, and I am a Professor of Law at Rutgers Law School. In the decade prior to joining the Rutgers Law School faculty, I advised clients in both the public and private sectors on developing and implementing legally defensible diversity policies and programs. I have spent the last decade at Rutgers teaching and writing about the intersection of law and diversity. In that time I have authored numerous articles addressing the importance of diversity as a key principle underlying both our ideals of representative democracy and our constitutional guarantee of equality. Several of my most recent articles are about the importance of judicial diversity specifically, and I would like to highlight a few key points from those articles.

## **II. The History of Federal Judicial Diversity**

### **A. 1789 - 1960**

I want to begin with some data about the diversity of the federal judiciary. It will likely come as no surprise that beginning with the first presidential appointment to the Supreme Court in 1789 and continuing through 1933, every judge appointed to the federal bench by every president from George Washington to Herbert Hoover was a white man.<sup>1</sup> It was not until 1934 that President Franklin Delano Roosevelt appointed the first woman to a federal court of general jurisdiction.<sup>2</sup> Roosevelt also appointed the first person of color to the federal bench in 1937.<sup>3</sup> Prior to the Civil Rights Movement, the number of women and minority judges appointed to the federal bench remained exceedingly low. From 1934 until 1960, of the 1337 judges appointed to the federal bench, only two were white women and another two were men of color.<sup>4</sup>

### **B. 1961-2016**

However, beginning with John F. Kennedy, the rate of racial, ethnic, and gender diverse judges appointed to the federal bench rose appreciably.<sup>5</sup> Although he served less than three years in office, Kennedy appointed five minority men and one white woman to the federal bench.<sup>6</sup> When Lyndon B. Johnson assumed the presidency after Kennedy’s assassination, Johnson appointed twelve minority judges and three women judges, including the first woman of color, to the federal bench.<sup>7</sup> It was Johnson who appointed the first minority Justice to the United States

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1. See Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789–2016*, 26 BERKELEY LA RAZA L.J. 92, 99 (2016).

2. Roosevelt appointed Florence Ellinwood Allen, a white woman, to the Court of Appeals for the Sixth Circuit on March 6, 1934 and she was confirmed by the senate on Marcy 15, 1934. *Id.* at 101. Calvin Coolidge had previously appointed Genevieve Rose Cline, also a white woman, to the U.S. Customs Court. *Id.*

3. *Id.* Roosevelt appointed William H. Hastie to serve on the federal district court for the U.S. Virgin Islands. Although Hastie, a black man, served on the court for only two years, in 1949 he was appointed by President Truman to serve on the Third Circuit Court of Appeals. *Id.* at 101–02.

4. *Id.* at 109.

5. *Id.* at 103.

6. *Id.*

7. *Id.* at 111. Johnson appointed Constance Baker Motley to serve on the federal district court in New York. *Id.* at 103–04.

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Supreme Court when he nominated, and the senate confirmed, Justice Thurgood Marshall in 1969. Indeed, the Civil Rights Era seemed to mark a key turning point wherein we began to acknowledge, albeit tacitly, that the judiciary must, even nominally, reflect the diversity of our citizens in order to be viewed as a legitimate institution of government in our pluralist democracy.

Then in 1977, this acknowledgment was made explicit when President Jimmy Carter announced his commitment to diversifying the federal bench.<sup>8</sup> Carter appointed forty women judges and fifty-seven minority judges (including eight women of color) to the federal bench during his single four-year term.<sup>9</sup> This was more than twice the number of women and minority judges that had been appointed during the previous four administrations combined.<sup>10</sup> It was a watershed moment that ushered in our nation's reckoning with the relationship between diversity on the bench and legitimacy for the courts. Ronald Reagan too broke a historic barrier in 1981 by appointing Sandra Day O'Connor as the first female Justice of the Supreme Court.<sup>11</sup> Reagan's successor, George H.W. Bush, improved on his predecessor's diversity performance significantly, increasing the share of women judges he appointed by 138 percent over Reagan and increasing the share of minority judges he appointed by 59 percent.<sup>12</sup>

It was Bill Clinton who once again renewed the express mandate of diversifying the federal bench by proclaiming his commitment to make his appointments "look like America."<sup>13</sup> Most notably Clinton added a second female Justice to the Supreme Court with his appointment of Ruth Bader Ginsburg in 1993. While his successor, George W. Bush, did not increase the diversity of the federal judiciary as much as Clinton did, Bush's appointments were more diverse than both of his Republican predecessors. In fact, continuing the Carter and Clinton legacies of making explicit what often had been only tacitly acknowledged since the Civil Rights Era, George W. Bush reportedly insisted that his judicial nominees reflect adequate racial and gender diversity.<sup>14</sup>

But by far the most notable increase in the diversity of the federal judiciary came during Barack Obama's presidency. He made no formal commitments to diversity, but his actions spoke louder

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8. Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 594 (2011).

9. Stubbs, *supra* note 1, at 111. By contrast, Nixon, Carter's immediate predecessor, appointed nine men of color and one white woman to the bench. *Id.* at 104, 111. Ford, who assumed the presidency when Nixon resigned, appointed only a quarter of the number of judges appointed by Nixon and they included six men of color and one white woman. *Id.* at 111.

10. *Id.*

11. *Id.* at 107.

12. George H.W. Bush appointed nineteen minority judges (including five women) and thirty-six women judges (including five minorities) to the federal bench during his single term. *Id.* at 108, 111.

13. Scherer, *supra*, note 8, at 601.

14. See Li Zhou, *Trump Has Gotten 66 Judges Confirmed This Year. In His Second Year, Obama Had Gotten 49*, VOX (Dec. 27, 2018, 7:10 AM), <https://www.vox.com/2018/12/27/18136294/trump-mitch-mconnell-republican-judges> [https://perma.cc/4ZV8-23K9]; see also Catherine Lucey & Meghan Hoyer, *Trump Choosing White Men as Judges, Highest Rate in Decades*, CHI. TRIB. (Nov. 13, 2017, 6:22 AM), <https://www.chicagotribune.com/news/nationworld/politics/ct-trump-blacks-judges-20171113-story.html> (quoting Bush II's Attorney General, Alberto Gonzalez, saying that Bush II pointedly requested that the number of women and minority judicial nominees be increased).]

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than any words.<sup>15</sup> Obama appointed more women and minority judges to the federal bench than Reagan and both Bushes *combined*.<sup>16</sup> He appointed 137 women judges and 118 minority judges to the bench, including more Asian American women than all forty-three of his presidential predecessors *combined*.<sup>17</sup> Obama was the first president to appoint two women to the Supreme Court, one of whom was also the first Hispanic Justice appointed to the nation's highest Court.<sup>18</sup> These appointments tripled the number of women on the Supreme Court, setting a new high water mark and making the Court more closely resemble the gender demography of the country than ever before.<sup>19</sup>

### C. *Trump's Presidency*

When Justice Ginsburg died in September 2020, then President Donald Trump appointed Justice Amy Coney Barrett to replace her, maintaining the historic female representation on the Supreme Court and at least tacitly acknowledging the importance of gender diversity on the Court.<sup>20</sup> However, the overall trend of increasing judicial diversity that had occurred across successive presidential administrations since the Civil Rights Era receded during Trump's presidency. An analysis of Trump's judicial appointments from demographic data collected by the Federal Judicial Center suggests that of the 226 judges confirmed during Trump's single term in office, only nine (13%) were minorities and fifty-five (24%) were women, making his appointees nearly ninety percent white and more than seventy-five percent male.<sup>21</sup> Perhaps most notably, none of the fifty-four Circuit Court judges appointed by Trump during his four years in office were African American, despite representing the largest share of sitting minority judges on the federal bench, and only one was Hispanic, the second largest minority group among sitting federal judges.<sup>22</sup>

Rorie Solberg and Eric Waltenburg, who study the extent to which judicial appointments have increased, decreased, or maintained the diversity of the federal bench across successive presidential administrations, reported that in his first two years in office Trump nominated the

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15. Perhaps Obama's failure to expressly affirm his commitment to judicial diversity can be explained by the research showing that women and minorities suffer negative consequences, relative to their white male peers, from exhibiting diversity-valuing behavior. See David R. Hekman et al., *Does Diversity-Valuing Behavior Result in Diminished Performance Ratings for Non-White and Female Leaders?*, 60 ACAD. MGMT. J. 771 (2017).]

16. Stubbs, *supra*, note 1, at 109.

17. *Id.* at 109, 111.

18. Obama's first Supreme Court nominee was Sonia Sotomayor, whom he nominated in 2009 to replace retiring Justice David Souter. Obama's second Supreme Court nominee was Elena Kagan, whom he nominated in 2010 to replace retiring Justice John Paul Stevens. See Supreme Court Biographies, <https://supremecourt.gov/about/biographies.aspx>.

19. Reagan's appointee, Justice Sandra Day O'Connor retired from the bench in 2006 during George W. Bush's second term. Although Bush initially nominated Harriet Mier, another woman, to replace O'Connor, her nomination was eventually withdrawn. Ultimately, Bush nominated, and the senate confirmed, Samuel Alito to replace Justice O'Connor, leaving Justice Ruth Bader Ginsburg as the sole woman on the Supreme Court when Obama assumed office. See Ron Elving, *The Fall of Harriett Miers: A Cautionary Tale for Dr. Rony Jackson*, NPR (Mar. 30, 2018), <https://www.npr.org/2018/03/30/598115811/the-fall-of-harriett-miers-a-cautionary-tale-for-dr-rony-jackson>.

20. See Peter Baker and Maggie Haberman, *Trump Selects Amy Coney Barrett to Fill Justice Ginsburg's Seat on the Supreme Court*, NEW YORK TIMES (Oct. 15, 2020).

21. See FED. JUDICIAL CTR., BIOGRAPHICAL DIRECTORY OF ARTICLE III FEDERAL JUDGES, 1789-PRESENT, <https://www.fjc.gov/history/judges/search/advanced-search> (last visited Mar. 23, 2021); see also John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RES. CTR. (Jan. 13, 2021)

22. Trump appointed only nine African American and eight Hispanic judges to the federal district courts. *Id.*

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lowest share of judges who *increased* the diversity of the bench since Ronald Reagan.<sup>23</sup> While Trump nominated the *highest* share of judges who *decreased* the diversity of the bench (by a margin of more than two to one) since before the Carter Administration first made judicial diversity a national priority.<sup>24</sup>

### **III. The Importance of Judicial Diversity**

The current demographic profile of the federal judiciary is approximately sixty percent white males, twenty percent white women, and twenty percent racial and ethnic minorities.<sup>25</sup> This falls far short of reflecting the demographic diversity of the population, which is comprised of only about thirty percent white men, thirty percent white women, and forty percent racial and ethnic minorities.<sup>26</sup> But, as already noted, Trump’s appointments notwithstanding, this judicial diversity was achieved incrementally over the course of six successive presidential administrations across both political parties. It is imperative that President Biden resume this important presidential legacy of increasing the diversity of the federal bench so that it might indeed one day “look like America.”

#### *A. Judicial Legitimacy Depends on Public Trust*

Diverse judges are important both for signaling judicial legitimacy and for ensuring judicial accountability in an increasingly diverse nation.<sup>27</sup> From the earliest days of our constitutional democracy, Alexander Hamilton described the court’s reliance on the people’s trust to achieve its legitimacy.<sup>28</sup> Opinion polls measuring public trust in our federal government reveal that while the judiciary remains the most well-regarded of the three branches, there has been an erosion in

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23. Rorie Solberg & Eric N. Waltenburg, *Trump’s Presidency Marks the First Time in 24 Years That the Federal Bench Is Becoming Less Diverse*, THE CONVERSATION (June 11, 2018, 6:43 AM), <https://theconversation.com/trumps-presidency-marks-the-first-time-in-24-years-that-the-federal-bench-is-becoming-less-diverse-97663> [https://perma.cc/V8BG-KFTU].

24. Nearly 21 percent of Trump’s judicial nominees in his first two years decreased the diversity of the federal bench, compared to only 9 percent of Obama’s nominees, and an even smaller percentage for every president before Obama. *Id.* By comparison, only about 21 percent of Trump’s nominees in his first two years increased the diversity of the federal bench, which is only slightly higher than Reagan’s 18 percent and far lower than any of his other Republican presidential predecessors, including Bush II (34 percent) and Bush I (32 percent). *Id.*

25. This is based on a snapshot of the federal judiciary as of March 23, 2021. See FED. JUDICIAL CTR., BIOGRAPHICAL DIRECTORY OF ARTICLE III FEDERAL JUDGES, 1789-PRESENT, <https://www.fjc.gov/history/judges/search/advanced-search> (last visited Mar. 23, 2021).

26. See *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045218> [https://perma.cc/ZK4U-WQ2E]. The profession has also been diversifying, but it is also less diverse than the general population. See *ABA National Lawyer Population Survey*, A.B.A., [https://www.americanbar.org/content/dam/aba/administrative/market\\_research/National\\_Lawyer\\_Population\\_Demo\\_graphics\\_2008-2018.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Population_Demo_graphics_2008-2018.pdf) [https://perma.cc/SU6X-2GYF] (showing female representation currently at thirty-six percent of the profession and minority representation at fifteen percent).

27. Numerous scholars have noted the relationship between diversity and judicial legitimacy. See, e.g., Scherer, *supra* note 8, at 625; 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); Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive?: What Grutter v. Bollinger Has To Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101 (2004); see also Stacy L. Hawkins, *Batson for Judges, Police Officers & Teachers: Lessons in Democracy From the Jury Box*, 23 MICH. J. RACE & L. 1 (2017).

28. FEDERALIST PAPERS NO. 78. (“The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment.”)

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public trust of the judicial branch over time.<sup>29</sup> Moreover, there are gaps in public perceptions between various groups. Only fifty-eight percent (58%) of Democrats trust the Judiciary, while eighty-two percent (82%) of Republicans trust the Judiciary.<sup>30</sup> Researchers have also documented racial disparities in the level of trust between certain minority communities and a number of social institutions.<sup>31</sup> One of the most frequently cited is the level of distrust between black communities and the justice system. One study found that only a quarter of white respondents (25%) but more than three-quarters of Black respondents (78%) believe the justice system treats Blacks unfairly.<sup>32</sup> While nearly half of white respondents (45%) and more than four-fifths of Black respondents (84%) said they think the justice system favors whites over Blacks.<sup>33</sup> As this data shows, the concern for the fairness of our justice system is in some ways endemic, but it is especially acute among certain minority groups. This concern for fairness is particularly problematic for the effective functioning of our judiciary, which relies on people to repose their trust in the system in order to legitimize the rule of law.

### B. *A Diverse Bench Fosters Public Trust in the Judiciary*

Much public discourse centers on the increase in politically polarized decision-making of the courts as the source of citizens' eroding trust in and the diminished legitimacy of the judicial branch.<sup>34</sup> Yet research demonstrates that it is the appearance of fairness in the judicial process, more than substantive outcomes, that fosters the trust among citizens necessary to legitimize our judicial system.<sup>35</sup> According to the theory of procedural justice, which describes this phenomenon, public perceptions of the legitimacy of our justice system turn less on the substance of decisions, and more on the perceived fairness of the judicial processes employed in reaching those decisions.<sup>36</sup> Fair process not only increases faith in the legitimacy of judicial decision-making, it also increases citizens' willingness to accept the decisions of courts, to

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29. According to Gallup, which collects data on public perceptions of the three branches of the federal government, the Judicial Branch has been and remains the most highly regarded of the three branches, but the current rate of public trust in the Judiciary – sixty-seven percent (67%) – remains below its height of eighty percent (80%) in 1999, although above the low watermark of fifty-three percent (53%). See Lydia Saad, *Trust in Federal Government's Competence Remains Low*, GALLUP (Sept. 29, 2020).

30. *Id.*

31. Race has been identified as the most salient trait for influencing levels of trust. See Susan Sternberg Greene, *Race, Class, & Access to Civil Justice*, 101 IOWA L. REV. 1263, 1276 (2016).

32. See Nancy King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177, 1184-1185 and 1194-1195 (1994).

33. *Id.*

34. See e.g., Richard L Hansen, *Polarization and the Judiciary*, ANN. REV. POL. SCI., VOL. 22: 261-276 (May 2019).

35. See e.g., See Tom R. Tyler and Tracey Meares, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, YALE L. J. FORUM, 525 (Mar. 24, 2014); Tom R. Tyler, *Governing Amid Diversity: The Effects of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOC'Y REV. 809 (1994); see also Nancy Scherer and Brett Curry, *Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts*, 72 J. POL. 90, 90-91 (2010) (“litigants’ satisfaction with the resolution of their legal dispute was largely influenced by the fairness of the process, rather than the substantive outcome of the dispute.”).

36. See Tyler & Meares, *supra* note 36; see also Sherer, *supra* note 8, at 625 (citing scholars demonstrating empirically that “fair court procedures . . . lead to greater legitimacy for the justice system.” Although Sherer herself distinguishes between “procedural fairness” and the kinds of “descriptive representation” reflected in calls for greater racial diversity within the judiciary (whether among judges or on juries), ensuring that jurors represent a fair cross-section of the community, including the racial diversity of the community, can itself be seen as promoting a kind of procedural justice. *Id.*; see also Tom R. Tyler, *Governing Amid Diversity: The Effects of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28:4 L. & SOC'Y REV. 809-832 (1994).

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cooperate with them, and to otherwise abide by the rule of law.<sup>37</sup> Because of the limits of the court's enforcement power, citizens' willingness to trust the court is key to its effective functioning. This trust can only be generated when citizens believe the process is fair. The literature on procedural justice identifies two key measures of fair process: (1) the quality of treatment of citizens by the decision-maker, and (2) the quality of the decision-making itself.<sup>38</sup> One way to foster the type of trust in the judiciary that promotes a sense of procedural justice is to ensure that decision-makers themselves are diverse in ways that reflect the communities they serve.<sup>39</sup> As one judge observed about the diversity of juries as judicial decision-makers, "[y]ou want . . . for this thing to not only be fair, but look fair. Th[e] Court depends on people believing that you get a fair shake."<sup>40</sup>

### C. *A Diverse Bench Improves Accountability to the Public*

In addition to fostering *trust* in judges as judicial decision-makers, research shows that ensuring diversity also improves the quality of judicial decision-making.<sup>41</sup> Jeffery Abramson, writing about the importance of diverse juries, argues that racial diversity among judicial decision-makers<sup>42</sup> promotes three different democratic ideals: (1) *epistemic diversity*: a populist claim about the collective wisdom of the people; (2) *deliberative diversity*: a claim that many minds outsmart the few brightest minds; and (3) *representative diversity*: a claim that diversity of representation matters in a democracy.<sup>43</sup> While representative diversity helps foster the needed trust in judges as judicial decision-makers, it is the epistemic and deliberative benefits of diversity that improve the quality of judicial decision-making.

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37. A 2002 study of 1656 respondents who had interactions with the justice system showed that respondents' perceptions of the fairness of the procedures employed in decision-making were more determinative of the respondents' willingness to accept the decision than was the favorability of the decision itself. Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing & Rightful Policing and Why It Matters*, 54 WM. & MARY L. REV. 1865 (2013).

38. Tyler & Meares, *supra* note 35, 537-538.

39. See Sherer & Curry, *supra* note 35 at 98 (discussing empirical analysis showing greater support for judicial legitimacy among blacks when there are more black judges on the bench. Notably this enhanced legitimacy was not registered for whites, but whites displayed a much higher baseline for judicial legitimacy than blacks); see also See JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY, 104 (1994) (discussing how racial diversity improves the quality of jury deliberation and decision-making).

40. Ashish S. Joshi and Christian T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, ABA J. (2015). Danielle Allen similarly describes this principle in relation to democratic decision-making more broadly when she explains that trust in fellow citizens as public decision-makers "inspires . . . a consent-based regime with the flexibility needed to garner from citizens of diverse backgrounds consent to decisions made in uncertainty." DANIELLE ALLEN, TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE *BROWN V. BOARD OF EDUCATION*, 156 (2004).

41. See Thomas & Meares, *supra* n. 35 at 537.

42. Here Abramson is referring to juries as deliberative, decision-making bodies in the justice system, but Abramson's observations are equally applicable to judges as decision-makers in our justice system. Diversity among judges is more important today than in the past as judges have expanded their decision-making power to include many issues that were previously decided by the jury. See Abramson, *supra* n. 61 at 866, 898 (offering theoretical model for democracy legitimizing features of jury that have equal application to judges). *Id.*, 870-71.

43. Jeffery Abramson, *Four Models of Jury Democracy*, 90 CHI.-KENT L. REV. 861 at 883 (2015). In explaining the optimal functioning of the jury and the necessity of cross-sectional representation, Abramson offers a deliberative theory of the jury that relies on Aristotle's assertion that "democracy's chief virtue [i]s the way it permit[s] ordinary persons drawn from different walks of life to achieve a 'collective wisdom' that none could achieve alone." *Id.* at 104.

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The theory of representative bureaucracy lends further support for the each of these benefits of judicial diversity.<sup>44</sup> This theory posits that racial congruence between bureaucrats and the citizens they serve influences how minority citizens benefit from public decision-making.<sup>45</sup> In other words, minority citizens will experience greater benefit from bureaucrats who share their racial and ethnic background, particularly on issues of high racial salience.<sup>46</sup> The underlying reasons involve an accrual of both the epistemic and representative benefits of diversity.<sup>47</sup> Representative bureaucracy argues that differences in social identity translate into different social experiences.<sup>48</sup> These experiences, in turn, contribute to differences in political attitudes, which are strongly correlated with political behaviors.<sup>49</sup> As a result, racial congruence between bureaucrats and citizens improves policy outputs on behalf of minority citizens, particularly on issues of high racial salience.<sup>50</sup>

Proof of representative bureaucracy's claims can be seen through studies in judicial behavioralism. Judicial behavioralism applies empirical methods to determine the relationship, if any, between the personal attributes of judges and their decisions.<sup>51</sup> Judicial behavioralism confirms the effects of racial congruence on judicial decision-making as theorized by

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44. J. Donald Kingsley first coined the term "representative bureaucracy" in 1944 in relation to British Parliamentary government, but it emerged in the American public administration and then political science literature in the late 1960's and early 1970's as a recognition that bureaucratic agencies make more public policy decisions than do legislatures. M.E. SHARPE, REPRESENTATIVE BUREAUCRACY: CLASSIC READINGS & CONTINUING CONTROVERSIES (Julie Dolan & David H. Rosenbloom eds., 2003).

45. There are some differences among theorists in describing the benefits of representative democracy, which loosely correlate with Abramson's epistemic, deliberative, and representative theories of jury diversity. Kingsley argues that government bureaucracies must reflect the larger populace to ensure they reflect the wisdom and insight of the diverse views of the public. *Id.* at 4. Max Weber, on the other hand, doubts that individual representatives can overcome institutional bureaucratic cultures, *id.*; while Frederick Mosher straddles these two views by acknowledging the importance of representative bureaucracy for enhancing public decision-making, but expresses suspicion that identity congruence between bureaucrats and citizens will necessarily translate into beneficial public policy for citizens because of their shared identity. *Id.* at 5. Samuel Krislov responds to Mosher's concern by suggesting that the descriptive (or passive) representation that arises from identity congruence between bureaucrats and citizens is itself beneficial because it legitimizes government by promoting the ideal of equality. *Id.* at 6. Despite these conflicting theoretical perspectives, each of these theorists acknowledge the importance of representative bureaucracy, regardless of their disagreement over its precise consequences for citizens. Moreover, the empirical data demonstrates that representative bureaucracy can inure to the benefit of minority citizens.

46. *Id.*

47. *Id.* at 52 (describing benefits as "enhancing administrative responsiveness . . . redressing [ ] underrepresentation . . . [and] legitimizing government.").

48. *Id.* at 85; see also Hong-Hai Lim, *Representative Bureaucracy: Rethinking Substantive Effects & Active Representation*, PUB. ADMIN. REV. (Mar./Apr. 2006).

49. Sharpe, *supra*, note 45 at 85. This theory and each of these linkages have been confirmed by at least some empirical research relating to race, whereas some other demographic characteristics, such as gender, wealth or education are only weakly correlated with bureaucratic decision-making. *Id.*, 89-90. Given the distinct social construction of racial identity, it is unsurprising that racial identity has strong correlations with social experiences and, consequently, political attitudes. See generally IAN HANEY LOPEZ, *WHITE BY LAW* (2006) (discussing the social construction of racial identity).

50. This is particularly true where bureaucrats exercise substantial discretion. Sharpe, *supra*, note 45, 122 and 126; see also Nick A. Theobald and Donald P. Haider-Markel, *Race, Bureaucracy & Symbolic Representation: Interactions Between and Police*, 19 J. PUB. ADMIN. RESEARCH & THEORY 409-426 (2008) ("research suggests that the presence of African American and Hispanic elected officials increases the likelihood that African American and Hispanic interests are represented in policy processes" and suggesting the same phenomenon operates with even greater force among unelected public officials).

51. See Pat K. Chew & Robert E. Kelley, *Myth of the Color-blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009); see also Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics in Minority Diversity of the Federal Bench*, 83 IND. L. J. 1423, 1471 (2008).

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representative bureaucracy.<sup>52</sup> In one study researchers found that plaintiffs in racial harassment cases had a higher success rate when their case was decided by an African American judge (45.8%), than when their case was decided by either a White judge (20.6%) or a Hispanic judge (19%).<sup>53</sup> Critics often claim that it is not this descriptive representation (or racial congruence) that matters among public decision-makers, but instead it is substantive representation (or interest congruence) that matters most.<sup>54</sup> But this study of judicial decisions in racial harassment cases found that the statistical disparity in outcomes by race held even after controlling for judges' party of appointment.<sup>55</sup> African American judges who were appointed by both Democrats (47%) and Republicans (43%) ruled in favor of Black plaintiffs significantly more often than White judges appointed by either Democrats (27.1%) or Republicans (16.6%).<sup>56</sup>

Another study similarly found that African American judges were more than twice as likely to rule in favor of Voting Rights Act plaintiffs than their white counterparts.<sup>57</sup> Moreover, consistent with the deliberative benefits of diversity, this study also found that on appeal White judges were significantly more likely to find a violation of the Voting Rights Act when they sat on a panel with an African-American judge than when they sat on an all-White judicial panel.<sup>58</sup> These representative, epistemic, and deliberative benefits of judicial diversity can be seen in

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52. These studies have found that racial congruence between judges and litigants matters in cases of high racial salience. *See* Chew & Kelley, *supra*, note 51 at 1134 (describing the significance of judges' race in cases alleging racial discrimination).

53. *Id.* The study was based on a random sampling of racial harassment cases across six federal circuits for the period 1981 – 2003. *Id.* at 1138. The success rate before a Black judge (45.8%) was twice the overall rate of success (22%). *Id.* at 1141.

54. *See e.g.* Royce Brooks, *Electing One of Our Own: The Importance of Black Representation for Black Communities in the Context of Local Government*, 3 AM. U. MODERN AM. 33, 37-38 (2007) (responding to this critique by expressing a preference for descriptive representation over substantive representation in local elections where the need for effective interest representation is most acute).

55. Chew & Kelley, *supra*, note 51 at 1149.

56. *Id.* This means that although Black Republicans were slightly less likely to rule in favor of race discrimination plaintiffs than were Black Democrats and White Republicans were also significantly less likely to do so than White Democrats, Black Republicans and Black Democrats were 2-3x more likely to rule in favor of race discrimination plaintiffs than were their white counterparts. *Id.* Providing further confirmation of the importance of identity congruence between judges and litigants, another study found that judges' gender was not significantly correlated with judicial decisions in racial discrimination cases, but judges' gender was correlated with outcomes in sex discrimination cases. *See* Pat K. Chew, *Judges, Gender & Employment Discrimination Cases: Emerging Evidence Based Empirical Conclusions*, 14 J. GENDER RACE & JUST. 359, 366 (2011). Interestingly, the judges' race was correlated with different rulings in both race and sex discrimination cases, with African American judges ruling in favor of sex discrimination plaintiffs twice as often as their white counterparts and ruling in favor of race discrimination plaintiffs more than twice as often as their white counterparts. *Id.* at 370.

57. Voting Rights Act plaintiffs are more often than not African American. *See* Adam Cox and Thomas Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008). Additional studies confirm the significance of racial congruence between judges and litigants by evaluating racial disparities in criminal sentencing. *See* David S. Abrams, Marianne Bertrand, and Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347 (2012). Although all judges impose harsher sentences on Black criminal defendants than on white criminal defendants, one study found a statistically significant reduction in the magnitude of the racial disparity among African American judges, suggesting that minority defendants are treated less harshly by African American judges than by judges of other races. *Id.*

58. Cox and Miles, *supra*, note 57 at 45.

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discrimination cases,<sup>59</sup> civil rights cases,<sup>60</sup> and even in contested Supreme Court cases,<sup>61</sup> and these diversity benefits are not simply a function of more progressive ideological commitments among minority judges.<sup>62</sup> Consistent with theories of procedural justice and representative bureaucracy, these empirical findings confirm the importance of racial diversity for both fostering trust in judges on behalf of minority citizens and increasing democratic accountability by judges to minority citizens, both of which in turn promote institutional legitimacy for the judiciary.<sup>63</sup> Not only does increased diversity among judges engender the trust necessary to secure citizens' belief in the fairness of our justice system, perhaps more important, when the bench lacks sufficient diversity, judges themselves can decide cases in ways that compromise the appearance of procedural fairness and undermine the rule of law.<sup>64</sup>

#### D. *Public Support for Diversity is Widespread*

Finally, a judiciary lacking in diversity is inconsistent with our ideals of representative democracy and is increasingly out of step with broad public support for a government more representative of “the people.” The current demographic profile of the federal bench is approximately sixty percent white males, twenty percent white women, and twenty percent racial and ethnic minorities.<sup>65</sup> The population is only about thirty percent white men, thirty percent white women, and forty percent racial and ethnic minorities; and census projections estimate that our nation will be comprised of a majority of racial and ethnic minorities by 2042.<sup>66</sup> Recent data released by the Pew Research Center suggests that the generation defined as post-millennials, or Generation Z, will reach this critical majority minority threshold by 2026, when they will be between the ages of fourteen and twenty-nine.<sup>67</sup> A judiciary that is comprised of

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59. See Chew & Kelley, *supra*, note 51 at 1134.

60. See Cox & Miles, *supra*, note 57 at 45; see also Stubbs, *supra*, note 1, at 119–24 (discussing the research on how diversity improves judicial decisionmaking).

61. See Lazos Vargas, *supra* note 51 (examining the impact of the Supreme Court's composition on the rule of law and suggesting greater diversity on the Court has resulted and would result in greater civil rights for minorities).

62. African American judges nominated by both Democrats (47 percent) and Republicans (43 percent) ruled in favor of black plaintiffs in discrimination cases significantly more often than white judges nominated by either Democrats (27 percent) or Republicans (17 percent). See Chew & Kelley, *supra*, note 51, at 1149.

63. Not surprisingly, given these findings and the widespread calls for greater racial diversity among judges, attempts to diversify the federal bench extend as far back as the Carter Administration in the 1970's. See Sherer, *supra*, note 8 at 601 (marking the start of efforts to diversify the federal judiciary with President Carter, observing “[w]hen President Jimmy Carter took office in 1977, there were but eight women (1.4% of all federal court judges at that time), twenty African-Americans (3.5%), and five Hispanics (0.9%) on the federal bench (including both active and senior status judges). Believing that such imbalance jeopardized the integrity of the entire justice system, President Carter became the first president to implement a far-reaching appointment strategy with diversity as its cornerstone” and citing President Clinton, as the “first to make descriptive representation the cornerstone of his judicial selection strategy . . . promising to make . . . appointed positions ‘look like America.’”) )

64. See Barbara Graham, *Toward An Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 183 (2004) (detailing diversity of federal bench); Tracey E. George and Albert H. Yoon, *The Gavel Gap: Who Sits in Judgement on State Courts?*, AM. CONST. SOCIETY FOR L. & POLICY (2016) (citing statistics on the lack of gender and racial/ethnic diversity among state court judges).

65. This is based on a snapshot of the federal judiciary as of March 23, 2021. See FED. JUDICIAL CTR., BIOGRAPHICAL DIRECTORY OF ARTICLE III FEDERAL JUDGES, 1789-PRESENT, <https://www.fjc.gov/history/judges/search/advanced-search> (last visited Mar. 23, 2021).

66. See *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045218> [<https://perma.cc/ZK4U-WQ2E>].

67. Richard Fry & Kim Parker, *Early Benchmarks Show ‘Post-Millennials’ on Track to Be Most Diverse, Best-Educated Generation Yet*, PEW RES. CTR. (Nov. 15, 2018), <https://www.pewsocialtrends.org/2018/11/15/early-benchmarks-show-post-millennials-on-track-to-be-most-diverse-best-educated-generation-yet/> [<https://perma.cc/XR38-WQG5>].

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predominantly white and largely male judges, not only fails to reflect the growing diversity of the population it is called upon to serve, but it also cannot be reconciled with shifting political attitudes, especially among younger generations of Americans who view increasing diversity as a social good to be encouraged, rather than a social ill to be cured.<sup>68</sup> The same Pew study found that even among Republicans the value for diversity is high. More than half of all post-millennial, or Generation Z, Republicans agreed that increasing racial and ethnic diversity is good for the country.<sup>69</sup> This means that future generations of Americans will inherit a judiciary that fails to adequately reflect either the polity or the broadly held social value for diversity.

And it is not just the millennial and post-millennial generations who embrace this value for diversity as a key feature of our representative democracy. The Reflective Democracy Campaign, a research and advocacy organization committed to analyzing demographic trends in politics, conducted a survey of 800 registered voters and solicited their thoughts on the current demographic trends in government.<sup>70</sup> Both Democratic and Republican respondents shared the belief that there are too many white men and too few women and minorities in elected offices.<sup>71</sup> Perhaps more surprising, more than three-quarters (77 percent) of respondents said they support affirmative efforts to increase the number of women in office and nearly three-quarters (71 percent) said the same about increasing the number of minorities in office.<sup>72</sup> So any assertion that citizens do not value judicial diversity, or that they are opposed to affirmative efforts to diversify the judiciary, is contradicted by this recent polling data. The fact is that the gap between our aspirations for greater diversity among our civic leaders and the reality that our federal judges are woefully unrepresentative of the diverse communities they serve leaves many citizens wanting for the ideal of representative democracy. This democratic failure threatens to undermine the legitimacy of our federal judiciary. It deepens mistrust in particular between racial and ethnic minority communities and a justice system that many in those communities already think lacks accountability to them.

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68. A related Pew Research Center study of political and social attitudes among younger generations found that nearly two-thirds of both post-millennials and millennials believe “increased racial and ethnic diversity is a good thing for society” and a similar share of both believe the increased number of women running for political office is a “good thing.” See Kim Parker, Nikki Graf, & Ruth Igielnik, *Generation Z Looks a Lot Like Millennials on Key Social and Political Issues*, PEW RES. CTR. (Jan. 17, 2019), <https://www.pewsocialtrends.org/2019/01/17/generation-z-looks-a-lot-like-millennials-on-key-social-and-political-issues/> [<https://perma.cc/SE6P-Z3FK>] (reporting that two-thirds of post-millennials, millennials and Gen-Xers, ranging in age from 17–54, support more women running for office, as do nearly two-thirds of baby boomers).

69. *Id.*

70. *Reflective Democracy 2017 Voter Opinion Research*, REFLECTIVE DEMOCRACY CAMPAIGN (Oct. 2017), <https://wholeads.us/resources/for-activists>. [<https://perma.cc/9M5G-D4UV>].

71. *Id.* at 6. 52 percent of all respondents said there are too many white men in office. 51 percent and 43 percent, respectively, thought there are too few women and too few minorities in office. *Id.* Although there were wide partisan gaps in response rates, a third of Republicans agreed there are too few women in office and nearly a quarter agreed there are too few minorities in office. *Id.* at 7.

72. *Id.* at 21. Here the partisan differences were less stark. More than nine in ten (92 percent) Democrats and almost two-thirds (65 percent) of Republicans expressed support for efforts to increase the number of women in office and nearly nine in ten (88 percent) Democrats and over fifty percent (57 percent) of Republicans agreed. *Id.*

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#### **IV. Conclusion**

For the first 145 years of our nation's history, the federal judiciary was comprised of all white men. Prior to the Civil Rights Era, only a handful of women and minority judges were appointed to the federal bench, but this began to change as a result of the Civil Rights Era. Then in 1977 President Carter announced a commitment to diversifying the federal judiciary, and meaningful progress to increase diversity on the federal bench began. Since that time, every president, save Donald Trump, has built upon the diversity progress of their political predecessor to gradually improve the diversity of the bench over time. As a result of these sustained efforts, a judiciary that just fifty years ago was comprised of more than 93 percent white men, is now comprised of twenty percent racial and ethnic minority judges and more than a quarter women judges. Not only does this increased diversity improve citizens' perceptions of judicial legitimacy, there is also evidence that it increases judicial functioning by making judges more accountable to minority interests.

Diverse citizens must believe in the legitimacy of the judicial process, but ultimately they must also believe that their interests will be effectively served by that process. Diversity among judges provides both the legitimacy and accountability necessary for all citizens to trust in the judicial process and submit to the rule of law. The progress in diversifying the federal judiciary achieved since President Carter has been eroded by President Trump, but it must be renewed under President Biden. Demographers predict a nation that will become majority minority within the next generation. Opinion polls reflect that citizens across the political spectrum increasingly want our nation's leaders to reflect that growing diversity and believe further that improving the diversity of our leaders is good for democracy. Diversity on the federal bench is not just about curing a crisis of judicial legitimacy, it is about preserving the promise of government "of the people, by the people, and for the people."

Thank you.