

LAW CLERK SELECTION AND DIVERSITY:  
INSIGHTS FROM FIFTY SITTING JUDGES  
OF THE FEDERAL COURTS OF APPEALS

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## LAW CLERK SELECTION AND DIVERSITY: INSIGHTS FROM FIFTY SITTING JUDGES OF THE FEDERAL COURTS OF APPEALS

Jeremy D. Fogel,\* Mary S. Hoopes\*\* & Goodwin Liu\*\*\*

*Judicial clerkships are key positions of responsibility and coveted opportunities for career advancement. Commentators have noted that the demographics of law clerks do not align with the student population by law school, socioeconomic background, gender, race, or ethnicity, and that ideological matching is prevalent between judges and their clerks. But extant studies draw on limited data and offer little visibility into how judges actually select clerks. For this study, we conducted in-depth individual interviews with fifty active judges of the federal courts of appeals to learn how they approach law clerk selection and diversity. Our sample, though not fully representative of the judiciary, includes judges from all circuits, appointed by Presidents of both parties, with average tenure of fourteen years. The confidential interviews, which drew in part upon the peer relationship that two of us have with fellow judges, yielded rich and candid insights not captured by prior surveys.*

*This Article reports our findings, among them: (1) With few exceptions, appellate judges hire clerks as an “ensemble” and assign positive value to diversity, although judges vary significantly in the dimensions of diversity they seek. (2) Most judges disclaim any interest in ideological alignment when hiring clerks; we situate this finding in the context of factors that contribute to ideological segmentation of the clerkship market. (3) Republican appointees, compared to Democratic appointees, more often identified socioeconomic diversity as the primary dimension of diversity they seek. (4) Judges who graduated from law schools outside the U.S. News & World Report top twenty are significantly more likely than other judges to hire clerks from schools outside the top twenty. (5) Almost all judges in our sample consider gender in clerkship hiring, and many have specific goals for gender balance. Republican appointees reported more difficulty drawing women into their applicant pool than Democratic appointees. (6) Most judges in our sample assign positive value to racial diversity and consider race to some degree in evaluating applicants, although it is important to note that some judges believe strongly that such consideration is inappropriate. (7) Many judges who view racial diversity positively nonetheless reported difficulty hiring Black and Hispanic clerks. The judges with the most robust records of minority hiring are those who make affirmative efforts to draw minority candidates into their applicant pool or place greater emphasis on indicators of talent besides grades and law school rank, or do both. (8) Black judges are particularly successful in hiring Black clerks; we estimate that Black judges, who comprised less than one-eighth*

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*of active circuit judges during our study, accounted for more than half of the Black clerks hired each year in the federal courts of appeals.*

*These findings have implications for judicial selection; in short, diversity among judges affects diversity among clerks. Further, one of our most consistent findings is that judges do not discuss clerk hiring or diversity with each other. This silence reflects norms of judicial culture that foster collegiality and mutual deference while tending to inhibit peer-to-peer discussion of how judges select their clerks. Yet many judges want to hire more diverse clerks and would like to learn from their colleagues' practices. We propose measures to increase transparency, facilitate peer exchange, and increase the capacity of judges to achieve their hiring objectives, whatever they may be.*

## INTRODUCTION

For recent law graduates, judicial clerkships are among the most coveted and prestigious opportunities in the legal profession. A clerkship offers insider knowledge of the judicial process and hones essential skills in research, analysis, and writing. It often results in an enduring mentoring relationship between the clerk and the judge, and opens doors to plum jobs in law firms, government, and academia. In addition, law clerks provide critical support for judicial decisionmaking and opinion-writing, and their potential influence on the adjudicative process underscores the public importance of their role.<sup>1</sup> Although clerkships do not pay the eye-popping salaries earned by associates in major law firms, the sizable clerkship bonuses offered by firms mitigate the compensation gap and signal the value of clerking.<sup>2</sup> Appellate clerkships, in particular, carry great prestige and present key opportunities both for career advancement and for helping to shape the development of the law.<sup>3</sup>

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<sup>1</sup> The nature and extent of law clerks' influence on Justices of the U.S. Supreme Court has been a topic of active study. See, e.g., TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006); ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006); Ryan C. Black & Ryan J. Owens, *The Influence of Personalized Knowledge at the Supreme Court: How (Some) Former Law Clerks Have the Inside Track*, 74 POL. RSCH. Q. 795, 795 (2021) (analyzing forty years of Justices' votes and finding that an attorney who formerly clerked for a Justice is 16% more likely to capture that Justice's vote than an otherwise identical attorney who never clerked); Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51 (2008); Mark C. Miller, *Law Clerks and Their Influence at the US Supreme Court: Comments on Recent Works by Peppers and Ward*, 39 LAW & SOC. INQUIRY 741 (2014).

<sup>2</sup> See Adam Liptak, *Law Firms Pay Supreme Court Clerks \$400,000 Bonuses. What Are They Buying?*, N.Y. TIMES (Sept. 21, 2020), <https://www.nytimes.com/2020/09/21/us/politics/supreme-court-clerk-bonuses.html> [<https://perma.cc/9WJC-DBDP>]; Kathryn Rubino, *Another Elite Firm Wows with Six-Figure Clerkship Bonuses*, ABOVE THE LAW (Sept. 2, 2020, 1:03 PM), <https://abovethelaw.com/2020/09/another-elite-firm-wows-with-six-figure-clerkship-bonuses> [<https://perma.cc/V625-JLP3>] (reporting that "most Biglaw clerkship bonuses are around \$50,000" and that some firms offer more than \$100,000 for a federal district or appellate clerkship).

<sup>3</sup> Some have argued, by contrast, that the elite culture of law schools leads students to overestimate the value of clerkships and obscures the costs they sometimes entail. See, e.g., William H. Simon, *Judicial Clerkships and Elite Professional Culture*, 36 J. LEGAL EDUC. 129 (1986).

Commentators have noted that the demographics of law clerks do not align with the student population by law school, socioeconomic background, gender, race, or ethnicity, and that ideological matching is prevalent between judges and their clerks. But extant studies draw on limited data and offer little visibility into how judges actually select clerks. For this study, we conducted in-depth individual interviews with fifty active judges of the federal courts of appeals to learn how they approach law clerk selection and diversity. Our sample, though not fully representative of the judiciary, includes judges from all circuits, appointed by Presidents of both parties, with average tenure of fourteen years.<sup>4</sup> The confidential interviews, which drew in part upon the peer relationship that two of us have with fellow judges, yielded rich and candid insights not captured by prior surveys. This Article reports our findings, among them:

1. With few exceptions, appellate judges hire clerks as an “ensemble” and assign positive value to diversity, although judges vary in the dimensions of diversity they seek
2. Most judges disclaim any interest in ideological alignment when hiring clerks; we situate this finding in the context of factors that contribute to ideological segmentation of the clerkship market.
3. Republican appointees, compared to Democratic appointees, more often reported socioeconomic diversity as the primary dimension of diversity they seek.
4. Judges who graduated from law schools outside the *U.S. News & World Report* top twenty are significantly more likely than other judges to hire clerks from schools outside the top twenty.
5. Almost all judges in our sample consider gender in clerkship hiring, and many have specific goals for gender balance. Republican appointees reported more difficulty drawing women into their applicant pool than Democratic appointees.
6. Most judges in our sample assign positive value to racial diversity and consider race to some degree in evaluating applicants, although it is important to note that some judges believe strongly that such consideration is inappropriate.
7. Many judges who view racial diversity positively nonetheless reported difficulty hiring Black and Hispanic clerks.<sup>5</sup> The judges

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<sup>4</sup> We constructed our sample in 2020 from active judges who had served at least three years on a federal court of appeals; thus, appointees of President Trump are underrepresented in our sample, and appointees of President Biden are not included. In addition, it is likely that judges who are wary of “diversity” as that term is used in contemporary parlance were less inclined to participate in our study. We detail our methodology in Part II below.

<sup>5</sup> We recognize there are differing views on what terms should be used to denote race and ethnicity. The terms “Hispanic,” “Latino,” and “Latinx” have been “rising and falling in popularity” over the decades among people who trace their roots to Latin America or Spain. LUIS NOE-BUSTAMANTE ET AL., PEW RSCH. CTR., ABOUT ONE-IN-FOUR U.S. HISPANICS HAVE

with the most robust records of minority hiring are those who make affirmative efforts to draw minority candidates into their applicant pool or place greater emphasis on indicators of talent besides grades and law school rank, or do both.

8. Black judges are particularly successful in hiring Black clerks; we estimate that Black judges, who comprised less than one-eighth of active circuit judges during our study, accounted for more than half of the Black clerks hired each year in the federal courts of appeals.

These findings have implications for judicial selection; in short, diversity among judges affects diversity among clerks. Further, one of our most consistent findings is that judges do not discuss clerk hiring or diversity with each other. This silence reflects norms of judicial culture that foster collegiality and mutual deference while tending to inhibit peer-to-peer discussion of how judges select their clerks. Yet many judges want to hire more diverse clerks and would like to learn from their colleagues' practices. We propose measures to increase transparency, facilitate peer exchange, and increase the capacity of judges to achieve their hiring objectives.

This Article proceeds as follows: Part I discusses the background and motivation for our study, including available data on law clerk demographics and key features of judicial culture that inform our approach. Part II describes our methodology. We discuss why we chose a qualitative inquiry, how we constructed our sample of judges, what topics we pursued in our interviews, and how we analyzed the data. Part

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HEARD OF LATINX, BUT JUST 3% USE IT 5 (2020), <https://www.pewresearch.org/hispanic/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it> [https://perma.cc/P9DL-QQEC]; see PAUL TAYLOR ET AL., PEW HISPANIC CTR., PEW RSCH. CTR., WHEN LABELS DON'T FIT: HISPANICS AND THEIR VIEWS OF IDENTITY 9 (2012), <https://www.pewresearch.org/hispanic/2012/04/04/when-labels-dont-fit-hispanics-and-their-views-of-identity> [https://perma.cc/V7SZ-AHQP]. Throughout this Article, we use the term that is used by source material; otherwise, we use the term "Hispanic" because it is the term most preferred by U.S. adults who self-identify as Hispanic or Latino. See NOE-BUSTAMANTE ET AL., *supra*, at 10. The term "Latinx" is not widely known within the Hispanic or Latino population, *id.* at 5, and among those who have heard of it, a large majority prefer the term "Hispanic" or "Latino" instead of "Latinx," *id.* at 10. Yet we acknowledge that the term "Hispanic" is not without its critics. See David Gonzalez, *What's the Problem with "Hispanic"? Just Ask a "Latino,"* N.Y. TIMES (Nov. 15, 1992), <https://www.nytimes.com/1992/11/15/weekinreview/ideas-trends-what-s-the-problem-with-hispanic-just-ask-a-latino.html> [https://perma.cc/P3VB-HMFY] (stating that some people find the term Hispanic "offensive" because "it recalls the colonization by Spain and Portugal and ignores the Indian and African roots of many people it describes"). Further, we adhere to the *Harvard Law Review's* convention of capitalizing "Black" and not capitalizing "white" when referring to the respective racial groups, recognizing that this is an issue on which thoughtful commentators hold different views. See Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, THE ATLANTIC (June 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159> [https://perma.cc/RCX5-5UMU] (canvassing various perspectives on the issue while favoring a rule of symmetry, and urging that we "remember that black and white are both historically created racial identities — and avoid conventions that encourage us to forget this").

III reports judges' attitudes and practices with regard to diversity in clerk hiring. Among the dimensions of diversity that judges identified, we discuss law schools, ideology, socioeconomic background, gender, sexual orientation, and race and ethnicity. In Part IV, we examine the implications of our study for judicial selection and ideological segmentation, and we suggest ways to promote discussion of these issues within the judiciary and to help judges better achieve their hiring objectives, whatever they may be.

It is fair to say that fellow judges comprise our study's primary audience. But our study may also be of interest to law students, lawyers, law deans, professors, clerkship directors, policymakers, and others who care about how the clerkship process distributes opportunity, affects the work of judges, and influences public perceptions of the judiciary. Further, our study may have significance for scholars interested in the legal profession, the sociology of organizations, the role of diversity in organizational settings, or qualitative methodology.

## I. BACKGROUND AND MOTIVATION

We bring to this study the collective experience with the clerkship process that the three of us have had as judges, law professors, and former law clerks. Over the decades, we have advised countless students, written scores of clerkship recommendation letters, and hired dozens of clerks. We recognize the special nature of a judicial clerkship as a learning opportunity and career stepping stone for the clerk, and as an indispensable support for the work of the judge. In addition, we have long been interested in issues of diversity in the legal profession and have experienced the challenges of hiring clerks who reflect the diversity of students in our law schools. We are particularly concerned about gender and racial diversity in light of persistent inequalities of opportunity in our society, and we set out to explore those issues. But in developing our research design and reporting our results, we have been committed to capturing and reflecting upon the many other ways that judges think about diversity. From numerous conversations with judicial colleagues, we know we are not the only ones to experience hiring challenges, yet there seems to be little systematic inquiry into what judges who seek more diversity, however defined, can do to achieve it.

### A. Law Clerk Demographics

Scholarship on law clerk selection has largely focused on the clerkship market and the practical operation of various hiring plans.<sup>6</sup> This

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<sup>6</sup> See Carl Tobias, *2021 Federal Clerkships: Can Order Emerge from Chaos?*, 94 S. CAL. L. REV. POSTSCRIPT 1, 1, 10–11 (2020); Diane Wood & Aaron Nielson, *A(nother) New Plan for Clerkship Hiring*, JUDICATURE, Summer 2018, at 70, 70; Christopher Avery et al., *The New Market for*

literature has addressed the somewhat chaotic and opaque nature of the hiring process, as well as the cyclical efforts over many decades to impose some measure of order and transparency.<sup>7</sup> Some of this commentary has observed that such a market with no rules or guidelines tends to advantage applicants with professional networks, personal connections, or early knowledge of what a clerkship is and how to get one.<sup>8</sup> But beyond impressionistic accounts, there has been little empirical inquiry into claims about how selection criteria, hiring plans, law school advising, or other aspects of market structure affect the demographics of law clerks. Although survey research can illuminate attitudes and perceptions among applicants and judges,<sup>9</sup> a central difficulty in studying law clerk diversity is the lack of complete, publicly available data on the demographics of federal law clerks from year to year.<sup>10</sup>

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*Federal Judicial Law Clerks*, 74 U. CHI. L. REV. 447 (2007) [hereinafter Avery et al., *The New Market*]; Richard A. Epstein, *Ending the Mad Scramble: An Experimental Matching Plan for Federal Clerkships*, 10 GREEN BAG 2D 37, 37–38 (2006); George L. Priest, *Reexamining the Market for Judicial Clerks and Other Assortative Matching Markets*, 22 YALE J. ON REG. 123, 127–28 (2005); Christopher Avery et al., *The Market for Federal Judicial Law Clerks*, 68 U. CHI. L. REV. 793, 796 (2001) [hereinafter Avery et al., *The Market*]; Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 GEO. L.J. 1749, 1750 (1995); Edward R. Becker, Stephen G. Breyer & Guido Calabresi, *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 YALE L.J. 207, 208 (1994); Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153–54 (1990).

<sup>7</sup> See Epstein, *supra* note 6, at 37–38, 40–41.

<sup>8</sup> See Avery et al., *The Market*, *supra* note 6, at 843–45 (reporting 1999 and 2000 survey results indicating that “the law clerk market appears to rely heavily on various forms of personal well-connectedness,” *id.* at 845, including “connections with friends of a judge or a judge’s former clerks,” *id.* at 844, as well as “faculty feeding,” *id.* at 843, of clerks to judges). In response to such concerns, the current hiring plan, adopted in 2018, provides that the application and hiring process may begin no earlier than the completion of students’ second year in law school. See Letter from 109 Law Deans to Whom It May Concern (Sept. 12, 2017), [https://oscar.uscourts.gov/assets/Ad\\_Hoc\\_Committee\\_on\\_Law\\_Clerk\\_Hiring\\_Announcement.pdf](https://oscar.uscourts.gov/assets/Ad_Hoc_Committee_on_Law_Clerk_Hiring_Announcement.pdf) [<https://perma.cc/6LMT-RNWE>]. Under the prior system, students applied during their second year of law school or immediately after their first year. “[T]he accelerated hiring schedule,” according to the deans, “reduced the number of women and students of color in the pool” and tended to disadvantage “students who are first in their families to go to college, first-generation professionals, or simply in need of some time to master the art of lawyering.” *Id.* at 1; see also J. Edward Moreno, *Federal Law Clerk Hiring Plan Gets 2-Year Extension*, LAW360 (Nov. 13, 2020, 3:16 PM), <https://www.law360.com/articles/1328342/federal-law-clerk-hiring-plan-gets-2-year-extension> [<https://perma.cc/264D-4D4P>]; Karen Sloan, *Judges Give High Marks to New Federal Law Clerk Hiring Plan*, LAW.COM (July 2, 2019, 5:18 PM), <https://www.law.com/2019/07/02/judges-give-high-marks-to-new-federal-law-clerk-hiring-plan> [<https://perma.cc/Y87W-6K5Y>].

<sup>9</sup> The most significant studies, going back nearly two decades, are Avery et al., *The New Market*, *supra* note 6; and Avery et al., *The Market*, *supra* note 6. A current effort led by the American Bar Foundation aims to use data from the Law School Survey of Student Engagement (LSSSE) “to explore law student career preferences and expectations about judicial clerkships.” Shih-Chun Steven Chien, Ajay K. Mehrotra & Xiangnong Wang, *Sociolegal Research, The Law School Survey of Student Engagement, and Studying Diversity in Judicial Clerkships*, 69 J. LEGAL EDUC. 530, 533 (2020).

<sup>10</sup> The Administrative Office of the United States Courts provides a form that requests demographic information from federal judicial branch employees “to aid the federal judiciary in

By contrast, regularly updated data on the demographics of federal judges are easily accessible online. A website maintained by the Federal Judicial Center allows users to search judges, past and present, by a variety of characteristics, including appointing President, individual court or circuit, professional background, law school attended, gender, and race.<sup>11</sup> This resource provides ready answers to basic questions such as: How many Democratic and Republican appointees are there at a given time? What is the gender and racial makeup of sitting judges? How have these numbers changed over time? What law schools account for the most federal judges? Yet no data from an official source are available to answer similar questions with regard to law clerks.

Recent work has examined the ideological makeup of federal law clerks and the degree of alignment between judges and their clerks.<sup>12</sup> This research, which inferred the ideology of clerks from their political donations, finds evidence that clerks are predominantly liberal, that their ideological orientation is correlated with the orientation of the hiring judge, and that this correlation becomes stronger as one moves up the judicial hierarchy.<sup>13</sup> Further below, we address considerations of ideology in reporting our findings and discussing their implications.<sup>14</sup>

As for clerk demographics by law school, gender, and race, two sources are often cited. The first is legal reporter Tony Mauro's compilation of the demographics of U.S. Supreme Court law clerks.<sup>15</sup> Mauro first published such data in 1998, showing that among 394 clerks hired by Justices of the Rehnquist Court, 25% were women, fewer than 2% were African American, even fewer were Hispanic, about 5% were

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reporting on equal employment opportunities." See ADMIN. OFF. OF U.S. CTS., VOLUNTARY RACE/ETHNICITY, GENDER, & DISABILITY IDENTIFICATION AO 78B (10/13), <https://www.ca7.uscourts.gov/HR/orientforms/ao78B.pdf> [<https://perma.cc/35B5-XCLP>]. But the form advises that "furnishing this information is voluntary," *id.*, and there do not appear to be any published policies or data on how many law clerks are asked to complete the form each year, how many clerks actually complete the form, who administers or collects the form, and what is done with the information obtained. To our knowledge, the Administrative Office of the United States Courts does not publish data on the demographics of federal law clerks.

<sup>11</sup> *Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> [<https://perma.cc/C9HU-S2NE>].

<sup>12</sup> See Adam Bonica et al., *Measuring Judicial Ideology Using Law Clerk Hiring*, 19 AM. L. & ECON. REV. 129, 129 (2017) [hereinafter Bonica et al., *Measuring Judicial Ideology*]; Adam Bonica et al., *The Political Ideologies of Law Clerks*, 19 AM. L. & ECON. REV. 96, 98 (2017) [hereinafter Bonica et al., *Political Ideologies*].

<sup>13</sup> See Bonica et al., *Measuring Judicial Ideology*, *supra* note 12, at 138–39; Bonica et al., *Political Ideologies*, *supra* note 12, at 108, 118, 122.

<sup>14</sup> See *infra* sections III.C, pp. 616–19, and IV.B, pp. 648–51.

<sup>15</sup> Tony Mauro, *Mostly White and Male: Diversity Still Lags Among SCOTUS Law Clerks*, NAT'L L.J. (Dec. 11, 2017, 4:00 AM), <https://www.law.com/nationallawjournal/2017/12/11/mostly-white-and-male-diversity-still-lags-among-scotus-law-clerks> [<https://perma.cc/XB52-3YGN>] [hereinafter Mauro, *Mostly White and Male*]; Tony Mauro, *Diversity and Supreme Court Law Clerks*, 98 MARQ. L. REV. 361, 362 (2014); Tony Mauro, *Corps of Clerks Lacking in Diversity*, USA TODAY, Mar. 13, 1998, at 12A [hereinafter Mauro, *Corps of Clerks*].



Asian, and approximately 90% were white.<sup>16</sup> In a more recent study, he reported that among 487 clerks hired by Justices of the Roberts Court between 2005 and 2017, about 33% were women, 4% were African American, almost 9% were Asian American, less than 2% were Hispanic, and 85% were white.<sup>17</sup> Two law schools — Harvard and Yale — accounted for half of the clerks, up from 40% in the 1998 study.<sup>18</sup> Notably, Justice Thomas “casts the widest net” among his colleagues in terms of law schools; he “hired from 23 different law schools since 2005, with one-third of his clerks coming from schools outside the Top 10 on the U.S. News and World Report rankings.”<sup>19</sup>

The second source of data is the National Association for Law Placement’s (NALP) survey of each law school’s graduating class, called the Employment Report and Salary Survey (ERSS).<sup>20</sup> The NALP data show that, from 2006 to 2016, men consistently outnumbered women in federal clerkships, while women outnumbered men in state clerkships.<sup>21</sup> In addition, the survey has consistently found that the minority share of law graduates serving as federal clerks in the year after graduation trails the minority share of graduates overall.<sup>22</sup> For example, among

<sup>16</sup> See Mauro, *Corps of Clerks*, *supra* note 15 (examining names and contacting former clerks to obtain demographic information).

<sup>17</sup> Mauro, *Mostly White and Male*, *supra* note 15. Comparative work reveals that women comprised a higher percentage of law clerks at the Canadian Supreme Court than at the U.S. Supreme Court every year from 1990 to 2007. See Erin B. Kaheny et al., *High Court Recruitment of Female Clerks: A Comparative Analysis of the U.S. Supreme Court and the Supreme Court of Canada*, 36 JUST. SYS. J. 355, 365–66 (2015). Whereas women have often comprised a majority of Canadian Supreme Court clerks, the highest percentage of female clerks at the U.S. Supreme Court in any year between 1941 and 2011 was 40%. See *id.* at 359, 365–66. Women comprised a majority of clerks at the U.S. Supreme Court for the first time in 2018. Emily Baumgaertner, *Justice Kavanaugh’s Law Clerks Are All Women, A First for the Supreme Court*, N.Y. TIMES (Oct. 9, 2018), <https://www.nytimes.com/2018/10/09/us/politics/kavanaugh-women-law-clerks.html> [<https://perma.cc/56LE-ZYU6>].

<sup>18</sup> Mauro, *Mostly White and Male*, *supra* note 15.

<sup>19</sup> Karen Sloan, *Justice Thomas Ventures Beyond Elite Schools to Fill Clerkship Posts*, LAW.COM (Dec. 11, 2017, 9:00 PM), <https://www.law.com/2017/12/11/justice-thomas-ventures-beyond-elite-schools-to-fill-clerkship-posts> [<https://perma.cc/Q9TE-R7MG>].

<sup>20</sup> *Employment Report & Salary Survey (ERSS) Info*, NALP, <https://www.nalp.org/erssinfo> [<https://perma.cc/S74U-W2V9>].

<sup>21</sup> *A Demographic Profile of Judicial Clerks — 2006 to 2016*, NALP BULL. (Oct. 2017), <https://www.nalp.org/1017research> [<https://perma.cc/438F-6QXF>]. By limiting our inquiry to circuit courts, we focus on a small and stratified portion of the clerkship market in which gender disparities are likely more pronounced. A recent study estimates that 42% of circuit court clerks were women between 2004 and 2017, compared to 59% of district court clerks. Marco Battaglini, Jorgen M. Harris & Eleonora Patacchini, *Interactions with Powerful Female Colleagues Promote Diversity in Hiring*, 41 J. LAB. ECON. 589, 597 (2023).

<sup>22</sup> See, e.g., *Racial/Ethnic Representation of Class of 2019 Judicial Clerks*, NALP BULL. (Feb. 2021), <https://www.nalp.org/0221research> [<https://perma.cc/2HE5-PSSN>]; *A Demographic Profile of Judicial Clerks — 2006 to 2016*, *supra* note 21; *Increasing Diversity of Law School Graduates Not Reflected Among Judicial Clerks*, NALP BULL. (Sept. 2014), <https://www.nalp.org/0914research> [<https://perma.cc/M6VC-76GJ>]; *A Demographic Profile of Judicial Clerks — Patterns*

2019 graduates employed as federal clerks in 2020, Black or African American graduates comprised 4.1%, Asians 6.0%, Latinx graduates 7.9%, and whites or Caucasians 79.2%; by comparison, the composition of 2019 graduates was 8.7% Black or African American, 8.5% Asian, 11.9% Latinx, and 67.2% white or Caucasian.<sup>23</sup> Similar disparities are observed when law clerks are compared to graduates of top law schools;<sup>24</sup> a tabulation of NALP clerkship data from 2017 to 2019 shows that the top thirty schools accounted for over 60% of federal clerks in those years.<sup>25</sup>

These data provide some insight into the demographics of federal clerks. But we are limited to general trendlines because the NALP data are reported without information on the location or level of court. And the data do not capture all clerks in a given year; many law graduates clerk more than one year after graduation, do multiple clerkships, or serve as permanent clerks.<sup>26</sup> Moreover, we are not aware of any data on the socioeconomic background of law clerks. The collection and public reporting of complete clerkship data each year — in a format that permits sorting by court, law school attended, gender, race, disability status, veteran status, and other characteristics — would significantly aid efforts to understand how law clerk demographics are affected by aspects of the application and selection process.

### B. Judicial Culture

In approaching this topic, we started with the premise that data limitations make it difficult to undertake quantitative study of how the

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*of Disproportionality*, NALP BULL. (Nov. 2010), [https://www.nalp.org/nov2010\\_demog\\_clerkships](https://www.nalp.org/nov2010_demog_clerkships) [<https://perma.cc/U6YB-MBA6>]; *Courting Clerkships: The NALP Judicial Clerkship Study*, NALP (Oct. 2000), <https://www.nalp.org/courtingclerkships> [<https://perma.cc/7N9H-6MY6>].

<sup>23</sup> *Racial/Ethnic Representation of Class of 2019 Judicial Clerks*, *supra* note 22.

<sup>24</sup> TYLER DANG ET AL., AM. BAR FOUND. & NAT'L ASIAN PAC. AM. BAR ASS'N, A PORTRAIT OF ASIAN AMERICANS IN THE LAW 2.0: IDENTITY AND ACTION IN CHALLENGING TIMES 20 (2022).

<sup>25</sup> See DEREK T. MULLER, FEDERAL JUDICIAL CLERKSHIP REPORT OF RECENT LAW SCHOOL GRADUATES: 2020 EDITION, 3–6, 10 (2020), <https://ssrn.com/abstract=3203644> [<https://perma.cc/RS2A-83W6>]; Miranda Li, Phillip Yao & Goodwin Liu, *Who's Going to Law School? Trends in Law School Enrollment Since the Great Recession*, 54 U.C. DAVIS L. REV. 613, 628, 658–62 (2020) (listing 160 law schools by average *U.S. News & World Report* ranking over the nine-year period from 2012 to 2020).

<sup>26</sup> See Gregg Costa, *Clerking to Excess? The Case Against Second (and Third and Fourth) Clerkships*, JUDICATURE, Fall–Winter 2018, at 22, 23–24 (reporting “the rapid ascent of double clerkships in the lower courts,” *id.* at 23, over the past two decades). In recent years, the NALP survey has reported that approximately 1,240 graduates are working in federal clerkships during the year after graduation. NALP, JOBS & JDS: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES — CLASS OF 2020, at 54 (2021). Yet the federal judiciary includes more than 600 active district judges, each with two or three law clerks, and 172 active circuit judges, each with three or four law clerks. See *Biographical Directory of Article III Federal Judges, 1789–Present*, *supra* note 11. Further, there are more than 620 senior judges, *see id.*, who collectively hire a large number of clerks. The NALP data also do not include U.S. Supreme Court clerks, as those clerks reach the Court only after one or more lower court clerkships. See Costa, *supra*, at 24.

clerkship process results in observed disparities. We opted for a different approach, drawing upon the ability that two of us have as experienced judges to relate to other judges as colleagues and peers. We sought to understand how the clerkship process operates from the perspective of judges, recognizing that any efforts to improve law clerk diversity must be responsive to the outlook and behavior of judges and to the nature of judicial culture. The notion of judicial culture merits some elaboration, as it informs not only our findings but also our methodology. We highlight four features.

The first is *independence*. The Framers of our Constitution decided that federal judges should have life tenure because they wanted to insulate judicial decisions from political pressure. Yet the Framers likely did not foresee the emergence of a branch whose members would come to value not only decisional independence but also the power to organize and conduct their work according to their own habits and preferences. The creation of the Judicial Conference of the United States and the Administrative Office of the United States Courts in the last century provided a durable framework for the branch's self-governance and gave concrete expression to the judiciary's institutional independence.<sup>27</sup>

Second, while the framework that has emerged has a solid administrative core, it is fundamentally *decentralized*. The particular preferences and traditions of each circuit, each district, and each judge receive great deference.<sup>28</sup> Although higher courts regulate the ways in which lower courts apply the law, they rarely if ever tell individual judges how to manage their dockets, hire or manage their staff, or interact with others.<sup>29</sup>

Third, consistent with decentralization and decisional and institutional independence, federal judges do much of their work in *isolation*

<sup>27</sup> See Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 618 (2009).

<sup>28</sup> This deference is not unlimited. See 2 GUIDE TO JUDICIARY POLICY pt. E, ch. 3, § 320 (Admin. Off. of the U.S. Cts. 2019); see also Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 331-332, 372, 604).

<sup>29</sup> See Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 761 (1995); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 403-14 (1982) (describing federal judges' roles in case management and docket control, especially pretrial). The U.S. Courts website notes: "A court's authority to prescribe local rules is governed by both statute and the Federal Rules of Practice and Procedure. See 28 U.S.C. §§ 2071(a)-(b); Fed. R. App. P. 47; Fed. R. Bankr. P. 9029; Fed. R. Civ. P. 83; Fed. R. Crim. P. 57." *Current Rules of Practice & Procedure*, U.S. CTS., <https://www.uscourts.gov/rules-policies/current-rules-practice-procedure> [<https://perma.cc/5GJZ-8EFD>].

The latest *Strategic Plan for the Federal Judiciary* devotes a section to "The Judiciary Workforce and Workplace" and identifies a need to "[r]ecruit, develop, and retain a talented, dedicated, and diverse workforce, while defining the judiciary's future workforce requirements." JUD. CONF. OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 15 (2020). That discussion includes a statement that "[j]udges must be encouraged to give special attention to diversity in their law clerk hiring practices." *Id.* However, as our data demonstrate, judges' responses to such encouragement are as varied as the judges themselves.

from people other than their chambers staff. This is certainly true in the district courts, and it is also a feature of appellate judging even though judges sit on panels:

Unlike lawyers in law firms or government bureaucracies, [a federal appellate judge] works in small, isolated chambers with a minimum of work contacts outside. She is totally dependent on herself, her law clerks, and her staff [for her work product]. . . . Although she may talk to and confer with other judges and sometimes their clerks in the opinion-writing process, her work will basically reflect the efforts of her own chambers.<sup>30</sup>

In addition, most people who work for or appear before federal judges are reluctant to give them critical feedback, and judges are often hesitant to openly question the actions or decisions of other judges. It is therefore not surprising that many judges tend to gravitate toward habits and practices with which they feel most comfortable personally. Few if any external influences compel judges to critically examine how they do their work or manage their chambers, including how they select law clerks.

At the same time, because federal judges are a select group of constitutional officeholders with the common experience of having survived the Senate confirmation process, they generally treat each other with a high level of regard. This fourth feature, *mutual regard*, encompasses not only collegiality but also a level of interest in one another's perspectives that is not generally accorded to persons outside the judiciary. Although reluctant to impose their views on their colleagues, many judges are nonetheless interested in how their colleagues work and think. While external criticism seems unlikely to have much influence on federal judges, the insider perspectives of judges themselves have the potential to motivate change.

We approach the topic of law clerk diversity by seeking to illuminate the insider perspectives of judges. As discussed below, one of our main findings is that although many judges are interested to learn from each other's hiring practices, they rarely discuss the topic with one another. Recognizing this disconnect points to a significant opportunity for catalyzing change among those judges who seek it.

## II. METHODOLOGY

This study focuses on the selection and diversity of law clerks in the United States Courts of Appeals. We focus on the circuit courts not only because they decide important legal issues and offer clerkships with great prestige, but also for three distinct methodological reasons. First, given the nature of the appellate function and the adjudication of cases by three-judge panels (and occasionally en banc courts), appellate clerks perform comparable tasks and generally must meet a common standard

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<sup>30</sup> Wald, *supra* note 6, at 153.

of quality. Although individual judges enjoy a great deal of discretion in selecting clerks, they have strong incentives to hire clerks who can help them write opinions of sufficient quality to garner agreement from other judges on the circuit. Focusing on circuit judges enables us to compare hiring practices in a context with broadly shared norms of job performance. Second, the universe of circuit judges is especially amenable to qualitative study because of its small size; our sample of fifty judges (detailed below) comprised roughly 30% of active circuit judges nationwide.<sup>31</sup> Third, the demographics of clerks in the federal circuit courts have some bearing on who clerks at the U.S. Supreme Court, and it is important to understand how this dynamic affects the clerkship market more broadly.

In focusing on federal circuit courts, we do not intend to diminish the significance of federal district courts or state courts. As the forum in which almost all federal civil and criminal cases originate and in which virtually all fact-finding and discretionary decisionmaking in those cases occur, federal district courts have a profound impact not only on the development of the law but also on the daily lives of the people who interact with them. State courts are responsible for more than 90% of our nation's judicial workload<sup>32</sup> and historically have played a central role in the evolution of our common law.<sup>33</sup> While clerkships in these courts require many of the same analytical and writing skills that are important for federal appellate clerkships, the experience that two of us have as judges in these courts suggests that district judges vary widely in how they approach cases and manage their dockets, and state judges vary widely in how they use law clerks. The diversity of practices among federal district courts and state courts, as well as the size of those judiciaries, makes it difficult to undertake an intensive qualitative study of the sort we conducted here. But because clerkships in state or federal district court offer their own career advantages, and because it is not uncommon for those clerks to also seek appellate clerkships, research on the hiring practices of federal district judges and state judges would be a valuable complement to our study.

As noted, we sought to draw upon the position that two of us have as experienced judges with many peer relationships throughout the

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<sup>31</sup> There are 179 authorized federal circuit judgeships, with typically nine or ten vacancies at any given time. See *Judicial Vacancies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies> [<https://perma.cc/3W5F-639F>].

<sup>32</sup> See Judith Resnik, *Revising Our "Common Intellectual Heritage": Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1922–23 (2016).

<sup>33</sup> See *id.* at 1925. Recent scholarship has highlighted the role of state courts as vital dispute resolution forums for the least advantaged members of our society, the vast majority of whom must navigate the justice system without a lawyer. See Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, DAEDALUS, Winter 2019, at 128, 128 (observing that close to 75% of state civil cases involve an unrepresented litigant); Anna E. Carpenter et al., *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 258 (noting that many scholars "call our state courts 'the poor people's courts'").

judiciary in order to elicit the most candid information possible from a broad range of judges. In developing our study design, we assembled a focus group of five active circuit judges in May 2019 and a second focus group of three active circuit judges in October 2019. These judges hailed from five circuits, three on the coasts and two in the middle of the country, and had an average circuit court tenure of twelve-and-a-half years. The eight judges included five women and three men, two Republican appointees and six Democratic appointees,<sup>34</sup> two feeder judges,<sup>35</sup> four current or soon-to-become chief judges, one African American judge, one Asian American judge, and one Hispanic judge. We engaged these judges in a wide-ranging discussion of their hiring experiences and views on diversity, and we sought their guidance on how best to engage other judges in honest conversation about these topics.

The focus groups gave us a sense of the range of approaches to clerk hiring and helped us to develop an approach to capturing this variation. Most significantly, the colleagues we consulted underscored that clerk hiring is a sensitive topic because it is viewed as a personal prerogative entirely within the judge's discretion. Given this context, our colleagues counseled against the use of survey instruments, which may be perceived as impersonal, insufficiently nuanced, or susceptible to data breaches. In their view, judges would be more willing to participate and would share higher-quality information if they were interviewed by other judges who could provide personal assurances of confidentiality and who could directly relate to the unique pressures they confront in hiring clerks. This advice dovetails with literature highlighting the need to gain the trust of interview respondents in order to collect high-quality data and the particular difficulties of doing so when interviewing elite actors.<sup>36</sup> Our methodology was also informed by other studies of judicial attitudes and behaviors on sensitive topics, including Professor Abbe Gluck and Judge Richard Posner's 2018 study of federal appellate judges' approaches to statutory interpretation.<sup>37</sup>

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<sup>34</sup> We sometimes use the phrase "party label" as shorthand for the political party of the appointing President of a given judge. We do not use the phrase to denote the political affiliation of the judge himself or herself.

<sup>35</sup> See *infra* note 39 and accompanying text (defining "feeder" judge).

<sup>36</sup> See William S. Harvey, *Strategies for Conducting Elite Interviews*, 11 QUALITATIVE RSCH. 431, 433 (2011); Joel D. Aberbach & Bert A. Rockman, *Conducting and Coding Elite Interviews*, 35 POL. SCI. & POL. 673, 675 (2002). We were not optimistic about the willingness of judges to answer a detailed online or paper survey on a sensitive topic. In one previous study of federal appellate clerk hiring, researchers mailed a survey instrument in 2013 to all active and senior circuit judges ("approximately 257") and received fifty-nine completed surveys, a response rate of 23%. See Todd C. Peppers et al., *Surgeons or Scribes? The Role of United States Court of Appeals Law Clerks in "Appellate Triage,"* 98 MARQ. L. REV. 313, 316 (2014). We believed we could get richer data from a comparable number of judges through confidential individual interviews, and we did.

<sup>37</sup> See Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (2018). Professor

We developed the sampling approach for this study in 2020 and ended up conducting in-depth, semi-structured interviews of fifty active federal circuit judges. In constructing our sample, we included only federal circuit judges with active status who had served on the appellate bench for at least three years. This limitation served to ensure that our interviewees would have recent and substantial experience with hiring appellate clerks.<sup>38</sup> Among these judges, we sought diversity of geography, appointing President, race, gender, and feeder status. We defined “feeder” as a circuit judge with five or more law clerks who went on to clerk at the U.S. Supreme Court at any time from October Term 2015 to October Term 2020.<sup>39</sup> Thirteen active judges met this definition during our sampling procedure.<sup>40</sup>

We started by drawing a random sample of African American, Asian American, and Hispanic judges, and then drew a random sample of the remaining judges, with an initial goal of securing forty participants. At each stage, we sampled without replacement. We sent invitation letters via email; if we received no response after one follow-up email, we approached the next judge on the list. We oversampled minority judges because of their relatively small numbers and some evidence suggesting

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Gluck and Judge Posner interviewed forty-two sitting circuit judges chosen through a sampling method to achieve “geographic, experiential, ideological, and demographic diversity.” *Id.* at 1307. Against the backdrop of “academic and judicial debates over statutory interpretation,” their aim was to understand how judges actually think about statutory text, dictionaries, canons of construction, legislative history, and purpose. *Id.* at 1309; *see also id.* at 1300–01. Other interview-based studies include TERRY A. MARONEY, WHAT JUDGES FEEL: HOW EMOTIONS PERMEATE THE ROLE OF JUDGING (forthcoming 2025); Donald W. Molloy, *Designated Hitters, Pinch Hitters, and Bat Boys: Judges Dealing with Judgment and Inexperience, Career Clerks or Term Clerks*, 82 LAW & CONTEMP. PROBS., no. 2, 2019, at 133, 133, 139 (interviewing twenty-six federal district court and magistrate judges under “strict confidentiality terms” to study the choice whether to use term clerks or career clerks; the author is a senior federal district judge in Montana); David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. COLO. L. REV. 1, 18 n.56 (2008) (interviewing over twenty-five Republican-appointed federal district judges, most of them preferring anonymity, to develop forty case profiles to inform sentencing policy); ANNA O. LAW, THE IMMIGRATION BATTLE IN AMERICAN COURTS 130 (2010) (interviewing Ninth Circuit judges about their review of the appeals from the Board of Immigration Appeals); and STANTON WHEELER, KENNETH MANN & AUSTIN SARAT, SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 3 (1988) (study of sentencing decisions based on in-depth interviews of fifty-one judges in seven federal districts).

<sup>38</sup> Although some circuit judges had previously served as federal district judges, we counted only their years of service as circuit judges.

<sup>39</sup> *See* Adam Feldman, *The New Clerks in Town*, EMPIRICAL SCOTUS (Apr. 11, 2022), <https://empiricalscotus.com/2022/04/11/the-new-clerks-in-town> [<https://perma.cc/S5BF-QN3J>] (similarly identifying feeder judges as “judges with at least five clerks who went or are going on to clerkships on the Supreme Court”).

<sup>40</sup> To identify feeder judges, we used a list of U.S. Supreme Court law clerks and the circuit judges for whom they clerked. *See Lists of Law Clerks of the Supreme Court of the United States*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Lists\\_of\\_law\\_clerks\\_of\\_the\\_Supreme\\_Court\\_of\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Lists_of_law_clerks_of_the_Supreme_Court_of_the_United_States) [<https://perma.cc/7JS7-BXF8>].

they have greater success in recruiting and hiring minority clerks.<sup>41</sup> Once we began interviewing, we observed that many minority judges did have greater success than other judges in hiring minority clerks. They described innovative and creative approaches to hiring that had not surfaced in our focus groups, and their hiring records differed significantly from their peers'. Because of the potentially useful information to be gleaned, we ultimately decided to invite all minority circuit judges and increased our overall goal to fifty participants. Based on biographical information compiled by the Federal Judicial Center,<sup>42</sup> we identified thirty-four minority judges with active status and at least three years of service on the circuit court; eighteen were African American, five were Asian American, and eleven were Hispanic. Thirty minority judges agreed to participate.<sup>43</sup>

We then grouped the remaining judges by the party of the appointing President and sampled from each group.<sup>44</sup> Because our focus groups had given us some indication that judges' views and practices with respect to law clerk diversity might vary along ideological lines, we sought to include judges appointed by Presidents from both parties. We over-sampled Republican-appointed judges because the thirty minority judges who had agreed to participate were disproportionately Democratic appointees. We randomly drew twelve Republican-appointed judges and five Democratic-appointed judges. As judges declined or failed to respond to our invitations, we continued to draw randomly from each group until we filled these seventeen slots. For Republican appointees, the response rate was 54.5%; for Democratic appointees, it was 71.4%.<sup>45</sup>

Finally, we sought to include several feeder judges because of the possible influence they exert on the overall dynamics of clerk hiring. The thirty minority judges and additional seventeen judges who agreed to participate already included three feeder judges, comprised of two Democratic appointees and one Republican appointee. This left ten feeder judges comprised of five Democratic appointees and five Republican appointees, and we set out to enlist two from each group.

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<sup>41</sup> In a 2016 survey of Black alumni of Harvard Law School, 23.6% of 514 respondents indicated they had clerked, and among 115 respondents who had clerked and identified the race of their judge, over 57% indicated they had clerked for a Black judge. See DAVID B. WILKINS & BRYON FONG, HARV. L. SCH. CTR. ON THE LEGAL PRO., HARVARD LAW SCHOOL REPORT ON THE STATE OF BLACK ALUMNI II 2000-2016, at 43 tbls.11 & 12 (2017), <https://ssrn.com/abstract=3110790> [<https://perma.cc/333T-UA2Y>].

<sup>42</sup> See *Biographical Directory of Article III Federal Judges, 1789-Present*, *supra* note 11.

<sup>43</sup> Fifteen of these judges are Black. We do not provide the breakdown of Hispanic and Asian American judges in order to preserve their anonymity.

<sup>44</sup> Grouping judges this way made it likely that we would achieve geographic and gender balance.

<sup>45</sup> Among the Democratic appointees, two judges declined to participate, so we ended up inviting seven judges in order to secure five, a response rate of 71.4%. Among the Republican appointees, ten judges declined to participate, so we ultimately invited twenty-two judges in order to secure twelve, a response rate of 54.5%. Minority judges were far more likely than other judges to participate; as noted, thirty out of the thirty-four minority judges accepted our invitation, a response rate of 88.2%.



We drew two of the Democratic appointees, and both agreed to participate. As for the Republican appointees, we kept issuing invitations until we exhausted the list; in the end, one of the five agreed to participate. The addition of these three feeder judges brought the total number of respondents to fifty.

Table 1 provides a descriptive summary. Table 2 shows that our final sample includes judges from all thirteen circuits. Table 3 shows the breakdown of our sample by appointing President. The fifty judges in our sample ranged in age from the forties to the eighties. Their tenure as circuit judges ranged from just a few years to more than three decades; the mean was fourteen years. Our sample includes ten then-current or former circuit chief judges. On the whole, the judges in our sample were quite experienced. In addition, they had graduated from a total of thirty-one law schools, eighteen private and thirteen public. Twenty-nine judges had graduated from one of twelve schools ranked within the top twenty, while twenty-one judges had graduated from one of nineteen schools outside of the top twenty.<sup>46</sup>

Table 1: Characteristics of Final Sample

TOTAL RESPONDENTS	50
<i>Gender</i>	
Female	15
Male	35
<i>Party of appointing President</i>	
Republican	18
Democrat	32
<i>Race/ethnicity</i>	
African American, Asian American, or Hispanic	30
White	20
<i>Law school attended</i>	
Top twenty	29
Non-top twenty	21
<i>Mean years of service as a circuit judge</i>	14
<i>Current or former circuit chief judges</i>	10
<i>Feeder judges</i>	6

<sup>46</sup> Throughout this Article, when we refer to the top twenty law schools or other rankings, we are using *U.S. News & World Report* rankings averaged over a nine-year period from 2012 to 2020, as developed in previous work that one of us coauthored. See Li, Yao & Liu, *supra* note 25, at 627–28; *id.* at 658 (listing the top twenty schools). When we use the term “elite” law schools, we are referring to the top twenty schools.

Table 2: Distribution of Respondents by Circuit

First Circuit	2	Eighth Circuit	2
Second Circuit	3	Ninth Circuit	10
Third Circuit	6	Tenth Circuit	3
Fourth Circuit	2	Eleventh Circuit	4
Fifth Circuit	3	D.C. Circuit	3
Sixth Circuit	6	Federal Circuit	5
Seventh Circuit	1		

Table 3: Distribution of Respondents  
by Appointing President

G.H.W. Bush	1
Clinton	9
G.W. Bush	14
Obama	23
Trump	3

Like Professor Gluck and Judge Posner in their study of statutory interpretation, we do not claim that our sample of fifty judges is random or representative.<sup>47</sup> By virtue of agreeing to participate, these judges comprise a self-selected group. As noted, Democratic appointees accepted our invitation at a higher rate than Republican appointees, and we invited all minority circuit judges and received a high response rate. Moreover, because our sample was constructed in 2020 and was limited to judges with at least three years of circuit court experience, it includes only three judges appointed by President Trump and none appointed by President Biden.<sup>48</sup> While our study does not include the most recently appointed judges, it nonetheless illuminates phenomena of perennial significance to the judiciary, including the nature and causes of persistent challenges in clerk hiring and aspects of judicial culture that shape approaches to clerk selection and diversity. In Part

<sup>47</sup> See Gluck & Posner, *supra* note 37, at 1307 (acknowledging their sample is not “random” or “representative or predictive”).

<sup>48</sup> President Biden’s judicial appointees are more diverse by gender and race than the appointees of any other President. See John Gramlich, *Biden Has Appointed More Federal Judges than Any President Since JFK at This Point in His Tenure*, PEW RSCH. CTR. (Aug. 9, 2022), <https://www.pewresearch.org/fact-tank/2022/08/09/biden-has-appointed-more-federal-judges-than-any-president-since-jfk-at-this-point-in-his-tenure> [<https://perma.cc/BHA5-7HER>]. As of September 2023, 61% of Biden’s appointees were women and 63% were racial minorities. See *Biden’s Nominees*, BALLS & STRIKES (Sept. 14, 2023, 11:03 AM), <https://ballsandstrikes.org/bidens-nominees> [<https://perma.cc/J9ED-CXT4>]. By contrast, 24% of President Trump’s appointees were women and 16% were racial minorities. See John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges> [<https://perma.cc/GU4Q-UYWQ>]. The changing composition of the judiciary may result in changes in the composition of clerks. See *infra* section III.G, pp. 622–41 (reporting our finding that minority judges hired more minority clerks than white judges, regardless of party label).

IV, we propose some ideas to address the hiring challenges that our sample of judges identified.

We also took care to ensure ideological diversity within our sample and to solicit a wide variety of perspectives. Eighteen of the judges were Republican appointees; thirty-two were Democratic appointees.<sup>49</sup> The range of participants enabled us to learn how judges think about diversity in clerk hiring, what successes and challenges they have experienced in achieving diversity, and what practices might be helpful to address challenges.

We conducted the interviews via Zoom between July 2020 and March 2021. Each interview lasted approximately one hour, and all three of us were present for each interview, with Judge Fogel and Justice Liu taking turns as the lead questioner from one interview to the next. The interviews were semi-structured, allowing us to investigate a predetermined set of questions and to explore individual perspectives that emerged during the interviews.<sup>50</sup> We developed an initial interview rubric and piloted it with three senior circuit judges.<sup>51</sup> With the benefit of their feedback, we refined our rubric into five parts.

First, we began each interview by asking respondents to describe the atmosphere or activities of their chambers when things are going well. This question served as an icebreaker that set a positive tone and prompted the judges to begin a process of reflection. Second, we asked respondents to describe their objectives for clerk hiring and to describe the mechanics of their hiring process, including whether they use the Online System for Clerkship Application and Review (OSCAR), whether they adhere to the federal hiring plan, what time of year they usually hire, what process they use for reviewing applications, what criteria or indicators they use to screen applicants, and what questions they ask when interviewing applicants. Third, we asked respondents whether

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<sup>49</sup> For a discussion of the difficulty of measuring judicial ideology, see generally Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, And How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133 (2009). While no measure is perfect, the party of the nominating President is a commonly used measure with predictive power in ideologically contested cases. See Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 305 (2004). Judicial Common Space (JCS) scores provide another measure of ideology. See Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 306 (2007). For data on JCS scores of all judges serving from 1953 to 2022, see Lee Epstein et al., *The Judicial Common Space*, USC GOULD SCH. L. (Feb. 5, 2022), <https://epstein.usc.edu/jcs> [<https://perma.cc/CSL3-EMVL>]. Eighteen judges in our sample were estimated to be between the 25th and 75th JCS percentiles, with eight estimated to be conservative (above the mean) and ten estimated to be liberal (below the mean). The remaining thirty-two judges had more extreme scores: ten were estimated to be particularly conservative (above the 75th percentile) and twenty-two were estimated to be particularly liberal (below the 25th percentile). Cf. Gluck & Posner, *supra* note 37, at 1309 (reporting the distribution of JCS scores within their sample).

<sup>50</sup> See MICHAEL QUINN PATTON, *QUALITATIVE RESEARCH & EVALUATION METHODS* 341–49 (3d ed. 2002).

<sup>51</sup> The three consisted of two men and one woman; all are Republican appointees, and all are white.

they consider diversity in hiring clerks and, if so, why they value diversity and what kinds of diversity they seek. In posing these questions, we purposely did not define the term “diversity” in order to avoid priming our respondents, instead allowing them to define the term themselves. Fourth, we asked respondents to elaborate on their actual hiring practices and outcomes. We asked the judges to describe the successes or challenges they have had in pursuing their stated hiring objectives, including diversity objectives, and to identify what strategies have or have not worked for them. This part of the interview typically surfaced demographic data on the respondent’s law clerks as well as reflections on their job performance. Fifth, we asked respondents about judicial culture, probing the extent to which they discuss law clerk hiring and diversity with judicial colleagues. We also asked for their ideas on what resources would help them better achieve their hiring goals and how best to engage judges in a discussion of our findings.

Many respondents touched on diversity at various points in the interview, not only in response to questions that expressly asked about diversity. For consistency, we hewed to our interview rubric even when it meant asking questions that a respondent had already answered. We found that asking the same or similar questions at different junctures and in multiple ways often produced richer answers and additional elaboration on sensitive topics. In addition, we reserved questions on sensitive topics until the later part of each interview, when our respondents were most forthcoming because of the rapport we had established with earlier questions.

We recognize that any study approach that relies on self-reporting is susceptible to response biases, including social desirability bias,<sup>52</sup> and we did not employ external checks on the information that the judges shared with us.<sup>53</sup> We did, however, take a number of steps to mitigate these potential biases in designing our study. Our invitation letter explained that we were interested in exploring a wide range of characteristics beyond those most often associated with diversity, including geography, religious affiliation, socioeconomic background, and educational background, among others. In the interviews, as noted, we

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<sup>52</sup> Social desirability bias is the tendency to respond to questions in a way that the respondent perceives to be socially acceptable, even though it may not be wholly reflective of his or her reality. See Nicole Bergen & Ronald Labonté, “Everything Is Perfect, And We Have No Problems”: Detecting and Limiting Social Desirability Bias in Qualitative Research, 30 QUALITATIVE HEALTH RSCH. 783, 783 (2020); see also Jonathan Mummolo & Erik Peterson, *Demand Effects in Survey Experiments: An Empirical Assessment*, 113 AM. POL. SCI. REV. 517, 518 (2019) (describing “demand effects,” that is, the bias resulting from participants inferring the purpose of an experiment and responding so as to help confirm a researcher’s hypothesis); cf. Gluck & Posner, *supra* note 37, at 1307 (“The interviews might . . . have a performative aspect — judges may have told us what they thought we wanted to hear.”).

<sup>53</sup> Cf. Gluck & Posner, *supra* note 37, at 1308 (sampling fifteen to twenty opinions of each judge interviewed in order “to compare to some extent how they describe their approaches to statutory interpretation with what they actually do”).

avoided priming judges and instead asked about diversity in an open-ended way that invited them to define it and explain its relevance, if any, to their hiring. Further, we asked judges to describe the specific strategies they employ in hiring clerks, separate and apart from questions about their goals or aspirations. In many cases, we asked for data about their hiring records, including how many minority clerks or clerks from nonelite schools they had hired, and we often explored in detail the steps that led to a particular hire. As detailed in our findings, we ended up collecting a substantial amount of data on hiring practices and outcomes that are less prone to self-reporting biases and provide an objective basis for comparison with judges' statements about their intentions.

Further, we are reasonably confident that the judges spoke freely and candidly in the interviews for several reasons. First, before and during each interview, we underscored that the respondent's participation would be kept confidential and that we would report our study results in an anonymous way, with no personally identifiable information. Also to encourage candor, we decided not to record the interviews; instead, two of us took detailed notes during each interview. The two sets of notes from each interview form the core of our data.

Second, the fact that two of us have direct experience with clerk hiring as judges resonated with many of our respondents. Various comments we heard — such as “I would not say this publicly, but . . .,” “I think you understand when I say . . .,” or “Because this is confidential, let me say . . .” — acknowledged the trust and rapport we sought to establish by approaching our interviewees as colleagues and peers.

Third, self-selection no doubt played a role. The judges who agreed to participate were favorably inclined toward speaking openly with us. We did not avoid asking, and the judges did not avoid answering, sensitive questions such as whether they had specific goals with regard to gender balance, how many Black clerks they had hired in their careers, or what law schools they hire from. Notably, we did not encounter any instance in which an interviewee declined to answer a question because it was too sensitive.

This is not to say all our interviewees were like-minded in their orientation toward diversity. To the contrary, we heard a range of views on how judges define and pursue diversity, what obstacles there are to achieving it, and whether it should be a consideration at all in hiring decisions. Whatever their views, the judges we interviewed came across as thoughtful and conscientious in how they approach clerk hiring. All of them spoke from personal experience; some had carefully reviewed their hiring records in preparation for the interview. Many expressed disappointment that they had not achieved more diversity among their clerks, while others said they do not consider diversity a relevant factor. We are grateful to our interviewees for the seriousness and candor they demonstrated in their conversations with us.

We coded and analyzed the interview data using an inductive process.<sup>54</sup> Along with a research assistant, we began by reading through both sets of interview notes and identifying themes.<sup>55</sup> This process was iterative, as we revisited the data numerous times in light of emerging themes, each time further refining our understanding.<sup>56</sup> We began with a set of codes derived from our interview rubric and the questions we asked each judge. These codes included the judges' staff structure, how many clerks they had hired, their approach to interviewing clerks, their hiring criteria, the schools from which they had hired, their conceptions of diversity and reasons for seeking it, the strategies they employed to achieve their goals, any challenges they faced, and the frequency of discussion with judicial colleagues about clerk hiring. We then added codes as themes emerged inductively from analyzing the interview notes.<sup>57</sup> These included judges' comments on mitigating risk in hiring, reasons for privileging certain types of diversity over others, instances in which minority judges described feeling discomfort in conversations with their colleagues, comments reflecting an awareness of the diversity of colleagues' clerks, and specific techniques for diversifying the applicant pool. Ultimately, we generated a list of thirty-one codes.

Although our focus is largely qualitative, we occasionally used the coded data to examine the frequency of phenomena of interest by the characteristics of each judge, including gender, race, party label, and law school attended. Such analysis enabled us to see patterns and contextualize salient issues, such as whether Republican and Democratic appointees tended to prioritize the same dimensions of diversity, or

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<sup>54</sup> See PATTON, *supra* note 50, at 453 (“*Inductive analysis* involves *discovering* patterns, themes, and categories in one’s data.”); Prachi Srivastava & Nick Hopwood, *A Practical Iterative Framework for Qualitative Data Analysis*, 8 INT’L J. QUALITATIVE METHODS 76, 77 (2009). While there are a variety of approaches to qualitative data analysis, four elements “are common: (1) prepare the data for analysis; (2) explore and code the data; (3) identify themes in the data; and (4) validate the accuracy of the findings.” Gerald F. Hess, *Qualitative Research on Legal Education: Studying Outstanding Law Teachers*, 51 ALTA. L. REV. 925, 935 (2014).

<sup>55</sup> Our research assistant compared both sets of notes for each judge and checked for inconsistencies. There were instances in which one set of notes was more complete than the other, but there were no substantive inconsistencies.

<sup>56</sup> See Susan Berkowitz, *Analyzing Qualitative Data*, in USER-FRIENDLY HANDBOOK FOR MIXED METHOD EVALUATIONS 4-1, 4-2 (Joy Frechtling & Laure Sharp eds., 1997) (describing the analytical process as “a loop-like pattern of multiple rounds of revisiting the data as additional questions emerge, new connections are unearthed, and more complex formulations develop along with a deepening understanding of the material”); Srivastava & Hopwood, *supra* note 54, at 77; Hess, *supra* note 54, at 935.

<sup>57</sup> As in any qualitative work, our own perspectives likely shaped the iterative process. See Srivastava & Hopwood, *supra* note 54, at 77; Kathy Charmaz, *Grounded Theory in the 21st Century: Applications for Advancing Social Justice Studies*, in THE SAGE HANDBOOK OF QUALITATIVE RESEARCH 507, 509 (Norman K. Denzin & Yvonna S. Lincoln eds., 3d ed. 2005) (“No qualitative method rests on pure induction — the questions we ask of the empirical world frame what we know of it.”). We triangulated our findings and minimized individual biases by having three researchers analyze the data and independently identify emerging themes. See Berkowitz, *supra* note 56, at 4-11.

whether the law school a judge attended bears any relation to the schools they consider in hiring clerks. In various parts of this Article, we report tabulations of how many judges mentioned particular views or practices.

### III. FINDINGS

The judges we interviewed uniformly described their clerks as essential to the quality of their chambers' work product, and many described the opportunity to hire and mentor clerks as an important way to contribute to the legal profession and to society. One judge said, "The most valuable thing I've done for society in the courts . . . is the law clerks I produce." Another said, "[T]he best part of being a federal judge is my work with the law clerks. That has been the most enduring part and that's the legacy I want." Some judges referred to their clerks as "family."

Judges described a variety of strategies to sort the volume of applications they receive each year. Many rely on their current clerks to take a first pass and cull the pool to a more manageable number, while others said they review each application personally. To develop a pool of candidates to interview, most judges reported using a combination of OSCAR and referrals from law faculty, former clerks, and other judges. Several judges reported that they have come to rely on other screening mechanisms, such as referrals, because the number of applications received through OSCAR felt overwhelming. However, some judges expressed concern about the efficacy or fairness of relying on referrals. One worried that first-generation college graduates may be disadvantaged in establishing faculty contacts and "some diverse candidates may be hurt by that." One expressed reservations about having a "cooked network" of faculty, and another worried that reliance on faculty referrals might become "an inside baseball game." Other judges, while aware of potential inequalities, said they rely on faculty contacts for a specific purpose: to identify "under the radar" applicants who might not stand out based on conventional criteria.

As for hiring criteria, all judges said they seek excellence in research, writing, and analysis, and a substantial majority rely heavily on grades and law school ranking.<sup>58</sup> Judges commonly reported that they primarily hire from the top 5% or 10% of the class from the top ten, fourteen, or twenty law schools. But not all judges said they follow this approach, and we were especially interested to learn about less conventional practices, as we elaborate below.

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<sup>58</sup> A 2013 survey of federal appellate judges found that more than 90% of respondents considered class ranking in selecting law clerks, with 66% identifying it as either first or second in importance. Peppers et al., *supra* note 36, at 317. In addition, more than 90% of respondents considered the "quality of a candidate's law school" in selecting law clerks, with 58% "ranking it either first or second in importance." *Id.*

Many judges also consider an applicant's writing sample and law review experience, although some did not consider such membership particularly meaningful. Judges also mentioned varying preferences for public service orientation, prior clerkship or work experience, or interest in legal academia. Judges sometimes reported preferring applicants who share their own background or interests; one judge said, "There's more personality matching that goes on now because people write their interests on the CV and so it's subliminal." Most judges said they do not consider ideological alignment when hiring clerks; we discuss this further in sections III.C and IV.B below. Judges also described a range of interview regimens, with interesting practices. For example, some judges use multipart interview processes that span several days or weeks, and one judge administers a grammar test.

Most relevant for our study, the judges we interviewed said they seek to create a collaborative environment in chambers and do not assess each clerkship applicant in a vacuum. Instead, they view the hiring process as akin to assembling an ensemble, with the aim of choosing a group of clerks who complement one another. Almost all judges emphasized that diversity informs their ensemble approach to hiring, and here we report our findings on that topic.

#### *A. Diversity: Definitions and Rationales*

We asked judges what diversity means to them and how, if at all, it is relevant to their hiring. Although diversity is often perceived as having a liberal valence, nearly every judge in our sample reported valuing diversity in some form. Most said they evaluate diversity along several dimensions, understanding the term capaciously. They described a range of characteristics, including gender, race, ethnicity, sexual orientation, socioeconomic background, ideological views, age, and whether an applicant is in the first generation of the family to attend college or law school. Six judges mentioned military service. In addition, many judges said they value geographic diversity, with some describing applicants from the South or rural communities as particularly desirable. In a typical comment, one Democratic appointee said, "I'm interested in getting a complement of clerks that brings me something different — race, ethnicity, ideological, interesting background in any way (rural state, grew up on a farm, an immigrant, etc.) — things that distinguish them from the stock elite law student that seems to rise to the top in terms of academic performance." Similarly, one Republican appointee said he looks for diversity across gender, race, religion, intellectual strengths or interests, socioeconomic status, and other dimensions, and "in a dream world, I get a class that has everything."

Judges reported three main reasons for seeking diversity in their clerks. First, many said diversity enhances the quality of their decisionmaking and work product. One Republican appointee said, "[T]he



job that we do involves the lives of people from all backgrounds. So if you don't have a perspective on what the real world is like, you can't be as good of a judge." A Democratic appointee explained, "I want people who have experienced different things in life than I have, who might think of things differently than me. That could be economic, geographic, race, cultural, sexual orientation; it enriches my ability to turn out a well-thought-out product when I'm issuing opinions and making decisions." Another Democratic appointee said, "The cases we deal with come from a society that comes from many different complexions and I need that in my chambers. I need to have people around me who can help me be mindful of my own blind spots." This judge, a Black woman, said she once hired four Black women clerks in a single cohort and would never do it again, in part because "[the law clerks] wanted diversity."

Second, many judges said that diversity enhances public perception of the judiciary's integrity. One Democratic appointee said, "All the courts have is their credibility. [Diversity] enhances our credibility as an institution." Another said, "These positions [clerkships] are funded by taxpayer dollars, and the taxpayers represent a broad range geographically, ethnically. I see these positions not as positions 'I' have, but as positions for which I'm a caretaker for the American people." One Republican appointee said, "I hope it doesn't sound trite, but I do think our institutions need to look like America." This judge said he felt "a little embarrassed" looking at a photograph of the judges in his circuit because the lack of women was particularly striking, and he brought this concern to the attention of a U.S. Senator from his state. He explained:

Exclusionary hiring may have more negative effects than we like to think. I do think it's largely grounded in philosophical differences, and a belief that it's possible to purely look at academic achievements. I suppose that if one is myopic enough, that could be the case. But I think we have a responsibility for helping to shape our profession and I've come to feel more strongly about this with age, that it includes bringing people aboard with diverse backgrounds and ethnicities and religious beliefs.

Third, several judges said it is important to extend opportunities to members of groups who are underrepresented in the legal profession. Minority judges, in particular, said they feel a sense of responsibility to hire minority clerks, stemming in part from their own experiences. One Black judge said, "It's hard to be an African American man and a snob . . . I've always felt from the beginning of my tenure that this is a responsibility I gladly took up." Another said he had faced his own share of struggles as the first Black person to achieve various milestones in his career, "so how could I dare have this opportunity to serve and not have that same type of mindset?" One Asian American judge said, "I consider this an important way to train lawyers, future leaders. I do feel a responsibility to help. This is a very concrete way for me to help."

Similarly, one white judge said, “My single biggest objective is to find people who can benefit from [a] clerkship, to the benefit of society. . . . I’m looking to boost people.” And one Hispanic judge said:

Some judges have been Supreme Court clerks; they themselves had perfect credentials, and they are hiring ‘mini-me.’ That wasn’t me. . . . If you look at the doors that these circuit clerkships open, I’m going to prefer someone who needs that door opened rather than someone who’s going to succeed anyway. Whose life is it going to make a bigger difference in?

Further, one Black judge said he believed the presence of minority clerks also benefited his white clerks by normalizing diversity in the workplace. Once “my white clerks end up being managing partners,” he said, “they have a frame of reference for diversity, and they’ve been in a workplace where there was diversity and nothing imploded. They may be more apt to hire women [and] minorities” in their firms and organizations.

It is also important to note, as we discuss further below, that some judges expressed the view that conscious consideration of racial diversity in clerk hiring is inappropriate. While they see no problem with having a racially diverse group of clerks as an outcome, they believe their hiring criteria must avoid any weighting directed toward that result. Other judges expressed reluctance to consider race and explained why they believe socioeconomic diversity is more compelling.

We now discuss in greater depth several dimensions of diversity mentioned in our interviews.

### *B. Law Schools*

As noted, most of the judges in our sample reported hiring a substantial majority of their clerks from the top twenty schools, with some judges considering only a handful of schools. One judge, who graduated from a top-ranked law school, said, “I understand the [students’] experience [at] the top schools better. I have [a] lack of familiarity with non-top schools; I wouldn’t know how to evaluate candidates from those schools.” Another judge, who had hired several clerks from schools outside the top fourteen, said, “It’s harder to know what a recommendation and GPA mean at a non-top-tier school,” and that one clerk she hired from a middle-ranked law school “was one of the best writers I ever had. So you can get really great talent. It’s just that you don’t have the certainty. It’s more reliable at top schools.” Some judges said they would be willing to hire from nonelite schools only if the applicant is at the very top of the class.

Despite the dominance of top schools in the clerkship market, however, a significant number of judges said they regularly hire clerks from schools other than the Ivy League or top ten to twenty schools. One-third of the Republican appointees in our sample voiced concern about the tendency to privilege elite schools; among Democratic appointees, several female judges and minority judges expressed similar views.

Some judges came to our interview prepared with data: “I’ve hired from thirty-eight law schools in twenty-six years. I’m not saying people have to hire from thirty-eight law schools, but they should look beyond three,” said one. “I’ve hired thirty-nine clerks so far, from twenty-four law schools,” said another. “Thirteen of the twenty clerks I’ve hired are not from top schools,” said another. From these and other judges, we heard a number of reasons for looking beyond top schools.

First, judges who graduated from nonelite law schools reported that their own career paths and educational experiences incline them to consider schools beyond the elite ranks, despite no shortage of applicants from top schools. This effect is quite powerful: our interviews revealed that 76% of the twenty-one judges who did not attend a top twenty school hired at least one-quarter of their clerks from schools outside the top twenty, whereas 34% of the twenty-nine judges who attended a top twenty school did so.<sup>59</sup>

One judge said, “I start from the premise that I didn’t graduate from Harvard, Yale, or Columbia. I want to be a living witness to the fact that you can find excellence in a lot of places.” Another said, “I’m not a product of elite education. I have a real leaning toward people from unconventional places,” adding, “I think I’m a better judge for it because I’ve been able to see a wide range of students from a wide range of schools and had the benefit of their thinking and academic journey that has made me look at things a different way sometimes.” One Republican appointee, referring to a colleague who is a Democratic appointee, said, “Judge [ ] and I are both more willing to look outside because we have less sterling credentials and we’re more committed to the opportunities that law clerkships offer. So if I have two equal people, one for whom this clerkship will open a door, I will choose that person . . . .”

Second, some judges give special consideration to candidates from schools in their local communities or schools where they are affiliated as an instructor, regardless of ranking. They said they have trusted relationships with faculty at these schools and view clerk hiring as a way of giving back and enhancing the school’s reputation. “Local schools get a leg up,” said one judge. “I hire a lot from [my state] law schools,” said another. One judge explained that because clerking provides an entrée to practice in the local community, “I’ve always viewed it as a relationship between the legal community and the bench, so I privilege in-circuit law schools.” One judge said he looks carefully at every applicant from the two law schools in his local community, both of which are middle-ranked; one is his alma mater, and he teaches a course there.

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<sup>59</sup> The 34% figure (ten out of twenty-nine judges) reflects the most generous estimate for two of the judges who attended elite schools. Excluding those two judges would lower the figure to 28% (eight out of twenty-nine).

Third, some judges said they believe students end up attending non-elite schools for reasons such as affordability or family obligations that have nothing to do with their qualifications or abilities.<sup>60</sup> “I’m not an elitist in terms of schools. People have different reasons for going to the school they did,” one judge said. “I’m not particularly interested in what law school they went to as opposed to what they did when they were there.” Another said that students who didn’t attend “Harvard, Yale, or Stanford . . . maybe . . . had family obligations or other factors that limited their possibilities. I don’t care what school they went to if they can demonstrate their ability. Clear, persuasive writing; people with a mission or vision; someone who has overcome something. Those things pique my interest.”

Fourth, some judges noted that in their experience, law clerks from nonelite schools may work harder and demonstrate greater determination to succeed. One judge said, “My [local law school] graduate is sitting next to my Harvard graduate, and maybe my [local law school] graduate is trying a little harder. They’re competing to show they’re the real deal and have the right stuff. They want to prove themselves.” Conversely, according to a few judges, clerks from top schools are sometimes “pretentious” or have “a sense of entitlement” that impairs working relationships.

Fifth, several judges who are not on the East or West Coast said that location impels them to consider a wide range of schools. One judge located in the South said that after losing “top Ivy League school students” to clerkships in California or New York, he decided to stop “being in that race” and instead sought candidates who “were looking for me, in some sense,” that is, candidates who found his city desirable. Another judge, also located in the South, said that while many top students at elite schools would opt for a coastal clerkship, he might be able to lure the number one student at a lower-ranked school.

Sixth, several judges commented that whether one aspires to be a feeder judge affects the range of law schools one is willing to consider. One feeder judge, a Republican appointee, said it is “unfortunate” but “realistic” that being a feeder means hiring “at the top of the class” from “Harvard, Yale, Stanford, [and] Chicago,” and not from state law schools. Another feeder judge, a Democratic appointee, said he considers applicants from “[m]aybe ten schools” and “rel[ies] heavily on a small number of professors at a narrow range of schools.” One judge, echoing others who said they do not aspire to be feeders, said that “many of my colleagues are auditioning their clerks for the Supreme Court. That is

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<sup>60</sup> Empirical studies have found that a substantial number of high school students forgo or are poorly informed about opportunities at the most selective colleges where they could gain admission, resulting in “undermatching” of these students. See Caroline Hoxby & Christopher Avery, *The Missing “One-Offs”: The Hidden Supply of High-Achieving, Low-Income Students*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2013, at 1, 3–4; Caroline Hoxby & Sarah Turner, *Expanding College Opportunities*, EDUC. NEXT, Fall 2013, at 67, 67–68.

not a goal of mine. . . . I'm more interested in providing people with an opportunity to learn and grow. That frees me immensely."<sup>61</sup>

Although several judges said they believe students from top schools are more likely to be strong clerks as a predictive matter, we heard virtually no negative comments from those or other judges about the actual job performance of clerks who had attended schools outside the top twenty. One judge said the work product of his clerks from less elite schools was "just as good as anything I've received from a clerk at Yale or Harvard." Another said, "A lot of my strongest clerks have not come from elite schools." Many judges made similar comments, explaining that they had not experienced a difference in quality from casting a wider net. Overall, although there is some perception of greater variation in quality among students at lower-ranked schools, the judges who had hired clerks from those schools reported positive experiences. However, only a subset of those judges had a regular practice of hiring clerks from a broad range of schools;<sup>62</sup> the others tended to adhere to narrow criteria with only occasional exceptions.

### C. Ideology

An earlier study of federal appellate clerk hiring reported that judges rank political ideology as the least important factor in selecting clerks.<sup>63</sup> But the authors expressed skepticism about the "candor" of the responses, arguing that "there is too much ideological matching between courts of appeals judges and their law clerks to be the result of chance or applicants applying to like-minded jurists."<sup>64</sup> In our study, we explored whether judges sought ideological alignment when hiring clerks. Similar to prior findings, most of our respondents said they do not.

A dozen judges in our sample, both Democratic and Republican appointees, said that membership in the American Constitution Society (ACS) or Federalist Society (FedSoc) carries no weight or negative

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<sup>61</sup> It is not surprising that Supreme Court clerks come disproportionately from a few law schools. But a recent study found that where law graduates went to college also matters. See Tracey E. George, Albert H. Yoon & Mitu Gulati, *Some Are More Equal Than Others: U.S. Supreme Court Clerkships* 22–24 (Jan. 31, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4338222> [<https://perma.cc/9VXA-DGZV>]. Among Harvard Law students from 1980 to 2020 who graduated with honors, graduates who obtained a college degree from one of twenty-two institutions were much more likely to get a Supreme Court clerkship than their peers who did not earn a college degree at one of those schools. *Id.* at 22–23. Further, among Harvard Law graduates who attended one of those twenty-two schools, cum laude law graduates who went to college at Harvard, Princeton, or Yale were three times more likely to get a Supreme Court clerkship than their cum laude peers with college degrees from the other nineteen institutions, and magna cum laude law graduates who went to one of those three schools were 50% more likely to get a Supreme Court clerkship than their magna cum laude peers who went to one of the other nineteen institutions. *Id.* at 24.

<sup>62</sup> We discuss this further below in the context of judges who have achieved high levels of racial and ethnic diversity in clerk hiring. See *infra* section III.G, pp. 622–41.

<sup>63</sup> Peppers et al., *supra* note 36, at 319.

<sup>64</sup> *Id.*

weight in their hiring process. In a typical comment, one Republican appointee said, “I don’t advertise myself in any way as liberal [or] conservative. . . . I’ve never put labels on myself. I’ve never used that criteria in hiring. I’ve shied away from picking clerks based on commitment to a particular viewpoint.” The judge said he looks for “clear-headed thinkers, open-minded, with certain character qualities that don’t match up with ideology. [I want] people with humility, intellectual honesty, who really want to be servants of the public in the role that law clerks serve in helping judges make good decisions.”

Another Republican appointee said, “I’m aware of [FedSoc or ACS membership] but it doesn’t matter much. I need [my clerks] to be able to give me what the law is. I don’t hire people with agendas; I don’t want an advocate.” Yet another said, “I had a young woman who kept writing to me and saying she needed a ‘conservative mentor,’ and that didn’t appeal to me. I wasn’t interested in being someone’s conservative mentor.” And another lamented that for a few hiring cycles, she “had been fed people who checked the ideological boxes but were less capable of the routine work that the majority of our cases involve.” She said she is less interested in hiring “true believers” in conservative ideology than in hiring “faithful agent[s]” who can apply the law.

One Democratic appointee similarly said, “I could care less [about ACS or FedSoc membership] as long as they will bring an open mind to the process and will be willing to try to effectuate what I want once a decision has been made.” Another Democratic appointee explained, “It’s probably a tiny negative that someone has picked their team and thinks they should be on a team. I’m still figuring out my [own] judicial philosophy, years in. So if I get a sense that someone is locked in in a dogmatic way, that’s a negative.” And another said, “Neither ACS nor FedSoc is a great plus for me. It’s a warning sign for me when students . . . come across too strong ideologically . . . or too partisan.”

Only two judges in our sample mentioned ACS or Federalist Society membership as a positive, though not for ideological reasons. One Republican appointee said it could be positive if it showed an applicant’s “interest in some of the fundamentals of the law”; one Democratic appointee said he viewed it favorably “especially if they’ve shown leadership.” We recognize, however, that our findings on this point are not representative of the judiciary as a whole. In particular, our sample does not appear to tap the substantial number of judges who utilize the Federalist Society network in hiring clerks.

A handful of judges couched clerk hiring within a broader concern about “ideological Balkanization of the federal judiciary,” as one Republican appointee put it. This judge said, “The [Trump] administration made a huge mistake by outsourcing their selection of judges to the Federalist Society. I think it’s a bad thing; it’s a tendency I’d rather not see. Same for ACS.” Another Republican appointee said, “I believe judges ought not have a sign on them that announces an ideological

orientation. It undermines the feeling that litigants should have that they will get a fair shake when they come in the door.” Similarly, one Democratic appointee said, “I’m not a fan of [clerkship applicants] who are heavily involved in politics.”

Another twelve judges said they seek ideological contrast or diversity in hiring clerks. One Republican appointee said, “The vast majority of my clerks are probably pretty far left, and that’s great from my perspective. I want to be stimulated, and I want people to give me their views but also tell me what the law is, and I make clear that I’m the judge and I’ll make the decisions.” Another Republican appointee said he hires both liberal and conservative clerks, as long as they can engage well with opposing perspectives. And both Democratic and Republican appointees described their outreach efforts to faculty and students to attract applicants with views different from their own.

Five judges in our sample either expressly indicated a preference for some degree of ideological fit or noticed consistent ideological trends among their applicant pools when hiring clerks. One Republican appointee said, “I’m looking in an interview that they’re comfortable with judicial conservatism.” Another said, “Judges don’t want to fight with their law clerks so if they feel like the clerks have been engaged in activities that aren’t consistent with their judicial philosophy, that will be hard.” One Democratic appointee said many of the students “who apply to me are kind of lefties” and have done programs like Teach for America. “I like that,” she said, because “it adds to the depth of understanding that a lot of the people we see in these cases are suffering and they need someone to understand what their problems are . . . [T]hat social awareness is a positive.”

It may be that the latter views are more prevalent than our interviews revealed and that most judges, consciously or unconsciously, favor like-minded applicants to some degree. Because judges view clerk hiring as a highly personal and discretionary prerogative, it is reasonable to think they are not immune from the tendency to favor people who are ideologically similar,<sup>65</sup> even if that tendency is not always dispositive.

Yet even among judges who have taken steps to resist this tendency, we heard concern that ideological diversity is, as one judge said, “getting increasingly difficult to achieve.” The reason, they said, is that clerkship applicants tend to apply only to judges whose perceived ideological views align with their own. In addition, the hiring practices of Supreme Court Justices may play a role. Because the Justices almost uniformly

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<sup>65</sup> See, e.g., MICHAEL DIMOCK ET AL., PEW RSCH. CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC: HOW INCREASING IDEOLOGICAL UNIFORMITY AND PARTISAN ANTI-PATHY AFFECT POLITICS, COMPROMISE AND EVERYDAY LIFE 53 (2014), <https://www.pewresearch.org/wp-content/uploads/sites/4/2014/06/6-12-2014-Political-Polarization-Release.pdf> [<https://perma.cc/75KN-56N2>] (reporting survey data showing that “there is a tendency on the left and the right to associate primarily with like-minded people, to the point of actively avoiding those who disagree”).

do not hire across ideological lines, a similar alignment takes shape between clerkship candidates and feeder judges or judges who aspire to be feeders.<sup>66</sup> Further, some judges said many of their conservative colleagues do not follow the hiring plan, instead hiring well before students finish the second year of law school. Describing ideological segmentation in the clerkship market as “quite dramatic,” one Democratic appointee who follows the hiring plan explained:

I used to try to have one conservative clerk, but it has become difficult. They don't apply to me anymore. . . . Conservative students have a lot of choices with Trump judges now, and many of those judges don't follow the plan and hire early, so conservative students are off the market by the time the plan kicks in.

Similarly, one Republican appointee who follows the plan said that “committed conservatives” are “already hired and off the market” by the time she is hiring. We discuss ideological segmentation in greater depth in section IV.B below.

Finally, two judges noted that ideological self-selection by applicants has demographic consequences. One Republican appointee said, “There’s a high degree of self-selection in the pool. More conservative law students identify [with] more conservative judges. That candidate pool lacks significant racial, gender, and socioeconomic diversity.” This judge reported that among sixty-seven clerks she had hired as a circuit judge, five were not white and none was African American. Because “far fewer female law students are conservatives,” she said, the applicants she sees are “heavily male and . . . almost entirely white.” Another Republican appointee, who is African American, believed that highly qualified Black applicants had self-selected out of his pool because they had a wealth of options among Democratic appointees: “I’ve had one Black law clerk [in more than a decade on the bench], and it’s not because I’ve been discriminating.”

#### *D. Socioeconomic Background*

More than one-third of the judges in our sample mentioned socioeconomic background, including first-generation college or law school attendance, as a dimension of diversity they value. They identified two reasons for this. First, judges said the “stock elite law student that seems to rise to the top in terms of academic performance” is from a relatively privileged background, and they were not as interested in students who grew up in places like the “Connecticut suburbs” or attended elite private high schools like “Exeter.” In their view, clerks from less privileged backgrounds contribute a variety of life experiences and perspectives that enhances judicial decisionmaking. Second, judges said these life experiences are predictive of success as a clerk because applicants who

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<sup>66</sup> We quote feeder judges’ observations on this point in section III.H below.



had overcome adversity are likely to be “hard-working and smart.” As one judge explained, “The best law clerks I’ve had in twenty years on this court are those that have had to struggle and work hard and put themselves through law school or college without family connections. People like that have a leg up when they apply.” Another judge said, “[P]eople who aren’t privileged may work a little harder; they keep growing.”

Republican appointees more frequently reported socioeconomic diversity as the primary dimension of diversity they seek, while Democratic appointees tended to describe it as one of several dimensions they consider. One Republican appointee explained that he valued diversity of race, religion, and gender, but felt that “the most important is economic.” As we describe further below, several Republican appointees described a reluctance to consider race in hiring while embracing consideration of socioeconomic status. One explained that he was “uncomfortable” considering race but believed a focus on socioeconomic status could better achieve many of the same aims. This judge emphasized that regularly teaching at an elite law school was helpful in achieving socioeconomic diversity, as it permitted him “to find the diamond in the rough.” Another Republican appointee explained:

I’m very much about the idea of overcoming adversity and giving people the opportunity to make their life story, and I want to be a part of that. Sometimes this manifests itself in racial and ethnic diversity, but in my situation, not often. I think of [a former clerk], a blond, blue-eyed white boy who came from nothing in [a rural area] and could have been working in a gas station. I wanted to be a part of his story about making it, and he has been very successful.

Still another Republican appointee said she values “diversity of life experience” more than racial diversity. “I have different proxies than my colleagues,” she said. “I’m looking to give a different group of people an opportunity that some of my colleagues don’t.” She added that many first-generation students “haven’t had the educational opportunities or academic support” and may take longer to find their footing in law school. She urged her colleagues to “look more to the second and third years and see how they do.”

Two Democratic appointees described wrestling with the relative weights to assign to socioeconomic versus racial diversity. One judge said, “I do worry that our society is more and more a class-based system; it’s more socioeconomic than anything else. If I hire an African American kid who grew up going to a country club, I’m not sure what the larger point is that we’re reaching for.” Another explained, “I haven’t seriously considered going deeper into class rank or school rank to change the minority numbers. I don’t think any of those people are any more deserving than people in the top cut who come from disadvantaged backgrounds . . .” She continued, “I do think about that: should I try to get a more obviously diverse class in terms of race instead

of the diversity I'm getting in other ways," such as applicants who have "manage[d] difficult family circumstances" or do not come "from really affluent backgrounds."

### *E. Gender*

Nearly every judge in our sample said he or she considers gender in clerkship hiring; only two judges said they select clerks without any consideration of gender. Among the judges who said they consider gender, thirteen said they have specific hiring goals. Typical comments include "I always hire two men, two women" (male Republican appointee); "Two males, two females are what I aim for" (male Republican appointee); "My goal is two women, two men" (male Democratic appointee); and "I have exactly the same number of men and women" (female Democratic appointee). A few judges said they seek "balance" with respect to gender. Others said they make sure not to have all clerks of one gender in a given year: "I've never had a class of all males or all females" (male Democratic appointee); "I'm intentional about making sure I have at least one woman each year" (male Republican appointee); "I always hire one woman" (female Democratic appointee); "I'd really like at least one woman each year" (male Republican appointee).

Judges varied in how intentional they felt they had to be to achieve their desired gender balance. Several reported difficulty attracting female applicants. One judge explained, "I don't get as many female applicants, so I tend to be more interested if [the applicant is] a female." Another said he aims to hire at least one woman each year and reported that approximately 70% of his clerks have been men, explaining that "women with good credentials get snatched up really quickly so you have to be prepared to move fast." Another Republican appointee, noting that conservative students tend to apply to conservative judges, said her applicant pool is heavily male because "far fewer female law students are conservatives." Another stated, "I'm not seeing a lot of women who would be drawn to the current Republican Party." Overall, Republican appointees reported greater difficulty than Democratic appointees did in achieving their desired gender balance.

Most of the Democratic appointees in our sample said they achieve their gender goals without having to adjust their strategies, and many reported receiving more applications from women than men. Ten Democratic appointees, compared to two Republican appointees, reported hiring more women than men; all of these judges were minorities or women, or both. Some Democratic appointees did report specific efforts to attract female applicants. One said he makes an "intentional effort to hire women" because early in his tenure he had hired all men and it felt "too much like a fraternity house." One judge on the Federal Circuit described an underlying gender imbalance among students with a science background and said he began doing recruiting trips to the

West Coast in order to hire more women. Another judge said that “a disproportionate number of males are included in the top performers at the top law schools” and that “it would be easy to get four males” if he were not attentive to gender in winnowing his applicant pool. Several judges said they have asked faculty to refer more women.<sup>67</sup>

One female judge said clerking may pose a greater cost to women because it involves delaying their long-term career plans during their child-bearing years.<sup>68</sup> She suggested more efforts to convince women that clerking is worth the short-term delay.

### F. *Sexual Orientation*

Twenty judges — sixteen Democratic appointees and four Republican appointees — mentioned sexual orientation as a facet of diversity they consider. One judge said that her circuit regularly hears cases related to sexual orientation and that diversity on this dimension enabled her to write opinions with more sensitivity. Another judge said he includes sexual orientation among the diversity characteristics he provides to his law clerks when they screen applications. A few judges said they have a reputation for being receptive to applicants from the LGBTQ+ community and that they received more such applicants once they had hired members of that community.

### G. *Race and Ethnicity*

Nearly every judge in our sample assigned positive value to having racial diversity among law clerks, which is unsurprising in light of the self-selection we described earlier.<sup>69</sup> However, in contrast to their comfort level in seeking gender balance, judges vary considerably in their approaches to racial diversity and viewed this as a more sensitive topic.

In exploring this topic, we pursued three lines of inquiry: first, the extent to which judges value racial diversity in hiring clerks as a matter of stated belief or aspiration; second, the extent to which judges consider race in evaluating the applications they receive; and third, the extent to which judges use specific strategies to increase the number of minority candidates among the applicants they receive. The first inquiry focuses

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<sup>67</sup> For more information on the gender gap in clerkship applications, see Alex Badas & Katelyn E. Stauffer, *Gender and Ambition Among Potential Law Clerks*, 11 J.L. & CTS. 116, 136 (2023), which finds that among women and men with the same self-reported levels of qualification and encouragement, women are less likely to apply for circuit court and Supreme Court clerkships, but similarly likely to apply for district court and state court clerkships. See also *infra* notes 74–77 and accompanying text (further discussing this study).

<sup>68</sup> For additional discussion of barriers women face in the clerkship process, see Sarah Isgur, *The New Trend Keeping Women Out of the Country's Top Legal Ranks*, POLITICO (May 4, 2021, 4:30 AM), <https://www.politico.com/news/magazine/2021/05/04/women-supreme-court-clerkships-485249> [<https://perma.cc/3ZHM-9GFR>] (noting that the expectation of multiple clerkships before clerking at the Supreme Court disadvantages women and those with law school debt).

<sup>69</sup> See *supra* pp. 607–08. Unless otherwise noted, we use the term “racial diversity” to encompass racial and ethnic diversity.

on judges' attitudes and beliefs; the second and third focus on their actual practices.

Further, we sought to go beyond judges' attitudes and practices to collect information on their hiring outcomes. We approached this inquiry cautiously, however. We did not set out to ask every judge to provide a demographic breakdown of all the clerks he or she had hired because we worried such a sensitive request could inhibit judges from speaking candidly with us about their attitudes and practices. In the end, we collected such data in some form from thirty-nine judges in our sample. Some judges had meticulously prepared such data in advance of the interview on their own initiative. Other judges gave numbers or approximations during the interview based on their best recollection. In other instances, judges did not give precise numbers or percentages but instead referred to specific minority clerks they had hired. By asking follow-up questions (for example, "Can you think of any other Black clerks you've hired?"), we could draw reasonable inferences about their hiring record. In addition, as explained below, our data include complete hiring data from eight Black judges in response to a request we made separately from the interviews.<sup>70</sup> Eleven judges — four Democratic appointees and seven Republican appointees — did not provide enough information for us to draw any inferences about the racial composition of their clerks.

Our most prominent finding is that minority judges reported much higher levels of minority clerk hiring than white judges, regardless of party label. Eighteen of the thirty minority judges in our sample reported that minority clerks comprised 40% or more of their total hires. Another eight reported that minority clerks comprised at least 18% to 30% of their hires. Black judges, in particular, reported hiring far more Black clerks than did other judges in our sample, many of whom had struggled to hire even one.<sup>71</sup> The white judges who offered demographic information reported that minority clerks comprised between 10% and 25% of their totals, with Democratic appointees more likely to report numbers at the higher end.

Given the composition of our sample, our findings offer a fairly complete portrait of minority judges on the federal courts of appeals. But our findings are likely not representative of circuit judges who are white because of selection effects. Judges who had hired more minority clerks may have been more likely to participate in our study. Also, among the judges who participated, those who had hired more minority clerks may have been more likely to offer information about their hiring records. Thus, the reported numbers for white judges in our sample are likely higher than those for white judges as a whole.

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<sup>70</sup> See *infra* section III.G.4.(c), pp. 637–39.

<sup>71</sup> Among the thirty-five non-Black judges we interviewed, six said they had never hired a Black clerk, and seven said they had hired only one.

Overall, the Democratic appointees in our sample were more inclined than were the Republican appointees to value racial diversity and take proactive steps to hire minority clerks. But we observed a wide range of views and practices that did not track party labels. Some Republican appointees reported hiring a substantial number of minority clerks and using deliberate strategies to do so, whereas some Democratic appointees, despite valuing racial diversity in principle, lamented that they had not hired many minority clerks and did not employ effective strategies to accomplish their goals. Moreover, the contrasting demographics of the Democratic and Republican appointees in our study limit our ability to draw inferences about party label separate from race. The majority of Democratic appointees in our sample were minority judges (twenty-five of thirty-two), while the majority of Republican appointees were white (thirteen of eighteen).

Our interviews elicited a broad range of thoughtful views and practices concerning racial diversity. In order to elucidate what we heard, we group the judges into four categories as follows:

Table 4: Approaches to Racial Diversity

Category	Assigns positive value to racial diversity	Considers race in evaluating applicants	Shapes applicant pool or looks deeper in class/school rank	Number of judges
1	No	No	No	2
2	Some	Some/No	No	5
3	Yes	Yes	Some/No	24
4	Yes	Yes	Yes	19

A categorization of this sort cannot capture all the richness and gradations of views on this topic. Nevertheless, the groupings provide a useful way of understanding the variation in our sample. As explained below, the majority of judges in our sample value racial diversity and consider race to some degree in evaluating applicants. But, with few exceptions, judges who consider race in the context of conventional hiring criteria (meaning top grades at top schools) reported limited success in hiring Black and Hispanic clerks. The judges who reported the most robust records of hiring Black or Hispanic clerks are those who make affirmative efforts to draw such candidates into their applicant pool or place greater emphasis on indicators of talent besides grades and school rank, or do both.

1. *Category 1: Colorblindness.* — Two judges, both Republican appointees, expressed firm opposition to any consideration of race or ethnicity in hiring. One explained, “I just don’t think about people this way. I never have and I never will. I just want the best people.” While he reported having hired several minority clerks, he said, “It has zero to do with their skin color; it’s because they’re wonderful.” The other judge expressed strict opposition to considering race in clerk hiring and

questioned whether a goal of our study was to encourage judges to engage in racial discrimination. This judge criticized a tendency to be “disingenuous and not be honest about what we’re doing”; in her view, the legal profession uses the term “diversity” to disguise unlawful discrimination.

We also encountered such views during our planning phase among judges in our focus groups and pilot interviews, and we are reasonably certain that a number of judges holding such views simply chose not to participate in our study. While only two judges in our sample fall into this category, the prevalence of such views within the judiciary is in all likelihood significantly greater.

2. *Category 2: Reluctance to Consider Race.* — Five judges in our sample expressed varying degrees of reluctance to consider race in hiring, though short of categorical opposition. These judges, all Republican appointees, said they do not go looking for diversity; to the extent they had achieved some degree of racial diversity among their clerks, some characterized it as positive but incidental. As one judge said, “I’m pleased at the diversity I’ve achieved, but it’s not my goal.” For these judges, race might serve at most as a “plus” factor among otherwise equal candidates. According to one judge, “The first thing I look for is someone who is going to be really good and the second thing is someone who will fit in with everybody. . . . Race or gender can be a tiebreaker or a ‘plus’ factor but only if someone meets the qualifications.”

As discussed in section III.D above, these judges generally believed that socioeconomic diversity is more compelling than racial diversity. One judge said:

Dimensions of diversity, such as class and socioeconomic, are pretty important. Constitutionally and [personally], I’m uncomfortable considering race and ethnicity for their own sake. But I think a lot of what people are trying to do is better accomplished by using class as a proxy. Sometimes it’s more about geographical diversity — a white girl from Arkansas who comes from a poorer family, for example.

Another judge explained that focusing on applicants’ life experiences and socioeconomic status did not result in more racial diversity, but it did yield “people who wouldn’t otherwise get a second look in other chambers.” Another reported that socioeconomic diversity was the most important dimension of diversity in his hiring: “The rags to riches story appeals to me the most.” These judges said they consider socioeconomic diversity in hiring because of the opportunity they can provide to worthy applicants and because of the perspectives those applicants can bring to chambers.

One judge worried that explicit consideration of race could result in his minority clerks feeling tokenized: “I don’t want someone to feel singled out as the Latino or Black clerk . . . . I don’t want quotas.” As an example of how fraught this phenomenon can be, this judge said recommenders sometimes inform him of a minority applicant’s LSAT score so

that he would not assume the applicant was admitted to law school because of affirmative action.

3. *Category 3: Race-Conscious Evaluation of Applicants.* — The remaining forty-three judges in our sample indicated that they value racial diversity and consider race in evaluating applicants to some degree. Among this group, we place in Category 4 those judges — a total of nineteen — who pursue racial diversity by also engaging in outreach to shape their applicant pool or emphasizing indicators of talent other than grades and school rank. The other twenty-four judges comprise Category 3.

Judges described a variety of ways they consider race in evaluating applicants. One Democratic appointee said, “I see racial diversity as a bonus for me. If I see a candidate with a different background than your typical white candidate, I give them an opportunity. . . . I’ll be honest: if I have two equal candidates, I pick the one of color.” One Republican appointee said applicants “have to have the objective factors [top 5% to 10% class rank at a top school], then diversity is a plus.” Another Democratic appointee said, “I do, to some extent, take race into account. I have a lot of South Asian and Asian applicants. But I actively look for Hispanic and African American candidates.” And another said, “[W]hen I screen through OSCAR, I look to see if any Black [students] or Latinos appl[ied]. I look for Asians. Or [other] people who have an interesting background . . . . If I think they meet the academic qualifications, I’ll give them more attention.” Yet another said, “I look at their résumé and affinity groups to figure out their race/ethnicity . . . . You can’t achieve diversity unless you’re intentional about it.” Seven judges highlighted the importance of being “intentional” with racial diversity or viewed it as a “non-negotiable” goal.

In addition, several judges described how they sort applications with an eye toward racial diversity. Many judges who ask their clerks to make an initial cut said they give specific instructions on diversity. One Democratic appointee said he tells his clerks, “I want to make sure that you’re fishing out promising-looking applicants of color that I can review from each of the schools we’re focused on.” Another Democratic appointee described his system of ranking applicants and said he instructs his law clerks to “write the race of the applicant [next to the ranking] so that I know there are some minorities in the applicant pool.” Another said, “I tell my law clerks explicitly I want a diverse pool. So when we sit down and talk about it, we talk about diversity.”

Several judges also described mechanisms to check for diversity during the evaluation process, including revisiting the applicant pool if the first cut does not yield a sufficiently diverse group of candidates. One Democratic appointee said, “I look for signs on their application . . . . If I have a sense that I don’t have as many racial or ethnic minorities represented, then I’ll look back at people who I’ve marked as four stars instead of five, and see if there are people who deserve another look.”

Another said she sorts the list of promising candidates assembled by her clerks “to see if we have diverse candidates” and “generally I go back and put some in.” Another Democratic appointee said he reaches out to faculty to ask for more minority candidates if the applicant pool is initially limited.

Importantly, although the judges in Category 3 consider race in evaluating their applicant pool, they did not report specific efforts to shape the pool itself. Instead, they tended to treat the clerkship pipeline as relatively fixed or outside of their control. This group includes both Republican and Democratic appointees, almost all of whom are not Black. Many of them lamented the lack of Black or Hispanic applicants they received. Attaining a racially diverse applicant pool appeared to be particularly challenging for judges who focus on top students at top schools and are not Supreme Court feeders or located in a major city.

For example, one white judge, a Republican appointee, explained that he believes in the value of diversity and the need for our institutions to “look like America.” He said he had hired several Asian American clerks and Hispanic clerks, but had never received an application from an African American and had not hired any. “I haven’t launched a concerted effort to find a specific candidate,” he said. Another white judge, a Democratic appointee, described racial diversity as enriching his work product because “life experiences can affect the way you react” to the facts of cases and, the judge noted, “I’m aware of the privilege of what it’s like to go through life and not be treated differently because of your race or religion.” However, he said he receives “very few applications from African Americans” and had not hired any, and he attributed this to the fact that he is located outside of a major city, in a state that is overwhelmingly white. He said his faculty network is aware of his interest in diversity, but he did not report any specific efforts to address the lack of Black applicants. One Asian American judge, also a Democratic appointee, reported mostly hiring from the “top 10% to 15% [of students at] top-tier schools” and said, “[I am] still in the process of figuring out why I don’t have enough [Black applicants] and why they’re not rising to the top of the pool.”

Several judges in Category 3 said 20% or more of their clerks were non-white, but they reported particular difficulty hiring Black clerks and, to a lesser degree, Hispanic clerks. One Democratic appointee’s response was typical of what we heard from judges who valued diversity but were disappointed by their hiring records with respect to Black clerks: “The one area that I’ve had a very hard time getting applications from is from the Black pool. . . . I’d like to do better in that area. I’m not sure how to do it.” Another judge, who is Hispanic, reported ten Asian American, ten Hispanic, and three Black clerks among one hundred clerks hired, and said, “I haven’t accomplished what I’ve wanted to. It bothers me that I’ve not hired more Black clerks.” Others mentioned strategies fellow judges had used to attract Black applicants and



expressed regret that they had not engaged in similar efforts. One judge said, "It's very difficult for me to get an African American candidate. . . . [A Black judge in my circuit] goes to the [Black Law Student Association] meetings and starts cultivating those kids in group interviews at [an elite law school]. I think I could have done a better job of that." Some judges said the interview with us was the first time they had reflected on their hiring practices and realized they had not done outreach or taken other steps to address the challenges they identified. One Republican appointee said, "This conversation is making me think I'm not being as intentional as I could be on state schools and minority clerks."

A recurring feature of judges in this category was their adherence to narrow hiring criteria focused on class rank or top schools, or both. When judges said they receive few or no applications from minority candidates, many later clarified that they meant candidates who meet stringent law school and class ranking criteria. Such criteria narrow the pool to a small number of students, with an even smaller number of minority students. Many judges acknowledged that they could not speak to their entire applicant pool because they reviewed only the applications that their current clerks or faculty contacts had identified according to conventional criteria.

For example, one Democratic appointee who reported a dearth of Black applicants said he hires from the top 5% of the top schools and will also consider students ranked first or second "at any of the top thirty or forty schools" as well as students from one regional law school. Another Democratic appointee reported hiring from the top 10% of students at the top fifteen schools "90% of the time" and found that Black applicants have been "difficult to recruit" despite his location in a major city. Yet another, also located in a big city, said that she generally hires from the top 5% to 10% of students at a few top schools and that her nearly three dozen clerks included no African Americans.

Given the small number of Black or Hispanic candidates who meet such criteria, many judges described intense competition for a few minority candidates each year. "The superstars who happen to be African Americans, my sense is that they are placed quickly with judges who have relationships," one judge said. Another said few Black or Hispanic candidates "have been groomed for these positions. They all go to Harvard and Yale, and they go to a small number of judges." Similarly, one Democratic appointee said, "I had one African American clerk I was interested in, and I was being flooded by calls from other judges wanting to know if I was going to hire [that person] because they were also interested. There's a lot of competition for African American candidates from elite schools." A Republican appointee said, "I've seen the competition for candidates. If you're Black or Latino at a highly ranked school, you're a very marketable person." Several judges mentioned having lost Black candidates to competing offers from Black judges,

feeder judges, or some judges located in major cities. Judges in these categories appear to be the only ones able to hire significant numbers of Black or Hispanic clerks while focusing narrowly on top students at elite schools.

Quite a few judges, mostly located in major cities, said they had no difficulty hiring Asian Americans. This was especially true of judges on the Federal Circuit; all five in our sample said they receive a high volume of Asian American applicants because Asian Americans are well represented in science and technology fields. These judges also reported receiving very few Black applicants.

*4. Category 4: Seeking a Broader and Deeper Applicant Pool.* — Finally, nineteen judges in our sample said they embrace racial diversity and consider race in sorting through their applicant pool, but unlike the judges in Category 3, they employ additional strategies to attract or hire minority applicants. Minority judges comprise most, though not all, of this group. These judges do not treat the applicant pool as fixed; instead, they take specific steps to get the applicants they want. In addition, these judges tend not to focus narrowly on grades or elite law schools; they instead apply broader selection criteria out of a belief that class or school rankings are only a limited measure of talent. Through efforts to recruit a diverse range of applicants, these judges manage to hire large numbers of minority clerks, which in turn draws more minority candidates into their applicant pool. On the whole, these judges hired far more minority clerks than other judges in our sample; this was especially true of Black judges.

Our interviews suggest that judges who want racial diversity among their clerks generally cannot achieve that goal by hoping to find minority candidates within a small applicant pool composed of top students at a few schools. We observed that judges who make concerted efforts to shape their applicant pool and who signal genuine interest in a broad range of candidates are most likely to succeed in hiring minority clerks.

*(a) Outreach Efforts.* — In discussing strategies for shaping the applicant pool, several judges stressed the importance of directly communicating their interest in racial diversity to law professors. One Black judge said, “To me, that’s the most critical tool or asset you can have as a judge going into the hiring process, to have law professors who will call attention to folks whose applications you might not otherwise see, their applications might not rise to the top.” Another said that “when there’s a dearth of [minority] applicants, . . . I call faculty members and ask them to send them to me.” This judge said that his white colleagues may be “reluctant to be that explicit” in seeking minority applicants and that faculty members might speak “more freely about minorities with me than [they] might with another judge.” But he encouraged his colleagues “to establish [their] own referral system” to get minority candidates.

Other judges noted the perceived sensitivity of the topic. After lamenting the scarcity of Black candidates in his applicant pool, one Asian American judge said, “Sometimes [professors are] nervous about telling me, ‘I have a really strong Black candidate, you ought to take a look.’ It would be completely confidential, and I would be open to that.” One Black judge described asking the dean of a top law school for a Black male candidate, and the dean replied that she had never received such a direct request. This judge said, “It was my ignorance that made me ask that question. It’s not something my colleagues are doing.” In retrospect, he described the conversation as “risky.” One Republican appointee said that while it is common to ask faculty contacts for more female applicants, making a similar request with respect to minority applicants “is more sensitive.” In our interviews, we heard several judges say they want more faculty to identify and refer minority candidates, but when we asked whether they had ever contacted a faculty member to express such interest, many said they never had.

Some judges said it takes time to cultivate a network of faculty with whom they can be explicit about their preferences. One Black judge said that when she first joined the bench, the faculty gave her recommendations of almost exclusively white men; faculty relationships evolve over time, she said, as professors learn more about a judge’s priorities. One Asian American judge similarly observed that professors sometimes have a limited field of vision; for example, they would send him five men, which would prompt him to ask explicitly for female candidates. He said that over the years his interest in diversity had spread within his network of professors and that faculty would market those candidates to him. Another Black judge emphasized that judges who hope to increase the diversity of their law clerks must let law schools know. Otherwise, he said, a circularity becomes inevitable, whereby schools send only candidates who meet conventional criteria and then, after several are hired, conclude that judges want to see only those candidates.

In addition to communicating clearly with law professors, several judges made efforts to meet directly with minority students. This often took the form of speaking at law school events and meeting with affinity groups such as Black or Hispanic law student associations. One Black judge said two of his Black clerks had applied as a result of sitting near him at a dinner during a school visit. We heard similar stories from many judges of informal encounters with students at school events that led to a clerkship hire, suggesting the importance of such outreach or, as one judge put it, “being out and about.”

Further, several judges in Category 4 said they rely on their former clerks. They mentioned numerous minority candidates they had hired as a result of referrals from former clerks who are now law professors or attorneys who work with summer associates. Many judges said their former clerks are an especially valuable conduit because they know from

experience which candidates would be a good fit for the judge's interests and work style, and because the trust between judges and their former clerks facilitates candid communication about the judge's hiring goals, including racial diversity.

A few judges also said they sought minority applicants through Just the Beginning, a Chicago-based nonprofit organization that provides career guidance, skills training, and leadership development to "young persons from socioeconomic, ethnic, and cultural backgrounds underrepresented in the legal profession."<sup>72</sup> The organization operates "a referral program run by federal judges," called Share the Wealth, that "provides law students and recent graduates with the opportunity to interview with multiple judges at one time for a highly selective federal judicial clerkship."<sup>73</sup>

In addition to these outreach strategies, some judges described more idiosyncratic means of recruiting minority clerks. One white Republican appointee, who reported that one-fifth of his clerks were Black, described having a very limited Black applicant pool during his early years on the bench. This prompted him to undertake "shameless" recruiting efforts; to spot candidates, he said, "I watch the newspaper and the community, and my [family members] watch social media for local schools." He described hiring two Black clerks who would not have applied but for a letter he sent to each, saying, "come clerk for me." Also, through his former clerks, he targeted students "who might otherwise not even apply." In addition, this judge was located in the middle of the country and said he developed an arrangement with some district judges to offer candidates two clerkships ("a package deal") as a way of overcoming the bias for more desirable cities. Further, after making offers, he invites applicants to spend five days in his chambers, "like an externship," during which "we draft an opinion together" and "they get to talk to my clerks." This "recruitment tool," he said, enables him to "compete against the coasts." He said he had learned from experience that "I wasn't going to get any diversity . . . if I just sit back" and wait for applicants to appear.

One Hispanic Democratic appointee, who reported that minority clerks comprise 60% of his total, described two initiatives he has undertaken to diversify his pipeline. One is a full-time internship program in his chambers that provides opportunities for five to eight law students each year to receive mentorship from him and his current clerks: "I'm

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<sup>72</sup> *Programs*, JUST THE BEGINNING, <https://jtb.org/programs> [<https://perma.cc/4XWL-4Y89>].

<sup>73</sup> *Id.* Another national initiative, called The Appellate Project, provides "clerkship support" and "pair[s] law students of color interested in appellate practice with mentors in the appellate field," including judges. *Mentorship Program*, APP. PROJECT, <https://theappellateproject.org/mentorship-program> [<https://perma.cc/EE95-3D6J>]; see also *Our Impact*, APP. PROJECT, <https://theappellateproject.org/our-students> [<https://perma.cc/8S8W-DMW4>]. A similar mentorship program is Law Clerks for Diversity. LAW CLERKS FOR DIVERSITY, <https://lawclerksfordiversity.com> [<https://perma.cc/9DHS-BD2Q>].

looking for the B+ student whom we can work with to make into a better student and lawyer down the road. We zero in on writing. Also, interns make a capstone [research] presentation, and we . . . give them an honest critique.” The second is a partnership with twenty law firms to offer up to thirty minority law students a week-long summer institute each year focused on a specialized area of law. The institute builds mentoring relationships between students and lawyers through educational programs, career guidance, and exposure to appellate advocacy, and paves the students’ path to law practice. Observing that many of his Hispanic clerks had come from these initiatives, he said, “If I hire just ‘by the book,’ I probably wouldn’t have many minorities. You have to step out and identify people, have faith in them, and then work with them.”

The two judges just discussed were unusual in the extent of their efforts to recruit minority candidates. Nevertheless, we found it noteworthy how intentional some judges feel they have to be in order to achieve the diversity they want.

In discussing outreach strategies, judges identified three main reasons why they believe such strategies are necessary. First, as one Hispanic judge said, “a lot of minority students don’t have the network that other students do.” Judges described this disadvantage in at least two dimensions. One is informational. Noting that Black men are “scarce” in the clerkship market, one Black judge said, “They don’t come from three generations of lawyers. They don’t know to clerk . . . . No one has [asked] them, ‘have you thought about clerking?’ A lot of them . . . haven’t taken the courses they need . . . . They aren’t coached that they have the brain power but need to work on writing . . . .” The other dimension is relational. Hiring decisions “tend to be relationship-driven,” one white judge said, and minority candidates often lack mentors or well-placed contacts who can advocate for them. The clerkship process rewards “insiders,” said the Hispanic judge above, and often, minority candidates “don’t have someone to do the warm handoff.”

Second, many judges believed minority students often have substantial debt and do not feel they can turn down a lucrative law firm job for a clerkship. One Black judge said, “They’re thinking about a job; they have \$200,000 of debt. . . . [They aren’t] shown that clerking may delay paying off the debt but could leverage you for the rest of your career.” One white judge said family obligations also can be daunting; in the case of one Black clerk she hired, “his parents’ house was foreclosed on during the year he clerked for me.” In light of these challenges, some judges suggested the importance of discussing with minority students the long-term benefits of clerking, as well as reaching out to minority candidates after they have been in practice for a few years, when they might feel it is more financially feasible to clerk. One white judge noted that the advent of interviewing by video during the COVID-19

pandemic has removed financial barriers to applying and has increased the diversity of her applicant pool.

Third, some judges believed minority candidates “self-veto” because they mistakenly believe they would not be competitive candidates. One Hispanic judge reported that “my two recent Black clerks told me that they didn’t think they would get a clerkship because they didn’t have the grades.” Another Hispanic judge said: “I think there are Latinos who have decent grades but not top 15% or 20%, and they don’t think they’ll get an offer, so they don’t apply.” One feeder judge reported he had hired one Asian American and two Black clerks from a particular school despite the fact that faculty members had put them on “a second-tier list”; the students “had no idea they were remotely in competition for [me],” he said. This judge noted a possible “aspirational difference” between minority and white students, resulting from inaccurate assessments of their own qualifications, that faculty are not aware of or do not mitigate. As he explained, law schools put forward candidates who fit “the type [they think] you’re interested in” and may inadvertently screen out minority candidates. One Asian American judge said that when law schools limit their advocacy efforts to students with exceptional grades, judges are “running over each other to try and get to this small group of students when the pool itself should be much larger than that.”

The “aspirational difference” between minority and white students mentioned above appears to parallel an observed “ambition gap” between women and men in the market for federal appellate and Supreme Court clerkships.<sup>74</sup> Based on a survey of student editors at thirty-three law reviews, a recent study found:

While women view themselves as equally qualified compared to men, they must perceive themselves to be especially qualified before considering applying for a clerkship; men, meanwhile, are willing to consider an application at lower levels of self-perceived qualifications. Likewise, while women report being encouraged to apply for a clerkship at equal rates with men, they require more encouragement before considering an application.<sup>75</sup>

This disparity, the study concludes, “suggests that something is signaling to women that these positions are not for them,”<sup>76</sup> perhaps causing them to be “more pessimistic about the competitiveness of their applications” at a given level of qualification and encouragement.<sup>77</sup> The judges’ comments above suggest that similar dynamics may affect minority students.

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<sup>74</sup> Badas & Stauffer, *supra* note 67, at 121, 136.

<sup>75</sup> *Id.* at 136. The thirty-three law reviews were among the top seventy-five law schools in the nation, and the total pool of respondents consisted of 1,672 students, of which 234 students, or 14%, completed the survey. *Id.* at 121–22. The authors found no evidence of an ambition gap between women and men for clerkships in federal district courts or state courts. *Id.* at 136.

<sup>76</sup> *Id.* at 136.

<sup>77</sup> *Id.* at 129.

(b) *Looking More Deeply Within Class and Law School Rankings.* —

A few judges said there are many minority students who do not apply for clerkships despite attending top schools and having strong grades, and urged greater efforts to recruit these “low-risk hires.” With few exceptions, however, judges who had achieved high levels of racial diversity had not done so simply by recruiting and selecting from the top echelon of students attending top schools. In their hiring processes, these judges regularly looked deeper within class and law school rankings.

The conventional practice of hiring clerks from the top ranks of top schools was described by judges in our sample as “the path of least resistance,” “the safety zone,” “adherence to the known,” and a way to “play the odds.” Many judges spoke of departing from class and school ranking criteria as “taking a risk.” One white judge candidly explained, “We want the very cream of the crop in terms of these objective criteria. And if you want that, you won’t get as diverse a pool of clerks as you would like . . . I think about that . . . but haven’t been able to convince myself that I should adjust the criteria.” This judge said she lives in a majority-Black city and “it is embarrassing to me that I haven’t had more Black clerks than I have.” But she has been unwilling to “take the risk” of departing from her usual criteria, which she described as “top 5% of the top twenty schools,” because “keeping the quality high is so important, given the demands of the job.” In her view, adjusting the “objective criteria” would amount to “using affirmative action in your pool selection.” She said, “I would like to hire more minority clerks. . . . I’d like to be confident enough to take that leap, but I’m not. . . . It’s a hard, hard issue — it really is.” This perspective was common among the judges we interviewed.

Nevertheless, a significant number of judges in our sample said they look beyond the top schools, and a smaller but still sizable number said they were flexible on grades. Some of these judges said that although hiring from lower-ranked schools or lower class rankings may present risks, they felt confident in their ability to mitigate the risks through training and mentorship. Most of them, however, expressed a rather different view: They did not agree with the premise that departing from narrow criteria entails a lowering of standards or poses greater risks. Instead, they said that despite receiving many applicants with good grades at top schools, they apply a wider lens because it is how they find talented individuals who will do an excellent job while benefiting enormously from the experience.

Several Black judges, both Democratic and Republican appointees, elaborated this view. One said: “My number one objective is to get the best talent I can find. . . . [Diversity is] not a social experiment for me at all. You can find excellence in a lot of different places.” He explained: “People tend to look within the spheres they’re most familiar. They don’t have the frame of reference for finding excellence outside their

traditional arenas. They're somewhat afraid, don't want to make a mistake." By hiring large numbers of Black clerks, he said:

I'm sending a message: My work gets done, it's high quality, it's on time, [other chambers] know who my clerks are. There's no diminution in quality. It's not an affirmative action experience, none of that. . . . Diversity doesn't mean a diminution in quality. It just means you have to be willing to look in non-traditional areas.

Another Black judge said: "I hope it's an anachronism that you have to go deeper into the class and worry about quality to hire minorities. There are different kids who can do the job. . . . The difficulty here is . . . how we imagine excellence." Yet another Black judge said: "What holds judges back — some of it is fear that I can't get my work done right, . . . that I can't be a feeder, that I can't be prestigious enough. I'm not afraid to broaden [my search]. . . . I'm not afraid to go 'off the grid.' I'm looking for talent, not comfort." Reflecting on his experience as a senior law firm partner, he said:

I've seen a broad range of talent. . . . I don't care where students went to school. You have to do your homework and dig underneath the transcript, figure out the curve, look beneath the law review editor titles. I drill deeper. . . . There's no monopoly over brains or qualifications; it's a question of opportunity.

Another Black judge said she considers applicants from the top third of their class, looks at the "entire package," and asks, "is this someone who has excelled?" She further explained: "I always have an eye toward diversity. I never have the conundrum of taking a lesser-qualified person. I take people who wouldn't have this opportunity otherwise." Still another said:

Some applicants I know they're going to be just fine [in their careers]. Then there are others who are going to be good lawyers, but who could benefit from the boost that a federal clerkship would give them. I don't have to sacrifice what I need in terms of intellect and production in order to give these applicants the boost. . . . [I]t's a disservice if I hire somebody who's going to be a 'project,' where their confidence will be shattered, where I have to hold their hand, people who feel 'oh my god, I can't match that.' But I'm convinced that not every bright person who's capable of doing quality Court of Appeals work ends up in four or five law schools.

This judge acknowledged that looking more broadly involves more work for him and his staff, but "we're trying to be aggressive about giving an opportunity to people who [otherwise] wouldn't get an opportunity because they didn't go to an Ivy League law school."

Another Black judge, reflecting on his own career, said that "where you went to law school [can get] you your first job, but how you do in practice has much more to do with how you develop and your interpersonal skills." Thus, he said, "other than academics, I'm looking for interpersonal skills, aggressive curiosity, work ethic, character. Against all



this, where [applicants] went to law school is a pretty small consideration for me.”

We heard similar comments from other Black judges and some non-Black judges who declined to treat high grades or attendance at a top school as the sole or dominant criteria for success in an appellate clerkship. In fact, some said they are wary of relying too heavily on these criteria. “If I hire someone from a top law school with top grades, I still think there’s a risk there,” one Black judge said. “I don’t know what kind of common sense and judgment they have, and that can make a big difference in the tone of a draft.” One Hispanic judge said: “Some of the . . . top schools are more likely to generate pretentious students.” Another Black judge said: “We ought to be honest that [law school ranking] is not necessarily a measure of how people will perform or how they will do post-clerkship. . . . It’s easy to say I only hire from certain schools and certain grades. . . . But you miss out on a lot of talent.” Another Hispanic judge said: “I’m not less demanding on the skill set. But I’m more flexible on the credentials.”

Toward the end of each interview, we asked judges to reflect on whether they had hired clerks who had not performed as well as they had hoped. Although many judges described a small number of such instances, we heard almost no indication that poor performance was correlated with grades, law school ranking, or race. One judge reported that two of his Black clerks who had “less good grades” but strong recommendations “did not end up doing well.” But, he added, “there were a couple white clerks in the top ten of their class who also were major disappointments.” He said that occasional disappointments have not stopped him from considering candidates with lower grades, just as they have not stopped him from considering top students from elite schools. Similarly, one Hispanic judge said: “If I made a note of law clerks who needed some extra work, there would be no correlation between ranking of school or the fact that they’re a minority.” One white judge reported that “a lot of my stronger clerks have not come from elite schools, and some of my weaker ones . . . have come from more elite schools.” One Black judge said he has not seen “a straight-line correlation” between school ranking and clerk quality; one of his best writers was from a school well outside the top fourteen, while some of his clerks from elite schools had not performed as well. Another Black judge recounted one difficult experience with a Black clerk and said, “if you have one bad experience, you don’t project it onto all minority clerks of that group. We don’t do that for white clerks.”<sup>78</sup>

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<sup>78</sup> When asked whether looking more deeply into class or school rankings involved greater risk, one Black judge responded by mentioning the practice of hiring family members of friends: “How many white people have asked me to hire their daughters?” This judge recalled at least five such instances and believed this was a common practice among judges, even though it often involves

Although hiring clerks with strong grades at top law schools appears to be the dominant practice of appellate judges, very few judges reported instances in which clerks who had unexceptional grades or attended nonelite law schools ended up performing poorly. To the contrary, many judges proudly described examples of clerks, both minority and nonminority, who came less well credentialed but turned out to be “excellent,” “phenomenal,” or among the “best clerks I’ve hired.” Nevertheless, only a subset of these judges said they regularly look more deeply within class and school rankings. The others tended to view their positive experiences with less credentialed clerks as exceptions and continued to rely on conventional criteria.

Finally, although most judges with a regular practice of considering candidates from a broad range of schools had achieved relatively high levels of racial diversity, we heard little indication that their minority clerks came disproportionately from lower-ranked schools. Instead, consideration of a broad range of schools may be associated with more minority hires in two ways. First, it may generate a greater number of minority candidates in judges’ applicant pools, even if judges hire minority candidates from nonelite schools at a rate equal to or lower than the rate for such candidates from elite schools. Second, considering a broad range of schools may be a proxy for greater flexibility in a judge’s approach to evaluating applicants from top schools, with greater racial diversity resulting from emphasis on indicators of talent other than grades.

(c) *Hiring Records of Black Judges.* — As numerous comments suggest, Black judges took a noticeably different approach to hiring clerks than many of their colleagues. They were more apt to describe their interest in diversity as a search for talent and excellence rather than an exercise in risk-taking or lowering qualifications. They were more likely to feel a personal responsibility to seek minority candidates in light of their own experiences encountering barriers throughout their careers. They were more likely to consider applicants from a broad range of schools and to place less emphasis on grades in assessing talent. And collectively, they hired far more Black clerks than the other judges in our sample.

Against the backdrop of many judges saying they had difficulty hiring Black clerks, we were so struck by the distinctive experiences of Black judges that we decided to separately ask them for complete data on their hiring records. We sent a letter to these judges after interviewing them, attaching a form that asked them to specify the following

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departing from conventional criteria. In his view, this practice puts into perspective whatever perceptions of risk are associated with looking at a broader pool of candidates. Cf. Mauro, *Diversity and Supreme Court Law Clerks*, *supra* note 15, at 365 (“[Supreme Court] Justices have taken risks with white males for a long time. Southern Justices often favored graduates of southern law schools, and some Justices would hire sons of friends, sight unseen.” (footnote omitted) (citing PEPPERS, *supra* note 1, at 20–21; WARD & WEIDEN, *supra* note 1, at 87–93)).

information about each of their former clerks: name, year hired, gender, race/ethnicity, LGBTQ+ identification, law school attended, and current employment.<sup>79</sup> We sent these requests in January 2021 and a reminder in May 2021. Among the fifteen Black judges in our sample, a total of eight — comprising both Democratic and Republican appointees — provided their hiring records.

The data from these eight judges support the patterns we heard in the interviews. Collectively, these judges had hired a total of 424 appellate clerks comprised of 54.2% women (230) and 45.8% men (194). Half of their clerks (212) are white; more than one-third (146) are Black.<sup>80</sup> The remarkable number and percentage of Black clerks are consistent with the hiring information we collected in interviews with the other Black judges in our sample. Among the seven Black judges who did not respond to our written data request, six of them during our interview reported estimates of the number of Black clerks they had hired. If we combine the interview data from these six judges with the data from the eight who provided complete records, we estimate that these fourteen Black judges had hired approximately 855 clerks, of whom 29.5% (252) are Black. The sheer magnitude of these figures suggests that the small number of Black clerks in the federal courts of appeals each year are heavily concentrated among a few judges and that most appellate judges hire very few if any Black clerks. Indeed, although Black judges comprised less than one-eighth of all active circuit judges at the time of our study, our findings suggest that on average they accounted for more than half of the Black clerks hired in the federal courts of appeals each year.<sup>81</sup>

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<sup>79</sup> The form indicated: “If you are unsure or do not have the requested information or are unsure of its accuracy, please leave the space blank.”

<sup>80</sup> Where a clerk is reported as being of more than one race or ethnicity (e.g., “half Black/half white”), we count the clerk in each category reported, thereby producing some double-counts. This method, called maximal reporting, is discussed in Li, Yao & Liu, *supra* note 25, at 621. There were only four such double-counts among the 424 clerks reported by the eight judges who provided their hiring records.

<sup>81</sup> We derive this estimate as follows: There are 179 authorized judgeships on the federal courts of appeals, *see* 28 U.S.C. § 44, but there are always some vacancies, *see, e.g., Current Judicial Vacancies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> [<https://perma.cc/Q6G3-Z636>]. Suppose at any given time there are 170 active circuit judges, each of whom hires four clerks each year (in fact, some hire fewer), for a total of 680 clerks. Suppose further that Black clerks comprise 5% of the total, amounting to thirty-four Black clerks. *See* sources cited *supra* note 22 (reporting that among 2006 law school graduates, 4.6% of federal clerkships were obtained by African Americans and that this rate was 4.3% in 2011, 3.5% in 2016, and 4.1% in 2019). In 2020, when we began our study, there were eighteen Black judges on active status in the circuit courts. *See Biographical Directory of Article III Federal Judges, 1789–Present*, *supra* note 11. If they hired a total of seventy-two clerks, with Black clerks comprising 30% (twenty-two) of their hires, it would mean the other 152 circuit judges collectively hired only twelve Black clerks each year. Even if we posit, more conservatively, that Black clerks comprised 25% (eighteen) of Black judges’ total hires, it would mean the other 152 circuit judges collectively hired only sixteen Black clerks. In all likelihood, this skew has become even more pronounced as the number of active circuit judges who are Black has increased to twenty-four as of October 2023. *Id.* If the most

Among the eight judges who answered our written data request, seven reported the law school attended by each clerk. Among the 386 clerks hired by those seven judges, 42.5% (164) had graduated from a law school outside the top twenty. Minority clerks comprised 48.2% (79) and Black clerks comprised 39.6% (65) of those 164 graduates — comparable to the 51.8% share of minority clerks (200) and 35.5% share of Black clerks (137) among the 386 total hires. In other words, the racial composition of these judges' clerks who had graduated from schools outside the top twenty is not much different from the racial composition of their clerks overall. And whether or not they had attended an elite school, many of these clerks, of all races and ethnicities, had gone on to attain impressive positions as law firm partners, corporate counsel, law professors, entrepreneurs, government lawyers, and nonprofit leaders.

(d) *Self-Sorting Versus Positive Feedback Loop*. — The high concentration of Black clerks working for Black judges that we observed aligns with other published data.<sup>82</sup> An important question is whether this concentration is a result of self-sorting by Black applicants. Some non-Black judges reported instances of having scheduled interviews or made offers to Black candidates, but ultimately losing them to Black judges. One white judge said that in his experience, Black candidates are often “steered to judges of color.” Some Black judges acknowledged the existence of such sorting. One said, “I tell Black and Latino students not to apply to just minority judges. [But] people gravitate to people who they think will be good mentors.” Another Black judge said, “Applicants say they want to clerk for me because it will be more meaningful to clerk for someone who has walked their road.” And another said, “An African American applicant feels he or she has a better shot with me than other colleagues,” but added, “this shouldn't be the case. . . . It should not just be law students of color applying to judges of color but everyone.”

Although applicant preferences appear to play a role, we did not find evidence that minority judges, upon taking the bench, automatically attracted a plethora of applicants of their own race or ethnicity. To the contrary, several described their surprise at the lack of such diversity in their initial applicant pools. One Black judge, located in a major city, said that early in his tenure, “I just wasn't getting Black applicants,” and it was only after he “started to speak at different law schools” to minority students that he was able to hire several Black clerks. Another Black judge said, “I wanted to have diverse clerks from the very beginning, but when you're a newbie, you don't know where to start.” In order to get the applicant pool he wanted, he began to

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recent appointees have similar hiring patterns as the Black judges in our sample, the result would be a slight increase in the number of Black clerks as well as an increase in the concentration of Black clerks working for Black judges.

<sup>82</sup> See WILKINS & FONG, *supra* note 41, at 43 tbls.11 & 12.

cultivate a network of faculty members who would refer minority candidates. Similarly, one Hispanic judge said the initial dearth of Hispanic candidates in her applicant pool prompted her to begin “pounding the pavement,” visiting law schools, speaking to students, and telling professors “to send diverse candidates my way.” She said she also engaged in direct outreach to specific candidates after reading about them in press releases or university websites. Because of these efforts, she said, “now I feel like I’m getting a flow, getting a lot of diverse candidates. . . . [T]he Latinos I’m getting are only because I’m making a concerted effort.”

Further, to the extent that applicants engage in self-sorting, minority judges said they did not perceive any self-sorting in their favor by applicants of a race or ethnicity different from their own. One Asian American judge said that although he has “no trouble getting Asian American applicants,” the number of Black and Hispanic applicants in his pool is “not great.” The data from the eight Black judges who provided their hiring records show that in contrast to their success with Black clerks, Hispanic clerks comprised only 2.8% (12) of their 424 total hires. They did fare better in hiring Asian American clerks, who comprised 9.9% (42) of their total.<sup>83</sup>

With few exceptions, the minority judges in our sample described concerted outreach and a broader range of selection criteria — and not self-sorting by applicants — as key drivers of diversity. Many judges described these strategies as part of a positive feedback loop: when efforts to broaden their applicant pools resulted in minority hires, more minority candidates were then drawn into their applicant pools, resulting in more minority hires. Some judges attributed this dynamic to referrals from their network of former clerks. Other judges reported a reputational effect, with their hiring records signaling that minority applicants are welcome and wanted.

One Black judge said, “When people see that you’ve hired African American clerks, they notice that you’re willing to do that.” Her minority applicant pool was larger, she said, because “people know that I will consider and will hire clerks of color. For some of the judges who don’t have a track record, [minority candidates] will not send their applications” because they worry “they won’t be fairly considered.”<sup>84</sup> Another Black judge said that “part of the reason minority kids apply to me is that they’re looking at my [twenty-plus]-year record of hiring. . . . Minority students may not know that white judges are interested or will

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<sup>83</sup> The eight judges also reported that clerks of Middle Eastern or Persian heritage comprised 2.4% (10) of their total hires. As noted, the written data request we sent to Black judges asked which clerks identify as LGBTQ+, to the extent the judges had accurate information. Four of the eight judges provided no information on this dimension; the other four reported that among their 205 total hires, 7.3% (15) identified as LGBTQ+.

<sup>84</sup> See Lynn K. Rhinehart, Note, *Is There Gender Bias in the Judicial Law Clerk Selection Process?*, 83 GEO. L.J. 575, 587 (1994) (reporting similar findings).

even read their applications.” A Hispanic judge similarly said, “For minorities, you never know when you won’t be treated well in the next meeting. . . . Part of it is that they know they will be respected by me.”

Importantly, reports of a positive feedback loop were not limited to judges who hired clerks of the judges’ own race. One white judge, who had hired five Black clerks out of thirty-seven hires, said, “If you’ve had any success on this, it builds on itself. If you’re someone who’s known to hire Black clerks, more will come.” One Hispanic judge reported that although he initially did not receive many Black applicants, he eventually did succeed in hiring Black clerks by “reaching out to organizations and colleagues,” including consulting a Black colleague. One Black judge said that although he struggled to get Hispanic applicants, “[o]ne helpful thing is that once you have a Latinx clerk or intern, you tap into a community of people. Your reputation spreads.”

Judges reported a similar path dependency in the range of schools from which they hired clerks. Often after hiring just one clerk from a given school, they said, they would receive a stream of applicants from that school. Conversely, one judge said, “If you put out the word that you’ll hire only from a limited range of schools, no one [from other schools] will apply.”

In sum, although minority judges acknowledged some degree of self-sorting by applicants, almost all of them said a diverse applicant pool does not materialize spontaneously. In their experience, concerted outreach and openness to varied indicators of excellence are essential. “You have to be proactive,” said one Hispanic judge. Although we heard no one suggest that non-Black judges can match the success of Black judges in hiring Black clerks, Black judges rejected the notion that non-Black judges have little or no means of hiring more Black clerks. When asked what advice she had for colleagues who want more racial diversity but have not achieved it, one Black judge said, “I would suggest that people *look*. I would suggest there are people who are qualified, who can do this job, who are people of color. You have to be open to it, and you have to look.” Another Black judge said, “Look in different places. . . . Not everything has to come from that narrow pipeline.”

#### *H. Feeder Judges*

In constructing our sample, we included feeder judges appointed by Presidents of both parties because of their potential influence in shaping the clerkship market. The outsized role of feeder judges as conduits to Supreme Court clerkships is well documented: during the five Terms from October 2017 through October 2021, thirteen circuit judges accounted for 69.6% (133) of the 191 clerks hired by Justices of the

Supreme Court.<sup>85</sup> The influence of feeder status on clerk hiring extends not only to the clerks whom judges send to the Supreme Court; it also extends to the many other clerks whom they try unsuccessfully to send. Further, according to several judges we interviewed, hiring practices are shaped not only by feeder status but also by a judge's aspiration to become a feeder. The feeder phenomenon thus affects the hiring of many more appellate clerks than the few dozen who go on to clerk at the Supreme Court each year.

Unsurprisingly, the six feeder judges in our sample — four Democratic and two Republican appointees — said they generally hire candidates with strong grades at elite schools. They have, as one judge said, the “luxury” of choosing among top academic performers. But they also expressed willingness to depart from those criteria to varying degrees. Four said they are flexible on grades if a candidate has a strong faculty recommendation, has a compelling personal background, or adds a dimension of diversity to chambers. In a typical comment, one judge said grades are “a good starting point for screening, but they are not 100% reliable. I’ve had clerks whose skill in taking tests did not translate into clerking, and vice versa. I’ve tried to take a flexible approach on grades and not use a hard cutoff.”

With regard to law schools, the four Democratic appointees said they were content to focus on the top ten or fifteen schools and expressed little interest in looking elsewhere. The two Republican appointees, by contrast, expressed concern about hiring from only a few schools. One of them quoted Justice Scalia as having said, “Why would I spend a lot of time screening when Harvard and Yale do it for me?” In response, this judge said, “I think this hurts a lot of groups, minorities, low-income groups, or kids that blossomed late,” as well as students who attend state schools because of “personal, financial, or family constraints.” He said, “I’ve made it a point to hire at least one clerk each year from [a] non-T<sub>14</sub> [school].”<sup>86</sup> The other Republican appointee said he has hired one clerk “every three or four years” from a particular state school ranked outside the top twenty. But he said this was “something I did more of

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<sup>85</sup> David Lat, *Supreme Court Clerk Hiring Watch: Feeder Judges, Courts, and Law Schools, 2017–2021*, ORIGINAL JURISDICTION (Aug. 12, 2021), <https://davidlat.substack.com/p/supreme-court-clerk-hiring-watch-47b> [<https://perma.cc/JC3D-NP6L>]. We tabulated the total number of clerks, 191, from David Lat’s annual listing of Supreme Court clerks. See, e.g., David Lat, *Supreme Court Clerk Hiring Watch: The Complete Clerk Roster for October Term 2019*, ABOVE THE LAW (July 21, 2020), <https://abovethelaw.com/2020/01/supreme-court-clerk-hiring-watch-the-complete-clerk-roster-for-october-term-2019> [<https://perma.cc/UQ77-9H8T>].

<sup>86</sup> The “T<sub>14</sub>” refers to a group of schools that consistently placed in the top fourteen in the *U.S. News & World Report*’s annual law school rankings. See Martha Neil, *Yale’s Still #1 in Latest US News Rankings; Harvard, Stanford, Columbia & Chicago Follow*, ABA J. (Apr. 15, 2010, 6:09 AM), [https://www.abajournal.com/news/article/law\\_school\\_rankings](https://www.abajournal.com/news/article/law_school_rankings) [<https://perma.cc/3U9Y-HNXW>].

at the beginning,” before becoming a feeder. In his view, the Justices are more “attentive to race and gender” than “non-elite schools.”<sup>87</sup>

All six feeder judges said they value multiple dimensions of diversity, including socioeconomic background, race, and gender. Although two of them (one Democratic appointee and one Republican appointee) reported little success in hiring Black clerks, the other four described concerted outreach or selection strategies that have resulted in Black clerks comprising 10% to 16% of their hires. Collectively, the feeder judges said they had little difficulty hiring Asian American clerks and the most difficulty hiring Hispanic clerks. Five of the six judges said they make intentional efforts to hire women.

Although four of the feeder judges reported some success in hiring Black clerks, several nonfeeder judges expressed doubt that greater racial diversity among clerks overall can be achieved by focusing on the strongest students at top schools. Their perception is that feeder judges can land the few minority candidates who meet narrow criteria, but other judges must take a different approach. As noted, many judges said that by making a conscious decision not to try to become a feeder, they freed themselves to apply broader criteria that work in favor of diversity.

Three of the feeder judges expressed concern about ideological segmentation among clerkship applicants, and the two Republican appointees said the hiring practices of Supreme Court Justices exacerbate the problem. One said, “The Justices don’t hire across perspectives; that . . . narrows the criteria. FedSoc and ACS . . . absolutely this matters; that ship has sailed. I’m not sure there’s a single Republican nominee [on the Supreme Court] who would hire someone with ACS on their résumé.” The other said, “It’s harder for me to get liberal clerks to the Supreme Court; that’s just the reality. I wonder how much my name hurts them” when they apply to the liberal Justices.<sup>88</sup>

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<sup>87</sup> From October 2017 through October 2021, nine law schools ranked within the top ten accounted for 90% (171) of the 191 clerks at the Supreme Court. See Lat, *Supreme Court Clerk Hiring Watch: Feeder Judges, Courts, and Law Schools, 2017–2021*, *supra* note 85. An exception to this pattern is Justice Thomas, who has hired from a broader range of schools than any of his colleagues. See *supra* note 19 and accompanying text.

<sup>88</sup> A recent study of Supreme Court clerks from 2017 to 2022 found ideological alignment, based on the party of the appointing President, between each Justice and the most prolific feeder judges to that Justice; the one exception was Chief Justice Roberts, whose three biggest feeders were two Republican appointees and one Democratic appointee. See Feldman, *supra* note 39. These findings cohere with a pattern of increasing polarization in Supreme Court clerk hiring in earlier years. See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 356 tbl.4 (2017) (showing the extent to which Justices, during the 2005 through 2016 Terms, hired clerks from circuit judges appointed by Republican Presidents); Lawrence Baum, *Hiring Supreme Court Law Clerks: Probing the Ideological Linkage Between Judges and Justices*, 98 MARQ. L. REV. 333, 338–39 tbl.1 (2014) (similar findings for Democratic appointees from 2010 to 2014); see also PEPPERS, *supra* note 1, at 34–36 (survey of former Supreme Court clerks showing partisan alignment between clerks and their hiring Justices).



Finally, one Republican appointee, while acknowledging that “I’ve been advantaged for being a feeder,” called the feeder phenomenon “unfortunate” because it narrows the criteria for clerk hiring and “leads to a lot of jealousy and competition among judges.” He described as “pernicious” the notion that “you put a bunch of Type A judges together and tell them it’s possible to be called a ‘feeder judge.’ . . . Because the Supreme Court turns to only 20 or 30 judges [for clerks], those judges can’t resist playing the game,” even though it hurts diversity on many dimensions. Two other feeder judges said the effects extend to faculty members, who recommend candidates based on perceptions of what those judges want in order to send clerks to the Supreme Court. One of the Democratic appointees reported his perception that elite schools play a gatekeeping function and sometimes discourage him from hiring students who might not be viable for a Supreme Court clerkship, even when those students are “bringing me something different and I don’t care if they won’t interview for the Supreme Court.” Several judges we interviewed, feeders and nonfeeders, said they wish the Justices would hire from a broader range of schools, judges, ideological profiles, and candidate characteristics in order to ease these pressures.

### *I. Judicial Culture*

In addition to learning about judges’ hiring practices, we sought to understand the institutional context in which these practices took shape. We asked the judges in our sample whether they discuss issues of clerk hiring and diversity with their colleagues and, if so, what those discussions are like.

Perhaps the single most consistent finding of our study, across the entire sample of fifty judges, is that appellate judges rarely if ever talk with each other about their hiring practices. Diversity is a particularly verboten topic. The issue “almost never comes up,” said one judge. “We don’t discuss law clerks,” said another. When asked if he ever talks about these topics with his colleagues, one former chief judge said, “The accurate answer is none, zero, nada.” To the extent these issues are discussed at all, they are discussed in informal or siloed conversations, most often among women or minority judges. About half of the judges, predominantly women and minority judges, mentioned isolated or sporadic conversations with colleagues about law clerk diversity; in particular, several Black judges said they occasionally discuss the topic with other Black judges. Only a handful of judges could recall the topic coming up in a more formal way, such as at a judicial retreat or circuit conference.

The primary reason for this reticence, the judges said, is that they are loath to intrude on what is regarded as a very personal prerogative. As one judge put it, “[H]iring a law clerk is so personal that as a general matter, unless you’re like-minded, folks don’t want to intrude in that

process.” The mindset of many judges, he said, is that “it’s my prerogative, I choose to exercise mine in the way I want and if you choose to exercise yours in that way, great.” Another said, “Judges are not receptive to [others] telling them what to do.” A further reason for avoiding the topic, some judges said, is that they are sometimes competing with their colleagues for the same applicants.

Yet the lack of discussion does not mean judges are uninterested in each other’s practices. To the contrary, many judges said they pay attention to the clerks hired by their colleagues. Some white judges expressed interest in learning from their minority colleagues how to hire more minority clerks. One noticed that a Black colleague “every year has at least one Black law clerk [and] he has had some really outstanding clerks,” and that a Hispanic colleague “has at least one and often more than one Hispanic clerk.” She said, “I haven’t asked them how they do it, whether they’re doing something different, but I should. [This interview] makes me think it would a good idea to consult them.” Another white judge said, “I probably should’ve called [a particular Black colleague] to ask how he’s getting all these great African American clerks, but I never did.”

Several minority judges noted the dearth of minority clerks among their colleagues’ hires. One Black judge said, “You can see it in the lunchroom, who’s intentional and who’s not. Very few [colleagues] have hired Black or Latinx clerks.” One Hispanic judge said, “I notice my colleagues’ hires at clerkship orientation, and when you sit on a panel with colleagues, you see their clerks. There’s only a handful of minority [or women] clerks.” Another Black judge said that “in ten years on this court, I’ve seen about three Black clerks who didn’t clerk for [a Black colleague] or me.” And another said she discusses racial diversity only “with other judges of color. But I really don’t see it as a part of the conversation. . . . [It is] not woven into the fabric of our court for selecting judges or clerks.”

Black judges said they have had to contend with the perception, directed at themselves and their clerks, that diversity is at odds with excellence. One said that Black judges are sometimes made to feel “you don’t belong because you’re not as good. If that’s the mindset with regard to one’s colleagues, how can it be anything else with regard to who you’re hiring?” Another recounted an instance where a colleague contacted her to recommend “‘a wonderful young man who was a student in my class . . . and I think he would be good for you.’ . . . [I]n the back of my mind, I thought he must be African American because if he’s that good, why didn’t my colleague hire him?” In fact, she said, the student was African American, and she “was blown away” by him. Another Black judge, who reported that “50% of clerks I’ve hired are people of color,” said that he once told a colleague he had received 700 applications, to which “the first thing [the] colleague said was, ‘They must think you will hire anybody!’”

While reluctant to discuss the topic directly with colleagues, a few Black judges said they try to influence fellow judges by example. One Black judge said, “I’ve never felt comfortable saying to my colleagues, ‘Is there any reason you all can’t find some Black folks?’” She believes the best way to effect change is to model success by producing excellent work with diverse clerks and to ensure that her clerks have a seat at the table so that her colleagues can observe the benefits of diversity firsthand. Another Black judge said he believes it is part of his role to demonstrate “not only that the talent is there, but there’s no diminution in the quality of the work.” He recounted that during en banc hearings, his white colleagues would meet his clerks, ask where they were from, and express surprise that his minority clerks graduated from top law schools. Minority candidates who do “top notch” work have been “there all the time,” he said, “but my colleagues don’t have a frame of reference for looking there for excellence.” In his view, the “key step” to making the issue resonate is “to undemonize the concept of diversity. For many well-meaning people, they don’t know what that means.” Reflecting on his former clerks and their successful careers, he said diversity “means quality, excellence. If people think it means something other than talent and quality, then people turn the hearing aid off.”

Some white judges expressed similar views. One Republican appointee acknowledged that a “fair number” of his colleagues see diversity as irrelevant, but he stressed the need to show the benefits of diversity to judges who “might be open to it. . . . Most of them want to benefit themselves; they want a better work product. And I do think that diversity — having a cross-section of the country who are intellectually able to do the work — that does benefit the work.” Another Republican appointee, who said minority clerks comprise one-third of his total, warned that judges would not be receptive to being told they “should” pursue diversity. Rather, he said, it is better to “help them see the advantages” of diversity:

I think one thing is to point out the advantage of getting the input of people who are representative of our country, number one. Number two, if they have not done this before, they should go to some of these good schools [and hire minority candidates], and see what the experience is. And if it’s like my experience, they’ll find out that this is not an affirmative action program. It is an important part of the future of the country and an important part of how we thrive.

This judge said it is important to “have judges talk to judges” and to “[g]et information out there about how successful these diverse clerks have been and are.”

#### IV. IMPLICATIONS

As noted at the outset, the fifty judges we interviewed do not comprise a representative sample of circuit judges nationally. We have no

doubt that the range and intensity of views on clerk hiring and diversity would have been different if our sample had included more white judges and more Republican appointees. Nevertheless, our findings reflect the considered perspectives of a large number of judges — roughly 30% of the active judges on the federal courts of appeals — who are diverse by geography, ideology, gender, race, educational background, and life experience. With an average tenure of fourteen years, these judges brought substantial experience to bear on the topics of our study.

While generally pleased with the clerks they have hired, many judges voiced concerns about diversity of law school, ideology, socioeconomic background, gender, or race, and many were interested in ideas to improve the diversity of clerks along these and other dimensions. We now discuss several implications of our findings for these issues.<sup>89</sup>

### A. *Judicial Selection*

A consistent finding throughout our sample is that minority judges and judges who did not attend elite law schools are more inclined to hire clerks outside the conventional mold of top performers at top schools. We understand the comments of these judges to distinguish between *credentials* and *qualifications*: they seek strong qualifications in their clerks, but they reject the notion that qualifications can be demonstrated only by a narrow set of credentials. This perspective was informed by their own personal experiences of having worked hard and achieved career success, from modest beginnings in many cases, without elite credentials. In addition, they were more likely to emphasize from personal experience that where students attend law school may turn on family or financial circumstances unrelated to talent, that law school grades are not the only or the best predictor of success in a clerkship, and that students from less credentialed backgrounds often lack mentors and networks that pave the way to coveted opportunities like clerkships.

It is apparent that diversity among judges affects diversity among clerks. This is not to say that improving the diversity of clerks is a task that should be relegated to a subset of judges. But our findings indicate that one way to increase diversity among law clerks is to appoint more judges whose backgrounds or experiences have given them, as one judge put it, “a frame of reference for finding excellence” that is broader than the usual metrics. Increasing the number of such judges would likely increase law clerk diversity not only as a result of their hiring decisions, but also through their potential influence on the conceptions of law

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<sup>89</sup> In focusing here on the role of judges, we do not mean to minimize the role of law schools in shaping clerk demographics. To the contrary, as several judges told us, law professors and clerkship advisors play a significant role in guiding potential applicants, and changing the demographics of clerks will likely require different practices by law schools as well as the judiciary. Although the role of law schools in the clerkship process is not the focus of this study, it is a topic of ongoing research that one of us (Justice Liu) is pursuing in collaboration with the American Bar Foundation.

professors and judicial colleagues as to which students are “clerkship material.”<sup>90</sup>

### B. Ideological Segmentation

Among the judges we interviewed, the vast majority said they do not seek ideological alignment when hiring clerks. Many said they do not consider ideology in evaluating applicants and assign little or no positive weight (or even negative weight) to attributes such as membership in the Federalist Society or American Constitution Society. Several others said they hire clerks with an eye toward ideological contrast or diversity, not alignment or homogeneity. These findings are consistent with prior research<sup>91</sup> and with what we might expect to hear from people who conceive of themselves as neutral, nonpartisan decisionmakers.

At the same time, other studies have found strong evidence of ideological alignment between federal judges and their clerks. Although most of these studies examine the Supreme Court, there is one large-scale empirical study that includes clerks at all levels of the federal judiciary.<sup>92</sup> Using a dataset of 5,057 circuit court clerks and 12,580 district court clerks who served from 1995 to 2004, as well as 1,854 Supreme Court clerks from 1960 to 2015, the authors matched each clerk to an ideology score based on his or her political donations.<sup>93</sup> The study found

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<sup>90</sup> As of October 2022, among 170 active circuit judges, 53 (31%) graduated from a law school outside the top twenty: 25 out of 78 total Democratic appointees (32%) and 28 out of 92 total Republican appointees (30%). These numbers were calculated in October 2022 using publicly available information from the Federal Judicial Center. See *Biographical Directory of Article III Federal Judges, 1789–Present*, *supra* note 11. Among active circuit judges, 51 (30%) identify as a member of a racial or ethnic minority group: 39 out of 78 Democratic appointees (50%) and 12 out of 92 Republican appointees (13%). See *id.* To our knowledge, judicial nominees have not been asked how they would approach law clerk hiring during the vetting processes of the White House, U.S. Department of Justice, Senate Judiciary Committee, or American Bar Association Standing Committee on the Federal Judiciary.

Judicial selection can also have more subtle or indirect effects on clerk hiring. A recent study finds that male federal appellate judges are more likely to hire female clerks after having served on a panel with female colleagues. See Battaglini et al., *supra* note 21, at 610 (estimating that each additional female federal appellate judge “would lead the judge’s male colleagues to hire an average of five additional female clerks over the next decade”).

<sup>91</sup> See *supra* note 63 and accompanying text.

<sup>92</sup> See generally Bonica et al., *Measuring Judicial Ideology*, *supra* note 12; Bonica et al., *Political Ideologies*, *supra* note 12. The two papers, published back-to-back in the same issue, report on the same study.

<sup>93</sup> See Bonica et al., *Measuring Judicial Ideology*, *supra* note 12, at 138–39. The ideology scores, called Campaign Finance Scores (CFscores), are derived from the Database on Ideology, Money, and Elections (DIME), which tracks approximately 100 million political donations made by 13.4 million individuals from 1979 to 2014. See *id.* See generally Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367, 369–70 (2014) (discussing construction of CFscores based on DIME data). The dataset of clerks was constructed by two researchers working with a nineteen-person team. See Daniel M. Katz & Derek K. Stafford, *Hustle and Flow: A Social Network Analysis of the American Federal Judiciary*, 71 OHIO ST. L.J. 457, 484 & n.114 (2010). They obtained the

“strong evidence that judges hire clerks with consistent ideologies”<sup>94</sup> and that the average ideology scores of a judge’s clerks are positively correlated with the judge’s ideology as measured by the judge’s political donations, the judge’s voting behavior, and the ideology of the appointing President and home-state Senators.<sup>95</sup> These findings suggest that “clerk ideologies provide a window into the ideology of the hiring judge.”<sup>96</sup>

How can these findings of ideological alignment be reconciled with the fact that most judges in our sample disclaimed any interest in such alignment when hiring clerks? We think three observations help to explain what is going on here. First, law clerks in the federal courts appear to be predominantly liberal. The large-scale study of law clerks discussed above found that roughly three-quarters fell on the left side of the ideological spectrum of political donors.<sup>97</sup> This likely reflects the fact that graduates of top law schools are overwhelmingly liberal.<sup>98</sup>

Second, according to some judges in our sample, many conservative applicants are hired by conservative judges outside of the timetable of the current federal hiring plan, i.e., before the end of students’ second year of law school. The resulting segmentation of the clerkship market means that by the time judges who follow the plan are hiring, few competitive conservative applicants are left in the pool. This was one aspect of a broader concern, reported by some judges we interviewed, that

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name, educational background, year of service, and judge’s name of each clerk from 1995 to 2004 by consulting the *Judicial Yellow Book*, Martindale-Hubbell, and law firm websites and by contacting former clerks to identify others. *Id.* at 484–85; *see id.* at 484 n.115 (estimating that the dataset includes 95.2% of federal clerkships from 1995 to 2004).

<sup>94</sup> Bonica et al., *Political Ideologies*, *supra* note 12, at 121; *see id.* at 120 & fig.9.

<sup>95</sup> *See* Bonica et al., *Measuring Judicial Ideology*, *supra* note 12, at 145–46, 145 tbl.4.

<sup>96</sup> *Id.* at 146. This general finding has layers of nuance. Interestingly, judges whose clerks on average had higher ideology scores, either liberal or conservative, had less variation in their clerks’ scores than judges whose clerks on average had more moderate scores. *See id.* at 144 & fig.1. This may mean that some judges, likely ones at either end of the spectrum, seek homogeneity among and ideological alignment with their clerks, whereas other judges hire clerks from across the spectrum because they do not care about ideology when hiring or because they actively seek ideological diversity. *See id.* at 144. However, judges whose clerks on average have moderate scores are not necessarily themselves ideological moderates; some ideologically strong judges may hire clerks without regard to ideology or with an intent to achieve ideological diversity. *See id.* Conversely, it is not always the case that judges whose clerks have high scores in either direction are themselves ideologically extreme. *See id.* at 141–42, 142 tbl.2 (showing that the 15 judges who had the most liberal clerks include three moderate Republican appointees).

<sup>97</sup> Bonica et al., *Political Ideologies*, *supra* note 12, at 108.

<sup>98</sup> *See id.* at 122. The ideology scores of lawyers who graduated from top law schools are disproportionately liberal, although for some schools the distribution of ideology scores for their law clerks is further to the left than the distribution of scores for their alumni overall. *See id.* at 110 fig.4, 113 & fig.6. We note that the study conducted by Professor Adam Bonica and his colleagues examined district and circuit court clerks from 1995 to 2004, *see id.* at 103, and it is not clear what a similar analysis would reveal today. The predominance of liberal-leaning graduates from top law schools has probably not changed, but it is possible that more students who lean conservative have become interested in clerking with the recent increase in Republican appointees on the circuit courts and the Supreme Court, or that Republican appointees are now considering clerkship candidates from a broader range of schools.

clerkship applicants sort themselves ideologically and do not apply to judges whom they perceive as incompatible, making it difficult for judges who seek ideological diversity to achieve that objective.

Third, this segmentation is exacerbated by current feeding patterns to the Supreme Court. Almost uniformly, conservative Justices hire conservative clerks from conservative circuit judges, and liberal Justices mirror the pattern.<sup>99</sup> The two feeder judges in our sample who are Republican appointees said they cannot send liberal clerks to conservative Justices or to liberal Justices; the ideological “ship has sailed,” one of them said. In all likelihood, this means that the hundreds of applicants each year who aspire to a Supreme Court clerkship apply predominantly to like-minded judges. The effect is likely substantial, impacting not only a small group of feeder judges but also many circuit judges who aspire to be feeders. And the hiring practices of the Supreme Court — because it is the Supreme Court — may tend to normalize ideological segmentation of the clerkship market overall.

Against this backdrop, it is understandable that hiring outcomes reflect ideological alignment, even as most of the judges we interviewed said they do not seek it. In general, it appears that Democratic appointees, who predominate in our sample and generally follow the hiring plan, have liberal-leaning clerks because those are the candidates who appear in their applicant pools. Feeder judges, whether Democratic or Republican appointees, also have like-minded clerks because of self-sorting by applicants in response to Supreme Court hiring practices. Further, there appears to be a subset of Republican appointees who hire conservative candidates outside of the hiring plan; it is possible our sample includes judges in this category, but none reported sufficient information for us to identify them as such.<sup>100</sup> Other Republican appointees, including many in our sample, see an applicant pool with few remaining conservative candidates, and they hire a substantial number of clerks from the large pool of liberal candidates. Indeed, “although Republican appointees hire relatively more conservative clerks than Democratic appointees, in absolute terms the former nonetheless hire more clerks with liberal [ideology scores] than clerks with conservative [scores].”<sup>101</sup> Given the relatively small number of conservative candidates in the applicant pool overall, we infer that cross-ideological hiring, to the extent it occurs,

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<sup>99</sup> Baum, *supra* note 88, at 335. In explaining why this alignment has strengthened over time, Professor Lawrence Baum points to “growing ideological polarization among political elites, which has given Justices stronger incentives to seek out law clerks whose policy preferences are similar to those of the Justices.” *Id.* at 333. Baum further argues that the dramatic increase in the number of clerkship applications incentivizes the Justices to use the identity of the judge for whom an applicant has clerked as an indicator of the applicant’s policy preferences. *Id.* at 355–56.

<sup>100</sup> We are all but certain that such judges are underrepresented in our study in light of our sampling criterion of three years of service as a circuit judge and the higher rate at which Republican appointees declined to participate in our study. See *supra* notes 4, 37, and 45 and accompanying text.

<sup>101</sup> Bonica et al., *Political Ideologies*, *supra* note 12, at 122.

largely consists of liberal clerks being hired by Republican appointees who are not feeder judges and do not aspire to be feeders, and who do not rely on conservative networks like the Federalist Society.<sup>102</sup>

The findings of our study, especially the observations of feeder judges and those judges who reported difficulty achieving ideological diversity, are consistent with prior research showing ideological segmentation in clerk hiring. What we do not know is the degree to which such segmentation reflects (a) the hiring decisions of some judges who seek like-minded clerks or (b) the inability of judges who value ideological diversity to achieve that objective due to self-sorting by applicants or the prevalence of liberal-leaning candidates from top schools. Although both phenomena are likely at play, it is unclear whether one or the other predominates.

Either way, the behavior of judges and clerkship candidates may be mutually reinforcing: bimodal outcomes in hiring, whatever their cause, may drive self-sorting by future applicants, which in turn tends to perpetuate bimodal outcomes. These dynamics, together with other signs of judicial polarization,<sup>103</sup> suggest that judges who do value ideological diversity among their clerks must send very strong signals in order to overcome perceptions that judges seek like-minded clerks. For example, Democratic appointees would need to make the rounds with student chapters of the Federalist Society, and Republican appointees would need to seek audiences with ACS chapters, women's law associations, and various affinity groups. In addition, ideological segmentation in circuit court clerkships would likely be less rigid if Justices of the Supreme Court were to hire more clerks from circuit judges appointed by an opposing-party President — a practice more common decades ago.<sup>104</sup>

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<sup>102</sup> This inference would suggest that rates of cross-ideological hiring are higher among district court judges, and among circuit court judges who are not feeders. Consistent with this inference, the Bonica study observed that the percentage of clerks with conservative ideology scores was higher for circuit judges (25.3%) than for district judges (23.9%), and even higher for Supreme Court Justices (30.4%) and feeder judges (31.0%), perhaps reflecting the makeup of the applicant pool and judges' hiring preferences at each level of the judicial hierarchy. *Id.* at 116–18, 122; *see also id.* at 117–18 (defining “feeder” as a circuit judge who has sent at least two clerks to the Supreme Court).

<sup>103</sup> Although the evidence of judicial polarization has largely focused on the Supreme Court, *see generally, e.g.*, NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* (2020); Brandon L. Bartels, *The Sources and Consequences of Polarization in the U.S. Supreme Court*, in *AMERICAN GRIDLOCK* 171 (James A. Thurber & Antoine Yoshinaka eds., 2015), some empirical work has also found such polarization in the federal courts of appeals, *see* LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES* 199 (2013); CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?* 41–43 (2006). For an overview, *see* Richard L. Hasen, *Polarization and the Judiciary*, 22 *ANN. REV. POL. SCI.* 261 (2019), which includes a review of studies on federal circuit courts, *id.* at 268–69.

<sup>104</sup> *See* Devins & Baum, *supra* note 88, at 355–56, 355 n.261. In the 2005–2016 Supreme Court Terms, the highest proportion of clerks hired from Republican-appointed lower court judges was 97.9% for Justice Thomas and the lowest was 23.4% for Justice Ginsburg. *See id.* at 356 tbl.4. By



### C. Data and Transparency

Another key finding of our study is that law clerk selection and diversity are rarely discussed among judges. Although judges have thought carefully about these issues, they are reluctant to be seen as intruding on each other's prerogatives. As a result, these issues are largely invisible within the culture of the judiciary. But our interviews also revealed that many judges — Democratic and Republican appointees — care deeply about which students become law clerks, both their own and throughout the judiciary. Many said they want clerks who provide multiple perspectives in order to get the best work product; others said it is important for public trust that clerks reflect the nation's diversity; still others said they want to open doors for individuals whose careers would benefit the most from a clerkship. And several judges said they would like to exchange ideas with their colleagues in order to better achieve their hiring goals.

As in other organizational contexts, it is difficult to bring these concerns to the fore without some degree of transparency. To that end, a key starting point for motivating and framing conversation about these issues is regular data collection and reporting. As noted, there is presently no official source of data on the composition of law clerks from year to year.<sup>105</sup> The only regular data on law clerk demographics, from the annual NALP survey of law graduates, do not include all clerks in a given year and are not reported by law school, geography, or level of court.<sup>106</sup> An annual report of law clerk demographics that is official, complete, and public would go a long way toward remedying the invisibility of the issues identified in our study.<sup>107</sup>

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contrast, during the 1975–1980 Terms, the “highest percentage of [Supreme Court] clerks drawn from Democratic-appointed judges was 68.2 (for Justice Marshall); the lowest . . . was 37.5 (for Justice Rehnquist).” *Id.* at 355 n.261. “In the 1981–1985 Terms, the highest . . . was 73.7 (for Justice Brennan); the lowest was 40.0 (for Rehnquist and Chief Justice Burger).” *Id.*

<sup>105</sup> See *supra* pp. 594–95.

<sup>106</sup> See *supra* note 26 and accompanying text.

<sup>107</sup> Similar reporting occurs in the private sector. Companies with more than 100 employees are legally mandated to report demographic workforce data to the Equal Employment Opportunity Commission (EEOC) through the Employment Information Report Component 1 (EEO-1). See 42 U.S.C. § 2000e-8(c); *EEO-1 Data Collection*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/eo-1-data-collection> [<https://perma.cc/ZH2N-KVKA>]. The EEO-1 demographic data includes sex and race or ethnicity data for each employee. *Id.* In addition, the Securities and Exchange Commission approved two rule changes in 2021 requiring NASDAQ-listed companies to publicly disclose voluntary information on the gender, racial, and LGBTQ+ status of their boards, and to have at least two diverse board members (at least one self-identified female and at least one underrepresented minority, which includes LGBTQ+ individuals) or to explain the lack thereof. See Order Approving Proposed Rule Changes to Adopt Listing Rules Related to Board Diversity, Release No. 34-92590, 86 Fed. Reg. 44424, 44424–25 (Aug. 12, 2021); see also Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. REV. 287, 300 (2021) (proposing mandatory disclosures as a new way to promote compliance with antidiscrimination law); All. for Fair Bd. Recruitment v. SEC, No. 21-60626, 2023 WL 6862856 (5th Cir. Oct. 18, 2023) (holding that the

Official data collection could build on an existing form that the Administrative Office of the United States Courts uses to collect demographic information from judicial branch employees “to aid the federal judiciary in reporting on equal employment opportunities.”<sup>108</sup> That form asks respondents to indicate their gender, disability status, and race or national origin. For law clerks, we suggest annual collection of this information, along with the court or jurisdiction where they are clerking, the law school they attended, veteran status, and socioeconomic indicators, such as parental education or whether they were the first in their family to attend college or law school. These data would be most useful to judges, professors, and students if they were reported in a manner that permits disaggregation by geography, jurisdiction, and level of court. Importantly, we do not suggest collecting or reporting data at the level of individual judges or in a manner that reveals individually identifiable information about any judge or clerk.<sup>109</sup> Such disclosure could discourage participation in data collection.

Based on our interviews, we believe many judges would welcome a degree of transparency in order to set the table for discussion of clerk hiring with their colleagues and faculty contacts. We recognize, however, that other judges may resist such transparency because they worry the data will cast the judiciary in a negative light or bring public pressure to bear on hiring decisions. We are not unsympathetic to these concerns. The role of judges and how they do their work are not well understood by the citizenry, and the characteristics that enable clerks to perform well in the unique environment of a judicial chambers are hardly matters of common knowledge. It is not without reason that

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Constitution doesn't apply to NASDAQ's diversity disclosure rules, given that it is a private entity, and thus the SEC acted within its authority in approving the rules). Prior to the adoption of this rule, many companies had voluntarily adopted such disclosures. See Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 VA. L. REV. 307, 336 (2023) (“Outside of regulators and legislatures, the private sector has begun to make changes towards more voluntary disclosures of diversity information and statistics.”).

<sup>108</sup> ADMIN. OFF. OF U.S. CTS., *supra* note 10. Completion of the form is “voluntary,” and the form states, “Your failure to do so will have no effect on you or your federal employment.” *Id.* To our knowledge, data from this form have not been used to monitor or publicly report on law clerk demographics.

<sup>109</sup> Of course, judges may voluntarily disclose the demographics of their clerks, as Judge Wilkins of the D.C. Circuit has done on OSCAR “[f]or transparency purposes” and to underscore that he “is committed to diversity and encourages persons of all backgrounds to apply.” See *Circuit Judge Robert L. Wilkins: 1 Year (Aug 01, 2022–Aug 01, 2023)*, OSCAR, [https://oscar.uscourts.gov/applicant/positions/judges/judges\\_list?mode=form&id=4doe35f5bb18e7cbo460e59f7e8e4188](https://oscar.uscourts.gov/applicant/positions/judges/judges_list?mode=form&id=4doe35f5bb18e7cbo460e59f7e8e4188) [https://perma.cc/P2K2-HH2A]. His OSCAR listing includes as an attachment a confidential survey of his clerks, which reports their demographics in the aggregate by race, gender, LGBTQ+ status, disability status, and “highest level of education attained by the person(s) who raised you.” JUDGE ROBERT WILKINS SURVEY OF LAW CLERK DEMOGRAPHICS, [https://oscar.uscourts.gov/applicant/positions/judges/judges\\_list?mode=form&id=4doe35f5bb18e7cbo460e59f7e8e4188](https://oscar.uscourts.gov/applicant/positions/judges/judges_list?mode=form&id=4doe35f5bb18e7cbo460e59f7e8e4188) [https://perma.cc/A44V-JTK8]. He also lists the names of all law schools from which he has hired clerks. *Circuit Judge Robert L. Wilkins: 1 Year (Aug 01, 2022–Aug 01, 2023)*, *supra*.

judges are highly protective of their prerogative to hire clerks of their choosing.

But public reporting of clerkship demographics need not take the form of a mere data dump that is left vulnerable to negative inferences. Instead, the data can be contextualized in numerous ways. Such reporting presents an opportunity to explain the role of law clerks in the judicial system and to encourage a broad range of individuals to apply. It also provides a common base of information for judges, law professors, clerkship advisors, and students to identify gaps in the applicant pool and to spur outreach to particular schools or communities of students. Some of the challenges we have discussed, such as the difficulty of attracting minority candidates to noncoastal cities and the role of financial considerations in determining who applies, may add further context to a demographic report. In addition, the data may reveal regional variation in clerk demographics, and such variation may prompt judges in different jurisdictions to learn from one another. Annual reporting also provides a basis for evaluating the impact of systemic initiatives such as the current hiring plan. Thoughtful elaboration of some or all of these elements, informed by judges' experiences and perspectives, may accompany the reporting of clerkship data in order to provide context and interpretation.

In sum, official reporting of annual clerkship data is likely to foster conversations and ideas that are not being surfaced today, which may lead some judges to try new approaches to achieving their hiring goals. Such transparency, we believe, would ultimately enhance public confidence in the judiciary. It also would be consistent with the aspiration of the *Strategic Plan for the Federal Judiciary* that “[j]udges . . . give special attention to diversity in their law clerk hiring practices.”<sup>110</sup>

#### *D. Organizational Structure*

Earlier we observed that judicial culture is characterized by decisional and institutional independence, decentralization in governance, and a degree of isolation from people other than each judge's own staff. When it comes to hiring clerks, every judge is his or her own boss and has virtually unbounded discretion. At the same time, our study suggests that these features make it difficult for many judges to achieve their hiring goals. To the extent that judges value diversity of law school, ideology, socioeconomic background, gender, race, or ethnicity, our study finds that achieving such diversity almost always requires intentionality: conscious effort and specific actions by judges to do outreach to students and law schools, to build and maintain relationships with professors and other recommenders, to probe carefully the background and qualifications of applicants beyond conventional proxies,

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<sup>110</sup> JUD. CONF. OF THE U.S., *supra* note 29, at 15.

and to recruit desired candidates. Yet judges have limited bandwidth to engage in such activities, and they have limited administrative support to facilitate outreach and relationship-building. In addition, there is little or no organizational infrastructure that enables judges to discuss hiring challenges and learn from one another.

This confluence of maximal discretion to determine hiring objectives yet limited capacity to effectuate them is unsurprising in an organizational context where every judge is his or her own human resources manager and his or her own diversity, equity, and inclusion officer. Because of capacity limitations and personal comfort level, many judges default to relying on established relationships with law schools, professors, and former clerks with whom they are most familiar. Lacking time or occasions to get to know different schools or faculty or to have in-depth discussions about candidates with recommenders, many judges use what they perceive to be low-risk proxies for talent — grades and law school ranking — even though we heard almost no indication that departing from such indicators is correlated with poor performance on the job. And without organizational mechanisms to facilitate discussion among judges about clerk hiring, a general norm of silence prevails, as does the status quo.

One can't keep doing the same thing and expect different results. But unlike many business organizations, the judiciary is not amenable to many of the strategies proposed for advancing workplace diversity and inclusion. For example, although there is evidence that visible leadership, clear metrics, and regular accountability are important,<sup>111</sup> these approaches are ill-suited to a system of co-equals in which each accords deference to the hiring decisions of others. Judges are not told what to seek or prioritize when hiring clerks, and there is no leadership structure for dictating such priorities. Although data collection and reporting can make issues visible and catalyze discussion, using metrics to hold judges accountable for progress toward diversity goals is a nonstarter. We understand firsthand why judges prize their independence and autonomy

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<sup>111</sup> In a systematic analysis of organizational strategies to improve diversity, researchers found that efforts to establish responsibility for diversity lead to the broadest increases in managerial diversity. Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOCIO. REV. 589, 590–91 (2006). The study found that networking and mentoring strategies have only modest effects and that efforts to moderate bias through diversity training do not lead to increases in diversity. *Id.* at 590. Drawing on this work, a recent study argues that the best approach to achieving diversity within an organization is to have “[a] central unit with responsibility for diversity outcomes” coupled with accountability structures. Ivuoma N. Onyeador et al., *Moving Beyond Implicit Bias Training: Policy Insights for Increasing Organizational Diversity*, 8 POL’Y INSIGHTS FROM BEHAV. & BRAIN SCIS. 19, 22 (2021); see also David Pedulla, *Diversity and Inclusion Efforts That Really Work*, HARV. BUS. REV. (May 12, 2020), <https://hbr.org/2020/05/diversity-and-inclusion-efforts-that-really-work> [<https://perma.cc/WR8D-BTN2>] (arguing that organizations should collect and analyze diversity data to “increase accountability and transparency”).

in hiring clerks. As one judge in our study said, it will not work to “tell [judges] what to do.”<sup>112</sup>

We take as given the values and preferences that judges have when hiring clerks; some judges look for socioeconomic diversity, others prioritize ideological diversity, still others seek racial diversity. Despite these differences, what judges have in common is limited capacity to undertake initiatives that may better serve their preferences. We propose one idea in response: the identification in each circuit of a *clerkship resource liaison* whom judges can consult for assistance in achieving their hiring objectives.

The main role of a clerkship resource liaison would be to help judges expand their networks and conduct outreach to faculty and students in ways that further their hiring objectives. To this end, the liaison would develop and maintain relationships with deans, clerkship directors, and professors in order to facilitate contacts between judges and law schools. For many judges, this would be especially helpful when it comes to schools outside of the top tier. Every school has its own grading system, clerkship support structure, and roster of faculty and areas of expertise; it does not make sense for every judge to start outreach from square one. A clerkship resource liaison could build a repository of continually updated knowledge and relationships that judges could access in accordance with their interests. This administrator could also communicate judges’ hiring priorities to law schools and arrange meetings with faculty or student groups when judges visit schools to speak on a panel or participate in a moot court. The liaison would serve as a natural counterpart to law school clerkship directors to facilitate such relationships. By lowering barriers to outreach, the liaison could help judges better reach the candidates they want.<sup>113</sup>

In addition to facilitating communication between judges and schools, a clerkship resource liaison could work more intensively with any interested judges. The liaison could become knowledgeable, on a confidential basis, about a judge’s hiring objectives, outreach and selection process, and perceived challenges, and then work with the judge to develop tailored strategies. To the extent that the judges in our sample had achieved diversity along the dimensions they valued, most of them

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<sup>112</sup> This point is underscored by research finding that because hiring managers value their independence, mandatory diversity training can threaten their sense of autonomy and elicit rebellion. See Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV., July–Aug. 2016, at 52, 54. Drawing upon a study of more than 800 companies over more than four decades, the authors conclude that when training is voluntary and managers are actively recruited to problem-solve, they are more likely to become committed to achieving diversity. FRANK DOBBIN & ALEXANDRA KALEV, GETTING TO DIVERSITY: WHAT WORKS AND WHAT DOESN’T 9, 19, 25–26, 33 (2022).

<sup>113</sup> In this way, the clerkship resource liaison could facilitate weak ties and enable better information-sharing among judges, clerkship directors and faculty, and candidates. See Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOCIO. 1360, 1373, 1376–78 (1973) (expanding on the sociological concept of weak ties).

emphasized the importance of being intentional rather than simply waiting to see who applies or filtering applicants through conventional screens. Some said their participation in our study helped them to reflect on their practices and possible improvements.<sup>114</sup> A clerkship resource liaison could facilitate such introspection on a regular basis, convey judges' hiring priorities to faculty and clerkship directors, and expand the capacity of judges to attract the applicants they want.

We envision that the position would be filled by an individual who has previously clerked and who has sufficient stature and credibility to work directly with judges, law professors, and senior administrators. Suitable candidates include law school clerkship directors and legal search consultants, and there may be other profiles that fit the role. Importantly, we do not conceive of the position as a diversity, equity, and inclusion officer for the circuit.<sup>115</sup> The role of a clerkship resource liaison would not be to advance any particular model of workplace diversity or to provide any guidance that judges may find intrusive. Instead, the role we propose is to help judges achieve *their* hiring goals,

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<sup>114</sup> For example, one judge was surprised to realize while preparing for the interview that he had hired only one Black clerk in nearly a decade. Another said the interview had given her the idea to ask her Black colleagues how they had succeeded in hiring many Black clerks. Another judge said, "Even these few minutes [of the interview] have been illuminating that you can find quality in lots of places, and lots of compelling life stories. I had not really thought about this until this conversation, that I'm not asking faculty for what I want explicitly enough."

<sup>115</sup> The Ninth Circuit in 2020 appointed a Diversity, Equity, and Inclusion Officer, a new position tasked with "developing and implementing strategic initiatives and best practices with respect to DEI matters in the workplace." See U.S. Court of Appeals, Ninth Circuit, *Diversity, Equity and Inclusion Officer*, SALARY.COM (Sept. 3, 2020), <https://www.salary.com/job/u-s-court-of-appeals-ninth-circuit/diversity-equity-and-inclusion-officer/282976d0-33f8-4204-b287-9d037a2f3b1a> [<https://perma.cc/3HGB-YRZR>]. To our knowledge, the Ninth Circuit is the only circuit that has taken this step.

We note that the appointment of diversity, equity, and inclusion officers has been widespread in law firms, universities, and the corporate sector. See Arriana McLymore & Caroline Spiezio, *Law Firm Diversity Chiefs Gain Numbers — And Influence*, REUTERS (July 7, 2021, 10:55 AM), <https://www.reuters.com/legal/legalindustry/law-firm-diversity-chiefs-gain-numbers-influence-2021-07-07> [<https://perma.cc/GAL2-SQ4Q>]; Chip Cutter & Lauren Weber, *Demand for Chief Diversity Officers Is High. So Is Turnover*, WALL ST. J. (July 13, 2020, 7:00 AM), <https://www.wsj.com/articles/demand-for-chief-diversity-officers-is-high-so-is-turnover-11594638000> [<https://perma.cc/DN9F-RL6Z>]; Ben Gose, *The Rise of the Chief Diversity Officer*, CHRON. HIGHER EDUC. (Sept. 29, 2006), <https://www.chronicle.com/article/the-rise-of-the-chief-diversity-officer> [<https://perma.cc/3BWV-5UFB>]. But some have criticized these efforts as virtue signaling or "performative solidarity" with little real efficacy. Tsedale M. Melaku & Christoph Winkler, *Are Your Organization's DEI Efforts Superficial or Structural?*, HARV. BUS. REV. (June 29, 2022), <https://hbr.org/2022/06/are-your-organizations-dei-efforts-superficial-or-structural> [<https://perma.cc/M5L3-CUG6>]; see Steven W. Bradley et al., *The Impact of Chief Diversity Officers on Diverse Faculty Hiring*, 89 S. ECON. J. 3, 23–24 (2022) (finding no significant difference in diversity among faculty hires in universities that have a chief diversity officer compared to those that do not). And a substantial body of scholarship argues that employers often adopt symbolic responses to diversity challenges instead of addressing underlying problems. See, e.g., LAUREN B. EDELMAN, WORKING LAW 218–25 (2016); Linda Hamilton Krieger, Rachel Kahn Best & Lauren B. Edelman, *When "Best Practices" Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases*, 40 LAW & SOC. INQUIRY 843, 861 (2015).

whatever they may be. Judges would avail themselves of clerkship resources on a voluntary basis, and there would be no expectation of conformity to any specific practice or objective.

A possible concern is that the liaison would serve as a conduit to information and relationships in a context where judges may be competing for the same talent pool. An element of competition in the clerkship market may be unavoidable, and some judges may prefer to rely on their own networks. Nevertheless, a few factors might mitigate this concern. First, as our study reveals, judges differ in their hiring goals; not every judge is looking for the same kinds of applicants. Second, we suggest that the clerkship resource liaison, as a rule, have no role in advising or interacting directly with clerkship candidates. This boundary would help ensure that the liaison is not put in a position that could be seen as steering candidates toward one judge or another. Third, in order to succeed in the role, the liaison would have to build relationships with judges and gain their trust. A person in that role would have every incentive to protect confidences, to be a fair and honest broker, and to avoid any appearance or reality of favoring some judges over others. The liaison should function as a facilitator, not a gatekeeper.

It is also possible that a clerkship resource liaison would be perceived as eroding the competitive advantage some judges feel they have because of their own sources of referrals. But the liaison's role would be counterproductive if it simply intensified competition for the same narrow slice of applicants. The main purpose of such a position is to enlarge or reshape the applicant pool for judges who want more diversity (as they define it), resulting in fewer situations in which judges are competing for a limited group of candidates.

Importantly, by virtue of the trust and broad perspective gained from working with many judges, a clerkship resource liaison would be well positioned to bring judges into conversation with one another. While a judicial conference or retreat can give visibility to the topic of law clerk selection and diversity, our interviews suggest that voluntary, informal discussion among colleagues may be especially conducive to tackling sensitive topics. One judge said she perceives a difficult trade-off between racial diversity and socioeconomic diversity. Another worried that his status as a feeder has compromised his willingness to hire clerks from nonelite schools. More than one judge expressed interest in hiring more diverse clerks but struggled to attract applicants or felt hesitant about candidates without conventional credentials. Although these are not easy topics, they are many judges' real concerns.

A clerkship resource liaison who knows which judges have what concerns can, with a deft touch, facilitate connections to colleagues who have experience and ideas on how to address those concerns. We found that many judges are interested in their colleagues' practices and would be open to learning, for example, how Black judges succeed in hiring Black clerks. And many Black judges, among others, indicated

willingness — even eagerness — to share their experiences in a manner that is respectful of every judge’s hiring prerogative. Yet the norm of silence on these issues will not change without a catalyst. By facilitating informal conversations among colleagues, a clerkship resource liaison can gradually foster a culture in which judges discuss common challenges in clerk hiring and learn effective practices from one another.<sup>116</sup> While ultimately each judge will determine whom to hire and why, access to a broader range of resources and perspectives can help judges become more intentional in their hiring practices and more successful in achieving the results they intend.

### CONCLUSION

Without exception, the fifty circuit judges with whom we spoke impressed us with their candor, thoughtfulness, and commitment to public service. While each judge offered his or her own understanding of diversity and considered opinion as to its relative importance in hiring law clerks, all of them expressed commitment to hiring clerks who will assist them in producing work of the highest quality.

Our interviews revealed that judges understand diversity capaciously and often seek it along several dimensions within each cohort of clerks. At the same time, many judges reported that it was difficult to achieve the diversity they desired. The judges who have been most successful in achieving diversity, however defined, are those who have taken intentional steps to attract the diversity of applicants they want, instead of merely seeking that diversity within the pool of candidates who happen to apply. With regard to racial diversity, some judges voiced opposition or reluctance toward race-conscious hiring and several worried about having to compromise on quality, whereas others — predominantly though not exclusively Black judges — rejected any trade-off between excellence and diversity as a false dichotomy. Further, our study finds that minority judges as well as judges who graduated from nonelite law schools are more apt to hire clerks with those characteristics. Diversity among judges affects diversity among clerks.

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<sup>116</sup> An example involving university faculty hiring may be instructive. In the context of efforts to hire more women faculty in science and engineering at the University of Wisconsin–Madison, focus groups described challenges likely shared by federal judges in hiring clerks: the university is a decentralized organization; faculty often possess no experience in hiring or serving on a search committee; and faculty tend to be more receptive to initiatives led by their peers than externally imposed mandates. See Jennifer T. Sheridan et al., *Searching for Excellence & Diversity: Increasing the Hiring of Women Faculty at One Academic Medical Center*, 85 ACAD. MED. 999, 1000 (2010). Faculty tended to view “workshops emanating from campus administration as a nuisance,” while placing a high value on programs initiated by fellow faculty members. *Id.* In response, the authors located the initiative within a research center and designed it to be faculty-led and evidence-based. *Id.* They found that departments participating in at least one workshop during a three-year period experienced an increase in the percentage of women faculty hired. *Id.* at 1003.



Moreover, judges uniformly reported that the topic of law clerk diversity is rarely broached within the judiciary, even as many expressed an eagerness to learn from their colleagues. This cultural norm of silence, along with structural features of the hiring process, makes it difficult for judges to learn new practices that might help them achieve their hiring objectives. We view this finding as particularly significant because judges are likely to be most receptive to the views and practices of their peers. Accordingly, we propose measures to facilitate peer exchange and increase judges' capacity to achieve their hiring objectives. We also suggest official annual reporting of law clerk demographics in order to provide transparency, catalyze outreach to various groups, and measure changes over time.