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Unequal Opportunities: Education Pathways to the U.S. Judiciary

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This paper is about diversity in federal and state courts in the United States. My main argument is that we should promote a judiciary that is reflective of the society of which it is a part for three reasons: first, because in doing so, we gain critical awareness of barriers to judicial service; second, because in doing so, we are also promoting access to resources, education and opportunities in the legal profession; and third, because it is possible (although not automatic) that a reflective judiciary will broaden the range of experience and perspective on the matters involved in the cases themselves. I will focus primarily on the first and second of these points, with some attention to individual judges in the paper’s closing section.

In the U. S., members of the bar become judges usually after a distinguished career in practice or the academy. There are no civil service exams to enter the judiciary. Under the U.S. Constitution, federal (i.e., Article III) judges reach the federal bench via presidential nomination and senatorial confirmation. States systems are separate. State judges attain their positions in various ways. The formal routes include election (partisan or nonpartisan), gubernatorial appointment, legislative appointment, or nomination by commission, otherwise known as the merit system. The customary understanding of merit selection includes a nonpartisan or bipartisan commission that nominates a limited number of individuals to the executive when a judicial vacancy occurs, for executive appointment, with continuing tenure on the bench dependent upon a subsequent retention election. In such elections, the judge is unopposed on the ballot; voters decide whether or not to retain the judge. Some state judges are elected directly by the public, like any other candidate for public office in a partisan election.1

Diversity of the bench is directly related to how judges are appointed and, especially, the candidate pools from which they are appointed. Therefore, the consequences of a broadly conceived sense of diversity will not only foster judicial legitimacy, but also the most fundamental values inherent in our society—democracy, fairness and, as I will

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especially argue below, access to education at all levels (primary, secondary, college and law school).

For the judiciary to be truly reflective of society, candidate pools must also be reflective. For this to occur with regularity, access to education is necessary at all levels of society. Education is the primary pathway to the bar and ultimately, the judiciary. A reflective judiciary is, therefore, like the canary in the mine—an indicator of access to education and to professional opportunity within the legal profession. When barriers exist to education, barriers exist to the judiciary as well. I could not, therefore, disagree more with Chief Justice Roberts than when he sought to bar the use of race to determine which public schools certain children may attend. He stated: "The way to stop discriminating on the basis of race is to stop discriminating on the basis of race."\(^\text{2}\) I disagree, because the evidence shows that various creative policy initiatives are necessary if we are to attain a non-discriminatory society through educational opportunity.

In part one of this paper, I will discuss various pathways to the federal and state judiciaries—gateways and impasses (“bottlenecks”). I will emphasize access to education and the role education plays as a gateway. As we shall see, progress has been made in the United States in the decades since the Civil Rights Act of 1964, but barriers persist. This is evident in the patterns of minority and female participation on the federal and state appellate bench: appointment favors men over women, and whites over minorities. We will look within those patterns to identify further gateways and bottlenecks. In part II, we then look to the human side of the law—namely judges—and discuss, briefly, illustrious judicial careers whose existence is owed to diversity in the federal judiciary.

I. DIVERSITY AND EDUCATION

Diversity matters at all judicial levels because, as published data will show, the judiciary is a bellwether for a democratic society - a yardstick to tell us how we're doing in terms of maintaining a democratic culture at all levels. A value on diversity throughout the judiciary but especially at the top exerts positive pressure all the way down. Moreover systematic exclusion isn't healthy for society in general or the legitimacy of the judiciary in particular.

The importance of diversity to education was forcefully recognized by Justice Sandra Day O’Connor, writing for the majority in \textit{Grutter v. Bollinger} in 2003\(^\text{3}\), upholding the use of race as a factor in decisions admitting students into law school:

\begin{quote}
We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to ‘sustaining our political and cultural heritage’ with a fundamental role in maintaining the fabric of society.\(^\text{4}\)
\end{quote}

\(^3\) 539 U. S. 306 (2003).
\(^4\) \textit{Id.} at 331 (quoting Plyler v. Doe, 457 U.S. 202, 221 (1982)).
Moreover, universities, and in particular, law schools, represent the training ground for a large number of our nation’s leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. In 2003, the Supreme Court said: “[t]he pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.” In fact, all eight Justices currently sitting on the Supreme Court as of this writing attended either Harvard or Yale.

Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

A. Higher Education and Judicial Diversity: Pathways and Bottlenecks

Race, ethnicity, gender and income structure and often block access to education, and thus to law school, law practice and the judiciary. An examination of the demographics of education and law practice, tell a story of career mobility into the judiciary with education as the driver. The effects of education are stronger at each level up the judiciary and are strongest, perhaps, at the federal level.

High school education varies widely by race and ethnicity – children of poor families of any race, and non-whites drop out at higher rates than children of wealthier or white families. Urban and minority-heavy public primary school systems like Chicago Public Schools are often drastically underfunded compared to their suburban counterparts. The effects of poor high school education are compounded throughout a person’s life. Someone who drops out of high school is likely to earn less and less likely to be

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7 Id. at 5.
8 Grutter, 539 U.S. at 332.
10 Grutter, 539 U.S. at 332.
employed than someone who graduates high school. A high school diploma is all but a necessity for admittance to an undergraduate institution, much less a law school.

The lack of people of color in law schools is especially noteworthy since undergraduate admissions of people of color at some top schools are higher (e.g., 12.1 percent at Harvard, 16.8 percent at Williams). Overall, the distribution of whites and minorities in higher education has tended to improve since the beginning of the 21st century. In 2009-10, African Americans represented 12.5 percent of all bachelors’ degrees; Hispanics 8.8 percent, Asian Americans 7.3 percent, American Indians and Alaska Natives 0.6 percent; whites 72.9 percent – the only racial group for whom conferred degrees declined over the previous decade. Of course, talented undergraduates may choose careers outside of law, but these differences can serve as rough benchmarks.

In 2015, the US Census Bureau estimated that African Americans comprised 13.9 percent of the total American population of 321.4 million. None of the top law schools regularly admits a student cohort reflective of the diversity of the population at large; Harvard comes closest, with 8.7 percent of its recent admission offers going to African Americans. About 12 percent of active district court judges are African-American, with 10.1 and 3.0 percent being Hispanic or Asian-American, respectively. Black judges also account for 13 percent of active circuit court of appeals judges, and only 5.3 percent of senior judges. This number has improved significantly due to a targeted effort by President Obama in nominating more non-white judges. Women are also significantly underrepresented on the federal bench: about 32 percent of both the active district and court of appeals judges are women.

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14 Many of the nation’s highest-rated colleges and universities have recently released data on the makeup of those students accepted for admission into the Class of 2019, indicating the racial and ethnic breakdown of accepted students. 12.1 percent of accepted students at Harvard are African-Americans. Black/African American students account for 11.6 percent of all admitted students at Pomona College. *Black Students Admitted to a Select Group of Colleges and Universities*, JOURNAL OF BLACKS IN HIGHER EDUC., http://www jbhe.com/2015/04/black-students-admitted-to-a-select-group-of-colleges-and-universities/.


18 Id.


20 Id. at 14.


22 McMILLION, supra note 23 at 13; 21.
The breakthroughs made by some elite schools at the undergraduate level have not transferred to elite law schools. In a recent survey of the top 15 law schools, Harvard, as I mentioned above, led the way. Others were well below that—Cornell, for example, was 6.4 percent.23 The law schools with the two lowest percentage of Black students among the 15 highest-ranked schools are the University of California Berkeley (4.4) and the University of Michigan (3.6).24

The latter figures may show the impact of recent bans on “affirmative action.” In both California and Michigan, among other states, public law schools are prohibited by state law from considering race in admissions decisions.25 These state law bans have dropped minority enrollment in higher education precipitously.26

*Grutter’s* viability as a precedent was watered down considerably by a differently constituted Supreme Court in 2013 in *Fisher v. University of Texas.*27 This case is now referred to as *Fisher I.* The Court explained that a university’s use of race must meet strict scrutiny, even if it is intended to promote diversity.28 This higher standard makes it significantly more difficult for a university to justify affirmative action programs. Justices Scalia29 and Thomas30 concurred in the opinion and reaffirmed their belief that *Grutter* should be altogether overturned.

In the 2016 sequel to *Fisher I,* a seven-member31 Supreme Court upheld the University of Texas’s admissions program that considered race as part of a set of holistic criteria32—a “factor of a factor of a factor.”33 This case is now generally called *Fisher II.* The result was a surprise to many commentators, who feared that the case could be a death knell for *Grutter.*34 The majority opinion is a repudiation of the white racial privilege and grievance that can be seen as the true impetus behind Abagail Fisher’s decision to sue the university—it seems to be asking why Fisher concentrated so heavily on one tiny factor when other admissions policies played a larger role in keeping her out of UT.35 The

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23 *JOURNAL OF BLACKS IN HIGHER EDUC.,* supra note 20.
24 *JOURNAL OF BLACKS IN HIGHER EDUC.,* supra note 20.
26 *Id.*
28 *Id.* at 2418.
29 *Id.* at 2242 (Scalia, J., concurring).
30 *Id.* at 2242 (Thomas, J., concurring).
31 Justice Scalia had passed away between argument and decision, see Liptak, *supra* note 9, and Justice Kagan recused herself due to her work on the case as Solicitor General. Adam Liptak, *Supreme Court Upholds Affirmative Action Program at University of Texas,* N.Y. TIMES, June 23, 2016.
33 *Id.* at 2207 (quoting 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009)).
35 For example, Fisher did not fall within the top 10 percent of her high school class. Those who fall within that range receive automatic admission to the university and account for about 75 percent of admitted students each year. Fisher II, 136 S.Ct. at 2208–9.
decision admitted that race-neutral practices were insufficient to creative “sufficient racial diversity”\(^{36}\) to ensure the “cross-racial understanding”\(^{37}\) and “increasingly diverse workforce and society”\(^{38}\) that stem from diversity in education. Justice Kennedy ends the majority opinion by stating: “it remains an enduring challenge to our Nation’s education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.”\(^{39}\) Perhaps most strikingly, all of the dissenting Justices (save Justice Thomas) confine their dissent to the majority’s application of *Fisher I*’s strict scrutiny standard.\(^{40}\) None except Thomas urge the majority to overturn *Grutter*.

The majority’s opinion can also be read to repudiate the “mismatch theory” infamously asserted by the late Justice Scalia in *Fisher II*’s oral arguments.\(^{41}\) It is clear that law students of color do not need to be slow-tracked into lesser law schools. They can keep up with their white colleagues, even at elite schools (if they manage to get in).\(^{42}\) The root of the judiciary’s diversity problem lies partially with admission rates, rather than individual performance.

The fact is that public universities have now developed significant “enrollment gaps” in states where affirmative action is banned in college admissions: California, Florida, Michigan, and Washington.\(^{43}\) This finding helps account, in part, for the bottleneck mentioned earlier, in the transition from college to law school, and shows the relevance of public policy and legal supports for maintaining the conditions that support a reflective judiciary.

Turning from law schools to the bar, we note that only 3.95 percent of the lawyers at large law firms are African American, and even fewer become partners.\(^{44}\) The American Lawyer magazine refers to this as the “leaky pipeline” between law schools and practice.\(^{45}\) This bottleneck is significant since judges tend to be drawn from large firms. In 2010, 71.5 percent of all law students were white, but 88.1 percent of all practicing lawyers were white.\(^{46}\) This appears to indicate a significant professional gap between law school and participation in the legal profession.

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\(^{36}\) *Id.* at 2211.

\(^{37}\) *Grutter*, 539 U.S. at 328.

\(^{38}\) *Id.* at 330.

\(^{39}\) *Fisher II*, 136 S.Ct. at 2214.

\(^{40}\) *Id.* at 2215–16 (Alito, J., dissenting).


\(^{43}\) *How Minorities Fare*, supra note 29.

\(^{44}\) M.P. McQueen, *Diversity Scorecard: Minorities Make Small Gains in Big Law*, AM. LAWYER, May 23, 2016.

\(^{45}\) *Id.*

On the federal level, however, at least some progress seems to have been made with respect to male minorities. Of the active U.S. circuit court judges, 51.2 percent are white men, 25.3 percent are white women, 16.7 percent are non-white men, and 6.8 percent are non-white women.\textsuperscript{47} Altogether, 48.8 percent of active circuit court judges are women or minorities.\textsuperscript{47} In contrast, of senior circuit court judges, appointed much earlier, 80.7 percent are white men, 9.6 percent are white women, 8.8 percent are non-white men, and less than 1.0 percent are non-white women.\textsuperscript{48} Of active U.S. district court judges, 52.7 percent are white men, 22.1 percent are white women, 15.4 percent are non-white men, and 9.8 percent are non-white women.\textsuperscript{49} Altogether, 47.3 percent of active district court judges are women or minorities.\textsuperscript{50}

As we will see, however, there is significant variation by state and by region. For example, the 11th U.S. Circuit Court of Appeals represents Alabama, Florida, and Georgia. Its territory comprises the highest percentage of black Americans—approximately 25 percent\textsuperscript{51}—of any federal judicial circuit in the country. Today, there are eleven judges on "active" status on the bench there and eight more on "senior" status.\textsuperscript{52} Of these nineteen jurists, only one is black—Judge Charles Wilson, who was appointed by President Bill Clinton in 1999.\textsuperscript{53} Judge Wilson, in turn, replaced Judge Joseph Hatchett, the first black judge ever to serve in the 11th Circuit since its creation in 1981.\textsuperscript{54} There have been six vacancies on the 11th Circuit since President Obama took office in January 2009. He has only nominated one African-American to fill these gaps—Abdul Kallon in 2016.\textsuperscript{55} The Senate has confirmed two of Obama’s 11th Circuit nominees—Adalberto Jordan and Beverly Martin, a Hispanic man and a white woman.\textsuperscript{56} Here we are most likely witnessing political bottlenecks as the Republican dominated senate delegations of these states have vigorously resisted most Obama nominees.

Looking to the future, the nation is becoming more diverse in ways that should favor increasing diversity of our institutions at all levels if education and the professions are reflective of the population at large.\textsuperscript{57} But that is a big “if”. The demographic shifts in

\textsuperscript{47} MCMILLION, \textit{supra} note 23.
\textsuperscript{48} MCMILLION, \textit{supra} note 23.
\textsuperscript{49} MCMILLION, \textit{supra} note 23.
\textsuperscript{50} MCMILLION, \textit{supra} note 23.
\textsuperscript{51} U.S. CENSUS BUREAU, \textit{supra} note 19.
\textsuperscript{56} Peacock, \textit{supra} note 60.
the United States are just as likely to make more visible the obstacles to equal access and participation.

B. High school to college: Dropouts and Wealth Disparities

These future demographic changes place an even greater premium on access to quality education at the primary and secondary levels of education as well as the affordability of college and law school beyond that. Who can qualify as candidates for college even as our demographics change? Obviously, high school drop outs cannot.

The United States is facing a dropout crisis – over 3 percent of high school students drop out each year, and over 6 percent of young adults are of high school age but lack a high school degree. That totals to over a million students per year either leaving high school early or lacking the credentials needed to move up to the next level of education.

Poverty and dropouts are inextricably connected. In 2009, poor (bottom 20 percent of all family incomes) students were about four times more likely to drop out of high school than high-income students. Child poverty is rampant in the U.S., with 22 percent of school-age children living in poor families. And poverty rates for Black and Hispanic families are three times the rates for white families. Students struggling financially have many reasons to miss school. Many of them have to take care of another relative at home. Some have to walk through violent streets on their way to school. Wide disparities in race and socioeconomic status continue to plague high school attendance.

In this context, it is important to note that many of what once were reliable gateways to higher education for poor and middle class students are changing significantly, as many public primary schools and universities essentially have become privatized as state funding recedes and costs and tuitions escalate.

59 Id. at A-1.
60 Id. at 27.
62 Id. at 54.
63 Id.
The Supreme Court has not been very supportive when it comes to advancing affirmative action with regard to high school students. In *Parents Involved in Community Schools v. Seattle School District*, the court considered student assignment plans that school districts voluntarily adopted that relied on race to determine which schools certain children may attend. The Seattle district had never historically operated segregated schools or been ordered to desegregate. The district classified children as white or nonwhite, and used the racial classifications as a “tiebreaker” to allocate slots in particular high schools in an attempt to keep them racially diverse. The Supreme Court held this use of race unconstitutional. The school districts had not carried their heavy burden of showing that the interest they seek to achieve justifies the means they had chosen—assigning students based in part on race in the name of equality.

In an eloquent dissent, Justice Breyer took issue with this ruling, noting that in his mind the context in which racial criteria were used here justified the school district’s policy. Among other arguments, he invoked democracy:

> [T]here is a democratic element: an interest in producing an educational environment that reflects the ‘pluralistic society’ in which our children will live . . . . It is an interest in helping our children learn to work and play together with children of different racial backgrounds. It is an interest in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation.

He went on to state that the majority should acknowledge the compelling nature of this interest in light of *Grutter*, and emphasized that the seminal *Brown* case concerned primary schools. “Primary and secondary schools are where the education of this Nation’s children begins, where each of us begins to absorb those values we carry with us to the end of our days.”

**C. Other Diversity Factors and Bottlenecks—Gender**

Nationally, women are entering higher education and post-graduate education at higher rates than men. This is true for all racial and ethnic groups; women’s greater participation in education is especially marked in more rural communities. This suggests that efforts to sustain a reflective judiciary in terms of race/ethnicity should

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68 Id. at 712.
69 Id. at 712.
70 Id. at 730.
71 Id. at 840 (Breyer, J., dissenting).
72 Id. at 841 (Breyer, J., dissenting).
73 Id. at 841 (Breyer, J., dissenting).
automatically increase the percentage of women.\textsuperscript{76} Recent American Bar Association data show that women make up 36 percent of the licensed bar, but only 18 percent of partners at large firms.\textsuperscript{77} Women also make up only 27 percent of the state and federal judiciaries.\textsuperscript{78} Women of color have it even worse than white women; for example, women of color make up only 3.41 percent of Fortune 500 general counsels\textsuperscript{79} and less than 2 percent of partners in major firms.\textsuperscript{80} They are much more likely to experience workplace discrimination and friction with their peers.\textsuperscript{81} These intersection points between race and gender highlight the double discrimination that women of color face in the legal profession. It seems that women suffer a similar “leaky pipeline” as African-Americans – increasing numbers of women in law school or in the bar do not necessarily lead to increasing numbers of women in prestigious positions.

Given the importance of a successful legal career as a pathway to the bench, the numbers of minorities in major law firms and minority women in particular are of great importance. Their experiences point to another bottleneck along the way to the judiciary.

\textit{Diversity on State Courts}

The Brennan Justice Center published a report indicating that diversity on state courts was far worse than one might expect. “Today, white males are overrepresented on state appellate benches by a margin of nearly two-to-one. Almost every other demographic group is underrepresented when compared to their share of the nation’s population.”\textsuperscript{82}

The report points implicit bias in the formation of the candidate pools, as well as the profession’s failure to engage in direct and effective outreach for minority and women applicants. In addition, these pools of applicants, although statistically larger than before, are more fragile than the consistently large and deep pools of white males available. Inequalities in state judiciaries contribute to inequalities in the federal judiciary.

\textbf{II. The human face of law}

\textsuperscript{76} \textit{Id}.
\textsuperscript{77} \textit{AM. BAR ASS’N, A CURRENT GLANCE AT WOMEN IN THE LAW} 2 (2016), http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_may2016.authcheckdam.pdf.
\textsuperscript{78} \textit{Id.} at 5.
\textsuperscript{79} \textit{AM. BAR ASS’N, VISIBLE INVISIBILITY V} (2015), http://www.americanbar.org/content/dam/aba/marketing/women/visible_invisibility_fortune500_executive_summary.authcheckdam.pdf.
\textsuperscript{80} \textit{Minorities & Women}, NATIONAL ASSOCIATION FOR LAW PLACEMENT, http://www.nalp.org/minoritieswomen
\textsuperscript{81} \textit{VISIBLE INVISIBILITY}, \textit{supra} note 88 at XII.
We have been reviewing rationales for a reflective judiciary based on the ladder of educational and professional opportunity. But those are not the only rationales for a reflective judiciary. Judges are the human face of the law, and international, as well as domestic, observers look to the courts’ composition as a measure of how well the law represents and is accessible to a diverse population. In a memo last month to the Georgia governor advocating for diverse judicial nominees, retiring Georgia Supreme Court Judge John Allen explained, “Unquestionably, judges are influenced in their notion of justice by their unique life experiences. It would be a travesty to the population served if their justice is reflected only in terms of the 'white male' experience.”

Experience matters, both in informing the court’s opinions and in ensuring that the population feels “part of the process and not an outsider looking in,” as Justice Sonia Sotomayor described an unrepresented community’s possible relationship to the courts.

I will conclude with three brief vignettes of the appointment of three judges. Each of their appointments seemed unlikely from a statistical standpoint, but each was groundbreaking in its own way. More importantly, they all had two things in common: a great education and a commitment to justice through law.

A. Elbert Parr Tuttle

On my office wall hangs a picture of the Fifth Circuit Court of Appeals, circa 1970. At that time the court consisted of 19 judges (active and senior)—all white males. Yet there were other kinds of diversity on that court—political and geographical—hidden from view. Elbert Parr Tuttle was born in California but grew up in Hawaii—a highly unlikely location for someone appointed to a judgeship in a Deep South state like Georgia. His family was not wealthy, but did place great weight on high-quality education. He went to the Punahao Academy in Hawaii—an excellent secondary school, the same one attended by President Obama. He then broke into the Ivy League, first at Cornell University and then on to the Cornell Law School. He made the most of his opportunities, graduating from college and law school with high honors. He moved to the Deep South after he met his wife, Sara Sutherland, and opened a law firm in Atlanta, Georgia with her brother, William Sutherland. The firm of Sutherland and Tuttle thrived and became one of the region’s and nation’s first and leading firm specializing in Tax Law.

Judge Tuttle’s parents had been lifelong Republicans when the party was truly the party of Abraham Lincoln. It supported integration and had many blacks as members. The Republican Party was founded in 1854 mainly to end slavery, and for two decades it honorably promoted African-American equality. Its first presidential nominee, pioneer

85 For this section, see generally ANNE EMMANUEL, ELBERT PARR TUTTLE: CHIEF JURIST OF THE CIVIL RIGHTS REVOLUTION (2011).
James C. Frémont, took a staunch anti-slavery stand in 1856 and ran well, paving the way for Abraham Lincoln's election four years later. In fact, Judge Tuttle’s mother’s father had died in Andersonville, Georgia at a confederate prisoner-of-war camp during the American Civil War. When Judge Tuttle explored the politics of a state like Georgia in the 1920’s, he found nothing but the white, consciously racist, Democratic Party. He once described the Democratic Party of Georgia as “paternalistic at best, and autocratic at worst . . . . [n]othing ‘democratic’ about it at all except the name.” He remained nominally a Republican, and when Eisenhower sought the nomination and eventually won the Presidency as a Republican in 1952, Tuttle had already come to the attention of the new administration. At the Republican Convention he had skillfully enabled the Eisenhower delegation to be seated as the delegates from Georgia, rather than the rival Taft delegation. This bit of convention maneuvering put Eisenhower over the top in delegates and clinched the Republican nomination. When the Republican Party won the Presidency in 1952 and looked to Georgia to determine whom they might appoint to an open seat on the Fifth Circuit Court of Appeals, there were not many Republicans to choose from. Most of the party of Lincoln in the Deep South was black, uneducated, and greatly discouraged or prevented from voting. There were few educated Republicans in the Deep South then, much less lawyers. Tuttle was an obvious choice.

He came to that Court not only as an accomplished, highly regarded tax lawyer, but someone who fought against the racism in the South long before he became a judge. He had, for example, argued, on a pro bono basis, several high profile cases seeking to protect the human rights of African-Americans. But perhaps more important was the perspective on race he brought, in large part due to his upbringing in Hawaii—a multi-cultural, multi-racial society. He once told the story of being stopped by the police in Atlanta because he was driving with a black man in the front seat of the car. He had to explain to the policeman that all was fine—he was just giving the man a ride home. He often reflected on how easy it was for him to understand the fact that race should not be a factor, causing suspicion like this, in the course of going about everyday life like this.

Elbert P. Tuttle was appointed to the Fifth Circuit in 1954 shortly after the landmark case of Brown v. Board of Education was decided. That case made the exclusion from educational institutions of persons solely on the basis of their race unconstitutional, but its implementation was truly undertaken “with all deliberate speed.” Much of the litigation it spawned took place in the Fifth Circuit which then included the states of Alabama, Florida, Georgia, Louisiana, Mississippi and Texas. (It has now been divided into the 5th and the 11th Circuits). Brown was eventually extended and applied to many areas beyond education. What was effectively a system of apartheid established

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90 Brown v. Board of Educ., 349 U.S. 294, 301 (1955). This case is commonly known as Brown II.
throughout the South by the use of state laws mandating *de jure* racial discrimination finally began to fall. The eradication of *de jure* segregation did not, however, occur without enormous resistance. Judge Tuttle was the Chief Judge of the Fifth Circuit throughout the Civil Rights struggle.

His leadership on the Court was bolstered by other Republican appointees who shared a similar integrationist philosophy —John Minor Wisdom in Louisiana and John R. Brown in Texas for example. Wisdom was native to Louisiana but Brown came from Nebraska. These three, along with Judge Rives from Alabama, helped transform the South and abolished what was in fact a system of state imposed apartheid.

Judge Tuttle was white, from a marginal state, and appointed by a political party whose views compared to the majority party in the South at that time were highly progressive. His education and success as a major lawyer in the region made him an obvious appointment.  He shaped the law for generations to come.

B. Constance Baker Motley

Constance Baker Motley was the first black woman to become a judge on a federal court in the United States, having been appointed to the Federal District Court in New York in 1966 by President Lyndon Johnson. She rose to prominence as an attorney with the NAACP, a job she held since the early 1940’s, and in that capacity she was recognized as one of the most courageous, creative and effective advocates for racial equality in her day. She argued innumerable cases in the Supreme Court and throughout the Deep South—almost all of them successfully—challenging what was then truly a system of apartheid. Attorney Motley played a key role, but the fact she was able to play this important role and ultimately become a Judge herself occurred, in retrospect, more by chance than design.

Constance Baker was born in New Haven, Connecticut in 1921, the ninth of twelve children of parents from the Caribbean island of Nevis. “Her father worked as a chef for various Yale University student organizations, including Skull and Bones, and her mother was a domestic worker.” Constance Baker was an excellent high school student who never expected to go to college, much less law school. Her family simply could not afford it. In a feature story about her published in the New Yorker magazine in 1994, (shortly, by the way, after Judge Motley visited our Law School) the author of that profile, Marie Brenner, recounted a speech Motley gave upon her induction into the Women’s Hall of Fame in Seneca Falls, New York. While the other honorees talked

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92 For background on Judge Motley’s life and career, see generally CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER THE LAW (1998).
94 *Id.*
95 *Id.*
96 *Id.*
about politics, Motley talked about education and the impact one man in particular had had on her career.

“There was no money for me to go to college,” she said. “I went to work at the National Youth Administration, and one day I gave a speech at a black community house. Clarence Blakeslee had built the community house. He was a contractor who had done a lot of work at Yale. He had made millions of dollars, and what he did with those millions was to help educate black Americans.” Blakeslee had been impressed by the teenager’s speech and had asked her where she would attend college. When Baker told him that her parents could not afford to send her, he offered to pay for her education.

She chose to attend Fisk University in Nashville; she did not think that the segregation of the South would bother her. Her frightened parents refused to cross the Mason-Dixon Line. “On her first trip home, she brought them back a ‘Colored Only’ sign.” After two years at Fisk, she transferred to NYU and graduated in 1943. When Blakeslee asked her what she wanted to do next, she said she had always wanted to go to law school. As she put it, “When I was 15, I decided I wanted to be a lawyer. No one thought this was a good idea.” Luckily, Blakeslee did and he financed her legal education as well. She became one of the foremost civil rights attorneys of her day.

Her career and accomplishments were made possible through the generosity of a single individual. As we will see below, the educational access challenges she faced as a child from a poor New Haven family, unable to finance her own education, persist today. Moreover, changes in the constitutionality of affirmative action programs at the university and law school levels also adversely affect the racial diversity of the pools from which judges may now be chosen. She prevailed due to the generosity of one individual who financed her excellent education—NYU and the Columbia Law School.

C. Sonia Sotomayor

Justice Sonia Sotomayor is the third of only four women to ever sit on the Supreme Court, its first Latina justice, and its twelfth Roman Catholic justice. She is one of

98 Id.
99 Id.
100 Id.
101 Id.
102 Id.
the youngest justices on the court, but brings a wealth of experience with her.\textsuperscript{105} Sotomayor was born in the South Bronx to Puerto Rican-born parents.\textsuperscript{106} Her father died when she was nine, and she was subsequently raised by her mother.\textsuperscript{107} Education was truly her pathway to success. Sotomayor graduated summa cum laude from Princeton University, where she was fortunate enough to receive a full scholarship.\textsuperscript{108} She made her way to Harvard Law, where she was an editor at the Harvard Law Review.\textsuperscript{109} Sotomayor credits her admission to Harvard to affirmative action.\textsuperscript{110} She worked in both private practice and as an assistant district attorney in New York City.\textsuperscript{111} She broke all the rules—not only with her education but her high level legal jobs as well.

Sotomayor reached the Supreme Court having served on the two lower federal courts below. She was appointed to the United States District Court for the Southern District of New York in 1991, and to the Second Circuit in 1998.\textsuperscript{112} She worked her way up the judicial ladder. Her nomination to the district court was slowed by Republican politicking.\textsuperscript{113} Following the retirement of liberal Justice David Souter, President Obama nominated Sotomayor in May 2009.\textsuperscript{114} The President praised her diverse background and noted that with her confirmation, “America will have taken another important step towards realizing the ideal that is etched above its entrance: Equal justice under the law.”\textsuperscript{115}

Sotomayor’s three-day Senate confirmation hearing centered in part around her 2001 comments at a University of California, Berkeley lecture: “I would hope that a wise Latina woman, with the richness of her experiences, would more often than not reach a better conclusion than a white male who hasn’t lived that life.”\textsuperscript{116} These comments, though perhaps inartful, hint at the profound way that having diverse experiences on the Court can change its jurisprudence by simply opening justices’ eyes to more issues.\textsuperscript{117}

\textsuperscript{105} See Biographies, supra note 9.
\textsuperscript{106} SONIA SOTOMAYOR, MY BELOVED WORLD 11–12 (2013).
\textsuperscript{108} SOTOMAYOR, supra note 109, at 123.
\textsuperscript{109} Biographies, supra note 9.
\textsuperscript{111} Biographies, supra note 9.
\textsuperscript{112} Biographies, supra note 9.
\textsuperscript{115} Id.
\textsuperscript{117} See, e.g., Dahlia Lithwick, The Women Take Over, SLATE, Mar. 2, 2016, http://www.slate.com/articles/news_and_politics/supreme_courtDispatches/2016/03/in_oral_arguments_for_the_texas_abortion_case_the_three_female_justices.html. In this article, Lithwick posits that having
Her nomination was confirmed by the Senate in August 2009 by a vote of 68–31, with all voting Democrats voting in favor and nine Republicans crossing the aisle to vote for her confirmation.\textsuperscript{118}

Here I think we can take away a different use of diversity that emerged in these hearings. As Carol Greenhouse has written:

> Race featured prominently in the hearings – never as a basis for exclusion, but consistently as a basis for doubt and delegitimation. Exclusion may be a consequence of delegitimation, but this is not automatically so. Similarly, exclusion may be a motive for delegitimation, but this is not automatically the case either. While any nominee may be challenged from the right or the left on the basis of the form and content of his or her speech, only an individual who has affirmatively embraced a minority self-identity and a professional identity may be challenged in precisely the way Sotomayor was. The construction of race deployed by Sotomayor’s opponents was strategic in the hearings as a broad appeal to constituents – against Sotomayor, in turn cast explicitly as a surrogate for the Obama administration. That construction of race projects political opposition into the judicial sphere by narrowing the ordinary language meanings of judicial neutrality to the (constructed) condition of racial whiteness.\textsuperscript{119}

All three of these Judges broke barriers to get their appointments—barriers that continue to persist but can and must be overcome to achieve a democratic, inclusive society.


\textsuperscript{119} See Carol J. Greenhouse, Judgment and the Justice: An Ethnographic Reading of the Sotomayor Confirmation Hearings, 8 LAW, CULTURE, AND THE HUMAN. 409, 412 (2012).