HOW THE POLITICS OF FEDERAL JUDICIAL SELECTION AFFECT JUDICIAL DIVERSITY AND WHAT THIS MEANS FOR PUBLIC CONFIDENCE IN COURTS

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I

INTRODUCTION

Today's federal judiciary is more diverse than ever before, with record numbers of sitting district court and circuit court judges who are, for example, women, people of color, religious minorities, members of the LGBTQ community, or are people who came to the federal judiciary from nontraditional legal backgrounds such as having served as public defenders or as public interest lawyers.[1] In its over two years in office, the Biden administration has been particularly praised for its successful transformation of the judiciary in regard to an emphasis on diversity.[2] This includes, of course, the successful confirmation of Ketanji Brown Jackson, the nation's first Black woman Supreme Court justice, but also the nomination and confirmation of many district and circuit court judges who help diversify those judicial bodies.[3]

While great strides have been made in diversifying the courts, the path to get to where we are today was slow. And, in many ways, much work remains to make the judiciary's composition reflective of society. What has been the holdup in diversifying federal courts in the United States? Might politics, and their interplay

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1. Caroline Fredrickson, *Diversity in Federal Judicial Selection During the Biden Administration*, BRENNAN CTR. FOR JUST. (Apr. 5, 2022), https://www.brennancenter.org/our-work/analysis-opinion/diversity-federal-judicial-selection-during-biden-administration [https://perma.cc/J333-JFKB].

2. Candice Norwood, *Biden's Judicial Nominations Have Set Records for Diversity, but Several Remain Unconfirmed*, (Dec. 13, 2022, 1:43PM), https://www.pbs.org/newshour/politics/bidens-judicial-nominations-have-set-records-for-diversity-but-several-remain-unconfirmed.

3. *Id.*

with federal judicial selection, play a major role in explaining the patterns we observe?

There are many reasons to suspect this to be the case. The process of selecting federal judges is, by design, very political. The U.S. Constitution delegates selection power to the president and the Senate.[4] With the high stakes involved in the nomination of federal judges—these are, after all, Article III lifetime tenure-granting positions—presidents and senators look for opportunities to make long term impacts on legal policy that are consistent with their preferences through their selections.[5] Throughout the federal judiciary's politically-tinged selection process, there are multiple signs of potential bias directed toward prospective judges who do not fit the "traditional" mold of federal judges—for example, white, male, Christian, etc.

Understanding the effects of our political judicial selection process, and when and where bias most frequently emerges in that process, is important for a variety of reasons. Notably, this judicial selection process affects who our judges are and what decisions the judges make. As overwhelming amounts of evidence now confirm, an important byproduct of a more diverse federal judiciary is that it is also more representative of society.[6] These topics—from descriptive and substantive representation in the judiciary to the political dynamics of judicial selection—are also closely connected to public confidence in our courts.[7]

We begin in Part II with an examination of the existing political process for selecting federal judges and its effects on efforts to diversify the courts. In Part III, we connect the political selection process to efforts to diversify the federal courts. In Part IV, we examine whether the consistent themes we have observed in Parts II and III—those of politics dominating selection and multiple hurdles to diversifying the judiciary persisting because of lingering bias—may ultimately harm the public's confidence in the judiciary.

II

THE POLITICS OF SELECTING FEDERAL JUDGES

The selection of Supreme Court candidates has long been a highly public, political, and politicized and political affair; often the product of power struggles

4. U.S. CONST. art. 2, § 2.

5. *See, e.g.*, SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1999).

6. *See, e.g.*, Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390–91 (2010); Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges' Race and Sex*, 69 POL. RSCH. Q. 788 (2016); Susan B. Haire & Laura P. Moyer, DIVERSITY MATTERS: JUDICIAL POLICY MAKING IN THE US COURTS OF APPEALS 3-6 (2015); Allison P. Harris, *Can Racial Diversity Among Judges Affect Sentencing Outcomes?*, AM. POL. SCI. REV. 1, 13 (2023); Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 181 (2013).

7. *See, e.g.,* Nancy Scherer & Brett Curry, *Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts*, 72 J. POLITICS 90 (2010)(finding greater descripitive representation of Black judges on the bench increases feelings of legitimacy for the court among Black respondents).

between the president and the Senate. While Supreme Court selections garner significant scholarly and public attention, lower court selections to the federal district and circuit courts often go unnoticed, despite their frequency and importance.[8] However, nominations to the lower courts, once routine patronage appointments often decided almost exclusively by senators, are increasingly politicized. As a result, there has been a dramatic rise in the length of the confirmation process as well as the percentage of unconfirmed nominations over time.[9]

Scholars attribute the politicization of the lower court selection process to an increased focus on the policymaking function of the lower courts. Scherer posits that presidents became more focused on the policy implications of appointing ideologically aligned candidates to the lower courts around the middle of the twentieth century due to changes in the party system and judiciary.[10] Party leaders, once "professionals" primarily interested in gaining resources from politicians, became ideologically driven "amateurs" concerned foremost with accomplishing their policy goals in an unyielding manner.[11] At the same time, federal courts were increasingly engaged in social policymaking, and interest groups began to see the value of appointing like-minded jurists to achieve their goals.[12] As these interest groups began to demonstrate their ability to mobilize voters, both presidents and senators realized the importance of lower court nominations as a means of gaining electoral support, as well as achieving policy goals.[13]

The judicial selection process for all Article III federal judicial candidates is similar. First, the President nominates a candidate. Next, the Senate considers the nominee for potential confirmation. At each stage of this process, key players juggle several priorities and strategies to advance or block a particular candidate.

A. Presidential Nomination

The judicial selection process begins with a presidential nomination. Most scholars focus on the confirmation process, particularly the obstructionist tactics employed in the Senate to delay confirmation of a president's appointee.[14] This scholarly focus provides us with a much less systematic understanding of the factors that influence the presidential selection of federal judicial candidates or the duration of the selection process.

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8. Presidents make "*hundreds* of lower court appointments each term" and lower courts decide "*thousands* of cases daily." Nancy Scherer, *Appointing Federal Judges*, *in* THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 1, 4 (Lee Epstein & Stefanie A. Lindquist eds., 2017).

9. *Id.* at 4–5.

10. *Id.* at 8.

11. *Id.*

12. *Id.* at 10.

13. *See, e.g.*, *id.*; Lauren Cohen Bell, *Senatorial Discourtesy: The Senate's Use of Delay to Shape the Federal Judiciary,* 55 POL. RSCH. Q. 589, 596 (2002); AMY STEIGERWALT, BATTLE OVER THE BENCH: SENATORS, INTEREST GROUPS, AND LOWER COURT CONFIRMATIONS 28–29 (2010).

14. Mikel Norris, *Judicial Nominations to the Courts of Appeals and the Strategic Decision to Elevate*, 41 JUST. SYS. J. 118, 119 (2020).

1. Presidential Political Nominations Strategy

Presidents consider several factors in selecting nominees to federal courts. A nominee's qualifications and credentials matter. Research indicates that presidents prefer candidates with prestigious educational backgrounds, prior judicial experience, prior experience in government, low records of judicial reversal, and high ABA rankings—where known.[15]

But presidents also prioritize factors beyond qualifications when selecting judges. Notably, presidents often look to make selections with an eye toward political considerations so that judges are likely to pursue the president's policy goals once on the bench. This includes, first and foremost, selecting nominees from the president's own political party. Doing so helps to provide numerous benefits, including increasing decision-making certainty, currying favor with political elites, gaining political capital, and mobilizing interest group support.[16] Closely connected to political affiliation, presidents also look to select ideological allies. As Erwin Chemerinsky once noted, such a focus among presidents in their nomination decisions makes perfect sense since "ideology matters" in how judges will behave once they are on the bench.[17] Chemerinsky argues that it is thus appropriate for the presidential selector "to pay careful attention to the likely consequences of an individual's presence on the court."[18]

With shared partisanship and ideological compatibility serving as an important consideration for presidential selection of judges, it would not be surprising to see presidents also prioritize picking nominees with substantial political experience and involvement. This includes, for example, instances where the judge has engaged in political activities on behalf of a political party, campaign, or politician, campaigning for a political candidate, organizing fundraisers and other campaign events, assisting an election committee, and so forth. While it is one thing to consider oneself a Democrat or Republican, it is another thing to officially join a political party or partisan organization and then openly discuss that membership and links to that party on your questionnaire. Why might this type of deep political background matter for federal judges? Notably, if a judges' political background is a characteristic distinct from ideology, partisanship, or other judicial characteristics, that political background could independently influence their behavior on the bench.

How many judges bring this type of substantial political experience with them to the federal bench? To examine this, we utilize original data collected by Boyd

15. *See generally* Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 906–07 (2003); PAUL M. COLLINS, JR. & LORI A. RINGHAND, SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE 26–28 (2013); DENIS STEVEN RUTKUS, CONG. RSCH. SERV., RL31989, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 8–11 (2010); Scherer, *supra* note 8, at 15–16.

16. GOLDMAN, *supra* note 5, at 3.

17. Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*. 36 U.C. DAVIS L. REV. 619, 628 (2003).

18. *Id.* at 627.

called the Federal Judicial Database (FJDB)[19] that compiles the relative political backgrounds of approximately 1600 federal judges confirmed to the U.S. District Courts and Courts of Appeals between 1987 and 2022.[20] The FJDB's judicial political background data are sourced primarily from nominees' Senate Judiciary Committee questionnaires where the nominees are asked about their political backgrounds.[21]

Table 1 provides a descriptive summary of this political background among confirmed nominees from 1987 to 2022.[22] Of the approximately 1600 judges in our dataset, nearly 60% of them, overall, had deep political backgrounds, with listed membership in one of the two major political parties or other strong ties to politics or political involvement such as campaigning, fundraising, or other efforts on behalf of a political party or candidate. It seems clear that these background experiences are not at all uncommon among the federal judges appointed to the bench between 1987 and 2002.

Table 1. Description of Political Background Variables, 1987–2022

	Percentage of Judges with Deep Political Backgrounds
Overall	59.6%
Democratic Appointees	57.9%
Republican Appointees	61.3%

Table 1 also breaks down the percentage of judges with deep political backgrounds by party of the appointing president. The data tell a balanced story across the parties, with judges appointed by both Republican and Democratic

19. Boyd, Christina L. ND. "Federal Judicial Database" (ongoing data collection supported by the National Science Foundation under Grant No. SES-2141551).

20. For a similar strategy, see Adam G. Rutkowski, The Political Backgrounds of U.S. Courts of Appeals Judges, at 26–28 (2022) (unpublished Ph.D. dissertation, on file with the University of Georgia Library) (examining the political backgrounds of the U.S. Courts of Appeals judges confirmed between 1987 and 2020).

21. The questionnaires typically contain twenty-five to thirty questions that cover information ranging from educational background to financial particulars. *Senate Judiciary Committee Questionnaires*, https://www.judiciary.senate.gov/committee-activity/library?c=all&type=committee_questionnaire [https://perma.cc/HRD9-2XTM] (last visited June 8, 2023). The questionnaires are long and considered to be trustworthy in content. *See*, *e.g.*, LOGAN DANCEY ET AL., IT'S NOT PERSONAL: POLITICS AND POLICY IN LOWER COURT CONFIRMATION HEARINGS 21 (2020); Dennis Steven Rutkus, CONG. RSCH SERV. 7-5700, THE APPOINTMENT PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: AN OVERVIEW 19 (2016). The questionnaire question most relevant to judges' political backgrounds reads as follows:

List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title, and responsibilities.

Id. This question, or a close derivative of it, has been asked of nominees during the full period of our analyzed data.

22. We are unable to isolate our inquiry to all presidential nominees (confirmed or not), so we elect to examine those nominees who are ultimately confirmed.

presidents being nearly equally likely—61.3% vs. 57.9%, respectively—to have this political background pre-appointment.

2. Assistance From White House Advisors And Interest Groups

With a selection strategy focused on picking judges who are qualified but also help a president achieve policy goals, how do presidents find the nominees who will meet their needs? Presidents often contemplate potential nominees before even taking office, particularly for anticipated Supreme Court vacancies.[23] Once in office, a president consults with trusted advisors to develop a shortlist of nominees.[24] Presidents seek advice from legal consultants such as White House counsel, the Attorney General, and current federal judges and justices, as well as political advisors such as Senate party leaders.[25] Finding and investigating potential nominees is a significant amount of work.[26] Thus, presidents often delegate the bulk of the judicial selection tasks to the Office of White House Counsel or the Office of Legal Policy.[27] These officials in turn rely heavily on their professional networks to help identify and select potential nominees.[28]

Interest groups are also undeniably involved at this stage in the process.[29] While we have little insight into the nature and extent of their involvement, interest groups do provide some input on potential nominees during this pre-nomination phase.[30] Much of this input happens behind closed doors and through affiliate networks and could be highly influential.[31] For example, in recent years, the Federalist Society has received significant scholarly and public attention for its increasing role in the judicial selection process.[32] The Federalist Society is a conservative organization focused on, *inter alia*, advancing originalism in Constitutional interpretation, in part by attempting to influence the ideological composition of the judiciary.[33] While we do not fully know the extent of its influence on

23. CHRISTINA L. BOYD ET AL., SUPREME BIAS: GENDER AND RACE IN U.S. SUPREME COURT CONFIRMATION HEARINGS 48 (2023).

24. RUTKUS, *supra* note 15, at 8.

25. *Id.*

26. *See* Jonathan M. King & Ian Ostrander, *Prioritizing Judicial Nominations After Presidential Transitions*, 50 PRESIDENTIAL STUD. Q. 592, 592–93 (2020) (discussing how new presidents "inherit a backlog of judicial vacancies" that they must put in the effort to fill); Anthony J. Madonna et al., *Confirmation Wars, Legislative Time, and Collateral Damage: The Impact of Supreme Court Nominations on Presidential Success in the U.S. Senate*, 69 POL. RSCH. Q. 746, 747 (2016) (discussing the various costs associated with "selecting and promoting" a nominee).

27. Christine C. Bird & Zachary A. McGee, *Going Nuclear: Federalist Society Affiliated Judicial Nominees' Prospects and a New Era of Confirmation Politics*, 51 AM. POL. RSCH. 37, 40 (2023).

28. *Id.* at 37–38.

29. *See* RUTKUS, *supra* note 15, at 8.

30. *See id.;* Bird & McGee, *supra* note 27, at 38; James ben-Aaron et al., *The Selection of U.S. Supreme Court Justices*, *in* ROUTLEDGE HANDBOOK OF JUDICIAL BEHAVIOR 152 (Robert M. Howard & Kirk A. Randazzo eds., 2017).

31. Bird & McGee, *supra* note 27, at 38; ben-Aaron et al., *supra* note 30, at 152.

32. *See* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015).

33. *Id*. at 13–23.

the president's selection of judicial nominees over time, we can be certain it has been involved, particularly during the Trump administration. Many of President Trump's judicial nominees spoke openly about their ties to the Federalist Society[34] and Trump himself confirmed that he sought a list of potential candidates from the Federalist Society.[35]

3. The Special Interest Group: The ABA

The most prominent example of interest group cross-time involvement in presidential selection decisions occurs with the American Bar Association (ABA). Since 1956, the ABA has heralded its role as the "only national, nonpartisan bar association representing all segments of the legal profession" capable of reviewing judicial nominees and rating their legal qualifications to serve on the bench.[36] To do this, the ABA has rated federal judicial nominees "well qualified," "qualified," or "not qualified" based on three criteria: integrity, professional competence, and judicial temperament.[37] The ABA evaluates the legal career of each nominee with an eye towards particular experience it sees as appropriate for federal judges. These are not merely outside interest group ratings; rather, they correlate to the success and speed of confirmation before the Senate.[38] Presidents have also frequently used these ratings to highlight their nominees' qualifications and combat opposition in the Senate.[39]

Despite this qualifications-forward approach, the ABA's unique role in federal judicial selection has not been without controversy. With each presidential administration, politics have played a part in how judges are evaluated by the ABA.

Historically, the White House confidentially sent nominees' names to the ABA Standing Committee on the Federal Judiciary before transmitting the

34. Bird & McGee, *supra* note 27, at 40.

35. David Montgomery, *Conquerors of the Courts*, WASH. POST (Jan. 2, 2019), https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/ [https://perma.cc/FV8M-KCGP].

36. Letter from Patricia Lee Refo, President, American Bar Association, to President-Elect Joe Biden (Jan. 8, 2021), (available at https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-letter-to-president-elect-biden.pdf).

37. AM. BAR ASS'N, STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1, 6 (last updated 2023), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/fjc-backgrounder.pdf. The ABA also had an "Exceptionally Well Qualified" Rating that was dropped in 1989. Sheldon Goldman & Matthew D. Saronson, *Clinton's Nontraditional Judges: Creating a More Representative Bench*, 78 JUDICATURE 68, 72 (1994).

38. *See generally* Wendy L. Martinek et al., *To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977–1998*, 64 J. POLITICS 337, 341 (2003) (finding ABA ratings increase the likelihood of success and speed of nominees to the appeals court and district benches even when controlling for race, gender, and other political factors).

39. LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 70-75 (2005); *see also* Lisa M. Holmes, *Presidential Strategy in the Judicial Appointment Process: 'Going Public' In Support of Nominees to the U.S. Courts of Appeals*, 35 AM. POL. RSCH. 567, 582 (2007) (finding that ABA ratings are not tied to whether or not presidents "go public" in support of courts of appeals nominees).

nomination to the Senate.[40] With the nominee's name in hand, the committee evaluated them based on their Senate Judiciary Committee Questionnaire, legal writings, court decisions, and other writings.[41] Nominees were investigated by the member of the committee assigned to the judicial circuit of the prospective court.[42] These investigators conducted extensive interviews with numerous members of the legal profession and local community, along with a personal interview of the nominee.[43] Throughout this process, the committee considered the experiences of nominees differently depending on whether the nomination would be for a trial or appellate court.[44]

ABA ratings are framed as a form of peer evaluation and the argument is that "[b]ecause lawyers are the only group of citizens that are in daily contact with the courts, they are the only group that are really able to judge the qualifications necessary for good judicial material."[45] However, since only one individual on the ABA committee investigates a nominee's background, the process vests a lot of power in that one person, allowing for outsized individual bias in the ABA's evaluation.[46]

The relationship between the ABA, presidents, and senators has been anything but free from political conflict. Initially, the ABA was considered a conservative organization trying to check President Truman from appointing liberal judges.[47] However, by the Reagan administration the ABA acquired a decidedly more liberal reputation.[48] Across the years, multiple presidential administrations would press forward with nominees rated as "not qualified" by the ABA, a signal that presidential preferences over nominees would at times outweigh the ABA's perceptions of qualifications.

The ABA began working directly with the Senate Judiciary Committee in the late 1940s with limited influence.[49] Despite its narrow task in that era, the ABA is broadly credited (or blamed) for President Truman's failed nomination of Frieda Hennock to the Federal District Court for the Southern District of New

40. AM. BAR ASS'N, *supra* note 37, at 1. From 2001 to 2008 and from March 2017 to present, the President allowed the ABA to evaluate nominees after their names have been submitted to the Senate. *Id.* The ABA Standing Committee on the Federal Judiciary is made up of fifteen members, hailing from all of the federal judicial circuits and a chair. *Id.*

41. *Id.* at 5.

42. *Id.* at 4.

43. *Id.* at 5.

44. For example, the committee states "that substantial courtroom and trial experience as a lawyer or trial judge is important." *Id.* at 3. For appellate nominees, there is emphasis on "legal scholarship, academic talent, analytical and writing abilities, and overall excellence." *Id*.

45. Edward J. Fox, Jr. et al., *The Selection of Federal Judges: The Work of the Federal Judiciary Committee*, 43 AM. BAR ASS'N J. 685, 685 (1957).

46. James A. Sieja, *How You Rate Depends on Who Investigates: Partisan Bias in ABA Ratings of US Courts of Appeals Nominees, 1958-2020*, POL. RSCH. Q. 1723, 1726 (2023).

47. Dustin Koenig, *Bias in the Bar: ABA Ratings and Federal Judicial Nominees from 1976-2000*, 95 JUDICATURE 188, 188 (2012).

48. *Id*.

49. JOEL B. GROSSMAN, LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION 65 (1965).

York (SDNY), who would have been the second female Article III judge ever.[50] In 1958 the ABA's role significantly expanded when the Eisenhower administration agreed to have the ABA informally investigate potential nominees in advance of a nomination and more formally investigate the nominee once he or she was announced.[51]

During the Kennedy and Johnson administrations, the ABA's role in evaluating nominees continued, but not without some presidential backlash. Both presidents advanced nominations rated as "not qualified" by the ABA,[52] and President Johnson, in particular, chafed at outsourcing power over nominations to an outside group.[53] With time, Johnson would begin to work with the ABA—a move that allowed it to begin the process of supplanting the political parties as arbiters of influence in judicial nominee selection.[54]

Unlike all prior White Houses, the Nixon administration used the ABA's ratings to help disqualify potential nominees from consideration. President Nixon's Deputy Attorney General announced that the president would not nominate anyone to the lower federal courts with a negative ABA rating.[55] President Nixon and the ABA also agreed on basic principles for nominees, including particular age ranges for, certain legal qualifications, and to not have prior political activity become an obstacle to a nominee's approval.[56] Nixon's commitment to the ABA became politically useful as he faced pressure to nominate a woman to the Supreme Court.[57] In the fall of 1971, Nixon forwarded multiple potential nominee names to the ABA for vetting.[58] Once of these names was Mildred Lillie, a twelve-year veteran judge on the California Court of Appeals.[59] Despite her judicial experience, the ABA committee, by an eleven-to-one vote, rated Judge Lillie as "not qualified."[60] Nixon's private reaction to the negative rating is telling,

50. *Id.* at 65; *Hennock Nomination Opposed by U.S. Bar,* N.Y. TIMES, June 28, 1951, at 16; *Judgeship Doubted for Miss Hennock: Confirmation Strongly Opposed in Secret Senate Hearing, Some Present Report*, N.Y. TIMES, Sept. 28, 1951, at 41.

51. GROSSMAN, *supra* note 49, at 76.

52. *Supra* note 49 at 178.

53. NEIL D. MCFEELEY, APPOINTMENT OF JUDGES: THE JOHNSON PRESIDENCY 52–54, 61–62 (1987).

54. Lauren C. Bell, *Federal Judicial Selection in History and Scholarship*, 96 JUDICATURE 296, 301 (2013).

55. GOLDMAN, *supra* note 5, at 213.

56. Individuals who were over 60 were disfavored and no one over 64 would be nominated to the district courts, with promotion to the courts of appeals only given to judges between 64 and 68 who were in excellent health and received the highest ABA rating. Nominees were expected to have practiced law for at least fifteen years before their nomination as well. *Id.* at 214.

57. John A. Farrell, *What Happened After Nixon Failed to Appoint a Woman to the Supreme Court*, POLITICO (June 21, 2020, 7:00AM), https://www.politico.com/news/magazine/2020/06/21/pat-nixon-woman-supreme-court-311408 (this pressure came, at least in part, from his wife Pat Nixon).

58. GOLDMAN, *supra* note 5, at 215 (explaining that, before this time, Supreme Court nominees were not evaluated by the ABA).

59. RENEE KNAKE JEFFERSON & HANNAH BREMER JOHNSON, SHORTLISTED: WOMEN IN THE SHADOWS OF THE SUPREME COURT 38 (2020).

60. GOLDMAN, *supra* note 5, at 215.

saying "And [the committee said] she's the best qualified woman but she's not qualified for the Supreme Court."[61]

President Ford generally worked well with the ABA, as he nominated only one individual with a "not qualified" rating and avoided announcing nominations until formal ABA approval had been given.[62] Similarly, President Carter fostered a good relationship with the ABA. Carter even invited the ABA's help after the passage of the Omnibus Judgeship Act of 1978 expanded the federal judiciary with the addition of 152 new federal judgeships.[63] However, around the same time President Carter also began using his own U.S. Circuit Judge Nominating Commission to vet potential nominees and solicited evaluations from the Federation of Women Lawyers and National Bar Association.[64] Carter nominated a higher number of women and people of color to the federal bench than any president before him, and these nominees received a disproportionately fewer "exceptionally well qualified" and "well qualified" ABA ratings.[65]

In contrast to his two immediate predecessors, President Reagan kept the ABA at arm's length, providing the group with only one name at a time.[66] Two nominees in particular brought the administration into conflict with the ABA: J. Harvie Wilkinson III and Robert Bork. Reagan nominated Wilkinson to the Fourth Circuit in 1984 and the ABA's committee initially blanched at Wilkinson's lack of in-court experience, with a potential "not qualified" rating in the works.[67] At the request of the administration, Supreme Court Justice Lewis Powell, a former president of the ABA, lobbied on Wilkinson's behalf, resulting in a majority vote of "qualified."[68] This inconsistent application of the guidelines sparked backlash from women's and underrepresented minority groups because many person of color nominees with substantially more trial experience were deemed "not qualified" around the same time.[69]

Reagan's 1987 nomination of Robert Bork to the Supreme Court cemented the battle lines between the ABA and conservatives. In 1981 Judge Bork was rated "exceptionally well qualified" by the ABA before his appointment to the

61. *Richard M. Nixon: Choosing Rehnquist*, AM. RADIOWORKS: THE PRESIDENT CALLING (Oct. 20, 1971), http://americanradioworks.publicradio.org/features/prestapes/f4.html [https://perma.cc/DJJ8-3LGR]; Bernard Bell, *Supreme Court Justice Mildred Lillie: What Might Have Been*, UNIV. PITTSBURGH CTR. FOR CIV. RTS. & RACIAL JUST. (Sept. 8, 2020), https://www.civilrights.pitt.edu/supreme-court-justice-mildred-lillie-what-might-have-been-prof-bernard-bell#_ftn3 [https://perma.cc/54A2-YLBP]. *See also*, JEFFERSON & JOHNSON, *supra* note 59.

62. GOLDMAN, *supra* note 5, at 217–18.

63. *Id.* at 242, 265.

64. William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 39 (1990).

65. Elliot E. Slotnick, *The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment - Part 2,* 66 JUDICATURE 385, 387 (1983).

66. GOLDMAN, *supra* note 5, at 323.

67. *Id.* at 325.

68. *Id*.

69. *Id.*

Court of Appeals for the D.C. Circuit.[70] However, when faced with his potential appointment to the Supreme Court, the ABA committee rendered a non-unanimous "well qualified" rating, with four dissenting "not qualified" votes.[71] Some conservatives saw this as evidence that the ABA had backtracked on its promise to not consider ideology or philosophy when rating potential judges.[72]

The backlash of the ABA's ratings on the Bork nomination resulted in a Senate Judiciary Committee hearing on the ABA's role early in the George H.W. Bush administration.[73] The Bush administration also required the ABA to disavow considering nominees' ideology or political views when rating them for the federal judiciary.[74]

Clinton, the first Democratic president in twelve years, used the ABA ratings as a vital part of his judicial appointment strategy. Nominees were simultaneously vetted by the FBI and ABA before announcing their nomination publicly.[75] Near the end of Clinton's time in office, he highlighted both the diverse nature of his judicial appointments alongside their historically high percentages of top ABA ratings, leveraging these ratings to make an argument that a diverse and qualified judiciary are not mutually exclusive propositions.[76]

While President Clinton used ABA ratings as a laudatory political tool, Republicans were still reeling from the Bork nomination. Hardball conservative opposition manifested in official action in 1997 when Senate Judiciary Committee Chairman Orrin Hatch announced the ABA would no longer be invited by the committee to opine on judicial nominees at confirmation hearings.[77] This portended a larger shockwave to come: on March 22, 2001 the George W. Bush White House announced the ABA would no longer receive deferential treatment in the pre-nomination process.[78]

In communicating this change to the ABA, Attorney General Alberto Gonzalez questioned "whether the ABA should play a unique, quasi-official role and thereby have its voice heard before and above all others."[79] The Bush

70. William G. Myers III, *The Role of Special Interest Groups in the Supreme Court Nomination of Robert Bork*, 17 HASTINGS CONST. L. Q. 399, 402 (1990).

71. *Id.* at 402 n.12.

72. *Id.*

73. Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 295 (1991).

74. *Id.*

75. Sheldon Goldman et al., *Clinton's Judges: Summing up the Legacy*, 84 JUDICATURE 228, 230 (2001).

76. Press Release, Bill Clinton, President, President Clinton Highlights the Importance of Ensuring Equal Access to Justice (Sept. 21, 2000), https://clintonwhitehouse4.archives.gov/textonly/WH/new/html/Tue_Oct_3_135311_2000.html [https://perma.cc/29A5-HUBG].

77. Bell, *supra* note 54, at 301.

78. Christine L. Nemachek, *Trump's Lasting Impact on the Federal Judiciary*, 42 POL'Y STUD. 544, 548 (2021); *Bush Dumps Bar Ratings of Judges*, ABC NEWS (Mar. 22, 2001, 4:17PM), https://abcnews.go.com/US/story?id=93753&page=1 [https://perma.cc/LRZ8-8VS8].

79. Amy Goldstein, *Bush Curtails ABA Role in Selecting U.S. Judges*, WASH. POST (Mar. 24, 2001), https://www.washingtonpost.com/archive/politics/2001/03/23/bush-curtails-aba-role-in-selecting-us-judges/ebfe106c-344d-40a0-8dff-ccf0a2e411fe/ [https://perma.cc/B7LE-M2XQ].

Administration's messaging, whether grounded in sound arguments or not, painted a target on the ABA's process as politically tainted. By sideling the ABA before announcing nominees publicly, the Bush administration might have helped their nominees receive higher ratings because individuals interviewed as part of the ABA process would be less likely to comment negatively about publicly known nominees.[80] Bush's nominees received the highest percentage of "well qualified" ratings by a presidential administration to that point in time.

As before, with a new administration came a new practice. President Obama resumed the pre-nomination access for the ABA to screen nominees.[81] Obama would not nominate anyone deemed unqualified, restoring the ABA's essential veto power over judicial nominees. However, early in the administration the ABA rejected nearly 7.5% of Obama's candidates, nine women and eight people of color.[82] Even though the administration cooperated with the ABA, its nominees fared slightly worse in their ability to garner the ABA's highest rating.

President Trump resumed George W. Bush's practice of denying the ABA pre-nomination access to nominees.[83] But the Trump administration's indifference to the ABA did not end there. The administration frequently nominated, and the Senate confirmed, more judges deemed "not qualified" than the five previous administrations combined.[84]

Not surprisingly, the political dimension of the ABA ratings has spilled over into debates as to the objectivity of the ratings. As one can glean from the history of the ABA's relationship with political actors, there is a great deal of debate over whether the ratings are biased against nominees with particular political proclivities.[85] The ABA has maintained, rather vehemently, that its ratings are not politically-biased. As the then chairwoman of the ABA Standing Committee on the Federal Judiciary said in 2009, "We are an impartial group of lawyers that bring a peer review to the process. . . .We are all lawyers. We are officers of the court. We speak the language of the law. We do not consider politics."[86]

However, the data tell a different story. In the years following the Bork

80. Sheldon Goldman et al., *W. Bush's Judicial Legacy: Mission Accomplished*, 92 JUDICATURE 258, 274 (2009).

81. Julie Zeveloff, *Obama Asks ABA to Evaluate Federal Judiciary Picks*, LAW360 (Mar. 17, 2009, 12:00AM), https://www.law360.com/articles/92105/obama-asks-aba-to-evaluate-federal-judiciary-picks [https://www.law360.com/articles/92105/obama-asks-aba-to-evaluate-federal-judiciary-picks].

82. David R. Papke, *ABA Rejections of Obama Judicial Nominees*, MARQ. UNIV. L. SCH. FAC. BLOG (Nov. 29, 2011), https://law.marquette.edu/facultyblog/2011/11/a-b-a-rejections-of-obama-judicial-nominees/ [https://perma.cc/4X7S-JEFD].

83. Adam Liptak, *White House Ends Bar Association's Role in Vetting Judges*, N.Y. TIMES (Mar. 31, 2017), https://www.nytimes.com/2017/03/31/us/politics/white-house-american-bar-association-judges.html [https://perma.cc/MHN7-PC6M].

84. *See* FED. JUD. CTR., *Biographical Directory of Article III Federal Judges, 1789-Present*, (last visited Jan. 23, 2023), https://www.fjc.gov/history/judges [https://perma.cc/JT92-YRXG]. Former President Trump nominated 8 judges to the bench who were ultimately confirmed by the Senate after receiving a "not qualified" rating. Former President George W. Bush had 4, Former President Clinton 3.

85. Koenig, *supra* note 47, at 192.

86. Adam Liptak, *Legal Group's Neutrality is Challenged*, N.Y. TIMES (Mar. 30, 2009), https://www.nytimes.com/2009/03/31/us/31bar.html [https://perma.cc/3LZ2-F2ZV].

nomination, George H.W. Bush nominees were one-third less likely to receive the highest ABA rating than Clinton nominees with the same legal and educational credentials, further reinforcing claims of liberal bias in the ratings process.[87] After George W. Bush removed the ABA from its pre-nomination role, scholars again re-examined ABA ratings for bias, finding evidence of bias against Republican nominees with regard to their attainment of the "well-qualified" rating.[88] A recent study of ABA investigator bias found that investigator partisanship was systematically tied to a nominee's ABA rating.[89] These findings reinforce the politically charged role of the ABA's standing committee despite its professed objectivity.

4. Presidential considerations of the Senate in the selection decision

Beyond interest groups, senators also provide input on the president's selection of judicial nominees, particularly for lower court vacancies. Because these appointments are confined to a specific geographic region, the senators from the states with vacancies have significant influence over the entire process through a practice known as senatorial courtesy. Historically, home state senators of a president's political party were responsible for selecting district court judicial nominees.[90] Responsibility shifted over time as presidents began to focus on the policy implications of lower court nominations. Still, these home state senators retained a great deal of influence over the confirmation process through their ability to formally object to a nomination using "blue slips," which effectively veto the nomination.[91] Presidents are therefore likely to consult or bargain with home-state senators of all parties during the selection process in order to avoid this fate.[92] As the use of obstructionist tactics by opposition party senators has increased, presidents may now further consult with additional senators to identify a nominee that has a greater chance of confirmation.[93]

While home-state senators maintain a great deal of influence on district court

87. James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989-2000*, 17 J. L. & POL. 1, 5–6 (2001); John R. Lott Jr., *The American Bar Association, Judicial Ratings, and Political Bias*, 17 J. L. & POL. 41, 41 (2001).

88. Susan N. Smelcer et al., *Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees*, 65 POL. RSCH. Q. 827, 836 (2012) (finding "Democratic nominees are 17.8 percent more likely to be rated Well Qualified than Republican nominees, all else being equal" and "Republican nominees are 8.3 percent more likely than Democrats to receive a rating of Qualified").

89. Sieja, *supra* note 46, at 1732 (democratic nominees have the highest chance of a top ABA rating when investigated by a co-partisan).

90. Mary L. Clark, *One Man's Token is Another Woman's Breakthrough - The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 487–88 (2004).

91. *See generally* Sarah A. Binder, *Where Do Institutions Come From? Exploring the Origins of the Senate Blue Slip*, 21 STUD. AM. POL. DEV. 1, 1 (2007); Ryan C. Black et al., *Obstructing Agenda Setting: Examining Blue Slip Behavior in the Senate*, 9 FORUM 1, 3 (2011); Mitchel A. Sollenberger, *The Blue Slip: A Theory of Unified and Divided Government, 1979-2009*, 37 CONG. & PRESIDENCY 125, 125 (2010).

92. STEIGERWALT, *supra* note 13, at 50–51; Glen S. Krutz et al., *From Abe Fortas to Zoë Baird: Why Some Presidential Nominations Fail in the Senate*, 92 AM. POL. SCI. REV. 871, 873 (1998).

93. David W. Rhode & Kenneth A. Shepsle, *Advising and Consenting in the 60-Vote Senate: Strategic Appointments to the Supreme Court*, 69 J. POL. 664, 664 (2007); STEIGERWALT, *supra* note 13, at 50–51.

nominations, their influence on circuit court nominations may be declining. Traditionally, home-state senators have had less influence on these nominations than district court nominations, partly because appellate jurisdiction spans multiple states and partly because presidents believe appellate courts are better able to advance their policy goals.[94] Still, "blue slip" privileges afforded them some sway with the president. In recent years, however, blue slips have often not been honored by the Senate Judiciary Committee chair for circuit court nominations, thereby weakening the influence of home-state senators in the process.[95]

B. Senate's Confirmation Process

The modern-era shift in focus from patronage to policy and reassertion of presidential power for judicial nominations has led to an increasingly reactive and obstructionist Senate. This is particularly true for lower court nominations. Once routine, conflict and hindrance are the new norms for district and circuit court confirmations.[96] Senators have used several tactics to delay or halt a nomination, including filibuster, secret holds—threats to filibuster—delays in processing, and the above-mentioned blue slip.[97] As a result, scholars have found a significant increase in the average length of time for lower court confirmations[98] and dramatic growth in the number of unconfirmed nominees.[99]

Scholars have identified several factors that impact the length of the confirmation process and the likelihood of success. Unsurprisingly, the ideological composition of the Senate affects confirmation time.[100] One study found that a nominee's greater ideological distance from the median senator increased the length of the confirmation process.[101] Similarly, nominees that share a political party with the Senate majority experience shorter confirmation times and are

94. Clark, *supra* note 90, at 488.

95. Jonathan M. King et al., *President Trump and the Politics of Judicial Nominations*, 43 JUST. SYS. J. 524, 527 (2022).

96. *See generally* Hartley & Holmes, *supra* note 38, at 275; STEIGERWALT, *supra* note 13, at 1–3; Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J. L. & PUB. POL'Y 521, 525 (2018); Sarah A. Binder & Forest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947-1998*, 46 AM. J. POL. SCI. 190, 190 (2002).

97. Scherer, *supra* note 8, at 7; Black et al., *supra* note 91, at 2–3.

98. Hartley & Holmes, *supra* note 38, at 277. *See also* Garland W. Allison, *Delay in Senate Confirmation of Federal Judicial Nominees*, 80 JUDICATURE 8, 11–14 (1996) (determining if factors including party affiliation and senate majority impact the speed in which federal court nominees are confirmed); Bell, *supra* note 13, at 589; Binder & Maltzman, *supra* note 96, at 194–95; Marcus E. Hendershot, *From Consent to Advice and Consent: Cyclical Constraints within the District Court Appointment Process*, 63 POL. RSCH. Q. 328, 328 (2010); Wendy L. Martinek et al., *supra* note 38, at 339–40.

99. *See*, *e.g.*, STEIGERWALT, *supra* note 13; Martinek et al., *supra* note 98, at 339; Scherer et al., *supra* note 38.

100. Scherer et al., *supra* note 38, at 1035.

101. Binder & Maltzman, *supra* note 96, at 195–96. *See also* Scott Basinger & Maxwell Mak, *The Changing Politics of Federal Judicial Nominations*, 37 CONG. & THE PRESIDENCY 157, 160, 165 (2010) (determining if ideological conflict between Presidents, nominees, and the Senate increase the confirmation process); Jeffrey A. Segal et al., *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96, 109–12 (1992) (finding greater delay in Senate vote if nominee considered too extreme ideologically).

more likely to be confirmed.[102] Nominations take longer to confirm under divided government.[103] Lastly, patronage likely still plays a role, with one study finding that nominees with a patron on the Judiciary Committee took less time to confirm.[104]

Interest group involvement can also significantly influence the duration of the confirmation process and the likelihood of success.[105] Scholars have also shown that a nominee's affiliation with certain interest groups like the Federalist Society may significantly increase their chances of confirmation.[106] This suggests that senators may rely on cues from interest groups to determine a candidate's ideology rather than their own analysis. This aligns with literature indicating that time and resource-strapped members of Congress often rely on interest group information to inform their floor votes and the content of committee deliberations.[107]

The Senate confirmation process consists of two steps: The Senate Judiciary Committee's gatekeeping role and the full Senate's consideration of confirmation.

1. Senate Judiciary Committee's Confirmation Hearings

Upon its delivery to the Senate, a presidential nomination to the federal judiciary is first sent to the Senate Judiciary Committee for review. The Judiciary Committee is responsible for holding public hearings on the nominees[108] and reporting the nomination for consideration by the full Senate.[109] Confirmation hearings conducted by the Senate Judiciary Committee are undoubtedly the most public aspect of the judicial confirmation process.[110] These question-and-answer sessions are designed to, at least in theory, assess a nominee's qualifications, promote democratic accountability among the judiciary, and instill public confidence.[111] They also serve as a platform upon which committee members can take

102. Thomas Stratmann & Jared Garner, *Judicial Selection: Politics, Biases, and Constituency Demands*, 118 PUB. CHOICE 251, 266 (2004).

103. Martinek et al., *supra* note 98, at 358.

104. BELL, *supra* note 13, at 600.

105. Scherer et al., *supra* note 38, at 1034.

106. Bird & McGee, *supra* note 27, at 38.

107. *See generally* FRANK R. BAUMGARTNER & BETH L. LEECH, BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE 137-40 (1998); Janet M. Box-Steffensmeier et al., *Cue-Taking in Congress: Interest Group Signals from Dear Colleague Letters*, 63 AM. J. POL. SCI. 163, 165 (2019); Charles M. Cameron et al., *From Textbook Pluralism to Modern Hyper-Pluralism: Interest Groups and Supreme Court Nominations, 1930-2017*, 8 J. L. & COURTS, 301, 301–02 (2020); Glen S. Krutz, *Issues and Institutions: "Winnowing" in the U.S. Congress*, 49 AM. J. POL. SCI. 313, 318 (2005).

108. The Judiciary Committee is not required to hold a hearing for a nominee, though hearings are standard practice, and a nomination is unlikely to advance without one. Mitchell A. Sollenberger, *"The Law": Must the Senate Take a Floor Vote on a Presidential Judicial Nominee?*, 34 PRESIDENTIAL STUD. Q. 420, 429 (2004).

109. COLLINS & RINGHAND, *supra* note 15, at 43–44; Sollenberger, *supra* note 108, at 428.

110. COLLINS & RINGHAND, *supra* note 15, at 37; George Watson & John Stookey, *Supreme Court Confirmation Hearings: A View from the Senate*, 71 JUDICATURE 186, 186 (1988).

111. Dancey et al., *supra* note 21, at 155–60.

public positions on a variety of politically salient issues in a bid for electoral support.[112] While most nominations are ultimately reported favorably out of committee, committee members can delay or halt a nomination through a variety of tactics, some of which occur at the hearing stage.[113]

The format of a Senate Judiciary Committee confirmation hearing differs for Supreme Court and lower court nominations, though both types include some amount of testimony by the nominees and their supporters and detractors, as well as questioning of the nominee by Committee members. Compared to Supreme Court hearings, lower court hearings have lower attendance[114] and panel questioning of nominees with only a few—often routine—questions per nominee.[115] By contrast, modern Supreme Court confirmation hearings are lengthy, in-depth, and very closely watched question-and-answer sessions held between a full Senate Judiciary Committee and the individual nominee.[116] Recent hearings have provided Committee senators an opening statement and two or three rounds of questioning of the nominee over the course of multiple days.[117]

2. Full Senate Review

If the nomination is reported favorably[118] out of committee—as the vast majority of nominations are—it proceeds to the Senate floor for a full vote. For Supreme Court nominations and some lower court nominations, this begins with a floor debate. Debate time is typically split between the majority and minority parties. Senators speak for or against a nominee, often discussing the nominee's qualifications, issue positions, and confirmation hearing testimony. These speeches are primarily a mechanism for signaling a senator's political positions to constituents rather than an effort to sway the vote, as most Senators have

112. *Id.* at 154–55.

113. *Id.* at 15–16.

114. *Id.* at 35–38 (finding that the median number of senators in attendance at district court hearings was one or two and that routine circuit court hearings never drew more than three senators. In contrast, hearings of circuit court nominees with significant interest group opposition drew a median of four senators, often more than five).

115. *Id* (finding a median of five questions asked of district court nominees and nine for unopposed circuit court nominees).

116. COLLINS & RINGHAND, *supra* note 15, at 40–42.

117. CHRISTINA L. BOYD ET AL., SUPREME BIAS: GENDER AND RACE IN U.S. SUPREME COURT CONFIRMATION HEARINGS 44 (2023); COLLINS & RINGHAND, *supra* note 15, at 40–42.

118. Supreme Court nominations can also proceed out of committee in other ways. Ketanji Brown Jackson's party-line vote of 11-11 meant that the Committee was unable to make a recommendation to the Floor. Following the tie vote, Senate Majority Leader Schumer (D-NY) used a procedural Floor vote called a discharge petition to allow Jackson's nomination to proceed. Mike Hayes et al., *Jackson Nomination Advances After Senate Committee Deadlocks*, CNN (Apr. 4, 2022, 10:35PM), https://www.cnn.com/politics/live-news/ketanji-brown-jackson-confirmation-vote-senate-committee/index.html [https://perma.cc/W9B9-2ZTP]. Clarence Thomas's Judiciary Committee took two votes. Its first vote, on whether to send the nomination to the Floor with a favorable recommendation, failed with a 7-7 tie. The Committee then overwhelmingly passed its second vote to report the nomination to the Floor without a recommendation. *See Judiciary Committee Votes on Recent Supreme Court Nominees*, U.S. SENATE COMM. ON THE JUDICIARY, https://www.judiciary.senate.gov/nominations/supreme-court/committee-votes [https://perma.cc/4QLS-S55P] (last visited Jan. 23, 2022).

already taken an unyielding position on a nominee by the time the nomination reaches the Senate floor.[119] Many lower court nominations advance straight to a floor vote without debate due to their largely non-controversial nature.[120]

Senators determined to block a confirmation typically do so before the final vote commences, as it is rare to defeat a nomination through floor debate.[121] Historically, senators sometimes engaged in filibusters to block or delay a nomination by extending floor debate indefinitely. Debate could only be ended by a sixty-vote majority, known as cloture. Filibusters of Supreme Court nominees were rare.[122] However, filibusters of lower court nominations occurred with surprising frequency, particularly during the presidencies of Clinton, George W. Bush, and Obama.[123] This culminated in the 2013 invocation of the "nuclear option," which effectively eliminated the filibuster for lower court nominations by lowering the vote threshold to a simple majority of fifty-one votes.[124] After an informal agreement not to filibuster Supreme Court candidates broke down with President Trump's nomination of Neil Gorsuch, the nuclear option was invoked again to lower the vote threshold for Supreme Court nominations as well.[125] Scholars are just beginning to study the effects of this post-nuclear world where a President only needs a simple majority vote to get a judicial candidate through confirmation.[126]

The last step of the process is the Senate floor vote. Scholars have extensively studied Senate votes on Supreme Court nominations. Studies show that candidates perceived as highly qualified—often on the basis of media portrayal or ABA ratings—tend to amass more votes.[127] Additionally, senators vote for Supreme Court candidates with whom they are ideologically aligned and this emphasis on ideology has increased over time.[128] There may also be an interactive effect between qualifications and ideology, with one study indicating that senators—particularly in the last few decades—placed more emphasis on ideological

119. Paul M. Collins, Jr. & Lori A. Ringhand, *The Institutionalization of Supreme Court Confirmation Hearings*, 41 L. & SOC. INQUIRY 126, 129 (2016); Jessica A. Schoenherr et al., *The Purpose of Senatorial Grandstanding During Supreme Court Confirmation Hearings*, 8 J. L. & COURTS 333, 334 (2020).

120. STEIGERWALT, *supra* note 13, at 32.

121. Scherer, *supra* note 8, at 7; Krutz et al., *supra* note 92, at 875.

122. ben-Aaron et al., *supra* note 30, at 159.

123. STEIGERWALT, *supra* note 13, at 46; Christina L. Boyd et al., *Nuclear Fallout: Investigating the Effect of Senate Procedural Reform on Judicial Nominations*, 13 FORUM 623, 632–33 (2015).

124. Boyd et al., *supra* note 123, at 623–24.

125. Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past,* 131 HARV. L. R. 96, 108–10 (2017).

126. *See*, *e.g.*, King et al., *supra* note 95, at 536–39 (discovering the impact of new Senate confirmation rules on President Trump's judicial nominees); Bird & McGee, *supra* note 27, at 37.

127. *See e.g.*, Charles M. Cameron et al., *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. R. 525, 525 (1990) (testing the likelihood of Senate votes for Supreme Court nominees based on nominees qualifications); Lee Epstein et al., *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POLITICS 296, 300 (2006); EPSTEIN & SEGAL, *supra* note 39; Krutz et al., *supra* note 92, at 877–78; JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

128. Epstein et al., *supra* note 127, at 303.

distance than nominee qualifications.[129] Finally, studies suggest that presidential strength influences senatorial votes. Presidents whose party controls the Senate and who are not in the fourth year of their presidential term receive more support for their nominees than others.[130]

We know considerably less about the votes cast for lower court nominees. Historically these nominations were routinely approved by unrecorded voice votes, making it difficult for scholars to analyze them.[131] In recent years, recorded roll call votes have become much more common, lending support to the proposition that lower court confirmations have become increasingly politicized.[132] We are likely to see more analysis of these votes in the future.

III

CONNECTING POLITICS WITH DIVERSITY IN FEDERAL JUDICIAL SELECTION

We have described a federal judicial selection process filled with political moments and strategies. We turn now to an examination of what this political process means for the selection of a diverse federal judiciary.

A. Presidential Diversity Focus in Nominations

In the modern era, presidents have increasingly focused their nomination efforts on diversifying the federal courts, particularly with respect to race and gender.[133] Figure 1 helps illustrate this pattern of growth. The figure plots for each presidential administration, from Franklin Roosevelt through Biden—as of the end of 2022—the number of confirmed federal district court judges by gender and race/ethnicity.[134] As the figure demonstrates, the upward trend in selecting women and people of color to the federal district courts is true of both Democratic and Republican presidents, though Republican presidents have been found to prioritize conservative ideology over racial and gender diversity in their nomination patterns.[135]

129. *Id.*

130. *Id.* at 303–05; Cameron et al., *supra* note 127, at 532.

131. *See* GOLDMAN, *supra* note 5, at 12 (arguing that lower court nominations are difficult to analyze because they are routinely approved by unrecorded voice votes).

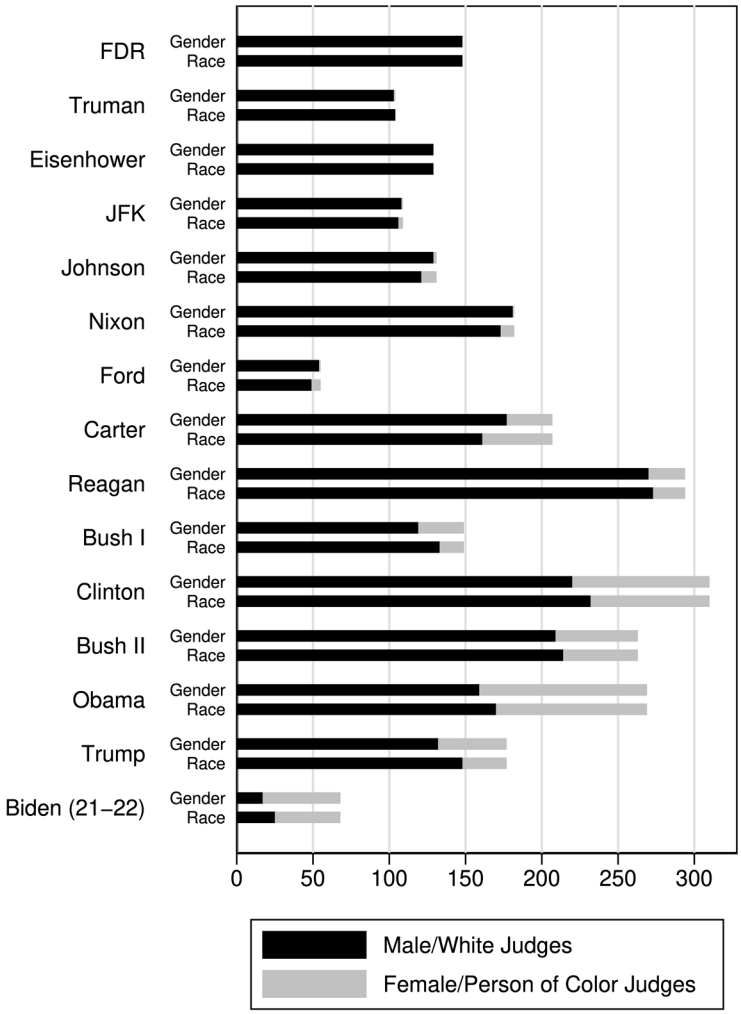
132. King et al., *supra* note 95, at 533.

133. *See generally* Nicole Asmussen, *Female and Minority Judicial Nominees: President's Delight and Senators' Dismay?*, 36 LEGIS. STUD. Q. 591, 591 (2011).

134. Our discussion in this section focused on judges who were eventually confirmed. While we recognize that this provides an incomplete examination of presidential nominations, since a small number of judges are nominated by presidents but not confirmed, data availability necessitates a confirmed-judge focus.

135. Asmussen, *supra* note 133, at 593.

Figure 1: Number of confirmed judges by judge race and gender[136]



This increased focus on nominee race and gender is not surprising. Recent research confirms that "it is in a president's interest to consider women and minority candidates when making nominations for judicial vacancies."[137] Presidents who nominate may be motivated by a desire to cement electoral support from political elites or constituents in key demographic groups. In some cases, presidents, particularly Republicans, may strategically nominate women and minorities that share their policy positions and are more ideologically extreme than the Senate might typically accept because they know senators will be reluctant to face

136. Figure created by authors utilizing data provided by FED. JUD. CTR., *supra* note 84.

137. Alex Badas & Katelyn E. Stauffer, *Descriptive Representation, Judicial Nominations, and Perceptions of Presidential Accomplishment*, 59 J. REPRESENTATIVE DEM. 249, 265 (2023).

the political costs of rejecting these candidates.[138] Some presidents are motivated by a personal commitment to judicial diversity as a remedy for past discrimination and a means to enhance descriptive and substantive representation. For example, as we can see from Figure 1, President Obama nominated—and saw confirmed—more female and person of color judicial candidates than his two immediate predecessors.[139] These nominations were more ideologically moderate than those of his predecessors, suggesting that Obama prioritized gender and racial diversity over ideological preferences.[140] More recently, President Trump seemingly reversed the trend of increasingly diverse nominations, and the female and person of color nominations he did make suggest a strategic focus on ideology rather than any personal commitment to diversity as a principle.[141] By contrast, as Figure 1 highlights quite starkly, the Biden administration's early federal judicial nominations have emphasized, with unprecedented gusto, the selection of women and person of color nominees, along with other underrepresented groups, to the federal courts.[142]

B. ABA Rating Bias Related to Diversity

In addition to ideological bias, as discussed above, there is also some evidence to suggest that the ABA ratings of federal judicial nominees are biased against female nominees, nominees of color, and nominees with non-traditional legal backgrounds. Since the Carter administration, when women and people of color were nominated in large numbers, many have identified systematic differences in how nominees fare in the ratings process based on their race, gender, or both. Carter's female and person of color nominees received far lower ratings than their white male peers.[143] This trend continued through the Reagan, Bush, and Clinton Administrations, with white male nominees having a 75.6% chance of receiving a "well qualified" rating, 15.6% higher than racial minority or female nominees.[144] These findings hold for federal district court judges through 2014, indicating that female and person of color judges received lower ratings, even when controlling for legal education, party of the appointing president, and many legal experiences.[145] While not studied in the same systematic ways as prior administrations, it was observed that the ABA and "the Obama administration had

138. Asmussen, *supra* note 133, at 592.

139. T.J. Kimel & Kirk A. Randazzo, *Shaping the Federal Courts: The Obama Nominees*, 93 SOC. SCI. Q. 1243, 1246 (2012).

140. *Id.* at 1247–48.

141. King et al., *supra* note 95, at 540.

142. Seung Min Kim & Collen Long, *Biden Outpaces Predecessors with Diverse Judicial Nominees*, PBS (Dec. 29, 2022, 6:02PM), https://www.pbs.org/newshour/politics/biden-outpaces-predecessors-with-diverse-judicial-nominees [https://perma.cc/4R6A-8Y89].

143. *See* Slotnik, s*upra* note 65, at 387 (finding over two-thirds of white-male candidates were found to be "Exceptionally Well Qualified" or "Well Qualified" where only 25% of "non-traditional" nominees received those ratings).

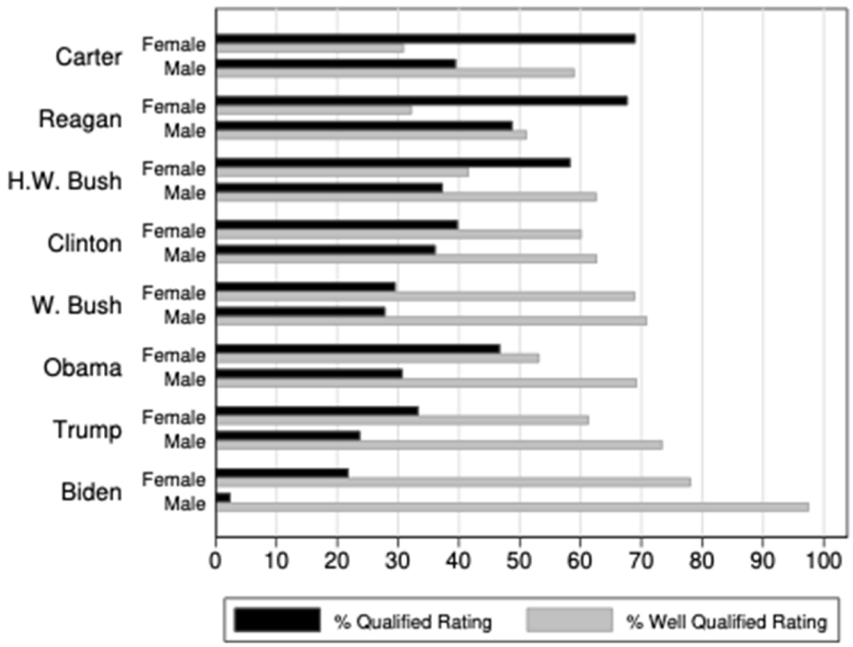
144. Susan Brodie Haire, *Rating the Ratings of the American Bar Association Standing Committee on Federal Judiciary*, 22 JUST. SYS. J. 1, 8 (2001).

145. Sen, *supra* note 38, at 43.

recurring tensions over the fact that most of the "not qualified" ratings the bar group's peer-review system produced were for women or people of color."[146]

In Figure 2, we present updated data on ABA ratings from the Carter administration through the Biden administration—through the end of 2022.[147] As the figure reveals, since the Clinton administration, the disparity between male and female nominees' ratings has shrunk substantially.[148] However, as is visible in Figure 3, for nominees of color, specifically Black nominees, lower rates of the ABA's highest rating persisted through the Obama administration—just as many Democrats speculated leading into the Biden administration in 2021.[149]

Figure 2: Percentage of Qualified Rating and Well Qualified Rating by Judge Sex and Presidential Administration (1977-2022).[150]



146. Charlie Savage, *Biden Won't Restore Bar Association's Role in Vetting Judges*, N.Y. TIMES (Feb. 5, 2021), https://www.nytimes.com/2021/02/05/us/politics/biden-american-bar-association-judges.html [https://perma.cc/TBC5-GPP5].

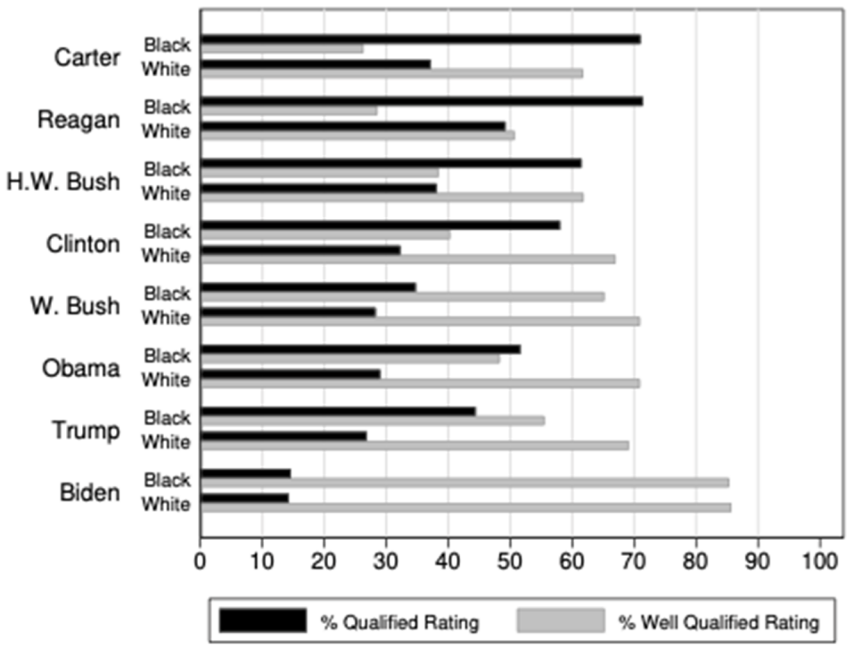
147. FED. JUD. CTR., *supra* note 84. The data includes only confirmed nominees as the Federal Judicial Center Biographical Directory only compiles information on judges who are or have served as federal judges. With that in mind, we can only draw conclusions about these confirmed judges. However, given the accounts we have discussed, the population of nominees with lower ratings is likely higher among the unconfirmed population.

148. *See* FED. JUD. CTR., *supra* note 84.

149. Savage, *supra*, note 146.

150. This figure displays the percentage of Qualified and Well Qualified Ratings by judge sex for each presidential administration. These data only include successful nominations. *See* FED. JUD. CTR., *supra* note 84 (compiling data reflected in the Figure).

Figure 3: Percentage of Qualified Rating and Well Qualified Rating by Judge Race and Presidential Administration (1977-2022)[151]



Beyond ideology, gender, and race, one other potential source of bias in the ABA ratings process is in legal experiential backgrounds. As of 2016, as many as fifty percent of district judges had prior prosecutorial experience while only around 11 percent had worked as public defenders.[152] While not the primary focus of earlier studies, there has been a persistent trend in the empirical research that nominees with experience as a public defender, in legal aid, or other less prestigious experiences fare worse in their ABA ratings than prosecutors or private practitioners.[153] Lawyers of color and women frequently make up higher percentages of public interest lawyers and thus face a double hurdle with bias against certain types of legal experience. Additional empirical research is needed to further assess the presence and extent of experiential bias in ABA ratings, both historically and today.

When he took office in 2021, President Biden, himself a former chairman of the Senate Judiciary Committee, continued to deny the ABA advance access to nominees in a way that the Bush and Trump administrations had. Doing so was

151. This figure displays the percentage of Qualified and Well Qualified Ratings by judge race for each presidential administration. These data only include successful nominations. *See* FED. JUD. CTR., *supra* note 84 (data source for Figure compiled by authors).

152. Tracey E. George & Albert H. Yoon, *Article I Judges in an Article III World: The Career Path of Magistrate Judges*, 16 NEV. L. J. 823, 840 (2015).

153. *See generally* Slotnick, *supra* night 65; Haire, *supra* note 144; Sen, *supra* note 145 (studies demonstrating that lawyers in less "prestigious" careers fare worse in their ABA ratings than prosecutors or private practitioners).

"a first for a Democratic president."[154] Biden professed his goal was to speed up confirmations,[155] while many speculated that the decision was driven by concerns that the ABA's ratings process would negatively impact Biden's efforts to diversify the judiciary.[156] Given that three out of four of the last presidential administrations sidelined the ABA's role early in the judicial nomination process, the ABA's role in federal judicial selection may be waning. With credible claims of political, racial, and gender bias—and potentially experiential bias—what once was lauded as a form of peer-review may just reflect the values of one dues-collecting organization, rather than the profession or public at large.

C. Senate Confirmation Process and Bias

A nominee's gender and race may affect the types of questions and overall hearing experience they receive during the Senate Judiciary Committee confirmation hearings. Studies suggest that female nominees to the Supreme Court are treated differently than their male counterparts, receiving more questions about judicial philosophy in an attempt to more closely scrutinize their competence.[157] Additionally, women and person of color nominees to the Supreme Court also receive more interruptions, questions about their expertise, and questions that invoke differentiation.[158] In contrast to the patterns observed at the Supreme Court, there is little systematic evidence to date of nominee race or gender affecting the types of questions received in lower court confirmation hearings, something that may be due to the more compact and less individualized hearing process lower court nominees experience.[159] Nonetheless, recent events suggest that race and gender may be salient even for lower court confirmation hearings. In 2022, a Republican Judiciary Committee member questioned a Black appellate court nominee about his "rap sheet" of traffic citations, a phrase that a fellow Committee member denounced as "demeaning" in its disproportionate use with nominees of color.[160] Similarly, in 2021, the Committee chair called attention to his fellow members' frequent interruptions of two female appellate court nominees during their joint confirmation hearing, noting that such interruptions were

154. Savage, *supra*, note 146.

155. Debra Cassens Weiss, *Like Trump, Biden asks ABA to Start Judicial Ratings Process after Nominations are Made*, ABA J. (Feb. 3, 2021, 3:27PM), https://www.abajournal.com/news/article/like-trump-biden-asks-aba-to-start-judicial-ratings-process-after-nominations-are-made [https://perma.cc/J7AN-A9MH].

156. Savage, *supra*, note 146.

157. *See generally* Christina L. Boyd et al., *The Role of Nominee Gender and Race at U.S. Supreme Court Confirmation Hearings*, 52 L. & SOC. REV. 871 (2018) (investigating the treatment of female and person of color nominees); Boyd et al., *supra* note 117.

158. BOYD ET AL., *supra* note 117.

159. Logan Dancey et al., *"Strict Scrutiny?" The Content of Senate Judicial Confirmation Hearings during the George W. Bush Administration*, 95 JUDICATURE 126, 134 (2011); Logan Dancey, et al., *Individual Scrutiny or Politics as Usual? Senatorial Assessment of U.S. District Court Nominees*, 42 Am. Pol. Rsch. 784, 795 (2014).

160. Tierney Sneed, *Judiciary Committee Senators Spar Over the Tone of Questions Directed at Nominees of Color*, CNN (Feb. 10, 2022, 3:40PM), https://www.cnn.com/2022/02/10/politics/senate-judiciary-racial-bias-nominees-of-color/index.html [https://perma.cc/YC4P-QC4Z].

much less frequent when male nominees were testifying.[161]

D. The Connection Between Judges' Race, Gender, and Political Backgrounds

Our discussion above revealed that the majority of federal judges selected from 1987-2022 had deep political backgrounds—from party membership to experience campaigning and working for a political party—prior to their judicial appointment. This was the case for judges appointed by both Democratic and Republican presidential administrations. Do these political backgrounds emerge with equal likelihood for women and person of color nominees as they do for male and white nominees, respectively?

We expect that they will not. Rather, we anticipate that female and person of color judges will be less likely to have been entrenched in politics prior to their nomination relative to other judges. A few reasons help to explain why this may be the case. First, research consistently finds a striking gap between men's and women's ambition to run for political office and be involved in politics more generally.[162] Person of color individuals, while not necessarily less politically ambitious than their white counterparts, are, on average, less successful in their political ventures.[163] A second related possibility lies with the pool of potential nominees from which federal judges are drawn. We think it is quite likely that men and white judges' nominations are aided by their close connections to and within political networks—something that would be aided by their prior work, for example, campaigning and fundraising for others or assisting their political party. By contrast, underrepresented groups may be less connected to political networks.[164] As an example of this, political elites are less likely to recruit women to run for office or participate in politics in other ways than they are to recruit men.[165] These systemic issues aside, racial and gender differences could even be a result of the confirmation process itself.[166] Knowing that they are already facing an uphill confirmation battle, these judges may downplay their politics-forward pasts, or even strategically avoid being involved in politics, to avoid further scrutiny and delay.

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161. Grace Benninghoff, *Senate Judiciary Committee Takes Up Beth Robinson's Nomination to Federal Appellate Court*, VT DIGGER (Sept. 14, 2021, 8:48PM), https://vtdigger.org/2021/09/14/senate-judiciary-committee-takes-up-beth-robinsons-nomination-to-federal-appellate-court/ [https://perma.cc/627Y-XR87].

162. *See, e.g.*, Richard L. Fox & Jennifer Lawless, *If Only They'd Ask: Gender, Recruitment, and Political Ambition*, 72 J. POL. 310, 321 (2010); Richard L. Fox & Jennifer L. Lawless, *Uncovering the Origins of the Gender Gap in Political Ambition*, 108 AM. POL. SCI. REV. 499, 512 (2014) (studying the gender gap in political ambition).

163. *See, e.g.*, Paru Shah, *Stepping Up: Black Political Ambition and Success*, 3 POL., GRPS., & IDENTITIES 278, 286 (2015) (discussing the causes and effects of success of political participation for racial minorities).

164. *See, e.g.*, Melody Crowder-Meyer, *Gendered Recruitment Without Trying: How Local Party Recruiters Affect Women's Representation*, 9 POL. & GENDER 390, 393 (2013).

165. *Id.* at 392.

166. *See, e.g.*, Asmussen, *supra* note 133, at 592; HAIRE & MOYER, *supra* note 6; Sen, *supra* note 145, at 43 (discussing the role of race and gender in the confirmation process).

Table 2 presents our descriptive data for the presence of deep political backgrounds among judges confirmed from 1987-2022, broken down by their gender and race.[167] Table 2's gender-centric data tell us, as expected, that female federal judges are less likely to have extensive connections to politics in their backgrounds than their male counterparts. These differences—over fifteen percentage points—are quite large. Similarly, the table's descriptive data indicate that person of color judges are also much less likely than white judges to have political backgrounds. While nearly 65% of white federal judges have rich political backgrounds, that number is nearly twenty percentage points lower for judges of color.

Table 2. Politics-Forward Judges: Gender & Race[168]

	Percentage of Judges with Deep Political Backgrounds
Male Judges	64.5%
Female Judges	48.3%
White Judges	64.4%
Person of Color Judges	44.9%

The substantial variation we observe among judges in holding deep political background status based on their race and gender may be informative as we think about the future of judicial selection. Could it be that a judicial selection strategy that prioritizes a diverse judiciary may have the unintentional benefit of yielding a less politicized judiciary? The data presented in Table 2 provide a cautious "yes" answer to this question given the vastly lower levels of political backgrounds observed among female and person of color judges relative to male and white judges, respectively. But given our above discussion about the high likelihood that female and person of color judges are likely drawn from a different, less politically well-connected sector of the population, it also seems likely that these judges' political backgrounds—and other backgrounds—are present but simply not visible by looking at the Senate Judiciary Committee's questionnaire and its focus on traditional types of political involvement. As such, we think that much about this inquiry is speculative at this stage. Too many unknowns still exist about the differing filtering process that exists for the women and person of color judges, relative to the male and white judge, serving in the federal judiciary from 1987-2022. It is undoubtedly a question that we should prioritize further exploring.

167. Judge race and gender are coded from the FED. JUD. CTR., *supra* note 84 (compiling data reflected in the Table).

168. Table 2 shows the percentage of judges, by group, with political background experiences. For this research, N=1623. The data were collected from FED. JUD. CTR., *supra* note 84.

IV

CONNECTING JUDICIAL SELECTION THEMES TO PUBLIC CONFIDENCE IN THE COURTS

We have discussed the politics of judicial selection, the trends of selecting politics-forward judges to the federal judiciary, and the ABA's mixed success in achieving its goal of advancing judicial qualifications in the federal judicial selection process. Within each of these federal judicial selection topics, we've seen the themes of politics and judicial diversity emerge with frequency. As we conclude, we consider whether the consistent themes we've observed—those of politics dominating and multiple hurdles to diversifying the judiciary persisting—may be potentially harmful to the role and function of courts in the United States. In particular, could these politicized and bias-suggesting patterns threaten public confidence in the judiciary?

To answer this important question, we begin with the fundamental ideal of judicial legitimacy. Scholars generally refer to legitimacy as an institutional property that promotes public perceptions of the institution as trustworthy, competent, impartial, and just.[169] Legitimate institutions hold public confidence since legitimacy confers a sort-of "right" on an institution to make authoritative decisions that will be followed by society.[170] In short, judicial legitimacy is necessary to preserve the rule of law, and therefore, arguably, democracy itself.[171]

Scholars of legitimacy theory often distinguish legitimacy as "diffuse support," a long-term and deeply rooted form of institutional loyalty, rather than "specific support," which is more of a short-term opinion about an institution, often formed in the wake of a high-profile decision.[172] Legitimacy as diffuse support allows institutions to build a "reservoir of goodwill" that ensures continued compliance with its decisions, even in the face of short-term disagreement.[173]

Applied to the courts, two important implications from legitimacy emerge. First, legitimacy promotes voluntary compliance with institutional decisions. This is especially important for judicial institutions, which are unelected and lack the enforcement powers of the other branches of government—the "sword and the purse."[174] Second, legitimacy—with its prevision of grace in the face of public disagreement for individual decisions—allows courts the freedom to decide cases in a counter-majoritarian manner, as may be needed or required. Otherwise, a court's decisions may be overturned or simply ignored.[175]

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169. Michael J. Nelson & James L. Gibson, *U.S. Supreme Court Legitimacy: Unanswered Questions and an Agenda for Future Research*, *in* ROUTLEDGE HANDBOOK OF JUDICIAL BEHAVIOR 132, 133 (Robert M. Howard & Kirk A. Randazzo eds., 2017).

170. *Id.* at 134–35.

171. Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. UNIV. L. REV. 587, 625 (2011).

172. *Id*.

173. *Id.*

174. Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 443 (1992).

175. Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL.

The U.S. Supreme Court, in particular, has enjoyed a consistently high level of legitimacy over time, even in the wake of controversial decisions.[176] One of the more prominent explanations for this put forth by scholars is the theory of positivity bias, which asserts that the public is socialized to view the Court positively as an apolitical institution, whose justices decide cases on legal principles rather than political views.[177] This belief is then reinforced through the public's consistent exposure to legal symbols, such as a judge's robe, a gavel, or a statue of lady justice, which send a message that courts are distinguishable from other political institutions and thus "worthy of more respect, deference, and obedience—in short, legitimacy."[178]

Recent research has challenged the notion that the Court's legitimacy is stable in the face of unpopular rulings, with some demonstrating that even a single contentious decision can impact public opinion of the institution.[179] In other words, diffuse support may be more affected by specific support than previously assumed. Still, it is not clear if a single outcome alone affects legitimacy views in the long-term. One study found that the public's assessments of legitimacy were sensitive to the outcome of salient cases but were conditioned on preexisting policy preferences and ideological distance from the Court. The authors concluded that some Court legitimacy must be rooted in other prior beliefs, noting that "people, collectively and individually, do not deviate from seeing the Court as fundamentally legitimate to fundamentally illegitimate on the basis of a single ruling."[180]

SCI. 971, 972-74 (2009).

176. *See, e.g.*, James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507, 532–33 (2007); James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 352 (1998) (discussing the Supreme Court's institutional legitimacy among American citizens). Note, however, that we know little to nothing about the public's perceptions of the legitimacy of lower federal courts.

177. Nelson & Gibson, *supra* note 169, at 134–35. Scholars have also dubbed this belief that the court's decision-making process is distinct from that of other political institutions in its seemingly logical application of politically neutral legal principles the "myth of legality." John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928, 929 (2000).

178. James L. Gibson & Gregory A. Caldeira, *Confirmation Politics and The Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination*, 53 AM. J. POL. SCI. 139, 142 (2009).

179. *See generally*, Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 196–97 (2013); Dino P. Christenson & David M. Glick, *Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403, 415–16 (2015) [hereinafter Christenson & Glick, *Chief Justice Roberts's Health Care Decision Disrobed*]; BRANDON L. BARTELS & CHRISTOPHER D. JOHNSTON, CURBING THE COURT: WHY THE PUBLIC CONSTRAINS JUDICIAL INDEPENDENCE (2020); Dino P. Christenson & David M. Glick, *Reassessing the Supreme Court; How Decisions and Negativity Bias Afffect Legitimacy*, 72 POL. RSCH. Q. 637, 649 (2019) [hereinafter Christenson & Glick, *Reassessing the Supreme Court*] (all discussing public perceptions of Supreme Court legitimacy through decision-making). *But see* James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the U.S. Supreme Court: Is the Court's Legitimacy Imperiled by the Decisions It Makes?*, 80 PUB. OP. Q. 622, 624 (2016) (finding that the effect of legal symbols neutralizes the effect of short-term disappointment in case outcome).

180. Christenson & Glick, *Reassessing the Supreme Court*, *supra* note 179, at 650.

A. The Politicization of the Judiciary and Public Confidence in Courts

Public confidence in the judiciary has reached historic lows and increasing politicization is likely at least partially to blame.[181] To this end, scholars have debated the extent to which the public continues to prize the "myth" of nonpolitical judicial decision-making. Some studies have confirmed that the public prefers Supreme Court justices to be fair and impartial in their decision-making and to forgo partisanship and ideology.[182] However, others have shown that a significant portion of the public expects judges to engage—or at least recognizes that judges will engage—in "attitudinal" rather than legalistic decision-making[183] and may base their perceptions of the Supreme Court's legitimacy on their ideological alignment with the Court.[184]

Public opinion regarding judicial nominations is particularly instructive as to whether the public still values a nonpolitical judiciary. Many studies have shown that ideology and partisanship are prominent factors in the public's assessment of judicial nominees, sometimes more so than a nominee's qualifications, temperament, or other legal criteria.[185] Adding to this, others have found scant evidence that the public evaluates justices on any sort of legal criteria at all.[186] This too would suggest that the public expects the Court to engage in some amount of political decision-making and would presumably not reevaluate their views on the legitimacy of the Court should the judges do just that—opinions on specific case outcomes aside. Still other studies have found that the public places higher importance on the legal and moral characteristics of a judicial nominee rather than the political characteristics.[187]

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181. Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/Q8KE-3GEU]; Nelson & Gibson, supra note 169, at 143–44.

182. *See*, *e.g.*, James L. Gibson, *Expecting Justice and Hoping for Empathy*, 20 L. & COURTS NEWSLETTER 21 (2010) (reporting on the traits that citizens desire in Justices).

183. James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 L. & SOC. REV. 195, 214 (2011).

184. *See* Bartels & Johnston, *supra* note 179, at 197; Christenson & Glick, *Chief Justice Roberts's Health Care Decision Disrobed*, *supra* note 179, at 415; Christenson & Glick, *Reassessing the Supreme Court*, *supra* note 179, at 644.

185. *See generally* Philip G. Chen & Amanda C. Bryan, *Judging the "Vapid and Hollow Charade": Citizen Evaluations and the Candor of U.S. Supreme Court Nominees*, 40 POL. BEHAV. 495, 505 (2018); Maya Sen, *How Political Signals Affect Public Support for Judicial Nominations: Evidence from a Conjoint Experiment*, 70 POL. RSCH. Q. 374, 389 (2017); Brandon L. Bartels & Christopher D. Johnston, *Political Justice?: Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process*, 76 PUB. OP. Q. 105, 112 (2012); Christopher N. Krewson & Ryan J. Owens, *Public Support for Judicial Philosophies: Evidence from a Conjoint Experiment*, 9 J. L. & COURTS 89, 107 (2021).

186. *See generally* Stephen P. Nicholson & Thomas G. Hansford, *Partisans in Robes: Party Cues and Public Acceptance of Supreme Court Decisions*, 58 AM. J. POL. SCI. 620, 634 (2014); Tom S. Clark & Jonathan P. Kastellec, *Source Cues and Public Support for the Supreme Court*, 43 AM. POL. RSCH. 504, 525–26 (2015); Alex Badas, *The Public's Motivated Response to Supreme Court Decision-Making*, 37 JUST. SYS. J. 318, 327 (2016).

187. Christopher N. Krewson & Jean R. Schroedel, *Public Views of the U.S. Supreme Court in the Aftermath of the Kavanaugh Confirmation*, 101 SOC. SCI. Q. 1430, 1439 (2020); JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE

While perceptions of political decision-making may or may not harm the legitimacy of the Court, there is evidence to suggest that politicized judicial behavior does. Nelson and Gibson distinguish *political* from *politicized* as a way to reconcile the potentially increasing emphasis on judicial ideology with the seemingly unharmed legitimacy of the Court. They posit that politicization, meaning the degree to which judges act like politicians by engaging in strategic or self-interested behavior, is the real cause of harm to legitimacy, rather than political decision-making.[188] This theory finds support in subsequent studies indicating that the public disapproves of behavior such as vote switching or strategic retirements, and this disapproval has a greater impact on diffuse support than does ideological disagreement with the Court.[189] Studies of state courts also demonstrate that the more the public perceives judges as acting like politicians—for example, engaging in aggressive campaigning and fundraising—the less they support the courts overall.[190]

The judicial confirmation process is perhaps the most salient demonstration of U.S. court politicization, with Supreme Court nominees' Senate Judiciary Committee confirmation hearings particularly well poised to encourage the public to view the justices through a political lens. As we've discussed, Supreme Court confirmation hearings are often contentious and politically charged, and a wealth of scholarship demonstrates that this politicization has increased over time.[191] Scholars, pundits, and politicians alike have warned that the highly visible partisan bickering that accompanies this process has the potential to threaten the legitimacy of the Court.[192] Studies show that confirmation hearings create a framing effect that encourages people to privilege political factors in their evaluation of nominees and the Court itself.[193] Senators in the modern era evaluate Supreme Court nominees primarily on ideological and partisan factors, and this is undoubtedly demonstrated to the public through the questions asked of nominees.[194] This effect may be exacerbated by media portrayal of the hearings and accompanying confirmation battles.[195] One recent study found that institutional

JUDGMENTS OF THE AMERICAN PEOPLE 81 (2009).

188. Nelson & Gibson, *supra* note 169, at 141–44.

189. Gibson & Caldeira, *supra* note 183, at 213; James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162, 173 (2015).

190. Damon M. Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens' Diffuse Support for State Courts*, 36 AM. POL. RSCH. 297, 316–17 (2018).

191. *See, e.g.*, Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301 (2017); Epstein et al., *supra* note 127; Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261 2019).

192. Krewson & Schroedel, *supra* note 187, at 1439*;* Keith J. Bybee, *Will the Real Elena Kagan Please Stand Up? Conflicting Public Images in the Supreme Court Confirmation Process*, 1 WAKE FOREST J. L. & POL'Y 137, 152–53 (2011).

193. Bartels & Johnston, *supra* note 185, at 113; Sen, *supra* note 185, at 390.

194. COLLINS & RINGHAND, *supra* note 17, at 47.

195. *See* James G. Gimpel & Lewis S. Ringel, *Understanding Court Nominee Evaluation and Approval: Mass Opinion in the Bork and Thomas Cases*, 17 POL. BEHAV. 135, 146 (1995) (explaining that the White House realized that pointed discussions of judicial philosophy and political views mainly

legitimacy was lower in the immediate aftermath of the hearings of controversial Supreme Court nominee Brett Kavanaugh, and this decline was only weakly associated with support for Kavanaugh as a nominee.[196]

Lower federal court confirmation hearings also provide important insight into this discussion. Dancey et al. assert that senators are not primarily concerned with scrutinizing the qualifications of an individual lower court nominee.[197] Rather, the number and types of questions they employ are more a function of the political environment and the controversial nature of a particular nominee.[198] The degree of senatorial participation in lower court confirmation hearings thus may be motivated more by a desire to take a public policy position and gain electoral support from interest groups than by a desire to seriously evaluate a nominee on the merits.

Viewed together, this line of confirmation hearings-related work tells us, more generally, that while only a small majority of the population may support the discussion and consideration of nominees' ideological positions,[199] the hearings are undoubtedly sending the public the message that a judge's political views are an important determinant of their ability to hold office. If viewing judges as political is in fact detrimental to long-term public support of the Court, then these hearings harm institutional legitimacy. Additionally, the increasingly lengthy confirmation process[200] results in lengthier judicial vacancies. This negatively impacts court productivity, increasing the backlog of cases and reducing the speed of case resolution.[201] This in turn may affect perceptions of a court's legitimacy.

Another of our other areas of discussion—findings that the ABA's rating of prospective federal judges for qualification are politically biased—may similarly have politically-tinged negative implications for public confidence in the courts. As we've discussed, the ABA's guise of neutral, objective qualification ratings of future judges has been tainted by findings that the party of their opposing president affects judges' ratings.[202] These findings have been widely publicized by the media and have been loudly used by presidential administrations to justify their

brought out opposition with few countermobilization efforts).

196. Krewson & Schroedel, *supra* note 187, at 1439.

197. DANCEY ET AL., *supra* note 21, at 140–46.

198. *Id*.

199. *See* Bartels & Johnston, *supra* note 185, at 112 (finding that roughly half of the public thought nominees should be asked about their personal views on legal and social issues and controversial cases).

200. Scherer, *supra* note 8, at 5. *See also* Drew DeSilver, *Up Until the Postwar Era, U.S. Supreme Court Confirmations Usually Were Routine Business*, PEW RSCH. CTR. (Feb. 7, 2022), https://www.pewresearch.org/short-reads/2022/02/07/up-until-the-postwar-era-u-s-supreme-court-confirmations-usually-were-routine-business/ [https://perma.cc/DNU2-M2YK] (demonstrating that generally Supreme Court confirmations have grown lengthier since the late 1960s).

201. *See*, *e.g.*, Sarah A. Binder & Russell Wheeler, *Do Judicial Emergencies Matter? Nomination and Confirmation Delay during the 111th Congress*, BROOKINGS INST. (Feb. 16, 2011), https://www.brookings.edu/articles/do-judicial-emergencies-matter-nomination-and-confirmation-delay-during-the-111th-congress/ [https://perma.cc/7BY2-CMVH] (explaining the rise of judicial emergencies wherein caseloads are increasing while vacancies are not filled).

202. Smelcer et al., *supra* note 86, at 836.

abandonment of the ABA as a partner in judicial selection.[203] Although more details are needed to know with certainty, these concerns surrounding the objectivity of its qualification evaluations may mean that the ABA ratings are simply not well-positioned to bolster public confidence in the courts in ways that many would hope.

B. The Importance of Representation for Public Confidence in Courts

Along with politicization, diversity may play a prominent role in public perceptions of judicial legitimacy. Scholars have identified several ways in which a diverse judiciary can increase the legitimacy of judges and judicial institutions. Perhaps most important here is the effect of the symbolic or descriptive representation of the public at large. There is a well-established body of literature indicating that a decision-making institution that "looks like" the American population is necessary for political stability and legitimacy.[204] This sentiment has been echoed by presidents and other political elites as justification for increasing diversity appointments to the courts.[205] The inclusion of members of marginalized groups in the judiciary should instill greater confidence in the courts as institutions by sending a message that the courts are open to all. This effect is likely to be particularly pronounced among members of those marginalized groups.[206]

Two additional points help support why a diverse judiciary is closely connected to legitimacy. First, the inclusion of underrepresented groups may increase citizens' perceptions of procedural fairness, a key component of institutional legitimacy.[207] Second, to the extent that citizens evaluate institutional legitimacy based on case outcomes, the inclusion of women and people of color on the bench may affect their views on the individual decisions issued by the court, thus affecting perceptions of legitimacy.[208]

Empirical evidence supports these theories. Studies find a direct link between

203. *Id.*

204. *See* Amanda Clayton et al., *All Male Panels? Representation and Democratic Legitimacy*, 63 AM. J. POL. SCI. 113, 113 (2018) (explaining that the presence of women in a political decision-making body increases its legitimacy); Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253 (1978) (explaining how Carter's decision to appoint racially diverse judges and more women would instill confidence in a diversifying society); Katelyn E. Stauffer, *Public Perceptions of Women's Inclusion and Feelings of Political Efficacy*, 115 AM. POL. SCI. REV. 1226, 1126 (2021) (explaining that the belief that women are included results in higher levels of external efficacy amongst both genders).

205. *See, e.g.*, Todd Ruger, *Seeking Court that Looks 'Like America,' Biden Picks Ketanji Brown Jackson*, ROLL CALL (Feb. 25, 2022, 3:20PM), https://rollcall.com/2022/02/25/seeking-court-that-looks-like-america-biden-picks-ketanji-brown-jackson [https://perma.cc/PS4K-US9M]; Kimel & Randazzo, *supra* note 139, at 1244 (identifying a pattern of personal nominations seeking to increase the number of women and people of color on the bench).

206. Goldman, *supra* note 204, at 253.

207. Clayton et al., *supra* note 204, at 114.

208. *See, e.g.*, *id.* (explaining that the presence of women's input in decisions harming women improves the perceived legitimacy of the decision for men).

the number of women[209] and people of color[210] on the bench and the level of institutional legitimacy afforded to the court by members of those groups. This association has extended to perceptions of the legitimacy of individual judges as well.[211] Additionally, scholars have confirmed the existence of both gender[212] and racial[213] gaps in diffuse support of the Supreme Court. Krewson and Schrodel find that women perceive the Court as less legitimate overall than men do, even when controlling for partisanship and ideology.[214] Similarly, Gibson and Caldeira show that Black respondents are generally less supportive of the Court than white respondents.[215] Historic lack of diversity on the bench is certainly one cause of this gap. However, several scholars have also shown that group identity affects the perception of legal symbols, court procedures, and other judicial concepts, which in turn may lower assessments of court legitimacy.[216] This may be due to institutionalized gender[217] and racial stereotypes, as well as shared group experiences that lower confidence in political institutions, such as police brutality against Black people.[218]

Studies are mixed regarding whether increased racial and gender diversity on the bench affects perceptions of institutional legitimacy among white and male citizens.[219] The presence of female and person of color judges on the bench may

209. *See, e.g.*, Christopher Krewson & Jean Reith Schroedel, *The Gender Gap in Supreme Court Legitimacy*, AM. POL. R. 1 (2023); Clayton et al., *supra* note 204.

210. *See, e.g.*, Scherer, *supra* note 7 (explaining that greater descriptive representation for Black people increased institutional legitimacy for African Americans); Matthew Hayes & Matthew V. Hibbing, *The Symbolic Benefits of Descriptive and Substantive Representation*, 39 POL. BEHAV. 31, 31 (2017) (showing that citizens value descriptive representation conditional upon the nature of the policy considered). *But see* L. Marvin Overby et al., *Race, Political Empowerment, and Minority Perceptions of Judicial Fairness*, 86 SOC. SCI. Q. 444, 458 (2005) (finding no effect of increased Black justices on Black citizens' perceptions of fairness in state courts).

211. Alex Badas & Katelyn E. Stauffer, *Someone Like Me: Descriptive Representation and Support for Supreme Court Nominees*, 71 POL. RSCH. Q. 127, 137 (2018).

212. *See, e.g.*, Krewson & Schroedel, *supra* note 209 (finding that women have less diffuse support for the Supreme Court than men, even when controlling for partisanship, ideology, race, age, education, and income).

213. *See, e.g.*, James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POLITICS 1120 (1992) (finding that Black citizens have less positive support for the Supreme Court than white citizens).

214. Krewson & Schroedel, *supra* note 209.

215. Gibson & Caldeira, *supra* note 213, at 1128.

216. *See* Philip Chen & Amanda Bryan, *The Legal Double Standard: Gender, Personality Information, and the Evaluation of Supreme Court Nominees*, 42 JUST. SYS. J. 325, 325 (2021); Kjersten Nelson, *Double-Bind on the Bench: Citizen Perceptions of Judge Gender and the Court*, 11 POL. & GENDER 235, 258 (2015).

217. *See* Philip Chen & Amanda Bryan, *The Legal Double Standard: Gender, Personality Information, and the Evaluation of Supreme Court Nominees*, 42 JUST. SYS. J. 325, 325 (2021) (explaining that individual evaluations of judicial nominees are dependent on gender information); Kjersten Nelson, *Double-Bind on the Bench: Citizen Perceptions of Judge Gender and the Court*, 11 POL. & GENDER 235, 258 (2015) (explaining that gender matters for citizens evaluating court decisions).

218. JAMES L. GIBSON & MICHAEL J. NELSON, BLACK AND BLUE: HOW AFRICAN AMERICANS JUDGE THE U.S. LEGAL SYSTEM 129-58 (2018); James L. Gibson et al., *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 LAW & SOC'Y REV. 837, 858 (2014).

219. *See* Scherer & Curry, *supra* note 210, at 97 (finding decreased perceptions of court's legitimacy

serve to legitimize rulings that seem at odds with group interests. This in turn may affect perceptions of institutional legitimacy. Achury et al. link symbolic representation to procedural legitimacy by showing that the increased presence of Latino judges on a judicial panel that issues an anti-immigration ruling increases perceptions of Court legitimacy among whites who disagree with the ruling.[220] Similarly, Clayton et al. show that women's equal presence in political decision-making institutions legitimizes decisions at odds with women's interests, particularly among men.[221] These results bolster the growing body of literature that suggests that descriptive representation may be more important to perceptions of court legitimacy than substantive representation.[222] That is, public confidence in the courts may ultimately have just as much—or even more—to do with the composition of the bench than with ideological agreement with case outcomes.

While emphasizing a diverse, representative judiciary is important for public confidence, as we have already discussed, numerous hurdles continue to persist in the selection of judges that will help with this. The ABA's rating process shows signs of being biased against women and people of color.[223] Supreme Court nominees' Senate Judiciary Committee confirmation hearings have provided particularly salient examples of gender and racialized stereotypes on full public display for the world to see. Those hearings, as detailed above, include grave imbalances in questions of competence, expertise, and negativity directed toward women and person of color nominees, with these nominees also facing higher rates of interruptions relative to others.[224]

V

CONCLUSION

In this project, we have tackled two related research questions:

Might politics, and how politics interplay with federal judicial selection, play a role in explaining the diversity patterns we observe for our federal courts?

What is the connection between this selection process (politics and attention to diversity) and public confidence in our courts and judges?

In addressing these questions, we have reviewed the very political process used to select judges—one where presidents, interest groups, and senators often

among white citizens as the number of Black judges increased); Clayton et al., *supra* note 204, at 113 (finding that the equal presence of women in decision-making bodies increased institutional trust even among men).

220. Susan Achury et al., *The Impact of Racial Representation on Judicial Legitimacy: White Reactions to Latinos on the Bench*, 76 POL. RSCH. Q. 158, 169 (2023).

221. Clayton et al., *supra* note 204, at 113.

222. *See* Badas & Stauffer, *supra* note 211 (showing that a shared descriptive identity with appointed judges moderated against ideological differences); Krewson & Schroedel, *supra* note 209 (finding that gender identity was a stronger predictor of diffuse support for the Supreme Court than partisanship or ideology); Hayes & Hibbing, *supra* note 210 (showing that citizens assign value to descriptive representation independently of substantive representation).

223. *Infra* Part III.B.

224. *Infra* Part III.C.

all look to achieve their partisan and policy-related goals. As we have seen, politics has also affected efforts and strategies to make our federal courts more inclusive. And while some—but not all—of the political motivations we have discussed favor the selection of more women and people of color to the bench, these prospective nominees also face multiple, bias-tainted hurdles on their way toward selection and confirmation. For both the judicial selection process and the presence of gender and race bias in judicial selection, public confidence in our judicial institutions and processes may be at risk when there is too much politics involved or when events like the confirmation hearings send the unfortunate signal that women and people of color are less fit for a seat on the federal judiciary.