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Judging judges: a study of U.S. federal district court judges in the 10th Circuit

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Abstract

This paper examines the demographics of federal district court judges in the 10th Circuit. Consistent with the glass-ceiling effect literature in positions of power and influence in the legal profession, the study finds that women judges are under-represented on the 10th Circuit bench compared with their numbers as lawyers in the jurisdictions of the Circuit. However, the study finds that minority judges are over-represented in the Circuit. The paper next explores the relationship between under-representation, over-representation and discrimination. Under-representation that cannot be explained in terms of merit criteria or informed opting out, such as the under-representation of women on the 10th Circuit, strongly suggests the lingering effects of past exclusion and discrimination, as well as the current effects of implicit bias. As demonstrated by the over-representation of minority judges, the political commission process can break through the gender glass-ceiling by over-representing qualified women judges in the short run until their overall numbers better reflect equality.

Key words

U.S. Judges; under-representation; over-representation; discrimination; glass-ceiling; implicit bias; merit

Resumen

Corroborando la literatura sobre el efecto del techo de cristal, el artículo descubre que las juezas están infrarrepresentadas en el 10º Circuito en comparación con el número de abogadas. Sin embargo, el estudio descubre que los jueces de grupos sociales minoritarios están sobrerrepresentados en el Circuito. A continuación, el artículo explora la relación entre la infrarrepresentación, la sobrerrepresentación y la discriminación. La infrarrepresentación que no puede ser explicada en términos de criterios de mérito o de la renuncia informada, como es el caso de la infrarrepresentación de mujeres en el 10º Circuito, apoya la idea de que persisten

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los efectos de la discriminación del pasado, así como los efectos actuales de la parcialidad implícita. Como queda demostrado por la sobrerrepresentación de jueces de minorías, el proceso de comisión política puede romper el techo de cristal por razones de sexo, y lo puede hacer mediante la sobrerrepresentación a corto plazo de juezas cualificadas.

Palabras clave

Jueces de EEUU; infrarrepresentación; sobrerrepresentación; discriminación; techo de cristal; parcialidad implícita; mérito

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1. Introduction

We know surprisingly little about U.S. judges (but see Schmidhauser 1979, Ryan *et al.* 1980, Goldman 1999, Baum 2006). Taking advantage of the Federal Judicial Center's Biographical Directory of Federal Judges[1], this study of federal district court judges in the 10th Circuit pursues two goals: increasing our knowledge of federal district court judges (e.g., who are they? What are their backgrounds?), and assessing whether the judiciary features trends similar to the ones experienced by the legal profession (e.g., are women and minority judges under-represented among district court judges? Are federal district court judges increasingly less experienced?).

The study's findings increase our knowledge about U.S. judges, put in place a blueprint for the study of the judiciary outside of the 10th Circuit, and suggest a framework for evaluating the number and background of federal and state judges alike.

2. Summary of the study's findings

The federal district court judges of the 10th Circuit feature under-representation of women judges, who historically account for only 9% of total commissions. Recent numbers increase only moderately: between 1986-2016 only 20% of judges commissioned were women. The numbers reflect significant gender under-representation. On the other hand, ethnic minority judges are over-represented in the 10th Circuit, and this over-representation has been achieved without discernable decline in objective criteria, such as years of practice experience.

Contrary to popular belief (Judicial Selection and Evaluation 2003), judges are not being commissioned at a younger age, and do not have less practice experience as lawyers before ascending to the bench. While women and ethnic minority judges are commissioned at a younger age and have less practice experience as lawyers than their male Caucasian counterparts, the difference in both measures is negligible.

Elite law school credentials play a role in receiving a commission: while the 10th Circuit is home to no elite law schools, approximately 25% of judges commissioned have graduated from an elite law school. Notably, however, graduation from a local law school is a much more significant factor, accounting for 60% of judges commissioned.

3. The Data Set

The Biographical Directory of Federal Judges (BDFJ) includes the biographies of all judges appointed since 1789 to the Supreme Court of the United States, the U.S. courts of appeals, the U.S. district courts, the former U.S. circuit courts, and the federal judiciary's courts of special jurisdiction[2]. This study examines federal district court judges in the 10th Circuit, which consists of Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming[3].

The study's data set consists of the 145 district court judges commissioned in the 10th Circuit. Following the BDJF, the data set includes the year in which judges were commissioned, the state in which they were commissioned, law school attended, gender, ethnicity, age at the time of commission, and appointing President. Based

[1] See Federal Judicial Center n.d.-a: "The Federal Judicial Center is the education and research agency for the federal courts. Congress created the FJC in 1967 to promote improvements in judicial administration in the courts of the United States."

[2] See Federal Judicial Center n.d.-b: "The directory includes the biographies of judges appointed since 1789 to the Supreme Court of the United States, the U.S. courts of appeals, the U.S. district courts, the former U.S. circuit courts, and the federal judiciary's courts of special jurisdiction. These judges were appointed by the president, with the advice and consent of the Senate, to serve "during good behavior" in accordance with Article III of the U.S. Constitution. In addition, the directory includes the biographies of judges who received presidential recess appointments to the aforementioned courts but were not confirmed by the Senate to permanent positions."

[3] As well as portions of the Yellowstone National Park extending into Montana and Idaho.

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on the BDJF, the data set also includes years of service as a federal district court judge, years of practice experience as lawyers prior to commission, and a breakdown of practice experience before commission.

The first 10th Circuit district court judge was commissioned in 1861, 155 years ago. The data is collected and presented in two ways, in five segments of 31 years; and by decade.

Before turning to analysis of the data, an important caveat. The study's results may not be representative of all U.S. district court judges. For example, the over-representation of ethnic minority judges may be somewhat unique and explained in part by the ethnic demographics of the 10th Circuit. And the extent of under-representation of women judges, over the last thirty years, may not reflect realities in other Circuits. Nonetheless, the study yields several important insights.

4. The Study's Findings

4.1. Gender Composition

TABLE 1

Period	Number of Judges Commissioned	Men (percentage)	Women (percentage)
1861-1892	5	5 (100%)	0 (0%)
1893-1923	13	13 (100%)	0 (0%)
1924-1954	19	19 (100%)	0 (0%)
1955-1985	48	47 (98%)	1 (2%)
1986-2016	60	48 (80%)	12 (20%)

Table 1. Gender Composition by Segment.

From a historical perspective, women judges account for 13 out of 145 commissions, or just shy of 9% of total commissions. Yet, a closer examination reveals a somewhat more positive and improving gender picture. Whereas in the first three segments (segments I-III, 1861-1954) there were no women judges, one female judge was commissioned in segment IV and twelve women judges were commissioned in segment V, for a positive trend of 0% to 2% and 20% of all commissions.

Furthermore, given that women lawyers accounted for less than 3% of all U.S. lawyers until the early 1970s (Fuchs Epstein 1995, Carson 2004, ABA 2009), it is not surprising that no women judges were commissioned through segment III. While no formal criteria existed for the selection of district court judges (Johnson and Songer 2002, Shenkman 2012), all were licensed lawyers, and women were systematically denied admission into the profession. Moreover, the same kind of prejudices that led to the exclusion of women from the profession would have similarly foiled commission of women judges through the mid-1950s (Norgren 2013).

Out of the 48 judges commissioned in segment IV between 1955-1985, 36 had at least 20 years of practice experience, and all but 1 had at least 10 years of practice experience. Yet given the exclusion of women lawyers from U.S. law schools and the profession until the 1970s, by 1985 only a small number of woman lawyers would have had at least 10 years of practice experience, let alone 20 years of experience as lawyers prior to being commissioned. Nonetheless, while the relative small number of experienced female practitioners may help explain the very small number of female

judges commissioned through 1985, it does not fully explain the data. For example, Judge Zita Leeson Weinshienk, the first woman judge commissioned in the 10th Circuit, graduated from Harvard Law School in 1958 and had 21 years of practice experience, mostly as a state judge, before she was nominated by President Carter in 1979. Other qualified women lawyers could have been elevated to the bench in segment IV, although the scarcity of female judges in that era did not reflect under-representation compared with their percentage in the legal profession.

Indeed, since only in the mid-1980s did women law students began to account for 50% of the national J.D. population (ABA 1995, 2005), only by the mid-1990s did a significant cohort of women lawyers had at least 10 years of practice experience, and only by the mid-2000s did a significant cohort had at least 20 years of experience ("significant", yet not approximately 50% of the relevant pool of candidates with 20 years of experience because women lawyers exit the profession disproportionately compared to their male counterparts) (Wald 2010a). In segment V, out of 60 commissioned judges, 41 had at least 20 years of experience and all had at least 10 years of practice experience, somewhat accounting for the low representation of women judges in the segment, 12 out of 60.

Review of the gender composition of the Circuit's judges may lead one to cautiously believe that the under-representation of women judges is a self-correcting, "no-problem" problem (Rhode 1991): as the number of experienced women lawyers increases, so will there percentage among federal district court judges. However, analysis of the gender composition of judges by decades reveals a more complicated outlook. Unsurprisingly, the first 12 decades, through 1976, feature no women judges. The first woman judge, Zita Leeson Weinshienk, of the District of Colorado, was appointed in 1979. In 1987-1996 women judges accounted for 25% of all commissions, followed by 28% in 1997-2006. The representation of women judges in 1987-1996 was encouraging notwithstanding the fact that, as expected, women judges had less practice experience than their men counterparts: all 6 women commissioned had at least 10 but less than 20 years of practice experience (for an average of 16 years of practice experience), whereas 13 out of the 18 men commissioned had at least 20 years of practice experience. By 1997-2006, all 5 women judges commissioned had at least 20 years of practice experience. Indeed, out of 18 commissions, the only 4 judges with less than 20 years of practice experience were men, which set up optimism for 2007-2016.

Surprisingly, 2007-2016 has seen a decline to only 6%, a lonely 1 woman judge out of 17 commissioned (with 2 additional women nominees out of 5 pending nominees for pending vacancies in the 10th Circuit) (United States Courts 2017). The 10th Circuit's record for 2007-2016 likely represents an outlier, both compared with other Circuits in the same time frame[4], and relative to 1987-2006. Even so, in this decade, President George W. Bush commissioned Judge Christine M. Arguello to the District of Colorado along with 5 men judges, followed by President Obama who commissioned 11 men judges but no female judges.

[4] Of the 326 federal district court judges commissioned nationally between 2007-2016, 37% were women. United States Courts 2017, Federal Judicial Center n.d.-b.

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TABLE 2

Period	Number of Judges Commissioned	Men (percentage)	Women (percentage)
1861-1866	2	2 (100%)	0 (0%)
1867-1876	1	1 (100%)	0 (0%)
1877-1886	1	1 (100%)	0 (0%)
1887-1896	2	2 (100%)	0 (0%)
1897-1906	3	3 (100%)	0 (0%)
1907-1916	4	4 (100%)	0 (0%)
1917-1926	6	6 (100%)	0 (0%)
1927-1936	3	3 (100%)	0 (0%)
1937-1946	7	7 (100%)	0 (0%)
1947-1956	11	11 (100%)	0 (0%)
1957-1966	13	13 (100%)	0 (0%)
1967-1976	11	11 (100%)	0 (0%)
1977-1986	22	21 (95%)	1 (5%)
1987-1996	24	18 (75%)	6 (25%)
1997-2006	18	13 (72%)	5 (28%)
2007-2016	17	16 (94%)	1 (6%)

Table 2. Gender Composition by Decade.

Importantly, however, even assuming the 10th Circuit gender record in 2007-2016 is an outlier, it is still a cause for alarm. Not only does 6% of commissions reflect significant under-representation of women judges, but by 2007, many women lawyers had ample practice experience and so the decade could have set a record in terms of commissions of women judges, perhaps as high as 36% (consistent with the percentage of women lawyers in the legal profession, ABA 2016b), or even higher, at 50% or more. Put differently, the low percentage of women judges commissioned in 2007-2016, at 6%, may distract attention from the fact that the decade did not feature women judges commissioned at 35-50+%. The problem of gender under-representation may not be self-correcting after all.

More disturbing insights emerge from comparing the gender compositing of federal judges to that of women lawyers in positions of power and influence in the profession. Legal profession scholars have long documented the glass-ceiling effect experienced by women lawyers in positions of power and influence, such as powerful or equity partners at large law firms, resulting in significant under-representation atop the profession (Wald 2010a).

Traditional estimates put the percentage of women equity partners at BigLaw at 11-15%, higher than the less than 9% women judges. And while 1987-1996 (25%) and 1997-2006 (28%) featured increased gender numbers, the gender picture may not be as exciting as can be. The glass-ceiling literature documents that the under-representation of women partners at large law firms is the result of implicit biases, stereotyping, compromised access to training and mentorships and inhospitable workplace cultures and professional ideologies (Wald 2010a, Pearce *et al*. 2015), all of which do not apply to the same extent to federal judicial commissions. That is, the very nature of political nominations is such that it can bypass such complex institutional, structural and cultural hurdles and instill at the top (the federal judiciary) visible gender equality. Indeed, America's Fortune500 corporations have managed to achieve similar visible gender equality at the top of their in-house legal departments, with women accounting for approximately 25% of General Counsel positions (Wald 2012a).

The commission process of federal district court judges is an overly political process. Historically the commission process was often the result of negotiations between the President and home-state Senators from the President's own party, or the party's elite in the state (while some states feature vetting commissions meant to advise home-state Senators on the qualifications of judicial candidates, such commissions are not commonly utilized in the 10th Circuit, with the exception of Colorado) (Johnson and Songer 2002).

More recently, other-party home state Senators appear to have become more aggressive negotiating with the President over the commission process, gaining increased influence. Given how the particulars of the political process differ than those of private practice, factors that explain the under-representation of women lawyers in equity partner positions at BigLaw, such as limited access to training and mentoring should in theory have less of an impact on judicial commissions. Even implicit gender biases and stereotyping should not be expected to play a significant role in the political nomination process compared to promotion policies at BigLaw because while Senators and their staffers are not immune from implicit biases, their bias is not institutionalized and is subject to public scrutiny. Thus, if the problem of gender under-representation is self-correcting, should it not have self-corrected by now? Indeed, even assuming that *recent* commissions are more-or-less representative of the percentage of women lawyers in the profession, should not the political arena be expected to allow for women judges to catch up, overcome historical exclusion, and be representative of the *overall* percentage of women in the profession? Put differently, should not women judges account for approximately 36% of all judges, not just 36% of recently commissioned judges?

Yet, another factor may explain the disappointing gender commission record in the 10th Circuit, and elsewhere. Historically, women (and women lawyers in particular) have been, and continue to be, outsiders to powerful political networks (Whitaker 2010). Thus, the under-representation of women judges may be explained in part by the fact that women tend to be absent from the inner-ranks of political insiders influencing and benefitting from the decision-making processes of home-state Senators, staffers and presidential advisors.

Moreover, perhaps the decline in the percentage of women judges commissioned in 2007-2016 – down from 25% and 28% in the previous two decades respectively – is not at all a coincidence (even if the extent of the decline, to 6%, is). Early empirical analyses in 2007-2016 following the Great Recession show a decline in the percentage of women lawyers holding powerful and equity partner status at BigLaw, as the ongoing restructuring of large law firms including the introduction of multi-tiered partnership tracks and eat-what-you-kill compensation schemes have undercut the position of women partners at these firms (Pearce *et al.* 2015). As noted above, the complex interplay of causes that explains the resurgence (or lowering) of the glass-ceiling at BigLaw does not apply as such to federal judicial appointments.

Yet, in tough and volatile economic times, diversity tends to take a back sit to so-called market considerations as well as to resurging implicit biases and gender stereotyping, which may inform and explain an environment in which declined gender diversity at both BigLaw and the federal judiciary becomes more acceptable to some.

In sum, while overall commissions feature a positive trend of increased representation of women judges over time, the rate of the change has been disappointingly slow.

4.2. Ethnic Composition

TABLE 3

Period	Number of Judges Commissioned	Caucasian (percentage)	Ethnic Minority (percentage)
1861-1892	5	5 (100%)	0 (0%)
1893-1923	13	13 (100%)	0 (0%)
1924-1954	19	19 (100%)	0 (0%)
1955-1985	48	45 (94%)	3 (6%)
1986-2016	60	48 (80%)	12 (20%)

Table 3. Ethnic Minority Composition by Segment.

Historically, minority judges account for 15 out of 145 commissions, or slightly more than 10% of total commissions. Whereas in the first three segments (segments I-III) there were no ethnic minority judges, three minority judge were commissioned in segment IV and twelve were commissioned in segment V, for a positive trend of 0%, to 6% and 20% of all commissions. Moreover, compared to gender diversity, ethnic minority judges fare well. Ethnic minorities experienced as challenging hurdles as women entering law schools and the legal profession, and yet at 6% in segment IV the number of ethnic minority judges approximated their representation in the legal profession, and at 20% in segment V the number of ethnic minority judges far exceeds the percentage of ethnic minority lawyers in the legal profession[5], let alone of partners at large law firms. Indeed, even from a historical perspective, the percentage of minority judges, at 10%, resembles their current representation in the profession.

The same overall positive picture is confirmed in the decade-based analysis. The first ethnic minority judge, Judge Santiago E. Campos, was commissioned in New Mexico in 1978 by President Carter. Since then, every decade has seen an increase in the percentages of ethnic minority judges, from 14% in 1977-1986, to 17% in 1987-1996, 22% in 1997-2006, and 24% in 2007-2016. Indeed, the over-representation of ethnic minority judges compared to their percentage as members of the legal profession (and as powerful and equity partners at BigLaw) features the very visible push toward diversity and equality possible in the political realm and missing at the gender side.

Notably, this relative success story has been managed without a decline in years of practice experience as a lawyer prior to being commissioned. In 1977-1986, of the 22 commissioned judges, 16 had at least 20 years of practice experience, 21 had at least 10 years of experience and only 1 judge has less than 10 years of experience. Of the 3 ethnic minority judges commissioned, 1 had at least 20 years of practice

[5] The ABA's Lawyer Demographics Year 2016 estimates the number of minority lawyers at 12% of the legal profession (ABA 2016a).

experience and the other 2 had at least 10 years of experience, more than reasonable given the recent exclusion of ethnic minorities from the profession at the time. In 1987-1996, of the 24 commissioned judges 13 had at least 20 years of experience and all had at least 10 years of practice experience. Of the 4 minorities commissioned, 2 had at least 20 years and 2 had at least 10 years of practice experience. In 1997-2006, out of the 18 commissioned judges 14 had at least 20 years of practice experience, among them 3 of the 4 ethnic minority judges. And in 2007-2016, out of 17 commissioned judges, 9 had at least 30 years of experience, among them 2 of the 4 minority judges, and 4 more had at least 20 years of experience, among them 1 more minority judge.

Notably, to the extent that this diversity achievement demonstrates that the political process is capable of bypassing the institutional, structural and cultural glass-ceiling effect common in private practice by commissioning qualified ethnically diverse judges, it highlights the shortcomings of and the road still ahead when it comes to gender diversity among the judiciary. It also gives rise to complex questions explored below, such as what explains the over-representation of minority judges and is such over-representation desirable?

TABLE 4

Period	Number of Judges Commissioned	Caucasian (percentage)	Ethnic Minority (percentage)
1861-1866	2	2 (100%)	0 (0%)
1867-1876	1	1 (100%)	0 (0%)
1877-1886	1	1 (100%)	0 (0%)
1887-1896	2	2 (100%)	0 (0%)
1897-1906	3	3 (100%)	0 (0%)
1907-1916	4	4 (100%)	0 (0%)
1917-1926	6	6 (100%)	0 (0%)
1927-1936	3	3 (100%)	0 (0%)
1937-1946	7	7 (100%)	0 (0%)
1947-1956	11	11 (100%)	0 (0%)
1957-1966	13	13 (100%)	0 (0%)
1967-1976	11	11 (100%)	0 (0%)
1977-1986	22	19 (86%)	3 (14%)
1987-1996	24	20 (83%)	4 (17%)
1997-2006	18	14 (78%)	4 (22%)
2007-2016	17	13 (76%)	4 (24%)

Table 4. Ethnic Minority Composition by Decade.

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Of particular note is the relative high percentage of Hispanic judges among minority judges, at 60% (9 out of 15 judges). Yet, this positive highlight ought not to distract attention from the low diversity numbers for other ethnic minorities: only 4 African-American judges (out of 145, at less than 3%), and only 2 Native-American judges at barely over 1%. To date, no Asian-American or Pacific-Islander judges have been appointed as district court judges in the 10th Circuit.

4.3. Age Composition and Practice Experience

Federal district court judges were never commissioned at a young age (controlling for varying life expectancy over time), and are not getting any younger. The first commissioned judge, Archibald Williams, was 60 years old at the time of commission. In segment I, the median age of judges was 40, in segment II it rose to 43, and in segment III it reached 51, where is stayed since (median age of 51 in segment IV and 50 in segment V). Judges' average age was 43 in segment I, up to 45 in segment II, 50 in segment III, 51 in segment IV and 50 in segment V.

TABLE 5

Period	Number of Judges Commissioned	Median Age	Average Age
1861-1892	5	40	43
1893-1923	13	43	45
1924-1954	19	51	50
1955-1985	48	51	51
1986-2016	60	50	50

Table 5. Age Composition by Segment.

Decades-based analysis confirms the trend. Indeed, 2007-2016 featured some of the oldest judges commissioned in terms of both median and average age.

TABLE 6

Period	Number of Judges Commissioned	Median Age	Average Age
1861-1866	2	47.5	47.5
1867-1876	1	37	37
1877-1886	1	43	43
1887-1896	2	41	41
1897-1906	3	46	46
1907-1916	4	42.5	45.5
1917-1926	6	43.5	42
1927-1936	3	55	51
1937-1946	7	46	48
1947-1956	11	54	53
1957-1966	13	55	53
1967-1976	11	53	51
1977-1986	22	50	49
1987-1996	24	47	47
1997-2006	18	50	49
2007-2016	17	53	54

Table 6. Age Composition by Decade.

As a group, women judges are only slightly younger than their male counterparts, with a median and average age of 46. Similarly, ethnic minority judges have a median age of 49 and an average age of 48.

A common critique of U.S. judges is that they lack sufficient practice experience as lawyers when assuming their commissions, although it should be acknowledged that the critique is often made with regard to state courts, as opposed to federal judges (Jurs 2012).

The data lends no support to this critique. While the average practice experience of judges has risen gradually and peaked in segment III (from 17.60, to 21.23 and to 25.32 years respectively), it dipped only moderately in segment IV (by 3.5%) and again in segment V (by another 2%). In fact, the data shows that judges' practice experience has been essentially constant.

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TABLE 7

Period	Number of Judges Commissioned	Average Practice Experience (years)
1861-1892	5	17.60
1893-1923	13	21.23
1924-1954	19	25.32
1955-1985	48	24.44
1986-2016	60	23.93

Table 7. Practice Experience Prior to Commission by Segment.

The analysis by decade sheds additional light on judges' practice experience. After peaking in 1947-1956 at an impressive 28.45 average years of practice experience, judges' experience has decreased for four consecutive decades, reaching a low of 20.96 in 1987-1996, a notable decline of 26%. However, the trend has reversed over the last two decades, in which judges' experience has risen considerably to 24.56 and 27.52 years respectively, its second-highest level of experience recorded.

TABLE 8

Period	Number of Judges Commissioned	Average Practice Experience (years)
1861-1866	2	21.5
1867-1876	1	15
1877-1886	1	19
1887-1896	2	16.5
1897-1906	3	22.33
1907-1916	4	20.75
1917-1926	6	20.5
1927-1936	3	19.67
1937-1946	7	23.71
1947-1956	11	28.45
1957-1966	13	26.92
1967-1976	11	25.09
1977-1986	22	22.45
1987-1996	24	20.96
1997-2006	18	24.56
2007-2016	17	27.52

Table 8. Practice Experience Prior to Commission by Decade.

Another common concern is that the relative low pay of district court judges compared to the alternative pay experienced judicial candidates may command in the private sector may deter qualified candidates from seeking judicial appointments, although the fear may be more justified with regard to state judges as opposed to federal judges who command relatively high pay and benefits. In any event, the data from the 10th Circuit does not reflect this concern. Quite the contrary, unlike the national trend, the data reveals that the percentage of judges hailing from private practice has increased steadily over the last 5 segments, suggesting that the prestige of the federal bench may well compensate candidates for the relative lower pay it offers.

TABLE 9

Period	Number of Judges Commissioned	Judicial	Public	Academic	Private
1861-1892	5	0	3 (60%)	1 (20%)	1 (20%)
1893-1923	13	4 (31%)	4 (31%)	0	5 (38%)
1924-1954	19	5 (26%)	5 (26%)	2 (11%)	7 (37%)
1955-1985	48	15 (31%)	12 (25%)	2 (4%)	19 (40%)
1986-2016	60	15 (25%)	12 (20%)	7 (12%)	26 (43%)

Table 9. Judges' Practice Experience Prior to Commission by Segment.

Analysis by decade somewhat blurs the picture, more consistent with the national trend. While it generally confirms the rise in judges hailing from private practice and the decline in judges with public practice experience, the last two decades have seen a decline in the percentage of judges hailing from private practice (although still the most likely practice background prior to commission), and the last decade has seen a rise in the percentage of judges from public practice. Interestingly, decade-based analysis seems to suggest the growing importance of academic experience for judicial candidates, accounting in the last three decades for 13%, 11% and 12% respectively of all commissions.

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TABLE 10

Period	Number of Judges Commissioned	Judicial	Public	Academic	Private
1861-1866	2	0	2 (100%)	0	0
1867-1876	1	0	1 (100%)	0	0
1877-1886	1	0	0	1 (100%)	0
1887-1896	2	0	0	0	2 (100%)
1897-1906	3	2 (67%)	1 (33%)	0	0
1907-1916	4	1 (25%)	0	0	3 (75%)
1917-1926	6	2 (33%)	3 (50%)	0	1 (17%)
1927-1936	3	1 (33%)	0	0	2 (67%)
1937-1946	7	2 (29%)	2 (29%)	1 (14%)	2 (29%)
1947-1956	11	1 (9%)	4 (36%)	2 (18%)	4 (36%)
1957-1966	13	5 (38%)	3 (23%)	0	5 (38%)
1967-1976	11	3 (27%)	5 (46%)	0	3 (27%)
1977-1986	22	7 (32%)	3 (14%)	1 (4%)	11 (50%)
1987-1996	24	5 (21%)	4 (17%)	3 (13%)	12 (50%)
1997-2006	18	6 (33%)	3 (17%)	2 (11%)	7 (39%)
2007-2016	17	4 (24%)	5 (29%)	2 (12%)	6 (35%)

Table 10. Judges' Practice Experience Prior to Commission by Decade.

4.4. Law School Attended

Federal district court commissions are highly prestigious, elite, coveted, competitive positions, who tend to feature highly qualified judges with elite credentials. As such, one might have expected some of the judges to be graduates of elite law schools[6]. And, indeed, while the jurisdictions of the 10th Circuit – Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming – are home to no elite law schools, the data reveals that a significant percentage of the judges in the Circuit are graduates of elite law schools. Discounting for segment I numbers (4 of the 5 judges commissioned read law, and elite law schools constituted the majority of American law schools), and somewhat discounting for segment II numbers (for similar reasons), graduates of elite law schools – all from outside of the Circuit – have accounted for between 17-25% of all judges commissioned.

At the same time, the data reveals a pattern relating to local law schools, defined for purposes of this study as non-elite law schools located in the same states in which commissions have been made (for example, for judges commissioned in Colorado, the University of Colorado and University of Denver law schools were counted as local schools). Graduates of local law schools account for a large and eventually a majority of judges commissioned in the Circuit. In segment III, graduate of local law schools accounted for 31% of all judges and in segments IV and V, more than 60% of judges commissioned graduated from local law schools.

TABLE 11

Period	Number of Judges Commissioned	Elite Law School (percentage)	Local Law School (percentage)
1861-1892	5	1 (100%)	0
1893-1923	13	4 (44%)	0
1924-1954	19	4 (25%)	5 (31%)
1955-1985	48	8 (17%)	31 (67%)
1986-2016	60	15 (25%)	37 (62%)

Table 11. Law School Attended Composition by Segment.

The results are confirmed in the analysis by decade, and are especially pronounced in the last four decades, 1977-2016, in which a very significant majority of judges commissioned have graduated from either a local or an elite law school.

[6] For purposes of this study, "elite" law schools are defined to be institutions ranked 1-20 in the U.S. News and World Report 2017.

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TABLE 12

Period	Number of Judges Commissioned	Elite Law School	Local Law School
1861-1866	2	0	0
1867-1876	1	0	0
1877-1886	1	0	0
1887-1896	2	2 (100%)	0 (0%)
1897-1906	3	1 (33%)	0 (0%)
1907-1916	4	0 (0%)	0 (0%)
1917-1926	6	2 (33%)	0 (0%)
1927-1936	3	2 (67%)	0 (0%)
1937-1946	7	1 (14%)	2 (29%)
1947-1956	11	2 (18%)	3 (27%)
1957-1966	13	1 (8%)	8 (62%)
1967-1976	11	3 (27%)	7 (64%)
1977-1986	22	3 (14%)	16 (73%)
1987-1996	24	3 (13%)	16 (67%)
1997-2006	18	4 (22%)	12 (67%)
2007-2016	17	8 (47%)	9 (53%)

Table 12. Law School Attended Composition by Decade.

While the data appears to validate the continued relevance of elite educational credentials, it may also reflect the particulars of the commission process as well as the composition of the local bar in the jurisdictions of the 10th Circuit. A majority of practitioners in the 10th Circuit jurisdictions are graduates of its local law schools, a significant minority are graduates of elite law schools and only a small number of lawyers are graduates of non-elite, non-local law schools. Thus, to the extent that the political commission process reflects the pool of candidates available in the jurisdiction – perhaps a local Senator is more likely to support a candidate from within his or her constituency as opposed to someone perceived to be more of an outsider – the representation of elite and local law schools' graduates in the judiciary is not surprising.

At the same time, however, while the data regarding law school attended may not be surprising it is far from intuitive. Graduates of elite and local law schools reflect their respective percentages among practitioners in the jurisdictions of the 10th Circuit, but as we have seen such representation is not the norm in the Circuit: women are under-represented and ethnic minorities are over-represented among commissioned judges.

5. Analysis and Discussion of the Data

Many questions about judges are difficult to answer because the United States has many different judges occupying different roles, pursuing different tasks, in a variety of courts with very different caseloads and challenges, not to mention problems of causality (e.g., are high judicial caseloads and delays in scheduling judicial proceedings a function of insufficient number of judges or of judicial inefficiencies or of other factors?), and of judicial values (e.g., what is the appropriate balance between achieving judicial efficiency and providing a fair judicial process?) (Green 2017). An important step in providing answers to questions about U.S. judges must be a contextual examination of the various U.S. courts in which U.S. judges serve.

This study of federal district court judges in the 10th Circuit offers such a contextual examination. Taking advantage of the BDFJ, it finds that women judges are under-represented and that ethnic minority judges are over-represented in the Circuit, that judges are not being commissioned at a younger age and do not have decreased practice experience, and that graduates of local law schools and of elite law schools are well-represented among judges.

5.1. Judicial Data

Commentators often call on scholars of the legal profession to study lawyers other than BigLaw attorneys (Rhode 1999, Wilkins 1999). At least four reasons explain scholars' fascination with BigLaw. First, information about BigLaw is relatively speaking readily available and easy to crunch (although not as available as it used to be, with some large law firms refusing to release detailed information pertaining to their various new tracks, such as the breakdown of equity and non-equity partners) (Wald 2007). Second, BigLaw are considered elite institutions such that examination of their organization, policies and procedures informs, frames and holds explanatory power regarding the legal profession more generally (Nelson 1992, ABF 2009, Wald 2010b). Third, historically, law professors tended to be the product of, familiar with, and had relationships with BigLaw, although as the background credentials of law professors has changed – increasingly relying on Ph.D. degrees instead of short stints with large law firms – that affinity is waning (McCrary *et al.* 2016). Finally, the ongoing transformation of BigLaw, from the stable and uniform "Cravath System" to a rich diversity of organizational structures, management styles, and business models sustains a scholarly interest in large law firms (Wald 2012b)[7]. Conversely, data about other segments of the legal profession is often, practically speaking, hard to collect and analyze, and their relative low status renders them less appealing areas of study.

Some of the reasons that explain scholars' fascination with BigLaw, similarly explain the scholarly interest in the federal judiciary. Courtesy of the BDFJ, information about federal judges is readily available, federal judicial positions (and clerkships with federal judges) are considered elite positions with which law professors as former clerks are familiar with, and the importance of U.S. Supreme Court and U.S. Court of Appeals appointments as well as the recent partisanship related to federal district court commissions ought to sustain scholarly interest in them.

At the same time, some of the reasons that explain the relative limited scholarly interest in segments of the legal profession other than BigLaw, also explain the somewhat limited scope of scholarship studying the judiciary outside of the federal bench. The great diversity of courts, judicial systems, methods of selection and

[7] "When it comes to the large law firm, the problem may be as much with what we think we know about the large firm as it is with what we do not know… a 'standard story of the large law firm' has emerged to explain the growth of the large firm, an account by now so well accepted that it hardly gets challenged or revisited. This standard account, however, fails to adequately describe the actual rich and vibrant world of large law firms. Instead, it only explains a subset of the large law firm universe, the old Wall Street elite firms and their progeny. A key, therefore, to understanding the complex world of large law firms, is to broaden the scope of inquiry and move past the standard account as a one-size-fits-all explanation for the rise and growth of the large firm." (Wald 2012b).

retention, number of judges and lack of national-wide collection of data renders it challenging to study state judiciaries. Moreover, the relative low status of many state judges makes them less likely to be examined and analyzed.

Thus, it is unsurprising how relatively little we know about judges and the judiciary. Worse, the empirical focus on BigLaw to the relative exclusion of other segments of the legal profession suggests that with the exception of the federal subset, the judiciary is unlikely to be studied in sufficient detail. However, given the central role judges play in our justice system we must do a better job of collecting and analyzing data about the judiciary, especially at a systematic, national level. The efforts of some leading institutions and organizations to study the state judiciary, such as the Conference of Chief Justices (n.d.), and the Institute for the Advancement of the American Legal System (n.d.), must be supplemented to increase our body of knowledge about judges and the judiciary.

5.2. Under-Representation and Discrimination

While in recent decades women judges have been commissioned in numbers approximating their percentage as lawyers, women judges continue to be under-represented as judges in the 10th Circuit compared with their overall percentage as lawyers[8], and their overall percentage in the general population. Ethnic minorities are over-represented as judges compared with their percentage as lawyers, but not relative to their percentage in the general population (and in the jurisdictions of the 10th Circuit). What should one make of under- and discrimination within the judiciary?

A significant body of work documents the under-representation of women and minority lawyers in positions of power and influence in the legal profession. It identifies past explicit discrimination and its legacy, stereotypes, limited mentoring and training opportunities, limited access to business developments and networking, inhospitable professional ideologies, implicit bias and ongoing harassment as some of the causes of the glass ceiling effect. In the context of this scholarship, the under-representation of women judges among the coveted positions of federal district court judges in the 10th Circuit is hardly surprising. Yet making sense of and addressing the under-representation of women judges first requires further scrutiny of the relationship between under-representation and discrimination.

While under-representation sometimes evidences discrimination or its legacy (Ford 2013), conceptually, under-representation is not inherently demonstrative of discrimination, defined as the treatment of similarly situated individuals or groups differently. For example, shorter individuals are under-represented among professional basketball players compared with their percentage in the general population not because of discrimination but because height is considered a relevant factor in assessing the merit qualifications of professional basketball players: shorter players are more likely to have their shots blocked, less likely to score and less likely to grab rebounds, all important factors in the game. Thus, the under-representation of shorter individuals on professional basketball teams in not discriminatory because they are not similarly situated to taller people when it comes to the qualifications that are valued among basketball players. Put differently, the under-representation of shorter people on professional basketball teams is not indicative of discrimination because height is a relevant merit consideration in professional basketball.

In general, under-representation does not indicate discrimination against individuals or groups possessing or lacking certain traits and skills if the traits and skills in question are objectively and reasonably related to the merits of a relevant activity, or if members of certain groups are welcomed to participate in an activity on equal

[8] Women lawyers account for 36% of the profession nationally (ABA 2016a). The percentages somewhat vary in the jurisdictions of the 10th Circuit. For example, in Colorado women lawyers account for 37% of licensed attorneys, as well as 37% of active lawyers (Office of Attorney Regulation Counsel 2015).

terms but choose voluntarily not to do so (Wald 2011a). These two conditions, which sever the presumption that over-representation indicates discrimination or its legacy are related yet distinct factors.

To begin with, under-representation does not evidence discrimination or its legacy if it can be explained in terms of merit-based differences. But not all merit-based explanations sever the presumptive link between under-representation and discrimination. Rather, only when the under-representation can objectively and reasonably be explained in terms of merit – shorter players are more likely to get blocked and thus less likely to score and less likely to secure rebounds, all cardinal aspects of the game – then it does not indicate discrimination.

Consider, on the other hand, the past exclusion of women from the practice of law or the current pay inequities within the profession. Some have tried, and still try, to explain these in terms of merit considerations. Women, wrote many judges denying women's admission petitions, lack the necessary judgment and temperament to be lawyers. In 1873, after "Myra Bradwell appealed her exclusion from the practice of law. U.S. Supreme Court Justice Joseph Bradley rejected her claim of Fourteenth Amendment rights, declaring it 'the law of the Creator' that women's destiny should be limited to the 'noble and benign offices of wife and mother'" (Norgren 2013). Two years later, Chief Justice Edward Ryan of the Wisconsin Supreme Court found it "revolting" that "women should be permitted to mix professionally in all the nastiness of the world which finds its way into the courts of justice." Common sense and experience have proven these findings to be false, but at one point in time they represented the common wisdom of the profession.

Similarly, some commentators purport to explain well-documented gender pay inequities among U.S. lawyers in terms of merit considerations, such as that male partners tend to have bigger books of business. However, research documents that male partners receive higher pay than female partners even when they do not have bigger books of business, and that bigger books of business are sometimes the result of gendered networks and structural and institutional gender discrimination (Reichman and Sterling 2002, 2004).

The point, to be clear, is not that every instance of under-representation evidences discrimination or its legacy. Rather, it is that in defense of the status quo under-representation will often be explained in terms of merit. Sometimes the explanation will be a convincing one – height is statistically relevant to performance as a professional basketball player – and sometimes the explanation will be demonstrably false – women are unfit to practice law. The takeaway here is that exactly because under-representation will often be explained in terms of merit, in cases of documented under-representation the burden of proof must be shifted away from those who claim discrimination and shouldered by alleged discriminators. If, for example, pay inequity at a law firm is in fact explained in terms of males' bigger books of business, then a firm would easily be able to explain it by revealing (subject to appropriate protections) its partners' books of business and how they came about to hold them (inherited the client from another partner, developed it etc.).

Next, under-representation does not evidence discrimination or its legacy if members of under-represented groups can freely and equally participate in the activity in question but voluntarily choose not to do so, a condition often discussed in terms of opting out versus being forced out (Rhode 1996, Selmi 2006). Under-representation that is the result of informed and voluntary opt out does not indicate discrimination, whereas under-representation which results from being forced out certainly suggests implicit (and sometimes explicit) discrimination.

As in the case of merit-based explanations for under-representation, however, the devil of distinguishing opting out from being forced out is in the details. Consider the following example. "A recent article in the New York Times saw as a problem the fact that females are greatly under-represented among the highest-rated chess players,"

writes Thomas Sowell (2016). "Are there girls out there dying to play chess, who find the doors slammed shut in their faces? Are girls and boys not allowed to have different interests? If girls had the same interest in chess as boys had, but were banned from chess clubs, that would be something very different from their not choosing to play chess as often as boys do. As for chess ratings, that is not subjective. It is based on which players, with which ratings, you have won against and lost to. Are women and men not to be allowed to make different decisions as to how they choose to spend their time and live their lives? Chess is not the only endeavor which can take a huge chunk of time out of your life, and unremitting efforts, to reach the top. If you want to become a top scientist, a partner in a big law firm or a top executive in a major corporation, you are very unlikely to do it working from 9 to 5, or taking a few years off, here and there, to have children and raise them" (*Id.*)

Sowell's analysis of the under-representation of women among highest-rated chess players appears to constitute a classic example of opting out. There is no denying that chess ratings are based on objective win-loss records against other chess players (merit considerations) and that girls and boys are allowed to have different interests. Yet the example and analysis collapse when they fail to acknowledge the forced out aspects of elite competitive chess playing: fewer girls are not "dying to play chess" because girls' and boys' interests are culturally manufactured, with girls often directed to play with dolls while boys are being encouraged to play chess, just as men are encouraged later in life "to become a top scientist, a partner in a big law firm or a top executive in a major corporation," whereas women are expected to take "a few years off, here and there, to have children and raise them". As Sheryl Sandberg (2013) and Anne-Marie Slaughter (2012) point out, no one can have it all, and Sowell (2016) is correct that one is unlikely to achieve professional success working only 9-5. At the same time, cultural indoctrination blurs the line between opting out and being forced out.

Today's employers are not, and should not be, held accountable for the background cultural conditions that shape and inform decisions made by their employees. If women employees facing equal opportunities at work choose on an informed basis to disproportionately opt out, then gender under-representation is not an indication of discrimination. But if women employees are forced out by virtue of not being offered equal opportunities, then under-representation may evidence institutional and structural discrimination. And since employers are likely to assert opt out, documented under-representation must entail shifting the burden of proof away from alleged victims of discrimination to alleged perpetrators, who can satisfy it by showing that they extended all employees equal opportunities to succeed in the workplace.

Applying this two prong test, the under-representation of women in the legal profession is indicative of discrimination and is in fact the result of past explicit discrimination because no objective reasonable admission criteria to the legal profession (and in particular to law schools) based on merit qualifications for practicing law could be explained in terms of lawyers' gender identity, and women did not choose not to participate in the practice of law but rather were systematically excluded from it (Wald 2015, 2016)[9].

In particular, the significant under-representation of women lawyers from positions of power and influence in the legal profession – the glass-ceiling effect – is indicative of past discrimination and its legacy, as well as of stereotyping, limited mentoring and business development opportunities, and implicit bias because no objective reasonable professional criteria can explain it (and robust research establishes it). For example, women are admitted to and account for approximately 50% of graduates of U.S. law schools, account for 50% of top-ranked graduates and for 50% of entry-level associates in BigLaw. That women lawyers account for only 11-15% of

[9] This does not mean, however, that gender identity does not impact the practice of law (Wald 2016).

BigLaw equity partners thus indicates implicit discrimination. To be sure, women do exit BigLaw and the profession in disproportionate numbers and some do so voluntarily to pursue other career paths or other preferences, such that the mere fact that women lawyers do not account for 50% of equity partners in BigLaw is not and ought not be considered as the benchmark for discrimination. At the same time, absent reasonable explanations, the persistent and significant under-representation of women as BigLaw equity partners is indicative of implicit discrimination (which ample research confirms). This ought not lead to automatic liability in particular discrimination lawsuits, but documented under-representation should shift the burden to law firms to account for the under-representation.

Now consider the under-representation of women judges in the 10th Circuit. Women account for approximately 35% of all lawyers in the jurisdictions of the Circuit, but historically account for only 9% of federal district court judges. Clearly, the under-representation of women judges on the 10th Circuit is the result of past explicit discrimination. Indeed, in recent decades (with the exclusion of an outlier 2007-2016), women have been commissioned as judges in the 10th Circuit in numbers approximating their percentage as lawyers. Yet, even discounting 2007-2016 as an outlier, because of past discrimination, the overall percentage of women judges at 9% lags far behind their percentage as lawyers.

In addition to the legacy of past discrimination, could women lawyers be opting out of applying for judicial positions? Federal district court judicial positions are prestigious and highly sought-after. Moreover, even accepting for the sake of argument that some cultural background conditions make women lawyers more likely to opt out of the profession or less likely in some circumstances to seek certain legal positions, it defies common sense that women would be opting out of the federal bench which compared to other elite positions within the profession, such as BigLaw partnerships, offer more rather than less relative flexibility. The question thus becomes, if women lawyers are not applying for federal district judgeships in numbers approximating their numbers in the lawyer population, why don't they?

Under-representation that cannot be explained in terms of merit-considerations or in terms of informed opting out is disconcerting because it evidences implicit discrimination. Such under-representation of members of previously excluded groups, for example, women, from the bench, is especially alarming, undermining the very legitimacy of our judiciary and justice system (Bennack 1999, ABA 2003, Rottman 2003). The inability to explain and justify the under-representation of women judges beyond the legacy of past discrimination, while hardly unique to the judiciary in and outside of the 10th Circuit, nonetheless suggests that the commission process is tainted by implicit bias. Presidents and home-state Senators are duty-bound to address it by commissioning qualified women to the federal bench in numbers approximating their percentage among women lawyers. Arguably, to correct for past discrimination and its legacy, in the near future women judges could be commissioned even at numbers exceeding their percentage in the lawyer population, an idea explored in the next section.

5.3. Over-Representation and the Judiciary

At 10% of all judges (and at 20% and 22% over the last two decades), ethnic minorities appear to be over-represented in the 10th Circuit compared with the percentage of ethnic minorities in the legal profession in the jurisdictions of the Circuit, although the numbers do reflect the percentage of ethnic minorities in the national population of lawyers[10]. Does over-representation on the bench constitute a

[10] Nationally, ethnic minorities account for 11% of all lawyers (ABA 2016b). Notably, Hispanic lawyers account for only 3% of all lawyers nationally (*Id*.), such that Hispanic judges are over-represented compared with the percentage of Hispanic lawyers, whereas Black lawyers are under-represented compared with their percentage of all lawyers (4%). (*Id*.)

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concern? Just as under-representation does not per se prove discrimination but rather it tends to indicate discrimination in certain circumstances, over-representation does not in-and-of-itself establish a problem.

The historical over-representation of Caucasian male lawyers in positions of power and influence in the legal profession, the federal judiciary included, is disconcerting exactly because it is the mirror image of the under-representation of women and minority lawyers and judges due to explicit exclusion and discrimination. To correct for this discriminatory past and its legacy, a temporary over-representation of qualified women and minority lawyers in positions of power and influence may be warranted to reflect the profession's and the judiciary's commitment to justice and equality.

Temporary measures meant to address past exclusion and discrimination are not a new concept in the American context. The U.S. Supreme Court, for example, has long recognized the validity of affirmative action in admission policies of institutions of higher education to address past discrimination and its legacy. Applied to the judiciary, however, over-representation in the commission process of district court judges may have two unique features.

First, only qualified lawyers should be commissioned to serve as federal judges. One, admittedly controversial, critique of affirmative action admission policies has been that they result in the admission of under-qualified students into law schools, who in turn fail to graduate, fail to pass the bar exam or become under-qualified lawyers (Sander and Taylor 2012). Yet, even accepting for the sake of argument only, that affirmation action and over-representation may raise valid questions about qualifications and competence, such a critique does not apply to judicial over-representation. While the meaning of merit-based qualifications for the judiciary is far from clear both conceptually and as it applies to the current commission process, given the relative small number of federal district court judgeships, there is no denying that there are ample women and minority lawyers who are more than qualified for the judiciary.

Second, unlike in the affirmative action context, in which the Supreme Court left the meaning of "temporary" ambiguous, temporary over-representation of women and minority judges can be easily defined. Over-representation of qualified women and minority judges ought to continue until women and minority judges are represented on the bench in numbers at least approximating their percentage in the lawyer population and arguably approximating their percentage in the general population. Thus, women judges should account for at least 35% of all sitting federal judges, and up to 50% of all judges; and minority lawyers should account for approximately 10% of all sitting judges and up to upwards of 25% of all sitting judges. And, given past exclusion and discrimination, the only way to achieve such numbers is to temporarily commission qualified women and minority judges in numbers over-represented compared with their percentages in the lawyer population.

Specifically, while the commission of women judges in recent decades (2007-2016 notwithstanding) approximates their rising percentage in the lawyer population, such commissions cannot "catch up" or correct for the documented history of gender exclusion and discrimination. If justice and equality indicate that 35%-50% of *all* sitting judges should be qualified women, women judges should be over-represented in the short run above 35% to catch up for past discrimination.

Recall that at 10% of all judges, ethnic minority judges are not over-represented compared with their percentage in the legal profession (11%), but are over-represented compared with their percentage in the jurisdictions of the 10th Circuit, and the over-representation is even more pronounced in Section V (1986-2016) at 20%, and in the last two decades, 22% and 24% respectively. Ethnic minority judges

are not, however, over-represented compared with their percentage in the general population in the jurisdictions of the 10th Circuit[11].

The equal representation, and over-representation compared with the minority lawyer populations of the 10th Circuit jurisdictions, of ethnic minority judges, a previously excluded group, reflects a commitment to justice and equality. Notably, the equal representation has been achieved without any decline in objective criteria, such as years of practice experience as a lawyer prior to being commissioned. There is no disputing that there are ample qualified ethnic minority candidates for the position of a federal district court judge. The issue is not one of merit but rather of political will, and the track record of the 10th Circuit establishes the commitment of Presidents and home-state Senators in the jurisdictions of the 10th Circuit to visible equality. The very visible success of the representation of ethnic minority judges highlights the failure of under-representation of women judges in the Circuit, yet, at the same time, demonstrates that temporary over-representation of qualified judges can be effectively deployed to address past exclusion and discrimination.

All lawyers are public citizens owing a special duty to the quality of justice (ABA 2017). Federal district court judges are not only lawyers but, as judges, embody and personify justice, fairness and equality. As such, there is a case to be made that over-representation of members of previously excluded groups in the legal profession, and in particular in visible positions of power and influence like the judiciary, is desirable as capturing a commitment to equality and justice.

5.4. Age and Experience

Older age and practice experience as lawyers are not always desirable qualities among judges, but as so far as they reflect positive attributes there is no cause for concern as judges are, contrary to some popular belief, not commissioned at a younger age and do not have less experience than in past generations. Nor does the data support a concern that qualified candidates hailing from private practice are less likely to be commissioned, to the contrary, the percentage of judges with private practice experience has been on the rise, at least until the last two decades.

The data does reveal two trends worthy of attention and additional study. First, the data reveals a rise in the percentage of judges who have academic experience. Academic credentials may reflect the increased politicization of the commission process of district court judges (Johnson and Songer 2002, Shenkman 2012). As legal academics are increasingly more likely to have a significant scholarly record indicative of their political leniencies (Sisk *et al.* 2015), they may become more attractive as judicial appointees. Juxtaposed against a trend in legal academia to hire professors with less practice experience and more graduate degree pedigree, the end result may be that commissioning more judges with academic practice experience means having judges with less practice experience. To the extent that some practice experience may be deemed a positive attribute for a judge, the increased commissions of law professors may be disconcerting.

Second, contrary to the national data at least until recent decades, the study indicates a decline in the number of judges hailing from public service and an increase in the number of judges with private practice experience, an insight that may be relevant in assessing the qualifications of judges to deal with varying types of dockets and litigants.

5.5. Elite and Local Credentials

The data reveals three related trends: elite credentials continue to confer benefits on their holders, a significant increase in the percentage of local law school graduates

[11] According to the U.S. Census Bureau's 2015 Population Estimates, for example, Hispanics account for 21% of Colorado's population, 12% of Kansas' population, 48% of New Mexico's, 10% of Oklahoma's, 14% of Utah's and 10% of Wyoming's.

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on the bench, and a corresponding decline in the percentage of judges who are graduates of neither elite nor local law schools.

That elite credentials tend to pay significant professional dividends is both an intuitive and well-documented phenomenon in the practice of law (Wald 2011b). When it comes to federal district court judges, the benefits of elite education appear to be two-fold. First, graduates of elite law schools will tend to find prestigious jobs more easily and build practice experience credentials that will lend themselves instrumental for those seeking appointment to the federal bench, especially when leveraged in jurisdictions that are home to no elite law schools. Second, when considered to the bench among other similarly qualified individuals, elite credentials will tend to distinguish candidates from those who do not have them.

Not long after World War II, local law schools have begun to account for a majority of judicial commissions in the 10th Circuit. To a degree, the data merely reflects the composition of the legal profession in the jurisdictions of the 10th Circuit, from which the judges are traditionally drawn: it consists of a majority of local law schools' graduates. Thus, while elite graduates are over-represented at the bench suggesting the lasting impact of elite credentials, graduates of local law schools reflect their percentage among practitioners in the 10th Circuit.

Yet, as we have seen, representativeness relevant to the pool of practicing lawyers is not the norm with regard to the gender and ethnic identity of lawyers. Part of the reason for the rise in the importance of local schools may be grounded in the overall exponential growth of the legal profession after WWII. Before 1945, when the bars of the various jurisdictions of the 10th Circuit were relatively quite small, the occasional graduates of non-elite, non-local law schools could still shine and rise to the federal bench. But as the bars grew fast, predominantly from the ranks of local law schools' graduates, they crowded-out graduates of non-elite law schools (Sterling, et al, 2007). Relatedly, as the commission process became more politicalized, graduates of local law schools offered home-state Senators a premium that graduates of non-elite law schools could not offer. Still, the rise in the combined percentage of graduates of elite and local law schools' graduates is quite striking:

TABLE 13

Period	Number of Judges Commissioned	Elite and Local Law Schools	Elite and Local Law School (percentage)
1861-1892	5	1	100%
1893-1923	13	4	44%
1924-1954	19	9	56%
1955-1985	48	39	84%
1986-2016	60	52	87%

Table 13. Elite and Local Law School Attended by Segment.

TABLE 14

Period	Judges Commissioned	Elite Law School	Local Law School	Combined Elite and Local Law Schools
1947-1956	11	2 (18%)	3 (27%)	5 (45%)
1957-1966	13	1 (8%)	8 (62%)	9 (70%)
1967-1976	11	3 (27%)	7 (64%)	10 (91%)
1977-1986	22	3 (14%)	16 (73%)	19 (87%)
1987-1996	24	3 (13%)	16 (67%)	19 (80%)
1997-2006	18	4 (22%)	12 (67%)	16 (89%)
2007-2016	17	8 (47%)	9 (53%)	17 (100%)

Table 14. Elite and Local Law School Attended by Decade.

In a day and age of the soaring costs of legal education (Bennett 2010, Bourne 2012), and the questioning of the value of the J.D. degree (Schlunk 2012), the data suggests an important insight to prospective law students seeking elite legal positions such as appointment to the federal bench: contrary to the traditional common-wisdom of "enroll in the highest-ranked law school that admits you" and the revised common-wisdom following the Great Recession of "enroll in the highest-ranked law school that admits and offers you financial aid and/or a scholarship" (see, e.g., Phipps 2012, Olson 2014) students ought to enroll in elite law schools or local law schools (that offer them aid or scholarships), but not in other law schools. In particular, the data suggests that if forced to choose between a non-elite yet higher-ranked school and a local law school, prospective students might counter-intuitively be better off enrolling in the latter. Emerging data from BigLaw tends to second the advice: as large law firms recruit smaller classes of associates post the Great Recession, they have less of a reason to recruit outside of elite and local law schools.

If the trend holds over time, it may yield complex and fascinating consequences: while the practice of law grows increasingly more national, even global, in nature (Wald 2011c), law schools, with the exception of elite law schools, may have increasingly more localized, regionalized student bodies, who will tend to stay after graduation in their jurisdictions, from which they will practice law nationally. This, in turn, may exert additional pressure on our existing state-based licensing and disciplinary apparatus and fuel trends such as the uniform bar exam. At the same time, it may undercut the ability of relatively high-ranked non-elite law schools to matriculate national student bodies.

6. Conclusion

This study yields several intriguing conclusions, demonstrating the upside of investing in studying the judiciary. Consistent with the robust empirical literature on the glass-ceiling effect, the study finds that women judges are under-represented as federal district court judges in the 10th Circuit compared with their numbers as lawyers in the jurisdictions of the Circuit and with their numbers in the general population in the states that are home to the Circuit. Because many of the reasons that explain the glass-ceiling effect in positions of power and influence in private practice, such as limited mentoring, training and business development opportunities, are absent from the commission process, the under-representation of women judges tends to suggest

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the relevance and importance of other factors, such as implicit bias in the application, commission and confirmation processes.

Next, the over-representation of minority judges in the Circuit compared with the percentage of minorities in the lawyer population suggests that temporary over-representation of qualified judges from previously excluded groups, women included, in the commission process to correct for past discrimination and current under-representation is feasible.

More generally, the study helps advance our understanding of the relationship between under-representation, over-representation and discrimination. Under-representation indicates discrimination or its lasting legacy if it cannot be explained in terms of objective and reasonable merit criteria, or if it results from forcing out members of suspect classifications. Under-representation that cannot be explained in terms of merit criteria or informed opting out, such as the under-representation of women judges as federal district court judges in the 10th Circuit, strongly suggests the lingering effects of past exclusion and discrimination, as well as the current effects of implicit bias. As offensive as the unmitigated effects of past discrimination and current implicit bias are to justice and equality in general, they are especially disturbing in the visible under-representation of women judges in the 10th Circuit and of women and minority judges in other Circuits.

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