Missing in Action: The Absence of Potential African American Female Supreme Court Justice Nominees - Why This Is and What Can Be Done about It

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INTRODUCTION

As a result of the sudden death of Justice Antonin Scalia, President Obama had an opportunity to nominate a third individual to serve on the United States Supreme Court. He nominated Merrick Garland, current Chief Judge of the United States Court of Appeals for the District of Columbia Circuit. While certainly a sound choice, the selection of a white male shines a light on the absence of viable African American female nominees. The absence of African American women on the short list of potential Supreme Court nominees raises questions about the role that African American women play in the federal judiciary in general and on the Supreme Court in particular. For instance, it raises questions about whether African American women, Asian American women, or any other group that has remained invisible in Supreme Court nomination discussions possess a meaningful voice in our democracy. With a Court where three of the nine Justices are over the age of 75,¹ there is a very good chance

¹ Ruth Bader Ginsburg is 83, Anthony Kennedy is 79, and Stephen Breyer is 77. The oldest justice was Oliver Wendell Holmes, Jr., who retired at the age of 90, two months shy of his
the next President of the United States will have an opportunity to nominate two or more Supreme Court Justices.

Article II, Section 2 of the U.S. Constitution provides that "[t]he President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court . . . ." Thus, the process of an individual attaining the position of Justice of the United States Supreme Court begins with a nomination by the President of the United States. While the Senate must approve presidential Supreme Court nominees, the vast majority of the individuals nominated by presidents have been confirmed.

One-hundred and sixty-one individuals have been nominated to serve as a Justice on the United States Supreme Court. Of that number, one-hundred and fifty-four have been white men, four have been white women, two have been black men, one has been a Latina, and...

91st birthday. The second oldest justice was John Paul Stevens, who retired at 90 years and two months. See The Supreme Court Justices: Illustrated Biographies, 1789-2012, at 262, 472, 486, 493 (Clare Cushman ed., 3d ed. 2013) [hereinafter Supreme Court Justices].

2. During the final stages of publication for this article, Donald Trump was elected President of the United States. Donald Trump’s short list of Supreme Court nominees also fails to include viable African American female nominees. See Donald J. Trump Finalizes List of Potential Supreme Court Justice Picks, Trump Campaign Website https://www.donaldjtrump.com/press-releases/donald-j-trump-adds-to-list-of-potential-supreme-court-justice-picks (last visited Nov. 21, 2016).


4. Of the 161 individuals who have been nominated, 124 have been confirmed. See Supreme Court Nominations, Present-1789, U.S. Senate, http://www.senate.gov/pagelayoureference/nominations/Nominations.htm (last visited Sept. 13, 2016).

5. Id.

6. While Thurgood Marshall and Clarence Thomas are the only two African American men nominated to serve on the Court, a third African American man, William H. Hastie, was considered for nomination. Hastie was the first African American federal district judge when he was appointed by President Franklin Roosevelt in 1937 to serve as the first federal district judge for the District Court of the U.S. Virgin Islands. Gilbert Ware, William Hastie: Grace Under Pressure 85–86 (1984). After serving two years, Hastie accepted an appointment to be dean of Howard Law School. Id. at 93. Hastie also became the first African American federal appellate judge when he was appointed to the Third Circuit Court of Appeals by President Truman. Id. at 225–27. In 1962, President Kennedy seriously considered nominating Hastie for the Associate Justice seat being vacated by Justice Whitaker who was retiring. However, due to concerns expressed by Chief Justice Warren and Justice Douglas that he was too conservative, Kennedy deferred and nominated Byron White. Robert Kennedy: In His Own Words 66, 115–16 (Edwin O. Guthman & Jeffrey Shulman eds., 1988); see also David Alistair Yalof, Pursuit of Justice: Presidential Politics and the Selection of Supreme Court Nominees 74–78 (1999). Ironically, Byron White turned out to be the conservative Warren and Douglas feared in Hastie. See, e.g., Mark Tushnet, A Court Divided 34 (2005).

none have been African American women or Asian American women. With a country in which African American female law students and lawyers outnumber African American male law students and lawyers, it is disturbing that an African American woman has never been seriously considered, let alone nominated, to serve on the High Court.

There are a variety of explanations for the lack of African American women in the pool of potential and viable Supreme Court Justice nominees. Historic discrimination against African American women in the legal profession is one such reason. In the past, the ban of nearly all African American women from law schools and the legal profession alone made it impossible for African American women to even be in the running for such positions until the 1970s, when African American women began to attend and graduate from law schools in

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**Latinx L. Rev.** 103, 106 (2009) ("Race is the most useful concept for understanding Latinos because Latinos are a profoundly racialized group that has been subject, over the years, to racism of the many forms we document in the book.").


LaFontant’s nomination would have made her the first woman, white or black, to be nominated to serve on the Supreme Court. However, despite the intrigue, Nixon did not give LaFontant serious consideration. See Ehrlichman, supra.

10. This Article focuses on African American women; however, many of the arguments that are asserted in this Article also apply to other women of color. While in this Article, I focus my attention on the lack of viable African American women as Supreme Court nominees, the issues raised in this Article apply equally to Asian American women, Latino women (notwithstanding the appointment of Sonia Sotomayor), and other women of color.

11. *See infra* Part III.A.
Another reason is pure politics. Because U.S. Supreme Court positions are appointments made by the President and confirmed by the Senate, politics always play a role in who is nominated and whether they are ultimately confirmed. In a profession in which women are still often viewed and treated as second-class citizens and in which African Americans are often viewed as sure-fire votes for Democrats, presidents may have concluded that little political mileage would be gained by appointing an African American woman. Though there are a wide variety of reasons which explain why African American women have remained invisible in the U.S. Supreme Court nomination process, in this Article, I focus my attention on what I contend as relatively new exclusionary criteria that are used for selecting Justices, criteria that have the effect of removing qualified and capable African American women from even being considered to serve on the Supreme Court. Specifically, I expose an inverse relationship between the increasing number of African American women into the legal profession and the consideration of African American women for positions on the Supreme Court. Ironically, as the number and percentage of African American women in the legal profession has grown, the criteria used for selecting judges for the bench has narrowed, resulting in the near-complete absence of African American women in meaningful discussions about potential appointments to the Supreme Court.

Part I of this Article briefly discusses the criteria used by past presidents in selecting U.S. Supreme Court nominees and examines in


13. There were “sound” political reasons for the appointment of each of the three people of color who have been nominated and appointed to the Court. President Johnson’s 1967 appointment of Thurgood Marshall to the Supreme Court was politically warranted. Not only was there national civil unrest due to racial conflict, see LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 495 (2000), Johnson also recognized that he could cement a place in history by appointing the first African American to the High Court. See HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 295 (5th ed. 2008); YALOF, supra note 6, at 86–90. With Justice Marshall’s retirement in 1991, President Bush used the opportunity to appoint not only another African American to the Court, Clarence Thomas, but to appoint a proven conservative after stumbling with the appointment of David Souter, who turned out not to be the conservative Justice the Republican base had desired. Id. at 192–96. President Obama’s selection of the third person color to the bench, Sonia Sotomayor, was politically expedient as well. David Jackson, Obama, Sotomayor and the Hispanic Vote, USA TODAY (May 26, 2009, 11:50 AM), http://content.usatoday.com/communities/theoval/post/2009/05/67282045/1#.Ug9 (noting that by making his first appointment a Latina, Obama was able to demonstrate his commitment to diversity both in terms of gender and ethnicity).
detail the current elite and exclusionary criteria that began in 1986, which is about the time when more women and racial minorities were gaining increased access to the legal profession. Part II discusses how the current exclusionary criteria—the criteria that have emerged as central since 1986—have contributed to the dearth of African American women on the short list of possible Supreme Court Justice nominees. Part III argues that use of today’s elite and exclusive criteria undermine the legitimacy of the Court, first by perpetuating the exclusion of African American women (and other women of color), and second by preventing full representation on the Court, not just in terms of race and gender, but also in terms of law school, legal experience and work, childhood socioeconomic class background, and a whole host of other factors that may affect an individual’s perspective on and approach to legal questions. Finally, Part IV concludes by arguing that the way to increase the available pool of potential African American female Supreme Court Justice is the use of judicial merit selection commissions.

I. PRESIDENTIAL SELECTION OF SUPREME COURT JUSTICE NOMINEES

Since 1980, when African American women began to enter the legal profession in large numbers, one would have expected a significant increase in the number of African American women appointed to the federal bench. One would have also expected more meaningful consideration of African American women for appointment to the U.S. Supreme Court. Ironically, however, as African American women and other once excluded groups have gained more access to entry into the legal profession, there have not been such increases. Rather, over this same period, there has been a narrowing of the once-broad criteria that were used to select Supreme Court Justices from 1789 to 1981 to the criteria today that are so elite and exclusionary that nearly all African American female lawyers have been excluded from serious consideration.15

This Part explains in detail the shift in the criteria employed by presidents to nominate potential Supreme Court Justices. Part I.A explains how the increasing lengths at which U.S. Supreme Court Jus-
tices are sitting on the bench have raised the stakes of inclusion in the nomination process. Part I.B provides a brief overview of the history of Supreme Court Justice selection from 1789 to 1981, revealing the range of criteria that were used in selecting U.S. Supreme Court Justices for more than two hundred years. It then explains how, when, and why the use of such broad criteria began to end in 1986, and identifies the exclusive criteria that are most commonly seen as critical to obtaining a nomination for the U.S. Supreme Court today.

A. The Stakes of Inclusiveness

Ensuring the full inclusion of all groups—here, African American women—in discussions concerning potential U.S. Supreme Court nominations as well as in actual nominations is even more critical today than it has been. To begin, such inclusion has become increasingly important over time because since 1970, the rate at which Supreme Court openings become available has slowed down significantly. From 1789 to 1970, the average length of service for Justices was sixteen years, a time period that did not greatly exceed the service of the presidents who nominated them. Today, in most cases, a president’s choice, if confirmed, will be on the bench long after the president who selected him or her has left office, as the average length of Justice service since 1970 has been twenty-five years. This shift in the Justices’ length of service over time means that the exclusion of African American women or any other underrepresented group from consideration for a position on the bench (and thus actual nomination and confirmation for a position) may have lasting consequences for a quarter of a century or more. And with the long-lasting tenure of the Justices, a president’s selection will have an even greater lasting impact on the jurisprudence of the Court.


17. Since 1970, there have been seven Justices who have completed tenures on the Supreme Court: Harry Blackmun served for 24 years, Lewis Powell served for 15 years, William Rehnquist served for 33 years, John Paul Stevens served for 34 years, Sandra Day O’Connor served for 24 years, Antonin Scalia served for 29 years, and David Souter served for 18 years. The average length of service of these Justices is twenty-five years. Moreover, the four most senior justices have all served more than 22 years: Justice Kennedy, 28 years; Justice Thomas, 25 years; Justice Ginsburg, 23 years; and Justice Breyer, 22 years.

18. From 1994-2005, there was no change in the membership of the Court, and there were a number of long-lasting jurisprudential changes that took place during that time period. THE SUPREME COURT: CONTROVERSIES, CASES AND CHARACTERS FROM JOHN JAY TO JOHN ROBERTS 1151 (Paul Finkelman ed., 2014). For example, United States v. Lopez, marked the narrow-
Because of the length of service of the Justices and the corresponding effects on the jurisprudence of the Court, the need for inclusion in the selection process of Supreme Court Justices is paramount. However, as the length of tenure of the Justices has increased, the breadth of the selection criteria has decreased. The primary criteria used by presidents today in selecting Justices have evolved over time such that they allow a more limited number of lawyers, and even a more limited type of lawyer, to be considered for the federal bench in general, and the U.S. Supreme Court in particular.

In the next section, Part I.B., I discuss just how the criteria for Supreme Court Justices have evolved and narrowed over time before discussing the effect of those criteria on the African American women in Part II.

B. Evolution of Presidential Selection Criteria

Throughout the 200-year history of the Supreme Court, presidents have considered a wide range of factors in selecting nominees to serve on the High Court. For example, George Washington and the other first century presidents placed heavy weight on where the nominees were from geographically. This was an important consideration due in part to the circuit riding responsibilities of the justices. The first century presidents also considered ideology, like most presidents throughout history. Federalist President John Adams's selection of John Marshall, a staunch Federalist himself, as Chief Justice demonstrates the importance of ideology in the selection of Supreme Court justices even during the early years of the Court.

As geographic diversity on the Court lost its importance, ideology began to play an even more dominant role. For example, after President Nixon’s failed attempts to add geographic diversity on the Court with two southern nominees, his push for an ideological choice culminated in the selection of William Rehnquist, who turned out to be his most conservative appointee.

Political ideology continues to be the primary consideration of presidents today. However, in recent years, the non-ideological crite-
ria used for the selection of nominees have grown increasingly narrow, to the point where only a select group of lawyers could even hope to be nominated and confirmed to sit on the Court. The narrow criteria are less about demonstrated aptitude, ability, and temperament, but rather more about politics and pedigree.

The narrowing of the non-ideological criteria began nearly thirty years ago with President Ronald Reagan’s nomination of Antonin Scalia in 1986 to fill the seat being vacated by William Rehnquist, who was being elevated from Associate Justice to Chief Justice following Chief Justice Burger’s retirement. When President Reagan selected Scalia, he chose Scalia primarily because of his ideology. However, President Reagan also chose Scalia because he knew that Scalia’s objective qualifications would not be questioned. Justice Scalia received his bachelor’s degree from Georgetown University and his law degree from Harvard Law School. He was a former assistant attorney general and a former law school professor at the University of Chicago Law School. Additionally, at the time Scalia was nominated, he had been a judge of four years on United States Court of Appeals for the District of Columbia Circuit. Another selling point was Scalia’s age. At 50, Scalia was a relatively young nominee, and would be in a position to serve twenty-five or more years on the bench.

Whether inadvertent or by design, the objective qualifications of the current Justices look very similar to that of Justice Scalia. Indeed, looking at the current Court and some of the more recent nominees to the Court, both failed and successful, one can see an emerging trend—the nomination of individuals who graduated from Ivy League law schools, who were federal appellate judges, and who served in high levels of the federal government. Eleven individuals were nominated

21. Yalof, supra note 6, at 134, 143–44.
22. Id. at 151.
24. Id. at 34.
25. Id. at 65.
26. Id. at 80, 99–100. In 1982, Scalia declined an earlier offer by the Reagan administration to be nominated to be a judge on the United States Court of Appeals for the Seventh Circuit in hopes of securing a seat on the more prestigious, Supreme Court feeding, D.C. Circuit. Id. at 80.
27. Yalof, supra note 6, at 147–48, 153.
28. See id. Scalia served for 27 years and was the longest serving member of the current Court.
after Scalia. Of those eleven, nine graduated from Ivy League law schools, nine were sitting federal appellate court judges, and eight had previously worked in the upper levels of government. An additional common characteristic that appears to be emerging is service as a judicial law clerk. Although Scalia did not serve as a judicial law clerk, six of the twelve nominees since Scalia’s nomination were former federal judicial law clerks.

In the remaining part of this section, I discuss these criteria, which have emerged as critical factors in selection of Supreme Court Justice nominees, and detail the evolution that has occurred with each factor.

1. Ivy League Law School

With the departure of Justice Stevens from the Court and the addition of Justice Kagan in 2010, for the first time in the history of the Supreme Court all of the current Justices are graduates of Ivy League law schools. What makes this fact even more astonishing is that Ivy

34. Five of the current Justices graduated from Harvard Law School (Roberts, Scalia, Kennedy, Breyer, and Kagan), three graduated from Yale Law School (Thomas, Alito, and Sotomayor), and one Justice graduated from Columbia Law school (Ginsburg, who began her law school career at Harvard and transferred and graduated from Columbia). See Lithwick, supra note 30. Merrick Garland, President Obama’s most recent nominee graduated from Harvard Law School, and if the Senate confirms Judge Garland to fill the current vacancy on the Court, this all Ivy League Court will continue. See Background on Merrick Garland, supra note 35.
League law schools account for only five of the approximately two hundred ABA-approved law schools in the United States.35

Despite this current trend of presidents nominating individuals with an Ivy League legal pedigree, the overwhelming majority of Supreme Court Justices who earned law degrees36 were not graduates of Ivy Leagues institutions. Even after most states began requiring a law degree to practice law,37 presidents were not overly preoccupied with selecting an individual who graduated from a specific institution. For example, Dwight Eisenhower’s five nominees, selected between 1953 and 1959, all hailed from different law schools: Earl Warren was a graduate of Berkeley, John Marshal Harlan II graduated from New York Law School, William Brennan from Harvard, Charles Whittaker received his law degree from University of Missouri-Kansas City, and Potter Stewart from Yale.38 John F. Kennedy’s two nominees, Byron White and Arthur Goldberg, were from Yale and Northwestern University Law School, respectively.39 Although two of Nixon’s six nominees received their law degrees from Harvard—Clement Haysworth and Harry Blackmun—his other nominees received their law degrees from non-Ivy League law schools.40 Nixon’s first nominee, Warren Burger, whom he selected for Chief Justice, graduated from St. Paul College of Law (since renamed William Mitchell College of Law);41

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36. Some Supreme Court Justices did not have law degrees. For example, Robert Jackson, who was nominated by Franklin Roosevelt in 1941, went to Albany Law School, but did not earn a degree. Frequently Asked Questions—Justices, supra note 16.

37. It was not until the early 1900s that legal education became formalized, and even as late as 1922, no state required a law degree to practice law. However, by about 1940, most states required a law degree to practice law. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s, at 172–74 (1983).


40. Supreme Court Nominations, Present-1789, supra note 4.

Harrold Carswell graduated from Walter George School of Law; Lewis Powell received his law degree from Washington and Lee University (however, he did receive his Masters of Law degree from Harvard); and William Rehnquist graduated from Stanford Law School.\textsuperscript{42} President Gerald Ford's only nominee to the Court, John Paul Stevens, graduated from Northwestern University Law School.\textsuperscript{43}

Reagan's first two nominees were from Stanford—Sandra Day O'Connor and William Rehnquist.\textsuperscript{44} Reagan then nominated Scalia from Harvard, Robert Bork from University of Chicago, and Anthony Kennedy from Harvard.\textsuperscript{45} As previously noted, the Ivy League trend began to emerge around the time Reagan nominated Scalia. The exclusivity became even more entrenched following Reagan's presidency, as the next ten nominees, selected by four different presidents, all hailed from Ivy League institutions, with the exception of Harriet Miers, who graduated from Southern Methodist. Interestingly, yet not surprisingly, given the elitist trend in the nominations at the time of her nomination in 2005, Miers' nomination was criticized in part because she was not a graduate of one of the more elite law schools.\textsuperscript{46}

Despite the assumption of many to the contrary, where an individual received his or her law degree does not necessarily dictate the effectiveness or quality of that individual as a Justice. First, Robert Jackson, who had a significant impact on the Court,\textsuperscript{47} did not receive a law school degree.\textsuperscript{48} Additionally, other highly regarded Justices, such as Chief Justice Earl Warren, and Justices John Marshall Harlan II

\begin{footnotes}
\textsuperscript{42} DOUGLAS CLOUATRE, PRESIDENTS AND THEIR JUSTICES 74 (2010).
\textsuperscript{44} CLOUATRE, supra note 42, at 74.
\textsuperscript{47} See Bryan Garner, Celebrating the Powerful Eloquence of Justice Robert Jackson, ABA L.J. (Oct. 01, 2016 02:50 AM) http://www.abajournal.com/magazine/article/powerful_eloquence_justice_robert_jackson.
\textsuperscript{48} See SUPREME COURT JUSTICES, supra note 1, at 369. That is, of course, not to say that an individual today without a legal education would be at all qualified to serve on the Supreme Court. The point is, however, that the best, brightest and most effective potential judges are not found exclusively at Ivy League legal institutions.
\end{footnotes}
and John Paul Stevens,49 were not products of Ivy League legal education.50

Without a doubt, there are a number of law schools, not just five, that produce high quality lawyers who would make and have made outstanding Supreme Court Justices. Not only does the trend in nominating exclusively products of Ivy League law schools ignore this fact, but the trend, like the below-discussed factors, significantly and unnecessarily limits the pool of qualified applicants. And this narrowing of the pool has a disproportionate effect on African American women.

2. Federal Judicial Experience

Probably the most important of the current criterion to have emerged is prior federal appellate judicial experience. Indeed, eight of the nine current Justices were sitting federal circuit judges when nominated.51 However, the nomination of federal appellate judges to serve on the Supreme Court is a relatively new trend.52 Admittedly, as the federal lower courts grew in number during the 1900s, presidents began selecting with increasing frequency Supreme Court nominees who were current or former federal court of appeal judges.53 However, even with the increase in the number of federal trial and appellate judges, presidents did not feel compelled, pressured, or even inclined to nominate individuals with judicial experience. For exam-

50. John M. Harlan II, supra note 38; John Paul Stevens, supra note 43; Earl Warren, supra note 38.
51. Chief Justice Roberts had been a judge on the D.C. Circuit for two years when he was nominated; Justice Scalia had been a judge on the D.C. Circuit for four years when he was nominated; Justice Kennedy had been a judge on the Ninth Circuit for thirteen years when he was nominated; Justice Thomas had been a judge on the D.C. Circuit for nineteen months when he was nominated; Justice Ginsburg had been a judge on the D.C. Circuit for thirteen years when she was nominated; Justice Breyer had been a judge on the First Circuit for fourteen years when he was nominated; and Justice Sotomayor had been a judge on the Second Circuit for eleven years when she was nominated (and prior to that had been a district court judge for the Southern District of New York for six years). Elena Kagan, the ninth and most recent Justice, had not served as a judge when she was nominated. See Biographies of Current Justices of the Supreme Court, supra note 32.
52. See Tracey E. George, From Judge to Justice: Social Background Theory and the Supreme Court, 86 N.C. L. REV. 1333, 1340 (2008) (describing the change in the norm of prior federal judicial experience for Supreme Court Justices).
53. Id. at 1337–48.
ple, from 1937-1943, Franklin D. Roosevelt nominated eight new Justices, and of those eight, only one was a federal judge.\(^5\) John F. Kennedy made his only two Supreme Court appointments in 1962 and neither individual had former judicial experience.\(^5\)

However, beginning in 1967, the trend has been for presidents to nominate individuals who were former federal appellate judges.\(^5\) Beginning with President Johnson’s nomination of Thurgood Marshall in 1967, seventeen of the twenty-two, or 77%, of the individuals who were nominated to the Court had been former or current federal court of appeals judges.\(^5\) In contrast, only twelve of the thirty-two, or 38%, of the new nominees from 1914 to 1967 were former or current federal appellate judges.\(^5\)

Although the trend of selecting graduates of Ivy League law schools may have developed from a certain degree of elitism, the trend of nominating federal appellate judges developed primarily as a result of politics. For instance, Nixon, who was elected on the conservative “law and order” platform,\(^5\) was determined to name “law and order” Justices to the Supreme Court.\(^5\) Nixon and his advisors believed that the most expeditious way to determine how an individual would adjudicate Supreme Court cases was to review an actual judicial record for a “law and order” judicial philosophy.\(^5\)

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54. Roosevelt appointed a total of nine Justices to the Court. The eight new appointees were Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, James F. Byrnes, Robert H. Jackson, and Wiley Blount Rutledge. Roosevelt also nominated Harlan Fiske Stone to serve as Chief Justice in 1941. Stone had previously served as an Associate Justice on the Supreme Court from 1925 to 1941. Of the eight, only Rutledge, who was serving on the D.C. Circuit, had previous judicial experience. CHRISTOPHER EISGUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 136 (2007).

55. Kennedy's nominees were Byron White, serving as Deputy Attorney General at the time of his nomination, and Arthur Goldberg, serving as Secretary of Labor at the time of his nomination. Id.


57. The nominees who were not federal court of appeals judges were Lewis Powell, William Rehnquist, Sandra Day O'Connor, Harriet Miers, and Elena Kagan. While Sandra Day O'Connor was not a federal appellate judge, she was an Arizona state court of appeals judge. See Curry, supra note 46; Harriet E. Miers Profile, supra note 32.


60. YALOF, supra note 6, at 131.

61. Id.
sult, Nixon first looked to then-current federal judges when seeking nominees to the High Court, and the first four of Nixon’s six nominees were federal appellate judges.\textsuperscript{62} It was only after two of his federal appellate judge nominees were rejected that Nixon expanded his search of potential nominees outside of the judiciary.\textsuperscript{63}

Likewise, politics led to Reagan’s selection of Scalia, as ideology was a primary concern in the selection.\textsuperscript{64} Reagan’s advisors focused primarily on current judges, having determined, like Nixon’s advisors, that an individual’s judicial record was the most expedient and accurate way to determine ideological views and judicial philosophy.\textsuperscript{65}

While presidents since Reagan have, with varying degrees of success, considered nominating non-judges,\textsuperscript{66} since Scalia’s nomination, ten of the twelve individuals nominated have been federal appellate judges.\textsuperscript{67} And of the two nominees who were not federal judges—Miers and Kagan—only Kagan was confirmed.\textsuperscript{68} Miers’ qualifications were questioned in part because she did not have prior judicial experience; after harsh criticism, she withdrew her nomination.\textsuperscript{69} And although Kagan was the current Solicitor General of the United States at the time of her nomination, and ultimately confirmed, her qualifications were nevertheless questioned by some because she did not have prior judicial experience.\textsuperscript{70}

Despite the current emphasis on federal judicial experience,\textsuperscript{71} history teaches us that having previous judicial experience does not necessarily determine the quality of the Justice. Many highly regarded

\begin{itemize}
  \item \textsuperscript{62} Id. at 70.
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} Id. at 142.
  \item \textsuperscript{65} Id. at 98.
  \item \textsuperscript{66} For example, Bill Clinton specifically sought to nominate a non-judge, and offered a Court vacancy to former governor of New York, Mario Cuomo; however, Cuomo declined. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 75–76, 84–85 (2008) (George H. Bush nominated non-judge Harriet Miers, and Barack Obama nominated non-judge Elena Kagan).
  \item \textsuperscript{67} Indeed, Judge Garland, who had served as a judge on the D.C. Circuit Court of Appeals for 19 years at the time of his nomination, has more judicial experience than any other Supreme Court nominee in history.
  \item \textsuperscript{69} Id.
  \item \textsuperscript{70} Charles W. “Rocky” Rhodes, Navigating the Path of the Supreme Appointment, 38 FLA. ST. U. L. REV. 537, 540–41 (2011).
  \item \textsuperscript{71} Even Chief Justice Roberts has commented that Supreme Court Justices should be selected from the bench. Lee Epstein et al., The Norm of Prior Judicial Experience and its Consequences for Career Diversity on the Supreme Court, 91 CAL. L. REV. 903, 905 (2003).
\end{itemize}
Justices did not have prior judicial experience. For example, Earl Warren, Hugo Black, and William Douglas, considered by many to be outstanding jurists, had no judicial experience when appointed to the Court. Likewise, many Justices who have been deemed ineffective or marginal Supreme Court Justices were former judges. For example, despite having served thirteen years on the D.C. Circuit when nominated, Chief Justice Warren Burger is regarded as a wholly ineffective Justice. Fred Vinson also served on the D.C. Circuit before becoming Chief Justice of the Court and is considered by many to be one of the worst Justices in the history of the Court.

Given that prior judicial experience does not necessarily determine the quality of a Supreme Court Justice, the weight given to this factor is unwarranted. Not only is undue weight unwarranted, but as discussed in Part II below, the overreliance on this factor is having a detrimental effect on the diversity of the pool from which Supreme Court nominees are being selected.

3. Age

The significance of age should be addressed at this point because, even if an individual is a federal appellate judge—one of the most important factors, if not, the most important—the age of the individual may completely remove them from consideration for nomination to the Supreme Court. Presidents have begun to appreciate more and more that their Supreme Court judicial nominees could have effects beyond the president's time in office. As a result, age has become a key consideration in the selection of Supreme Court nominees. For instance, when President Reagan considered individuals to fill the seat being vacated by Rehnquist who was being elevated from Associate

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73. When nominated, Warren was governor of California, Black was a U.S. Senator, and Douglas was Chair of the Securities and Exchange Commission. Other non-judge nominees who are regarded as among the best Justices to serve on the Court include Charles Evans Hughes (governor of New York), Felix Frankfurter (law professor), Robert Jackson (Attorney General and Solicitor General), and Louis Brandies (private practice). *Id.* at 94, 134-37, 150-53.


75. Bernard Schwartz, *A Book of Legal Lists: The Best and Worst in American Law* 32 (1997); other former judge nominees whose tenures on the bench were less than stellar include Charles Whittaker (Eighth Circuit), Sherman Milton (Seventh Circuit), *Id.* at 29, and Willis Van Devanter (Eighth Circuit). Ross, *supra* note 49, at 445-52.

76. See, e.g., Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. Pa. L. Rev. 781, 795 (1957) ("One is entitled to say without qualification that the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero.").
Justice to Chief Justice, Scalia was selected over Bork, in part, because Scalia, who was fifty, was nine years younger than Bork. The average appointment age of the current Justices is 52.5, and all of the sitting Justices were 56 or younger when appointed, with the exception of Justice Ginsburg, who was 60 when she was appointed. Thus, the trend appears to be that presidents will generally seek nominees no older than 56.

4. Federal Government Experience

In recent years, when a Supreme Court Justice nominee did not have prior judicial experience, that individual was most likely a high-ranking federal government official. As noted above, since 1967, only five of the twenty-two new nominees were not federal judges. Of those five, three were high-ranking government officials. Of the remaining two, one was a state court of appeals judge and the other was in private practice.

In many cases, a nominee had been both a federal judge and a high-ranking government official. Indeed, of the eight current Justices who were former federal appellate judges, five served in high-level federal government positions prior to being appointed to the federal appellate bench. Thus, it would be difficult to imagine an individual

77. YALOF, supra note 6, at 147.
78. Chief Justice Roberts was 50 at the time of his appointment; Justice Scalia was 50, Justice Kennedy was 52, Justice Thomas was 43, Justice Ginsburg was 60, Justice Breyer was 56, Justice Alito was 56, Justice Sotomayor was 55, and Justice Kagan was 50. Biographies of Current Justices of the Supreme Court, supra note 32.
79. If confirmed, Judge Garland who is 63 would be one of the oldest individuals to join the Court. It bears noting that the other two individuals on President Obama's short list, Judge Paul Watford of the Ninth Circuit and Judge Sri Srinivasan of the D.C. Circuit, are 48 and 49 respectively. Pamela Brown, Sources: Obama Narrowing Supreme Court List, CNN (Mar. 12, 2016), http://www.cnn.com/2016/03/12/politics/obama-supreme-court-short-list/.
81. William Rehnquist was the Assistant Attorney General for the Department of Justice Office of Legal Counsel when nominated by President Nixon. Harriet Miers was White House Counsel when nominated by President Bush II. Elena Kagan was Solicitor General when nominated by President Obama. YALOF, supra note 6, at 125; see Biographies of Current Justices of the Supreme Court, supra note 32.
82. Sandra Day O'Connor was an Arizona State Court of Appeals judge when nominated, and Lewis Powell was in private practice when nominated. Biographies of Current Justices of the Supreme Court, supra note 32; Lewis F. Powell, Jr., BIOGRAPHY.COM, http://www.biography.com/people/lewis-f-powell-jr-38967#early-life (last visited Oct. 23, 2016).
83. Chief Justice Roberts served in the Solicitor General's office, Justice Scalia served in the White House Office of Legal Counsel, Justice Thomas was the Chairman of the Equal Employment Opportunity Commission, Justice Breyer served in the Department of Justice as a special prosecutor and counsel; and Justice Alito served in both the Attorney General's office and the Solicitor General office. Biographies of Current Justices of the Supreme Court, supra note 32.
being nominated today who was neither a federal appellate judge nor a high-level federal government official.

Like the federal appellate judge factor, serving as a high ranking federal government official has only recently become a critical factor in selection of Supreme Court nominees. While presidents have frequently scoured federal public servants for possible Supreme Court nominees, not serving as a high-ranking government official has not historically removed one altogether from consideration. For example, in 1965 when President Johnson was seeking to fill the seat vacated by Arthur Goldberg, Johnson was advised that he was “free to choose [an individual] from the federal or state judiciary, private practice, or the academic world.” Indeed, of the fifteen individuals suggested to Johnson by his advisors for nomination, only two were federal government officials. Of the remaining thirteen, two were federal appellate judges, six were in academia, four were state judges, and one was in private practice. Johnson ultimately selected the individual who was in private practice—Abe Fortas.

Also like the federal judge criterion, service in a high governmental position does not determine whether an individual will make an effective or “good” Justice. A number of highly regarded Justices were neither federal judges nor federal government officials. Justices Benjamin Cardozo, Oliver Wendell Holmes and William Brennan were all state judges. Chief Justices Earl Warren and Charles Evans Hughes were both state governors when selected. Justice Brandeis was in private practice and Justice Frankfurter was a law professor. Moreover, some of the least effective Justices served in high-level federal government positions when nominated. The most noteworthy example is Justice James Clark McReynolds. McReynolds was serving as Attorney General when nominated by Woodrow Wilson in 1914, and has frequently been labeled one of the worst Supreme Court Justices in history.

Despite the historical inclusion of individuals with varied backgrounds in the pool of potential Supreme Court Justices, presidents

84. YALOF, supra note 6, at 83.
85. Id. at 84.
86. Id.
87. Id. at 85–86.
88. See SUPREME COURT JUSTICES, supra note 1, at 260, 337, 410.
89. Id. at 279, 401.
90. See Schwartz, supra note 72, at 123–44; see also Ross, supra note 49, at 414.
91. See Ross, supra note 49, at 433.
today appear to place greater emphasis on federal government experience, especially when the individual being considered does not have federal appellate judicial experience. The heavy weight given to this factor, like the above-discussed factors, is unwarranted. Moreover, as demonstrated in the next Part of this Article, this factor unnecessarily limits the pool from which Supreme Court nominees are selected.

5. Judicial Clerkships

An emerging trend appears to be the selection of individuals who served as Supreme Court law clerks. Justice Horace Gray initiated the use of a law clerk or "secretary" in 1882 when he was appointed to the Court. Following his practice as the chief Justice of the Supreme Judicial Court of Massachusetts, each year Gray would hire a graduate from Harvard Law School to serve as his law clerk. By 1919, virtually all of the Justices had followed suit and Congress, formally recognizing the practice, began providing funding for Supreme Court law clerks. During the 1940s, the Justices began employing two law clerks. In the 1970s, the number of law clerks for each Justice increased to three. Today, all of the Justices employ at least four law clerks.

Although Supreme Court clerkships provide an individual with a first-hand view of the workings of the Court, historically, presidents have not placed much weight, if any, on whether an individual clerked for a Supreme Court Justice, or any other judge. In fact, there have only been six Justices who were former Supreme Court law clerks.

93. Id.
94. Id. (noting that in 1930, Congress authorized federal circuit judges to hire law clerks. In 1945, Congress authorized funding for all district judges to hire law clerks).
97. See JUDICIAL YELLOW BOOK 3-6, (Summer 2016); see also O'BRIEN, supra note 95, at 134.
Recent presidents, likewise, do not appear to have placed significant weight on this factor. It is nevertheless striking that five of the last fifteen individuals nominated were Supreme Court law clerks. Moreover, four of the last seven nominees,\(^99\) and three of the last five confirmed nominees were former Supreme Court law clerks. Additionally, a majority of the current Justices, five of nine, clerked at some level, and three of those five clerked for a Supreme Court Justice.\(^100\)

Again, whether an individual served as a judicial law clerk does not necessarily determine or predict whether an individual will be an effective Justice. While all of the Justices who have clerked are either well regarded or too early in their tenure to be assessed, some of the most highly regarded Justices did not clerk at any level. And again, while presidents do not appear to place undue weight on this factor, the numbers suggest that this is an emerging trend and that this factor, like whether an individual attended an Ivy League institution, may in the future limit the pool of viable applicants. To the extent that presidents begin to favor individuals who have clerked for Supreme Court Justices over those who have not, this will severely narrow the pool of potential Supreme Court nominees.

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In the end, the emergence of and reliance on these heavily weighted factors has resulted in the exclusion of particular groups from the U.S. Supreme Court Justice consideration, nomination, and confirmation. Although each of the criterions individually may be reasonable for consideration of Supreme Court nominees, it is the unstated requirement that a viable nominee satisfy the majority, if not all, of the criterions that has such a devastating effect on the inclusion of African American women (and other women of color) in the pool of potential nominees. What makes this combined effect especially devastating is the fact that the exclusionary effect of each criterion builds upon the others. For instance, having an Ivy League law de-

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\(^99\) Merrick Garland clerked for Associate Justice William Brennan during the 1978-79 term. It bears noting that the other two individuals on President Obama’s short list also clerked at the Supreme Court level. Paul Watford clerked for Associate Justice Ruth Bader Ginsburg during the 1995-98 term, and Sri Srinivasan clerked for Associate Justice Sandra Day O’Connor during the 1997-98 term. Brown, supra note 79.

\(^100\) Justice Ginsburg clerked for a federal district judge. Chief Justice Roberts, and Justices Alito and Kagan all clerked for federal circuit judges, and as previously noted Chief Justice Roberts, and Justices Breyer and Kagan each clerked for Supreme Court Justices. Biographies of Current Justices of the Supreme Court, supra note 32.
gree, particularly a degree from Yale or Harvard, makes it all the more likely that one will get a Supreme Court clerkship, which makes it more likely that one will get a prestigious government job, which makes it more likely that one will get a federal appellate judgeship, and ultimately be in a position for at least consideration for appointment to the High Court.\(^{101}\)

In Part II below, I explain how each of the criterion identified in Part I has a negative disparate effect on African American women.

II. THE EFFECT OF CURRENT CRITERIA: ABSENCE OF AFRICAN AMERICAN WOMEN

Even if a president were predisposed to nominate an African American woman,\(^{102}\) the current criteria employed for selecting Justices would frustrate his or her efforts to do so. The sheer low number of people in general, and African American women in particular, who possess the above-discussed credentials contributes to the absence of African American women on any shortlist discussion of potential Supreme Court nominees.

A. Ivy League Law School

The trend of nominating individuals who have an Ivy League law degree eliminates a number of lawyers of all genders, races, and ethnicity for consideration for appointment to the High Court, but the trend has a particularly devastating effect on the number of viable African American women who could be nominated to serve on the High Court. As previously noted, Ivy League law schools account for only five of the roughly two hundred ABA accredited law schools.\(^{103}\)


102. It is a common misperception that presidents do not have predispositions for whom they select and only select nominees based solely on who they deem the most qualified. FDR was predisposed to nominate a U.S. Senator. Reagan was predisposed to nominate a woman. Johnson was predisposed to nominate an African American. Bush was likewise predisposed to select an African American man to replace Thurgood Marshall. Obama was predisposed to nominate a Latino. See generally Mack, supra note 12.

103. Columbia University, Cornell University, Harvard University, the University of Pennsylvania, and Yale University. The other Ivy League institutions—Brown University, Dartmouth College, and Princeton University—do not have law schools.
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In 2013, less than five percent of all law students were attending Ivy League institutions.\textsuperscript{104} And less than five percent of Ivy League law students during that year were African American female students.\textsuperscript{105} With such small numbers of African American women attending and therefore graduating from Ivy League law schools, the emergence of this criterion greatly reduces the chance that an African American lawyer will be considered for appointment to the Supreme Court.

For those who do decide to attend an Ivy League law school, the cost of the education may severely limit their post-graduation options. With law school tuition (not including living expenses) at Ivy League law schools exceeding $55k a year,\textsuperscript{106} many African American women attending Ivy League law schools require educational loans to pay for school.\textsuperscript{107} As a result of post-law school debt load, many African American women may opt to accept jobs in the higher-paying private sector over lesser-paying government or public interest sector positions.\textsuperscript{108} However, government positions are often the first post-graduation stepping stone on the path to an appointment to the Supreme Court.

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\textsuperscript{104} In 2013, a total of 128,641 students were enrolled in law school. Data From the 2013 Questionnaire, AM. BAR ASS’N, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_fall_id_nonjd_enrollment.authcheckdam.pdf (last visited Sept. 14, 2016).

\textsuperscript{105} Of the 5007 Ivy League law students, 210 were African American women. See generally ABA Law Schools Standard 509 Information Reports for each Ivy League law school. ABA Required Disclosures, AM. BAR ASS’N, http://www.abarequireddisclosures.org/ (last visited Oct. 9, 2016) (providing a database of in which readers can search for particular schools). There were a total of 6379 African American female law students enrolled in 2013. Thus, less than four percent of all African American female law students were enrolled in Ivy League law school. See ABA Law Schools Compilation - All School Data J.D. Enrollment and Ethnicity Report, AM. BAR ASS’N, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/official-guide-to-aba-approved-law-schools.html (last visited Sept. 14, 2016).

\textsuperscript{106} See generally ABA Required Disclosures, supra note 105 (providing a database for readers to search particular schools’ tuition). Moreover, it is often the case that one needs to have attended an Ivy League or other costly private undergraduate institution to get into an Ivy League law school. One scholar recently noted that “[t]he three most recent justices—Elena Kagan, Sonia Sotomayor, and Samuel Alito—all earned undergraduate degrees from Princeton. The other justices did their baccalaureate studies at Harvard, Stanford, Georgetown, Cornell, and Holy Cross. Members of the Court hold four international degrees: two from Oxford, and one each from the London School of Economics and the University of Fribourg.” A. E. Dick Howard, The Changing Face of the Supreme Court, 101 VA. L. REV. 231, 252 (2015). The cost of attending both a private undergraduate institution and an Ivy League law school could result in significant debt if the student does not come from an affluent background, which is often the case with African American women.

\textsuperscript{107} Christopher R. Benson, A Renewed Call for Diversity Among Supreme Court Clerks: How A Diverse Body of Clerks Can Aid the High Court As an Institution, 23 HARV. BLACK-LETTER L.J. 23, 29 (2007).

\textsuperscript{108} Id.
Court. A position as a federal government lawyer could lead to connections that facilitate further governmental appointments—judicial and executive—that could in turn lead to consideration for possible appointment on the Supreme Court. It is no coincidence that the majority of the current Justices began their legal careers in public service or public interest positions.109

B. Federal Judicial Experience

As previously discussed, federal appellate experience has emerged as the most important factor being considered by presidents selecting a Supreme Court nominee.110 Indeed, eight of the sitting nine Justices were federal appellate judges at the time of their nomination.111 It is also worth noting that of the four women appointed to serve on the Supreme Court during its 223 year history, three of the four were appellate judges—two were federal appellate judges, and one was a state appellate judge.112 Likewise, the only two African Americans nominated to the Supreme Court were federal appellate judges.113

The trend of selecting appellate judges, particularly federal appellate judges, has had the effect of greatly reducing the number of African American women on the short list of potential Supreme Court Justice nominees because so few African American women have been appointed to the federal appellate bench. Although the first white woman was appointed to a federal appellate court in 1934,114 and the first African American man was appointed to a federal appellate court

109. Biographies of Current Justices of the Supreme Court, supra note 32.
110. See supra Part I.B.2.
111. Although Justice Kagan did not serve as a federal judge prior to her appointment, she was nominated by President Bill Clinton in 1999 to serve on the D.C. Circuit Court of Appeals. Her nomination lapsed, however, because the Senate Judiciary Committee failed to schedule a hearing. Biographies of Current Justices of the Supreme Court, supra note 32.
112. Justice O'Connor, appointed by President Reagan in 1981, was an Arizona State Court of Appeals judge. Justice Ginsburg, appointed by President Clinton in August 1993, was a judge on the federal D.C. Circuit, and Justice Sotomayor, appointed by President Obama in August 2009, was a judge on the federal Second Circuit. Id.
114. Florence Ellinwood Allen was appointed by President Franklin Roosevelt to the United States Courts of Appeal for the Sixth Circuit in 1934. See The Honorable Anna Blackburne-
in 1950, the first African American women was not appointed to the federal appellate bench until 1979, when President Carter appointed Amalya Kearse to the United States Courts of Appeals for the Second Circuit. Since Carter’s appointment of Judge Kearse to the Second Circuit more than thirty-five years ago, only seven additional African American women have been appointed to the federal appellate bench out of a total of 285 appointments. Carter’s only African American female appointment to the federal appellate bench was Judge Kearse. While Presidents Reagan and Bush I appointed 83 and 42 federal appellate judges, respectively, neither appointed a single African American woman to the federal appellate bench during the twelve-year span of their presidencies. President Clinton appointed three African American women to the federal appellate bench, and President Bush II appointed two. President Obama has, thus far in his presidency, appointed two African American women to the federal appellate bench.

The lack of African American women being appointed during the twelve-year Reagan and Bush I presidencies has had a devastating effect on the pool of African American female federal appellate judges who might be considered as potential Supreme Court nominees. And although the appointment of African American women to the federal appellate courts has improved since the Reagan/Bush I era, the number of African American women appointed to the federal appellate judiciary is still far outpaced by the appointment of white men, white


115. William Hastie was appointed by President Harry Truman to the United States Courts of Appeal for the Third Circuit in 1950. Id. at 658.

116. Id. at 674 (discussing the history of African American women judges).


118. See Blackburne-Rigsby, supra note 114, at 660–61 (explaining that based on the political climate, there was no incentive or inclination on the part of Reagan or Bush to select an African American woman because this was a period of political conservatism and there was a backlash against affirmative action and civil rights).


120. Janice Rogers Brown was appointed to the D.C. Circuit in June 2005, and Allyson Kay Duncan was appointed to the Fourth Circuit in August 2003. Id.

121. Ojetta Regericke Thompson was appointed to the First Circuit in March 2010, and Bernice Donald was appointed to the Sixth Circuit in September 2011. Id.
women, and African American men.\textsuperscript{122} Thus, the limited number of African American women on the federal bench and the significant weight given to federal appellate experience have greatly reduced the number of African American women in the pool of viable Supreme Court nominees. While all of the African American women appointed remain on the federal appellate courts (although Judge Kearse is on senior status), African American women make up less than four percent of this primary pool for Supreme Court nominees.\textsuperscript{123} And that percentage shrinks even further considering the African American women federal appellate judges that graduated from an Ivy League law school, of which there is only one—Judith Ann Wilson Rogers, who received her JD from Harvard Law School in 1964.\textsuperscript{124} And as discussed in the next section, the percentage shrinks to zero when age is considered.

C. Age

As noted above, the age of an individual will have a significant impact on their viability as a Supreme Court Justice nominee. And not only are African American female federal appellate judges few in numbers, they are all significantly older than the average age of fifty-three of the last ten Justices appointed. Of the seven current African American female federal appellate judges, the youngest is Johnnie B. Rawlinson who is sixty-three years old.\textsuperscript{125} Thus, if the next president tasked with filling a vacant seat on the Court was inclined to further increase the diversity of the Court and nominate an African American woman with federal appellate experience, their ages virtually eliminate all of them from consideration.\textsuperscript{126} It bears noting that the lack of

\textsuperscript{122} Since 1994, there have been 88 white males appointed to the federal courts of appeal, 46 white women, 16 black men, and only 6 black women. \textit{Id.}


\textsuperscript{124} Judge Rogers also received an LL.M. from the University of Virginia in 1988. \textit{See Biographical Directory of Federal Judges, supra note 119.}

\textsuperscript{125} Judge Kearse is 78, Judge Rogers is 76, Judge Williams is 67, Judge Rawlinson is 63, Judge Brown is 66, Judge Duncan is 64, Judge Thompson is 64, and Judge Donald is 64. \textit{Id.}

\textsuperscript{126} President Obama reportedly considered Ann Claire Williams when seeking to fill the seat being vacated by John Paul Stevens. Christi Parsons, \textit{Black Female Judge, A Former Third-Grade Teacher, Makes Supreme Court Nominee List}, \textit{L.A. Times} (Apr. 21, 2010), http://articles.latimes.com/2010/apr/21/nation/la-na-obama-supreme-court-20100422. However, Judge Williams, born in 1949, would have been 61, and would not have been a viable candidate. Leah Ward Sears, who served as the first African American Chief Justice of the Georgia Supreme Court from 2005-2009, was also said to have been considered. Although Sears, born in 1955, would have been 55, some have speculated that her close relationship with Justice Thomas may have hurt her chances. \textit{See Krissah Thompson, Friendship With Conservative Thomas Compli-}
African American female appellate judges under the age of sixty can be directly traced to the failure of presidents Reagan and Bush I to appoint a single African American woman to the federal appellate bench during a twelve year period, and only appointing three African American women between them to federal trial bench out of 438 federal trial judge appointments.\textsuperscript{127}

D. Federal Government Experience

The prominence of the criterion of high-level federal government service also significantly reduces the pool of African American women considered for a position on the Court. For example, the position of Solicitor General, often dubbed the "Tenth Justice," represents the United States in cases pending before the Supreme Court. Generally, presidents have favored Solicitor Generals for appointment to the Supreme Court. In fact, at least four former Solicitor Generals have been appointed to the High Court: Stanley Reed, Robert H. Jackson, Thurgood Marshall, and most recently Marshall’s former law clerk, Elena Kagan. Additionally, two of the current Justices worked as attorneys in the Solicitor General’s office: John Roberts and Samuel Alito.\textsuperscript{128}

While there have been three African American men to serve as Solicitor General—Thurgood Marshall, Wade McCree, and Drew Days, and one white woman—Elena Kagan, like the majority of the highest legal positions in the federal government, there has not been an African American female to serve as Solicitor General.\textsuperscript{129}

Similarly, the Attorney General’s office has been fertile ground for consideration of potential Supreme Court Justices. In addition to being Solicitor General, Robert Jackson was Attorney General immediately preceding his appointment to the Court.\textsuperscript{130} James McReynolds


\textsuperscript{128.} See \textit{Biographical Directory of Federal Judges}, supra note 119.

\textsuperscript{129.} Id.

\textsuperscript{130.} Id.
was also Attorney General when he was nominated, as was Frank Murphy.\textsuperscript{131} But like the Solicitor General position, up until a few years ago there had not been an African American female Attorney General.\textsuperscript{132} Nor has there been an African American woman who has served as Deputy Attorney General, the number two position in the Department of Justice,\textsuperscript{133} or Associate Attorney General, the number three position.\textsuperscript{134} The over-reliance on this criterion, particularly when a potential nominee has not served as a judge, removes from the pool individuals who would nevertheless make very able Justices. And the recent reliance on this factor, coupled with the lack of any viable African American female federal appellate judge nominee, has had the effect of virtually eliminating African American women from consideration for appointment to the High Court.

E. Clerkships

As noted above, a trend of preferring individuals who have clerked at the Supreme Court appears to be emerging. Such preference would have a disproportionate negative impact on the number of African American women who might be considered for a seat on the Supreme Court. Like the legal profession in general, the history of selection of law clerks has favored white men.\textsuperscript{135} The practice of Supreme Court Justices hiring law clerks began in 1882.\textsuperscript{136} The first female Supreme Court law clerk was hired in 1944,\textsuperscript{137} and the first African American male was hired in 1948.\textsuperscript{138} However, the first Afri-

\textsuperscript{131} Id.
\textsuperscript{132} Appointed by President Clinton, Janet Reno was the first woman Attorney General (1993-2001) and Eric Holder, appointed by President Obama, was the first African American Attorney General (2009-2015). On November 8, 2014, President Obama nominated Loretta Lynch to succeed Eric Holder as Attorney General, and on April 23, 2015, she was confirmed by the Senate making her the first African American female U.S. Attorney General. \textit{Attorneys General of the United States}, U.S. DEP'T OF JUST., https://www.justice.gov/ag/historical-bios (last visited Nov. 10, 2016).
\textsuperscript{133} There have been three females (Carol Dinkins, Jamie Gorelick, and Sally Q. Yates), and one African American male (Eric Holder) Deputy Attorney Generals.
\textsuperscript{134} There have been no women and one African American male (Tony West) Associate Attorney Generals. \textit{Meet the Associate Attorney General}, U.S. DEP'T OF JUST., https://www.justice.gov/asz/ meet-associate-attorney-general-old (last visited Sept. 17, 2016).
\textsuperscript{135} Mark R. Brown, \textit{Gender Discrimination in the Supreme Court's Clerkship Selection Process}, 75 OR. L. REV. 359, 362-63 (1996); O'BRIEN, supra note 95, at 135.
\textsuperscript{136} Brown, supra note 135, at 362 n.19.
\textsuperscript{137} William Douglas hired Lucille Lomen in 1944. T\textit{ODD C. PEPPERS}, supra note 96, at 20–22; see also Brown, supra note 135, at 362–63.
\textsuperscript{138} Felix Frankfurter hired William T. Coleman, Jr. in 1948. See PEPPERS, supra note 96, at 20–22; see also Winkfield F. Twyman, \textit{A Critique of the California Civil Rights Initiative}, 14 NAT'L BLACK L.J. 181, 185 (1997) (detailing the tribulations of William T. Coleman, Jr., who after
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can American woman was not hired until 1974.\textsuperscript{139} Although the number of white female Supreme Court law clerks increased dramatically since 1944, the number of African American Supreme Court law clerks, both male and female, is still disproportionately low.\textsuperscript{140} Out of more than 1300 Supreme Court law clerks hired since 1974,\textsuperscript{141} there have been less than sixteen African American female law clerks by my count.\textsuperscript{142}

This is explained, in part, by the absence of African American Justices.\textsuperscript{143} The vast majority of African American law clerks clerking at the federal level are hired by African American judges.\textsuperscript{144} Thus, it is of no surprise that the Supreme Court comprised almost entirely of white men would have so few African American female law clerks.

The "feeder judge" phenomenon also decreases the chance African American women will be selected as Supreme Court law clerks. Feeder judges are those federal appellate judges who frequently "feed" law clerks to the Supreme Court Justices.\textsuperscript{145} And it is now the case that serving as a law clerk for one of the top court of appeals

\footnotesize{graduating first in his class at Harvard Law School, becoming the first African American editor of the Harvard Law Review, and clerking for Supreme Court Justice Felix Frankfurter, was still excluded from every law firm in Philadelphia).


\textsuperscript{140} See Todd C. Peppers & Christopher Zorn, \textit{Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment}, 58 \textit{DePaul L. Rev.} 51, 76 (2008) ("[T]he number of female clerks has increased precipitously during the past three decades, while the number of African American law clerks has both grown more slowly and has varied dramatically by Justice.").

\textsuperscript{141} Beginning in 1974, the Justices were allowed four law clerks each. Chief Justice Rehnquist routinely hired only three law clerks, and while on occasion, some Justices hired fewer than the allowable four, most of the Justices hired four law clerks for each term. See ARTEMUS WARD & DAVID L. WEIDEM, SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 45 (2006).

\textsuperscript{142} Research on file with author.

\textsuperscript{143} See Angela Onwuachi-Willig, \textit{Clarence Thomas and Affirmative Action}, Nat’l L.J. (June 3, 2013), \url{www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202602263004} ("[W]hen Thomas graduated from law school, there were very few black federal judges who could hire law clerks, and even fewer white judges who hired black clerks at all. Indeed, prior to Justice Thurgood Marshall’s service on the court, only one African-American had ever served as a U.S. Supreme Court law clerk for any justice. Even today, black judges hire the vast majority of African American law clerks at the federal level.").

\textsuperscript{144} Id.

\textsuperscript{145} O’BRIEN, supra note 95, at 135; see PEPPERS, supra note 96, at 31–32.

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“feeder” judges, the majority of whom are white males, is a “virtual requirement for any candidate to clerk at the Supreme Court.”

Like the above-discussed criterions, the emerging preference for nominees who have clerked at the Supreme Court or at the federal appellate level will have the effect of removing qualified African American female lawyers from consideration for appointment to the Court.

III. WHY THE USE OF CRITERIA THAT EXCLUDE AFRICAN AMERICAN WOMEN IS PROBLEMATIC

The use of unnecessary and overly narrow criteria that operate in practice (whether intended or not) to virtually exclude African American women from consideration for a seat on the Court raises two major issues. First, by employing unnecessarily narrow criteria that exclude African American women, the Court, which should be the ultimate defender of equality, is populated with criteria that perpetuate discrimination against African American women. Second, the criteria frustrates full representation on the Court by preventing descriptive representation, which speaks to the Court reflecting outward characteristics of the country, and by preventing substantive representation, which speaks to the Court members reflecting various viewpoints.

A. The Use of the Current Criteria Perpetuates Discrimination Against African American Women

The use of these politically induced and exceedingly narrow criteria is perpetuating the historic discrimination and marginalization of African American women in our society in general and in the legal profession in particular. And where the process for selecting Justices to serve on our High Court—the protector of the rule of law—perpetuates invidious discrimination, such a process flies in the face of what our High Court represents.

Women and African Americans have historically been discriminated against in legal education and the legal profession. The reasons for the exclusion of women from law schools were numerous and


147. See supra Part I.B.
ranged from the belief that women did not have the intellectual ability to study the law, to the belief that the admittance of women in law school would be a detrimental distraction for the male students.\textsuperscript{148} It was not until 1972 that all ABA-accredited schools ceased exclusionary practices against women.\textsuperscript{149}

Like white women, African Americans, regardless of gender, were historically excluded from law schools. Following the formalization of legal education in the early 1900s, many law schools excluded African American students through formal policies or informal practices.\textsuperscript{150} “As late as 1939, thirty-four of the eighty-eight accredited law schools had formal policies excluding Blacks.”\textsuperscript{151} Even during early 1960’s American law schools were approximately 99% White.\textsuperscript{152}

These discriminatory practices against women and African Americans had an even more devastating effect on African American women, who were doubly offensive to the white male institutions. The overwhelming majority of the African American law students prior to the 1970s were African American men.\textsuperscript{153} And the overwhelming majority of women law school students were white women. Underscoring the exclusion of African American women in the legal profession, Professor J. Clay Smith noted that “[t]he number of black women lawyers increased from 446 in 1970 to 11,006 in 1990” and that “[d]uring that same period the number of white women lawyers increased from 11,664 to 161,044.”\textsuperscript{154}

\textsuperscript{149} Id. (citing Donna Fossum, \textit{Women in the Legal Profession: A Progress Report}, 67 \textit{Women L. J.} 1 (1981)).
\textsuperscript{150} Daria Roithmayr, \textit{Deconstructing the Distinction Between Bias and Merit}, 85 \textit{Cal. L. Rev.} 1449, 1475–76 (1997). For example, Texas passed a law restricting attendance at the University of Texas, including its law school, to white students. See \textit{Sweatt v. Painter}, 339 U.S. 629, 631 n.1 (1950) (citing \textit{Tex. Const.} art. VII, §§ 7, 14; \textit{Tex. Rev. Civ. Stat.} arts. 2643b, 2719, 2900 (Vernon 1925 & Supp.)). The University of Missouri Law School also formally excluded black applicants on the grounds that “it was ‘contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri.’” Missouri \textit{ex rel.} Gaines \textit{v. Canada}, 305 U.S. 337, 343 (1938).
\textsuperscript{151} Roithmayr, \textit{supra} note 150, at 1475–76 (citing Jerold S. Auerbach, \textit{Unequal Justice: Lawyers and Social Change in Modern America} 183 (1976)).
\textsuperscript{154} Rebels in Law: Voices in History of Black Women Lawyers, \textit{supra} note 9, at 7.
Even after women and African Americans were granted admission to law schools and allowed to graduate, they were not afforded the same legal employment opportunities as their white male counterparts. For example, when retired Justice Sandra Day O'Connor graduated from Stanford Law School in 1952 at the top of her class, private law firms would hire her only as a legal secretary. Justice Ruth Bader Ginsburg also experienced gender discrimination when she graduated from Columbia Law School in 1959, even though she tied for first in her class. African Americans were likewise discriminated against when seeking employment following graduation from law school. Moreover, in many states, African Americans were frequently denied admission to the bar and a license to practice law solely due to their race. And again, discrimination in legal employment had an even greater impact on African American women trying to find a place in the white male dominated world.

Because of the pervasive discrimination against women and minorities in legal education and the legal profession, the pool of lawyers considered by presidents before 1970, even when using more expansive criteria, was overwhelmingly white and male. If post-1970 presidents continued to use the broader criteria for selection of Supreme Court Justices, the natural consequence would have been a more diverse pool of viable nominees. However, as the profession became more diverse, the criteria employed to select Supreme Court Justices became more exclusionary.

If more narrow criteria were necessary for the selection of well-qualified Supreme Court Justices, it would be difficult to question the current criteria. However, a historic review of the selection of Supreme Court Justices demonstrates that limiting Justices to those who attend Ivy League law schools and who were federal appellate judges, for example, was not necessary to secure quality Supreme Court jurists. Indeed, many of the Justices considered by commentators to be

among the "best" Justices would not have met the current criteria used by our most recent presidents. 159

The practical and harmful effect of the current and unnecessarily narrow criteria is the elimination from consideration of well-qualified and diverse individuals. The method of selecting Supreme Court Justices has changed in such a way that natural diversity that could and would have occurred with the diversification of the profession is thwarted. Indeed, the current narrow criteria produce a pool of viable candidates very similar to the demographic of the legal profession during and prior to the 1970s. Moreover, the use of the current exclusionary measures to populate the Supreme Court bench, measures that are reminiscent of the means of exclusion employed by legal institutions and legal employers for the specific purpose of excluding women and African Americans, 160 is inconsistent with the role of our High Court—the ultimate defender of justice, equality, and the rule of law. 161 And this inconsistency severely undermines the legitimacy of the Court.

B. The Criteria Undercut the Legitimacy of the Court by Limiting Full Representation

One of the cornerstone ideas that make this government unique is the idea that the government be "of the people, by the people, and for the people." 162 Consistent with this view is the notion that our government should reflect the citizenry it serves, both descriptively (reflecting outward characteristics) and substantively (reflecting various viewpoints). Although the Supreme Court Justices are not directly elected by the people, they are nominated and confirmed by members of our government who are directly elected by the people.

159. Schwartz, supra note 72, at 93–94 (naming Hugo Black and Earl Warren among the greatest Supreme Court Justices).

160. I am not suggesting that the use of the current criteria was for the specific purpose of excluding women and minorities. As discussed, the current criteria developed as the confirmation process became more politicized and as presidents began selecting individuals not personally known to them. The end result is the same however—the unnecessary exclusion of a qualified and diverse pool of potential nominees. See supra Part I.B.

161. See Eli Wald, A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why, 24 Geo. J. LEGAL ETHICS 1079, 1101 (2011) ("Exactly because law is the social glue of our society, because it is premised on the fundamental values of equality, fairness, and the rule of law, the legal profession ought to be a leader in the quest for diversity.").

And as a co-equal branch of our government, the Supreme Court should likewise be a representative body.\textsuperscript{163}

Accordingly, where the criteria used to select Supreme Court Justices unnecessarily remove an entire demographic from consideration, i.e., African American women, use of such criteria prevents full descriptive and substantive representation. And this, in turn, undercuts the legitimacy of the Court.

1. Descriptive Representation

Descriptive representation calls for a government that reflects the outward characteristics of the people. Thus, the governing body should include members who reflect, \textit{inter alia}, the gender, race, and ethnicity of the governed. When descriptive representation is lacking, the credibility of the representative body, in this case the Supreme Court, is undermined.

The need for descriptive representation was noted in the Supreme Court case \textit{Grutter v. Bollinger}. Justice O'Connor, writing for the majority, stated that “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”\textsuperscript{164} Thus, “descriptive representation promotes legitimacy . . . by creating the appearance that a particular governmental institution is open to those from all walks of life.”\textsuperscript{165}

If the Supreme Court Justices today were all white men of privilege (which has been the case for much of the Court’s history), the country (the majority of which are non-white men) would intuitively question the legitimacy of the Court regardless of the quality of the decisions. This would be so because based on appearance alone, the Court would be perceived as tyrannical, i.e., the powerful dictating the less powerful. On the other hand, a diverse bench (or a bench that could at least acquire diversity) is perceived as a Court that will strive to ensure Justice and equality for the collective governed.

Moreover, a Court comprised of all white men of privilege would suggest to underrepresented groups that they are not capable of serv-

\textsuperscript{163} Angela Onwuachi-Willig, \textit{Representative Government, Representative Court? The Supreme Court As A Representative Body}, 90 \textit{Minn. L. Rev.} 1252, 1258 (2006).


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Conversely, descriptive representation encourages individuals in un-derrepresented groups to aspire to enter areas historically unavailable to them. For example, Constance Baker Motley said that one of the reasons she decided to become a lawyer was because of black lawyers she saw as role models. One author has noted that when diverse individuals are nominated to the Court, it has the effect of generating diversity in the state judicial and political arenas.

When, despite the existence of many African American women who are qualified to serve on the Court, there are no viable African American women nominees based on the current overly narrow criteria, the promise of full descriptive representation in one of our branches of representative government is wholly thwarted. It is this lack of promise that undermines the legitimacy of the Supreme Court.

2. Substantive Representation

While descriptive representation is achieved when the Court is demographically similar to the citizens, substantive representation is achieved when the Court is comprised of Justices whose decision-making is informed by experiences that are similar to experiences of the citizenry. Thus, substantive representation can only be achieved if the Court is comprised of individuals with unique perspectives.
Judges are human, and when deciding legal issues, they are all informed by their personal experiences. As Chief Judge Harry Edwards noted, “it is inevitable that judges’ different professional and life experiences have some bearing on how they confront various problems that come before them.”

Justice Ginsburg has noted “[a] system of Justice is the richer for the diversity of background and experience of its participants. It is the poorer, in terms of evaluating what is at stake and the impact of its judgments, if its members—its lawyers, jurors, and judges—are all cast from the same mold.”

Judge Richard Posner has maintained that “[t]he nation contains such a diversity of moral and political thinking that the judiciary, if it is to retain its effectiveness, its legitimacy, has to be heterogeneous; . . . and the members of a heterogeneous judicial community are not going to subscribe to a common set of moral and political dogmas that would make their decision-making determinate.”

Indeed, having diverse individuals on the Supreme Court has made for better decision-making. Justice Thurgood Marshall’s presence on the Court has been credited as adding insight to deliberations. In commenting on what made Justice Marshall unique, Justice Brennan stated: “Above all, it was the special voice that he added to the Court’s deliberations and decisions. His was a voice of authority: he spoke from first-hand knowledge of the law’s failure to fulfill its promised protections for so many Americans.”

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173. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 94 (2003); see also Sylvia R. Lazos Vargas, Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive? What Grutter v. Bollinger Has to Say About Diversity on the Bench, 10 MICH. J. RACE & L. 101, 106–07 (2004) (asserting that “constitutional judgments are visibly biased when the Supreme Court or other courts selectively strip out social and racial context to conform with the identity-based views of the majority”) (cited in Onwuachi-Willig, supra note 163, at 1274).
175. William J. Brennan, Jr., A Tribute to Justice Thurgood Marshall, 105 HARV. L. REV. 23, 23 (1991); see also Anthony M. Kennedy, The Voice of Thurgood Marshall, 44 STAN. L. REV. 1221 (1992) (noting how Justice Marshall reminded the other Justices of their “moral obligation as a people to confront those tragedies of the human condition which continue to haunt even the richest and freest of countries”); O’Connor, supra note 155, at 1217 (“Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.”); Byron R. White, A Tribute to Justice Thurgood Marshall, 44 STAN. L. REV. 1215, 1216 (1992) (“Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match . . . . [H]e told us that[sic] we did not know due to the limitations of our own experience.”).
The benefit of gender diversity was underscored in the case of Safford Unified Sch. Dist. v. Redding. In Redding, a thirteen-year-old girl sued her school after she had been strip searched by school officials looking for drugs. During oral argument, some of the male Justices failed to appreciate the humiliation a teenage girl would feel during and after a strip search. Justice Ginsburg, the lone woman on the Court at the time, was able to share insight that otherwise would have been lost on the other Justices, none of whom "[had ever] been a 13-year old girl." Ginsburg’s reproach appears to have made a difference. To many Court watchers’ surprise, the Court ruled 8-1 that the search was unreasonable. In his majority opinion, Justice Souter noted: “Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as . . . degrading.”

That diverse decision-making groups make better decisions than homogeneous groups is also well supported by social science research. And the Supreme Court, tasked with deciding the most important legal issues facing the country, is no different from other decision-making groups. Accordingly, a Court of Justices with diverse experiences leads to better decisions.

In addition to generating better decisions, substantive representation adds to the legitimacy of the Court. Professor Nancy Scherer makes the point that “[w]hen the voices of a minority group are not engaged in an institution’s decision making [sic] process, that institution may be perceived by those excluded as illegitimate.” She further notes that “substantive representation is a way to resolve [the] ‘tyranny of the majority’ dilemma by ensuring that racial and ethnic minorities’ interests (as well as those of other marginalized groups)
are at least considered in the decision making [sic] process of any given institution."\textsuperscript{185}

An African American person has a unique perspective different from a non-African American individual. Women, by the nature of their gender, have experiences that are different from experiences of men.\textsuperscript{186} Accordingly, African American women have unique experiences and perspectives different from both African American men and white women. Thus, in order to have the ability to achieve full substantive representation and thereby increasing the legitimacy of the Court, the criteria used to select Supreme Court Justice nominees must not be one that has the effect of excluding African American women from any consideration for appointment to the High Court.

IV. SOLUTION—EXPAND THE POOL WITH THE USE OF JUDICIAL MERIT SELECTION COMMISSIONS

As discussed in this article, the current criteria are needlessly narrow and unnecessary to select qualified Supreme Court Justices. Moreover, the use of the narrow criteria harms the legitimacy of the Court by thwarting both descriptive and substantive representation, particularly where African American women are concerned.\textsuperscript{187} One way to address the problem of the lack of viable African American women Supreme Court Justice candidates is to expand the criteria to include qualified individuals who, like nominees of the past, have varied backgrounds and experiences.

One logical place to begin the expansion would be the inclusion of individuals serving as state court judges.\textsuperscript{188} One would expect that expanding the criteria to include state court judges would not pose a problem, particularly when Justice O'Connor, the first female and a well-regarded former member of the Court, was not a federal judge, but rather a state appeals judge in Arizona. However, if Justice O'Connor were nominated today, it is unclear whether (indeed doubtful) she would receive much public or political support. This is so because since Justice O'Connor's nomination, ten of the twelve

\textsuperscript{185} Id.

\textsuperscript{186} In a recent interview, Justice Ginsburg noted that the male Justices had a blind spot when it came to some women issues. Interview by Katie Couric with The Honorable Ruth Bader Ginsburg, Supreme Court Justice (July 31, 2014) https://www.yahoo.com/news/video/exclusive-ruth-bader-ginsburg-hobby-091819044.html?ref=gs.

\textsuperscript{187} See supra Part III.B.

\textsuperscript{188} While there are also too few African-American female state judges, the representation is better than in the federal judiciary.
nominees (excluding Rehnquist's nomination to be elevated to Chief Justice) were federal appellate judges, and in the public's mind, it is the rule, not the exception, that a Supreme Court Justice nominee will be a federal appellate judge. Thus, it is highly likely that the public-at-large would view an individual with only two years of state judicial experience as lacking. And while many politicians may be well aware that the majority of Supreme Court Justices have not been federal judges, many would nonetheless oppose an individual nominated by a president from the opposing party and cite lack of federal experience as the pre-textual reason for opposition to the nominee, where the real reason for opposition is political. These roadblocks hindering the expansion of potential nominees to include state judges also hinder the expansion beyond the other characteristics making up the current, overly narrow criteria.

The solution to the public perception and political gamesmanship problems is a judicial merit selection commission to provide a list of qualified nominees from which the president can select individuals to nominate to the Court. The use of a judicial merit selection commission would not only facilitate the identification and consideration of qualified and diverse individuals, but the system would also quiet the public and political criticism of superbly qualified individuals who do not fit the current Justice mold.

A. Use of Merit Selection Commissions in the Federal Judiciary

The use of judicial selection commissions in the selection of federal judges is not unprecedented. President Jimmy Carter utilized a judicial commission during his presidency, and such use had the in-

189. See Rhodes, supra note 70, at 544 (“As the public has become increasingly involved in the confirmation process, the current popular image of judges as neutral referees commands additional respect. And this conception has been realized through appointing to the High Court those who at least superficially appear less enmeshed in identity politics—those engaged in a role in the judicial system (especially federal appellate judges) who have exhibited a propensity for independent, open-minded decisionmaking [sic]. Challenging this public conception is a difficult undertaking, as President George W. Bush learned the hard way.”).

190. It bears noting that while O'Connor's nomination gained much national media attention, the public scrutiny of Supreme Court nominees' confirmation hearing in her time was not what it is today. It was not until 1987, with Reagan's failed Robert Bork nomination, that the public took serious notice of confirmation hearings and began to more closely scrutinize the qualification of nominees. See Richard Davis, Electing Justice: Fixing the Supreme Court Nomination Process 98 (2005) (finding the failed Bork appointment “marked a change in the newsworthiness of Supreme Court nominations,” with news stories in the New York Times increasing by thirty-eight percent pre-Bork and post-Bork periods”).

191. See Rhodes, supra note 70, at 541.
tended effect of making the federal judiciary more diverse. Although
President Carter did not have an opportunity to appoint a Justice to
the Supreme Court, he appointed more African Americans and wo-
men to the federal courts of appeals and district courts than any other
president up to that point.  

When President Carter took office in 1977, there had been only
ten women, twenty-three African Americans, and seven Hispanics
ever appointed to the federal bench. Only one of the female judges
was African American. To address the issue of the lack of diversity
on the federal bench, President Carter issued Executive Order 11,972
on February 14, 1977, less than a month after his inauguration, which
established a commission for the selection of federal circuit judges.
Pursuant to the order, each panel of the commission was to include
members of both sexes, members of minority groups, and equal num-
bers of lawyers and non-lawyers. The order specified that the selec-
tion panels were to cast their votes wide in seeking judicial candidates,
screen and identify those well qualified for a judgeship, and submit to
the president the names of five possible nominees within sixty days of
the vacancy. President Carter’s plan was the first widespread diver-
sity initiative for the federal courts. His three-pronged diversifying
approach set out to dismantle the traditional method of selecting
lower court judges by the Senate, directed the merit selection commit-
tees to make concerted efforts to identify minorities and women for
appealate vacancies, and directed the Attorney General to make an
affirmative effort to identify qualified candidates, including women
and members of minority groups for federal judgeships. On Octo-
ber 20, 1978, he signed the Omnibus Judgeship Act stating: “This act
provides a unique opportunity to begin to redress another disturbing
feature of the Federal judiciary: the almost complete absence of wo-
men or members of minority groups . . . I am committed to these

192. See Scherer, supra note 165, at 588.
194. Constance Baker Motley, appointed by President Lyndon B. Johnson to the U.S. Dis-
  trict Court for the Southern District of New York in 1966, was the first African American wo-
  man appointed to the federal bench. Amber Fricke & Angela Onwuachi-Willig, Do Female
  1530 (2012).
196. Peter G. Fish, Merit Selection and Politics: Choosing a Judge of the United States Court
197. See Scherer, supra note 165, at 594.
198. Id. at 594–95.
appointments, and pleased that this act recognizes that we need more than token representation on the Federal bench.”199 By the end of his term, President Carter had appointed forty-one women, thirty-three white, and one Hispanic.200 Seven of the female judges were African American.201

However, within six months of taking office, President Reagan terminated the commissions and abolished the use of merit selection commissions in the selection of federal judges.202 As previously noted, President Reagan failed to nominate a single African American woman to the federal appellate court during his eight years in office; nor did Reagan's successor, George H.W. Bush.203

B. Use of Merit Selection Commissions in Selection of District of Columbia and State Judges

Judicial commissions are being effectively used in the selection of District of Columbia judges and a number of state judges. The District of Columbia has two levels of courts: the Superior Court of the District of Columbia, which is the trial level court; and the District of Columbia Court of Appeals, which is the court of last resort in the District. When Congress passed legislation establishing these courts in 1970, Congress mandated the use of a judicial commission in the selection of D.C. judges.204 Like other federal judges, D.C. judges are nominated by the President and confirmed by the Senate.205 However, the President appoints the judges, who serve a fifteen-year term, from lists submitted by the D.C. judicial nomination commission.206

A number of states also utilize judicial commissions for the selection of their state judges. The first state to employ a judicial merit selection system was Missouri. The Missouri Nonpartisan Selection of Judges Court Plan, commonly known as the "Missouri Plan," was adopted in November 1940 in response to the public's increasing dis-

201. Id.
203. Blackburne-Rigsby, supra note 114, at 660.
205. Id.
206. Id. Although District of Columbia judges are federal judges, they are Article I judges, as opposed to Article III judges which are entitled to life tenure. Theodore Voorhees, The District of Columbia Courts: A Judicial Anomaly, 29 CATH. U. L. REV. 917, 917 n.3 (1980).
satisfaction with the increasing role of politics in judicial selection and judicial decision-making. The new plan was adopted by initiative referendum and the goal was to fight the widespread abuse of the judicial system by political machines.\textsuperscript{207} Under this plan, judges are appointed by the governor from lists of nominees compiled by judicial nominating commissions. In 2010, voters refused to support a ballot initiative that would have repealed the non-partisan merit selection process.\textsuperscript{208}

The non-partisan plan has increased the diversity on Missouri’s bench. Prior to the nonpartisan plan, only two persons of color had ever been elected to the appellate and supreme courts and only one person of color remained on the bench in 2008.\textsuperscript{209} Furthermore, under the Missouri Plan, Missouri achieved its first female appellate judge and the first woman on the Supreme Court, its first African American to be named to the appellate bench, and the first African American to be selected for the Supreme Court.\textsuperscript{210} In 1994, there was only one African American judge on the entire appellate bench, only one woman in the Eastern District, one in the Western District, and only one on the Supreme Court.\textsuperscript{211} By 2003, there was an African American judge on the Supreme Court, two African American judges in the Western District Court of Appeals and two on the Eastern and a total of nine women on the Court of Appeals and the Supreme Court.\textsuperscript{212} According to a 2008 study conducted by the Brennan Center for Justice, which surveyed ten states with merit selection systems, Missouri’s state bench most closely reflects the demographics of the state’s population.\textsuperscript{213} The Missouri Plan has served as a model for a number of other states that use merit selection to fill some or all of the judicial vacancies.\textsuperscript{214}

\begin{thebibliography}{9}
\bibitem{209} The Honorable Laura Denvir Stith, Address at Judicial Conference to the Missouri Bar During Kansas City Annual Meeting (Sept. 18, 2008), http://www.courts.mo.gov/page.jsp?id=119 23.
\bibitem{211} Id.
\bibitem{212} Id.
\end{thebibliography}
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Connecticut has also adopted a merit plan for the selecting judges. Adopted in 1986, the plan provides that the judicial selection commission provides a list of qualified candidates to the governor for nomination. The governor’s nominee must then be appointed by the general assembly.\footnote{215} Although the primary reason for the implementation of the judicial nomination commission was to ensure judicial independence and judicial responsibility, the use of the commission in Connecticut has resulted in diversity, which more closely reflects the demographics of the state.\footnote{216}

C. Use of Judicial Merit Selection Commissions in Foreign Countries

Foreign nations have also found the wisdom in using merit selection commissions to ensure judicial diversity. For example, despite its history of apartheid, and certainly because of it, South Africa has designed a system for populating its high court to ensure racial and gender diversity. The South African Constitution, which was enacted in 1996, specifically recognizes the “need for the judiciary to reflect broadly the racial and gender composition of South Africa[,]”\footnote{217} and explicitly provides that diversity “be considered when judicial officers are appointed.”\footnote{218} To facilitate the selection of qualified diverse individuals, the South African Constitution created the Judicial Service Commission (JSC), which is tasked with providing a list of candidates (at least three more than the number of vacancies) from which the South African President selects the Constitutional Court and other court judges.\footnote{219} The Commission is a twenty-three member independent body comprised of judges, lawyers, legislative representatives from each party, and a law professor.\footnote{220} When preparing the list of potential nominees, the Commission calls for nominations and con-

\footnote{217. S. AFR. CONST., 1996, § 174(2).}
\footnote{218. Id.}
\footnote{219. Id. § 174(4)(a).}
\footnote{220. Id. § 178(1).}
ducts public interviews. This procedure was implemented to ensure that qualified and diverse judicial applicants were presented to the South African President. Prior to the use of the JSC the South African judiciary was almost exclusively white and male. Since the implementation of the JSC, the South African judiciary, while not as diverse as it is one day hoped to be, is far more diverse than it once was.

The United Kingdom also uses a judicial selection commission. The Constitutional Reform Act of 2005 created the Judicial Appointments Commission, which is responsible for appointments of judges based solely on merit. The commission is comprised of fifteen members, seven of which are judges and magistrates, two lawyers, and six laymen. The reform came out of a concern regarding the lack of minorities and women on the bench.

The use of judicial merit selection commissions is a demonstrated way to ensure diversity of courts. As diversity of the judiciary at all levels is recognized to be valuable, the use of commissions in widening the pool to include qualified diverse applicants should be a method employed.


222. Ruth B. Cowan, *Women’s Representation on the Courts in the Republic of South Africa*, 6 U. Md. L.J. RACE RELIGION GENDER & CLASS 291, 298 (2006) (“In 1994, for instance, one hundred and sixty-one of the one hundred and sixty-six superior court judges were white males. There were only two women judges, one of whom the apartheid government had appointed as it departed. The almost all white, all male apartheid judges were, by agreement, to remain in their positions, and many of these judges maintained, as one report documented, the values and attitudes that aided and abetted a system of injustice.”) (internal citations omitted).

223. See generally id. (discussing South Africa’s efforts to promote gender equality and women’s rights in the country).

224. The South African Constitutional Court is currently comprised of six Black South Africans, four White South Africans, eight men, and two women, both of whom are Black South Africans. See generally Current Judges, Const. Ct. of S. Afr., http://www.constitutionalcourt.org.za/site/judges/currentjudges.htm (last visited Oct. 6, 2016) (directing readers to click on the eight judges’ links to learn more about each one of them).


CONCLUSION

While diversity on the U.S. Supreme Court has certainly increased with three current female justices, one of whom is a Latina, the future of diversity in terms of the selection of an African American female to fill a seat on the High Court does not look so bright. The emergence of elitist and exclusionary criteria will ensure that many highly qualified individuals of all genders and ethnicity will be overlooked as potential Supreme Court Justices. However, these criteria will have a particularly devastating effect of consideration of female African American lawyers. As our society becomes more diverse and as the legal profession becomes more diverse, it is vital that the means by which we select Justices to serve on the Highest Court in the land facilitate the creation of a diverse Court.