

ECONOMIC JUSTICE, JUDGES, AND THE LAW

ALLIANCE FOR JUSTICE | AFJ.ORG



ABOUT ALLIANCE FOR JUSTICE:

Alliance for Justice is a national association of over 130 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society. AFJ works to ensure that the federal judiciary advances core constitutional values, preserves human rights and unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans, especially the most marginalized individuals and communities. It is the leading expert on the legal framework for nonprofit advocacy efforts, providing definitive information, resources, and technical assistance that encourages organizations and their funding partners to fully exercise their right to be active participants in the democratic process.

For more information on this report, contact AFJ's Washington headquarters:

Alliance for Justice
11 Dupont Circle NW, Second Floor
Washington, DC 20036
202.822.6070

All material within this report is protected by copyright law and may not be reproduced without the express written consent of Alliance for Justice.

© 2022 Alliance for Justice

ABOUT THE AUTHOR:

Jennifer Hunter is a labor lawyer, writer, and consultant to unions and nonprofit organizations. She writes and consults on workers' rights and civil rights law and policy, as well as judicial nominations and the courts.

Before she began writing and consulting full-time in 2021, Jenny practiced labor law for 15 years, first as an associate at Bredhoff & Kaiser in Washington DC, and then in the Legal Department of the Service Employees International Union for 11 years. In her last 3 years at SEIU, she was the Lead Counsel for the Public Division. In this role she served as the legal point of contact for the dozens of SEIU local unions across the country that represent public employees and publicly-funded workers, including state and local government employees, higher education workers, and family child care providers. She supported the work of SEIU organizing campaigns, including by drafting legislation to recognize collective bargaining rights for tens of thousands of family child care providers in California.

Jenny is originally from Grinnell, Iowa. She attended Macalester College, where she majored in Math, and went to Yale Law School. She now lives in Washington, DC with her husband and two children.



TABLE OF CONTENTS:

Executive Summary	6
Introduction	10
Part I. There Are Very Few Labor and Economic Justice Judges	14
Part II. Federal Court Decisions Cause Enormous Harm to Peoples' Economic Lives	34
Part III. Judges' Backgrounds Impact Their Decisions	42
Part IV. The Backstory: The 50-Year Campaign To Pack The Courts	60
Conclusion	74

EXECUTIVE SUMMARY

Every day, federal judges decide issues of enormous importance to peoples' economic lives. Judges decide whether consumers and workers harmed by corporations and employers can bring lawsuits in court, or whether they are limited to unfair systems of forced arbitration. They determine whether workers can join together to form unions to fight for better pay and working conditions. And in a country in which an average of **15 workers die of job injuries each day**¹ and **2.7 million workers** were reported injured or sickened at work in 2020,² judges determine whether to enforce occupational safety and health rules to protect workers from injury, illness, or death on the job.

Judges also decide questions that are less obviously “economic,” but that have huge economic implications. These include whether the government can take action to avoid catastrophic climate change; whether employers can discriminate against employees based on race, sex, or other characteristics; and whether states can prevent pregnant people from accessing legal abortion in their home states, forcing them to either use illegal or legally murky abortion methods, spend enormous amounts of money and travel long distances for care, or give birth against their will with profound economic implications for themselves and their families.

In recent years, our federal courts have ruled overwhelmingly for the wealthy and powerful and against the interests of working people and communities. This report finds that just seven Supreme Court decisions have caused economic harm to at least **74 million people since 2011**,³ including workers, renters, consumers, and low-income people without health insurance. This includes an estimated 250,000 hospitalizations and **6,500 deaths in just 6 months** from COVID-19.

One factor contributing to this tilt against working and middle-class people and families is the vanishingly small number of federal judges with backgrounds in organized labor or economic justice fields. This report quantifies the number of active federal appeals court judges with backgrounds in these fields, which we define as union-side labor law, employee-side wage and hour law, consumer protection, and civil legal aid. Only **11 out of the 171** court of appeals judges on active status as of July 1, 2022 have any background in one of these economic justice fields. This number is down from 14 since 2021 because of judges taking senior status, a form of semi-retirement. Four more of these 11 have announced they will take senior status, upon the confirmation of their successors, so the number will soon drop further. Only two active appeals court judges spent the majority of their pre-judiciary careers working in those fields, down from four last year.⁴

The dearth of judges with labor and economic justice backgrounds is part of a larger lack of professional and demographic diversity among federal judges — this includes underrepresentation of Latinx judges, those with a disability, and those who have practiced in the areas of climate justice, reproductive rights, and other civil rights categories. Most federal judges spent their careers representing powerful organizations like corporations, or the government as prosecutors. They are overwhelmingly white, male, and heterosexual. They also come disproportionately from wealthy or economically affluent backgrounds. Judges with corporate or prosecutorial backgrounds are also more likely to be white and male than judges with other kinds of professional experience.

Demographic and professional diversity among judges is important not just because it improves public confidence in the courts and provides role models for other people from under-represented groups, although those are also benefits. But most importantly, diversity is crucial because it improves judicial decision-making by bringing often-excluded perspectives to the federal justice system.⁵ Multiple studies confirm the common-sense observation that judges' personal and professional backgrounds affect their decisions.⁶ **For instance, judges who are former prosecutors and corporate lawyers are more likely to rule against workers in employment cases than judges with other types of backgrounds.**⁷ White judges are more likely to rule against plaintiffs in racial discrimination cases than Black judges,⁸ and male judges are more likely to rule against plaintiffs in sexual discrimination,⁹ sexual harassment,¹⁰ and LGBTQ+ discrimination cases.¹¹ The notion that judges' backgrounds should have no impact on their judicial decisions props up the racist and sexist tendency to see white male judges from corporate or prosecutorial backgrounds as neutral, objective, and well-qualified, and judges who are women, people of color, or who have represented underrepresented people and communities as biased and unqualified.¹²

1: *Commonly Used Statistics*, United States Department of Labor, Occupational Safety and Health Administration, last visited Nov. 4, 2021, <https://www.osha.gov/data/commonstats>.

2: *Employer-Related Workplace Injuries and Illnesses—2020*, Bureau of Labor Statistics News Release, Nov. 3, 2021, <https://www.bls.gov/news.release/pdf/osh.pdf>.

3: This estimate was derived through analyzing the projected impacts of six recent Supreme Court decisions: *Alabama Assn. of Realtors v. Nat'l Mfrs. Assn.*, *Janus v. AFSCME*, *NFIB v. Sebelius*, *Epic Systems v. Lewis*, *NFIB v. DOL*, and *Whole Woman's Health v. Jackson*. For further explanation see Table 4 on p. 36.

4: See discussion in Section I below (“There are very few economic justice judges”).

5: Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 405 (2000), <https://scholarlycommons.law.wlu.edu/wlulr/vol57/iss2/5/>.

6: See discussion in Section III.B. below (“Studies demonstrate that judges' professional and personal backgrounds influence their decisions”).

7: Joanna Shepherd, *Jobs, Judges, and Justice: The Relationship between Professional Diversity and Judicial Decisions*, Demand Justice (Feb. 2021), <http://demandjustice.org/wp-content/uploads/2021/03/Jobs-Judges-and-Justice-Shepherd-3-08-21.pdf>.

8: Pat K. Chew and Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1156 (2009), https://openscholarship.wustl.edu/law_lawreview/vol86/iss5/2/.

9: Christina L. Boyd, Lee Epstein, and Andrew Martin, *Untangling the Causal Effects of Sex on Judging*, 54 Am. Journal of Political Science 389 (2010).

10: Sean Farhang and Gregory Wawro, *Indirect Influences of Gender on the U.S. Courts of Appeals: Evidence from Sexual Harassment Law* (U.C. Berkeley working paper 2010) <http://www.columbia.edu/~gfw10/FarhangWawroIndirectEffectsMay2010.pdf>.

11: Fred O. Smith Jr., *Gendered Justice: Do Male and Female Judges Rule Differently on Questions of Gay Rights?*, 57 Stanford Law Rev. 2087 (2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=864984.

12: See discussion in Section III below (“Judges' backgrounds influence their decisions”).

Much of our current lack of demographic and professional diversity on the courts can be traced to a successful and documented 50-year campaign by the Republican Party and organized corporate interests to define what it means to be qualified for the federal bench and to pack the courts with judges that favor the wealthy and powerful. The goal of this campaign has been to choose judges whose records showed they would use the law to increase the power and profits of corporations at the expense of most people, and in turn, to further the political interests of the politicians those corporations helped elect. **These judges have proven themselves willing to ignore or rewrite laws by ruling in favor of corporations and against workers and consumers. They have also eviscerated voting rights and issued decisions that disempower communities based on race and immigration status.**¹³

The three justices President Trump named to the Supreme Court are all good examples of this pattern. They all had records of bending laws passed by Congress to shift power and rights from workers and families to large corporations. As a result, wealthy and powerful corporate interests and the elected officials that cater to them spent millions of dollars and broke long-established rules to confirm these justices.

While Democratic presidents have nominated somewhat more judges with backgrounds representing underrepresented people and communities, they have also tended to choose more former corporate lawyers and prosecutors than economic justice lawyers, civil rights lawyers, or public defenders. This is partially attributable to the conservative assumption, which has at times been supported by purportedly neutral institutions like the American Bar Association, that lawyers who built their careers by practicing in these areas are less qualified to be federal judges. This is despite the pivotal impact of phenomenal Supreme Court Justices with nontraditional legal backgrounds such as Thurgood Marshall and Ruth Bader Ginsburg, who both had prominent careers in civil rights and women's rights, respectively, prior to their appointment to the Supreme Court.

President Biden has broken with this pattern, and his administration's judicial nominees have been admirably diverse in terms of race, gender, sexual orientation, and professional background. Many of President Biden's nominees have been public defenders and, to a slightly lesser extent, civil rights lawyers.¹⁴ But he has named only two judges with labor or economic justice backgrounds to the federal appeals courts, and just one has been confirmed. The need for more judges with economic justice experience is pressing.

13: See discussion in Section IV below ("The backstory: the 50-year campaign to pack the courts").

14: Alliance for Justice, *A Fairer Court: How President Biden and Congress Raised the Bar in 2021*, December 2021, <https://www.afj.org/wp-content/uploads/2021/12/A-Fairer-Court-How-President-Biden-and-Congress-Raised-the-Bar-in-2021.pdf>.



INTRODUCTION

Over the course of the last several decades, inequality in the United States has reached levels not seen since the Gilded Age, and millions of people have struggled to make ends meet. Wages have stagnated, and jobs have been “fissured” as major corporations have exploited legal loopholes to avoid recognizing the people working for them as employees, resulting in the denial of many basic workplace protections. Additionally, healthcare remains unaffordable for millions of people, and it has become harder and harder for working people to form unions. These harms have been particularly acute in Black and brown communities.

It has also become more difficult for working and middle-class people to bring about change through our political systems. Gerrymandering and voter suppression have worked to prevent, discourage, or diminish the impact of the votes of people of color, low-income people, the young and seniors, people with disabilities, and those who live in gerrymandered states. While there was an important union organizing victory recently — in April 2022, the first Amazon workers’ union was formed at a warehouse in Staten Island, New York — these victories are rare. Today, generally fewer workers are in unions, which have historically served as political counterweights to big business. And a flood of money in politics has made elected officials essentially non-responsive to the policy preferences of a majority of Americans.¹⁵ **In this report, we use the term “underrepresented” to refer to the large majority of people and communities whose policy preferences are largely not reflected in the actions of their elected officials, and whose interests are also underrepresented in our market-based legal system because they are not wealthy.**¹⁶ The group includes both historically marginalized communities, such as people of color and low-income people, and middle-class communities who nonetheless have much less influence over our politics and our legal system than the very wealthy and large corporations.

Federal court decisions have contributed to this increase in inequality and concentration of power in the hands of a wealthy few individuals and corporations. Every time a person gets a job, decides whether to ask for fair wages or better working conditions, buys something, pays rent, or gets sick and seeks healthcare, those economic interactions and choices are shaped by the decisions of federal judges.

Over the last several decades, courts have become increasingly indifferent or hostile to economic justice for regular people. The Supreme Court has led the way. The Court has ignored precedent and the words of statutes to rule for wealthy and powerful interests, or against government attempts to empower or protect workers and low-income people. **By our calculation, just seven Supreme Court rulings have harmed the economic well-being or physical health and safety of at least 74 million people since 2011, including causing the unnecessary deaths of thousands due to COVID-19 and lack of health insurance.**

People deserve more judges with backgrounds in economic justice fields: union-side labor law, employee-side wage and hour law, consumer protection, and civil legal aid. Judges with experience in these areas understand the economic realities of life for many people — for consumers injured by dangerous products, renters threatened with eviction during a pandemic, or workers whose employers retaliate against them for trying to form a union or do not pay them for the hours they have worked. They also have knowledge of areas of law, like labor law, unemployment compensation, Social Security appeals, and product safety that are vitally important to millions of people, but that most judges have never practiced or have only practiced from a corporate or government perspective. Economic justice judges’ perspectives can help ensure that the courts are a fair forum for everyone, rather than a tool for exacerbating income inequality and weakening democracy.

15: Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elite, Interest Groups, and Average Citizens*, Cambridge University Press, Sept. 18, 2014, <https://www.cambridge.org/core/journals/perspectives-on-politics/article/testing-theories-of-american-politics-elites-interest-groups-and-average-citizens/62327F513959D0A304D4893B382B992B>; Andrew Prokop, *Study: Politicians listen to rich people, not you*, Vox, Jan. 28, 2015, <https://www.vox.com/2014/4/18/5624310/martin-gilens-testing-theories-of-american-politics-explained>.

16: Kathryn A. Sabbeth, *Market-Based Law Development*, Law and Political Economy Project, July 21, 2021, <https://lpeproject.org/blog/market-based-law-development/>.



As of July 1, 2022, only 11 of the 171 active federal Court of Appeals judges have any experience in economic justice fields. Only two of these 11 spent the majority of their pre-judiciary legal careers in those fields. These numbers have actually decreased since 2021 and are set to decline even further as 2022 progresses due to judges taking senior status.

President Joe Biden has nominated a laudable and historic number of people of color, women, former public defenders, and civil rights lawyers to the bench,¹⁷ but his nominees have included few economic justice lawyers. Including nominees who are not yet confirmed, Biden has named two circuit court nominees with experience in economic justice fields, and four more with jobs representing plaintiffs in civil rights cases – but at least two others who have significant experience on the other side of those types of cases, representing employers in labor and employment disputes.¹⁸

Types of diversity are not fungible, although they sometimes intersect or overlap. Naming more judges with backgrounds as public defenders is important and much needed, but it does not rectify the dearth of labor and economic justice judges. Civil rights and public defense law have important economic implications — as do other areas of law underrepresented among federal judges, including racial justice, women’s rights, LGBTQ+ rights, disability rights, immigrants’ rights, criminal defense, housing, health law, voting rights, Indian law, environmental justice, and reproductive rights. All of these legal fields are economic justice fields, in a sense, since they all deeply impact the economic lives of the communities at stake. And economic justice law is also often about the rights and well-being of people of color, women, formerly incarcerated people, immigrants, and other marginalized groups. But this report focuses on economic justice more narrowly defined because the number of judges with backgrounds in those fields is rarely studied or quantified, and because so few recent nominees have backgrounds in labor and economic justice.

17: Alliance for Justice, *A Fairer Court: How President Biden and Congress Raised the Bar in 2021*, December 2021, <https://www.afj.org/wp-content/uploads/2021/12/A-Fairer-Court-How-President-Biden-and-Congress-Raised-the-Bar-in-2021.pdf>.

18: Biden’s two appeals court nominees with experience in economic justice fields are Jennifer Sung (9th Cir.) and Rachel Bloomekatz (6th Cir., not yet confirmed). The four more with experience in civil rights are Myrna Perez (2nd Cir.), Beth Robinson (2nd Cir.), Holly A. Thomas (9th Cir.), and Nancy Abudu (11th Cir., not yet confirmed.) Rachel Bloomekatz also has civil rights experience. The two with significant experience representing employers in labor and employment disputes are J. Michelle Childs (D.C. Cir., not yet confirmed) and Andre Mathis (6th Cir., not yet confirmed).

PART I.

THERE ARE VERY FEW LABOR &
ECONOMIC JUSTICE JUDGES



THERE ARE VERY FEW LABOR AND ECONOMIC JUSTICE JUDGES

President Joe Biden made a laudable commitment to nominate judges who “look like America” and who are “committed to the rule of law, understand the importance of individual civil rights and civil liberties in a democratic society, and respect foundational precedents like *Brown v. Board of Education* and *Roe v. Wade*.”¹⁹ After Biden was elected, his White House counsel Dana Remus sent a letter to Senators asking them to suggest judicial nominees “whose legal experiences have been historically underrepresented on the federal bench, including those who are public defenders, civil rights and legal aid attorneys, and those who represent Americans in every walk of life.”²⁰

President Biden has followed through on his promise, nominating an unprecedentedly diverse group of judges. As of July 1, 2022, he has named and seen confirmed five appeals court judges with experience as public defenders, including one, Ketanji Brown Jackson, whom he also nominated to the Supreme Court. This nearly doubled the number of former public defenders on the appeals courts, and marked the first Supreme Court Justice to have worked as a public defender.²¹ He has also nominated and confirmed three appeals court lawyers with civil rights experience.²² **Overall, his nominees have been 75% women and 68% people of color,²³ and he has named a number of “firsts” and “onlys” — the first Black woman Justice on the Supreme Court, the first Muslim-American district court judge,²⁴ the first openly LGBTQ+ female court of appeals judge,²⁵ the only active Black woman judge in the Northern District of California,²⁶ the first Asian-American or Pacific Islander judge in Washington state,²⁷ and the first Hispanic district court judge in Ohio.²⁸**

One of President Biden’s confirmed appeals court nominees, Jennifer Sung, is a superbly qualified judge who has focused her career on union-side labor law and other economic justice fields. Before Sung attended law school, she worked as a union organizer; she completed a two-year fellowship focusing on economic justice; and then she worked for nearly a decade as an attorney at two union-side labor law firms. Most recently she was a member of the Oregon Employment Relations Board for four years, where she ruled on labor and employment cases. She is an Asian-American woman.

19: Bettina Ramon, *Joe Biden Promises to Nominate Judges “Who Look Like America,”* People for the American Way, May 5, 2020, <https://www.pfaw.org/blog-posts/joe-biden-promises-to-nominate-judges-who-look-like-america/>.

20: Harper Neidig, *Biden team asks Senate Democrats to recommend public defenders, civil rights lawyers for federal bench,* *The Hill*, Dec. 30, 2020, <https://thehill.com/regulation/court-battles/532164-biden-team-asks-senate-dems-to-recommend-public-defenders-civil>.

21: See discussion infra Section I.A (“Our study quantifies the very small number of judges with economic justice backgrounds”) and I.B (“There are also far too few judges with other types of experience representing the less-powerful”). President Biden has also named one additional nominee, Arianna Freeman, with experience as a public defender, but she has not yet been confirmed as of July 1, 2022.

22: President Biden has also named one additional nominee, Nancy Abudu, with civil rights experience, but she has not yet been confirmed as of July 1, 2022.

23: *Balls and Strikes, Biden’s Nominees*, last visited July 1, 2022, <https://ballsandstrikes.org/bidens-nominees/>.

24: Azi Paybarah, *U.S. Senate Confirms First Muslim Federal District Judge*, *New York Times*, June 11, 2021, <https://www.nytimes.com/2021/06/11/nyregion/zahid-quraishi-first-muslim-federal-district-judge.html>.

25: Mike Scarella, *U.S. Senate confirms first openly LGBTQ female appeals court judge*, *Reuters*, Nov. 1, 2021, <https://www.reuters.com/legal/litigation/us-senate-confirms-first-openly-lgbtq-female-appeals-judge-2021-11-01/>.

26: *President Biden Names Ninth Round of Judicial Nominees*, *White House*, Nov. 3, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/03/president-biden-names-ninth-round-of-judicial-nominees/>.

27: Mike Carter, *Attorney who helped fight Trump travel ban appointed to federal bench in Washington state*, *Seattle Times*, Oct. 21, 2021, <https://www.seattletimes.com/seattle-news/attorney-who-helped-fight-trump-travel-ban-appointed-to-federal-bench-in-washington-state/>.

28: *President Biden Names Eighth Round of Judicial Nominees*, *White House*, Sept. 30, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/30/president-biden-names-eighth-round-of-judicial-nominees/>.



JENNIFER SUNG

Jennifer Sung is President Biden's first appeals court nominee to have a background in economic justice. Sung, an Asian-American woman, has dedicated her career to economic justice work.

Sung was born in Edison, New Jersey. She graduated from Oberlin College and then from Yale Law School in 2004. Before law school, she worked as a union organizer for five years for three different locals of the Service Employees International Union. After she graduated from law school, she clerked for Judge Betty Binns Fletcher on the 9th Circuit. She served as a Skadden Fellow in the Economic Justice Project at the Brennan Center for Justice from 2005 to 2007,²⁹ where her work focused on improving wages and working conditions for low-wage workers.³⁰

She then worked at two union-side labor law firms: as an associate at Altshuler Berzon LLP from 2007 until 2013, and as a partner at McKanna Bishop Joffe LLP from 2013 until 2017. Sung represented workers who were the victims of wage theft and those who were denied meal and rest breaks; she was part of a team that successfully enjoined a California county from cutting in-home services to low-income people with disabilities; and she represented striking faculty when their university threatened to disable their email access days before the strike.³¹

In 2017, Oregon Governor Kate Brown nominated Sung to become a member of the Oregon Employment Relations Board, which adjudicates unfair labor practice charges and employment cases for Oregon workers.

PRESIDENT BIDEN NOMINATED SUNG TO THE 9TH CIRCUIT IN JUNE 2021. SHE WAS CONFIRMED ON DECEMBER 15, 2021.

Judge Sung is a fantastic addition to the federal judiciary. But as of now, she is the only one of Biden's confirmed appeals court nominees who has experience in an economic justice field. Biden has named one additional circuit court nominee, Rachel Bloomekatz, who has experience representing both workers and consumers; she has yet to be confirmed. Sung is one of only two active court of appeals judges in the country who have spent most of their careers in economic justice fields. Two others who also spent their careers as economic justice lawyers recently took senior status, so the number has actually declined since last year. Jennifer Sung and Rachel Bloomekatz cannot be the only circuit court nominees with this type of background.

Additionally, while Biden has nominated six court of appeals judges with economic justice and/or plaintiffs' side civil rights experience, he has named at least two who have experience on the opposite side of those same types of cases, representing employers in labor and employment cases.³²

We conducted an analysis of the professional backgrounds of all active Court of Appeals judges in order to determine how many had economic justice experience, as well as other types of demographic and professional diversity. In the following pages, we first discuss our findings about the number of economic justice judges, and we then examine the need for more public defenders and civil rights lawyers on the bench. Finally we broaden to discuss the need for more socioeconomic and demographic diversity among judges.

29: Maxine Bernstein, *Oregon labor lawyer, former union organizer nominated to serve as judge on federal appellate court*, OregonLive.com, June 30, 2021, <https://www.oregonlive.com/crime/2021/06/oregon-labor-lawyer-former-union-organizer-nominated-to-serve-as-judge-on-federal-appellate-court.html>.

30: Alliance for Justice, *Jennifer Sung Fact Sheet*, Aug. 18, 2021, <https://www.afj.org/document/jennifer-sung-fact-sheet/>.

31: *Id.*

32: See supra n. 18.

ANALYSIS OF JUDGES WITH ECONOMIC JUSTICE BACKGROUNDS

We examined the professional backgrounds of all the current active Court of Appeals judges to quantify the number who have any experience in economic justice, as well as other fields.³³

We defined “economic justice” experience as union-side labor law, employee-side wage and hour law, consumer protection, and civil legal aid.

Union-side labor lawyers represent workers who are organizing into unions, unionized workers bargaining with their employers for better working conditions or enforcing collective bargaining agreements, and unions as institutions in a variety of legal matters. Employee-side wage and hour lawyers represent workers in claims against their employers for unpaid wages.³⁴ Consumer protection lawyers represent individuals or groups of or groups of consumers (or the government on their behalf), challenging dangerous, deceptive, or fraudulent products or businesses. Civil legal aid lawyers provide free representation to low- or middle-income people with a variety of civil legal issues, including landlord-tenant issues; applications for disability, food stamps, or other benefits; family law; and employment law violations. To our knowledge, the number of judges with these types of backgrounds has not previously been analyzed.³⁵

We looked at each job held by each judge, so the types of experience are not mutually exclusive; a judge could have been a civil rights lawyer and also a prosecutor who also worked in a corporate law firm.³⁶ We also looked at each judge’s legal career as a whole to determine which type of job each judge held for the majority of their legal career before becoming a judge or a magistrate.

We found that of the 171³⁷ appeals court judges active as of July 1, 2022, only 11, or 6.3% of the total, had any experience working in economic justice fields. Four of these 11 judges had backgrounds in union-side labor law; six in legal aid; and one in consumer protection. There were 14 active appeals court judges with economic justice experience just last year; three took senior status late last year or early this year.³⁸ Four of the current 11 have announced that they will take senior status upon the confirmation of their successor, so these numbers will soon drop further.

Because there are so few of them, all 11 judges, including summaries of their economic justice experience, are listed in Table 1 on the next page.

33: We drew information about judges’ professional experience and demographic characteristics from the Federal Judicial Center’s Biographical Directory of Federal Judges, <https://www.fjc.gov/history/judges>; from the Senate Judiciary Questionnaires that nominees fill out; and from descriptions of the nominee’s work in a particular job on their employer’s website or in news reports. We considered each job held by each active appeals court judge after graduating from law school and before becoming either a state or federal judge or magistrate judge, other than judicial clerkships. The reason for excluding judgeships and judicial clerkships is that the focus of our analysis is jobs in which a lawyer represented a client or advocated on behalf of a position, cause, person, or entity.

34: Wage and hour law is one aspect of employment law that generally concerns the relationship between individual employees and their employers. Employment law could also include allegations of workplace safety violations, unemployment, whistleblower, and employment discrimination claims. We have categorized employee-side employment discrimination law as “civil rights” rather than “economic justice” because nearly all of the active appeals court judges with experience in employee-side employment discrimination law worked for organizations that handled multiple kinds of civil rights cases, like discrimination in education or voting in addition to employment.

35: This is in part because the Federal Judicial Center, the primary database of information about federal judges, does not distinguish between different types of “private practice.” Many union-side labor lawyers (and civil rights lawyers) work at law firms rather than nonprofit organizations.

36: The categories into which we categorized judges’ legal jobs were: union-side labor law; legal aid; consumer protection (all three of which together make up “economic justice”); civil rights, which includes employment discrimination, housing discrimination, voting rights, and other types of civil rights practice; public defenders; environmental law; corporate law (including predominately corporate practice at law firms and in-house at corporations); general or other firm practice; other federal agencies; other state/local agencies; academia; elected officials; and other. With the exception of the three categories that make up “economic justice,” we treated these categories as mutually exclusive to describe a single job; thus, a job as an Assistant U.S. Attorney working on criminal matters counted as “prosecutor” but not “federal government.” Many lawyers work on a variety of types of cases, but we considered the overall nature of each job, not whether a lawyer ever handled a case in a particular field.

37: This 171 does not include Justice Ketanji Brown Jackson, since she was sworn in as a Supreme Court Justice on June 30.

38: These three are Judges Marsha Berzon (9th Cir.), Richard Paez (9th Cir.), and Rosemary Pooler (2nd Cir.).

TABLE 1:
ACTIVE FEDERAL APPEALS COURT JUDGES WITH
ANY ECONOMIC JUSTICE EXPERIENCE

- Will Take Senior Status Upon the Confirmation of Their Successor
- Majority of Career in Economic Justice Field

Judge	Circuit	President, Year Confirmed	Economic Justice Experience
Judith Ann Wilson Rogers	D.C. Circuit	Clinton, 1994	Legal Aid: Staff Attorney, San Francisco Neighborhood Legal Assistance Foundation, 1968-1969
O. Rogeriee Thompson	1 st Circuit	Obama, 2010	Legal Aid: Staff Attorney, Rhode Island Legal Services, 1976-1979
Susan Carney	2 nd Circuit	Obama, 2011	Union Side Labor Law: Of Counsel, Bredhoff & Kaiser Labor Law Firm, 1994-1996
James Earl Graves	5 th Circuit	Obama, 2011	Legal Aid: Staff Attorney, Central Mississippi Legal Services, 1980-1983
Jane Branstetter Stranch	6 th Circuit	Obama, 2010	Union Side Labor Law: Partner, Branstetter Stranch Labor Law Firm, 1978-2010
Bernice Donald	6 th Circuit	Obama, 2011	Legal Aid: Staff Attorney, Employment Law & Economic Development Unit, Memphis Area Legal Services, 1980
Lavenski R. Smith	8 th Circuit	G.W. Bush, 2002	Legal Aid: Staff Attorney, Ozark Legal Services, 1987-1991
Johnnie B. Rawlinson	9 th Circuit	Clinton, 2000	Legal Aid: Staff Attorney, Nevada Legal Services, 1980
Jennifer Sung	9 th Circuit	Biden, 2021	Union Side Labor Law: Associate, Altshuler Berzon Labor Law Firm, 2007-2013; Associate and Partner, McKanna Bishop Joffe Labor Law Firm, 2013-2017
John Byron Owens	9 th Circuit	Obama, 2014	Consumer Protection: Trial Attorney, Office of Consumer Litigation, U.S. Department of Justice, 1998-1999
Harris L. Hartz	10 th Circuit	G.W. Bush, 2001	Union Side Labor Law: Special Counsel to International Brotherhood of Teamsters, 1999-2001

Only two appeals court judges, or 1.1% of the total, spent the majority of their legal careers before becoming judges in an economic justice field: **Jane B. Stranch (6th Circuit) and Jennifer Sung (9th Circuit)**. A brief biography of Judge Stranch is on the next page; Judge Sung’s biography is on page 16.

Presidents have not always eschewed potential judges with economic justice backgrounds. As recently as the 1960s, for instance, a prominent union-side labor lawyer sat on the Supreme Court. Arthur Golberg had a wide-ranging professional background: After graduating from law school in 1930, he joined the Army during World War II, serving as a captain, a major, and in an espionage group. After the war, he became a labor lawyer, representing striking Chicago newspaper workers and eventually becoming the General Counsel to the Congress of Industrial Organizations and to the Steelworkers. President Kennedy appointed Goldberg as the Secretary of the Department of Labor in 1961, and then in 1962 to the Supreme Court. Goldberg only served on the Supreme Court for three years, resigning in 1965 to become the Ambassador to the United Nations. But in that time, he ruled on several important cases, including writing an influential concurring opinion in *Griswold v. Connecticut*, which found that the Constitution protected a right to privacy that encompassed the right of married couples to use contraception.⁴²

42: AFL-CIO, *Arthur Goldberg*, <https://aflcio.org/about/history/labor-history-people/arthur-goldberg> (last visited March 13, 2022).



JUDGE JANE BRANSTETTER STRANCH

Her practice focused on labor and employment, specifically the representation of individuals and labor unions, with additional work in personal injury, wrongful death, and utility law.

She developed a specialization in complex ERISA cases in which she represented classes of plan participants seeking to recover their pensions after corporate bankruptcies or other calamities. She also taught labor law at Belmont University.⁴⁰

Judge Jane Branstetter Stranch spent her entire legal career before becoming a judge at a law firm that advocates for “unions and for the rights of consumers, victims of discrimination, and other under-represented voices in our society,”³⁹ where she represented primarily workers, unions, and pension plan participants.

Born in Nashville, Tennessee, Stranch graduated from Vanderbilt University and Vanderbilt University Law School. She began working at the law firm of Branstetter, Stranch & Jennings, PLLC, as a summer law clerk. She became an associate there upon her graduation from law school in 1978, and became partner in 1994.

President Obama nominated Stranch to the 6th Circuit Court of Appeals in August 2009. She was confirmed more than a year later, in September 2010; at that time she had waited longer than any other Obama nominee to be confirmed by the Senate.⁴¹

39: *Legal Services*, Branstetter Stranch & Jennings PLLC, last visited Nov. 4, 2021, <https://www.bsfirm.com/>.

40: *Jane Branstetter Stranch, Member*, Branstetter Stranch & Jennings PLLC, last visited Nov. 4, 2021, archive via Wayback Machine, <https://web.archive.org/web/20100105001854/http://www.branstetterlaw.com/article.aspx?a=23>.

41: Martha Neil, *After 1-Year Wait, Judge Jane Stranch Is Confirmed by Senate for 6th Circuit Seat*, ABA Journal, Sept. 13, 2010, https://www.abajournal.com/news/article/after_1-year_wait_judge_jane_stranch_is_confirmed_by_senate_for_6th-circuit/.

THERE ARE NOT ENOUGH JUDGES WITH OTHER TYPES OF EXPERIENCE SERVING UNDERREPRESENTED PEOPLE AND COMMUNITIES

Our study confirmed what advocates have pointed out for years:⁴³ There is a serious dearth of judges with backgrounds in all types of law that serve underrepresented people, including economic justice, civil rights, and public defense. As discussed above, as of July 1, 2022, only 11 of the 171 active appeals court judges, or 6.3% of the total, had any economic justice experience.⁴⁴ Only six held any legal job focused on civil rights, or 3.5% of the total.⁴⁵ Only nine active appeals court judges have any experience as public defenders, or 5.3% of the total.⁴⁶

Meanwhile, a staggering 68.4% of active federal court of appeals judges have experience representing corporations, either by practicing in a corporate-related field at a law firm or working in-house at a corporation. More than a quarter, 28%, have worked as prosecutors.

Table 2 shows the fields in which active appeals court judges spent the majority of their careers before becoming judges. As discussed above, only two active appeals court judges, or 1.2% of the total, spent the majority of their careers in economic justice fields. Only three, or 1.8%, spent the majority of their careers as civil rights lawyers,⁴⁷ and seven, or 4.1%, spent the majority of their careers as public defenders.⁴⁸

Meanwhile, judges who spent the majority of their careers in corporate law make up 37% of active federal appeals court judges, and career prosecutors 16.4%, for a total of more than half of all active appeals court judges between those two over-represented categories.

43: See Alliance for Justice, *Broadening the Bench: Professional Diversity and Judicial Nominations*, Feb. 6, 2014, <https://www.afj.org/wp-content/uploads/2021/03/AFJ-2014-Professional-Diversity-Report.pdf>; Maggie Jo Buchanan, *The Startling Lack of Professional Diversity Among Federal Judges*, Center for American Progress (June 17, 2020), <https://www.americanprogress.org/issues/courts/news/2020/06/17/486366/startling-lack-professional-diversity-among-federal-judges/>; Shepherd, *supra* n. 7.

44: All the statistics in this section are current as of July 13, 2022.

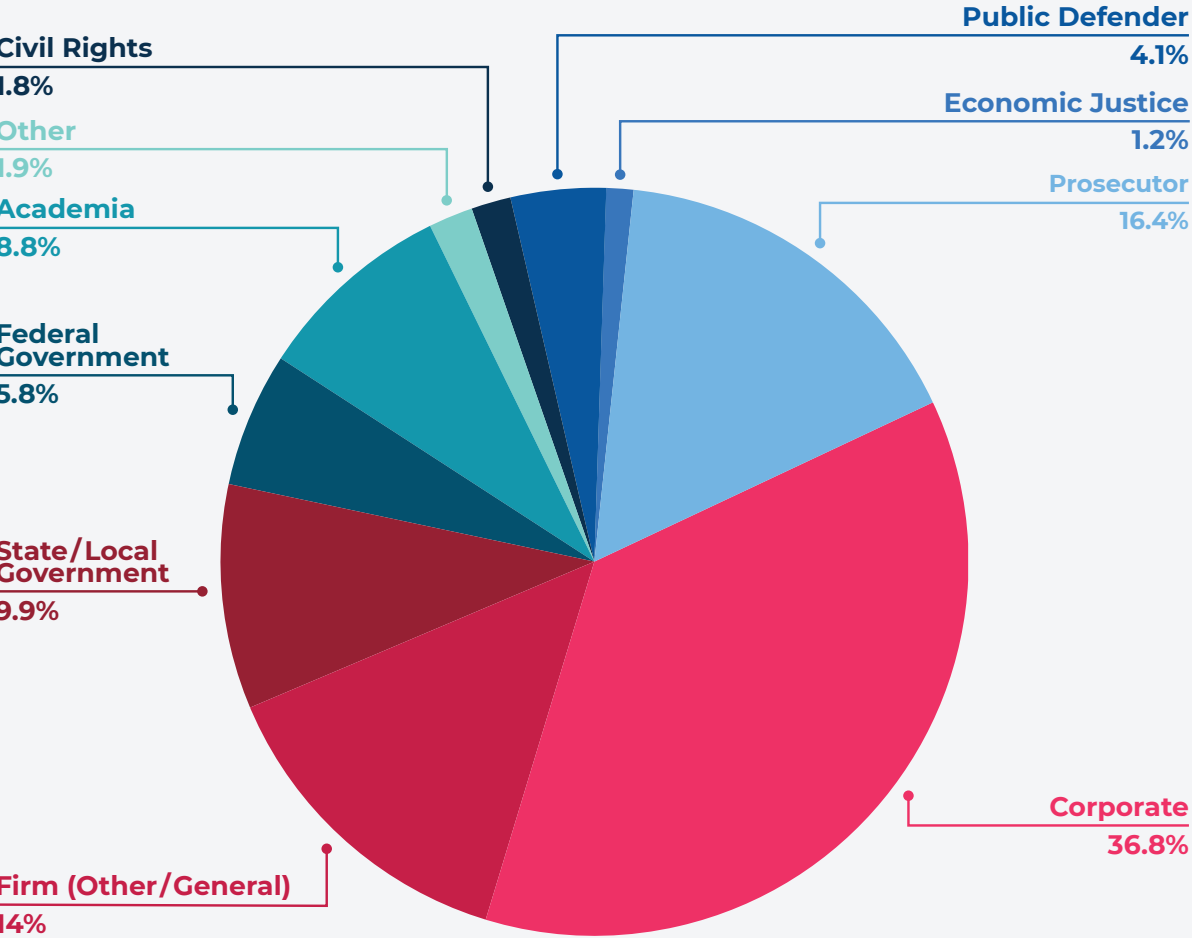
45: The six active appeals court judges with any experience as civil rights lawyers are Cornelia “Nina” Pillard (D.C. Cir.), Beth Robinson (2nd Cir.), Raymond Joseph Lohier, Jr. (2nd. Cir.), Myrna Perez (2nd Cir.), Luis Felipe Restrepo (3rd Cir.), and Holly A. Thomas (9th Cir.).

46: The nine active appeals court judges with any experience as public defenders are Robert Leon Wilkins (D.C. Cir.), Gustavo Gelpi (1st Cir.), Eunice Lee (2nd Cir.), Luis Felipe Restrepo (3rd Cir.), James A. Wynn Jr. (4th Cir.), Bernice Donald (6th Cir.), Candace Jackson-Akiwumi (7th Cir.), Jane Louise Kelly (8th Cir.), and Veronica S. Rossman (10th Cir.).

47: The three active appeals court judges who spent the majority of their legal careers as civil rights lawyers are Myrna Perez (2nd Cir.), Luis Felipe Restrepo (3rd Cir.), and Holly A. Thomas (9th Cir.).

48: The seven active appeals court judges who spent the majority of their legal careers as public defenders are Robert Leon Wilkins (D.C. Cir.), Gustavo Gelpi (1st Cir.), Eunice Lee (2nd Cir.), Bernice Donald (6th Cir.), Candace Jackson-Akiwumi (7th Cir.), Jane Louise Kelly (8th Cir.), and Veronica S. Rossman (10th Cir.).

TABLE 2:
PROFESSIONAL BACKGROUNDS OF ACTIVE
FEDERAL APPEALS COURT JUDGES



Percentages show the fields in which judges spent the majority of their careers before becoming judges.

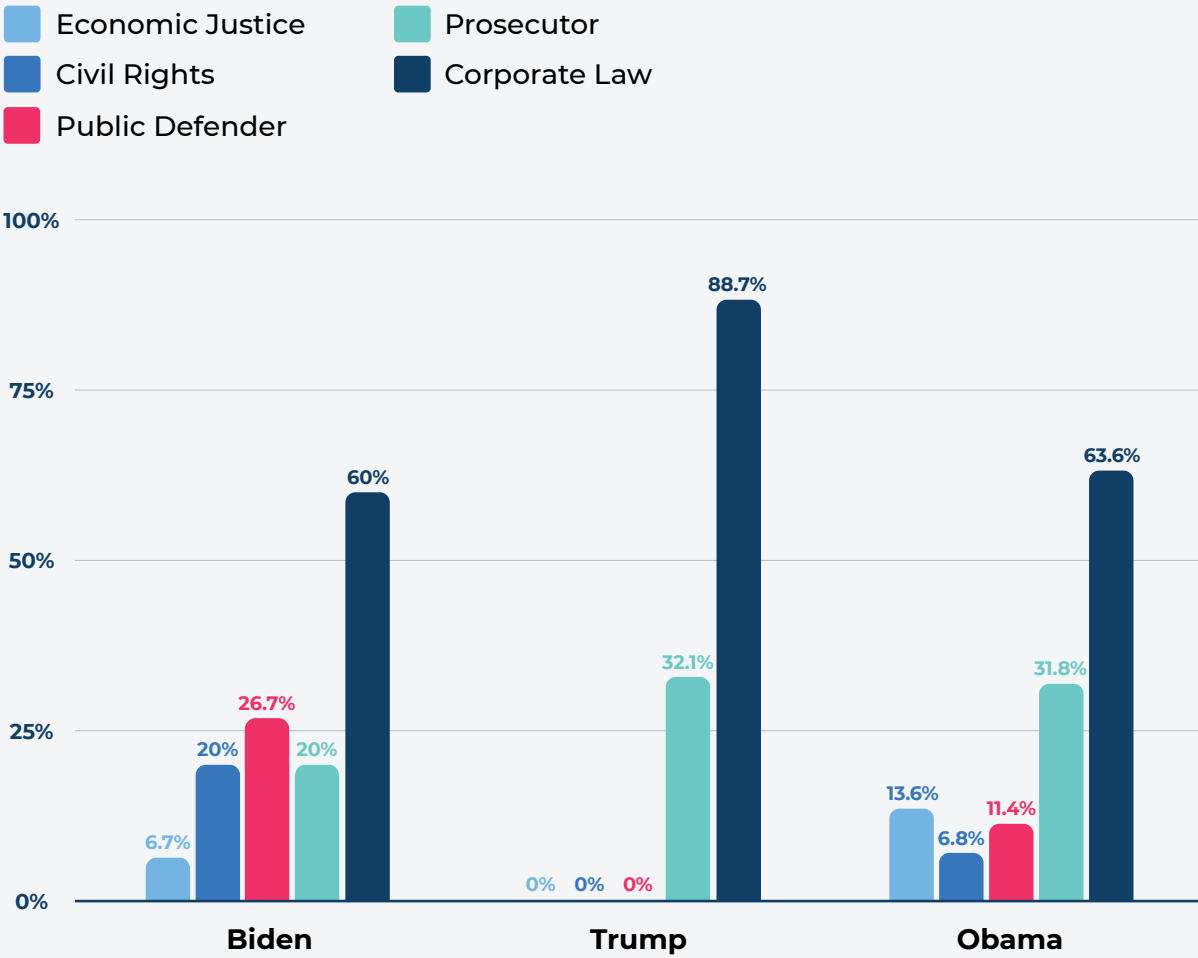
There are significant differences in the professional backgrounds of judges appointed by different presidents. As we have noted, President Biden’s nominees are laudable for including a much higher number of lawyers with backgrounds as public defenders than those of most presidents.⁴⁹ In just over a year in office, Biden has appointed nearly half of all the active appeals court judges with backgrounds as public defenders — there are only nine total, and Biden has named four of them (plus one more who has not yet been confirmed). More than a quarter of Biden’s confirmed and still-active nominees to the appeals courts (4 out of 15) have had backgrounds as public defenders.

49: Alliance for Justice, *A Fairer Court: How President Biden and Congress Raised the Bar in 2021*, December 2021, <https://www.afj.org/wp-content/uploads/2021/12/A-Fairer-Court-How-President-Biden-and-Congress-Raised-the-Bar-in-2021.pdf>; Sahil Kapur, *With public defenders as judges, Biden quietly makes history on the courts*, NBC News, Oct. 18, 2021, <https://www.nbcnews.com/politics/congress/new-public-defenders-joe-biden-quietly-makes-history-courts-n1281787>; Demand Justice Statement on Biden Appointing Record-Tying Number of Public Defenders to Circuit Courts, October 18, 2021, <https://demandjustice.org/demand-justice-statement-on-biden-appointing-record-tying-number-of-public-defenders-to-circuit-courts/>.

Biden has also seen three appeals court nominees with civil rights experience confirmed to the appeals courts (plus one more who has not yet been confirmed), meaning 19% of his confirmed circuit court nominees have had civil rights backgrounds. These three are half of the total number of active appeals court judges with civil rights backgrounds.

Biden has since confirmed one appeals court nominee with an economic justice background, Jennifer Sung, and has nominated one more, Rachel Bloomekatz, who has not been confirmed. Sung’s confirmation means judges with economic justice backgrounds constitute 6.7% of Biden’s confirmed and still-active appeals court nominees. Sung constitutes 9.1% of the total number of active appeals court judges with economic justice experience. By contrast, of the appeals court judges named by President Obama who are still active, 13.6% have economic justice experience; the number for President Trump, unsurprisingly, is 0%. The percentages of the last three presidents’ still-active appeals court judges with experience in these fields, plus prosecutors and corporate law, are shown in Table 3.

TABLE 3:
PROFESSIONAL BACKGROUNDS OF STILL-ACTIVE FEDERAL APPEALS COURT JUDGES, BY APPOINTING PRESIDENT



Note: The percentages for each president add up to more than 100% because the same person can have more than one type of professional experience.

Consistent with other analyses of federal judges’ professional backgrounds, we found that prosecutors and corporate lawyers are overrepresented among judges compared to their numbers in the legal profession. In the U.S. legal profession as a whole, only about 3% of practicing lawyers are federal or state prosecutors — so the 28% of active federal appeals court judges who have worked as prosecutors is a vast over-representation.⁵⁰

50: Joanna Shepherd, *Jobs, Judges, and Justice: The Relationship between Professional Diversity and Judicial Decisions*, Demand Justice (Feb. 2021), <http://demandjustice.org/wp-content/uploads/2021/03/Jobs-Judges-and-Justice-Shepherd-3-08-21.pdf> (“Shepherd report”).

The percentage of practicing lawyers who work for all types of private law firms, including corporate law, civil rights law, and all other types of law, or in-house for corporations, is about 61-66%.⁵¹ By contrast, we found that 68.4% of active appeals court judges have backgrounds just in corporate law, meaning corporate lawyers, a subset of the larger group of law firm or in-house business lawyers, are over-represented on the bench. Partners at large law firms are particularly likely to become judges: Only about 4.2% of practicing lawyers are partners in the 200 largest law firms in America, but an earlier study showed that among President Obama’s and President Trump’s appeals court nominees, 22% and 30%, respectively, had been partners at these firms.⁵²

It is difficult to assess how the percentages of judges with economic justice, civil rights, and public defender backgrounds compare to the percentage of attorneys with experience in those fields.⁵³ Even if the percentage of federal judges with backgrounds serving underrepresented people and communities were proportional to the numbers of lawyers practicing in those fields in the legal profession, that number would still vastly underrepresent the importance of these areas of law to people in this country. Because our legal system is market-based, a disproportionate number of lawyers spend their careers working on legal issues of importance to a small number of wealthy and powerful people and organizations that have the money to hire lawyers. It is merely optional for lawyers to provide *pro bono* services to those who cannot afford to pay. As a result, the proportion of lawyers who spend their careers representing people who are not wealthy is much smaller than the number of people who need those services, or who are impacted by the law in those fields.⁵⁴ The experiences of our federal judges should reflect the legal issues that are important to the American people, not just the wealthy and powerful.

**LOW AND DECREASING
EDUCATIONAL DIVERSITY, A PROXY
FOR SOCIOECONOMIC CLASS**

Diversity of educational background among federal judges has declined over the last 100 years. A 2016 paper examined judges’ educational backgrounds and found that “elite [law] schools are significantly more overrepresented in the federal judiciary today than they were one hundred years ago.”⁵⁵ With a smaller and smaller number of schools educating future federal judges, federal judges have a shrinking diversity of educational experiences and viewpoints.

Even more concerning, this decrease in educational diversity likely means that judges are also becoming less diverse in terms of their socioeconomic class. A huge majority of students at elite law schools come from affluent families. A 2011 study showed that of students at the 20 most elite American law schools, more than three quarters of students came from the top quarter of socioeconomic status, with half of students coming from the top 10% of socioeconomic status. **Only 2% of law students at those elite schools came from the bottom socioeconomic quarter.**⁵⁶

While there is no data, to our knowledge, about the socioeconomic backgrounds of federal judges, the disproportionate number of judges who attended elite law schools suggests that judges disproportionately come from high socioeconomic status backgrounds, and that this problem may be getting worse.

51: Bryant G. Garth, et al., American Bar Foundation and NALP Foundation for Law Career Research and Education, *After the JD III: Third Results from a National Study of Legal Careers* 28, 2014, http://www.americanbarfoundation.org/uploads/cms/documents/ajd3report_final_for_distribution.pdf (percentage of lawyers who were admitted to the bar in 2000 working in law firms or as inside counsel for businesses ranged between 61.1% and 66% at seven and 12 years after began to practice law, respectively).
52: Shepherd report, supra n. 7, at 6.
53: Bryant G. Garth, et al., American Bar Foundation and NALP Foundation for Law Career Research and Education, *After the JD III: Third Results from a National Study of Legal Careers* 27-28, 2014, http://www.americanbarfoundation.org/uploads/cms/documents/ajd3report_final_for_distribution.pdf (percentage of lawyers who were admitted to the bar in 2000 who worked in “legal services, public interest, and nonprofit” sectors, which includes public defenders, was 8% seven years after the cohort began their legal careers and 10% twelve years after they began practicing law).
54: Kathryn A. Sabbeth, *Market-Based Law Development*, Law and Political Economy Project, July 21, 2021, <https://lpeproject.org/blog/market-based-law-development/>.

55: Jason Iuliano and Avery Stewart, *The New Diversity Crisis in the Federal Judiciary* at 249, Tennessee Law Review 84, 249 (January 26, 2017), <https://ssrn.com/abstract=2906531>. Controlling for the number of judges without law degrees (since before about 1850 it was common for lawyers to learn their profession through self-study or apprenticeships rather than a formal school), and for the increasing number of law schools over time, the authors found that the top 20 law schools went from holding about 2.5 times the average number of judicial seats in 1900 to more than six times the average in 2014—an increase of more than 100%. The top five law schools went from holding more than seven times the average number of seats in 1900 to 11 times in 2014.
56: Richard Sander, *Class in American Legal Education*, 88 Denver Univ. Law Rev. 631, 637 (2011), https://www.law.du.edu/documents/denver-university-law-review/v88-4/Sander%20Final_ToPrinter_917.pdf.

LACK OF DEMOGRAPHIC DIVERSITY

Federal judges are disproportionately white, male, and heterosexual. Demographic diversity had been increasing since Jimmy Carter's presidency, but then decreased under the presidency of Donald Trump.⁵⁷

According to data from the Federal Judicial Center, as of 2020, 73% of federal judges were male,⁵⁸ 80% were white and non-Hispanic,⁵⁹ and less than 1% identified as LGBTQ+.⁶⁰ Our results were similar: current active appeals court judges are 63% Male, 73% white, and 13% Black, 7% Asian-American, and 7% Hispanic. By contrast, the population at large is 49.2% male, 60% white and non-Hispanic,⁶¹ and about 4% LGBTQ+.⁶² Among practicing attorneys, about 63% are male and 85% are white.⁶³

In terms of religion, a 2017 study found that several minority religions had no representation at all on the federal courts: zero federal judges were Muslim, Buddhist, Orthodox Christian, Jehovah's Witness, and zero were openly atheist or agnostic.⁶⁴⁻⁶⁶

Our study confirmed other findings that judges with experience in economic justice fields, civil rights, and public defense are generally more demographically diverse than other judges. Active appeals court judges with experience as public defenders are 56% women, 22% white, 56% Black, 22% Hispanic, and none are Asian-American. Those with experience in civil rights are 67% women, 33% white, 33% Black, 33% Hispanic, and none are Asian-American.

To our knowledge, unfortunately, there is no publicly available data on the number of federal judges who identify as having a disability.

57: Mark Joseph Stern, *Carter's Quiet Revolution*, *Slate*, July 14, 2019, <https://slate.com/news-and-politics/2019/07/jimmy-carter-diversity-judges-donald-trump-court-nominees.html>.

58: Federal Judicial Center, *Gender of Article III Judges* (chart and dataset), 1789-2020, <https://www.fjc.gov/history/exhibits/graphs-and-maps/gender> (last visited March 13, 2022) (in 2020 the federal judiciary was composed of 1048 men and 388 women).

59: Federal Judicial Center, *Article III Federal Judges by Race or Ethnicity* (chart and dataset), 1920-2020, <https://www.fjc.gov/history/exhibits/graphs-and-maps/race-and-ethnicity> (last visited March 13, 2022) (in 2020, the federal judiciary had the following numbers of judges of these races: 1154 White, 136 African-American, 93 Hispanic, 38 Asian American, 4 Hispanic/White, 2 American Indian, 2 African American/White, 2 African American/Hispanic, 1 Asian American/White, 1 Asian American/Pacific Islander, 1 African American/American Indian, 1 Afro-Latino/Hispanic, and 1 Chaldean).

60: Minority Corporate Counsel Association, *LGBT Article III Judges*, available at <https://www.mcca.com/resources/reports/federal-judiciary/lgbt-judges/> (last visited July 26, 2021).

61: U.S. Census Bureau, *QuickFacts United States*, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited October 15, 2021).

62: Gary J. Gates, *In U.S., More Adults Identifying as LGBT*, *Gallup*, Jan. 11, 2017, <https://news.gallup.com/poll/201731/lgbt-identification-rises.aspx> (4.1% of Americans identified as LGBT in a 2016 Gallup survey).

63: ABA National Lawyer Population Survey, https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf (last visited October 15, 2021).

64: Shahshahani, Sepehr and Liu, Lawrence J., *Religion and Judging on the Federal Courts of Appeals*, 14 *Journal of Empirical Legal Studies* 716, 12, May 20, 2017, <https://ssrn.com/abstract=2971472> or <http://dx.doi.org/10.2139/ssrn.2971472>

65: Sepehr Shahshahani and Lawrence J. Liu, *Religion and Judging on the Federal Courts of Appeal*, *Journal of Empirical Legal Studies* 14 at 716 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2971472.

66: Saeed Ahmed, *The Senate Has Just Confirmed The First Muslim American Federal Judge In U.S. History*, *NPR* (June 10, 2021), <https://www.npr.org/2021/06/10/1005261268/zahid-quraishi-first-muslim-american-federal-judge-in-u-s>.



PART II.

FEDERAL COURT DECISIONS CAUSE
ENORMOUS HARM TO PEOPLES'
ECONOMIC LIVES



FEDERAL COURT DECISIONS CAUSE ENORMOUS HARM TO PEOPLES' ECONOMIC LIVES

Even for people who will never be involved in a court case, federal judges' decisions have an immense impact on daily economic life. Here are a few examples:

Blocking Workers And Consumers From Court:

When a person takes a new job, or buys a phone or other product, the stack of forms they have to fill out or the legalese they have to click through often includes a forced arbitration agreement. These agreements say that by taking this job or buying this product, the worker or consumer agrees to never bring a case in court against the employer or the product manufacturer or seller. Instead, if something goes wrong, the person can only resolve the problem through arbitration, in a system that is biased in favor of corporations by design. Even for people who will never personally bring a lawsuit, forced arbitration agreements cause harm: They increase companies' willingness to break the law, because the chances that they will face any consequences are so small. Courts decide whether companies can force workers and consumers to sign arbitration agreements and what those agreements can say.

Workplace Safety:

There are many workplace health and safety and health risks, from COVID-19, to burns from the boiling oil used to make French fries at fast food restaurants, to back injuries from lifting heavy objects. An average of 15 workers die of job injuries each day in the U.S.,⁶⁷ and in 2020 there were 2.7 million nonfatal workplace injuries and illnesses reported.⁶⁸ Whether federal judges properly enforce the federal Occupational Safety and Health Act (OSH Act) and the rules and decisions that the Occupational Safety and Health Administration (OSHA) makes to enforce it has a huge impact on whether employers make their workplaces safe to begin with and on whether employers are held accountable when workers are hurt, sickened, or killed on the job.

Disability Benefits:

Many people will become disabled at some point in their lives. The Social Security system provides benefits for people who are unable to work because of disability. If someone applies for disability benefits and is denied, their case might go to federal court. Judges' decisions determine not just whether a particular individual gets benefits, but also shapes the way that future cases are decided.

The Right To Form Unions:

When coworkers join together to exercise their legal right to form a union and negotiate for better working conditions, employers often fire or retaliate against them. This often has the effect of killing the union drive, since other workers reasonably fear they could be next. Federal judges decide cases in which the National Labor Relations Board seeks a temporary injunction to require the reinstatement of a worker fired for unionizing. Whether a judge understands the stakes and the importance of quickly reinstating a fired worker can determine the outcome of the unionization effort at that workplace and also whether other employers decide it is worth the risk of firing union leaders in other workplaces.⁶⁹

It is essential that the judges who hear these cases be fair and unbiased and give full effect to our critical rights and legal protections. But too often, they instead consistently side with the wealthy and powerful over the rights of all Americans.

Indeed, in the last several decades and especially the last few years, the Supreme Court alone has issued numerous decisions that directly hurt the economic well-being of working Americans. As shown in Table 4 on the next page, we calculate that just the seven decisions below have caused economic harm or instability, or even illness and death, to at least 74 million people.

67: *Commonly Used Statistics*, United States Department of Labor, Occupational Safety and Health Administration, last visited Nov. 4, 2021, <https://www.osha.gov/data/commonstats>.

68: *Employer-Related Workplace Injuries and Illnesses—2020*, Bureau of Labor Statistics News Release, Nov. 3, 2021, <https://www.bls.gov/news.release/pdf/osh.pdf>.

69: See Brandon Magner, *Why We Need More Labor Lawyers On The Bench*, Labor Law Lite, May 11, 2021, <https://brandonmagner.substack.com/p/why-we-need-more-labor-lawyers-on>.

TABLE 4.
SEVEN RECENT SUPREME COURT
DECISIONS CAUSED ECONOMIC HARM, ILLNESS,
OR DEATH TO AT LEAST 74 MILLION PEOPLE

Case(s)	People Impacted	Number of People
<i>National Federation of Independent Businesses (NFIB) v. Department of Labor</i> (2022)	People hospitalized or killed by COVID-19 in six months because of the Supreme Court's invalidation of OSHA's vaccine-or-test mandate for large employers	250,000 Hospitalized and 6,500 Dead
<i>Alabama Assoc. of Realtors v. Department of Health and Human Services</i> (2021)	Renters at greater risk of eviction and COVID infection after the Supreme Court terminated the CDC's eviction moratorium intended to stop the spread of the virus	6-17 Million
<i>Dobbs v. Jackson Women's Health Organization</i> (2022)	Pregnant people projected to be forced to give birth because abortion is now illegal in their home states, in the first year post- <i>Dobbs</i>	75,000
<i>Janus v. AFSCME</i> (2018)	Unionized public employees in 22 states and the District of Columbia whose unions were weakened by the Supreme Court	5.9 Million
<i>Epic Systems v. Lewis</i> (2018) and <i>Lamps Plus v. Varela</i> (2019)	Non-union private-sector workers blocked by the Court from being able to challenge violations of their rights through class actions or group arbitration	60 Million
<i>NFIB v. Sebelius</i> (2011)	Low-income people who could have qualified for Medicaid coverage but whose states opted out of expanding Medicaid after the Supreme Court struck down the Affordable Care Act's nationwide expansion	2.2 Million

= 74,431,500
PEOPLE TOTAL

This is a conservative estimate of the number of people impacted by just these few decisions. Additional explanation about these cases, including how the Court’s rulings ignored settled law and laws passed by Congress and information about the number of people harmed, are below:

National Federation of Independent Businesses v.
Department of Labor (2022):

In January 2022, the Supreme Court invalidated the Occupational Safety and Health Administration’s COVID-19 “vaccine-or-test” rule for employers with more than 100 employees. The Court did so based on an anti-federal agency judicially-invented doctrine called the “major questions doctrine” that courts use to invalidate regulations they don’t agree with. The Court’s specific reasoning was that COVID-19 is not an “occupational” hazard because workers could also become infected outside of work — even though OSHA regulates many workplace hazards, like fires and unsafe drinking water, which are also dangerous to those not at work.⁷⁰ OSHA estimated that its rule would have saved over 6,500 worker lives and prevented over 250,000 hospitalizations over the course of just six months.⁷¹

Alabama Association of Realtors (2021):

In an earlier case featuring the Court majority’s dislike of health and safety regulation, especially around the COVID-19 pandemic, the Court ended the moratorium on evictions that the Centers for Disease Control and Prevention (CDD) enacted to stop the spread of the virus, despite the fact Congress gave the CDC authority to protect public health during a pandemic. According to the decision itself, lifting the moratorium left between six and 17 million people at greater risk of eviction;⁷² for those who were evicted, their risk of contracting COVID-19 increased as well.

70: *Nat’l Fed’n of Indep. Bus. V. Dep’t of Labor*, 595 U.S. ___, No. 21A244, at *5 (Jan. 13, 2022).
71: *Id.* at *7.
72: *Ala. Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2485, (2021).

Dobbs v. Jackson Women's Health Organization (2022):

The Supreme Court held that pregnant people do not have a right to choose abortion, overruling the nearly 50-year-old precedent *Roe v. Wade*. It did so on the ground that a right to abortion was not widely recognized in 1868, when the Fourteenth Amendment was ratified—even though women were not considered full citizens and could not vote in 1868.⁷³ The decision means that states can ban abortion completely, at any stage of pregnancy, with no exceptions. Thirteen states have “trigger laws” already in place that ban abortion immediately, and a total of 26 states are certain or likely to ban it in response to the ruling.⁷⁴ Depending on exactly how many states ban abortion, between 17 and 24 million women of childbearing age will live more than 200 miles away from the nearest abortion clinic.⁷⁵ Economist and researcher Caitlin Myers estimates that in the first year after the *Dobbs* decision, 100,000 people seeking abortion will be unable to reach an abortion provider and 75,000 of them will be forced to give birth as a result.⁷⁶ Loss of access to abortion and forced birth have devastating economic impacts on women and their families. Women who are denied abortion and forced to give birth have an 80% increase in bankruptcies, evictions, and tax liens; are less likely to advance educationally and professionally; and their children are more likely to live in poverty.⁷⁷

Janus v. AFSCME (2018):

The Court overturned a 40-year old precedent to make it harder for public-sector workers to form strong unions to fight for better wages and working conditions. The Court created a First Amendment right for workers who decline to join the union but still benefit from the union's representation; the Court held that these workers can benefit from representation without paying anything, overturning decades of precedent. The decision disrupted thousands of collective bargaining agreements across the country, impacting about 5.9 million state and local public employees covered by union contracts in 22 states and the District of Columbia.⁷⁸

Epic Systems v. Lewis (2018) and Lamps Plus v. Varela (2019):

Ignoring the plain language of a law passed by Congress, the National Labor Relations Act, the Court blocked millions of workers from joining together with coworkers to recover stolen wages or challenge discrimination or other violations of their rights.⁷⁹ *Epic Systems* allows employers to force workers into arbitration agreements under which employees can only seek to resolve employment disputes through individual arbitration rather than class claims; individual arbitration is designed to be biased in favor of employers and is too costly to be worthwhile for most individual workers. A year later, in *Lamps Plus*, the court doubled down by ruling that even workers whose arbitration agreements don't explicitly bar class claims in court or in arbitration settings can still only bring individual arbitrations.⁸⁰ A 2017 study found that more than half of non-union private-sector workers, or 60 million people, were bound by forced arbitration agreements at work.⁸¹ These two cases together mean that these 60 million people are blocked from bringing class action cases in court or even class arbitrations if they and their coworkers face widespread violations of their workplace rights. By 2024, that is projected to be true for over 80% of non-union private-sector workers.⁸²

NFIB v. Sebelius (2011):

The Court revived an old Constitutional theory to hold that Congress could not expand Medicaid nationwide under the Affordable Care Act.⁸³ The result is that about 2.2 million low-income people, most of whom live in the South and are people of color, could be receiving affordable health care through Medicaid but are not.⁸⁴ One study estimated that more than 15,000 deaths could have been prevented if Medicaid expansion had taken effect nationwide.⁸⁵

73: *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. ____ (2022).

74: *U.S. Supreme Court Overturns Roe v. Wade: 26 States Are Certain or Likely to Ban Abortion*, Guttmacher Institute, June 24, 2022, <https://www.guttmacher.org/news-release/2022/us-supreme-court-overturns-roe-v-wade>.

75: Quoctrung Bui, Claire Cain Miller and Margot Sanger-Katz, *How Abortion Bans Will Ripple Across America*, New York Times, June 24, 2022, <https://www.nytimes.com/interactive/2022/06/24/upshot/dobbs-roe-abortion-driving-distances.html>.

76: Caitlin Myers, Rachel Jones, Ushma Upadhyay, *Predicted Changes in Abortion Access and Incidence in a Post-Roe World*, 100 Contraception 367 (2019), <https://pubmed.ncbi.nlm.nih.gov/31376381/> (estimating between 93,546-143,561 people would be prevented from accessing abortion care in the year following the overturning of Roe); Caitlin Myers, Twitter post, May 6, 2022, https://twitter.com/Caitlin_K_Myers/status/1522540905881903104?s=20&t=OJvYTepNPavTJE-1QiEOcw (updated projection of 100,000 women unable to reach a provider and 75,000 giving birth as a result).

77: Nora Howe, *The Untold Consequences of Losing Abortion Access*, Alliance for Justice, June 2, 2022, <https://www.afj.org/article/the-untold-consequences-of-losing-abortion-access/>; Kate Bahn and Emilie Openchowski, *Factsheet: What the research says about the economic impacts of reproductive care*, Washington Center for Equitable Growth, June 27, 2022, <https://equitablegrowth.org/factsheet-what-the-research-says-about-the-economic-impacts-of-reproductive-care/>.

78: *Janus v. Am. Fed'n of State, Cnty., & Mu. Emps., Council 31*, Brief for Respondent at 50 (Jan. 12, 2018), https://www.supremecourt.gov/DocketPDF/16/16-1466/27640/20180112104519993_Resp%20Merits%20Brief%20Janus%20v%20AFSCME.pdf. Nancy Long, *Legal Watch: Post-Janus Legislation*, AAUP, Fall 2019, <https://www.aaup.org/article/legal-watch-post-janus-legislation#.YbgISb3MI2w>.

79: *EPIC Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

80: *EPIC Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

81: Alexander J.S. Colvin, *The growing use of mandatory arbitration: Access to the courts is now barred for more than 60 million American workers*, Economic Policy Institute, April 6, 2018, <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/>. Only 30.1% of the 60 million mandatory arbitration agreements contained class action waivers, but the decision in *Lamps Plus* means that even if a mandatory arbitration agreement is silent about whether class actions or arbitrations are allowed, courts will still bar workers from bringing collective legal actions.

82: Kate Hamaji, Rachel Deutsch, Elizabeth Nicolas, Celine McNicholas, Heidi Shierholz, and Margaret Poydock, *Unchecked corporate power: Forced arbitration, the enforcement crisis, and how workers are fighting back*, Center for Popular Democracy and Economic Policy Institute, 1 and 10, May 2019, <https://files.epi.org/uploads/Unchecked-Corporate-Power-web.pdf>.

83: *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 839 (2011).

84: Judith Solomon, *Federal Action Needed to Close Medicaid 'Coverage Gap,' Extend Coverage to 2.2 Million People*, Center on Budget and Policy Priorities, May 6, 2021, <https://www.cbpp.org/research/health/federal-action-needed-to-close-medicare-coverage-gap-extend-coverage-to-22-million>.

85: Sarah Miller, Norman Johnson, & Laura R. Wherry, *Medicaid and Mortality: New Evidence From Linked Survey and Administrative Data*, National Bureau of Economic Research Working Paper 26081, July 2019, revised Jan. 2021, <http://www.nber.org/papers/w26081>.

PART III.

JUDGES' BACKGROUNDS IMPACT THEIR DECISIONS





JUDGES' BACKGROUNDS IMPACT THEIR DECISIONS

Having judges with a diversity of personal and professional backgrounds, including experience fighting for economic justice, is key to the integrity of our courts and legal system. As Sherrilyn Ifill, the law professor and former President and Director-Counsel of the NAACP Legal Defense Fund, wrote in a 2000 law review article about racial diversity on the bench, diversity in our courts is not important just because diverse judges will be “role models” for people from under-represented groups, or because diversity will promote “public confidence” in the justice system.⁸⁶

Rather, Ifill wrote, “the most important benefit of judicial diversity is its potential to improve judicial decision-making.” Diversity does this by “introduc[ing] traditionally excluded perspectives and values,” and also by “encourag[ing] judicial impartiality, by ensuring that a single set of values or views do not dominate judicial decision-making.”⁸⁷

Recent Supreme Court nominations show how vital it is that judges meet the minimum requirements of being committed to interpreting and applying the law fairly and impartially. However, a commitment to impartiality does not erase the importance of judges’ personal and professional backgrounds. Because judges are human beings, they inevitably bring their own personal and professional experiences and common sense to questions whose answers are not clear-cut. Did the specific facts of a racial or sexual harassment case constitute “severe and pervasive” harassment? Was a particular witness credible? How should the unclear words of a decades-old law apply to specific modern circumstances? Judges’ backgrounds impact the way they approach these difficult questions.

Judges who work in economic justice fields understand how the law and the economy impacts their clients, whether the clients are workers who were not paid the wages they are owed or low-income people applying for food stamps. They also have substantive experience and knowledge of sometimes-technical areas of law, like labor law, consumer class actions, and family law, in which few federal judges have practiced.

86: Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 405 (2000), <https://scholarlycommons.law.wlu.edu/wluir/vol57/iss2/5/>.
87: *Id.* at 410-411.

THE IDEA THAT JUDGES' BACKGROUNDS DON'T MATTER FEEDS INTO THE DEVALUATION OF NOMINEES WITH UNDERREPRESENTED BACKGROUNDS

The notion that judges could or should be blank slates whose personal and professional backgrounds do not impact their decisions perpetuates the racist and sexist idea that people whose personal and professional experiences are atypical among judges are biased or unqualified. Potential judges and judges who are women, people of color, non-heterosexual, disabled, who also more often have backgrounds as civil rights lawyers, labor lawyers, public defenders, or in other areas of law, are often looked at askance, as though their backgrounds would contaminate the relatively homogeneous perspective of current judges.

This dynamic was resoundingly clear in the reaction to President Biden's nomination of now-Justice Ketanji Brown Jackson, who is African American and has experience as a public defender, to the Supreme Court. Even before Biden named Jackson, conservative commentators suggested or openly stated that Biden's promise to nominate the first-ever Black woman to the Court meant that the nominee would be less qualified or less worthy than a nominee who was not a Black woman. The Wall Street Journal's editorial board bemoaned that Biden was putting "skin color over qualifications"⁸⁸; Cato Institute executive Ilya Shapiro said that whoever Biden chose would be a "lesser [B]lack woman" and that the nomination would "always have an asterisk attached."⁸⁹

The same dynamic was at play in the spring of 2021, when Senators asked Jackson during her confirmation hearing for the D.C. Circuit whether her race played a role in her approach to deciding cases.⁹⁰ **White male judges with backgrounds in corporate law or as prosecutors are not asked whether their identities or backgrounds will make them biased, and their qualifications are not questioned, even though they likely benefited from old boys' networks and mentoring opportunities that are frequently not available to lawyers from less-traditional backgrounds.**

There is also quantitative evidence that the legal profession tends to devalue the qualifications of potential judicial nominees who are women and people of color. A 2014 study found that the American Bar Association gives non-white and female candidates for federal judicial nominations lower ratings, even after controlling for education, experience, and partisanship.⁹¹

88: Editorial Board, *Stephen Breyer's Loss to the Supreme Court*, Wall Street Journal, Jan. 26, 2022, <https://www.wsj.com/articles/stephen-breyers-loss-to-the-supreme-court-retirement-11643238845>.
89: Mark Joseph Stern (@mjs_DC), Twitter (Jan 27, 2022, 8:42 AM), https://twitter.com/mjs_DC/status/1486696022516682752.
90: Amber Phillips, *Five questions Ketanji Brown Jackson could face in her Supreme Court hearing*, March 19 2022, <https://www.washingtonpost.com/politics/interactive/2022/ketanji-brown-jackson-hearing-questions/>.
91: Maya Sen, *How Judicial Qualification Ratings May Disadvantage Minority and Female Candidates*, Journal of Law and Courts, Spring 2014, https://ash.harvard.edu/files/how_judicial_qualification_ratings_may_disadvantage_minority_and_female_candidates.pdf.



STUDIES DEMONSTRATE THAT JUDGES' PROFESSIONAL AND PERSONAL BACKGROUNDS INFLUENCE THEIR DECISIONS

Studies confirm what common sense suggests: that judges' professional and personal backgrounds influence their judicial decision-making.

In a 2021 study of the impact of judges' professional backgrounds on their decision-making, Emory University Law Professor Joanna Shepherd showed that judges who are former prosecutors and corporate lawyers are more likely to rule against workers and other claimants in employment cases than are judges with other types of backgrounds.⁹² **Judges with a corporate background were 43% less likely to decide in favor of a claimant in an employment case than other judges and judges who had been prosecutors were 56% less likely to decide in favor of a claimant than non-prosecutors.** This was true even after controlling for other variables such as a judge's race, gender, age, educational background, and the political environment in a state. These results build on past studies finding that judges with backgrounds as prosecutors are more likely to rule against criminal defendants.⁹³

The study also showed that judges with corporate or prosecutorial backgrounds were more likely to be white and male than judges with other types of professional backgrounds.⁹⁴

The fact that judges are disproportionately from privileged socioeconomic backgrounds also impacts the way they view cases involving poor people. **A 2013 paper on "socioeconomic bias" and judges found that judges favor wealthy litigants over those living in poverty.**⁹⁵

Other studies show a relationship between judges' race and their judicial decisions in other types of cases. A 2009 study showed that judges' race significantly affects their decisions in workplace racial harassment cases; **a plaintiff in a racial harassment case appearing before a white judge was about 3.3 times less likely to win than if they appeared before an African-American judge.**⁹⁶ Other studies have shown that in search and seizure cases, white appellate judges are less likely than Black judges to rule in favor of Black defendants who claimed there was police misconduct.⁹⁷ Non-Black judges are also less likely to rule for affirmative action programs when compared to Black judges.⁹⁸

Judges' genders also influence their decisions, at least in some types of cases. Male judges have been shown to be less likely than female judges to rule for plaintiffs in sex discrimination,⁹⁹ sexual harassment,¹⁰⁰ and LGBTQ+ discrimination cases.¹⁰¹

92: Joanna Shepherd, *Jobs, Judges, and Justice: The Relationship between Professional Diversity and Judicial Decisions*, Demand Justice (Feb. 2021), <http://demandjustice.org/wp-content/uploads/2021/03/Jobs-Judges-and-Justice-Shepherd-3-08-21.pdf> ("Shepherd report").
93: See Shepherd report at 11 & footnote 23.
94: *Id.* at 7.
95: Michele Bendetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 Cleveland State L. Rev. 137 (2013), <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1585&context=pubs>.

96: Pat K. Chew and Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 Wash. U. L. Rev. 1117, 1156 (2009), https://openscholarship.wustl.edu/law_lawreview/vol86/iss5/2/.
97: Maya Sen, Written Testimony on the Importance of Judicial Diversity, Subcommittee on Courts, Intellectual Property, and the Internet, March 25, 2021, <https://scholar.harvard.edu/files/msen/files/sen-written-testimony.pdf> (citing Nancy Scherer, *Blacks on the Bench*, 119 POL. SCI. Q. 655, 658–59 (2004), <https://www.psqonline.org/article.cfm?idarticle=15062>.
98: Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 Am. Journal of Political Science 167 (2013), <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1540-5907.2012.00618.x>.
99: Christina L. Boyd, Lee Epstein, and Andrew Martin, *Untangling the Causal Effects of Sex on Judging*, 54 Am. Journal of Political Science 389 (2010).
100: Sean Farhang and Gregory Wawro, *Indirect Influences of Gender on the U.S. Courts of Appeals: Evidence from Sexual Harassment Law* (U.C. Berkeley working paper 2010) <http://www.columbia.edu/~gjlw10/FarhangWawroIndirectEffectsMay2010.pdf>.
101: Fred O. Smith Jr., *Gendered Justice: Do Male and Female Judges Rule Differently on Questions of Gay Rights?*, 57 Stanford Law Rev. 2087 (2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=864984.



DIVERSITY IMPROVES GROUP DECISION-MAKING, INCLUDING AMONG JUDGES

Judges' backgrounds do not just impact their own decision-making: they influence and improve group decision-making. This is quite relevant to the federal Courts of Appeals and Supreme Court, on which groups of judges make decisions together.

Studies show that diversity of educational background and life experience improves group decision-making because people from different backgrounds approach problems differently and, together, are more likely to question their initial assumptions.¹⁰²

Some of the same studies that show judges' backgrounds have an impact on their own decisions also show that diversity on a panel of judges influences the panel's decisions. The presence of a Black judge on an otherwise non-Black panel in an affirmative action case, for instance, substantially increases the chances that the non-Black panel members will vote to uphold an affirmative action program.¹⁰³

The presence of a female judge on a panel with men in a sex discrimination case likewise increases the chances that the male panel members will rule in favor of the plaintiff.¹⁰⁴

EXAMPLES OF CASES IN WHICH JUDGES' BACKGROUNDS IN ECONOMIC JUSTICE MATTERED

The number of judges with experience in economic justice fields is so small that we have not attempted to show a statistically significant relationship between those backgrounds and decisions in cases involving workers or other economic justice issues. However, there are numerous illustrative examples of how judges with those backgrounds see facts and legal issues differently than their fellow judges with different backgrounds.

The three examples below are decisions by three judges who spent the majority of their careers prior to becoming a judge in economic justice fields. Two of the judges, Judge Berzon and Judge Paez, recently took senior status, meaning they are no longer active Court of Appeals judges.

¹⁰²: Jason Iuliano, *New Diversity Crisis*, supra n. 55 at 249; see also Sherilyn Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, supra n. 5.

¹⁰³: Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, supra n. 99.

¹⁰⁴: Boyd, Epstein, and Martin, *Untangling the Causal Effects of Sex on Judging*, supra n. 9.

JUDGE JANE STRANCH AND RACIAL HARASSMENT AND DISCRIMINATION

The 11 plaintiffs in *Berryman v. SuperValu Holdings Inc.* were Black current and former warehouse employees at a grocery store distribution center. They alleged that they experienced decades of racial harassment, including the “ongoing repetition of highly offensive racial insults — including the words ‘[n-word],’ ‘Buckwheat,’ ‘boy,’ ‘monkey,’ and variations on these offensive racial pejoratives — spanning several decades and manifested in several different forms, including verbal insults, written graffiti, insulting caricatures, musical lyrics, and jokes.”¹⁰⁵

In a decision by Judge David McKeague, a former corporate lawyer, joined by Judge Eugene Siler, a former prosecutor and law firm lawyer, the 6th Circuit Court of Appeals upheld a lower court’s decision dismissing the plaintiffs’ cases. They reasoned that the plaintiffs did not show they were aware of all the incidents of harassment against the other plaintiffs and, taken individually, their experiences did not rise to the level of “severe or pervasive” harassment necessary to show a “hostile work environment.”¹⁰⁶

Judge Jane Stranch, who spent decades as a union-side labor lawyer, dissented. She wrote that the alleged harassment incidents considered together were sufficiently “severe or pervasive” to constitute a hostile work environment. She wrote that it “begs credulity to suggest that the Plaintiffs were not well aware of each other’s problems at work.” They should not lose their day in court, she wrote, simply because the employer moved for summary judgment against each individual plaintiff separately, resulting in an unfounded presumption that each Plaintiff experienced an “individual, segregated work environment” rather than a shared one.¹⁰⁷

¹⁰⁵: *Berryman v. SuperValu Holdings, Inc.*, 669 F.3d 714, 720 (6th Cir. 2012) (Stranch, J., dissenting).
¹⁰⁶: *Id.* at 718-20.
¹⁰⁷: *Id.* at 721.

JUDGE MARSHA BERZON AND THE FAMILY AND MEDICAL LEAVE ACT

Judge Marsha Berzon was a union-side labor lawyer who served as Associate General Counsel of the AFL-CIO and co-founded Altshuler Berzon, a leading civil rights law firm. A trailblazer who was the first woman to serve as Supreme Court Justice Stephen Brennan’s clerk and represent the AFL-CIO before the Supreme Court, she joined the 9th Circuit in 2000, and took senior status in January 2022. In *Hibbs v. Nevada Department of Human Resources*, a male public employee who was fired after he took leave to care for his injured wife sued under the Family and Medical Leave Act (FMLA).¹⁰⁸ The state public employer argued that he could not sue under the FMLA because states generally have “sovereign immunity” from private lawsuits.

The plaintiff and the Justice Department argued that Congress had validly allowed individuals to sue their state employers for FMLA violations as an exercise of its power to pass laws to enforce the Fourteenth Amendment’s bar on sex discrimination.

A three-judge panel of the 9th Circuit Court of Appeals agreed that Congress could allow individuals to sue public employers under the FMLA. They reasoned that there was a long history of sex discrimination in the administration of leave benefits by states, and this was enough to justify enforcing the FMLA to require states to provide family leave.

Judge Marsha Berzon wrote a section of the opinion that was originally a separate concurring opinion, but that was adopted by the other two panel members because they agreed with it. Judge Berzon wrote that it was valid for Congress to allow people to sue states for FMLA violations not just because of state discrimination in leave policies, but also in response to a larger set of “state-imposed systemic barriers to women’s equality in the workplace.”¹⁰⁹

Judge Berzon’s broader rationale was later essentially adopted by the Supreme Court in a decision by Justice Rehnquist.¹¹⁰

¹⁰⁸: *Hibbs v. Department of Human Resources*, 273 F.3d 844 (9th Cir. 2001).
¹⁰⁹: *Id.* at 860.
¹¹⁰: *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

JUDGE RICHARD PAEZ AND TIPPED WORKERS

Judge Richard Paez, who took senior status in 2021, was the only appeals court judge to have spent the entirety of his pre-judicial legal career as a legal aid lawyer. In 2018, he wrote the majority opinion for the *en banc* 9th Circuit in *Marsh v. J. Alexander's LLC*, a case about whether restaurants could pay servers and bartenders sub-minimum wages when they did non-tipped tasks like cleaning toilets or maintaining soft drink machines. His decision allowed the servers' lawsuits for unpaid wages under the Fair Labor Standards Act (FLSA) to proceed against their employers.¹¹¹

The FLSA permits employers to pay tipped employees a sub-minimum wage of as little as \$2.13 per hour, so long as the employer makes up the difference when the workers' wages and tips do not add up to the minimum wage. The Department of Labor (DOL) had issued a regulation, called the "dual jobs" regulation, and clarifying guidance that stated that workers were entitled to be paid minimum wage for time spent in a non-tipped occupation, or when they spent more than 20% of their time doing non-tipped tasks.

Judge Paez wrote a decision upholding the validity of the DOL's "dual jobs" rule and related guidance. His decision acknowledged the economic reality that allowing employers to pay tipped workers the "tipped minimum" for doing non-tipped work "effectively makes tips — intended as gifts to servers for their service — payments to employers instead, who use these tips to minimize their obligations to pay employees the full minimum wage."¹¹² He also recognized that permitting employers to hire servers at sub-minimum wage but then requiring them to do the jobs of janitors, cooks, and dishwashers allows the employers to avoid hiring as many janitors, cooks, and dishwashers who would have to be paid at least minimum wage.¹¹³

On the other side of the ledger, there are innumerable examples of cases in which the absence of any judges with economic justice experience may have influenced the outcome of a case negatively for the less wealthy. Because so few judges have economic justice backgrounds, in fact, almost every case in our federal system involving an economic issue for workers, consumers, or poor people is heard entirely by judges who have no experience representing those groups of people. The following pages contain a few examples.

¹¹¹: *Marsh v. J. Alexander's LLC*, 905 F.3d 610 (9th Cir. 2018).

¹¹²: *Id.* at 615-16.

¹¹³: *Id.* at 616



SUPREME COURT AND UNION ACCESS TO FARMWORKERS

The California Agricultural Labor Relations Act (ALRA) granted union organizers the right to temporary, limited access to farmland to speak with farmworkers about their rights to organize and form unions — no more than 3 hours per day before work or during breaks, 120 days per year. The law was a major victory of Cesar Chavez’s groundbreaking organizing of farmworkers in the 1960s and 1970s.¹¹⁴

In the 2021 case *Cedar Point Nursery v. Hassid*, a 6-3 Supreme Court held that the ALRA’s right of access for organizers was a “per se taking,” meaning that California would have to either compensate the agriculture companies or eliminate the union access provision of the law.¹¹⁵ This radically reshaped more than a century of settled property law and will make it easier for business owners to challenge regulations of all types, including those intended to protect public health and safety and prevent discrimination.

Both the majority opinion by Chief Justice Roberts and the dissenting opinion by Justice Breyer essentially erased farmworkers’ lives and working conditions from the story of the ALRA. Neither decision contained any discussion of farmworkers’ pay, linguistic and geographic isolation, immigration status, or their difficulty in learning about their right to form a union without union organizers speaking to them at work. The justices did have information about farmworkers before them, as an amicus brief filed in the case by California Rural Legal Assistance and others explained:

"The conditions in California agriculture persist and are remarkably unchanged since the 1970s. California’s farmworkers continue to experience the same low literacy levels; poverty; poor working and housing conditions; dependency on labor contractors for work; undocumented status; and language isolation that limit accessibility."¹¹⁶

Justice Breyer’s dissent contained just one paragraph noting that California’s elected representatives had enacted the law because they believed union organizing brought benefits including community health and educational benefits, higher standards of living, and labor peace.¹¹⁷

The realities of farmworkers’ economic lives and how they could be improved by union organizing were not just relevant as context to a dry legal discussion. An important issue in the case was whether the temporary access for union organizers was akin to other situations in which the government requires property owners to allow third parties to access their property — for instance, for health and safety inspections. A serious consideration of the benefits of union access to the farmworkers themselves — and the community at large, would have been quite relevant to that discussion. But none of the Supreme Court justices have a background in economic justice fields, and the farmworkers’ economic lives went essentially unaddressed.

¹¹⁴: *Cedar Point Nursery v. Hassid*, 594 U.S. ___, No. 20-107 (June 23, 2021).

¹¹⁵: Ian Millhiser, *The sweeping implications of the Supreme Court’s new union-busting case*, Vox, March 15, 2021, <https://www.vox.com/22323888/supreme-court-cedar-point-nursery-hassid-farm-workers-union-property-rights-takings-clause>.

¹¹⁶: Brief of Amici Curiae California Rural Legal Assistance, Inc., California Rural Legal Assistance Foundation, Farmworker Justice, and California Catholic Conference in Support of Respondents, 9, *Cedar Point Nursery v. Hassid*, https://www.supremecourt.gov/DocketPDF/20/20-107/168951/20210212160123182_CRLAF%20et%20al%20Amicus%20Brief%20in%20Support%20of%20Respondents%20FINAL.pdf.

¹¹⁷: *Cedar Point* at *41 (Breyer, J., dissenting).



JUDGE J. CAMPBELL BARKER AND THE COVID EVICTION MORATORIUM

Before the Supreme Court itself struck down the CDC's COVID eviction moratorium in September 2021, several lower-court judges had ruled that it was invalid. In *Terkel v. Centers for Disease Control and Prevention*, Eastern District of Texas Judge J. Campbell Barker, a former prosecutor and corporate lawyer, held that the eviction moratorium was unconstitutional and would have been even if it had been enacted by Congress as a law. This was because, he said, evicting a renter is not an "economic activity."¹¹⁸

Barker's reasoning willfully ignores the obviously economic nature of eviction and the devastating economic impact of evictions on renters. It is also contrary to decades of Supreme Court precedent upholding the federal government's power under the Constitution's Commerce Clause to regulate activities that have a substantial impact on interstate commerce. If this reasoning were accepted, it would undermine the constitutional basis for huge numbers of other federal laws passed under the Commerce Clause, including civil rights laws requiring restaurants and other businesses to serve African-American people.¹¹⁹

¹¹⁸: *Terkel v. Centers for Disease Control & Prevention*, No. 6:20-cv-00564 (E.D. Tex. Feb. 25, 2021).

¹¹⁹: Leah Litman, *A judge says we can't ban evictions. It's an attack on all federal power.*, Washington Post (Mar. 1, 2021), <https://www.washingtonpost.com/outlook/2021/03/01/evictions-court-decision-constitution-commerce/>.

PART IV.

THE BACKSTORY:
THE 50-YEAR CAMPAIGN
TO PACK THE COURTS



THE BACKSTORY: THE 50-YEAR CAMPAIGN TO PACK THE COURTS

Federal courts' increasingly hostile attitude towards the interests of workers and other underrepresented people is not just the result of unconscious bias by judges selected for their fair-mindedness. Rather, it is also the result of a concerted 50-year effort by the wealthy and powerful to pack the courts with judges chosen because they would enact partisan and corporate-friendly policy goals, including rewriting or ignoring laws passed by Congress.

The judges sought out and hand-picked in this court-packing effort are those who are skeptical of laws or regulations that limit corporate power or profits (such as by requiring employers to pay employees overtime) or that increase the economic freedom and power of regular people (such as by making health insurance more affordable so that people can leave bad jobs more easily). The current 6-3 Supreme Court is a direct result of this court-packing effort.



THE POWELL MEMO AND THE COSTRUCTION OF A COURT-PACKING INFRASTRUCTURE

The takeover of the courts by the wealthy and powerful is often traced to a 1971 memo by then-corporate lawyer, soon-to-be Supreme Court Justice Lewis Powell for his client the U.S. Chamber of Commerce. The short document, known as the “Powell memo,” was titled, “Attack on American Free Enterprise System.”¹²⁰ It took an apocalyptic tone in describing what Powell called a “broad attack” on the “American system” embodied by the success of environmentalism, consumer advocacy, and other progressive movements.

While Powell’s description of an existential threat to the free enterprise system has proven to be melodramatic, he was correct in observing that in the mid-century period, Congress had enacted — and the courts had generally enforced — a significant body of laws benefiting workers and consumers. These included the New Deal and its National Labor Relations Act, which recognized workers’ rights to unionize; civil rights, occupational safety and health, environmental protection, and consumer protection laws; and high (by today’s standards) levels of corporate taxation that paid for public goods. After the contentious *Lochner* period during the 1930s in which the Supreme Court struck down several New Deal laws as unconstitutional, the Supreme Court changed its tune and the lower courts generally followed course, enforcing progressive laws that Congress enacted.

Business interests had long organized in opposition to the New Deal and other economic justice laws,¹²¹ but Powell found their efforts lacking. Powell recommended that the Chamber of Commerce lead a long-term counterattack in the form of well-funded think tanks, college faculty seats, advertising, and politics — with a focus on the courts. In a section of his memo titled “Neglected Opportunity of the Courts,” Powell wrote that “with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic, and political change.”¹²²

It is ironic, given the current anti-union focus of much of the right-wing network that Powell conjured, that the Powell memo itself identified “labor unions” and “collective bargaining” as among the “essential freedoms” in society, along with private ownership, private property, and a market economy.¹²³

120: Lewis F. Powell, Jr., *Confidential Memorandum: Attack on American Free Enterprise System*, to Mr. Eugene B. Sydnor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce, Aug. 23, 1971, available at <https://scholarlycommons.law.wlu.edu/powellmemo/1> (“Powell Memo”).

121: See generally Kim Phillips-Fein, *Invisible Hands: The Businessmen’s Crusade Against the New Deal*, 2009.

122: *Id.* at 26.

123: *Id.* at 32-33.

Two months after Powell wrote his memo, in October 1971, President Nixon nominated him to the Supreme Court. His memo was originally confidential, but it became public less than a year later after his confirmation when a journalist obtained a copy and wrote about it in the Washington Post. The Chamber of Commerce then released the memo publicly. The publicity likely contributed to the fact that numerous high-profile businessmen read the Powell memo and cited it as inspiration for their political activism.¹²⁴

In the decades after Powell wrote his memo, corporate America and the Republican party successfully built a version of the vast right-wing infrastructure he had sketched out, including an “activist-minded Supreme Court.” In Alliance for Justice’s 1993 report “Justice for Sale,” AFJ showed how a “multi-faceted, comprehensive, and integrated campaign” funded by large corporations and right-wing foundations had created a network of nonprofit law firms, think tanks, right-wing scholars, and, eventually, judicial nominees and judges.¹²⁵ This network now includes dozens of right-wing “public interest” nonprofit law firms dedicated to attacking environmental and other regulations and labor unions and expanding the rights of corporations.¹²⁶ It also includes the Chamber of Commerce itself, which appears constantly before the Supreme Court and has an astonishing and increasing win rate. In cases in which the Chamber represented a party or submitted an *amicus* brief, its side won 43% of the time before the Burger court in 1981-86; 56% of the time before the Rehnquist court from 1986-2005; 70% of the time before the Roberts court in 2006-2020; and 83% in the 2020-2021 term after the death of Justice Ruth Bader Ginsburg and the confirmation of Justice Amy Coney Barrett.¹²⁷

Another key part of this network is the Federalist Society, which serves as a pipeline and training ground for right-wing lawyers and judicial nominees and as an incubator and PR firm for the pro-corporate legal theories that those judges embrace.¹²⁸ *The Washington Post* reported that between 2014 and 2017 alone, Federalist Society co-chair Leonard Leo and his allies raised more than \$250M for a network of organizations that supported conservative policies and judicial nominations.¹²⁹

The Federalist Society and Leo were heavily involved in the selection of judicial nominees for President George W. Bush, including Supreme Court Chief Justice John Roberts and Justice Samuel Alito. Under President Trump, the Federalist Society’s influence grew even larger. Leonard Leo effectively picked the bulk of Trump’s judicial nominees, including Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, giving him a hand in the selection of 5 of the 9 Justices on the Court.¹³⁰ Leo is also linked to the Judicial Crisis Network, a group that has poured tens of millions of dollars into judicial nominations battles in recent years and that does not publicly disclose the identities of its donors.¹³¹

124: Phillips-Fein, *Invisible Hands*, at 160-162.
125: Alliance for Justice, *Justice for Sale: Shortchanging the Public Interest for Private Gain*, 1993, <https://www.docdroid.net/2gY4UFK/justice-for-sale-afj-1993-pdf>.
126: Senators Debbie Stabenow, Chuck Schumer, and Sheldon Whitehouse, *Captured Courts: The GOP's Big Money Assault on the Constitution, Our Independent Judiciary, and the Rule of Law*, Democratic Policy & Communications Committee, May 2020, <https://www.democrats.senate.gov/imo/media/doc/Courts%20Report%20-%20FINAL.pdf> (“Captured Courts”).
127: Elizabeth B. Wydra and Brian R. Frazelle, *QUICK TAKE: The Chamber of Commerce at the Supreme Court: 2019-2020*, Constitutional Accountability Center, July 6, 2020, <https://www.theusconstitution.org/blog/quick-take-the-chamber-of-commerce-at-the-supreme-court-2019-2020/>; Elizabeth B. Wydra and Brian R. Frazelle, *QUICK TAKE: The Chamber of Commerce at the Supreme Court: 2020-2021*, Constitutional Accountability Center, July 1, 2021, <https://www.theusconstitution.org/blog/quick-take-the-chamber-of-commerce-at-the-supreme-court-2020-2021/>.
128: Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, *The New Yorker*, April 10, 2017, <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court>.
129: Robert O’Harrow Jr. and Shawn Boburg, *A conservative activist's behind-the-scenes campaign to remake the nation's courts*, *Washington Post*, May 21, 2019, <https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/>.

130: Id.; Jackie Calmes, *How Republicans have Packed the Courts for Years*, *Time*, June 22, 2021, <https://time.com/6074707/republicans-courts-congress-mcconnell/>.
131: John Kruzel, *It's true: millions in dark money has been spent to tilt courts right*, *PolitiFact*, Sept. 11, 2019, <https://www.politifact.com/factchecks/2019/sep/11/sheldon-whitehouse/its-true-millions-dark-money-has-been-spent-tilt-c/>.

THE TRUMP JUSTICES: PACKING THE COURT WITH ANTI-WORKER JUDICIAL ACTIVISTS

From 2017 to 2020, Republican leaders in Congress and the network of judicial-nomination groups established since the 1970s poured huge amounts of money and political capital into packing the Supreme Court. The partisan political maneuvering that led to the confirmations of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett are well known. What may be less well known is that all three had records that showed their willingness to rewrite laws passed by Congress to side with the wealthy and powerful over workers and other ordinary people.

The confirmations of these three justices were anything but routine. After Justice Scalia died in 2016, the Republican-controlled Senate refused to allow so much as a hearing on D.C. Circuit Court Judge Merrick Garland, President Obama's highly qualified nominee to fill the seat, allegedly because there was a custom against confirming a justice during a Presidential election year — even though Justice Kennedy had been confirmed in 1988, an election year. This blockade effectively reduced the size of the Supreme Court to eight for a period of more than a year.

After Donald Trump was elected, he nominated Neil Gorsuch to the vacant seat. Justice Gorsuch was confirmed in 2017, after Senate Republicans changed the rules by ending the filibuster of Supreme Court justices.

In 2018, Senate Republicans confirmed Brett Kavanaugh to replace Justice Kennedy after the White House and Republicans refused to release thousands of relevant documents from the Senate and the Americans people¹³² and despite credible accusations that Kavanaugh committed sexual assault and an FBI “investigation” that involved interviewing only 10 witnesses, not including Kavanaugh himself or his primary accuser, Christine Blasey Ford.¹³³

In 2020, when Justice Ruth Bader Ginsburg died less than two months before the presidential election, the Republican-controlled Senate disregarded its 2016 “rule” of refusing to confirm a justice during a Presidential election year. They confirmed Justice Amy Coney Barrett just a week before Election Day, when millions of voters had already cast ballots.

Wealthy groups and individuals in the conservative network established since the Powell memo poured tens of millions of dollars into these confirmation battles. The Judicial Crisis Network (JCN) alone spent as much as \$27 million to block Merrick Garland's nomination and to support Gorsuch's and Kavanaugh's confirmations.¹³⁴ JCN received a \$17.9 million anonymous donation in 2016 and then another \$17.1 million anonymous donation the next year, possibly from the same person or group.¹³⁵ Conservative groups spent \$30M to confirm Amy Coney Barrett in 2020, with \$10 million of that amount coming from JCN.¹³⁶

Republican leaders and donors' eagerness to confirm these three justices at all costs was not due to their sparkling personalities. As we explain below, Justices Gorsuch, Kavanaugh, and Barrett had records of ruling for wealthy and powerful interests and against workers and other regular people, including when they had to ignore or rewrite laws that Congress passed to do so. Rather than being disqualifying, these records were at least one reason their confirmations were so important to Senate Republicans, President Trump, and wealthy donors.

¹³²: Michael Kranish, *The story behind the withheld documents of the Kavanaugh hearing*, September 4, 2018, https://www.washingtonpost.com/politics/the-story-behind-the-withheld-documents-of-the-kavanaugh-hearing/2018/09/04/55336a2a-b05c-11e8-a20b-5f4f84429666_story.html.

¹³³: Ayman Mohyeldin, *FBI reveals 4,500 tips led to just 10 interviews in Brett Kavanaugh investigation*, MSNBC, July 23, 2021, <https://www.msnbc.com/ayman-mohyeldin/watch/fbi-reveals-4-500-tips-led-to-just-10-interviews-in-brett-kavanaugh-investigation-117284421615>.

¹³⁴: Richard Lardner, *Pro-Kavanaugh group received millions from anonymous donors*, AP News, Nov. 27, 2018, <https://apnews.com/article/91c58df540884d698ceb35a529c34b08>.

¹³⁵: John Kruzel, *It's true: millions in dark money has been spent to tilt courts right*, PolitiFact, Sept. 11, 2019, <https://www.politifact.com/factchecks/2019/sep/11/sheldon-whitehouse/its-true-millions-dark-money-has-been-spent-tilt-c/>.

¹³⁶: Megan Henney, *Conservative groups spending \$30M on Barrett's confirmation to Supreme Court*, Fox Business, Oct. 22, 2020, <https://www.foxbusiness.com/money/gop-groups-reportedly-spending-30m-on-barretts-confirmation-to-supreme-court>; Judicial Crisis Network, *Judge Amy Coney Barrett Confirmed*, Oct. 27, 2020, <https://judicialnetwork.com/in-the-news/judge-amy-coney-barrett-confirmed/>.

JUSTICE GORSUCH AND THE FROZEN TRUCKER

As AFJ highlighted in our comprehensive report on now-Justice Gorsuch's record, before his Supreme Court nomination he had a long record of "aggrandizement of corporations over individuals" and "skepticism of the federal government's role in protecting the health and safety of the American people."¹³⁷

One case in particular exemplified this approach to judging and may have secured Gorsuch his seat on the Supreme Court. *TransAm Trucking v. Administrative Review Board* was about Alphonse Maddin, a truck driver for TransAm Trucking. Maddin was working on a cold night when his trailer's brakes locked up. At first, he followed his employer's order to remain with the trailer. He waited without heat in sub-zero temperatures on the side of the road for almost three hours until his torso and feet became numb. Then, afraid for his own life and health and facing temperatures of -27 degrees Fahrenheit, he disconnected the broken trailer from his truck and drove to safety.¹³⁸ His employer, TransAm Trucking, fired him.

Gorsuch was the only one of seven judges to consider the case who would have ruled against Maddin, finding that his termination did not violate a federal law designed to protect the health and safety of workers and the public. To reach this pro-corporate, anti-worker conclusion, Gorsuch had to effectively rewrite the law and ignore Supreme Court precedent that requires judges to defer to agencies (in this case the Department of Labor).

The legal issue in the case was whether Maddin's conduct was protected by a whistleblower law that prohibits transportation employers from firing a worker who "refuses to operate a vehicle" because he is afraid of injury to himself or the public. Two other judges on the 10th Circuit Court of Appeals agreed that it was reasonable of the Occupational Safety and Health Administration (OSHA), the agency tasked with enforcing the whistleblower law, to conclude that the phrase "refused to operate a vehicle" included refusing to operate a vehicle in the way directed by the employer.¹³⁹

Gorsuch, however, dissented, explaining that he did not think the statute protected Maddin. He wrote that the only possible meaning of the phrase "refuse to operate" was to refuse to drive at all. Since Maddin had driven his truck, not refused to drive it, Gorsuch wrote, he was not protected by the whistleblower law.¹⁴⁰

Gorsuch's opinion essentially boasted about being anti-worker. "It might be fair to ask whether TransAm's decision [to fire Maddin] was a wise or kind one," he wrote. "But it's not our job to answer questions like that."

The other judges on the panel responded to Gorsuch's dissent by pointing out that he had not only disregarded the agency's interpretation of the law, but had essentially rewritten the law, changing the word "operate" to "drive." They quoted back to him his own words in oral argument in the case: "Our job isn't to legislate and add new words that aren't present in the statute."¹⁴¹ In other words, Gorsuch's decision in *TransAm* showed his willingness to rewrite laws passed by Congress in order to rule against workers and for corporations.

Far from being disqualifying, this seems to have been a mark in Gorsuch's favor for the Federalist Society and Leonard Leo, and therefore for then-candidate Donald Trump. In May 2016, Trump released a list of 11 people he might nominate to the Supreme Court. Gorsuch was not on the list. The "frozen trucker" decision came out August 8. In September, Trump put out another list — and this time Gorsuch was on it.¹⁴²

¹³⁷: Alliance for Justice, *The Gorsuch Record*, 1, Feb. 16, 2017, <https://www.afj.org/document/the-gorsuch-record/>.

¹³⁸: *TransAm Trucking, Inc. v. Admin. Review Bd.*, 833 F.3d 1206, 1208-09 (10th Cir. 2016).

¹³⁹: *Id.* at 1211-12.

¹⁴⁰: *Id.* at 1216.

¹⁴¹: *Id.* at 1213 n. 4.

¹⁴²: Amy Goodman, *Gorsuch and the case of the frozen trucker*, Press Connects, March 26, 2017, <https://www.pressconnects.com/story/opinion/columnists/2017/03/26/gorsuch-case-frozen-trucker/99538768/>.

JUSTICE KAVANAUGH AND THE SEAWORLD TRAINER

Brett Kavanaugh's record before he was nominated to the Supreme Court contained rulings attacking "the right to health care, to reproductive freedom, to clean air and water, and to fair wages and safe working conditions," according to AFJ's report soon after his nomination.¹⁴³ On workers' rights, his opinions consistently "favored big business and corporations at the expense of workers" on issues from workplace safety to the right to collective bargaining to equal employment opportunities.¹⁴⁴

One case, *SeaWorld of Florida, LLC v. Perez*, illustrated Judge Kavanaugh's hostility to — and willingness to disregard — laws enacted by Congress to ensure workplace safety. The case was about a tragedy: Dawn Brancheau, an experienced animal trainer at SeaWorld, was killed by a killer whale during a performance before a full crowd. The same whale had killed another trainer in the past. OSHA fined SeaWorld and required it to adopt additional safety precautions as part of its enforcement of a law which requires employers to keep workplaces free of "recognized hazards that are causing or are likely to cause death or serious physical harm to employees."

Two of Kavanaugh's fellow judges on the D.C. Circuit Court of Appeals upheld OSHA's fine and additional safety measures. But Kavanaugh dissented in an opinion dripping with ideological bile and antipathy towards the very idea that laws should protect workers from injury. "When should we as a society paternalistically decide ... that the risk of significant physical injury is simply too great even for eager and willing participants?" he wrote, as though Dawn Brancheau had asked to be killed at work. "And most importantly for this case, who decides that the risk to participants is too high?"¹⁴⁵

Kavanaugh's colleagues in the majority opinion responded that Kavanaugh's analysis, "although framed as a question of who decides, acknowledges that Congress has vested in [OSHA] general authority to protect employees from unhealthy and unsafe work places."¹⁴⁶ In other words: Congress already decided and did not leave it up to judges to determine that they think safety precautions are too paternalistic.

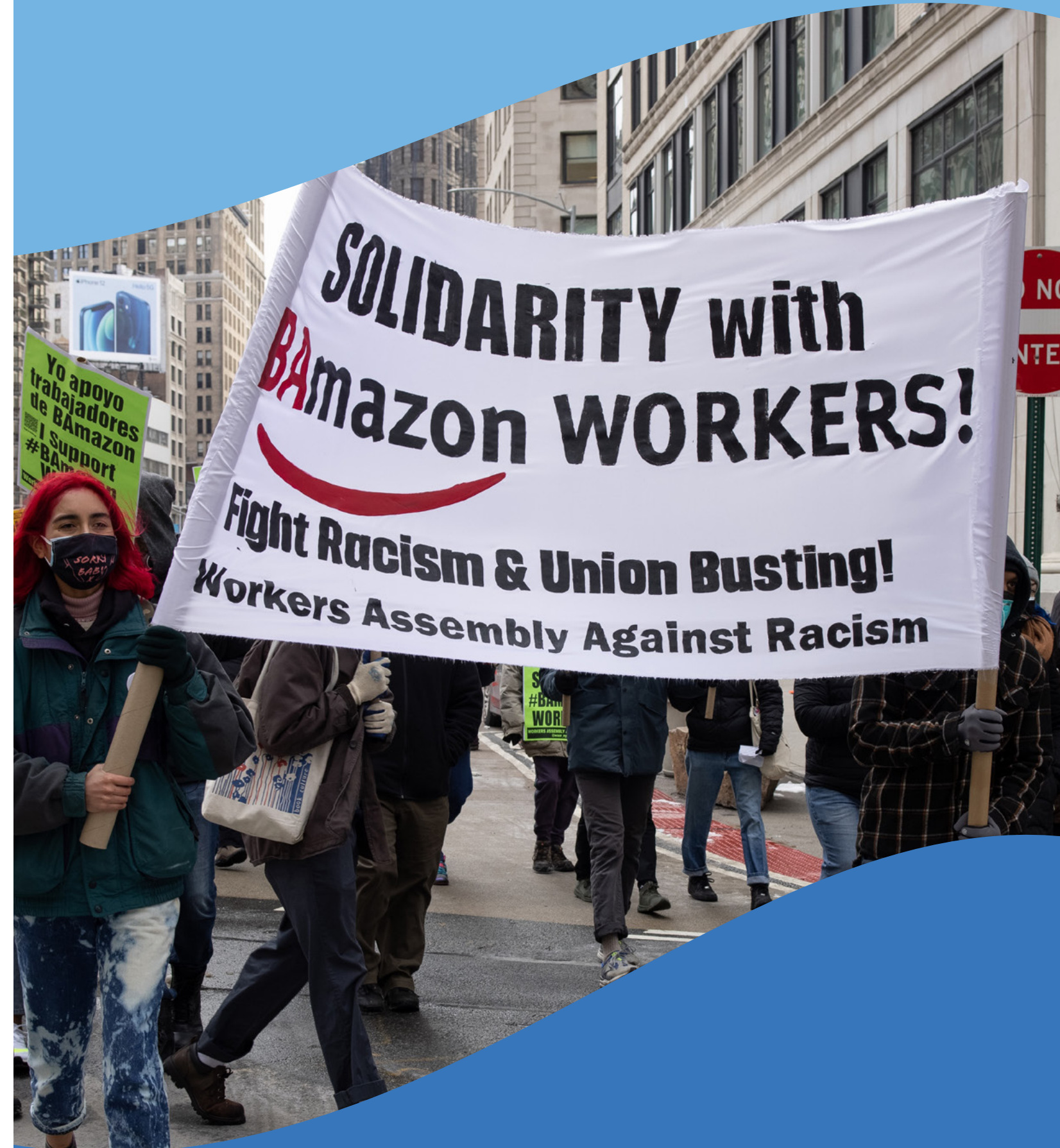
The *SeaWorld* decision, among many other aspects of Kavanaugh's nomination, should have been disqualifying, but instead seems to have been the opposite.

¹⁴³: Alliance for Justice, *Supreme Court Nominee Report: First Look: Brett Kavanaugh*.

¹⁴⁴: Alliance for Justice, *Kavanaugh on Workers' Rights*, Sept. 1, 2018, <https://www.afj.org/document/kavanaugh-on-workers-rights/>.

¹⁴⁵: *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1217 (D.C. Cir. 2014).

¹⁴⁶: *Id.* at 1211.



JUSTICE BARRETT AND THE OLDER JOB APPLICANT

As a judge on the 7th Circuit Court of Appeals, Amy Coney Barrett ruled in favor of corporations and against working people 76% of the time.¹⁴⁷ As Alliance for Justice report on then-Judge Barrett put it, after President Trump nominated her to the Supreme Court, “one thing is clear: if Congress has enacted a law to protect the American people, Barrett will find a way to eviscerate its protections.”¹⁴⁸

One example is the case *Kleber v. Care Fusion Corp.* Dale Kleber, a 57-year-old job applicant, claimed he had been discriminated against on the basis of age by a job requirement that applicants have “no more than 7 years” of relevant experience.¹⁴⁹ The Age Discrimination in Employment Act makes it illegal for an employer to “limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age.”

The Court majority opinion, which Barrett joined, concluded that the term “any individual” did not include job applicants. This is a fairly breathtaking conclusion for a judge who claims her judicial philosophy requires her to focus on the plain meaning of words. Several judges dissented, pointing out that if Congress had wanted to just cover employees, it could have said “employees” rather than “any individual.”¹⁵⁰ They also noted that it made no sense to read a law making it illegal to deprive “any individual” of “employment opportunities” as not covering job applicants because, as the dissenting judges wrote, “[r]efusing to hire an individual has the most dramatic possible adverse effect on that individual’s ‘status as an employee.’”¹⁵¹

Again, then-Judge Barrett’s willingness to rewrite laws passed by Congress in order to rule against working people and for corporations should have been disqualifying. But instead, several months after she joined the Kleber decision, she was nominated to the Supreme Court.

DEMOCRATIC PRESIDENTS HAVE ALSO DISPROPORTIONATELY NOMINATED FORMER CORPORATE LAWYERS AND PROSECUTORS

Republican presidents and senators have done the bulk of the work of packing the courts with corporate friendly judges. But while previous Democratic presidents have nominated judges with somewhat more diverse backgrounds, they still named a disproportionate number of former corporate lawyers and prosecutors. For instance, a 2014 AFJ report found that, from 2009 until 2014, 85% of President Obama’s nominees had been corporate attorneys, prosecutors, or both. Only 10% had significant experience representing workers in labor and employment disputes and prosecutors outnumbered public defenders by more than three to one.¹⁵² President Obama nominated more management-side labor lawyers than he did union-side labor lawyers.¹⁵³

One reason why Democratic presidents have nonetheless heavily chosen former prosecutors and corporate lawyers to be judges is that presidents often defer to senators’ recommendations as to who should become federal judges in those senators’ states. In turn, many senators create un-elected committees to do the work of vetting and choosing judicial nominees. According to a 2020 study by the People’s Policy Project, about half of Democratic senators who have these committees do not reveal who sits on them. For senators whose committees’ membership is public, they are made up of, on average, about 50% lawyers with backgrounds as prosecutors, corporate lawyers, or both, despite those fields comprising only 17% of attorneys.¹⁵⁴ Unsurprisingly, committees made up of law firm lawyers and prosecutors often end up recommending other attorneys like themselves to be judges.

Democratic presidents and senators may also avoid nominating lawyers with experience serving underrepresented people and communities because they know that nominees with those backgrounds will face attacks — or because they have internalized the idea that lawyers with experience representing underrepresented people or communities are biased or less qualified than the more typical corporate lawyer or prosecutor nominees.

Whatever the reason, the result is a judiciary over-stuffed with law firm lawyers and prosecutors. As discussed above, President Biden has done an impressive job in countering this trend by naming many judges who bring demographic and professional diversity to the bench. But nominees with economic justice experience lag well behind.

147: Accountable.us, *REPORT: Coney Barrett Sided with Corporations Over People 76% of the Time*, Sept. 29, 2020, <https://www.accountable.us/news/report-coney-barrett-sided-with-corporations-over-people-76-of-the-time/>.

148: Alliance for Justice, *Nomination of Amy Coney Barrett, Supreme Court of the United States*, 2, Oct. 9, 2020, <https://www.afj.org/wp-content/uploads/2020/09/Barrett-Report-10.9.20-1.pdf>.

149: *Kleber v. CareFusion Corp.*, 914 F.3d 480 (7th Cir. 2019).

150: *Id.* at 492.

151: *Id.* at 493-94.

152: Alliance for Justice, *Broadening the Bench: Professional Diversity and Judicial Nominations*, 6, Feb. 6, 2014,

<https://www.afj.org/wp-content/uploads/2021/03/AFJ-2014-Professional-Diversity-Report.pdf>.

153: Brandon Magner, *Labor Lawyers and Biden’s Judges*, *Labor Law Lite*, Dec. 17, 2020, <https://brandonmagner.substack.com/p/labor-lawyers-and-bidens-judges>.

154: Emma Steiner and Matt Bruenig, *Democrats Need to Nominate Better Judges*, People’s Policy Project (July 23, 2020), <https://www.peoplespolicyproject.org/projects/nominate-better-judges/>.

CONCLUSION



CONCLUSION

The crises that our country faces — immense inequalities of income and wealth, a desiccated democracy, centuries of structural racism, and impending environmental disaster — cannot be fixed through judicial nominations alone.

But appointing more judges who have devoted their legal careers to pursuing economic justice for regular people, families, and communities, rather than wealthy corporations and other powerful interests, is a crucial step in the right direction.



