

Final Report of the 1st Bench Diversity Project

The public's trust and confidence in the justice system is enhanced when they see that the judges deciding their cases resembles the vast racial, ethnic, and cultural groups that make up American society. Likewise, a diverse judicial branch expands an individual judge's perspective in making decisions that impact a diverse population.¹

Introduction

The 1st Bench Diversity Project was joint effort of the Arizona Supreme Court Commission on Minorities in the Judiciary and the Administrative Offices of the Courts. The Commission is a standing committee of the Arizona Judicial Council. One of the mandates of the Commission on Minorities is to “*enrich the diversity of the judiciary to reflect the communities it serves.*” In order to move forward with that goal, the Commission determined that, as a starting point, it needed more comprehensive data to assess the current status of the Arizona judiciary in terms of reflecting the rich diversity of our state’s population.

As the project began, it quickly became clear that comprehensive data about judicial diversity of our state courts (or any state court) was not readily available or collected in a systematized fashion. The lack of comprehensive data is certainly not unique to Arizona.

Although state judges are public servants, little is known about them. Unlike their counterparts on the federal courts, much of the information is non-public, and in many instances, not even collected in a systematic way...

This lack of information is especially significant because judges’ backgrounds have important implications for the work of courts. The characteristics of those who sit in judgment can affect the internal workings of courts as well as the external perception of courts and judges. The background of judges can influence how they make decisions and impact the public’s acceptance of those decisions. We need to know more about state judges.²

Nor was the lack of easily accessible data that surprising. The Arizona judiciary covers a wide spectrum of courts whose judicial officers are selected in a variety of ways. At the community level, we have Municipal Courts and Justice Courts. The administration

¹ American Bar Association Standing Committee on Diversity in the Judiciary

² George, Tracy E. and Yoon, Albert H., *The Gavel Gap: Who Sits in Judgment on State Courts*, American Constitutional Society, 2016

of those courts varies from jurisdiction to jurisdiction. Depending on the particular community, some judicial officers are elected; others are appointed. All Justices of the Peace are elected. All municipal judges are appointed except Yuma City which elects its judge. In some local courts, the selection of judicial officers requires consideration of diversity. In others, consideration of diversity is prohibited.

The Superior Court is Arizona's trial court of general jurisdiction. Cases are presided over by Superior Court Judges and Superior Court Commissioners. Superior Court Judges in Maricopa, Pima and Pinal Counties are appointed by what we call "merit selection." In those counties, the Governor appoints Superior Court Judges from a list provided by a Judicial Nominating Commission.³ Judges in the remaining counties are elected by direct vote of the people. Commissioners, who also serve as trial judges, are selected locally by the Presiding Judge of that county.

Judges in Appellate Courts are appointed by the Governor from a list provided by a Judicial Nominating Commission. These Courts include the Arizona Court of Appeals Division I and Division II as well as the Arizona Supreme Court.

The Project decided that the best way of gathering comprehensive data was a direct survey of the judges themselves. That way the Project could gather standardized and reliable information relating directly to the Project's needs. The Project was also able to ask for information not otherwise be available from public sources.

The Supreme Court Administrative Office of the Court (AOC) was extremely cooperative and agreed to help create and administer the survey. The survey was designed to be a snapshot of the diversity of the Arizona Judiciary. The survey also looked for some correlations that might be useful for future Commission or AOC needs.

As with any snapshot, the survey has its limitations. The membership of Arizona's judiciary is not static. Judges enter and judges leave the judicial system over the course of any given year for a variety of reasons – term expiration, retirement, promotion, and creation of new positions. Thus, the survey represents the diversity of the judiciary at a given point in time only. As would be expected, some data has changed since the survey was taken.⁴

As far as we know, this survey began the first comprehensive look at the Arizona Judiciary for diversity purposes. It may well be the first such look for any state court

³ Judges appointed by the Governor serve fixed terms. Judges are later subject to a retention election. In a retention election judges face a straight up or down "yes"/"no" vote. There are opposing candidates. Article VI, Section 42 Arizona Constitution.

⁴ See, e.g. FN 20 below.

system.⁵ The ten question survey was designed by University of Arizona law students⁶ with the help of Commission members Paul Bennett, John Vivian and Hon. Penny Willrich. The survey was revised and administered by the Administrative Offices of the Courts under the supervision of Deputy Director and Commission member Mike Baumstark and with the help of Court Services Specialist Susan Pickard. Chief Justice Bales approved the survey and encouraged judges to complete it.

The survey was sent by email to all judges of record in the State of Arizona at the end of August, 2015. AOC collected and collated responses to ensure anonymity. AOC received 412 valid responses out of 506 verified emails for a return rate of 81.4%.

The comparison data was compiled by Deputy Director Baumstark, law students Briar Martin and Samantha Sanchez, Susan Pickard and Paul Bennett. This report consists of the following:

1. Selected results of the survey;
2. Data comparisons of the Arizona judiciary with other relevant populations with analysis;
3. Conclusions and suggestions for further steps.

⁵ At the time, the only other published source of information was a far less comprehensive survey conducted by the former American Judicature Society in 2009. The AJS survey was narrower in scope and did not cover the full spectrum of judicial officers. It was also taken from a relatively small sample. The 2009 data is now housed in the National Center for State Courts and can be viewed at website http://www.judicialselection.us/judicial_selection/bench_diversity/index.cfm?state=AZ

Since then, researchers from Vanderbilt University and University of Toronto gathered information concerning over 10,000 judges nationwide. They collected data from a variety of secondary sources such as state government webpages, press releases, and printed directories; professional association publications; academic journals; newspapers; judges' official campaign websites; judicial directories; and confidential telephone interviews with judges and lawyers. Their study looked at 191 Arizona Superior Court and Appellate Judges but did not appear to include Commissioners and lower courts. They did not seek any correlating information. See George, Tracy E. and Yoon, Albert H., *The Gavel Gap: Who Sits in Judgment on State Courts*, American Constitutional Society, 2016

⁶ The law students were Briar Martin, Joe Baker and Junjuan Song.

The Bench Diversity Survey

The Bench diversity survey was sent to over 500 Arizona judges at all levels of court – municipal, county, state and appellate. The survey asked about diversity in two ways: First, the survey used a forced answer format asking respondents to place themselves within the U.S. Department of Labor categories that are also used by the State of Arizona. That question allows for direct comparison with census data and State Bar data which use very similar categories. For the remainder of this report, the USDOL categories will be called categorical diversity. Survey takers were asked the following USDOL question:

“4. Please select the one category that most closely applies to you.

White (Not Hispanic or Latino)

Hispanic or Latino

Black or African American

Asian

American Indian/Native Alaskan

Native Hawaiian/Pacific Islander⁷

Two or more races (Not Hispanic or Latino)

Unknown

Decline to Answer

2. Participants were also asked the open ended question:

“5. Irrespective of the categories in question 4, how would you describe yourself for diversity purposes?”

The remaining questions relevant to this report were designed for comparison purposes and asked about:

Level of Court

Age (within 5 year ranges)

Gender

Age when first became a judicial officer

Prior Judicial experience

Selection Process – e.g. appointed, elected

⁷ For analysis purposes, the report combines Asian and Native Hawaiian/Pacific Islander into one category as the numbers are so small.

Executive Summary

Below is a summary of the Project's analysis:

- 1. The report makes no assumptions about the 18.6 percent of judges who did not complete the survey. Nor does it make any assumptions about the small number of judges who chose not to answer the specific categorical diversity question.**

Some of the responses of the latter group suggest that the choice not to answer is not a random choice. For example, more than nine out of ten judges who declined to answer categorical diversity questions are male. Similarly 70.7% percent of lawyers who decline to answer similar State Bar membership diversity questions are male.

Therefore, this report does not attempt to extrapolate anything from the non-answering group. All of the data and conclusions should be evaluated as if they contain the prefatory language: ***“For the judges who responded . . . “***

- 2. The traditional federal diversity categories do not necessarily correspond to a judge's personal conceptions of diversity.**

When asked the open ended question, many judges answered with a very different sense of identity than the U.S. Department of Labor categories.

Irish-Catholic
Grandmother
Gay/lesbian
Jewish
Hair challenged
Elderly
Low socio-economic status

For these judges, diversity does not necessarily equate with pre-determined USDOL categories. That is important information for both the Commission and state diversity mandates. In Arizona, diversity is consistently defined broadly in terms of “reflecting the community” served by the courts without regard to particular categories.

- 3. The Arizona State Court Judiciary does not reflect the categorical diversity of the state's population.**

Whites are significantly over-represented on the bench. Traditional minorities are significantly under-represented.

- 4. Compared to the state's population, Hispanics, in particular, are under-represented in the judiciary.**

- 5. Instead of reflecting the population as a whole, the diversity of the judiciary more closely mirrors the diversity of the State Bar.**

Selection of white judges slightly under-represents the proportion of white lawyers. The same applies to Native American judges. The proportion of Hispanics and African Americans in the judiciary actually exceeds their proportion within the community of licensed lawyers. Asians and persons of two or more races are under-represented.

- 6. Different levels of court have demonstratively different diversity. Local appointment plays a significant role in diversity outcomes.**

- 7. There is more diversity in judicial offices that do not require a law degree.**

- 8. When adjusted for population, merit selection of Superior Court Judges produces slightly better diversity outcomes for categorical diversity than selection by local election.**

- 9. Women are under-represented across the judiciary. However, among locally appointed Superior Court Commissioners, women are over-represented.**

- 10. The population of women in the judiciary is more diverse than that of men.**

- 11. However, whites are significantly over-represented among locally appointed female Superior Court Commissioners.**

- 12. Diversity prohibitions and diversity mandates do not necessarily change diversity outcomes.**

13. There is much more data to be gathered and analyzed. This data includes:

- a. more data over time. Are there meaningful differences over time?
- b. more information about the selection process. Does it matter who is on selection commissions or who is making appointments.
- c. more information about the prior experience of our judges. What are the pathways to becoming a judicial officer?
- d. what can be done to increase the categorical diversity of the State Bar?
- e. can data give us a better understanding of what we mean by diversity?

Full Report

I. Introduction

Judicial diversity has long been an Arizona value. The Arizona Constitution and the Code of Judicial Administration formally recognize that judges should reflect the diversity of the communities they serve.^{8 9} The State Constitution specifically mandate that appointed judges reflect the diversity of the state's population. This process, called *merit selection*, requires that diversity be considered not only for the judges themselves but for the committees that recommend nominees to the Governor.¹⁰

The current version of merit selection was the result of a statewide constitutional referendum in 1992. One of the specific justifications for merit selection was increased diversity. The Secretary of State's voter description for the 1992 referendum states:

*Now, 18 years after merit selection was enacted, members of the public, the judiciary, the bar and the legislature have concluded that improvements need to be made in order to ensure that the judiciary more accurately reflects the diversity of each county's population.*¹¹

Nearly twenty-five years later, Chief Justice Bales reiterated merit selection's commitment to diversity when he said:

*[M]erit selection has resulted in the appointment of competent, impartial judges who are diverse in their personal and professional backgrounds.*¹²

However, not all of Arizona' judges are chosen by merit selection. Nor is the same consideration for diversity uniform throughout the state. For example, until June, 2016, the Phoenix Municipal Court Selection Advisory Board was mandated:

*To submit its recommendations for candidates for appointment or reappointment to the office of judge of the City Court or Chief Presiding Judge, **without regard for race, religion, political affiliation or sex of the candidate** (emphasis added).*¹³

⁸ Article VI, Section 37, Arizona Constitution "In making the appointment, the governor shall consider the diversity of the state's population"

⁹ Section 1-107, Arizona Code of Judicial Administration

¹⁰ Article VI, Sections 36, 37, Arizona Constitution

¹¹ Voter pamphlet from Secretary of State, October, 1992

¹² Arizona Republic, September 14, 2014

¹³ Phoenix City Code 2-96 Judicial Selection Advisory Board in effect at the time of the survey. The City of Phoenix has since reversed itself. The code now reads similarly to the Arizona Constitution: "When making

II. The Survey

The Project's survey provides a first look at assessing how the Arizona Judiciary reflects the population it serves. The survey was sent by email to all judges of record in the State of Arizona at the end of August, 2015. AOC collected and collated responses to ensure anonymity. AOC received 412 valid responses out of 506 verified emails for a return rate of 81.4%.

Table 1 shows the distribution of responses by level of court.

Table 1 Judicial Position N=412	Percent
Superior Court Judge	37.6
Municipal Court Judge	18.8
Superior Court Commissioner	16.9
Justice of the Peace	15.2
Appellate Judge or Justice	6.3
Full-time Judge Pro Tempore	4.6
Hearing Officer	0.2
No answer	0.5
Total	100

Throughout the report, we will use tables such as Table 1 above.

The survey information was then disseminated to the Project in a collated format that enabled questions to be correlated to other questions. The collated format also protected the confidentiality of participating judges. The Project chose to focus on correlations between diversity and level of court, gender, and selection process. The format of the categorical diversity question also allowed the Project to compare data with the US Census, the State Bar, and the diversity of the State's law schools.

recommendations for judicial office, the Board shall consider the diversity of the City's population; however, the primary consideration shall be merit." Ordinance No. G-6163, eff. 6-17-2016

As with any data collection, the survey has its limitations. It is a snapshot of a given point in time. As with any snapshot, the results of the survey may be different than if it were taken a month later. The Arizona's judiciary is not static. Judges enter and judges leave the judicial system over the course of any given year for a variety of reasons – term expiration, retirement, promotion, and creation of new positions. Thus, the survey represents the diversity of the judiciary only at the point in which it was given. Nonetheless, given the high response rate and the large number of responders, the survey provides useful information.

This report makes no assumptions about the 18.6 percent of judges who did not complete the survey. Nor does the report make any assumptions about the 12 judges who chose not to answer the categorical diversity question.¹⁴ Some of the answers of the latter group suggest that the choice not to answer is not a random choice. For example, more than 90% of judges who declined to answer categorical diversity questions identified themselves as male. Similarly 70.7% percent of lawyers who decline to answer State Bar membership diversity questions are male.

The survey used a forced answer format asking respondents to place themselves within the U.S. Department of Labor categories that are also used by the State of Arizona. That question allows for direct comparison with census data which uses very similar categories. For the remainder of this report, the USDOL categories will be called categorical diversity. Survey takers were asked the USDOL question:

“4. Please select the one category that most closely applies to you.

White (Not Hispanic or Latino)

Hispanic or Latino

Black or African American

Asian

American Indian/Native Alaskan

Native Hawaiian/Pacific Islander¹⁵

Two or more races (Not Hispanic or Latino)

Unknown

Decline to Answer

¹⁴ We made no assumptions except for a single judge who declined to answer the categorical question but then identified with a category in the open-ended diversity question.

¹⁵ Because the numbers are relatively small, the report combines Asian and Native Hawaiian/Pacific Islander into one category.

2. Participants were also asked the open ended question:

“5. Irrespective of the categories in question 4, how would you describe yourself for diversity purposes?”

The remaining questions relevant to this report were designed for comparison purposes and asked about:

Level of Court
Age (within 5 year ranges)
Length of time admitted to practice
Gender
Age when first became a judicial officer
Prior Judicial experience
Selection Process – e.g. appointed, elected

This report focusses most of the analysis on three correlations with categorical diversity: level of court, gender, and selection process. We also compared categorical diversity responses to U.S. Census data for Arizona, to diversity information from the State Bar of Arizona, and to diversity information from the State’s law schools. Lastly, we did a limited correlation to prior judicial experience only as it relates to the selection process.

III. What do we mean by diversity?

There is no universal definition of diversity. When we use the term diversity, we are often not referring to the same concepts. In our survey, the traditional federal diversity categories did not necessarily correspond to a judge’s personal conception of diversity. When asked the open ended question, many judges answered with a very different sense of identity than the U.S. Department of Labor categories.

Irish-Catholic
Grandmother
Gay/lesbian
Jewish
Hair challenged
Elderly
Low socio-economic status

Especially with respect to judicial selection, diversity can also mean ideological diversity, geographic diversity, or type of law experience.

For many of the survey judges, diversity did not necessarily equate with pre-determined categories. Those other conceptions of diversity mattered enough to those judges to answer the two survey diversity questions differently. The difference in perspective raises an important question of whether our own diverse constructions of diversity influence any qualitative assessments about whether or not the judiciary reflects the community it serves. Nonetheless, for survey purposes, categorical diversity allows us to speak a common language when comparing the judiciary to specific populations.

The Phoenix Municipal Code also raises the question of whether another kind of diversity should be reflected in the judicial diversity discussions – that is, political party diversity. Prior to June, 2016, the Phoenix municipal judicial selection process prohibited consideration of party affiliation.¹⁶ Yet the statewide merit selection application specifically asks for party affiliations. And nominating commissions must reflect partisan diversity when submitting names to the Governor.¹⁷ The instant survey did not gather data on political affiliation. The different selection processes raise a question of whether political diversity should be part of any discussion.¹⁸

Then, there is a simple matter of perception. Does the word *diversity* equate with the notion of *minority*? In a 2011 report, *Improving Judicial Diversity*, from the Brennan Center for Justice at New York University School of Law, a member of the Arizona Appellate Nominating Commission was quoted as saying:

*. . . in Arizona, Latinos are not really considered to be a minority group. He said that Latinos have always been a part of Arizona's history, and as such, are fully integrated into all of its communities.*¹⁹

This report addresses Arizona's Hispanic communities as an important category and documents significant disparities as set forth below.

¹⁶ Former Phoenix City Code 2-96 since amended by City Ordinance G-6163

¹⁷ ARS 12-3151. For both trial and appellate judges, the same rule applies: "If the commission submits five or more nominees, not more than sixty per cent of the nominees shall be from the same political party. If the commission submits fewer than five nominees, no more than two nominees may be from the same political party."

¹⁸ To be clear, this Project's analysis is limited to categorical and gender diversity.

¹⁹ Torres-Spelliscy, Chase, Greenman, *Improving Judicial Diversity*, Brennan Center for Justice (2010) 13

IV. The Arizona State Court Judiciary does not reflect the categorical diversity of the state’s population. Whites are significantly over-represented on the bench. Minorities are under-represented. African-American Judges follow a unique pattern.

Table 2 below summarizes the categorical diversity of Arizona Judges as compared to the state population and to the diversity of the State Bar.

Table 2 Diversity Comparisons	White	Hispanic	Black/AA	Asian/PI	American Indian	Two or More Races
State of Arizona ¹ ¹ 2015 US Census Estimate N=6,828,065	55.8%	30.7%	4.8%	3.7%	5.3%	2.7%
State Bar of Arizona ² ² As of 11/15/15 N=10,422 59.2% of the Bar	82.3%	7.8%	2.4%	3.0%	1.3%	3.1%
Judiciary N=412	77.2%	11.1%	3.4%	1.9%	1.2%	1.5%

In order to better illustrate the significance of different percentages, the project uses a ratio that we call a Relative Selection Index or RSI. The RSI assigns a numerical value to the difference between the expected occurrence of judicial selection for a particular group based on population and the actual occurrence. The RSI is computed by dividing the actual percentage by the expected percentage. An RSI of 1.0 would indicate that the actual selection of judges from a population matches the expected percentage. An RSI of greater than 1.0 means that the group is over-represented. An RSI of less than 1.0 means that the group is under-represented.

Table 3 illustrates the RSI comparing the overall judiciary to the population it serves.

Table 3 RSI Diversity Comparisons	White	Hispanic	Black/AA	Asian/PI	American Indian	Two or More Races
State of Arizona ¹ ¹ 2015 US Census Estimate N=6,828,065	55.8%	30.7%	4.8%	3.7%	5.3%	2.7%
Judiciary RSI N=412	1.38	.361	.708	.513	.226	.555

The RSI indicates that whites are demonstratively over-represented in the overall judiciary and that all other groups are under-represented. The greatest under-representation within the judiciary occurs with the state's two largest minority groups: Hispanics and American Indians. Graph I illustrates the RSI differences:

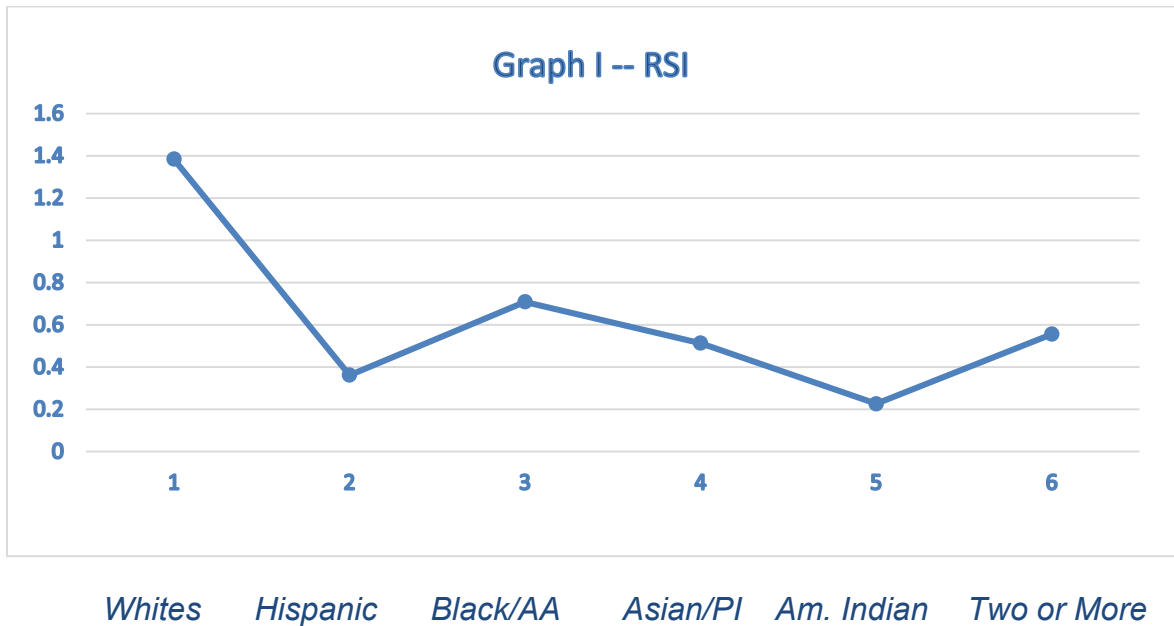


Table 4 breaks down judicial diversity by level of court.

Table 4 Diversity By Level of Court	White	Hispanic	Black/AA	American Indian	Asian/PI	Two or More
State of Arizona ²⁰ N= 6,828,065	55.8%	30.7%	4.8%	5.3%	3.7%	2.7%
Lower Courts/Pro Tem N=160	68.8%	19.4%	5%	2.5%	0.6%	2.5%
Superior Court Commissioners N=67	94%	0	4.5%	0	1.5%	0
Superior Court Judges N=147	84.3%	8.1%	1.4%	0.68%	4.1%	0.68%
Appellate Courts N=25	84%	12%	4%	0	0	0

Table 4 shows two indicators. First, generally speaking, local community courts are more diverse than the higher courts of record. Second, at all levels of court, whites are over-represented and most other groups are under-represented. Table 5 and Graph 2 confirm using the RSI.

Again, the RSI illustrates the disparities. At all levels of court, the RSI for white judges is significantly higher and the RSI for Hispanics is significantly lower. It is striking that at the time of this survey, the RSI for Superior Court Commissioners was zero. At the time

²⁰ United State Census Bureau at <http://www.census.gov/quickfacts/table/RHI725215/04>

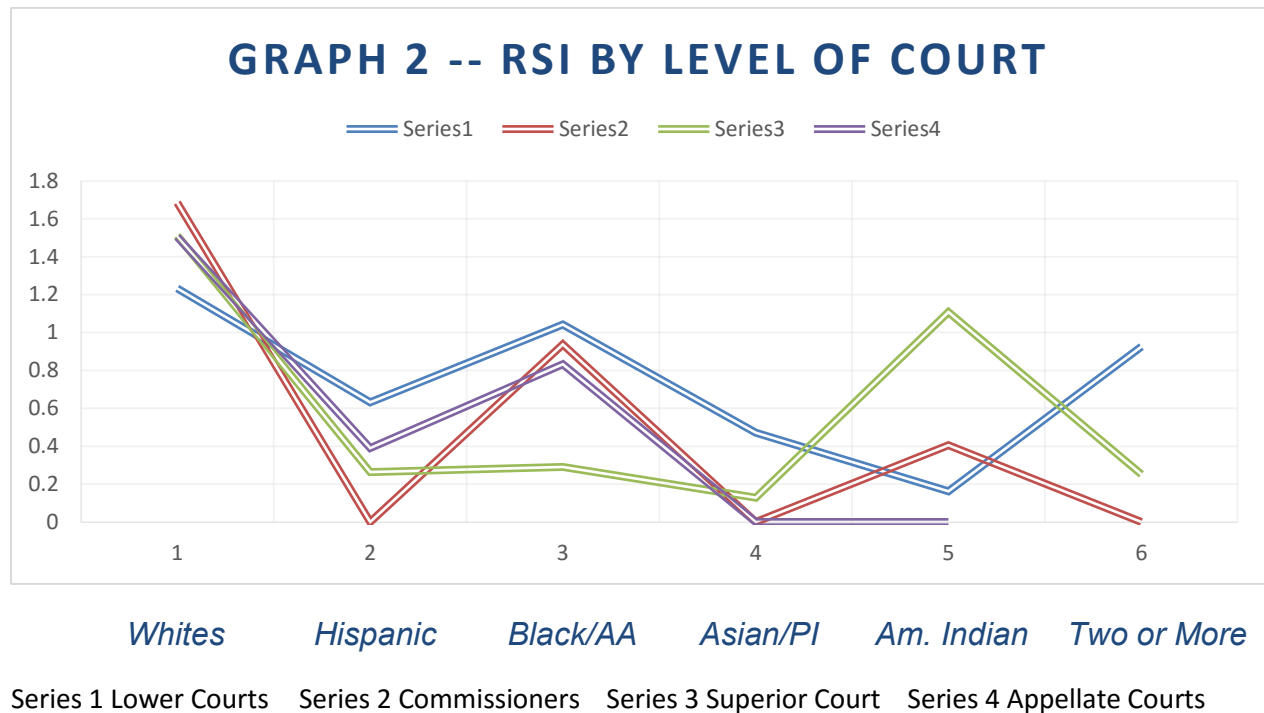
of the survey, there were no Hispanic judges among the 67 locally appointed commissioners in the entire State of Arizona.

Table 5 shows the RSI values for the respective courts.

Table 5 RSI Diversity By Level of Court	White	Hispanic	Black/AA	American Indian	Asian/PI	Two or More
Lower Courts/Pro Tem N=160	1.23	.632	1.04	.471	.162	.925
Superior Court Commissioners N=67	1.68	0	.935	0	.405	0
Superior Court Judges N=147	1.51	.263	.291	.128	1.11	.251
Appellate Courts N=25	1.50	.390	.833	0	0	0

The RSI shows the anomaly that African Americans are close to proportionally represented on all benches –except as Superior Court Judges where they are significantly under-represented. In nearly every court, the RSI for African-Americans is closer to the expected 1.0 than that for every other minority. The RSI is nearly 1.0 for Superior Court Commissioner and closer to 1 than all other minorities at the Appellate level. Yet among Superior Court Judges, the RSI for African Americans is among the lowest of any group.

Graph 2 illustrates the RSI values in graphic comparison.



V. At all levels of court, Hispanics are significantly under-represented in the Arizona Judiciary.

According to U.S. Census estimates for 2015, Hispanics or Latinos make up 30.7% of the Arizona population or over two million people.²¹ Despite being Arizona’s largest minority, the RSI values for Hispanics is significantly under 1.0 at every level of court no matter how judges are selected.

Perhaps most disturbing is that the RSI values are lowest across the Superior Court bench. The Superior Court is the trial court for all felonies, divorces, child custody disputes and child support. The Superior Court is also the court of general civil and equity jurisdiction throughout the state.

As seen in Table 6, the RSI for Hispanic judges is extremely low within the Superior Court – especially as compared to the RSI for white judges. The combined RSI for white judges is 1.56 – significantly above the 1.0 expected value. The combined RSI for Hispanic Judges is 0.182 – significantly below the 1.0 value.

²¹ United State Census Bureau at <http://www.census.gov/quickfacts/table/RHI725215/04>

Table 6 RSI in Superior Court	White	Hispanic
Superior Court Commissioners N=67	1.68	0
Superior Court Judges N=147	1.51	.263
Combined Superior Court Judicial Officers N=214	1.56	.182

VI. The diversity of the bench much more closely tracks the diversity of the State Bar than the diversity of the general population.

Compared to the diversity of the State Bar, the selection of judges is closer to the population of lawyers than to the State’s population. Selection of white judges slightly under-represents the overall proportion of white lawyers. The same applies to Native American judges. The proportion of Hispanics and African Americans in the judiciary actually exceeds their proportion within the community of licensed lawyers – although not the community at large. Asians and persons of two or more races are under-represented.

The State Bar is not overly diverse. Comparing the State Bar to the general population produces RSI numbers that do not reflect the diversity of the population served by lawyers.

Table 7 compares the State judiciary to the population of the State Bar of Arizona at the time of the survey by percentage of populations:

Table 7 Comparison to State Bar Membership	White	Hispanic	Black/AA	Asian/PI	American Indian	Two or More
State Bar of Arizona ² ² As of 11/15/15 N=10,422 (59.2% of the Bar)	82.3%	7.8%	2.4%	3.0%	1.3%	3.1%
Overall Judiciary N=412	77.2%	11.1%	3.4%	1.9%	1.2%	1.5%
Lower Courts N=160	68.8%	19.4%	5%	2.5%	0.6%	2.5%
Superior Court Commissioners N=57	94%	0	4.5%	0	1.5%	
Superior Court Judges N=167	84.3%	8.1%	1.4%	0.68%	4.1%	0.68%
Appellate Court Judges N=25	84%	12%	4%	0	0	0

Table 8 shows the RSI values of the Judiciary when compared to the State Bar.

Table 8 RSI Comparison of Judiciary to State Bar Membership	White	Hispanic	Black/AA	Asian/PI	American Indian	Two or More
Overall Judiciary N=412	.938	1.42	1.41	.633	.923	.484
Lower Courts N=160	.836	2.487	2.083	.833	.461	.806
Superior Court Commissioners N= 57	1.14	0	1.875	0	1.15	0
Superior Court Judges N=167	1.02	1.04	.583	.227	3.15	.219
Appellate Court Judges N=25	1.02	1.54	1.67	0	0	0

A look at RSI shows numbers more consistently approaching the expected value of 1.0. The numbers also show that several minorities are actually over-represented in a few categories as compared to the Bar as a whole --although the numbers are so small that it would be hard to draw conclusions.

Nonetheless, the State Bar is not representative of the categorical diversity of the State's population

Table 9 compares the State Bar to the population of Arizona

Table 9 RSI Diversity of the State Bar	White	Hispanic	Black/AA	American Indian	Asian/PI	Two or More
State of Arizona ²² N= 6,828,065	55.8%	30.7%	4.8%	5.3%	3.7%	2.7%
State Bar of Arizona	82.3%	7.8%	2.4%	3.0%	1.3%	3.1%
RSI	1.47	.254	.500	.566	.351	1.15

The diversity of the judiciary, on the whole, aligns with the diversity of the State Bar. That alignment signals that the pool of potential candidates may be a most important factor in judicial diversity. For most courts, the judiciary is chosen from the pool of licensed lawyers. Since the population of lawyers does not reflect the community at large, the pool of candidates does not reflect the community. True judicial diversity becomes a broader challenge than improving the selection process alone. The challenge may be to increase the diversity of those eligible for selection.

That is not to say that the selection process itself cannot be improved – especially in places where disparities are more pronounced. The survey identified two such areas – the selection of Commissioners and African-American Superior Court judges. In those categories, the data demonstrates that the selection process can influence diversity. Those two areas will be examined below.

In a similar vein, the survey shows that there is more diversity in courts where judges are not required to be lawyers. Not requiring a law degree broadens the pool of

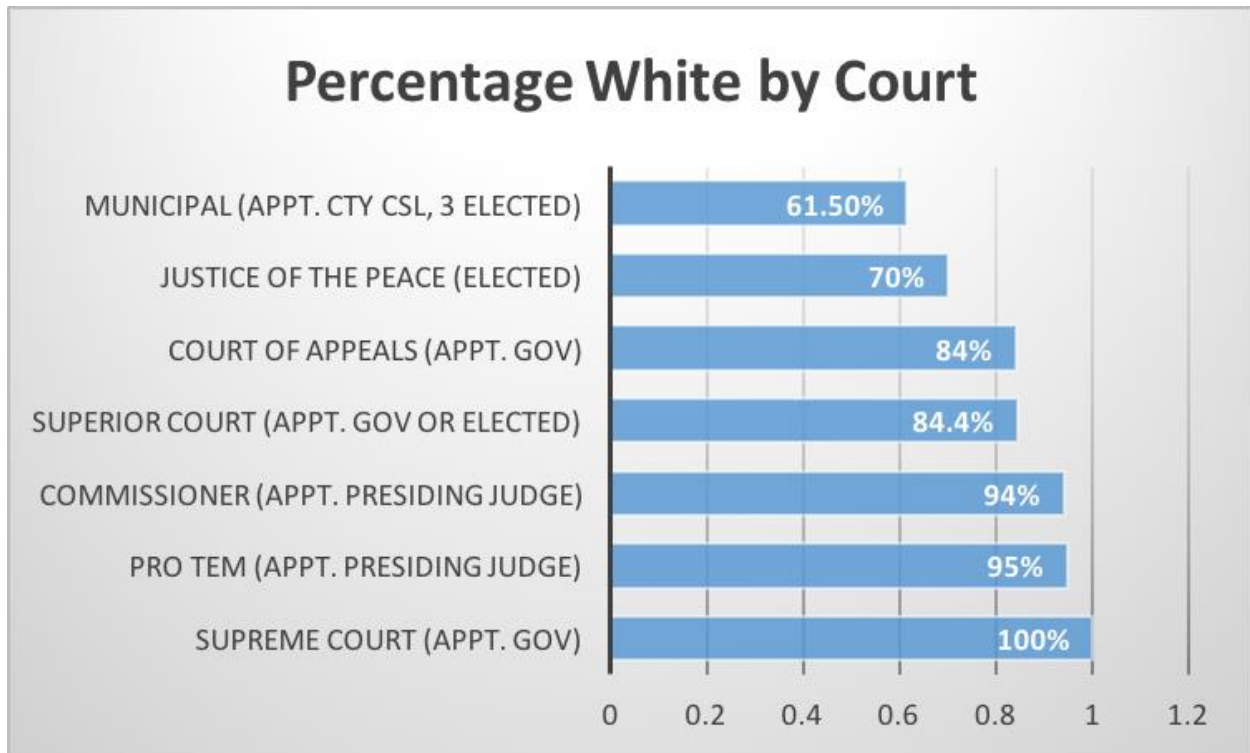
²² United State Census Bureau <http://www.census.gov/quickfacts/table/RHI725215/04>

available candidates. The net effect of the more diverse pool may be one explanation why lower courts are more diverse.

- VII. Different courts have demonstratively different diversity.**
 - a. Local appointment by a presiding judge resulted in less diversity.**
 - b. Lower courts are more diverse.**

A look back at Tables 4, 5 and 7 shows significant differences in diversity among different courts. This is more apparent when the data is looked at strictly from the percentage of white judges as opposed to the larger category of minority judges.

Table 10 shows the percentage of white judges by court.²³



²³ For the first 104 years since statehood, no minority judge had been appointed to the Arizona Supreme Court. That drought ended on November 28, 2017 when Governor Ducey appointed John R. Lopez as the state's first Hispanic Justice.

One anomaly is that the RSI for white judges is the highest in locally appointed courts. The RSI for locally appointed white commissioners and locally appointed pro tem judges is the highest for any judicial group.

Table 11 below shows the RSI for locally appointed white judges compared to minority judges by level of court.

Table 11	White RSI	Minority RSI
RSI for locally appointed judges		
Superior Court Commissioners (Locally appointed)	1.68	.063
Locally appointed Pro Tem	1.70	.052
Locally appointed lower Courts	1.16	.791

In one sense, the locally appointed data is somewhat surprising. Local appointments are most likely the place where the appointing authority has both the flexibility and the continuity of appointments that might be expected to enhance diversity. As will be discussed in Section IX and X, local appointment of commissioners has established gender equality but a rather extreme disparity in categorical diversity.

Courts in which judicial officers are not required to have a law degree are the most diverse. The RSI of minority judges in Justice Courts – where a law degree is not required -- is higher than in courts requiring a law degree. While there are a number of factors that might contribute to the greater diversity, it is hard to ignore that a potentially more diverse pool of candidates plays a noticeable role in increased diversity.

VIII. When adjusted for population, merit selection of Superior Court Judges produces slightly better diversity outcomes for categorical diversity than selection by local election.

Merit selection of judges has resulted in slightly better diversity than in counties in which judges are elected. Table 12 compares the diversity percentages and RSI for merit selection and election of Superior Court Judges. The RSI is adjusted for population differences among the counties.

Table 12 Diversity of Superior Court Judges	White	Hispanic	Black/A A	Asian/PI	American Indian	Two or More races
% Appointed Judges	82 %	8.5 %	1.7 %	5.1 %	.09 %	.09 %
RSI Appointed Judges	1.47	.369	.309	1.24	.272	.303
% Elected	90 %	6.7 %	3.3 %	0 %	0 %	3.3 %
RSI Elected Judges	1.63	.246	0	0 %	0 %	1.51

The RSI for white judges is slightly closer to the 1.0 value under merit selection than when judges are elected. Merit selection also shows somewhat broader diversity across the board. Hispanics, however, are under-represented under both systems as are all other non-whites – except the “two or more” category in the rural counties.

What Table 12 does not show is that Native Americans make up 14% of the rural counties where Superior Court judges are elected.²⁴ Despite the fact that Native Americans make up one out of every seven persons in the election counties, there are no Native American judges. Similarly, African-Americans make up 5.5 % of the urban counties. Yet only two African-Americans have been appointed Superior Court Judges.

²⁴ United State Census Bureau <http://www.census.gov/quickfacts/table/RHI725215/04>

There are several systemic reasons why greater diversity may be more likely under the current merit selection system. First, under the merit selection system, the Nominating Commissions and the Governor are constitutionally required to consider diversity. In an election county, while the voters are free to consider whatever they want, there is no similar mandate.

Another difference is that both the merit selection Nominating Commissions and the Governor recommend and appoint a number of judges over a given time period. Both the Governor and Commission are free to compare current applicants to recent appointments. They each have the ability to look back to recent past appointments and choose the next applicant based on considerations of diversity or balance. For example, the governor might choose an attorney with a family law background when the last three selections had criminal law credentials. Similarly, the governor could choose diversity from among the categorical groups.

The electorate has no such option. In election counties, voters choose judges by judicial divisions. The voter may choose one candidate only in each division rather than select from a group of candidates or have a second or third choice later in the year.

The election process limits diversity choice in one other way. In the most recent Arizona Superior Court elections in November, 2016, there were 17 different Superior Court divisions on the ballot.²⁵ In each division, the candidate ran unopposed. The electorate had no diversity choice.

Political scientists have long noted that winner-take-all single elections tend to favor majorities – although the research focuses mainly on political majorities.

“Single-member districts produce a winner-takes all allocation of seats, and the electoral rules display dramatic majoritarian biases.”²⁶

“By design, a winner-take-all voting system represents majority constituencies to the detriment of minority constituencies”²⁷

Of course, merit selection does not guarantee diversity nor do elections negate diversity.

²⁵ There was a primary election in Graham County in September, 2016. But there was no opposition on the general election ballot. https://ballotpedia.org/Arizona_local_judicial_elections_2016#Candidates

²⁶ Calvo, Ernesto and Rodden, Jonathan, *The Achilles Heel of Plurality Systems: Geography and Representation in Multiparty Democracies*, Vol. 59 American Journal of Political Science, p. 789, 2015

²⁷ Hill, Stephen, *Fixing Elections: The Failure of America’s Winner-Take-All Politics*, Vol. 91 National Civic Review, p. 193, Summer 2002

IX. Women are under-represented in the overall judiciary and in nearly every category. However, among locally appointed Superior Court Commissioners, there are more women than men.

Women make up approximately one-half of the state's population. However, women have been selected for only 37.2 % of all judges. Similar to categorical diversity, the percentages do not represent the community served by judges but correspond, instead, to the percentage of women lawyers.

However, among locally appointed Commissioners in the Superior Court, women judges outnumber men 60.8 % to 39.2 %.

Table 13 shows the percentage of judges in each category by gender.

Table 13 Judges by Gender	Male	Female
State Bar	64.8	35.2
Overall	62.8 %	37.2
Lower Courts/Pro Tem	64 %	36 %
Commissioners	39.2%	60.8%
Superior Court Judges	69.5	30.5
Appellate	76..9	23.1

Gender is one area in which we have some additional information over time for Superior Court judges. This information is based on studies by The American Bench.²⁸

²⁸ The American Bench: Judges of the Nation, 15th Edition, 2006

Table 14 shows the percentage of female Superior Court judges over the last 10 years.

Table 14	2006*	2015**	2016
Gender of Superior Court Judges	*Source: The American Bench	**Source: Survey	*** Source Administrative Offices of the Courts
Male	72.7%	69.2%	68.4%
Female	27.3%	30.8%	31.6%

The data suggests some improvement in gender equality over the last decade. The big anomaly is the appointment of female commissioners. Commissioners are locally appointed to Superior Court by the Presiding Judge in each county. The Presiding Judges appear to have made a concerted effort to appoint female judges.

X. Superior Court Commissioners are disproportionately white.

Tables 15 shows that Presiding Judges are appointing mostly whites to the bench – male and female – in larger proportions than in any other part of the judiciary. At the time of the survey, over 9 out of 10 Commissioners were white; there were no Hispanic Commissioners. While there is progress towards gender equality for Commissioners, there has been a step backwards in categorical diversity.

Table 15 illustrates the diversity of Commissioners

Table 15 Commissioners	White	Hispanic	Black/AA	Asian	American Indian	Two or more Races
Female	90 %	0 %	7.3 %	2.4 %	0 %	0 %
Male	100 %	0 %	0 %	0 %	0 %	0 %
All Commissioners	93.8 %	0 %	4.6 %	1.5 %	0 %	0 %

XI. The population of women judges is more diverse than that of men.

Even with the over-representation of white women Commissioners, women in the judiciary are more diverse than men.

Table 16 illustrates diversity by gender.

Table 16 Judiciary By Gender	White	Hispanic	Black/AA	Asian/PI	Native American	Two or more races
Overall	77.25 %	11.10%	3.4 %	2.0 %	1.2 %	1.5 %
Female	74.3 %	15.8 %	3.9 %	1.9 %	1.9 %	1.9 %
Male	82.9 %	9 %	3.3 %	2 %	.4 %	1.2 %

XII. Diversity prohibitions and diversity mandates do not necessarily change diversity outcomes.

At the time of the survey, the Phoenix City Code prohibited consideration of both categorical diversity and political party. At the same time, the Arizona Constitution mandated consideration of both diversity and political parties. One might assume that the City Code prohibition would make diversity more difficult and that the Constitutional mandate would make diversity easier.

The data suggests otherwise. The Phoenix Municipal Court was more diverse than the judiciary under merit selection despite the opposite legal requirements.

Table 17 compares diversity for under the respective prohibition and mandate for Phoenix and Merit Selection.

Table 17 Comparison	White	Hispanic	Black/AA	Native American	Asian/PI	Two or More
Merit Selection and Phoenix Municipal Court						
Merit Selection Superior Court	82 %	8.5 %	1.7 %	5.1 %	.09 %	.09 %
RSI Merit Selection Superior Court	1.51	.263	.291	.128	1.11	.251
Merit Selection Appellate	84 %	12 %	4%	0	0	0
RSI Appellate	1.50	.390	.833	0	0	0
Phoenix Municipal Court	63.6 %	22.7 %	13.6 %	0	0	0
RSI Phoenix Municipal Court	1.13	.744	2.20	0	0	0

XIII. Conclusions and next steps

1. The data suggests that one way to increase diversity is to increase the diversity of the pool of potential applicants. The most obvious way to increase the pool is to increase the diversity of the State Bar. We need to study ways in which the State Bar can be more reflective of the community it serves.

One interesting observation is that the three Arizona Law Schools have more diverse student bodies than the State Bar. Note that the law schools have an additional category identifying foreign students.

Table 18 shows diversity of each law school as reported to the American Bar Association.

Table 18 Arizona Law Schools²⁹	White	Hispanic	Black/AA	Asian/PI	Native American	Two or More Races	Non- Resident Aliens
U of A	63.2%	9.1%	3.3%	2.2%	3%	6.6%	11.1%
ASU	68.4%	11.1%	1.6%	4.0%	3.2%	3.5%	5.0%
Arizona Summit	48.9%	17%	18.7%	5.8%	2.9%	0.3%	1%

²⁹ As disclosed on the law schools' websites.

The two state law schools are under a Constitutional prohibition from considering categorical diversity in both admissions and in hiring.

“This state **shall not** grant preferential treatment to or discriminate against any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting.”³⁰

The Constitutional prohibition directly contradicts the Constitutional diversity mandate for selection of judges. Apparently, the State wants a diverse judiciary but makes it more difficult to have a diverse pipeline to the State Bar through its State law schools. Arizona Summit is not restricted by the prohibition as it is a private school.

One positive note to the pipeline is that the University of Arizona’s new undergraduate law degree may result in increased applications to law schools in the state. The undergraduate degree program has over 400 students. Less than one-half of the undergraduate law students are white (47.8%) and more than 35% are Hispanic. There is also some hope that the new availability of the GRE test in lieu of the LSAT may promote diversity as it is a more accessible entrance exam.³¹

In any event, we need to further study and implement actions designed to increase the diversity of the Bar if we want to increase the diversity of the judiciary.

2. Increasing the potential pool is only one step. The anomaly of Superior Court Commissioners’ diversity demonstrates that the selection process needs to be further studied. We need to understand why Commissioners are the only group with gender equality but with exceptionally low categorical diversity. Something in the selection process is skewing categorical diversity.

Similarly, we need to study the lack of African-American Judges in the Superior Court. Why are there so few African-Americans in Superior Court but not in the other courts? Again, is there something in the process that we should try to understand?

3. We need to repeat the survey (with some adjustments) so that we have data over time. Snapshots are useful. But they are not as useful as data that can show trends.

³⁰ Arizona Constitution, Article 2, Section 36 A

³¹ *Without LSAT Requirement, U. of Arizona Trains Nontraditional Law Students*, Law.com, October 10, 2016 at http://www.law.com/sites/almstaff/2016/10/10/without-lsat-requirement-u-of-arizona-trains-nontraditional-law-students/?cmp=share_email&slreturn=20170209183622

4. We need to gather information about the people who choose nominees – especially Nominating Committees and Selection Advisory Boards. The current survey did not address those people.
5. Lastly we need to better understand the immediate pipeline. The survey showed that nearly 60% of judges had no prior judicial experience. Only one in five Superior Court judges had been a Superior Court Commissioner. The initial survey did not identify the type of non-judicial experience. The next survey needs to modify those questions to provide better information about the pipeline.