

United States Bankruptcy Court District of Massachusetts

Frank J. Bailey United States Bankruptcy Judge

Diversity on the Bench December 6, 2017



: I will cover today:

Part 1: How diverse are the judges on the Bankruptcy Bench?

Part 2: Why does it *matter* if the Bankruptcy Bench is diverse?

Part 3: What can we do to increase diversity on the Bankruptcy Court bench?

The U.S. system of bankruptcy is the best in the world

"As tough as the last few years have been, the American economy has responded a bit more effectively than other economies, and bankruptcy is a big part of that."

Prof. David Skeel, U. Penn. Law School

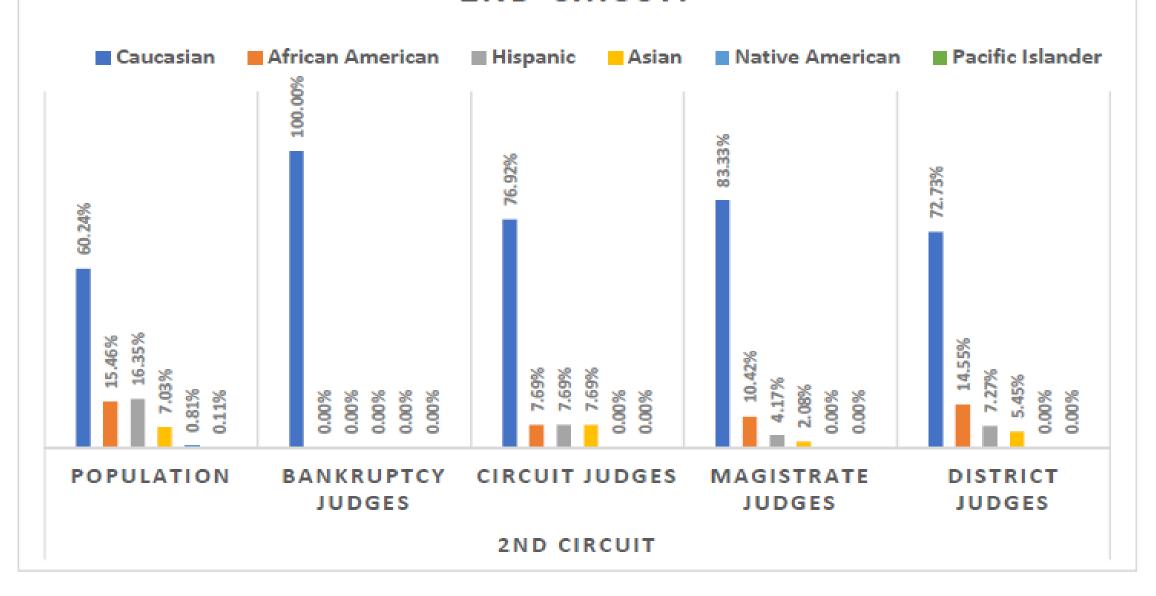
Part 1. Does the Bankruptcy Bench "Look Like" the Population It Serves?

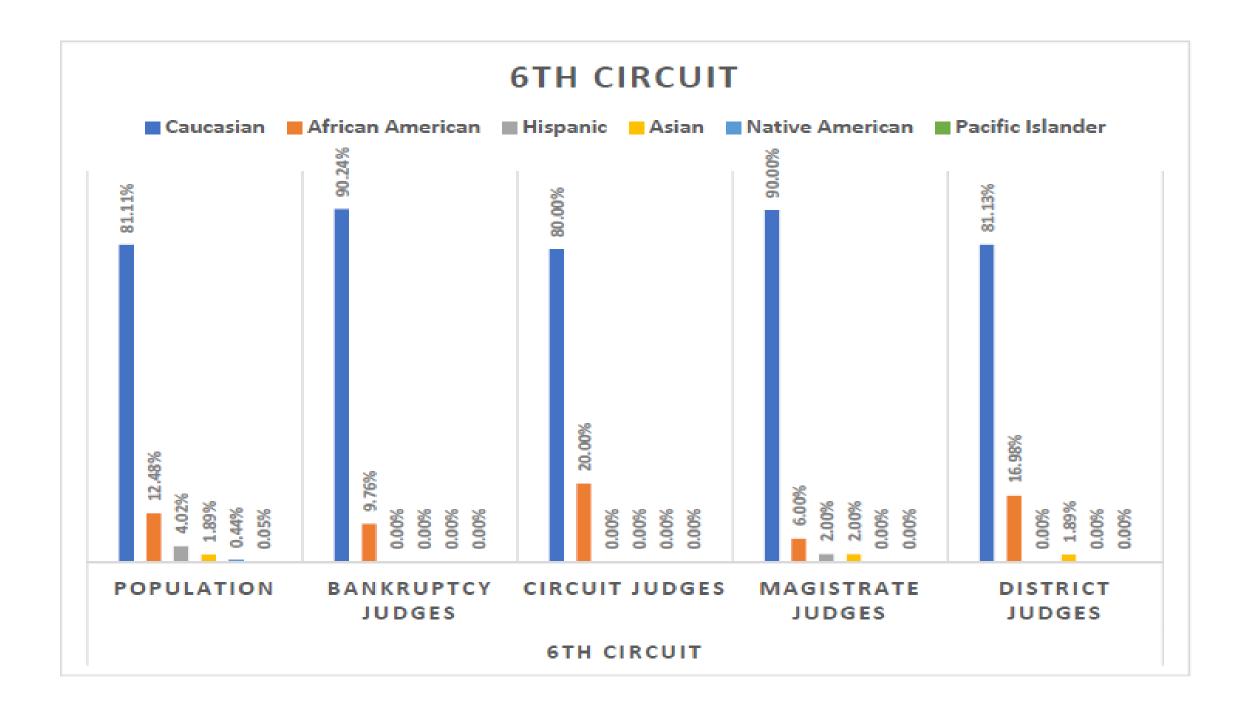
 The NCFTJ/JD did a study: Compare the Racial Profile of Federal Judges to the Racial Profile of the general population

 Use 2013 Census Data and 2013 Data on Judges from the Administrative Office

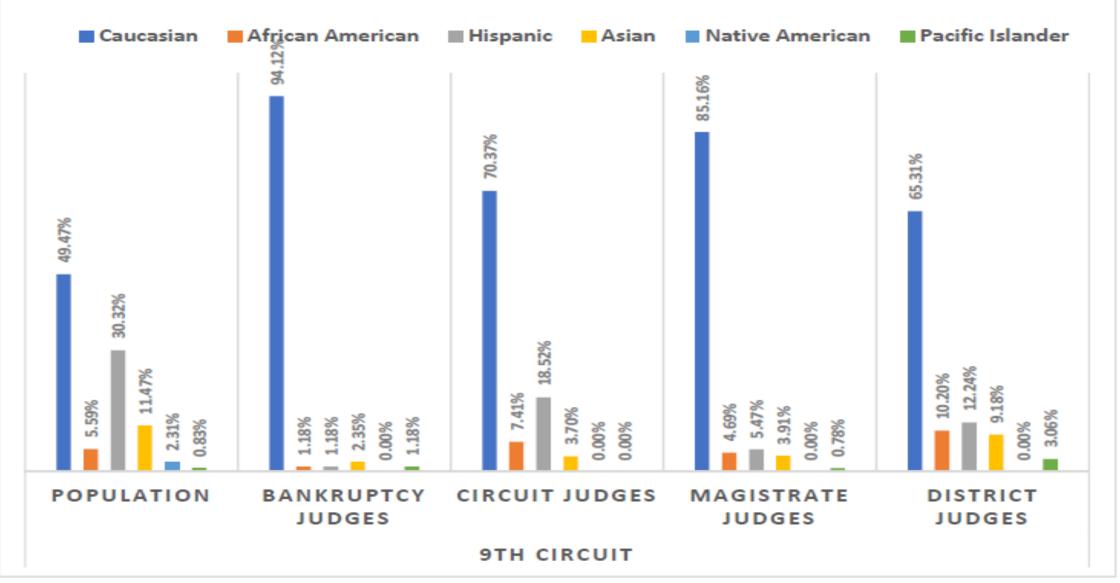
Please note: we have made progress since 2013!

2ND CIRCUIT

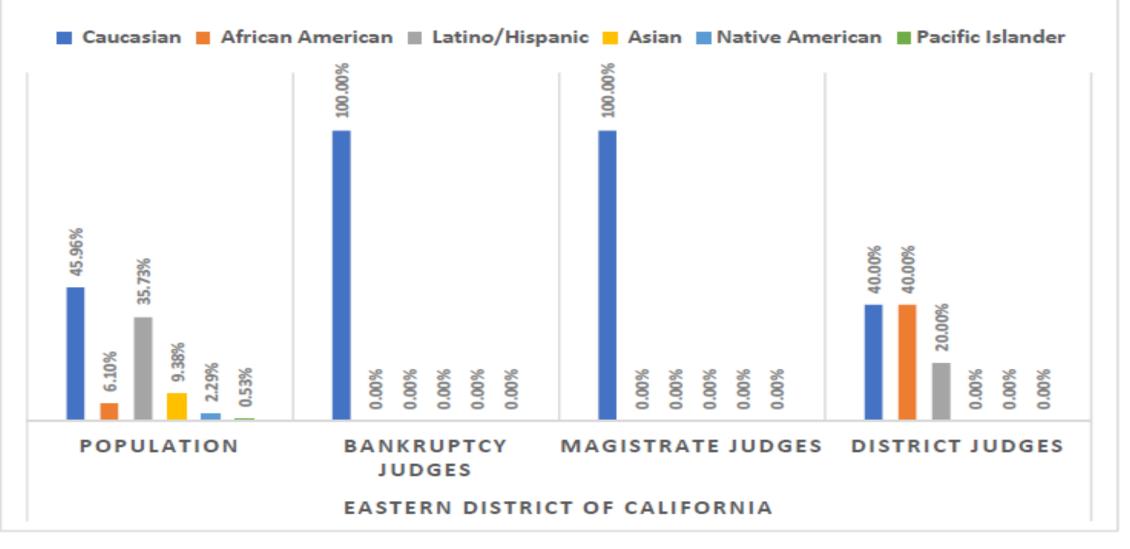




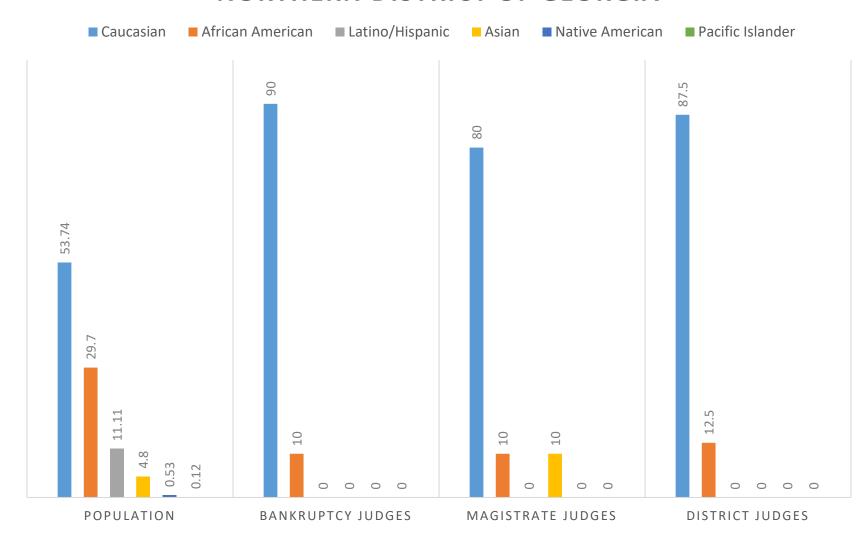




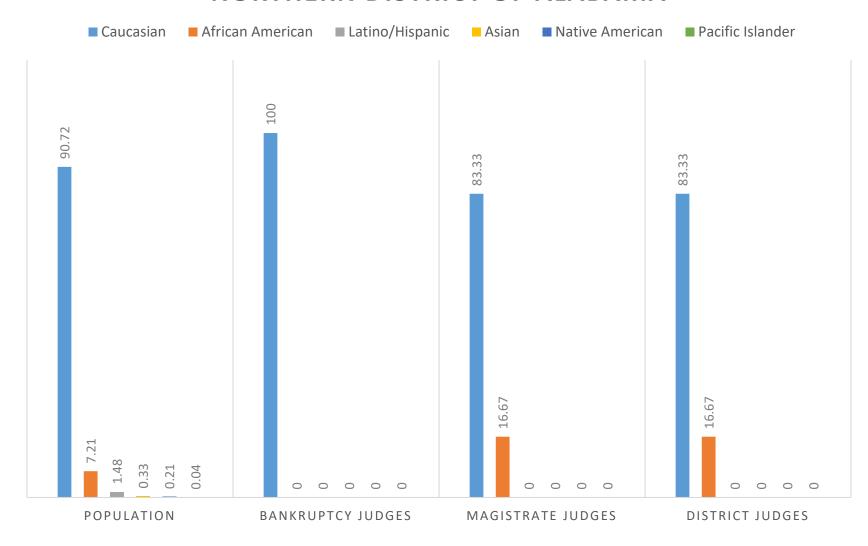
(SACRAMENTO AREA)



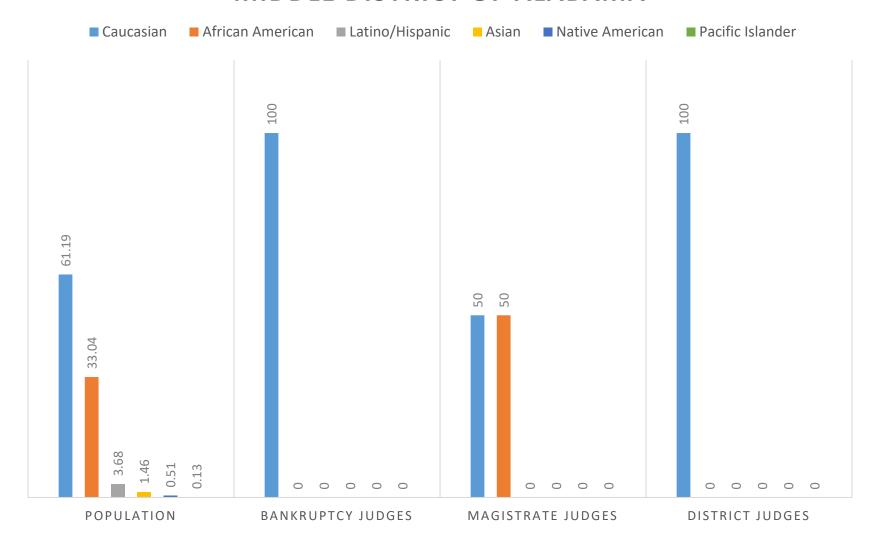
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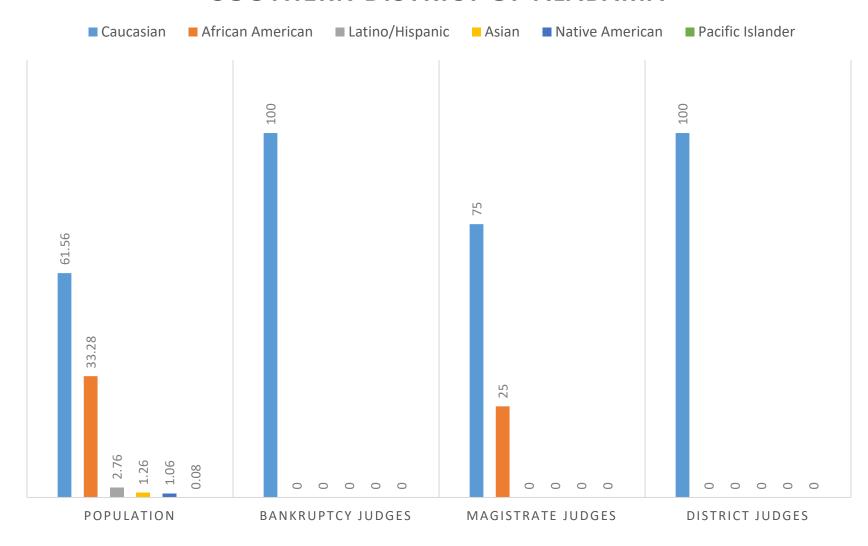
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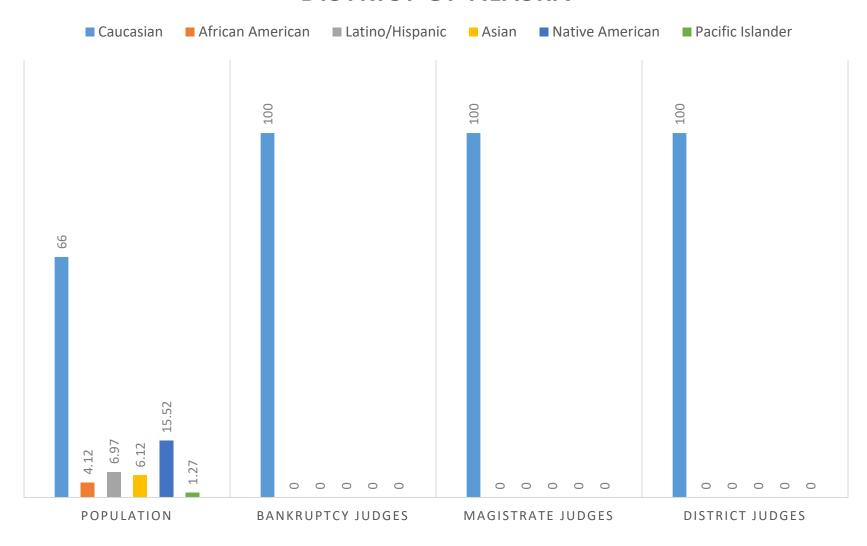
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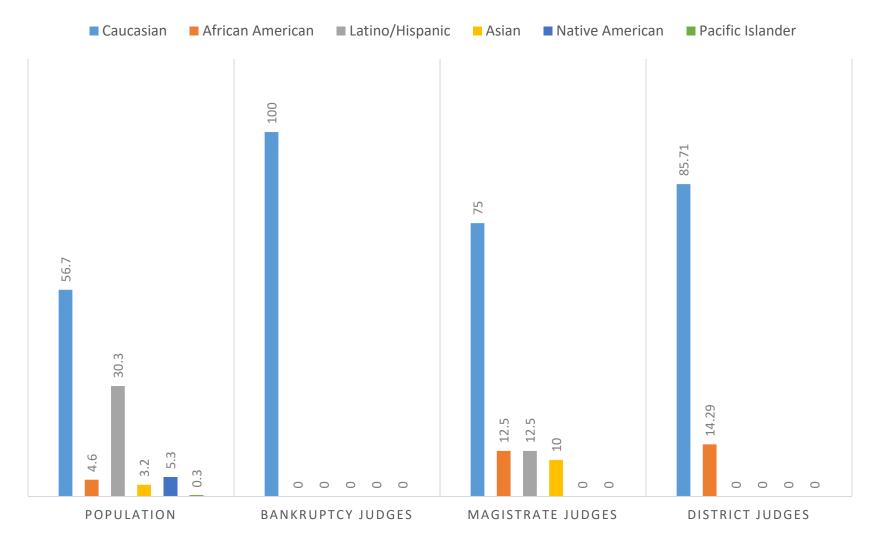
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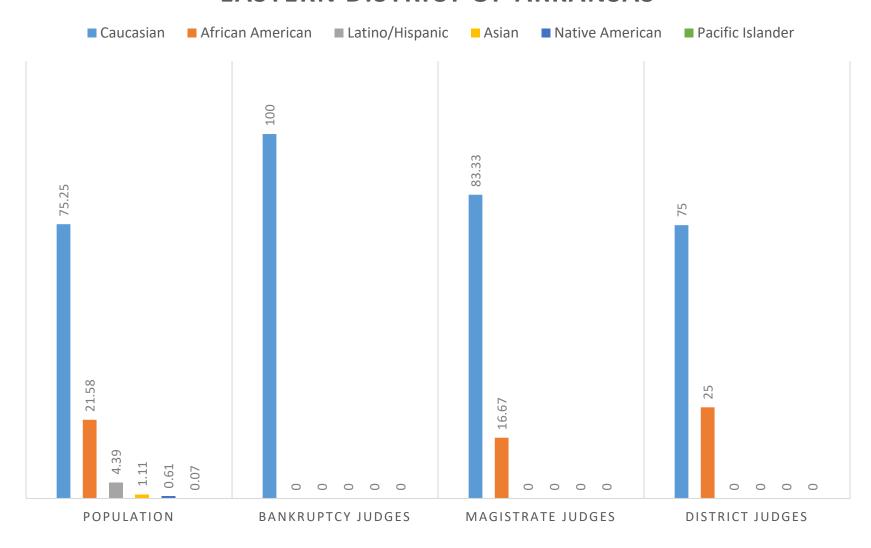
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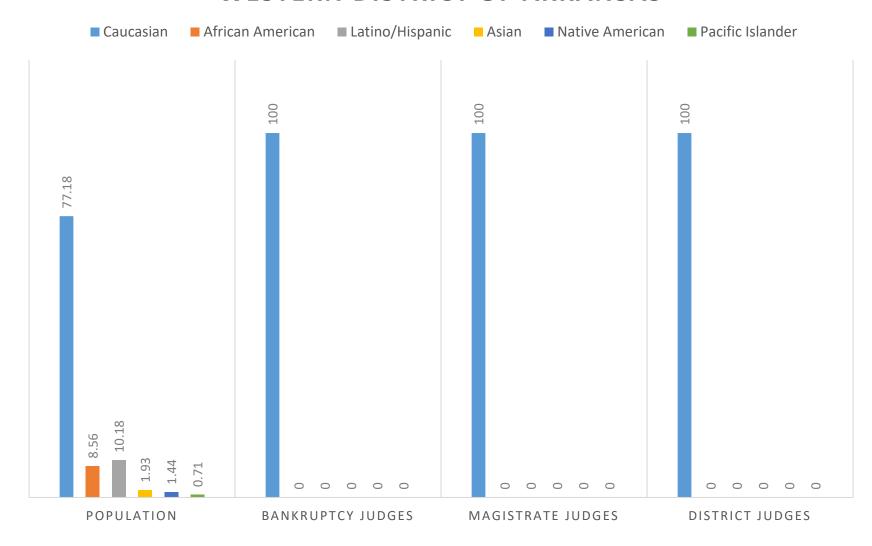
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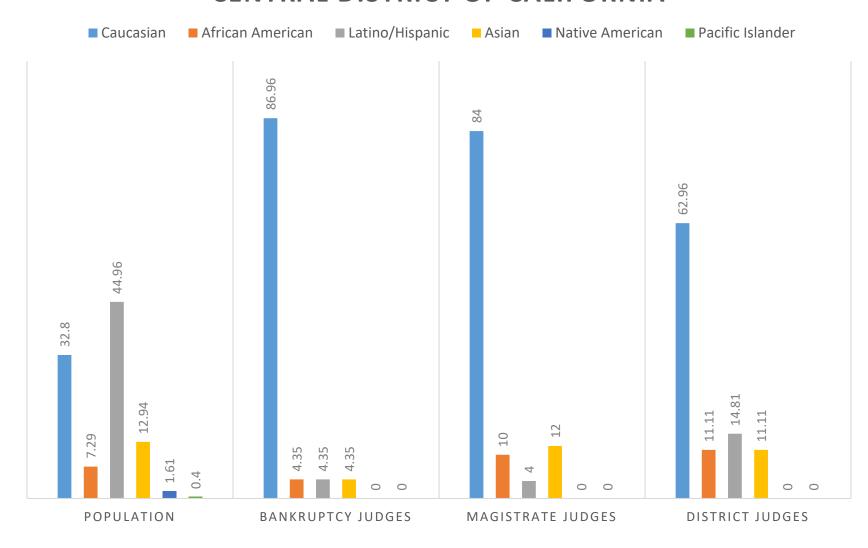
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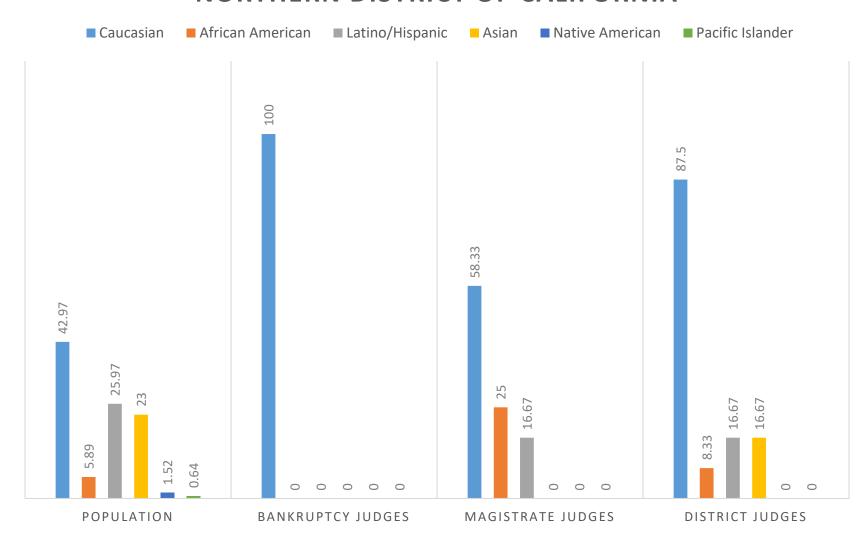
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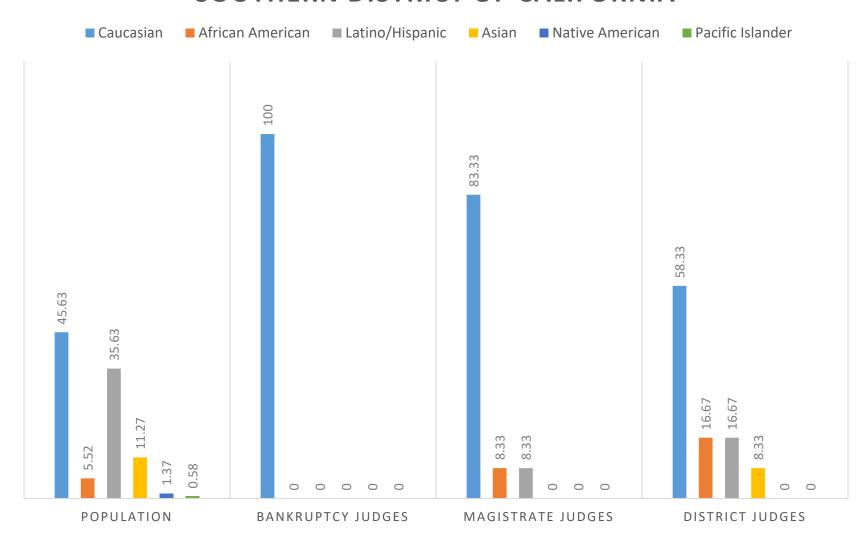
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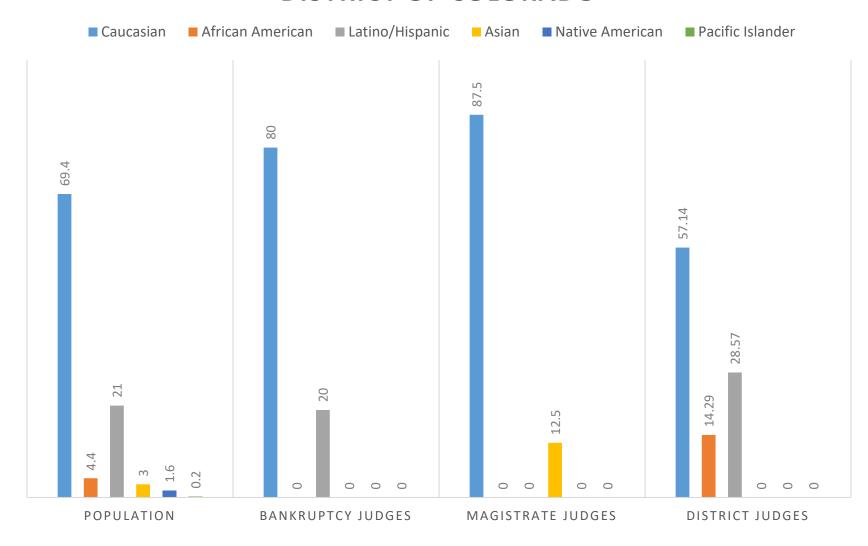
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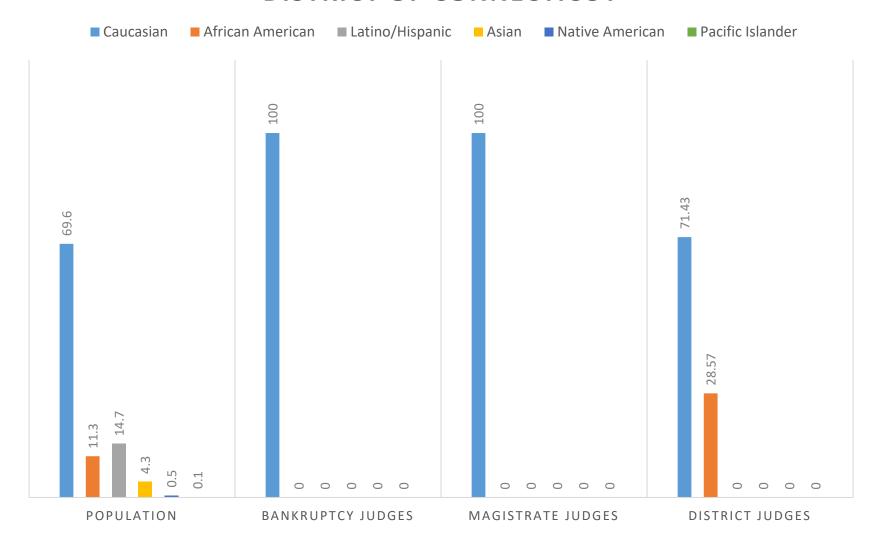
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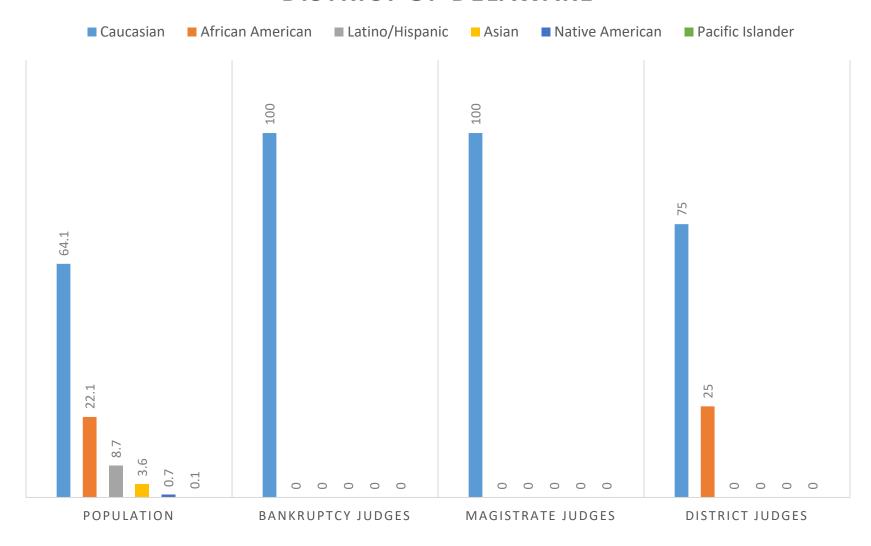
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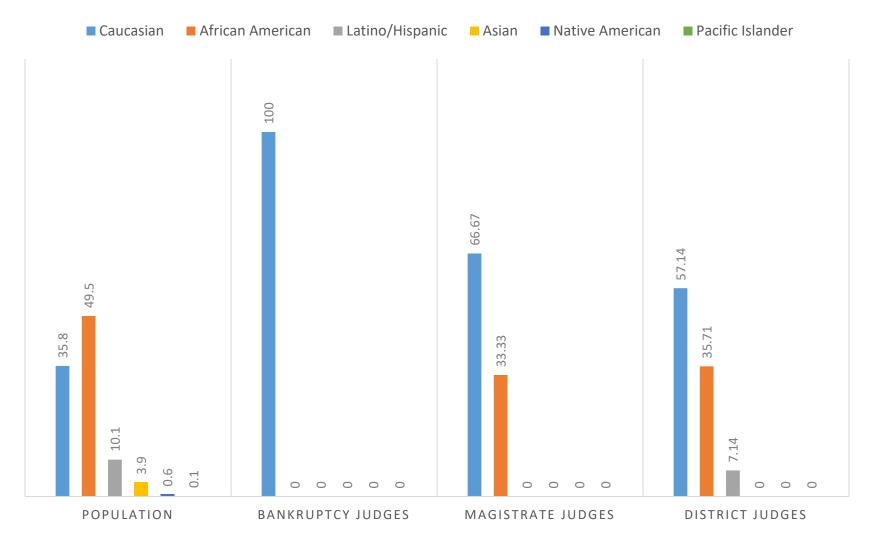
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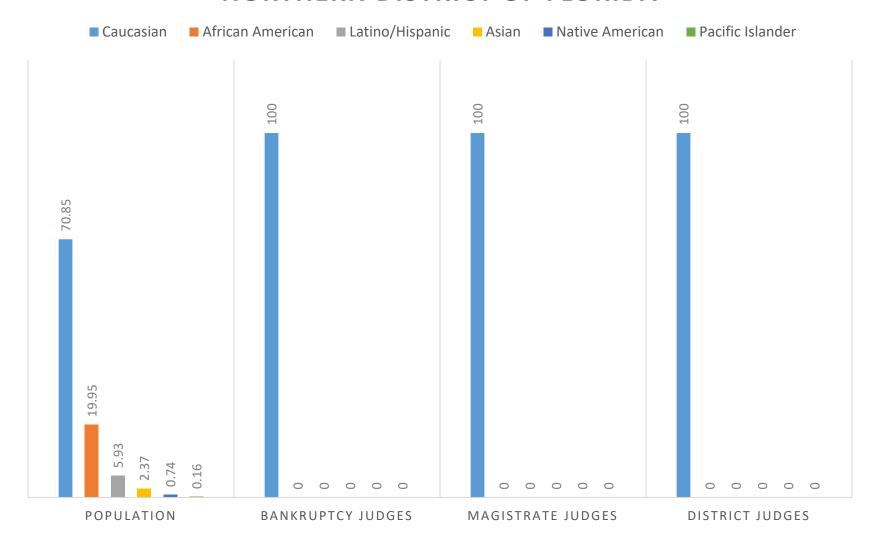
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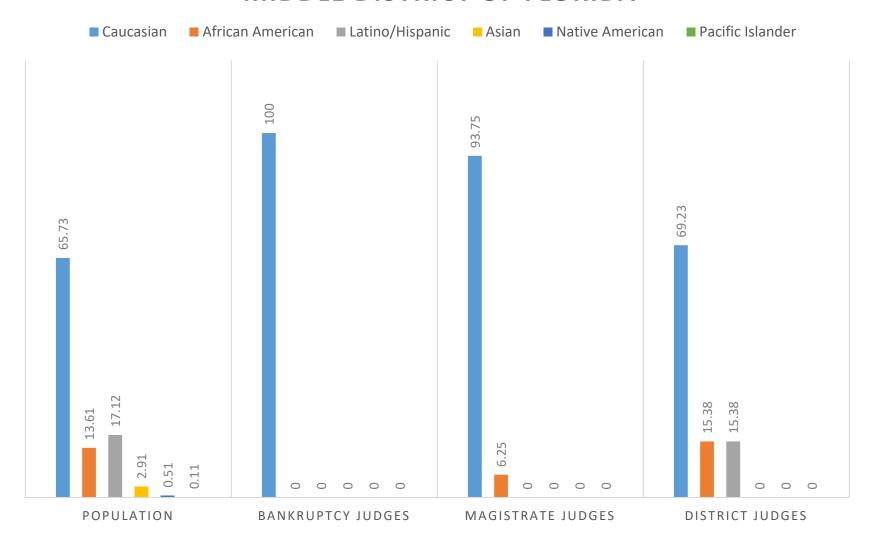
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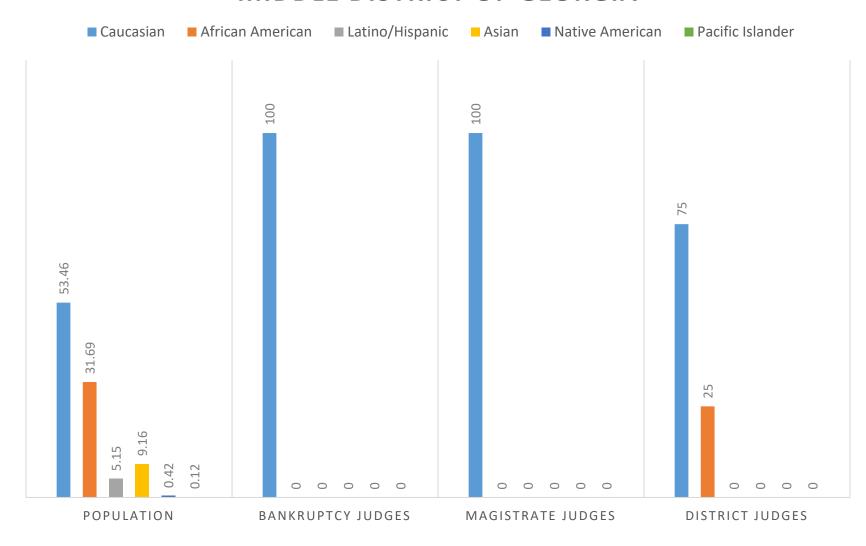
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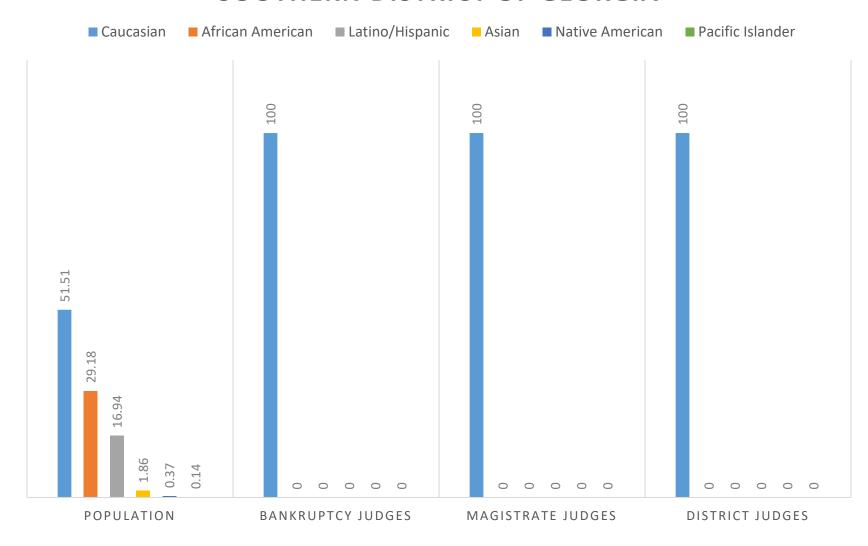
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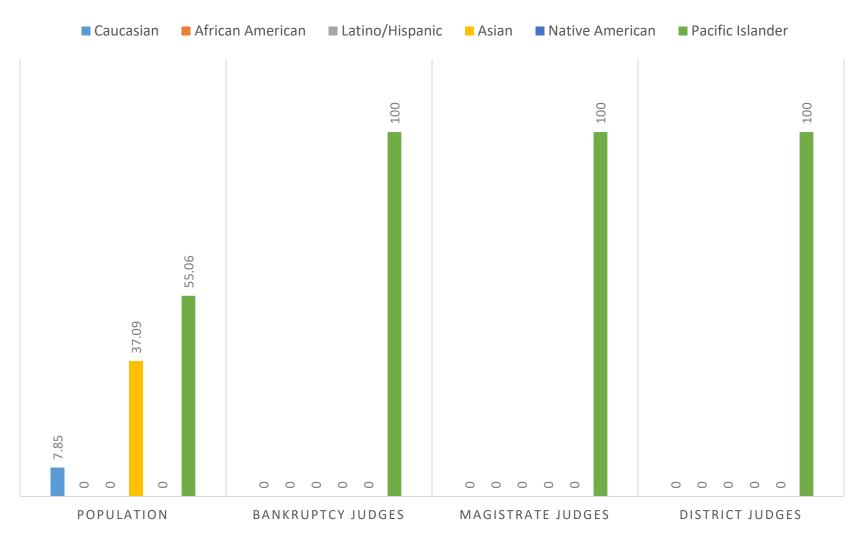
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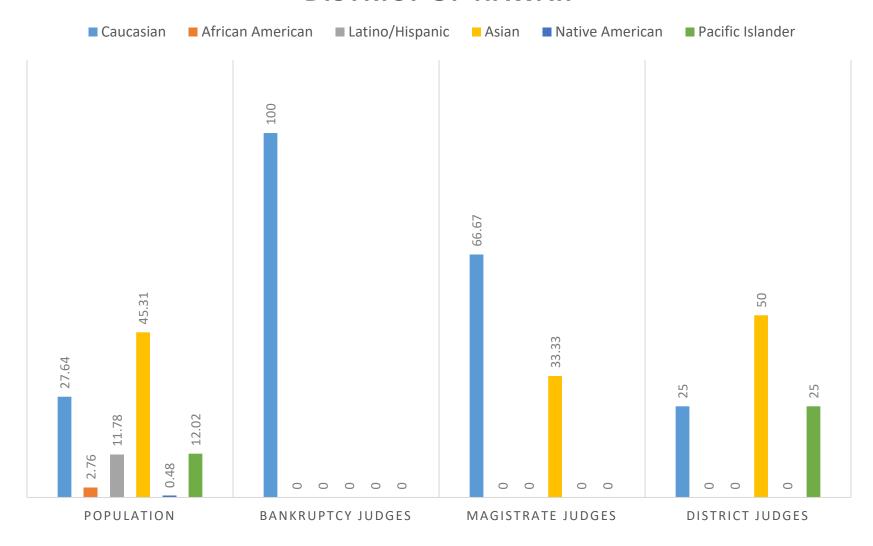
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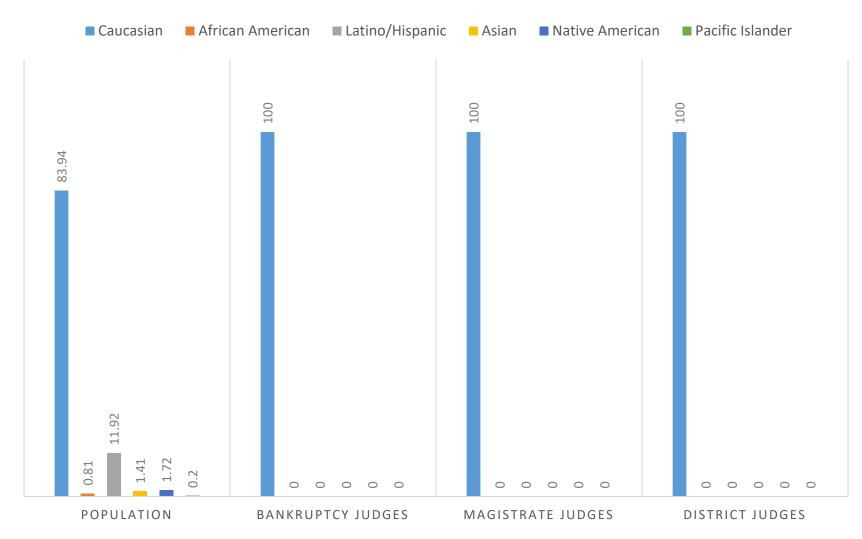
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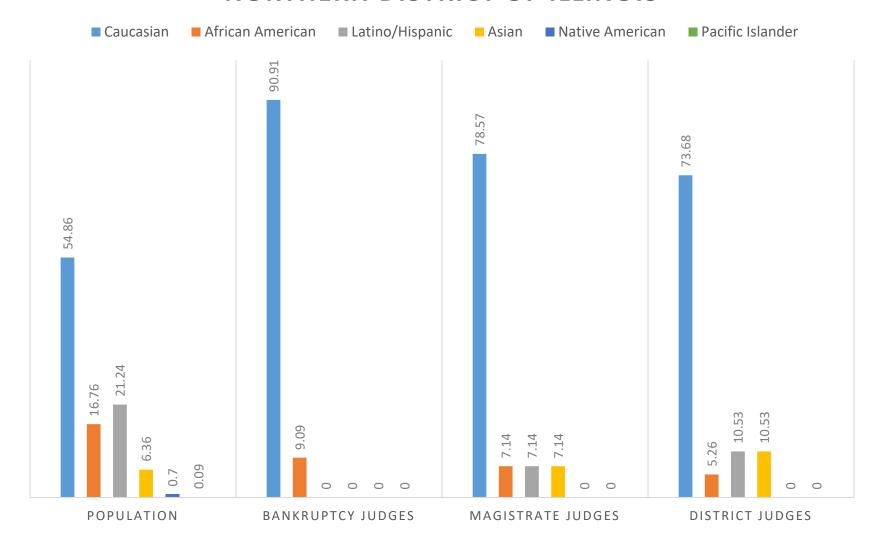
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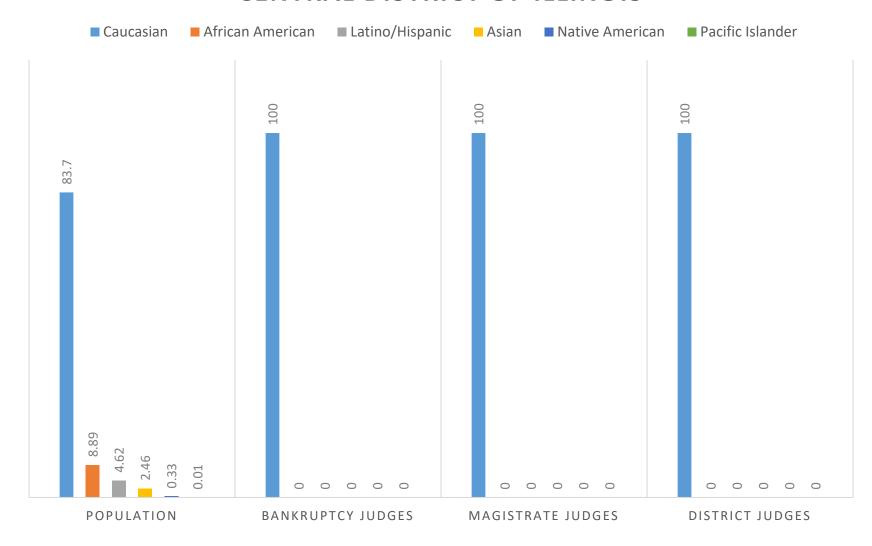
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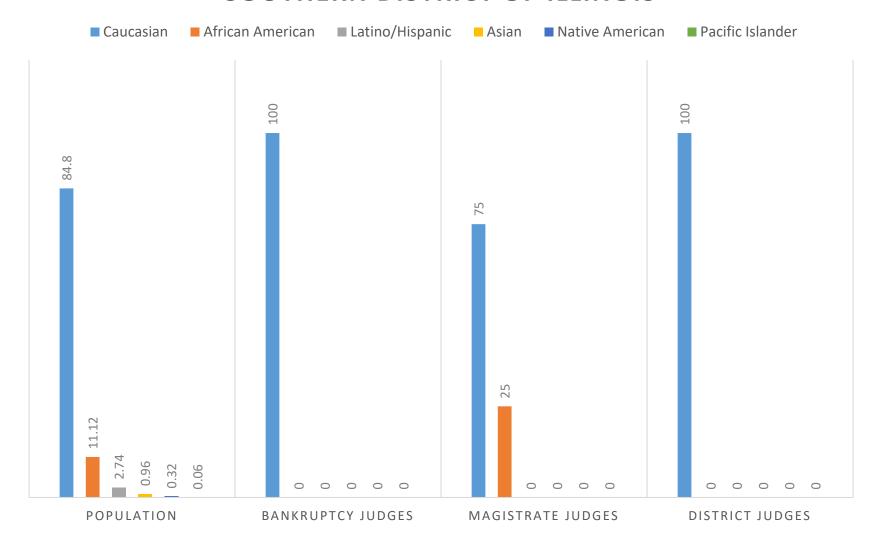
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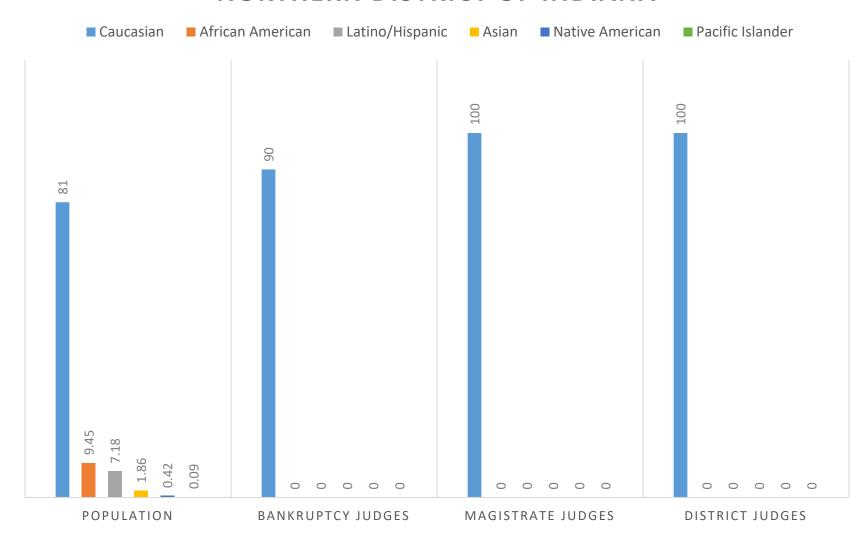
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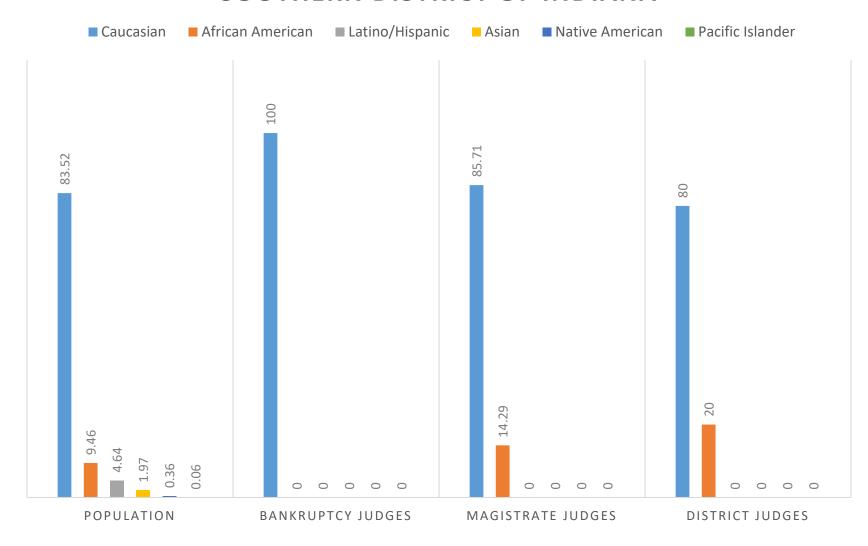
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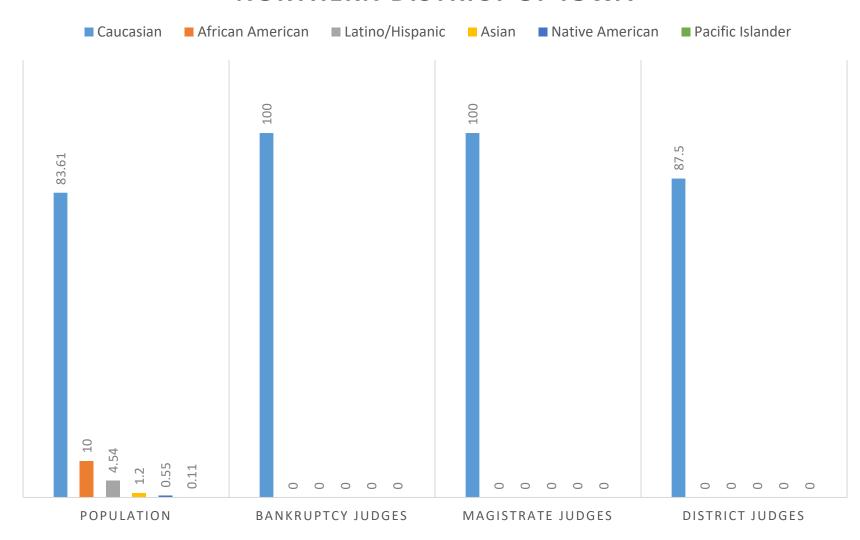
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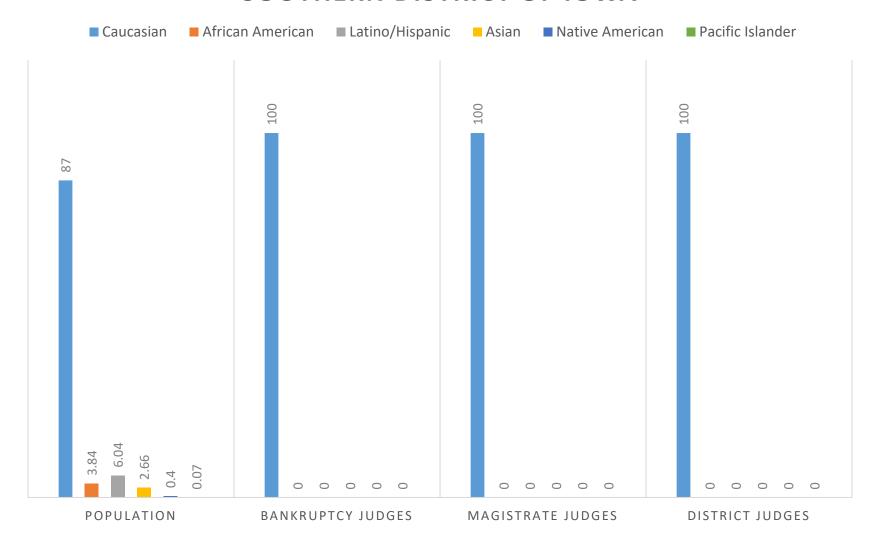
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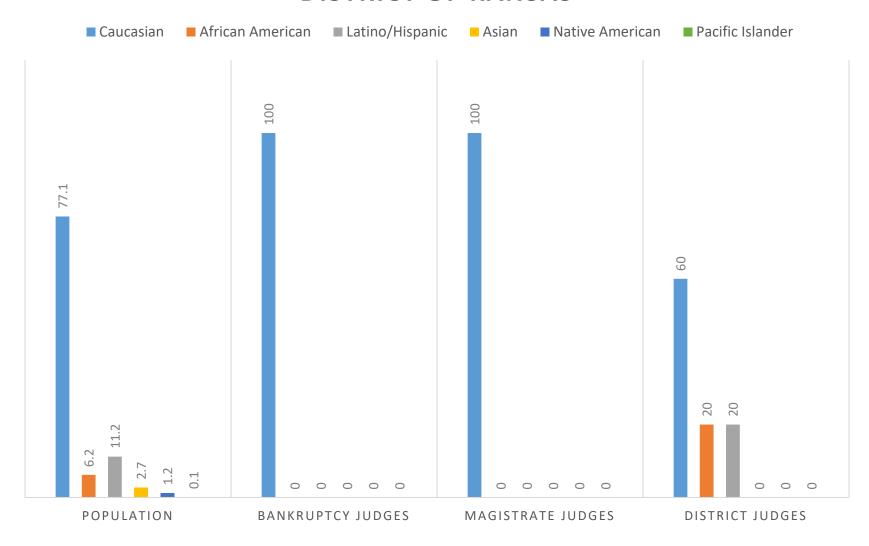
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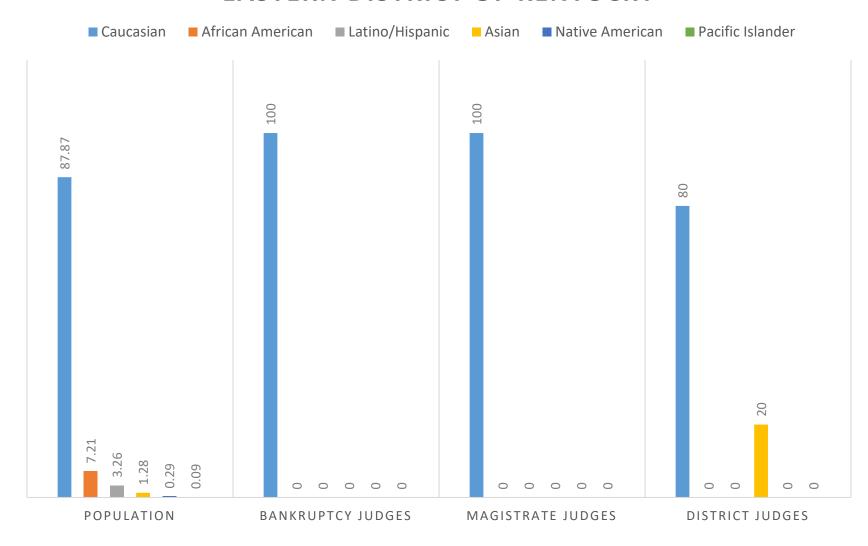
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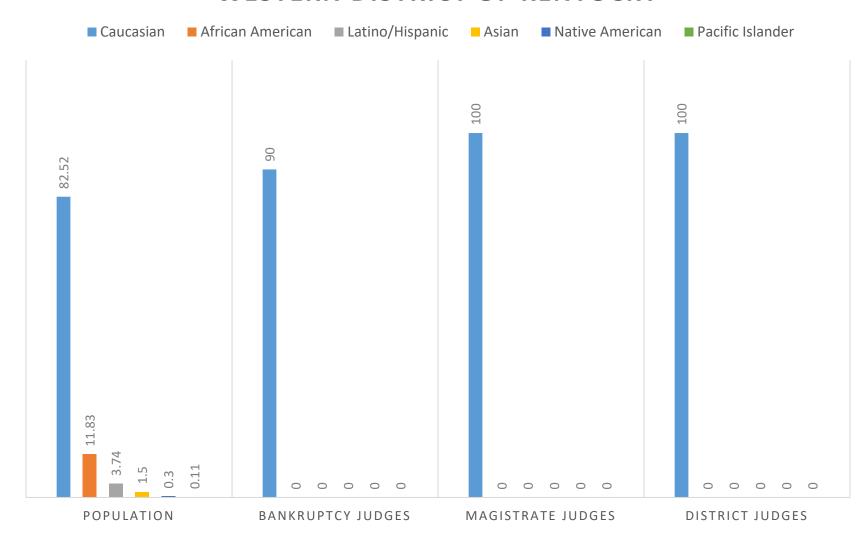
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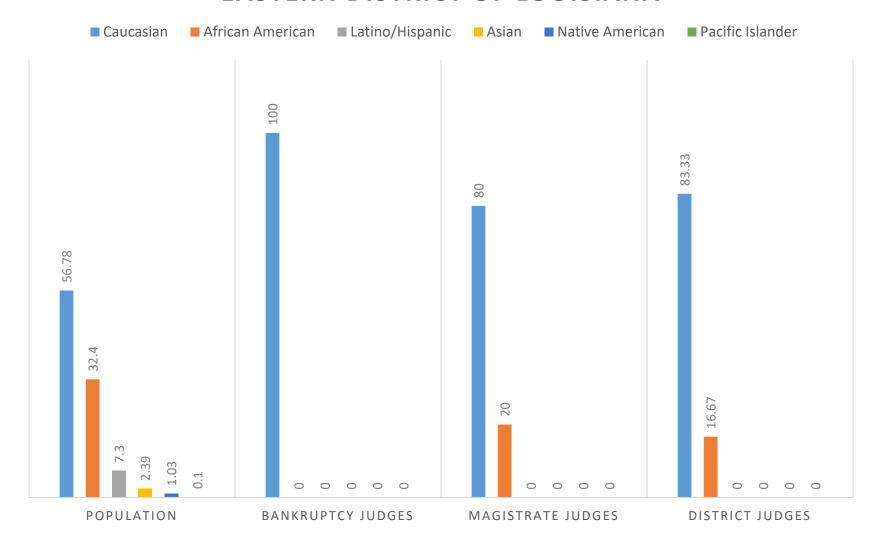
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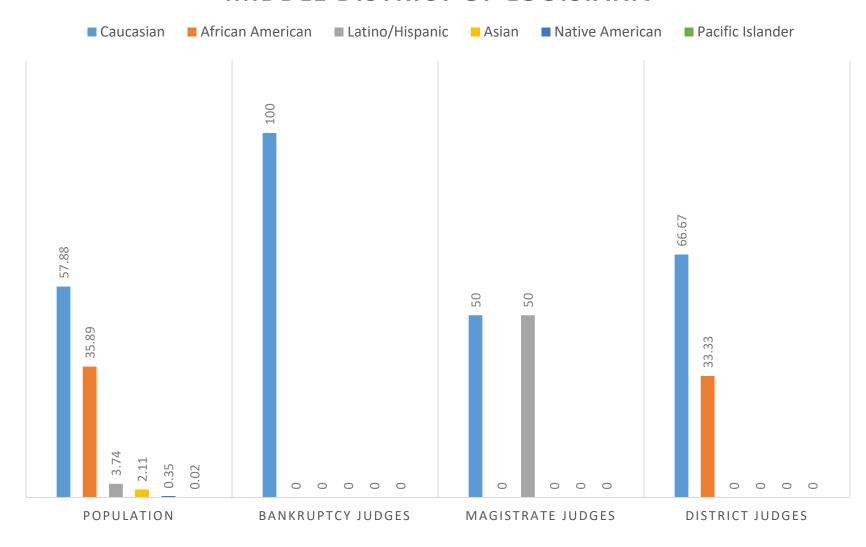
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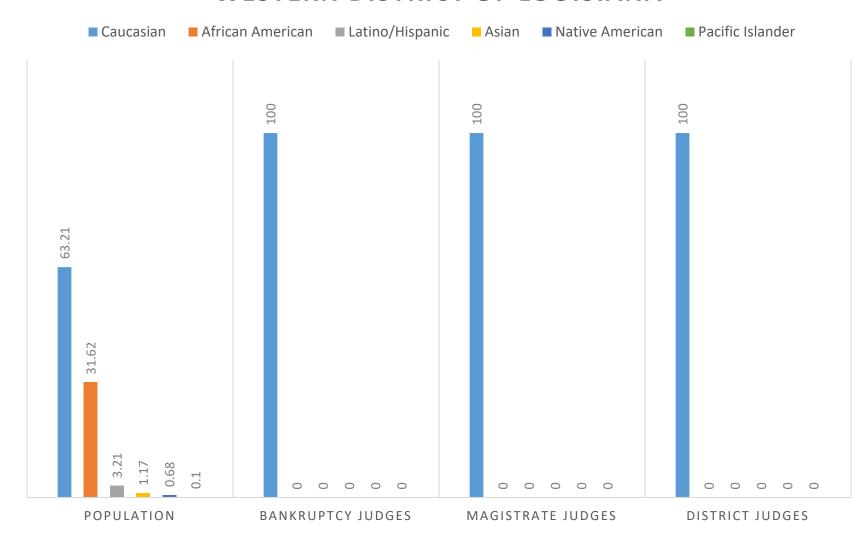
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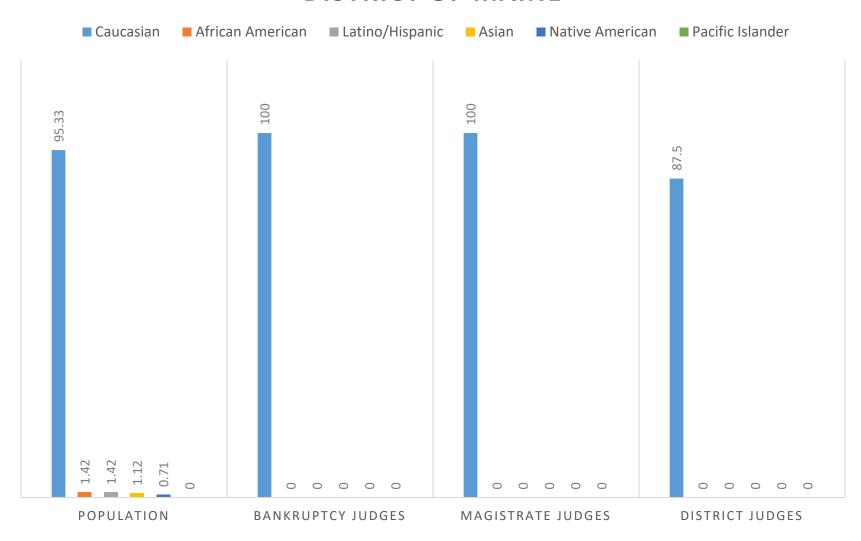
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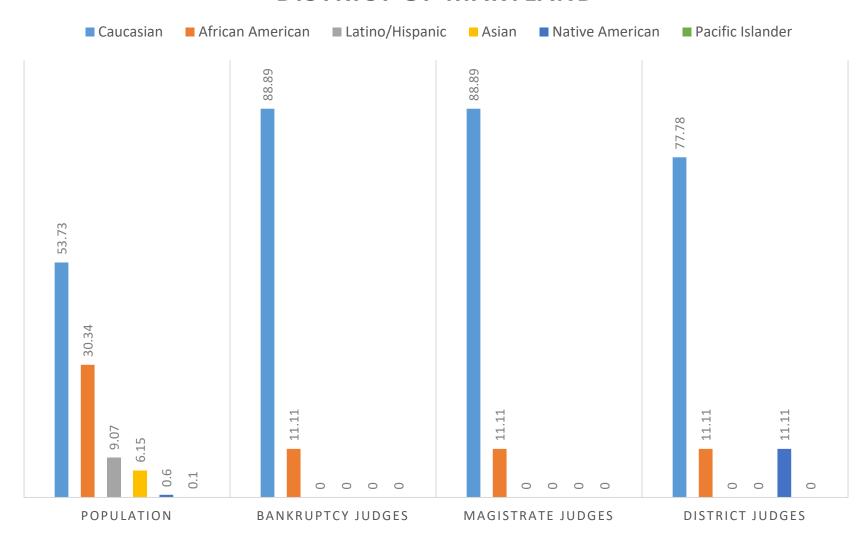
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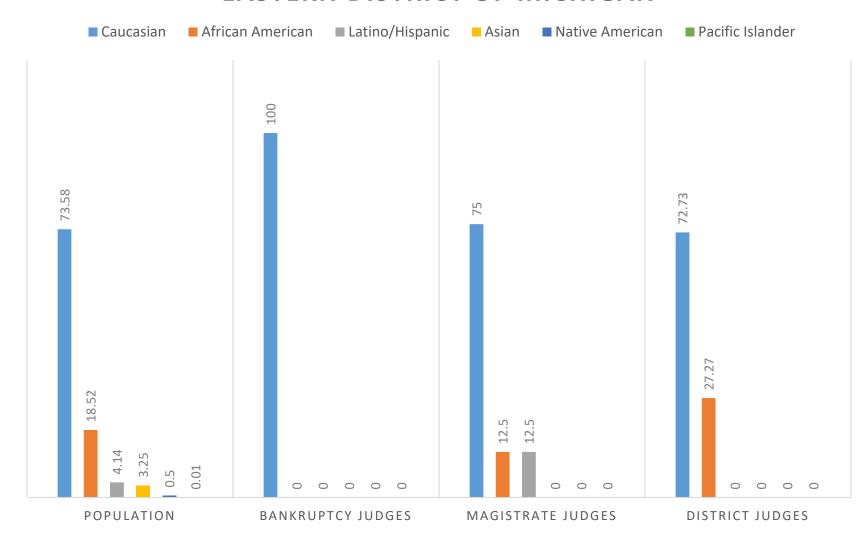
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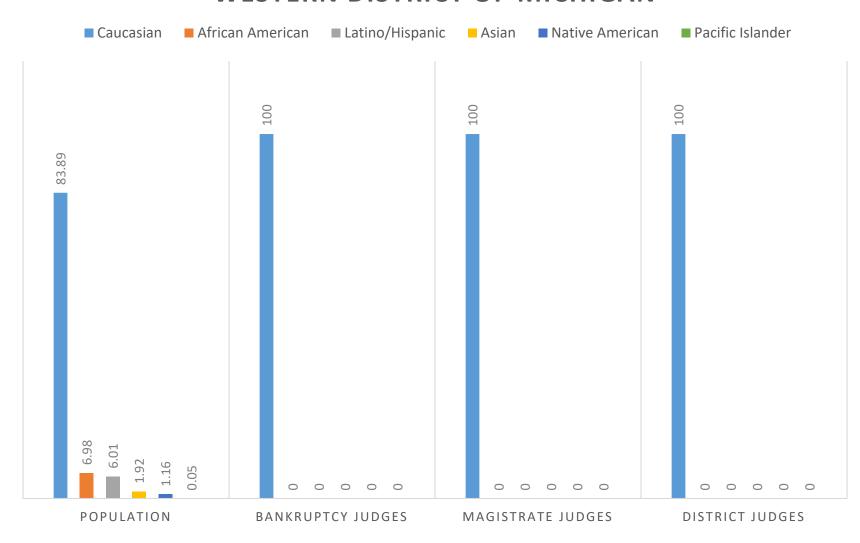
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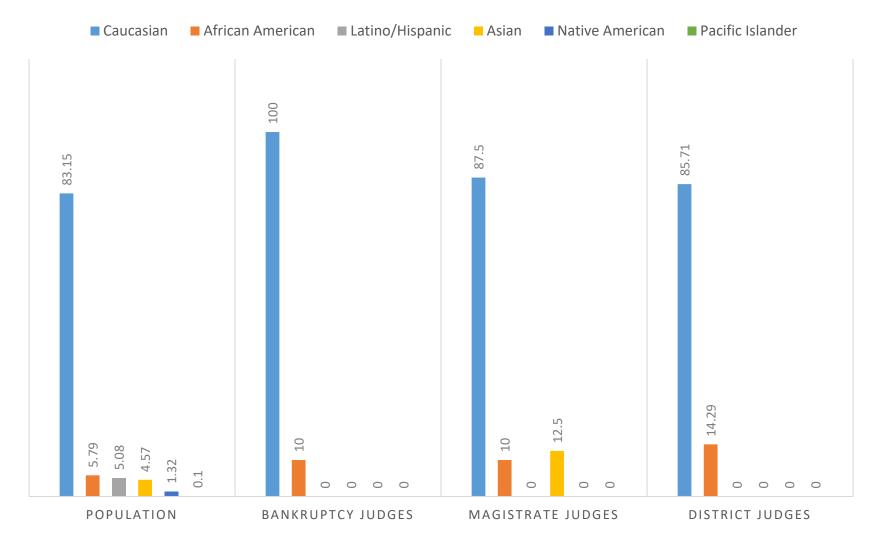
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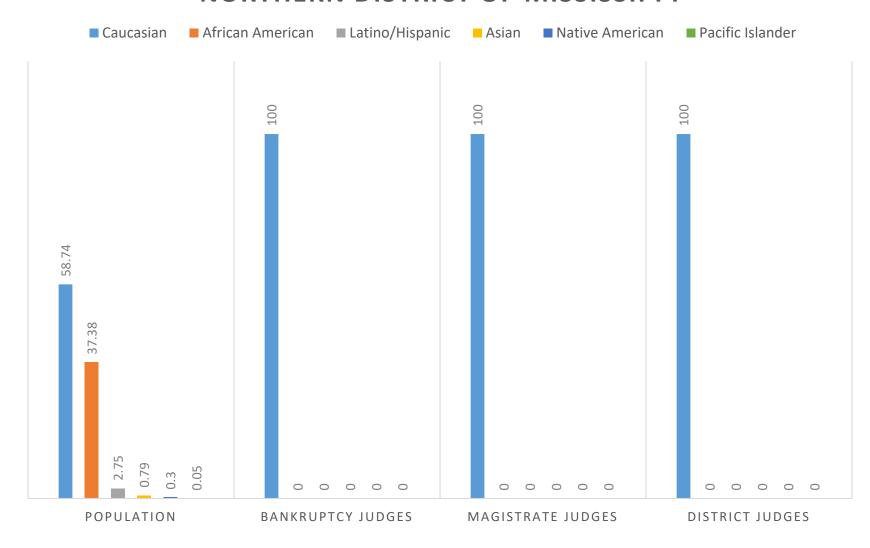
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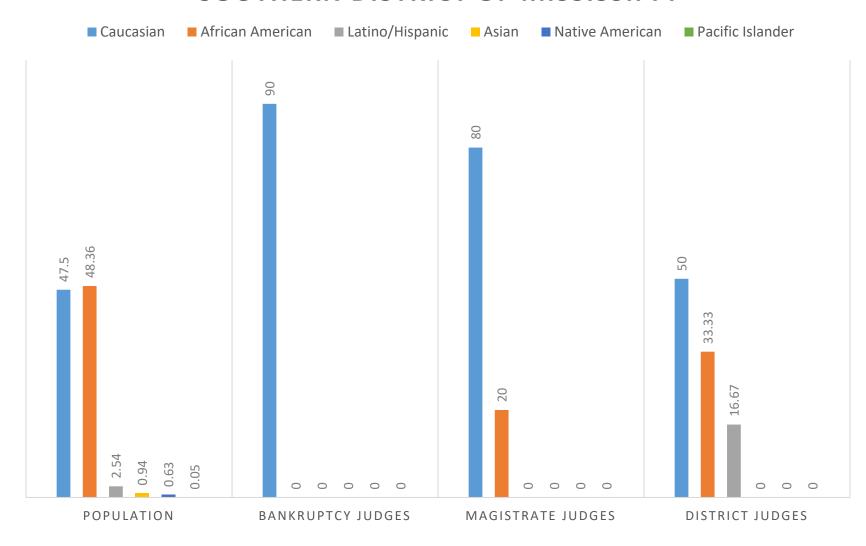
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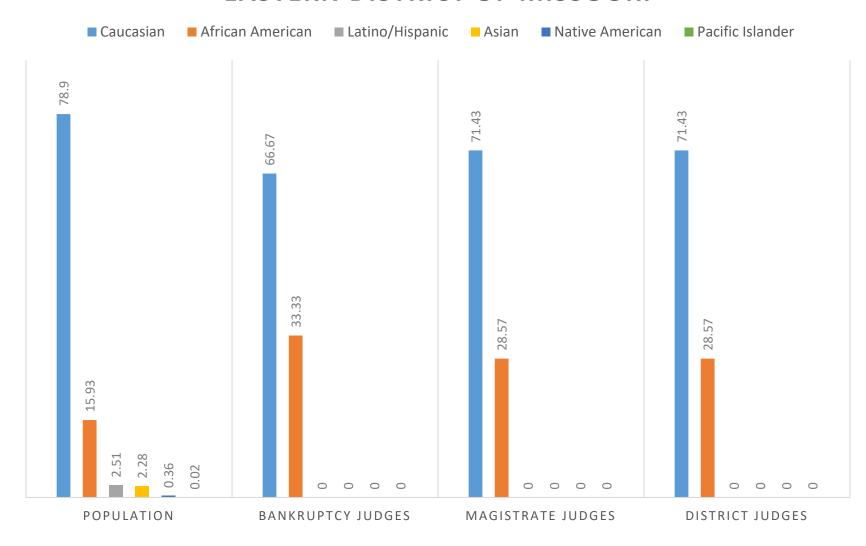
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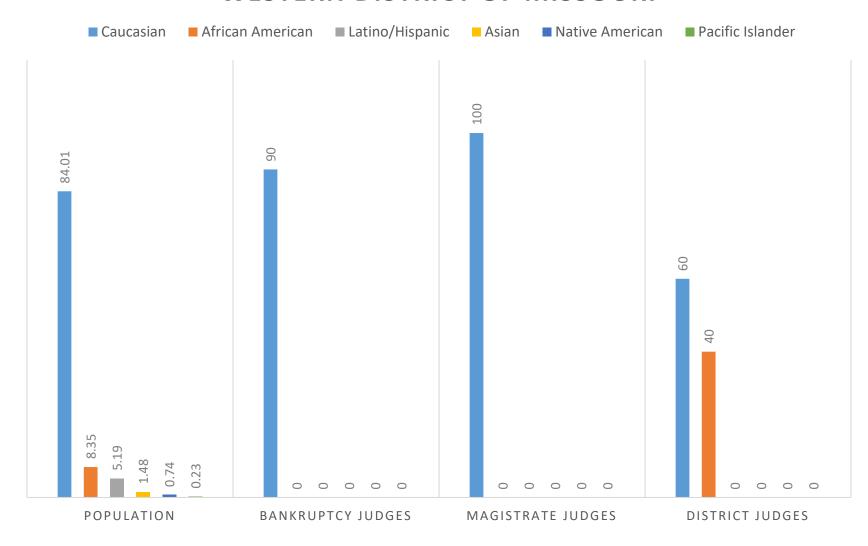
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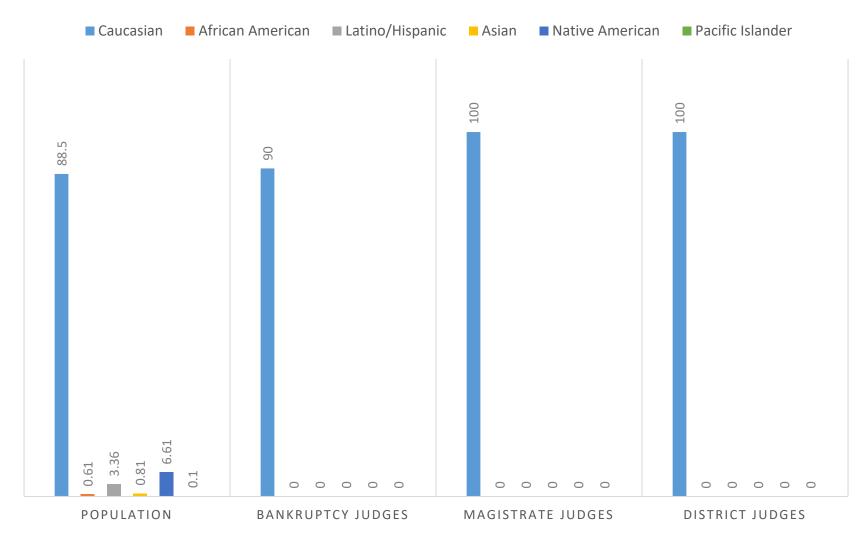
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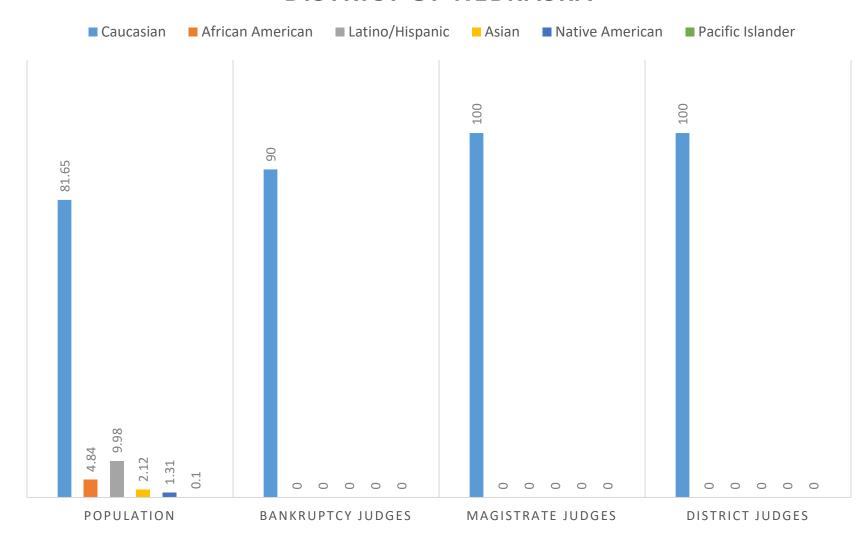
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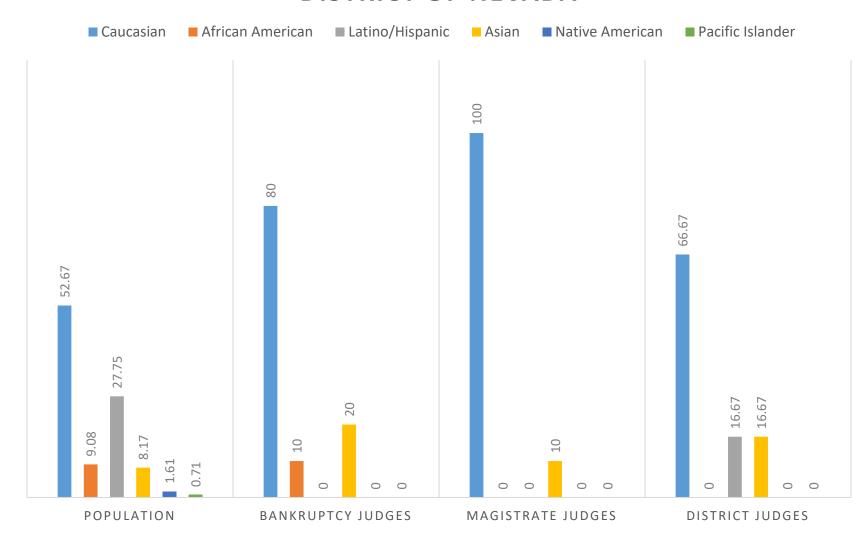
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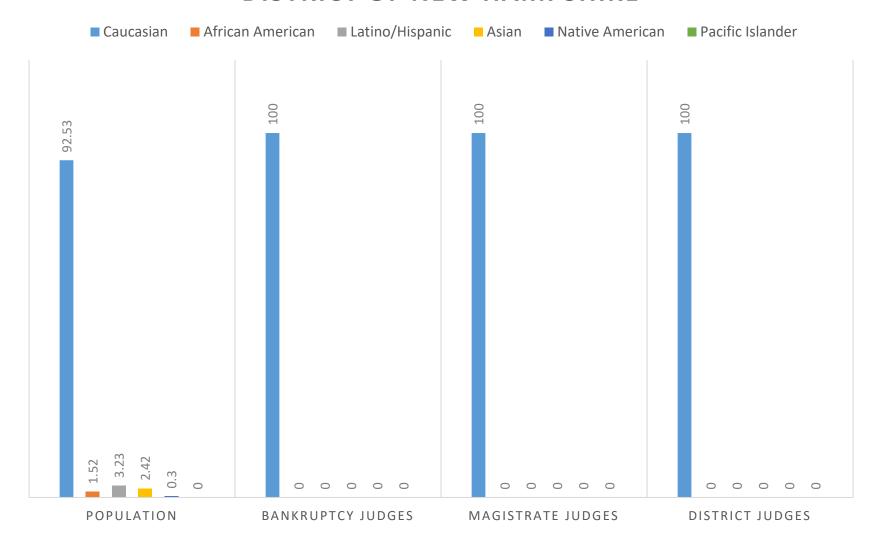
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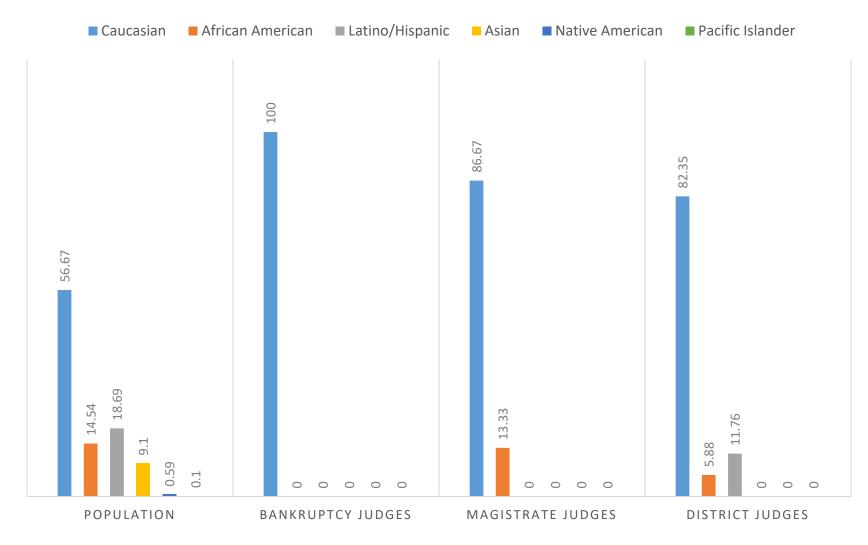
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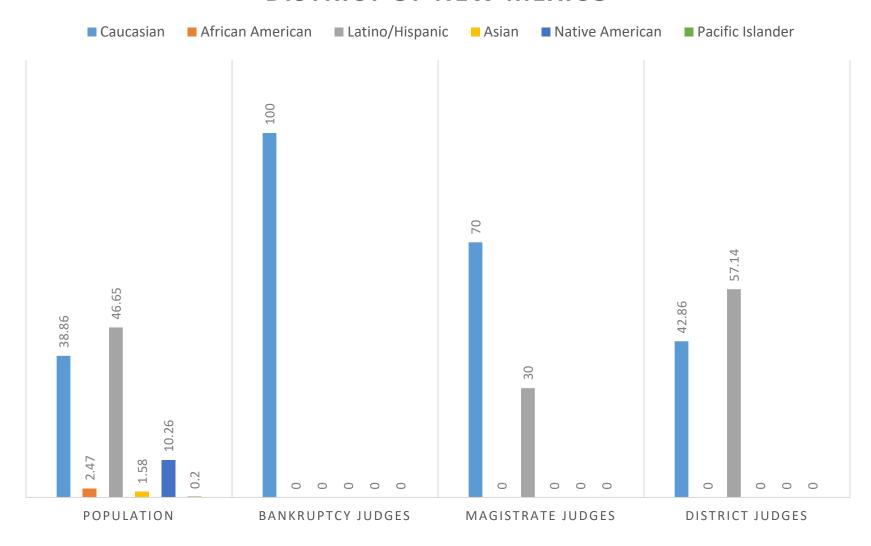
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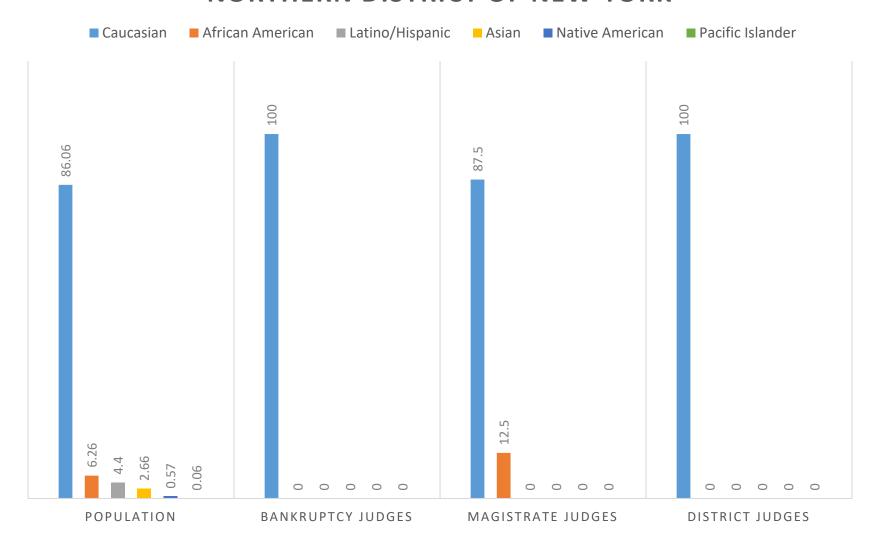
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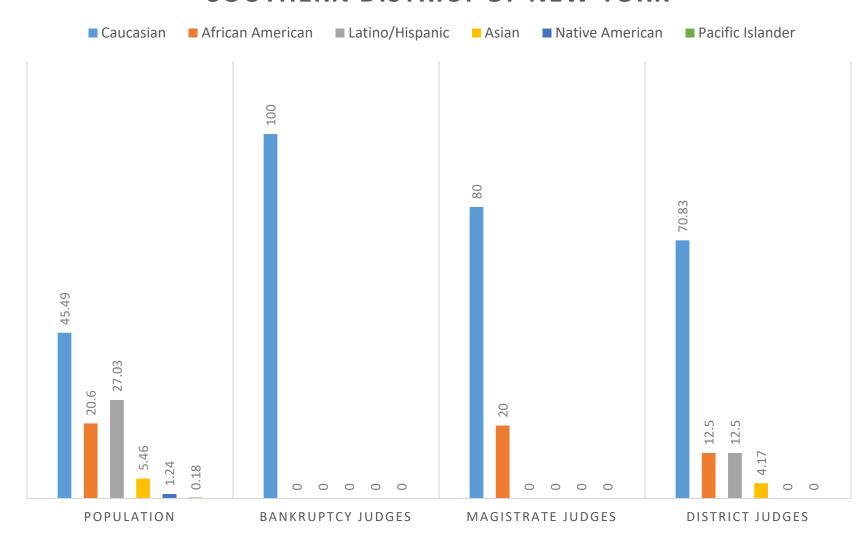
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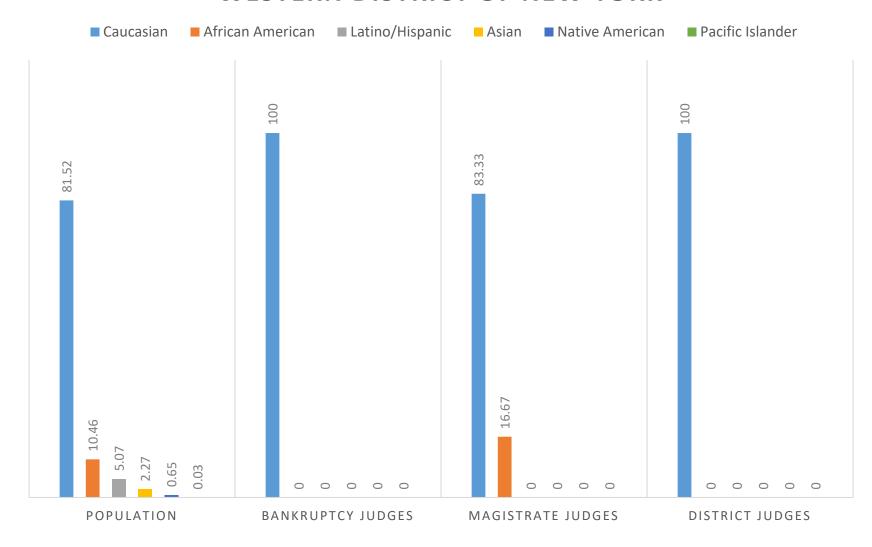
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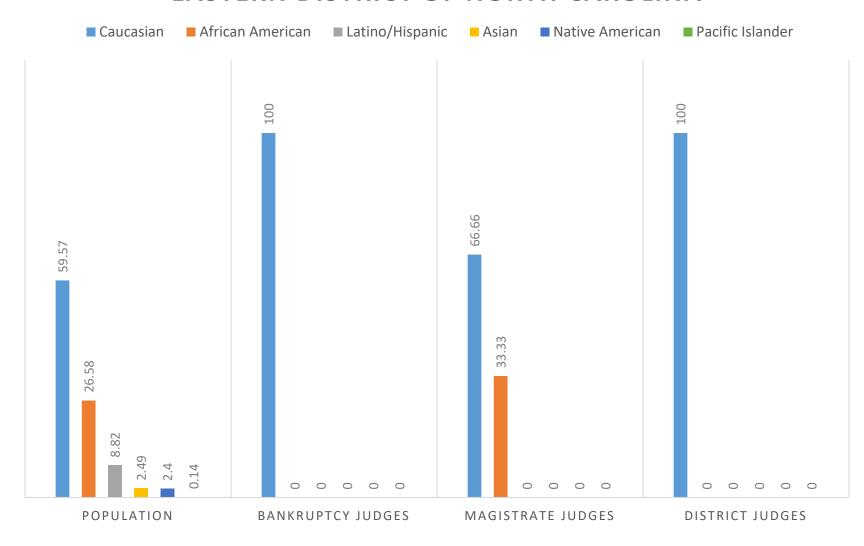
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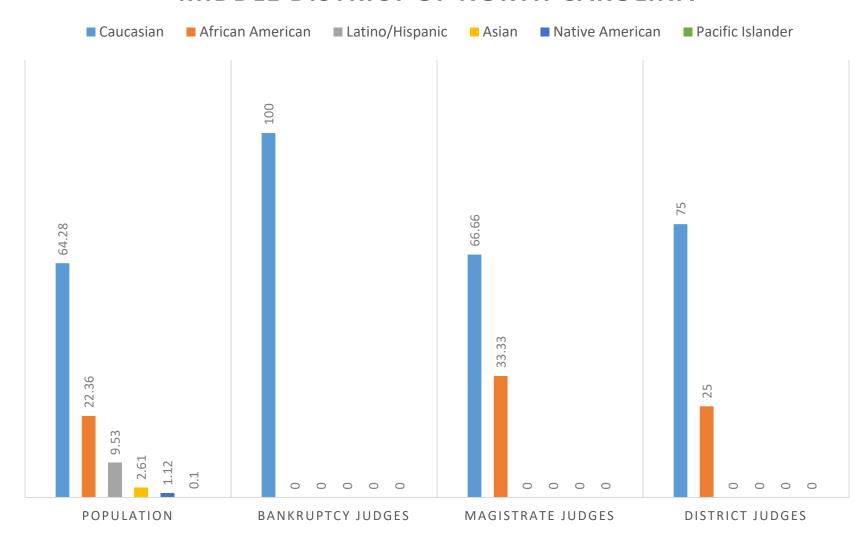
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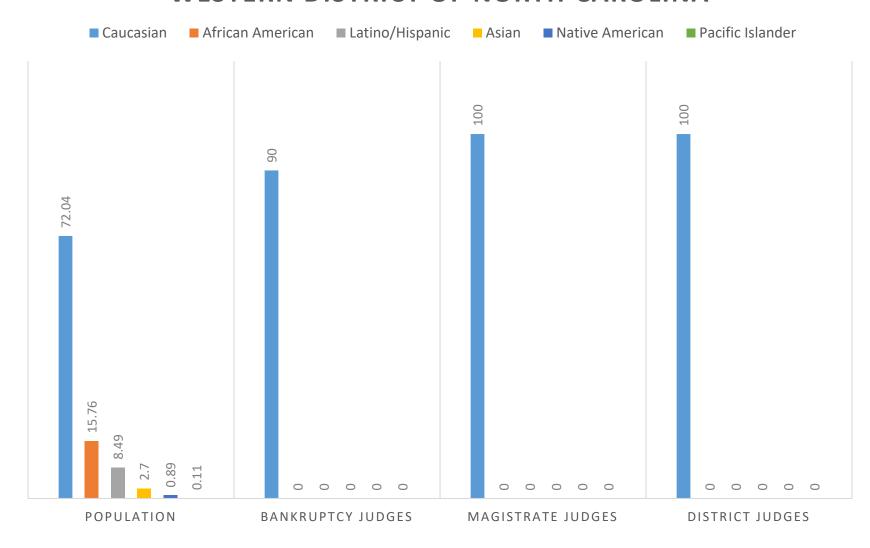
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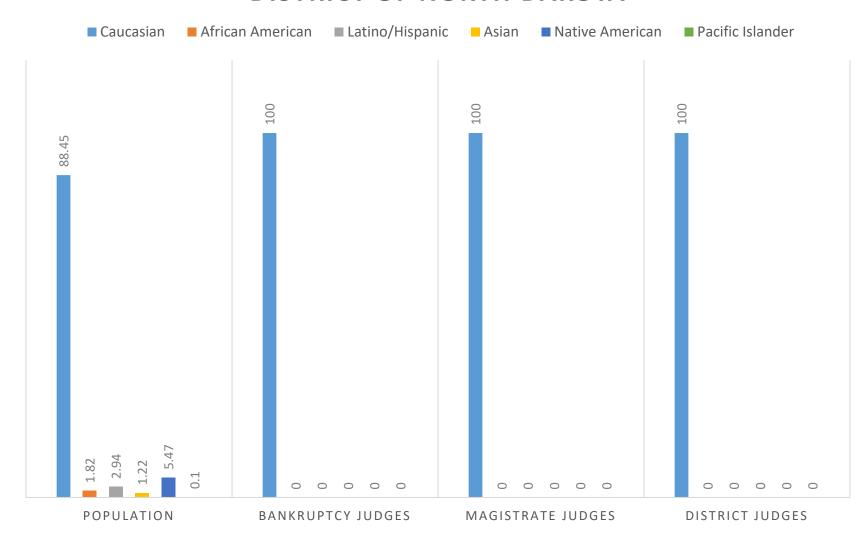
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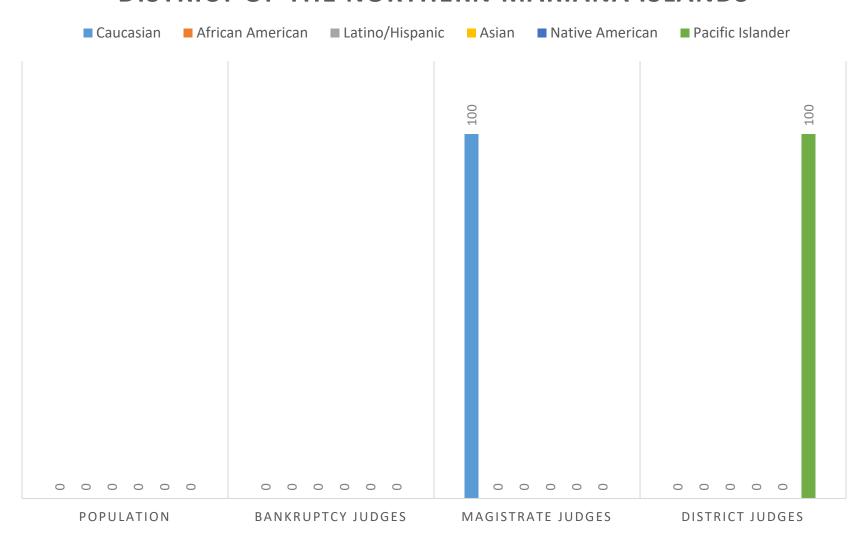
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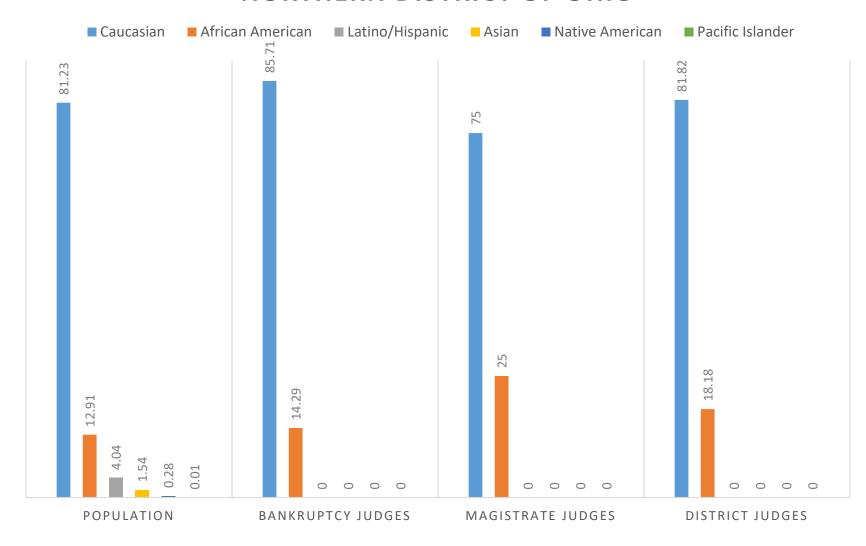
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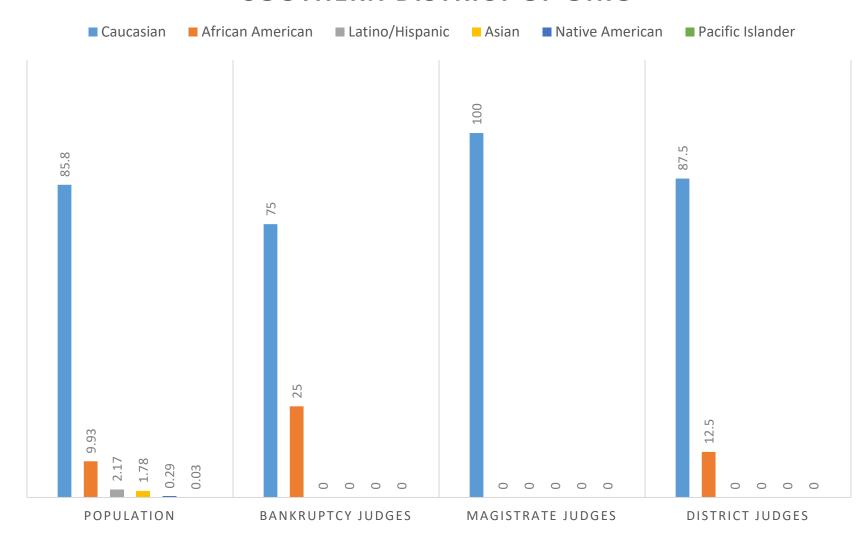
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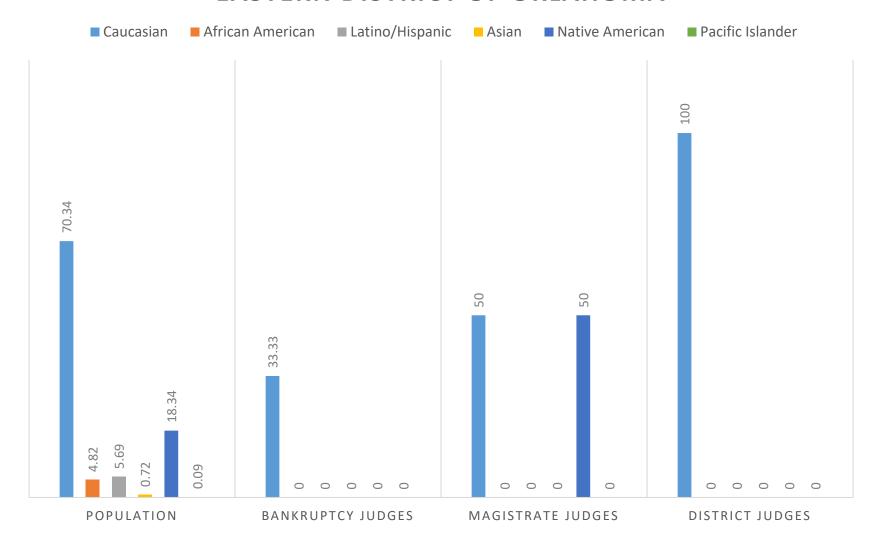
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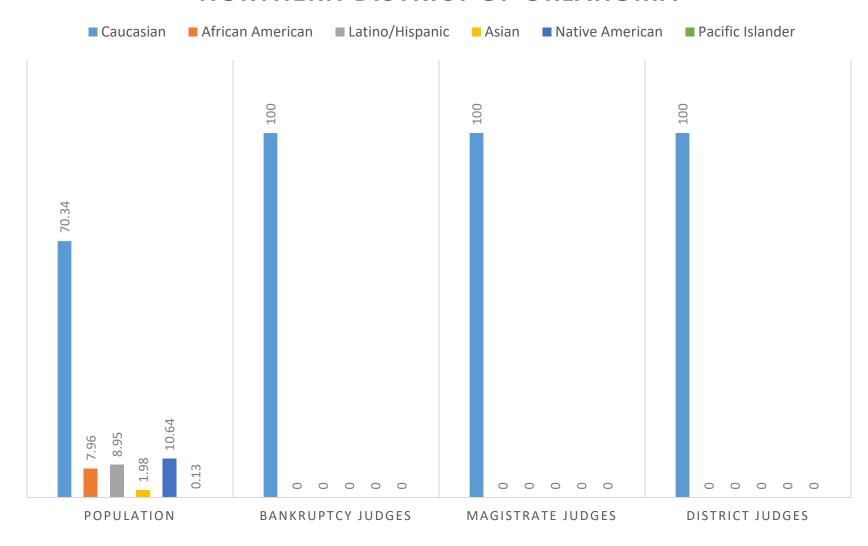
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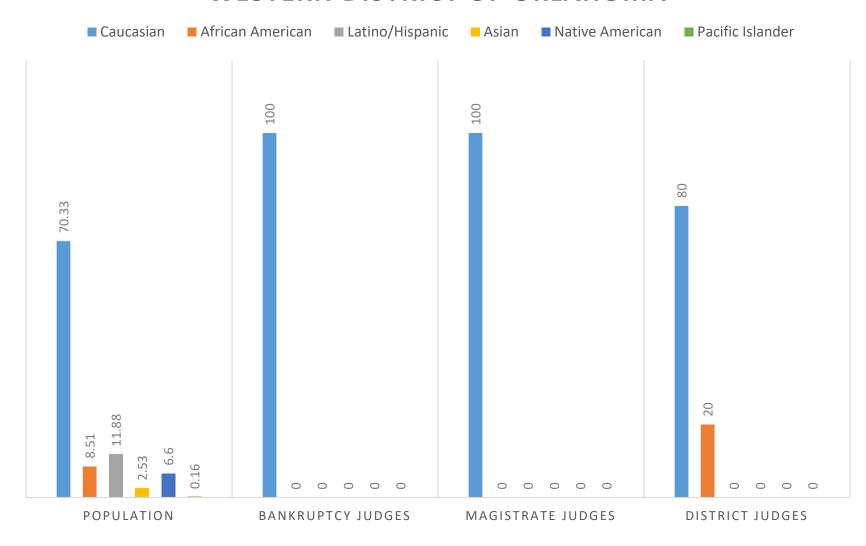
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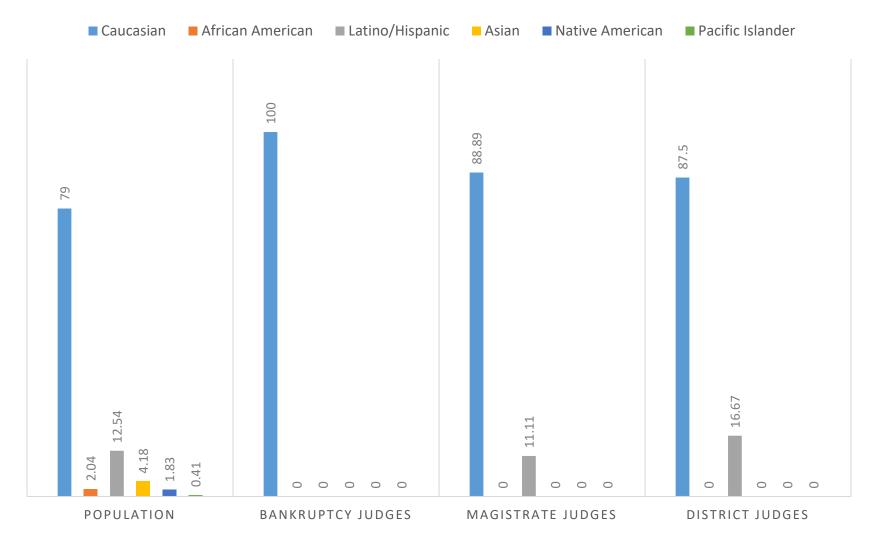
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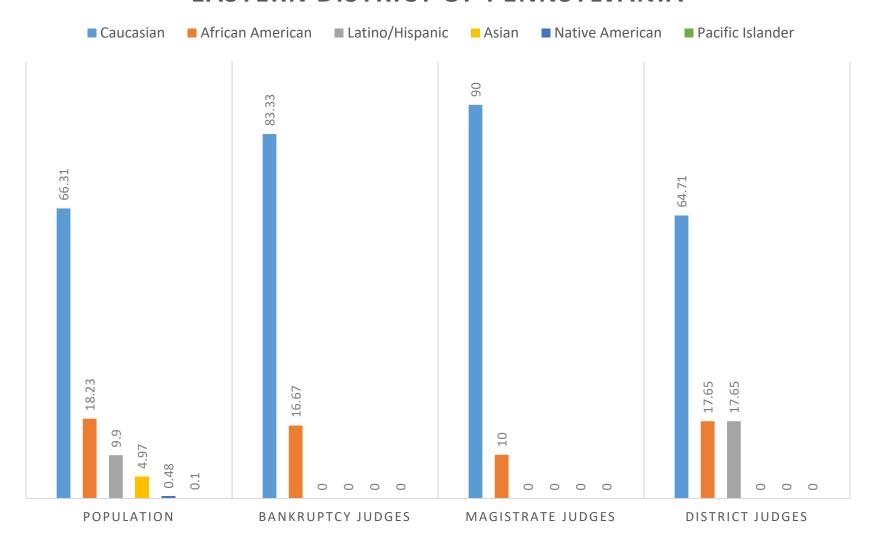
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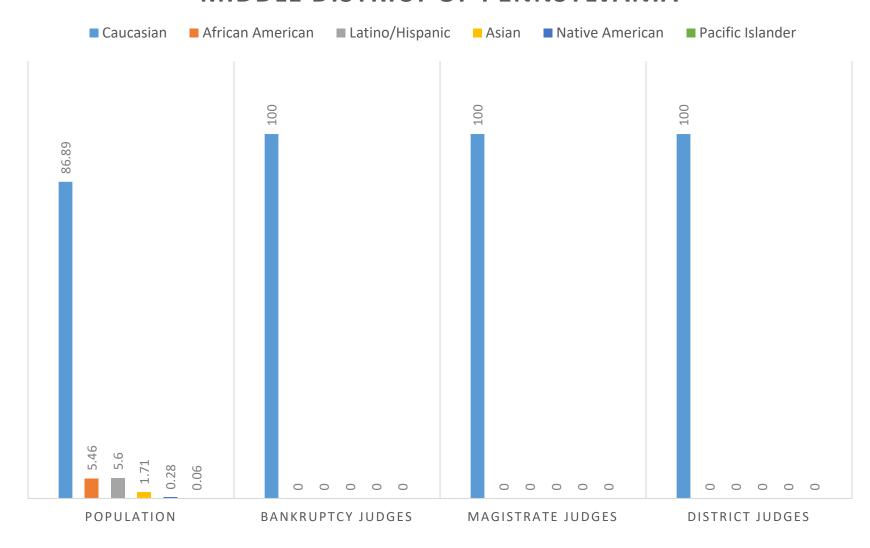
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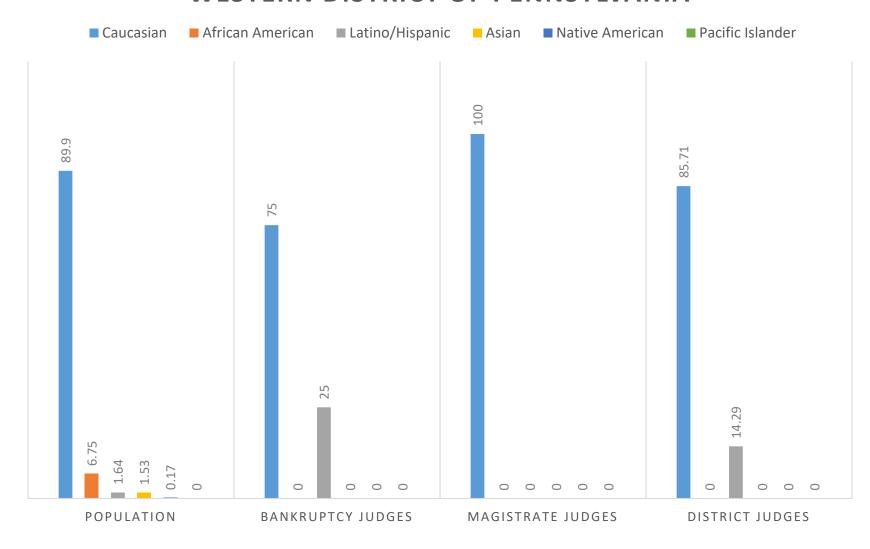
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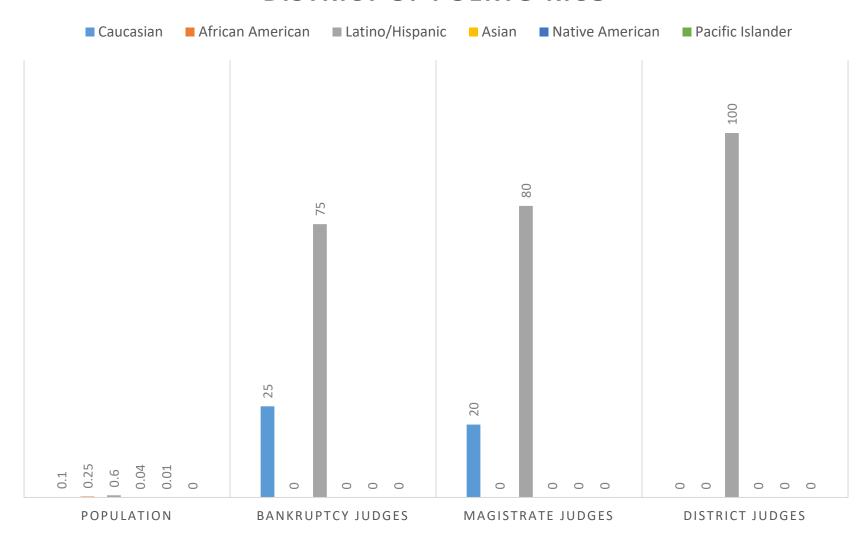
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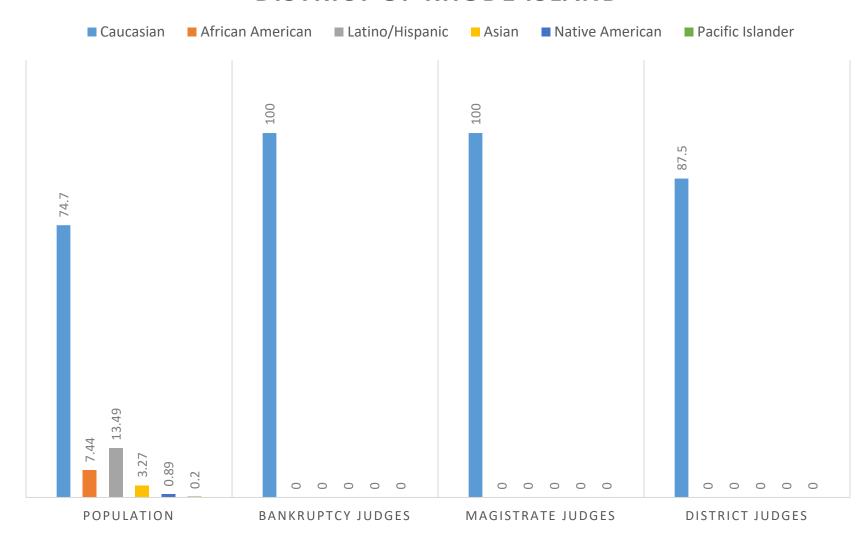
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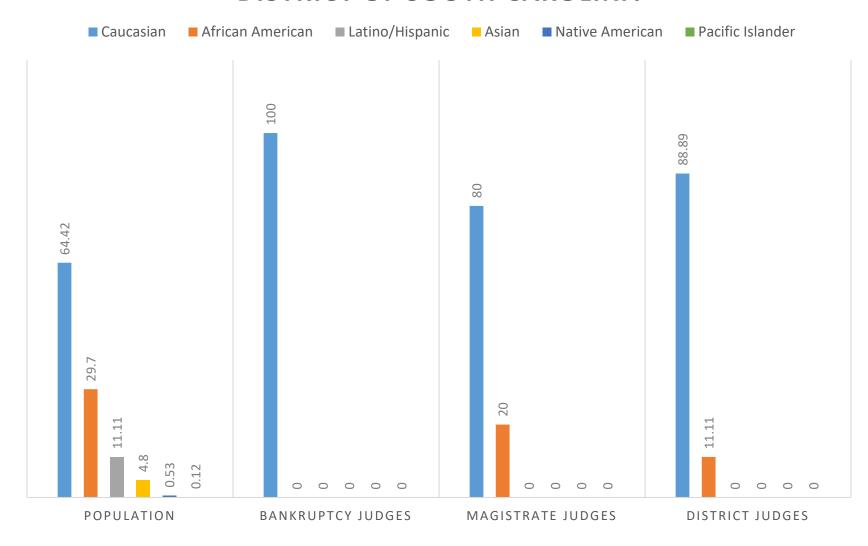
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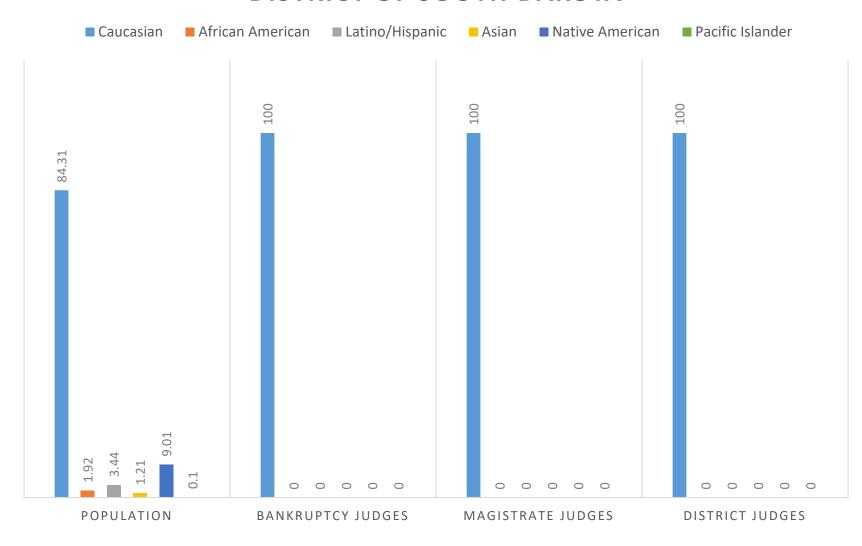
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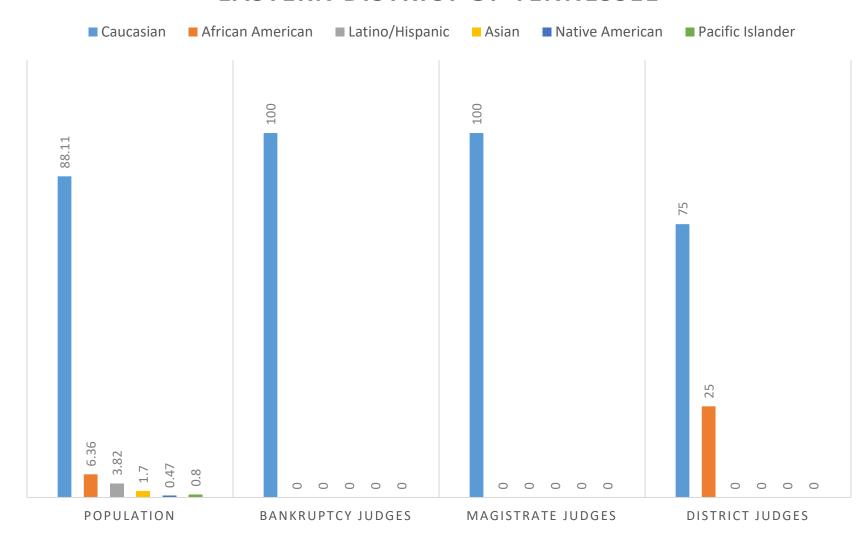
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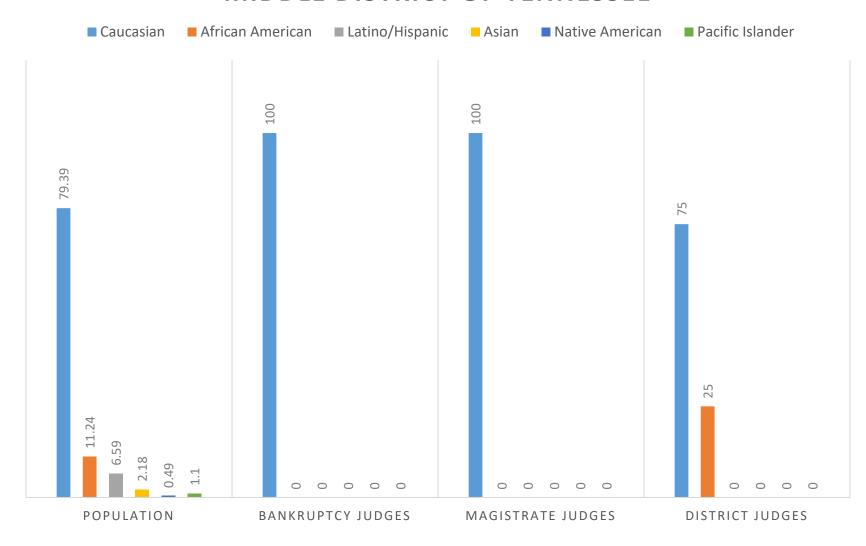
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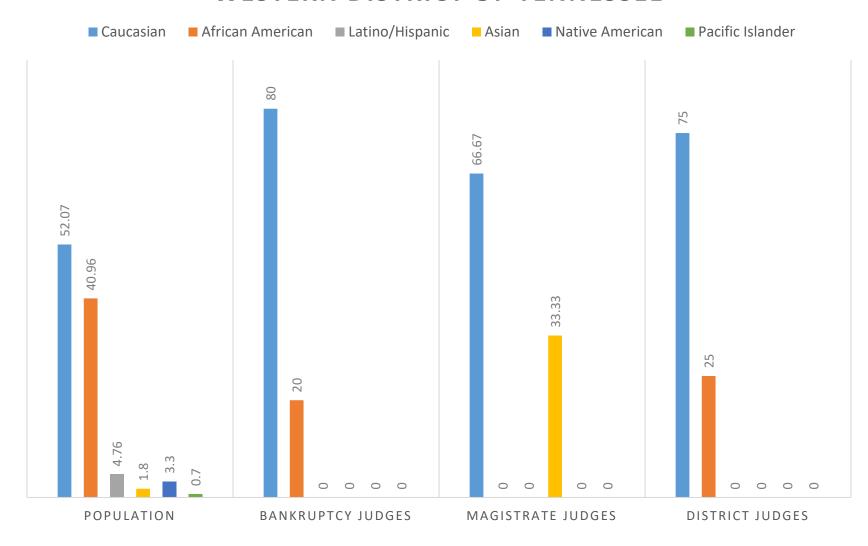
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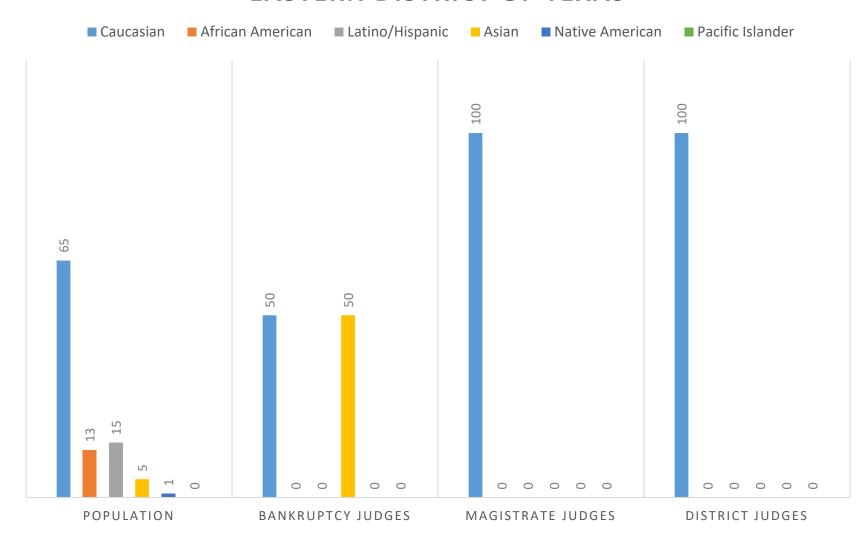
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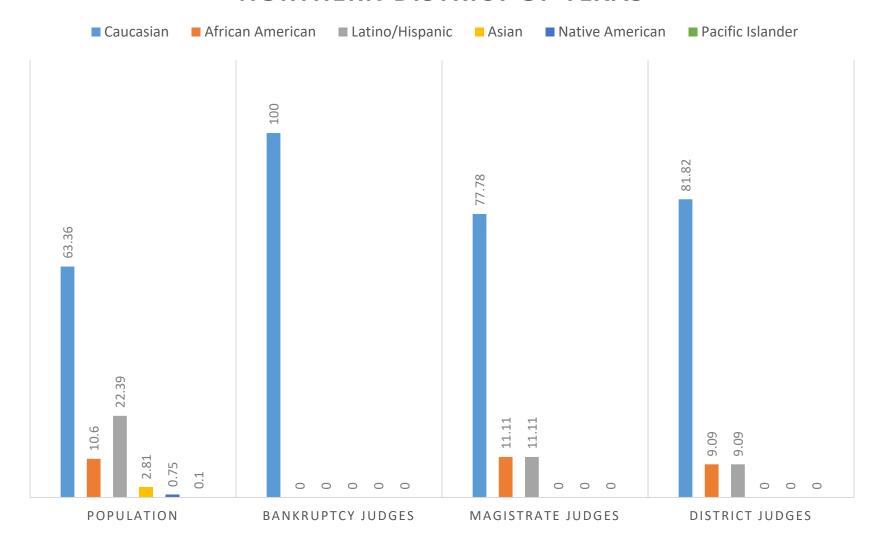
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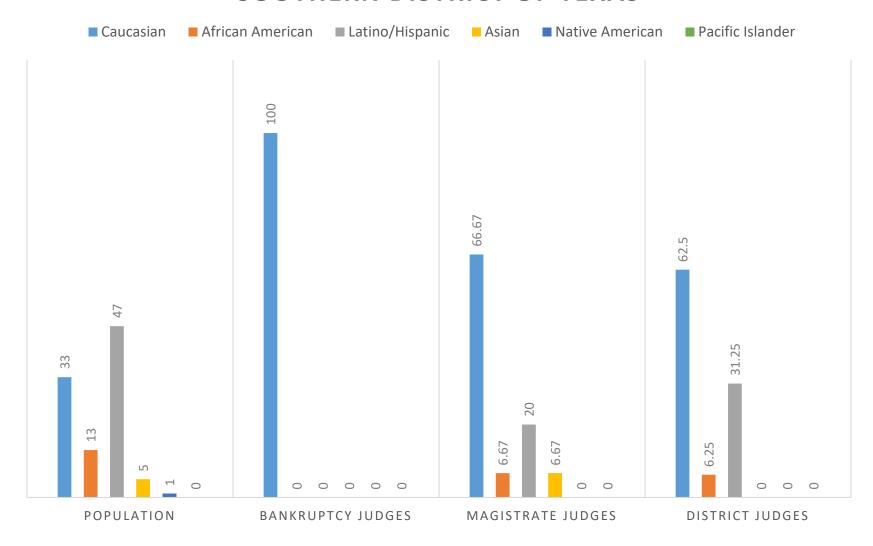
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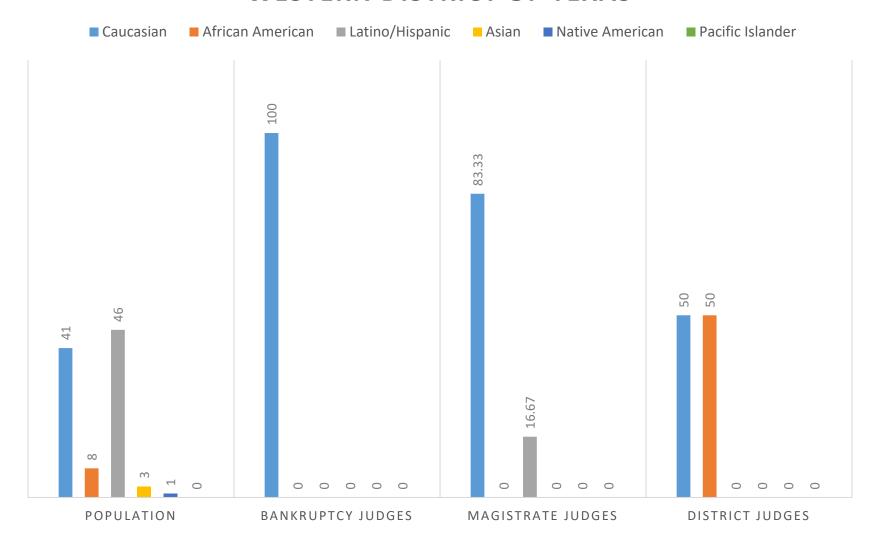
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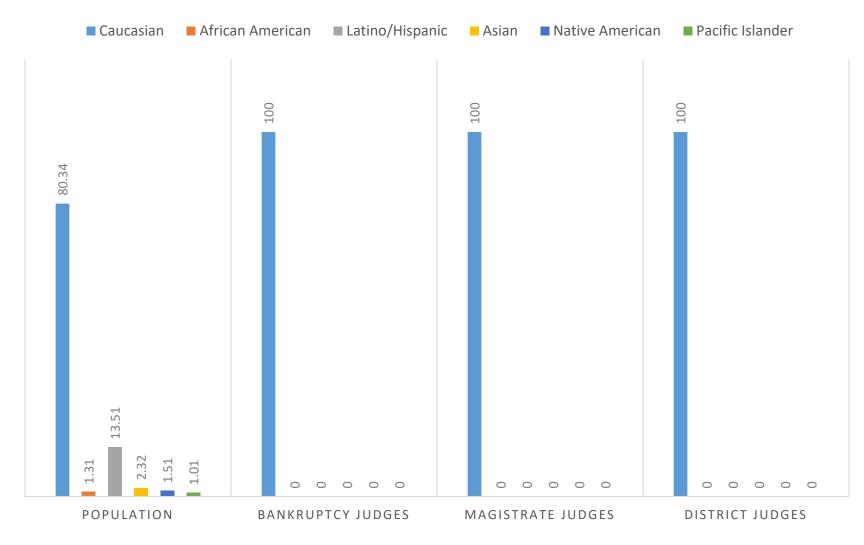
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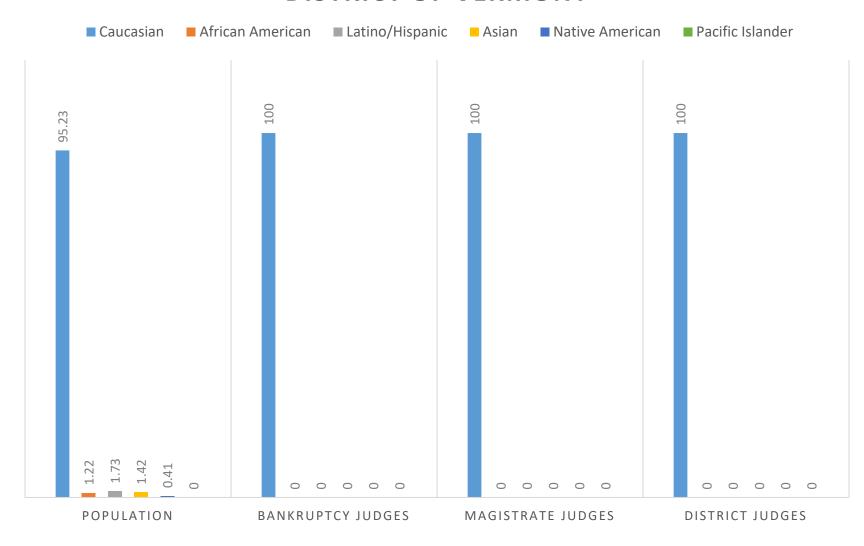
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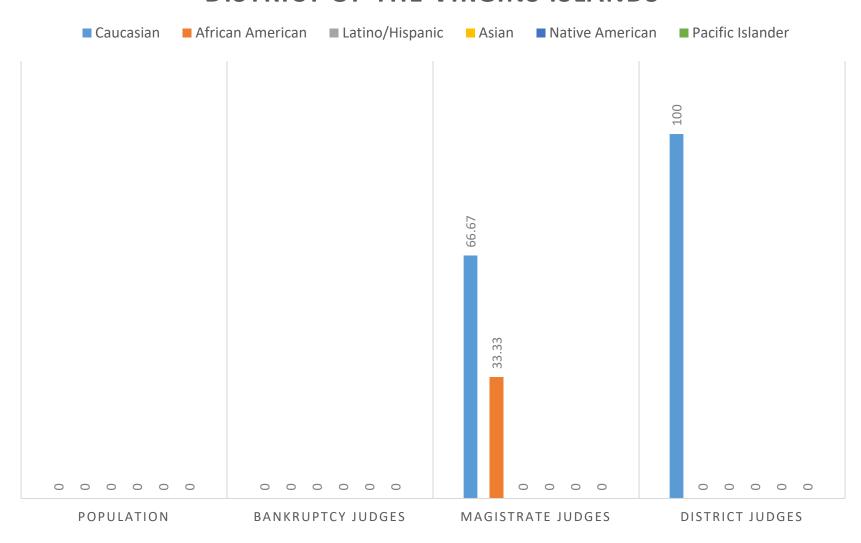
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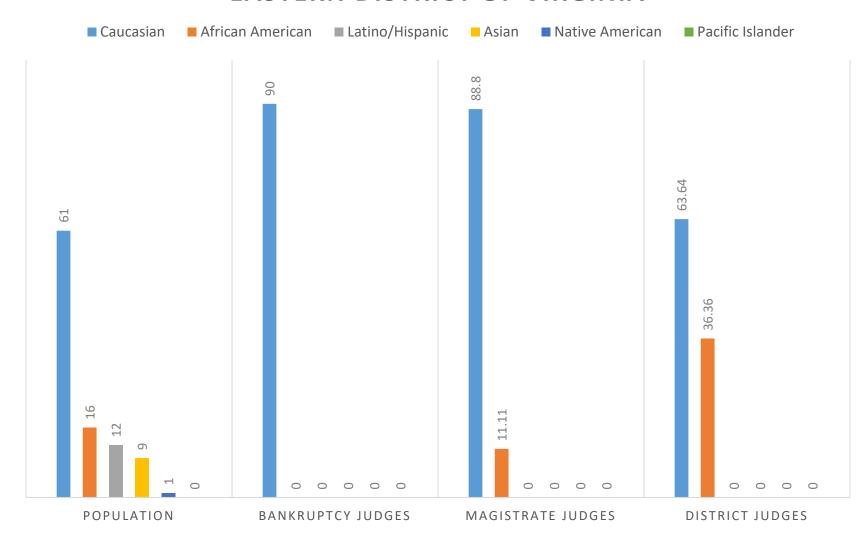
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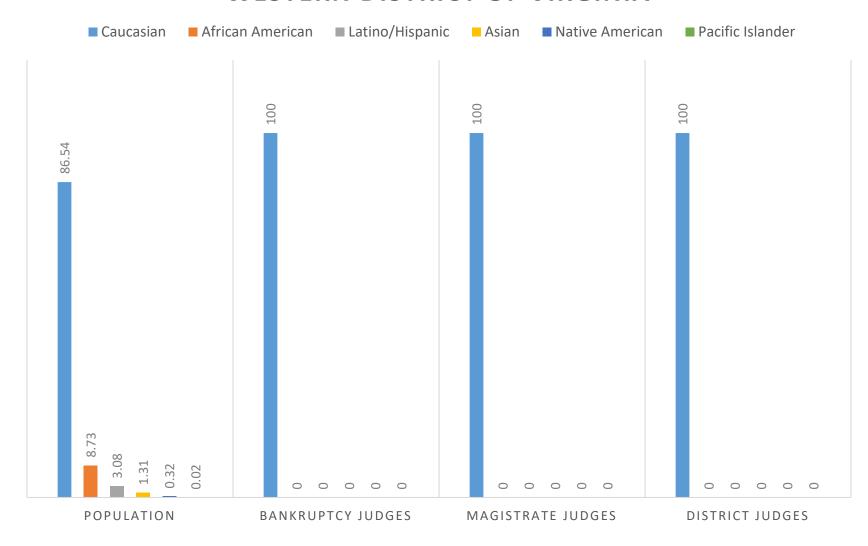
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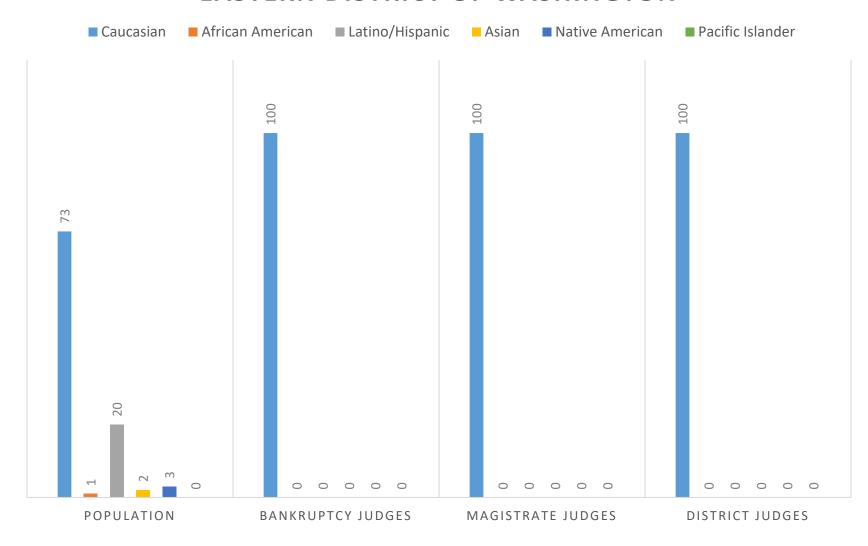
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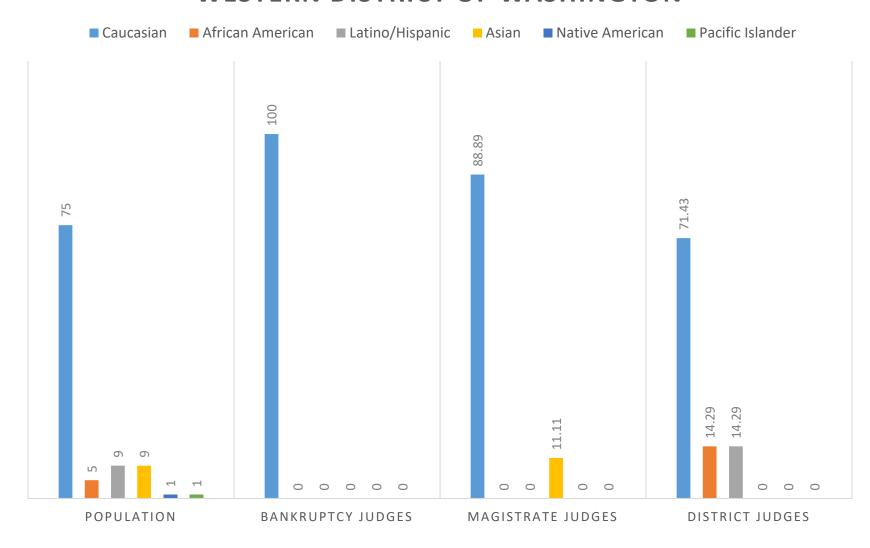
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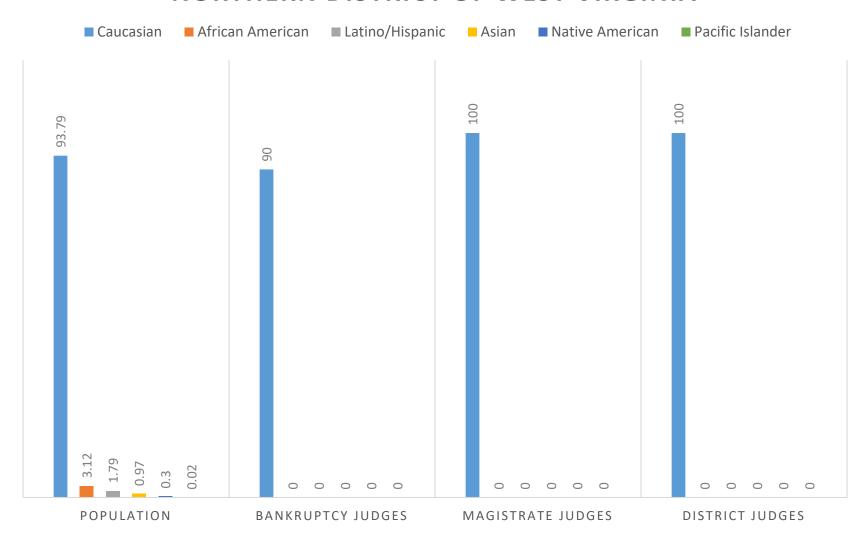
EASTERN DISTRICT OF WASHINGTON



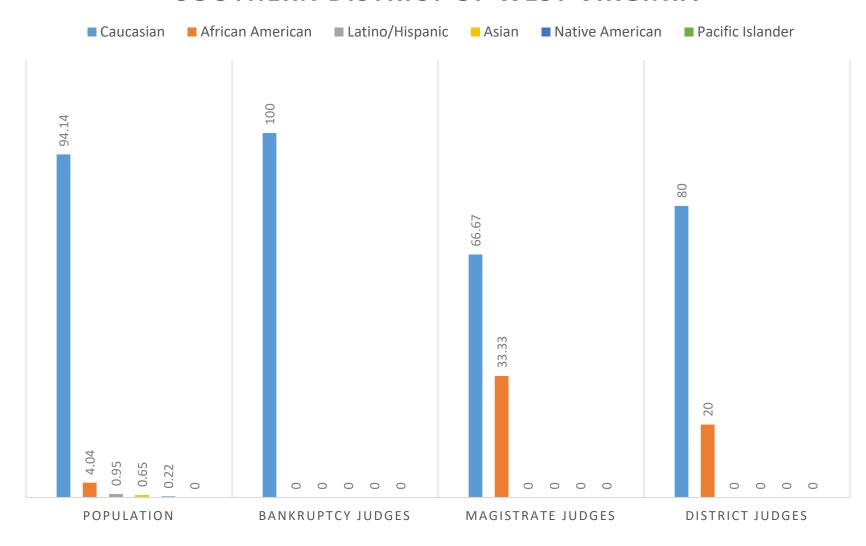
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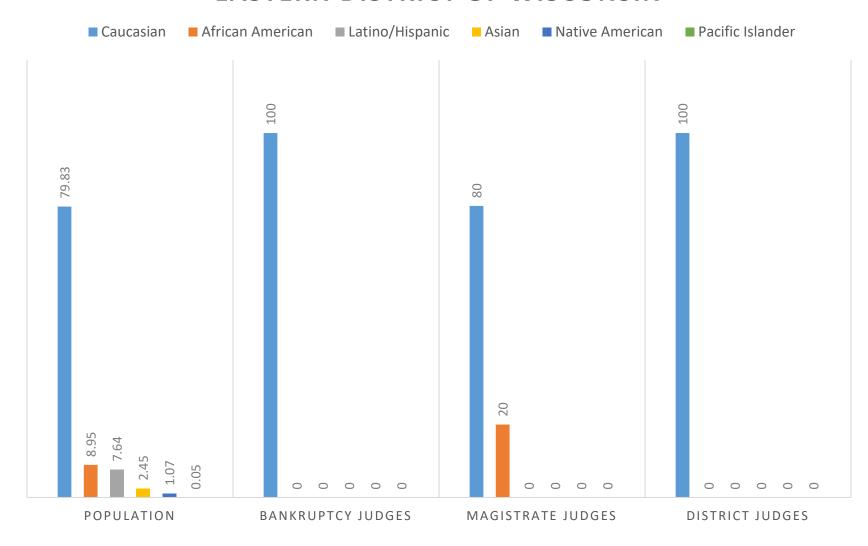
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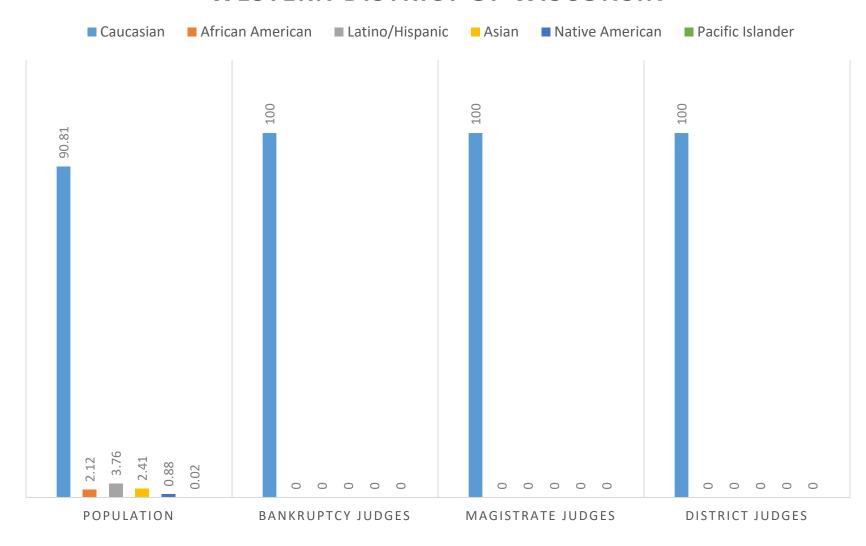
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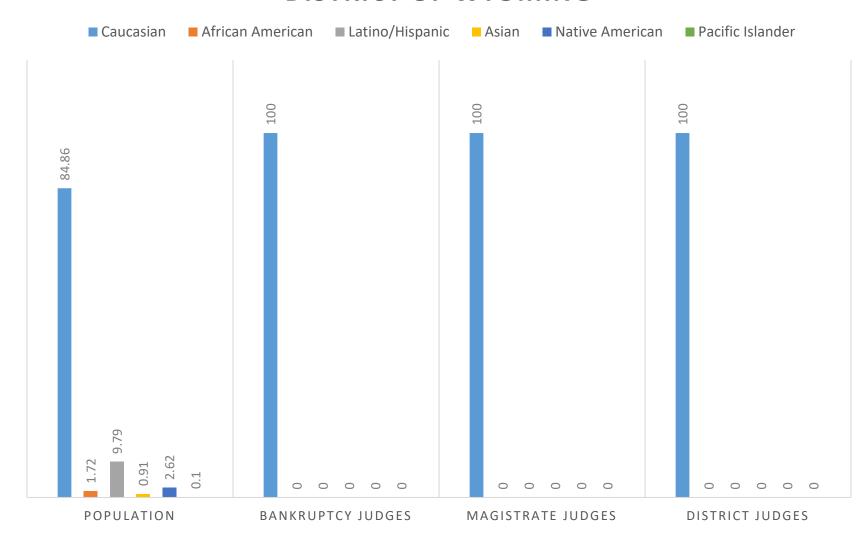
EASTERN DISTRICT OF WISCONSIN



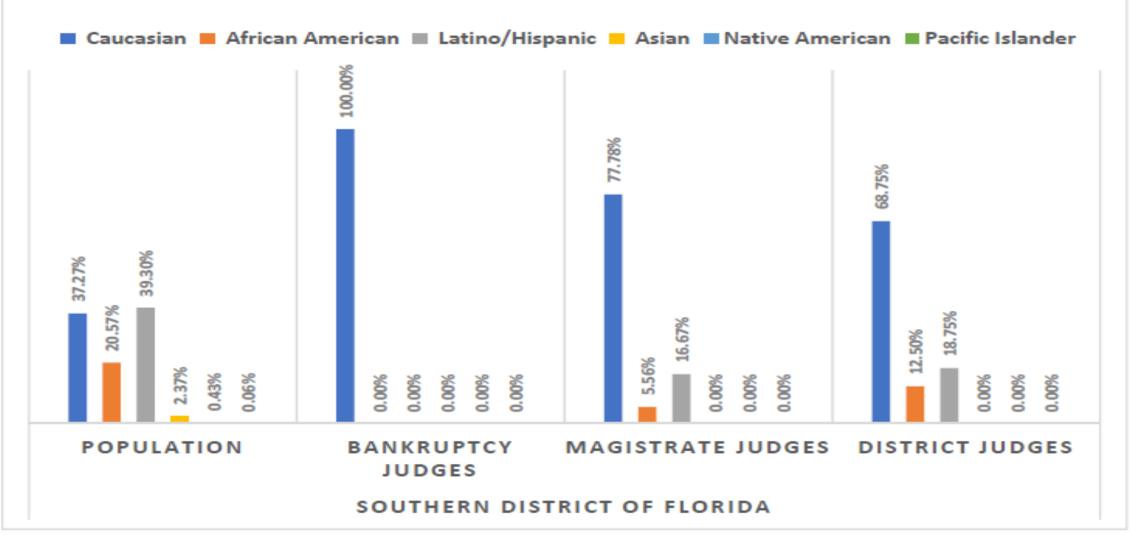
WESTERN DISTRICT OF WISCONSIN



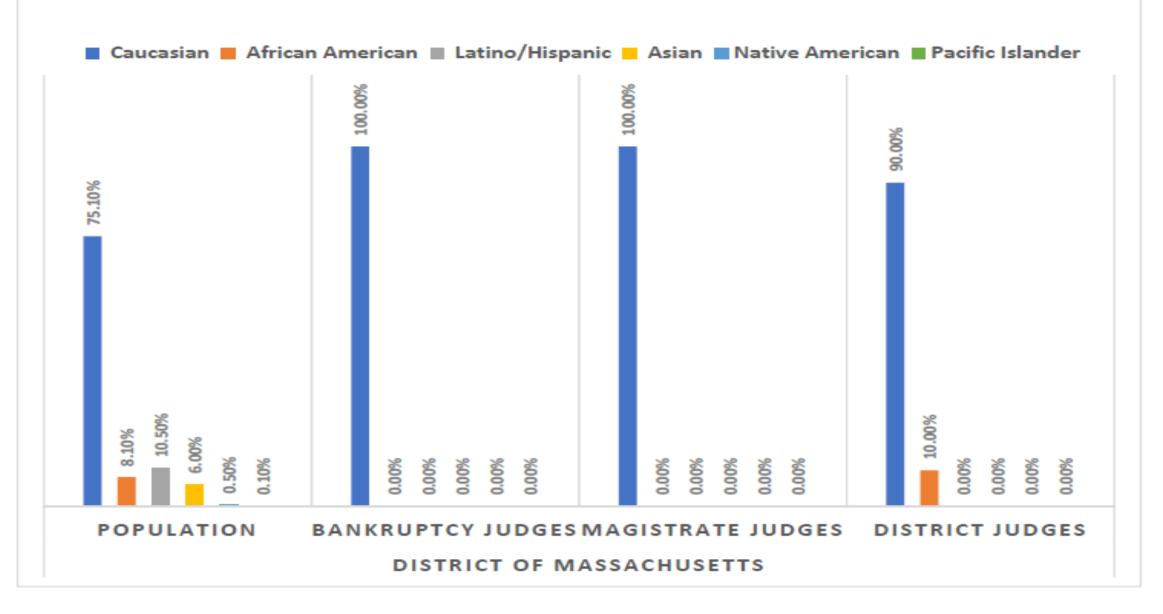
DISTRICT OF WYOMING



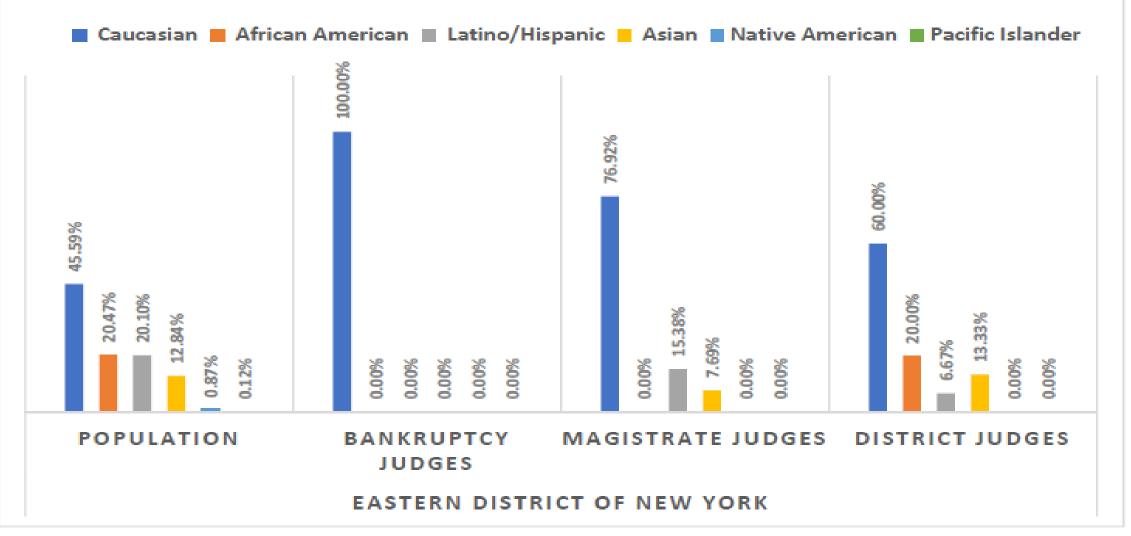
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DISTRICT OF MASSACHUSETTS



(NEW YORK CITY AREA)



PART 1 CONCLUSIONS:

No, the judges on the Bankruptcy Bench *do not* look like the populations they serve – and are not close to doing so.

❖ Federal District Judges and Circuit Judges look **a lot more** like the populations they serve.

Federal Magistrate Judges are also lagging behind on this metric

Part 2. DOES HAVING A DIVERSE BAR AND BENCH MATTER?

Proposition: Diversifying the Bankruptcy Bench will help diversify the bankruptcy bar – "Pipeline Down"

Recent study: African American citizens receive different treatment from White lawyers than they do from African American lawyers

They are directed to ch. 13, while White debtors are directed to ch. 7, which may be less advantageous (not always)

See *HOW THE BANKRUPTCY SYSTEM IS FAILING BLACK AMERICANS*, by Paul Kiel (ProPublica and Atlantic, September 2017).

7 vs. 13

Chapter 7 is:

Quick

Cheaper

More relief

Chapter 13 is:

Slower

More expensive

Less relief

Case Study: Novasha Miller, Memphis, TN

- Age 32, single mom, teenage sons, African American
- Job: food service worker, \$10.50/hour
- Does not own a home; high credit card debt
- She signed a one-year lease on an apartment that was so filled with mold (son has asthma) she had to break the lease
- Ended up with a \$5,500 judgment (plus attorneys fee) to pay and shocking collection efforts
- Garnishment of her paycheck

Can Bankruptcy Help Ms. Miller?

- Chapter 7: after a few months the Debtor gets a *discharge* of almost all debts; *BUT* cost is \$1,000 up front
- Chapter 13: no up front cost, **BUT** costs \$3,000 over 5 years
- Ch. 13: No discharge unless she pays for 5 years
- In Memphis, where Ms. Miller lives, African American citizens are directed to chapter 13 at *5 times* the rate of White citizens with similar financial profiles
- And across the US, African American debtors are *more than twice* as likely to file chapter 13 as white debtors

But, what if the lawyer is African American?

- Jerome Payne is one of very few African American debtor attorneys in Memphis
- His clientele is almost entirely African American and he files mostly chapter 7 cases for them
- Very few ch. 13 debtors end up with a discharge

"Me being African American, and me understanding my community, maybe I've been more successful in showing them that this (chapter 13) is not the way you ought to go."

Jerome Payne

PART 2 cont'd: Another Study

- Approximately 1,000,000 bankruptcy petitions filed per year
- 30% chapter 13 filings
- African Americans are more likely than debtors of other races to file Ch. 13
- Let's see why?

Race, Attorney Influence, and Bankruptcy Chapter Choice (Lawless Study)

- Chapter choice (ch. 7 v. ch.13) begins in the attorney's office
- Attorney is the guiding force in the type of chapter filing decision
- Local Legal Culture attorneys' values drive chapter recommendation
 - What's best for the client viewed through lenses of attorneys' values
 - Morality and client's self-esteem chapter 13
 - Best financial deal for clients chapter 7



 STUDY 1 – 2007 data from the Consumer Bankruptcy Project (race as independent variable)

Chapter 13 Rates by Race

<u>Race</u>	Chapter 13 Rate
African-American	54.7%
White	28.6%
Asian	24.4%
Other	23.8%
Hispanic	21.7%

Chapter 13 Filing Choice by Race (selected Judicial Districts)

		African		African	Non-African	Non-African		
		American	Americans		American		Americans	
Judicial District:	<u>Cases</u> :	<u>in chapte</u>	<u> 13</u> : <u>case</u>	<u>s</u> :		in chapter 13:		
Tennessee, Western	28		79%		19		58%	
Alabama, Northern	16	75%	25			36%		
Ohio, Southern	15	67%		47		32%		
Mississippi, Southern	16		63%		11		18%	
Georgia, Middle	15		60%		13		38%	
Illinois, Northern	38		53%		45		16%	
Georgia, Northern	27		52%		37		27%	
Michigan, Eastern	35	37%	6 97			31%		
Districts w/ 15 or more								
African-American								
respondents		190			58%	294	30%	
Districts w/ 1-14								
African-American								
respondents		321			53%	1,260		30%
All Districts w/ no								
African American								
respondent						200	16%	

Ch. 13 is also *less effective* for African Americans than for others

10 -14 months after filing, African Americans chapter 13 plans had a *dismissal* rate of 36.2% versus 25.5%.

 STUDY 2 Survey – How bankruptcy attorneys might guide people of different races into different chapters

Random sample of bankruptcy attorneys

Same profiles for two couples, except hints as to race

1/3 had "Todd and Allison" who attended First United Methodist church

1/3 had "Reggie and Latisha" who attended Bethel A.M.E. church

1/3 had debtors with initials "R. and L." who attended a "church"

 STUDY 2 Finding – Attorneys contribute significantly to the racial gap in chapter choice

<u>Couple</u> :	Recommendation for Ch. 13 Filing:
"Reggie and Latisha" who attend Bethel A.M.E. church	47.4%
"R. and L." who attend a church	36.2%
"Todd and Allison" who attend First United Methodist church	32.1%

Lawyers were provided goals in the study

Moral Obligation (repaying creditors under ch.13) v. Fresh Start (ch.7)

Lawyers Concluded:

- African Americans viewed as "people of good values" when chose to repay creditors (chapter 13)
- White debtors viewed as "people of good values" when chose the "clean slate" (chapter 7)

STUDY 2 - Competence by Race and Chapter Preference on scale of 1-9 (higher = more competent)

Expressed Preference for	Competence Index
Chapter 7	4.88
None	4.51
Chapter 13	5.31
Chapter 7	4.70
None	4.50
Chapter 13	4.47
Chapter 7	5.36
None	4.76
Chapter 13	4.32
	Chapter 7 None Chapter 7 None Chapter 13 Chapter 13 Chapter 7 None None

Back of the Envelope Math Costs to Debtors per Prof. Lawless

	# of Af/Am	
	in Wrong Ch	Excess Cost in Att'y Fees
2010	72,494	\$144,988,109
2013	47,942	\$95,883,554
	,	
2014	42,265	\$84,530,142
2045		476.004.006
2015	38,046	\$76,091,896

Part 2: CONCLUSIONS

Foregoing studies seem to tell us:

- ➤ African Americans may not get the same advantages from bankruptcy as non-African Americans
- African American lawyers may be better equipped to properly advise African American debtors

Proposition: we need to encourage more African American lawyers to enter bankruptcy practice area. But how?

"All the News That's Fit to Print

The New Hork Times

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NEW YORK, SATURDAY, JANUARY 21 2012

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BLACKS FACE BIAS IN BANKBUPTCY. STUDY SUGGESTS

A DISPARITY IN FINANCE

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By TARAMICAN BURNARD

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Commercial Physics III.

Justices Reject Election Maps By U.S. Court

Texas Case May Affect Control of the House

By ARREST LIPTURE

WHICH SERVICES - The Represent Court on Finding Industrial elections maps discon by a fedand yours in Takes that had for mored. Ownerson's, carolidates The same

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TIGHTENING RACE IS ABRUPT BLOW TO ROMNEY TEAM

SOUTH CAROLINA RATTLE

As His Rivals Advance, Widthers lie Far Cry From a Sure Bet

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BLACKS FACE BIAS Strices Reject IN BANKRUPTCY. STUDY SUGGESTS

A DISPARITY IN FINANCE.

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By TARIA HISTORIA BERNARD

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Election Maps By U.S. Court

Texas Jose May Affect arol of the House

By MINNEY LIPTURE

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TIGHTENING RACE IS ABRUPT BLOW TO ROMNEY TEAM

SOUTH CAROLINA BATTLE

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Comment on Page 514

PART 3: STRIVING FOR JUDICIAL DIVERSITY

How about developing the "pipeline" up? (recruit diverse lawyers and law students)

How about developing the "pipeline" down? (a diverse judge as role model)

STRIVING FOR JUDICIAL DIVERSITY

Judiciary Should Reflect (approx.):

- the demographic characteristics of the population it serves
 - gender, race, ethnicity, national origin, sexual orientation, gender identity, parental status, physical ability, religious affiliation or lack thereof, socioeconomic background, veteran status and geography
- the diversity of the legal profession
 - broad experience across all areas of the law
 - representing clients along the socio-economic spectrum

STRIVING FOR JUDICIAL DIVERSITY

Reviewing: Where Do We Stand?

Women – 50% of U.S. population, but only 33% of magistrate & bankruptcy judges

People of Color – 40% of population, but

- only 15% of magistrate judges
- only 7% of bankruptcy judges

BRENNAN/ABA MANUAL, a resource for appointing judges

Strategy #1: Diversifying the Applicant Pool

<u>Pipeline Building "Up"</u>:

 Reach not only into law schools, but also target under-served and minority high school and college students

 Targeted Outreach to Young Attorneys – early consideration of doing bankruptcy practice and later career on the bench

Diversifying the Applicant Pool

Recruitment of Candidates:

- Start Early often times vacancies can be anticipated months in advance
- Identify and Task a Court Official with Coordination Recruitment Efforts
 - engage the Court staff and set recruitment goals
 - reach out to leadership at minority and affinity bar associations
 - reach out to community groups, law school alumni associations etc.
 - organize a panel of current judges discussing their work and pathway to the bench

Diversifying the Applicant Pool

Vacancy Description and Dissemination:

- Develop a detailed vacancy description
- Post the vacancy before the Merit Panel Assembles (90 days to report results of search)
- Disseminate the Posting Widely
 - court websites
 - national, state, and local bar associations, minority and women's bar association
 - national and state affinity groups such as criminal defenders, prosecutors, government attorneys, and civil rights attorneys
 - alumni networks of national and local law schools, including minority and specialized student groups
 - national and local law firms
- Conduct outreach to Bar Leadership

Diversifying the Applicant Pool

Merit Selection Panel Composition:

- Solicit diverse Merit Selection Panel Members
- Involve the Chief Judge
- Consider Increasing the Panel's size
- Make a Merit Selection Panel Members' Names Public
- Consult with Magistrate and Bankruptcy Judges on suggesting potential panel members

Strategy #2: Vetting & Selection (Clear & Transparent Process)

- Schedule organizational meeting to set clear goals before receiving applications:
 - formalize selection procedures evaluation criteria, re-publication of notice, interviewing, voting
 - affirm judicial diversity as a goal
 - familiarize the panel with the work of the Court (duties can vary per jurisdiction)
 - schedule Implicit Bias Training
 - recent studies show all individuals are susceptible to unconscious biases
 - implicit bias training can mitigate biases

Vetting & Selection (Clear & Transparent Process)

- Interviews:
 - develop uniform interview questions
 - include a question facilitating a discussion of greater life experience
 - "Is there any aspect of your personal or professional background that you believe will be a particular asset to this court?"
 - provide ample time for a meaningful interview and standardize the length (at least 30 minutes)
 - take notes during interview

Vetting & Selection (Clear & Transparent Process)

- Deliberation and Voting:
 - review the definition of diversity, values, and evaluation criteria
 - carefully weigh experiences and recommendations
 - weigh skills and experience, not the candidate's title
 - no single legal experience should be determinative
 - avoid placing undue weight on the raking of an applicant's law school
 - standardize conversations with references (checklist of questions)
 - articulate reasons for recommending candidates

THANK YOU!

Diverse College Students: Go to law school

Diverse Law Students: Practice bankruptcy law for a rewarding career

Diverse Lawyers: Apply for and become a Bankruptcy Judge!