Introduction

For most individuals and organizations, courts are the "law" for all effective purposes. We know little about who serves on courts – i.e., federal judges, state judges – despite their central and powerful role. This lack of information is especially significant because judges' backgrounds have important implications for the works 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. In fact, judges' biases are often used to politicize their rulings. The background of judges can influence how they make decisions and impact the public's acceptance of those decisions. The effects of having more minorities in the judiciary is not fully developed; yet the diversification of the bench is something that could affect how the judicial system works. We need to know more about justices.

The number of women, minorities, and LGBT candidates gaining access to positions of power in the United States has grown in recent years and is expecting an unprecedented boom in the coming ones. One important seat of power is on the bench, as the judiciary may be a crucial site of arbitration for nearly every political issue. Therefore, for those interested in women's, minority, and LGBT political power, whether on the grounds of fairness, enhancing the legitimacy of state institutions, or improving representation, their presence on the bench matters.

In order to understand this serious shortcoming in our understanding of America's courts, we have constructed an unprecedented collection of judicial scholarship from top researchers across the country. In this edited collection, we examine the intersectionality of race, ethnicity, gender, sexuality, and the composition of courts. It is our contention that the composition of courts, when compared to the composition of the general population across the country, is not representative of the people whom they serve.

If women and minorities are increasingly taking seats on the bench, under what conditions are they doing so? Why are they more successful in some places than others? Does the method of judicial selection influence their relative success (Alozie 1990; Glick and Emmert 1987)? These questions are of extreme importance given the institutional power of the courts and the status of justices as political elites. Or are the influences on political minorities' success in the judiciary related more to the cultural, political, and social characteristics of their constituencies? If so, we can better understand the representativeness of the bench and how those dynamics affect the courts' decision-making.

POLITICAL MINORITIES IN THE JUDICIARY

Diversity among the ranks of public officials serves a number of important purposes. The perceived legitimacy of government is enhanced when office-holders have similar characteristics to those they represent. A correspondence between political elites and their constituencies brings greater legitimacy and validity to the policy decisions of those representatives (Alozie 1988; Bratton and Spill 2002; Mansbridge 1999; Pitkin 1967; Rosenthal 1995; Uslaner and Weber 1983). While descriptive representation is important to all public institutions, it may be especially important for the judiciary, where normative yet ambiguous concepts such as "justice" and "rule of law" are most often associated with the work of the courts. The judiciary has the power to affect the daily lives of citizens, and it is one of the most direct and frequent points of contact between citizens and their government (Walker and Barrow 1985). Consequently, we need to understand which factors enhance and detract from diversity and descriptive representation on the bench.

Numerous factors have the potential to influence judicial diversity. First, there are structural influences, which arise from institutional variance across the courts. Justices in different states attain their position through varying selection methods, including partisan and nonpartisan election, executive nominations, legislative appointments, and merit selection. In contrast, all Article III judges in the federal court system are appointed by the president, with Senate confirmation.

While we are not the first to study judicial diversity and selection, we are the first to include LGBT justices in the analysis of judicial diversity. We are also the first to provide the most complete analysis of judicial diversity across various levels of the bench. Some authors contend that merit systems, external political interests, and executive appointments influence political minorities' representation (in one direction or another) on the bench (Alozie 1990;

Graham 1990; Henry et al. 1985), and others have found that electoral systems lead to lower minority representation there (Lyon 1981; Warden, Schlesinger, and Kearney 1979). Still others have found that selection methods have no discernible effect on diversity (Alozie 1996; Dubois 1983; Flango and Ducat 1979; Glick and Emmert 1987; Hurwitz and Lanier 2001). The studies in this volume incorporate multimethod analyses to address this issue.

Since justices "can be viewed largely as a product of the political environment in which they are selected" (Brace, Langer, and Hall 2001, 395), we must also consider the political factors that may influence judicial diversity. For example, ideology could affect diversity similarly to merit system (Graham 1990; Hall 2001). Furthermore, political minorities are more likely to win elections in districts where their constituents are more liberal in their policy views, whether because political minorities tend to be more liberal than other candidates (Sigelman and Welch 1984) or because some voters may seek to promote fellow women and minority candidates who bring a unique set of policy views to the bench (McDermott 1997).

Finally, demographic variations among states citizens may affect judicial diversity. In particular, scholars have advanced an eligibility pool theory to explain the ascent of women and minorities to the judiciary (Alozie 1990, 1996; Martin 1987). Since earning a law degree is a necessary condition for becoming a judge, a positive relationship is expected between the number of political minorities earning law degrees and practicing law in a state and the number of political minorities on the bench. The rise in the number of political minorities who are lawyers affords more available and qualified candidates to fill a vacancy on a bench. Yet, Bratton and Spill (2002) found that once a political minority has been selected for a particular bench, the likelihood that another political minority candidate will be chosen for that bench declines, due to the relative scarcity of judicial positions. Thus, the selection of one political minority might work to preclude others from obtaining a seat on that bench, since an acceptable level of diversity on the bench is akin to an unstipulated quota and no additional political capital for the selectors is gained from further diversification (Schroedel and Mazumdar 1998). We now turn to the chapters in this volume to provide a closer look at the intersectionality of gender, sexuality, race/ethnicity, and occupation.

OUTLINE OF THE BOOK

In Chapter 1, Nancy Bays Arrington uses data on the racial and gender identification of women, minority, and minority-women state supreme court judges to uncover potential ways in which women, minority, and especially

minority-women state supreme court judges are similar to and different from white and male state supreme court judges. Arrington finds that minority women are more likely to have attended Ivy League law schools than white women but are no more or less likely to have prior judicial experience than white women or minority men. Minority women are not discernibly older or younger than white women or minority men at selection, while white men are, on average, the oldest at time of selection. Minority women are less likely to be elected than white women, but there are no differences in selection method between minority men and minority women. Minority men and women are more likely to be liberal or Democratic than white men or white women, and minority women have shorter average lengths of tenure than white women. Minority women have the highest rate of interim appointment, and they also have the highest rate of nominations to the federal judiciary. Although there have only been fifteen minority women who have left the bench, their vacancies are rarely filled by white men. Instead, vacancies by minority women are most often filled by white women and other minority women.

In Chapter 2, Sharon A. Navarro proposes that with the changing demographics in Texas and the increasing population of Latinos, Texas should experience more Latinos in elected office such as the judiciary. She argues that the intersection of race/ethnicity and gender created avenues of opportunity for Latino men and women to climb to state-level judicial offices in Texas, one of the most conservative states in the country. Utilizing standpoint theory, Navarro contends that political and institutional pressures converge with race and gender to enable diversification of Texas' state level courts. This study is important for understanding how a historically underrepresented group can become politically incorporated into a state's judiciary. The findings suggest that Latino/a judges recognize and use their race/ethnic and gender identities to their advantage in political judicial appointments.

Barbara L. Graham and Adriano Udani's Chapter 3 suggests that for women of color, entry into the state judicial hierarchy is not nearly as open as entry into the legislative hierarchy. Women of color, defined by constitutive features of "otherness," have experienced a long history of discrimination and exclusion from law schools and the legal profession. Unfortunately, this exclusion extends to representation in the state judicial system. To date, only token levels of representation among women of color exist in state appellate courts. These courts are frequently the subject of scholarly attention because state appellate judges have the greatest opportunities to shape state legal policy. In the United States, the process of judicial selection is especially contentious at the state level. Judicial elections, whether partisan, nonpartisan, or retention,

exemplify the highly charged political and partisan atmosphere over who will occupy seats on the state bench. Politicians, political parties, and interest groups battle over judicial selection to influence legal policy outcomes most favorable to their interests.

The concept of descriptive representation as applied to state courts views courts as institutions of government where their decision-makers – judges – should mirror the diversity of its citizenry. Scholarly inquiry is warranted in the area of race, gender, and representation in the judiciary because courts, like other institutions, are often evaluated by the presence of women of color in key decision-making positions such as judgeships. Judicial diversity is linked to legitimacy and trust in legal institutions in the eyes of underrepresented groups. Calls for greater representation of women of color in state courts is not incompatible with democratic principles of presentation, participation, and equality.

Women of color make up approximately 6 percent of state appellate courts (intermediate appellate courts and state supreme courts). What accounts for token levels of representation among women of color on state appellate courts? Early studies point to the eligible pool theory, which posits that the lack of race and gender diversity on state courts is directly linked to the underrepresentation of women and minorities in the legal profession. The competing hypothesis, which examines the effects of institutional arrangements such as judicial selection methods, has produced mixed results. The debate centers around whether judicial elections or judicial appointment methods account for gender and racial diversity on the bench.

The objective of this research is to investigate whether judicial selection methods and political party effects present barriers to women of color's ascension to state appellate courts. This data is based on a cross-sectional analysis of all intermediate and state supreme court judges on the bench as of January 2017 (approximately 1,280). These models predict the likelihood that the observed judge is a woman of color for intermediate appellate courts and state supreme courts. Because we are interested in the conditional effects of judicial selection system characteristics, including partisan effects, we will present predicted probabilities that will conceptualize and communicate the nature of the relationships uncovered in this research.

In Chapter 4, Donald Haider-Markel and Patrick Gauding provide a seminal piece on LGBT justices. They explore LGBT representation in the United States through the lens of appointed and elected judges. Their historical analysis and case studies examine where and when LGBT justices have served, their pathways to the bench, and the implications of openly LGBT judges for the LGBT community and LGBT equality. Haider-Markel and

Gauding include data on local, state, and federal judges, showing patterns at each level. Their discussion concludes with speculation about future LGBT representation in the courts.

Taneisha Nicole Means's Chapter 5 provides a front row seat to the challenges intersectionality and occupation bring. At the urging and encouragement of Senators Robert F. Kennedy (D-NY) and Jacob K. Javits (R-NY), Lyndon B. Johnson nominated Constance Baker Motley to the Southern District of New York's court bench on January 26, 1966. While seen as remarkably qualified by many and a watershed moment in federal judicial selection, some wondered whether she would actually be confirmed because President Johnson had already been forced to withdraw his previous nomination of Motley to the Court of Appeals for the Second Circuit due to racial and gender politics.

As anticipated, a number of private groups, conservative federal judges, and southern senators fiercely opposed Motley's nomination to the district court bench. For instance, Senator James O. Eastland (D-MS), chairman of the Senate Committee on the Judiciary during the 1960s, held up her confirmation for months arguing that Motley's past required close scrutiny, and alleging that Motley had been active in a communist organization in the 1940s. To force senatorial action on Motley's nomination, President Johnson refused to nominate any other judges to the federal bench. This strategy worked, because on August 30, 1966, Constance Baker Motley became the first black woman appointed to the federal judiciary.

Motley's nomination and confirmation undoubtedly helped pave the road for other women of color appointed to the federal judiciary between 1966 and 2017. Scholars, however, have largely overlooked the nomination of Motley as a potential starting point to explore and better understand how race and gender fundamentally influence the federal judicial selection process, and therefore, judicial diversity. Here, Means addresses the following questions: How did the politics of race and gender influence the appointment of the first black woman federal judge? What lessons can we learn from the nomination and confirmation of Motley, and how can we apply these lessons to twenty-first century federal judicial selection politics and processes? Using interviews and the growing scholarship on Motley, in addition to the Senate Judiciary Committee's historical documents, Means reveals the politics involved in placing Motley on the federal bench. Her historical and qualitative analysis demonstrates that Motley's appointment is the beginning of a long legacy of racial-minority women being appointed to the federal judiciary, and that her treatment by the Senate, and perception of her by elites, as a (potential) judicial nominee, was deeply influenced by her race and gender.

In Chapter 6, Shenita Brazelton and LaTasha Chaffin examine whether diversity at the federal level mirrors changes in the citizenry. As the U.S. population diversifies, will the federal courts be representative? What determinants lead African-American and Latina women to be nominated and confirmed to the federal judiciary? Using the Federal Judicial Center database, this study qualitatively examines the demographic, political, and economic determinants that influence the appointments of African-American and Latina women to the district and circuit courts since the Carter administration. They additionally interview African-American and Latina women judges who have earned senior status, to assess their perceptions of the changing diversity of federal judgeships. Brazelton and Chaffin anticipate that changing demographics and socioeconomic status will impact the ascent of Latina women to the federal bench, political mobilization will impact the ascent of African-American women to the federal bench, and interest group pressure will influence both.

In Chapter 7, Lisa M. Holmes takes a close look at Supreme Court–worthy nominees. In April of 2013, *The New Yorker* published a short article by Jeffrey Toobin on Sri Srinivasan days before Srinivasan's hearing with the Senate Judiciary Committee (Toobin 2013). The focus of Toobin's article was that Srinivasan's nomination to a seat on the U.S. Court of Appeals for the District of Columbia Circuit was a trial run for his future nomination to the U.S. Supreme Court. Put succinctly and starkly in the article, Toobin predicted that "if Srinivasan passes this test and wins confirmation [to the DC Circuit], he'll be on the Supreme Court before President Obama's term ends."

Toobin's assessment of Srinivasan's nomination to the federal circuit court highlights a largely unexamined problem for women and people of color who seek appointment to U.S. district and circuit courts. Namely, their placement on these lower levels of the judiciary puts them as directly as possible in the pipeline for future appointment to the U.S. Supreme Court. While a seat on the lower federal judiciary is a favored stepping stone for any viable future Supreme Court nominee, for women and people of color, the pedigree that identifies a lawyer as being "Supreme Court–worthy" may be *more* of an impediment to the initial appointment than is the case for highly credentialed white men. Opposing senators may fight harder to keep the most highly qualified women and people of color off the lower courts out of concern that a future position on the Supreme Court may be difficult, if not impossible, to deny someone who has already been confirmed to a federal judgeship. Holmes's chapter examines the treatment of court of appeals nominees who are not white men. Specifically, Holmes examines if "non-traditional"

nominees (those who are not white men) are treated less favorably in the confirmation process, especially when they have the kind of education and professional backgrounds that mark a court of appeals nominee as a potential future Supreme Court pick.

This is an important question to consider, especially in the wake of Clarence Thomas's contentious appointment to the Supreme Court in 1991 a mere sixteen months after his relatively easy confirmation to the U.S. Court of Appeals for the District of Columbia Circuit. A preliminary analysis based on limited data found some evidence that minority nominees with the most prestigious educational pedigrees are treated less favorably than non-minority, high-pedigreed nominees in the confirmation process. A fuller assessment is required to determine whether women and people of color with the most impressive educational and professional backgrounds are the targets of more opposition out of concern that their exemplary pedigrees mark them as particularly viable future nominees to the Supreme Court.

And finally, Samantha L. Hernandez discusses Supreme Court Justice Sonia Sotomayor's rise to the highest court in the country in Chapter 8. In a 2017 lecture held at Arizona State University, Justice Sotomayor was asked to reflect on how she made it all the way to the Supreme Court. Her candid discussion highlighted parallels found in women and politics literature focusing on ambition and opportunity. Sotomayor hints towards important changes that can happen when a minority or woman are sitting on the bench. Hernandez delves into potential changes in the judiciary by examining the number of women and minorities in the legal and judicial pipeline. In order to examine the effect of having a Latina on the Supreme Court, Hernandez uses Sotomayor's dissent in *Schuette v. Coalition to Defend Affirmative Action* to highlight differences in case positions.

Our courts must be representative in order to fulfill their purposes. Our laws are premised in part on the idea that our courts will be staffed by judges who can understand the circumstances of the communities which they serve. Our judicial system depends on the general public's faith in its legitimacy. Both of these foundational principles require a bench that is representative of the people the courts serve. A truly representative judiciary would have the same ratio of women and minorities on the bench as it does in the general population. Having justices mirror constituencies would go immeasurably far in chipping away at the stereotype that a minority may possess as a "perpetual foreigner" – that minorities are something other than simply American or heterosexual. As judges break barriers throughout the country, they serve as role models for generations to come.

REFERENCES

Alozie, Nicholas O. 1988. "Black Representation on State Judiciaries." *Social Science Quarterly* 69: 979–86.

1990. "Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods." *Social Science Quarterly* 71: 315–25.

1996. "Selection Methods and the Recruitment of Women to State Courts of Last Resort." *Social Science Quarterly* 77: 110–26.

Brace, Paul, Melinda Gann Hall, and Laura Langer. 2001. "Placing Courts in State Politics." *State Politics and Policy Quarterly* 1: 81–108.

Bratton, Kathleen A., and Rorie L. Spill. 2002. "Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts." *Social Science Quarterly* 83: 504–18.

Dubois, Philip. 1983. "The Influence of Selection System on the Characteristics of a Trial Court Bench." *Justice System Journal* 8: 59–87.

Flango, Victor Eugene, and Craig R. Ducat. 1979. "What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort." *Justice System Journal* 5: 25–44.

Glick, Henry R., and Craig F. Emmert. 1987. "Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges." *Judicature* 70: 228–35.

Graham, Barbara Luck. 1990. "Do Judicial Selection Systems Matter? A Study of Black Representation on State Courts." *American Politics Quarterly* 18: 316–36.

Hall, Melinda Gann. 2001. "State Supreme Courts in American Democracy: Probing the Mythos of Judicial Reform." *American Politics Science Review* 95: 315–30.

Henry, M. L., Estajo Koslow, Joseph Soffer, and John Furey. 1985. *The Success of Women and Minorities in Achieving Judicial Office: The Selection Process.* New York: The Fund for Modern Courts.

Hurwitz, Mark S., and Drew Noble Lanier. 2001. "Women and Minorities on State and Federal Appellate Benches, 1985 and 1999." *Judicature* 85: 84–92.

Lyon, Mark A. 1981. *The Proportions of Black Judges to Black Population in Supreme and Appellate Jurisdictions: Elective vs. Appointive Systems of Judicial Selection.* Chicago: Committee on Courts and Justice.

Mansbridge, Jane. 1999. "Should Blacks Represent Blacks and Women Represent Blacks and Women Represent Women? A Contingent 'Yes'." *Journal of Politics* 61: 628–57.

Martin, Elaine. 1987. "Gender and Judicial Selection: A Comparison of the Reagan Carter Administrations." *Judicature* 71: 136–42.

McDermott, Monika L. 1997. "Voting Cues in Low-Information Elections: Candidate Gender as a Social Information Variable in Contemporary United States Elections." *American Journal of Political Science* 41: 270–83.

Pitkin, Hanna. 1967. *The Concept of Representation.* Berkeley: University of California Press.

Rosenthal, Cindy Simon. 1995. "The Role of Gender in Descriptive Representation." *Political Research Quarterly* 48: 559–611.

Schroedel, Jean Reith, and Nicola Mazumdar. 1998. "Into the Twenty-First Century: Will Women Break the Political Glass Ceiling?" In *Women and*

Elective Office, eds. Sue Thomas and Clyde Wilcox. New York: Oxford University Press.

Sigelman, Lee, and Susan Welch. 1984. "Race, Gender, and Opinion toward Black and Female Presidential Candidates." *Public Opinion Quarterly* 48: 467–75.

Toobin Jeffrey. 2013. "The Supreme Court Nominee-in-Waiting."*The New Yorker*. April 8. www.newyorker.com/news/daily-comment/the-supreme-court-nominee-in-waiting.

Uslaner, Eric M., and Robert E. Weber. 1983. "Policy Congruence and American State Elites: Descriptive Representation versus Electoral Accountability." *Journal of Politics* 45: 183–96.

Walker, Thomas G., and Deborah J. Barrow. 1985. "The Diversification of the Federal Bench: Policy and Process Ramifications." *Journal of Politics* 47: 596–617.

Warden, R. T., Schlesinger, and J. Kearney. 1979. *Women, Blacks and Merit Selection of Judges*. Chicago: Committee on Courts and Justice.