

Diversity on the Bench:
**The Appointment of Women to the Federal
Courts**

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Chapter 1: Introduction

Background and Significance

The concept of political representation has been a consistent theme since the birth of our nation. The United States was founded on the principle that a representative government is the ideal form of government – the public should be able to vote for representatives that they feel will best represent their interests. The federal judiciary is slightly different than the executive and legislative branches of government. Judges are not elected - they are appointed by the president and confirmed by the Senate. The judiciary interprets laws and determines constitutionality, and therefore its decisions impact the American people. Consequently, the federal judiciary should be held to the same standards of representative government as the elected branches. In regards to this matter, Dame Brenda Hale, the first female judge appointed to Britain's highest court has said,

It matters because democracy matters. We [the judiciary] are the instrument by which the will of Parliament and the government is enforced upon the people. It does matter that judges should be no less representative of the people than the politicians and civil servants who govern us (as quoted by Lane, 2004).

Though Hale's comments are referring to British government, they are nonetheless applicable to our democracy.

In recent decades, controversy over the representative of nature of the judiciary has emerged. President Jimmy Carter began to reform judicial selection with Executive Order 11972 in 1977; his goals were to decrease the number of judges appointed due to political patronage, and add more women and minorities to the bench (Goldman, 1997). Carter began a trend in selection – many presidents were and continue to be committed to

gender and ethnic diversity. In recent years, as the partisan divide has increased, presidential interest in judicial appointments has grown; both Republican and Democratic presidents understand that they can leave lasting legacies on American government and judicial policy since judges they appoint “go on to decide cases of great political import” for the rest of their lifetime tenure (Scherer, n.d.). Some groups criticize the use of race or gender as valid criteria for judicial selection; however, we stand today with the most diverse federal judiciary in our history (Goldman, Schiavoni, & Slotnick, 2009). Despite any criticism, presidents since Carter must have had some commitment to diversifying the bench in order to reach the current state of judicial diversity.

Since the 1970’s, females have generally fared better than other nontraditional (any judges that are not white males) groups in their appointments to the bench (Goldman et al., 2009). In fact, three of the last four nominees to the Supreme Court were women, but only one of the four was a racial minority.¹ This clear commitment to appointing women suggests that their judicial representation warrants further analysis to determine if the commitment is necessary. This thesis will focus on the appointment of females to the federal bench from the Carter administration through the first two years of the Obama administration. Women are an ideal group to focus on, because despite a large number of sub-groups, females are “an easily identifiable group...sharing some common identifiable ‘women’s interests’” (Mishler & Schwindt-Bayer, 2005). Using Hanna Pitkin’s framework of political representation, this thesis seeks to answer if female representation in the federal judiciary is of importance and what the state of female judicial

¹ The last four nominees to the Supreme Court, beginning with the most recent, are: Elena Kagan, Sonia Sotomayor, Samuel Alito, and Harriet Miers.

representation is today. All three levels of the federal judiciary (district, appeals, and Supreme Courts) will be assessed.

Methodology

Political representation is a broad concept that must be properly defined before any analysis can take place. Hanna Pitkin defines four separate dimensions of political representation, which will provide the framework for this thesis. Pitkin's book, *The Concept of Representation*, is arguably the most important work on political representation. Her analysis takes into account all prominent theories of representation before her writing in 1967. Though it may seem inappropriate to analyze the current judiciary with a work from the 1960's, there have been few, if any, additions to Pitkin's framework. Indeed, she is the most cited author in scholarly works on representation, and even if she is not explicitly cited, many authors appear to use her definitions. Other scholars of representation, such as Samuel Krislov, use the same concepts of representation that Pitkin discusses, but simply label them differently. Thus, using Pitkin's framework in this project will provide a complete analysis of female judicial representation.

Pitkin (1967) identifies four separate dimensions of political representation. They are formalistic, descriptive, symbolic, and substantive representation. Formalistic representation refers to the way in which the representative obtained his or her position. Descriptive representation is defined by the resemblance of the representative to his constituents. Symbolic representation refers to the meaning the representative has to those being represented. Finally, substantive representation analyzes the representative's actions to determine if they further the needs of the constituency (Pitkin, 1967).

Each of Pitkin's dimensions of representation will be applied specifically to the federal courts. The assessment of each one will begin with the Carter administration; any analysis of earlier administrations would not be fruitful, as only eight women held federal judgeships between 1934 and the time Carter assumed office in 1977 (Clark, 2003). The analyses will end with the first two years of the Obama administration. Each chapter will assess one dimension of political representation. The analysis of formalistic representation will seek to determine the president's motivation in selecting female judges. This chapter will draw heavily on biannual reports on the lower federal judiciary published by Sheldon Goldman. The analysis of descriptive representation is twofold- it will look at the percentage of female judges on the bench as a whole, as well as compare the backgrounds of male and female federal judges. This chapter will rely on statistics compiled by Goldman in his biannual reports. My examination of symbolic representation will determine if the presence of female judges increases the legitimacy, or institutional support, of the federal judiciary, drawing primarily from the writings and studies of Nancy Scherer. Finally, the substantive analysis will assess if male and female judges vote differently, that is if one sex furthers the interests of women more than the other. This section will be draw upon the abundance of articles that have been published on the topic.

Hypothesis and Findings

If any dimension of political representation is important, then it will be necessary for presidents to continue to actively recruit females to the federal judiciary, and perhaps even increase their commitments to diversifying the bench. I hypothesize that female representation must be important because the increase in presidential attention to

diversity appointments suggests that their political representation matters, and the large body of research on voting patterns of female judges demonstrates women may affect decision-making. This suggests that substantive representation is likely relevant. From my analysis, I confirm that substantive representation is an important aspect of female judicial representation; in addition, I find that symbolic and descriptive representation are relevant dimensions as well.

Structurally, the thesis is broken down into six chapters. The next four chapters examine one aspect of representation each. The purpose of each chapter will be to determine the effects of female judges on the bench as they relate to the specific dimension of representation. Conclusions will be drawn at the end of each analysis. Chapter six will summarize these findings, determining which, if any, dimensions of representation suggest that the commitment to appointing women to the federal courts should remain, or perhaps even grow.

Chapter 2: Formalistic Representation

There is a tendency, and we see this across the political spectrum, to use bench appointments to gain clout with certain voters.

- Rorie Spill Solberg, Professor of political science at Oregon State University

The first dimension that Hanna Pitkin discusses in *The Concept of Representation* is formalistic representation. This was likely in response to Thomas Hobbes' theory on the subject, which was prominent during the time Pitkin was writing. Hobbes defined representation in terms of giving and having authority (Pitkin, 1964), which is a very formalistic-based definition. Pitkin expands on Hobbes' conception to create her definition of formalistic representation, concluding that the formalistic representative is someone who has been "authorized to act" (1967). Authorization is the key word in Pitkin's definition. The formalistic representative is defined by his ability to act on behalf

of those who gave him authority. This authority allows the representative to “deliberate and decide for others” (Pitkin, 1967).²

In the judiciary, the representative’s authorization to act comes from the nomination by the president and confirmation by the Senate. Therefore, federal judges can be thought of as formalistic representatives because the other branches of government give them the authority to decide cases on behalf of other people. Even though the Senate confirms each nominee, the president arguably has more power in the judicial appointment process; people who become judges ultimately end up on the federal bench because the president chose them.³ Because of the nature of the selection process, we can understand why a specific judge was appointed based on the motivations of the president.

According to Dovi (2008), a formalistic representative is evaluated based on whether she legitimately holds his position. To do this, we need to understand the how the representative gains power. For example, if we were to evaluate the president as a formalistic representative, we would look at his presidential election. In terms of the

² Pitkin also discusses “accountability theorists” under formalistic representation. These theorists believe that the formalistic representative must be held accountable if he does not act based on the wishes of the constituents. Accountability theorists study how a constituency can sanction a representative for poor behavior (Dovi, 2008). Because federal judges have lifetime appointments, and are therefore not sanctioned by their constituencies, it is not necessary to study accountability for formalistic representation in the judiciary.

³This is not to devalue the strength of the Senate. The Senate has proved to be powerful in the appointment process in recent decades through increased scrutiny of lower court nominations. This has led to long delays and more rejections of judicial candidates (Hartley & Holmes, 2002). However, I argue that the president’s role is more important to analyze for the purpose of this research, as his motivations to appoint a judge are ultimately the reason why a judge reaches the federal bench.

judiciary, a judge may be evaluated as formalistic representative depending on why the president nominated her. Sheldon Goldman identifies three potential motivations for the president's selection of judges (1997). They are the policy agenda, the partisan agenda, and the personal agenda. Presidential administrations concerned with the policy agenda "view the courts as likely to affect the success or failure of its policy goals" (Goldman, 1997). The president appoints judges whom he believes will further his political philosophy. Presidents motivated by the partisan agenda use judicial appointments to gain support for the president or his party. Examples of these would be appointing a judge to maintain a good relationship with a Senator, to help party leaders, or earn the support of a constituency (Goldman, 1997). Finally, a president concerned with the personal agenda uses judicial appointments to favor a friend or associate. Though some judicial appointments may appear to further all three agendas at the same time, they are distinguished by the president's motivation (Goldman, 1997). Thus, for example, if the president furthered his policy goals with an appointment, but chose the judge in order to maintain a good relationship with a Senator, Goldman would define this as a partisan agenda.

Elite Mobilization and the Emergence of Affirmative Action

Historically, personal agenda appointments largely filled vacancies in the federal judiciary, but this pattern began to shift in the 1950's (Scherer, 2005). According to Scherer (2005), presidential agendas of judicial selection became more partisan-oriented during this time period for two reasons. First, the "old party system" broke down. Amateurs, who were "ideologically driven political activists" and unwilling to compromise replaced professional organizers who had once controlled the political

parties (Scherer, 2005). The amateurs widened the ideological gap between the Republican and Democratic parties. In addition, they decreased the focus on political activism at the local level and set out to achieve national policy goals (Scherer, 2005). This disgusted many Americans, and fewer continued to identify themselves as a Democrat or a Republican. Consequently, interest groups took on the former role of parties, and they began to mobilize voters to support certain candidates. This entangled interests groups and specific ideological values with political parties. Thus, liberal groups like the ACLU and NAACP became intertwined with the Democratic Party, and conservative groups intertwined themselves with the Republican Party (Scherer, 2005). Interest groups then looked to the courts as the perfect venue to further their national policy objectives.

Interest groups would not have injected their policy goals into the judiciary had there not been a transformation of jurisprudence in the federal courts. In the 1950's, under the judicial activist style of the Warren Court, liberal interest groups increased the amount of litigation they brought to the federal judiciary (Scherer, 2005). Since the Warren Court was more sympathetic to constitutional protections for individuals than courts in the past, these interest groups felt comfortable bringing more cases. The increase in individual and constitutional rights litigation "transformed the federal judiciary into the principal political institution where the disadvantaged could seek redress that they could not otherwise obtain from the elected branches" (Scherer, 2005). Consequently, interest groups began to get more involved in the selection of lower court judges, so they could ensure that these cases would continue to be decided in a way that was favorable to them.

The involvement of interest groups in judicial selection remains steady today, and is what Scherer calls the “strategy of elite mobilization.” She defines it as follows:

Senators and presidents are so dependent on political activists to mobilize the electorate to turn out at the polls – and key political activists are so dependent on the federal courts to achieve their policy outcomes, politicians are now forced to pursue nomination/confirmation strategies that satisfy first and foremost the policy demands of these highly mobilized activists (2005).

Presidents appease the interests of ideologically driven activists with court appointments of individuals who are likely to further their policy objectives. Democrats would therefore appoint liberal judges, and Republicans would appoint conservative judges. According to this definition, all appointments to the federal judiciary, since the breakdown of the party system and the transformation of the federal courts, conform to the partisan agenda. Even though there are policy outcomes from the appointments, this is not the main focus of the president, who is ultimately concerned with courting a constituency.

During the Carter Administration, Scherer believes that affirmative action became an elite mobilization strategy to “shore up support among minority and female activists” (2005). President Jimmy Carter signed Executive Order 11972 in 1977 with the intention of increasing efforts to recruit female and minority judges. When this order failed to diversify the judiciary, Carter amended it in 1978 to explicitly say, “each panel is encouraged to make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees” (Executive Order 12059, 1978). Carter’s efforts forced the next administrations to take *some* stance on efforts to diversify the judiciary, whether for or against. Scherer suggests that Republican presidents are hesitant to appoint women, since females are constituents of the Democratic Party (2005).

Her rationale is that if a Republican president appointed a woman to the federal bench, she would not further the policy goals of conservative interest groups, so interest groups would not mobilize voters, and the president would risk the next election, or at least risk lowering his approval ratings (2005). Thus, according to Scherer, Republican presidents would not want to risk their popularity by appointing females.

Regardless of possible party differences in appointment strategies, all administrations must have had some commitment to diversity, as we stand today with the most diverse lower federal court in history (Goldman et al., 2009). The rest of this chapter will explore the motivations that each president had in appointing females to the federal judiciary, beginning with Carter. The analysis will be divided between Democrats and Republicans, since Democrats have openly stated their commitment to pursuing diversity appointments, and Republicans have not. Records of female appointments for each presidential administration will be assessed in an attempt to determine which of the three agendas motivates presidents to appoint females to the judiciary, and if agendas differ along party lines, as Scherer has suggested. Finally, the analysis will draw conclusions as to why women are appointed to the federal bench.

The Democratic Administrations: Carter and Clinton

Clinton, Carter, and now Obama have been explicitly committed to diversity initiatives. Carter was the only president with a written policy to recruit females and minorities, but Clinton and Obama have made it clear in various speeches that they believe in the virtues of a diverse judiciary. According to the theory of elite mobilization, it would have been easier for these administrations to diversify the courts since women and minorities are constituents of the Democratic Party. As of 2009, 41% of women

identified as Democrats, compared to only 27% who identified as Republicans (Jones, 2009). Because more women are Democrats, appointing a female to the federal bench would likely further the agenda of liberal interest groups, and in return the groups would mobilize women to support the president. If elite mobilization holds, we can expect Carter, Clinton, and Obama to appoint women in order to gain the support of female voters.

Carter and the First Large-Scale Effort to Diversify the Judiciary

Before Carter, only eight women had been appointed to the federal judiciary. Roosevelt appointed the first female, Florence Ellinwood Allen, in 1934, but it was not until Carter that significant number of women reached the bench. While less than 1% of appointments by his predecessors were female, almost 16% of Carter's judicial appointees were women (Clark, 2003).⁴ Carter's record alone speaks to his commitment to putting women on the federal bench. As mentioned previously, the Carter administration made a policy commitment to recruit women to the bench in Executive Order 11972 and its revised version, Executive Order 12059. It was able to achieve its goal partly due to the Omnibus Judgeship Act, which passed in 1978. This act increased the size of the federal judiciary, adding 152 seats to the lower courts, and ultimately allowed more women to be appointed than if Carter relied on filling vacancies of the current judges who were retiring (Goldman, 1997).

Carter generally supported women's representation in the federal judiciary for two reasons. Firstly, he was motivated by the policy agenda, stemming from his commitment to women's rights (Goldman, 1997). Carter supported affirmative action policies, civil

⁴ None of Carter's appointments were at the Supreme Court level, as there were no vacancies during his presidency (Clark, 2003).

and human rights, and the women's rights movement, and was undoubtedly influenced by the many female advisors he had (Clark, 2003). Adding women to the federal bench was a way to further the affirmative action agenda that was central to Carter and his administration (Scherer, 2005). One of the goals of Carter's presidency was to "provide maximum employment opportunities for women...and be sure they have an opportunity for satisfying career development" (Clark, 2003). By appointing women to the federal bench, the Carter Administration could further its objective of ensuring equal opportunities to all people through affirmative action.

Carter was also certain that adding women would increase the number of viewpoints that would be present in judicial deliberations. He stated his focus on minority appointments was grounded in the "special knowledge of the effects of past discrimination" that women and minorities possess (Scherer, 2005). Thus, the appointment of women supported the Carter Administration's goal of providing equal opportunity to women by allowing females access to become judges and broadening the perspectives of the judiciary to include those of women.⁵

Secondly, Carter was influenced by a partisan agenda in an attempt to secure votes of females and minorities (Goldman, 1997; Clark 2003). During his 1976 presidential campaign, Carter pledged to change the selection process in the judiciary in order to please activists who had "pressed the issue of women's judicial appointments on the presidential agenda" (Clark, 2003). Once elected, Carter quickly implemented a strategy to ensure diverse appointments of judges, but was unsuccessful. In the first two

⁵ Carter was looking for substantive representation in his appointment of females, which Pitkin defines as "acting in a manner responsive to the represented" (Pitkin, 1967) This concept will be explored further in Chapter 5.

years of Carter's presidency, no females were appointed to the courts. This prompted the Women's Political Caucus to release statistics to criticize his judicial selections in January of 1979. Despite a policy of diversifying the judiciary, 51 of 59 people on Carter's list of recommended appointees were white males (Goldman, 1997). Carter was then prompted to consult with interest groups on strategies to increase minority and female representation for the rest of his presidency (Scherer, 2005). Clearly, Carter was concerned with satisfying the wants of interest groups and mobilizing female voters.

Carter's motivations for appointing women can be classified under both the policy and the partisan agenda. Scherer's theory of elite mobilization does not explain the administration's entire reasoning for its method of judicial selection, but it does provide an understanding of part of it. Clinton, the first president since Carter to continually emphasize a commitment to diversifying the judiciary, was less interested in a substantive component to appointing females. Instead, his strategy was almost entirely based on the partisan agenda.

Clinton and the End to the Reagan-Bush Era of Judicial Appointments

During his 1992 presidential campaign, Clinton promised to create a court that "looked more like America," citing the risk of losing legitimacy among minorities and females if the record of diversity appointments continued at the same rate during the Bush-Reagan era (Abraham, 2008). To go even further, Clinton pledged to "outdo" Carter's record on diversity (Scherer, 2005). Clinton greatly surpassed Carter's number of diversity appointments – he was the first person to appoint more nontraditional (women and minority) judges than traditional (white male) (Goldman, Slotnick, Gryski & Zuk, 2001). Clinton's main focus was to gain the support of female and minority voters.

Thus, Clinton's appointment of women to the federal bench can be defined as motivated by the partisan agenda.

Clinton's presidential election relied very heavily on the mobilization of women and minorities by interest groups. He was indebted to add female judges to the courts once he got to office, since interest groups rallied women in high numbers to vote for him. The interest groups even kept tabs on Clinton's record of appointments - organizations like NOW claimed they intended to "hold Clinton accountable" if he did not fulfill his campaign promise to make the courts "look like America" (Scherer, 2005). The influence of women's groups was strong early on in the Clinton presidency. They were present at Clinton's transition meeting in December of 1992, demanding that he appoint a female as attorney general (Scherer, 2005). This was a strategic move, as the attorney general is not only a high-powered cabinet-level position, but she holds considerable sway in the judicial appointment process (Goldman, 1997). Presumably, women's groups hoped a female attorney general would make the executive branch more representative, as well as increase the number of women recommended to the courts. Janet Reno accomplished at least the latter objective.

Unlike Carter, Clinton had the opportunity to appoint a Supreme Court justice, and Janet Reno can be credited with suggesting the eventual appointee, Ruth Bader Ginsburg (Toobin, 2007). When Justice White retired from the Supreme Court in 1993, Clinton desired to replace him with New York Governor Mario Cuomo. Unable to get Cuomo, he looked to Senate majority leader George Mitchell, then Bruce Babbitt, followed by Breyer, who would get his Supreme Court seat during the next vacancy, and various circuit court judges (Toobin, 2007; Abraham, 2008). All these choices did not

pan out for various reasons, paving the way for Ruth Bader Ginsburg. In a call of desperation to Janet Reno, Clinton begged for his attorney general's recommendations. Reno's tone suggested that Clinton did not see the obvious choice. Her first words were, "Why aren't you looking at Ruth Bader Ginsburg?" (Toobin, 2007). Reno had followed through on recommending a female judge, as women's groups hoped she would.

Ginsburg's appointment was partially motivated by the partisan agenda, but there were also personal motivations as well. Before meeting with Ginsburg, solicitor general Erwin Griswold told Clinton, "As Thurgood Marshall had been to civil rights, Ruth Bader Ginsburg had been to women's rights" (Toobin, 2007). Clinton was intrigued by Ginsburg's career, arguing many women's rights cases in front of the Supreme Court on behalf of the ACLU (Abraham, 2008). His desire to support Ginsburg and her women's rights activism is a clear indication of the partisan agenda – he was favoring a specific constituency by righting the past discrimination of women's groups. However, Clinton was motivated by his personal feelings for Ginsburg and her "big heart" as well (Abraham, 2008). His personal agenda was stronger than his partisan agenda in this specific appointment. The night before Ginsburg's interview, Cuomo's son called to ask if the justice position was still vacant. Clinton decided he would still speak with Ginsburg the next morning, but Cuomo was his first choice (Toobin, 2007). Shortly after Clinton met with Ginsburg, however, he announced her nomination. Clinton was enchanted with Ginsburg's life story – her mother died while she was in high school, she attended law school classes for both her and her husband when he was diagnosed with testicular cancer, she graduated from law school at the top of her class, taught at Rutgers and Columbia (and was the first female tenured there), worked for the ACLU, and was

appointed to the D.C. Circuit by Carter (Toobin, 2007). Clinton felt a strong connection to Ginsburg's story, and she overtook Cuomo as his first choice to fill the bench. This does not fall under the category of a traditional personal agenda appointment, as Ginsburg was not Clinton's close friend or associate. Clinton did, however, nominate Ginsburg in part because he favored her over other candidates for personal reasons. Thus, Ginsburg's appointment was at least partially motivated by the personal agenda.

Ginsburg's appointment was an anomaly to the Clinton appointment strategy. Few, if any other appointments were motivated by the personal agenda. Based on how involved women's groups were with his administration, it was very clear that Clinton's main motivation was the partisan agenda. He needed the support of interest groups in order to mobilize voters, and thus owed them their pick of judicial appointees in return; as Scherer states, "having delivered key votes to Clinton in the 1992 election, these activists fully intended to hold him to his campaign promise" (2005). He was not interested in the policy implications of choosing women, as evidenced by the types of female judges he appointed. He appointed many women who were ideologically moderate or even conservative to both the district and circuit courts, a pattern that is abnormal in judicial appointments, especially at the appeals court level (Goldman et al., 2001). It was not necessarily the types of women that motivated Clinton to appoint to them to the federal courts; it was simply the fact that they were women.

Clinton's partisan agenda in appointing female judges was very successful. When he entered office, the percent of women in the federal judiciary was 11.1%. When Clinton left, the percentage of women had increase to 19.9%, representing an 83.5% increase (Goldman et al., 2001). The Clinton legacy on the judiciary is that of diversity.

Though women remained a significant minority on the bench, Clinton's efforts greatly increased their presence. Both Democratic presidents, Carter and Clinton, heavily promoted their diversity efforts. In a combined 28 speeches, or 93% of all speeches on appeals court nominees by the two presidents, the race, ethnicity, or gender of the nominee was emphasized (Holmes, 2008). Contrary to the Democrats, Republican rhetoric has generally rejected the need for affirmative action in the federal judiciary. Though they have not appointed women at the same pace as Democratic presidents, Republican appointment records suggest that they were not as hostile to actively diversifying the judiciary as Scherer or the presidents themselves claim.

The Republican Administrations: Reagan, Bush I, and Bush II.

The rhetoric of the Republican administrations does not suggest that they are against a diverse judiciary, but rather that they are against affirmative action policies to achieve it. Both President George H. W. Bush (Bush I), and his son George W. Bush (Bush II) stated their interest in looking for qualified women to fill the bench, and Reagan promised to fill the first vacancy on the Supreme Court during his presidency with a woman (Goldman, 1997). Even though they have fewer females in their constituency, Republican presidents still use diversity appointments to try and court female voters. As Reagan, Bush I, and Bush II have shown, however, the need to diversify the federal courts is second to appointing those judges who will further the ideological conservative agenda (Goldman et al., 2009).

Reagan's "Anti-Affirmative Action" Appointments

Reagan claimed to be opposed to affirmative action, so it was quite strange that he promised to appoint a woman to the Supreme Court upon the next vacancy (Goldman,

1997). In a speech to the American Bar Association, Reagan stated, “We will never select individuals just because they are men or women, whites or blacks, Jews, Catholics, or whatever” (Goldman, 1997). In addition, a memo by the administration regarding judicial selection stated that gender and race were invalid criteria for nominations (Goldman, 1997). Reagan’s appointment of Sandra Day O’Connor suggests that Reagan thought otherwise. Calling her the “most outstanding candidate for the position,” Reagan denied that O’Connor was appointed because she was a female (Goldman, 1997). Instead, he masked his affirmative action appointment by emphasizing her qualifications. These qualifications were generally below the standards used in judicial selection – O’Connor was only a state court judge, and was not very known outside of Arizona (Goldman, 1997; Nemacheck, 2007). By the time Reagan had become president, Supreme Court judges were normally well-known judges selected from the federal judiciary; clearly O’Connor’s gender played a role in her nomination.

Reagan occasionally sought women for judgeships on the lower courts as well. The Ohio Republican Congressional delegation specifically asked for the president to appoint a woman when there was a vacancy on the Northern Ohio District Court in 1982. Reagan fulfilled this request, as well as many others during his administration (Goldman, 1997). Reagan’s reasoning for fulfilling such requests, despite his personal opposition to affirmative action appointments, was that he was motivated by the partisan agenda. In his first election, few women voted for Reagan, and his promise to add a woman to the highest court, as well as actively appointing women to the lower courts, was an attempt to reach out to female voters (Abraham, 2008). This was not as successful as Democrats’

initiatives to diversify the courts, since liberal women's rights groups were still unhappy with Reagan's appointees (Scherer, 2005).

For Republican presidents, including Reagan, the judiciary has become a venue to establish conservative economic and social agendas. Reagan did not nominate individuals until he was "assured that the nomination shared the administration's political philosophy" (Goldman, 1997). This meant that the judges had to exercise "judicial restraint," suggesting that they would have very strict interpretations of the constitution, as well as possess family values and believe in the sanctity of innocent human life (Goldman, 1997). Reagan's biggest goal was to reshape the judiciary based on this conservative policy agenda.

Reagan had a lot of work to do in regards to remaking the federal bench – Carter had created a judiciary with a 60% Democratic majority (Goldman, 1997). This meant that his policy agenda came at the expense of appointing women. Though Reagan did appoint more females to the court than most of his predecessors, his record on diversity was below Carter's. He appointed 29 women to the federal judiciary, including the first woman to the Supreme Court (Goldman, 1997). When attempting to court the female constituency, Reagan only appointed conservative females, many of whom supported pro-life interest groups (Scherer, 2005). This is a minority of females; because of Reagan's emphasis on his policy agenda, he limited the number of female candidates he could potentially appoint to the judiciary.

For Reagan, the policy agenda was the most important motivation for appointments. This was a setback to Carter's implementation of judicial diversity initiatives. However, occasionally motivated by the partisan agenda, Reagan did appoint

more females than all his predecessors (other than Carter). Reagan's presidency can be characterized as one that explicitly rejected affirmative action, but used it in judicial appointments in an attempt to gain the support of women. Therefore, Reagan was motivated by the partisan agenda in his appointment of female judges, but his motivation was not strong enough to sacrifice his policy agenda. Bush's record on judicial appointments played out similarly to Reagan's, despite a stated commitment to diversity.

*Bush I's Continuation of Reagan's Judicial Agenda*⁶

Bush told his administration four points that should guide them in the process of judicial selection. First, he wanted to name qualified, philosophically conservative judges. Second, he wanted people who were "sensitive to the separation of powers under the Constitution." Third, he was looking to diminish the use of old-boy networks in judicial appointments. Finally, Bush sought to recruit qualified women and minorities (Goldman, 1991). Unlike Reagan, Bush explicitly committed himself to recruiting women. However, he did not use the same strategies as Carter did, which had objectively opened up access to the judiciary. Like Reagan, Bush screened candidates to ensure they were sufficiently conservative (Goldman, 1991), as well as rejected Carter's nomination panels that made huge efforts to recruit women and minorities. Instead, Reagan and Bush used the President's Committee on Federal Judicial Selection to seek out nominees, which relied on recommendations of judges from senators and others to the Justice Department (Goldman, 1997). This strategy calls into questions Bush's desire for diversity.

⁶ All references to "Bush" in this subsection refer to President George H.W. Bush.

Despite choosing a method of nominations that did not objectively diversify the judiciary, it is clear from Bush's record, especially the second half of his presidency, that he was in fact committed to appointing women to the courts. Bush even exceeded the rate of Carter during this period at the district court level: 1 in 4 district court appointees were female (Goldman, 1993). It is unclear why Bush's commitment to diversity increased significantly during this period. Goldman believes one such explanation was to compensate for the treatment of Anita Hill during the Thomas-Hill hearings (1993).

When Thurgood Marshall retired from the Supreme Court, Bush replaced him with another African-American justice, Clarence Thomas. Thomas' nomination proved to be very controversial. Contrary to Marshall's liberal jurisprudence, Thomas was extremely conservative, which appropriately conformed to Bush's social agenda (Goldman, 1993). During the confirmation battle in the Senate, Anita Hill, a former employee of Thomas, testified to the sexual harassment she experienced while working for him. Thomas vehemently denied these allegations. Orrin Hatch even told Hill she was fabricating the story (Smolowe, 1991). The accusations from the all-male committee that Hill was committing perjury enraged women's groups, who were disgusted that a sexual harassment claim was not being taken seriously. These groups, most of which were liberal, began to mobilize (Goldman, 1993). Goldman (1993) suggests that Bush's commitment to appointing female judges increased significantly as a form of compensation to the angered women's groups. This would be classified as the partisan agenda. His desire to extinguish the rage after the Thomas-Hill hearings led Bush to exceed Reagan's number of female appointments, but his record still fell below Carter's.

The number of female judges Bush appointed may have been larger if he was not so committed to his policy agenda. Bush continued remaking the federal bench in the same way that Reagan did – both were looking to create a more conservative judiciary. As Goldman (1993) states, “liberal activists in the tradition of Earl Warren, William Brennan, and Thurgood Marshall were not welcome.” Bush appointed an extremely large number of people to the federal bench who were already held other judgeships in order to use their records to understand the judge’s judicial philosophy. Those with philosophies dissimilar to the Bush administration did not get appointed (Goldman, 1991).

Bush’s legacy is that of 36 women appointed to the federal courts, or 19% of his judicial appointments, but this number would have perhaps been larger if he was not so committed to his policy agenda. Thus, diversity was important to Bush, but like Reagan, this diversity could not come at the expense of conservative policy. Thus, Reagan and Bush appointed women because they were motivated by the partisan agenda; Reagan did this because he wanted voter support from women, and Bush likely did to make up for the Hill-Thomas controversy. However, they did not diversify the judiciary at the same pace as Carter, because they would not compromise on their policy agendas. Bush’s son, George W. Bush, would struggle with the tension between diversity and conservative policy agendas as well.

*Bush II’s Balance of the Conservative Agenda and Judicial Diversity*⁷

W. Bush’s record of nontraditional judicial appointments surpasses that of Carter. Though his record falls short of Clinton, W. Bush appointed significantly more female and minority judges than his Republican predecessors. At first, it appears that W. Bush

⁷ All references to “Bush” in this section refer to George W. Bush.

successfully balanced the seemingly opposite goals of promoting a conservative policy agenda with increasing judicial diversity. However, W. Bush's diversity record is deceiving. In terms of the absolute numbers, W. Bush appointed 71 women to the federal judiciary, which was 22% of his appointments, but he did little to *increase* the number of women on the bench. Instead, Bush generally replaced retiring women on the bench with other women, which maintained the level of diversity more so than increasing it (Diascro & Solberg, 2009).

President Bush had no written policy on diversifying the courts, but according to his associate White House counsel Dabney Friedrich, diversity was "something the president cares very much about, and he makes the effort to find qualified men and women for the federal bench" (Goldman, Slotnick, Gryski & Schiavoni, 2005). During his presidency, Bush clearly understood the benefits of diversity, making statements in support of it after the *Grutter* and *Gratz*⁸ decisions, and suggesting that a woman replace Sandra Day O'Connor upon her retirement. However, Bush believed that diversity must come to exist on its own – there can be no preferences or quotas for minorities or women to fill positions (Solberg, 2005). Thus, Bush believed he could diversify the judiciary without actively seeking minority and female judges.

Though he stated his belief in race and gender neutral approaches to diversification (Goldman, Slotnick, Gryski, Zuk & Schiavoni, 2003), it seems that Bush did consider the

⁸ *Grutter v. Bollinger 2003*, was a case where the Supreme Court upheld the University of Michigan Law School's use of racial preferences in admissions decisions, since race was one of just one of the factors that the university used. *Gratz v. Bollinger 2003* found that racial preferences at the University of Michigan's undergraduate schools violated the equal protection clause because they were not narrowly tailored. The University gave admission based on a point system, and members of an underrepresented minority group were awarded 20 points. The Court ruled that this did not achieve the state's compelling interest in diversity, but that the state *does* have an interest in diversity.

gender of the retiring judge when seeking to replace her. Carter and Clinton used the creation of new judgeships in order to increase the number of women in the judiciary. Bush gave most new positions away to white male appointees, and instead, Bush appointed a number of women to replace other female judges that were retiring (Diascro & Solberg, 2009). If Bush's strategy was truly gender neutral, it is unlikely that many of the women he appointed would fill the seats of retiring female judges. Of the 71 women that Bush appointed to the federal bench, 48 replaced traditional appointees, and 6 were appointed to 24 new seats (Diascro & Solberg, 2009). The rest replaced other female judges. To Diascro and Solberg (2009), the replacement of women judges with other women judges, as well as his substantial appointments of men to new seats, calls into question Bush's commitment to diversity - even though most of his appointments of females did replace white males, his pattern of replacement for women judges is higher than the pattern for the Democratic presidents (Diascro & Solberg, 2009). Thus, Bush was able to appoint many women, but unlike Carter and Clinton, he did not increase representation of women as much as he could have if he utilized new seats to appoint female judges, and focused on less replacement. Bush's attention to women on the court, whether replacing females or males, does suggest that Bush had at least a moderate commitment to diversity, as at the very least, he sought to maintain diverse gender representation.⁹

⁹ Bush even attempted to name a woman to the Supreme Court to replace Justice O'Connor in 2005. His choice, Harriet Miers, was deemed unqualified by both the left and the right, and she quickly withdrew her nomination (Goldman, Slotnick, Gryski & Schiavoni, 2007). This was a combination of policy, partisan and personal motives. She was counsel to the president and his close friend (Goldman et al., 2007), and Bush assured everyone that she would adhere to his judicial philosophy of strict constitutionalism ("Remarks," 2005). Bush's assurance did nothing to ease conservatives.

Perhaps Bush would have committed himself even more to diversity if he were not so caught up in his policy agenda. Bush was extremely aware “of the central role judicial appointments play in the president’s domestic policy agenda” (Goldman et al., 2005). This policy agenda appealed to very conservative Republicans. Vice president of People for the American Way Elliot Minceberg states that the president understood that he could use judgeships to “continue to appeal to and mobilize the far right base” (Goldman et al., 2005). Bush was against activist judges who “legislated from the bench.” Instead, he supported judges who were “strict constructionists,” and wavered little from this standard of interpreting the Constitution (Diascro & Solberg, 2009). Thus, judges who held liberal social values were generally deemed unqualified for the judiciary. As a result, Bush was able to slant the judiciary, which had been moderate under Clinton, towards the right (Goldman et al., 2009).

Bush appears to be the most committed to diversity out of any Republican president; however, similar to past Republican administrations, Bush was unwilling to compromise on his policy agenda. According to an aide to a senior Democratic senator, “it appears that diversity of views is...not valued so much. Loyalty along ideological lines is much more valued than racial or ethnic diversity” (Goldman et al., 2005). The majority of Bush’s appointments were therefore motivated by the policy agenda, but his diversity appointments were motivated by the partisan agenda as well. As Diascro and Solberg (2009) point out, “electoral gain for himself [Bush] and his party seem to be the main factor accounting for the diversity of his judicial legacy.” It appears that although Bush may have been genuinely committed to the principles of diversity, his record suggests

Due to her lack of records, they could not be convinced that she “would vote their way” (Nemacheck, 2007).

that women could not be appointed at the expense of his policy agenda. Bush, as his father and as Reagan did, limited himself to the smaller pool of conservative women (though it was larger than during Reagan's presidency) to appoint to the federal bench. Bush wanted to retain the gender demographic of the judiciary, but simultaneously wanted to create a more right-wing judiciary. Thus, he replaced liberal women judges who retired with more conservative ones, to maintain the gender composition.

When Bush's second term ended, the percentage of white male judges in the federal judiciary decreased by only 5% (Diascro & Solberg, 2009). The judiciary was significantly more conservative, suggesting that Bush was much more interested in pursuing his policy agenda. Bush, however, was able to surpass records of all other presidents, except Clinton, of nontraditional appointments. Even though he used the judiciary to promote the policy agenda, his moderate commitment to diversity allowed him to nominate many nontraditional judges to the federal bench. This ultimately helped him gain electoral support (Diascro & Solberg, 2009). Thus, Bush's appointment of women can be thought of as furthering the partisan agenda, and he has been most committed to it than any other Republican president. However, Democratic presidents appear to value diversity objectives more. Though Obama has only been president for little more two years, it appears that he is looking to make diversity a huge factor in his judicial appointments, and perhaps even beat Clinton's record of nontraditional appointments.

Obama's First Two Years: On Track to Surpass Clinton's Record?

Obama, like his Democratic predecessors, believes strongly in having a diverse judiciary. He has made a huge effort to appoint females to the bench since his presidency

began. Of the 76 judges that Obama has appointed to all three levels of the federal judiciary, 37 of these appointments, or 49% of all his appointments, have been female.¹⁰ If Obama continues appointing women at this rate, he will surpass Clinton's record for the most appointments of female judges. At the end of his presidency, Clinton had appointed 372 judges, 106 of which were female (or roughly 28%) (Federal Judicial Center, 2011). Obama has clearly exceeded this rate in his first two years. Unlike Clinton however, it appears that Obama may have some substantive reasons for appointing nontraditional judges, in addition to partisan ones.

Concerns for diverse representation are evident in Obama's speeches. Similar to Carter, Obama hopes that increasing diversity on the courts will lead to some sort of substantive representation. This is clear from his first appointment to the Supreme Court. Obama pledged to fill the vacant seat with "someone with a broad range of life experiences, capable of understanding the difficulties many average families face." (Galston, 2009). This echoes the sentiment Clinton expressed when he fell in love with Ginsburg's "big heart," as he felt Ginsburg could understand certain experiences, having faced so many difficulties in her life. In his pledge, Obama suggests that diversity is important because those judges with different types of life experiences are more apt to understand certain struggles that traditional judges may not. Consequently, Obama appointed a candidate who affirmed the need for empathy in the judiciary.

In a 2001 speech, Sonia Sotomayor stated, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life" (Savage, 2009). She has not backed down

¹⁰ I collected this data myself through the Federal Judicial Center website's Biographical Directory of Federal Judges, on April 5, 2011.

from this belief, despite the huge backlash during her confirmation hearings. Though Sotomayor does admit that there is no uniform way for minorities and women to rule in a case, there will be some difference in jurisprudence by changing the demographic in the judiciary, as “our gender and national origins may and will make a difference in our judging” (Savage, 2009). Thus, Obama hopes that appointing diverse candidates to the court will create a judiciary that is empathetic to all types of people. This can be classified under the policy agenda, since the president is motivated to appoint nontraditional judges in the hope of a substantive outcome.

Obama is also interested in fulfilling the partisan agenda, as all other presidents have been at least partially committed to. By appointing diverse judges, Obama hopes to appeal to women and minorities by letting them know that the legal institution is open to them. When he appointed solicitor general Elena Kagan to the Supreme Court, Obama emphasized the importance of increasing judicial diversity. In a speech honoring Kagan’s confirmation, Obama stated that he is

proud that our Supreme Court will be a little more inclusive, a little more representative, more reflective of us as a people...and it is yet another example of how our union has become more, not less, perfect over time -- more open, more fair, more free (The White House, Office of the Press Secretary, 2010).

By emphasizing the need to open up the judiciary to specific groups who have been historically barred from the institution, and appointing a large number of nontraditional judges, Obama is catering specific groups. This suggests that the president is motivated by the partisan agenda, in addition to a policy one. Whether Obama is more motivated by the policy or partisan agenda is unclear. More studies will undoubtedly come out as his record for judicial selection becomes larger.

Conclusion

The Republican/Democrat distinction in methods of appointments that Scherer discusses is more complicated than she admits. According to Scherer (2005), Republicans support the policy agenda, and Democrats support the partisan one. Though this generally holds, there are some key points that this theory misses. First, Carter, and possibly Obama, were looking to further some policy agenda. These policy agendas were so intertwined with their partisan agendas of diversification that it is unclear which was more important to Democratic administrations (except in the case of Clinton, where the partisan agenda was most important). Second, Republican administrations appear to be more open to diversity, especially to court women voters. This trend began with Reagan and has only increased during Bush I and then Bush II's administrations. Scherer is right, however, in saying that Republican administrations are more committed to their policy agenda than diversity, as evidenced by the small increases in diversity compared to the large shift of the court to the right under their presidencies.

In sum, Republicans appoint women for partisan reasons, and Democrats appoint women for policy and partisan reasons. The main distinction is that for Republicans, the policy agenda takes precedence over the partisan agenda; for Democrats, there is no need to rank the agendas, as presidents can achieve both liberal jurisprudence and an increase in diversity at the same time. Both Republicans and Democrats are looking to capture the "female constituency," but Republicans limit themselves to conservative women. Though Democrats still limit their pool of candidates to liberal and moderate women, they are less hesitant to appoint conservative women than Republicans are to appointing liberal ones, and the number of liberal and moderate candidates greatly outnumbers conservative females. Thus, both Democrats and Republicans have increased the number of females in

the federal judiciary, but Clinton's strategy of appointing moderate females, motivated by partisan and not policy objectives, was the most successful. In light of Obama's first two years, however, Clinton's record may soon be challenged. Close to 50% of Obama's appointees are females. This record suggests that Obama believes in the value of descriptive representation – the percentage of female judges should resemble the percentage of females in the population. This dimension will be explored in the next chapter.

Chapter 3: Descriptive Representation

Despite the encouraging and wonderful gains and the changes for women which have occurred in my lifetime, there is still room to advance and to promote correction of the remaining deficiencies and imbalances.

- Retired Justice Sandra Day O'Connor

Descriptive representation is defined by the resemblance of the representative to what it represents (Pitkin, 1967). Because of a specific characteristic, the representative is believed to represent the larger class of people with the same trait; thus black representatives would represent the black constituency, and female representatives would represent the female constituency (Mansbridge, 1999). If one views representative government as a substitute for direct democracy, the government should be reflective of the descriptive characteristics of society. This theory of representation gained popularity during the American and French Revolutions, when founders and revolutionaries fought for equal representation that had not existed under monarchical rule. Based on sheer numbers, it would have been impossible to establish a direct democracy, so citizens of both countries sought to create representative legislatures that reflected the characteristics of the whole society. John Adams suggested that the representative body "should be an

exact portrait, in miniature, of the people at large” (as quoted by Pitkin, 1967).¹¹ The founders believed that this would be “the most natural substitute for the assembly of the whole” (Pitkin, 1967). Simply put, descriptive representatives look like those they represent.

Because the federal judiciary is part of our representative government, it is appropriate to analyze it to see if it does in fact resemble our society at large. As the first female justice to Britain’s highest court remarked upon her appointment, “judges should be no less representative of the people than the politicians and civil servants who govern us” (Lane, 2004). To evaluate this dimension, we must “assess the representative by accuracy of the resemblance between the representative and the represented” (Dovi, 2008). There are no qualifications specified in the Constitution regarding selection of judges; however, there is an unwritten rule that one must have a law degree (Abraham, 2008). This limits the pool of qualified potential candidates to lawyers. Though not every female in the United States has a J.D., law school enrollment since the 1990’s has been pretty equally divided between male and female students. Women made up only about 10% of enrolled law school students in the early 1970’s, but that amount has steadily increased since then, reaching 40% by the mid 1980’s (“Women in law,” 2010). Therefore, because the pool of qualified potential judges should be about equal today, we can assume that the federal judiciary should comprise of a more or less 50% male and 50% female judges, which also reflects the number of women in our nation.

In the past few decades, more unwritten rules have been created in terms of qualifications of federal judges, further minimizing the pool of potential candidates. First,

¹¹ Notably, the founders did not allow all groups of people run for office, or even vote.

they overwhelmingly are recruited from other judgeships, such as state court or magistrate judges (Wheeler, 2010). Second, they must have prestigious higher education. Not only do they have law degrees, but also most of them have attended the top private and Ivy League schools in our nation (Goldman, 1997; Goldman et al., 2009). Finally, they are extremely wealthy, with many newly appointed judges having a net worth over \$1 million (Goldman et al., 2009).

This chapter will explore the current state of female representation in the federal judiciary. Because the nature of the federal judiciary is so elite, this chapter will focus on how the backgrounds of female judges compare to the backgrounds of male judges. To satisfy qualifications of descriptive representation in the judiciary, their qualifications and backgrounds should be largely similar. In addition, I will analyze the current state of female representation in the judiciary by determining the percentage of female judges on the federal bench. Based on current trends in judicial appointments, not only should female judges make up half the federal bench, but they should also come overwhelming from other judgeships, have a high net worth, and prestigious undergraduate and law degrees. If these predictions hold true, then the judiciary will satisfy the requirements of descriptive representation for both the general population and the judiciary.

The Professionalization of the Federal Judiciary

Beginning with the Eisenhower administration, there has been a steady increase in appointments of men and women who are judges immediately prior to their appointment to the federal bench (Wheeler, 2010). Goldman refers to this trend as the “continuing professionalization of the federal judiciary” (1997). Once a majority of appointees, a decreasing percentage of federal judges are now appointed straight from private practice

(Wheeler, 2010). Whether this is good or bad is unknown. It may be easier for judges to acclimate to federal judgeships because they are familiar with the role. Chief Justices Roberts and Rehnquist, however, believe it is best to appoint those who are “leaders of the bar,” though their only rationale is that this is how the judiciary has always been (Wheeler, 2010). Whether or not these merits are accurate, a main reason for the trend in professionalization is that judges have records that lawyers do not; the president and the Senate can guess how a judge will vote on key issues based on the opinions that judges write. Knowing how a judge will vote is crucial to pleasing the interest group activists that the president relies on to mobilize voters (Scherer, 2005). As mentioned previously, elite mobilization began in the 1950’s, so it makes perfect sense that the professionalization of the judiciary began during the same time period.

The appointment of former judges has increased in recent decades. During the Carter administration, 44.6% of district court appointees had judicial experience (Goldman, 1993). During the first two years of Obama’s presidency, 52.3% were previously judges (“The Obama judiciary at midway,” 2011). In a little over three decades, judicial experience prior to appointment has become the norm for district court judges. As the level of the judiciary gets higher, the number of federal court judges with previous experience continues to increase. 46.4% of Carter’s appointees to the appeals courts had previous judicial experience (Goldman, 1993). Obama greatly increases this trend; at midterm, 80% of his appointments to the appeals courts have had previous judicial experience (“The Obama judiciary at midway,” 2011).

Judicial experience has almost become a requirement for appointments to the Supreme Court. With the exception of Justice Kagan, all of the current justices have had

previous judicial experience. Moreover, all had judicial experience at the federal circuit court level (“Biographies of current justices,” 2011). For the Supreme Court, judicial experience on the appeals court is now a huge factor in appointments. Thus, when appointing justices to the highest level of the judiciary, president’s look for sitting judges on the next highest-ranking court. Clearly, judicial experience is an important, though not mandatory, prerequisite of federal court judges, though the higher the level of the judiciary, the more likely the judge is to have such experience.

The Consequences of Low Judicial Salaries

Similar to increases in the professionalization, the net worth of judges has increased as well, though this increase is even more dramatic. In the past few years, a number of extremely wealthy judges, many with a net worth over \$1 million, have become a large proportion of the federal bench. This is likely due to low compensation for federal judges. Consequently, low salaries have substantially changed the nature of the federal judiciary. Once coveted positions for those with law degrees, many private practice lawyers do not want to serve on the federal bench because they would make a fraction of their current salaries. Thus, many judges now come increasingly from the public sector, who actually take a pay raise when they are appointed, or they have such high levels of wealth that they are indifferent to the compensation (Roberts, 2006).

This is a problem that has not gone unnoticed by members of the federal judiciary, but Congress had paid little attention to the need for more compensation. In his second annual Report on the Federal Judiciary (2006), Chief Justice John Roberts focused exclusively on this issue. Echoing Chief Justice Rehnquist’s recognition of the same problem twenty years earlier, Roberts states that the nation’s failure to raise judicial

pay is now a “constitutional crisis” (2006). Relying on two categories of judges – the super wealthy and the ones who accept pay increases – is not adequate to represent the entire nation. According to Roberts, good judges come from both of these categories, but to rely entirely on these pools of candidates is not “the sort of judiciary on which we have historically depended to protect the rule of law” (2006). He advocates raising judges’ salaries so private practice lawyers will be more interested becoming judges (2006).

Indeed, the number of wealthy people on the federal bench has dramatically increased. During Carter’s presidency, 35.8% of district court judges had a net worth of less than \$200,000 (Goldman, 1993). During Obama’s first two years, this percentage has fallen to 2.3% (“The Obama judiciary at midway,” 2011). Those with a net worth between \$200,000 and \$499,999 represent 41.2% of Carter’s district court appointments (Goldman, 1993), but only 9.1% of Obama’s (“The Obama judiciary at midway,” 2011). The percentage of district court judges who were worth between \$500,000 and \$999,999 that were appointed by Carter was about 18.9% of all his appointments (Goldman, 1993). For Obama, these judges were about 22.7% (“The Obama judiciary at midway,” 2011). The most stark contrast appears for those district court judges worth more than \$1 million. Though a mere 4% of Carter’s appointees had a net worth this high (Goldman, 1993), almost 66% percent of Obama’s appointees reported this level of wealth (“The Obama judiciary at midway,” 2011). Thus, there was a great change in the net worth of district court judges between the Carter and the Obama presidencies. While the majority of Carter’s appointees (77%) had a net worth of less than \$499,999, the vast majority of

Obama's district court appointees (88.6%) were worth *more* than this. The data demonstrate a complete shift in the wealth demographics on the district courts.¹²

A similar shift to a very rich judiciary has occurred on the appeals court level as well. 33.3% of Carter's appeals court appointees had a net worth of less than \$200,000 (Goldman, 1993); for Obama, this number was around 6.7% ("The Obama judiciary at midway," 2011). 38.5% of Carter's appointees had a net worth between \$200,000 and \$499,999 (Goldman, 1993); 13.3% of Obama's appeals court appointees were in this category ("The Obama judiciary at midway," 2011). 17.9% of Carter's appointees had a net worth between \$500,000 and \$999,999 (Goldman, 1993); for Obama, this number was around 13.3% ("The Obama judiciary at midway," 2011). Finally, 10.3% of Carter's appointees were worth over \$1 million. A staggering 66.7% of Obama's appeals court appointees reported a net worth at this level. This shows a very similar to pattern to district court appointments. The majority of appeals court appointments have switched from judges with less than \$500,000 in net worth to over \$1 million. As Roberts has stated in the past, lack of adequate compensation has created a federal judiciary of individuals who are indifferent to the salary; however, those who take a pay increase upon their appointment are significantly less than the Chief Justice suggested in his report. Thus, in addition to previous judicial experience, another attribute of the majority of federal court appointees today is that they are extremely wealthy. This represents a significant change from just a few decades ago.

The Federal Judiciary and Prestigious Higher Education

¹² Goldman's statistics are not adjusted for inflation. Using the Bureau of Labor's CPI Inflation Calculator, I have concluded that \$1.00 in 2010 was worth \$3.60 in 1977.

Unlike the other new trends, the importance of prestigious education has remained pretty consistent in the last half century. Though not specified in the Constitution, obtaining a law degree is almost obligatory if one wants to be a federal court judge. The prestige of the degree has always been an important factor considered when choosing potential nominees, especially for the appeals courts and Supreme Court. In general, the majority of judges has always attended either private or Ivy League institutions for both undergraduate and law school.¹³ As the level of the judiciary increases, the number of judges with private or Ivy League education increases as well. This is a trend that has remained steady since the Reagan administration.

For the district court appointees since the Reagan Administration, a slight majority has attended private and Ivy League undergraduate and law schools. At the undergraduate level, from Reagan through Obama, the percentage of each administration's appointees that received this education range between 52.9% and 62% ("The Obama judiciary at midway," 2011). For law schools, the number of appointees in each administration with private or Ivy League degrees ranges from 47.3% to 60.4% ("The Obama judiciary at midway," 2011). Thus, while these percentages are occasionally a bit more or a bit less, it generally holds true that a slight majority of district court judges attend private or Ivy League institutions for undergraduate and law school.

For the appeals courts, the percentage of appointees with private and Ivy League education are a greater majority than that of the district court judges. The percentage of

¹³ There are a few exceptions to this. For example, 57.4% of Carter's district court appointments attended public undergraduate institutions. However, many attribute this to the fact that Carter appointed so many women and minorities (Goldman, 1997).

appointees who had private or Ivy League undergraduate education from the Reagan to the Obama administrations ranges between 55.7% and 86.6% of appointees (“The Obama judiciary at midway,” 2011). For private or Ivy law degrees, the percentage of appointees for each administration ranges between 59% and 80% (“The Obama judiciary at midway,” 2011). While there are some outliers, it is clear that at the appeals court level, attending private or Ivy League schools for undergraduate or law school are slightly more important than at the district court level. Though they represent a majority of nominees to the lower court, a private or Ivy League degree is certainly not a requirement to become a judge on either of these levels of the federal bench. The same cannot be said of the current Supreme Court.

The current Supreme Court, comprised of nine individuals with nine different backgrounds, is representative of few institutions of higher education. All the justices attended prestigious private or Ivy League undergraduate universities. Even more astounding, however, is that all the justices, with the exception of Justice Ginsburg, have obtained a law degree from Harvard or Yale (“Biographies of current justices,” 2011). Justice Ginsburg is not a complete exception, however. She did attend Harvard for part of law school, but transferred to Columbia when her husband was diagnosed with cancer (Toobin, 2007). It appears to be mandatory to attend private or Ivy League schools for college, and crucial that one attends Harvard or Yale for law school if one wants to be a Supreme Court Justice. Thus, at all levels of the federal judiciary, not only are undergraduate and law school mandatory, but the majority of judges have private or Ivy bachelor’s and law degrees.

Women and the Federal Courts: How Female Judges Compare to the Rest of the Judiciary

Clearly presidents appoint wealthy individuals who have had prestigious education and prior judicial experience to the federal judiciary, but we do not know how female judges compare to these standards. Unfortunately, there are no statistics that focus solely on the comparison between females and the rest of the judiciary. Various data prepared by Sheldon Goldman, however, provide statistics that compare nontraditional appointees and traditional appointees in both the Clinton and W. Bush administrations. Since females are considered nontraditional appointees, we can use these statistics as a general guide as to how the backgrounds of females on the courts compare to white male judges, keeping in mind that the numbers also represent all non-white male judges.

Female judges and judicial experience

Firstly, nontraditional judges have much more judicial experience than traditional judges. For Clinton's district court appointees between 1999 and 2000, 64% of the nontraditional judges were judges immediately prior to their appointment, while only 46.9% of traditional judges were (Goldman et al., 2001). This same pattern held in Clinton's appointments earlier in his presidency. For example, from 1993 to 1994, 55.4% of nontraditional appointees had judicial experience and only 26.2% of traditional appointees did (Goldman, 1995). Similarly, for W. Bush's district court appointments, 67% of nontraditional nominees had judicial experience, and only 39.2% of the traditional appointees did (Goldman et al., 2009).

The appeals court has a similar pattern. For Clinton's nontraditional appointees from 1993 to 1994, 88.9% had judicial experience, compared to merely 22.2% of the

traditional appointees (Goldman, 1995). Between 1995 and 1996, 55.1% of nontraditional versus 32.5% of traditional had judicial experience (Goldman & Slotnick, 1997). From 1997 to 1998, 75% of Clinton's nontraditional appointees had prior judicial experience. Only 36.4% of traditional appointees in the same period had been judges (Goldman & Slotnick, 1999). W. Bush's presidency demonstrates a similar pattern. 71.4% of W. Bush's nontraditional appointees to the appeals court were judges prior to appointment; only 36.8% of traditional appointees listed "judge" as their occupation (Goldman et al., 2009).

If we continue to assume that the comparison of all nontraditional to traditional appointees can give us a general idea about how women judges compare to traditional judges, the data suggest that women judges have significantly more judicial experience. This holds with Russell Wheeler's recent findings that one reason why appointees to the district courts have more judicial experience than in the past is because presidents have increased their attention to female and minority appointments (Wheeler, 2010). Women and minorities have also had a disproportionate number of jobs in the public sector, which may explain why federal judgeships may be more appealing to them than their peers in private practice (Wheeler, 2010).

Female Judges and Wealth

The pattern for the level of wealth of female judges is similar to current federal judges, but not exact. Though they generally substantiate a larger percentage of appointees with a net worth under \$200,000 than traditional appointees, a majority of nontraditional judges have a net worth over \$500,000. A significant number of those judges have a net worth over \$1 million. For W. Bush's appointments to the district courts, 8.2% of nontraditional judges had a net worth under \$200,000, compared to only

3.4% of traditional appointees (Goldman et al., 2009). For the appeals court, 9.5% of nontraditional judges had a net worth under \$200,000 and 2.6% of traditional judges did (Goldman et al., 2009). Though small, nontraditional judges made up a larger portion of the lowest wealth level than traditional ones. However, for W. Bush's appointees, traditional and nontraditional appointees had a pretty equal proportion of millionaires; around 50% of both Bush's traditional and nontraditional judges at the district and appeals court level had a net worth over \$1 million (Goldman et al., 2009).

The data suggest that Clinton's appointees demonstrate similar tendencies as Bush's did, though there were fewer millionaires. Nontraditional appointees made up a larger portion of judges with a net worth under \$200,000, but generally around 30% to 50% of both traditional and nontraditional appointees were worth more than \$1 million. For example, from 1993-1994, 19.1% of Clinton's nontraditional appointees to the district courts were worth less than \$200,000, compared to 15.0% of traditional judges. However, 46.9% of nontraditional and 50.7% of traditional judges were millionaires (Goldman, 1995). From 1997 to 1999, 15.6% of Clinton's nontraditional district court appointees had a net worth of less than \$200,000, compared to only 8.5% of traditional judges. 31.2% were worth over \$1million, but 25% still were worth between \$500,000 and \$1 million (Goldman & Slotnick, 1999). Thus, Clinton's record suggests that nontraditional appointees may not be as wealthy as traditional ones, but the majority generally has a high net worth. For both presidents, nontraditional appointees generally have a lower net worth than traditional ones, but the differences are not large – a larger percentage of female judges are less wealthy than traditional judges, especially at the

lowest level of wealth, but like most of the bench, the majority of nontraditional judges still have a very high net worth.

Female Judges and Prestigious Education

For all levels of the federal judiciary, the educational backgrounds for nontraditional appointees are similar to those of traditional ones. Carter's high percentage of appointees with public undergraduate education was due to his appointment of women and minorities (Goldman, 1997), but this trend has not held in more recent years. For example, of Clinton's district court appointees from 1999-2000, 36% of nontraditional judges attended public undergraduate institutions, compared to 53% of traditional judges (Goldman et al., 2001). This is contrary to what we would predict based on the conclusions from Carter's appointments, as the traditional judges have more public schooling. In general however, the majority of both nontraditional and traditional judges on the lower courts have attended private or Ivy League institutions (Goldman, 1995; Goldman & Slotnick, 1997; Goldman & Slotnick, 1999; Goldman et al., 2001; Goldman et al., 2009). For the three women currently on the Supreme Court, all have Ivy League undergraduate and law degrees. Justice O'Connor received both her degrees from Stanford University, a private school ("Biographies of current justices," 2011). For women on the Supreme Court, they too have private or Ivy undergraduate and law degrees. Thus, women judges on all levels of the bench are similar to the rest of the federal judiciary in that the majority attended private or Ivy League institutions for college and law school.

Conclusion

Compared to the rest of the federal bench, female judges are more or less descriptively representative; however, their resemblance is not exact. These women have comparatively more judicial experience than traditional judges. They also represent a larger percentage of judges with a net worth under \$200,000, but the majority are still worth over \$500,000, and a plurality over \$1 million. Most female judges also attended private and Ivy League institutions of higher education. Thus, in terms of the judiciary, women have more judicial experience, have a slightly smaller net worth, and have the same level of prestigious education, and are therefore more or less descriptively representative.

More importantly than any of these comparisons is that in pure numbers, women are still *vastly* underrepresented in the judiciary. If the federal bench were descriptively representative of the population in terms of gender, women would account for about 50% of all judgeships. Of the 778 active judges in the federal judiciary, only 230 are females (Federal Judicial Center, 2011).¹⁴ This amounts to approximately 29.5% of all federal judges, which represents a huge increase from 1977 when President Carter began his efforts to diversify the judiciary. Before he took office, 6 out of 504 federal judges were women, or 1.4% (Goldman, 1997). By the time Clinton left office, close to 20% of federal judges were women (Goldman et al., 2001). We are clearly headed in the right direction, but our judiciary continually fails to satisfy the dimension of descriptive representation; the federal bench clearly does not resemble the proportion of females in our population. The percentage of female judges does not resemble the number of females in law school either, since the percentage of females enrolled in J.D. programs

¹⁴ I computed these statistics myself through data obtained from the Federal Judicial Center's Biographical Directory of Federal Judges on April 10, 2011.

has been at or around 50% since the 1990's ("Women in law," 2010). Because it is likely that there will continue to be an equal number of male and female law students, perhaps future presidents will not need to actively recruit females to the federal judiciary to ensure that the federal bench resembles the population. Until this happens, it is clear that the judiciary is not descriptively representative of women in the population, though the women who do become federal judges have backgrounds similar to their male counterparts. Whether there are measurable benefits to having more female judges will be explored in the next two chapters.

Chapter 4: Symbolic Representation

My basic concern about being all alone [as the only female on the Supreme Court] was the public got the wrong perception of the court. It doesn't look right.

- Justice Ruth Bader Ginsburg, in a 2009 interview with the New York Times

Soon after being hospitalized for pancreatic cancer, Justice Ginsburg attended Obama's first State of the Union, stating that she "wanted the country to see that there is a woman on the Supreme Court" ("Ginsburg on gender," 2009). Second to effects of gender on voting, the next largest body of research on women in the judiciary focuses on the symbolic nature of female judges. Much of the research suggests, as Ginsburg's statement does, that the presence of women in government evokes some sort of response from the public (Scherer, n.d; Mansbridge, 1999; Lawless, 2004; Malleson, 2003). Since judges are supposed to decide cases based on neutral principles, some are hesitant to assert substantive reasons for a diverse judiciary (Beiner, 2003). However, they may be more comfortable with supporting the need for symbolic representation because it focuses on the public's response to a diverse bench, rather than questioning the neutrality of jurisprudence.

Symbolic representation is one of the two dimensions of the political representation that Hanna Pitkin describes as “standing in for” (1967). By this, Pitkin means that the representative has certain attributes that make her a good representative. Descriptive and symbolic representation both fit this definition. While descriptive representation is defined by the exact correspondence between the representative and the constituency, symbolic representation relies more on the reaction the constituent has to the representative. While descriptive representation is based on the physical attributes of the representative, symbolic representatives are based on the meaning those attributes have for the represented. Symbols are created by people’s attitudes and beliefs. They do not exist if they are not widely believed to be symbolic. Further, the symbol holds some “meaning beyond itself,” suggesting that the representative does not just represent her constituents because they believe her to be symbolic, but because her position conveys some greater implication to society (Pitkin, 1967). Indeed, Ginsburg’s appearance in poor health at the State of the Union suggested that there would be a negative message sent to Americans if the nation’s highest court was entirely male. Justice Ginsburg certainly believes that female judges have the ability to convey some “meaning beyond themselves.”

Effective symbolic representation is measured by the “state of mind, condition of satisfaction, or belief, of certain people” (Pitkin, 1967). It is not the result of the representative’s actions that are crucial to her success as a symbolic representative; it is her ability to “foster belief, loyalty, [and] satisfaction” that make her prosper (Pitkin, 1967). The same criteria can apply to institutions as well. Loyalty to an institution is called legitimacy. More specifically, it is the “reservoir of favorable attitudes or good will

that helps members to accept or tolerate outputs to which they are opposed” (Easton, 1965, as quoted in Scherer, n.d.). A legitimate judiciary exists if the public continues to support the courts, even after they issue a policy that one does not tolerate or agree with (Gibson, 2007).

Legitimacy and the Judiciary

Though legitimacy is important in all branches of the federal government, it is especially crucial to the judiciary. First, it does not hold elections, which can replenish goodwill as in other branches (Gibson & Caldeira, 1992). Second, it lacks the means of enforcing decisions that the executive and legislature count on. The executive can employ the use of force, and the legislature creates laws and can deny allocation of money, but the judiciary has no constitutional power to ensure that we abide by its decisions.

Alexander Hamilton highlighted this point over 200 years ago in Federalist No. 78. He states:

The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse... It may truly be said to have neither FORCE nor WILL, but merely judgment.

“Merely judgment” implies that the only thing the judiciary can do is issue a judgment and hope people comply. Consequently, the judiciary relies heavily on legitimacy to enforce its decisions, especially unpopular ones (Malleon, 2003). This chapter will explore how the presence of female judges affects the legitimacy of the federal judiciary through an analysis of legitimacy and women representatives in Congress, legitimacy and minority judges, and a single study on legitimacy and women judges. Nancy Scherer, the Jane A. Bishop '51 Professor of Political Science at Wellesley College, does the majority

of work on judicial diversity and legitimacy, and she will therefore be relied on heavily for analysis. If women judges are effective symbolic representatives, their presence on the court would make the judiciary more legitimate. Conversely, if the presence of women on the court does not affect the legitimacy of the judiciary, symbolic representation is of little importance.

Enhancing the Legitimacy of the Judiciary

Because the success of the judiciary depends so much on institutional loyalty, politicians seek ways to maintain and enhance it. Democratic and Republican presidents have differed on how to achieve this goal. In fact, their strategies are completely opposing – Democrats believe using diversity appointments will increase legitimacy, while Republicans believe race and gender-blind selection is best (Scherer, n.d.). The Democratic strategy suggests that we should take extra steps to create judicial diversity to remedy past discrimination in the legal profession, as a symbol for underrepresented groups, and to ensure more voices are heard in deliberations (Scherer, n.d.). Democrats clearly believe in the power of symbolic representation to increase confidence in the judiciary. In fact, President Clinton implemented a large-scale diversity initiative for the stated purpose of increasing the legitimacy of the courts, sometimes at the cost of appointing more moderate than far-left candidates (Scherer, n.d.; Goldman et al., 2001). For Clinton, the need for public support of the courts was of utmost concern.

Many scholars and members of legal institutions echo Scherer's discussion of the reasons Democratic presidents believe in diversity initiatives. Authors Cameron and Cummings (2003), state that the strongest argument in favor of diversity is social legitimacy, at a minimum because it "offsets memories of exclusion." For the authors, the

ban on women from legal institutions for much of American history is enough to ensure more women sit on the bench. Now that the number of women on the federal bench is increasing, it is important that we maintain the commitment to gender diversity, so women feel as though they are represented in judicial processes. Goldman and Saronson highlight the importance of public confidence and feeling represented, stating “if federal courts are to be legitimate, no segment of the American population should be excluded” (1994). Continued policies of diversity appointments will counter any sentiments of exclusion, since female judges promote legitimacy by suggesting that the judiciary is open to women, and men will no longer have a monopoly on judicial power (Malleon, 2003).

According to Scherer (n.d.), Republican presidents often dismiss the need for diversity initiatives in judicial appointments. By actively seeking qualified minority and female candidates, Republicans believe judicial legitimacy will ultimately decrease because it “further shames and stigmatizes” minority groups, minority candidates are less qualified, and it creates white backlash and reverse discrimination (Scherer, n.d.). Scherer’s discussion of Republicans and diversity is not always so cut and dry, however. As found in chapter two, Republicans may mask their diversity initiatives by calling the nominee “the most qualified candidate” when that is not necessarily the case, such as Reagan’s appointment of state court judge Sandra Day O’Connor to the Supreme Court (Goldman, 1997), and Bush’s failed nomination of Harriet Miers. Though the rhetoric of Republican presidents may fit Scherer’s description, their actions occasionally suggest that diversity can increase the confidence in the courts for at least *some* portion of the population.

Legitimacy and Congress

There is much theoretical work on the symbolic value of women in judgeships; however, most of the empirical studies on public opinion focus on female representation in Congress. Congress and the federal courts are separate institutions, so we must be cautious when applying findings of studies on female representation in the legislature to the judiciary. It's possible that female Congressional representatives may be more responsive to women's interests than female judges need to be because they are motivated by reelection. However, due to the lack of empirical research on female judicial representation, it's necessary to use studies of women's representation in the legislature in our analysis. The results of those studies are not transmutable to the federal courts, but they provide some general insight into how the public may perceive a female representative. As female judges can be considered representatives, the Congressional research is applicable.

The findings from the Congressional studies have not proven that there is any increase in legitimacy when female legislators represent women, (Lawless, 2004; Mansbridge, 1999; Mishler & Schwindt-Bayer, 2005; Dolan, 2006) but suggest that it may be possible if more women become lawmakers (Mishler & Schwindt-Bayer, 2005). In a study done by Lawless (2004), the author analyzes almost twenty years of National Election Survey data to explore whether increased trust in government may result from more women in Congress. Lawless' first point of analysis focuses on approval ratings. Lawless found that women are 2% more likely to approve of a female representative than of a male representative. The author's next point of analysis looked at public trust in Congress. She measures this by how well the represented believes the Congressperson

handled their job and how responsive the government was to their interests. Lawless found no difference between genders. Women were not more or less likely than men to assess Congress positively or negatively.

Dolan (2006) does a similar study, which also uses National Election Survey Data to analyze women in the legislature. Though her analysis found select instances where a female Congressional representative appeared to change the attitude of women towards the government, Dolan was unable to find any pattern or connection between them. Consequently, Dolan concludes that any influence over public opinion that women in Congress have is specific to the circumstances of that Congressional representative – including political party, what type of issues the Congresswoman pushes, and public awareness of the representative, but not necessarily gender. There is no discernable, general effect of women representatives on public support (Dolan, 2006).

Mishler and Schwindt-Bayer (2005) confirm the findings of the Dolan (2006) and Lawless (2004), but suggest that a large percentage of women are necessary to have a symbolic effect. The authors use data from 31 different representative democracies, including the United States, to analyze female political representation in legislatures. Their model finds no significant relationship between descriptive and symbolic representation, meaning that the presence of women does not necessarily increase confidence in the legislature. However, they do conclude that this is attributed to the small presence of women in representative governments, a trend that exists internationally. The authors hypothesize that if there was a larger percentage of female lawmakers, there would be a more significant relationship between women in the legislature and support for the institution.

The findings on Congressional female representation provide little hope that female judges will increase the legitimacy of the federal courts, unless they obtain a larger percentage of judgeships. It seems more likely that citizens will approve of a specific female judge, instead of greatly increasing their confidence in the judiciary. Therefore, the female judge would fail as a symbolic representative, because she does not create a “meaning beyond herself.” However, we cannot draw conclusions without first analyzing the research specific to the judiciary.

Legitimacy and the Judiciary: The Studies

As opposed to studies on gender, more research has been done specific to racial diversity and legitimacy of the courts. Democrats and Republicans cite the same reasons for diversity and against diversity appointments that were previously described (Scherer, n.d). According to Scherer and Curry (2010), there is a large gap between legitimacy of the courts for blacks and whites. Whites tend to view the court as highly legitimate, but blacks are significantly less likely to be supportive (Gibson, 2007). Gibson and Caldeira (1992) and Gibson (2007) also found gaps in support of the court along racial lines. In addition, as the number of African-Americans judges increases, the legitimacy of courts increases for Africans-Americans, but decreases for whites (Scherer & Curry, 2010). Scherer (n.d) call this the “paradox of diversity.” Under the Democrats’ approach to diversity, legitimacy will be raised for one group and decreased for another. Under the Republican strategy, the gap in public support of the courts will remain divided along racial lines (Scherer, n.d).

There is evidence that men are less hostile to diversity appointments of women than whites are to diversity appointments of minorities. To some, appointments of racial

minorities can be viewed as an “out-group” (blacks) trying to usurp power from the “in-group” (whites) (Scherer, 2011). This creates an environment in which whites may become hostile to the appointment of blacks. Diversity appointments of women are not viewed in the same light. Since 2001, a majority of men have supported affirmative action for women (Scherer, 2011). This suggests that unlike race-based diversity appointments, gender appointments may increase the legitimacy of the courts for men and women. Scherer is currently exploring this hypothesis.

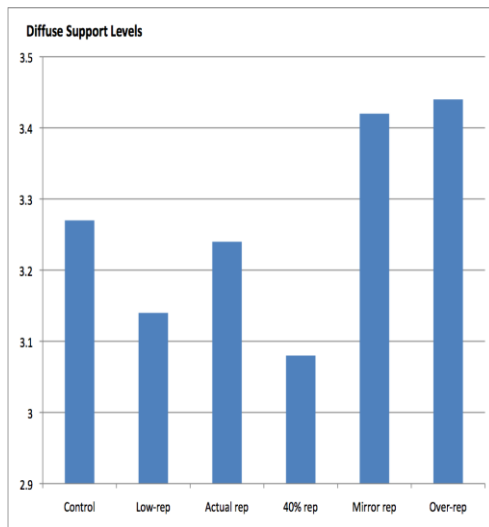
Scherer’s recent empirical study (2011) on legitimacy and gender diversity appears to be the only study of its kind. It is risky to draw conclusions from a single analysis, though her research creates a basis for further research on public confidence in the courts and diversity. Scherer’s data comes from an “opt-in” online survey, which posted a fake newspaper article, reporting the percentage of women in the federal judiciary, and the percentage of women in the American population. The percentage of women in the judiciary was changed to represent more or less female representation; the baseline was the current percentage of federal female judges, or 29%. The participants were then asked to answer some questions about their support for the courts. Scherer performed a regression analysis based on the responses.

The findings of the study are contrary to what we may have naturally assumed about legitimacy and judicial diversity. For women, there was an increase in public confidence in the courts as the number of women increased; however, it was not statistically significant. If diversity appointments serve to increase the legitimacy of institutions to those who have been excluded, they have failed for women. According to

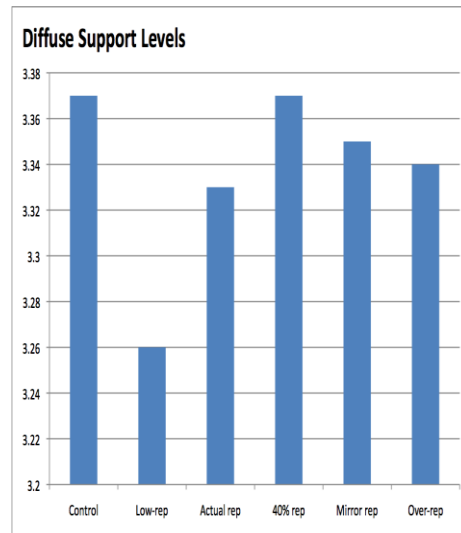
Scherer’s conclusion (2011), the number of female judges has no significant effect on the support of the courts for women.

Based on her numbers, it appears that Scherer may have come to the wrong conclusion. Though there was no direct positive relationship between an increase in women judges and an increase in support of the courts, there does appear to be a difference between having very low representation and having some significant amount of it. Scherer compares the level of diffuse support of each group to that of the baseline value, or the level of support for the control group.¹⁵

Diffuse support levels: Men



Diffuse support levels: Women¹⁶



Note: From Scherer, N. (2011). Public opinion about descriptive gender representation on the U.S. courts. Paper presented at the 69th annual national conference of the Midwest Political Science Association, Chicago, IL, fig. 1a and 1b.

¹⁵ Diffuse support is synonymous with legitimacy (Gibson and Caldeira, 1992).

¹⁶ In these graphs, the diffuse level of support is ranked on a scale of 1 to 7, with 7 being the highest level of support for the court. The independent variable is the percentage of representation of women in the judiciary that was listed in the article given to each group. The key is as follows: low rep = 12%, actual rep = 28%, 40% rep = 40%, mirror rep = 51% and over rep = 60%. The control group was not given an article; its level of diffuse support is what Scherer calls the “baseline” level of support.

For men, this baseline level of support is 3.27, for women, it appears to be 3.37. When women's representation is less than 50%, diffuse support is below the baseline for men. It goes above the baseline when the percentage of female judges is over 50. For women, there is not a clear pattern as to why diffuse support rises and falls away from its baseline, which is why Scherer found no statistically significant relationship. However, there is a large difference in diffuse support levels when there is low representation of female judges and all other levels of representation. The difference between the low representation group and the baseline is about .11. The difference between the baseline and all the other representation groups ranges from approximately .01 to .04.

Because there is a comparatively larger difference between diffuse support in the low representation case and diffuse support at all other levels of representation from the baseline, it seems that legitimacy of the judiciary will likely decrease without *some* number of females on the bench. Therefore, I would conclude that having female judges increases women's support of the courts until it reaches a certain threshold of representation. If legitimacy falls below this level, women's support for the judiciary will decrease. In Scherer's defense, she was hesitant to reach her conclusion. She states at the end of her work that "benefits will still accrue to women through presidents' efforts to gender diversify the bench, including raising levels of legitimacy for the courts," even though this is contrary to her statistical results (2011).

Interestingly, as women increased their percentages on the court, men were more likely to view the institution as legitimate (Scherer, 2011). This supports Scherer's belief that men are less hostile to gender appointments than whites are to minority ones (2011). In comparison to other factors, such as higher education or ideology, the change in

legitimacy as the percentage of female judges increased was small. It was, however, statistically significant. This demonstrates that increased representation of females on the federal bench increases the court's legitimacy among men. If the goal of both parties is to increase the public support of the courts, Scherer's results suggest that appointing women will increase it for the male half of the population. However, we must be careful of generalizing Scherer's research. Firstly, women seem to need some significant level of representation to reach a stable level of support for the judiciary. Secondly, more studies must be done in this field, so we do not rely on a single set of empirical results to draw conclusions about the nature of legitimacy and judicial diversity. It may be more plausible to say that an increase in women judges is likely to increase legitimacy for men, and it may increase legitimacy for women up to a certain point of representation.

The Role Model Effect

While we can draw conclusions about public support for the federal courts and women's representation, this does not help us "understand the extent to which women in politics send messages to citizens about the entire social structure in which we live" (Lawless, 2004). There may be social implications of women judges that cannot be measured by statistical data. One reason cited for diversity appointments is that they provide role models for underrepresented groups (Mansbridge, 1999). It is unclear how many women become lawyers or judges because they see other women in these professions, or at least how many girls feel like they can aspire to those positions. After Judge Christina Reiss was appointed to the federal district court in Vermont, Vermont Law School Professor Cheryl Hanna was taken aback when her six-year-old daughter questioned why a woman was a judge (2010). Hanna states, "I was shocked that in 2010,

a six-year-old had internalized the idea that men were the ones primarily entitled to positions of power.” She goes on to conclude that her daughter and her friends must see women as judges, or else “they won’t see themselves in black robes.”

Scholars have noted that there is a significant effect when girls see women participate in politics. According to Campbell and Wollbrecht (2006), women who are visible in politics inspire young women to discuss politics more with their parents, which in turn increases their aspirations and political ambitions. Unfortunately, other than the Supreme Court, the federal judiciary is not highly visible to those who have no need to be involved with the legal institution. Girls are unlikely to be inspired by women judges in the lower courts the same way they would if, for example, their Congressional representative was female. This puts enormous pressure on the Supreme Court to have female judges. Ginsburg likely made the enormous effort to attend the State of the Union, as having no females on the court sends a bad signal to women about career aspirations; it may suggest that the judiciary is “inhospitable to women” and “drive qualified women away” (O’Connor & Yanus, 2010).

Conclusion

Based on theoretical research, it appears that symbolic representation is inextricably linked to the legitimacy of the courts. This is not so clear once Scherer’s (2011) empirical evidence is introduced. It may not be possible to draw conclusions as to how gender appointments affect the public support of the courts until more research is done in the field. However, based on Scherer’s statement in her conclusion, which suggests that female appointments should continue because they may still raise the level of legitimacy of the courts for women (2011), it seems that scholars are not willing to

stray from the link between legitimacy and a diverse judiciary. I am hesitant to draw any conclusions from these theories until they are based in fact.

Absent of solid empirical evidence, I would argue that symbolic representation of women in the judiciary is of importance, solely because of the message it sends to society and specifically young women. The Chief Justice of Canada, Beverly McLachlin in a speech to the International Association of Women Judges, touched on this point. She states that the courts must reflect society's commitment to equality (2006). Girls must grow up thinking that every industry and every institution is open to them, including the judiciary. For young women to think this, female judges must be visible so they have a role model to aspire to. Therefore, it is extremely important that women are on the Supreme Court, at a minimum, since it is the most visible level of the judiciary. Further, women must be present on the district and appellate courts so that as girls grow up and try to get involved in the judiciary, they can see women in positions of power, making the institution "less alien and more relevant" to them (McLachlin, 2006). The next chapter will explore the substantive effects that occur once these young women who aspired to being judges actually reach the bench.

Chapter 5: Substantive Representation

You know the line that Sandra and I keep repeating ... that at the end of the day, a wise old man and a wise old woman reach the same judgment? But there are perceptions we have because we are women. It's a subtle influence.

- Justice Ruth Bader Ginsburg, in a 2009 interview with USA Today

Of all the dimensions of representation, Hanna Pitkin believed that substantive representation was the most important form, since it is the only one in which the representative must "*act* [italics added] in a manner responsive to the represented" (Pitkin, 1967). Of all the types of political representation, only the substantive dimension

suggests that the results of the representative's actions are of importance. The representative's success depends on how well she advances policy outcomes that help her constituency. For a judge to be a substantive representative, as defined by Pitkin, she must create favorable policies to those she represents through her voting. Consequently, a judge will be a good substantive representative of females if her voting record demonstrates that she is sympathetic to women's issues.

Women are not a homogenous group, and subcategories of females have varied political interests. However, they are "perceived as sharing some common identifiable 'women's interests'" (Mishler & Schwindt Bayer, 2005). Therefore, it is appropriate to analyze judicial opinions and voting records in search of sympathy towards women. This sympathy will be referred to as a "female jurisprudence," and indicates the presence of substantive female representation. According to writer and psychologist Carol Gilligan, we should expect gendered differences in jurisprudence due to the separate moral development of men and women. While men may assert an objective, impersonal sense of justice, women's morality is based in the concept of caring and personal relationships (1982). Based on these moral differences, we should expect male judges to strictly interpret laws, and females to interpret them in such a way that reflects compassion for the injured party.

According to Gilligan's "different voice" theory, women's moral nature should make them more sympathetic to women's interests in the judiciary. These interests are widely understood as those which promote "the autonomy and wellbeing of women, [those that address] concerns that belong to the private sphere according to established views on gender relations, and any issues of concern to the broader society" (Celis,

Childs, Kantola & Krook, 2008). A judge's voting record on subjects pertaining to the above criteria should determine her success in being a good substantive representative of women. Unlike the other dimensions, male judges can be substantive representatives of females. If men and women are equally sensitive to women's issues, there is no substantive need to have females in the federal judiciary – women's interests will be represented no matter which gender presides. However, many scholars point to at least some difference in female jurisprudence between men and women (Boyd, Epstein & Martin, 2008). To determine if female judges are better substantive representatives of women's interests than males judges, it is crucial to understand the effect sex has on the way a judge votes, and which sex, if either, is more sympathetic to female policy concerns.

Since women have been denied access to various institutions for much of American history, many scholars believe that female judges will be more sympathetic to women's interests. As women, they have the shared experience of being treated as a subordinate sex (Martin, Reynolds & Keith, 2002). This effect plays out in voting patterns of judges, since it suggests women will be more conscious of gender inequality (Martin et al., 2002). That being said, despite the increase in data regarding voting patterns of female federal judges resulting from an increase in the number of such judges, and a consequent increase in articles on the causal effects of gender and judging, there is little consensus on what the causal effect of gender is. At the minimum, most analyses have concluded that women judges are significantly more sympathetic to plaintiffs in sex discrimination cases (See Boyd et al., 2008, Peresie, 2005, Farhang & Wawro, 2004; Songer, Davis & Haire, 1994).

The following chapter seeks to demonstrate that substantive representation is important in all levels of the federal judiciary due to differences in voting in sex discrimination cases that stem from society's treatment of females, and how this affects the collegial nature of the district court and the multi-member panels of both the appeals and Supreme Court. This will be done through an analysis of scholarly work, empirical studies, and a few case studies specific to the Supreme Court. Though men and women rarely vote differently, "rarely is not never" (Boyd et al., 2008). Also, women influence men to vote in favor of the plaintiff, suggesting the judiciary benefits from deliberation of those with different backgrounds (Boyd et al., 2008; Farhang & Wawro, 2004). Therefore, it is crucial to have women on the courts to ensure female substantive representation exists when necessary.

The inspiration for much research of female jurisprudence stems from feminist standpoint theory. The theory suggests that because women are more prone to experience gender-based discrimination, they develop a feminist consciousness (Martin et al., 2002). Feminist consciousness is defined by three tenets. The first is the understanding that there is systematic discrimination against women. Second is that this discrimination is wrong, and third is that this discrimination must be ended by some collective action (Martin et al., 2002). Discrimination may be especially prevalent in legal institutions, since judges, jurors and lawyers have been primarily male since their inception.

In a study by Martin et al., (2002), the authors found that women have more feminist consciousness than men in legal settings because they have experienced a significant amount of gender based discrimination. The study focused on a series of issues in which gender bias is prevalent – rape myth, divorce property rights, domestic

violence, negative stereotypes of women, and the public/private divide between men and women. Through interviews with judges and attorneys, the authors found a statistically significant positive correlation between the number of experiences with gender bias and a higher feminist consciousness for every issue except the public/private divide between genders. Men reported to observe gender bias, but it did not translate into feminist consciousness. Although both genders acknowledge discrimination, men do not actively seek to stop it. This is likely due to the fact that it is women, not men, who experience systematic disadvantages.

Assuming that judges cannot completely separate life experiences from judging, a feminist consciousness would make a judge much more likely to be sympathetic to women's interests. Women translate their experiences with gender bias into a desire to remedy discrimination; men simply observe it. Females should be better substantive representatives of women's interests because they wish to change institutions that disadvantage women. A federal judge has the ability to do this through creating legal precedents. According to Martin et al. (2002), men do not have a feminist consciousness even though they observe gender-based discrimination. Males understand that gender bias exists, but because they cannot translate this understanding into a feminist consciousness, they do not act to change these discriminatory practices. This suggests that male judges may be sympathetic to women's interests, but their rulings may uphold practices that harm the autonomy of women.

Voting patterns in sex discrimination cases suggest that there is some legitimacy to feminist standpoint theory. Ideally, judges are supposed to decide cases based on neutral principles, but this does not hold every time. Male and female judges have

different life experiences that cause them to interpret facts differently (Coontz, 2000). Because men have historically dominated American society, women face significantly more discrimination. This is likely why women often take the “liberal position” in politics. As of 2009, 41% of women associated themselves with the Democrats, who are generally liberal. Only 27% of females were Republican. In contrast, men are equally divided between the two (Jones, 2009). In the judiciary, Songer, Davis, and Haire (1994) define the liberal position as voting “to support claimants who allege discrimination that has resulted in exclusion from full participation in the community”, and suggest that women are more likely to be liberal in certain cases, even after controlling for ideology.

Though it not plausible to assume that women and men always vote differently, most scholars have concluded that women have different perspectives and rulings than male judges in cases involving sex discrimination (Boyd et al., 2008; Peresie, 2005; Farhang & Wawro, 2004; Songer et al., 1994). Females are much more likely to vote in favor of the plaintiff. In this type of case, the plaintiff is the one who alleges that someone unfairly discriminated against them. By sympathizing with the plaintiff more often than do males judges, female judges are supporting those who face unfair discrimination, therefore taking the liberal position. In a 2005 study, which used data from federal appellate cases on Title VII between 1999 and 2001, Peresie (2005) found that females were 11% more likely to vote for the plaintiff in sex discrimination cases than males were. Using a different model, and data set, Boyd, Epstein, and Martin found that the probability of a female judge voting in favor of the plaintiff in a sex discrimination case was 10% higher for females than for male judges (2008). Peresie (2005) and Boyd et al. (2008) controlled for other factors, such as age, ideology, and

race, and found that the relationship between gender and voting in favor of the plaintiff was still statistically significant.

The findings of both studies prove there is some variance in jurisprudence between males and females. Using separate data sets and methodology, the scholars obtained extremely similar results; the calculated probabilities of voting for the plaintiff vary by only 1%. Though sex discrimination cases are only one of a handful of different types of lawsuits, there are clear substantive implications of having women on the bench. At the very least, substantive representation of female judges is important because of these implications. Additionally, there are other aspects of each level of the federal judiciary that increase the importance of the substantive dimension. The studies that were previously quoted analyzed federal appellate courts and various state courts. I have applied the findings to the entire federal judiciary, since gendered differences in voting are not based on the nature of the judgeship, but rather the life experiences of the woman. The following analyses will demonstrate that there are institutional features of each federal court that further support the need for female substantive representation.

District Courts: The Collegial Nature of the Lower Federal Judiciary

Though explicit diversity initiatives have existed since the Carter administration, women are still a vastly underrepresented group in the federal judiciary. Of the few female appointments in American history, close to 85% have been to openings in the district courts (Collins, Manning, & Carp, 2010). In 1977, female judges were less than .5% of all district court judges. As of 2009, they were about 26% (Collins et al., 2010). Consequently, the district court provides the most fruitful analysis of gendered decision-making because it draws from the largest sample of female federal judges.

Since females have achieved a significant level of representation in the district courts, Collins et al. applies critical mass theory to their analysis. In terms of gender, critical mass theory states that until women reach a level of representation that is beyond token status, they will conform to “characteristics of the dominant group” (2010). Collins et al. (2010) does not state a specific number that constitutes critical mass. However, they say their analysis is applicable to the district courts because the number of women has increased substantially since 1977, from .5% to about 26%. They authors may have been citing the Kanter model of integration, in which a group surpasses token status once they hold over 20% of available positions (as quoted in Cook, 1987). For females in the federal judiciary, this would mean that women have to hold more than 20% of judgeships.¹⁷ As applied to the judiciary, critical mass theory suggests that differences of voting patterns between males and females will not exist unless female judges represent over 20% of federal judges. With many members of the same gender, women would be more assertive in promoting the interests of females. If there are only a few women on the judiciary, their opinions will conform to those of their male counterparts.

Collins et al. found proof of critical mass theory in the district courts, but only in criminal justice cases. Women were more likely to issue liberal decisions when more women were judges in one district courthouse (called “court point”). For civil rights and liberties cases, women were more likely to be liberal, but the probability of issuing a liberal decision did not change as the number of women increased (2010). The analysis of Collins et al. confirms that female jurisprudence is more sympathetic to those who have

¹⁷ This does not mean women are fully integrated. The Kanter model defines full integration as when the previously excluded class holds between 40% and 60% of judgeships. This has not occurred at any level of the federal judiciary (Kanter, 1978).

been discriminated against. It also suggests that we do not know the true effect of female substantive representation because there is evidence on the lower court level that females become even more liberal as more women become judges at the same court point. This implies that we may never know the extent of differences in voting behavior between male and female judges if women do not reach critical mass at all levels of the federal judiciary.

It is crucial that critical mass is reached at the district court level, due to the unique nature of the lower federal court. Unlike the Supreme and circuit courts, a single judge presides over the district court. However, district court judges depend on their colleagues at the same court point for judicial socialization. Judges interact with each other in such a way that values become “cross-pollinated” (Collins et al, 2010). This is likely to happen at a courthouse, since the closest judicial peers are normally in the same building. Since these interactions are the most important form of judicial socialization, it is important to have a critical mass of women. According to Collins et al.,

The mere presence of decision makers from an underrepresented group in the overall decision-making environment may be enough to have a discernable effect on the output of that environment, so long as a certain ‘critical mass’ is reached (2010).

This suggests that the presence of women in critical mass may have an effect on the entire judicial environment at a specific court point. The level of female representation affects judgments from both genders. As proven by Collins’s study (2010), it is evident that differences in voting between genders may be more significant than we can observe with the current state of the judiciary. Therefore, it is extremely important that there is a critical mass of female judges on the district courts, because the level opens the court up to more decisions and types of cases that are influenced by female jurisprudence.

Though critical mass of females is required in the district courts, where one judge presides in order to socialize other judges to their perspectives, female judges are crucial, though not necessary, in substantial levels on the higher courts. On the appeals and Supreme Court, one woman can influence a panel with a majority of males. Though it is unclear if critical mass would increase the differences between male and female jurisprudence on these courts, there is a consensus that the presence of a single female can influence the way men vote in sex discrimination cases.

Appeals Courts: The Importance of the Panel Effect

The structure of the circuit courts is much different than that of the district courts. Each circuit covers a large geographic region in the U.S. federal cases that are appealed are presided over by a three-judge panel. For a variety of reasons, the three-judge panel has led to an important unwritten, institutional feature of the circuit courts – the norm of unanimity. The norm suggests that it is in the best interest of the court for each judge to reach the same decision. This will increase the legitimacy of the court, because it appears to be neutral. The desire for unanimity in federal appeals courts allows dissenting minorities to affect outcomes of cases (Farhang & Wawro, 2004). Because the panel is comprised of three people, a single judge cannot decide a case alone. Efforts will be made to influence the dissenter.

Farhang and Wawro outline two types of reasons to reach a unanimous outcome. In suppressed dissent, the dissenter concedes to the opinion of the other two judges. This may be because the dissenter feels pressure to join the majority, has a high workload, or is trying to preserve unanimity so that the court appears neutral (2004). For modified content, the dissenter influences the court's decision. The threat of dissent may force the

majority to concede if they want to maintain unanimity. Also, judges may change their minds when deliberating with the dissenting member (2004). Because there is consensus on different voting patterns between men and women in sex discrimination cases, I will assume that the woman is the dissenting member on the panel. Furthermore, since there is a lack of diversity on the courts of appeals, it is unlikely that there would be a panel with a majority of females.

If the female dissenter can influence the court through the modified content theory, more cases would be decided for the plaintiff in matters of discrimination (Farhang & Wawro, 2004). Farhang and Warwro (2004) find support for this hypothesis in a study of federal appellate employment discrimination cases between 1998 and 2000. The presence of one female on the panel increases the probability that a male judge will vote in favor of the plaintiff by 19%. The authors conclude that through accommodation of views to reach a judicial consensus, and through deliberation in which judges change their opinions after hearing new perspectives, one woman on the circuit court panel is able to influence the outcome of employment discrimination cases (2004). The norm of unanimity and hearing opinions that they may never have thought of causes men to vote differently than if a female were not present.

This phenomenon is what many scholars refer to as the “panel effect” (Boyd et al., 2008; Farhang & Wawro, 2004; Peresie, 2005). Boyd et al. (2008) found similar results to Farhang and Wawro (2004). First, the panel effect was only important in sex discrimination cases (2008), which is consistent with their findings on individual effects of voting. If women vote differently than men only in sex discrimination cases, then they would only have a discernable panel effect in these cases as well. The authors found that

men were 12 to 14% more likely to vote for the plaintiff if there was one female on the panel (2008). Reasons for this include the perception that women are simply more credible on certain issues (Peresie, 2005). Surely, few males have had experiences with sex discrimination, so they are more open to adapting the opinion of the dissenting female during deliberations. Peresie also suggests that men might not care about sex discrimination cases and concede to gain support for future issues that they are more invested in (2005). This is not empirically supported, but an important issue that warrants further research.

Regardless of the motivations for men changing their opinions when a woman is present on the court, the panel effect exists, and therefore affects female substantive representation. On the appellate courts, males are more likely to support women's interests if *one* woman is present. Farhang and Wawro concluded that the presence of more than one woman does not increase the probability of men voting a certain way beyond the 19% change when a single woman is present (2004). It is crucial to have one woman on the panel for every case for this reason. The panel is chosen from a pool of appellate judges. If few women exist in the pool, it will decrease the likelihood of having at least one female preside over each case. Consequently, it is important that a significant number of women are appointed to the circuit courts; otherwise, it will decrease the instances where a panel effect may take place, leading to a decrease in women's substantive representation.

Though few women have sat on the Supreme Court, there is evidence that a panel effect exists at this level of the judiciary as well. The following section will use case studies to demonstrate that a woman must sit on the bench to advance the substantive

interest of females. Empirical studies at the Supreme Court level are useful, but limited, because there have been so few women justices. Though a total of four women have been appointed to the Supreme Court, and three are current members, only Justices O'Connor and Ginsburg will be analyzed; it is too early in their careers as justices to draw conclusions from the opinions of Justices Sotomayor and Kagan.

Supreme Court: Case Studies on Female Jurisprudence in the Highest Court

Much of the media's attention on gender and voting in the judiciary focuses on Justices Sandra Day O'Connor and Ruth Bader Ginsburg. Both justices have been quoted in the past as saying that "at the end of the day, a wise old man and a wise old woman reach the same decision" (Biskupic, 2009)¹⁸. Their rulings on various cases suggest that this is not always true. Further, due to O'Connor's retirement in 2005 and the absence of any female appointments until Sotomayor in 2009, Justice Ginsburg's temporary position as the lone female on the court altered her view on the subject. She now believes that her previous statement may not always hold because "there are perceptions that we have because we are women" (Biskupic, 2009). Based on the judicial careers of Justice O'Connor and Justice Ginsburg, it is necessary for women to be on the Supreme Court to advance the substantive interests of females. Both justices tend to be sympathetic towards the plaintiff in sex discrimination cases, their presence created a panel effect among the male justices, and they bring valuable perspectives to deliberation that those who have not experienced life as a female may not otherwise have understood.

¹⁸ This is contrary to Justice Sotomayor's now infamous "wise Latina" comment, which bluntly states that different life experiences due to race and gender in fact lead to different conclusions.

Justice Ginsburg and Justice O'Connor have upheld the theory of Boyd et al. (2008), and consistently vote in favor of the plaintiff in sex discrimination cases. Both justices take a large role in these cases, writing a disproportionate number of opinions on the topic (Dixon, 2010). In an analysis of Title VII decisions, most of which involved male supervisors and female employees, Brenda Kruse (2005) found that the justices were significantly more likely to have voted for the plaintiff than their male colleagues. When the plaintiff was not a female, O'Connor and Ginsburg were more likely to find for the plaintiff as well. Kruse (2005) suggests that the tendency to vote for anyone who has faced discrimination is gendered – women are more likely to do this because they have experienced discrimination first hand.

The justice's jurisprudence supports Kruse's assertion. Their opinions often implicitly draw from their own life experiences, such as expanding the definition of "abusive work environment" to include abuse that is not physical in nature (Kruse, 2005). O'Connor and Ginsburg were never physically abused in the workplace, but they experienced much discrimination upon entering the legal profession, such as being one of few females in law school, difficulty in being hired for a position for which they were most certainly qualified upon graduation, or Ginsburg's demotion when she became pregnant with her daughter (Kruse, 2005). O'Connor's and Ginsburg's empathy towards plaintiffs in sex discrimination cases is present in their judicial voting patterns as well. In their twelve years on the court together, O'Connor and Ginsburg agreed on 11 out of 12 of gender discrimination cases (O'Connor & Yanus, 2010). This number is astounding, considering that both justices, though moderate, come from different political parties - O'Connor is a moderate conservative, and Ginsburg, a moderate liberal. Gender, in this

case, is a stronger predictor of support for women's rights than ideology. Due to life experiences, as demonstrated by Justices Ginsburg and O'Connor, female judges will be better substantive representatives of women than male judges.

The presence of females on the highest court has changed the jurisprudence of the male justices as well. After O'Connor joined the court, there was a dramatic increase in the sensitivity of the justices to claimants of gender discrimination. Similar to analyses at the circuit court level, the effect was more pronounced with the addition of the first woman. There was a small effect with Justice Ginsburg's appointment, but it was much weaker (O'Connor & Yanus, 2010). The astounding change in support by male justices for plaintiffs in gender discrimination cases suggests that there was no widespread support for these claimants before O'Connor's arrival. After her appointment in 1981, Justice Rehnquist's support for gender discrimination plaintiffs increased from 25% to 50%. The increase for Chief Justice Burger was from 32% to 50%. Justices Stevens and White, both supportive of the claimants the majority of the time, also increased support from 57% to 83% and 70% to 92% respectively (O'Connor & Yanus, 2010). The presence of one woman on the court clearly has significant panel effects, guaranteeing the need for at least one female. However, one woman is not enough.

During Justice Ginsburg's tenure as the court's only woman, two cases appeared before the justices where more female presence was greatly needed. In *Ledbetter v. Goodyear Tire and Rubber Company* (2007), Ginsburg wrote the dissent, saddened that her male colleagues were unable to understand the nature of pay discrimination. In case involving a strip search for contraband on a thirteen-year-old girl, *Safford School District v. Redding* (2009), Ginsburg made the unlikely move of speaking to the press before the

case was decided (Biskupic, 2009). This potentially shamed her colleagues (with the exception of Justice Thomas) in deciding in favor of the girl, Redding, but Ginsburg's effort went beyond what would have been necessary if more women had been there to support her opinion in normal deliberation.

Lily Ledbetter v. Goodyear Tire and Rubber Company provides important insight into the need for female substantive representation in the judiciary. Unable to understand how hard it is to detect pay discrimination in the 180-day window required by Title VII, the court ruled in favor of Goodyear, with Ginsburg writing the dissent. The case involved Lily Ledbetter, an employee with Goodyear. Every year, pay raises were given based on positive performance evaluations. Ledbetter, who began working in 1979, began to investigate the possibility of pay discrimination in 1998, and filed a suit that year. In a 5-4 opinion, the Supreme Court ruled that Ledbetter did not file in a timely fashion after the discrete act of pay discrimination took place.

Ginsburg's angry dissent was read from the bench (Biskupic, 2009), which she wrote to show "how far the Court has strayed from the interpretation to Title VII, with fidelity to the act's core purpose," and that the Court's interpretation was "at odds with the robust protection against workplace discrimination that Congress intended Title VII to secure" (*Ledbetter v. Goodyear*, 2007). Congress created Title VII to protect against employment discrimination. Lower compensation on the basis of gender, and not performance, is surely meant to be protected under it. The lone female justice argued that pay discrimination is hard to detect in 180-day window that the title requires for claims to be filed. First, salaries are confidential, so it is hard to compare your pay to that of other employees. Second, and more importantly, pay discrimination that occurs in small

increments over a long period of time (Ledbetter had worked at the firm for *twenty* years), is extremely hard to detect in the time required by Title VII. Most, if not all, of Ginsburg's colleagues never experienced pay discrimination, and the majority were therefore unable to understand the difficulty of filing a claim within the 180-day statute of limitations.

The case was decided in 2007, shortly after O'Connor left the court. In *Ledbetter*, Ginsburg was positive that Justice O'Connor would have been the swing vote. In an interview with Biskupic (2009), Ginsburg stated, "I have no doubt that she [O'Connor] would have understood Lily Ledbetter's situation." In this quote, Justice Ginsburg asserts the importance of female substantive representation. It is possible that Ginsburg wished for O'Connor because she was more moderate than her replacement, Justice Alito. However, based on the partnership between the two female justices in gender discrimination cases, it seems more plausible that Ginsburg wished O'Connor was on the case because she was knowledgeable about pay discrimination and an advocate for substantive female interests during her judicial tenure. Should Justice O'Connor have kept her position, it is likely that *Ledbetter* would have been decided differently. In this case, it is necessary to have multiple females on the court.

In *Safford School District v. Redding*, Justice Ginsburg was able to successfully advocate for female substantive interests, but her opinion was initially dismissed. Disgusted by the questions asked by her colleagues during oral arguments, such as Scalia, who asserted the school's right to make her sit outside the principal's office for two hours during investigation, or Breyer "trying to work out why this is a major thing to say strip down to your underclothes" (*Safford School District v. Redding*, 2009), Ginsburg spoke

to the press about the inability of the male justices to understand what it is like to be a young teenage girl (Biskupic, 2009). In *Safford*, Savana Redding was strip searched by school officials after a student alleged that she had ibuprofen on her body. She was forced to sit on a chair outside of the principal's office for almost two hours without her parents being contacted. She then filed a suit based on an unlawful search and seizure.

During oral arguments, Ginsburg was the only Justice who asserted that there was a humiliating aspect to the strip search. She continually emphasized the unnecessary action of making Redding sit outside the principal's office, and the traumatic nature of having your underwear shaken in front of school officials. Justice Breyer was especially unaware of the humiliating nature of Redding's search. He compared it to taking your clothes off when changing for gym class, or wearing a bathing suit (*Safford v. Redding*, 2009). Breyer did not understand what it meant to be a thirteen-year-old girl with concerns and shameful feelings about changes in your body. Only Ginsburg could understand that Redding was extremely embarrassed. She states, "it's a very sensitive age for a girl. I don't think that my colleagues, some of them, quite understood" (Biskupic, 2009).

Though none of the other justices acknowledged the humiliating aspect that was central to Ginsburg during oral arguments, they adapted this position in the decision. The opinion of the court, written by Justice Souter, makes an explicit reference to the point:

Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure.

Clearly, this was idea would not have been a part of the opinion if Justice Ginsburg did not enlighten the court to the effects of a strip search on a young, female teenager.

Without a woman on the court, no one would have suggested that there is an emotional aspect to the case. Consequently, it is necessary to have a woman on the Supreme Court to introduce certain ideas that men cannot understand because of the differences in life experiences between men and women. If more women were present, Ginsburg would not have had such a difficult time trying to express her views to her male colleagues.

Though Ginsburg and O'Connor have ruled similarly in many cases and depend on each other for substantive representation of women's interests, it is possible that this similarity stems from the nature of their specific experiences in legal environments (Dixon, 2010). Both women went to law school at a time when there was generally less than ten women in each class. The both graduated with high rankings in their class but found it very difficult to obtain positions with law firms and judicial clerkships (Kruse, 2005). Perhaps their similar rulings are based on these experiences. Unfortunately, we will not be able to study this empirically until there are more opinions and rulings by other females on the Supreme Court. It is too early to draw conclusions on Kagan and Sotomayor's jurisprudence. However, if the current studies on the lower courts are any indication, women who are younger than the first two Supreme Court justices will continue to be more sensitive to claimants of gender discrimination than males. The biases that O'Connor and Ginsburg faced are more extreme than those which exist today, but some bias is still present, and female jurisprudence on the lower federal courts continues to be sensitive to it. Since Supreme Court justices are mostly picked from the

lower federal judiciary, it seems plausible that the sympathy towards the plaintiff would continue once appointed to the high court.

Women are necessary on the Supreme Court to achieve substantive political representation. The highest court makes decisions with widespread effects, and to create legal precedent without female representation is dangerous. As Ginsburg has said, “Women belong in all places where decisions are being made” (Biskupic, 2009). We cannot assume that men will be effective substantive representatives of females on this level, as they may not recognize certain things that are offensive to women. Though it is unclear how many women are necessary, one is not enough.

Conclusion

The analysis of female judges on the judiciary demonstrates that women are the best representatives of the substantive interests of females. Because they vote differently in sex discrimination cases and influence men to be more sympathetic to the plaintiff, they are the best representatives to advance female interests. Women must be present on the district court in critical mass because their presence helps socialize males at the same court point to be more sensitive to women’s interests. Women must also be present on the appeals court in such levels that it is likely a woman will be represented in each chosen panel. This raises the probability that a female dissenter would influence a majority of two males. In general it is important to have women on the Supreme Court, though it is not clear how many females are necessary to advance women’s substantive interests. This chapter does not prove that men can *never* represent women’s interests. However, it is more likely that female judges will advocate for them. Therefore, it is extremely

important to ensure women are on all levels of the federal judiciary to have effective levels of female substantive representation.

Chapter 6: Conclusions

When President Jimmy Carter signed Executive Order 11972 in 1977, he forever changed the nature of federal judicial selection. Though the next presidents would not enact similar policies, the order forced each administration to take some stance on judicial diversity. Today, with three women on the Supreme Court, and the most diverse lower federal court in the history of the United States, Carter clearly started a trend in judicial politics. Unfortunately, women still constitute a minority of federal judges. Based on the findings in this thesis, presidential commitment to appointing women must increase.

First, Republican and Democratic presidents appoint women because they wish to court women voters. This can be classified under Goldman's partisan agenda. By appointing women to the federal bench, presidents hope to please interest group activists who look to the judiciary to legislate their policies from the bench. These groups will in turn mobilize voters. Democrats may also increase diversity on the federal courts because it is likely that these judges will further the liberal policy agenda. They generally appoint liberal and moderate women; Republicans limit themselves to conservative women, because they are unwilling to sacrifice their social conservative policy agendas in favor of diversity. This trend may change, because as the number of women who identify as conservatives grows, Republicans will have a larger pool of potential nominees that they

deem eligible for the bench. This suggests that in the future, diversity appointments will be used to further the policy and partisan objectives for both parties, not just Democrats.

Second, the female judges currently on the bench are extremely similar to male judges. They have comparatively more judicial experience and slightly less money, but their education qualifications are largely the same. Some groups worry that we should not actively recruit female and minority judges because they are simply not as qualified as traditional male ones (Scherer, n.d.). The data suggest that these fears are misplaced; male and female judges have very similar backgrounds. Though they may be descriptively representative of the pool of judges, the percentage of women on the federal bench does not resemble the percentage of women in the population or the percentage of women with law degrees. However, the proportion of female federal judges is headed in the right direction – the number of female federal judges has increased from 1.2% to 29.5% between 1977 and early 2010.

Third, more women on the bench may possibly increase legitimacy for men and women. Many scholars believe that theoretically, women should be a part of the federal judiciary to increase support for the courts. In an empirical study, Scherer (2011) suggests that legitimacy only increases for men as the number of women on the bench increases, but as stated previously, it is difficult to draw conclusions from just one study. Absent of any solid conclusions about legitimacy and judicial diversity, symbolic representation is of importance because it sends the message to young girls and women that the legal institution is open to them. For young girls, it is especially important for the Supreme Court to have female judges, since it is most visible level of the federal courts to the general population (Campbell & Wollbrecht, 2006). For women looking to

be involved in the judicial system, it is important to have women on the lower courts, to send the message that the judiciary is not an exclusively male venue (McLaughlin, 2006).

Finally women and men vote differently on sex discrimination cases, which can in turn affect male judges on all three levels of the federal courts (Collins et al, 2010; Boyd et al.; 2008; Farhang & Wawro, 2004; Peresie, 2005, O'Connor & Yanus, 2010). Female judges are significantly more likely to vote for the plaintiff in these cases. In the federal district courts, women may influence male judges because judges at the same court point rely on each other for advice (Collins et al., 2010); the female judges may then socialize the males to be more sensitive to women's interests. On the federal circuit courts and Supreme Court, there is a panel effect. Having women on the bench will make male judges more likely to vote for the plaintiff than if there were no females present (Boyd et al., 2008; Farhang & Wawro, 2004; O'Connor & Yanus, 2010).

The most relevant findings to this thesis are that of substantive and symbolic representation, and descriptive representation of gender. Substantive representation is clearly important because having women on the bench adds a new perspective to judicial deliberations. Additionally, symbolic representation is of importance because of the role model effect it has for women and young girls. When more empirical studies are done, we may be able to conclude that it is also of importance due to an increase in judicial legitimacy if there are more women.

Descriptive representation of the backgrounds of the judges is of little importance. Because female judges have similar qualifications to their male counterparts, they are descriptively representative of the entire federal bench. Descriptive representation in this sense, therefore, is not a relevant dimension of representation, since there is little

distinction between males and females – adding female judges does not significantly change the qualifications necessary to be a judge. Female judges are not less qualified than male judges, as some conservatives who resist judicial affirmative action have hypothesized (Scherer, n.d). Though the factor of gender may have been considered in the appointment, it is certainly not the only aspect the president looks at.

Descriptive representation is of importance, however, when we look at where female judicial representation is today. The percentage of female judges does not resemble the percentage of females in the population, nor does it resemble the percentage of females in law school, as women are only 29.5% of all federal judges. Because of substantive and symbolic representation, as well as descriptive representation of the judiciary compared to the general population of women, presidents should increase their commitment to appointing females until the percentage of women comes close to 50%. This will ensure that girls will grow up knowing that the judiciary is open to them, and that a woman's perspective is represented in proportion to the population of females in judicial deliberations. The findings for formalistic representation suggest that presidents are likely to continue their commitment to appointing women, since they will always need to court female voters to get elected. Even though the partisan agenda suggests that the trend of female appointments will continue, maintaining the number of female federal judges would not be enough. The president's commitment should *increase* to reach the standard of descriptive representation because of the implications symbolic and substantive representation of female judges have for the entire federal judiciary.

This thesis barely touches the surface on possible implications of female diversity on the federal bench. Though I have analyzed women as a single constituency in this

project, it would also be appropriate to analyze judicial representation of each female sub-group, especially for minority women, as the ramifications of appointing female federal judges may depend on race and ethnicity as well. Of the 29.5% of female judges who sit on the federal bench, 22% are Caucasian, meaning that a mere 7.5% of federal judges are minority females (Federal Judicial Center, 2011).¹⁹ This number is so small that it would be hard to study each dimension of representation empirically, however it may nonetheless have some important implications for female representation on the federal bench. I suggest future research be done in this area to understand if the results of this project really pertain to all women or if they are only representative of the majority of female judges who are white.

Despite few female minorities on the current bench, female judicial representation has come a long way since Carter began his campaign to diversify the federal courts in 1977. The Obama administration has made its commitment to judicial diversity very clear, with the appointment of two women to the Supreme Court to fill two vacancies, one of whom is Hispanic, and a record of filling about 50% of lower court vacancies with females. However, a gap between the percentage of female judges and the percentage of females in the population or females with law degrees still remains. Due to the substantive, symbolic, and descriptive implications of having female judges in the federal judiciary, future presidents must be committed to eliminating this gap.

¹⁹ I obtained this data through the Federal Judicial Center's Biographical Directory of Federal Judges on April 5, 2011.

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