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Bias and Judging

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Abstract

How do we know whether judges of different backgrounds are biased? We review the substantial political science literature on judicial decision making, paying close attention to how judges' demographics and ideology can influence or structure their decision making. As the research demonstrates, characteristics such as race, ethnicity, and gender can sometimes predict judicial decision making in limited kinds of cases; however, the literature also suggests that these characteristics are far less important in shaping or predicting outcomes than is ideology (or partisanship), which in turn correlates closely with gender, race, and ethnicity. This leads us to conclude that assuming judges of different backgrounds are biased because they rule differently is questionable. Given that the application of the law rarely provides one objectively correct answer, it is no surprise that judges' decisions vary according to their personal backgrounds and, more importantly, according to their ideology.

INTRODUCTION

Before she was nominated to the US Supreme Court, Justice Sonia Sotomayor famously wrote that she "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" (Sotomayor 2002, p. 92). Years later, herself a nominee to the Supreme Court, Sotomayor tried fervently to distance herself from her earlier comments. As she announced in her 2009 confirmation hearings, "I do not believe that any racial, ethnic or gender group has an advantage in sound judging. I do believe that every person has an equal opportunity to be a good and wise judge, regardless of their background or life experiences" (Nomination of Sonia Sotomayor 2009, p. 66). Even so, conservative criticisms of bias have dogged Sotomayor. Senator Jeff Sessions, in announcing his vote against her confirmation, complained that she was the kind of judge who "believes it is acceptable for a judge to allow their personal background, gender, prejudices, or sympathies to sway their decision in favor of, or against, parties before the court" and that such a viewpoint was automatically "disqualifying" (Nomination of Sonia Sotomayor 2009, p. 7).

In this review article, we assess what research in political science, economics, and empirical legal studies tells us about Sotomayor's statement as well as those of her detractors. Do judges "regardless of their background or life experiences" rule on cases similarly? What would it mean for judges of different backgrounds to be biased? These are important questions. Normatively speaking, we might wish for judges' decision making to be unaffected by race, gender, religion, or political party—either their own or of the parties before them. However, as we discuss throughout this piece, such a viewpoint is squarely at odds with long-standing empirical observations about how judges actually decide cases. Scholars as far back as Jerome Frank (1930, p. 6) have observed that the law is far from "clear, exact, and certain" but instead "is now, and will continue to be largely vague and variable." With something so "vague and variable" and lacking in clear right answers, would it be reasonable to expect judges of different backgrounds to reach identical legal conclusions? If they do not, would that be evidence of bias?[1]

Judicial politics research has much to say on these questions. The key takeaway is that judicial decision making is highly variable—indeed, research shows that judges' personal backgrounds, professional experiences, life experiences, and partisan and ideological loyalties might impact their decision making, just as Justice Sotomayor originally suggested. The research is also clear that, among these characteristics, ideology and partisanship have the strongest relationship with judicial decision making. Multiple studies have documented that judges appointed by Republicans decide cases differently than do judges appointed by Democrats, even after accounting for personal and professional differences (including gender and race). Other studies have shown that female and nonwhite judges, as well as judges from other backgrounds, decide cases differently, though these differences are more modest and tend to be detected primarily where the cases involved have a significant gendered or racial connotation. Taken holistically, the literature suggests that differently situated judges might decide cases differently, but that any differences associated with demographics are actually fairly issue-specific and much less pronounced than differences rooted in ideology or partisanship.

Moreover, as we argue in this article, the fact that studies have found such differences does not necessarily make judges biased. Like other political elites, judges have policy preferences, shaped by factors that include their race, gender, and, most importantly, ideology or partisanship (which themselves could be influenced by race or gender). In other words, judges are nuanced decision

[1]This article focuses on bias as defined through the frame of judges' backgrounds, including race, gender, ideology, and personal experiences. For an excellent overview on empirical work on other possible kinds of bias—including the use of heuristics and other nonjudicial factors—see Rachlinski & Wistrich (2017).

makers who bring their preferences and experiences to bear on what are sometimes difficult questions lacking objectively correct answers, as suggested by Frank (1930) and many others. Given this, we think a better way to consider claims of bias in judging is to assess the composition of the judiciary as a whole. The research suggests more women on the courts would lead to more decisions favorable to women, more people of color on the courts would lead to more decisions favorable to people of color, and more Republican judges would lead to more decisions less favorable to criminal defendants. Focusing on the composition of the judiciary as a whole and how that relates to the overall tenor of rulings, rather than on the relationship between individual judges' characteristics and decisions, allows scholars to consider the implications of population shifts in diversity—including partisan, gender, and racial diversity—on the bench.

This article proceeds as follows. We begin by discussing the extensive and fairly conclusive literature documenting the robust relationship between ideology (and partisanship) and judicial decision making. Next, we examine the somewhat smaller set of studies looking at the relationship between personal characteristics—including race, ethnicity, and gender—and decision making. These studies have found smaller differences in judicial decision making, after controlling for ideology, and any differences are mostly limited to specific contexts where race or gender are particularly salient. Next, we consider what these two lines of research mean for the question of bias in the judiciary. Our conclusion is that the courts are an ideological body whose rulings represent the preferences of the men and women who serve on them. This means that when questioning bias, we must consider very broadly the composition of the courts—not just as they are, but as we wish them to be.

RELATIONSHIP BETWEEN IDEOLOGY AND JUDICIAL DECISION MAKING

The literature on the relationship between ideology (or partisanship) and judicial decision making is long-standing and dates to early law school–based debates about the nature and purpose of judicial decision making. Most subsequent research within political science has taken the strong influence of ideology on decision making as a given and looked for ways to measure ideology accurately. Importantly, most of the literature in this area does not frame the importance of ideology in decision making as bias; rather, judges here are maximizing over preferences in much the same way that other political decision makers are but subject to a different set of constraints.

Legal Formalism and the Legal Realists

Early American legal scholars were largely of the view that the law was a tool applied to a set of facts; the neutral application of the law would thus result in a clear answer. This legal formalism is best represented by Harvard Law School Dean Christopher Columbus Langdell. As described by Grey (1983, p. 5), Langdell and others like him were of the "view that law is a science. Langdell believed that through scientific methods lawyers could derive correct legal judgments from a few fundamental principles and concepts, which it was the task of the scholar-scientist to discover." This philosophy, and Langdell's style of pedagogy, dominated early-twentieth-century legal education, with students attempting to distill and discern uniting principles in cases and then using those principles to formulate rules that could be applied to a new set of facts. (The imprint of this can be found in modern-day law school curricula, in particular the use of the case method.) Of course, the idea that a clear answer results from the objective application of law to fact would make it straightforward to detect a judge's bias.

Legal formalism eventually engendered strong intellectual responses, many of which pointed out the obvious—that two judges applying the same laws to the same facts frequently reached

different conclusions. This prompted scholars and judges to consider how individual judges' characteristics—as well as the broader societal context—could help explain and provide a guiding principle for judicial decision making. For example, Supreme Court Justice Oliver Wendell Holmes wrote extensively on the role of judges' personal experience in decision making. "The life of the law has not been logic," wrote Holmes (1909, p. 1), "it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." Likewise, Jerome Frank (1930, p. 111), a former federal appeals judge, wrote famously that the "law may vary with the personality of the judge who happens to pass upon any given case."

In line with this thinking, a growing number of pragmatic and sociologically inclined legal scholars (loosely termed legal realists) engaged with the social sciences as they sought a broader understanding of how judges' characteristics could influence their decision making (see Hull 1989 for more on these debates). Among them was Roscoe Pound, another Harvard Law dean, who advocated "the adjustment of [legal] principles and doctrines to the human conditions they are to govern rather than to first principles" (Pound 1908, pp. 609–10). Legal scholar Karl Llewellyn (1931) pushed these sentiments further, arguing that "jurisprudence cannot stand alone; and that the significance of law is law's effects." He further encouraged "large-scale quantitative studies of facts and outcomes" to better understand the decision-making process and to incorporate sociological context into the process of reasoning (Llewellyn 1931, p. 1222).

Emerging Political Science Research

The "personality of the judge" component to decision making spoke directly to social scientists' interests. Thus, beginning in the 1940s, political scientists broadly interested in political behavior picked up the legal realists' challenge. These early studies, rooted in summary statistics and basic quantitative analyses, sought to understand which individual characteristics predicted voting blocs. Unsurprisingly from a modern perspective, partisanship often emerged as the most important characteristic.[2] For example, the landmark analysis by Pritchett (1948) examined the way Supreme Court justices voted during the tumultuous New Deal Era, showing that the partisan identity of the appointing president was predictive of rulings. Early work by Schubert (1959) examined the Supreme Court and found that blocs were a useful way of categorizing liberal and conservative votes by the justices and of understanding judicial decision making.

Other early work affirmed the strongly predictive power of partisanship in judicial decision making. Ulmer (1960) analyzed voting patterns on the Supreme Court, determining quantitatively which justices tended to vote with each other on which issues, thus reinforcing voting blocs as an important area of study. Spaeth (1961) compared differences in the voting behavior of Justices Black and Douglas, with the implication that ideological differences predicted the differences in their voting. Several other early papers considered decision making on the US Courts of Appeals. For example, Goldman (1968, p. 475) documented the existence of voting blocs on appeals courts in the early 1960s, with "attitudinal differences" being "related to a larger, more general, liberal-conservative dimension." Goldman (1975, p. 495) concluded that "attitudes and values defined politically rather than legally may be of prime importance in understanding appeals."

[2] Many of these early studies looked at either the federal courts or courts where judges were selected primarily by partisan election; thus, partisanship was measured as the party of the appointing president (for federal courts) or as the identified party (for state courts). As we discuss below, modern scholarship has focused more on ideology as a predictive factor, looking beyond the party of the appointing president.

Early judicial politics scholars found similar patterns in state courts. Ulmer (1962) found that Michigan Supreme Court justices elected under a Democratic Party label were more likely to have pro-worker leanings, a finding consistent with Adamany's (1969) on the Wisconsin Supreme Court and Flango & Ducat's (1977) on the California Supreme Court. Nagel (1961, p. 847) reviewed decisions from "313 state and federal supreme court judges" on a wide range of cases and concluded that "party affiliation and decisional propensity for the liberal or conservative position correlate with each other because they are frequently effects of the same cause." In highlighting the importance of ideology on the US Supreme Court, Rohde & Spaeth (1976, p. 7) noted that "each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences." Pinello (1999) provides a helpful meta-analysis of these earlier studies.

The Attitudinal Model and the Dominance of Ideology in Decision Making

The next leap in the literature involved more focused and more statistically sophisticated analyses documenting the predictive power of ideology (frequently operationalized as party of appointing president) on judicial outcomes. Tate (1981), for example, showed that a small number of personal attributes—including party of the appointing president and a judge's own partisan identification—predicted much of the variance in US Supreme Court justices' voting on civil rights and civil liberties cases. Tetlock et al. (1985, p. 1227) found that those justices "with liberal and moderate voting records exhibited more integratively complex styles of thought in their early case opinions than did those with conservative voting records." Segal (1985) noted the Court's ideology shifts over time, arguing that it was the more conservative composition of the Burger Court that led to more conservative rulings on search and seizure cases.

Segal & Spaeth (1993, 2002) further redefined the field, theoretically developing and confirming the strong relationship between ideology and judicial decision making. Their influential "attitudinal model" theorizes that the "Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal" (Segal & Spaeth 2002, p. 86).

Segal & Spaeth's (2002) attitudinal model has been foundational in guiding a large body of scholarship documenting the importance of partisanship and ideology in judicial decision making, both in terms of voting overall and in terms of specific substantive legal arenas. In terms of overall prediction, Ruger et al. (2004) and Martin et al. (2004) predict Supreme Court decisions using a simple algorithm, which includes Justice ideology and case characteristics, that outperforms even experienced law professors in terms of accuracy. Looking at the US Courts of Appeals, Sunstein et al. (2006) show that ideology (operationalized by party of the appointing president) predicts not only individual judges' votes but also the votes of their colleagues—for example, a panel composed of three Democrats votes differently than a panel composed of two Democrats and one Republican. At the district court level, Epstein et al. (2013) show a strong relationship between ideology and decision making, with Democrats reaching more liberal decisions and Republicans more conservative ones. Zorn & Bowie (2010) document the influence of ideology at all tiers of the federal judiciary, but interestingly find that ideology's impact is stronger at higher levels (specifically at the appeals courts and at the Supreme Court). This suggests that less constrained courts are the ones where ideology is likely to have the biggest influence.

There are numerous findings on the extent to which ideology influences judges' rulings on specific issues. Cox & Miles (2008b) find evidence that Democrats and Republicans vote differently regarding potential violations of the Voting Rights Act. Cohen & Yang (2019) examine federal

criminal justice sentencing and find large discrepancies in sentences given by Republican and Democratic district judges, with Republican judges being more likely to mete out longer sentences, a finding consistent with Schanzenbach & Tiller (2006). Pinello (2003) finds considerable differences in voting on gay rights cases between federal judges appointed by Republicans versus Democrats, with Democratic judges being more in favor.

The importance of ideology in structuring judicial decision making has led to a cognate literature concerned with how to measure it. The challenges in estimating judicial ideology are significant. Unlike congressional representatives, judges seldom vote together (particularly if they sit on different courts). One exception is the US Supreme Court, where the various justices who have sat on the Court have voted together frequently. Thus, Martin & Quinn (2002) use a Bayesian model to estimate justice ideology using a few assumptions in tandem with the justices' votes. The resulting Martin-Quinn scores are dynamic, shifting from term to term, and allow scholars to examine ideological drift and median shifts over time. Segal & Cover (1989) take a different approach by estimating judicial ideology based on newspaper editorials written about the justices when they were being confirmed. For the lower courts, party of the appointing president is a frequently used, albeit rough, measure for judicial ideology. Giles et al. (2001) and Epstein et al. (2007) rely on party of the appointing president or, in cases where the president and the US senators from the state with the vacancy are of the same party, the ideology of the appointing senator(s). The resulting Judicial Common Space scores, which we discuss below, are among the most widely used measures of judicial ideology. Boyd (2011) provides similar measures for the US District Courts. Measuring judicial ideology in the state courts is more challenging, given that the 50 states all use different selection mechanisms. Thus, party-adjusted surrogate judge ideology (PAJID) scores use the ideology of executives, political elites, and political action committees to construct state judge ideological scores (Brace et al. 2000). A unifying approach to measuring ideology that links all tiers of the judicial system—including state, federal, and higher and lower courts—is that of Bonica & Sen (2017), who use data from campaign contributions to generate ideological scores for all US judges and lawyers; although they rely on strong assumptions, these data have the advantage of being more fine-grained than Judicial Common Space scores.

This judicial politics literature is clear in its documentation that ideology is a significant factor in judicial decision making.[3] However, the literature is not unified in the proposition that such influence is evidence of bias. Indeed, the overwhelming broader point of the literature is that judges operate similarly to other policy-makers: They try to maximize their preferences subject to institutional and informal constraints. Just like other political actors—including not only elected officials but also administrative actors, voters, and party leaders—judges seek to implement rulings that accord with their ideological worldviews. To expect otherwise would require judges to set aside political and ideological interests—likely the same factors that led them to pursue careers in law and in the judiciary in the first place. As Segal & Spaeth (2002, p. 6) simply note, "judges make policy."

JUDGES' DESCRIPTIVE CHARACTERISTICS AND JUDICIAL DECISION MAKING

Ideology is one possible way in which judicial attitudes could influence decision making. Identity—specifically, demographic factors—is another. However, research into this question is much newer

[3] Although too numerous to list here, other studies have noted that important factors—including the law, other colleagues, and the judicial hierarchy—play a key role in judicial decision-making (e.g., Epstein & Knight 1998, Friedman 2006, Hinkle 2015). An excellent overview of these points is provided by Epstein & Knight (2013).

than the literature on ideology and decision making. The reason is straightforward: It was not until the Carter Administration in the 1970s that American courts became more diverse, with greater numbers of women, blacks, Latina/os, Asian Americans, and LGBT judges named to the courts, not to mention judges of other backgrounds (such as religious minorities).

This increased judicial diversity has attracted scholarly attention to the topic of decision making by judges of different backgrounds (for example, see Haire & Moyer 2015, which we discuss below). Indeed, studying the role played by increasingly diverse judges is important for the courts' legitimacy; Scherer & Curry (2010) show that greater descriptive representation of judges from minority racial groups leads members of those groups to have increased belief in the legitimacy of the courts. As the country itself becomes more diverse, this finding suggests that a diverse judiciary might lead to a judiciary that not only rules in different ways but might also enjoy greater public trust.

Why Might Judges of Different Backgrounds Vote Differently?

The key research question that has captured scholars' attention has been how female judges and judges who are members of racial minority groups vote and whether they vote differently from others, nearly always using white, male judges as the baseline for comparison (a strategy critiqued by Gill et al. 2017). A key problem with this approach is that any resulting identification of bias related to judges' race or gender inherently assumes that white, male judges are not biased. In thinking about the question of how women and people of color differ from white male judges, the literature has coalesced around three theories that help explain why differently situated judges could reach different sorts of conclusions. These are helpfully summarized by Boyd (2016) in the context of the gender of trial judges (see also Haire & Moyer 2015). A related concept—that of panel effects, which we discuss below—also posits that these judges might not only reach different conclusions but also influence their colleagues' votes (Boyd et al. 2010, Kastellec 2013).

The first theory typically applies to gender, although the reasoning could apply to other contexts. It posits that women have a "different voice" than men (based on Gilligan 1982), and that female judges thus bring a different perspective to judicial decision making (Sherry 1986, p. 160). For example, "the male voice is distinctly masculine and committed to concepts like logic and justice. By contrast, the female voice is much more devoted to obligations, relationships, and problem solving through personal communication" (Boyd 2016, p. 789, paraphrasing Gilligan). Other works within jurisprudence and legal theory have built upon this argument (see, e.g., Karst 1984, Davis 1992). Menkel-Meadow (1985, p. 53) comments more broadly on the historically male-dominated nature of the law and the legal system, noting that the very essence of the legal system itself "might look different if there were more female voices in the legal profession."

A second theory is rooted in information, holding that the different knowledge and experience that judges acquire from their backgrounds lead them to rule differently on cases. Female judges, black judges, and other nonwhite, nonmale judges "bring a unique knowledge base and expertise to the bench" (Boyd 2016, p. 789). This knowledge is particularly salient in cases or issues that touch upon race, gender, or identity (Boyd et al. 2010, Kastellec 2013, Boyd 2016). This theory is perhaps the closest to Sotomayor's comment that a "wise Latina" would reach a different conclusion than "a white male who hasn't lived that life" (though, of course, none of these theories imply that a "wise Latina" would reach a "better conclusion").

A third theory is that women and members of racial, ethnic, and other minority groups act as substantive representatives of members of their group, furthering their interests and the group's policy preferences. To use the example of black judges quoted by Boyd (2016, p. 789), "it is safe to assume that a disproportionate number of blacks grow up with a heightened awareness of the

problems that pertain to 'racial discrimination' areas of the law." This awareness would lead judges who belong to these groups to vote or rule in ways that would advance group members' interests, thus differentiating their votes from those of white judges.

Providing additional context for these theories is a separate line of findings in the broader American politics literature, which documents differences in ideological leanings among women and members of racial and ethnic minority groups in the US population writ large. These suggest that ideology closely correlates with race, ethnicity, and gender, in ways that could complicate the study of judicial decision making. For example, the ideological distribution of people of color leans more to the left than that of whites, a phenomenon reflected in the voting patterns associated with these groups (Hutchings & Valentino 2004). This left-leaning tendency exists for black Americans (Miller et al. 1996), Latina/os (Segura 2012), and, increasingly, Asian Americans (Ramakrishnan 2014). To give some substantive context on these patterns, in 2016, Democratic presidential nominee Hillary Clinton carried 37% of whites, 88% of African Americans, 65% of Latina/os, and 65% of Asian Americans (Roper Center for Public Opinion Research 2016). These patterns also extend to specific policy positions, suggesting ideological differences between whites and nonwhites, rather than simply partisan differences.[4] Looking at the courts suggests similar ideological patterns among judges. For example, Sen (2017) uses Bonica & Sen's (2017) fine-grained ideology scores to show that nonwhite federal judges tend to be more left leaning than are whites; this is the case even among judges appointed by the same president.

A similar ideological pattern applies to gender, with women in the US population at large being on average more liberal than are men. This gender gap in political attitudes dates back to the latter half of the twentieth century (Shapiro & Mahajan 1986, Conover & Sapiro 1993, Howell & Day 2000). Recent electoral outcomes support the research here as well. In 2016, 54% of women voted for Democrat Hillary Clinton while 42% voted for Republican Donald Trump (Roper Cent. Public Opin. Res. 2016). This gap was not due exclusively to Clinton's gender: In 2008, 56% of women voted for Barack Obama, while 43% voted for John McCain (Roper Cent. Public Opin. Res. 2008). Several studies have tried to explain this gender gap. For example, Shapiro & Mahajan (1986) point to feminists as a source of the gap, while Edlund & Pande (2002) look to marriage rates as a cause. But taken together, this literature shows that, on average, women are more likely to identify with the Democratic Party (Box-Steffensmeier et al. 2004), have left-of-center ideologies (Norrander & Wilcox 2008), and hold progressive positions on many important policy issues (Howell & Day 2000). (For findings in contrast to this, see Kirkland & Coppock (2017).) Again, this is echoed within the courts, with female judges being more left leaning than are male judges, even conditional on being appointed by the same president (Sen 2017).

Race or Ethnicity of the Judge and Decision Making

All of this evidence would predict that female judges and nonwhite judges are likely to vote differently than do white male judges—in partial support of Sotomayor's "wise Latina" statement. But what does the empirical research on judicial decision making say about these claims? We address this question by first considering the relationship between race and ethnicity and judicial decision making.

Black judges. Research examining the relationship between judges' backgrounds and their rulings has focused largely on black judges and how their voting differs from white judges' voting,

[4]For example, a 2017 poll found that 76% of blacks agreed that "poor people have hard lives because government benefits do not go far enough," compared with 60% of Hispanics and 47% of whites (Pew Res. Cent. 2017, p. 17).

controlling either for partisanship or, more roughly, for ideology (usually with Judicial Common Space scores). The reason for the focus on black judges is largely historical: Black judges were among the first nonwhite male judges to be appointed to the courts in numbers large enough for scholars to study.

A large set of papers has compared the decisions of black judges to those of white judges within the context of criminal justice, especially criminal sentencing in trial courts. However, the findings of the earlier studies are somewhat mixed. Welch et al. (1988) found that while white state trial judges were more lenient with white defendants than with black defendants, black judges treated both equally. Spohn (1990), on the other hand, found that both white and black judges sentenced black defendants more harshly. Steffensmeier & Britt (2001) found that black judges were slightly more likely to sentence defendants to prison, regardless of the defendant's race; the authors attributed this to the pressures that black judges may face as "tokens" in the judiciary or the greater concern they may have about crime, especially within black communities (Steffensmeier & Britt 2001, pp. 761–62). In the federal appeals court context, Scherer (2004) examined search and seizure cases and found black judges more willing than their white counterparts to accept black defendants' claims of police misconduct.

More recent papers—including several in economics—have mostly focused on differences between judges with regard to sentencing, particularly when the race of the defendant is part of the analysis. Schanzenbach (2005) finds no significant differences in federal district court criminal sentencing disparities associated with the proportion of judges in the district who are black or Hispanic (or female). Abrams et al. (2012) exploit the random assignment of felony cases to state trial judges, finding that the judge to whom a case is assigned can affect the likelihood of incarceration. They find that this variation across judges contributes significantly to the variability of the black–white gap in incarceration. However, the authors do not find any clear differences in sentencing disparities based on the race of the judge (Abrams et al. 2012). More recently, Cohen & Yang (2019) find that black federal district judges issue shorter criminal sentences than nonblack judges.

A closely related area of literature has documented some differences in voting between black and white judges in noncriminal issue areas, specifically ones in which race or ethnicity is salient. For example, in an influential paper, Cox & Miles (2008a) find that black federal appeals judges are more likely to vote in favor of nonwhite plaintiffs in Voting Rights Act cases than are white judges. Kastellec (2013) uses matching techniques to find that black federal appeals judges are more likely than white judges to vote in support of affirmative action programs. Looking at a related topic, Morin (2014) shows that black federal appeals judges are more likely to rule in favor of black workers making employment discrimination claims than white workers. This finding is consistent with Chew & Kelley's (2008) finding that black federal appeals court judges are more likely to rule in favor of plaintiffs in racial harassment cases, and with Weinberg & Nielsen's (2011) conclusion that nonwhite federal district judges are less likely to dismiss civil rights employment claims than are white judges. All of these papers include measures of judicial ideology or partisanship (or party of appointing president).

Looking beyond race-related issues, the literature is more scarce and the findings more mixed. Some studies have found that black judges may also render more liberal decisions in gender discrimination cases and in cases with plaintiffs who identify as gay or lesbian (Martin & Pyle 1999, Pinello 2003). In one of the more inclusive reviews of the topic, Haire & Moyer (2015, p. 30) find, after controlling for ideology, that black federal appeals judges tend to vote in a more liberal direction on average across all cases, but the authors find no differences in "contested cases." (They do find differences when looking specifically at racial discrimination cases, as do the papers mentioned above.) In earlier work, Walker & Barrow (1985) found no meaningful differences

between black and white federal district judges across a variety of substantive legal issues. Haire & Moyer (2015) and Walker & Barrow (1985) are broadly consistent with Segal (2000, p. 144), who examines President Bill Clinton's appointments to the federal courts and finds no differences between white and black judges in terms of their "support of a variety of issues before their benches," including "black issues."

Importantly, a related set of papers suggests that the impact of more people of color on the bench extends to their peers in certain race-related cases, thus possibly widening their scope of influence. This is most apparent when considering the votes of judges on panels—for example, those sitting on three-judge panels in the US Courts of Appeals. Papers have shown adding a black judge to an otherwise all-white panel influences white judges' votes, making them more likely to vote in favor of minority plaintiffs or in a more liberal direction in cases where race is salient such as voting rights and affirmative action (Cox & Miles 2008a, Kastellec 2013). (See, however, Farhang & Wawro (2004) for findings to the contrary.) In the state criminal trial court context, Harris (2018) finds that judges (both black and white) sentence black and white defendants more equitably as they gain black colleagues. Further evidence of this impact is provided by Haire et al. (2013), who document that appeals panels that have a majority of nonwhite (or female) judges issue rulings discussing a greater number of legal issues.

While scholars are uncertain of the mechanisms underlying these effects, the simple presence of a black judge might change how an appellate panel deliberates (which scholars cannot observe), or observing a black judge's vote might encourage white colleagues to vote differently (Kastellec 2013).[5] In criminal trial courts, increases in black judges' representation on the bench may create pressure for white judges not to appear discriminatory and alleviate pressures that previously prevented black judges from showing lenience toward black defendants (Harris 2018).

Other racial or ethnic minority groups. The appointment of Latina/o, Asian and Pacific Islander, and Native American judges, especially, to the federal courts, has moved more slowly (Sen 2017, pp. 371–72), and fewer of these judges have served on the nation's courts compared to black judges. For example, as of our writing, only three judges of Native American heritage have ever served on the federal courts, according to the Federal Judicial Center. The relative lack of racial diversity among federal judges beyond the black–white dichotomy has presented challenges for scholars trying to detect differences in judicial decisions across racial or ethnic identities.

There have been a few studies, however. Morin (2014) examines black and Latina/o federal appeals judges' voting in employment discrimination cases. He finds, interestingly, that Latino judges are less likely than are white judges to rule in favor of claimants. An older study, Holmes et al. (1993), examines differences in sentencing between Latina/o and white judges, juxtaposing these with defendant ethnicity; they find that Latina/o judges are not impacted by defendant ethnicity, while white judges sentence non-Latinos more leniently. Perhaps the most comprehensive analysis is Haire & Moyer's (2015, pp. 30–32), which finds no statistically distinguishable differences between Latino and white federal appeals judges on a host of issues (though they find some differences between Latino and black judges), after controlling for ideology. However, the authors are careful to note that "Latino" on the courts means many different things, including differences

[5] Other papers have examined how black judges are evaluated by other lawyers and judges. For example, Gill et al. (2011) find that nonwhite and female state judges score consistently lower on judicial performance evaluations than do white, male judges, while Sen (2014a,b) finds that when women and people of color are nominated to the federal district courts they receive lower qualification ratings from the American Bar Association than do white, male nominees. [However, see Smelcer et al. (2011) for findings to the contrary in regard to nominees to the federal appeals courts.] Looking at reversal rates, Sen (2015) finds that rulings by black federal district judges (but not female judges) are more likely to be overturned on appeal.

in national origin (Haire & Moyer 2015, pp. 22–28), and Latina/os may identify as members of any, many, or no racial groups. We find no studies exploring decision making by Asian American or Native American judges, likely due to the relatively few members of these racial groups in the judiciary.

Gender and Judging

After race and ethnicity, the largest set of scholarly work concerned with the relationship between judges' personal characteristics and decisions has focused on the role of gender in the decision-making process. Much of this literature finds that gender is a predictive factor in gender-related cases—especially those involving sexual harassment, reproductive rights, and sex- or gender-based discrimination—after controlling for partisanship or, more roughly, ideology (usually via Judicial Common Space scores). However, the literature is somewhat mixed, especially given how few women were judges in earlier time periods. Indeed, it was not until the Carter Administration that there was a concerted effort to appoint more women to the nation's courts. In part due to early scarcity, most scholarly attention has examined how women rule differently from men; Gill et al. (2017) critique this approach, noting that it has the effect of treating female judges as the "other."

Some early papers found that female judges, in both state and federal courts, ruled more liberally than men. Allen & Wall (1993), for instance, explored different pathways of decision making for female state supreme court justices, finding that female justices vote more liberally on gender-related cases. This finding is consistent with Gryski et al.'s (1986) finding that the presence of at least one woman on the state high court is weakly positively related with rulings in favor of plaintiffs in sex discrimination cases. Other studies, however, have found no relationship or a more modest relationship between gender and judging. Segal (2000) examines Carter and Clinton appointees to the federal courts and paradoxically finds that male judges are more supportive of women's issues in gender-related cases. These findings are similar to Ashenfelter et al.'s (1995, p. 281) analysis of federal district courts' civil rights cases, which finds only "modest effects" of a judge's gender in the handling of these cases. Walker & Barrow (1985) find some differences between men's and women's decisions in other types of cases, including cases involving personal liberties, federal and economic regulations, and racial minority groups.[6]

More recent work focusing on the federal appeals courts is consistent with earlier work that found slight gender differences in judges' decisions in certain types of cases, especially those related to gender. This is the case even after controlling for ideology or partisanship. For example, Davis et al. (1993) find statistically significant differences between male and female appellate judges' votes in employment discrimination and search and seizure cases, but not in obscenity cases. Farhang & Wawro (2004) find that, in employment discrimination cases, female appellate judges are more likely to vote in favor of the plaintiff, and that having at least one woman on the three-judge panel increases the probability that the panel will rule for the plaintiff. These findings are supported by Peresie (2005), who examines federal appeals judges' voting on Title VII sex discrimination and sex harassment cases and finds, in addition to panel effects, that female judges are more likely to side with the plaintiff. In another influential paper, Boyd et al. (2010) use matching techniques to estimate the relationship between gender and judging, finding that

[6]Peresie (2005) helpfully identifies some potential reasons for inconsistencies in the earlier studies. First, small sample sizes could potentially cloud small but substantively meaningful differences between male and female judges. Additionally, when women are significantly underrepresented, they may experience tokenism and pressure to behave similarly to white counterparts (see also, e.g., Kanter 2008). Lastly, individual effects might be "muted on collegial courts" like the US Courts of Appeals (Peresie 2005, p. 1764).

female federal appeals judges are more likely to vote in a liberal direction in gender-related cases. Gill et al. (2017) find that all-male appellate panels hearing immigration appeals are much harsher with male litigants than female litigants (but that mixed-gender panels are not). However, Haire & Moyer's (2015, pp. 47–49) analysis of federal appeals judges' overall voting records concludes that gender has no relationship with voting after controlling for ideology. The authors also see no difference across specific issue areas, with the exception of sex discrimination cases, in which, interestingly, their analysis reveals that older female judges are more sympathetic to plaintiffs than younger female judges.

Other studies have considered how male and female judges approach judicial procedure, questioning whether they approach the business of deciding cases differently. For example, Boyd (2013) examines thousands of civil rights court cases terminated in the federal district courts, finding that cases assigned to women are more likely to settle, and to settle more quickly, than cases assigned to men. Haire & Moyer (2015, pp. 52–53) look at three-judge federal appeals panels and find that female-authored opinions are longer, suggesting a greater attempt to incorporate a variety of perspectives. However, the authors find mixed results on voting; some female judges who are also members of minority groups (for example, black women) vote more liberally on gender-related cases, but the authors find no real differences in voting on race-related cases. Most recently, Gleason et al. (2018) find that male US Supreme Court justices evaluate female attorneys based on traditional gender norms, but female justices do not.

The literature on gender and judging also finds evidence of panel effects—in which the presence of at least one female judge changes the voting behavior of her male colleagues. For example, Farhang & Wawro (2004) and Peresie (2005) both find that having at least one woman on a three-judge federal appeals panel moves the entire panel in the direction of the plaintiff in gender discrimination cases. In more recent work, Boyd et al. (2010) use matching to find that adding a woman to an otherwise all-male appeals panel increases the likelihood that the panel will decide in favor of plaintiffs in cases where gender is a salient factor. Importantly, these papers find that the overall rulings are different not just because of the woman's vote, but because her inclusion on the panel also increases the likelihood that her male colleagues will vote in favor of the plaintiff. The flip side of this question is explored by Johnson et al. (2011), who examine voting on the Supreme Court of Canada. They find that female justices vote in a more liberal direction on a host of gender-related issues and, surprisingly, that their votes are not influenced by whether there exists a "critical mass" of female justices.

We also note a small but growing literature that focuses on intersectionality, specifically on judges who are women of color. For example, Collins & Moyer (2008) find that nonwhite female judges are more likely to rule in favor of criminal defendants. Haire & Moyer (2015) conducted another of the few studies of judges who are women of color and their opinion assignment. They find that Latina judges are more likely to assign important cases to themselves (as are white women), but this is not the case for black women (Haire & Moyer 2015, p. 71). Relatedly, Collins et al. (2017) find that female attorneys of color are more likely to report being treated unfairly by other lawyers. However, the literature on these topics is very limited.

Other Personal Characteristics

Another growing literature has explored the impact and influence of personal characteristics beyond race, ethnicity, and gender. The overall contributions of these papers have been to show that, similar to demographic characteristics, personal experiences can also influence judicial decision making. For example, Glynn & Sen (2015) use the natural experiment of a child's gender to assess the causal impact of parenting a daughter versus a son. The authors find strong evidence

that having a daughter (as opposed to a son) leads federal appeals judges—particularly those appointed by Republicans—to vote in a more liberal direction on certain gender-related issues (for example, reproductive rights and employment discrimination cases).

Scholars have examined other kinds of personal characteristics as well. For example, several papers have looked at the relationship between age and decision making involving older plaintiffs. Manning et al. (2004) show that older judges are more likely to rule in favor of age discrimination claims. (However, Epstein & Martin (2004) examine the same data and find no relationship.) Boyea (2010) documents that older judges (those with more seniority) are more likely to issue dissents, while Kaheny et al. (2008) focus on career stage and find that judges are more predictable in their decision making at earlier than later points in their careers.

Other papers have considered the potential role of religion in judging. Songer & Tabrizi (1999) find that evangelical state supreme court judges are more conservative across key social issue areas than are mainline Protestant, Catholic, and Jewish judges. Pinello (2003) analyzes voting on LGBT rights issues, finding that Jewish judges are more inclined to make decisions in favor of LGBT causes and Catholic judges are less so, both in comparison with Protestant judges. Shahshahani & Liu (2017) provide perhaps the most in-depth examination of religion and judging. Examining federal appeals court cases involving religious freedom claims, they find that Jewish judges are more likely to favor claimants; a likely explanation, they argue, is that Jewish judges are more likely to be concerned about the separation of church and state.[7]

Beyond these studies, the literature on the possible impact of personal experiences or characteristics is more scarce, suggesting ample opportunities for scholarship. Military service, professional background, elite training, and political careers might be other factors that could influence judicial decision making. Other characteristics, too, are potentially important and thus far unexplored, either because there are few judges who identify as having those characteristics or because data on those characteristics are limited or unavailable. For example, as of our writing, no research has examined the voting of LGBT judges, despite the importance of LGBT rights–related litigation. In addition, as we discussed above, only a few studies have directly addressed judicial decision making through the lens of intersectionality (for an example, see Collins & Moyer 2008).

DISCUSSION: IS IT BIAS WHEN DIFFERENT JUDGES REACH DIFFERENT CONCLUSIONS?

Given this literature, how do we know whether judges of different backgrounds are biased? Our review clarifies that the research in political science supports the idea that judges' backgrounds—including their race, gender, ethnicity, and religion—shape their decision making. Studies over the past several decades have shown that judges of color, women, religious minorities, parents, and older judges decide certain kinds of cases differently than people who haven't "lived that experience" (to use the words of Justice Sonia Sotomayor in her famous "Wise Latina" comments). Thus, the research does provide support for part of Sotomayor's contention, that the "richness" of the wise Latina's "experiences" would probably lead her to reach different—albeit not necessarily "better"—conclusions.

However, these findings must be put in context, and doing so suggests caution about overclaiming any such differences. First, the studies finding differences in decision making between judges of different races, ethnicities, and genders (as well as other characteristics) are fairly specific

[7]In the international context, Grossman et al. (2016) find panel effects in multiethnic societies, with Arab defendants receiving more lenient punishments when there is at least one Arab judge on a criminal appeals panel (see also Gazal-Ayal & Sulitzeanu-Kenan 2010).

to cases where race and gender are salient or otherwise important to the substance of a case. For studies involving judges' race and ethnicity, these include cases involving criminal procedure and sentencing—and in particular when scholars are comparing sentences meted out to white versus black defendants—as well as a handful of other civil rights issues. For gender, the studies have shown that women primarily vote differently on cases that have a gender dimension, such as sex- or gender-based employment discrimination or reproductive rights. Taken together, this suggests that Sotomayor's "wise Latina" judge would decide some, but not all, cases differently than a similarly situated white non-Hispanic judge, and that the differences would mostly involve cases where race and gender are particularly salient.

Second, these differences associated with personal background largely pale in comparison to the findings showing differences according to a judge's party and ideology. The cumulative empirical research is very clear: Being a conservative or a liberal (or being appointed by a Republican or a Democrat) is highly predictive of decision making, and it is more predictive than personal demographics across a larger swath of issue areas—including criminal sentencing and civil rights (Cox & Miles 2008b, Cohen & Yang 2019). If women and people of color are generally more likely to identify as liberals or Democrats (as comports with research in American politics more broadly), then it is unsurprising that their decisions might be more liberal overall than those of their white male counterparts, but only limitedly so after controlling for ideology. Put differently, Sotomayor's own rulings are better explained by the fact that her ideology is left-of-center than by her ethnicity or gender—although the latter characteristics clearly inform the former.

More broadly, the research provides no support for the opposing contention, which is that Sotomayor's background automatically makes her—and other judges who deviate from the traditional white, male judicial stereotype—biased. Considering this claim gives us the opportunity to think more deeply about what bias means and how the research we have discussed informs different interpretations (for research concerning different interpretations of bias, see Rachlinski & Wistrich 2017). Social scientists typically think of bias as systematic divergence from some expected value or outcome, which is a useful lens through which to evaluate the judicial politics research. Indeed, the application of the law to facts offers no clear expected value. Going as far back as the realists—the precursors to modern-day judicial politics scholars—research has firmly rejected the idea that there is such a thing as an asymptotically correct answer unaffected by judge idiosyncrasies. As Judge Richard Posner (2010, p. 79) notes in an influential book on judicial decision making, "when legalist methods of judicial decision making fall short, judges draw on beliefs and intuitions," and these intuitions "may have a political hue."

Given that the law rarely provides a clear, objectively correct answer, it is no surprise that judges' decisions vary highly according to their personal backgrounds and ideologies. Instead, the scholarship suggests that judicial decision making writ large reflects the different characteristics and identities that are represented among the judiciary. The percentage of women, blacks, Democrats, gays and lesbians, or religious minorities has important consequences for the decisions judges make, both because judges with different backgrounds behave differently and because judges' behavior can change as the composition of their group of colleagues changes. Work in this area suggests that having more black judges might help to decrease the variability in the incarceration gap between black and white defendants (Abrams et al. 2012, Harris 2018), a matter of national policy concern; and, if gender equality is a matter of national concern, then appointing more women will effectuate change with regard to sex- and gender-based employment discrimination claims (Boyd et al. 2010). To phrase this via analogy, Americans have relatively little concern about individual congressional representatives being biased because legislators of varied backgrounds are expected to have different preferences on different topics on which there is no single right answer. This is a normative good, since it increases the kinds of voices at the table.

Likewise, we should not expect that differently situated judges approach judicial interpretation identically. Instead, we should consider that the composition of the judiciary as a whole—like that of Congress as a whole—greatly informs the overall kinds of decisions that judges will yield.

CONCLUSION

We conclude by noting avenues of future research. First, our review of the literature suggests clear gaps in how we understand judicial decision making: We know little of the decision making of Asian American, Native American, or LGBT judges and, with some exceptions (e.g., Haire & Moyer 2015), we know little about judicial decision making through the lens of intersectionality. These represent clear opportunities for important scholarship. Second, even though the literature has mostly regarded ideology and identity as distinct, a broader literature in American politics suggests a powerful correspondence between ideology (or partisanship) and identity; we briefly discussed the interplay in this review article, but the fact that women, people of color, and members of religious minority groups are appointed mostly by Democratic presidents clearly has implications for their rulings and their roles that have, so far, gone unexplored. Lastly, we believe that a fruitful path for scholarship lies in looking at the judiciary as a whole, understanding that judicial decision making takes place not only at the level of individual judges, but also holistically, with judges of different ideologies and backgrounds coming together to rule on issues of political and policy importance. That is, the issue of "bias and judging" implicates the entire judiciary, not just individual judges. We believe that these are all important areas for further scholarly attention.

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