

# Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination

Rosalind Dixon\*

*"The question should not be whether Justice O'Connor's seat ought to be filled by a woman but why half of the nine justices are not women . . . . We're asking for another woman."*

—*Feminist Majority Foundation, 2005*<sup>1</sup>

*"NOW urges President Obama to nominate a woman to join [Justice Ginsburg on the Court] . . . . We want two women (and three and four and five) because together they can make a real impact on women's lives."*

—*National Organization for Women, May 2009*<sup>2</sup>

**ABSTRACT:** In recent years, feminists in the United States have consistently advocated for the appointment of more female justices to the Supreme Court. Given the records of Justices O'Connor and Ginsburg on the Court and broader empirical findings below the Supreme Court level showing a relationship between a judge's gender and her voting behavior, feminists have argued that, from a feminist perspective, the appointment of new female justices to the Court is likely to offer significant substantive, as well as symbolic, benefits. This Article challenges such feminist orthodoxy by showing that at a substantive, if not symbolic, level, it is based on a mistaken view of existing empirical data on judicial behavior and its likely future predictive value. The

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1. Adam Liptak, *O'Connor Leap Moved Women up the Bench*, N.Y. TIMES, July 5, 2005, at A1 (quoting Eleanor Smeal, President of the Feminist Majority Foundation).

2. Kim Gandy, *One is Not Enough*, NOW News, May 7, 2009, <http://www.now.org/news/note/050709.html>.

Article shows how, from both quantitative and qualitative perspectives, the current literature on judicial behavior in fact reveals little if any meaningful connection between a judge's gender and her pro-feminist views. By drawing on comparative experience in Canada, which between 2005 and 2008 had a near female majority on its Supreme Court, the Article also shows how any female-feminist connection previously evident in the United States, particularly at the Supreme Court level, is unlikely to endure in the future, given changes in the kind and degree of discrimination experienced by female justices prior to appointment. Consequently, the Article also calls for a change in strategy on the part of feminists to focus more directly on the demonstrated jurisprudential commitments, rather than on the gender, of future judicial nominees.

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## INTRODUCTION

In 2006, with the retirement of Justice O'Connor, many feminist groups argued vocally for the replacement of O'Connor with a woman.<sup>3</sup> In 2009, this time with far more success, those same groups urged President Obama to replace Justice Souter with a female candidate.<sup>4</sup> They also indicated an intention to continue this female-judge strategy until women reach a majority on the Court.<sup>5</sup>

Taken at its face, such a strategy makes sense for feminists. A strong female presence on the Court is important: it signals the inclusion and equality

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3. See Liptak, *supra* note 1. See also Jeffrey Rosen, *The Woman's Seat*, N.Y. TIMES, Oct. 16, 2005 (Magazine), at 13 ("Many Democrats embrace a version of the essentialist argument that it's important to have women on the court because they will provide a uniquely female perspective, rooted in their personal experiences as women.").

4. See Gandy, *supra* note 2.

5. *Id.* See also Rosen, *supra* note 3.

of women in national political life.<sup>6</sup> For female attorneys, it has the important capacity to counter implicit gender bias in the legal profession.<sup>7</sup> Given both the record of female justices such as O'Connor and Ginsburg and the empirical literature on the voting behavior of male and female judges, it is also plausible for feminists to think that a female justice will be more likely than an equivalent male justice to be sympathetic to certain substantive feminist ideals.<sup>8</sup>

However, this Article shows that, on closer inspection, such a strategy misreads the lessons of female judicial behavior to date and is thus an imprudent path for feminists concerned with promoting certain substantive, society-wide legal outcomes.

While Justices O'Connor and Ginsburg clearly have played a considerable role in advancing gender equality on the Court, the Article argues that it is important to consider the link between this role and the justices' own experiences of gender discrimination. More recently appointed female justices are much less likely to have experienced the same degree of discrimination and therefore are also less likely to approach claims of gender discrimination in the same way. This is not only logically the case, but also is supported by recent experience in Canada, which has recently had four female members on its Supreme Court.<sup>9</sup>

When close attention is paid to empirical studies of female judicial behavior in the United States below the Supreme Court level, those studies also fail to reveal the kind of interaction between gender and ideology, and gender and panel composition, that is observable in the context of O'Connor's and Ginsburg's jurisprudence. At a more qualitative level, when the cases behind leading empirical studies are examined in more detail, they also reveal differences between female and male judges that are irrelevant, ambiguous, or extremely limited in their significance from a feminist perspective.

In future nomination battles, there is a strong argument that feminists concerned about promoting gender equality at the level of substantive legal outcomes, not just symbolism or internal professional organization, should focus directly on the demonstrated commitment of a particular judicial nominee—whether male or female—to substantive feminist ideals. In many cases they may still support the appointment of a female candidate to the Court,

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6. See Martha Nussbaum, Op-Ed., *Women in Office Break Stereotypes*, PHILA. INQUIRER, Nov. 24, 2008, at A10.

7. For discussions of implicit bias, see *infra* notes 198-202.

8. For further discussion and definition of different strands of feminist thought, including those that are liberal and anti-subordination oriented, see *infra* note 12.

9. For a discussion of the ideological orientation of the female justices on the Canadian Supreme Court, see Mary Jane Mossman, *Defining Moments for Women as Lawyers: Reflections on Numerical Gender Equality*, 17 CANADIAN J. WOMEN & L. 15, 23-25 (2005).

but at least in *some* cases they may find that a male candidate is the best feminist for the job.<sup>10</sup>

The argument proceeds in five parts. Part I examines, first, the jurisprudential contributions to date of Justices O'Connor and Ginsburg in areas of particular feminist significance; second, the likely link between the approaches of Justices O'Connor and Ginsburg in this area and their own prior personal experiences of gender discrimination; and third, the degree to which female judicial candidates in the future are likely to share these same experiences. Part II examines larger-scale empirical studies of female judicial behavior in the United States, particularly findings about the interactions between gender, ideology, and panel composition evident in the jurisprudence of Justices O'Connor and Ginsburg. This Part argues that the findings of these studies do not in fact support the existence of this same kind of female-feminist correlation below the Supreme Court level. Part III discusses one such study by Christina Boyd, Lee Epstein, and Andrew Martin, and examines the significance from a feminist perspective of decisions of female judges in key cases relied on in this study.<sup>11</sup> Part IV examines the parallel experience in Canada and argues that such experience confirms the likelihood that female justices' sympathy for anti-subordination feminist goals will decline over time as their personal experiences with gender discrimination decrease. Part V concludes by considering the normative implications of these empirical lessons for feminists.

## I. FEMALE JUSTICES, THE SUPREME COURT, AND FEMINISM

### A. *O'Connor, Ginsburg, and a Female-Feminist Correlation?*

In the legal academy, feminism can mean different things to different people.<sup>12</sup> In the domain of Supreme Court appointments, however, a narrower range of feminist perspectives and goals tends to dominate. For most national feminist organizations concerned with the politics of judicial appointments,

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10. *But see* Rosemary Hunter, *Can Feminist Judges Make a Difference?*, 15 INT'L J. LEGAL PROF. 7, 8 (2008) (arguing that because "the experience of being gendered female . . . [is] a crucial element of feminism," only female judges can be truly feminist).

11. Christina Boyd, Lee Epstein & Andrew Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. (forthcoming 2010).

12. *See* Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277 (2008). For the breadth of the potential perspectives encompassed by feminism, see also Nicola Lacey, *Feminist Legal Theory and the Rights of Women*, in GENDER AND HUMAN RIGHTS 13, 16 (Karen Knop ed., 2004), which defines feminism as:

[c]onstructed out of a combination of *analytic and political-ethical claims*. Analytically, the claim is that sex/gender is one important social structure or axis of social differentiation, and is hence likely to characterize and influence the shape of law. Politically and ethically, feminist theory starts out from the assumption that the ways in which sex/gender has shaped the world, including through law, have been unjust.

*Id.*

feminism involves, at its core, a shared commitment to the “advancement of the legal, social and political equality of women with men.”<sup>13</sup> Equality is also consistently defined by these organizations to involve both the liberal feminist goals of equal opportunity, dignity, and social respect for women and the *anti-subordination* (or dominance) feminist goal of eliminating historical sources of gender-based subordination.<sup>14</sup>

Given this understanding of gender equality, there is little doubt that both Justices O'Connor and Ginsburg made a significant contribution to the achievement of substantive feminist goals on the Court, not only absolutely but also when compared to their male counterparts.

Take the approach of the two justices in cases involving claims of sex discrimination or sexual harassment under Title VII of the Civil Rights Act of 1964. From 1981 to 1992, Justice O'Connor joined the most liberal members of the Court 88% to 89% of the time in such cases, whereas her conservative male colleagues joined such opinions in fewer than 50% of Title VII cases.<sup>15</sup> Between 1993 and 2000, she voted for the plaintiff in approximately 82% of cases, making her the conservative justice most likely to favor the plaintiff. She voted for the plaintiff at a rate less than 2% below that of Justice Stevens, while Justice Kennedy voted for the plaintiff in approximately 67% of cases, Justice Rehnquist in 50% of cases, and Justices Thomas and Scalia in approximately 25% of cases.<sup>16</sup> During this period, Justice Ginsburg was the justice who, together with Justice Souter, was most likely to support the plaintiff.<sup>17</sup> Like Souter, she voted for the plaintiff in approximately 92% of Title VII cases, whereas in broader “civil liberties” cases, she lagged behind both Stevens and Souter in voting for the plaintiff.<sup>18</sup>

In such cases, as well as in cases decided under the Equal Pay Act<sup>19</sup> and constitutional cases involving claims of gender equality during this period (“gender cases”), both Justices O'Connor and Ginsburg also assumed a disproportionate role in writing the majority or plurality opinion of the Court. Justice O'Connor wrote for the Court in at least twice as many of these cases as any other justice (in six cases as compared to three in the case of Justices

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13. Feminist Majority Foundation, Welcome: About the Feminist Majority Foundation, <http://feminist.org/welcome/index.html>.

14. See, e.g., National Organization for Women, NOW and Violence Against Women, <http://www.now.org/issues/violence/index.html> (posting news about the many facets of violence against women, “all of which result from society’s attitudes toward women and efforts to ‘keep women in their place’”).

15. See Barbara Palmer, *Feminist or Foe? Justice Sandra Day O'Connor, Title VII, Sex-Discrimination and Support for Women's Rights*, 13 WOMEN'S RTS. L. REP. 159, 162 (1992).

16. See Barbara Palmer, *Justice Ruth Bader Ginsburg and the Supreme Court's Reaction to Its Second Female Member*, 24 WOMEN & POL. 1, 9 (2002).

17. *Id.*

18. *Id.*

19. Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified at 29 U.S.C. § 206(d)).

Ginsburg, Kennedy, Scalia, and Stevens).<sup>20</sup> Justice Ginsburg, as well as Justice O'Connor, also wrote significantly more opinions in such cases than would have been expected under a norm of equal responsibility for opinion-writing, whereas other than Justice Kennedy, all male justices equaled or fell below this expectation in gender cases.<sup>21</sup>

In many of these opinions, Justices O'Connor and Ginsburg expressed explicit sympathy for feminist ideas about the importance of full equality of opportunity and dignity for women and in some significant cases even addressed the importance of countering structures of gender-based subordination. In her landmark opinion for the Court in *United States v. Virginia*,<sup>22</sup> concerning the constitutionality of Virginia's all-male school—Virginia Military Institute (VMI)—designed to train “citizen soldiers,” Justice Ginsburg emphasized concerns about both equal opportunity for women and the need for the constitutional guarantee of equal protection to be interpreted in a way that is sensitive to concerns about gender-based subordination. In setting out the heightened standard of scrutiny applied by the Court to classifications based on gender, Ginsburg noted the link between that standard and the Court's suspicion of “official action that closes a door or denies opportunity to women (or to men).”<sup>23</sup> In noting the way in which that standard was to be applied in the face of potential real differences between men and women, Ginsburg also emphasized the importance of attention to gender-based hierarchies, not just stereotypes, suggesting that gender-based classifications “may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.”<sup>24</sup>

It is even more striking that, given Justice O'Connor's more conservative approach to a variety of constitutional and statutory issues, in cases involving abortion and sexual harassment her opinions demonstrated sympathy for feminist ideas about the importance of equal dignity for women and even the need for law to help counter, rather than perpetuate, historical gender subordination. Notably, in her joint opinion with Justices Kennedy and Souter in *Planned Parenthood v. Casey*,<sup>25</sup> O'Connor upheld the “central holding” of the Court in *Roe v. Wade*,<sup>26</sup> that “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”<sup>27</sup> In adopting an “undue burden” test to determine whether a law impermissibly infringes that right, O'Connor and her colleagues showed clear appreciation of

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20. Palmer, *supra* note 16, at 9.

21. *Id.*

22. 518 U.S. 515 (1996).

23. *Id.* at 532-33.

24. *Id.* at 534.

25. 505 U.S. 833 (1992).

26. 410 U.S. 113 (1973).

27. 505 U.S. at 837, 853, 860 (plurality opinion).

the gender dimension of the issues at stake.<sup>28</sup> In delineating the scope of the right, the plurality suggested that a woman's suffering during pregnancy:

is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.<sup>29</sup>

While, in the eyes of some, O'Connor overlooked the potential for various restrictions on abortion (such as waiting periods and parental notification requirements) to burden poor women,<sup>30</sup> she also clearly advanced the enjoyment of substantive gender equality by married women. In striking down Pennsylvania's requirement that a woman notify her spouse or sign an appropriate waiver declaration in order to obtain an abortion, O'Connor emphasized the degree to which women who were affected by the law were subject to widespread forms of abuse by their husbands, thereby recognizing the arguments of anti-subordination feminists about the gravity of domestic violence as a source of inequality for women.<sup>31</sup> She also linked the Court's finding that the law imposed an undue burden on women's right to obtain an abortion with the way in which the law reflected outmoded stereotypical and hierarchical notions of women's role in the family and in marriage.<sup>32</sup>

O'Connor also authored a number of notable Title VII opinions adopting an understanding of sexual harassment strongly in line with that advocated by anti-subordination feminists. For anti-subordination feminists, sexual

28. *Id.* at 876.

29. *Id.* at 852.

30. See Chris Whitman, *Looking Back on Planned Parenthood v. Casey*, 100 MICH. L. REV. 1980, 1981 (2002) (arguing that the "undue burden" test "protects women only against total prohibitions on their right to choose to have a safe abortion. Like traditional rules regarding rape, it requires women to resist to the utmost in order to preserve their liberty. Less serious burdens are classified as mere inconveniences"); Linda Greenhouse, *High Court, 5-4, Affirms Right to Abortion but Allows Most of Pennsylvania's Limits*, N.Y. TIMES, June 30, 1992, at A1 (noting that the "undue burden" test will make restrictions easier and that "[a]bortion-rights supporters said the ruling would encourage more state restrictions and that the waiting period, in particular, would make abortions more difficult and expensive for women who would have to make two trips to abortion clinics that might be hundreds of miles from their homes"); Robin Toner, *Ruling Eases a Worry for Bush, but Just Wait, His Critics Warn*, N.Y. TIMES, June 30, 1992, at A1 (describing reactions to the decision from NOW and NARAL that say the decision eviscerated *Roe*).

31. *Casey*, 505 U.S. at 891-92 (plurality opinion). For O'Connor's particular role in shaping the plurality opinion in this context, see JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 268-69 (2005). For anti-subordination feminist arguments, see CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 142-44, 178 (1989). O'Connor can, of course, also be criticized for not going further in prioritizing concerns about the impact of domestic violence on women and women's achievement of full gender equality over countervailing concerns about the maintenance of federal-state boundaries. See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005); *United States v. Morrison*, 529 U.S. 598 (2000).

32. *Casey*, 505 U.S. at 898 (plurality opinion) ("[A] husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. . . . A State may not give to a man the kind of dominion over his wife that parents exercise over their children.").

harassment has dramatic implications for women's equality well beyond a particular workplace; it has the potential to condition women to be more receptive to sexual violence in society generally and to reinforce women's economic subordination by excluding them from traditionally higher-paying, male-dominated sectors of the labor market.<sup>33</sup> Empowering women to prevent and redress such conduct is therefore critical to countering gender-based subordination.

In *Harris v. Forklift Systems, Inc.*<sup>34</sup> in particular, O'Connor adopted a definition of hostile work environment sexual harassment that made it much easier, and more realistic, for female plaintiffs to bring successful claims. In her opinion for the Court, O'Connor rejected the defendant's argument that Harris needed to demonstrate tangible economic or psychological injury. Instead, O'Connor held that a court should consider several factors to identify a violation of Title VII, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."<sup>35</sup>

#### *B. Explaining the Female-Feminist Correlation*

*Studies [show] that "women judges were more likely than their male counterparts to have experienced sex discrimination and conflict between their work and family roles" and that "women repor[t] observing both gender disparagement and sexual harassment more frequently than . . . men."*

—National Organization for Women, May 2009<sup>36</sup>

It is important for feminists assessing the record of Justices O'Connor and Ginsburg to carefully consider *why* it is that these female justices seem to have been more sympathetic than their male counterparts to various gender justice claims. While some scholars have suggested that Justices O'Connor and Ginsburg have adopted a distinctly "feminine" jurisprudential approach simply by reason of being female,<sup>37</sup> such a "cultural feminist" theory<sup>38</sup> seems difficult

33. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

34. 510 U.S. 17 (1993).

35. *Id.* at 21-22.

36. Gandy, *supra* note 2.

37. See, e.g., Paula A. Monopoli, *In A Different Voice: Lessons From Ledbetter*, 34 J.C. & U.L. 555 (2008) (analyzing Justice Ginsburg's dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), and suggesting that it took a more contextual—and to that extent "different voice"—approach to the relevant facts); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986). For empirical studies that take this cultural feminist hypothesis as their starting point, see Lisa Baldez, Lee Epstein & Andrew D. Martin, *Does the U.S. Constitution Need an ERA?*, 35 J. LEGAL STUD. 243, 257 (2006), which suggests that:



to reconcile with both the record of the justices themselves and the records of their male counterparts. Cultural feminists sometimes disagree about the extent to which sex and gender, or femaleness and the feminine, are inevitably connected. However, they generally do agree that there is a close connection between being female and being predisposed to express or favor certain “feminine” values, such as care, connection, community, context, and dialogue or communication.<sup>39</sup> Consequently, such theories find it difficult to account for the complex relationship between gender and ideology in judicial decision-making, and, in particular, the degree to which certain male justices, such as Justice Souter, have been predisposed to favor claims of sex discrimination.

Because of this correlation, it is also difficult for cultural feminist theory to explain why, in various important cases, female justices such as Justices O'Connor and Ginsburg have tended to adopt positions which, while arguably pro-feminist from a liberal or anti-subordination standpoint, are in direct

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Virtually from the day Sherry . . . penned her classic work on the possibility of a feminine jurisprudence, scholars have hotly debated whether female judges “speak in a different voice” . . . While the results of various research projects exploring judicial votes are decidedly mixed, those centering on jurisprudence—especially in the area of sex discrimination—are clearer. A consensus now exists that women have “pushed the law forward in sex discrimination cases” . . . with their distinct approach to legal principles possibly altering the choices made by their male colleagues.

*Id.*; Sue Davis, Susan Haire & David R. Songer, *Gender Effects in the Voting of Judges on the United States Courts of Appeals*, 77 JUDICATURE 129, 130 (1993), which seeks to test the prediction of Sherry and others that “women can be expected to vote differently from their male colleagues in ways that reflect a tendency to emphasize interdependent rights—the right to full membership in a community—rather than rights against the community”; Madhavi McCall & Michael A. McCall, *How Far Does the Gender Gap Extend? Decision Making on State Supreme Courts in Fourth Amendment Cases, 1980-2000*, 44 SOC. SCI. J. 67, 69 (2007), suggesting that “feminist jurisprudence . . . hold[s] that that the presence of women in significant numbers as professionals in the legal system leads to profound legal changes because women bring alternative perspectives to the law” and that given the increase in the number of female judges on state supreme courts, it “is an appropriate moment to revisit the general question of whether women judges approach their role in a unique and gender-related fashion”; Sarah Westergren, *Gender Effects in the Court of Appeals Revisited: The Data Since 1994*, 92 GEO. L.J. 689, 691-94 (2004), outlining Carol Gilligan’s work, as well as that of legal scholars such as Sherry and Judith Resnik who have subsequently applied it to a judicial setting, as the theoretical background to her empirical inquiry and noting that “the idea that women might bring a unique perspective to the practice of judging grows out of social science literature—and most famously, the work of Carol Gilligan—which argues that while women’s socialization creates a unique set of moral and relational attributes, society identifies male attributes as the standard for human behavior”; and Tajuana Massie, Susan W. Johnson & Sara Margaret Gubala, *The Impact of Race in the Decisions of Judges on the United States Courts of Appeals* 5 (2003) (unpublished manuscript, on file with author), which “hypothesiz[es] that female judges will be more conservative in their decision-making in criminal cases [because] feminist theory informs us that women tend to support issues that are in the best interests of society.”

38. For the theoretical origins of cultural feminist theory, see CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982).

39. Compare ROBIN WEST, CARING FOR JUSTICE 18 (1997) (arguing that it would be odd if “[i]t turned out that the experiences of pregnancy and childbirth, shared by the majority of all women everywhere, . . . ha[d] no effect, and len[t] to women’s perspectives no unifying and distinguishing threads”), with Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1296-97, 1284-85 (1987) (arguing that while feminists should be careful not to equate femaleness and the feminine, links between sex and gender are deeply encoded in our current social “structures and selves”).

opposition to cultural feminist understandings.<sup>40</sup> Take a case like *United States v. Virginia*. In response to a finding by the Court of Appeals for the Fourth Circuit that Virginia could not constitutionally exclude women from VMI without creating adequate equivalent opportunities for women, the state created the Virginia Women's Institute for Leadership (VWIL), a program attached to Mary Baldwin College that emphasizes "cooperative" rather than "adversative" training methods.<sup>41</sup> Such methods had a clear connection to cultural feminist ideas about the importance of values such as care, community, and communication.<sup>42</sup> A tendency to favor those values should therefore have led both Justices O'Connor and Ginsburg to give at least some deference to VWIL as a constitutionally adequate response by Virginia. Instead, in writing for the majority (which included O'Connor), Justice Ginsburg insisted on the need to give searching scrutiny to VWIL and decisively rejected the program as an adequate alternative on the grounds that it differed greatly from VMI in its academic offerings, methods of education, and financial resources. In reaching this conclusion, Ginsburg also emphasized the importance of comparability in "masculine" areas such as military training and scientific specialization.<sup>43</sup>

Cultural feminism is therefore not the most plausible explanation for the approach taken by O'Connor and Ginsburg in gender cases. The explanation is more particularistic and focused on the extent to which the direct personal experience of gender discrimination by female justices like O'Connor and Ginsburg may have made them more sensitive to and sympathetic toward certain claims to both formal and substantive gender equality.<sup>44</sup>

As NOW itself notes, female justices have been more likely than their male counterparts "to have experienced sex discrimination" in the course of their professional lives and to have encountered a "conflict between their work and

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40. See, e.g., *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (emphasizing the impermissibility of treating nursing as a naturally female occupation by holding unconstitutional the exclusion of men from the University's nursing program); *United States v. Virginia*, 518 U.S. 515 (1996); *Nguyen v. INS*, 533 U.S. 53 (2001) (O'Connor, J., with Souter, Ginsburg & Breyer, JJ., dissenting) (voting to invalidate a federal statute that automatically gave U.S. citizenship to children born both abroad and outside of marriage to mothers, but not fathers, who are U.S. citizens, and rejecting the argument that there are natural differences between men and women in terms of connection to infant children). For other studies that cast doubt on cultural feminist theories of female judging, and specifically the link between being female and favoring feminine values such as context, over more "masculine" abstract universal values, see, for example, Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998), which finds no statistically significant relationship between a judge's gender and the likelihood of her striking down federal sentencing guidelines as impermissibly constraining discretion or removing issues of fact from a jury.

41. See 518 U.S. at 548.

42. *Id.* at 549-50.

43. *Id.* at 553.

44. But cf. Theresa M. Beiner, *Female Judging*, 36 U. TOL. L. REV. 821, 847 (2005) (focusing on the connection between the jurisprudence of female judges and the position of legal outsiders).

family roles.”<sup>45</sup> While studying law, O’Connor and Ginsburg were both part of an extremely small and visible minority of female students and upon graduating were systematically denied appellate clerkships and other prestigious entry-level positions open to male counterparts. They were also, at various points in their careers, challenged in their dedication and competence as lawyers on account of their domestic or parental responsibilities.

Justice O’Connor was one of only five female students in a class of 102 at Stanford Law School in 1949, and although she graduated third in her class, she received no offers to work as an attorney in private practice. Instead, she was offered a position as a legal secretary. As a result, she worked briefly as a deputy county attorney before starting her own private practice in Arizona.<sup>46</sup>

Justice Ginsburg, while accompanying her husband on selective-service duty prior to law school, was forced to work as a typist after being denied a G-5 civil service position on the grounds of pregnancy. In 1956, she was one of only nine women in a class of 400 at Harvard Law School and was asked by the Dean why she was taking up a place that might otherwise have gone to a man.<sup>47</sup> Upon graduating, she was offered a federal district court clerkship but was not, despite her outstanding academic record, interviewed for a Supreme Court clerkship or offered employment by any New York law firm.<sup>48</sup> Instead, after completing her clerkship Ginsburg took up a position as a research fellow in Sweden and then as the second female member of the tenure-track faculty at Rutgers University Law School.<sup>49</sup> In both environments, she developed an academic interest in sex discrimination law in a way that gave her much greater exposure to broader patterns of gender discrimination than most other attorneys would experience. In the context of her family life, Ginsburg also reports experiencing a clear double-standard in the way she and her husband were treated with respect to their child-rearing responsibilities.<sup>50</sup>

These experiences clearly had the capacity to make O’Connor and Ginsburg more sensitive to and sympathetic toward claims of gender discrimination. Given their differences in other areas of law, the tendency of

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45. See Gandy, *supra* note 2 (citing Elaine Martin, *Men and Women on the Bench: Vive La Difference?*, 73 JUDICATURE 204, 205 (1990)). For a discussion of the broader experience of work-family conflict among female lawyers of O’Connor and Ginsburg’s generation, see Elaine Martin, *U.S. Women Federal Court Judges Appointed by President Carter: Ongoing Relevance*, 17 FEMINIST LEGAL STUD. 43, 47-48 (2009).

46. WOMEN IN THE LAW: BIOGRAPHICAL SOURCEBOOK 211 (Rebecca Mae Salokar & Mary L. Volcansek eds., 1996) [hereinafter SOURCEBOOK].

47. Debra Bruno, *Balancing Act: Ruth Bader Ginsburg Remembers Her First Steps in the Law*, LEGAL TIMES, Nov. 12, 2007, at 1.

48. *Id.*

49. SOURCEBOOK, *supra* note 46, at 80-81.

50. She reports, for example, that teachers and others responsible for her children’s care repeatedly called her, rather than her husband, to report when the children were ill or badly-behaved. See Ruth Bader Ginsburg, *Some Thoughts on the 1980’s Debate Over Special Versus Equal Treatment for Women*, 4 LAW & INEQ. 143, 146 (1986).

the two justices to vote consistently in the same way in such cases also strongly suggests that it did, in fact, have this effect.<sup>51</sup>

### C. Gender Discrimination and Future Female Justices

If Justices O'Connor's and Ginsburg's treatment of gender cases was in fact influenced by their backgrounds, the difficulty for feminists in the future is that few female judicial candidates are likely to have experienced sex discrimination to this same degree—or at least in this same way—prior to appointment. The barriers to professional success for female attorneys are now far fewer than they once were for O'Connor and Ginsburg. Where they exist, they also tend to be more subtle and indirect and therefore more difficult to identify as having been based on sex.<sup>52</sup> Absent other experiences that make them more sensitive to issues of discrimination, few future female justices are thus likely to follow a similar jurisprudential path simply by reason of being female.<sup>53</sup>

Take the professional experiences of current Supreme Court Justice Sonia Sotomayor and the two other leading female candidates who were considered as replacements for retiring Justice Souter: Seventh Circuit Judge Diane Wood and Solicitor General Elena Kagan.<sup>54</sup> Not surprisingly, as the eldest of the three candidates, Judge Wood has to some degree shared the experiences of Justices O'Connor and Ginsburg as the only woman in a cohort—including as a professor at the University of Chicago Law School, when she joined the faculty

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51. See, e.g., Palmer, *supra* note 16, at 9 (noting the two justices' different voting records in relation to civil liberties).

52. See, e.g., DEBORAH RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* (1999). This, for example, is why feminists in previous decades have emphasized the need for sharing experiences and for "consciousness raising." MACKINNON, *supra* note 31, at 83-92.

53. It should be noted that studies examining the voting behavior of female court of appeals judges, in aggregate, do not find a statistically significant relationship between confirmation age (as a possible rough proxy for age and therefore also for experience of discrimination) and voting behavior. See Boyd et al., *supra* note 11 (finding that, on the basis of year of appointment, there is no statistically significant difference in the tendency of female court of appeals judges to vote in favor of female plaintiffs, compared to a parametrically-matched male judge). At the federal district court level, where judges on average tend to be younger than at the court of appeals level, the evidence is more mixed. See, e.g., Carol T. Kulik, Elissa L. Perry & Molly B. Pepper, *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, 27 LAW & HUM. BEHAV. 69 (2003) (finding that younger judges are more likely to vote for the plaintiff in sexual harassment cases but not finding a statistically significant interaction effect between age and gender in this context); Jennifer Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137 (2000) (finding that female Clinton appointees to the federal district court were more likely to vote against a female plaintiff than equivalent male appointees). Special thanks are due to Christina Boyd and Carol Kulik for graciously calculating these data for me. However, Segal suggests that explanations beyond age alone may account for the correlation. *Id.* at 147. As I further explore in Part III, *infra*, however, neither of these results are necessarily an accurate guide to the relevant judges' approach to feminism.

54. Kate Phillips, *The Early Word: Supreme Choices*, N.Y. TIMES, May 1, 2009, <http://thecaucus.blogs.nytimes.com/2009/05/01/the-early-word-supreme-choices/>.

in 1981.<sup>55</sup> She has also been a strong advocate for gender equality by helping develop sexual harassment and parental leave policies.<sup>56</sup> However, in other respects even Judge Wood's experience has been very different from that of Justices O'Connor and Ginsburg because she graduated from law school almost two decades after Ginsburg. Unlike Justices O'Connor and Ginsburg, after graduating Judge Wood was hired to clerk first for Judge Goldberg on the Court of Appeals for the Fifth Circuit and then for Justice Blackmun on the Supreme Court. Soon after she was hired by the major commercial law firm Covington & Burling, LLP.<sup>57</sup> When she became Deputy to the U.S. Assistant Attorney General of the U.S. Department of Justice Antitrust Division in 1993, she worked for a female Assistant Attorney General.<sup>58</sup> Since being appointed to the Seventh Circuit, Judge Wood has served with three other female judges.<sup>59</sup>

Justice Sotomayor and Elena Kagan, who graduated from law school after Judge Wood, not only have had more access to various professional opportunities, such as law review membership, large private practice, and prestigious appellate clerkships; they have also been far less likely to be in an overwhelming minority in such contexts.<sup>60</sup> For example, in 1975, Judge Wood was one of only two women on the *Texas Law Review* masthead out of seventeen editors in total; in 1979, Justice Sotomayor was one of sixteen female editors out of a total of sixty-two general editors of the *Yale Law Journal*, and she served under an executive board which was one-third female; and in 1986, Kagan was one of two female editors out of a total of sixteen general editors of the *Harvard Law Review* and one of two female executive editors out of a total of seven.<sup>61</sup> It is likely that these experiences partly explain

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55. Neil A. Lewis, *Potential Justice Offers a Counterpoint in Chicago*, N.Y. TIMES, May 12, 2009, at A17.

56. *Senate Confirmation Hearing of Diane Wood before the S. Judiciary Comm.*, 104th Cong., 1005-1008 (1995) (statement of Sen. Carol Moseley-Braun).

57. *Id.* at 1005.

58. Diane P. Wood—Antitrust Biography, <http://www.abanet.org/antitrust/at-bios/wood-diane.pdf>; Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, U.S. Antitrust Policies in World Trade, Address Before the World Trade Center Chicago Seminar on GATT After Uruguay I, 4 (May 16, 1994), available at <http://www.justice.gov/atr/public/speeches/0111.pdf> (noting that Bingaman appointed Diane Wood to be her "International Deputy").

59. Ilana Rover was appointed to the Seventh Circuit in 1992, Anne Williams in 1999, and Diane Sykes in 2004. See Biographical Directory of Federal Judges, Federal Judicial Center, <http://www.fjc.gov/history/home.nsf> (follow "Judges of the United States" hyperlink, then use the "search" function) (last visited Nov. 20, 2009).

60. Kagan, for example, clerked first for Judge Mikva on the D.C. Circuit and then for Justice Thurgood Marshall before entering private practice as an associate at Williams & Connolly, LLP. See Elena Kagan, Solicitor General, available at <http://www.usdoj.gov/osg/>. Likewise, after graduating Sotomayor was hired by the New York County District Attorney's Office and then by the New York firm Pavia & Harcourt, LLP. See The Justices of the Supreme Court, available at <http://www.supremecourtus.gov/about/biographiescurrent.pdf>.

61. This mirrors the corresponding shift which occurred during this time in the size of the female JD class at the various institutions. Judge Wood was one of eighty female students out of a class of 476 at Texas; Kagan was one of approximately 187 female students out of a class of 549 at Harvard. My thanks to Emily Tancer for compiling these data from the relevant yearbooks.

why, during her tenure as the first female Dean of Harvard Law School, Kagan “perceived no differential treatment from the faculty or other colleagues” on account of her gender and noted that her gender was “something that in many ways . . . seemed remarkably not relevant in the job.”<sup>62</sup>

To some degree, Justice Sotomayor’s experience is an exception to this pattern because while she was never the first or only female in the professional contexts in which she served,<sup>63</sup> she was often the first and only Hispanic woman—as Assistant District Attorney, law firm partner, and judge.<sup>64</sup> She has also expressed a keen awareness of the past history of discrimination in the legal profession.<sup>65</sup> At the same time, because any discrimination she personally encountered was likely far less overtly and singularly based on gender than that of either Justice O’Connor or Justice Ginsburg, one would also expect it to make her less sympathetic than O’Connor and Ginsburg to claims of gender equality per se.<sup>66</sup> Her remarks in 2001 about the perspective a “wise Latina” could bring to judging also bear out this point.<sup>67</sup> In suggesting that a judge is inevitably influenced by personal experience, Justice Sotomayor suggested that her own experience as a woman and person of color were both important.<sup>68</sup>

62. At the same time Kagan did acknowledge the potential symbolic importance of her appointment to other women. See Beth Potier, *Big Plans Highlight Elena Kagan’s 2L: HLS Dean Looks Forward to a Busy Year*, HARV. GAZETTE, Sept. 16, 2004, available at <http://www.news.harvard.edu/gazette/2004/09.16/03-kagan.html>.

63. When Sotomayor was appointed to the bench, there were already twelve other female judges on the federal district court for the Southern District of New York, and when she was elevated to the Court of Appeals for the Second Circuit, there were five other female judges already serving. See Biographical Directory of Federal Judges, *supra* note 59.

64. On the general pattern of representation of Hispanic women in the legal profession, see, for example, National Association for Legal Career Professionals, 2008 Statistics on Minority Women Who Are Law Partners, available at <http://nalp.org/2008febclouserlook>, which found that 0.39% of partners are Hispanic women. This is representative of the small numbers of women—and particularly minority women—in prominent positions at law firms despite twenty years of growth. Sotomayor’s experience is comparable to the experiences of other leading female minority candidates under consideration, such as Justice Leah Ward Sears and other female minority judges and attorneys. See Shaila Dewan, *After Many Firsts, Judge has a Talent for Persuasion*, N.Y. TIMES, May 23, 2009, at A12. Cf. Todd Collins & Laura Moyer, *Gender, Race, and Intersectionality on the Federal Appellate Bench*, 61 POL. RES. Q. 219 (2008) (showing that, all else being equal, female jurists show a greater concern for the unequal or subordinated position of criminal defendants); Lynn Hecht Schafran, *Not From Central Casting: The Amazing Rise of Women in the American Judiciary*, 36 U. TOL. L. REV. 953, 958, 961 (2005) (reporting the experiences of women of color, including that of Judge Thelma Wyatt Cummings of Georgia in hiring court staff, where male colleagues suggested that she was “overreacting” to bias from a white female applicant and questioned whether she was related to the black applicant; and that of Judge Jacqueline Allen of Philadelphia, who was described by an attorney as looking “like a welfare mother of eight” without her robes).

65. Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L. J. 87, 89-90 (2002).

66. On the complex way in which many women of color experience gender discrimination in relationship to other axes of discrimination, see, for example, PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); and Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 598 (1990).

67. Sotomayor, *supra* note 65, at 91 (arguing that “our experiences as women and people of color affect our decisions”).

68. *Id.* at 90-92.

While she could strive to be impartial, she could not avoid being influenced, she suggested, by either her “gender [or] . . . Latina heritage.”<sup>69</sup> There was also a pressing need, she argued, for the legal system as a whole to address inequality along both dimensions.<sup>70</sup> Nor could equality along these dimensions be separated, in her view, for those seeking to promote greater equality.<sup>71</sup>

## II. EMPIRICAL STUDIES OF JUDICIAL BEHAVIOR: RE-EXAMINING THE DATA

*Research confirms the differing perspectives of women judges as compared to their male counterparts.*

—National Organization for Women, May 2009<sup>72</sup>

For some feminists, the prediction that, all else being equal, female justices will tend to be more pro-feminist than their male counterparts finds support beyond the historical contributions of Justices O'Connor and Ginsburg in broader empirical studies of judicial voting behavior at the federal court of appeals and state court levels, which include the judgments of Judge Wood and then-Judge Sotomayor.<sup>73</sup> While many studies of female judicial behavior do not directly address liberal or anti-subordination feminist concerns, they do find a clear correlation between a judge's gender and her willingness to vote for the plaintiff in gender cases or in those cases with greatest gender salience.<sup>74</sup> Such a correlation can be understood to imply a “targeted gender effect.” This effect was not always evident in early studies of female judicial behavior, particularly those conducted prior to the 1980s.<sup>75</sup> The most obvious explanation for the

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69. *Id.* at 92.

70. *Id.* at 89-90 (citing statistics on the gender and racial composition of the judiciary and suggesting that both sets of figures were somewhat “shocking”).

71. *Id.* at 90 (arguing that Latino and Latina organizations, among other groups, have an important role to play in prompting equality for “women and men of all colors”).

72. Gandy, *supra* note 2.

73. See Gandy, *supra* note 2. See also Beverly B. Cook, *Will Women Judges Make a Difference in Women's Legal Rights? A Prediction from Attitudes and Simulated Behaviour*, in WOMEN, POWER & POLITICAL SYSTEMS 216 (Margherita Rendell ed., 1981) (noting that “the efforts of feminist organizations in the USA to secure the appointment of women to new judgeships and to vacancies indicate their expectation that women judges will act to improve the legal status of women. . . . [and that whether] women will make decisions more supportive of sex equality than . . . men can be predicted from a comparison of responses from a matching sample of male judges”); Elaine Martin, *The Representative Role of Women Judges*, 77 JUDICATURE 166 (suggesting that under certain conditions, survey data supported a finding that women judges may undertake behavior designed to represent what might be called a woman's perspective).

74. In many cases, they tend to address questions about the degree to which judges are influenced by legal as opposed to extra-legal factors. See, e.g., Kulik et al., *supra* note 53, at 72 (exploring “whether personal characteristics influence judges' decisions”).

75. In fact, early studies often found the opposite result. See, e.g., Gerard Gryski, Eleanor Main & William Dixon, *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 150 (1986) (examining state supreme court decisions from 1971 to 1981 involving sex discrimination claims and finding no statistically significant difference between the presence or absence of a woman on the court and the court's finding); Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67

findings of these earlier studies is that they were based on a very small sample of female judges and therefore simply did not have the power to pick up any statistically significant gender-based effects.<sup>76</sup> In some cases, a contributing factor may also have been that, below the Supreme Court level, the earliest female judges felt that their position or legitimacy was too precarious to allow them to adopt an approach that was overtly different from their male colleagues.<sup>77</sup> Since at least the 1990s, however, the vast majority of studies have found a clear and statistically significant link between a judge's gender and voting behavior in gender cases.<sup>78</sup>

At the federal level, this effect has been particularly clear and consistent in cases involving claims of employment discrimination based on sex or gender under Title VII. In their 1993 study, Sue Davis, Susan Haire, and Donald R. Songer found that, between 1981 and 1990, female judges voted for the plaintiff in 63% of sex discrimination cases falling into this category, compared to a rate of 46% for male judges.<sup>79</sup> In a 2005 study, Jennifer Peresie found that in sex discrimination cases the probability that an appellate judge would find for the plaintiff increased by 65% if that judge was female (from 17% to 28%).<sup>80</sup> In a more recent and even more robust study using non-parametric matching techniques, Christina Boyd, Lee Epstein, and Andrew Martin also observed a similar link between a judge's gender and the likelihood of her voting for the plaintiff in sex discrimination and sexual harassment cases under Title VII. The study found that at the broadest level, the probability of a judge's deciding such a case in favor of the plaintiff decreases by 10% when the judge is male.<sup>81</sup>

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JUDICATURE 165, 172 (1983) (examining U.S. courts of appeals cases decided between July 1, 1979, and June 30, 1981, and finding no statistically significant differences between male and female judges in their voting in sex discrimination cases); Thomas Walker & Deborah Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 607 (1985) (examining the voting patterns of twelve matched pairs of female and male Carter appointees to the U.S. federal district court and finding no statistically significant results with respect to "women's policy" issues).

76. On the problem of sample size in these early studies, see DEBORAH L. RHODE, *THE UNFINISHED AGENDA: WOMEN IN THE LEGAL PROFESSION*, ABA COMMISSION ON WOMEN IN THE PROFESSION 27 (2001).

77. See Davis et al., *supra* note 37, at 133 (highlighting the potential for discrimination against female judges to make them more conformist to male norms); Hunter, *supra* note 10, at 9-10.

78. For studies finding no statistically significant effect, see, for example, Westergren, *supra* note 37.

79. Davis et al., *supra* note 37, at 131.

80. Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1776 (2005). In sexual harassment cases, Peresie found that having a female judge increased the probability of a vote for the plaintiff by 86% (from 22% to 41%). Cf. Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the U.S. Courts of Appeals, 1981-1996* (1999) (unpublished Ph.D. dissertation, University of Chicago) (examining employment discrimination cases in the U.S. courts of appeals from 1981 to 1996 and finding a statistically significant relationship between gender and the tendency of judges to vote for the plaintiff in sex discrimination cases).

81. Boyd et al., *supra* note 11 (manuscript at 19, on file with author).



At a state court level, studies have found a similar relationship in sexual harassment cases, as well as in a broader range of gender cases. A 2003 study by Madhavi McCall found that, at least between 1980 and 1992, female judges in such cases were ten percentage points more likely than male judges to write a dissenting opinion in favor of a plaintiff (female judges supported a pro-plaintiff or “liberal” position in dissenting opinions in 73.7% of cases, while male judges did so in only 63.7% of cases).<sup>82</sup> A 2000 study by Elaine Martin and Barry Pyle found a similar result in divorce cases decided by the Michigan Supreme Court between 1985 and 1998 but not in discrimination cases, while David Allen and Diane Wall found an equivalent effect in a broad range of gender cases decided by early female judges in twenty-one different states.<sup>83</sup> A 2006 study by Baldez, Epstein, and Martin also found that in state constitutional cases from 1960 to 1999 involving claims of a gender-based equal protection violation, there was a clear correlation between the number of female judges on a state appellate court and the willingness of the panel to adopt a standard of strict or intermediate scrutiny for assessing such claims.<sup>84</sup>

From a brief inspection of the existing empirical literature on female judicial behavior, it would be reasonable for feminists to conclude that their hypothesis of a general female-feminist correlation is justified. Given the mix of sex discrimination and sexual harassment cases involved in these studies, it would also be reasonable for them to conclude that this link is broad—that is, applicable to a greater tendency on the part of female judges to advance not just formal but substantive approaches to gender equality.<sup>85</sup> A closer inspection of this literature, however, suggests that in fact it provides far less robust support for a female-feminist correlation below the Supreme Court level than most feminists have tended to assume.

#### *A. A Conservative Versus General Effect*

At the Supreme Court level, the impact of a targeted gender effect has clearly been much greater, in terms of its effect on simple voting outcomes, for Republican-appointee Justice O'Connor than for Justice Ginsburg, a Democratic-appointee. Justice O'Connor, for example, was 15% more likely than the next closest conservative justice, Justice Kennedy, to vote for the

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82. See McCall & McCall, *supra* note 37, at 91-92.

83. Elaine Martin & Barry Pyle, *Gender, Race, and Partisanship on the Michigan Supreme Court*, 63 ALB. L. REV. 1205, 1205 (2000); David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156 (1993).

84. Baldez et al., *supra* note 37, at 268-69.

85. While the results they identify in sex discrimination cases do not necessarily support such a broad inference, the existence of the same set of findings in sexual harassment cases provides much greater support for the possibility of a female-anti-subordination-feminist link, given the importance of such cases for the achievement of gender equality in an anti-subordination approach. See Palmer, *supra* note 15.

plaintiff in gender cases. Justice Ginsburg, on the other hand, was no more likely than Justice Souter, the next closest liberal justice, to vote in this same direction.<sup>86</sup>

The reason for this difference is that there has tended to be a degree of “under-reporting” in the observed effect of gender as a proxy for feminism on the voting behavior of Democratic-appointed female judges. As a philosophy, feminism, as it is understood by organizations such as the Feminist Majority Foundation and NOW, is positively correlated with the political commitments of many Democrats and negatively with those of many Republicans. Numerous studies have also found that whether a judge is appointed by a Democratic or Republican president will have a clear impact on voting behavior in cases involving sex discrimination and sexual harassment.<sup>87</sup> If female judges are in fact more pro-feminist than male judges, it is thus likely that in some number of cases, the decision by a female Democratic-appointed judge to vote in favor of the plaintiff will be over-determined by reason of her being *both* a Democrat *and* female. (That is, the decision to vote in favor of the plaintiff will be caused by two sufficient and independent factors.) Accordingly, studies that report a judge’s binary yes or no vote, such as those of Justices O’Connor and Ginsburg, will also tend to understate the effect of gender, at the margin, on the voting behavior of female Democratic-appointed judges.

At the federal court of appeals level in the United States, however, studies which find a targeted gender effect do not reveal anything like this same interaction effect between gender and ideology. In fact, some studies find that the existence of a targeted gender effect is greater among Democratic-appointed rather than Republican-appointed judges. For example, in a 1993 study of court of appeals decisions, Davis, Haire, and Songer found that while there was a clear *overall* difference between female and male judges in their voting behavior in employment discrimination cases, that difference was almost entirely accounted for by the difference between male and female Democratic-appointed judges. Female Democratic appointees, they found, were likely to support a plaintiff’s claim in 68% of cases in their sample, whereas male Democratic appointees were likely to do so in 64.3% of cases. There was no statistically significant difference in the voting pattern of Republican-appointed male and female judges.<sup>88</sup>

While some of these results may be the product of a small sample size, subsequent research also supports this finding. In their 2007 study, Boyd,

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86. Palmer, *supra* note 16, at 9.

87. See, e.g., Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeal: A Preliminary Investigation*, 90 VA. L. REV. 301, 319-20 (2004) (finding that Democratic appointees voted for the plaintiff at a rate of 51% compared to 35% for Republican appointees in sex discrimination cases and at a rate of 52% compared to 37% for Republican appointees in sexual harassment cases).

88. Davis et al., *supra* note 37, at 131.

Epstein, and Martin also found that the magnitude of a targeted gender effect tends to be *greater*, both in absolute and relative terms, for judges who are more liberal, rather than conservative.<sup>89</sup> Within a 95% confidence interval, they found that for the most liberal judges (who are at -0.6 in the Judicial Common Space),<sup>90</sup> the probability that judges will vote for the plaintiff increases from approximately 22% to 38% (by approximately 64%) if they are female; whereas for judges at the median, it increases from 16% to 23% (by 44%), and for the most conservative judges (who are at 0.6 in the Judicial Common Space), it increases from 12% to 18% (by 50%).<sup>91</sup>

Other studies, which use somewhat less fine-grained methods for identifying the magnitude of a targeted gender effect, find this effect to be more or less constant across liberal and conservative judges.<sup>92</sup> Jennifer Peresie, for example, specifically tested for the interaction effect between gender and ideology in her 2005 study of court of appeals decisions but found no statistically significant effect of this kind, indicating that the effect of being female was similar for both liberal and conservative judges.<sup>93</sup> In a broader study of employment discrimination cases conducted in 2004, Sean Farhang and Gregory Wawro also considered the possible interaction effect between gender and ideology and found no robust interaction effect to indicate that ideology modifies the effect of gender.<sup>94</sup>

### B. Panel Effects

Experience at the U.S. Supreme Court level also suggests that where gender is a proxy for sympathy to feminism, the composition of an appellate panel will affect the degree to which members of a panel vote in a pro- (or anti-) feminist direction. Prior to Justice Ginsburg's appointment, Justice O'Connor voted for the plaintiff in 77% of gender cases. After Ginsburg's appointment, that percentage increased to 82%.<sup>95</sup> Other moderately pro-feminist justices, such as Justices Souter, Stevens, and Kennedy, voted for the plaintiff in such

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89. Boyd et al., *supra* note 11.

90. Modeled after Keith T. Poole's "Common Space Scores," which measure the voting preferences of members of Congress, the Judicial Common Space applies a scaling algorithm to a set of issue scales to measure the preference of each Supreme Court justice. Each justice is placed on the scale within a -1 to 1 interval, with liberal justices falling below zero and conservative justices falling above zero. See Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 306-13 (2007).

91. Boyd et al., *supra* note 11, fig. 5 (manuscript at 26, on file with author).

92. Boyd, Epstein, and Martin use non-parametric matching techniques to estimate the relationship between gender and voting behavior, whereas other studies use standard regression techniques. This allows the authors to identify any causal relationship between gender and voting behavior, rather than needing to infer likely causation from the finding of a correlation between the two. Peresie's study, *supra* note 80, is an example of a study using standard regression techniques.

93. Peresie, *supra* note 80, at 1777 n.78.

94. Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 320 n.15 (2004).

95. See Palmer, *supra* note 16, at 11.

cases at a respective rate of 67%, 77%, and 44% before Ginsburg's appointment. That rate increased to 92%, 84%, and 67% after Ginsburg was appointed.<sup>96</sup> While some of this increase was likely due to case-specific factors, it is unlikely that all of it was due to these factors because during the same period, the most conservative male justices on gender issues, Justice Thomas and, in particular, Justice Scalia, became substantially less likely to vote for the plaintiff in a way which was far more than just a statistical anomaly.<sup>97</sup> At a more qualitative level, if one looks closely at cases such as *Harris v. Forklift System Co., Inc.*, one of the prominent gender cases in which Justice O'Connor wrote for the Court, it is also quite plausible to think that panel effects between O'Connor and Ginsburg prompted O'Connor to adopt a somewhat more anti-subordination-oriented stance in those cases.

As Part I notes, in writing for the Court in *Harris*, Justice O'Connor held that there was no single criterion for identifying a violation of Title VII and that courts needed to look to a number of factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."<sup>98</sup> It is clear, both from the questions she asked in oral argument and the conference notes made by Justice Blackmun, that Justice O'Connor was always inclined to this view.<sup>99</sup> A subtle shift is nonetheless evident in her views between oral argument and the opinion-writing stage about what is necessary to constitute an unreasonable interference with work performance. At oral argument, she seemed to suggest that conduct would need to make it almost intolerable for employees to continue to perform their jobs, whereas in the opinion she wrote for the Court, she made it clear that conduct need only detract from employees' job performance or discourage them from remaining on the job in order to be actionable.<sup>100</sup>

It is difficult to explain this shift other than by reference to the role of Justice Ginsburg, who from the outset suggested that liability should arise wherever conduct was based on sex and made it "more difficult" for an employee to perform the job successfully.<sup>101</sup> Based on the votes in the case at

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96. *Id.*

97. *Id.* (citing a shift in the willingness of Justices Scalia and Thomas to vote for the plaintiff in women's rights cases from 46% (6/13) and 100% (2/2), to 25% (3/12) and 27% (3/11), respectively).

98. 510 U.S. at 22-23.

99. See Transcript of Oral Argument, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) (No. 92-1168); Notes on *Harris v. Forklift Systems, Inc.*, The Harry A. Blackmun Papers, The Library of Congress, available at <http://www.loc.gov/rr/mss/blackmun/> [hereinafter The Blackmun Papers].

100. Compare Transcript of Oral Argument at 7, *Harris*, 510 U.S. 17 (No. 92-1168) (O'Connor, J.) (suggesting that "you certainly could have a hostile working environment that makes it very difficult for the female employee to continue to work there" (emphasis added)), with *Harris*, 510 U.S. at 22.

101. See Transcript of Oral Argument at 14, *Harris*, 510 U.S. 17 (No. 92-1168) (Ginsburg, J.) (asking "how do you define interfere with work performance? . . . How about just saying it makes the job more difficult for the person?").

conference recorded by Justice Blackmun, there was little danger that had Justice O'Connor had voted in line with her initial position, she would have been unable to gain the support of a majority.<sup>102</sup> There is also no suggestion that Justice O'Connor made this change in response to a request from another justice.<sup>103</sup>

Panel effects of this kind also seem to be a particularly plausible explanation for this shift given Justice O'Connor's apparent desire to occupy the center of the Court on a range of important issues, including those of gender equality.<sup>104</sup> A key reason panel effects occur, both in experimental and real-world decision-making settings, is that decision-makers are influenced by a desire to be perceived in relation to others in a particular way—by a form of “social comparison.”<sup>105</sup> In a judicial setting, there is a highly rational explanation for this desire.<sup>106</sup> Because legal outcomes are a complex product of both legalist and ideological influences, it is often extremely difficult for outsiders to assess reliably the ideological valence of a judicial decision by looking only at the result reached in a particular case.<sup>107</sup> The relevant result may not only reflect a judge's broader ideological (or philosophical) leanings but may also be the product of almost purely legalist influences and therefore is not a reliable signal of the judge's ideology. In order for people outside of the legal profession to assess that ideology, the most reliable approach will be to compare a judge's voting behavior with that of other judges subject to the same case-specific legalist influences. Knowing this to be the case, if a judge wishes to be seen as having a particular ideology, he or she must carefully calibrate rulings by reference to those of other judges on a panel.

In ideologically diverse panels, calibration of this kind may require little actual shift in a judge's approach because judges naturally tend to differ and therefore to signal the existence of ideological diversity amongst themselves. In more homogeneous panels, judges *will* often be required to shift their position if they wish to maintain a certain ideological position. Judges on such a panel are more likely to agree at the outset and, therefore, if they continue to adhere to this initial position, to appear indistinguishable from other judges. To

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102. The Blackmun Papers, *supra* note 99.

103. The relevant language appeared in the first draft of the opinion she circulated. *See id.* Thereafter, she specifically declined to accommodate a request from Justice Blackmun that she further soften this language. *See* Memorandum of Justice O'Connor to Justice Blackmun, Re 92-1168, *Harris v. Forklift Systems* (October 25, 1993), The Blackmun Papers, *supra* note 99.

104. *See* BISKUPIC, *supra* note 31.

105. *See, e.g.*, Cass R. Sunstein, *Group Dynamics*, 12 CARDOZO STUD. L. & LITERATURE 129, 132 (2000); Sunstein et al., *supra* note 87. On group polarization generally, *see*, for example, ROGER BROWN, *SOCIAL PSYCHOLOGY* 200-245 (2d ed. 1986); and David G. Myers, *Discussion-Induced Attitude Polarization*, 28 HUM. REL. 699 (1975).

106. In many other settings, such an intensity shift will be much less rational. *See* Sunstein, *supra* note 105, at 130.

107. On the inevitable influence of both sets of factors in most cases, *see* generally RICHARD POSNER, *HOW JUDGES THINK* (2008).

distinguish themselves, they thus face much greater pressure to adopt a more extreme liberal or conservative position, which then produces a more extreme—or amplified—median outcome. The result is that if a justice such as O'Connor wishes to be perceived as only weakly pro-feminist, her ultimate willingness to vote in a pro-feminist direction may be greatly dampened or amplified according to whether she serves with other justices who are more or less pro-feminist (in the relevant liberal or anti-subordination sense) than she.<sup>108</sup>

Clear support for this prediction of ideological amplification and dampening has also been found in numerous studies of the effect of political ideology on decision-making at the federal court of appeals level in the United States, among judges appointed by different Presidents.<sup>109</sup>

There is, by contrast, almost no evidence of a similar shift among female appellate judges below the Supreme Court level according to the gender composition of the panel on which they sit.<sup>110</sup> The main study that tests this question is the 2004 study by Farhang and Wawro, which finds a clear targeted gender effect for individual female judges and also a statistically significant relationship between the presence of one female judge on a panel and the tendency of male judges to vote for the plaintiff in such cases.<sup>111</sup> When Farhang and Wawro tested for the marginal effect of a second female judge on a panel, they found that there was no statistically significant positive marginal effect on the probability that “either male or female judges on the panel will vote for the plaintiff.”<sup>112</sup> If anything, though this finding was not statistically significant, they found that the presence of a second female judge on a panel has a negative relationship to the likelihood that the panel will vote for the plaintiff.<sup>113</sup>

Other studies have yielded similar results when considering the interaction between a female judge's presence on a panel and the ideology of other panel

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108. For the concepts of dampening and amplification, see Sunstein, *supra* note 105.

109. See, e.g., Sunstein et al., *supra* note 87, at 306 (finding, in a study of nearly 5000 court of appeals decisions between 1995 and 2004, including several hundred sex discrimination and sexual harassment cases, a large difference in the tendency of all-Democratic and all-Republican appointed judicial panels versus mixed panels to issue “liberal” rulings: the probability that an all-Democratic, all-Republican, Democratic-majority, and Republican-majority panel would issue such a ruling was 61%, 34%, 50%, and 39% respectively). There is also evidence of a similar effect in Canada. See James Stribopoulos & Moin A. Yahya, *Does a Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Canada*, 45 OSGOODE HALL L.J. 315, 346-47 (2007). There is also support for this finding in the specific context of gender and feminism in an experimental setting. See Myers, *supra* note 104, at 699, 700-12.

110. At the state supreme court level, the available evidence does not, unfortunately, help address this question. One of the leading studies, conducted by Baldez, Epstein, and Martin, simply assumes, rather than tests, the existence of a linear relationship between the number of female judges on a panel and the likelihood that the panel adopts a standard of strict scrutiny. See Baldez et al., *supra* note 37, at 258 (“[O]n the basis of this consensus, we think it reasonable to hypothesize that the greater fraction of female justices on the courts, the greater the probability of the adoption of a higher standard of law.”).

111. See Farhang & Wawro, *supra* note 94, at 301.

112. *Id.* at 320.

113. *Id.* at 322, tbl.2.

members. If female judges were, for example, generally more feminist than male judges, one would expect there to be some evidence of ideological amplification on judicial panels where two female judges sit together and where one female judge sits with a male Democratic-appointee. (If feminists are right about female judges being more feminist, then being appointed by a Democratic President is to some degree equivalent in this context to being female because, as Section A of this Part notes, it is an indication that a judge is more predisposed to being pro-feminist.) However, when Jennifer Peresie tested this hypothesis in her 2005 study, she found that there was no statistically significant interaction between the presence of a female judge on a panel and a male colleague's ideology score.<sup>114</sup>

### III. THE EMPIRICAL LITERATURE: A QUALITATIVE RE-EXAMINATION OF THE DATA

A qualitative examination of the key decisions underpinning the finding of a targeted gender effect, including those of Judge Wood and then-Judge Sotomayor, also reveals a pattern of decision-making by female judges which, from a feminist perspective, is either irrelevant, ambiguous, or highly limited in significance.

Consider the recent study by Boyd, Epstein, and Martin, which is arguably the strongest study to date in this area at the federal court of appeals level.<sup>115</sup> The most logical place to start analyzing the significance of the study's findings from a qualitative perspective is to identify cases in which it appeared that female judges adopted a broader view of Title VII liability.<sup>116</sup> Two sets of cases fall into this category: (i) those involving a dissent by a female judge from a majority opinion written by two male judges, either dismissing a plaintiff's appeal or upholding a defendant's appeal; and (ii) those involving decisions in which a male federal district court judge (or magistrate) found against the plaintiff, and a female federal court of appeals judge wrote for the court in upholding an appeal by the plaintiff. There were four cases in the first category and nineteen in the second, amounting, as *Figure 1.1* shows, to a total of twenty-three cases out of an overall sample of 415.

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114. Peresie, *supra* note 80, at 1778.

115. See Boyd et al., *supra* note 11, at 16 n.24 (noting the overall size of dataset). The strength of this study lies in its use of non-parametric matching techniques, as opposed to standard regression techniques. See *supra* note 92.

116. There may, of course, be other cases in which a female judge did not write but nonetheless influenced a male colleague to adopt a more pro-plaintiff position, but at an individual case-by-case level, such an influence almost always will be unobservable.

Figure 1.1 – Cases Involving Observable Male-Female Judicial Differences

Total number of cases with observable differences between the judicial decisions of male and female jurists			23
Finding for <i>female</i> plaintiff (traditional discrimination)	16	70%	
Finding for <i>female</i> plaintiff (reverse discrimination)	1	4%	
Finding for <i>male</i> plaintiff	6	26%	

Among these twenty-three cases, five had almost no relevance from a feminist perspective because they involved appeals by male plaintiffs and extremely narrow issues of law or law and fact. One case, *Shick v. Illinois Department of Human Services*,<sup>117</sup> involved the question of whether the trial judge had abused his discretion by vacating a jury verdict awarding the male plaintiff damages for sex and disability discrimination, on the basis that the evidence was not sufficient to support a verdict of disability discrimination. In her dissent, Judge Ilana Rovner held that, while she agreed with the majority that “[w]ithout a doubt” the case involved “a bizarre verdict and damage award,” the fact that the defendant had conceded the intertwined nature of the claims meant that, on an appropriately deferential standard of review, the trial judge’s decision could not be considered an abuse of discretion.<sup>118</sup> A second case, *Byrnie v. Town of Cromwell Board of Education*,<sup>119</sup> involved the question of whether it was reasonable for the jury to infer, in light of broader circumstantial evidence, that the defendant had destroyed documents that would have supported a finding of unlawful discrimination against the male plaintiff in favor of a somewhat less well-qualified female employee.<sup>120</sup> Another three cases, *Jakubiak v. Perry*,<sup>121</sup> *Ester v. Principi*,<sup>122</sup> and *Wilson v. Peña*,<sup>123</sup> involved issues relating to the timeliness of a male plaintiff’s filing of a complaint of discrimination with the Equal Employment Opportunity Commission (EEOC) and an appeal from a particular aspect of the EEOC’s approach to calculating his back-pay award.

Two cases, *Shepherd v. Slater Steels Corp.*<sup>124</sup> and *Messer v. Meno*,<sup>125</sup> involved questions of greater potential significance, but the approach taken by the female federal appellate judges in question was highly ambiguous from a feminist perspective, especially from an anti-subordination perspective. In *Shepherd*, while Judge Rovner granted the appeal of a male plaintiff against the

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117. 307 F.3d 605 (7th Cir. 2002).

118. *Id.* at 616-17.

119. 243 F.3d 93 (2d Cir. 2001).

120. *Id.* at 107-11.

121. 101 F.3d 23 (4th Cir. 1996).

122. 250 F.3d 1068 (7th Cir. 2001).

123. 79 F.3d 154 (D.C. Cir. 1996).

124. 168 F.3d 998 (7th Cir. 1999).

125. 130 F.3d 130 (5th Cir. 1997).



summary dismissal of his claim of hostile work environment sexual harassment and unlawful retaliation under Title VII, the decision nonetheless had some real potential benefits, even from an anti-subordination feminist perspective. The conduct at issue in the case had been directed toward both male and female employees, and therefore requiring the employer to prevent such conduct had the potential to improve women's, as well as certain men's, position in the workplace. A finding in favor of the relevant male plaintiff's claim also had the potential to increase the chance that future gay male plaintiffs will be able to recover for sexual harassment based on sexual orientation and therefore had the potential to help define group-based subordination.<sup>126</sup> At the same time, by granting the plaintiff's appeal, Judge Rovner ultimately went much further than most anti-subordination feminists would favor by allowing recovery for sexual harassment by men in positions of relative equality—rather than subordination—and therefore in diverting the focus of Title VII in this area from substantive to formal equality.<sup>127</sup>

In the earlier case, *Messer*, Judge Edith Jones considered a claim by a white female plaintiff that had even more ambivalent significance from an anti-subordination feminist perspective. The claim in question involved an allegation of reverse race discrimination and unlawful retaliation by the Texas Education Agency. Unlike the male district court judge, Judge Jones found in favor of the plaintiff on a plea for summary judgment.<sup>128</sup> The basis for this finding was in direct opposition to anti-subordination concerns. While most anti-subordination feminists and critical race feminists argue that, given the pervasiveness of inequality in society's background conditions, it is impossible to isolate the degree to which particular individuals or institutions contribute to inequality, Judge Jones held that, based on the correct reading of Supreme Court precedent, any scheme designed to achieve parity in promotion and retention would necessarily be unlawful without a concrete showing of prior *institution-specific* gender or race discrimination by a particular employer.<sup>129</sup>

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126. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

127. In doing so, Rovner departed from a power-based account of harassment. For the desirability of such an approach from a feminist perspective, see, for example, Martha C. Nussbaum, Carr, *Before and After: Power and Sex in Carr v. Allison Gas Turbine Division, General Motors Corp.*, 74 U. CHI. L. REV. 1831 (2007). By emphasizing the same-sex, rather than power-based, dimension to the harassment in the case, Rovner also opened the door for homophobic claims of male-on-male sexual harassment to undermine substantive equality for gay men in the workplace in a way which would trouble many feminists. See *Shepherd*, 168 F.3d at 1009 (1999) (noting that "there is evidence in the record suggesting that Jamison's harassment of Shepherd was borne of sexual attraction"). For a discussion of this concern, though from a perspective which disclaims the feminist label, see JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

128. She held that, on the plaintiff's theory of a continuing violation by the defendant, the claim was not time barred, and there was a material factual issue as to whether the defendant's decision to promote a black male employee over the plaintiff constituted unlawful discrimination on the basis of race. See 130 F.3d at 130, 135, 139.

129. *Id.* at 136.

She also held that there was clearly an issue on the record as to whether the Agency had pursued a policy of parity.<sup>130</sup>

As Figure 1.2 shows, of the remaining sixteen cases, fourteen involved a decision by a female federal appellate judge to reverse and remand a grant of summary judgment, rather than to uphold a verdict for the plaintiff. They therefore had limited potential significance for female workers and feminists concerned about their plight.

*Figure 1.2 – Subset of Traditional Cases with Traditional Sex Discrimination Claims by Female Plaintiffs Involving Observable Male-Female Judicial Differences*

Total number of cases with observable differences between the judicial decisions of male and female jurists		16
Appellate Court Decision Based on:	Appeal from Summary Judgment / Dismissal Prior to Merits Hearing	Appeal from Jury Verdict / Bench Trial / Settlement
Narrow Issue of Law	7	1
Burden of Proof / Issue of Fact	4	
Scope of Primary Liability / Associated Rights	3	1

In seven of these fourteen cases involving an appeal from a grant of summary judgment, there was an extremely narrow substantive difference, in terms of the issues of law involved, between male federal district court judges and female court of appeals judges. One case, *Holley v. Department of Veteran Affairs*,<sup>131</sup> involved a question about the timeliness of the plaintiff's complaint to the EEOC. A second, *Woodford v. Community Action Agency of Greene County, Inc.*,<sup>132</sup> concerned the proper test for federal court abstention in the face of contemporaneous state court proceedings. A third, *Sizova v. National Institute of Standards & Technology*,<sup>133</sup> raised a question about the relationship, for the purposes of determining whether a claim should be dealt with via a motion to dismiss or summary judgment, between the timeliness of a complaint to the EEOC and exhaustion of administrative remedies against a federal agency. A fourth, *Harrison v. Eddy Potash, Inc.*,<sup>134</sup> raised the question of the test for vicarious liability for hostile work environment sexual harassment based on the actual authority of a supervisor. A fifth case, *Blair v. Scott*

130. *Id.* at 137.

131. 165 F.3d 244 (3d Cir. 1999).

132. 239 F.3d 517 (2d Cir. 2001).

133. 282 F.3d 1320 (10th Cir. 2002) (granting the plaintiff's appeal against the dismissal of her claim for want of jurisdiction but affirming the district court's finding that one of the defendants was not her employer for purposes of Title VII).

134. 158 F.3d 1371 (10th Cir. 1998).

*Specialty Gases*,<sup>135</sup> concerned a question about the evidence required to show that the plaintiff's lack of financial capacity meant that arbitration would deny her a forum to vindicate her statutory rights. A sixth case, *Russell v. Board of Trustees of University of Illinois at Chicago*,<sup>136</sup> involved the kind of period of suspension which can constitute materially adverse employment action in the context of a claim of sex discrimination. Finally, a seventh case, *Turgeon v. Premark International, Inc.*,<sup>137</sup> examined the scope for claims of unlawful retaliation by former employees.

In *Russell* and *Turgeon* in particular, the narrowness of the difference between male district court judges on the one hand and female appellate judges on the other was made even clearer by the express rejection by Judges Wood and Rovner of certain aspects of the plaintiff's appeal. In *Russell*, for example, while granting the plaintiff's appeal, Judge Wood specifically rejected the plaintiff's additional claim of hostile work environment harassment on the basis that while the plaintiff's supervisor's conduct was "offensive," "boorish," and "less than admirable," it did not rise to the level of abuse necessary for it to be actionable.<sup>138</sup> In *Turgeon*, while voting in dissent to overturn the district court's award of \$400 in Federal Rules of Civil Procedure Rule 11 sanctions on the basis that the plaintiff's unlawful retaliation claim was not frivolous as a matter of law, Judge Rovner expressly concurred in the majority's decision not to vacate the grant of summary judgment on the claim itself.<sup>139</sup> This same tendency to reject at least part of the plaintiff's claim, or its likelihood of success, is also implicit in at least one other case in this category.<sup>140</sup> In a further four out of these fourteen cases involving an appeal from summary judgment, there was also an extremely narrow observable difference between male district court judges and female court of appeals judges because the court of appeals reversed and remanded on the basis that the district court had either not considered all of the plaintiff's contentions, had not applied the correct burden of proof, or had not treated the contentions in their most favorable light as they required for summary judgment.<sup>141</sup>

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135. 283 F.3d 595 (3d Cir. 2002).

136. 243 F.3d 336 (7th Cir. 2001).

137. 87 F.3d 218 (7th Cir. 1996).

138. 243 F.3d 336, 343 (7th Cir. 2001). Moreover, the conduct in question would likely be of serious concern to most anti-subordination feminists. It consisted of the supervisor calling female employees "grandma," "bitch," and "the staff from hell," and saying that intelligent women were unattractive and that one of the female employees was "sleazy" and "dressed like a whore." *See id.*

139. 87 F.3d 218, 223 (7th Cir. 1996).

140. *See, e.g., Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1328 (2002) (indicating that while there were potential obstacles to the plaintiff's showing exhaustion, the trial judge decided the issue "prematurely").

141. *See Cifra v. G.E. Co.*, 252 F.3d 205 (2d Cir. 2001) (reversing and remanding the dismissal of the plaintiff's claim of retaliatory discharge. Judge Amalya Kearse held that, while it was likely a "close case" factually, there were sufficient circumstantial evidence and contradictions in the defendants' and plaintiff's accounts that, as a matter of law, it would have been up to a rational fact-finder to find the existence of a causal connection between the protected activity of the plaintiff and her dismissal); *Oest*

In at least one additional case, *Shea v. Galaxie Lumber & Construction Co. Ltd.*,<sup>142</sup> a female federal appellate judge *did* vote in a way that directly allowed that plaintiff to recover on the merits. However, the findings made by the court were narrow as a matter of law and of limited gender salience. In granting the plaintiff's appeal from the decision by the trial judge to vacate a jury's verdict under Title VII, Judge Wood simply held that, applying the appropriate standard of review established by the Supreme Court, the award of \$2500 in punitive damages was not grossly disproportionate to the award of \$1 in compensatory damages.<sup>143</sup>

In the entire sample of 415 cases studied by Epstein, Boyd, and Martin, there were thus only four cases in which there was a female plaintiff, a potentially significant issue of law, and an observable difference between male and female judges and therefore a judgment of potential significance for the establishment of a female-feminist correlation. In three out of these four cases, the appeal in question also involved a decision to reverse and remand a claim for further hearing, rather than a finding for the plaintiff, and in all four the result was potentially over-determined because the female judges in question were appointed by Democratic presidents.<sup>144</sup> Even more importantly from the perspective of a female-feminist jurisprudential correlation, in three out of these four cases, the willingness of female court of appeals judges to take a broader, and to that extent more feminist, approach to the *legal* scope of Title VII than male judges also coincided with a greater tendency to view relevant *facts* in a light more favorable to the plaintiff than did the male trial judge.

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v. Ill. Dep't of Corrections, 240 F.3d 605 (7th Cir. 2001) (Williams, J., dissenting) (voting to reverse the district court's grant of summary judgment on the basis that the district court and majority of the court of appeals had not focused on a particular sub-set of the plaintiff's causal claim, which if taken in its most favorable light, could have provided sufficient evidence to allow a reasonable jury to find in her favor); *Buntin v. Breathitt County Board of Education*, 134 F.3d 796 (6th Cir. 1998) (reversing and remanding a grant of summary judgment against the plaintiff school-administrator under the Equal Pay Act (EPA) and Title VII. Judge Karen Nelson Moore held that the trial judge had not properly taken into account the fact that, once the plaintiff met her prima facie burden of showing a gender disparity, the defendant had the burden of showing an affirmative defense under the EPA and had not met that burden); *Kechmar v. SunGard Data Systems, Inc.*, 109 F.3d 173 (3d Cir. 1997) (reversing and remanding the district court's grant of summary judgment against the plaintiff. In doing so, Judge Dolores Sloviter emphasized the need, as a matter of law, to avoid giving an unduly restricted view of causation, which focused solely on questions of temporal connection. She further emphasized that, if viewed in the light most favorable to the plaintiff, the process by which the plaintiff was gradually marginalized and taken off a management track provided the basis of a colorable legal claim of retaliation on that basis).

142. 152 F.3d 729 (1998).

143. *Id.* at 732-36 (upholding an appeal against the trial judge's verdict in favor of the plaintiff under the Fair Labor Standards Act and in respect of attorney's fees under the Act).

144. See *Raniola v. Bratton*, 243 F.3d 610 (2d Cir. 2001) (Judge Sonia Sotomayor, appointed by President Clinton); *Neilson v. Colgate-Palmolive*, 199 F.3d 642, 658 (2d Cir. 1999) (Judge Sonia Sotomayor, appointed by President Clinton, dissenting); *Lyes v. City of Riviera Beach, Florida*, 166 F.3d 1332, 1356 (11th Cir. 1999) (Judge Phyllis A. Kravitch, appointed by President Carter, concurring in part and dissenting in part); *Wagner v. Nutrasweet Co.*, 95 F.3d 527 (7th Cir. 1996) (Judge Diana Wood, appointed by President Clinton).

Consider a case such as *Raniola v. Bratton*,<sup>145</sup> in which the plaintiff was a female police officer who brought a claim of hostile work environment sexual harassment and unlawful retaliation under Title VII. In granting the plaintiff's appeal, then-Judge Sotomayor, who was at the time a judge on the Court of Appeals for the Second Circuit, clearly emphasized the kind of broad reading of hostile work environment harassment advocated by various feminist scholars and endorsed by the Supreme Court in *Harris*. She held that abusive conduct may be actionable whether or not it has sexual content or involves explicitly gender-based insults.<sup>146</sup> She also held that in determining whether a pattern of conduct is actionable, it would be reasonable for a jury to infer from a number of prominent instances of gender-based insults that the overall pattern of conduct was based on sex.<sup>147</sup> In overturning the grant of summary judgment, then-Judge Sotomayor also gave a different reading than the trial judge to the significance of a number of alleged facts, such as the significance to the reasonable female officer of the word "cunt" being written over her name in the official police ledger and on a police notice-board and of the precinct captain's referring to domestic violence victims as "bitches," as well as the likely meaning of the precinct captain calling her and her female partner (who also had been administratively transferred) "a pair of criminals."<sup>148</sup>

It is quite reasonable to think that in such a case, a judge's gender, along with a range of less observable variables in life experience, may contribute to how she (or he) assesses certain facts.<sup>149</sup> The federal district court judge who sat in the case is white, male, from a relatively privileged background, and a former member of the Army Judge Advocate Corps, whereas then-Judge Sotomayor is Hispanic, female, from a working class background, and a former assistant district attorney. It was thus extremely likely that the two judges would construe the use of these words differently. From his prior experience, the trial judge would be likely to see such words as crude but relatively pervasive and unthreatening, whereas then-Judge Sotomayor, from her quite distinct experience, may well have seen such words as having a more particular

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145. 243 F. 3d 610 (2d Cir. 2001).

146. *Id.* at 617, 621-22 (noting that "although sexual harassment is usually thought of in terms of sexual demands, it can include employer action based on [sex] but having nothing to do with sexuality" and that the plaintiff "may resort to circumstantial proof that the other adverse treatment that was not explicitly sex-based was, nevertheless, suffered on account of sex"). For a feminist defense of this kind of approach, see Nussbaum, *supra* note 127.

147. *Id.* at 622.

148. *Id.* at 623 (finding that "a reasonable jury [could] infer that the hostility expressed toward the female officers was based on the officers' sex, and not their disciplinary records").

149. *Cf.* Diane Wood, *Sex Discrimination in Life and Law*, 1999 U. CHI. LEGAL F. 1, 4 ("The dominant model, I suggest, is still subconsciously based upon the supposition that women should be more like men. Even more regrettably, many women set exactly this task for themselves: 'I, too, can be a 'rat' at VMI; I, too, can work ten hours a day even though I'm pregnant and the men aren't; I, too, can intimidate opposing counsel with the best of them.' Furthermore, accounts of discrimination offered by women are too often implicitly measured by a male standard.").

racial and gender valence or as being linked to both the threatened and actual use of violence in a way which gave them a more hostile character.<sup>150</sup>

A similar analysis also applies to cases such as *Wagner v. Nutrasweet Co.*<sup>151</sup> and *Neilson v. Colgate-Palmolive*,<sup>152</sup> where there was a confluence of both legal and factual differences between the approaches of a female court of appeals judge and a male district court or court of appeals judge. In *Wagner*, various female employees brought a claim under the Equal Pay Act and Title VII against Nutrasweet for certain pay decisions made before the employees signed a voluntary severance package that included a waiver of prior claims. The district court granted summary judgment for the defendant on all counts. While the court of appeals largely affirmed, it held that a limited number of claims should have withstood summary judgment. In granting *Wagner's* appeal, in particular, Judge Wood also clearly endorsed a broad view of one key aspect of liability under Title VII, namely the question of whether or not each paycheck constituted a distinct instance of actionable conduct under Title VII.<sup>153</sup> She held that based on the clear analogy between race and sex discrimination in this context, Supreme Court precedent favored the broader view of liability. At the same, it was equally important to her ultimate decision in favor of the plaintiff that she took a view of certain aspects of the facts that was different from that of the trial judge; namely, that the relevant severance agreement did not, as a matter of statutory construction, constitute a valid waiver of the plaintiff's prospective rights under Title VII.

In *Neilson*, the plaintiff had been ordered to undergo a psychiatric examination and after doing so had been declared incompetent to conduct her own trial, so that a guardian ad litem was appointed on her behalf. Two male federal court of appeals judges dismissed her appeal against the appointment of that guardian, holding that she had (implicitly) consented to the appointment and that in any event a failure to provide her with adequate notice of the appointment was harmless in the circumstances. Then-Judge Sotomayor, by contrast, held that the appointment of and therefore also the settlement by that guardian were invalid for both lack of adequate notice and lack of informed consent. In reaching this conclusion, then-Judge Sotomayor adopted what was clearly a feminist legal definition of informed consent and due process.<sup>154</sup> She also, however, strongly differed from her colleagues in the way she interpreted the significance of various facts, such as whether the plaintiff had shown a true

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150. Cf. Sotomayor, *supra* note 65 (commenting on the importance of experience in forming judicial opinions).

151. 95 F.3d 527 (7th Cir. 1996).

152. 199 F.3d 642 (2d Cir. 1999).

153. *Wagner*, 95 F.3d at 534.

154. She emphasized the importance to individuals of agency over major decisions affecting their life development and the obligation of the state to support the meaningful exercise of such agency. For the link between this kind of substantive conception of the right to equal autonomy and feminist concerns, see, for example, MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* (2001).

lack of consent and was capable of understanding any notice given to her. Part of this interpretative difference might also be attributed to differences between then-Judge Sotomayor's professional style as a former prosecutor and the style of the judge who wrote for the Court, Judge Sand, a renowned conciliator.<sup>155</sup>

An experience-fact correlation such as this, if it exists, will point very strongly toward the need for broad diversity among judges if a system is to ensure fairness to all litigants.<sup>156</sup> Indeed, it suggests that if plaintiffs in the position of Raniola, Wagner, or Neilson are to receive justice, male and female life experience should be more or less equally represented in the legal system. Feminists, in particular, will also have a powerful interest in ensuring that female plaintiffs, no less than male plaintiffs, have an equal chance, as a substantive matter, of receiving a fair hearing in this way.

At the Supreme Court level, however, the difficulty for feminists is that an experience-fact correlation provides little support for the prediction of an ongoing female-feminist *jurisprudential* correlation. If anything, it tends to point in the opposite direction, suggesting that, even in those few cases in which an overall targeted gender effect can be connected at the federal district and court of appeals levels to decisions that are concretely more pro-female *and* pro-feminist by female, as opposed to, male judges, that connection is unlikely to translate to the Supreme Court level where, relative to a court of appeals, few cases ultimately turn on the justices' reading of the facts rather than the law.<sup>157</sup>

#### IV. CHANGES IN FEMALE JUDICIAL EXPERIENCE AND JURISPRUDENCE: THE CANADIAN EXPERIENCE

From a comparative perspective, there is little basis for thinking that, once appointed to the Supreme Court, female judges are significantly more likely to adopt a more pro-feminist position (especially an anti-subordination feminist one) than while on the court of appeals.

Canada provides a useful comparison in this context because historically there have been clear parallels between the role of the United States and Canadian Supreme Courts in defining and enforcing evolving understandings

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155. Dena Kleiman, *Man in the News: Leonard Burke Sand; Mild-Mannered U.S. Judge Under Attack*, N.Y. TIMES, Aug. 4, 1988, at B4.

156. See Regina Graycar, *The Gender of Judgments: Some Reflections on "Bias,"* 32 U. B.C. L. REV. 1 (1998) (arguing for the merits of broad diversity in the judiciary from the point of view of norms of fairness and impartiality); see also Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000); Kate Malleson, *Justifying Gender Equality on the Bench: Why Difference Won't Do*, 11 FEMINIST LEGAL STUD. 1 (2003) (arguing for the merits of a diverse judiciary from the perspective of public confidence in the judiciary).

157. There are, of course, important exceptions. See, e.g., *Ledbetter v. Goodyear Tire, Inc.*, 550 U.S. 618 (2007); Martha C. Nussbaum, *The Supreme Court 2006 Term, Foreword: Constitutions and Capabilities—'Perception' Against Lofty Formalism*, 121 HARV. L. REV. 4 (2008). These examples also highlight the degree to which a contextual approach to the law and mere factual determinations are connected, so that the question is one of degree only.

of gender equality in the two countries. Female as well as male Supreme Court justices in both countries have also played a major role in defining the contours of rights to abortion, pay equity, and equal gender access to various public benefits, as well as in interpreting the scope of statutory protections against sexual harassment and sex discrimination.<sup>158</sup> In Canada, there have been far more female justices appointed to date than in the United States, and therefore there are more opportunities to observe female judicial behavior at the highest appellate level. The first female justice appointed to the Supreme Court of Canada (SCC) was Justice Bertha Wilson, who joined the Court in 1982.<sup>159</sup> The second, Justice Claire L'Heureux-Dubé, joined the Court in 1987.<sup>160</sup> Since then, there have been an additional five female justices appointed to the Court. Justice Beverly McLachlin was appointed in 1989 and in 2000 became Chief Justice of the Court; Justices Arbour and Deschamps were appointed in 1999 and 2002, respectively; and Justices Charron and Abella both were appointed in 2004.<sup>161</sup> In 2005, following the appointment of Justices Charron and Abella, Canada's Supreme Court had four female members out of a total of nine, making it one of the first constitutional democracies in the world to have an ultimate appellate court with a near female majority.<sup>162</sup>

Among the seven female justices appointed to the SCC, there has also been a clear shift over time in the justices' experiences of gender discrimination prior to appointment, just as there has been in the United States at the lower court level. To a striking degree, Justices Wilson and L'Heureux-Dubé had remarkably similar experiences prior to appointment to those of Justices O'Connor and Ginsburg. Like Justice Ginsburg, Justice Wilson worked as a

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158. In Canada, see, for example, *Regina v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.), which struck down the Criminal Code prohibitions on abortion; *Janzen v. Platy Enterprises*, [1989] 1 S.C.R. 1252 (Can.), which defined the scope of liability for sexual harassment; and *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 (Can.), which considered a challenge to a decision by the Newfoundland government, in the face of a budget deficit, to cancel retroactively a collective pay agreement with public sector unions (N.A.P.E) to increase wages in positions dominated by female employees to match wages in more male-dominated areas. In Canada, the Court has also played an important role in defining rights to gender equality at common law. See, e.g., *R v. Lavallee* [1990] 1 S.C.R. 852 (Can.) (defining common law evidentiary principles allowing the admission of expert evidence on "battered women's syndrome"). Consequently, changes in the jurisprudence of the SCC over time provide a much more useful guide to predicting likely future trends in the jurisprudence of future female U.S. Supreme Court justices than changes in the jurisprudence of state supreme courts in the United States, which also have had strong female pluralities or majorities but a much narrower role than the U.S. Supreme Court in defining legal norms of gender equality. (On the composition of state supreme courts in this context, see, for example, Ruth Bader Ginsburg, *Remarks on Women's Progress at the Bar and on the Bench for Presentation at the American Sociological Association Annual Meeting, Montreal, August 11, 2006*, 30 HARV. J.L. & GENDER 1, 8 (2007).)

159. See, e.g., JUSTICE BERTHA WILSON: ONE WOMAN'S DIFFERENCE (Kim Brooks ed., 2009) (providing an analysis of Justice Wilson's work and influence).

160. Supreme Court of Canada, Current and Former Puisne Judges, <http://www.scc-csc.gc.ca/court-court/ju/cfpju-jupp/index-eng.asp> (last visited Nov. 9, 2009).

161. *Id.*

162. See Mossman, *supra* note 9.



secretary (or dentists' receptionist) prior to law school.<sup>163</sup> When she inquired about enrolling in law school in 1954, she was told by the Dean of Dalhousie Law School that she would do better to "go home and take up crocheting" as a way of passing the time.<sup>164</sup> On graduating she also struggled to find the private-sector employment she wanted, though she eventually became the first female attorney, and eventually partner, in the Toronto law firm of Osler, Hoskin & Harcourt. Even there, however, she was responsible for a "non-core" area of practice: the "research department."<sup>165</sup>

Justice L'Heureux-Dubé was one of only two women in her law school class at Laval University in Québec and worked part-time during law school as a legal secretary. Upon graduating, she became one of only a few women practicing law in Québec itself. As a result, the partner who hired her had to go to significant lengths to persuade clients of the firm that she was competent to do their legal work.<sup>166</sup> Like Justice Ginsburg, Justice L'Heureux-Dubé developed significant professional expertise in an area of law (in her case, family law) that at the time tended to reveal broader patterns of gender discrimination not always readily apparent to attorneys in the rest of the legal system. Justice L'Heureux-Dubé reports that when she was first appointed to the Court, a fellow male judge flatly refused to speak to her.<sup>167</sup>

By contrast, Chief Justice McLachlin and Justice Arbour entered law school in the late 1960s, when women, although still a clear minority, already comprised a significant number of their class.<sup>168</sup> Justice Deschamps, in turn, graduated from law school in 1974. Upon graduation, younger female justices received a much broader range of prestigious job offerings and opportunities to practice in traditionally male-dominated areas. For example, Justice Arbour, the first female member of the Court to graduate in the 1970s, was offered a Supreme Court clerkship immediately upon graduation. She was then hired by the Law Commission of Canada and subsequently by the prestigious Osgoode Hall Law School.<sup>169</sup> Likewise, Justice Deschamps became a successful commercial litigator in private practice, chairing various advisory committees,

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163. SOURCEBOOK, *supra* note 46, at 338.

164. *Id.* at 339.

165. *Id.*

166. *Id.* at 137.

167. See Kirk Makin, *Pioneering Judge Retires: Gatecrashing the Old Boys' Club: Ridiculed, Censured, Accused of Gender Bias, L'Heureux-Dubé Withstood Sexist Attacks from Fellow Judges*, GLOBE & MAIL (Toronto), May 2, 2002, at A8.

168. The Dean of the Alberta Law Faculty was so happy to receive Chief Justice McLachlin's inquiry about application that he admitted her without requiring her to submit a formal application. When she graduated, she was offered a position as an associate doing major commercial litigation before taking up a position as a law professor at the University of British Columbia. She was appointed from her academic position to Chief Justice of the province. See SOURCEBOOK, *supra* note 46, at 160.

169. Allan Thompson, *Louise Arbour*, 59 INT'L J. 681, 687 (2004).

including one on bankruptcy law, before being appointed to the Supreme Court of Québec.<sup>170</sup>

At a substantive jurisprudential level, recent experience in Canada also provides quite clear support for the prediction that, in the face of the experiences of female justices, there will be a change in their support for anti-subordination feminist arguments relative to male counterparts.<sup>171</sup> Consider recent studies of the dissent rate of various justices in Canada. Consistent with their experience as “outsiders” in a male-dominated legal profession, while on the bench, Justices Wilson and L’Heureux-Dubé agreed with the majority in only 36% and 40% of cases, respectively, compared to an average of 61% for all justices with whom they served.<sup>172</sup> Chief Justice McLachlin agreed with the majority at the rate of 53%, while later female justices, such as Justices Deschamps, Abella, Arbour, and Charron have agreed with the majority in 61%, 66%, 68%, and 73% cases, respectively, compared to an overall average rate of 61% agreement for justices over the last twenty-five years.<sup>173</sup>

A similar shift is also evident when one examines the rate at which female justices have tended to write separate concurring judgments, which may be necessary in some cases for the advancement of a distinctly pro-feminist position. Peter McCormick, for example, found that between 2000 and 2004, in cases in which female justices were in the majority, Justice L’Heureux-Dubé wrote a separate concurring opinion in 6.3% of cases, whereas later appointees, Justices Arbour and Deschamps, did so in only 2.5% of cases.<sup>174</sup>

At a qualitative level, various decisions by female members of the SCC also reveal a clear shift away from female justices favoring an anti-subordination approach to issues of gender equality. Such a shift can be observed to some real degree in the differing approaches of even the second and third female appointees to the SCC, Justice L’Heureux-Dubé and Chief Justice McLachlin, who were both appointees of a Conservative government. For example, in a range of Charter and common law cases, including criminal justice cases and cases involving economic equality, Justice L’Heureux-Dubé was a leading voice for anti-subordination-based understandings of gender

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170. Kim Lunman, *Appeal Judge Appointed to Top Court: Quebec Jurist Marie Deschamps is Known for Impatience with Delays in Legal System*, GLOBE & MAIL (Toronto), Aug. 9, 2002, at 1.

171. To some degree, this shift may also understate the potential parallel shift that may occur in the United States in the future if the current pressure to appoint young candidates to the Supreme Court continues. Justices Deschamps, Abella, and Charron were forty-nine, fifty-eight, and fifty-three, respectively, when appointed. The median age of the three leading female candidates recently considered for appointment to the U.S. Supreme Court was fifty-four. See Supreme Court of Canada, Current and Former Puisne Judges, <http://www.scc-csc.gc.ca/court-court/ju/cfpju-jupp/index-eng.asp>.

172. See Marie-Claire Belleau & Rebecca Johnson, *Judging Gender: Difference and Dissent at the Supreme Court of Canada*, 15 INT’L J. LEGAL PROF. 57, 64 (2008). Cf. Beiner, *supra* note 44.

173. Belleau & Johnson, *supra* note 172.

174. Peter McCormick, *The Choral Court: Separate Concurrence and the McLachlin Court, 2000-2004*, 37 OTTAWA L. REV. 1, 18 (2005). Justice McLachlin in this context was closer to Justice L’Heureux-Dubé, writing separately in 6.1% of cases. Justices Abella and Charron had not yet been appointed to the Court when the study was conducted.

equality, even where it meant departing more sharply from Conservative-appointed colleagues and colleagues with a generally conservative voting record (at least in Canadian terms).<sup>175</sup>

In the prominent Canadian case *Regina v. Seaboyer*,<sup>176</sup> while the majority held that provisions of the Canadian Criminal Code preventing the admission of evidence of a complainant's prior sexual history in sexual assault trials were incompatible with the Charter, L'Heureux-Dubé held that the law should be upheld, given the link between its aims and the ability to ensure the effective reporting and prosecution of crimes of sexual violence. And in *Nova Scotia v. Walsh*,<sup>177</sup> she was one of only three justices willing to find that the exclusion of de facto couples from a scheme governing the division of matrimonial property was in breach of the equality guarantee in section 15(1) of the Charter. She held that the distinction often tended to reflect, as well as further, unequal bargaining power between male and female partners in a relationship.<sup>178</sup>

In some of these cases, Chief Justice McLachlin was willing to join L'Heureux-Dubé in giving a broad and substantive reading to the requirements of gender equality under section 15(1). For example, in *Symes v. Canada*,<sup>179</sup> all of the male justices of the SCC held that the plaintiff was not entitled to deduct expenses incurred for childcare as "business expenses" for tax purposes except for a limited \$1000 deduction. The male justices further held that this was fully compatible with section 15(1). Both Justice L'Heureux-Dubé and Chief Justice McLachlin, on the other hand, held that, against the backdrop of section 15(1), the code should be interpreted to allow such a deduction.<sup>180</sup> Likewise, in *Thibadeau v. Canada*,<sup>181</sup> while all of the male justices upheld provisions of the Canadian federal tax code that allowed a person paying child support to deduct that amount from his taxable income but required a person receiving child support to declare it as income, L'Heureux-Dubé and McLachlin held that such provisions constituted an unjustifiable infringement of the rights of divorced custodial parents to equality under the Charter. The two justices' dissenting judgments also were ultimately vindicated by federal legislative change.<sup>182</sup>

Even in these cases, however, Chief Justice McLachlin has often been less sympathetic than Justice L'Heureux-Dubé to anti-subordination-based feminist

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175. For extra-judicial examples, see Claire L'Heureux-Dubé, *Making A Difference: The Pursuit of Equality and A Compassionate Justice*, 13 S. AFR. J. HUM. RTS. 335 (1997); and Claire L'Heureux-Dubé, *The Search for Equality: A Human Rights Issue*, 25 QUEEN'S L. J. 401 (2000).

176. [1991] 2 S.C.R. 577 (Can.).

177. [2002] 4 S.C.R. 325 (Can.).

178. [2002] 4 S.C.R. 325 paras. 152-57 (Can.).

179. [1993] 4 S.C.R. 695 (Can.).

180. *Id.* at 822.

181. [1995] 2 S.C.R. 627 (Can.).

182. See Lisa Phillips, *Measuring the Effects of Feminist Legal Research: Looking Critically at "Failure" and "Success,"* 42 OSGOODE HALL L. J. 603, 607-08 (2004).

arguments.<sup>183</sup> In other cases, she has quite sharply disagreed with Justice L'Heureux-Dubé about the scope and priority to be given to such concerns. Take *Seaboyer* and *Walsh* as examples. In *Seaboyer*, Justice L'Heureux-Dubé held that the scheme in question was designed to advance the reporting and successful prosecution of crimes of sexual violence by protecting complainants from disclosure of their prior sexual history wherever possible. For Chief Justice McLachlin the scheme's only legitimate purpose was much narrower: to prevent defendants from relying on the "twin myths" or stereotypes about the link between a complainant's prior sexual history and credibility, or the general likelihood of consent, and therefore to increase the reliability of the jury's fact-finding process.<sup>184</sup> For Chief Justice McLachlin, the defendant's rights to a fair trial also had a much greater claim to priority in this context than for Justice L'Heureux-Dubé; therefore, the means the scheme used to advance its objectives were unconstitutionally overbroad.<sup>185</sup> In *Walsh*, Justice L'Heureux-Dubé strongly emphasized the importance, from the perspective of women's economic equality, of giving legal recognition to de facto relationships, while Chief Justice McLachlin emphasized the importance of maintaining a distinction between de facto and marital relationships from the perspective of "individual choice."<sup>186</sup>

There has been an even more dramatic difference in approach between Justice L'Heureux-Dubé (and Justice Wilson) and later female justices appointed after Chief Justice McLachlin in cases involving the balance between anti-subordination-based understandings and claims to freedom of expression.<sup>187</sup> In *Regina v. Butler*,<sup>188</sup> the first case in Canada decided in this area, a majority of the SCC showed clear sympathy for anti-subordination feminist arguments about the importance from a gender-equality perspective of limiting access to pornographic material.<sup>189</sup> First, the Court interpreted the concept of "obscenity" in the Canadian Criminal Code to directly target sexual

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183. See, e.g., [1995] 2 S.C.R. 627, 649-50 (Can.) (L'Heureux-Dubé, J., dissenting) (noting that by assuming that parties could negotiate how best to "gross up" child support awards, the scheme left a custodial spouse in a position not only of economic vulnerability, but also personal vulnerability and indignity vis-à-vis the custodial spouse); *id.* at 704 (McLachlin, J.) (discussing only the issue of economic vulnerability).

184. The decision was strongly criticized by anti-subordination feminists partly on this ground. See, e.g., Martha Shaffer, *Seaboyer v. R: A Case Comment*, 5 CAN. J. WOMEN & L. 202 (1992).

185. *Id.*

186. [2002] 4 S.C.R. 325 (Can.).

187. This, of course, is not to say that recent female appointees to the SCC have been unconcerned with norms of gender equality. It is simply to suggest that, on average, they have been less likely to see gender equality in anti-subordination terms. Justice Deschamps, in particular, has also been an exception in some family law cases. See, e.g., *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550 paras. 80-82 (Can.) (Deschamps J., dissenting) (holding that an agreement governing the division of marital assets was unfair); *Rick v. Bransema* 2009 SCC 10 (Can.) (Deschamps J.) (emphasizing the tendency for family law to reflect and perpetuate women's economic inequality).

188. [1992] 1 S.C.R. 452 (Can.).

189. Compare in the U.S. context the result of *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 US 1001 (1986).

material that was “degrading or dehumanizing” and thereby harmful to women; second, the Court held that such a prohibition constituted a justifiable limitation on the right to freedom of expression in section 2(b) of the Charter. In doing so, the relevant justices showed a clear willingness to defer to the legislature about the likely connection between exposure to relevant pornographic material and changes in attitudes and beliefs of a kind which could harm women.<sup>190</sup> The two female justices on the Court at the time, Justices L’Heureux-Dubé and McLachlin, both joined in this opinion.

In *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*,<sup>191</sup> in considering a challenge to the scheme governing the importation of “obscene” material into Canada, a majority of the Court again upheld the basic scheme delineated in *Butler* and held that in order for the importation scheme to be valid under the Charter, the particular scheme simply needed to include certain increased procedural safeguards regarding the relevant timing, burden of proof, and procedure for determining whether something was obscene. Both Justice L’Heureux-Dubé and Chief Justice McLachlin were again part of this majority. Justice Arbour, by contrast, showed far less willingness to defer to Parliament’s attempts to prevent harm or promote equality in this context via reliance on anti-subordination feminist theories about pornography. While Justice Arbour was willing to apply the basic framework set out in *Butler*, she insisted on giving much greater priority than the majority to rights to freedom of expression. In a way which represented a clear rejection of certain anti-subordination feminist ideas, she granted a much broader remedy, striking down the entirety of the relevant Customs regime and giving strong endorsement to arguments about the benefits of gay and lesbian pornography for the achievement of full equality.<sup>192</sup>

Even more strikingly, in *Regina v. Labaye*,<sup>193</sup> when considering a Charter challenge to the definition of “indecent” under the Criminal Code, Chief Justice McLachlin and Justices Deschamps, Abella, and Charron gave clear priority to concerns about freedom of expression over competing anti-subordination feminist concerns. In writing for the Court, Chief Justice McLachlin held that, given the private and consensual nature of the sexual activity involved in the commercial swingers club operated by the appellant, the operation of the club could not be considered an “indecent act” for the

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190. [1992] 1 S.C.R. 452, 455 (Can.) (holding that “while a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs”).

191. [2000] 2 S.C.R. 1120 (Can.).

192. *Id.* at paras. 247, 258-70 (noting that “homosexual literature is an important means of self-discovery and affirmation for gay, lesbian and bisexual individuals” and that banning this material “can only reinforce the existing perceptions gay, lesbian and bisexual individuals have of their marginalization by society.”).

193. [2005] 3 S.C.R. 728 (Can.).

purposes of the Code.<sup>194</sup> In adopting the harm principle as the touchstone for “indecentcy,” Chief Justice McLachlin also took a narrower, less deferential approach to the concept of “harm” than that endorsed by the Court in *Butler* or favored by anti-subordination feminists.<sup>195</sup> She held that if the harm of the relevant club was “based on predisposing others to anti-social behavior, a real risk that the conduct will have this effect must be proved” and that this required “proof,” rather than vague generalizations, about “first . . . the sexual conduct at issue and the formation of negative attitudes, and second between those attitudes and the real risk of anti-social behavior.”<sup>196</sup>

There is strong evidence suggesting that in Canada it is not only female justices’ experiences that have changed between the first and fifth female judicial appointments to the Supreme Court; it is also female justices’ approach to hard cases involving anti-subordination feminist goals.

## V. NORMATIVE IMPLICATIONS: HARD CHOICES AHEAD

If there is, in fact, no female-feminist jurisprudential correlation, feminist organizations will face hard choices in the months and years ahead as they decide how to approach the politics of judicial nominations. There are several symbolic reasons for feminists to favor the appointment of female justices, regardless of the justices’ substantive jurisprudential commitments. Female justices, such as Justices O’Connor, Ginsburg, and Sotomayor, are in an important position to send a message to women of different backgrounds about the degree to which governmental power is open to them and designed to serve their interests.<sup>197</sup> In this sense, female justices are no different in importance from other prominent female holders of high national office.

For female attorneys, a female presence on the Supreme Court and other appellate courts will have very real additional benefits when it comes to their own sense of belonging in the profession, as well as to the way in which they are perceived by male attorneys. For many female attorneys and female judges, implicit forms of gender bias in the legal profession remain a major obstacle to their nomination and appointment to appellate courts.<sup>198</sup> Unlike earlier, more explicit biases, these do not take the form of explicit over-generalizations about the inability or inappropriateness of women performing certain roles, such as that of appellate judge. Rather, they represent a subconscious tendency on the part of male and female attorneys, but particularly the former, to make

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194. *Id.* at para. 70.

195. *Id.* at paras. 26–62.

196. [2005] 3 S.C.R. 728 para. 58 (Can.). For the suggestion that the majority’s opinion did mark a clear shift, at least of emphasis, away from the Court’s approach in *Butler*, see *Regina v. Labaye*, [2005] 3 S.C.R. 728 para. 95 (Can.) (Binnie & LeBel, JJ., dissenting).

197. Nussbaum, *supra* note 6.

198. See Dermot Feenan, *Women Judges: Gendering Judging, Justifying Diversity*, 35 J. L. & Soc’y 490 (2008).

connections between male behavior and notions of legal talent and merit and therefore to perpetuate a tendency to view female lawyers as less talented or able than they actually are.<sup>199</sup> Because they often operate on this subconscious level, implicit biases of this kind are difficult to counter. At the same time, behavioral psychologists have shown that implicit biases are also subject to potentially ameliorative situational influences. In an experimental setting, psychologists have shown that exposure to individuals from a stigmatized group can have a substantial capacity to curtail implicit bias.<sup>200</sup> Even more importantly, they have shown that, when placed in a subordinate position to an individual from a stigmatized group, individuals who would otherwise exhibit implicit biases are even less likely to express those biases.<sup>201</sup> In a legal setting, this suggests that if male attorneys appear routinely before female judges sitting either alone or in an apparent position of influence on a panel, male attorneys will gradually begin to show far less gender bias.<sup>202</sup>

Evidence of this effect in a real-world setting is provided by the change wrought in notions of judicial excellence or “suitability” during Justice O’Connor’s time on the Supreme Court. In the late 1970s, for example, when O’Connor was a federal court of appeals judge in Arizona, she received positive but mixed reviews of her performance from male attorneys. While ninety percent of attorneys voted to retain her, nearly twenty percent thought that she had a poor or very poor “judicial temperament and demeanor,” and less than half of those surveyed gave her the highest rating for her “knowledge of the law” and “quality of written opinions.”<sup>203</sup> Around this same time, Judge Mildred Lillie, who in many respects was very similar to O’Connor<sup>204</sup> and

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199. *Id.*

200. See Brian S. Lowery & Curtis D. Hardin, *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCH. 842 (2001). For an illuminating discussion of these findings in a legal context, see also Christine Jolls, *Antidiscrimination Law’s Effects on Implicit Bias*, in N.Y.U. SELECTED ESSAYS ON LABOR AND EMPLOYMENT LAW: BEHAVIORAL ANALYSIS OF WORKPLACE DISCRIMINATION 69 (Mitu Gulati & Michael J. Yelnosky eds., 2007).

201. Jennifer A. Richeson & Nalini Ambady, *Effects of Situational Power on Automatic Racial Prejudice*, 39 J. EXPERIMENTAL SOC. PSYCH. 177 (2003). The explanation for this phenomenon is that if person *A* assumes power over person *B*, it becomes much more costly for *B* to maintain a biased view of *A*’s competence. (If *A* is truly incompetent, she will be extremely unlikely to reward the hard work and talent of *B*, thereby imposing clear costs on *B* at the level of motivation and expected well-being. It therefore makes sense for *B*, at a subconscious level, to upwardly revise his estimate of *A*’s likely competence, in order to avoid these costs.) See also S.T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 AM. PSYCHOLOGIST 621 (1993).

202. See also Erica Rackley, *Difference in the House of Lords*, 15 SOC. LEGAL STUD. 163 (2006) (arguing that any female judge can have a positive feminist effect by disrupting the aesthetic presuppositions of what it means to be a judge).

203. See ARIZONA BAR ASSOCIATION, SANDRA DAY O’CONNOR: 1980 JUDICIAL EVALUATION SURVEY (1980) (special thanks are due to Bill Schwesig and the Arizona Historical Society for providing this information). See also B. Drummond Ayres Jr., *A Reputation for Excelling—Sandra Day O’Connor*, N.Y. TIMES, July 8, 1981, at A1.

204. For the parallel between O’Connor and Lillie in this context, see, for example, *People v. King*, 73 Cal. Rptr. 440 (1968), in which Justice Lillie took an “all things considered approach,” similar in style to that often favored by O’Connor, to determine the validity under the First Amendment of a condition imposed on a Vietnam war-era protester as part of her probation that she not engage in any

whom President Nixon briefly considered for appointment to the Supreme Court, was rated by the American Bar Association, by a vote of 11-1, as "not qualified."<sup>205</sup> By contrast, by the time Justice O'Connor retired from the Court, she had in many ways redefined what it meant to be qualified to sit on the Court. In 2006, it was not only feminists and liberals who sought to emphasize Justice O'Connor as a comparator against which subsequent nominees should be judged;<sup>206</sup> even Republican Senators felt pressured to show how nominees conformed to the standard of judicial merit defined by Justice O'Connor.<sup>207</sup>

Ultimately, however, feminists must also weigh these benefits associated with the mere *presence* of a female justice on the Court against the importance of a justice's substantive approach to issues of central concern to feminists, such as abortion, pay equity, sex discrimination, sexual harassment, and an ongoing dialogue about the meaning of gender equality under the Equal Protection Clause. For gender equality to be realized, it may no longer be necessary for the Supreme Court to play as active a role at a jurisprudential level as it did in earlier decades. Between the Court and Congress, legal changes have been introduced in the United States over the last three decades which have largely eliminated ongoing formal barriers to women's equal opportunity and dignity.<sup>208</sup> Title VII and various state law provisions have also helped counter deeper structural sources of gender-based subordination in many cases. As feminists have long recognized, however, especially in the context of decisions such as *Roe* and *Casey*, it is nonetheless extremely important that these existing constitutional and statutory gains be preserved by new appointees to the Court. As new issues of sex and gender justice come to the forefront, it is also important for many feminists that members of the Court be willing to continue to play a role in countering political inertia in the adoption of new measures designed to achieve greater gender equality.<sup>209</sup>

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other demonstrations; and Interview by Kate Ellis with John Dean (2001), available at <http://americanradioworks.publicradio.org/features/prestapes/johndean.html>, in which Dean discusses the clear parallels in the abilities and qualifications of Justice O'Connor and Judge Lillie.

205. The ABA stated that she lacked relevant federal judicial experience, though such a requirement would have eliminated a large number of prior and sitting Supreme Court justices. See, e.g., Beverly B. Cook, *Women as Supreme Court Candidates: From Florence Allen to Sandra O'Connor*, 65 JUDICATURE 314 (1982).

206. See, e.g., Adam Liptak, *O'Connor Casts a Long Shadow on the Nominee*, N.Y. TIMES, Jan. 12, 2006, at A1 (noting questions by Sen. Charles E. Schumer (D-NY) to this effect).

207. *Id.* (noting statements by Sen. John Cornyn (R-TX) that "Justice O'Connor and Judge Sam Alito both set limits on Congress's commerce power . . . both struck down affirmative action policies that had strict numerical quotas [and] both . . . criticized *Roe v. Wade*.").

208. For one notable exception to this, see *Nguyen v. INS*, 533 U.S. 53 (2001).

209. See, e.g., *Town of Castle Rock v. Gonzales*, 366 F.3d 1093, 1103 (2004). For a discussion of the Supreme Court's role in these areas, see, for example, Guido Calabresi, *Foreword: The Supreme Court 1990 Term: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 104 (1991); Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947 (2008); and William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: The Supreme Court 1993 Term: Law as Equilibrium*, 108 HARV. L. REV. 27, 88-91 (1994).



In a world in which implicit gender bias persists, it will be more difficult, all else being equal, for the President to succeed in nominating and confirming strongly pro-feminist female rather than male judges. Consider the recent confirmation battle following the nomination of Justice Sotomayor. A number of concerns were raised during this process which revealed a striking double-standard between the assessment of male and female judicial nominees. One concern was that Justice Sotomayor might be (at least somewhat more) difficult to confirm because she was thought, by some, to be “a bully on the bench” or to have a “blunt and testy” side.<sup>210</sup> Another was that her writing was pedestrian and technocratic.<sup>211</sup> While both criticisms may or may not have been fair, those who made them blatantly ignored the extent to which, even if true, they failed to distinguish Justice Sotomayor from many prior male justices. As Noah Feldman notes, it has been the norm and not the exception among male justices to be “irascible, socially distant, personally isolated, arrogant or even downright mean.”<sup>212</sup> An uninspired writing style is also a fairly natural consequence of having had a large, routine case-load as a federal appellate judge, but no male justice has in recent memory been criticized on these grounds. On the contrary, in the confirmation hearings of Justice Breyer, in 1994, it was the hearings themselves and not the justice’s writing style, which the press labeled “dull.”<sup>213</sup>

Perhaps even more troubling, implicit gender bias may persist even within the workings of the Supreme Court itself.<sup>214</sup> If this is so, as Justice Ginsburg has recently pointed out, a male justice who makes an argument similar to one espoused by a female justice may be more likely to be heard and taken seriously by the other justices, especially on questions where, if pro-feminist, a female justice is more likely than equivalent male justices to be perceived by as “biased.”<sup>215</sup> If feminists continue to urge President Obama to restrict his focus to female rather than male judicial candidates, they may end up supporting a female justice who is far less willing—or able—than the next best confirmable male justice to advance feminist jurisprudential aims.

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210. See SONIA SOTOMAYOR, ALMANAC OF THE FEDERAL JUDICIARY 2009; Jo Becker and Adam Liptak, *Assertive Style Raises Questions on Demeanor*, N.Y. TIMES, May 29, 2009, at A14; Jeffrey Rosen, *The Case Against Sotomayor*, NEW REPUBLIC, May 4, 2009, <http://www.tnr.com/article/politics/the-case-against-sotomayor>. But see Daphne Eviatar, *How Sotomayor’s Incisive Questioning on Executive Power Became Sotomayor’s “Blunt and Testy” Style*, WASH. INDEP., June 17, 2009, <http://washingtonindependent.com/47661/how-sotomayors-incisive-questioning-on-executive-power-became-sotomayors-blunt-and-testy-style>.

211. Rosen, *supra* note 212.

212. Noah Feldman, Op-Ed., *When Arrogance Takes the Bench*, N.Y. TIMES, June 10, 2009, at A31.

213. See Linda Greenhouse, *The Nation: Why Breyer’s Hearing Was Meant To Be Dull*, N.Y. TIMES, July 17, 1994, at A4.

214. See Joan Biskupic, *Ginsburg: The Court Needs Another Woman*, USA TODAY, May 5, 2009, at A1.

215. *Id.*

A further danger feminists face if they continue to pursue their current strategy is that a future President may consciously seek to exploit this strategy in order to appoint an actively *anti-feminist* female judge. Provided that such a President could find a strong female judicial candidate about whom little was known, he or she could count on nominating such a judge without facing any truly effective feminist opposition.<sup>216</sup> By then, feminists would have argued so many times for the appointment of a female justice to the Court that it would be too late for them to reverse course and remain credible to the broader public.

Given this, it is increasingly important that feminists should reconsider the priority they give to symbolic concerns on the one hand and substantive gender justice on the other. The hope is that they will never actually be asked to choose between the two. But if such a circumstance arises, it may well be that they should choose the feminist who is male.

At the very least, if feminists carefully examine the historical experience in the United States, parallel experience in Canada, and existing studies of judicial behavior in this area, they should be very wary of counting on the fact that, because a Supreme Court candidate is female, as a justice she will be ideologically sympathetic to pro-feminist views.

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216. The mistake President Bush made, if this is in fact the strategy he was pursuing in nominating Harriet Miers, is that her legal credentials were not sufficiently strong overall. See, e.g., Sheryl Gay Stolberg, *Bush Works to Reassure G.O.P. Over Nominee for Supreme Court*, N.Y. TIMES, Oct. 9, 2005, at A1 (quoting then-Senate Judiciary Committee Chairman Arlen Specter (R-PA) as saying that Miers needed a "crash course in Constitutional Law"); Randy E. Barnett, Op-Ed., *Cronyism: Alexander Hamilton Wouldn't Approve of Justice Harriet Miers*, WALL ST. J., Oct. 4, 2005, at A26 (arguing that while Miers, as White House Legal Counsel, must be an able lawyer, nothing in her background has prepared her for the "constitutional minefield" that a Supreme Court justice must navigate).