CHOOSING JUDGES: A BUMPY ROAD TO WOMEN'S EQUALITY AND A LONG WAY TO GO

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Why do so few women serve as judges? Why has the torrent of women's entry into the legal profession not produced a pipeline to power for women in the judicial branch of government? What will it take to move women from minority to parity? Answering these questions provides an excellent vehicle for exploring concepts in gender theory such as the myth that women have already achieved equality or are making great progress, the qualified labor pool, disparate impact, the pipeline, the pyramid, tokenism, backlash, and the difference women make—all of which are important to understand the underrepresentation of women more generally. Judgeships, like executive offices, may be more difficult for women to attain, as voters may be more comfortable including a woman in legislative deliberations of a group rather than making her commander-in-chief. The exercise of judicial power is enmeshed in powerful cultural norms of masculinity. It is no accident that women's exclusion from juries was one of the last sex-based classifications the U.S. Supreme Court declared to be unconstitutional.

In the summers of 2009 and 2010, the nominations and confirmations of U.S. Supreme Court Justices Sonia Sotomayor and Elena Kagan rekindled public discussion about the gender and ethnic identities of judges and senators. In their opening statements at Sotomayor's confirmation hearings, for example, senators burst with pride about a great country where anyone can achieve anything, regardless of gender, class, ethnicity, or national origin, while some equated empathy with prejudice and difference with par-

tiality.[1] Despite the vitriol opposition directed at Sotomayor, the Senate confirmed her by a vote of 68-31 and Kagan by a vote of 63-37.[2] In the end, both hearings squelched rather than explored the questions of what feminist legal theorist Martha Minow has so aptly named "the dilemma of difference"—how women can be both equal to and different from men[3]—and the nature of judging—how one's social location and life experiences inevitably shape judgment.[4] The dullness of the Sotomayor hearings stood in sharp contrast to the euphoria in the Latino community, where many sported the latest fashion: t-shirts emblazoned with "Wise Latina Woman," which dispelled any doubt about the symbolic importance of such appointments.[5]

INTRODUCTION: KEY CONCEPTS

Progress toward women's equality is not quick, steady, or irreversible, and the bumpy road to women's equality in the judiciary is no exception. It took the women's movement seventy-two years to win the vote for women after the Women's Rights Convention in Seneca Falls in 1848 first placed

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1. The Women's Media Center drew the parallel between how opponents and media critics treated Hillary Clinton during her presidential campaign and the campaign against Judge Sotomayor. *See Media Justice for Sotomayor*, WOMEN'S MEDIA CENTER (July 10, 2009), http://www.womensmediacenter.com/blog/entry/media-justice-for-sotomayor; *see also Campaign Update: Sexism Sells but We're Not Buying It*, WOMEN'S MEDIA CENTER (July 25, 2008), http://www.womensmediacenter.com/blog/2008/05/sexism-might-sell-but-were-not-buying-it (highlighting the media's treatment of Hillary); Susan J. Carroll, *Reflections on Gender and Hillary Clinton's Presidential Campaign: The Good, the Bad, and the Misogynic*, 5 POL. & GENDER 1 (2009); Nancy Burns, *Comparison and Intersection*, 5 POL. & GENDER 69 (2009); Jennifer L. Lawless, *Sexism and Gender Bias in Election 2008: A More Complex Path for Women in Politics*, 5 POL. & GENDER 70 (2009); Leonie Huddy & Tony E. Carey, *Group Politics Redux: Race and Gender in the 2008 Democratic Presidential Primaries*, 5 POL. & GENDER 81 (2009); Ange-Marie Hancock, *An Untraditional Intersectional Analysis of the 2008 Election*, 5 POL. & GENDER 96 (2009); Jane Junn, *Making Room for Women of Color: Race and Gender Categories in the 2008 U.S. Presidential Election*, 5 POL. & GENDER 105 (2009).

2. Stuart Taylor Jr., *Kagan's Hearings Are All About the Midterms*, NEWSWEEK (June 30, 2010), http://www.newsweek.com/2010/06/30/kagan-hearings-are-all-about-the-midterms.html; Carl Hulse, *Senate Confirms Kagan in Partisan Vote*, N.Y. TIMES (Aug. 5, 2010), http://www.nytimes.com/2010/08/06/us/politics/06kagan.html?_r=0.

3. Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 10-95 (1987).

4. Nancy Maveety, *Difference in Judicial Discourse*, 6 POL. & GENDER 452, 457 (2010).

5. Mireya Navarro, *Sotomayor Fans Claim the Phrase "Wise Latina,"* N.Y. TIMES (Aug. 7, 2009), http://www.nytimes.com/2009/08/09/fashion/09latina.html?_r=0.

that demand on the public agenda.[6] Although Iowa's Attorney General ruled that her sex was not an obstacle to the Iowa Bar Association admitting Belle Babb Mansfield in 1869,[7] most courts worldwide interpreted laws and regulations on membership of the legal profession as excluding women.[8] Women were neither persons nor sufficiently autonomous from husbands to practice law, the courts opined,[9] and women had to petition their legislatures for admission state by state and province by province.[10] Florence Allen won election to the Common Pleas Court of Ohio in 1920 and was the first woman to serve on a general jurisdiction court in the United States.[11] In 1922, she won election to the Ohio Supreme Court (the first woman on any state supreme court), and in 1934, President Roosevelt appointed her to the U.S. Court of Appeals for the Sixth Circuit, where she served until 1959.[12] She was the first woman whom presidents could credibly consider for Supreme Court vacancies, and women campaigned hard each of the twelve

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6. Elizabeth Cady Stanton, Seneca Falls Keynote Address (July 19, 1948), *available at* http://www.greatamericandocuments.com/speeches/stanton-seneca-falls.html; U.S. CONST. amend. XIX.

7. KAREN BERGER MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT 11 (1986); *see also* Cheryl Mullenbach, *The Election of Julia Addington: An Accidental Milestone in Iowa Politics*, IOWA HERITAGE ILLUSTRATED, Fall 2007, at 112, *available at* http://www.las.iastate.edu/cattcenter/wp-content/uploads/Julia_Addington.pdf.

8. *He* heretofore had always been inclusive for purposes of criminal law or taxation, LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 81-123 (1998) (discussing taxation and the right to vote), most notoriously in the U.S. Supreme Court's decision in *Bradwell v. State*, 83 U.S. 130, 140-41 (1872).

9. ALBIE SACHS & JOAN HOFF WILSON, SEXISM AND THE LAW: A STUDY OF MALE BELIEFS AND LEGAL BIAS IN BRITAIN AND THE UNITED STATES 137-38 (1978).

10. *See* MARY JANE MOSSMAN, THE FIRST WOMEN LAWYERS: A COMPARATIVE STUDY OF GENDER, LAW AND THE LEGAL PROFESSIONS 24 (2006).

11. *See* FLORENCE ELLINWOOD ALLEN, TO DO JUSTLY 63-64 (1965); Larry Berkson, *Women on the Bench: A Brief History*, 65 JUDICATURE 286, 291 (1982); Beverly Blair Cook, *Florence Ellinwood Allen*, *in* NOTABLE AMERICAN WOMEN: THE MODERN PERIOD—A BIOGRAPHICAL DICTIONARY 11, 11-13 (Barbara Sicherman et al. eds., 1980) [hereinafter Cook, *Florence Ellinwood Allen*]; Beverly B. Cook, *Women as Supreme Court Candidates: From Florence Allen to Sandra O'Connor*, 65 JUDICATURE 314, 319 (1982) [hereinafter Cook, *Supreme Court Candidates*]; Sally J. Kenney, *"It Would Be Stupendous for Us Girls": Campaigning for Women Judges Without Waiving*, *in* BREAKING THE WAVE: WOMEN, THEIR ORGANIZATIONS, AND FEMINISM, 1945-1985, at 209, 211-12 (Kathleen A. Laughlin & Jacqueline Castledine eds., 2011); JOAN ELLEN ORGAN, SEXUALITY AS A CATEGORY OF HISTORICAL ANALYSIS: A STUDY OF JUDGE FLORENCE E. ALLEN, 1884-1996, at 2-3 (1998); JEANETTE E. TUVE, FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN 56 (1984). For a list of all notable judicial firsts, see MART MARTIN, THE ALMANAC OF WOMEN AND MINORITIES IN AMERICAN POLITICS 115-17 (1999).

12. Kenney, *supra* note 11, at 211-12.

times a seat became open before she retired.[13] Her sexual orientation may have been a contributing factor to presidents overlooking her.

Not until 1981 did President Reagan appoint Justice Sandra Day O'Connor as the first woman to serve on the U.S. Supreme Court. Because women have increased their numbers among law school graduates during the last thirty years and because women have made substantial inroads into the legal profession, we tend to think that the number of women judges is going steadily upward, but that is not the case. President Clinton appointed the largest number of women to date and the largest percentage of women to the bench of any president, 28%.[14] But progress has not been steady. Following President Clinton, only slightly more than 22% of the judges President George W. Bush appointed were women.[15] South Dakota was the last state to appoint its first woman to its supreme court in 2002, but three states that had women serving on their state supreme courts went back to all-male: Indiana, Idaho, and Iowa.[16] In fact, at least forty-eight states have reversed their progress, each going from one woman on its supreme court (like Indiana, Idaho, and Iowa) to none, or from a majority of women to a minority (such as Minnesota), or not replacing a woman who leaves with another woman.[17] "[W]omen make up . . . 22% of all federal judgeships and 26% of all state-level positions."[18] Only eight states have achieved a 33% threshold or more, but in fourteen states, women fill less than 20% of the positions.[19] We cannot take women's steady progress for granted, nor assume it is irreversible.

A number of important concepts from employment discrimination can help us think about women's progress on the bench, such as the qualified labor pool. An important part of the analysis of a claim of sex discrimination is to compare the composition of the qualified labor pool to the num-

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13. Cook, *Supreme Court Candidates*, *supra* note 11, at 323-24.

14. Elaine Martin, *Gender and Presidential Judicial Selection*, 26 WOMEN & POL., no. 3-4, 2004 at 109, 117-18.

15. Jennifer Segal Diascro & Rorie Spill Solberg. *George W. Bush's Legacy on the Federal Bench: Policy in the Face of Diversity*, 92 JUDICATURE 289, 291 (2009).

16. Sally J. Kenney & Jason Windett, *Diffusion of Innovation or State Political Culture? Explaining the First Women State Supreme Court Justices* 2 (2012), *available at* http://2012sppconference.blogs.rice.edu/files/2012/02/Kenney_Windett_SPPC_Draft.pdf. Loretta Rush took her seat as the second woman on the Indiana Supreme Court in September of 2012. *First Woman Named to Indiana Supreme Court since 1999*, WTHR.COM (Sep. 14 2012, 10:29 AM), http://www.wthr.com/story/19543665/daniels-set-to-name-new-ind-supreme-court-justice.

17. SALLY J. KENNEY, GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER 147 (2013).

18. CTR. FOR WOMEN IN GOV'T & CIVIL SOC'Y, WOMEN IN FEDERAL AND STATE-LEVEL JUDGESHIPS (2010), *available at* www.albany.edu/womeningov/judgeships_report_final_web.pdf.

19. *Id.*

bers of women employers hire.[20] If women make up 50% of law school graduates, but only 10% of the lawyers law firms hire are women, we suspect something about the selection procedures or criteria works to women's disadvantage. The onus is thus on the employer to show the relevance of its selection criteria and that its hiring process is free of bias. The same analysis applies to women judges. If the process for choosing judges was fair and did not discriminate against women, we would expect the proportion of women judges to be close to the proportion of women lawyers with the required number of years of practice. When political scientist Beverly Blair Cook first investigated, however, she found that between 1920 and 1970, states varied as to whether 1% or 5% of lawyers were women and 1% to 10% of trial court judges were women.[21] By 1984, as the number of women lawyers grew, a wider gap emerged.[22] This left Cook to reject the "trickle up hypothesis," which was that women would ascend to the bench proportionate to their numbers in the legal profession with the passage of time.[23] Cook found a 50% disparity between the numbers of women judges we might expect based on the number of women lawyers.[24] If women were 10% of the lawyers in a state, about 5% of judges would be women.[25] Scholars continued to investigate the relationship between the proportion of women lawyers and the proportion of women judges and found little relationship between the two.[26] Nor did the number of women trial judges predict the number of women appellate judges.[27] To conclude, we cannot explain women's

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20. SALLY J. KENNEY, FOR WHOSE PROTECTION? REPRODUCTIVE HAZARDS AND EXCLUSIONARY POLICIES IN THE UNITED STATES AND BRITAIN 67 (1992).

21. Beverly Blair Cook, *Women Judges: The End of Tokenism*, *in* WOMEN IN THE COURTS 84, 84-105 (Winifred L. Hepperle & Laura Crites eds., 1978).

22. Beverly Blair Cook, *Women Judges: A Preface to Their History*, 14 GOLDEN GATE U. L. REV. 573, 576 n.7 (1984).

23. *Id.* at 574-75.

24. *See id.* at 576 n.7.

25. Beverly B. Cook, *Women on the State Bench: Correlates of Access*, *in* POLITICAL WOMEN: CURRENT ROLES IN STATE AND LOCAL GOVERNMENT 191, 199 (Janet A. Flammang ed., 1984).

26. *See, e.g.*, Nicholas O. Alozie, *Selection Methods and the Recruitment of Women to State Courts of Last Resort*, 77 SOC. SCI. Q. 110, 122 (1996); Rorie L. Spill & Kathleen A. Bratton, *Clinton and Diversification of the Federal Judiciary*, 84 JUDICATURE 256, 256-57 (2001); Mark S. Hurwitz & Drew Noble Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*, 3 ST. POL. & POL'Y Q. 329, 342 (2003); Martin, *supra* note 14, at 113; Elaine Martin & Barry Pyle, *Gender and Racial Diversification of State Supreme Courts*, 24 WOMEN & POL., no. 2, 2002 at 35, 39; MALIA REDDICK, MICHAEL J. NELSON & RACHEL PAINE CAUFIELD, EXAMINING DIVERSITY ON STATE COURTS: HOW DOES THE JUDICIAL SELECTION ENVIRONMENT ADVANCE—AND INHIBIT—JUDICIAL DIVERSITY? 6 (2009), *available at* http://www.judicialselection.us/uploads/documents/Examining_Diversity_on_State_Courts_2CA4D9DF458DD.pdf.

27. *See* Spill & Bratton, *supra* note 26, at 257; Margaret Williams, *Women's Representation on State Trial and Appellate Courts*, 88 SOC. SCI. Q. 1192, 1200 (2007).

underrepresentation on courts simply as a result of the absence of women in the qualified labor pool, nor can we assume that the numbers of women judges will grow naturally or inevitably as the number of women lawyers grows. Moreover, the huge variation among states in how long it took after the admission of women to the state bar for a state to appoint its first woman to the state supreme court,[28] as well as the large differences among states as to when they named their first woman supreme court justice,[29] suggest that something other than simply the number of women lawyers is at work.

Employment discrimination analysis uses two categories, disparate impact and disparate treatment. Using different standards for choosing men and women judges, what we call a double standard, constitutes disparate treatment discrimination—the most blatant form of discrimination other than excluding women from consideration altogether. Political scientist Elaine Martin documented how the American Bar Association's (ABA) Committee on the Federal Judiciary, which rates nominees, employed a double standard, rating women but not men lower if they had not been judges.[30] Disparate impact discrimination occurs when employers use a facially neutral requirement or condition—for example, that one must have had previous judicial experience—as a criterion.[31] Employers can justify using such a criterion, once it is shown to have a disparate impact on women, if it is a business necessity for the job.[32] The ABA, for example, rated women low for the failure to have worked for a large firm, an accomplishment nearly impossible for women to have met because large firms openly refused to hire women attorneys until recently.[33] When Sandra Day O'Connor and Ruth Bader Ginsburg were recent law school graduates, law firms told them explicitly that they would not hire women.[34] When President Reagan nominated Justice O'Connor, critics argued she was not qualified because she had not worked for a large firm; when President Bush nominated Harriet Miers, who had been a managing partner for her law firm, critics claimed

28. Cook, *supra* note 22, at 597-99.

29. *Id.* at 599-600.

30. *See* Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 138-39 (1987) [hereinafter Martin, *Gender and Judicial Selection*]; Elaine Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 306, 309 (1982) [hereinafter Martin, *Women on the Federal Bench*].

31. KENNEY, *supra* note 20, at 148-51.

32. *Id.*

33. Martin, *Gender and Judicial Selection*, *supra* note 30, at 138-39; Martin, *Women on the Federal Bench*, *supra* note 30, at 309; KENNEY, *supra* note 17, at 78-79.

34. Not until 1984, twenty years after Congress passed the Civil Rights Act of 1964 outlawing sex discrimination in employment, did the Supreme Court declare that the Act covered law firms in *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

she was unqualified because she had not served as a judge.[35] Opponents of Elena Kagan made similar arguments.[36] The most important qualification for judicial office always seems to shift to something women achieve at lower rates than men, and selectors also apply a double standard to women.

Using the selection criterion of being known to judges or selectors constitutes disparate impact. The old adage is a judge is a lawyer who knows a senator. Women were not just excluded from the large law firms, but all spheres of influence in the legal profession, making it harder for them to be known to people of importance. Elaine Martin's survey of the women President Carter appointed to the federal bench revealed that they believed that under the previous system, to be considered for a judgeship, one had to be known by senior judges. Her survey found that 43% of the women felt that they would not have been considered under the previous system because they lacked the political influence and credentials.[37] By de-emphasizing political connections, Carter's judicial nominating commissions let the women candidates' stronger academic credentials emerge.[38] Moreover, Martin discovered that circuit nominating commissions imposed a standard of judicial experience on women but not men candidates because they doubted women's abilities despite other credentials.[39]

What constitutes merit in judicial candidates—academic excellence, or knowing a senator? Martin found Presidents Carter and Reagan held men and women nominees to different standards.[40] President Carter required women but not men to have prior judicial experience and women to have a demonstrable commitment to equal justice under law.[41] President Reagan required women but not men to have prosecutorial experience and party political experience.[42] Debating the qualifications of one nominee at a time can conceal the operation of a gendered double standard.

The concept of the pipeline refers to the path lawyers follow to be judges, and that path varies between state and federal office, among judges,

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35. Tom Curry, *For Court Clout, No Judicial Experience Needed*, NBCNEWS.COM (May 12, 2010, 10:20 AM), http://www.nbcnews.com/id/37072697/ns/politics-supreme_court/t/court-clout-no-judicial-experience-needed/#.UWBdmVcd_gk.

36. *See* Jeffrey Rosen, *The Case Against Sotomayor*, NEW REPUBLIC (May 4, 2009, 12:00 AM), http://www.tnr.com/article/politics/the-case-against-sotomayor?id=45d56e6f-f497-4b19-9c63-04e10199a085. NPR reporter Nina Totenberg once again cut through the gender double standard about judicial experience. Nina Totenberg, *Should Kagan's Lack of Judicial Experience Matter?*, NAT'L PUB. RADIO (May 12, 2010), http://www.npr.org/templates/story/story.php?storyId=126764692.

37. Martin, *Women on the Federal Bench*, *supra* note 30, at 308.

38. *Id.* at 312.

39. *See id.*

40. *See* Martin, *Gender and Judicial Selection*, *supra* note 30, at 139-40.

41. *See id.*

42. *See id.* at 140.

and over time.[43] When President Obama nominated Elena Kagan (who had no previous judicial experience), for the first time in history all nine of the current sitting U.S. Supreme Court Justices had served as federal appeals court judges.[44] U.S. Supreme Court Justices generally graduate from elite law schools (usually the Ivy League), serve as editors-in-chief of their law reviews, clerk for federal judges (preferably U.S. Supreme Court justices), have some experience working for large elite law firms, work in the U.S. Attorney's Office or for the Justice Department, and serve on a federal district and then a federal appeals court. Employment discrimination offers helpful concepts for interrogating whether the pipeline is discriminatory. If we adopt the requirement that all U.S. Supreme Court nominees must have previously served on a federal court of appeals, that requirement has a disparate impact on women and will ensure few women are in the pool. We should challenge the assumption that working in a large firm on commercial law is necessarily a sign of greater merit than serving as a public defender, public interest lawyer, or family law specialist. Requiring litigation experience might make sense for trial court judges, but should we not consider legal academics, legislators, and governors for the appellate courts?

The final relevant concept is the concept of the pyramid. Women's groups operate on the implicit assumption that if we get women into lower judicial offices they will necessarily trickle up into higher judicial offices. An examination of the numbers from the qualified labor pool, however, reveals that no such necessary relationship exists. Martin's evidence suggests that the pipeline may be different for men and women.[45] Men may pursue a lucrative private practice and then leapfrog into a state supreme court or a lower federal court position, but women do not seem to be able to do so as easily. Moreover, women may find it more difficult than men to be promoted from lower courts. Critics argued that Justice O'Connor's service on the Arizona courts did not constitute a sufficiently meritorious background worthy of an appointment on the U.S. Supreme Court. We have learned from feminist labor historians that when women start to gain the credentials for a particular position, the requirements tend to change. Experience with the double standard and a gendered pipeline leads us to be wary of thinking if we simply get women into the feeder positions, they will automatically ascend to high judicial office.

Two other concepts from feminist theory are relevant to our discussion: tokenism and backlash. In her canonical work, *Men and Women of the*

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43. Margaret S. Williams, *In a Different Path: The Process of Becoming a Judge for Women and Men*, 90 JUDICATURE 104, 104-13 (2006) (discussing the various ways in which judges in Texas have risen to that position).

44. Totenberg, *supra* note 36.

45. *See generally* Martin, *Women on the Federal Bench*, *supra* note 30; Martin, *Gender and Judicial Selection*, *supra* note 30.

Corporation, Rosabeth Moss Kanter described how a corporation would hire one woman for a position to show that the enterprise was not closed to women altogether, but that the woman would be isolated, be seen as the representative of her group rather than an individual, and always be marked as "other."[46] Only when they reach a certain size do courts seem to have room for a token woman.[47] As early as 1978, however, Cook found that as a solitary token woman moved up the hierarchy, she would not necessarily be replaced by another woman.[48] The recent evidence of both Justice Sandra Day O'Connor and Chief Judge Judith Kaye of New York[49] being replaced by men suggests no fixed women's seats exist. Rorie L. Spill's and Kathleen A. Bratton's research showed that President Clinton was likely to replace African American judges with other African Americans, but he only replaced one of the five women who left the bench with another woman.[50] Criminology, Law, and Society professors Jon Gould and Linda Merola conducted research for the Lawyers' Committee for Civil Rights Under Law and found that judges who were "first" (minority or woman) to hold a seat felt less confident about winning; they also documented how important it is to break the run of all white male office-holders.[51] If the ceiling consists of merely one woman no matter the size of the pool, the evidence also undermines the argument that the number of women in the pool drives the number of women serving. Bratton and Spill found it was more likely that a governor would choose a woman for the state supreme court if the court had

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46. ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 206-07 (1977).

47. *See* Beverly Blair Cook, *Political Culture and Selection of Women Judges in Trial Courts*, *in* WOMEN IN LOCAL POLITICS 42 (Debra W. Stewart ed., 1980) [hereinafter Cook, *Political Culture*]; Beverly Blair Cook, *Women Judges in the Opportunity Structure*, *in* WOMEN, THE COURTS, AND EQUALITY 143, 149-52, 170-71 (Laura L. Crites & Winifred L. Hepperle eds., 1987) [hereinafter Cook, *Women Judges*]; Alozie, *supra* note 26; Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504 (2002); Cook, *supra* note 22; Hurwitz & Lanier, *supra* note 26, at 340-42; Rorie L. Spill Solberg & Kathleen A. Bratton, *Diversifying the Federal Bench: Presidential Patterns*, 26 JUST. SYS. J. 119 (2005).

48. *See* Cook, *supra* note 21, at 95-97 (discussing the structure of female representation in the courts).

49. Judge Judith Kaye was the Chief Judge of the state of New York and the first woman to hold that position. When she retired in 2008, the nominating commission sent the Governor a list of seven men's names. The Governor chose one from the list, as state law required. John Eligon, *Paterson Picks Chief Judge Nominee*, N.Y. TIMES (Jan. 13, 2009), http://www.nytimes.com/2009/01/14/nyregion/14judge.html?_r=0#.

50. Spill & Bratton, *supra* note 26, at 258.

51. CTR. FOR JUSTICE, LAW & SOC'Y, IMPROVING DIVERSITY ON THE STATE COURTS: A REPORT FROM THE BENCH 31 (2009), *available at* http://www.justiceatstake.org/media/cms/DiversityReport2009_4F739E0E55910.pdf.

no women members.[52] Their research suggests that selectors wanted at least token representation, and the credit and attention for appointing a "first."[53] But their research bodes ill for women's prospects of increasing their representation on courts if selectors are less likely to pick women for positions when a woman already sits on that court, that is to say, if the ceiling for women is one position.

The idea of the token is that only one spot exists for a marginalized category. The idea of backlash is that resistance increases and is qualitatively different as more women progress.[54] Kanter hypothesized that once women moved from token to minority, and then towards parity, resistance would soften.[55] Some evidence suggests, however, that resistance to women may harden precisely because they are progressing.[56] A token woman does not threaten the coding of a job—judge, or law professor—as male; instead, the token woman is exceptional, the honorary male. But as more women enter a profession, rather than the job being coded as neither exclusively male nor female, the job may tip to the other category[57] with deleterious consequences for pay and status, as in the example of women doctors in the former Soviet Union. Men in a job category may defend the male prerogative more fiercely as women gain in numbers and power. Admittedly, it is hard to disentangle resistance to women that is plain old sexism and misogyny from resistance expressly to women's progress. But we do have some evidence to support the backlash hypothesis. For example, voters removed from office Rose Bird, the first woman on the California Supreme Court and also its Chief Justice.[58] Explaining her demise merely as a result of the antipathy agribusiness had for her as a result of her stint as Secretary of Agriculture or as a result of her opposition to the death penalty fails to fully account for the hostility of her colleagues and the legal profession and her electoral vulnerability. Only by adding gender and perhaps backlash to the equation can we understand what happened.[59] Similarly, it appears that women may face

52. Bratton & Spill, *supra* note 47, at 514-15.

53. *See id.* at 515.

54. *See* SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN, at xix (1991); Mary Hawkesworth, *Analyzing Backlash: Feminist Standpoint Theory as Analytical Tool*, 22 WOMEN'S STUD. INT'L F. 135, 136 (1999); Sally J. Kenney, *New Research on Gendered Political Institutions*, 49 POL. RES. Q. 445, 448-49 (1996); Jane Mansbridge & Shauna L. Shames, *Toward a Theory of Backlash: Dynamic Resistance and the Central Role of Power*, 4 POL. & GENDER 623, 623-26 (2008).

55. KANTER, *supra* note 46, at 206-42.

56. *See, e.g.*, Patricia MacCorquodale & Gary Jensen, *Women in the Law: Partners or Tokens?*, 7 GENDER & SOC'Y 582, 583 (1993); Janice D. Yoder, *Rethinking Tokenism: Looking Beyond Numbers*, 5 GENDER & SOC'Y 178, 180-81 (1991).

57. *See* KENNEY, *supra* note 20.

58. *See* KENNEY, *supra* note 17, at 154-60.

59. *See id.*; BETTY MEDSGER, FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE ROSE BIRD AND THE COURTS (1983).

more motions to recuse themselves as their numbers increase.[60] In addition, at times, it has taken longer for women to win Senate confirmation than men, regardless of ideology or qualifications. In Australia and Canada, legal scholars are beginning to explore the backlash hypothesis and construct clearer empirical tests to support the claim.[61]

Rosemary Hunter's analysis of women judges in Australia shows that behind the recent numbers of women appointments "lurks an undercurrent of hostility toward women judges, which shows no sign of abating in the near future."[62] According to Hunter, women judges experience what Rosabeth Moss Kanter called heightened attention: their colleagues and the media dispute their qualifications and show open hostility to them.[63] She notes that women judges' colleagues "hold them in contempt simply for being women."[64] The assumption is that men are the natural occupants of such positions, that women obtain them through political maneuvering, not merit, and that enough women have been appointed.[65] Moreover, evidence from Canada suggests that women judges are far more likely than men to have their objectivity challenged and gender-based conflicts of interest asserted.[66] Litigants seem to miss the irony that if the gender of the woman judge poses a conflict in a rape or employment discrimination case, the same goes for the gender of a male judge.

I. HOW JUDGES ARE SELECTED: A NON-MERIT SYSTEM THAT FAVORS MEN

Appointments to the federal bench have always been party patronage positions, even as senators or presidents occasionally recommended judges from another party.[67] As a formal matter, the President recommends candidates to the U.S. Senate, which must confirm them by a simple majority vote. Traditionally, the President deferred to senators of his own party from

60. Constance Baker Motley, *Reflections*, 102 COLUM. L. REV. 1449, 1450 (2002).

61. *See, e.g.*, Reg Graycar, *Claire L'Heureux-Dubé: Reflections from Down Under*, *in* ADDING FEMINISM TO LAW: THE CONTRIBUTIONS OF JUSTICE CLAIRE L'HEUREUX-DUBÉ 81 (Elizabeth Sheehy ed., 2004); Rosemary Hunter, *The High Price of Success: The Backlash Against Women Judges in Australia*, *in* CALLING FOR CHANGE: WOMEN, LAW, AND THE LEGAL PROFESSION 281 (Elizabeth Sheehy & Sheila McIntyre eds., 2006); MARGARET THORNTON, DISSONANCE AND DISTRUST: WOMEN IN THE LEGAL PROFESSION (1996).

62. Hunter, *supra* note 61, at 281.

63. *See id.* at 282-83.

64. *Id.* at 295.

65. *See id.* at 284-88.

66. Constance Backhouse, *The Chilly Climate for Women Judges: Reflections on the Backlash from the* Ewanchuk *Case*, 15 CAN. J. WOMEN & L. 167, 168 (2003); Maryka Omatsu, *The Fiction of Judicial Impartiality*, 9 CAN. J. WOMEN & L. 1, 1-2 (1997).

67. SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 9-14 (1997).

the home state for district court judges, relied upon them heavily for circuit court appointments, and consulted key senators as a whole on appointments to the U.S. Supreme Court. Senators from the state of the vacancy of either party, however, may in effect veto an appointment or subject committee hearings to delay by not returning their "blue slip"[68] on the nominee; although more recently, not all Senate Judiciary chairs have deferred.[69] The chair of the Senate Judiciary Committee may delay or refuse to hold a hearing, and the Senate Majority Leader may refuse to schedule a floor vote (usually a voice vote but occasionally a roll call vote). More recently, senators have threatened the filibuster to prevent confirmation. Thus, senators have many ways of delaying or opposing judicial nominees while avoiding the public accountability of a roll call vote.[70] Senators have been known to block nominees for personal grudges as well as ideological and partisan differences, most recently in Pennsylvania.[71]

Since 1953, presidents have called upon the ABA's Standing Committee on the Federal Judiciary to rate nominees before their public nomination as a regular part of the process.[72] The Justice Department referred their files

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68. Once the President makes a nomination, the chair of the Senate Judiciary Committee sends out blue slips to the two senators from the nominee's home state. *Id.* If either senator returns the slip with the mark "objection," traditionally no hearing on the nomination is scheduled. *Id.* If both senators return the slip marked "no objection," the subcommittee and then full committee proceed to hearings. *Id.* Senators who object to a choice may simply fail to return the blue slip altogether, delaying the process without having to take responsibility for opposing the nomination. *Id.*

69. 1979 Senate Judiciary Committee Chair Edward Kennedy shared Carter's commitment to a diverse and representative bench and relaxed the policy, announcing that failure to return a blue slip would no longer automatically stall a hearing on a nominee, making it easier for Carter's nominees to be confirmed. *See id.* at 12 n.j; Richard L. Pacelle, Jr., *A President's Legacy: Gender and Appointment to the Federal Courts*, *in* THE OTHER ELITES: WOMEN, POLITICS, AND POWER IN THE EXECUTIVE BRANCH 147-66 (MaryAnne Borrelli & Janet M. Martin eds., 1997); Elliot E. Slotnick, *The Changing Role of the Senate Judiciary Committee in Judicial Selection*, 62 JUDICATURE 502, 503-06 (1979).

70. Stephen B. Burbank, *Politics, Privilege, and Power: The Senate's Role in the Appointment of Federal Judges*, 86 JUDICATURE 24, 26-27 (2002); Hendrik Hertzberg, *Filibluster*, NEW YORKER (June 13, 2005), at 63; Nancy Scherer, *The Judicial Confirmation Process: Mobilizing Elites, Mobilizing Masses*, 86 JUDICATURE 240, 248-49 (2003); Elliot E. Slotnick, *A Historical Perspective on Federal Judicial Selection*, 86 JUDICATURE 13, 14-16 (2002).

71. *See, e.g.*, Kate Zernike, *In Act of Defiance, Democrat Stalls Obama Choice for Court*, N.Y. TIMES (Jan. 5, 2012), http://www.nytimes.com/2012/01/06/nyregion/senator-robert-menendez-stalls-obama-move-to-promote-judge-patty-shwartz.html (discussing how Senator Menendez blocked the appointment of Patty Shwartz to the Third Circuit Court of Appeals).

72. AM. BAR ASS'N, STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/scfedjud/federal_judiciary09.authcheckdam.pdf. President George W. Bush had suspended the practice but President Obama reinstated it. Editorial, *The A.B.A. and Judi-*

to both the FBI and IRS once the President's administration had fully vetted them but before sending their nominations to the Senate.[73] The ABA champions its ideal of merit rather than political loyalty.[74] Feminists have criticized the gender composition of this Committee and its standards;[75] Brooksley Elizabeth Born was the Committee's first woman member in its twenty-five-year history, serving from 1977 to 1983 and as its chair from 1980 to 1983.[76] The Committee favored judicial experience and large firm practice over academic work, government lawyering, or public defense and legal aid. It demanded trial experience, particularly membership in the American College of Trial Lawyers.[77] And, in Carter's time, it automatically gave judges older than sixty-four an unqualified rating.[78] Feminists criticized the standards, which they argued constituted disparate impact discrimination, and also objected to how they seemed to apply only to women and how the Committee made exceptions for men. Conservatives have charged that the Committee rates far-right nominees as less qualified because of their judicial temperament, most notably in the Committee's split vote over the rating for Robert Bork.[79]

Each president also has his own system for choosing nominees, sharing responsibilities between the Attorney General (overseeing the Department of Justice with the staff to investigate large numbers of candidates) and the White House Counsel's office. While appointments to the U.S. Supreme Court have often reflected contentious issues of the day, whether they be Federalists versus anti-Federalists, supporters or opponents of a national bank, supporters or opponents of slavery, supporters of the New Deal or of liberty of contract, President Nixon was the first president to

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cial Nominees, N.Y. TIMES (Apr. 13, 2009), http://www.nytimes.com/2009/04/14/opinion/14tue2.html.

73. *See* GOLDMAN, *supra* note 67, at 9-13.

74. AM. BAR ASS'N, *supra* note 72, at 1.

75. *See* Mary L. Clark, *One Man's Token Is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 490-92 (2004); Martin, *Women on the Federal Bench*, *supra* note 30, at 309.

76. FEMINISTS WHO CHANGED AMERICA: 1963–1975, at 50 (Barbara J. Love ed., 2006); Susan Ness & Fredrica Wechsler, *Women Judges—Why So Few?*, GRADUATE WOMAN, Nov.-Dec. 1979, at 10, 48. In 2012, the committee had five women members out of fifteen. *Members: Standing Committee on the Federal Judiciary 2011-2012*, A.B.A., http://www.americanbar.org/groups/committees/federal_judiciary/about_us/members.html (last visited Dec. 18, 2012).

77. Dolores Korman Sloviter, *Personal Reflections*, 36 U. TOL. L. REV. 855, 858 (2005); Ness & Wechsler, *supra* note 76, at 48.

78. *See* GOLDMAN, *supra* note 67, at 275.

79. Stuart Taylor Jr., *A.B.A. Panel Gives Bork a Top Rating but Vote Is Split*, N.Y. TIMES (Sept. 10, 1987), at A1. Four members of the Committee found President Bush's nominee, Judge Robert Bork, to be unqualified. *Id.* The Senate failed to confirm him in 1987. Linda Greenhouse, *Bork's Nomination Is Rejected, 58-42; Reagan 'Saddened,'* N.Y. TIMES, Oct. 24, 1987, at 1.

make ideology rather than party loyalty or personal connections the most important criterion for selecting federal court judges.[80] Keeping his campaign promise to appoint strict constructionists (meaning judges who were supportive of the police and not interested in expanding the rights of the accused nor supportive of court-ordered busing to achieve racial integration), President Nixon charged his Attorney General, John Mitchell, to vet judicial candidates to ensure their policy views aligned with his. Until President Carter's Administration, the Justice Department exclusively handled district and circuit court appointments, mostly by deferring to senators. Since President Carter, White House staffers have actively participated in the selection of judges, and President Obama is no exception.

II. PRESIDENT CARTER PUTS GENDER ON THE AGENDA

President Roosevelt appointed the first woman to the federal bench, Florence Allen, in 1934.[81] Sixteen years later, Truman appointed a second, but President Eisenhower appointed no women to the federal bench.[82] Presidents Kennedy, Nixon, and Ford appointed one each; President Johnson appointed three.[83] President Carter's appointment of forty women to the federal bench was thus a very dramatic policy change.[84] President Carter declared a gender-integrated and racially-integrated bench to be a priority, charged his staff with implementing that policy, and altered the way he chose federal judges.[85] When President Carter took office, four women served on federal courts, although women made up about 15% of recent law school graduates and 9.2% of all lawyers.[86] The eligible pool of lawyers with twenty-five years of practice was closer to 3.5%, however. Carter's appointment of forty women (increasing the number from four to forty-four) is huge compared to Johnson's three, or the others' appointment of a token one, and his percentage of appointees at 15% is large considering how gatekeepers defined the eligible pool at the time.[87]

Goldman and others analyzed President Carter's judicial appointments.[88] They documented President Carter's policies, his changes in the judicial selection procedures, and the results.[89] But an important player in

80. NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 50 (2005).
81. Clark, *supra* note 75, at 493.
82. *Id.* at 492.
83. *Id.* at 493.
84. Martin, *supra* note 14, at 110.
85. *Id.* at 114.
86. *Id.* at 111.
87. *Id.* at 110.
88. GOLDMAN, *supra* note 67, at 236-83.
89. *Id.*

the gender diversity of the bench deserves more credit for this accomplishment. Only thirty-two years old, Margaret McKenna was the first woman to hold the position of Deputy White House Counsel.[90] Having been editor of the Law Review at Southern Methodist University Law School, she tried race discrimination cases as a trial attorney in the Civil Rights Division of the Justice Department and later coordinated the Rhode Island Carter-Mondale campaign. She served on the transition team for the Justice Department and worked closely with President Carter's designate for Attorney General, Judge Griffin Bell. Deputy White House Counsel Douglas Huron and her boss, White House Counsel Robert Lipshutz, shared McKenna's commitment to a racially and gender-diverse federal bench, but McKenna made that goal a reality.[91]

McKenna, Lipshutz, and Huron overcame a number of significant obstacles. First, McKenna connected President Carter's commitment to merit selection and racial diversity for judges to his commitment to bringing women in to governmental positions more generally. She shaped President Carter's policy on affirmative action. Second, she persuaded the newly-created circuit nominating commissions, and later senators advocating for federal district court appointments, to include women on their lists of recommendations. Third, she wrested control over the decision on judicial nominations from the Justice Department, and particularly from Attorney General Bell and his Deputy Attorney General, Mike Eagan, and brought the White House Counsel's office into the deliberations. Fourth, the Administration fought the ABA's tendency to rate all the women and minority men candidates "not qualified," destroying their chances at confirmation.[92] McKenna succeeded because she made this issue a priority and because she was the insider working strategically with a network of women's groups on the outside.

III. FEMINISTS WORKING INSIDE AND OUT: THE WORK OF OUTSIDERS

Political scientist Beverly Blair Cook documented how feminists worked to secure the appointment of women judges immediately after suffrage.[93] It was not until almost fifty years later that women's rights groups

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90. KENNEY, *supra* note 17, at 71.

91. Mary L. Clark, *Changing the Face of the Law: How Women's Advocacy Groups Put Women on the Federal Judicial Appointments Agenda*, 14 YALE J.L. & FEMINISM 243, 245 (2002); Interview by Sarah Wilson with Barbara Babcock (May 19, 1995); Telephone Interview with Margaret McKenna (June 25, 2007).

92. Maya Sen, *Below the Bar? Racial and Gender Bias in Judicial Nominations*, 1, 20-21 (Apr. 30, 2012), http://visionsinmethodology.org/wp-content/uploads/2012/04/Sen_VIM2012.pdf.

93. Beverly B. Cook, *Women as Judges*, *in* WOMEN IN THE JUDICIAL PROCESS 9, 9-24 (Beverly B. Cook et al. eds., 1988).

would gain traction protesting the open exclusion of women from consideration.[94] When Justices Harlan and Black retired in 1971, and Nixon promised to eschew litmus tests and to "appoint the best man for the job," Liz Carpenter, Lady Bird Johnson's press secretary who was well connected with women in the Washington Press Corps and active in the National Women's Political Caucus, enlisted the help of Virginia Kerr, a National Women's Political Caucus staff member helping with the set-up of the national office and working on press and legislative testimony.[95] Kerr's dramatically successful press release "turned the taken-for-granted male monopoly into a gaffe."[96] Women's groups not only urged President Ford to appoint a woman to replace William O. Douglas, but also protested that the President's advisers on this matter were all men and mostly opponents of the Equal Rights Amendment.[97]

Feminists inside the Carter Administration formed a Washington Women's Network that grew to more than 1,200 women—women who were networked with each other as well as outside groups.[98] They "publicized information about the judgeships, recruited and screened candidates, and lobbied for candidates they believed to be well-qualified."[99] Second, they formed specific projects to generate names and work for their nomination. By forming broad coalitions, they ensured a wide audience for their efforts, troops to deploy across a broad spectrum of the women's community, and clout on their letterhead when they wrote to the White House as the Judicial Selection Project. Third, these groups met with White House staff to press their case and plan a course of action.[100]

Fourth, these groups were whistleblowers who monitored the Administration's performance in meeting its new policy objectives and communicated their dissatisfaction at the results to their constituencies, the media, and the White House through a series of press releases and fact sheets, de-

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94. *See id.*; Cook, *Supreme Court Candidates*, *supra* note 11, at 314-16, 323-34.

95. Sally Kenney, *Nixon Gaffe Sparks Era of Judicial Advance*, WOMEN'S ENEWS (May 4, 2009), http://womensenews.org/story/our-story/090504/nixon-gaffe-sparks-era-judicial-advance.

96. *Id.*; Interview with Virginia Kerr (Feb. 2007); E-mail from Virginia Kerr to Sally J. Kenney (Feb. 2009) (on file with author).

97. Kenney, *supra* note 95; JANET M. MARTIN, THE PRESIDENCY AND WOMEN: PROMISE, PERFORMANCE & ILLUSION 186 (2003).

98. Arvonne S. Fraser, *Insiders and Outsiders: Women in the Political Arena*, *in* WOMEN IN WASHINGTON: ADVOCATES FOR PUBLIC POLICY 120, 138 (Irene Tinker ed., 1983); Clark, *supra* note 91, at 246; *See* Martin, *Gender and Judicial Selection*, *supra* note 30, at 142; *see also* Beverly B. Cook, *The First Woman Candidate for the Supreme Court*, *in* SUPREME COURT HISTORICAL SOCIETY: 1981 YEARBOOK 13, 13-34 (2008), *available at* http://www.supremecourthistory.org/wp-content/themes/supremecourthistory/inc/schs_publications-1981.pdf.

99. Ness & Wechsler, *supra* note 76, at 49.

100. GOLDMAN, *supra* note 67, at 253.

manding that the Administration do more.[101] The National Women's Political Caucus, for example, released statistics in early January 1979 that fifty-one out of the fifty-nine recommendations from Democratic senators for the new judgeships were white males.[102] Fifth, women's groups lobbied on many fronts. They met with the Administration to suggest names of panelists for the new circuit nominating commissions President Carter mandated, pressured senators to appoint women to their nominating commissions, criticized recommendations of only white men, and pressed for the women who did appear on the list. They testified before the Senate Judiciary Committee about the slow pace of women's judicial appointments and pressured the Committee to require nominees to refrain from membership in discriminatory clubs.[103] Sixth, they set up their own screening panel to decide which candidates they wanted to promote. Seventh, they formed an organization of women judges. In 1979, the National Association of Women Judges formed, and part of its mission included advocating women's appointments at the federal, state, and local levels, as well as training women for election and selection.[104] One of its first resolutions was to call for the appointment of a woman to the U.S. Supreme Court, and the group lobbied both presidential candidates to commit to such an appointment. Ronald Reagan took the pledge, but President Carter refused.

In the United States, judges are more recognizable as public figures than elsewhere, so feminists seeking symbols of women's progress in sharing political power with men have at times prioritized the appointment of women to state supreme courts and the U.S. Supreme Court. But even in the United States, feminists have not always consistently campaigned for the appointment or election of women judges and, when they have done so, it has been done by projects or organizations that separate themselves from those seeking to increase the number in legislative and executive positions. The efforts of the National Women's Political Caucus in the 1970s, for example, are now defunct at both the national and state level. Groups such as the National Association of Women Judges (NAWJ), who championed the appointment of a woman to the U.S. Supreme Court, have turned to other issues in addition to the appointment of women judges; although, former NAWJ president and judge on the Massachusetts Appeals Court, Fernande Duffly, did testify for Sotomayor. Groups whose mission is to grasp political power for women, such as EMILY's List, do not raise money for women judicial candidates, despite the fact that many state court judges are elected

101. Susan Ness, *A Sexist Selection Process Keeps Qualified Women Off the Bench*, WASH. POST (Mar. 26, 1978), at C8.

102. GOLDMAN, *supra* note 67, at 258.

103. Clark, *supra* note 91, at 247.

104. *Id.* at 250.

officials. Although it does recruit for judicial races, the White House Project focuses mainly on non-judicial elective offices.

Many of those who champion the cause of a gender-diverse judiciary also advocate for judicial independence and merit selection.[105] They want to define law as a system of rules and principles governed by decision-making processes vastly different from legislatures and bureaucracies. Those of us who see law and legal decision making as inherently political and as the province of political scientists have not articulated the differences between legal decision-making and other kinds of political decision-making in ways that are easily understood by the public. The politics of law, then, and the politics of judicial selection, are almost always conducted using rhetoric that eschews politics. For example, President George H.W. Bush announced that politics and race had nothing to do with his decision, but rather that Clarence Thomas just happened to be the best man for the job. Senator Leahy, responding to the resignation of Justice Powell, declared that partisan politics would play no part in the Judiciary Committee's deliberations on Robert Bork; they would merely consider his merit as a judge. This conundrum plagues campaigns to create a gender-diverse bench, since most advocates have to try to expose the politics and cronyism of reigning judicial selection regimes while contending that their motivations are not political; they assert that they believe in merit selection, but they also want more women.

IV. COMPARING PRESIDENTIAL RECORDS

Presidential appointments of women judges have varied enormously rather than followed a pattern of steady increases reflecting women's greater presence in the legal profession or even the overall strength of the feminist movement. Women insiders pushed for the appointment of women judges with few, yet notable, successes from 1920 to 1976.[106] Only eight women had served on Article III federal courts when President Carter took office in 1976.[107] President Carter appointed more women than all previous presidents combined; he appointed forty women, which was 15.5% of his appointments.[108] Reacting to new evidence of a widening gender gap in support for his presidency, Ronald Reagan outflanked President Carter during the 1980 campaign by promising to appoint a woman to the U.S. Supreme Court, which he did.[109] The fanfare over the appointment of the first woman

105. *See generally* KENNEY, *supra* note 59.

106. Clark, *supra* note 75, at 492-93; Cook, *Supreme Court Candidates*, *supra* note 11, at 323-24; Kenney, *supra* note 11, at 210.

107. Sloviter, *supra* note 77, at 857.

108. Pacelle, *supra* note 69, at 155.

109. Carter was grooming Ninth Circuit judge Shirley Hufstedler, who served as Carter's Secretary of Education, for a Supreme Court appointment. Sheldon Goldman, Book Review, 96 AM. POL. SCI. REV. 222, 223 (2002) (reviewing DAVID ALISTAIR YALOF, PURSUIT

to the U.S. Supreme Court, Sandra Day O'Connor, deflected attention from the fact that only 7.6% of Reagan's judicial appointments were women.[110] President George H.W. Bush appointed few women in the first two years of his presidency, but following his appointment of Clarence Thomas to the U.S. Supreme Court and the backlash surrounding Anita Hill's testimony, Bush appointed nearly half of his thirty-six women appointees in the year he ran for re-election.[111] Only 19.5% of his appointments were women, but most of those were Reagan appointees he elevated from the district to the circuit appellate courts, which did little to change the overall gender composition of the federal bench.[112] Bush did give women major roles in the judicial selection process; Lee Lieberman was Assistant White House Counsel and Barbara Drake was Assistant Attorney General in the Department of Justice.[113] Despite President Clinton facing a Republican-controlled Senate after 1994, facing political machinations that disproportionately delayed women and minority men nominees, and eventually facing impeachment proceedings, 28% of his appointments to the federal bench were women, compared to 22% for President George W. Bush.[114] Forty-two percent of Obama's nominees have been women,[115] including two women nominated to the U.S. Supreme Court.[116] Since the Carter Administration, with the exception of the Infinity Project in the Eighth Circuit, feminist groups have largely dismantled their efforts to press for women appointments, and new groups have not taken up the charge.[117]

V. WOMEN ON STATE COURTS

In 1923, Florence Allen became the first woman in the United States to serve as a judge on a state supreme court, joining the Ohio Supreme

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OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES (1999)). Had Carter not been expected to name a woman to the Supreme Court for the next vacancy, "it is questionable whether Ronald Reagan would have made his pledge to appoint a woman to the Supreme Court during the fall 1980 presidential campaign." *Id.* Similarly, Gerald Ford nominated his one woman to the federal bench, Mary Anne Reimann Richey, after candidate Jimmy Carter had promised to appoint more women to the bench. Clark, *supra* note 75, at 533.

110. Pacelle reports that Reagan's record improved when "two women were brought into the circle of advisers who screened potential nominees." Pacelle, *supra* note 69, at 158.

111. *Id.* at 159.

112. Martin, *supra* note 14, at 117.

113. Pacelle, *supra* note 69, at 159.

114. Segal Diascro & Spill Solberg, *supra* note 15, at 292.

115. ALLIANCE FOR JUSTICE, JUDICIAL SELECTION SNAPSHOT (2012), *available at* http://www.afj.org/judicial-selection/judicial-selection-snapshot.pdf.

116. Carl Tobias, *Justifying Diversity in the Federal Judiciary*, 106 NW. U. L. REV. 283, 290 (2012).

117. *See* INFINITY PROJECT, http://www.theinfinityproject.org (last visited Dec. 18, 2012).

Court.[118] It would be thirty-six years later before Rhoda Lewis joined the Hawaii Supreme Court in 1959.[119] Not until 2002 would the first woman join the South Dakota Supreme Court, which was the last all-male state supreme court.[120] Four women joined their state supreme courts in the 1960s, twelve in the 1970s, eighteen in the 1980s, and twelve more in the 1990s.[121] Some appointments, such as Rosalie Wahl's in Minnesota, were highly dramatic.[122] Others, such as Linda Kinney Neuman, who joined the Iowa Supreme Court in 1986, appointed by a Republican governor, generated almost no notice. California voters turned the first woman appointed chief justice out of office in a retention election; voters similarly rejected one of the first women to serve on the Tennessee State Supreme Court, Justice Penny White.[123] Some states elect judges in partisan elections, others elect judges in non-partisan elections, others appoint judges and have them stand for retention election with no opponent, and still others use the federal system with lifetime appointment and no retention election.[124]

Few obvious patterns emerge for women's progress on state courts, and whatever patterns that do emerge vary widely over time. Twenty-six percent of state court judges in the United States are women.[125] Yet states vary enormously in the number of women serving, ranging from Vermont, which ranks first with 41%, to South Dakota and Idaho, which are tied for last with only 13%.[126] Perhaps even more puzzling than this variation is its erratic nature over time. The last six states to place a woman on their state supreme courts were not all from one region (South Dakota, New Hampshire, Wyoming, Nebraska, Alaska, and Indiana). We know women have more difficulty being elected to legislative positions in the South and in rural areas more generally, but little comparative data exists for state judi-

118. *See supra*, note 11 and accompanying text.

119. In August 2010, an all-male Senate Committee rejected the Governor's nomination of Katherine Leonard to be the state's first woman chief justice of the Hawaiian Supreme Court ostensibly because she lacked judicial experience. Nancy Cook Lauer, *Hawaii Passes on Chance of Female Chief Justice*, WOMEN'S ENEWS (Aug. 20, 2010), http://womensenews.org/story/in-the-courts/100819/hawaii-passes-chance-female-chief-justice.

120. Kenney & Windett, *supra* note 16. Three states, Idaho, Indiana, and Iowa, have returned to all-male courts. *Id.*

121. *Id.*

122. Sally J. Kenney, *Mobilizing Emotions to Elect Women: The Symbolic Meaning of Minnesota's First Woman Supreme Court Justice*, 15 MOBILIZATION 135, 140 (2010).

123. Traciel V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68 (1999).

124. *See Judicial Selection Methods in the States*, AM. JUDICATURE SOC'Y, http://www.ajs.org/selection/sel_state-select-map.asp (last visited Dec. 18, 2012).

125. *See 2009 Representation of United States State Court Women Judges*, NAT'L ASS'N WOMEN JUDGES, http://www.nawj.org/us_state_court_statistics_2009.asp (last visited Dec. 18, 2012).

126. *See id.*

cial elections.[127] If political culture impedes women from legislative office in the South, it does not seem to impede women's accession to judicial office and judicial leadership: eight of thirteen chief justices of state supreme courts were women as of 2010.[128]

The first political scientist who sought to explain why so few women served as judges, Beverly Blair Cook, tried to explain the large variation in the number of women serving on general jurisdiction trial courts in the fifty-eight largest cities of the United States.[129] Legal academic Karen Tokarz, too, wondered about the large variation from Alaska, where then 21.9% of its judges were women, versus 1.3% in Tennessee, but she focused her inquiry on understanding why Missouri in particular lagged behind.[130] Alaska is now a laggard, not a leader, with 19%,[131] but the state variation is as puzzling as ever. Cook asked whether Daniel Elazar's three categories of state political culture could explain differences among states in the number of women judges serving.[132] She found that moralist states (states that run clean governments and believe in a collective good, such as the upper New England States, the Upper Midwest, and several states in the West) had significantly higher percentages of women on appellate courts, but she found Elazar's typology could not explain variation among states in the number of women general jurisdiction trial judges, nor could it explain variations among the cities of those states.[133]

Cook tried to refine Elazar's political culture explanation, and she added two gender variables. Cook found a significant but weak relationship between a state population's answer to the Gallup Poll question asking whether one would vote for a woman for president and the number of women judges in that state.[134] After Cook, other scholars tested political culture variables. Nicholas O. Alozie's study of state courts of last resort in 1993 found women represented a slightly higher percentage of judges in the

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127. *See* Karen L. Tokarz, *Women Judges and Merit Selection Under the Missouri Plan*, 64 WASH. U. L. Q. 903, 904, 933 (1986); Traciel V. Reid, *The Competitiveness of Female Candidates in Judicial Elections: An Analysis of the North Carolina Trial Court Races*, 67 ALB. L. REV. 829, 829-30 (2004) [hereinafter Reid, *Competitiveness*]; Traciel V. Reid, *Women Candidates and Judicial Elections: Telling an Untold Story*, 6 POL. & GENDER 465, 465-70 (2010) [hereinafter Reid, *Women Candidates*].

128. Mark Curriden, *Tipping the Scales: In the South, Women Have Made Huge Strides in the State Judiciaries*, A.B.A. J. (July 1, 2010), http://www.abajournal.com/magazine/article/tipping_the_scales.

129. Cook, *Political Culture*, *supra* note 47, at 42.

130. Tokarz, *supra* note 127, at 915.

131. *The American Bench*, NAT'L ASS'N WOMEN JUDGES, http://www.nawj.org/us_state_court_statistics_2012.asp (last visited Dec. 12, 2012).

132. Cook, *Political Culture*, *supra* note 47, at 42.

133. *Id.* at 53-54.

134. Cook, *supra* note 21, at 98-99.

Midwest, but that more women served as judges in the South;[135] the region variable, however, was not significant.[136] Bratton's and Spill's study of state courts of last resort showed that "relatively liberal states [were] particularly likely to have gender-diverse courts."[137] Mark S. Hurwitz and Drew Noble Lanier found region as a variable did not attain statistical significance.[138] Williams found liberal states to have more women judges only on their trial courts and not on their appellate courts.[139] Bratton's and Spill's study of federal trial courts showed that ideology had little predictive effect.[140]

If culture could not explain differences in the number of women judges serving, perhaps more simple demographic variables could? Cook observed what legislative scholars have more recently discovered: women were more likely to represent suburban and urban rather than rural constituencies.[141] Cook also found that the higher women's incomes and the lower the birthrates in a state, the greater the number of women judges.[142] Susan Carbon and other researchers, too, found as early as 1980 that women were much more likely to serve in large metropolitan areas than rural districts.[143] Gould and Merola found a difference between rural and urban districts in their study of minority judges.[144]

Preliminary results from data analysis Jason Windett and I are conducting show that political culture does not explain the emergence of the first women supreme court justices, but a gender equality culture composite measure does help explain the proportion of women in later decades and the emergence of the first woman chief justice. We are finding little evidence for a diffusion of innovation argument—that is, that ideas diffuse regionally where states emulate their neighbors.

Our evidence supports previous findings that the size of the court matters. Cook found women were more likely to serve on larger rather than smaller courts.[145] In 1984, Cook identified exactly how large a court had to be before selectors created a woman's seat: twenty-five judges for superior

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135. Alozie, *supra* note 26, at 118.

136. *Id.* at 122.

137. Bratton & Spill, *supra* note 47, at 515.

138. Hurwitz & Lanier, *supra* note 26, at 348 n.12; Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 47, 58 (2008).

139. Williams, *supra* note 27, at 1198.

140. Spill Solberg & Bratton, *supra* note 47, at 130.

141. Cook, *supra* note 25, at 203-04.

142. Cook, *supra* note 21, at 98.

143. Susan Carbon, Pauline Houlden & Larry Berkson, *Women on the State Bench: Their Characteristics and Attitudes About Judicial Selection*, 65 JUDICATURE 294, 298 (1982).

144. CTR. FOR JUSTICE, LAW & SOC'Y, *supra* note 51, at 31.

145. Cook, *Political Culture*, *supra* note 47, at 54.

court and five judges for municipal court.[146] Her finding was consistent with what scholars of legislative elections know about proportional representation and multimember constituencies: when voters or other selectors choose more than one city council member, legislator, or judge at a time and have many places to fill, they are more likely to present a balanced slate. Choosing one at a time for a small number of slots yields more homogeneity and representation from the dominant group. The size of the court may partly explain the few women in rural courts, which are smaller. Conversely, the U.S. Court of Appeals for the Ninth Circuit has the highest number of women judges, but not the highest percentage of women judges, which is not surprising since it is the largest federal appellate court.[147] Hurwitz and Lanier studied the composition of state supreme courts and intermediate appellate courts in 1985 and 1999 and found that the most consistent influence on women's representation across time and court was court size, which was positive and statistically significant with every model.[148] Alozie found size important in his study of state courts of last resort in 1993.[149] Bratton's and Spill's study of state courts of last resort from 1980 to 1997 also showed larger courts to be more likely to be gender-diverse,[150] as did their study of federal courts.[151] More intriguing, however, is their finding that President Clinton appointed a higher percentage of women to the larger courts than the smaller courts—Clinton filled only seven of the fifty-two small court vacancies with women, but filled twenty-two of the fifty-two large court vacancies with them.[152] If Clinton's principal goal was to diversify the courts, he would have appointed women to the smaller rather than the larger courts. Williams, too, found that the greater number of seats on a state court, whatever the level, the greater the representation of women.[153]

Perhaps the most obvious structural issue for investigation is method of selection. Do women do better under merit systems or elections? Under partisan or non-partisan elections? Close comparison of different systems by social scientists does not show that so-called merit selection systems produced more women judges—not because the requirement of being known to

146. Cook, *supra* note 22, at 581.

147. Eight out of 28, and 2 out of 15 senior judges, for a total of 10. *The Judges of this Court in Order of Seniority*, U.S. CIRCUIT CT. FOR NINTH CIRCUIT, http://www.ca9.uscourts.gov/content/view_seniority_list.php (last updated Apr. 2013). The Fifth Circuit has 6 of 15 (with two positions vacant); 7 of the 7 senior judges are men, *Fifth Circuit Clerk's Office & Judges*, U.S. CIRCUIT CT. FOR NINTH CIRCUIT, http://en.wikipedia.org/wiki/United_States_Court_of_Appeals_for_the_Fifth_Circuit#Current_composition_of_the_court (last visited Feb. 13, 2013).

148. Hurwitz & Lanier, *supra* note 26, at 340.

149. Alozie, *supra* note 26, at 122.

150. Bratton & Spill, *supra* note 47, at 514.

151. Spill Solberg & Bratton, *supra* note 47, at 128.

152. Spill & Bratton, *supra* note 26, at 261.

153. Williams, *supra* note 27, at 1199.

a senator or governor was not indirectly discriminatory, but because nominating commissions can discriminate, too, unless they have women members; are trained to avoid discrimination and stereotyping; and make securing a gender-diverse bench a priority. Marianne Githens found, for example, that the Maryland Nominating Commission employed a gender double standard for its men and women applicants.[154] Commissioners saw women as uppity, seeking judicial positions above their station, whereas they saw men as lacking in ambition by seeking judicial appointments when they should have aspired to more lucrative partnerships in large firms.[155] Electoral systems, too, can discriminate against women if gatekeepers keep women from partisan endorsements, if voters discriminate, or if women have difficulty raising money.

In 1980, Susan Carbone, Pauline Houlden, and Larry Berkson sent a questionnaire to all 549 women state court judges.[156] With the exception of judges that governors chose by straight appointment (who preferred nominating commissions), judges tended to declare whichever system produced them to be their preferred system for producing the highest quality bench and placing the highest number of women in judicial positions.[157] By 1988, Cook had concluded that no one judicial selection system produced more women; instead, what mattered was a commitment on the part of gatekeepers to considering women and jettisoning discriminatory criteria.[158] Tokarz's findings that women were more likely to serve as judges in outstate Missouri under an elective system than in the two cities under merit selection was damning to the argument that women did better under merit systems.[159] Tokarz showed how the selection system shut out women. Tokarz concluded that merit systems were insufficient to guarantee women's full representation, if not indeed an impediment.[160] Subsequent analyses confirmed Tokarz's finding of no systemic effect.[161]

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154. Marianne Githens, *Getting Appointed to the State Court: The Gender Dimension*, 15 WOMEN & POL., no. 4, 1995 at 1, 9-21.

155. *Id.* at 17-19.

156. Carbon, Houlden & Berkson, *supra* note 143, at 295-96.

157. *Id.* at 303, 305.

158. Cook, *supra* note 93, at 11.

159. Tokarz, *supra* note 127, at 924.

160. *Id.* at 907.

161. *See* Nicholas O. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 71 SOC. SCI. Q. 315, 321 (1990); Alozie, *supra* note 26, at 123; Kevin M. Esterling & Seth S. Andersen, *Diversity and the Judicial Merit Selection Process: A Statistical Report*, *in* THE HUNTER CTR. FOR JUDICIAL SELECTION, RESEARCH ON JUDICIAL SELECTION 1999 1, 1-39 (1999); Lisa M. Holmes & Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort Through Interim Appointments*, 27 JUST. SYS. J. 1, 11-12 (2006); Hurwitz & Lanier, *supra* note 26, at 344; Hurwitz & Lanier, *supra* note 138, at 65; Martin & Pyle, *supra* note 26, at 49-50; REDDICK, NELSON & CAUFIELD, *supra* note 26, at 6.

What little data exist for state judicial races shows contradictory results. Traciel Reid examined women's electoral performance in races for North Carolina District Court between 1994 and 1998.[162] Women raised more money for their races than men, but as she wrote, men "received significantly more electoral bang for their campaign buck than women."[163] Women incumbents did not enjoy the same benefits as men; women running for open seats spent much more than men to do less well.[164] Jennifer Lucas examined partisan and nonpartisan state supreme court elections from 1990 to 2006 and found that women won more often than men in both partisan and nonpartisan elections (neither system, however, favored women more so than the other), and Republican women won most of all (84% of Republican women won compared to 60% of Republican men).[165] Women incumbents, challengers, or candidates for open seats won their races more often than men.[166] Gender was an important variable in predicting success, and incumbency did not completely trump gender.[167] Controlling for both incumbency and partisanship, Lucas found women candidates to have won 3% more of the vote in their judicial races than their men counterparts.[168] She found women to have done better in nonpartisan election states than in partisan election states, but in both women did better than men.[169]

Method of selection does matter to whether women are likely to lead state supreme courts.[170] Women do better when the members of the court choose the chief justice or the position goes to the most senior justice.[171] They do less well when governors or voters select the chief.[172]

VI. DO WOMEN JUDGE IN "A DIFFERENT VOICE?"

How should we think about gender differences in judging in ways that are theoretically sophisticated, empirically true, and do not lead to women's disadvantage? Political scientists who study women judges have been grappling with this problem for thirty years.[173] Legal academics, sociologists,

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162. Reid, *Competitiveness*, *supra* note 127, at 831.

163. *Id.* at 834.

164. *Id.*

165. JENNIFER LUCAS, IS JUSTICE BLIND?: GENDER VOTING CUES IN JUDICIAL ELECTIONS 11-12 (2007), *available at* http://citation.allacademic.com/meta/p_mla_apa_research_citation/1/9/6/5/6/pages196569/p196569-1.php.

166. *Id.* at 13.

167. *Id.*

168. *Id.*

169. *Id.* at 15.

170. *Id.*

171. *Id.* at 4.

172. *Id.*

173. *See* Kenney, *supra* note 95; Susan Gluck Mezey, *Gender and the Federal Judiciary*, *in* GENDER AND AMERICAN POLITICS: WOMEN, MEN, AND THE POLITICAL PROCESS 221,

historians, and other scholars are increasingly studying gender and judging across jurisdictions and legal systems.[174] Although she frequently functions as a straw woman, educational psychologist Carol Gilligan's work as applied to the question of whether women judges reason in a different voice has come to define *the* feminist approach to gender and judging, and hampers our ability to theorize effectively about difference.[175] In her 1982 book, *In a Different Voice*, Gilligan rightly criticized theories of moral development constructed by studying only boys.[176] Posing a hypothetical moral dilemma to boys and girls, and interviewing women struggling with the decision to abort, Gilligan claimed to have found a different voice of moral reasoning that weighed more heavily how moral decisions affected a "web of relationships" rather than deduced what was right from a hierarchy of principles.[177] Although Gilligan claimed to have discovered a different voice and many scholars criticized her methods as well as her interpretation of the evidence, those who took up her theory quickly labeled it the woman's voice.[178] This tendency to construct men and women as two dichotomous, non-intersecting groups of adjudicators worsens rather than recedes over time. As new scholars take up questions of gender and judging, rather than build on their predecessors, many fall into the same predictable trap of essentialism (all men are x, all women are y). Although postmodernism leads feminists to be skeptical of binaries such as male and female, not all attempts to use sex as a variable are misguided. Evidence does occasionally show differences worthy of feminists' attention.[179] Yet we are right to question the sample size from which a sex difference is declared. Findings based on a few trial judges in Wisconsin, a few women agonizing over abortion in

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221-38 (Sue Tolleson-Rinehart & Jyl J. Josephson eds., 2005); Barbara Palmer, *Women in the American Judiciary: Their Influence and Impact*, 23 WOMEN & POL., no. 3, 2001 at 91; Barbara Palmer, *"To Do Justly": The Integration of Women into the American Judiciary*, 34 PS: POL. SCI. & POL. 235, 235 (2001).

174. ULRIKE SCHULTZ & GISELA SHAW, WOMEN IN THE WORLD'S LEGAL PROFESSIONS xvii, xxv, xxvii (Ulrike Schultz & Gisela Shaw eds., 2003).

175. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 1-3 (1982); Sally J. Kenney, *Women, Feminism, Gender, and Law in Political Science: Ruminations of a Feminist Academic*, 15 WOMEN & POL. 43, 59-60 (1995).

176. GILLIGAN, *supra* note 175.

177. *Id.* at 31-32.

178. Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice"?*, 15 HARV. WOMEN'S L.J. 37, 37-38 (1992); Linda K. Kerber, *Some Cautionary Words for Historians*, 11 SIGNS 304, 304-08 (1986).

179. *See* Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 396-97 (2010); Elaine Martin & Barry Pyle, *State High Courts and Divorce: The Impact of Judicial Gender*, 36 U. TOL. L. REV. 923 (2005); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005); Sally J. Kenney, *Thinking About Gender and Judging*, 15 INT'L J. LEGAL PROF. 87 (2008); KENNEY, *supra* note 17, at 24-27.

Massachusetts, or even all judges in Michigan at one point in time do not prove essential sex differences. The problem is not the finding, but the meanings attached to it. If we abandoned the search for the essential sex difference that persists across time and place, we might be able to say some more interesting things about gender differences with empirical support. Rather than discovering an essentially different voice, we might uncover tendencies particular to a cohort. Why is it, for example, that we can generalize about baby boomers, or the approach of German judges on international or supranational courts, in ways that do not lead to the same sort of essentializing we see when we find sex differences? If we could find a way to talk about tendencies and overlaps—if sex were one variable among many—feminist scholars might not have to be so worried about essentialism.

Besides the dangers of overgeneralization that lead to claims of a false dichotomy, such research may wrongly claim sex to be the explanation when sex masks other determinants. President Carter, for example, appointed more judges to the federal bench than all other presidents combined and a higher percentage of women judges than any other president until President Clinton. If one finds sex differences among federal judges, it may merely be an artifact of the appointing president. But if one avoids this second pitfall by controlling for party, ideology, or even such things as experience as a prosecutor versus experience as a public defender, then one is left with the concept of sex as a residual variable. Such an approach is at odds with a growing tendency to think of gender intersectionally within feminist theory.[180] Identity categories work in many intersecting ways that are patterned, if not true, for all members of the group. Not all black women think alike, but black women lawyers who went to law school in the 1970s were likely to have had many common experiences. By stripping away class, race, and sexual orientation to drill down to the core of what constitutes sex differences, one inevitably approaches sex as a biological category. Feminists go beyond seeing sex as a category to conceptualize gender as a social process, a process that is intersectional. Everyone's experience is gendered, not just women who are otherwise privileged.

Scholars have used sex as a proxy for feminist, that is, more likely to be concerned with children and better at juvenile justice, pro-plaintiff in sex discrimination cases, pro-choice, pro-woman in divorce cases, employing communitarian reasoning, inclined to seek to mediate solutions, likely to raise women's issues in speeches, likely to inflict harsh or lenient sentences, and likely to find for asylum seekers. Only occasionally has the evidence shown that sex is a proxy for the assumed attribute. We need to examine the

180. *See* Wendy Smooth, *Intersectionality in Electoral Politics: A Mess Worth Making*, 2 POL. & GENDER 400, 407-10, 412-13 (2006).

strength of the empirical basis for the claim of difference: What was the sample size? How representative of the judiciary as a whole? Did the researchers control for other explanatory variables? Even when researchers uncovered a difference, it predicted different outcomes only in some cases, while other predictors, such as party or ideology, predicted differences more reliably in others.[181] We need to take great care in how we talk about sex differences. Strangely, findings of no difference never seem to challenge the fundamental assumption of difference or deter the search for it.

Women and men do have different life experiences. Some, but not all, women are mothers. Some, but not all, women are in heterosexual marriages where they do the lion's share of caring labor. All experience the world as a woman, subject to the risks of sexual violence, gender devaluation, and exclusion and discrimination. Rather than identify essential sex differences, perhaps we should understand gender as producing tendencies among generational cohorts. When the women who are now senior judges entered the legal profession, they had profound experiences of exclusion in the legal profession. Many, such as Justice Sandra Day O'Connor and Minnesota Supreme Court Justice Rosalie Wahl, did not enter large law firms but instead worked for the government on mental health issues or, as many women did because it was one of the few places where parents could work part-time, worked for public defenders. We can expect women who serve on the bench in Texas, for example, who have run as Republicans, served as prosecutors, and spent their time with the victims of violent crime, to have very different outlooks and to bring to the bench different experiences than women who have worked for a public defender. The Republican women whom President George W. Bush appointed might be as different from earlier Republican women appointed to the bench as they are from Democratic women appointees. Even women of the same age cohort do not necessarily share a feminist consciousness. One need only consider the differences between Justices O'Connor and Ginsburg and between Justices Marshall and Thomas for the point to be clear. We must move from an assumption of essential sex differences to a discussion of gender.

We should recognize that a feminist consciousness is a political achievement, not an inevitable result of being female or living life as a woman.[182] So, too, should we understand that the creation of a group of

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181. Elaine Martin, *Judicial Gender and Judicial Choices*, *in* GENDER AND POLICYMAKING: STUDIES OF WOMEN IN OFFICE 49, 60-61 (Debra L. Dodson ed., 1991); Elaine Martin, *Women on the Bench: A Different Voice?*, 77 JUDICATURE 126, 127-28 (1993); Elaine Martin, *The Representative Role of Women Judges*, 77 JUDICATURE 166, 166-67 (1993).

182. Patricia Yancey Martin, John R. Reynolds & Shelley Keith, *Gender Bias and Feminist Consciousness Among Judges and Attorneys: A Standpoint Theory Analysis*, 27 SIGNS 665, 665 (2002).

judges, men and women, who bring a gender lens to judging, is an organizational accomplishment and not an automatic result when a certain number of women judges join a court. In fact, the evidence suggests that women may feel less compelled to articulate "a woman's point of view" when more women are serving in a legislature. The solution is not simply in adding more women to the mix, but in creating organizations attentive to gender devaluation. Gender is a relevant category for social interaction, and the absence or presence of women may change group dynamics; but that does not mean it does so in fixed, predictable, and static ways. Particularly on collegiate courts, seeking diversity of experience among judges can be more helpful than using gender as an automatic proxy for feminist, liberal, or compassionate toward the downtrodden. The gender composition of groups matters in often subtle ways, determining what comments might be intolerable and how issues are framed, as well as what kinds of evidence and arguments the group considers. It matters, then, that Justice Ruth Bader Ginsburg is a woman, but perhaps more important is that she is an expert in sex discrimination law and has championed the cause of women's rights. As the author of one of the first texts on women and the law, she brings a sophisticated understanding of gender issues to her analysis.[183]

Presidents Jimmy Carter, Bill Clinton, and Barack Obama, as well as Governors Perpich (Minnesota), Brown (California), and Pawlenty (Minnesota) have made creating a gender-diverse judiciary a priority as executives. But even now, as women make up nearly half of all law school graduates, governors in Oregon and South Dakota, or nominating commissions in New York, submit slates of candidates for judicial positions that include no women. This Article's examination of concepts in gender theory, such as the myth that women have already achieved equality or are making great progress, the qualified labor pool, disparate impact, the pipeline, the pyramid, tokenism, and backlash, demonstrate that only by continued vigilance and organized pressure will women succeed in creating, and maintaining, a gender-equal judiciary or a gender-equal executive branch. Progress is neither inevitable nor irreversible. We need to understand how women can win executive and judicial positions, and also how we succeed in getting executives to use their positions to expand the numbers of women in public office more generally. Only by first rejecting the proposition that women's progress is natural, inevitable, irreversible, and a necessary result of women's

183. The work of more than seventy scholars in the Collaborative Research Network on Gender and Judging of the Law and Society Association shows the rich possibilities of a gender analysis. *See* GENDER & JUDGING, http://genderandjudging.com (last visited Dec. 18, 2012). For more information, see the March-July 2008 issue of *The International Journal of the Legal Profession* as well as the Critical Perspectives on Gender and Judging section of the September 2010 issue of *Politics & Gender*. Ulrike Schultz and Gisela Shaw have edited the papers from the 2009 Oñati conference that Hart will publish in 2013.

representation in the legal profession can we begin the discussion of what *would* generate progress. We can learn from this history of women's movement from 0% to 25%. But while we may want to replicate efforts that have produced success in the past, gender theory—particularly the concepts of discrimination, devaluation, and backlash—can help us design and mobilize for a new campaign to move us from minority to parity.