

# ECHOES OF THE FEMININE MYSTIQUE: FEMALE JUDGES AND INTERGENERATIONAL CHANGE IN THE UNITED STATES COURTS OF APPEALS

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## INTRODUCTION

Among the most significant and celebrated developments in law and judicial politics in the U.S. and worldwide over the last 50 years has been the growing number of women on the bench.<sup>1</sup> Whereas specific courts still lack gender diversity, the increased representation of women, while gradual and difficult,<sup>2</sup> has been large enough to overcome the tokenism once

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<sup>1</sup> Mark Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 54, 64 (2008) (documenting the rise of women and other non-traditional judges in state and federal courts from 1985 to 2005); Sital Kalantry, *Women in Robes*, AMERICAS QUARTERLY (July 24, 2012), <https://www.americasquarterly.org/women-in-robess>; Stephanie Kirchgaessner, *Female Italian Judges Outnumber Male Counterparts for First Time*, GUARDIAN (Jan. 29, 2016), <https://www.theguardian.com/world/2016/jan/29/female-italian-judges-outnumber-male-counterparts> (celebrating the rise of women judges in Italian trial courts but emphasizing more work still needs to be done); SALLY JANE KENNEY, GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER 2 (2013) (praising the growth of women Justices in the U.S. Supreme Court via the appointments of Justices Sonia Sotomayor and Elena Kagan as “major victories for women’s equality” while echoing the concern that “attention to women’s representation in the judiciary has been surprisingly scant”). According to USCourts.gov, women make up approximately one-third of active judges across the federal appellate, district, magistrate, and bankruptcy courts. See *Annual Observances: Women’s History Month*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/annual-observances/womens-history-month> (last visited Sept. 23, 2022).

<sup>2</sup> Larry Berkson, *Women on the Bench: A Brief History*, 65 JUDICATURE 289, 290 (1982).

described by sociologist Rosabeth Moss Kanter<sup>3</sup> and confirmed by political scientists Elliot E. Slotnick<sup>4</sup> and others who lament the number of female judges.<sup>5</sup> As a result, it is now possible to conduct systematic empirical research to examine the judicial decision-making of female judges, as well as intertemporal differences among female judges who serve as an elite group of decision-makers in the United States<sup>6</sup> and abroad.<sup>7</sup> The growing research on female judges has produced significant insights and improvements in our understanding of the dynamics and substance of case law, legal doctrine, and legal policy emanating from American courts and whether gender makes a difference in judicial decision-making.<sup>8</sup> In this study, we make an important contribution by testing the possibility of an intergenerational gap among female judges in terms of their judicial decision-making.

We rely on the conflict framework formulated by V.O. Key, Jr., popularized by Hubert Blalock, and expanded by Stuart Scheingold.<sup>9</sup>

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<sup>3</sup> See Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965 (1977).

<sup>4</sup> See Elliot E. Slotnick, *The Path to the Federal Bench: Gender, Race, and Judicial Recruitment Variation*, 67 JUDICATURE 314 (1983); Elaine Martin, *Profile in Leadership: Eminent Women Judges in the United States*, in GENDER & JUDGING 69 (Ulrike Schultz & Gisela Shaw eds., 2013) [hereinafter *Profile in Leadership*]; Elaine Martin, *The Representative Role of Women Judges*, 77 JUDICATURE 166, 166-67 (1993) [hereinafter *Representative Role of Women Judges*].

<sup>5</sup> Women represented only eight percent of the federal judiciary in 1982, and this was after President Jimmy Carter increased the number of women judges by 41 (more than all previous U.S. presidents combined), helping to counteract the traditional male bias of the U.S. federal judiciary. See Elaine Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 306, 307 (1982); see also Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425 (1994) [hereinafter *Diversification in the Federal Courts*]; KENNEY, *supra* note 1, at 1-3.

<sup>6</sup> See *id.*; Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 389 (2010).

<sup>7</sup> See Kimi L. King et al., *Deborah's Voice: The Role of Women in Sexual Assault Cases at the International Criminal Tribunal for the Former Yugoslavia*, 98 SOC. SCI. Q. 548 (2017).

<sup>8</sup> See generally John Gruhl et al., *Woman as Policymakers: The Case of Trial Judges*, 2 AM. J. POL. SCI. 308 (1981); Christina J. Boyd and Michael L. Nelson, *The Effect of Trial Judge Gender and Public Opinion on Criminal Sentencing Decisions*, 70 VAND. L. REV. 1843 (2007) (finding that female judges are more lenient than male judges when sentencing female defendants); Darrell Steffensmeier & Chris Hebert, *Men and Woman Policymakers: Does the Judge's Gender Affect Sentencing of Criminal Defendants?*, 77 SOC. FORCES 1163 (1999) (finding that female judges are somewhat harsher than male judges overall but particularly harsh towards black repeat offenders); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985).

<sup>9</sup> In their respective formulations of conflict theory, Key focused on racial conflict and control whereas Blalock focused on social class differences, economic competition, and power dynamics between blacks and whites. V. O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 4-7 (1949); HUBERT M. BLALOCK, *TOWARD A THEORY OF MINORITY GROUP RELATIONS* 37, 154 (1967) ("prejudice is deliberately fostered by economic elites in order to preserve their dominance"); Scheingold focused on

Whereas these scholars used this theory to analyze the dynamics of policy change based on group differentials, we rely on it here for the first time to examine the possibility that an intergenerational dimension exists that structures the decisions of female judges on the U.S. courts of appeals who were acculturated in different generations.

Political conflict theory is one perspective that scholars have relied upon when comparing relationships (including differences, similarities, and tensions) between and among subgroups.<sup>10</sup> An underlying assumption of conflict theory is that the existing social order is not necessarily a product of consensus and mutual benefit, but rather one of conflict and control among groups in society.<sup>11</sup> Above all else, the theory emphasizes the primacy of power differentials among groups. It postulates that due to limited societal resources, policy is the result of social and political contestation among groups in society.<sup>12</sup> Such contestation is necessary to achieve lasting legal and social change. Conflict theory has been used in social science settings to explain the power dynamics between Southern Blacks and Whites during Jim Crow. It has also been used to explain racial and ethnic differences in perceptions of injustice, wherein Black Americans and Hispanics experience more injustice due to their relative lack of political, sociolegal and economic power as compared to Whites.<sup>13</sup>

When it comes to potential gender differences among judges, findings differ depending on the level of court studied. In appellate courts, scholars have found that gender-based differences in judges' voting behavior are generally limited to cases that activate gender awareness on the bench, such as gender-based employment discrimination and violence against women.<sup>14</sup>

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attitudes of liberals and conservatives toward crime fighting. See STUART A. SCHEINGOLD, *THE POLITICS OF LAW AND ORDER* 5, 19-23, 224 (1984).

<sup>10</sup> See BLALOCK, *supra* note 9; KEY, *supra* note 9; Michael W. Giles & Arthur Evans, *The Power Approach to Intergroup Hostility*, 30 J. CONFLICT RESOL. 469, 470-72 (1986); Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"*, 61 J. POL. 628 (1999). Note that our reference to the power approach is also referred to in the cited studies as the conflict or competitive ethnicity model.

<sup>11</sup> KEY, *supra* note 9, at 5.

<sup>12</sup> Giles & Evans, *supra* note 10, at 470-72.

<sup>13</sup> John Hagan, Carla Shedd & M. R. Payne, *Race, Ethnicity and Youth Perceptions of Injustice*, AM. SOC. REV. 70, 381-407 (2005); KEY, *supra* note 9, at 5-8.

<sup>14</sup> *Diversification in the Federal Courts*, *supra* note 5, at 432-37; Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1780-82 (2004); Laura P. Moyer & Holly Tankersley, *Judicial Innovation and Sexual Harassment Doctrine in the US Court of Appeals*, 65 POL. RSCH. Q. 784, 789 (2012). See Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010) ("[T]he presence of women in the federal appellate judiciary rarely has an appreciable empirical effect on judicial outcomes."). Note that beyond voting behavior, there are important gender differences in other measures of judicial outcomes and behavior). See Laura P. Moyer et al., *'All Eyes Are on You': Gender, Race, and*

The research concludes that these differences among male and female judges emerge because of the lived experiences and unique perspectives that female judges bring into a traditionally male-dominated organizational culture, in particular, the more-discriminatory era in which these judges were socialized. Female judges socialized in an era where fewer opportunities existed demonstrate a greater affinity for plaintiffs in employment and sex discrimination cases.<sup>15</sup> Similar differences in gender issues awareness have been demonstrated outside the context of the judiciary, including in the national political arena<sup>16</sup> and in the setting of policy priorities in state legislatures.<sup>17</sup> Using data from 1988, for example, Susan Carroll showed that more than 50% of women legislators, but just 33% of men, had proposed or sponsored legislation addressing traditional women's issues such as education, family, abortion, and public health in the year before her study.<sup>18</sup>

Among federal trial courts, there is a greater “hodgepodge of findings.”<sup>19</sup> “While the bulk of empirical research on outcomes of cases before trial judges does not support theories of difference,”<sup>20</sup> Christina Boyd finds that female judges more often rule in favor of plaintiffs in sex discrimination cases filed by the Equal Employment Opportunity Commission than male

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*Opinion Writing on the US Court of Appeals*, 55 LAW & SOC. REV. 452, 460-61 (2021) (finding that the majority opinions written by female judges are longer, have more citations, and more discussed citations).

<sup>15</sup> See KENNEY, *supra* note 1; *Profile in Leadership*, *supra* note 4, at 81; Gerard Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 145 (1986); Laura P. Moyer & Susan B. Haire, *Trailblazers and Those That Followed: Personal Experiences, Gender, and Judicial Empathy*, 49 LAW & SOC. REV. 665, 666-67 (2015); Peresie, *supra* note 14, at 1761 (finding that federal appeals courts’ decision-making in sex discrimination and sexual harassment cases, female judges were more likely to find for the plaintiff and that “the presence of a female judge significantly increased the probability that a male judge supported the plaintiff”);

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

<sup>16</sup> DEBRA L. DODSON, *THE IMPACT OF WOMEN IN CONGRESS* 8 (2006) (“Compared with their male colleagues, women officeholders’ policy attitudes are more liberal and more feminist”). See also Susan Welch, *Are Women More Liberal than Men in the U.S. Congress?*, 10 LEGIS. STUD. Q. 125, 131 (1985).

<sup>17</sup> See Edith J. Barrett, *The Policy Priorities of African American Women in State Legislatures*, 20 LEGIS. STUD. Q. 223, 227-34 (1995); Michelle A. Saint-Germain, *Does Their Difference Make a Difference? The Impact of Women on Public Policy in the Arizona Legislature*, 70 SOC. SCI. Q. 956, 961-62 (1989); Sue Thomas, *The Impact of Women on State Legislative Policies*, 53 J. POL. 958, 967-68 (1991); Sue Thomas & Susan Welch, *The Impact of Gender on Activities and Priorities of State Legislators*, 44 W. POL. Q. 445, 450-55 (1991).

<sup>18</sup> Susan J. Carroll, *Taking the Lead*, 64 J. ST. GOV’T. 43, 45 (1991).

<sup>19</sup> Christina L. Boyd & Michael J. Nelson, *The Effects of Trial Judge Gender and Public Opinion on Criminal Sentencing Decisions*, VAND. L. REV. 1819, 1824 (2017).

<sup>20</sup> Susan Haire & Laura P. Moyer, *Gender, Law, and Judging*, OXFORD RSCH. ENCYC. POL. (Apr. 26, 2019), <https://doi.org/10.1093/acrefore/9780190228637.013.106>. For a recent piece of scholarship showing no difference between male and female voting behavior, see Christina L. Boyd & Adam G. Rutkowski, *Judicial Behavior in Disability Cases: Do Judge Sex and Race Matter?*, 8 POL. GRO. & ID., 834, 839 (2020).

judges.<sup>21</sup> In criminal cases, Boyd and Michael Nelson concluded that overall “there is no evidence that male and female judges differ in their average punitiveness;” however, from a representational perspective, female judges are significantly more lenient when sentencing female defendants than are male judges.<sup>22</sup> Collins et al. find that during wartime female judges issue more liberal decisions than male judges.<sup>23</sup> We acknowledge the broad conceptions of the word “liberal” in different arenas, but for purposes of this article, we follow the standard definition of a liberal court decision, which goes as far back as 1975. That definition is based on the type of claim being launched and/or the assumed relative economic and political resources of the litigants. Specifically, a liberal decision is one that favors: (1) the claims of the defendants or prisoners in criminal and prisoner petition cases; (2) the claims of minorities and women in racial and gender discrimination cases, respectively; (3) plaintiffs in civil liberties cases; (4) the government in regulation and tax cases; (5) individual workers or unions in disputes with management; (6) injured persons in tort cases; and (7) the underdog in private economic disputes.<sup>24</sup>

Thus, when it comes to comparing the voting behavior of male and female judges, scholars find that this behavior is “more alike than different.”<sup>25</sup> Where differences do exist, they are highly contextualized and nonessentialist (i.e., not based on unique personality traits possessed by female versus male judges).<sup>26</sup> This has led some scholars to emphasize organizational accounts of gender and judging, arguing that the lack of identifiable voting differences between male and female judges is explained by the identical professional training all judges receive and the similar

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<sup>21</sup> Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges’ Sex and Race*, 69 POL. RES. Q. 788, 789 (2016); see also Phyllis Coontz, *Gender and Judicial Decisions: Do Female Judges Decide Cases Differently than Male Judges?*, 18 GENDER ISSUES 59, 68 (2000) (finding differences between male and female trial court judges in Pennsylvania).

<sup>22</sup> Boyd & Nelson, *supra* note 19, at 1831. Boldt et al. find that compared to male judges, female judges are less likely to detain or require monetary bail for female defendants. Ethan D. Boldt et al., *The Effects of Judge Race and Sex on Pretrial Detention Decisions*, 42 JUS. SYS. J. 341, 353 (2021).

<sup>23</sup> Paul M. Collins, Jr. et al., *International Conflicts and Decision Making on the Federal District Courts*, 29 JUS. SYS. J., 121, 131 (2008) (“We expect that female judges will be more likely to render liberal decisions than their male counterparts as a result of women’s collective experience overcoming discrimination, resulting in increased empathy for underdogs (e.g., criminal defendants, civil liberties claimants) in the judicial system.”).

<sup>24</sup> See Sheldon Goldman, *Voting Behavior in the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 492 (1975); see also Reginald S. Sheehan et al., *Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court*, 86 AM. POL. SCI. REV. 464, 470 n.2 (1992).

<sup>25</sup> Haire & Moyer, *supra* note 20.

<sup>26</sup> See *Diversification in the Federal Courts*, *supra* note 5, at 432-37; KENNEY, *supra* note 1, at 2.

constraints they face on the bench.<sup>27</sup> This organizational account ignores the important effect of lived experience and socializing forces that existing scholarship demonstrates informs judicial voting for female judges, at least in certain cases. Previous scholarship's attribution of gender-based differences to female judges' socializing experiences is important for this project, as we go beyond simply considering male versus female judges' voting behavior. Instead, we also examine whether female judges of different generations differ in their voting behavior, and we theorize that the socializing experiences that shaped different generations of women will lead to different patterns of voting behavior. Importantly, we add to the literature on gender and judging, as judicial scholars have not fully analyzed the potential behavioral differences among female judges based upon the *generational cohort* to which they belong.<sup>28,29</sup> Specifically, we expand upon previous work by finding a generational effect for female judges across issue areas in the U.S. courts of appeals.

#### I. WHY STUDY INTERGENERATIONAL CHANGE AMONG FEMALE JUDGES?

Studying intergenerational change reveals whether a female judge's predisposition is dependent upon or related to the collective consciousness of her generational cohort. We argue that an important byproduct of the changes in political attitude and orientation surrounding gender roles during the 1960s is a generational gap in the decision-making behavior of female judges in the U.S. courts of appeals. In short, there are differences in the voting behavior of female judges based on generational affiliation. We use the term "generational affiliation" in effort to deconstruct the homogenous image of female judges and to characterize the linkages between distinct age groupings and their unique perceptions of the process of social and legal change.<sup>30</sup> We are agnostic about the normative question of how narrow or

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<sup>27</sup> Herbert Kritzer & Thomas M. Uhlman, *supra* note 8; Darrell Steffensmeier & Chris Herbert, *Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?*, 77 SOC. FORCES 1163, 1187 (1999).

<sup>28</sup> *But see* Moyer & Haire, *supra* note 15, at 665 (investigating generational effects among women judges in sex discrimination cases between 1995-2008).

<sup>29</sup> The developmental experiences provided by generations and cohorts has long been emphasized by sociologists. See David I. Kertzer, *Generation as a Sociological Problem*, 9 ANN. REV. OF SOC. 125 (1983).

<sup>30</sup> See "Politics Across Generations: Family Transmission Reexamined" M. KENT JENNINGS, LAURA STOKE, & JAKE BOWERS, 71 J. POL. 782-799 (2009) (recognizing that a generational divide exists between parents and their children, argues that political attitudes of parents are transmitted to their children through social learning processes and especially if parents are politically attuned: "Having a

wide the age groupings should be. For us, what is relevant is that generational analysis should proceed on the assumption that a generation is formed during youth, along with its accompanying period of intense learning, rebellion, and change. Indeed, social theorist Karl Mannheim agrees that it is the creation of a collective consciousness that fundamentally distinguishes one generation from another.<sup>31</sup>

Since the courts of appeals typically rely on three-judge panels to hear and decide cases, we model the contributions of multiple generations of female judges using the outcomes of appellate cases. Do female judges from different generations, whose political coming-of-age occurred at different historical time periods, differ in their vote and effect on collegial decision-making? This question is the central focus of our analysis. Moreover, the courts of appeals are an excellent platform for analyzing the differences in how female judges from different generations vote in small-group decision-making settings.

Legal scholars have empirically examined panel composition and its effects on case outcomes by focusing on the ideology of the judges based on the party identification of the appointing president. For example, for purposes of exposition, having two Republican judges and one Democratic judge on a panel would lead to amplification effects where “judges show far more ideological voting patterns when sitting with two judges appointed by a president of the same political party.”<sup>32</sup> In this example, the Democratic judge is more likely to vote like the two Republican judges, i.e., conservatively. Thus, “the affiliation of the appointing president matters a great deal to the content of the law.”<sup>33</sup>

Multiple generations of American women have ascended into the professional ranks in science, technology, law, business, education, etc., since the 1963 publication of Betty Friedan’s seminal work, *The Feminine*

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politicized family environment typically encourages the child to learn from the parent and to adopt the parent’s views.” However, this “also leaves the child more attuned to outside political influences. In periods of upheaval like those of the mid-1960s, or in general when the political environment contains forces antithetical to parental inclinations, this politicization may work against within-family congruence”); Susan A. McDaniel, *Born at the Right Time? Gendered Generations and Webs of Entitlement and Responsibility*, 26 CAN. J. SOC. 193, at 193 (2001); Beth E. Schneider, *Political Generations in the Contemporary Women’s Movement*, 58 SOC. INQUIRY 4 (1988).

<sup>31</sup> See Karl Mannheim, *The Problem of Generations*, in ESSAYS ON THE SOCIOLOGY OF KNOWLEDGE 283 (Paul Kecskemeti ed., 1952). Mannheim further maintains that the events and context a generation experiences in its formative years serve as a potential basis for the emergence of a shared “inborn way of experiencing life and the world.” KARL MANNHEIM, ESSAYS ON THE SOCIOLOGY OF KNOWLEDGE 283 (1952).

<sup>32</sup> CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN, & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 10 (2006).

<sup>33</sup> *Id.* at 10.

*Mystique*.<sup>34</sup> The book challenged the prevailing social ethos of the 1950s and earlier periods concerning the lives of women, their cultural conformity, and selfless devotion to family.<sup>35</sup> Few would question the centrality of Friedan's ideas in sparking the second wave of the women's movement in the United States and, indeed, around the world.<sup>36</sup> We think the echoes or reverberations of Friedan's ideas continue to register their effects in today's judicial and social systems. In an obituary of Friedan following her death in 2006, *The New York Times* lauded her contributions by noting that "'The Feminine Mystique[]' ignited the contemporary women's movement in 1963 and as a result permanently transformed the social fabric . . . ."<sup>37</sup> Furthermore, the *Times* noted, "Rarely has a single book been responsible for such sweeping, tumultuous and continuing social transformation."<sup>38</sup>

We consider the book's publication to be a crucial time-marker of intergenerational change among American women during the twenty-first century. To be sure, it is not easy to pinpoint the beginning and ending points of a generation and any attempt at perfection is foolhardy. We make no such attempt here. Instead, we choose the book's publication as a generational time-marker for two reasons. The first is the transformative effects in political attitude and cultural orientation that the book helped instigate among subsequent generations of women. The second is that our evolving understanding of gender and feminism, either as categories for explaining social processes or as social processes to be contested and explored, owe a tremendous debt of gratitude to this book.<sup>39</sup>

#### A. *A Woman's Place on the Appellate Court Bench*

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<sup>34</sup> BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963). In the legal profession, for example, female judges constitute 32% of all state judges in the Northeast, 28% in the Midwest, 28% in the South, and 33% in the West. See TRACEY E. GEORGE & ALBERT H. YOON, *THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS?*, at 11 (2016),

<https://eduhelphub.com/blog/wp-content/uploads/2021/11/gavel-gap-report.pdf>.

<sup>35</sup> STEPHANIE COONTZ, *A STRANGE STIRRING: THE FEMININE MYSTIQUE AND AMERICAN WOMEN AT THE DAWN OF THE 1960S*, at 162-165 (2011).

<sup>36</sup> Ruth M. Alexander, *In Defense of Nature: Jane Jacobs, Rachel Carson, and Betty Friedan*, 31 J. OF WOMEN'S HIST., Issue 33, 68, 71 (2019).

<sup>37</sup> Margalit Fox, *Betty Friedan, Who Ignited Cause in 'Feminine Mystique,' Dies at 85*, N.Y. TIMES (Feb. 5, 2006), <https://www.nytimes.com/2006/02/05/us/betty-friedan-who-ignited-cause-in-feminine-mystique-dies-at-85.html>.

<sup>38</sup> *Id.*

<sup>39</sup> See KENNEY, *supra* note 1, at 16.



Throughout much of American history, women were denied descriptive and substantive representation in federal collegial courts.<sup>40</sup> For example, no woman was appointed to any federal appeals court until 1934 when Florence Ellinwood Allen of Ohio was appointed to the Sixth Circuit by President Franklin D. Roosevelt, making her the first woman to secure a permanent seat on a United States court of appeals bench.<sup>41</sup> Indeed, until 1977 when President Jimmy Carter reformed the judicial selection process to diversify the federal bench, “women judges were too scarce to study in any meaningful way.”<sup>42</sup> This scarcity created a variability problem that made it impossible to determine whether a generational gap existed in the federal courts or how women could be most effectively represented in the federal judiciary.<sup>43</sup> Moreover, the political stalemate in Washington D.C. during recent decades rendered politicians especially unlikely to address the major policy concerns of American women through normal political channels.<sup>44</sup> Consequently, the judiciary became, for all intents and purposes, the most viable institutional option for women to achieve their policy objectives.<sup>45</sup>

Therefore, having more female judges from different age cohorts on the appellate court bench is tremendously important. Internally, it helps ensure

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<sup>40</sup> TRACEY E. GEORGE & ALBERT H. YOON, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS?, at 8 (2016), <http://gavelgap.org/pdf/gavel-gap-report.pdf> (this study of representation in state courts shows that more than half of American states (27) received a grade of F when it comes to gender representation). For similar claims of underrepresentation of women, see *Profile in Leadership*, *supra* note 4, at 204-08 and *Representative Role of Women Judges*, *supra* note 4, at 166-67.

<sup>41</sup> Michael J. Gabrail, *Hon. Florence Ellinwood Allen U.S. Court of Appeals for the Sixth Circuit: A Judge of Many Firsts*, FED. LAW. (Aug. 2016), at 51.

<sup>42</sup> Sue Davis et al., *Voting Behavior and Gender on the United States Courts of Appeals*, 77 JUDICATURE 129, 129 (1993).

<sup>43</sup> *Id.* at 129.

<sup>44</sup> *But cf.* BARBARA C. BURRELL, A WOMAN’S PLACE IS IN THE HOUSE: CAMPAIGNING FOR CONGRESS IN THE FEMINIST ERA 158 (1994) (noting that an exception is women politicians who are more likely to focus on “issues of special concern to women”).

<sup>45</sup> On abortion, for example, legal mobilization started with women’s effort to remove state bans on contraceptive use and information dissemination about family planning. *See, e.g.*, BARBARA HINKSON CRAIG AND DAVID M. O’BRIEN, ABORTION AND AMERICAN POLITICS 6 (1993) (arguing that “in most states [women, doctors, and others] were initially unsuccessful in persuading legislative majorities to revise state laws and therefore sought litigation to challenge the constitutionality of those laws in the courts”). Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV. 690, 700 (1983) defines legal mobilization as “the act of invoking legal norms to regulate behavior....The law is thus mobilized when a desire or want is translated into a demand as an assertion of one’s rights.” American women mobilized the law to gain abortion rights when facing stalemate in legislatures. *See* *Roe v. Wade*, 410 U.S. 113 (1973) (nationalizing abortion as a fundamental right of privacy that was recognized initially in *Griswald v. Connecticut* 381 U.S. 479 (1965)); GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 174-75 (1991) (arguing that women were unsuccessful in legislatures but achieved success in the Supreme Court in *Roe v. Wade*). On pay equity victory for women in court, *see* *Wash. Cnty. v. Gunther*, 452 U.S. 161 (1981); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 48 (William M. O’Barr & John M. Conley eds., The Univ. of Chicago Press, 1994).

diversity of opinion and balanced representation on the bench. More broadly, having more women on the bench promotes the legitimacy of judicial institutions and helps ensure a stronger constitutional democracy where all citizens can feel invested.<sup>46</sup> According to Justice Ruth Bader Ginsburg “women, like persons of different racial groups and ethnic origins, contribute to the United States judiciary . . . ‘a distinctive medley of views influenced by differences in biology, cultural impact and life experience.’”<sup>47</sup> Fortunately, even though the United States still has yet to achieve gender parity in its judicial appointment practices, several women of different age cohorts have now served on the federal courts of appeals, which will permit an examination of whether a generational gap exists in the decisional impact of female judges.

This Article proceeds in three steps. First, we provide basic information about political conflict theory and examine how the theory, as reflected in Justice Ginsburg’s early thinking on feminism, might help us understand experiential differences in judging between women and men. The second section examines the crux of our theoretical contribution, which is to uncover the potential intergenerational differences in judicial decision-making among female judges. Here, we rely on the role that socializing experiences played for different generations of female judges in informing their voting behavior. The third section examines the social environment surrounding *The Feminine Mystique* and its association with the second wave of the women’s movement, which we believe continues to echo across U.S. court systems. The remainder of the paper concerns our research design, analysis, and results.

We find that, contrary to the conservative times in which they grew up, the opinions of female judges whose political coming-of-age preceded publication of *The Feminine Mystique* are more “liberal” as compared to those of female judges of a younger (more recent) political generation. Moreover, we also find that the inclusion of female judges on the federal appellate courts is an important source of decisional conflict in the U.S. courts of appeals. We draw several conclusions from the analysis and identify their implications to better understand judicial decision-making and the role of women in the federal courts of appeals.

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<sup>46</sup> See Walker & Barrow, *supra* note 8, at 597 (explaining that a judiciary that descriptively represents society “has a positive legitimizing effect on the functioning of a democracy”).

<sup>47</sup> NICHOLA D. GUTGOLD, THE RHETORIC OF SUPREME COURT WOMEN: FROM OBSTACLES TO OPTIONS 3 (2012) (quoting Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 67 VITAL SPEECHES OF THE DAY 420, 420 (2002)); Ruth Bader Ginsburg, U.S. Sup. Ct. Just., Delivered to Wash. Univ., St. Louis, Mo. (Apr. 4, 2001).

## II. POLITICAL CONFLICT THEORY AND FEMALE JUDGES

### *A. Political Conflict, Justice Ginsburg, Critical Mass, and Gender Differences in Judging*

Legal scholars and social scientists have long pointed to conflict theory as a critical framework for explaining subgroup differences and similarities in the targeting and effect of governmental policies, as well as in individual-level behaviors.<sup>48</sup> Conflict perspective emphasizes standard law, political science, and sociological concepts, particularly social class, group threat, powerlessness, and pursuit of interests in modern pluralistic societies.<sup>49</sup> It asserts that group threats to existing social, political, and economic arrangements posed by disadvantaged groups—like Blacks, Hispanics, or women—can be used to explain the arc of their mistreatment by those who control the levers of political power as well as their expected reactions.<sup>50</sup> Early emphasis was placed on one's social class status and attachment to the economic structure.<sup>51</sup> Social scientists and legal scholars paid comparatively more attention to race and class but little attention to the effects of gender differences on social organization.<sup>52</sup> Our focus here is on gender rather than on race or class.

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<sup>48</sup> See KEY, *supra* note 9, at 5 (arguing that overall, the grand politics of the South, no matter the level of government or policies one chooses to analyze and compare, center around race: "[I]n the last analysis the major peculiarities of southern politics go back to the Negro."); SCHEINGOLD, *supra* note 9, at 22 ("[P]olitical conflict is over the rules of the game, with the politically powerful establishing rules that favor their interests and values..."); Giles & Evans, *supra* note 10, at 470-71 ("[A]dvantaged groups seek closure to exclude outsiders and subordinate them to an inferior position and hence, to secure their position of advantage. In contrast, disadvantaged groups seek closure to avoid dominant exploitation and to lay claim upon roles and resources within the control of the more advantaged groups.").

<sup>49</sup> Giles & Evans, *supra* note 10, at 471 (arguing that conflict theory views "groups as participants in ongoing competition for control of economic, political, and social structures and suggests that intergroup hostility and antagonisms are natural products of that competition").

<sup>50</sup> See SCHEINGOLD, *supra* note 9, at 21 ("[I]ndividuals differ from one another in a variety of ways that affect the goals they choose as well as their chances of reaching those goals. People are born into different circumstances and endowed with a wide variety of talents and handicaps, and people tend to be thrown into competition for the scarce resources that society makes available. The competition goes on among individuals and among groups that band together because of things they have in common. People may unite because their life chances are similar as a result of their jobs, race, or sex. Unity may also develop around a shared sense of right and wrong based on ethnicity, social class, or religious training. Organization and struggle tend to reinforce the interests and values shared within groups and to distance them from their competitors.").

<sup>51</sup> See H. M. Blalock, *Economic Discrimination and Negro Increase*, AM. SOC. REV. 584, 584-85 (1959) at 584. Cf. WILLIAM J. CHAMBLISS & ROBERT B. SEIDMAN, LAW, ORDER, AND POWER (1971).

<sup>52</sup> See generally JENNIFER L. HOCHSCHILD, FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION (1995); LEE SIGELMAN & SUSAN WELCH, BLACK AMERICANS' VIEWS OF RACIAL INEQUALITY: THE DREAM DEFERRED (1991).

Among the first set of women to serve on a federal appellate court was Justice Ruth Bader Ginsburg. Justice Ginsburg commented extensively on the social milieu of gender discrimination and conflict that prevailed when she and women of her generation attended law school in the 1950s. For example, her 1978 law review article about differences in social expectations for women and men provides the theoretical inspiration for our analysis. Justice Ginsburg stated:

[T]here was a chill wind for women in the law schools of the 1950's, although many of us barely noticed it while we were there. It was expected, taken for granted. Our sense of injustice was not aroused until years later when younger women, many of them touched deeply by the experiences in the 1960's civil rights movement, said the signpost at the gate was wrong.<sup>53</sup>

In this statement, Justice Ginsburg raises useful theoretical insights that feed into the larger framework of political conflict, which we think can improve our understanding of the role of gender and of intergenerational cleavages in judicial decision-making. For purposes of this article, we follow Louis Kriesberg in conceptualizing political conflict as a relationship in which two or more groups believe they have incompatible legal, social, or political goals.<sup>54</sup> For purposes of our theoretical setup, we recognize that political groups are *rarely* of equal political or resource strength.<sup>55</sup> Indeed, conflict theory is premised upon the sociolegal, economic, and political dominance of one group over another.<sup>56</sup> Along these lines, we characterize

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<sup>53</sup> Ruth Bader Ginsburg, *Women at the Bar—A Generation of Change*, 2 U. PUGET SOUND L. REV. 1, 4 (1978).

<sup>54</sup> LOUIS KRIESBERG, *THE SOCIOLOGY OF SOCIAL CONFLICT* 17 (1973).

<sup>55</sup> Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC'Y REV., Autumn 1974, at 95; Ryan C. Black & Christina L. Boyd, *U.S. Supreme Court Agenda Setting and the Role of Litigant Status*, 28 J. L. ECON. & ORG. 286, 288, 293 (2012) (noting that in litigation, for example, the 'haves' can "favorably leverage" their resource advantages against the 'have nots': "resource-endowed litigants have expertise, bargaining credibility, flexibility in long-term strategy and litigation, continuity in legal services, and fewer cost and delay barriers. The authors also identify examples of the gradation of resource endowment from weakest to strongest among potential parties in litigation).

<sup>56</sup> Jim Sidanius et al., *Social Dominance Orientation and the Political Psychology of Gender: A Case of Invariance?*, 67 J. PERSONALITY & SOC. PSYCH. 998, 999-1007 (1994). (Describing social dominance orientation as one that expresses "general antiegalitarianism" in intergroup social relationships, "a view of human existence as zero-sum" (999). Specifically, the authors define social dominance orientation as "the desire for one's ingroup to dominate out-groups, regardless of the individual's level of interpersonal dominance within her or his own in-group" (at 999). They identify men as the group expected to exhibit greater levels of social dominance orientation than women (at 999). Moreover, the authors rely on the

the *current* dominant social group (men) as perceiving the *current* dominated group (women) as posing a threat to the status quo.<sup>57</sup> V.O. Key, Jr. early on articulated the importance of perceived threat for understanding and distinguishing between group dynamics in American society.<sup>58</sup> Whereas Key's insight targeted social organization concerning race relations, Justice Ginsburg's insight is about social organization concerning gender, domination, and opportunity differentials.

First, Justice Ginsburg's statement points to a gender gap in opportunity structure, which raises the potential for a "difference" jurisprudence between men and women.<sup>59</sup> Justice Ginsburg's metaphor of "a chill wind" evokes an emotional bond or a type of linked fate among women that is reflected in their struggle and coalitional efforts to raise consciousness and build gender equality.<sup>60</sup> The women's movement of the 1950s and 1960s perceived

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logic and language of conflict theory to motivate the discussion, including "hierarchical relationships between social groups" and "a view of groups relations as inherently zero-sum" at 998).

<sup>57</sup> We characterize women as a dominated group based on the social, economic, and political reality of the times. Relative to men, women still suffer discrimination in pay inequities. *See, e.g.* Goodyear Tire v. Ledbetter, 550 U.S. 618 (2007); Robert G. Wood, Mary E. Corcoran, & Paul N. Courant, *Pay Differences among the Highly Paid: The Male-Female Earnings Gap in Lawyers' Salaries*, 11 J. LAB. ECON., 417 (1993) (finding that even after accounting for a rich set of control variables, including childcare, work history, law school performance, and job setting, one-fourth to one-third of the earnings gap in favor of men remained unexplained); BERNADETTE D. PROCTOR, JESSICA L. SEMEGA, & MELISSA A. KOLLAR, *INCOME AND POVERTY IN THE UNITED STATES* (2016), <https://www.census.gov/library/publications/2016/demo/p60-256.html> (reporting that in 2015, American women working full time were paid 80% of what American men working full time were paid); Barbara L. Wilson, et al., *Nursing Gender Pay Differential in the New Millennium*, 50 J. NURSING SCHOLARSHIP 102, 104 (2017) (comparing wage differential among male and female nurses and teachers working similar hours and finding that the gender premium in favor of men remains "robust" in both professions). Moreover, most positions of power (and hence higher pay) in various fields, including government, law, business, sports, entertainment, and medicine are occupied by men. *See* ARIANE HEGEWISCH & HEIDI HARTMAN, *OCCUPATIONAL SEGREGATION AND THE GENDER GAP: A JOB HALF DONE*, INSTITUTE OF WOMEN'S POLICY RESEARCH 3, 11 (2014); *see also*, Rebecca D. Gill et al., *Are Judicial Performance Evaluations Fair to Women and Minorities? A Cautionary Tale from Clark County, Nevada*, 45 L. & SOC'Y REV. 731, 732 (2011).

<sup>58</sup> *See* KEY, *supra* note 9, at 5.

<sup>59</sup> *See* CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 1-4, 6 (1982). In her review of Gilligan's book, Caryl B. Germaine's analysis underscores the sense in which we cited Gilligan's book. Germaine's review points to how women and men experience themselves and the route through which women and men reach the pinnacle of moral judgement. "Because of the dynamics of the mother-child relationship, men experience themselves as being in an unequal hierarchy of relationships, striving to be alone at the top, fearful of others getting too close. Women experience themselves as being within a web of relationships, striving to be at the center of connectedness, fearful of being stranded at the edge of the web." As such, "women resolve moral conflicts in a context of caring and responsibility for others and men in a context of impartial justice. They are different voices." Caryl B. Germaine, *Carol Gilligan's In a Different Voice: Psychological Theory and Women's Development*, 28 SOCIAL WORK 484, 484 (1983) (book review).

<sup>60</sup> A recent study of state court judges shows that female judges share a linked fate when their performance is evaluated relative to male judges. *See* Gill et al., *supra* note 58, at 749-55. Overall, female judges are evaluated lower than male judges with similar abilities and professional credentials and

gender equality and male domination as incompatible goals. It claimed that structural inequalities, as well as disregard for and discrimination against women, posed the most serious obstacles to social advancement that women must fight cooperatively to eradicate. Broadly speaking, the movement's aim was "to mobilize American women as a self-conscious, solidary political force" toward a common struggle to close the gender gap in opportunity structure, education, and value attribution.<sup>61</sup>

Viewed within the framework of political conflict, the movement saw women as being locked in a political struggle with men because men have historically maintained a monopoly over social organization, opportunity structure, and political power in society. This was demonstrated in several early Supreme Court cases.<sup>62</sup> There is a sense of solidarity or sisterhood among women that is communicated through Justice Ginsburg's "chill wind" metaphor of gender relations, a belief that women are all in this struggle together, and that only by taking ownership of their own fate and working collectively can they advance the larger objective of expanding equality and opportunity.<sup>63</sup> Research in political psychology demonstrates that because women are connected by a shared fate in discrimination and existing social roles in the domestic sphere, including dominant responsibility over childrearing and household management,<sup>64</sup> there is a stronger emotional bond among women than among men, especially in relation to political values and attitudes toward gender-coded issues.<sup>65</sup> This linked-fate constitutes a strength because it created opportunities for women to form coalitions to support one another and allows women to build and maintain a formidable unified front to pursue their shared interests.

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trajectories. *Id.* at 749-55. Similarly, analysis of perceptions of discrimination suggests three-fourths of well-off black women recognize sex discrimination as a serious problem, and claim "'a common fate' with other women and endorse collective action among all women. HOCHSCHILD, *supra* note 52, at 108.

<sup>61</sup> David O. Sears & Leonie Huddy, *On the Origins of Political Disunity Among Women*, in WOMEN, POLITICS, AND CHANGE 249, 249 (Louise A. Tilly & Patricia Gurin eds., 1990).

<sup>62</sup> See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 130 (1873); *Minor v. Happersett*, 88 U.S. 162, 171 (1874). In these cases, the Supreme Court determined that the Privileges or Immunities Clause of the Fourteenth Amendment did not guarantee women the right to practice law (*Bradwell*) nor to vote (*Minor*).

<sup>63</sup> Kelli Zaytoun and Judith Ezekiel, *Sisterhood in a Movement: Feminist Solidarity in France and the United States* 37 FRONTIERS: J. WOMEN STUDIES 195, 195 (2016) (noting that "[t]he Women's Liberation movement was predicated upon the idea of solidarity among women, once commonly referred to as 'sisterhood'"). GILLIGAN, *supra* note 59, at 23 (underscoring the importance of attachment in the developmental thinking of women).

<sup>64</sup> GILLIGAN, *supra* note 59, at 7-8.

<sup>65</sup> See Leonie Huddy, *From Social to Political Identity: A Critical Examination of Social Identity Theory*, 22 POL. PSYCH. 128, 131 (2001); Virginia Sapiro, *News from the Front: Inter-Sex and Intergenerational Conflict Over the Status of Women*, 33 W. POL. Q. 260, 260-62, 264-67 (1980).

The value of shared fate is especially relevant in powerful political and legal institutions such as the courts. As noted earlier, tighter emotional bonding among women raises the possibility that “difference” jurisprudence among genders will emerge when female and male judges work together.<sup>66</sup> Consistent with political conflict theory, this view, first articulated by psychologist Carol Gilligan, posits that alternative perspectives will emerge when women are included in institutional decision-making processes typically dominated by men.<sup>67</sup> This is because women and men speak in different voices. They bring different sets of lenses, experiences, and concerns to the judicial conference table. Female judges are shaped by shared gender roles, family experiences, and socialization within the women’s movement. Therefore, they employ a different and more communal mode of legal reasoning that is tied to social connectedness as compared to their male colleagues who, on average, bring a distinct worldview that is far more atomistic.<sup>68</sup> As a result, there was a strong expectation early on among scholars that having more women on the bench would produce more liberal decisions. Female judges tended to be more liberal (i.e., more likely to favor the resource underdog) than male judges in their disposition of cases across various areas of the law.<sup>69</sup>

While a limited literature supports this expectation, the bulk of the scholarship on gender and voting behavior finds little difference in male and female judges’ behavior.<sup>70</sup> Given this literature, our theoretical perspective largely focuses on differences between generations of female judges, emphasizing the role of formative socializing experiences in shaping judicial behavior. However, research on critical mass theory supports an expectation of greater liberalism for female judges compared to male judges in several issue areas. Indeed, critical mass theory may explain how the lack of difference between male and female judges’ decisions remains consistent

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<sup>66</sup> GILLIGAN, *supra* note 59, at 7-8.

<sup>67</sup> *Id.* at 2.

<sup>68</sup> *Id.* at 7. “The elusive mystery of women’s development lies in its recognition of the continuing importance of attachment in the human life cycle.” GILLIGAN, *supra* note 59, at 23. *See also*, Germain, *supra* note 56 (“Women resolve moral conflicts in a context of caring and responsibility for others and men in a context of impartial justice. They are different voices.”).

<sup>69</sup> *See* Sheldon Goldman, *Voting Behavior in the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 492 (1975) (defining liberal outcomes as those that favor the resource underdog); Reginald S. Sheehan et al., *Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court*, 86 AM. POL. SCI. REV. 464, 470 n.2 (1992).

<sup>70</sup> For research showing greater liberal voting behavior by female judges compared to male judges, see Donald R. Songer & Kelly A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750, 750 (2000); Boyd & Nelson, *supra* note 19 at 1831 (e.g., “there is no evidence that male and female judges differ in their average punitiveness. This is true for all charges as well as for the most and least severe offenses.”)

with political conflict theory. Critical mass theory asserts that “once a certain level of minority representation (i.e., a critical mass) has been reached, group interactions will change and substantive differences in the behavior of the involved groups will begin to emerge” and “members will become more assertive... and consequently exhibit more distinctive behavior.”<sup>71</sup> In civil rights cases in the federal appellate courts, Laura Moyer finds that as the frequency of mixed-sex panels increases, so does the likelihood of voting for the plaintiff by both male and female judges.<sup>72</sup> Similarly, McCall finds that the greater the number of women on a court, the more likely female state supreme court justices are to cast liberal votes in criminal cases.<sup>73</sup> In the analysis that follows, we test whether increases in the number of women on panels and on courts increases the likelihood of a liberal vote.

Political conflict theory is also consistent with the representation account of sex-based judging that views female judges as both symbolic and substantive representatives of their social group. According to this perspective, female judges work more aggressively than male judges toward protecting women in litigation involving issues that carry a high gender valence.<sup>74</sup> As Beverly Cook wrote: “The organized campaign to place more women on the bench rests on the hope that women judges will seize decision-making opportunities to liberate other women.”<sup>75</sup> Previous research indicates gender differences in voting behavior in cases concerning women’s rights claims, such as employment discrimination. Indeed, we would make an inferential leap and claim that female judges, regardless of ideological leaning, show much stronger inclination to support women’s rights claims than male judges.<sup>76</sup> After finding decisional differences in her analysis of

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<sup>71</sup> Paul M. Collins, Jr., Kenneth L. Manning & Robert A. Carp, *Gender, Critical Mass, and Judicial Decision Making*, 32 L. & POL’Y 260, 264 (2010).

<sup>72</sup> Laura Moyer, *Rethinking Critical Mass in the Federal Appellate Courts*, 34 J. WOMEN POL. & POL’Y 49, 63 (2013). See also Katherine Felix Scheurer, *Gender and Voting Decisions in the US Court of Appeals: Testing Critical Mass Theory*, 35 J. WOMEN POL. & POL’Y 31, 31 (2014) (finding support for critical mass theory in civil rights and economic activity cases). The article adopts its own definition of a liberal decision. *Id.* at 34. In civil rights cases, a liberal decision is one where judges “place a greater emphasis on not tolerating discriminatory practices and ensuring equality for all members within the community.” *Id.* In economic activity cases, “a liberal vote opposes business, employers, and arbitration, while supporting competition, liability, indigents, small business vis-à-vis big ones, debtors, bankruptcy, consumers, the environment, and accountability.” *Id.*

<sup>73</sup> Madhavi McCall, *Structuring Gender’s Impact: Judicial Voting Across Criminal Justice Cases*, 36 AM. POL. RSCH. 264 (2008).

<sup>74</sup> See Boyd et al., *supra* note 6, at 390-91.

<sup>75</sup> Beverly B. Cook, *Will Women Judges Make a Difference in Women’s Legal Rights?*, in WOMEN, POWER, and POL. SYS. 216 (Margherita Rendel ed., 1981).

<sup>76</sup> See Boyd et al., *supra* note 6 at 390 (“Only in cases implicating sex discrimination do we observe sex-based effects: the probability of a judge deciding in favor of the party alleging discrimination decreases by 10 percentage points when the judge is a male. Likewise, when a woman serves on a panel



1999-2001 sex-discrimination and sexual harassment cases in the federal courts of appeals, Jennifer Peresie concluded, “[w]ise old men and wise old women sometimes reach different conclusions.”<sup>77</sup>

This expectation is also supported in legislative institutions.<sup>78</sup> Political scientist Susan Welch, who analyzed conservative coalition scores in the U.S. Congress, found that women were more likely than men to cast liberal votes, but that the differences had decreased over time.<sup>79</sup> Others have analyzed policy priorities espoused by male and female policymakers and concluded that women legislators in twelve states were slightly more likely than men to give higher priority to women's issues than to business and commerce issues.<sup>80</sup>

Studies specifically assessing panel dynamics in the courts of appeals provide further support for these accounts of gender effects on judging. A detailed examination of panel configurations and their connection to decision-making reported that mixed panels of female and male judges were more supportive of women's rights claims in employment discrimination cases than were homogenous panels composed of all-male judges.<sup>81</sup> The logic underlying this finding is that “[w]omen appear to influence their male colleagues, modifying the content of decisions from what is rendered, *ceteris paribus*, by all-male panels.”<sup>82</sup> Thus, there is reason to believe that female membership on a judicial panel can change the dynamics of the discussion, the type of issues deemed salient, and possibly the case outcome. As such, having a woman judge on a judicial panel in the courts of appeals should, on average, produce more liberal decisional outcomes than panels that feature no women.

In specialized appellate courts that normally focus on a narrower area of the law, differential gender effects have been detected as well. For example,

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with men, the men are significantly more likely to rule in favor of the rights litigant.”); *see also*, Gerard S. Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 153 (1986).

<sup>77</sup> Peresie, *supra* note 14, at 1787.

<sup>78</sup> Sarah Poggione, *Exploring Gender Differences in State Legislators' Policy Preferences*, 57 POL. RSCH. Q. 305, 305 (2004); SUE THOMAS, *HOW WOMEN LEGISLATE* 62 (1994) (arguing that there is a significant difference in legislative outcomes when the number of women in a legislature reaches a certain threshold along with the number and types of laws that are passed because “women [are] expected to cast a more critical eye toward all legislation, whatever the subject matter, to judge how its purpose would indirectly affect segments of constituencies usually overlooked”).

<sup>79</sup> Welch, *supra* note 16, at 129-31.

<sup>80</sup> *See* Thomas & Welch, *supra* note 17, at 454.

<sup>81</sup> *See* Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Courts of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON & ORG. 299, 324-26 (2004); *see also* Boyd et al., *supra* note 6; Peresie, *supra* note 14.

<sup>82</sup> *Id.* at 325.

one study analyzed the emergence of conflict or disagreement among judges in international trade policy cases decided by various panels of the U.S. Court of Appeals for the Federal Circuit.<sup>83</sup> That study indicated that the few women on the court wrote a disproportionately higher number of dissenting opinions.<sup>84</sup> Consistent with the conflict perspective, one can surmise that beyond speaking with a different voice, writing dissenting and concurring opinions is one way for female judges to demonstrate independence and distinguish themselves in a male-dominated judicial environment. This finding raises the possibility that after a critical mass of women has been reached in an appellate bench, female judges feel freer to express controversial opinions and take stances that diverge from the norm typically exercised by the dominant group.<sup>85</sup>

The critical mass perspective is consistent with the conflict framework in suggesting that after the number of women on a court moves beyond “token status,” female judges will become more nonconformist in their behavior and orientation.<sup>86</sup> The theoretical implication is that women will find the social environment of a court somewhat less constraining in their capacity to serve as substantive representatives of their social group if more of them are serving on that court. Based on this discussion and the findings on panel dynamics, we expect that as the number of women on a court of appeals increases, its opinions will generally lean toward women’s interests. That is, these courts are in general more likely to make liberal decisions.

### *B. Women, Intergenerational Change, and Judging*

The second insight that we can draw from Justice Ginsburg’s statement is that there is an intergenerational gap in political orientation among women who attended law school decades apart and thus were shaped by a unique chronology of cultural and political experiences as they came of age.<sup>87</sup> This,

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<sup>83</sup> See Isaac Unah, *The Incidence and Structure of Conflict on the US Court of Appeals for the Federal Circuit*, 23 L. & POL’Y. 69, 83 (2001).

<sup>84</sup> *Id.*

<sup>85</sup> ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 241 (1977) (reminding us that, “[c]hange in the behavior and treatment of token women is strongly tied to shifting proportions”). But see SUSAN HAIRE & LAURA MOYER, *DIVERSITY MATTERS: JUDICIAL POLICYMAKING IN THE U.S. COURTS OF APPEALS* (2015). (Discussing research that indicates increases in female judges on appellate courts (and hence greater gender diversity on panels) does not drive greater disharmony or conflict: “greater panel diversity does not result in the formal expression of divergent views through separate opinions” p. 88).

<sup>86</sup> See Collins, Jr., et al., *supra* note 71, at 261; see also Kanter, *supra* note 3, at 966; McCall, *supra* note 73, at 271.

<sup>87</sup> GUTGOLD, *supra* note 47, at 128-29 (arguing that Supreme Court Justices Sandra Day O’Connor’s and Ruth Bader Ginsburg’s “experiences are tied to their generations” but that Justices Sonia Sotomayor

of course, applies to women who have served and those that are currently serving as federal appellate judges. From the perspective of conflict theory, Justice Ginsburg's claim suggests another form of "difference" jurisprudence, one constituting an intertemporal gap whereby female judges from an older generation voted differently in terms of their ideological orientation compared to female judges from a younger generation because of varied role socialization and gender consciousness.<sup>88</sup> Thus, quite distinct from previous studies on judging, it is by testing the possibility of an intergenerational gap among women that our study makes an important contribution to the literature on judicial decision-making.

More specifically, Justice Ginsburg's statement points toward adherence to tradition among older women, which younger women rejected. She noted that injustice was expected and taken for granted by her generation until years later when a younger generation of women came along and shook things up by pointing out that "the signpost at the gate was wrong."<sup>89</sup> To us, this means that tradition had desensitized Justice Ginsburg's generation of women (particularly White women) to toward injustice. Of course, we recognize that not all women of this earlier generation were inclined to accept tradition for its own sake, but a substantial number of them did just that as a matter of cultural norm, even if reluctantly. We conceptualize this earlier generation as that generation of women who came of age (e.g., reached ages thirteen to twenty-five) before publication of *The Feminine Mystique* in 1963. These women were born before the end of 1950 and are largely a product of Depression Era society and World War II. In the analysis section, we refer to them as the *pre-mystique* generation. As shown in Appendix Table 1, there were forty-two female judges in the U.S. courts of appeals who fell into this age cohort during the period of our study. The generation that came immediately after, we have christened the *post-mystique* generation. There are six women appellate judges in this cohort.<sup>90</sup>

Political scientists David Sears and Leonie Huddy have described the tendency toward tradition by a given generation as symbolic predisposition, which they describe as the attribution of adult behavior to the "residues of earlier learning."<sup>91</sup> They concluded that symbolic predisposition is a major

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and Elena Kagan "have been able to rise up more comfortably than O'Connor and Ginsburg"); See Moyer & Haire, *supra* note 15, at 673-74.

<sup>88</sup> We believe that this claim would apply to any group whose members have a shared historical experience that is unique to the group within a social structure that has undergone profound change over time. The African American experience with racial discrimination is but one of many possible examples.

<sup>89</sup> Ginsburg, *supra* note 49, at 4.

<sup>90</sup> See *infra* Appendix, Table 1

<sup>91</sup> SEARS & HUDDY, *supra* note 56, at 256.

source of disunity among women.<sup>92</sup> This is a recognition that women of any generation are not monolithic in their aspirations. For that reason, we think that the women of the pre-mystique generation who became judges broke with the prevailing cultural ethos of marriage and motherhood at an early age to instead pursue higher education, professional careers, and eventually rise to the level of appeals court judges, and indeed, U.S. Supreme Court justices. They are truly extraordinary women. Justice O'Connor described these early law women by emphasizing their "spunk, spirit, and wit" along with the enormous barriers they faced.<sup>93</sup> They had a different (i.e., more progressive, cosmopolitan, and even rebellious) political outlook and seemed willing to challenge existing orthodoxy, even as other women of their generation accepted the prevailing social mores and beliefs that viewed power as something that naturally resided with men and was promoted by those in charge (men) for the benefit of men.<sup>94</sup> The bottom line is that the pre-mystique generation of female judges occupies part of an enduring feminist movement that, to varying degrees, faced limited freedoms and resources but had to fight long and hard for equality and social liberation by challenging male domination and venturing into institutions that had previously excluded them.<sup>95</sup> Do these older female judges adopt a more liberal mode of decision-making than their younger "sisters?" We think and expect that they do.

Before *The Feminine Mystique* was published, women of an earlier generation were expected to marry and become mothers at a youthful age.<sup>96</sup> Their happiness and success was defined narrowly in terms of their place within the nuclear family. For most women of earlier times, little emphasis

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<sup>92</sup> *Id.*

<sup>93</sup> Sandra Day O'Connor, *Portia's Progress*, 66 N.Y. L. REV. 1546, 1548 (1991); see also GUTGOLD, *supra* note 47, at 128.

<sup>94</sup> Indeed, Stephanie Coontz, whose book is based on letters to Friedan from, and interviews she conducted of women who read *The Feminine Mystique* when it was first published in the early 1960s, succinctly captures the sentiment we describe here: "The choices women were forced to make in the 1950s were far more starkly posed than ours are today. Contemporary women may resent the pressure to be a superwoman and 'do it all,' but in that era the prevailing wisdom was that *only* a superwoman could choose to do *anything* with her life in addition to marriage and motherhood, and that such superwomen were few and far between." Stephanie Coontz, *supra* note 35, at xxii.

<sup>95</sup> The women's liberation movement is an American phenomenon whose beginning can be traced back more than 200 years. On March 31, 1776 Abigail Adams wrote to her husband John Adams as he served in the Continental Congress and urged him to "remember the ladies" in the new legal codes Congress was constructing: "Emancipating all nations, you insist upon retaining absolute power over Wives." That communication forms the first known incidence of an American woman striving for individual rights for women. See Letter from Abigail Adams to John Adams (Mar. 31, 1776), in 1 ADAMS FAMILY CORRESPONDENCE, 1761-1776 (L. H. Butterfield et al. eds., 1963), [https://www.masshist.org/database/viewer.php?item\\_id=5&pid=15](https://www.masshist.org/database/viewer.php?item_id=5&pid=15).

<sup>96</sup> COONTZ, *supra* note 35, at 1-5, 59.

was placed on education beyond high school and professional development.<sup>97</sup> Moreover, women were not expected to work outside the home for pay.<sup>98</sup> When they did work outside the home, the work was often limited to unpaid volunteer activities in community organizations such as schools, community centers, churches, and other civic institutions.<sup>99</sup>

All these structural trends led to the view in political science during the 1950s and 1960s that women of an older generation were relatively more conservative than those of a younger generation. Indeed, generational studies reported in *The American Voter* and other important works indicated that American women from an older generation were in fact more conservative than women from later generations.<sup>100</sup> This was reflected in their vote choice for president. For instance, Jeff Manza and Clem Brooks reported that women leaned toward the Republican Party during the 1952, 1956, and 1960 presidential elections.<sup>101</sup>

In this article, we are discounting this explanation, not because it is invalid but because of the uniqueness and struggles of the group of women we study. Our study is not focused on mass publics but on a specific group of women who experienced significant levels of gender discrimination in their professional development and legal careers. Collectively, they are very different from most women of their time in terms of cultural and professional aspirations and so we would not expect their decision-making to follow traditional (i.e., conservative) expectations. Indeed, some authors have suggested that women become more feminist and more liberal in outlook once they have experienced inequalities or discrimination related to their

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<sup>97</sup> *Id.* at 59 (noting that the movement towards women's empowerment was "well under way by the mid-1950s . . . [yet] many of Friedan's readers found her defense of women's right and need to work a revelation").

<sup>98</sup> *Id.* at 60 (for example, "[i]n the 1930s, laws and policies had prohibited employers from hiring married women if their husbands were employed by the same company or government agency. . . . Married women were welcomed into the workforce during the war, but as soon as the war ended they were urged to go home and tend to their husbands' needs."); *Id.* at 61 ("It was not acceptable for a woman to want a job that would be satisfying enough to compete with her identity as wife or impinge on her husband's sense that he was the primary breadwinner.").

<sup>99</sup> *Id.* at 32, 130.

<sup>100</sup> See ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (1960 at 490, 493) (Based on data on political attitudes from 1952 and 1956, the authors concluded that on the dimension of political motivation, sex roles "presume the woman to be a submissive partner. The man is expected to be dominant in action directed toward the world outside the family." Furthermore, "Women in our samples consistently show slight differences in vote partisanship by comparison with men, being 3-5 percent more Republican." See also MURRAY GOOT & ELIZABETH REID, *Women: If Not Apolitical, Then Conservative*, in *WOMEN AND THE PUBLIC SPHERE: A CRITIQUE OF SOCIOLOGY AND POLITICS* 122 (Janet Siltanen & Michelle Stanworth eds., 1984); COONTZ, *Supra* note 35, at 59 (stating that Betty Friedan "painted the 1950s as a time of political conformity, cultural conservatism, social repression, and female passivity").

<sup>101</sup> See Jeff Manza & Clem Brooks, *The Gender Gap in U.S. Presidential Elections: When? Why? Implications?*, 103 AM. J. OF SOC. 1235, 1238 (1988).

jobs.<sup>102</sup> Similarly, according to Pam Conover, increased feminist consciousness is associated with individuals who have abandoned traditional or conservative social and political attitudes in favor of more egalitarian and progressive beliefs.<sup>103</sup>

It is certainly possible that the transformative social movements of the 1960s enhanced progressive inclinations in political beliefs among the pre-mystique generation of women so that female judges of that generation should exhibit relatively more liberal tendencies in their judging compared to female judges of the post-mystique generation who faced relatively lower obstacles and higher institutional protections in their professional careers than their mothers or grandmothers. As such, we expect these pre-mystique female judges to be more likely to vote liberally than their post-mystique counterparts.

According to Paul Abramson, it is always treacherous to arbitrarily designate specific years to mark transition points from one generation to another.<sup>104</sup> We avoid this difficulty by choosing a point of generational transition that is marked by a widely recognized major event in women's history. The publication in 1963 of Betty Friedan's seminal book, *The Feminine Mystique*, is one such event; it marked a generational shift in the social and political orientation of women. Furthermore, Friedan's book and the cultural transformation it represents helped shape decisions made by female judges from the older versus the younger generations.

Finally, previous research on gender and judicial decision-making supports this expectation of an intergenerational difference among female judges. In their study of sex discrimination cases in the U.S. courts of appeals, Moyer and Susan Haire find that female judges lent greater support to plaintiffs over their employers than their male colleagues. However, this effect only exists for judges who graduated from law school between 1954 and 1975.<sup>105</sup> The judges who graduated from law school during this time frame correspond to those we have termed "pre-mystique" in this project. The greater propensity among these female judges to support women in sex discrimination cases results from the "first-hand experience with severe, pervasive discrimination . . . commonplace for the first wave of female

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<sup>102</sup> See Nancy E. Downing & Kristin L. Roush, *From Passive Acceptance to Active Commitment: A Model of Feminist Identity Development for Women*, 13 COUNSELING PSYCH. 695, 695-709 (1985); Schneider, *supra* note 30, at 15.

<sup>103</sup> See Pamela J. Conover, *Feminists and the Gender Gap*, 50 J. OF POL. 985, 1000-01 (1988).

<sup>104</sup> See Paul Abramson, *Generational Change and the Decline of Party Identification in America 1952-1974*, 70 AM. POL. SCI. REV. 469, 471 n.6 (1976).

<sup>105</sup> Moyer & Haire, *supra* note 15.

judges because of the unique set of circumstances these women faced.”<sup>106</sup> Importantly, while the authors find a difference between different generations of female judges and male judges, they do not find significant differences between generations of female judges in their voting behavior. This is the primary hypothesis we test below.

### *C. The Feminine Mystique and the Women’s Movement*

The women’s movement was formed to fight discrimination and injustices directed at women in numerous areas of social life. The movement emphasized different issues at different historical intervals during its storied evolution, including access to the ballot box, schooling opportunities, reproductive freedom, and labor force participation. The movement began earnestly in 1848 when a group of over 300 women and men under the leadership of Elizabeth Cady Stanton and Lucretia Mott gathered in Seneca Falls, New York.<sup>107</sup> They established the *Declaration of Sentiments and Resolutions*, which detailed decades of injustices men had inflicted on women, and they demanded women’s liberation through suffrage and property ownership.<sup>108</sup> Their crowning achievement was the ratification of the Nineteenth Amendment in 1920, giving women the vote.<sup>109</sup> This emphasis on enfranchisement and the removal of legal obstacles to property ownership is generally associated with the first wave of the women’s movement. In our study, we consider pre-mystique judges to be a part of this initial wave.

The second wave of the women’s movement began during the early 1960s and lasted through 1979 when Congress enacted the Pregnancy Discrimination Act. Feminist theorists indicate that the women’s movement was at its most activist and powerful phase during this wave.<sup>110</sup> Having secured the vote, women sought to expand their power in society and to change public attitudes toward gender roles. Women in the second wave placed heavy emphasis on challenging broader conceptions of patriarchal society, correcting economic and social inequalities between men and

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<sup>106</sup> *Id.* at 674.

<sup>107</sup> SALLY G. McMILLEN, *SENECA FALLS AND THE ORIGINS OF THE WOMEN’S RIGHTS MOVEMENT* 4, 5-8, 105 (2008). (Describing the background of the primary organizers of the movement and their motivations for demanding foster women’s equality).

<sup>108</sup> *Id.* at 237. *See also id.* at ch. 4.

<sup>109</sup> McMILLEN, *supra* note 107, at 4. NANCY COTT, *THE GROUNDING OF MODERN FEMINISM* 85 (1987).

<sup>110</sup> *See* CATHERINE MACKINNON, *BUTTERFLY POLITICS*, at 301 (2017) (noting some of the legal accomplishments of this period and identifying some setbacks as the struggle continues).

women, giving women a greater voice in the social and political order, and improving conditions for women in the workplace, including pay equity and flexible work hours.<sup>111</sup> Importantly, we believe this phase of the women's movement was galvanized by the publication of *The Feminine Mystique*. In it, Betty Friedan described a dark age in women's history and criticized the idealized view of the American housewife of the 1950s as exploitative of women, relegating women to the domestic sphere of the home and family life, while being afraid to ask "Is this all?"<sup>112</sup> This wave produced several legislative and legal victories, including the enactment of Title IX of the Education Amendments Act of 1972,<sup>113</sup> the Equal Pay Acts of 1963<sup>114</sup> and 1974, the Women's Educational Equity Act of 1974.<sup>115</sup> This period also was marked by landmark Supreme Court decisions constitutionalizing the right to privacy in *Griswold v. Connecticut*<sup>116</sup> and the expansion of reproductive rights in *Roe v. Wade*.<sup>117</sup>

These successes were very important. However, the greatest victory came in the form of significant changes in social attitudes and expectations of Americans toward women both in the home and at work.<sup>118</sup> The children born during the year the *Feminine Mystique* was published were high school seniors in 1980. They were born and came of age at a time when political activism was very intense, expected, and accepted. As an example of how the book helped shape the gender consciousness and political socialization of its generation, a U.S. Department of Education survey of the high school class of 1980 showed that 98% of both boys and girls said that a woman should have exactly the same educational opportunities as a man; more than 96% said that women and men should be paid the same for doing the same

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<sup>111</sup> See FLORA DAVIS, *MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960*, 70 (1999); RITA J. SIMON & GLORIA DANZIGER, *WOMEN'S MOVEMENTS IN AMERICA* 4-5 (1991); Lee Ann Banaszak, *When Waves Collide: Cycles of Protest and the Swiss and American Women's Movements*, 49 POL. RES. Q. 837, 837-38 (1996).

<sup>112</sup> See FRIEDAN, *supra* note 34, at 11, 15. Friedan's work has been severely criticized for focusing almost exclusively on white women and ignoring the plight of Black American women, a great many of whom worked outside the home and were active in the fight for racial justice within the civil rights movement. See COONTZ, *supra* note 35, at xix-xx.

<sup>113</sup> Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235.

<sup>114</sup> Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

<sup>115</sup> Women's Educational Equity Act of 1974. Pub. L. 93-380, 88 Stat. 554.

<sup>116</sup> 381 U.S. 479, 485 (1965).

<sup>117</sup> 410 U.S. 113, 163 (1973).

<sup>118</sup> Leonie Huddy, Francis K. Neely, and Marilyn R. Lafay, "The Poll---Trends: Support for the Women's Movement" 64 PUB. OP. Q. 309, 309 (2000) (concluding based on public opinion poll that "Americans seem generally sanguine about the broadening of women's roles from the home to the workplace and beyond").



work; and more than 91% said that women should be considered as seriously as men for jobs as executives or politicians.<sup>119</sup>

In her analysis of intersex and intergenerational conflict over the status of women, political scientist Virginia Sapiro noted that “[t]he women’s movement is often characterized as young women . . . making choices about their education, careers, and family life that their mothers . . . would not have made.”<sup>120</sup> This suggests the possibility of an intergenerational dimension in how women make judicial decisions. But it remains to be seen whether these changes in perceptions have any bearing on the behavior of female judges in the judiciary. Meanwhile, we think that during the post-Carter years, the judiciary has gotten significantly more conservative, owing to the success of Republicans in presidential elections.<sup>121</sup> Since the presidency of Jimmy Carter ended in 1980 and until 2002 (the last year in our dataset), Republicans have largely controlled the White House and hence the power to appoint courts of appeals judges in four presidential terms. This includes Ronald Reagan’s two terms, George H.W. Bush’s one term, and George W. Bush’s first term. Democrats have controlled the White House during only two terms (Bill Clinton’s). Consequently, in the post-Carter years, more courts of appeals judges were appointed by Republicans and are therefore more likely conservative in ideological orientation.<sup>122</sup> As such, we would

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<sup>119</sup> Virginia Sapiro, *Gender Politics, Gendered Politics: The State of the Field*, in [1 THE THEORY AND PRACTICE OF POLITICAL SCIENCE] POLITICAL SCIENCE: LOOKING TO THE FUTURE 165 (William J. Crotty ed., 1991).

<sup>120</sup> Sapiro, *supra* note 6, at 261.

<sup>121</sup> Erwin Chemerinsky, *Supreme Court--October Term 2009 Forward: Conservative Judicial Activism*, 44 LOY. L.A. L. REV. 44 863, 864 (2011) (noting that “over the last two decades, the Supreme Court has become significantly more conservative”); Stephen Jessee et al., *A decade-long longitudinal survey shows that the Supreme Court is now much more conservative than the public*, 119 PROC. NAT’L ACAD. SCI., No. 24, at 1-7 (2022).

<sup>122</sup> The question of ideological orientation of judges and its linkage to judicial decisions remains controversial in law but incontrovertible in the social sciences. For example, District of Columbia Circuit Judge Harry T. Edwards argues that “it is the law – and not the personal politics of individual judges – that controls judicial decision-making in most cases resolved by the court of appeals.” Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1364-65 (1998). Similarly, Ninth Circuit Judge Alex Kozinski raised strong doubts in his appraisal of legal realism and the “political” view of judicial decision-making by saying: “I am here to tell you that this is all horse manure.” Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 993 (1993). First, empirical research on the background characteristics of Presidents’ appeals court appointments shows that for Republican presidents: Ronald Reagan’s appointments were 96.2% Republican, George H. W. Bush’s appointments were 89.2% Republican; George W. Bush’s appointments were 91.5% Republican. See ROBERT A. CARP, ET AL., JUDICIAL PROCESS IN AMERICA 115 (10th ed. 2017). For Democratic Presidents: Bill Clinton’s appointments were 85.2% Democrats, Barack Obama’s appointments were 87.2% Democrats. *Id.* The authors reported similar percentages for district court appointments, with Republican presidents overwhelmingly appointing Republican judges and Democratic presidents overwhelmingly appointing Democratic judges. *Id.* at 112. Second, in terms of judges’ political identification linking with how they vote on cases,

expect a lower likelihood of liberal decisions in the courts of appeals post-Carter.

*D. Hypotheses*

Based on the foregoing theoretical discussion, we conduct two analyses. The first considers the likelihood of a judge's liberal vote in the courts of appeals. We derive the following hypotheses:

Hypothesis 1. We expect a *critical mass* effect. Judges will be more likely to vote liberally when the number of women on their panel increases and as the number of women on their court increases.

Hypothesis 2. We expect an *intergenerational change* effect. On balance, pre-mystique female judges will be more likely to reach ideologically liberal/progressive decisions compared to post-mystique female judges.

Hypothesis 3. We expect a *post-Carter* effect. Liberal decisions are significantly less likely in the courts of appeals during the post-Carter period compared to the pre-Carter period.

The second analysis considers the likelihood of conflict, or the presence of a dissenting or concurring opinion on a three-judge panel in a case. We derive the following hypotheses:

Hypothesis 4. We expect a *gendered conflict* effect. The presence of at least one woman judge on a three-judge panel (regardless of generational affiliation) will make conflict in the form of concurring or dissenting opinions more likely than in all-male three-judge panels.

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Carp et al. "examined the liberal-conservative voting patterns of teams of district court judges appointed by thirteen presidents during the twentieth century and the first eleven years of the twenty-first century." *Id.* at 160. "This comprehensive study is the only one that covers enough presidents, judges, and cases to allow for meaningful generalizations." *Id.* The issue areas they examine were civil rights and liberties, government regulation of the economy, and criminal justice. *Id.* Carp et. al. conclude that "presidents tend to get the kind of judges they want." *Id.* at 173. "In other words, an identifiable policy link exists among the popular election of the president, the appointment of judges, and the substantive content of the judges' decisions." *Id.* In the courts of appeals, Donald Songer et al. summarized the extensive literature on this issue and concluded that "[o]ver time, a substantial body of research now indicates that extralegal factors . . . appear to mediate the expression of individual judges' policy preferences." DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS xiv, at 103 (2000). Specifically, for the courts of appeals, "party is one of the best predictors of judicial decisions." *Id.* at 111. Finally, Cass Sunstein et al. reported that their hypotheses about ideological voting, ideological dampening, and ideological amplification were strongly confirmed in numerous areas of the law using data from the United States Courts of Appeals. Cass Sunstein et al., ARE JUDGES POLITICAL? EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 8-9 (2006).

Hypothesis 5. We expect a *conflict-related critical mass* effect. As more female judges join the courts of appeals, we expect collectively more concurring and dissenting opinions.

### III. RESEARCH DESIGN

To investigate these hypotheses, we use data from the U.S. Courts of Appeals Judicial Database.<sup>123</sup> This database features a random sample of federal appellate court decisions for the First through Eleventh Circuit Courts of Appeals, as well as the Court of Appeals for the District of Columbia (D.C.) Circuit, from 1925 to 2002, which provides us with seventy-seven years of decisions to analyze. Whereas the dataset contains a total of 20,355 cases originally, we included in our analysis only those cases where a three-judge panel decision was made. Thus, *en banc* cases are excluded.<sup>124</sup> Although our study considers decisions in the federal circuit courts of appeals, we do include cases where a federal district court judge joined one or two appellate court judges to comprise a panel.

We augmented the full dataset with biographical information on all female judges who served on these courts during that time.<sup>125</sup> There were a total of forty-eight women who served on one of the twelve circuit courts of appeals during the period of this study.<sup>126</sup> Appendix Table 1 lists the biographical information of all the female appellate court judges in our dataset, including their duration of service, their pre/post-mystique status, and the political affiliation of their appointing president.

We conduct two analyses to test our above hypotheses. The first analysis attempts to explain liberalism in the courts of appeals over this seventy-

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<sup>123</sup> See DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS xiv (2003). See generally Mark S. Hurwitz & Ashlyn Kuersten, *Changes in the Circuits: Exploring the Courts of Appeals Databases and the Federal Appellate Courts*, 96 JUDICATURE 23 (2012).

<sup>124</sup> The Court of Appeals database as originally constructed by Donald Songer does not include cases from the Court of Appeals for the Federal Circuit, a specialized court that was only elevated to the circuit level in 1982. SONGER, *supra* note 123, at xvii. As such, even though women did serve on the Federal Circuit during the time we study, we cannot examine cases from that court. We also exclude cases where the database codebook does not identify the source of the case (i.e., which court the case was appealed from).

<sup>125</sup> For biographical information, we relied on the Federal Judiciary Center. See *Biographical Directory of Federal Judges*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/glossary-search/> (last visited Aug. 1, 2022).

<sup>126</sup> We counted all the women judges that ever served as active-duty judges on the U.S. Courts of Appeals (except the Court of Appeals for the Federal Circuit, which is a specialized court). These judges are identified in the Court of Appeals Judicial Database. See SONGER, *supra* note 123. This number of judges does not include the larger number of female judges participating in appellate court panels by designation who were district court judges at the time of the case. Moyer & Haire, *supra* note 15, at 666-67 (also listing the names of courts of appeals judges).

seven-year period. Our unit of analysis is the individual judge's vote in each case, and our main *dependent variable* is the judge vote (coded 1 if liberal and 0 if conservative). What constitutes a liberal decision is defined in the introduction to this paper.<sup>127, 128</sup>

For simplicity, we identify two generations of female judges, pre-mystique and post-mystique, based on biological age cohort (not on how long the women served on the appeals court bench). The *pre-mystique* generation refers to female judges who came of age before publication of *The Feminine Mystique* in 1963.<sup>129</sup> This includes women born in 1950 or earlier. Most of these judges were between the ages of thirteen and twenty-five when Friedan first published her book. Examples include Pamela Ann Rymer of the Ninth Circuit, Deanell Tacha of the Tenth Circuit (both Reagan appointees), and Dorothy Nelson of the Ninth Circuit (a Carter appointee). This older generation of women is characterized by a fervent desire to overcome the limitations of tradition.<sup>130</sup> Our operational definition is consistent with the designation of this generation assigned by other researchers.<sup>131</sup>

Post-mystique female judges are those who underwent puberty after 1963. They include women such as Justice Sonia Sotomayor (formerly of the Second Circuit) who were born in January 1951 or after. They inhabited a world of less constraining circumstances. They are defined by greater opportunities in education and the labor market, as well as greater personal freedoms and equality in gender roles. Post-mystique female judges are the younger generation, whereas pre-mystique female judges are the older

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<sup>127</sup> See *supra* note 24. In our data collection, we determined the resource "underdog" based on the work of Songer and Sheehan. See Donald R. Songer and Reginald Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SC., 235 (1992). They reported that, on average, better-resourced litigants are more likely to prevail in the courts of appeals. See *id.* at 242, 243 tbl.2, 253. They reported a resource-based index of litigation success for various categories of litigants. *Id.* at 252, 253 tbl.9. We rely on this index in determining whether court of appeals decision favors the underdog, with respect to the definition of liberal. According to this index, individual underdogs (those with presumed income below the federal poverty line or "members of racial minorities (who may be presumed on average to be less wealthy than the residual category of individuals)" are at the bottom. *Id.* at 244, 246. The United States government is at the top in terms of resource capacity and likelihood of winning in court. *Id.* at 253 tbl.9.

<sup>128</sup> Note that the Appeals Court Database lists several cases as having no ideological direction or a mixed ideological direction. These cases are excluded from the liberalism analysis.

<sup>129</sup> We define coming-of-age as individuals that have attained at least the age of puberty at 13 years old in 1963. We think that at this age, young girls (especially those destined for the learned professions such as law) can understand larger trends occurring in society that they read about in books, mass media, or hear about in school or civic organizations such as their places of worship.

<sup>130</sup> See, e.g., Pia Peltola et al., *The 'Feminist' Mystique: Feminist Identity in Three Generations of Women*, GENDER & SOC'Y 122, 124 (2004)

<sup>131</sup> *Id.*

generation.<sup>132</sup> For this analysis, we use the above information to construct a variable that reflects a judge's position as a pre-mystique woman, a post-mystique woman, or a male. In the regression analysis that follows, the post-mystique woman is the excluded category to which the coefficients for male judges and pre-mystique female judges are compared.<sup>133</sup>

In addition to gender status, we accounted for the total number of female judges on each three-judge panel<sup>134</sup> as well as the total number of female judges on the circuit court when the case was decided. In our construction of the number of female judges on the court and on the panel, we included female judges that have attained senior status since they are occasionally called upon to decide cases. These variables will allow us to test hypotheses concerning gender dynamics in three-judge panels as well as the critical mass hypothesis (H1), which focuses on the number of women in the entire court.

We also include several control variables in our analysis. Post-Carter is coded 1 if the year of decision is after the Carter Administration (i.e., after 1980.) We also control for the total number of amicus briefs filed in the case, as well as the number of amicus briefs squared. We suspect that the potential effect of amici in courts of appeals decision-making is nonlinear. This is because as more and more "friends" raise their voices to influence the court, their arguments inevitably cancel out other arguments proffered by other "friends," making the effect of greater organizational participation not necessarily proportionate, but marginally diminishing. In our analysis, we represent these diminishing returns to scale through a squared amici term.

We controlled for the effect of the federal government as a party, as well as the directional power of that effect, by constructing the variable, "Dem Federal Government as Party", which is coded 1 if the federal government is an appellant or respondent during a Democratic administration. Finally, we include two measures of a judge's ideology. The first is whether the judge was appointed by a Democratic or Republican president. The variable is coded 1 if the judge was appointed by a Democrat. Second, we measure

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<sup>132</sup> We recognize the potential weakness of our post-mystique designation because it includes women who came of age during the "backlash against women's equality" era after the height of the feminist movement in 1979. SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* xviii (1991). We assume that only an extraordinarily small subset of these women would have become circuit court judges during the timeframe of our study.

<sup>133</sup> Note that the Appeals Court Database is missing information for judges in several cases. In some instances, the unique judge code listed for a judge does not correspond to any code in the database's codebook. Thus, we exclude any judge votes for judges we are unable to identify.

<sup>134</sup> Again, this includes district court judges sitting by designation.

ideology by including the first dimension DW-Nominate score<sup>135</sup> of the judge's appointing president. Higher values of this variable indicate a more conservative ideology. Given that federal court appointments constitute a key part of a president's legacy, it is recognized that Democratic presidents typically choose liberal federal court nominees. Likewise, Republican presidents are prone to selecting more conservative nominees. Thus, using this measure of ideology should capture a rough estimate of a nominee's ideology. These measures of ideology are included in separate models.

Our second analysis seeks to test the conflict hypothesis. This analysis is at the panel level, rather than at the individual judge level. For our dependent variable, we constructed an indicator variable called "Disharmony" to designate the presence or absence of conflict within the appeals court panels (coded: 1/0). Disharmony (or conflict) is present when there is either a dissenting or concurring opinion in the case. Disharmony is present in approximately 12% of the decisions of the courts of appeals. For our primary independent variable, mystique status, we construct a categorical variable that reflects whether the three-judge panel includes at least one pre-mystique woman, at least one post-mystique woman, or only male judges. Panels that contain both pre-mystique and post-mystique women are excluded from the analysis. Panels with at least one post-mystique woman are the excluded baseline category.<sup>136</sup> We include nearly all the same control variables as above. Since the dependent variable in all our models is binary, we use logistic regression estimation method to analyze the data. We chose to cluster our standard errors in both analyses on source (the agency or court from which the case was appealed) to account for different decision-making structures or inherent differences existing in these bodies. For example, the decision-making structure, power, and jurisdiction of an administrative agency is very different from a U.S. district court.<sup>137</sup>

#### IV. RESULTS

##### *A. Echoes of the Women's Movement and Gender Diversity in the Courts of Appeals*

We are interested in assessing whether those female appeals court judges who came of age before and after publication of *The Feminine Mystique* in

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<sup>135</sup> See *About the Project*, VOTEVIEW, <https://voteview.com/about> (last visited Sep. 10, 2022).

<sup>136</sup> We also exclude all cases where the three judges on the panel are not identified by the database.

<sup>137</sup> Clustering by judge yields similar results in our primary model. See *infra* Appendix Table 2, Column 2.

1963 and were shaped by different social experiences and histories have differential impact on case outcomes in three-judge appeals court panels. To consider our effort successful, we must demonstrate that, on average, the presence of women from the two different generations in appeals court panels leads to significantly different case outcomes. In addition to assessing intergenerational effects and overall gender effects on liberal voting behavior, we analyze the correlates of disharmony or conflict on the courts of appeals.

The lack of women in federal appeals courts throughout American history is well documented. Prior to 1980, fewer than five women served on the courts of appeals. The first woman, Florence Ellinwood Allen (1884-1966), served as an active judge on the Court of Appeals for the Sixth Circuit from 1934 until 1959.<sup>138</sup> She continued serving with senior status until her death in 1966.<sup>139</sup> Ruth Bader Ginsburg's appointment to the District of Columbia Circuit in 1980 by President Carter made her only the second woman to serve on that court. This gender disparity continues to the present day: As of 2020, only 27% of all federal judges are women.<sup>140</sup>

It was during the 1970s that American presidents began to fully appreciate the value of appointing women to the federal judiciary. Most of these female judges were appointed during the Carter, Reagan, H.W. Bush, and Clinton administrations. However, when we examine variation within individual circuit courts overtime, the underrepresentation of women remains quite stark in several circuits.

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<sup>138</sup> Florence E. Allen Named Federal Judge; First Woman to Get Place on Circuit Bench, *N.Y. TIMES*, Mar. 7, 1934, at 9.

<sup>139</sup> Florence Allen, 82, First Woman On U.S. Appellate Bench, Dead, *N.Y. TIMES*, Sept. 14, 1966, at 47.

<sup>140</sup> Atthar Mirza & Chiqui Esteban, *Female Judges Were a Rarity when Ruth Bader Ginsburg Was Born. They Still Are*, WASH. POST. (Sept 21, 2020) <https://www.washingtonpost.com/politics/2020/09/21/female-judges-were-rarity-when-ruth-bader-ginsburg-was-born-they-still-are/>.

Figure 1a: A Count of the Number of Female judges in Each Circuit Court Over Time

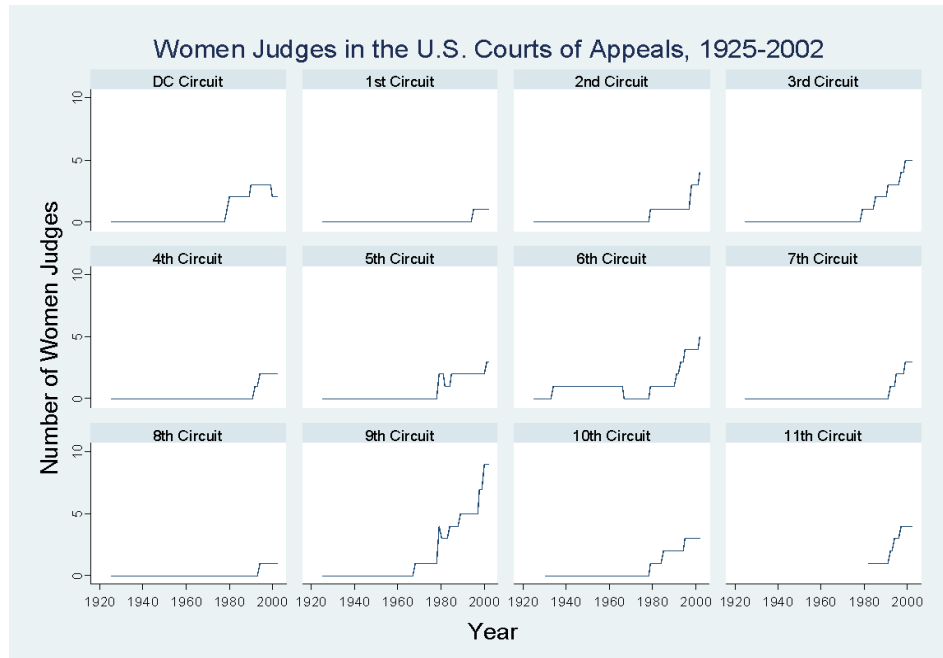


Figure 1a<sup>141</sup> shows the historical pattern of judicial appointment of women to the courts of appeals. The line represents, for each particular year, a count of the number of female judges on the designated circuit. Overall, there have been some improvements in the number of women appointed to each circuit, although some circuits have experienced greater improvements than others. The Sixth and Ninth Circuits have experienced the greatest gender diversity of all circuits in the federal judiciary when viewed longitudinally. Eleven permanent female judges have served on the Ninth Circuit during the period we study.<sup>142</sup> Logically, this reflects the reality of

<sup>141</sup> The data for this graph come from the U.S. Court of Appeals Database, augmented with biographical information from the Biographical Directory of the Federal Judiciary published by Federal Judicial Center. See *Biographical Directory of Article III Federal Judges, 1789-present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges> (last visited Sept. 30, 2022).

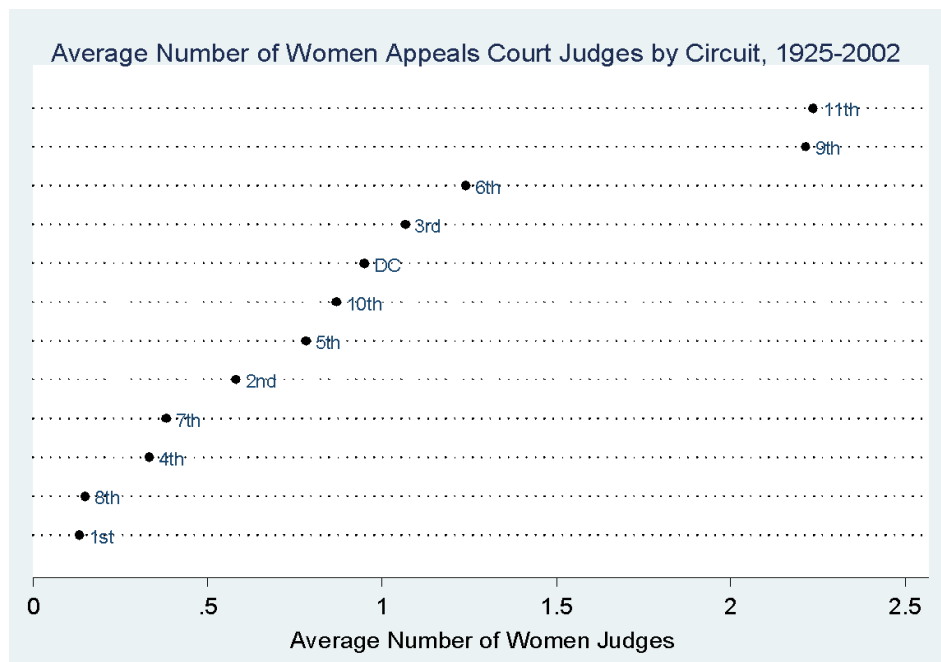
<sup>142</sup> We say “permanent” to distinguish these female judges from judges who are designated to serve on a temporary basis on these courts. These temporary judges typically include district court judges and retired U.S. Supreme Court Justices. For example, as indicated in ISAAC UNAH, *THE SUPREME COURT IN AMERICAN POLITICS* 34 (2010), retired Justice Tom Clark participated in some 380 cases decided by various courts of appeals. Justice Clark wrote 70 majority opinions and 24 were appealed to the Supreme Court. The Justices granted certiorari to 3 and reversed their former colleague’s decision in 2 of these.



that circuit's size as the largest appeals court, with twenty-nine permanent active-duty judges. Five women have served on the Third Circuit. The Eleventh Circuit had four female judges as of 2002 since its establishment in 1981.<sup>143</sup> Interestingly, the First Circuit is tied for last place in gender diversity, a distinction it shares with the Eighth Circuit.

Figure 1b examines the average number of female judges per term that have served on each appeals court in the period examined. The Ninth and the Eleventh have the highest average number of female judges.

Figure 1b<sup>144</sup>



<sup>143</sup> The Eleventh Circuit was created in 1981. See Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1995 (1981).

<sup>144</sup> The data for this graph come from the U.S. Court of Appeals Database, augmented with biographical information from Biographical Directory of the Federal Judiciary. See *Biographical Directory of Article III Federal Judges, 1789-present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges> (last visited Sept. 30, 2022).

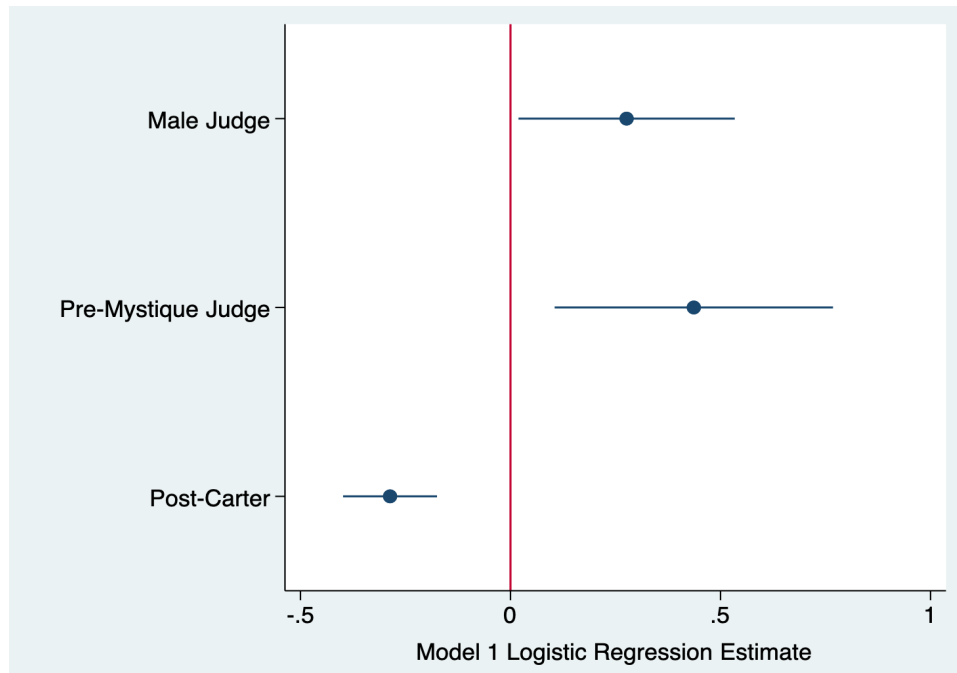
*A. Is There a Generational Gap Among Women in Appeals Court Judging?*

An important value of having more women on the courts of appeals is not simply that it provides symbolic representation for all women and girls but that it helps us more fully understand representation and elite-level decision-making. In that regard, we estimated several logistic regressions whose findings are reported in the form of graphs in the main text and regression tables reproduced in Appendix Tables 2 and 3. We opted to report our findings via graphical representation because graphs are easier to interpret and understand than logistic coefficients.<sup>145</sup> Those requiring further analytical details should see the table of results in the appendix. We proceed methodically to test the generational change, gendered conflict, critical mass and post-Carter hypotheses. The results suggest that the models perform relatively well. The Wald chi square value for each model reaches an acceptable level of statistical significance, indicating that the findings are not produced by mere chance.

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<sup>145</sup> See Ben Jann, *Plotting Regression Coefficients and Other Estimates*, 14 STATA J. 708, 708 (2014); see generally MICHAEL N. MITCHELL, A VISUAL GUIDE TO STATA GRAPHICS (3d ed. 2012).

Figure 2 (Model 1): Coefficient Estimates – Judge Type and Post-Carter Presidency



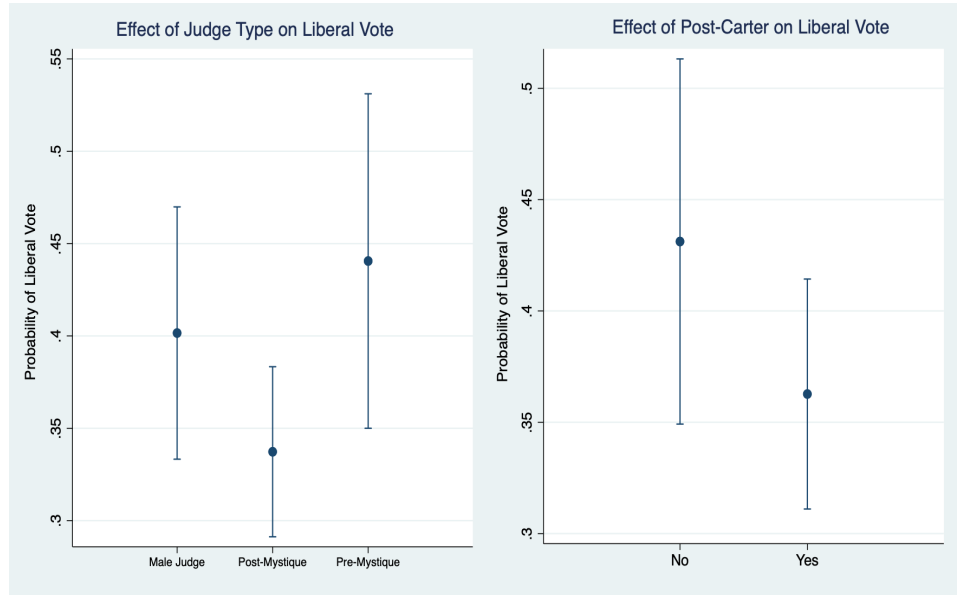
In Figure 2, we conduct an initial test of the intergenerational change hypothesis and report the coefficient plots. These estimates are derived from a simple logistic regression model that estimates the effect of mystique and post-Carter status on the likelihood of a liberal vote in a case (Appendix Table 2, Model 1). Post-mystique judge is the excluded baseline category to which male judge and pre-mystique judge are compared. Again, this analysis is conducted at the individual vote level, so we are estimating the likelihood a judge issued a liberal vote based on whether the judge is male, a pre-mystique female judge, or a post-mystique female judge. The post-Carter variable measures whether the reforms instituted by President Carter through appointments of several women and liberal-leaning judges, have made a difference in voting outcomes in the courts of appeals long after Carter left office in 1980. To understand the findings, note that each dot represents the point estimate of the effect of the independent variable (male judge, pre-mystique judges and post-Carter era) on the likelihood of a liberal vote. The horizontal line on the point estimate represents the 90% confidence interval. The confidence interval must not cross the vertical line for the variable to be

considered statistically significant. Thus, whenever the confidence interval crosses the vertical line at zero, it means that the independent variable is not statistically significant (i.e., not important) and so we must fail to reject the null hypothesis that the impact of the variable is statistically different from zero. Statistically significant estimates that fall on the right-hand side of the vertical line indicate that the variable has a positive effect. Estimates that fall to the left of the vertical line indicate a negative effect on liberalism. Thus, Figure 2 shows that compared to post-mystique female judges, pre-mystique female judges are more likely to rule in a liberal direction. The difference between post-mystique female judges and male judges is also statistically significant, as male judges are more likely to vote in a liberal direction.

In this model, we also include an indicator variable representing the post-Carter era. We expected this variable to show a negative impact on liberalism because of the success of Republican presidents in appointing conservatives to the courts of appeals. That hypothesis, Hypothesis 3, is supported by the empirical results. Cases decided by three-judge panels in the post-Carter era are less likely to be liberal. Note that logistic regression coefficients do not communicate the effect size of the independent variable. To determine effect size, we must generate the predicted margins.

The predicted probabilities of the variables are shown in Figure 3. The probability of a liberal decision improves by nearly ten percentage points when one moves from post-mystique to pre-mystique woman judge. This is an important result that is consistent with our expectation that pre-mystique female judges are more likely to move their panel's decision in a decidedly more liberal direction. In the post-Carter era, the probability of a liberal decision drops seven percentage points, from 43% to 36%.

Figure 3: *Left Panel:* Effect of Male Judge, Pre-Mystique Judge, and Post-Mystique Judge on Liberal Vote; *Right Panel:* Effect of Post-Carter Era on Liberal Vote



In Figure 4, we focus on explaining how the presence of women on the court and panel affects liberalism, regardless of the generational cohort to which the women belong. In doing so, we estimated two models whose results are plotted in Figure 4. This model seeks to test Hypothesis 1: the critical mass effect. When there are more women on a court, we expect more liberal/progressive decisions.

The left-hand coefficient plot in Figure 4 features results from a model (Appendix Table 2, Model 4) that controls for whether the judge was appointed by a Democrat, our first measure of ideology, while the right-hand plot uses the DW-Nominate measure of ideology (Appendix Table 2, Model 5). The analysis shows that when we remove pre/post-mystique status from consideration, mixed findings emerge for the critical mass hypothesis. The number of women on the panel has no bearing on liberalism in the courts of appeals. However, having more women on the court leads to a greater likelihood that a judge votes in a liberal direction. The effect is moderately strong and can be better assessed in Figure 5. When there are no female judges on an appeals court, the probability of a liberal vote is approximately 40%. That probability rises steadily as female judges are introduced into the

court. The probability rises to 43% when six women are added to the court. Finally, it is close to 47% when there are ten women on a court (the maximum amount in our dataset). Note that this is the effect across all judges, regardless of gender or generational status. Thus, we estimated another model to examine if male and female judges differed in their voting behavior based on the number of women on the panel and on the court. Following previous literature, we included interaction terms between the variable for gender (recoded as “1” for female and “0” for male) and number of female judges on the panel and gender and the number of female judges on the court. As depicted in Appendix Table 4, the interaction term for female judges on the court and gender is not significant. However, the interaction term for female judges on the panel and gender is significant. As more women are included on a panel, female judges are more likely than male judges to vote liberally. Figure 12 in the appendix presents a predicted probability plot for this effect.

Figure 4: How the presence of women on the court and on the panel affects liberalism, regardless of the generational cohort to which the women belong, controlling for Democratic appointment (Left Panel) and D-Nominate score of judge ideology (Right Panel)

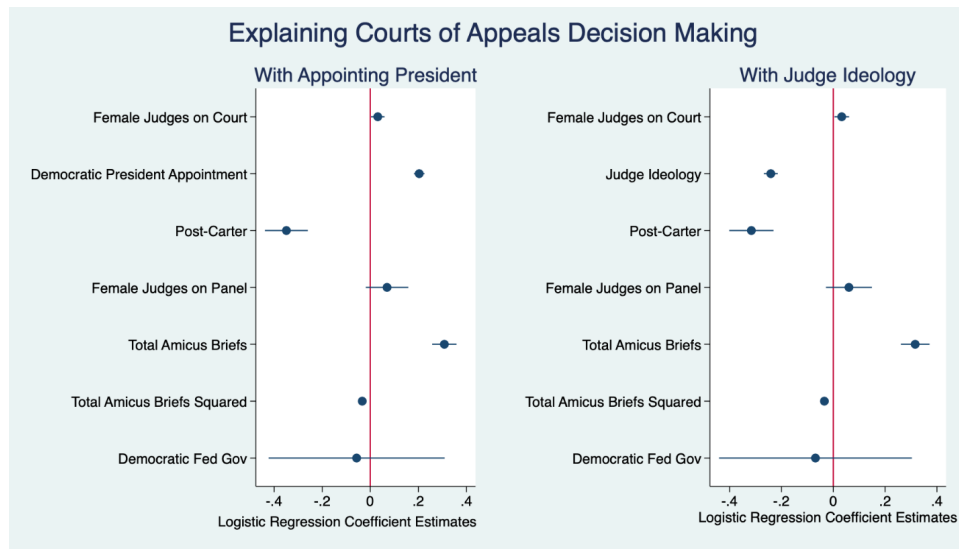
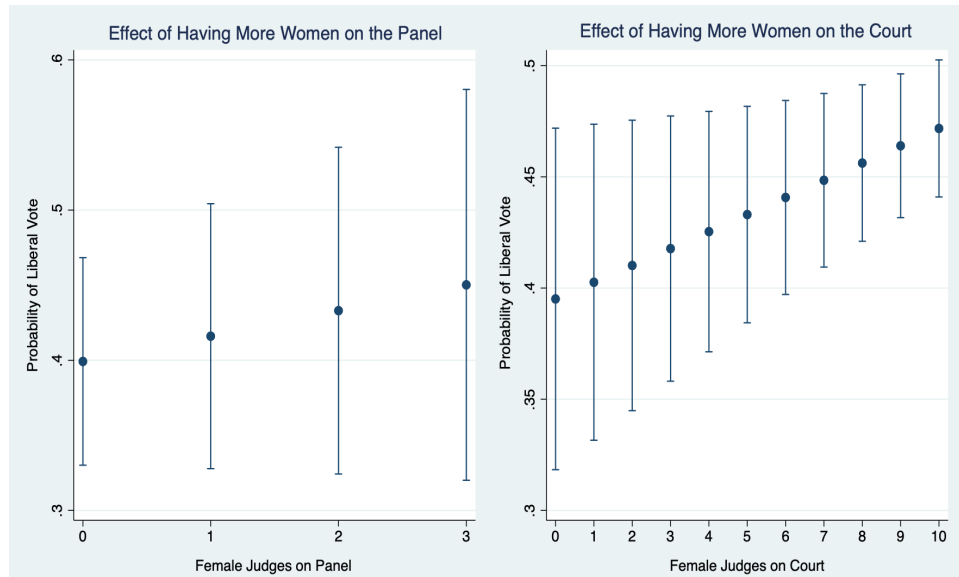


Figure 4 reports other important insights. For example, the effect of amicus curiae briefs on panel decisions is not linear, as we suspected. The direct effect is positive and significant whereas the effect of amici squared is negative and significant. Unlike in the Supreme Court where amicus curiae briefs are a growing staple of litigation, amicus briefs are significantly less utilized in the courts of appeals.<sup>146</sup> Indeed our data suggest that approximately 97% of all cases decided by the courts of appeals lack amici support. Also of interest are the variables measuring ideology. As expected, the estimate for Democratic President Appointment indicates that judges appointed by Democratic presidents are more likely to vote in a liberal direction. Also, the estimate for Judge Ideology suggests that more conservative judges are less likely to vote in a liberal direction.

<sup>146</sup> Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361, 371 (2015).

Figure 5: Effect of Having More Women on the Panel (Left) and on the Court (Right)



Finally, Figure 4 shows that cases decided in the post-Carter era are significantly less likely to be decided liberally.

#### *B. Another Look at Generational Change Among Female Judges*

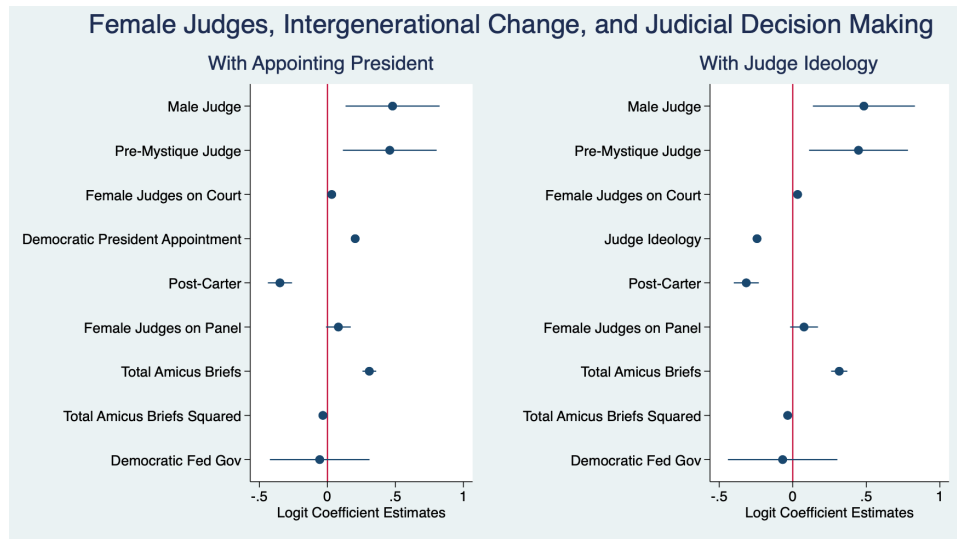
The most important contribution of this analysis is depicted in Figure 6, which reports the coefficient plots for Appendix Table 2, Models 2 and 3.<sup>147</sup> The models consider most of the independent variables together. Importantly, the results depicted in Figure 3 above hold with the introduction of the full complement of control variables. Compared to post-mystique female judges, pre-mystique female judges are more likely to vote in a liberal direction. Again, the comparison between male judges and post-mystique judges is also significant, here at the 95% confidence level. The analysis shows that there is indeed an intergenerational gap in the contribution to panel decision making exhibited by pre-mystique female judges versus post-mystique female judges in the courts of appeals. This

<sup>147</sup> We also estimated a model that included year and circuit fixed effects. The results remain unchanged.



suggests that the younger generation of American female judges are having a more conservative influence in the outcome of panel decisions unlike the older generation of female judges. This finding supports the primary research objective of this article.

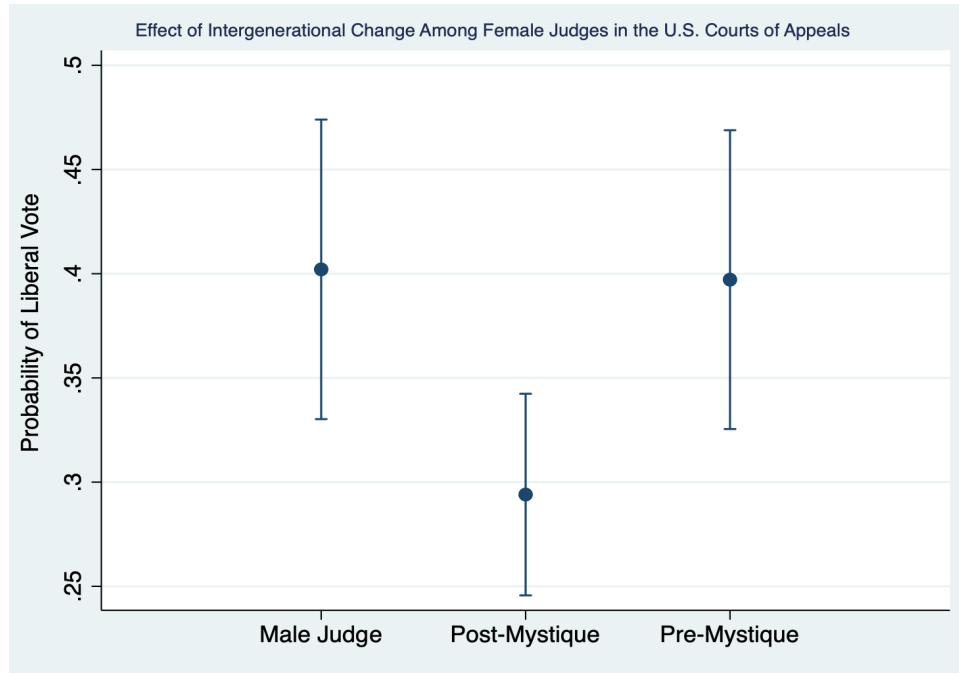
Figure 6: Effect of Pre-Mystique Judges Compared to Post-Mystique Judges, Controlling for All Other Relevant Variables



How strong is the effect of this generational gap in decision-making in appeals courts? On balance, Figure 7 shows that there is a roughly 40% probability that a judge will vote in a liberal direction when the judge is male or a pre-mystique female judge. However, for a post-mystique judge, the probability of a liberal decision drops from 40% to 29%, all else equal. The other independent variables retain their sign and significance from the previous models.

This analysis demonstrates that female judges are not all alike and that it is important to examine the contributions of female judges in panel decisions by considering the generational cohort to which they belong.

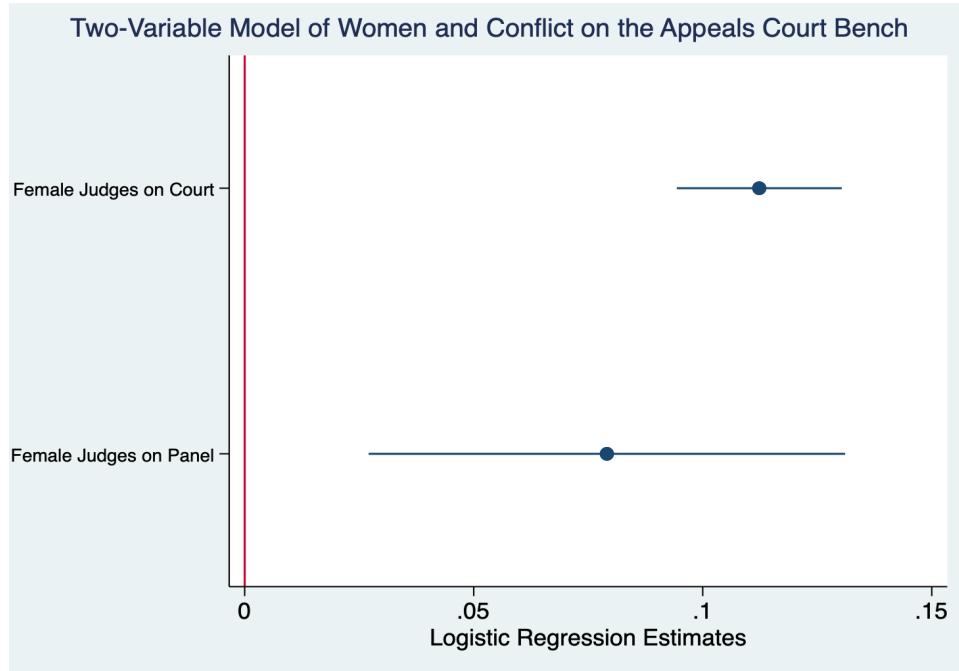
Figure 7: Probabilistic Estimates that Male Judge, Pre-Mystique Judge, and Post-Mystique Judge Will Cast Liberal Vote



### C. *Harbingers of Conflict on the Courts of Appeals Bench*

In the next set of graphs, we turn toward untangling the contribution that female judges make to the emergence of conflict or disharmony on the courts of appeals bench. The dependent variable is whether there is conflict or disharmony in the outcome of the panel decision. Conflict takes the form of a concurring or dissenting opinion. We use the term “conflict” from the perspective of the judge to indicate allegiance to the principle of judicial independence and to a sense of fidelity to the law and Constitution. Figure 8 displays the results from a basic model with only two independent variables, women on the panel and women on the court. The effect of both variables is statistically significant, with the effect of women on the court being relatively stronger as a source of conflict. The adjusted marginal predictions for these variables are presented in Figure 9. Clearly the probability of conflict rises when more women are introduced in the court or judicial panel. What substantive difference does it make when more women are introduced into an institutional environment historically dominated by men?

Figure 8: Coefficient Estimates for Females on Panel and Females on Court



Insofar as the presence of female judges leads to more discord on these courts, we think that this is a positive development from the perspective of democratic theory, particularly in a pluralistic society such as the United States. Having more women on the courts of appeals is bound to strengthen the quality of decisions that appeals court judges make.<sup>148</sup> Furthermore, it

<sup>148</sup> Scholars have found that diversity on the bench produces important benefits related to quality of output and deliberation in the court system. George & Yoon, *supra* note 40, at 2 (explaining the value and importance of descriptive representation in the courts). George and Yoon noted that “judges’ backgrounds have important implications for the work of courts. The characteristics of those who sit in judgment can affect the internal workings of courts as well as the external perception of courts and judges. The background of judges can influence how they make decisions and impact the public’s acceptance of those decisions.” *Id.* Susan Haire, Laura Moyer, and Shawn Treier (2013) argue that diversity has “information-processing benefits that flow from having a range of perspectives and skills represented in a mixed racial group.” Susan B. Haire et al., *Diversity, Deliberation, and Judicial Opinion Writing*, 1 J. LAW & CTS. 303, 304 (2013). They found that compared to all-white male panels, appellate court panels that have majority women or racial minorities produced opinions with more points of law (i.e., headnotes), which they consider as a signal of “enhanced deliberative processes.” *Id.* at 310. *See also* Moyer, *supra* note 14, at 452 (finding that majority opinions written by women judges are more detailed and contain more citations on average than those written by men). Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1206,

will strengthen the institutional legitimacy of these courts and belief in American democracy by showing that female judges are not simply a rubber stamp for choices made by their male colleagues. When an appeals court judge issues a concurring or dissenting opinion in a case, that judge is registering a disagreement with the legal rationale advanced by the majority to support the outcome in a case. Each additional woman on the courts of appeals or on a judicial panel emboldens incumbent female judges to exercise their independence more forcefully.

Figure 9: Predicted Probability of Dissent/Concurrence Based on Female Judges on Panel and Female Judges on Court

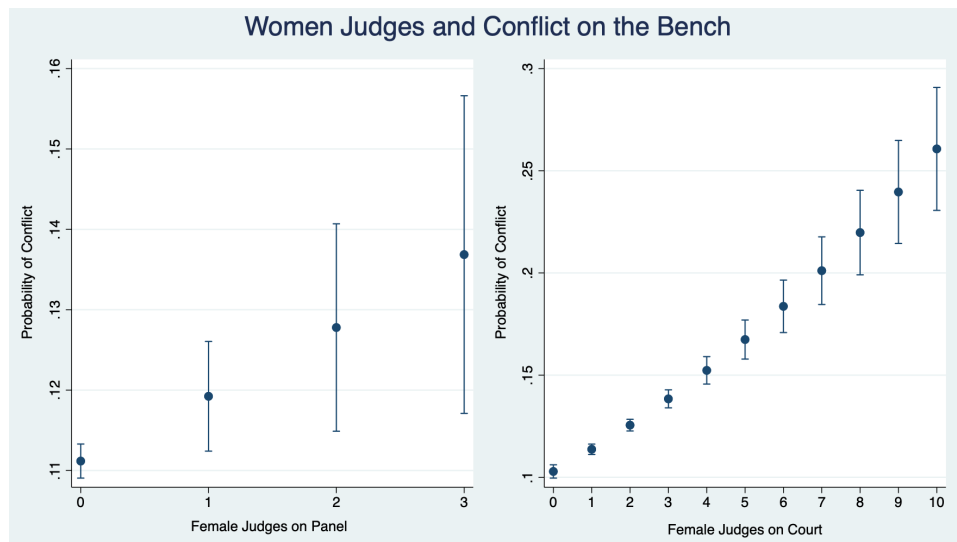


Figure 10 presents the findings from a more complete logistic regression model. The model has eight independent variables. Having a post-mystique

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1209-10 (2006); Josh Hsu, *Asian American Judges: Identity, Their Narratives, and Diversity on the Bench*, 11 *ASIAN PAC. AM. L. J.* 92, 107-11, 115 (2006) (finding that background and personal experiences inform judges' interpretations of the law, especially in immigration deportation cases); Diane Hu, *Broadening Diversity on the Bench: Voting Behavior and Panel Effects on the United States Courts of Appeals*, 8 *COLUM. J. RACE & L.* 341, 376 (2018) (finding that "the presence of females and blacks raises the probability of a more liberal decision overall but tends to do the opposite on cases that relate to their attributes"). Mark S. Hurwitz and Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 *JUDICATURE* 84, 85 (2001) (arguing that diversifying state and federal appellate benches "is vital in maintaining and even increasing the legitimacy of the nation's judicial tribunals").

woman judge on a court of appeals panel is a strong and significant cause of disharmony on the panel compared with having a male judge or a pre-mystique judge. However, the findings for Hypothesis 4 are otherwise mixed, as there is no significant difference between male judge panels and pre-mystique judge panels on the amount of conflict in a case. Hypothesis 4 expected that, regardless of generational affiliation, the presence of female judges on a panel would lead to greater conflict. This is the case for panels with post-mystique women, but not so for panels with pre-mystique women.

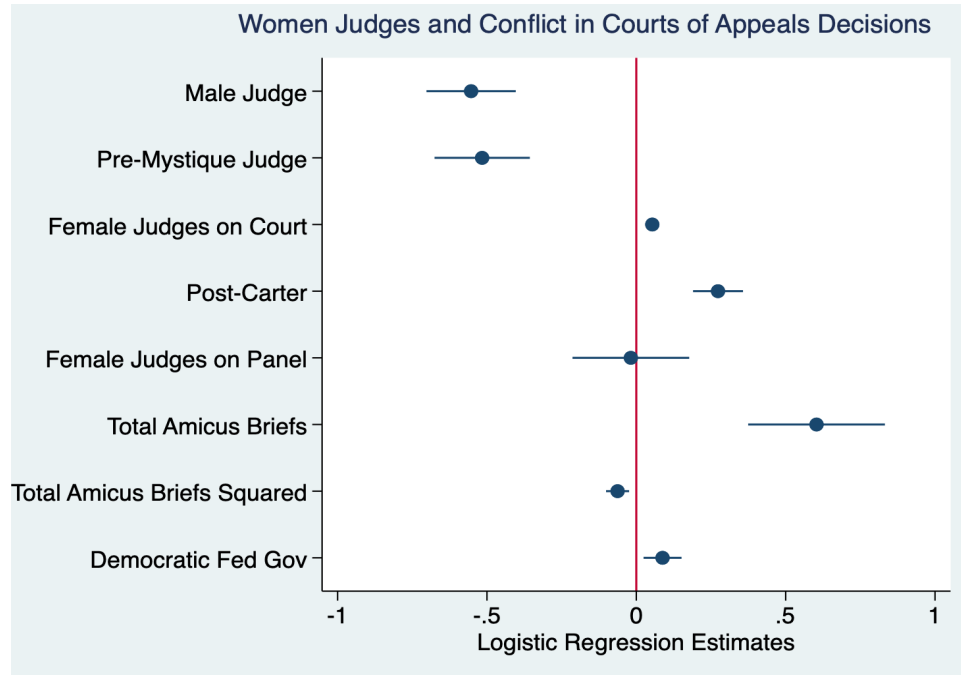
However, the analysis does corroborate Hypothesis 5 concerning the number of female judges on the court. As more women ascend onto the courts of appeals bench, we witness a very steady increase in the likelihood of disharmony in the outcome of judicial panels. The strength of the impact can be ascertained in Figure 11. The probability is roughly 11% that having one woman judge on an appeals court will result in disharmony on the panel. That probability rises proportionately as more women join the court. Notably, unlike in Figure 9, there is no significant effect for the number of women on a panel.<sup>149</sup> Thus, mixed findings emerge for Hypothesis 5 in this more complete model. Interestingly, when we test for differences between male and female judges across the number of women on the court, we do find statistically significant effects. Figure 13 in the Appendix shows that panels with at least one female judge are more likely than all-male panels to feature a concurring or dissenting opinion as the number of women on the court increases.

Conflict is also significantly more likely when there are more amici filings in the case. As we saw in the case of liberalism, the effect of amici support on conflict is nonlinear. The evidence is displayed in Figure 11B. Finally, cases decided during the post-Carter era are more conflict prone than those decided before the Carter presidency.

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<sup>149</sup> Variance inflation factor (VIF) analysis shows that the variable for the number of women on the panel and the mystique variable are collinear. However, dropping the panel variable does not significantly change the results, and neither does dropping the mystique variable. *See infra* Appendix Table 3, Model 2.

Figure 10: Coefficient Estimates of Variables Predicting Conflict

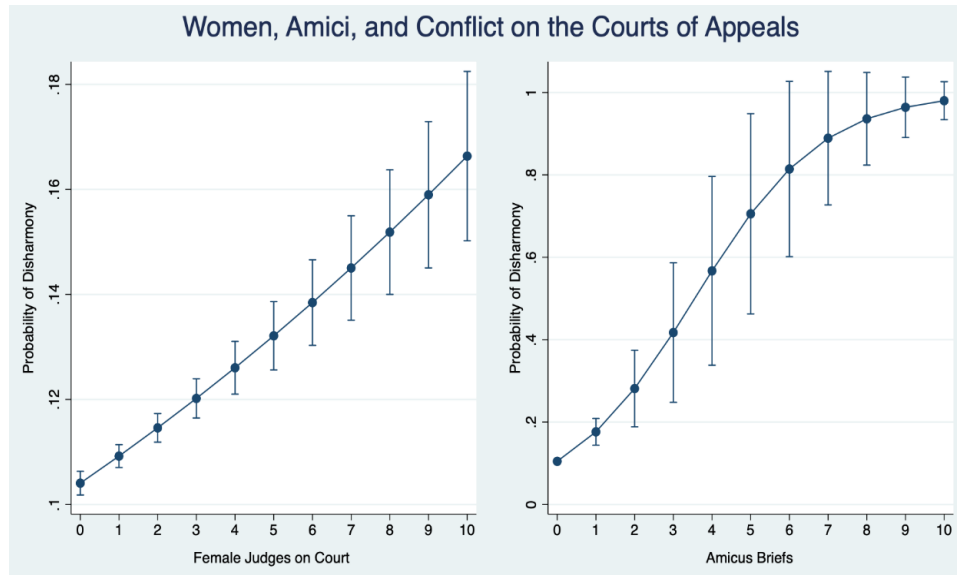


The significant effect of amici as a source of conflict is not surprising since these friend-of-the-court briefs are a major source of information and counter arguments for judges, beyond the discussions by legal counsels during oral argument.<sup>150</sup> The availability of amici information facilitates disagreement among judges and could help promote “the intelligence of a future day”, especially for those judges that are more inclined to issue a dissenting or concurring opinion as an appeal to a future court.<sup>151</sup>

<sup>150</sup> Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988).

<sup>151</sup> In 1936, Chief Justices Charles Evan Hughes characterized dissenting opinions as “an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.” CHARLES EVAN HUGHES, *THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS, AND ACHIEVEMENTS: AN INTERPRETATION* 68 (1936).

Figure 11: Predicted Probability of Conflict Given Female Judges on Court and Number of Amici Briefs



### CONCLUSION

More than 50% of individuals entering law schools in the U.S. in 2021 were women according to information supplied by the American Bar Association website.<sup>152</sup> This development constitutes a noteworthy progressive change from the time when Ruth Bader Ginsburg attended law school during the 1950s and was a mere token (one of only nine women in a class of 500 at Harvard Law).<sup>153</sup> As more women graduate from law school and advance in their professional ranks, many more women will also be appointed as judges in state and federal collegial courts. Although feminist theorists offer different interpretations of the trajectory of the women's

<sup>152</sup> ABA LAW SCHOOL DATA: JD Total First Year Class Enrollment Data, Fall 2021, A.B.A. (Dec. 15, 2021), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2021/2021-fall-fyclass-enrollment-gender-minority.xlsx](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2021/2021-fall-fyclass-enrollment-gender-minority.xlsx).

<sup>153</sup> Ruth Bader Ginsburg, *The Changing Complexion of Harvard Law School*, 27 HARV. WOMEN'S L.J. 303, 303 (2004); Ruth Bader Ginsburg, *Women at the Bar---A Generation of Change*, November 2, 1978, 34 SEATTLE U. L. REV. 649, 649 (2011) (expressing that she "was a first-year law student in 1956-57, part of an entering class that included 9 women among some 500 men"). Note also that "pre-mystique" women judges Shirley Hufstедler and Cynthia Hall "were one of only two women in their Stanford law school classes." Moyer & Haire, *supra* note 15, at 672.

movement, empirical scholars show the value of having more female judges, especially at higher levels of the judiciary.<sup>154</sup> Having more women in the courts of appeals imbues Americans with confidence that their judges likely understand the real-world implications of the decisions they make.<sup>155</sup> Moreover, having more women as judges brings a “distinctive medley of views”<sup>156</sup> into an environment long dominated by male judges. Six women have now been appointed to the U.S. Supreme Court. Associate Justices Sandra Day O’Connor (retired), Ruth Bader Ginsburg (deceased), Sonia Sotomayor, Elena Kagan, Amy Coney Barrett, and Ketanji Brown Jackson serve as examples of the struggles of the women’s movement. Whereas their position atop the judicial hierarchy is certainly a triumph and positive development, citizens must remain conscious of the fact that women remain highly underrepresented as judges in the nation’s court systems, especially at the appellate level, despite making up most of the U.S. population.

The actions of the forty-eight women who have served on the courts of appeals from 1925 to 2002 are extremely important and worthy of study. They help us better understand both the gender and intergenerational dynamics that exist as a historical legacy of various waves of the women’s movement. Our analysis suggests that the echoes of that movement continue to reverberate across the courts of appeals. We examined four main hypotheses concerning women in the courts of appeals: critical mass, intergenerational change, post-Carter, and gendered conflict. We were interested in analyzing variation in two dependent variables: liberalism and conflict. The following table summarizes the findings of the hypothesis tests.

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<sup>154</sup> See Beverly B. Cook, *supra* note 75, at 217 (1981); Stephanie A. Lindquist, Wendy L. Martinek, & Virginia A. Hettinger, *Splitting the Difference: Modeling Appellate Court Decisions with Mixed Outcomes*, 41 L. & SOC. REV. 429, 445 (2007) (noting that “increasing ideological diversity is associated with an increase in the likelihood of a separate opinion”); Peresie, *supra* note 14, at 1769.

<sup>155</sup> “By their mere presence, women judges enhance the legitimacy of courts, sending a powerful signal that they are open and accessible to those who seek recourse to justice.” See Judge Vanessa Ruiz, *The Role of Women Judges and a Gender Perspective in Ensuring Judicial Independence and Integrity*, United Nations Office on Drugs and Crime <https://www.unodc.org/dohadeclaration/en/news/2019/01/the-role-of-women-judges-and-a-gender-perspective-in-ensuring-judicial-independence-and-integrity.html>. This is also true for race. See Nancy Scherer & Brett Curry, *Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts*, 72 J. of POLS. 90, 98 (2010).

<sup>156</sup> GUTGOLD, *supra* note 47, at 3.



**Summary of Hypothesis Testing**

Hypothesis	Liberalism	Conflict/Disharmony
Intergenerational Change	√	NA
Critical Mass	Mixed	Mixed
Gendered Conflict	N/A	Mixed
Post-Carter	√	NA

√ indicates that hypothesis was supported by the empirical results. X indicates no support.

While much research has focused on the differences between male and female judges, little research has attempted to analyze differences in decisional orientation between multiple generations of female judges. Our study fills that void. The lack of female judges during the more than two centuries of courts of appeals history has long made this research a difficult task. Fortunately, more judges now sit on these courts than in times past, enabling us to investigate generational change hypotheses with female judges in the U.S. courts of appeals. We have reason to believe that these differences do indeed exist. Female judges in the U.S. courts of appeals bring distinct levels of political and social consciousness to the bench based on their generation. The female judges who came of age before 1963 tend to influence panel voting in a more liberal direction, whereas female judges who came of age after 1963 tend to influence panel voting in a more conservative direction. This outcome supports our theoretical expectation. Even though early research on political socialization indicates that symbolic predispositions that form early in life tend to survive throughout much of one's life, it is possible that these elite women are simply different and non-traditional compared to most other women of their respective generations.

It is notable that despite similar career trajectories of these two groups of judges, there are striking generational differences. The first group (the pre-mystique judges) entered adulthood during the women's liberation movement, which predates 1963. This means that these women were part of the group of trendsetters or the "recalcitrants" of their generation who had to fight very hard for their rights and against institutions bedecked with traditions constraining female advancement. They are the ones who defied social expectations to attend law school and succeeded in a phase of significant social stigma against such activities for women. These women broke barriers in higher education, the labor market, and social expectations. They had to break through the proverbial glass ceiling of the legal profession and interrogate gender stereotypes from which men were largely spared. We

think all this makes the pre-mystique judges ideologically different from most women of their traditionalistic generation. Such behavior is consistent with liberal idealism.

Conversely, the post-mystique women have benefitted from government programs such as Title IX and affirmative action.<sup>157</sup> As Justice Sonia Sotomayor, who is a member of this post-mystique generation, noted: “I am a product of affirmative action. I am the perfect affirmative action baby. My test scores were not comparable to that of my colleagues at Princeton or Yale, but not so far off the mark that I wasn’t able to succeed at those institutions.”<sup>158</sup> In addition, this generation of women possibly has a different conception of feminism and group consciousness. This view is weaker, more individualistic, and therefore more consistent with conservatism than liberalism.<sup>159</sup> Indeed, similar effects have been demonstrated among minority groups. Catherine Tate’s work on the Congressional Black Caucus is one example.<sup>160</sup> She documented a significant divergence in voting trends among black representatives who arrived in Congress in recent years compared to black members of Congress from earlier generations. As the perceived success of the civil rights movement reduces the urgency for Black Americans to organize and push aggressively for constitutional protections, representatives have turned to promoting their local district’s interests even if doing so is contrary to the interest of the larger black community.

Interestingly, differences between generational cohorts of female judges emerge even before one examines specific issues areas with high gender valence. Indeed, these issues have been the subject of previous efforts at examining generational differences in gender-based voting behavior in both the U.S. and Canada. These studies find greater liberal voting behavior in earlier generations by female judges in discrimination cases compared to men.<sup>161</sup> Interestingly, unlike this project, no differences between women of different generations were uncovered. Future research should take advantage

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<sup>157</sup> See TERRY ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 112, 132-133 (2004) (explaining EEOC enforcement effort regarding Title VII of the Civil Rights Act of 1964).

<sup>158</sup> JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 132 (2012).

<sup>159</sup> See Pia Pelota et al., *The ‘Feminist’ Mystique: Feminist Identity in Three Generations of Women*, 18 *GENDER & SOC.*, 122, 122-144, 139-140 (2004).

<sup>160</sup> KATHERINE TATE, *BLACK FACES IN THE MIRROR: AFRICAN AMERICANS AND THEIR REPRESENTATIVES IN THE U.S. CONGRESS* 158-59 (2003).

<sup>161</sup> See Moyer & Haire, *supra* note 15, at 665, 684-85; Susan W. Johnson & Ali S. Masood, *Trailblazer Women in the Supreme Court of Canada*, *POL., GRO., & ID.* 1, 4 (2021).

of more updated datasets that go beyond 2002 and feature greater numbers of post-mystique women.

Consistent with a political conflict perspective, having more female judges adjudicate cases in an appeals court panel makes a significant difference in favor of greater liberalism. Moreover, female judges vote differently based upon predisposition to elite sentiments of their generation. We showed that female judges who came of age before the second wave of the women's movement (pre-mystique judges) voted more liberally whereas their counterparts who came of age during or after the second wave of the women's movement (post-mystique judges) voted in a more conservative direction. Possible explanations for this phenomenon include the change in gender consciousness during the 1960s and 1970s and different social circumstances and socialization between the two generations, with each generation adopting a different interpretation of the women's movement and feminism more broadly.

The success of Republicans in presidential elections is also a reasonable explanation for this outcome because it led to a significantly higher number of conservative women being appointed to the U.S. courts of appeals. Critical mass is a possible explanation as well because there is strength in numbers. The presence of more female judges in the courts of appeals increases the likelihood of disharmony within these courts and within judicial panels since women can rely on each other for psychic support and understanding when they do disagree with their male colleagues or with each other. These findings enhance the predictions of conflict theory insofar as differentials in group consciousness remain a part of human experience. The implication is that female judges of different generations do speak with different voices and from the vantage point of alternative experiences. As a group, female judges are not simply acquiescing to the legal chronology and chorus constructed by male jurists. Instead, female judges are displaying a great deal of judicial independence, the cornerstone of American democracy and legal theory.

Appendix Table 1  
Female Judges in the U.S. Courts of Appeals, 1925-2002

Circuit/Judge	Service	Year of Birth and Pre/Post- Mystique Status in 1963	Partisanship of Appointing President
First Circuit			
• Sandra Lynch	1995-present	1946, pre	Democrat
Second Circuit			
• Amalya Kearse	1979-present	1937, pre	Democrat
• Rosemary S. Pooler	1998-present	1938, pre	Democrat
• Reena Raggi	2002-present	1951, post	Democrat
• Sonia Sotomayor	1998-2009	1954, post	Democrat
Third Circuit			
• Maryanne Trump Barry	1999-2019	1937, pre	Democrat
• Carol Los Mansmann	1985-2002	1942, pre	Republican
• Marjorie O. Rendell	1997-present	1947, pre	Republican
• Jane R. Roth	1991-present	1935, pre	Republican
• Dolores Sloviter	1979-present	1932, pre	Democrat
Fourth Circuit			
• Diana G. Motz	1994-present	1943, pre	Democrat
• Karen J. Williams	1992-2013	1951, post	Republican
Fifth Circuit			
• Edith Brown Clement	2001-present	1948, pre	Republican
• Edith Jones	1985-present	1949, pre	Republican
• Carolyn Dineen King	1979-present	1938, pre	Democrat
• Phyllis Kravitch	1979-1981	1920, pre	Democrat
Sixth Circuit			
• Florence E. Allen	1934-1966	1884, pre	Democrat
• Alice M. Batchelder	1991-present	1944, pre	Republican
• Martha C. Daughtrey	1993-Present	1942, pre	Democrat
• Julia Smith Gibbons	2002-present	1950, pre	Republican
• Cornelia Kennedy	1979-2014	1923, pre	Democrat
• Karen N. Moore	1995-present	1948, pre	Democrat
Seventh Circuit			
• Ilana K.D. Rovner	1992-present	1938, pre	Republican
• Diane P. Wood	1995-present	1950, pre	Democrat
• Ann Claire Williams	1999-2018	1949, pre	Democrat
Eighth Circuit			

• Diana E. Murphy	1994-2018	1934, pre	Democrat
Ninth Circuit			
• Marsha Berzon	2000-present	1945, pre	Democrat
• Betty Fletcher	1979-2012	1923, pre	Democrat
• Cynthia H. Hall	1984-2011	1929, pre	Republican
• Susan Graber	1998-present	1949, pre	Democrat
• Shirley Hufstедler	1968-1979	1925, pre	Democrat
• M. Margaret McKeown	1998-present	1951, post	Democrat
• Dorothy Nelson	1979-present	1928, pre	Democrat
• Johnnie B. Rawlinson	2000-present	1952, post	Democrat
• Pamela Ann Rymer	1989-2011	1941, pre	Republican
• Mary Schroeder	1979-Present	1940, pre	Democrat
• Kim McLane Wardlaw	1998-present	1954, post	Democrat
Tenth Circuit			
• Mary B. Briscoe	1995-present	1947, pre	Democrat
• Stephanie K. Seymour	1979-present	1940, pre	Democrat
• Deanell Tacha	1985-2011	1946, pre	Republican
Eleventh Circuit			
• Rosemary Barkett	1994-2013	1939, pre	Democrat
• Susan H. Black	1992-Present	1943, pre	Republican
• Frank M. Hull	1997-present	1948, pre	Democrat
• Phyllis Kravitch	1981-2017	1920, pre	Democrat
DC Circuit			
• Ruth Bader Ginsburg	1980-1993	1933, pre	Democrat
• Karen L. Henderson	1990-present	1944, pre	Republican
• Judith W. Rogers	1994-present	1939, pre	Democrat
• Patricia Wald	1979-1999	1928, pre	Democrat

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Note: In the “service” column, we note the judge’s duration of service status as of August 1, 2022. Judges whose tenures reflect ongoing senior service are included as present. A judge is considered pre-mystique if she was born before the end of 1950 (i.e., she was at least 13 years of age in 1963 when *The Feminine Mystique* was published). Judges born after 1950 are classified as post-mystique. Judges appointed to the Court of Appeals for the Federal Circuit are excluded.

Appendix Table 2: Explaining Liberalism in the United States Courts of Appeals (cont'd on the next page)<sup>162</sup>

VARIABLES	Model 1	Model 2	Model 3
Male Judge	0.276* (0.157)	0.479*** (0.176)	0.484*** (0.177)
Pre-Mystique Judge	0.437** (0.201)	0.459*** (0.176)	0.447*** (0.172)
Female Judges on Court		0.032** (0.014)	0.033** (0.014)
Appointed by Democratic President		0.204*** (0.011)	
Post-Carter	-0.287*** (0.068)	-0.349*** (0.045)	-0.316*** (0.043)
Female Judges on Panel		0.081* (0.046)	0.077 (0.048)
Total Amicus Briefs		0.308*** (0.026)	0.316*** (0.028)
Total Amicus Briefs Squared		-0.033*** (0.006)	-0.034*** (0.006)
Democratic Federal Government		-0.057 (0.187)	-0.069 (0.190)
Judge Ideology			-0.243*** (0.014)
Constant	-0.561*** (0.123)	-0.873*** (0.136)	-0.782*** (0.132)
Observations	46,566	45,551	43,827

Note: The dependent variable is the direction of the judge's vote in each case, coded 1 for liberal and 0 for conservative.

Post-Mystique Judge is the omitted baseline.

Standard errors in parentheses \*\*\* p<0.01, \*\* p<0.05, \* p<0.1

Robust standard errors are clustered on the source of the case (i.e. federal district court, state court, etc.).

<sup>162</sup> Data are derived from the United States Courts of Appeals Database. See DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS xiv (2003); see also Hurwitz & Kuersten, *supra* note 123. (describing the contours, characteristics, and usability of the Songer database and what we can learn from it regarding the dynamics of political institutions, including the courts of appeals).

Appendix Table 2: Explaining Liberalism in the United States Courts of Appeals (cont'd)<sup>163</sup>

VARIABLES	Model 4	Model 5
Male Judge		
Pre-Mystique Judge		
Female Judges on Court	0.031** (0.014)	0.033** (0.014)
Appointed by Democratic President	0.204*** (0.011)	
Post-Carter	-0.349*** (0.045)	-0.316*** (0.043)
Female Judges on Panel	0.070 (0.045)	0.060 (0.045)
Total Amicus Briefs	0.308*** (0.026)	0.316*** (0.028)
Total Amicus Briefs Squared	-0.034*** (0.006)	-0.034*** (0.006)
Democratic Federal Government	-0.057 (0.187)	-0.069 (0.190)
Judge Ideology		-0.241*** (0.014)
Constant	-0.393*** (0.118)	-0.298** (0.121)
Observations	45,551	43,827

Note: The dependent variable is the direction of the judge's vote in each case, coded 1 for liberal and 0 for conservative.

Post-Mystique Judge is the omitted baseline.

Standard errors in parentheses \*\*\* p<0.01, \*\* p<0.05, \* p<0.1

Robust standard errors are clustered on the source of the case (i.e. federal district court, state court, etc.).

<sup>163</sup> Data are derived from the United States Courts of Appeals Database. See DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS xiv (2003); see also Hurwitz & Kuersten, *supra* note 123. (describing the contours, characteristics, and usability of the Songer database and what we can learn from it regarding the dynamics of political institutions, including the courts of appeals).

Appendix Table 3  
Explaining Conflict in the United States Courts of Appeals

VARIABLES	Model 1	Model 2
Male Judge	-0.553*** (0.076)	
Pre-Mystique judge	-0.516*** (0.081)	
Female Judges on Court	0.054*** (0.006)	0.054*** (0.006)
Post-Carter	0.274*** (0.043)	0.275*** (0.041)
Female Judges on Panel	-0.018 (0.100)	0.030 (0.028)
Total Amicus Briefs	0.603*** (0.117)	0.600*** (0.118)
Total Amicus Briefs Squared	-0.063*** (0.020)	-0.061*** (0.020)
Democratic Federal Government	0.088*** (0.032)	0.088*** (0.033)
Constant	-1.749*** (0.086)	-2.302*** (0.013)
Observations	17,887	17,901

Note: The dependent variable is disharmony (i.e., there is conflict on the panel as indicated by the presence of a concurring or dissenting opinion), coded 1; 0 otherwise.

Post-Mystique Judge is the omitted baseline.

Robust standard errors are clustered on the source of the case.

Robust standard errors in parentheses \*\*\* p<0.01, \*\* p<0.05, \* p<0.1



Appendix Table 4

VARIABLES	Model 1
Female	-0.309*** (0.089)
Total Female Judges on Panel	0.051 (0.035)
Female*Female Judges on Panel	0.235** (0.110)
Female Judges on Court	0.033*** (0.012)
Female*Female Judges on Court	-0.000 (0.024)
Judge Ideology	-0.244*** (0.014)
Post-Carter	-0.312*** (0.045)
Total Amicus Briefs	0.318*** (0.028)
Total Amicus Briefs Squared	-0.035*** (0.006)
Democratic Federal Government	-0.069 (0.189)
Constant	-0.298** (0.121)
Observations	43,827

Note: The dependent variable is the direction of the judge's vote in each case, coded 1 for liberal and 0 for conservative. Robust standard errors in parentheses and are clustered on the source of the case (i.e. federal district court, state court, etc.).

\*\*\* p<0.01, \*\* p<0.05, \* p<0.1

Figure 12

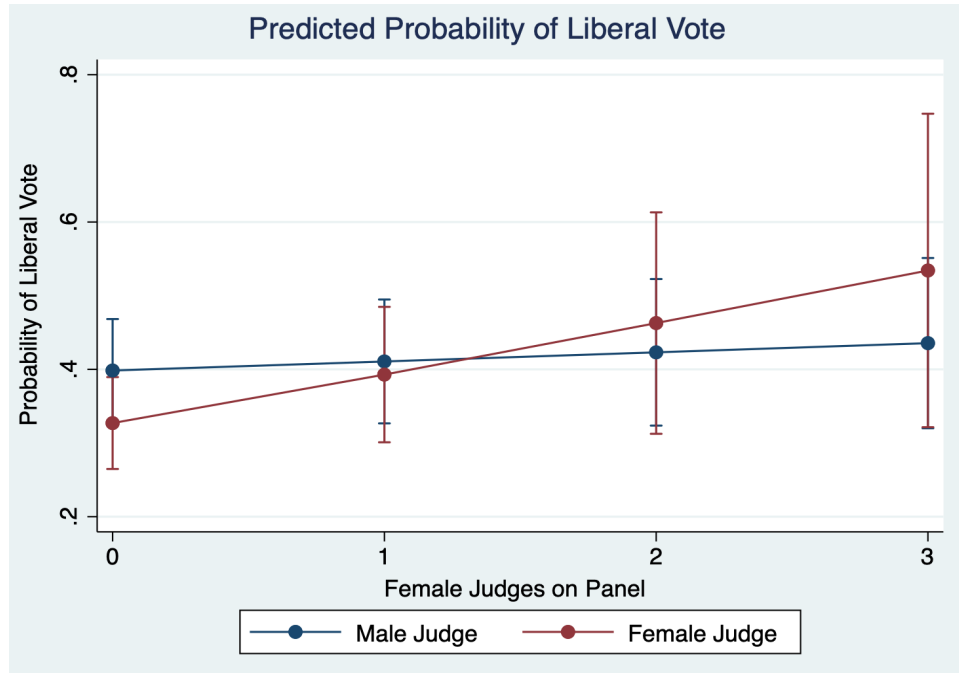


Figure 13

