Note

Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts

Jennifer L. Peresie

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> A wise old man and a wise old woman reach the same conclusion . . . .[1]

> [Female judges] bring an individual and collective perspective to [their] work that cannot be achieved in a system which reflects the experience of only a part of the people whose lives it [a]ffects.[2]

INTRODUCTION

This Note provides data to illuminate whether and how the presence of female judges on three-judge federal appellate panels affects collegial decisionmaking in a subset of gender-coded cases—those involving claimants alleging sexual harassment or sex discrimination in violation of Title VII of the Civil Rights Act of 1964.[3] An empirical analysis of 556 federal appellate cases decided in 1999, 2000, and 2001 reveals that judges' gender mattered to case outcomes. Though plaintiffs lost in the vast majority of cases, they were twice as likely to prevail when a female judge was on the bench.

This Note has three goals. First, it contributes to the literature on the role of gender in individual judicial decisionmaking. I show that for at least two types of cases—Title VII sex discrimination and sexual harassment—a significant correlation existed between gender and individual federal appellate judges' decisions. In my data set, female judges were significantly more likely than male judges to find for plaintiffs. Second, the Note begins to illuminate the impact of gender on panel decisionmaking, by showing that the presence of a female judge significantly increased the probability that a male judge supported the plaintiff in the cases analyzed. This analysis

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1. David Margolick, *Women's Milestone: Majority on Minnesota Court*, N.Y. TIMES, Feb. 22, 1991, at B16 (internal quotation marks omitted) (quoting Minnesota Supreme Court Justice M. Jeanne Coyne). Justices O'Connor and Ginsburg both have quoted Coyne in discussing the relationship between gender and judging. *See, e.g.*, Ruth Bader Ginsburg, *Foreword*, 84 GEO. L.J. 1651, 1654 (1996); Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1558 (1991); *Women on the Bench*, 12 COLUM. J. GENDER & L. 361, 363 (2003) (remarks of Justice Ginsburg).

2. Betty Barteau, *Thirty Years of the Journey of Indiana's Women Judges: 1964-1994*, 30 IND. L. REV. 43, 88 (1997) (internal quotation marks omitted) (quoting Utah Supreme Court Justice Christine M. Durham).

3. I acknowledge that gender may be relevant to all cases. *See* Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2196 (1993) ("There are no safe harbors . . . from having to think about the implications of gender."). However, I define gender-coded cases as those that automatically evoke categorization by gender. *See* Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science To Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 401, 407 (2003) (defining gender as salient when it "jumps out at you"). Other gender-coded cases include, inter alia, those involving abortion, pornography, prostitution, and rape.

reaffirms the importance of collegiality in appellate courts,[4] thus distinguishing the Note from past literature, which focused almost exclusively on male/female differences. Third, the Note proposes several possible explanations for how the presence of a female judge might increase the likelihood that a male judge will support the plaintiff in gender-coded cases.

    Part I reviews past empirical findings on the direct and indirect effects of gender on judging. Part II describes my data, and Part III reports the findings of regression analyses. Part IV proposes four possible mechanisms for the indirect effect of gender on collegial decisionmaking that I observed: deliberation; male judges' deference to female judges; logrolling, or strategic bargaining; and moderation of male judges' anti-plaintiff preferences. The Conclusion argues that the effect I observed should inform future debates about gender diversification of the federal appellate bench.

I. PAST EMPIRICAL FINDINGS

    Some scholars expect that increasing the number of female judges will make courts more receptive to the arguments of claimants in gender-coded cases like the Title VII cases analyzed in this Note.[5] One form of this argument goes so far as to expect female judges to "seize decision-making opportunities to liberate other women" in deciding cases.[6] Thus far, the validity of arguments that gender affects case outcomes is uncertain because the literature has produced inconsistent empirical findings. In this Part, I detail past research on the direct and indirect effects of gender on judicial decisionmaking.

A. *Direct Effect of Gender on Judging*

    Previous empirical studies examining whether male and female judges decide cases differently have produced conflicting results. Two studies of

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4. *See, e.g.*, Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1652-62 (2003) (arguing that the "attitudinal" and "strategic" models of judicial decisionmaking, which focus on individual judges' preferences, ignore the collegial nature of the federal appellate bench); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 1 (1993) (arguing that collegial decisionmaking is "[o]ne of the most salient features of appellate courts [but] is also one of the most ignored").

5. *See, e.g.*, Elaine Martin, *Men and Women on the Bench: Vive la Difference?*, 73 JUDICATURE 204, 208 (1990).

6. Beverly B. Cook, *Will Women Judges Make a Difference in Women's Legal Rights? A Prediction from Attitudes and Simulated Behaviour*, *in* WOMEN, POWER AND POLITICAL SYSTEMS 216, 216 (Margherita Rendel with Georgina Ashworth eds., 1981); *see also* Elaine Martin, *The Representative Role of Women Judges*, 77 JUDICATURE 166 (1993) (discussing the representation of women's interests by female judges).

state supreme courts showed that female justices were more likely than their male counterparts to support plaintiffs in sex discrimination cases.[7] However, in federal district courts, researchers have not found evidence that judges' gender affected decisions in civil rights or discrimination cases.[8] In one study, Jennifer Segal found that female Clinton appointees to federal district courts were actually less likely than male Clinton appointees to rule for female sex discrimination plaintiffs.[9] While some studies provided evidence that female federal appellate judges were more likely to side with plaintiffs, particularly in discrimination cases,[10] other studies produced opposite findings[11] or revealed no significant gender differences.[12]

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7. David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156, 159-65 (1993) (investigating an unspecified number of cases involving eighteen different issue areas and decided by twenty-one different state supreme courts between 1975 and 1988); Gerard S. Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 146-53 (1986) (analyzing 126 sex discrimination cases decided between 1971 and 1981).

8. *E.g.*, Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 265, 265-80 (1995) (analyzing "nearly every federal civil rights and prisoner case filed in three federal districts" decided between October 1980 and September 1981 and counting settlements, motions decisions, bench trials, discovery events, and referral to magistrates—totaling 2258 observations); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 601-13 (1985) (comparing the decisions of twelve matched pairs, each composed of one male and one female Carter appointee, in 743 cases appearing in the Federal Supplement between January 1976 and mid-summer 1982).

9. Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 142-47 (2000) (examining 799 cases decided by thirteen matched male-female pairs between January 1994 and May 1999).

10. *E.g.*, Sue Davis, *President Carter's Selection Reforms and Judicial Policymaking: A Voting Analysis of the United States Courts of Appeals*, 14 AM. POL. Q. 328, 331-36 (1986) (analyzing 123 cases in diverse issue areas that were decided between 1981 and 1983); Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 130-32 (1993) (examining 428 cases, including 123 involving alleged employment discrimination, decided between 1981 and 1990 and finding gender differences in employment discrimination and search and seizure cases but not in obscenity cases); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 310-24 (2004) (examining 400 employment discrimination cases decided between 1998 and 2000); Tajuana Massie et al., The Impact of Gender and Race in the Decisions of Judges on the United States Courts of Appeals 6-11 (Apr. 25-28, 2002) (unpublished manuscript, on file with author) (evaluating 938 civil rights and civil liberties cases decided between 1977 and 1996). The text of Massie and her coauthors' manuscript is available at http://www.cla.sc.edu/poli/psrw/MassieJohnsonGubala.pdf.

11. *E.g.*, Carol A. Leach, The Relationship of Judges' Gender to Decision Making in the State and Federal Courts 10, 94-95 (1990) (unpublished Ph.D. dissertation, Southern Illinois University) (on file with the Lillian Goldman Law Library, Yale Law School) (analyzing 100 individual judges' decisions, including 14 discrimination decisions issued between 1977 and 1983, and concluding that male judges rendered more liberal decisions than female judges, but failing to control for factors such as ideology).

12. *E.g.*, Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 164, 171 (1983) (analyzing 765 cases, including 169 sex discrimination cases, decided between July 1979 and June 1981); Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 432, 429-36 (1994) (examining 669 cases, including 203 sex discrimination cases, decided between 1981 and 1990 and concluding that the

Assuming that gender differences do exist, there are several possible explanations for the weak and inconsistent findings of previous studies. First, much of the earlier work, of necessity, focused on a relatively small pool of female judges, possibly resulting in sample sizes that were too small to register differences.[13] Second, because female judges were once novelties on courts, selection bias may have resulted in the first female judges being more like male judges in their substantive views.[14] Additionally, the pressure of being "tokens" may have encouraged early female judges to conform their views to those of their male colleagues regardless of their personal preferences.[15] Third, past studies examined a broad range of issue areas—many where gender was arguably less salient than in the Title VII sexual harassment and sex discrimination cases examined in this Note.[16] Fourth, many past studies contained "inadequate controls for factors other than gender" that might have affected decisionmaking, including ideology and other background variables such as past careers or experience.[17] Finally, gender differences in voting behavior might be muted on collegial courts if the presence of a female judge affects male judges' decisions.

B. *Indirect Effect of Gender on Judging*

Past research on the indirect effect of judges' gender on federal appellate case outcomes also produced inconsistent results. In a study of employment discrimination cases decided in the federal courts of appeals between 1981 and 1996, Nancy Crowe found that the presence of a female judge on a panel did not have a statistically significant effect on the decisions of the male judges with whom she sat.[18] Because Crowe focused exclusively on nonunanimous decisions, however, she may have

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"gender of the judge appears to have no effect on the likelihood of a liberal vote when other factors are taken into account").

  13. This problem of small sample size persists today, given the relatively small number of women on the bench. The larger number of female judges on state supreme courts compared to federal appellate courts might explain why scholars looking at state court judges consistently found gender differences, while scholars looking at federal appellate court judges did not.

  14. *See* Davis et al., *supra* note 10, at 133.

  15. *See* ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 47-68 (1977) (finding that women in majority-male settings modified their behavior to conform to the dominant majority and to obtain legitimacy in the group).

  16. *See, e.g.*, Davis et al., *supra* note 10; Walker & Barrow, *supra* note 8. Relatedly, because this Note focuses on a narrow range of cases, its results may not be applicable to the more general run of cases.

  17. ABA COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 30 (2001), *available at* http://womenlaw.stanford.edu/ aba.unfinished.agenda.pdf.

  18. Nancy E. Crowe, The Effects of Judges' Sex and Race on Judicial Decision Making on the U.S. Courts of Appeals, 1981-1996, at 45, 143-53 & tbl.5.1 (1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with the Lillian Goldman Law Library, Yale Law School) (examining 926 employment discrimination cases).

preordained her result. By definition, nonunanimous cases involve disagreement, and thus we are less likely to find male judges agreeing with their female colleagues in such cases. Furthermore, nonunanimous cases are rare,[19] and judges' decisions in such cases may not be indicative of their general voting patterns.

Two other studies provided some evidence that the presence of female judges on federal appellate panels affected case outcomes. Analyzing a sample of cases decided between 1977 and 1996, Tajuana Massie, Susan Johnson, and Sara Gubala discovered that the presence of one or more female judges increased the probability that male judges took pro-plaintiff positions in criminal procedure and civil rights cases.[20] Similarly, Sean Farhang and Gregory Wawro found that in employment discrimination cases decided in 1998 and 1999, male judges on panels with female judges were more likely to favor plaintiffs than their colleagues on all-male panels.[21] However, in both studies, the magnitude of female judges' impact (as measured by the change in the probability that a male judge found for the plaintiff) was relatively low—likely because of the broad range of case types included in each study.

Furthermore, empirical flaws in both of the above studies reduce the validity of their results. First, the studies failed to account for individual characteristics other than gender, ideology, and race that could affect judges' decisions.[22] As a result, they may have overestimated the effect of gender. Second, both studies used flawed measures of colleague ideology, thus potentially underestimating the impact of a judge's colleagues on his or her decisions. Farhang and Wawro included a single variable representing the average of the Poole common space scores[23] of the appointing president for the judge's two panel colleagues.[24] This meant that a conservative and a liberal appointee canceled each other out in the model and thus likely resulted in biased measures of the other coefficients. Massie and her coauthors did not directly measure the ideology of the panel; instead, they calculated the median common space scores for the appointing president of each active judge in the circuit and applied that figure to every panel from

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19. *See* DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 105 tbl.5.1 (2000) (calculating that more than ninety percent of cases decided between 1970 and 1988 were unanimous).

20. Massie et al., *supra* note 10, at 10-11. Massie and her coauthors did not provide sufficient information to determine the magnitude of the impact of the presence of a female colleague on male colleagues, nor did they explain how they classified their cases.

21. Farhang & Wawro, *supra* note 10, at 319-20. Farhang and Wawro's sample included 131 sex discrimination cases, of which only a subset involved panels with female judges. Given this small sample size, the data provide a tenuous basis for generalization to the population of federal appellate court panels.

22. *See id*. at 314; Massie et al., *supra* note 10, tbl.1.

23. For an explanation of Poole common space scores, see *infra* note 52.

24. *See* Farhang & Wawro, *supra* note 10, at 317 tbl.1.

that circuit.[25] Third, the homogeneity and thus the comparability of the cases examined are questionable. Farhang and Wawro analyzed cases from a two-year period marked by significant changes in Supreme Court precedent.[26] Massie and her coauthors used a twenty-year period that saw even greater changes in Supreme Court doctrine[27] as well as the adoption of the Civil Rights Act of 1991,[28] which significantly strengthened the protections of Title VII. Because Massie and her coauthors did not control for significant doctrinal change and because the number of female federal appellate judges increased during their sample period, what looks like a greater propensity of panels with female members to rule for plaintiffs could be a pro-plaintiff doctrinal shift.

This Note improves on past research designs by using a limited time frame with no significant changes in Supreme Court precedent or federal statutes, to increase the homogeneity of the cases in the sample;[29] by including variables representing a judge's past careers, age, and federal appellate experience; and by coding separate variables to represent the ideology of each panel colleague. Further, this Note may be more relevant than some of the prior studies because I focus on a narrow set of gender-coded cases, where scholars anticipating direct and indirect effects of

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25. *See* Massie et al., *supra* note 10, at 8-9. Under this method, a liberal panel and a conservative panel in the same circuit had the same ideology score. Senior circuit judges and judges sitting by designation had no impact on the measure.

26. Partway through the authors' two-year sample period, the Supreme Court decided three significant Title VII cases: *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (determining that an employer is vicariously liable for sexual harassment by a supervisory employee); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) (same); and *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) (holding that same-sex sexual harassment is actionable under Title VII).

27. The initial cases in their data set predate the Supreme Court's holding in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 73 (1986), reaffirmed in *Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993), that conduct producing a "hostile work environment" is actionable under Title VII. The Supreme Court decided several other significant cases during the time period included in the data set. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (holding that once the plaintiff shows that an employer's reason for discrimination is pretextual, a fact-finder is not required to infer discrimination, but may do so); Price Waterhouse v. Hopkins, 490 U.S. 228, 252-53 (1989) (plurality opinion) (requiring defendants to prove by a preponderance of the evidence that an employment decision was not motivated by a discriminatory purpose once plaintiffs make a prima facie case); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) (holding that the ultimate burden of persuasion is on the employee to prove discrimination under Title VII). Though Massie and her coauthors included a variable that purported to control for changing Supreme Court precedent, this variable only represented "the percentage [of] issue-specific liberal decisions made by the Court for each year in [the] analysis lagged by one year." Massie et al., *supra* note 10, at 8. This measure thus sought to account for the changing liberalness of the Supreme Court but not the instability of the doctrine, and it did not statistically correct for changing precedent.

28. Civil Rights Act of 1991, Pub. L. No. 102-166, 1991 U.S.C.C.A.N. (105 Stat.) 1071 (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C.).

29. A search of the Westlaw and Lexis databases revealed no federal legislation or Supreme Court cases that significantly affected Title VII sexual harassment or sex discrimination claims during the time period. Nonetheless, I acknowledge that the absence of significant Supreme Court cases during my sample period does not mean that each circuit's doctrine was consistent during the years analyzed.

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gender argue that the presence of female judges is essential to producing fair outcomes.[30]

II. DATA

A. *Overview of the Data Set*

My data set includes published and unpublished decisions in all sexual harassment and sex discrimination cases decided by the federal courts of appeals between 1999 and 2001[31] where the plaintiff's cause of action fell under Title VII of the Civil Rights Act of 1964.[32] I generated the set via keyword searches on the Westlaw electronic database.[33] Cases are included from all eleven numbered circuits and the District of Columbia Circuit. The sample includes 556 total cases, consisting of 1666 decisions (i.e., votes) rendered by individual judges.[34] The sexual harassment data set contains 1091 decisions—188 from female judges and 903 from male judges. The sex discrimination data set includes 773 decisions—127 from female judges

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30. *See, e.g.*, Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113, 136 (1999); Martin, *supra* note 5, at 208.

31. The analysis was restricted to a three-year period to minimize the effect of the passage of time. Recent years were selected to provide a greater number of cases with female judges on the panel.

32. Title VII makes it unlawful for an employer

    (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

    (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2000).

33. To generate the data set, I ran three searches in November 2002: (SEX SEXUAL! /S HARASS! HARRASS!), ((DISCRIM! TITLE-VII "42 U.S.C. 2000e") /P SEX! GENDER!), and ((GENDER SEX SEXUAL! /5 DISCRIM!) /P (EMPLOY! JOB WORK!)). The search was overbroad, yielding many cases that mentioned these terms but did not involve Title VII sexual harassment and sex discrimination claims. *See, e.g.*, Carter v. Metro. Water Dist., 20 Fed. Appx. 751 (9th Cir. 2001) (concerning an employee who alleged racial discrimination in connection with his termination for sexual harassment); Brightful v. Pa. Higher Educ. Assistance Agency (*In re* Brightful*), 267 F.3d 324 (3d Cir. 2001) (concerning a bankruptcy claim). I excluded these cases from my analysis.

34. The number of decisions reflects the exclusion of 34 cases with mixed decisions—those partly in favor of and partly against the plaintiff's claims. These cases were not included in the data set because the dependent variable was dichotomous. Including these cases in the analysis and conducting ordered probit regression analyses produced results similar to those in Part III. In 2 of the 556 cases analyzed, only two judges rendered the final decision—in one instance due to death and in the other due to retirement of the third judge on the panel.

and 646 from male judges.[35] The data set is limited to cases involving appellate review on the merits of the claims.[36]

The judges in the data set include 54 females (38 Democratic appointees and 16 Republican appointees) and 273 males (116 Democratic appointees and 157 Republican appointees). These sample sizes are large enough to merit confidence in the statistical power of the results. Of the judges, 107 are district judges sitting by designation (of whom 7 are female), and 3 are judges on the U.S. Court of International Trade (of whom 1 is female).

TABLE 1. TITLE VII SEXUAL HARASSMENT AND SEX DISCRIMINATION
CASE OUTCOMES BY GENDER COMPOSITION OF THE PANEL

Gender composition of panel	Number of cases	Number pro-plaintiff	Percent pro-plaintiff
All females	1	0	0%
Two females	35	15	43%
One female	209	72	34%
All males	311	53	17%
Total cases	**556**	**140**	**25%**

As Table 1 indicates, the data show that in an overwhelming number of Title VII sex discrimination and sexual harassment cases—nearly 75% (416 of 556)—the plaintiffs lost. In 38% (158 of 416) of these cases where plaintiffs lost, female judges were on the panel. But female judges were also on the panel in 62% (87 of 140) of the cases in which plaintiffs won. The data indicate that the presence of a female judge significantly increased

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35. Sixty-six cases included allegations of both sexual harassment and sex discrimination and thus are included in both data sets.

36. "Merits" rulings include the full range of dispositions of a trial court judgment that an appellate court renders (i.e., affirming, reversing, reversing and remanding, and affirming in part and reversing in part). I excluded rulings that turned on purely procedural errors or standing. *See, e.g.*, Martens v. Thomann, 273 F.3d 159, 164 (2d Cir. 2001) (vacating the dismissal of a motion to enforce a Title VII sex discrimination settlement agreement because the district court did not hold a hearing or state reasons for the dismissal); Carter v. West Publ'g Co., 225 F.3d 1258, 1267 (11th Cir. 2000) (holding that the plaintiffs lacked standing because their claims were untimely).

I acknowledge that judges might decide cases on procedural grounds to avoid deciding on the merits. *Cf.* Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (arguing that the Supreme Court should selectively use procedural doctrines such as standing, ripeness, and the political question doctrine to avoid answering questions that could compromise the Court's effectiveness). However, I excluded procedural decisions to limit the data set to cases directly implicating Title VII sexual harassment and sex discrimination doctrine—cases where gender was presumably salient. Although gender differences may exist in judges' views of procedural doctrines, procedural rulings are less likely to be affected by a judge's gender.

the probability that the plaintiff would prevail. Further, the dissent rate on mixed-gender panels was low (approximately 6%), indicating that male judges decided with their female colleagues rather than against them.[37]

These results contrast with the results of a sample of 367 Title VII race discrimination cases I assembled from the years analyzed. In those cases, there were no statistically significant differences between the outcomes of all-male panels and of panels with at least one female judge.

By looking more closely at individual judges' rulings in the data set, it is apparent that gender and judicial ideology (as measured by party of the appointing president) significantly affected the results. As Table 2 indicates, female judges ruled for plaintiffs more often than did male judges, and judges appointed by Democratic presidents found for plaintiffs more often than did Republican appointees.[38] Additionally, Republican-appointed females supported plaintiffs at about the same rate as Democrat-appointed males—29% and 30%, respectively.[39]

TABLE 2. NUMBER AND PERCENTAGE OF PRO-PLAINTIFF DECISIONS BY
JUDGE'S GENDER AND PARTY OF APPOINTING PRESIDENT

Judges		Number of judges' decisions	Number pro-plaintiff	Percent pro-plaintiff
All Democratic appointees	Males	555	164	30%
	Females	206	88	43%
	Total	*761*	*252*	*33%*
All Republican appointees	Males	829	170	21%
	Females	76	22	29%
	Total	*905*	*192*	*21%*
All judges	Males	1384	334	24%
	Females	282	110	39%
	Total	**1666**	**444**	**27%**

To better understand the effect of gender on individual judges' decisions and to control for other factors that may influence a judge's

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37. Of the dissents on mixed-gender panels ($n = 15$), 60% (9) were by female judges and 40% (6) were by male judges. Two-thirds of these dissents (10) occurred in cases where the panel decided for the defendant.

38. T-tests showed that both of these differences were significant. T-tests also showed that the differences between men and women were significant within each party.

39. A t-test showed that this disparity was not significant.

decision, most notably judicial ideology, I conducted probit regression analyses.[40]

For these analyses, I separated the sexual harassment and sex discrimination cases.[41] Although sexual harassment and sex discrimination cases both fall under Title VII and are conceptually similar, scholars have shown that judges treat the two types of cases differently. Even though the Supreme Court has never held that sexual harassment requires conduct of a sexual nature, studies have shown that plaintiffs are more likely to win when they allege sexualized behavior.[42] By contrast, to prevail in sex discrimination cases plaintiffs must present sufficient evidence for judges to infer that sexism is the reason for gender disparities.[43]

Before analyzing the data, I had two conflicting hypotheses regarding whether male/female differences would be greater in sexual harassment or in sex discrimination cases. On the one hand, judges' emphasis on evidence of sexualized behavior in sexual harassment cases might result in less significant gender differences in those cases than in sex discrimination cases, which require judges to infer discrimination. On the other hand, research showing that males and females in the general population differ in their perceptions of what constitutes sexual harassment[44] leads to the opposite expectation—more significant gender differences in sexual harassment cases. Surprisingly, the data indicate that individual-level gender differences were greater in sexual harassment cases, but the impact of the presence of a female judge on male judges' decisions was greater in sex discrimination cases.[45]

The remainder of this Part describes the variables used in the regression analyses.

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40. I used probit regression analyses instead of ordinary least squares regression analyses because the dependent variable (the judge's decision) was discrete, not continuous.

41. I also combined all the observations into a single data set and reran the analyses with results similar to those in Part III.

42. *See, e.g.*, Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 593 (2001); *see also* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1710, 1710-38 (1998) (examining the use of the "sexual desire-dominance paradigm" in sexual harassment cases and how reliance on this paradigm has caused courts to disaggregate sexual conduct, which is used to establish sexual harassment, from nonsexualized behavior, which is used, if at all, to establish disparate treatment sex discrimination).

43. *See* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 956-59 (1989) (describing the "reversing the groups" test whereby, in deciding a sex discrimination case, the court asks whether the same decision would have been made if males and females were reversed).

44. *See* Maria Rotundo et al., *A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 86 J. APPLIED PSYCHOL. 914, 919 (2001); Richard L. Wiener et al., *Perceptions of Sexual Harassment: The Effects of Gender, Legal Standard, and Ambivalent Sexism*, 21 LAW & HUM. BEHAV. 71, 73-75, 85 (1997).

45. Table 3 of the Appendix contains descriptive statistics for all of the variables included in the regressions.

B. *Dependent and Independent Variables*

The dependent variable in the analyses was the judge's decision in the case, measured as in favor of (1) or against (0) the plaintiff.[46] The key independent variable in the analyses of individual gender differences was the gender of the judge.[47] The key independent variable in the analyses of the effect of female judges on male judges was the presence of a female judge on the panel.

C. *Control Variables*

To determine whether the disparities I observed indicated that gender mattered, I included in the regressions control variables for other factors that might affect a judge's decision—background variables, namely ideology, race, prior employment, federal appellate experience, and age,[48] and case-specific variables, namely the direction of the lower court decision, the gender of the plaintiff, and whether the defendant was a government entity.[49]

Ideology. Judicial political ideology is the most powerful alternative explanation for my results. Research shows that Democratic appointees are significantly more likely than Republican appointees to support sexual harassment and sex discrimination plaintiffs.[50] As Table 2 indicated, the data bear out this expectation.

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46. An example helps illustrate the coding: In *Swenson v. Potter*, where an employee sued her employer under Title VII, alleging sexual harassment, the majority held that the employer was not liable for damages because it took "prompt corrective action." 271 F.3d 1184, 1198 (9th Cir. 2001). Thus, I coded the two decisions of the judges in the majority as 0, or against the plaintiff. The dissenting judge found that the employer did not respond appropriately, so it was liable. *Id*. at 1198-99 (W. Fletcher, J., dissenting). I coded his decision as 1.

47. I identified each judge's gender through self-reported data collected by the Federal Judicial Center. Fed. Judicial Ctr., Federal Judges Biographical Database, http://www.fjc.gov/ history/home.nsf/judges_frm (last visited Apr. 30, 2005).

48. For federal appellate court judges appointed before 1995, I obtained data on appointing president, race, prior employment, experience, and age from Gary Zuk et al., Multi-User Database on the Attributes of United States Appeals Court Judges, 1801-1994 (1997), *available at* http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/06796.xml. For missing data, appellate judges appointed in or after 1995, and district judges sitting by designation, I used the Federal Judicial Center database to code the data. Fed. Judicial Ctr., *supra* note 47. For judges sitting by designation from the United States Court of International Trade, I used the biographical data available on the court website. U.S. Court of Int'l Trade, Judges of the United States Court of International Trade, http://www.cit.uscourts.gov/Judges/judges.htm (last visited Apr. 30, 2005).

49. I coded the case-specific variables using information from the opinions themselves. The research design did not assess the strength of plaintiffs' claims. Because of the large sample size, the differences in the claims of individual plaintiffs should balance out.

50. *See* Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1171 tbl.10 (1992); Songer et al., *supra* note 12, at 435 tbl.3.

Given the impossibility of accurately measuring judges' political inclinations, I used two different measures as close, but admittedly imperfect, proxies for ideology:[51] the party of the appointing president and a continuous variable based on the appointing president or same-party senator(s)' Poole common space scores, which rank presidents and senators by liberalness.[52] I coded the party measure 0 for Republican appointees and 1 for Democratic appointees. The ideology score measure was coded on a 0-to-1 scale with 0 being the most conservative and 1 being the most liberal.[53] With both measures, the predicted effect on the likelihood of a pro-plaintiff decision was positive. Both variables had highly statistically significant effects.

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51. The professed party affiliation of the judge might be a better measure of judicial ideology, but some judges do not have party affiliations, and for those who do, this information is not readily or uniformly available. Furthermore, a judge's party is closely correlated with the party of the appointing president—one of the two measures I used. *See* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 355 tbl.9.2 (1997) (calculating that presidents from Eisenhower to Reagan appointed federal appellate judges from their own parties more than ninety percent of the time, except for Carter, who appointed Democrats only eighty-two percent of the time).

Ultimately, the best measure of a judge's ideology with respect to a given case type is the judge's decisions over time in such cases, but this measure is obviously circular. Though I could develop a measure based on judges' decisions in other issue areas, it would be difficult to do so systematically, and such a measure would risk grouping effects due to pure ideology with effects due to other variables (e.g., gender, age, and race).

52. The Poole common space scores place presidents and senators on a scale ranging from -1 (most liberal) to 1 (most conservative) that is consistent across time and institutions. *See* KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997) (deriving common space scores for members of Congress from each member's decisions); Nolan M. McCarty & Keith T. Poole, *Veto Power and Legislation: An Empirical Analysis of Executive and Legislative Bargaining from 1961 to 1986*, 11 J.L. ECON. & ORG. 282 (1995) (deriving scores for presidents); Keith T. Poole, Data Download Front Page, http://www.voteview.com/dwnl.htm (last visited Apr. 30, 2005) (providing presidential and senatorial common space scores and a detailed description of the scores) [hereinafter Poole, Data Download]; *see also* Keith T. Poole, *Recovering a Basic Space from a Set of Issue Scales*, 42 AM. J. POL. SCI. 954 (1998) (describing the scaling procedure for calculating common space scores).

53. Consistent with past scholarship, I calculated the ideology score as follows: When the judge was from a state that (at the time of his or her appointment) had one senator from the same party as the appointing president, the variable was the value of the senator's ideology score. When the judge was from a state that had two senators from the president's party, I averaged the senators' ideology scores to calculate the judge's score. If neither of the state's senators were the president's party, the variable was the ideology score of the appointing president.

In coding the ideology scores, I rescaled the common space scores from a scale of -1 to 1 to a scale of 0 to 1 to make the coefficients easier to interpret. I also changed the direction of the scale to make 1 the most liberal and 0 the most conservative, because I hypothesized that a positive relationship existed between liberalness and the probability of a pro-plaintiff decision.

I coded the ideology scores for federal appellate judges using a 2002 database generated by Micheal Giles, Virginia Hettinger, and Todd Peppers. For district judges sitting by designation, I first identified the year of appointment and the appointing president from the Federal Judicial Center website, *see* Fed. Judicial Ctr., *supra* note 47, and then found the relevant presidential and senatorial common space scores at Poole, Data Download, *supra* note 52, to calculate the ideology scores. Because Court of International Trade judges do not sit in particular states, I used the appointing president's common space score as the ideology score for each judge.

Though party is the most commonly used measure of judicial ideology in the literature,[54] it is less exact than the ideology score measure, which accounts for ideological differences between presidents of the same political party (e.g., President Reagan was more conservative than the first President Bush) and the importance of senatorial courtesy in judicial appointments.[55]

Based on the expectation that male judges are influenced by the ideology of all of their colleagues on the panel,[56] I also included two variables in the regressions to represent the party of the appointing president or the ideology score of each of a judge's colleagues on the panel.[57] In coding these variables, the *Colleague 1* variable represented the ideology of the more liberal colleague.

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54. *See, e.g.*, Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2168-73 (1998); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1738-43 (1997).

55. Although some researchers have used the appointing president's common space score to calculate judicial ideology, *see, e.g.*, Farhang & Wawro, *supra* note 10, at 314, I used the senatorial scores, where relevant, to provide a more detailed measure of ideology. Doing so allowed me, for instance, to distinguish between a Clinton appointee from Massachusetts and one from Georgia. Giles, Hettinger, and Peppers found a very strong correlation between judicial outcomes and this measure. *See* Micheal W. Giles et al., *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 634-35 (2001); Micheal W. Giles et al., Measuring the Preferences of Federal Judges: Alternatives to Party of the Appointing President 9-10 (June 11, 2002) (unpublished manuscript, on file with author); *see also* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 88-89, 95-96 (2002) (arguing that this measure is a more valid indicator of judicial ideology than the party of the appointing president). The results did not vary significantly when I used the appointing president's common space score to calculate judicial ideology for all judges.

   On average, the common space measure is an unbiased estimate of judicial ideology, but it is an imperfect one. The use of this measure is based on the assumption that presidents and home state senators are at least moderately successful in selecting federal judges who share their ideologies.

56. *See, e.g.*, Cross & Tiller, *supra* note 54, at 2168-76 (finding empirically that, in the D.C. Circuit, the ideology of a judge's colleagues on the panel affected the judge's decisions); Revesz, *supra* note 54, at 1751-56, 1764 (same) ("[T]he ideology of one's colleagues is a better predictor of one's vote than one's own ideology."); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 316-17 (2004) (observing this phenomenon across circuit courts).

57. The use of two separate variables to represent colleague ideology is preferable to using an average value, as was done in other studies, *e.g.*, Farhang & Wawro, *supra* note 10, at 317 tbl.1, because it ensures that the ideological environment of the panel is fully represented. However, parsing the ideology effect in my analyses meant that neither colleague variable measured the full impact of colleague ideology. As a result, in most of the regressions, only one of the two colleague variables was statistically significant, and in the sex discrimination regressions with only male judges' decisions, neither colleague variable was statistically significant.

   When I used the average ideology of a judge's colleagues instead of their individual ideology scores, this variable was statistically significant in all of the regressions and the direction of the other coefficients did not change. However, using the average biased the coefficients upward, falsely indicating a stronger relationship between gender and judging.

Race. Given that some scholars anticipate that minority judges are more likely to make liberal decisions than white judges,[58] even though past research has not generally borne out this expectation,[59] I coded a dummy variable 1 if the judge was a member of a racial minority, 0 otherwise.[60] This variable had no statistically significant effect.[61]

Prior Employment. Because research has shown that career path may affect judicial decisionmaking,[62] the regressions included several variables for judges' past occupations: dummy variables for prior military service, government service (at the local, state, or federal level),[63] a prior judgeship (state or federal and any court type—appellate, trial, bankruptcy, or magistrate), employment as a law professor, employment in private practice (in a firm, as a solo practitioner, or in a corporation), and employment at a nonprofit organization.

Of the employment variables, the only one that achieved statistical significance in any of the models was employment in private practice. Previous work in private practice increased the likelihood that female judges decided for sex discrimination plaintiffs but had no statistically significant effect for male judges. Thus, this finding of significance might be an artifact of the data rather than an indicator of a true phenomenon.[64]

Age and Federal Appellate Experience. The regressions included variables for seniority and age based on the expectation that increasing seniority on the federal appellate bench may cause "hardening . . . of the

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58. *See generally* MICHAEL DAVID SMITH, RACE VERSUS ROBE: THE DILEMMA OF BLACK JUDGES (1983) (noting differences in backgrounds and judicial attitudes between black and white judges); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000) (hypothesizing that minority judges decide cases differently than white judges).

59. *See, e.g.*, Gottschall, *supra* note 12, at 171-73 (identifying no statistically significant differences between the decisions of black and white federal appellate judges appointed by President Carter); Walker & Barrow, *supra* note 8, at 613-15 (same). *But see* Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 595-96 (2004) (finding empirically that minority federal appellate judges were more likely than their white counterparts to support plaintiffs alleging religious discrimination).

60. In the sample, eleven percent of male decisions and twelve percent of female decisions were from minority judges.

61. I also ran the regressions with a dummy variable for black judges ($n = 113$) and Hispanic judges ($n = 71$), the only racial subgroups large enough for statistical analysis, and these variables had no statistically significant effect.

62. *See* Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 954-56, 961-65 (2003) (describing twenty-two studies investigating the link between past occupations and judicial decisions and noting that seventy percent of these studies found some relationship).

63. Holding a judicial clerkship was not included in government service.

64. There are at least two possible explanations for the finding of significance in the sample of female judges but not in the sample of male judges. First, the female judges in the sample might have been more likely than the male judges to work in plaintiff-side law firms. Second, female judges' careers in private practice might have exposed them to sex discrimination in law firms and thereby influenced their views in sex discrimination cases.

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bureaucratic judicial arteries."[65] Indeed, one study found that age was more useful than the party of the appointing president in predicting judges' decisions on civil liberties issues.[66] Because a judge's age is highly correlated with the length of service on the federal appellate bench, both variables could not be included in the same regressions, so I ran separate analyses with each variable. Neither variable had a statistically significant impact on the results.[67]

Lower Court Decision. Extensive research has documented the tendency of federal appellate courts to affirm lower court decisions.[68] The appellate court affirmed the lower court's decision in seventy-eight percent of the cases in my data set. To account for the inclination of federal courts of appeals to affirm, I constructed a variable to represent the district court outcome.[69] I coded this variable using the same procedure as the dependent variable. The variable's effect was highly statistically significant.

Male Plaintiff. Because male plaintiffs are generally less likely to prevail in sex discrimination and sexual harassment cases,[70] the regressions included a dummy variable that was 1 where the plaintiff was male.[71] The effect was not statistically significant.

Government Defendant. The regressions included a dummy variable that was 1 if the defendant was a government entity, 0 otherwise, because research has shown government defendants are more likely to be successful than other litigants.[72] In the data, no statistically significant relationship existed between this variable and a judge's decision.

Circuit-Level Variation. The regressions included dummy variables representing each circuit to account for regional variation in support for

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65. Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 499 (1975).

66. *Id*. at 503.

67. To simplify the display of the data, Tables 4 and 5 of the Appendix, which report the regression analyses, only include the regressions with the experience variable.

68. *See, e.g.*, Jon O. Newman, *A Study of Appellate Reversals*, 58 BROOK. L. REV. 629, 632 tbl.1 (1992) (calculating that the Second Circuit affirmed the lower court in seventy-six percent of the cases it decided between July 1, 1989 and June 30, 1991).

69. Though Farhang and Wawro included this variable in their regressions, *see* Farhang & Wawro, *supra* note 10, at 315, Massie and her coauthors did not do so, *see* Massie et al., *supra* note 10, tbl.1, thus biasing the results.

70. In the sexual harassment data set, judges found for the plaintiff in 27% of the cases with female plaintiffs (88 of 325) and in 18% of the cases with male plaintiffs (7 of 39). In the sex discrimination data set, judges found for the plaintiff in 25% of the cases with female plaintiffs (53 of 216) and in 12% of the cases with male plaintiffs (5 of 42). These differences were the same for male and female judges.

71. In all of these cases, the defendants were female.

72. *See* Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235, 242-44, 253 (1992) (finding empirically that government defendants prevailed significantly more often than private defendants in federal appellate cases). Songer and Sheehan theorized that government defendants are more successful because they can mobilize powerful resources to support their cases. *Id*. at 253. Government defendants may also have greater legitimacy than their private counterparts.

    In my data set, thirty-eight percent of the defendants were government entities.

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plaintiffs.[73] The circuit variables controlled for the influence of the culture of each circuit and the different prevailing precedents in each circuit.[74] Several of the circuit dummies achieved conventional levels of statistical significance in each model.

III. REGRESSION RESULTS

Using probit regression analyses,[75] I found that in Title VII sexual harassment and sex discrimination cases, controlling for the factors above, a judge's gender and the gender composition of the panel mattered to a judge's decision. This Part details the results.

A. *Gender Differences in Voting Behavior*

Although in the data set both male and female judges generally ruled against plaintiffs, male judges were significantly more likely to find for defendants than female judges.[76] As Figure 1 indicates, controlling for the factors enumerated in Part II, being female increased the probability that a judge found for the plaintiff by 86% (from 22% to 41%) in sexual harassment cases and by 65% (from 17% to 28%) in sex discrimination cases.[77]

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73. The cases in the data set are distributed as follows: 13 from the First Circuit, 59 from the Second Circuit, 10 from the Third Circuit, 53 from the Fourth Circuit, 30 from the Fifth Circuit, 70 from the Sixth Circuit, 83 from the Seventh Circuit, 86 from the Eighth Circuit, 73 from the Ninth Circuit, 42 from the Tenth Circuit, 28 from the Eleventh Circuit, and 9 from the D.C. Circuit.

   To code the circuit dummies, I used the Ninth Circuit, which is generally regarded as the most liberal, as the reference point.

74. *See generally* Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 966 (1992) (noting that region serves as "an indicator of variation in the political culture that presumably affects judges' socialization as well as variation in contextual influences").

   I conducted a Wald test to determine whether the circuit variables, as a group, were statistically significant. The test yielded $p < .01$, confirming that the variables should be included in the model.

75. I conducted the regressions with the aid of the Stata software program. In performing my analysis, I used Stata's cluster option to obtain robust estimates, adjusted for within-cluster correlation by case (i.e., the fact that the decisions of the three judges on each case are highly correlated). For an explanation of the between-cluster variance estimator used by Stata, see Rick L. Williams, *A Note on Robust Variance Estimation for Cluster-Correlated Data*, 56 BIOMETRICS 645 (2000).

76. The results of the regression analyses are reported in Table 4 of the Appendix.

77. The predicted probabilities were generated in Stata using the Clarify version 2.1 macro set, available at Michael Tomz et al., Clarify: Software for Interpreting and Presenting Statistical Results, http://gking.harvard.edu/stats.shtml (last visited Apr. 30, 2005). For an explanation of the simulation methods Clarify employs, see Gary King et al., *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 347 (2000).

FIGURE 1. PROBABILITY OF A PRO-PLAINTIFF
DECISION BY JUDGE'S GENDER
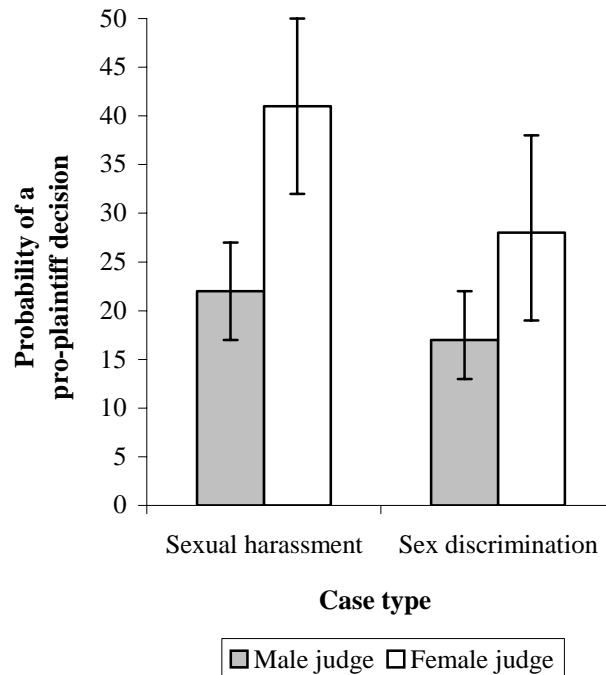
Note: The figure displays predicted probabilities from probit regression analyses, holding all other variables at their sample means and moving *Female* from 0 to 1. The analyses use the common space score measure for ideology. The bars represent 95% confidence intervals, using Clarify to simulate probabilities.

Because the regressions controlled for political ideology, the results indicate that both liberal and conservative female judges were more likely than their male counterparts to support plaintiffs.[78] In the sexual harassment cases analyzed, being female had a more significant effect on the probability of a pro-plaintiff decision than did being appointed by a Democratic president,[79] and in the sex discrimination cases, being female had as significant an effect as did being a Democratic appointee.[80]

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78. To examine whether the effect of being female varied according to the ideology score of the judge, I coded a new variable, which represented the product of *Female* and *Ideology Score*, to capture the possible interaction effect between the two variables. I found no statistically significant effect, indicating that the effect of being female was similar for liberal and conservative judges.

79. In the sexual harassment data set, being female increased the estimated probability that a judge would find for the plaintiff by 19 percentage points (from 22% to 41%), while being a Democratic appointee increased this probability by 12 percentage points (from 20% to 32%). T-tests indicated that these differences were statistically significant.

80. In the sex discrimination data set, being a Democratic appointee increased the estimated probability that a judge would find for the plaintiff by 12 percentage points (from 14% to 26%),

B. *Impact of Female Judges*

The data also indicate that an indirect effect existed: Male judges were more likely to find for plaintiffs when at least one female judge was on the panel.[81] Because the regressions controlled for ideology, the results indicate that regardless of the ideology of the male judge, sitting on a panel with a female judge increased the likelihood that he found for the plaintiff.[82] As Figure 2 illustrates, adding a female judge to the panel more than doubled the probability that a male judge ruled for the plaintiff in sexual harassment cases (increasing the probability from 16% to 35%) and nearly tripled this probability in sex discrimination cases (increasing it from 11% to 30%). Further, conservative male judges were affected as much as liberal male judges were by the presence of a female judge.[83]

The presence of a female judge trumped an individual male judge's ideology: The data indicate that serving with a female judge had more than 1.5 times the effect on a male judge of being appointed by a Democratic president.[84]

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while being female increased this probability by 11 percentage points (from 17% to 28%). T-tests revealed that these differences were not statistically significant.

81. The results of the regression analyses are reported in Table 5 of the Appendix.

82. Of the fifty-four female judges in the data set, thirty-nine were repeat players. Four female judges—Martha Craig Daughtrey, Diana Gribbon Motz, Ilana Diamond Rovner, and Diane P. Wood—served in fifteen or more cases. To be certain that these four judges were not responsible for the results, I excluded cases in which they sat from the data set and reran the analyses. The results were virtually identical to the initial analysis.

83. I hypothesized that ideology might condition the influence of female judges on their male colleagues, with liberal appointees being more likely than conservative appointees to support plaintiffs regardless of whether a female judge was present and thus less affected by the presence of a female judge. However, I found no statistically significant interaction effect between the presence of a female judge and the male judge's ideology score, indicating that the gender effect was not conditional.

84. In the sexual harassment data set, being a Democratic appointee increased the estimated probability that a male judge decided for the plaintiff by 12 percentage points (from 17% to 29%), while sitting with a female judge increased that probability by 19 percentage points (from 16% to 35%). In the sex discrimination data set, being a Democratic appointee increased the probability that a male judge decided for the plaintiff by 10 percentage points (from 12% to 22%), while sitting with a female judge increased that probability by 19 percentage points (from 11% to 30%). T-tests revealed that these differences were statistically significant.

FIGURE 2. MARGINAL IMPACT OF THE PRESENCE OF
A FEMALE JUDGE ON MALE JUDGES' DECISIONS
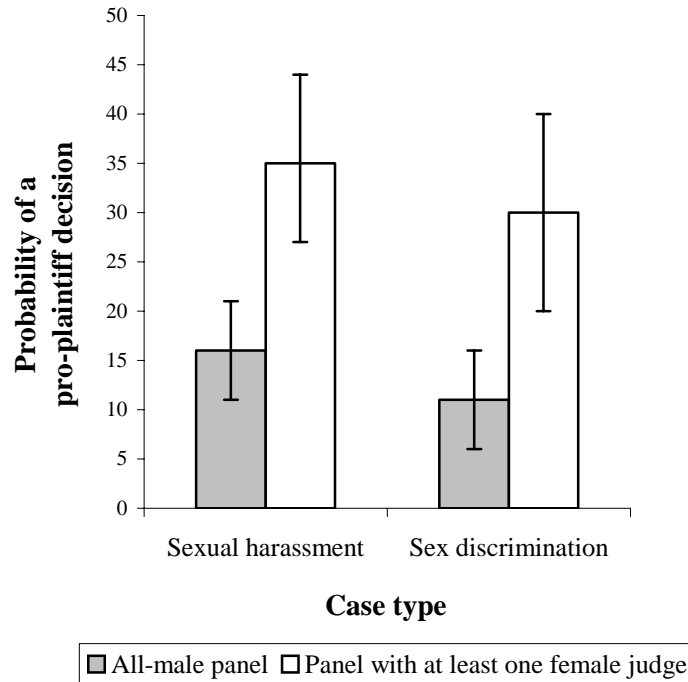
Note: The figure displays predicted probabilities from probit regression analyses, holding all other variables at their sample means and moving *Woman Present* from 0 to 1. The analyses use the common space score measure for ideology. The bars represent 95% confidence intervals, using Clarify to simulate probabilities.

IV. POSSIBLE EXPLANATIONS FOR THE EFFECT
OF GENDER ON PANEL DECISIONMAKING

In the Title VII sexual harassment and sex discrimination cases analyzed in this Note, plaintiffs generally lost. Plaintiffs were significantly more likely to win, however, when a female judge was on the bench. Thus, in some cases, the presence of a female judge must have affected the nature of the decisionmaking and, specifically, the decisions of the panel's male judges—ultimately resulting in a pro-plaintiff outcome.

In this Part, I develop four possible explanations for the observed gender effect and more generally for how the presence of a female judge on a federal appellate panel may increase the likelihood that a male judge, and the panel as a whole, will support the plaintiff in gender-coded cases: (1) deliberation, (2) deference, (3) logrolling, and (4) moderation. The first explanation predicts that the effect stems from the normal give-and-take of judges with different preferences all seeking to influence case outcomes,

while the latter three explanations predict that the presence of a female judge changes the character of that deliberation, causing the female judge's preferences to carry greater weight.[85] These mechanisms could operate separately or in tandem.

Three points warrant emphasis here. First, these explanations do not describe the bulk of Title VII sexual harassment and sex discrimination cases, in which plaintiffs lose regardless of whether a female judge is on the bench. Rather, they only endeavor to explain those instances where the presence of a female judge leads to a pro-plaintiff outcome.

Second, these mechanisms do not presume a universal form of collegial decisionmaking. The presence of female judges may influence male judges before or during oral argument, in conference after argument, in informal conversations about the case, or in writing as judges exchange drafts of their opinions. The specific form the interactions take probably varies across panels and circuits. Some circuits, for instance, generally eschew oral argument and conferences about outcomes.[86] All circuits rely on staff members, including judicial clerks and staff attorneys, to process cases and write the initial drafts of some opinions.[87]

Third, all four possible explanations for the impact of the presence of a female judge on male judges are agnostic about why individual-level gender differences existed in the data set in the first place. In the cases analyzed, female judges might have made more accurate or less accurate decisions than male judges because they placed a greater or lesser weight on the specific facts of the case and the applicable precedent. Alternatively, perhaps female judges' different patterns of socialization, types of work, and life experiences caused them to have different views regarding gender-coded cases, resulting in a greater sympathy to plaintiffs or sensitivity to

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85. I acknowledge that in describing these mechanisms, I rely on an all-male baseline. This is for ease of explanation and because a majority of federal appellate panels (fifty-four percent in the data set) are all male. The use of this baseline should not be read to indicate that normal decisionmaking is synonymous with what occurs on all-male panels or that all-male panels do not exhibit variations of the mechanisms I describe in reaching decisions.

86. *See* JUDITH A. MCKENNA ET AL., FED. JUDICIAL CTR., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 11 tbl.6 (2000), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/CaseMan1.pdf/$file/CaseMan1.pdf (noting that in 1998 the Fourth Circuit heard only one in four appeals orally). Overall, oral argument is held in less than half of all cases. *Id.* (citing 1998 data indicating that oral argument occurred in forty-one percent of all federal appellate cases and fifty-seven percent of cases in which litigants had counsel).

87. *See* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 141-44 (1994); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 287-93 (1996).

Different methods of decisionmaking might be more likely to facilitate some of the causal mechanisms that I propose than others. For example, when conferencing occurs only in writing, fewer opportunities may exist for the moderation and deliberation mechanisms to operate. Conversely, the deference mechanism might be more likely, particularly if the female judge drafts the opinion.

Title VII concerns.[88] Or female judges could have used different means of decisionmaking than male judges did.[89] Then again, maybe the female judges in my data set were just more liberal than their male colleagues.[90] Finally, the presence of female judges might have reduced a blatant or hidden bias against plaintiffs on the part of male judges.

Previous literature is silent on theoretical explanations for the indirect effect of gender on outcomes. Thus, my discussion aspires to spur debate and additional empirical analyses regarding the causal mechanism through which the effect I observed occurs. The four possible explanations I propose may not be specific to female judges and gender-coded cases. Because the explanations all aim to describe how an individual judge might affect the final case outcome, they may apply to collegial decisionmaking more broadly.

A. *Deliberation*

Female judges may influence male judges through simple deliberation, with the majority moving toward a compromise view that incorporates the female judge's more pro-plaintiff preferences. The deliberation explanation relies on the collegiality of appellate courts and the consensus norm[91]—both

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88. *See, e.g.*, Martin, *supra* note 5, at 208; Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 178 (1990) (quoting Judith S. Kaye, then an associate judge of the New York Court of Appeals ("After a life-time of different experiences and a substantial period of survival in a male-dominated profession, women judges unquestionably have developed a heightened awareness of the problems that other women encounter in life and in law; it is not at all surprising that they remain particularly sensitive to these problems." (internal quotation marks omitted))); Kathryn Mickle Werdegar, *Why a Woman on the Bench?*, 16 WIS. WOMEN'S L.J. 31 (2001). For a critique of this argument, see Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891 (1995).

89. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (arguing that women speak "in a different voice" because they exhibit an ethic of care and emphasize their connections to the community in decisionmaking, while men rely on an ethic of rights and emphasize autonomy in making decisions); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 592-616 (1986) (applying Gilligan's theory to the law to argue that the feminine perspective emphasizes connection, contextuality, and responsibility while the masculine perspective emphasizes autonomy, abstraction, and rights). *But see* Jilda M. Aliotta, *Justice O'Connor and the Equal Protection Clause: A Feminine Voice?*, 78 JUDICATURE 232 (1995) (concluding that Justice O'Connor's opinions did not evidence a different voice from those of other Supreme Court Justices); Sue Davis, *Do Women Judges Speak "In a Different Voice?": Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit*, 8 WIS. WOMEN'S L.J. 143, 171 (1992-1993) (questioning the idea that female judges speak in a different voice).

90. Because my ideology measures did not fully capture the judges' ideologies, it is possible that among both liberal and conservative appointees in my data set, the female judges were more liberal, and that this liberalness drove my results. My finding that female judges were no more likely than male judges to support race discrimination plaintiffs, however, undercuts this hypothesis.

91. *See* J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 189 (1981)

of which lead judges with different preferences to discuss and deliberate before deciding a case. This explanation reflects the basic notion that judges "can be swayed by an articulate and well-reasoned argument from a colleague with a differing opinion,"[92] and it anticipates that judges confer "in a spirit of 'give-and-take' (or accommodation) in an effort to reach decisional consensus and thus avoid public dissension."[93]

Deliberation emphasizes the collegial nature of appellate decisionmaking. As Judge Harry Edwards of the D.C. Circuit explained, "[J]udges have a common interest, as members of the judiciary, in getting the law right, and . . . , as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect."[94] Past research found that judges on heterogeneous panels tended to shift their views toward the center to reflect the perspectives of all member judges.[95] For instance, a Republican appointee was significantly more likely to rule liberally when sitting on a panel with two Democratic appointees than when sitting with two Republican appointees.[96]

Through deliberation, a female judge, like any member of the panel, can persuade her colleagues to side with her. By adding her different preferences to the deliberation, the female judge changes the possible range for the consensus view. Because the panel must ultimately render a decision for or against the plaintiff, this influence translates into a changed final outcome.

If deliberation fully captures the indirect effect, the addition of a second female judge to the panel should affect the direction of the outcome beyond the addition of the first female judge, just as the addition of a second Democratic appointee affects a panel's decision. When I included a dummy variable in the regressions for the presence of a second female judge, however, that variable had no statistically significant effect on male judges' decisions. This indicates that only the presence of the first woman on the panel mattered in determining the probability that a male judge ruled for the plaintiff. Thus, deliberation by itself is insufficient to explain my data but likely operated in concert with another explanation for the indirect effect.[97]

("Judging is a collective enterprise . . . . [J]udges are expected to make joint decisions with a maximum of cohesion and a minimum of discord.").

    92. ROBERT A. CARP & RONALD STIDHAM, THE FEDERAL COURTS 174 (4th ed. 2001).

    93. Sheldon Goldman, *Conflict and Consensus in the United States Courts of Appeals*, 1968 WIS. L. REV. 461, 479.

    94. Edwards, *supra* note 4, at 1645 (footnote omitted).

    95. *See, e.g.*, Cross & Tiller, *supra* note 54, at 2173-75; Revesz, *supra* note 54, at 1732-34, 1765-66. Revesz posited that "it may be that a judge who sits with two colleagues from the other party moderates his or her views in order to avoid having to write a dissent." Revesz, *supra* note 54, at 1733.

    96. *See, e.g.*, Revesz, *supra* note 54, at 1765-66; Sunstein et al., *supra* note 56, at 316-17.

    97. Of course, the fact that the effect on male judges of two female colleagues was statistically indistinguishable from that of one female colleague does not mean that no further

B. *Deference*

A second possible explanation is that male judges defer to female judges because male judges view them as more credible and persuasive in gender-coded cases, based on their viewpoints, past experiences, or gender alone.[98] Under this explanation, female judges make the deliberation more receptive to plaintiffs' claims. If male judges perceive female judges as experts in Title VII sexual harassment and sex discrimination cases, they likely will defer to the female judges' preferences, particularly where the male judges are uncertain about cases. The deference explanation is supported by psychological research showing that on issues where men considered or expected women to be more knowledgeable, they generally supported women's views.[99] This phenomenon may be magnified if a female judge can recount personal experiences with sexual harassment or sex discrimination.[100]

The deference mechanism does not presume that female judges are actually more knowledgeable about gender-coded issues (though they might be), only that male judges view them as such. Once a male judge deems a female judge particularly credible in a gender-coded case, he will be much less willing to side against her—whichever direction she rules. The deference explanation draws on the concept of cue taking,[101] because it

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deliberation occurred in the cases analyzed. The addition of a second female judge could change the style of the debate without affecting the final outcome.

98. *See* Beiner, *supra* note 30, at 136-37.

99. *See, e.g.*, John F. Dovidio et al., *Power Displays Between Women and Men in Discussions of Gender-Linked Tasks: A Multichannel Study*, 55 J. PERSONALITY & SOC. PSYCHOL. 580 (1988) (showing that males deferred to females in a task involving pattern sewing, a task selected because the females in the study indicated greater familiarity with it than did the males); Marlaine E. Lockheed, *Sex and Social Influence: A Meta-Analysis Guided by Theory*, *in* STATUS, REWARDS, AND INFLUENCE: HOW EXPECTATIONS ORGANIZE BEHAVIOR 406, 409-10 (Joseph Berger & Morris Zelditch, Jr. eds., 1985) (suggesting that males deferred to women in decisionmaking on "feminine" topics); Barbara F. Meeker & Patricia A. Weitzel-O'Neill, *Sex Roles and Interpersonal Behavior in Task-Oriented Groups*, *in* STATUS, REWARDS, AND INFLUENCE, *supra*, at 379, 390-91 (surveying past literature and reaching the same conclusion).

One study found that female expert witnesses were more influential than male expert witnesses on jurors' decisions in cases where the subject matter was perceived as within a woman's field of knowledge. *See* Regina Schuller et al., *The Impact of an Expert's Gender on Jurors' Decisions*, 25 LAW & PSYCHOL. REV. 59, 73-74 (2001).

100. *See* Beiner, *supra* note 30, at 136.

101. *See, e.g.*, Shelly Chaiken, *Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion*, 39 J. PERSONALITY & SOC. PSYCHOL. 752 (1980) (finding empirically that individuals rely on heuristics (i.e., cues) to evaluate the value of communications); *cf.* JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 94-95 (1973) (reporting statements of members of Congress that they look to their committee colleagues for voting cues); DONALD R. MATTHEWS & JAMES A. STIMSON, YEAS AND NAYS: NORMAL DECISION-MAKING IN THE U.S. HOUSE OF REPRESENTATIVES 51, 49-54 (1975) (describing cue taking in Congress and defining a "'cue'" as "any communication . . . that is employed by the cue-taker as a prescription for his vote" (emphasis omitted)).

posits that judges on collegial courts defer to more informed jurists on the bench as a shortcut to the desired end: deciding the case.

The data provide some support for the deference explanation. Because the results show that only the presence of the first female judge affected the likelihood that a male judge supported the plaintiff, they indicate that the male judges may have deferred to that female judge. Additionally, the data indicate that learning occurred in the sexual harassment cases analyzed:[102] The greater the number of such cases in which a male judge had previously sat with a female judge, the more likely he was to rule for the plaintiff in a given case.[103] This is consistent with the expectation under the deference mechanism that male judges considered their female counterparts more knowledgeable, because it suggests that the male judges were persuaded by the arguments of female judges and that this impact carried over to future cases.

In the sex discrimination cases analyzed, however, the data exhibit no learning effect. This could signify that no learning occurred in Title VII sex discrimination cases, but the results may also point to a longer learning period or a minimum threshold before a learning effect was realized. These results could also indicate that different mechanisms operated in sexual harassment and sex discrimination cases.[104]

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102. I constructed a new variable to represent the number of previous Title VII sexual harassment cases in the data set in which a male judge had sat on a panel with at least one female judge. This variable had a positive and statistically significant coefficient, indicating that there was a cumulative positive effect on the likelihood of a pro-plaintiff vote from serving with female judges.

This new variable ranges from 0 to 8 with a mean of 1.03 and a standard deviation of 1.50 in the sexual harassment data set, and it ranges from 0 to 6 with a mean of 0.65 and a standard deviation of 1.06 in the sex discrimination data set. Because the variable only included data from my data set, a truncation problem exists: The data do not reflect how many times prior to those three years a male judge sat with female judges in Title VII sexual harassment or sex discrimination cases, nor do they account for any learning occurring in other cases. Although this makes the test somewhat weak, the data provide a preliminary means of assessing whether learning occurred.

103. An increase in the *Previous Cases* variable from 0 to 2 reflected a 33% increase (from 18% to 24%) in the predicted probability of a pro-plaintiff decision in the sexual harassment data set, while an increase from 1 to 5 reflected a 62% increase (from 21% to 34%) in the predicted probability. Although the real effect is probably not linear, as my model posited, this increase provides evidence that learning occurred in the data set.

The existence of a learning effect in my data has implications for the deliberation explanation as well. Because the effect indicates that influence from the presence of a female judge carried over to subsequent cases, deliberation with members of subsequent panels likely decreased accordingly.

To be sure, the observed effect might be only masquerading as a learning effect. It might instead reflect repeat play whereby male judges sided with plaintiffs in gender-coded cases for strategic reasons.

104. It is also possible that different learning effects exist in sexual harassment and sex discrimination cases. Because research has shown that women are more likely than men to view certain behaviors as sexual harassment, *see* Rotundo et al., *supra* note 44, at 919; Wiener et al., *supra* note 44, at 85, more learning by male judges may be possible in sexual harassment cases than in sex discrimination cases.

C. *Logrolling*

The third possible explanation is the logrolling hypothesis, which posits male judges as strategic actors who bargain with female judges for future gains. Although judges may ostensibly condemn vote trading,[105] some evidence suggests that such trading occurs.[106]

The logrolling explanation predicts that male judges side with female judges in gender-coded cases in hopes that female judges will follow their views in other cases. This trading of decisions is motivated by male judges' desire to achieve their preferred outcomes in cases where their preferences are more intense and by the desire of all judges on the panel to achieve the consensus norm.[107] The phenomenon of logrolling may be heightened where male judges anticipate (rightly or wrongly) that female judges have especially intense preferences in gender-coded cases.

To determine whether logrolling was responsible for some or all of the indirect effect I observed requires data beyond the scope of this Note, but it is a promising avenue for future research. Evidence of female judges reciprocating male judges' pro-plaintiff rulings by supporting them in other areas would provide some indication of logrolling.[108]

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105. Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2380 (1999) ("One apparent 'rule of the game' of collegial judging is that, while certain forms of output-focused strategic behavior are accepted (even encouraged) and others are quietly tolerated, explicit vote trading is disallowed." (footnote omitted)).

106. FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 83 (2000) (finding evidence that Supreme Court Justices "adopt tit-for-tat strategies with one another").

107. *See, e.g.*, Steven A. Peterson, *Dissent in American Courts*, 43 J. POL. 412, 417 (1981) (discussing the norms of reciprocity).

108. Such an analysis might be possible in a close examination of outcomes on specified panels. The researcher would first have to identify a subset of male judges with strong preferences regarding a given issue (e.g., for pro-prosecutor decisions in death penalty cases or pro-plaintiff ones in free speech cases) and then analyze the decisions of female judges without strong preferences regarding the issue, both when they sat on panels with the male judges with strong preferences and when they sat on panels without those judges. If a female judge were consistently more likely to rule for a male judge's preferred outcome when she sat on a panel with a male judge with strong preferences, this would provide some evidence of logrolling. However, establishing causality—that the male judges were changing their decisions in Title VII cases *because* the female judges were changing their decisions in other cases—would be extremely difficult without specific evidence of judges' reasons for their decisions. Further, the above effect could also indicate repeated deliberation or deference.

Another means of assessing the presence of logrolling would be to look at the decisions of female judges on panels with male judges in the ideological minority. A Republican appointee on a panel with two Democratic appointees—one of whom is a woman—might have an added incentive to bargain with the female judge, to gain support for his preferences in other cases. It is possible that judges in circuits where strategic voting might be more important (e.g., Democrat-appointed judges in conservative circuits) would be more likely to exhibit evidence of this mechanism.

D. *Moderation*

Finally, the presence of female judges may cause male judges to moderate their anti-plaintiff preferences.[109] Male judges may feel constrained in what arguments or preferences they put forward when a female judge is a member of the appellate panel and, thus, may be less willing to argue vigorously against sex discrimination or sexual harassment claims.[110] Males may even silence themselves out of respect for their female colleagues or because they fear that they will appear biased if they oppose the plaintiff's claims, particularly where the female judge enthusiastically supports the plaintiff.

The moderation hypothesis is different from the other three possible explanations because it does not require a direct effect of gender on individual judges' decisions. Therefore, it relies not on female judges' active influence on their male colleagues in deliberations but on the passive presence of female judges on the bench. The moderation explanation expects that male judges presume a difference when a female judge is present and consequently act (and eventually rule) differently in the presence of a female judge than they would in the company of other male judges.

Because the moderation explanation holds that the presence of a female judge moderates male judges' opinions against the plaintiff, if it is correct, male judges will be more likely to find for the plaintiff when a female judge is on the panel regardless of how she rules. The sample size of nonunanimous cases in which mixed-gender panels decided for defendants was too small ($n = 6$) to determine whether this phenomenon occurred in my data. Future research is needed to determine the likelihood that moderation is operating.

CONCLUSION

The data in this Note indicate that female judges mattered to outcomes in Title VII sexual harassment and sex discrimination cases. The results

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109. *See* Beiner, *supra* note 30, at 136 ("[B]eing confronted with a woman judge . . . may quiet some sexist thoughts that might have found expression during discussion of the case."); *cf.* Deborah Ramirez, *Affirmative Jury Selection: A Proposal To Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 162 ("[A] racially diverse jury is more likely to render a race-neutral verdict, because it is more likely to suppress racial bias in deliberations and to challenge inferences based on thoughtless racial stereotypes.").

110. Most of the psychological research on this theory has focused on racial biases, with researchers finding that whites expressed less racial bias in the presence of black interviewers or experimenters than in the presence of white experimenters. *See, e.g.*, Brian S. Lowery et al., *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 842 (2001). Because race and gender are arguably equally salient status characteristics, it is possible that this pattern is applicable to males and females.

show that Justice Coyne[111] was at least partly wrong: Wise old men and wise old women sometimes reach different conclusions. Although plaintiffs lost in the majority of cases in my data set, they were significantly more likely to win when a female judge was on the bench. This effect was independent of judicial ideology—the presence of both liberal and conservative female judges increased the probability that plaintiffs prevailed on panels of varying ideological composition.

The gender impact I observed is significant. Panels with at least one female judge decided cases for the plaintiff more than twice as often as did all-male panels. Assuming the gender impact illustrated in this Note persists,[112] increasing the gender diversity of the federal appellate bench— as all recent presidents beginning with President Carter have done—will have important substantive implications. If, for instance, the number of panels with at least one female judge doubled, then approximately eight more Title VII sexual harassment and sex discrimination cases out of every hundred would be decided for plaintiffs.[113]

To be sure, it is possible that my data only reveal something about the fifty-four female judges in my data set.[114] However, because the data showed significant gender disparities after controlling for other factors affecting judges' decisions—most significantly ideology—it is reasonable to conclude that direct and indirect effects of gender exist beyond the data set, at least in Title VII sexual harassment and sex discrimination cases. Whether the findings are applicable to other areas is less certain, but this is a rich area for future research.

The results indicate that participants in the diversification debate should acknowledge—and perhaps defend—the substantive implications of their positions for judicial outcomes in gender-coded cases. Judges' gender matters both to what the bench looks like and to what it decides.

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111. *See supra* note 1 and accompanying text.

112. However, if a learning effect exists, the impact of female judges will decrease as more female judges are appointed to the federal appellate bench and the difference between an all-male panel and a panel with at least one female judge decreases.

113. To calculate these figures, I used Clarify to determine the probability of a pro-plaintiff outcome, holding all other variables at their means, for an all-male panel and for a panel with a female judge. Using these probabilities, I calculated the expected number of pro-plaintiff outcomes out of every 100 where 43% of panels had female judges (the observed percentage in the data set) and compared this to the expected number of pro-plaintiff outcomes where 86% of panels had female judges.

114. In at least some respects, the female judges in my data set are different because they are among the relatively few females who have been selected for appointment to the federal bench.

APPENDIX

TABLE 3. DESCRIPTIVE STATISTICS

Variable	Mean	Standard deviation	Minimum	Maximum
Judge's decision	0.27	0.44	0	1
Female	0.17	0.38	0	1
Woman present	0.44	0.50	0	1
Party of appointing president	0.46	0.50	0	1
Colleague 1 party	0.69	0.46	0	1
Colleague 2 party	0.22	0.41	0	1
Ideology score	0.49	0.18	0.17	0.83
Colleague 1 ideology	0.59	0.15	0.22	0.83
Colleague 2 ideology	0.39	0.16	0.17	0.73
Racial minority	0.11	0.32	0	1
Military service	0.45	0.50	0	1
Government service	0.62	0.49	0	1
Prior judgeship	0.39	0.49	0	1
Law professor	0.22	0.41	0	1
Private practice	0.84	0.37	0	1
Nonprofit	0.02	0.15	0	1
Years on federal appellate bench	13.11	8.23	0	39
Age	63.13	9.52	43	93
Lower court decision	0.13	0.34	0	1
Male plaintiff	0.13	0.34	0	1
Government defendant	0.38	0.49	0	1
First Circuit dummy	0.02	0.15	0	1
Second Circuit dummy	0.11	0.31	0	1
Third Circuit dummy	0.02	0.13	0	1
Fourth Circuit dummy	0.10	0.29	0	1
Fifth Circuit dummy	0.05	0.23	0	1
Sixth Circuit dummy	0.13	0.33	0	1
Seventh Circuit dummy	0.15	0.36	0	1
Eighth Circuit dummy	0.15	0.36	0	1
Tenth Circuit dummy	0.08	0.26	0	1
Eleventh Circuit dummy	0.05	0.22	0	1
D.C. Circuit dummy	0.02	0.12	0	1

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TABLE 4. PROBIT REGRESSION ANALYSES OF THE IMPACT OF
BEING FEMALE ON THE PROBABILITY OF A PRO-PLAINTIFF DECISION

Independent variables	Sexual harassment coefficient (standard error)		Sex discrimination coefficient (standard error)[115]	
	Party model	Ideology score model	Party model	Ideology score model
Female	**0.52 (0.11)**	**0.55 (0.11)**	**0.37 (0.13)**	**0.38 (0.13)**
Party of appointing president	**0.39 (0.11)**	—	**0.46 (0.13)**	—
Ideology score	—	**0.91 (0.29)**	—	**1.23 (0.37)**
Colleague 1 party/ideology	0.12 (0.13)	0.46 (0.39)	0.25 (0.16)	**1.01 (0.50)**
Colleague 2 party/ideology	**0.43 (0.13)**	**1.01 (0.38)**	**0.42 (0.18)**	0.96 (0.52)
Racial minority	-0.12 (0.16)	-0.09 (0.15)	-0.21 (0.20)	-0.19 (0.20)
Military service	0.15 (0.10)	0.12 (0.10)	-0.09 (0.14)	-0.11 (0.13)
Government service	-0.07 (0.10)	-0.05 (0.10)	-0.03 (0.12)	0.00 (0.12)
Prior judgeship	-0.08 (0.09)	-0.08 (0.09)	0.00 (0.11)	0.01 (0.11)
Law professor	0.04 (0.11)	0.03 (0.11)	-0.05 (0.13)	-0.07 (0.14)
Private practice	0.09 (0.12)	0.11 (0.12)	**0.36 (0.17)**	**0.34 (0.16)**
Nonprofit	-0.22 (0.29)	-0.22 (0.29)	0.34 (0.33)	0.35 (0.35)
Years on federal appellate bench	0.01 (0.01)	0.00 (0.01)	0.01 (0.01)	0.01 (0.01)
Lower court decision	**1.17 (0.20)**	**1.18 (0.20)**	**0.97 (0.32)**	**0.99 (0.32)**
Male plaintiff	-0.22 (0.26)	-0.21 (0.26)	-0.55 (0.28)	-0.49 (0.30)
Government defendant	-0.19 (0.15)	-0.18 (0.15)	-0.08 (0.20)	-0.09 (0.20)

Number of observations	1091	1091	773	773
Log likelihood	-542.55	-544.50	-334.09	-333.73
χ^2	**107.40**	**104.91**	**100.72**	**99.09**
Pseudo-R^2	0.15	0.15	0.21	0.21

Note: Probit regression analyses. Fixed circuit effects omitted. Robust standard errors clustered by case. Coefficients in bold are significant at the 5% level, and coefficients underlined and in bold are significant at the 1% level.

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115. The dummy variable for the D.C. Circuit was dropped because it was collinear with the dependent variable.

TABLE 5. PROBIT REGRESSION ANALYSES OF THE IMPACT OF
THE PRESENCE OF A FEMALE JUDGE ON A MALE JUDGE'S
PROBABILITY OF A PRO-PLAINTIFF DECISION

Independent variables	Sexual harassment coefficient (standard error)		Sex discrimination coefficient (standard error)[116]	
	Party model	Ideology score model	Party model	Ideology score model
Woman present	**0.62 (0.16)**	**0.64 (0.16)**	**0.70 (0.21)**	**0.71 (0.21)**
Party of appointing president	**0.41 (0.12)**	—	**0.41 (0.14)**	—
Ideology score	—	**1.02 (0.33)**	—	**1.18 (0.41)**
Colleague 1 party/ideology	-0.02 (0.15)	-0.06 (0.49)	0.23 (0.17)	0.80 (0.51)
Colleague 2 party/ideology	**0.43 (0.15)**	**1.18 (0.42)**	0.29 (0.18)	0.83 (0.56)
Racial minority	-0.12 (0.18)	-0.10 (0.18)	-0.14 (0.22)	-0.14 (0.22)
Military service	0.18 (0.11)	0.16 (0.11)	-0.02 (0.15)	-0.03 (0.15)
Government service	-0.14 (0.12)	-0.12 (0.12)	-0.09 (0.13)	-0.06 (0.13)
Prior judgeship	-0.07 (0.12)	-0.06 (0.12)	0.10 (0.13)	0.11 (0.13)
Law professor	0.12 (0.13)	0.11 (0.13)	-0.04 (0.16)	-0.05 (0.16)
Private practice	0.20 (0.15)	0.20 (0.15)	0.35 (0.19)	0.33 (0.19)
Nonprofit	-0.53 (0.42)	-0.54 (0.42)	0.10 (0.35)	0.10 (0.36)
Years on federal appellate bench	0.00 (0.01)	0.00 (0.01)	0.00 (0.01)	0.00 (0.01)
Lower court decision	**1.31 (0.21)**	**1.31 (0.21)**	**1.07 (0.33)**	**1.08 (0.34)**
Male plaintiff	-0.24 (0.29)	-0.22 (0.29)	-0.43 (0.30)	-0.37 (0.31)
Government defendant	-0.29 (0.16)	-0.29 (0.16)	-0.17 (0.20)	-0.19 (0.20)

Number of observations	903	903	646	646
Log likelihood	-406.79	-407.52	-255.50	-254.03
χ^2	**93.58**	**96.04**	**79.99**	**74.44**
Pseudo-R^2	0.20	0.20	0.23	0.23

Note: Probit regression analyses. Fixed circuit effects omitted. Robust standard errors clustered by case. Coefficients in bold are significant at the 5% level, and coefficients underlined and in bold are significant at the 1% level.

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116. The dummy variable for the D.C. Circuit was dropped because it was collinear with the dependent variable.