

SELECTION AND DECISION-MAKING IN STATE SUPREME COURTS:
HOW FEMINIST THEORY INFLUENCES FEMALE JUDGES

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DEDICATION

This paper is dedicated to my grandmother, Mrs. D.F. Kaitell. You lived feminism and breathed it into me before I even knew what that concept was. Thank you, I miss you everyday Mama K.

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This paper examines the history that influences the rate at which female justices are elected and appointed to state supreme courts. There are different variables like judicial campaign activity, limited pool, role expectations of women and advocacy that influence the selection process. I pick the states with the earliest history of selecting female justices (Ohio and New Mexico) and the states that selected female justices last (South Dakota and West Virginia) to address some of the variables mentioned above that have influenced the use of feminist jurisprudence on the bench.

After selection, I examine if it is possible for said judges to use feminist theories (like liberal feminist theory) in decision-making processes on the bench. Specifically, can we, in fact use feminist theory to understand the decision making of female state Supreme Court justices? For the most part, I find that we can imply that they do and are additionally interested in creating policy and programs based on the decisions made. Does this change with political party affiliation, race and sexual orientation of the female judges? I determine that more research needs to be conducted in this area on the courts of last resort at both the federal and state level.

Amanda Friesen, Ph.D., Chair

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Chapter 1: Introduction

The interest in this research area was inspired by the responses in the legal and political communities to the 2002 United States Supreme Court (now "SCOTUS") decision in *Republican Party of Minnesota v. White* (now "GOP MN v. White") which extended free speech rights to individuals seeking judicial office, allowing them to accept campaign funds and express their views on various legal and policy based issues. Feminist and legal scholars expressed concern that accepting campaign funds "adds to the cynical view that judges are merely another group of politicians" (Schotland, 2001) instead of being impartial and uninfluenced by political motivations.

This thesis will begin to analyze the legitimacy of state supreme courts by examining decision-making patterns in judges that are allowed to raise campaign funds during judicial elections, intentionally examining gender. Specifically, this paper will introduce concepts in feminist theory and relate them back to female judges and how decision-making is influenced depending on if they are elected versus appointed.

In essence, by examining existing data and surveys in peer-reviewed sources, do we see more elected female judges who are able to accept campaign funds make decisions that affirm feminist theories? Do any of these judges identify as radical or liberal feminists; how does that affect decision-making in the courts? Subsequently, is there an impact on a voter's perceptions of impartiality and legitimacy of state supreme courts when female judges accept campaign funds when seeking judicial office? Is this impact observed when female judges also identify as feminists? Are these female judges, by making decisions on issues, able to influence policy as a whole or are they only

influencing policy in matters that are typically regarded as special interests to women like family law?

The first hypothesis states that more female justices at the state supreme court level will make more decisions that can imply that they are affirming feminist ideology while states that have fewer female justices at the state supreme court level will not. The second hypothesis is that state supreme courts where female justices seek campaign funds (hence are elected) will have more women at the state supreme court level than states where female judges do not seek campaign funds. The number of women in the various state supreme courts has historically been low in comparison to their male counterparts.

A substantial portion of the paper will then discuss reasons why this trend is observed by highlighting existing theories, such as the "limited pool" argument. Legal scholar Nienke Grossman explains this concept as an argument of numbers where women make up a smaller amount of candidates in the legal field as a whole, implying that there are not enough women in legal academia, the judiciary and diplomatic corps in each country to represent in courts in individual countries much less the international system (Grossman, 2015).

It will also include the opinions of female legal scholars, political feminist theorists and comparative law theorists on the impacts of the current legal system in decision-making among female judges. The bulk of the existing research examined in this paper will also come from these scholars; the research will include analytical data like tables and graphs showing, for example, the total number of female judges that have presided on various cases in the state supreme courts as well as explanations of the data (Buss, 2011). The thesis will then be divided into five chapters; the first will be the

introduction; the second provides a theoretical basis for the research questions and hypotheses based on extant literature; the third will identify the states that have the most female justices at the supreme court level and their backgrounds. Then that information will be compared to their reasoning and decisions made on various issues since they have been on the bench to determine if they affirm or reject positions and opinions popularly held by either radical or liberal feminists. The fourth chapter will examine the selection of state supreme court justices and the effects of these institutional rules on four case studies: Ohio, South Dakota, New Mexico, and West Virginia. The fifth will then compare the information derived from the first four chapters to determine if there is a difference in how elected female judges affirming feminist ideology makes decisions from elected female judges that do not affirm feminist ideology. This chapter will also include examining an intersectional approach to understanding how gender and race can impact judicial decision-making.

From the information in the chapters above, one of my hypotheses will be supported, which suggests that feminist theory could help us understand why state supreme courts with more female justices may have decisions with more impact on policy, affirm high perceptions of impartiality and legitimacy of the court to the average voter.

This thesis will also summarize opinions of existing female judges like Ruth Bader Ginsburg on the necessity of more women in the Courts and Law as a whole (Anker, 2013). A comparison of all these scholars will show a unanimous agreement among them that there needs to be a change in the existing system and predictions on

how policy in all areas will be impacted and influenced if the gender imbalance is addressed.

Finally, the thesis will conclude with an assessment of extant theories and the current findings. This part of the paper as a whole will highlight a general agreement that more female judges should preside on all matters at the state supreme courts while also suggesting long-lasting measures to ensure that possible gender balance on the bench of state supreme courts is not a short-term trend but a long-term achievement.

Chapter 2: A Review of the Literature on Judicial Decision Making and Feminist Theory

In this chapter, I will lay out the extant theory and findings from the literature regarding how we can think about gender, judicial decision making and feminist theory. Examining the existing legal model will help frame the analysis of the judge decision-making process, including behavioral and methodological approaches. Where the methodological approach relies heavily on a historical analysis of a judge's decision-making patterns and behavior during case proceedings, the behavioral approach examines mainly a judge's policy preferences and intended outcomes from presiding over case proceedings. In Supreme Court Decision-Making, the attitudinal model of decision-making is examined closely as a strong indicator of how our existing legal system functions (Clayton, 1999). The attitudinal model shifts our understanding of the Supreme Court as an institution that dictates how its actors operate to an institution shaped by the goals and policy positions of its actors. For Supreme Court justices, this means making decisions and behaving individually, but under the constraint of the actions and preferences of other justices as well as other actors that have influence outside of the Court (e.g. Congress, interest groups, the president). Scholars like Murphy (2001) believed that strategic decision-making did not allow the justices to act independently and push their individual preferences to the forefront because the justices as a whole had to consider possible action from actors, both within and outside the Supreme Court, when passing decisions that were geared to influencing policy or creating new laws.

Strategic decision-making also occurs at the State Supreme Court level, and it comes into play most notably in dissenting opinions among the justices. There are several

influences and actors at play in this strategic model. According to feminist legal theorists, constraints are largely due to the gender of the justices. According to said theory, we tend to find female justices are more concerned with the constraints to their opinions, which are largely their male counterparts and public policy.

Feminist Theory.

Liberal feminism examines a woman's individual ability to achieve and maintain equality and security through her own actions. While the idea that women are subordinate to their male counterparts is false, the alternate idea is deeply rooted in legal and political constraints at all levels and arms of government. So, theorists here assert that women themselves need to push for equality where these constraints come up at each level independently.

On the other hand, radical feminism calls for a societal reordering aimed at changing the institutions, societal norms and political processes deeply rooted in patriarchy. Most of the observations in liberal and radical feminism can definitely be applied to the judicial campaign and decision-making patterns of female justices. This is because similar variables and factors influence female justices in their decision-making process.

One of the first scholars to recognize this distinction and favor the radical feminism approach was Ann Tickner. In her research, she draws a correlation in countries with deeply gendered hierarchies influencing the countries' security ideologies, both locally and internationally (Keohane, 1998). Since these states operate on these gender hierarchies, there is not much acknowledgment of personal security, particularly for

women. She reasoned that this theoretical divide was a result of feminists and International Relations scholars drawing on very different realities and using various epistemologies when they theorized on international security; these differences being driven by gender and cross-cultural communication (Tickner, 1997).

The research method here was a comparative analysis of responses to feminist theory on security among international relations scholars; most of these scholars applied either quantitative or qualitative approaches in conducting research and giving opinions on feminist theory i.e. quantitative realists, neoliberals, behaviorists etc. She discovered that the differences among the theorists are realized especially when defining gender and a push for a positivist/scientific feminist approach as necessary to impact research of international relations and security. In her opinion, a post-positivist/theoretical approach was more ideal because most of the IR theorists and positivist analysis do not acknowledge the contributions of gender in its concepts; applying a more theoretical approach puts gender on the forefront.

Tickner's work clearly influences other scholars like Valerie Hudson and Nicole Detraz, who have both written books on the concept of international security from a feminist perspective and its importance. Tickner's discovery that there is in fact a difference in perceptions of international security has pushed these two scholars to define gender and the historical, social, economic and cultural significances of incorporating women's security into international security.

Hudson's book "Sex and World Peace" begins by setting up certain foundation concepts that paint a clear picture of the international characteristics that are associated with being a woman. These characteristics ranged from a woman's position as the

boundary of her sovereign nation whose identity is derived first from her father and then her husband in order to unify the family to concepts of honor and shame and economic empowerment. These concepts explained Tickner's earlier discovery of gendered hierarchies and the impact that had on nations' security while disregarding personal security. A good example in the book was the author's explanation of how a woman became a protectee to the males in her family but that status soon shifts to one of control and possession as the need to protect her becomes more associated with the need to protect these foundation concepts (her honor, identity, chastity, earning potential) for the benefit of the nation rather than protecting the woman as an individual (Hudson, 2012). This book, in its essence, analyzes concepts of female violence and lack of security as components of the larger observations of violence and security observed at the societal and national levels.

Detraz takes a more quantitative and positivist approach through recent contributions and emerging research areas to advocate for a revaluation of international security along gender lines. She introduces an intermediate variable between gender and international security, emancipation defined as a concern with the ability of people to freely make choices (Detraz, 2013). Her data revealed that embracing the term emancipation pertaining to security of women will eventually level the field of security across genders and will allow for further discussion and study into international security.

Scholars like Angela Davis and Cynthia Enloe reflect the positions of modern day feminist theorists that combine both radical and liberal approaches. In her book "The Curious Feminist", Enloe examines the roles of women in their daily lives, as players in international economics and global conflict. As labor in global economics, she finds that

their lack of economic rights and security can be traced back to a lack of security within these women's homes, families and the hierarchical and patriarchal order of economic systems. She employs a post-positivist approach by describing the challenges faced by female sweatshop workers in sneaker factories in Asia. Enloe specifically blames the international trade agreements that have given more power to big companies like Nike and Reebok to produce their products in Asia without consideration to provide the women fair labor practices and an ability to be represented through unions ensuring these practices. In essence, the New World Order has successfully excluded women and empowered corporate giants even though women make up most of the production, "on the line" labor (Enloe, 2002).

This same concept of no value being placed on women's contributions to global economy is echoed in Hudson's book, which she traces back to the complete exclusion of women's work and duties in the home as an economic contribution to the families' resources, let alone their societies' (Hudson, 2012). Both theorists discuss the need for economic reform at the global level to begin by including and considering women's economic contributions through their duties as part of the family structure as a clear source of economic resources because said contributions make up more than half of global economic resources. The fact that they have been ignored for so long makes our understanding of the global economy flawed.

In the same book, she also discusses the need for post-conflict reform starting with simply listening to the women seeking equality and reform and creating policy based solely on their needs and input. This is more pronounced in the book's discussion on the role of women post-conflict. She recognizes that gender awareness has been

considered in attempts to create policy that favors a nation's rebuilding process post-conflict but gender awareness is in itself fueled by informal and formal presumptions of femininity and masculinity (Enloe, 2004). These presumptions potentially lead to flawed post-conflict policies and strategies that are passed on from one generation to the next. In "Women, Culture and Politics," Davis talks about the entwined relationship of race and economic and political security for women. The whole book is split into different articles that discuss institutions in politics, including the courts and judicial arm and how they are constructed in preventing women of color from participating in governance. At the same time, she also attacks militarization and defense policies in America. While calling for them to be eliminated or reconstructed because they consistently put women of color at a disadvantage, she also discusses the importance of women of color acting and speaking out against these institutions and demanding for a reform. The book details her doing this at various forums notably United Nations Decade for Women Forum '85 Conference in Nairobi where various women of color petitioned the American delegates to support two documents, one with conventions to eliminate discrimination against women in patriarchal societies and the other that allowed women to participate actively in promoting world Peace and Corporation (Davis, 1989). Taken together, this framework of gendered political power can help us understand how female judges may be constrained by actors, processes and institutions forged in patriarchal structures.

Judicial Campaign Activity.

In discussing the structure of courts, another factor that influences differences in judicial decision-making is campaign finance during the selection process of judges. A

good amount of research has been conducted on the general topic of the influence of judicial campaign activity on perceived impartiality and legitimacy of courts in general and their judges. While the research specifically on judicial campaign funding and perceived impartiality of judges while controlling for gender is scarce, there is enough from the existing political science research to justify more exploration in the area.

In order to understand the political science implications on perceptions of impartiality and legitimacy on judicial institutions, an understanding of the human cognitive process of legitimacy is important. This is because said implications of impartiality and legitimacy are central to how judges, citizens and all stakeholders understand various courts, the judicial arm as a whole and if judicial behavior and decision-making is attitudinal or strategic. This is the research that Tom Tyler (2006) brings together in his article *Psychological Perspectives on Legitimacy and Legitimation*. He examines what factors that human beings cognitively recognize as legitimizing legal authorities, and they include (similar to political authorities) that all their actions have to be consistent with fair procedures.

Tyler (2004) conducted research in another article, *Profiling and the Legitimacy of Police*, on the human cognitive understanding of perceived legitimacy of police and found that racial profiling and the use of unnecessary force leads to police losing public support from citizens.

Judicial legitimacy can be firmly linked to strong notions of impartiality and fairness, not just in their duty as judges but also in the process by which the judges received those seats. Other scholars look at various methods of testing this understanding of judicial impartiality and fairness. Some of the variables examined are the existing

opinions of voters on the policy issues, the methods of asking about and recording these opinions and pre-existing bias of voters.

Gibson (2009) is an important source as he examines the resulting implications of *GOP MN v. White* to judicial campaigns after 2002. He used a representative national survey conducted in 2007 to determine how specific types of campaign behavior shape the perceived impartiality and legitimacy of state supreme courts. He looked at data of perceived impartiality from voting citizens when judges used attack ads, accepted campaign funds and announced their policy decisions on certain issues when seeking judicial office. He found that perceived impartiality and legitimacy of the courts is questioned the most when campaign funds and contributions are readily accepted.

Another Gibson article, coauthored by Gregory A. Caldeira on "Supreme Court Nominations, Legitimacy Theory and the American Public: A dynamic Test of the Theory of Positivity Bias," reveals a slightly different finding. The goal of their article was to examine how public opinions and attitudes towards the courts change over time based on politicized confirmation hearings and controversial Supreme Court decisions. They conducted and observed a three-wave panel national survey of Americans to understand the influence of the Alito nomination/confirmation process on loyalty toward the Supreme Court. They found that public opinion and attitudes changed negatively towards the Supreme Court because of the message conveyed by interest group ad campaigns for Alito, which indicated the Supreme Court is just like any other political institution and not worthy of high esteem (Gibson, 2007).

Hoekstra's (2003) panel study also explored public attitudes toward judicial institutions. Her research was heavily focused on examining local court opinions and

attitudes to Supreme Court decisions. She examined media reaction and public opinion to four Supreme Court decisions in states where the issues were first tried. Her dependent variables were the quantity and quality of media coverage and subsequent levels of local awareness, effect of those decisions in public attitudes towards issues in the case and changes in support of the Supreme Court in the wake of those decisions (Hoekstra, 2003). She measured panels of local citizens' attitudes to the cases before and after the Supreme Court decision. Her research showed local public opinion needed to be considered in communities where cases were first brought because it is a more accurate depiction of how public opinion can change towards the judicial institution when they address issues of particular interest to local communities. Her results were statistically significant and different from the national results that only found change in opinion in iconic cases like *Brown v. Board of Education*. Hoekstra's research was important because it was another observed instance of local citizens being aware and having an opinion on judicial proceedings.

In 2009, Gibson and Caldeira once again coauthored two pieces of research; the first was a book that examined the impact of positivity bias on the activities of courts. Their initial hypothesis and conclusion in this book was that positivity bias encouraged preexisting institutional loyalty to courts, which in turn plays a crucial role in how confirmation processes are perceived and judged. Hence, this implied that people with an existing sense of loyalty to the Court and judicial process will rely on the judicial symbols and activities that have established a positive bias to judge potential and confirmed judicial candidates. Individuals without a sense of loyalty to the Court and judicial institutional process are likely to judge these same candidates using political

criteria (Gibson, 2009a). The second was an article that challenged the idea that the American public was ill informed and not knowledgeable of judicial processes, so public preferences for Supreme Court confirmations were deemed unnecessary. Gibson and Caldeira, based on data from two national surveys that used close-ended questions found that the public was actually more knowledgeable about the Supreme Court and its justices than the previous surveys and research had illustrated (Gibson, 2009b).

Sara Bonneau conducted research on campaign spending on state supreme court elections. Her research focused on the factors that caused the varying amounts in campaign spending and subsequently what this implied for other state offices. She uses data from 21 states and 281 state supreme court races between 1990 and 2000. The dependent variable in her research is the total amount of spending by all candidates contesting a state supreme court judicial seat while her independent variables are factors that affect spending like the nature of the judicial race and how competitive it is, institutional and electoral state supreme court context and institutional arrangements of the state supreme courts. She concluded, "...other factors being equal, a race for the state high court bench will be more expensive if it is for an open seat, if the competition for it is closer, if there are fewer high court seats on the ballot, if its term of office is longer, and if the court decides a higher number of tort cases" (Bonneau, 2005). One of the factors she found that did not affect state court campaign spending was the concern of partisan control of the state courts, which she attributes to the public perceptions of impartiality of judges. Taking all of the above studies and their findings together, the results on the effects of campaigns and citizen knowledge of decisions are mixed, leaving an open question to how we think about citizen involvement in court influence.

It is also important to also look to legal scholars and their opinions of campaign activity, as this is where the bulk of research specifically on the impact of campaign funds to judicial legitimacy is occurring. While most foresee negative impacts, others see judicial campaign activity as an opportunity to have more serious discussion on election procedure reform.

Schotland, as a legal scholar, had strong opinions on the negative direction that financial campaigns and campaign funds are leading the process of judicial elections. Her data on the rapidly increasing donations, costs and funding on judicial elections in states since 1987 pushes her to the conclusion that the election process and campaign finance of judges should be critically reformed to curb the need for frequent judicial elections that require campaign finance (Schotland, 2001). In her opinion, this is the only way we can secure the impartiality that is expected and demanded of the judges and their courts.

David Pozen also reaches a similar conclusion as Schotland but he conducts a more comprehensive analysis of both sides of the argument on judicial elections. He finds that both the benefits and costs of elected judiciaries have been enhanced and strengthened, hence leaving the two sides of the issue more divided than ever before. For example, following the *GOP MN v. White* decision, he offers predictions on the rise of judicial activism (confirming the fears of scholars against judicial elections) but counters with existing checks and balances like the “Announce clause” (allowing for judge’s requirement to recuse themselves from cases in which they have vested interests) as a good deterrent to judicial activism. All in all, he concludes that inevitably, the rise of judicial elections in any form and regardless of the checks and balances applied will gradually diminish the impartiality standard of judges and the courts (Pozen, 2008). This

recognition is pushing a gradual reform of electoral processes, through codes of conduct from judicial electoral commissions, for example, to strengthen judicial impartiality so it is not lost while attempting to gain legitimacy through elections.

Regardless of this reform push, campaign finance is still an independent variable in determining if elected female judges will make decisions following feminist theory. Any elected official will want to address the needs of his or her campaign donors throughout their term; elected judges are no exception. A substantial donation from a group like the National Women's Political Caucus (NWPC) to an elected female judge's campaign could not only increase decisions made applying liberal feminist theory but encourage more women to campaign for judicial elections, gradually eliminating the limited pool process. On the other hand, a donation from a group like the NRA could limit a decision-making process along feminist theory as a whole.

Chapter 3: Examining Male and Female Judges at the U.S. State Level

Prior research and case studies have shown that state supreme courts with at least one woman on the bench leads to more decisions and judgments made along liberal feminist ideology. This trend is also higher in state supreme courts where female judges are the chief justices as well. Prior theories have discovered various reasons and interpretations of how women end up as judges on the state supreme court; some of these reasons have been found to directly correlate with female judges giving decisions and opinions along liberal feminist ideology.

First, there are major differences in the backgrounds and prior experience of male and female judges. In 1994, Blank found that women judges who have reached state supreme courts did so by more involvement in women's interest groups and causes and less prosecutorial experience. Second, female judges, like most women, align liberal and liberal feminist ideology with their political positions. In the state legislature and Congress, surveys had found that female legislators, regardless of party, adopt liberal feminist positions on women's rights and environmental protection. If the party is directly opposed to such positions, female legislators push for and align with the most liberal policy positions the party can provide that will enhance the status of women and improve gender equality (Saint-Germaine, 1982).

At the same time these theories were developed, there were also compelling variables to explain the decision-making patterns of female judges. One of which is the federal system, as we only see female state supreme court judges appointed from more liberal states, with a higher occurrence (Songer, 1994) in a state where both male and female judges are considered liberal. The political climate at the time of appointments

also affects the ideologies in general of judges; feminist theory is not an exception. Also, the possibility that male and female judges receive different educational experiences and professional opportunities was also provided. However, though professional opportunities may be different between male and female judges, the educational opportunities remain the same.

Importantly, party affiliation is the one variable that most researchers have had to take in account when discussing decision-making patterns among males and females. In particular, several studies (Allen, 1993) suggest that gender effects may play out differently in the Democratic and Republican parties. But while the importance of the party as a control is recognized in judicial studies, relatively little attention has been paid to the possibility that the nature and extent of differences between male and female judges may differ substantially within the Democratic and Republican parties themselves. Recently, however, the polarized political climate has found that Democratic men are more liberal and more likely to adopt feminist ideology in decision-making than Republican women (Osborn, 2012). In addition, female legislators are far more likely to be Democrat than Republican, leading to a fusion between gender and party in trying to understand ideological voting (Elder, 2012).

Further research showed that there was an interrelationship between the Democratic positions of the judges, judicial attitudes and decision-making (Collins, 2008). Judicial attitudes are factors like state liberalism and changing Supreme Court policies.

Another factor was selecting the judges themselves; states are responsible for establishing their own judiciaries but biases like sex discrimination cases (Gryski et al,

1986), diversity on the bench (Glick et al, 1987; Hurwitz and Lanier, 2003); the likelihood of dissenting opinions (Boyea et al, 2010); votes on capital punishment cases (Brace and Hall 1995, 1997; Brace and Boyea, 2008); rates of litigation (Hanssen, 1999); size of tort awards (Tabarrok and Helland, 1999); decisions on judicial review cases (Langer 2002, 2003); court responses to search and seizure precedent (Comparato and McClurg, 2007); strategic voting to secure retention (Shepherd, 2009a,c); the extent to which legislatures constrain judicial behavior (Randazzo et al, 2010); and quality of opinion writing and productivity (Choi et al, 2010). These biases often affected the consideration, let alone the selection of female judges to most state benches. If any of said judges identified as feminist or with feminist ideology, they were swiftly passed over for both Democrat and Republican male judges.

Suzanna Sherry worked on identifying when female judges applied feminist theories to adjudication. She reviewed Justice Sandra Day O'Connor's record on the bench and found that her voting record and opinions from the time of her appointment to the date of Sherry's writing (1981-1986) shows that community values inform Justice O'Connor's decision-making. In one instance, O'Connor's application of the Establishment Clause of the First Amendment advanced a test which focuses on whether the state endorsement of religion communicates a message that nonbelievers are excluded from the polity. Similarly, in various discrimination cases, Justice O'Connor has emphasized the effect that the law being challenged has on membership in the community. Therefore, Sherry adds that it is "not surprising" that Justice O'Connor has been particularly receptive to claims of gender discrimination. According to Sherry, a

community perspective helps to explain Justice O'Connor's generally pro-prosecution perspective in criminal cases.

After Sherry's observations, more social scientists have done more research on female judges and female political officials in general, and their findings have been varied and diverse. Some studies found congresswomen to be more liberal than their male counterparts on social welfare and defense spending, others found no actual differences in decision making between men and women in Congress (Peresie, 2005). However, female judges in state supreme and district courts that showed different, more liberal decision-making did so on issues and policy involving personal liberties and minorities. Hence, Gilligan's studies and feminist legal (Davis, 1992) theory would suggest that women judges can be expected to vote differently from their male colleagues in ways that reflect a tendency to emphasize interdependent rights-the right to full membership in a community rather than rights against the community. When communitarian values and individual rights conflict, women judges would be expected to support the former (Boyd, 2010). The rights of criminal defendants may be conceived as involving claims against the community, but such a generalization may not hold for all cases. Support of some claims could result in harm to innocent people and to the community, while support of other claims may recognize the need to preserve relationships.

This is why the results of the study revealed female state supreme court judges supporting plaintiffs in employment discrimination cases and search and seizure cases. In general, political scientists have found that female judges on state supreme courts are more likely to grant decisions in favor of plaintiffs in discrimination cases (Kenney, 2008). Davis (1993) found that background variables like race, prior employment, age

and judicial experience as well as case specific variables like gender of the plaintiff could encourage or hinder female judges and their decision-making processes. He chose to control these variables.

He chose to control these variables. Other researchers adopted the bolster approach, i.e. certain case specifics rather than the judges' background variables further explained female decision-making processes. Judicial behavior is the umbrella-term of all these case-specific and background variables as everything from ideology of the female judges, previous decisions in various legal matters to their leadership skills and how they interact with their employees. The latter produced mixed results, and it was unclear if the female judge's leadership skills directly impacted their opinions (Collins, 2008).

However, ideology was interpreted as political party affiliation and identification. The general findings were more liberal judges (who were women) usually affiliated with the Democratic Party and vice versa. Liberal judges in lower courts also welcomed changing Supreme Court policy (which can be impacted by party affiliation) more often than conservative judges. Political party affiliation can indirectly measure female judicial participation if more female judges identify with a specific political party consistently over time, however this is not the case (Orentlicher, 2017). So, political party affiliation becomes a control variable to check the participation of female judges when other variables are introduced.

Judges also may be influenced by the context (Brace and Hall, 1997). If a judge's gender has the most important contextual influence on judicial decision-making, the presence or absence of a woman colleague will create a one-voiced type of adjudication process. One study found that courts with one or more women are more likely than all

male courts to support liberal decisions. An example is in measuring gender in national cases (Gryski, 1986); a variable was created which checks if a judge (either male or female) has one or more colleagues that are female. The value "0" is given if all of the judge's colleagues are male. At the end of the study, most courts were male and given the 0 value with no liberal decision-making observed.

Extensive literature exists that has documented an association between the dominant values of the home state or region of elites and the political positions they take (Brace and Hall, 1997; Songer et al, 1994). Most of the studies of such linkages have used region as a surrogate for common political culture or values. Unfortunately, most times, region as a variable is not able to capture change over time in local opinions or moods, and the variable provides at best only a rough indicator of local opinions and values. Recently, however, Bonica (2014) has developed a new measure that overcomes these shortcomings of region as a measure of the influence of state culture and values. It started with Berry (1998) creating a measure of citizen ideology for each state from 1960 through 1993. The score was derived from an analysis of the voting behavior of the members of Congress from each state in combination with an analysis of the partisan composition of state and national officeholders from the state. The analyses provided convincing evidence that the measure was both valid and highly reliable. Bonica adopted this measure and called it Citizen Ideology, as a control for the dominant values of each state. The variable now theoretically runs from 0 (most conservative) to 100 (most liberal).

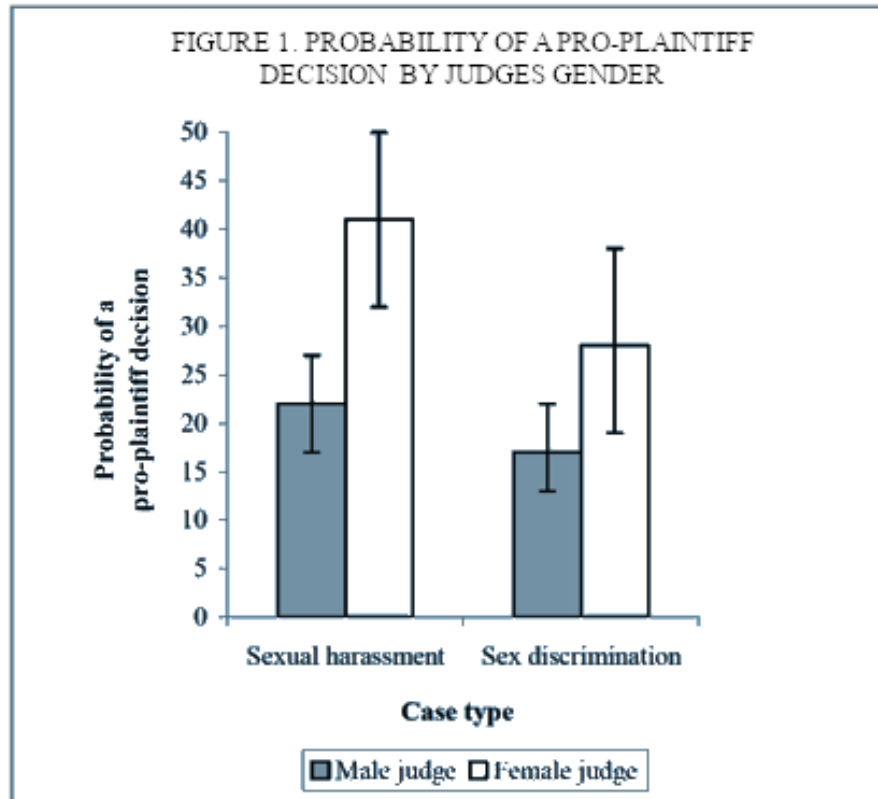
These variables that inform female judicial making at the state supreme court level also categorize female judges into four major roles; the representative, the outsider, the token and the different role voice.

The Representative Role.

The Representative role has been used to study the behavior of other women officeholders. Adapting this notion to female justices leads to the assumption that a Representative incorporates a woman's viewpoint in legal matters directly impacting on women as a category, such as cases involving damages for sexual assault. This results in a "pro-women" voting record on women's issues cases. Literature on women judges suggests that women may manifest a Representative role. Surveys of female judges who were asked to decide hypothetical cases that focus on women's issues reveal that these respondents were more likely than their male counterparts to adopt a pro-women position, and off-the-bench remarks by women judges confirm this. In a more recent study, survey responses to hypothetical women's issue cases revealed that female judges who called themselves feminists were twice as likely as all other respondents to advance pro-women positions (Alozie, 1996). The researcher noted, however, that these results could be due to the hypothetical nature of the responses and that different results might be forthcoming if the research focused on actual voting behavior. The few studies that have analyzed behavior in actual cases have found that female judges were far more likely than their male counterparts to cast pro-women votes on feminist issues. Peresie (2005) performed regression analysis and found that in sex discrimination cases, judge's gender and the gender composition of the panel had significant effects on the judgments

passed. Female justices were significantly more likely to find for the defendant and their male counterparts were significantly more likely to find for the plaintiffs.

As seen in Figure 1 (Peresie, 2005) below, 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.



While several studies of judicial behavior indicate that some female judges may adopt the representative role, other research points in the opposite direction. For example, the attitudes of male and female party elites differ only slightly on women's issues, and party explains the largest part of the difference.

The Token Role.

While the Representative role applies to cases that directly affect the status of women, it does not identify the role orientation of female jurists regarding issue areas that are not of immediate consequence to women, such as criminal rights and economic liberties. Other role orientations can help illuminate the voting behavior of female judges in these areas. For instance, women isolated in a male-dominated organization may modify their behavior in order to conform to the dominant majority; that is, they adopt the role orientation of the Token (Gill, 2015). By adopting this posture, they avoid drawing attention to the characteristic that sets them off as a minority member, and they obtain legitimacy in the group's eyes. In the judicial setting, Tokens might gravitate toward a centrist position on the court, legitimizing themselves as reasonable people who listen to both sides of the argument and vote for the sounder set of legal principles. This approach is utilitarian in that centrists occupy the pivotal position in evenly split courts; the other justices must accommodate the centrist's preferences in order to create a majority coalition. Thus, Token female justices are characterized by voting records that lie within the central area of any continuum and do not exhibit behavior that differentiates them from other justices. Prior research supports this expectation. Various studies (Davies, 1993) have revealed insignificant behavioral differences between President Jimmy Carter's male and female judicial appointees. Other studies have shown that male and female local officials ranked a set of policy issues nearly identically, and the first term behavior of male and female state supreme court justices tends to be similar.

The Outsider Role.

The opposite of the Token is the Outsider. Instead of conforming to group norms, Outsiders disregard institutional traditions. Rather than attempt to moderate conflict, persuade colleagues to adopt centrist positions, and compromise away differences, Outsiders address audiences outside the institution (Clark, 2002). Outsiders would therefore exhibit comparatively extreme voting behavior. Although the Outsider label is not generally used to describe female political elites, existing literature supports the classification. For example, survey research points to personality characteristics that might lead one to expect this type of behavior from women justices. Werner and Backtold (1998) found that women who were the first of their class to enter a specific political arena had high scores on intelligence, dominance, adventurousness, unconventionality, and radicalism. The authors conclude that this set of women, having rejected one set of societal norms, are not likely to be constrained by the norms associated with the institution to which they have gained admittance. These traits are similar to those found among individuals who are not afraid to deviate from group norms. For example, high self-esteem judges have been found to deviate from institutional norms more frequently than those who are lacking in self-esteem (Werner, 1998). Also, the Werner and Backtold list describes high-status women whose behavior is not constrained by minority status.' All the women justices under study here are among the first of their gender to enter a previously all-male bastion. It therefore seems safe to assume that they share the personality traits isolated by Werner and Backtold. Given the similarity among these traits, high self-esteem and high status, female justices might be expected to have the emotional and psychological wherewithal necessary to maintain the Outsider role.

Current literature also supports the Outsider hypothesis. On a wide variety of issues, female party elites and members of Congress are more liberal than their same-party male colleagues. Also, female state and local officials are more likely than their male counterparts to oppose capital punishment (Landes, 2009). Moreover, female state supreme court justices have been found to position themselves at the extremes of the ideological continuum in the areas of criminal rights and economic liberties.

The Different Voice Role.

Different Voice is a term coined by Carol Gilligan (Davis, 1992) and based on the premise that women think differently from men. Under this heading, scholars assert that women adopt a different, not necessarily better or worse, approach to morality. Women are also thought to place higher values on relational concerns, such as the community, as opposed to individual rights. If female justices have a different view of morality and place a higher value on relational concerns than their male counterparts, there will be an absence of common ground between women and men on the bench. Female justices would therefore exhibit extremism and isolation in dissenting behavior. Research findings supporting the Different Voice role are mixed. Some women judges have made off-the-bench remarks that suggest the presence of this role orientation, and another study found that Justice Sandra Day O'Connor's opinions can be distinguished from Justice William Rehnquist's by the presence of a communitarian feminine jurisprudence in O'Connor's writings (Davis, 1992). Additional research (Hendricks, 2017) on O'Connor disputes these findings, and an analysis of votes of federal circuit court judges on three

issue areas found only partial support for the notion that women judges bring a different perspective to the courts.

The female state supreme court judges discussed in the next chapter have displayed some or all of the role characteristics described above, depending on the issue being adjudicated. At this stage, this tells us that additional independent variables like education level, public policy concerns, and first to attain the seat impacts decision-making processes along feminist theory concepts. Therefore, it highlights variables that explain decision patterns in female judges.

Chapter 4: Selection of State Supreme Court Justices

In order to examine the patterns of selecting female justices in state supreme courts, the institutions that select the justices have to be examined. The institutions of selection, as well as other factors, also explain why certain states elect female justices sooner than others. The first female state supreme court justice was Florence Ellinwood Allen, elected by Ohio voters in 1922, two years after the 19th amendment was ratified (Allen, 1987). After Allen's election in 1922, another 37 years passed before Hawaii and Massachusetts seated the next first female justices with the appointments of Rhoda Valentine Lewis and Jennie Loitman Barron in 1959. Only two other states seated female justices during the 1960s. There is a lull in female justices in state supreme courts until the 1980s seeing an increase in women on state benches. After 1980, the number steadies again with a few female justices sitting through appointments and elections. South Dakota was the last state in 2002 to sit its first female justice.

Given this history, this section will examine the institutions that led to the selection of female justices in Ohio (the first state) and South Dakota (the last state). This comparison will be used to examine the institutions that select female justices and the decision-making observations of these female justices in New Mexico (currently with the most female state Supreme Court justices) and West Virginia (most recent state with a female majority bench presiding over a case) when compared to their male counterparts. The early prediction of findings is there may be slight differences in judgments on certain issues because of these decision-making processes. However, female justices are more likely to be at state supreme courts when there is a liberal feature (i.e. democratic governor or citizen liberalism) operating in the selection institution.

Ohio.

Goelzhauser (2011) stated that both internal and external political pressures are some of the factors that shape the diversification of state supreme courts; it also explains why some states diversify faster than others. Citizen liberalism is also another factor that pushes diversification, with states that adopt citizen liberalism diversifying their supreme courts faster than states that hinder citizen liberalism. Ohio was the perfect example of this. In 1915, three years after the state's constitution allowed for a chief justice, term limits and increasing the supreme court seats to seven, one of the last appointed justices began a 38-year term on the bench. The feminist movement was also still gaining momentum across the country, and Ohio was no exception. One of their major goals was for more female representation in government and given the 19th amendment in 1920 along with citizens' interest in diverse representation, Allen was elected as the first female Ohio supreme court justice.

The three amendments made in the Ohio constitution are also three variables that have affected the selection of female state supreme court justices across the country. The number of seats on a court is a consistent predictor of greater gender and racial diversity (Bratton & Spill 2002; Hurwitz & Lanier 2003; Solberg & Bratton 2005). One possible explanation for this result is that courts with more seats are less prestigious, which reduces the competition for office (e.g., Hurwitz & Lanier 2003). A simpler explanation is that more seats mean more opportunities to seat political minorities. More seats on the bench also leads to more defined roles such as the creation of the chief justice. It can be reasonably inferred that the more diverse the bench is with more women presiding over cases, the higher the chance a woman will be selected as the chief justice on the state

supreme court and vice versa. Similarly, setting term limits and having mandatory retirement rules increase turnover of judges and leading to a diverse pool of judges for selection. This, in turn, encourages citizen liberalism that elects more female state supreme court justices over time.

Additional variables, that played a role in Ohio and may have an effect on the selection of female justices include national attention to judicial diversity when female justices are appointed at the Supreme Court, female justices elected in other neighboring state supreme courts aka vertical diffusion, and the voting ages of women in the states.

The Ohio electoral system, currently, has secured a female majority on the bench with justices that have varied interests in creating policy that supports education, family law, proper judicial administrative selection, tax law and public finance (OH website, 2018). Justice Kennedy, for example, as administrative judge, improved the case management system to ensure the timely resolution of cases for families and children. Working with state legislators she championed a "common sense" family law initiative to reduce multiple-forum litigation for Butler County families. Justice French, whose mother was an elementary schoolteacher, supports the voucher program ensure equitable educational opportunities for every Ohio student. She also mentors students from around Ohio, particularly those studying the Ohio Judicial system. Justice DeGenaro is passionate about proper judicial selection process. She was appointed by the late Chief Justice Thomas J. Moyer to serve during as a member of the Voter Education & Public Funding Working Group to further Judicial Impartiality: The Next Step Forum. This court-policy initiative addressed issues involving judicial races and preserving the integrity of Ohio's judiciary. In 2005, she began serving as a founding member of the

Ohio State Bar Association's Appellate Practice Specialty Certification Board, which administers the specialty bar examination and certification (OH website, 2018).

While Ohio was the first state to have a female judge sitting on any bench in the US, other states appointed or elected female justices shortly after female justice appointments were made in the Supreme Court. Sandra Day O'Connor was the first female justice appointed in 1981, and Ruth Bader Ginsburg became the second in 1993. From 1981 to 1993, thirty-one states appointed or elected state female Supreme Court justices, with at least one each year. Vertical diffusion also worked in a similar way with neighboring states electing first female justices within a year of each other. As the feminist movement gained steam and more women were allowed to vote in local elections, there was automatic, grassroots support for female justices that ran for state supreme court elections.

South Dakota.

The same way internal and external pressures in Ohio pushed for the first female state supreme court justice, the absence of these pressures in South Dakota is the reason that the first state supreme court justice, Justice Judith Meierhenry, was added in 2002. South Dakota was mostly conservative for decades with an appointment system for judges, hence no opportunity for citizen liberalism. South Dakota also only has five seats for judges in its state supreme court and no term limits. All the judges are appointed by the governor, which means the chief justice seat is appointed as well, usually by a Republican and more conservative governor.

The predominantly Republican and conservative political control was as a result of the voting public being mostly male and mostly conservative (Alozie, 1996). More women did not start attaining positions in political institutions until the late 1990s because the pool of voters changed, in this period, to reflect a statistically significant amount of more women voters. Diversification was observed from the first appointment of the female justice, who was first appointed in a lower court on an all-male bench. After her appointment to the supreme court in 2002, the next justice came along in 2007 and the third was appointed in 2015. The first justice is retired now but the other two still serve on the bench. Bratton (2002) proves this pattern of diversification in her paper, in which she discusses appointments of female justices. She was able to prove that in some instances, female justices are appointed more frequently to state courts than those elected in state courts, only if the first one was appointed for the first time to an all-male bench. Appointments generally do not improve existing diversity on a bench. This is the pattern observed in South Dakota where even though the first female state supreme court justice was appointed in 2002, only three have served to date; a big difference from other states that elect their state supreme court justices. However, South Dakota is also the last state to appoint a female justice to their state's supreme court making it unclear if over time, there may be an observed increase of female justices appointed to the court. Along with existing diversity or lack thereof, knowledgeable and informed decision-makers also influence the patterns we observe in South Dakota. In appointments, the actors are presumably aware of the current gender composition of the panel, and, if the panel is all male, there is likely pressure to select a woman. Conversely, there may be much less such pressure once a court reaches any degree of gender diversity. Judicial elections, in

contrast, are low-information events. Voters rarely know who is running for judicial office, much less the composition of the remainder of the panel (Baum, 1998). Voters in the mass public are less likely than elite actors (from appointments) to weigh the current composition of the panel in making a decision.

Governors and judicial nominating systems are also well-informed decision makers. They are aware of the existing composition of the state supreme courts and are more likely to appoint women, and are also more likely to be influenced by existing gender diversity. Similarly, the influence of existing gender diversity on selection will be least evident when justices are selected by voters because voters often know little about the composition of state government in general and state courts in particular.

In addition, other variables that could explain this late appointment of female justices in South Dakota and other similar states include the level of urbanization in the state and gender role perceptions in the states. States that have bigger cities with infrastructure attract a diverse group of voters and decision-makers with the necessary organizational processes to appoint or elect diverse candidates like female justices. The pool of candidates is also more likely to come from the urban areas and bigger cities in the state. Essentially, there is a positive correlation between urbanization and female justices by election and appointment. In an election system, an urban constituency may be better able to recruit and elect female judicial candidates; in a judicial appointment system, an urban constituency may be more likely to pressure governors, legislatures, and judicial selection commissions to prioritize gender diversity (Allen, 1984).

In terms of gender roles, prior and conflicting responsibilities of candidates can be viewed as a determining factor based on these gender roles. A seat on a state supreme

court bench is considered a "service in a high-status office" which can conflict with family responsibilities and existing professional responsibilities of female candidates. Scholars' findings and opinions are definitely mixed in this area because regardless of the state's culture regarding women's family obligations, sex role responsibilities and professional responsibilities, female justices are still appointed and elected to state supreme courts. Some scholars find that in more conservative states that appoint justices, there is a slight correlation between these gender role beliefs and the frequency of female justices being appointed on state supreme courts (Gill, 2015). However, other factors like diversification and the number of seats on the bench had a more significant effect as well.

Currently, there is one female justice on the South Dakota supreme court, Justice Kern who was appointed in 2014 by the Governor Duggard. South Dakota is divided into four districts with various counties and a judge representing each district. Justice Kern represents the first supreme court district. She began serving with Justice Wilbur (who retired in 2017): making it the first time in the state's history that two women served on the state supreme court. As expected, the cases and issues adjudicated by the court, even when Justice Kern votes in favor of the injured party, still results in a majority vote and judgment against said party.

In *State v Barry*, The South Dakota Supreme Court recently decided to deny an attempt to suppress drugs found during a traffic stop a woman claimed was unlawfully prolonged to seize the drugs. Barry and her attorney motioned that the questions asked and the evidence found was during an attempt to prolong the stop on a hunch of drugs. Circuit court ruled in their favor, saying the trooper: didn't have specialized expertise to suspect other criminal activity; didn't smell odor of marijuana until after the stop was

unlawfully extended; and unlawfully extended the stop to question Barry, conduct field sobriety tests and call for a drug dog. The state Supreme Court in its ruling said the trooper had reasonable suspicion to call a drug dog because Barry: had purchased a one-way ticket and drove back a rental car in another name a day later, a common practice for people who pay others to bring back drugs from a location; showed unusual nervousness even after being told her traffic violation would be lowered; and had a drug history.

Barry's attorney, public defender Beau Blouin, said the ruling is a cause for concern.

Although I cannot comment on the details of the case because it is still pending, as both a concerned citizen and a criminal defense attorney, I worry that this decision represents a further erosion of Fourth Amendment protections from unreasonable searches and seizures.

Justice Kern dissented, upholding the circuit court's ruling in favor of Barry. It can be inferred that the court as a whole imposed certain gender expectations on the plaintiff. Perhaps, a woman having drugs on her in a rental car under a different name with a one-way ticket could be how female drug dealers, though rare, operated. The primary goal could have been to deter other women drug dealers, thereby making the search and seizure lawful. Justice Kern possibly viewed this as a way to uphold the Fourth Amendment protections as having more public policy implications than the search for drugs. She was definitely playing the outsider role in this case.

This bench has also found for the state regarding cases where the state has pushed for an incorporation of historically Native American towns and settlements. In *State v Buffalo Chip*, the state hired a private attorney to serve as a special assistant attorney general. The state Supreme Court then allowed the state's intervention in this manner. Buffalo Chip is located outside Sturgis and used to be a campground mainly used by motorcyclists.

The supreme court in January had said any challenge to a 2015 vote to incorporate Buffalo Chip must be brought by the state. Both Sturgis and a Meade County landowner appealed; the Sturgis City Manager Daniel Ainslie was displeased at the time (and now) so he stated the Supreme Court could rule based on what has been submitted or ask for additional information. Justice Kern once again voted in favor of the plaintiff but the need to uphold the executive's interest (indirectly maintaining existing judicial appointments) was deemed preferable.

There have been some judgments where Justice Kern and the court as a whole, has held the executive branch accountable and pushed for transparency, like in *Argus Leader Media v Hogstad*, which have led to future policy implications for the executive branch and a requirement of transparency. Initially, there was state law that stated that the executive branch at any level could keep contracts between contractors away from the public.

The court, by its decision, created new policy that overturned this law in the *Argus Leader* case, requiring the city of Sioux Falls to release the contracts and settlement agreements negotiated between the city and various contractors for renovating the Denny Sanford Premier Center. The South Dakota Supreme Court reversed the lower courts with its decision, arguing the Premier Center contract cannot be kept secret.

The contract, the court concluded, does not meet exceptions to the state's open record laws, which would have otherwise kept it secret. "Therefore," wrote Justice Glen Severson, "it is a public record open to inspection, and the city must make it available in accordance with" the state's open record laws."

This policy was then cited and applied in March 2018, when city council members wanted the mayor of Sioux Falls to publicly release the safety audit report of Falls Park, after the third child in two years had drowned in the park. Councilor Theresa Stehly wasted no time in trying to force the audit to be opened to the public through a resolution she introduced formally when they were unable to first volunteer the information to the City Council or the public. "Hopefully we won't have to have this resolution because we can have that information," she said. That would also be the ideal outcome for Councilor Christine Erickson, who said the administration hasn't provided a legal justification for not sharing the safety audit. She says:

We all share a lot of frustration with that, I know there have been requests from several asking for it, and we have not received anything. We have had instances of confidential settlements. We are not able to know what policies are happening. We are not told about proposals. We're told we can't know who investors are, and to me, I couldn't believe this incident actually happened yesterday and we were once again not told.

While there was no formal order from the court, the policy enacted from the previous decision was enough to push pressure on the mayor's office from avenues like the media, families of the deceased children and other stakeholders. The mayor's office, for the first time, had a response where it promised to work with the audit preparers so that the audit would be released.

The statement from the office read:

It is our understanding that the SDPAA is working diligently to respond to the media requests and is making plans to release the portion of the assessment that relates to Falls Park. The city of Sioux Falls has encouraged them to do so. It is the SDPAA's decision to release and not a decision the city of Sioux Falls can make.

The court has also attempted to create new tax law policy by affirming the decision of a lower court to stop taxing remote retailers that sell their products and provide services in South Dakota. The initial law was made in the Quill case (1994) 25 years ago, it allowed state tax to be levied on any business within South Dakota's physical jurisdiction without much clarification on the parameters of the kinds of operations that qualify as having "physical jurisdiction." The court (SD v Wayfair, 2018) tried to rectify this law, with major support for reform from Justice Kern, more recently by requiring the law to only apply if one of two criteria were met in the previous calendar year or in the current calendar year:

One is the remote seller's gross revenue of sale of tangible property, any products transferred electronically, or services delivered into South Dakota exceed \$100,000. The other is the remote seller made 200 or more separate transactions of tangible property, any products transferred electronically or services delivered into South Dakota.

Business attorneys in this dispute and scholars alike have criticized this reform as not direct enough to apply to remote businesses that do not have a physical presence in South Dakota. Essentially, the two new elements added to Quill were not critically analyzed before application, which means the terms are still too vague. The population size of South Dakota means most remote companies pay very high taxes for an average of 300 transactions completed in the courts. As a result, this decision is currently being appealed to SCOTUS for a reversal.

South Dakota's supreme court is a case study of how a judicial institution, which was late in electing female candidates, influenced the policy that was created from its votes and judgments. Unlike Ohio, it is clear that while various variables may or may not have contributed to a late start in appointing female justices, the bench is still majority

male with majority male votes controlling the outcomes of issues and the creation of policy. Most scholars (Alozie, 1996; Goodwin, 2018) recognize that South Dakota is a unique judicial system with judicial representation by districts and long terms; but it is still a system, where the citizens and policies are not adequately represented in its courts.

New Mexico.

New Mexico has a bi-dimensional selection process. The justices begin with a merit selection plan; while retention and reelection is determined in partisan, contested elections. The justices' then vote for who will be the chief justice after their initial merit selection, which usually involves passing a review by a standards review committee.

Unlike its other state counterparts, the supreme court has had a tumultuous history as a territory that was seized from Mexico during the Mexican-American War. It was not fully recognized as a state, which meant that they did not gain federalist benefits and state autonomy immediately. Congress appointed the first chief justice, Joab Houghton, in the provisional civil government along with two supporting justices, Antonio Otero and Charles Beaubien. New Mexico did not become an official US state till 1912, after which the New Mexico constitution governed the supreme court (Rosen, 2017).

The first woman to serve on the state supreme court was Mary Walters and the first to serve as chief justice on the supreme court in 1994 was Pamela Minzner. In 2015, Justice Nakamura was nominated to fill the seat of retired Justice Bosson; her nomination gave the court its current female majority (Rosen, 2017). In the various arms of government, there has been more than average female representation; the second female

governor of New Mexico, an accomplishment that many states have not attained because there has not been a first, appointed Justice Nakamura.

New Mexico is also a current example of how political ideology does not influence the decision-making and voting process. Before Justice Nakamura's appointment, Democratic candidates had predominantly retained the court. Nakamura was the first female Republican candidate to be nominated historically and go ahead to win her re-election for a second term since 1980. Despite this, the New Mexico bench votes mostly liberal on various issues and cases brought before the court.

The court has made judgments in family law, reproductive rights, property law, and natural resources law that have gone on to influence policy changes in these areas. In 2007, for instance, the court turned back the attempt to expand criminal child abuse laws to apply to pregnant women and fetuses. In 2003, Ms. Cynthia Martinez was charged with felony child abuse “for permitting a child under 18 years of age to be placed in a situation that may endanger the child's life or health . . .” (State v Martinez, 2003). In bringing this prosecution, the state argued that a pregnant woman who cannot overcome a drug addiction before she gives birth should be sent to jail as a felony child abuser. However, the supreme court summarily affirmed the state's Court of Appeals decision, which overturned Ms. Martinez’s conviction. At that time, New Mexico joined more than 20 other states that ruled on this issue and refused to judicially expand state criminal child abuse and related laws to reach the issues of pregnancy and addiction. There was also major support in the amicus brief presented by Watson's lawyer from advocacy groups like the National Women's Health Network, National Latina Institute for Reproductive Health and various other advocacy groups (Goodwin, 2018).

There have also been decisions that have led to policy changes regarding duties of the police and natural resources law. There were two big ones regarding a coal power plant and police reform that have been adopted in the past two years. The court backed up a decision by state regulators to allow a utility to close part of a coal-fired power plant and replace the lost capacity with a mix of other energy sources. Public Service Co. of New Mexico already has shuttered two of the four units at the plant as part of a federal mandate to reduce haze-causing pollution. After a two-year battle, the utility, the state, federal regulators and others reached an agreement to fill the void with a mix of coal, nuclear, natural gas and solar-generated power. One environmental group appealed the plan. The court found there was enough evidence to support the December 2015 decision by the Public Regulation Commission.

The court also overturned a lower court and ruled that police don't have to help drunken-driving suspects arrange to exercise their right under state law to have an independent blood-alcohol test. The decision was applied to a 2008 (*State v Chakerian*, 2018) arrest by Albuquerque police and says police only have to advise suspects of their right to have a test and not interfere with exercising the right. An officer provided Chakerian, the suspect with access to a phone, a telephone directory and a pen, but Chakerian testified he didn't arrange an independent test because too much time had passed, and he didn't know whom to call. The decision overturns a Court of Appeals (2009) ruling that said police must "meaningfully cooperate" with a suspect's desire to have an independent test.

The female judges are also well involved in the areas of law they vote and make decisions. Justice Vigil, who has been on the bench since 2012, presided over Children's

Court for over 10 years, while serving as a district court judge. She was instrumental in the creation of Juvenile Justice Boards in Santa Fe, Rio Arriba and Los Alamos counties. These boards served as a vehicle for the receipt of state and federal resources to create and sustain many critical social programs for at-risk youth. As a licensed lawyer for over 28 years, Justice Vigil also served on numerous community and legal boards, committees and commissions, including the New Mexico Drug Court Advisory Board and the New Mexico Chief Judges Council. Her work on the Drug Court Advisory board mainly assisted in policies that aimed to rehabilitate repeat drug offenders rather than criminalize them.

The majority female bench in New Mexico is a clear case of female justices having equal capabilities as their male counterparts to adjudicate issues and make decisions. Some researchers (Dixon, 2009) believe that since their ideologies or political parties have not restrained them, it might indicate that female state supreme court justices are more able to adjudicate using pragmatic and unrestrained reasoning. It also indicates that a majority female bench will apply liberal feminist theory when deciding most cases, as seen with the cases described above.

West Virginia.

Unlike the other states, the supreme court here is interesting because historical factors have ensured that the bench has remained predominantly white and male. Most of the lawyers, since the state's creation, have been male which greatly impacted the pool of lawyers that could be appointed and elected as judges at every level in the state. Therefore, white males may not be as aware of the importance and necessity of state

supreme court female justices because they usually dominate the nominating/appointment commissions. The eligible pool of judicial candidates, which are lawyers, is also predominantly male and influenced through private sources (Bratton, 2002). Historically, women were denied entry to law school on the basis of their gender alone and those who were finally admitted to law school faced discrimination, not just during law school, but also after graduation when law firms across the country refused to hire them. Many of these women opened up their own practices, entered into private practice with another woman, or joined a family member's practice.

Even for women who were able to overcome these obstacles to obtain the kinds of credentials that could land appointments to the federal bench and state benches, there were still challenges to overcome. First, male, home-state senators usually gave any open judicial seat to another man as a political reward. It was also politically difficult to appoint a female judge to judgeships that had previously been held by men (as opposed to the few token women seats) because those judgeships were generally viewed as being reserved for men. Second, women usually had to pass higher standards in order to receive a nomination to the federal bench and even then, they often received lower ratings from the ABA on their qualifications.

Some research has suggested that lawyers and their law firms constitute the first frontier of resources for judicial candidates (Champagne, 1986). This makes sense given the peculiar nature of judicial campaigns. Where there are more women and minority lawyers, one can anticipate more effective networking and a viable group bar association (Segal, 1983). Regardless of judicial selection method, the group can become formidable politically. In judicial election states, lawyers and the law firms they represent donate

generously to judicial campaigns (DuBois, 1986; Nicholson and Weiss, 1986; Champagne, 1990). Lawyers also have been instrumental in initiating and litigating judicial vote dilution cases across the country. This means that women lawyers may make an impression on commissions and governors, or any other elected official making an appointment decision. Lawyers also vote, and this is vital given the often-abysmal vote response to judicial races. It also affects the levels of influence female lawyers have in state judicial systems in general, let alone the supreme courts.

There is also the eligible pool argument, which implies that, the best explanation for under representation of female justices is the absence of women in the legal field in general. One of the reasons for this is because it is typically perceived as a male-dominated field. There is also this idea that women are intentionally socialized away from the legal field, beginning when they are young which in turn affects the eligible pool of female law school students, attorneys and justices. Additionally, gender discrimination through history denied women the education and exposure required for certain legal offices thereby minimizing or eliminating the potential pool of judicial candidates.

The eligible pool argument and male dominance in law explains West Virginia's election of Margaret Workman in 1988 to serve a 12-year term as a justice of its supreme court of appeals (Gill, 2015). She was the first woman elected to the Court and the first woman elected to statewide office in West Virginia. Although West Virginia elects its state justices, citizen liberalism could not take root in the election process because the eligible pool of justices was minimized, with white males dominating the legal field. This has required the supreme court of appeals to create long terms for its justices with

flexible requirements for election and service, usually determined by the political climate of the state.

Coincidentally, these flexible requirements have also provided opportunities for more female justices to serve on the bench. One notable change occurred in 2015 when elections to the bench became non-partisan after male-dominated republican representatives were the majority in the state's legislature. This resulted in Beth Walker's election, the first non-partisan justice who joined the three other female justices on the bench. This currently gives the West Virginia Supreme Court of Appeals a majority female composition. It also means that these women are direct influencers of policy because they serve on the court of last resort in the state that hears all general jurisdiction issues from the trial courts as well as specialized issues if appealed from special appellate courts.

As a result, the same decision-making patterns that have shown that female justices make decisions from a public policy and utility standpoint operate heavily in West Virginia. Every case since 2015, which have been mainly juvenile and workers compensation cases, have been presided over by a majority female bench who have sought to uphold the interests of the lesser party and effectively creating public policy standards that protect citizens first.

In her capacity as Chief Justice, Justice Workman fostered a close working relationship between the court system and domestic violence programs, and she visited many shelters to learn how the court system could be more effective in addressing domestic violence. Chief Justice Workman created the Task Force on Gender Fairness in the Courts and the Task Force on the Future of the Judiciary. She formed the Broadwater

Committee, which made reforms in the court system's response to children's issues and spearheaded the development of rules governing child abuse and neglect cases. In her tenures as Chief Justice in 2011 and 2015, she focused on improving the judicial system budget process, rehabilitation services for juveniles, and magistrate court facilities. She established the Adjudicated Juveniles Rehabilitation Commission, now the Juvenile Justice Commission, which monitors juvenile facilities and works to improve rehabilitative services (WV website, 2018).

Justice Davis is the Supreme Court's designee to the Judiciary's Initiative on Truancy, and in that role she has held dozens of public meetings to encourage collaborative community truancy programs. Under her leadership as Chief Justice in 2010, the Court approved Revised Rules of Appellate Procedure, which modernized and comprehensively changed the appellate process in West Virginia to provide a decision on the merits in every case. In her previous terms as Chief Justice, she initiated a number of programs which have proven to be essential to the Court's continuing work with children and families and that have allowed the Judicial Branch to remain current with the constant changes in technology. These initiatives include the Workers' Compensation Mediation Program; the expansion of parent education programs; Rules on Mass Litigation; the expansion of courtroom technology, including the video initial appearance pilot project; the creation of the West Virginia Trial Court Rules; the establishment of an online Child Abuse and Neglect database; and additions to legal rules governing child abuse and neglect proceedings. In 2007, she led the West Virginia delegation to the National Judicial Leadership Summit in New York City, and she was responsible for the Court using a competitive federal grant to initiate the West Virginia Domestic Violence

Registry (WV website, 2015). Under her guidance, the Supreme Court Administrative Office also received other major grants, which have been used to improve the way the court system handles abuse and neglect cases.

The non-partisan elections have also assisted in ensuring that influence from other arms of government and influencers are not interrupting the judicial process. However, the eligible pool argument still has a substantial effect. Five justices with 12-year terms are afforded leaves of absence, and vacancies occur quite often. The governor is then responsible for appointing justices, usually previous justices to fill vacancies and preside over issues. These appointees are then eligible for election in the next cycle. The social policy implications of no term limits for justices in West Virginia is therefore potentially unstable; a female-led bench, despite all their positive policy implementations, could easily be replaced by an all-male bench with justices from previous terms and the decision-making patterns change again. Further research and analysis into the institutional rules, court make-up and partisan politics of these cases can help us understand influences on feminist judicial decision-making.

Chapter 5: Discussion and Conclusion

Given the observed patterns of female judicial selection in the four states above, a clearer explanation begins to form about decision-making in state supreme courts. Specifically, I examined whether female judges will make decisions along feminist jurisprudence guidelines. The findings on this are not conclusively for or against feminist jurisprudence, but still provide some insight into the decision-making patterns and existing policy observed in state supreme courts across the U.S.

Hurwitz and Lanier (2003) do not completely agree that an electoral and merit-based system of state judicial selection has a direct impact on minority representation and feminist jurisprudence on the bench as a whole; their findings found evidence that regardless of the selection method, it could either have immense or no effect on the number of women and minorities as a whole that were judges. Other researchers like Solimine (Peresie, 2005) found that representation mattered, and the best way to ensure more female state supreme court justices and a better reflection of the populace as a whole was to elect these justices. However, they also raise the question of whether judges currently are, and should continue being, representatives of the electorate. This is even more complicated with state supreme court judges, as different selection methods or a combination of more than one method exist in different states. Then, there is the assumed core value of the judiciary, especially judges, which is to preside over issues without taking a representative approach regardless of selection method. Rather, they ought to make decisions and judgments according to rules of ethics, fairness and interpretation of the law. As a result, the electorate has no idea, even when elected, on the decision-

making patterns of both male and female justices as a whole, let alone those that make decisions based on feminist ideals.

Next, there's the assumption that only female justices can make these decisions along feminist jurisprudence guidelines. Some researchers have found that feminist jurisprudence guidelines tend to promote decisions and judgments that are equal, fair and uplift the injured party. This means that any justice that makes more liberal decisions can make decisions that follow feminist jurisprudence guidelines. Recent findings from scholars like Osborn (2012) prove this with elected Democratic male legislators making more liberal and feminist influenced decisions than Republican female legislators. Sometimes, additional factors like race, age, and ties to the community lead to a higher occurrence of decisions based on feminist jurisprudence guidelines. Despite these findings, there is a general consensus that female judges at state supreme courts are most likely to make decisions along feminist jurisprudence guidelines. As a result of this likelihood, it benefits the bench to have enough seats that female justices can fill.

Judicial decision-making generally falls under two categories; a legal/realist method and an attitudinal/strategic method. The strategic method is the most promising feminist jurisprudence. Here, the existing attributes of the judges like their gender, political party, education, and work experience significantly correlate with their voting and decision-making patterns on various cases. This definitely convolutes the core value of justices not deciding cases by representative factors, but it also allows judges to use pragmatic reasoning. Pragmatic reasoning is subjective to each issue and case, and the judges usually employ a variety of interpretative styles (i.e. plain meaning of the law,

legislative intent, public policy, precedent etc.) to reach a decision that is within the confines of justice and fairness.

Therefore, a female judge, consciously or unconsciously is more likely to employ pragmatic reasoning in decision-making. A female state supreme court justice can further use pragmatic reasoning to influence policy since they preside over courts of last resort within a state. The influence of policy is clearly exemplified in Ohio where Justice O'Connor was instrumental in implementing long-lasting reform in death penalty applications and the Ohio Courts Technology Initiative. West Virginia also has taskforces and strong programs that address domestic violence and child abuse issues, largely because of Justice Workman's influence through her work as Chief Justice. She also focused on improving the judicial system budget process, rehabilitation services for juveniles, and magistrate court facilities.

These reforms affirm Sherry's findings (Songer, 2000) that female justices tend to have the most influence in effecting policy regarding female empowerment issues and family law. At the same time, these reforms were also possible because of the majority vote provided in these cases. It is safe to say that while there may not be significant differences in how justices vote on an issue, the policy reform is pushed further by female justices more so than male justices, especially in issues involving family law and policy.

Female justices working with female advocacy groups to push policy reform is not new; it can also be attributed as another factor in understanding their decision-making patterns on various issues. Advocacy for female justices goes as far as back the Roosevelt administration (Jozanc, 2011). After his first inauguration in 1933, Molly Dewson, the head of the women's division of the DNC, submitted a list of female candidates for the

judiciary. On this list was Florence Allen who became the first female judge in the sixth circuit court. After her tenure as chair, other female chairs were able to lobby continuously for women to seat on the several judicial seats that were being created. Their efforts were not significantly successful till the Carter administration, after which the number of judicial seats held by women across the country tripled. By the time Carter left office in January 1981, he had appointed eleven women to the courts of appeals 7 and twenty-nine to the 8th district court. Indeed, women constituted nearly 20 percent of Carter's 57 court of appeals appointees and more than fourteen percent of his 202 district court appointees, an enormous increase over that of his predecessors (Clark, 2002).

The women's advocacy organizations in this period had also doubled in size and had become better organized, connected and more sophisticated at using the media to push their agenda than their predecessors had. One of the major groups was the National Women's Political Caucus (NWPC) Legal Support Caucus, created shortly after President Carter was appointed to encourage women to apply for federal judgeships by keeping them informed on the application process and training them on said process. Then, a list of qualified female candidates was compiled and sent to the Carter administration for approval. They were instrumental in Justice Ginsburg's appointment to the DC circuit court at this time because they wrote a letter to the Carter administration supporting her appointment. They worked in partnership with other female advocacy groups (some at the state level) continuously, and they all signed the letter, expressing their support of Ginsburg's appointment. The Caucus also effectively used the media to advocate for more appointments at the federal courts and was able to push for these appointments at various judicial selection councils and commissions.

The female candidates that were increasingly illuminated as judicial candidates also worked closely with the caucus and other organizations. Justice Ginsburg, for example, co-founded and was actively involved with the Women's Rights Project at the ACLU, where she argued and won six gender discrimination cases at SCOTUS and won five. She continued with her work as a litigator and a member of advocacy groups to push for significant advances for women under the Equal Protection Clause and the Constitution. It is clear that her work and experiences influence her decision-making in the Supreme Court as well, as she is one of the liberal judges sitting on the bench, advocating through her votes and opinions, for a more pragmatic and ideological decision-making process with the main objective being to promote justice and fairness for all. She is not explicitly regarded as a judge that actively employs feminist jurisprudence directly but is clearly influenced by her experiences as a woman who pushed for equality for women. This working relationship between female lawyers and advocacy groups started at state levels and continues to this day in states like Ohio and West Virginia. Justice O'Connor and Workman as lawyers already worked closely with various state-based women advocacy groups, and as a result, have been able to influence policy from their decisions and experiences.

Thus far, most of these factors and processes discussed above have been influential in selecting white women as justices as a whole and as justices in state supreme courts. Many researchers have examined if there is any correlation in how women and men of color are selected or make decisions as justices in an effort to test if there is an impact on courts in general (Gottschall, 1983; Fricke, 2012). However, not much research has been conducted on the selection of women of color as justices. The

first black female judge in the U.S. was Judge Constance Baker Motley in 1966. Under the Carter administration, the first black female judge, Amalya Kearse, was appointed on a federal court of appeals, specifically the Second Circuit Court of Appeals. It will take 30 years from Judge Kearse's appointment for Justice Sotomayor to be appointed to the Supreme Court in 2009. Clearly the gap between women of color and white female judges is significant; the same constraints that white female judges are hindered by also apply to female judges of color with the added constraints of race discrimination policies and practices.

Schafran (Fricke, 2012) explains the unique racial gender barriers that women of color face with the status set concept. She writes

The status set for judges is still white and male. Thus, white women judges are one step removed from the "norm." Women of color judges are two steps removed. This lack of fit with peoples' expectations has many implications for how women judges, particularly women of color, are perceived and treated by a wide array of people.

It is twice as hard for women of color judges to receive respect that they are qualified in their judicial position from disputing parties, lawyers, and even court employees. It is not unusual for them to receive more scrutinized and hostile evaluations from attorneys, more requests for recusals based on race and gender and a general more scrutinized process during civil or criminal procedure.

There is also the unfair generalization of women of color according to stereotypes that generally pushes an inability to be "lady-like;" female judges of color are no exception. There are accounts of lawyers not wanting to have an "angry black woman" or a "fiery Latina" adjudicate their cases and make decisions, even when said judge works actively to counter that stereotype. A good example of this was Hutchinson's comparisons

of lawyers' reactions to Justice Sotomayor and Scalia. Hutchinson (2008) contrasted individual comments that several lawyers had made over both Justices, both of whom are known for asking many questions from the bench. He writes:

Rather than being firm, but flexible, detached but engaged, [Sotomayor's] detractors describe her as a fiery Latina tempest waiting to knife and brutalize lawyers in the courtroom. A survey of lawyer comments from the AFJ [Almanac of the Federal Judiciary] report on include:

"...Sotomayor can be tough on lawyers, according to those interviewed.

'She is a terror on the bench.' 'She is very outspoken.' 'She can be difficult.'

'She is temperamental and excitable. She seems angry.' 'She is overly aggressive-not very judicial. She does not have a very good temperament.'

'She abuses lawyers.' 'She really lacks judicial temperament.

She behaves in an out of control manner. She makes inappropriate outbursts.' 'She is nasty to lawyers. She doesn't understand their role in the system-as adversaries who have to argue one side or the other. She will attack lawyers for making an argument she does not like'

'...She dominates oral argument. She will cut you off and cross-examine you.' 'She is active in oral argument. There are times when she asks questions to hear herself talk.' 'She can be a bit of a bully. She is an active questioner.' 'She asks questions to see you squirm. She is very active in oral argument. She takes over in oral argument, sometimes at the expense of her colleagues.' 'She can be very aggressive in her questioning.' 'She can get harsh in oral argument.' 'She can become exasperated in oral argument. You can see the impatience.' 'You need to be on top of it with her on your panel.'

For Sotomayor, being a sharp interrogator and requiring lawyers to be 'on top of it' are negative qualities. These traits are not negative in most men, certainly not white men. Compare the lawyer responses to [Justice] Sotomayor with the AFJ comments on Justice Scalia-whom many lawyers consider a tough questioner as well. While lawyers negatively describe Sotomayor's toughness, in Scalia, toughness receives praise, if not awe. Scalia's hazing of lawyers is just part of the understood fun among the brotherhood of lawyers. Although reviewers describe Scalia as tough, this does not make him a

dangerous "out-of-control" she-judge. Notice the sporting and friendly hazing metaphors in the AFJ description of Scalia:

Never utter the words 'legislative history.' If you do, chances are Scalia will interject with a ridiculing harangue that makes it clear he views legislative history as poppycock. Legislative debates are often contrived and can't trump the actual words of the statute, Scalia insists. But even if you play it safe, you can expect tough, persistent questioning from Scalia, often delivered with an almost gleeful lust for the sport of jabbing and jousting with advocates before him. And Scalia is an equal-opportunity jousting; even when his position seems obvious, Scalia will be just as hard on the lawyer he agrees with as the lawyer he'll oppose. Ever the law professor, Scalia will sometimes ask questions with no clear relevance, just to see if you are on your toes. In a now-legendary exchange during arguments on a federal rule that barred the advertising of the alcohol content of beer, Scalia asked a lawyer for Coors to define the difference between beer and ale. The lawyer, the late Bruce Ennis, answered without missing a beat, to the amazement of justices and spectators alike, and Coors won the case. But Scalia can be nasty, as well. When a lawyer once paused too long before answering his question, Scalia said sharply, 'You have four choices, counselor: "Yes," "No," "I don't know," or "I'm not telling."' But the most important advice on how to sway Scalia at oral argument or in brief-writing is to buy his new book [One] tip: Don't use the kitchen sink strategy of throwing at the Court every conceivable argument your legal team can think up. Pick your best three, at most, Scalia and Garner advise. Arm-wrestle, if necessary, to see whose brainchild gets cut.

In essence, Hutchinson discovered that lawyers praised toughness and thoroughness with Scalia and were very defensive and irritated about the same characteristics in Sotomayor. These experiences and reviews of female judges of color on the bench are definitely a result of stereotypes; but identify a larger problem; the absence of female judges of color reinforces the idea that they do not have the competence, temperament and ability to serve as judges. This reinforced idea then leads to stereotypes and discrimination for the few that preside over several federal courts.

The presence of female women of color judges at state supreme courts is even bleaker. The numbers are very unclear at the state level, because there really is no extensive research on women of color as state judges as a whole. There is a focus in data collection for race and gender as two separate variables, while completely ignoring the identity of women of color as the intersection between the two (Fricke, 2012). Since the variable is not coded for, it means the data hardly exists and inferences or predictions in decision-making are next to impossible. The expectation, however, is that female judges of color at the state supreme court level will consider their unique experiences as part of their pragmatic reasoning process when voting and making decisions. Whether these decisions fall under feminist jurisprudence is an open question because the same findings and inferences made for white female justices cannot apply along feminist jurisprudence guidelines, simply because of the intersection of race and gender that female judges of color experience.

It is even harder with female judges of color to determine background factors like liberal and conservative ideology and political party participation than it is with white female judges. If the feminist ideology of selection was having more women as a whole secure judicial seats (regardless of "firsts" or "seconds") is applied to female judicial candidates of color, there will never be a consistent amount of them on the bench in state supreme courts. This ideology dangerously assumes that all women, regardless of race, class, sexual orientation and other factors all experience the same restrictions as women and as judicial candidates. It completely throws out intersectionality and a closer review of these factors. Scholars like Crenshaw (1990) have pushed the need to continuously address and include how these factors uniquely affect women of color structurally and

politically into the broader feminist theories i.e intersectionality. Failure to do so not only places women of color at a disadvantage but stamps feminism as a white female-focused movement. One of said factors is political party orientation and ideology, where the feminist ideology states that women mostly hold liberal decisions because these decisions apply feminist thinking and jurisprudence. However, this does not necessarily apply to women of color. In the political party identity ideology, people of color (including women) tend to have individual reasons for joining political parties and are more independent voters than their white counterparts, not likely to be persuaded by identity party politics and concepts of groupthink (Collins, 2008). The assumption can be made then that as judges, this same independent thinking will be applied regardless of liberal or conservative ideology.

At the federal level, Justice Sotomayor is a good example. Another reason that the "catch all" feminist approach does not apply to female judges of color is because appointments of these judges are significant at a symbolic level (Landes, 2009). It illustrates to the legal community and the society as a whole that they are qualified, capable and competent enough to sit on the bench and make decisions. This in turn begins to dispel the stereotypes attributed to women of color, and in essence all women. However, female justices of color need to be selected in courts at both the state and federal level in numerous numbers after the "firsts" and "seconds" in order to effectively perform their duties without being saddled with the responsibility of being the token female judge of color to answer for all her peers.

The diversity in experiences among women of the same race is also experienced with female judges that are the same race. Selecting more female judges of color in

general will diversify the courts and ensure a diverse array of judicial decision-making styles and opinions that only benefits the courts as a whole. The diverse experiences between two black female judges, Judge Motley and Judge Janice Rogers Brown of the U.S. Court of Appeals for the D.C. Circuit (Clark, 2002), are a great example. Although Judge Motley was a civil rights litigator for the NAACP prior to becoming a judge, and Judge Brown was not a civil rights litigator and is, in fact, conservative, they are both black female judges, and whether their writings invoke their racial backgrounds or not, they both have "voices of color."

If state supreme courts and courts in general had more female judges of color on the bench at the same time or in close succession, it eliminates the stereotype that a certain race, class or sexual orientation of female judges decide in one voice and represent the ideas of the whole race. This, in turn, will lead to a reduced amount of recusal requests towards female justices of color because there is an understanding (due to exposure) that female judges of color are more than capable of making decisions while setting aside any biases, just like is the expectation of any white judge.

In general, meaningful numbers of female judges of color on the bench will help counter the occurrence of racist and/or sexist arguments that aim to diminish their qualifications and ability to adjudicate and make decisions. This means no assumptions that a justice was selected because of a special exception like affirmative action or a judge like Justice Sotomayor is an exception to her race, implying that other Latinas are incompetent and not qualified to be judges.

Regarding decision-making, creating greater diversity within the federal judiciary by nominating and confirming more women of color will strengthen decision making on

affected courts-leading those members of the judiciary to think more broadly about legal issues and to consider more frequently life experiences that are foreign to them. This will enhance the deliberative decision making process on panels. The ability of a judge to understand an experience provides valuable context for adjudicating issues in an informed manner.

One person will not have the experiential knowledge to adjudicate every case in an informed manner, but appellate courts provide crucial opportunities for judges to discuss cases, provide insight from their own experience, bring underlying assumptions in parties' arguments to the surface, and ensure that biases do not take the discussion off-track and deny justice to a party. Diversity on the bench encourages all members on an appellate court to think more broadly. Chief Justice Peggy Quince of the Florida Supreme Court (Fricke, 2012), the first black woman to serve in this position, said that she feels that having black women judges at the appellate level makes a difference. She explained:

Just your mere presence makes people stop and listen. Your colleagues may not agree and your perspective may not make a difference in the particular case at issue, but it opens the minds of your [colleagues] to different perspectives ... to the table that would not otherwise have had a voice.

Research conducted on appellate courts also bear out the tangible effects that a woman or a person of color may have on the outcome of a case. Studies (Davis, 1993; Songer, 1994) have shown that the presence of one woman on an appellate panel increases the likelihood that a female sex discrimination plaintiff will prevail. Similarly, the presence of an African-American on an appellate panel has been found to increase the likelihood that a panel will find in favor of the racial minority who is alleging race discrimination (Graham, 1990). In many cases, there will not be a tangible, quantifiable outcome

determinative effect of diversity on appellate courts. Nevertheless, anecdotal evidence suggests that racial and gender diversity on appellate courts is still important.

With respect to race in particular, several U.S. Supreme Court Justices have remarked on the importance of the unique perspective that the late Justice Thurgood Marshall, the first black man to sit on the bench, brought to cases. For example, Justice Lewis Powell once articulated how Justice Marshall's "unique contribution" to the court derived from "his direct experience with racial segregation in this country." Additionally, in her tribute to Justice Marshall in the Stanford Law Review (2001), Justice O'Connor described how the late Justice "profoundly influenced" her, a woman who prior to *Brown v. Board of Education* had not been exposed to racial tensions and "had no personal sense of being a minority in a society that cared primarily for the majority." As Justice O'Connor so vividly explained the effect that Justice Marshall had on the Court:

Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice. At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.

Similarly, the late Justice Byron White (Orentlicher, 2017) described the impact that

Justice Marshall's voice had on him as a jurist, noting:

Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match. Thurgood could tell us the way it was, and he did so convincingly, often embellishing with humorous, sometimes hair-raising, stories straight from his own past. He characteristically would tell us

things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our own experience.

Justice Marshall's colleagues' remarks further proves that his insight and experience provided valuable considerations that's should not be narrowly interpreted to be unique to him. Although he was a remarkable Judge, the impact is duplicable. Additional voices on the courts may provide perspectives that the majority did not know, did not want to know, or did not understand. These voices are crucial to have at the table, even when colleagues are not persuaded. Without such voices, the ultimate reasoning for a case could have been different, or at least the discussion could have gone differently. For example, Justice Ginsburg, while she was the only woman on the Supreme Court, often voiced a uniquely female perspective to her colleagues and the public, on issues of gender discrimination and, specifically in one instance, with regard to why a strip search of a teenage girl by school staff could be traumatizing (*SUS District v Redding*, 2009). In another example, Justice Thomas also provided unique perspectives as a Southern black man, such as when he detailed how affirmative action had left him stigmatized and when he spoke about the statement that a burning cross sends.

At other times, there was not a dissenting voice, but if the judiciary had been more diverse, perhaps there would have been a dissenting voice or a different majority voice. In the infamous case of *Rogers v. American Airlines* (1981), Judge Abraham Sofaer found that American Airlines' grooming policy, which provided that women's hair had to meet certain professional standards, did not discriminate on the basis of race and gender. However, this case may have been decided differently if the judge presiding over the case were intimately aware of the differences between white women's hair and black women's hair; the burdens that black women must endure to make their hair fit prescribed

styles; and the temporal, financial, and physically painful difficulties that may be necessary to endure in order to achieve the ideal that American Airlines required. Maybe the case would have turned out differently if more diverse considerations would have been involved, or the style would not have been attributed to a fad started by white model Bo Derek, if a black female judge had heard the case.

Similarly, Dean Kevin Johnson and Professor Luis Fuentes-Rohwer explain how one Supreme Court case may have been decided differently if a person of Mexican descent had sat on the Court. They asserted: “The Supreme Court in *United States v. Brignoni-Ponce* (2002) approved the reliance on "Mexican appearance" in immigration enforcement and stated that it may be employed with other factors to justify the questioning of a person about his or her immigration status. This holding seems incredible to most persons of Mexican ancestry, who appreciate that there is no readily definable "Mexican appearance" (Fricke, 2012). The Court in *Brignoni-Ponce* simply failed to recognize that persons of Mexican ancestry have physically diverse appearances. Its decision reflects a missing perspective, lack of information, and misunderstanding of the Mexican-American and Mexican immigrant communities in the United States that a Latina/o would be less likely to overlook. Although points such as this one about *Brignoni-Ponce* may be raised by people of all races, and not just by people who are Latino or, more specifically, of Mexican descent, there is a greater likelihood that they will be made if greater diversity exists on the bench.

Finally, it is important to have diverse appellate courts at the state and federal level because a variety of voices and perspectives are more likely to ensure that unconscious biases do not taint the analyses of cases (Gibson, 2007). For example,

having a female judge on a sexual harassment case or sexual assault case could help to eliminate unconscious biases about a woman's dress in cases where clothing and appearance are irrelevant. The list could go on and on, but the basic point is that diversity still matters, and that, in the case of women of color, who are nearly absent from the federal bench, "firsts" still matter.

In general by 2011, there were 65 women of color serving as active federal judges, including 33 African-American women (26 on the District Court and seven on the Court of Appeals), 25 Hispanic women (22 on the District Court and three on the Court of Appeals), eight Asian-American women (seven on the District Court and one on the Court of Appeals), and one woman of Hispanic and Asian descent (on the District Court). In the end, only 8.62% of active federal judges are women of color (Fricke, 2012). In 2018, state supreme courts as a whole only had 118 female judges, which is 33% of the seats. There is no data on the race and ethnicities of these judges but it can be inferred that less than 5% are women of color.

Conclusion.

This thesis identifies the various challenges that female judges, particularly state supreme court judges, have had to overcome to attain their seats and effect policy changes. Despite a somewhat steady selection timeline, there is much room for improvement. While it is unclear if there is a correlation and significant effect of feminist decision-making and having female judges on state supreme courts, the need for more female judges on the bench cannot be denied. From a representation perspective, female judges, female judges of color, female judges that identify as a different sexual orientation etc. diversify the bench, which leads to a diverse but critical analysis of various issues and cases to be decided. A diverse bench recognizes that the judgments and law cannot be broadly applied to the population because the people are not a monolith. There is always a new perspective to consider while making decisions and having female judges that apply feminist theories in decision-making. This is a step towards ensuring the best possible decision is made upholding justice and fairness standards.

A diverse bench also educates other actors in the judiciary like male justices, court employees, attorneys, enforcement officers and the like that certain stereotypes that are common with female justices are not true, should not be subscribed to and could create potentially harmful biases. The standing stereotype of the angry black woman, fiery Latina, butch woman, transgender identity and so on have no relevance in determining how effective female justices are in their roles. They also create implicit biases that slow down the flow of process in the courts and can be used as justified prejudicial and racist reasons that female justices are wrongfully believed to be

inefficient. Female justices of color and non-heterosexual orientation have proven that they are just as equipped to understand the law, interpret it, apply it to the facts of a case, listen to arguments from both parties, make a judgment and support their opinions using sound legal doctrines (Fricke, 2012).

An indirect effect of female justices voting and impacting decisions is, in certain instances, male judges also voted similarly to the female justice on the bench, especially if there was at least one presiding over a case. Peresie's (2005) regression that controlled for ideology found that in sexual harassment and discrimination cases, the presence of at least one female judge increased the probability of a male judge voting for the plaintiff from 16% to 35% in sexual harassment cases and 11% to 30% in sex discrimination cases. This is mainly due to the unique reasoning and experiences that a female justice affords a sexual discrimination case. I can infer that having a diverse bench of female justices serving with male justices will improve votes for plaintiffs in additional areas like civil rights violations, discrimination by sexual orientation, female labor violations and so on. Thus, this increases areas that lasting judgments can be made to influence policy. This is definitely a rich area for future study and analysis.

The selection systems of female justices are varied but no one system significantly selects more female judges than others. An electoral system correlates with a more liberal state government and electorate, which allows for a more diverse pool of judges. At the same time, states with an appointment-based system have had more female judges at the supreme court level but not quick succession with female justices from one administration to the next. States that have a combination of two systems have remained flat in selecting female justices for years. This makes it difficult to measure their

decision-making styles and systems, let alone their efficiency. This is the reason advocacy groups were necessary during the feminist movement and Roosevelt administration to ensure we start seeing some women assume judicial positions. These advocacy groups were effective at their time and left a lasting legacy for two main reasons.

First, women's advocacy groups employed a multi-pronged approach to advancing women's opportunities for service on the federal bench, simultaneously pressing their agenda on the presidential, congressional, and public fronts. Training women to apply for judicial office and submitting women candidates' names to the administration, these advocacy groups' efforts went beyond the focused push for women's judicial appointments; they lobbied for change in the evaluation of judicial candidates such that consideration was given to their attitudes on women's rights and membership in discriminatory clubs, with potentially far-reaching consequences for women's equality of opportunity generally.

Second, these groups worked in coalition with other women's groups and civil rights groups broadly, to press women's appointments on the presidential agenda, support particular women's candidacies, oppose candidates threatening to women's and civil rights, study the impact of bias in the federal courts, and lobby for judicial reform. The work the advocacy groups performed, beginning in the Carter administration, made a lasting change on how female justices at the state and federal level are selected and perform their duties. Besides from groups like the National Association of Women Judges (NAWJ) formed in 1979 to advocate female justices for federal appointments, there was also a marked interest from elected female justices to work with these same advocacy

groups to effect lasting policy changes. Alliances like those between Ginsburg and the ACLU, for example have continued even after her appointment to SCOTUS and inspired similar alliances at the state level.

Many state supreme court justices work closely with domestic violence support groups, child welfare groups, prison systems etc. and have pushed policy changes and close cooperation. In family law and criminal law so far, is where we see these close alliances with female state supreme court justices. Most state supreme court female justices, for example, vote more liberally in death penalty cases pushing a reformatory and not a punitive deterrence while doing work with advocacy groups that transition prisoners to functional citizens while in prison or upon release (where possible).

Female justices are also not as constrained by political ideology as their male counterparts. Several researchers have consistently found that female justices are able to separate their ideological political beliefs and political party affiliations where necessary and apply pragmatic reasoning concepts like feminist jurisprudence (Orentlicher, 2017). The end result where female justices mostly vote liberally and make judgments for the injured party is influenced by other factors like state liberalism and changing positions in SCOTUS. The correlation is more so with their gender, their experiences, and the political ideology of their state. This leads to an inference that female justices are more careful with their decision-making process i.e. asking questions, requiring more definitive evidence, requiring stronger arguments from both parties in an attempt to make the best possible vote and judgment. However, there is no definitive factor that explains the correlation between pragmatic reasoning occurring more with female state supreme court justices than their male counterparts. It is an opportunity for further research.

Perhaps the key to a diverse pool of women elected as female justices at the state supreme court level is a more concentrated effort of advocacy groups at the state level pushing for their appointments and elections. In a state with an appointment system, advocacy groups could submit a list of female justices that are eligible for appointments at state supreme courts. In an electoral system, advocacy groups could participate in electoral campaigns and campaign finance projects for female justices that are supported. These advocacy groups also need a multi-pronged approach, similar to the federal level, where a concerted effort between civil rights groups, LGBT groups, youth groups and similar advocacy groups at the state level for visibility for more female justices at the supreme court level. Making use of traditional media outlets and social media to get their goals and vision out in the public will lead to more votes and/or more pressure on the executive to make more appointments of female justices at the state supreme court level.

Essentially, more study on the decision-making patterns and processes of female justices at the state supreme courts and in general needs to be conducted. This cannot happen without selecting more female judges to serve, diversifying the pool of female justices and eliminating the constraints that exist with female justices like the male-dominated eligible pool from law school to practice. This thesis has demonstrated that female justices do have an impact on the voting and decision-making processes on the court. Their decisions are further strengthened by concepts like feminist ideology, which leads to active work with advocacy groups in various areas of the law to influence policy. Female justices at every level are incredibly influential on the bench in women's rights issues, labor issues relating to worker's compensation and punitive issues involving the death penalty. This is important for further study in order to demonstrate how men no

longer dominate the bench. The importance of intersectionality and its effect on judging is also highlighted and important. It is advantageous to study white and minority women because race in addition to sex may affect how a judge will vote on a particular issue and which decision-making processes will be applied.

Angela Davis stated it best, "In order to understand fully how any society functions, you must understand the relationship between the men and women" (Davis, 1990). The research conducted on female justices decision-making styles as a whole are insufficient because more female justices are not selected to serve on the bench frequently and consistently like their male counterparts. However, states like West Virginia and New Mexico with majority female justices on their supreme courts provides some hope for more judicial seats being acquired and more possibility for research and analysis. Only then can we understand the full impact of the judiciary at various levels on the society as a whole.

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