

# AMERICAN COURTS AND THE SEX BLIND SPOT: LEGITIMACY AND REPRESENTATION

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*We argue the legacy of explicit sex bias and discrimination with relation to political rights and social status begins within government, hewn from state and federal lawmaking. As such, male lawmakers and judges conscribed a woman's role to her home and defined the scope of her independence in the local community and broader society. Politically and legally, women were legal appendages to men—objects of male power (vis-à-vis their husbands and fathers). In law, women's roles included sexual chattel to their spouses, care of the home, and producing offspring. Accordingly, women were essential in the home, as law would have it, but unnecessary, and even harmful and sabotaging, to a participatory democracy.*

*Building from two years of empirical research and examining each federal appeals court's record on abortion and each judge's vote on a particular case, this project studies whether women are more likely than their male counterparts to affirm reproductive health rights. We examined 302 cases across each federal appellate circuit, including the District of Columbia and the Federal Circuit. Our findings have both normative and sociological implications. This project tells an important story about the composition of the federal appellate judiciary and the slow climb for women, including women of color, within the elite branches of the courts. This is a story expressed in numbers and it reflects the historical marginalization of women within the law and the problem of homogeneity in the courts.*

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#### INTRODUCTION

September 27, 2018, marked the end of what women across the United States described as a “triggering” week.<sup>1</sup> On that date, Dr. Christine Blasey Ford testified before the Senate Judiciary Committee. Dr. Ford told the “panel about the terror she felt on a summer day more than 30 years ago, when, she said, a drunken young Mr. Kavanaugh pinned her to a bed, tried to rip off her clothes and clapped his hand over her mouth to muffle her cries for help.”<sup>2</sup> Republican members of the committee ceded their time and questioning to a sex-crimes prosecutor, which, according to some, gave the

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1. Eve Rittenberg, *Trauma-Informed Care—Reflections of a Primary Care Doctor in the Week of the Kavanaugh Hearing*, 379 NEW ENG. J. MED. 2094, 2095 (2018) (“Many of my patients named the Kavanaugh hearings as a source of dread, which has been slightly tempered by admiration for Dr. Blasey Ford. The news in which they are immersed has resonated deeply and brought back memories of their own experiences.”); Deborah Bloom, *Sexual Assault Victims Are Reliving Their Trauma, Triggered by Kavanaugh Hearing*, WASH. POST (Sept. 28, 2018), <https://www.washingtonpost.com/health/2018/09/28/sexual-assault-victims-are-reliving-their-trauma-triggered-by-kavanaugh-hearing/> [https://perma.cc/BQ52-XH7A] (“Painful. Gut-wrenching. Heartbreaking. Unbearable. That’s how women described listening to Thursday’s Senate Judiciary Committee hearing, where Christine Blasey Ford testified that Supreme Court nominee Brett M. Kavanaugh had sexually assaulted her when they were both in high school.”); Maggie Fox, *Kavanaugh Hearings Triggered Painful Memories, One Doctor Finds*, NBC NEWS (Oct. 11, 2018, 6:07 PM), <https://www.nbcnews.com/health/health-news/kavanaugh-hearings-triggered-painful-memories-one-doctor-finds-n919261> [https://perma.cc/MB2B-UW72] (“Many of my patients named the Kavanaugh hearings as a source of dread.”).

2. Sheryl Gay Stolberg & Nicholas Fandos, *Brett Kavanaugh and Christine Blasey Ford Duel with Tears and Fury*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/us/politics/brett-kavanaugh-confirmation-hearings.html> [https://perma.cc/ZL93-TQFR] (“A few hours later, Judge Kavanaugh delivered a blistering, scorched-earth defense. Speaking through tears at points, he denied that he assaulted Dr. Blasey—‘I am innocent of this charge!’—and denounced a partisan ‘frenzy’ bent on destroying his nomination, his family and his good name.”).

impression that Dr. Ford was on trial.<sup>3</sup> Women throughout the United States rallied to Washington, D.C. in droves, phoned their legislators, and confronted them at their offices, in the halls of Congress, at elevators, and airports, all with the mission in mind to prevail upon senators to delay the vote or reject Brett Kavanaugh's nomination.<sup>4</sup> By the next week, *Time* magazine would claim that "Christine Blasey Ford's Testimony Changed America."<sup>5</sup> Had it, really? Less than ten days after Dr. Ford's testimony, the Senate confirmed Judge Kavanaugh to the Supreme Court of the United States.<sup>6</sup>

From an empirical point of view, it is an old, familiar, and unfortunate story. Women comprise 51 percent of the United States's population.<sup>7</sup> Yet,

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3. *Id.* ("But the alternative scenario—Republican male senators handling the questions—may have been worse. During a break in the hearing, Senator Orrin G. Hatch, Republican of Utah, told reporters: 'I don't think she's incredible. I think she's an attractive, good witness.' [When] [a]sked for clarity, he said, 'In other words, she's pleasing.'").

4. Caroline Simon & Doug Stanglin, *Rise Up, Women!': Angry Crowds Flood Capitol Hill to Protest Brett Kavanaugh Nomination*, USA TODAY (Sept. 28, 2018, 9:15 PM), <https://www.usatoday.com/story/news/2018/09/28/brett-kavanaugh-hearing-protesters-christine-blasey-ford/1453524002/> [<https://perma.cc/TD8S-D4F3>] ("Angry protesters marched and shouted in, around and through the marbled buildings that dot Capitol Hill even as members of the Senate Judiciary were gingerly advancing the controversial nomination of Brett Kavanaugh to the full Senate for a vote next week.").

5. Haley Sweetland Edwards, *How Christine Blasey Ford's Testimony Changed America*, TIME (Oct. 4, 2018), <http://time.com/5415027/christine-blasey-ford-testimony/> [<https://perma.cc/6HGV-59EJ>] ("Most of all, the hopes and fears of women and men who have lived with the trauma of sexual violence were riding on the credibility of Ford's testimony. Her treatment in the halls of power, and her reception by an expectant public, would send a signal to countless survivors wrestling with whether they should speak up.").

6. Nevertheless, it is worth considering that the scale and scope of the protests surrounding this Supreme Court nominee were unprecedented. For example, more than 2400 law professors signed an open letter opposing Judge Kavanaugh's confirmation based on "an intemperate, inflammatory and partial manner" during his hearing. Opinion, *The Senate Should Not Confirm Kavanaugh: Signed, 2,400+ Law Professors*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/interactive/2018/10/03/opinion/kavanaugh-law-professors-letter.html> [<https://perma.cc/S9HJ-FEK8>]. The American Bar Association reopened its evaluation of the candidate. Aris Folley, *American Bar Association Reopening Kavanaugh Evaluation Due to 'Temperament'*, HILL (Oct. 5, 2018, 2:33 PM), <https://thehill.com/homenews/senate/410130-american-bar-association-re-opening-kavanaugh-evaluation-due-to-temperament> [<https://perma.cc/UP8V-6JKJ>]. A Jesuit magazine rescinded its endorsement of Judge Kavanaugh. See *The Editors: It Is Time for the Kavanaugh Nomination to Be Withdrawn*, AM. MAG. JESUIT REV. (Sept. 27, 2018), <https://www.americamagazine.org/politics-society/2018/09/27/editors-it-time-kavanaugh-nomination-be-withdrawn> [<https://perma.cc/D69F-B8NN>] ("[E]ven if the credibility of the allegation has not been established beyond a reasonable doubt and even if further investigation is warranted to determine its validity or clear Judge Kavanaugh's name, we recognize that this nomination is no longer in the best interests of the country."). In addition, the American Civil Liberties Union issued a rare statement of opposition (only its fourth in nearly a century) to the nominee's confirmation. See *In Rare Move, ACLU to Oppose Kavanaugh for Supreme Court*, ACLU (Sept. 29, 2018), <https://www.aclu.org/news/rare-move-aclu-oppose-kavanaugh-supreme-court-0> [<https://perma.cc/C7DU-J4CK>].

7. See *Population Distribution by Gender, 2017*, HENRY J. KAISER FAM. FOUND., <https://www.kff.org/other/state-indicator/distribution-by-gender/> [<https://perma.cc/2USC-8VGX>] (last visited Apr. 10, 2019); *QuickFacts*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/fact/table/US/LFE046217> [<https://perma.cc/PBS8-RW8D>] (last visited Apr. 10, 2019).

their political power remains comparatively marginal. This is not a matter of invisible power, where economic influence plays a bold, perceptible, but decidedly masked role in government.<sup>8</sup> Rather, for women, it is a matter of lacking power and influence in government—state and federal—to such a degree that their voices yield marginal influence.<sup>9</sup> Men remain in dominant power at the executive level, within legislatures, and in the courts.

In 2017, a widely circulated image of the power-wielding “Freedom Caucus” captured the symbolic and substantive meaning of women lacking power, or a “seat at the table,” including on matters unique to their personal health and safety.<sup>10</sup> The image, circulated by various news organizations domestically and abroad and posted to social media by Vice President Mike Pence, displays a standing-room-only boardroom with members of Congress.<sup>11</sup> Noticeably, they are all male. They are all white. The optics are profound; there is no unseeing this anachronistic image or wiping away what seems inherently out of touch. No people of color and no women participate in this discussion or sit in this room of power brokers whose meetings with the president and vice president typify their outsized access and influence.<sup>12</sup> One news outlet refers to the chair of the caucus as “the

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8. See RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 11 (2016) (illuminating the problem of money in American politics and offering insights for reform); JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* 3 (2016) (relating the power and influence of wealthy individuals and families in American politics, noting that much of this is “cloaked in secrecy”); ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* xxiv (2018) (uncovering the “lost history of the corporate rights movement” and the controversial Supreme Court cases that extended free speech and religious freedom protections to corporations).

9. See Charlotte Alter, *How Women Candidates Changed American Politics in 2018*, TIME (Nov. 7, 2018), <http://time.com/5446556/congress-women-pink-wave/> [<http://perma.cc/NA73-K9C2>] (noting that having more women in the House can strengthen their political influence).

10. See *All-Male White House Health Bill Photo Sparks Anger*, BBC (Mar. 24, 2017), <https://www.bbc.com/news/world-us-canada-39375228> [<https://perma.cc/M495-WAKH>].

11. See *id.*; see also Jessica Estepa, *Vice President Mike Pence Faces Backlash for Photo of Freedom Caucus Meeting*, USA TODAY (Mar. 24, 2017, 9:11 AM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/03/23/vice-president-mike-pence-faces-backlash-photo-freedom-caucus-meeting/99554710/> [<https://perma.cc/VA6E-233P>]; Katie Forster, *Donald Trump Meets 30 Men to Discuss Future of Maternity Care Under New Healthcare Bill*, INDEPENDENT (Mar. 24, 2017, 11:23 AM), <https://www.independent.co.uk/news/world/americas/us-politics/donald-trump-obamacare-men-mike-pence-picture-no-women-freedom-caucus-repeal-healthcare-bill-a7647426.html> [<https://perma.cc/L4UR-G76Y>] (“A picture of a White House meeting with lawmakers about a new healthcare bill affecting access to pregnancy and maternity care shows 25 men discussing the reforms—and not a single woman.”); Z. Byron Wolf, *Is There Something Wrong with This White House Photo?*, CNN (Mar. 24, 2017, 9:12 AM), <https://www.cnn.com/2017/03/23/politics/mike-pence-patty-murray-photo/index.html> [<https://perma.cc/U3NE-ANPE>].

12. Andrew J. Clarke, *Trump Is Tweeting Threats at the Freedom Caucus. Good Luck with That.*, WASH. POST (Apr. 5, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/05/trump-is-tweeting-threats-at-the-freedom-caucus-good-luck-with-that/> [<https://perma.cc/VJU6-5QXP>] (“The group has worked hard to develop its own war chest with the support of major players in conservative politics (such as the Koch Industries Inc.

most powerful man in the House [of Representatives].”<sup>13</sup> If a sign of influence is being “in the room where it happens,” clearly women are at a significant disadvantage.

On one hand, this is an ordinary meeting or photo opportunity of men “making plans and cutting deals” in the halls of government. In other words, sadly, it is more emblematic than atypical. On the other hand, the meeting reflected something more disconcerting and odious in government as the agenda concerned the Patient Protection and Affordable Care Act (PPACA). Specifically, the meeting was a debate as to whether new health-care legislation should gut the protections guaranteed under the PPACA for basic reproductive health care services. Members of the caucus oppose essential health benefits for women, and they have suggested that mandates for mammograms, cervical screenings, prenatal and maternity care, and even pediatric services are unfair, advantageous only to women, and limit states’ freedom of choice.<sup>14</sup>

The Freedom Caucus’s male-centered foci seem undeniably captured by their proposed legislation, the American Health Care Act, which would “dismantle[] all insurance coverage for abortion,” defund the largest reproductive health services organization in the United States, and even “restrict women’s access to lifesaving care, particularly if they’re unemployed.”<sup>15</sup> What some pundits considered “[t]he worst provision” of their efforts to derail the PPACA was a provision that would have permitted states to “revoke Medicaid coverage from new mothers who haven’t found a job within two months after giving birth.”<sup>16</sup> One journalist noted that such a requirement is not only shocking, but “cruel and counterproductive as [a] public health policy.”<sup>17</sup> Senator Pat Roberts put it this way, “I wouldn’t want to lose my mammograms.”<sup>18</sup> He later apologized.<sup>19</sup>

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PAC). The House Freedom Fund brought in about \$1.4 million during the past election cycle. That enables Freedom Caucus leaders to insulate their members . . .”).

13. Tara Golshan, *Meet the Most Powerful Man in the House*, VOX (Aug. 28, 2017, 8:00 AM), <https://www.vox.com/policy-and-politics/2017/8/28/16107200/mark-meadows-freedom-caucus-explained> [<https://perma.cc/SLC3-5XMU>] (“The chair of the Freedom Caucus, a cohort of roughly 40 men who make up the House’s most conservative faction, Meadows wields enough votes to stop any Republican-led legislation in its tracks. And he has a direct line to the president if things don’t go his way—leverage points he used to make an unpopular health care bill move further to the right in the House.”).

14. *See* Wolf, *supra* note 11.

15. Christina Cauterucci, *The AHCA Would Force New Moms on Medicaid to Find Work 60 Days After Labor*, SLATE (Mar. 22, 2017, 2:09 PM), <https://slate.com/human-interest/2017/03/the-ahca-would-force-new-moms-on-medicaid-to-find-work-60-days-after-labor.html> [<https://perma.cc/7ZNE-73N6>].

16. *Id.* (“Medicaid currently offers essential resources for low-income women and their children, including screenings for postpartum depression, in-home educational visits, and check-ups, all of which help babies survive and mothers thrive.”).

17. *Id.*

18. *All-Male White House Health Bill Photo Sparks Anger*, *supra* note 10.

19. *See id.* Republicans have also launched state-level Freedom Caucuses. In Texas, an overwhelmingly white male Freedom Caucus blocked two maternal mortality bills one week before Mother’s Day. Marissa Evans & Jim Malewitz, *House Freedom Caucus Blocks Maternal Mortality Bills, More Than 100 Others*, TEX. TRIB. (May 12, 2017, 11:00 AM),

However, the Freedom Caucus and its membership did not create the problem of sex inequality and the sex blind spot in government. Rather, their actions are only emblematic of a larger, more enduring problem of women's marginal inclusion in government, which results in policies, legislation, and judicial opinions that too often threaten or undermine the interests of women. Decades-long opposition to women's equal employment opportunities;<sup>20</sup> enduring hostility to the Violence Against Women Act (VAWA);<sup>21</sup> presidential orders barring reproductive health care providers receiving humanitarian aid from even mentioning abortion;<sup>22</sup> and myriad U.S. Supreme Court decisions, rooted in stereotypes, that banned women from serving on juries,<sup>23</sup> denied them equal rights to contract for longer workdays

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<https://www.texastribune.org/2017/05/12/maternal-mortality-bills-and-others-get-house-freedom-caucus-axe/> [<https://perma.cc/H75N-CVQV>] (“In a stunning blow to public health experts and advocates, the 12-member House Freedom Caucus used a parliamentary maneuver to kill a wide slate of bills, including House Bill 1158, which would have connected first-time pregnant women enrolled in Medicaid to services, and House Bill 2403, which would have commissioned a study on how race and socioeconomic factors affect access and care for pregnant black women. Both bills were aiming to help the state better understand how to better reach expecting mothers.”).

20. The 1932 National Recovery Act, which prohibited more than one family member from holding government employment, served as a proxy to oust women from the government workforce. *See generally* *Goesaert v. Cleary*, 335 U.S. 464 (1948).

21. *See, e.g.*, Molly Ball, *Why Would Anyone Oppose the Violence Against Women Act?*, ATLANTIC (Feb. 12, 2013), <https://www.theatlantic.com/politics/archive/2013/02/why-would-anyone-oppose-the-violence-against-women-act/273103/> [<https://perma.cc/9YUV-PC6K>] (noting that nearly one-quarter of senators—all men—voted against reauthorizing the Violence Against Women Act); Kimberly Lawson, *Zero Republicans Have Backed the Violence Against Women Reauthorization Act*, BROADLY (Oct. 4, 2018, 2:50 PM), [https://broadly.vice.com/en\\_us/article/wj94p4/zero-republicans-have-backed-the-violence-against-women-reauthorization-act](https://broadly.vice.com/en_us/article/wj94p4/zero-republicans-have-backed-the-violence-against-women-reauthorization-act) [<https://perma.cc/9MFZ-QNAE>]; Jonathan Weisman, *Women Figure Anew in Senate's Latest Battle*, N.Y. TIMES (Mar. 14, 2012), <https://www.nytimes.com/2012/03/15/us/politics/violence-against-women-act-divides-senate.html> [<https://perma.cc/U5B7-H2LT>] (noting that a draft of VAWA “failed to get a single Republican vote in the Judiciary Committee last month”).

22. *See Policy Statement: International Conference on Population*, in 41 FOREIGN RELATIONS OF THE UNITED STATES 801, 804–05 (Alexander O. Poster ed., 2017). More recently, the Trump administration's policies threaten to gut Title X, which provides reproductive health care for the poorest of women, including for breast cancer screenings, sexually transmitted infection tests, contraception, and other services. Julie Hirschfeld Davis & Michael D. Shear, *Trump Rule Would Bar Some Abortion Advice at Federally Funded Clinics*, N.Y. TIMES (May 22, 2018), <https://www.nytimes.com/2018/05/22/us/politics/trump-abortion-limits.html> [<https://perma.cc/CWD3-NY5D>]; Marie Solis, *Here's What the Trump Administration's Proposed Title X Rule Would Do to Abortion Access in America*, NEWSWEEK (May 2, 2018, 12:22 PM), <http://www.newsweek.com/heres-what-trump-administrations-proposed-title-x-rule-would-do-abortion-908474> [<https://perma.cc/395L-WCLW>]; *see also* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (exempting closely held corporations from regulations that its owners object to on religious grounds so long as there is a less restrictive means of furthering the law's interest, as per the Religious Freedom Restoration Act).

23. *See Hoyt v. Florida*, 368 U.S. 57, 65 (1961) (upholding a statute allowing women to automatically be exempted from serving on juries). *But see* *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) (finding unconstitutional a state law that excludes citizens from juries on the basis of race), *abrogated by* *Taylor v. Louisiana*, 419 U.S. 522 (1975); Laughlin McDonald, *A Jury of One's Peers*, ACLU (Mar. 18, 2011, 11:20 AM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/jury-ones-peers>

as men could,<sup>24</sup> or restricted their range of employment (e.g., prohibiting them from serving as bartenders—even in establishments they owned)<sup>25</sup> illustrate this inequality.

That is, the legacy of explicit sex bias and discrimination with relation to political rights and social status begins within government, hewn from state and federal lawmaking and advocated for by men, that conscribed a woman's role in her home, local community, and broader society.<sup>26</sup> As all first-year law students comprehend rather quickly, politically and legally, women were legal appendages to men—objects of male power (vis-à-vis their husbands and fathers) whose capacities were legally conscribed to sexual chattel of their spouses,<sup>27</sup> care of the home,<sup>28</sup> and producing offspring.<sup>29</sup>

Accordingly, women are essential in the home, as law would have it,<sup>30</sup> but unnecessary, and even harmful and sabotaging, to a participatory democracy.<sup>31</sup> Perhaps this helps to explain why, as of 2018, women held

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[<https://perma.cc/22RM-ARP8>] (highlighting the ACLU's work in removing the barriers that prevented women from serving on juries).

24. See *Muller v. Oregon*, 208 U.S. 412, 421–23 (1908) (upholding Oregon legislation limiting the number of hours women were allowed to work).

25. See *Goesaert*, 335 U.S. at 466–67 (upholding Michigan legislation banning women from being licensed bartenders unless their husband or father owned the bar).

26. See Michele Goodwin, *Challenging the Rhetorical Gag and TRAP: Reproductive Capacities, Rights, and the Helms Amendment*, 112 N.W. L. REV. 1417, 1419–21 (2018).

27. See generally Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000). Moreover, states typically vindicated the legitimacy of marital rape and courts followed suit. See, e.g., *State v. Paoella*, 554 A.2d 702, 708 (Conn. 1989) (finding that Connecticut law exonerated married men from the crime of rape when the victim was his wife); Michael G. Walsh, Annotation, *Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 24 A.L.R. 4th 105 § 2[a] (2011).

28. Among the legal innovations that expanded husbands' authority over their wives while limiting the same for women over their own personhood were "loss of consortium" causes of action. Loss of consortium derives from the legal premise that the husband is the master of the wife. Thus, when wives suffered injuries caused by third parties, husbands could file suit against the injuring party for the "loss" of their wives' servitude, companionship, and sex. See, e.g., *Birmingham S. Ry. v. Lintner*, 38 So. 363, 366 (Ala. 1904); *Ohio & M. Ry. v. Cosby*, 7 N.E. 373, 375 (Ind. 1886); *Hyde v. Scysson* (1620) 79 Eng. Rep. 462, 462; *Miller v. Regem* (1620) 79 Eng. Rep. 461, 461. Historically, loss of consortium litigation provided economic remedies only for husbands. See generally Jo-Anne M. Baio, Note, *Loss of Consortium: A Derivative Injury Giving Rise to a Separate Cause of Action*, 50 FORDHAM L. REV. 1344 (1982).

29. Marie Jenkins Schwartz, "Good Breeders," SLATE (Aug. 24, 2015, 10:50 AM), <https://slate.com/human-interest/2015/08/how-enclaved-womens-sexual-health-was-contested-in-the-antebellum-south.html> [<https://perma.cc/8BBC-7D84>].

30. See generally *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (holding that the right to practice law was not guaranteed by the Fourteenth Amendment).

31. *Minor v. Happersett*, 53 Mo. 58, 64–65 (1873) (upholding a state law denying women the right to vote); Eleanor Barkhorn, "Vote No on Women's Suffrage": Bizarre Reasons for Not Letting Women Vote, ATLANTIC (Nov. 6, 2012), <https://www.theatlantic.com/sexes/archive/2012/11/vote-no-on-womens-suffrage-bizarre-reasons-for-not-letting-women-vote/264639> [<https://perma.cc/UR8V-F8DL>] ("The stated reasons to 'vote no' include: . . . BECAUSE 80% of the women eligible to vote are married and can only double or annul their husband's votes.").

barely 20 percent of elected federal offices<sup>32</sup> and roughly 12 percent of federal judgeships, which raises questions regarding the legitimacy of those branches of government and fundamental concerns about the rule of law.<sup>33</sup> Despite women's notable gains in the 2018 midterm elections, the needle overall moved only slightly, and for Republican women not very much at all.<sup>34</sup> Indeed, recent studies identify other nations who have increased the numbers of women in legislative and parliamentary leadership in the twentieth century and since, while the United States continues to lag behind. For example, a study conducted by the Inter-Parliamentary Union (IPU)—based on information provided by national governments as of November 2018—ranks the United States seventy-eighth worldwide in women's federal leadership.<sup>35</sup> To place the results of the IPU study in context, women continue to make substantive political inroads in developed and developing nations across Asia, Africa, South America, Europe, and the Caribbean, while the United States remains in closer proximity to Kyrgyzstan,<sup>36</sup> Tajikistan,<sup>37</sup> and Pakistan<sup>38</sup> rather than the usual points of comparison: France,<sup>39</sup> Spain,<sup>40</sup> Italy,<sup>41</sup> or Germany.<sup>42</sup>

In other words, there are greater percentages of women in central government leadership not only in Sweden, Finland, and Norway (countries usually praised for their egalitarian social policies), but also in developing nations such as Rwanda, Nicaragua, and Ecuador, than in the U.S. Congress. This raises important questions, including whether the representation of women in legislative leadership is essential to achieving the goals of sex equality.<sup>43</sup> What is at stake if women continue to be shut out of the political

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32. *Women in Elective Office 2018*, CTR. FOR AM. WOMEN & POL., <http://www.cawp.rutgers.edu/women-elective-office-2018> [https://perma.cc/5WNY-GE9B] (last visited Apr. 10, 2019).

33. Mariah Lindsay & Michele Goodwin, Study of Female Representation on the Federal Bench 1790–2017 (2018) (unpublished manuscript) (on file with authors). Other data points are equally troubling. According to the World Economic Forum, “Political Empowerment is where the gender gap remains the widest.” WORLD ECON. FORUM, THE GLOBAL GENDER GAP REPORT 2018, at 8 (2018), [http://www3.weforum.org/docs/WEF\\_GGGR\\_2018.pdf](http://www3.weforum.org/docs/WEF_GGGR_2018.pdf) [https://perma.cc/T5WT-XPLC] (emphasis omitted). In 2018, the United States ranked ninety-eighth among countries in political empowerment. *Id.* at 10 tbl.3.

34. See Susan Chira, *Banner Year for Female Candidates Doesn't Extend to Republican Women*, N.Y. TIMES (Nov. 15, 2018), <https://www.nytimes.com/2018/11/15/us/politics/women-politics-republican.html> [https://perma.cc/GV79-QEQR].

35. This data is based on 193 nations reporting. See *Women in National Parliaments*, INTER-PARLIAMENTARY UNION, <http://archive.ipu.org/wmn-e/classif.htm> [http://perma.cc/68JB-FCFB] (last visited Apr. 10, 2019).

36. *Id.* (ranked 108).

37. *Id.* (ranked 110).

38. *Id.* (ranked 101).

39. *Id.* (ranked 16).

40. *Id.* (ranked 13).

41. *Id.* (ranked 30).

42. *Id.* (ranked 47).

43. See, e.g., BEATRIZ LLANOS & KRISTEN SAMPLE, 30 YEARS OF DEMOCRACY: RIDING THE WAVE? WOMEN'S POLITICAL PARTICIPATION IN LATIN AMERICA 35 (2008) (discussing quotas implemented in several South American countries that require women to “represent at least 30 per cent of candidates on party lists”); Drude Dahlerup, *Increasing Women's Political*



process? In reality, the stakes are quite high, particularly as some of the most contentious debates in Congress (and the courts) relate to women's reproductive health and rights. Prior works address aspects of that debate, including assessing the strength of the legislative process in eliminating discrimination and promoting sex equality.<sup>44</sup>

This project does not repeat that important debate. Rather, we offer it as a robust analogy and pathway for introducing this work, a brief Essay, which navigates a different path, turning to women's representation in the federal judiciary and the legitimacy of that branch of government. Critiques of the judicial branch of government are not new. Many important works predate our contribution to this Symposium.<sup>45</sup> Recently, Erwin Chemerinsky wrote that the Supreme Court has failed throughout its history to protect the interest of "minorities of all types."<sup>46</sup>

This project emerges at a time in which some scholars question the efficacy of the Court and its lower branches to protect civil liberties and civil rights,<sup>47</sup> let alone the interests of women in matters of health, economics, and reproductive rights. As Jeremy Waldron notes, courts suffer from a democratic deficit.<sup>48</sup> And even while the Court "has given us decisions like *Lawrence*, *Roe*, and *Brown*, which upheld our society's commitment to individual rights in the face of prejudiced majorities,"<sup>49</sup> it has given women *Buck v. Bell*,<sup>50</sup> *Burwell v. Hobby Lobby Stores, Inc.*,<sup>51</sup> and, most recently, *National Institute of Family & Life Advocates v. Becerra*.<sup>52</sup>

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*Representation: New Trends in Gender Quotas*, in WOMEN IN PARLIAMENT: BEYOND NUMBERS 141, 150 (Julie Ballington & Azza Karam eds., 2005) ("Quota[] rules are not enough. Whether a quota system meets its objective depends largely on the process and method of implementation and enforcement.").

44. Michele Goodwin & Allison M. Whelan, *Reproduction and the Rule of Law in Latin America*, 83 FORDHAM L. REV. 2577, 2579 (2015) (examining and critiquing "the rule of law as a method for advancing women's rights"); Sandra Day O'Connor & Kim K. Azzarelli, *Sustainable Development, Rule of Law, and the Impact of Women Judges*, 44 CORNELL INT'L L.J. 3, 9 (2011) (describing how the "rule of law . . . particularly as [it] relate[s] to gender equity" is "essential in th[e] endeavor" to ensure women and girls have access to justice and basic human rights); *Rule of Law: Justice and Security*, U.N. WOMEN, <http://www.unwomen.org/en/what-we-do/peace-and-security/rule-of-law-and-justice> [<https://perma.cc/CQD2-Q58X>] (last visited Apr. 10, 2019) ("Re-establishing the rule of law is foundational to protect women's rights and security, prevent relapse into conflict, and, ultimately, to achieve sustainable peace.").

45. See, e.g., ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 11 (2014) (asserting that his critiques of the Supreme Court should not be perceived as focusing on the atypical mistakes).

46. *Id.* at 10.

47. See generally MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

48. Waldron, *supra* note 47, at 1348 (expressing that, of those cases, "[t]hat is almost the last good thing I shall say about judicial review").

49. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

50. 274 U.S. 200 (1927).

51. 134 S. Ct. 2751 (2014).

52. 138 S. Ct. 2361 (2018).

This preliminary Essay offers a valuable descriptive and empirical contribution. Building from two years of empirical research, examining each federal appeals court's record on abortion and each judge's vote on a particular case, it helps to inform whether women are more likely than their male counterparts to affirm reproductive health rights. We examined 302 cases across each federal appellate circuit, including the District of Columbia and the Federal Circuit. Our study begins at the year each woman was appointed to the circuit.<sup>53</sup> This Essay is our introductory contribution emerging from the study.

Our findings have both normative and sociological implications. Part I tells an important story about the composition of the federal appellate judiciary and the slow climb for women, including women of color, within the elite branches of the courts. This is a story expressed in numbers and it reflects the historical marginalization of women within the law. Part II addresses the problem of homogeneity in the courts. Part III takes up our study, focusing specifically on the Fifth, Sixth, Seventh, and Tenth Circuit Courts of Appeals.

#### I. MISSING FROM THE PROFESSION AND BENCH

When Justice Sandra Day O'Connor announced her retirement from the Supreme Court, President George W. Bush nominated Judge John Roberts, who sat on the Court of Appeals for the District of Columbia, as her successor.<sup>54</sup> Asked her opinion about the nominee, she responded, "That's fabulous . . . . He's good in every way," she explained, "except he's not a woman."<sup>55</sup> She was not alone; other Republican women expressed similar concern, including the president's wife, Laura Bush.<sup>56</sup> When Senator Kay Bailey Hutchinson was asked, "[W]ell didn't you want a woman?" she responded, "Well, yes, of course, I did."<sup>57</sup>

Reporters for the *Washington Post* noted that "[Justice O'Connor] put a spotlight on the obvious trade-off involved in Bush's decision."<sup>58</sup> However, it is unclear exactly what the trade-off was. Male competence for female representation? At the time, of the more than 130 nominees to the Supreme Court, *only four* were not white men: Thurgood Marshall, Sandra Day O'Connor, Clarence Thomas, and Ruth Bader Ginsburg.

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53. For the Sixth Circuit, our research begins in 1979 because no abortion cases were decided during the tenure of the first woman on that court, who was appointed in 1934.

54. See John King et al., *Bush Nominates Roberts to Supreme Court*, CNN (July 20, 2005, 3:26 AM), <http://www.cnn.com/2005/POLITICS/07/19/scotus.main/> [<https://perma.cc/L8HT-9X4P>].

55. Dan Balz & Darryl Fears, *Some Disappointed Nominee Won't Add Diversity to Court*, WASH. POST (July 21, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/20/AR2005072002381.html> [<https://perma.cc/QL6S-7MJY>].

56. Julie Hirschfeld Davis, *Factions Lobby Bush on Court*, BALT. SUN (Oct. 3, 2005), <https://www.baltimoresun.com/news/bs-xpm-2005-10-03-0510030081-story.html> [<https://perma.cc/A8C5-L52D>]. "As a woman myself," Laura Bush explained to American Urban Radio, "I hope it will be a woman." *Id.*

57. 151 CONG. REC. S8521 (daily ed. July 20, 2005) (statement of Sen. Hutchinson).

58. Balz & Fears, *supra* note 55.

Today, very little has changed. Since 1790, of the 113 individuals who have served on the Court, only four have been women. Similarly, in over 225 years, only three justices have been persons of color (two presently serving on the Court). A male judge replacing Justice O'Connor would have resulted in only one woman serving the Court—something that Justice O'Connor told a reporter in 2005 was “not acceptable.”<sup>59</sup> In the end, President Bush withdrew his nomination of John Roberts to replace Justice O'Connor. Instead, at Chief Justice William Rehnquist's retirement, he named Roberts to replace him as chief justice of the Supreme Court and another man, “Samuel A. Alito, Jr., . . . ultimately filled O'Connor's seat on the bench.”<sup>60</sup> Tellingly, Justice O'Connor predicted that President Bush would not name a woman as chief justice, which she told a reporter “almost assures . . . there won't be a woman appointed to the court at this time.”<sup>61</sup>

Researchers at the Gavel Gap project, sponsored by the American Constitution Society for Law and Policy, find “troubling differences between the race and gender composition of the courts and the communities they serve.”<sup>62</sup> For two decades, they report, women have been about 50 percent of law students. Yet, within the legal profession, women do not comprise 50 percent of partners, general counsels, prosecutors, or judges. What explains this? Likely, not one answer. The 2017 report by Vault and the Minority Corporate Counsel Association (MCCA) on diversity in law firms sheds some light on the problem and presents alarming data, including the fact that, for law firms, the rate of recruiting and hiring Black lawyers “remains below pre-recession levels.”<sup>63</sup> As the report notes, “The decline is primarily among women.”<sup>64</sup> The researchers note that, “in both 2007 and 2008, more than 3 percent of lawyers hired were African-American women; since 2009 that number has not climbed above 2.77%, the most recent figure.”<sup>65</sup>

Quite possibly, the social sorting of women law graduates results in a stratification into law's invisible pink collar. In addition, women who do

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59. Rich Landers, *My Day with Sandra Day O'Connor*, SPOKESMAN-REV. (Oct. 24, 2018, 9:22 AM), <http://www.spokesman.com/stories/2018/oct/24/my-sandra-day/> [<http://perma.cc/FTX7-6ML6>].

60. See Paul M. Collins, Jr., Kenneth L. Manning & Robert A. Carp, *Gender, Critical Mass, and Judicial Decision Making*, 32 LAW & POL'Y 260, 275 n.1 (2010).

61. Balz & Fears, *supra* note 55.

62. GAVEL GAP, <http://gavelgap.org/> [<https://perma.cc/5DTL-FRSX>] (last visited Apr. 10, 2019).

63. VAULT & MCCA, 2017 VAULT/MCCA LAW FIRM DIVERSITY SURVEY 3 (2017), <https://www.mcca.com/wp-content/uploads/2017/12/2017-Vault-MCCA-Law-Firm-Diversity-Survey-Report.pdf> [<https://perma.cc/FL6F-2535>] (“For the last 10 years, the Minority Corporate Counsel Association (MCCA) and Vault have gathered detailed breakdowns of law firm populations by race/ethnicity, gender, sexual orientation and disability status across attorney levels—from summer associates hired to partners promoted, from the lawyers who serve on management committees to the attorneys who leave their firms—thus offering comprehensive demographic snapshots of the nation's leading law firms as well as of the industry as a whole.”).

64. *Id.* at 12.

65. *Id.*

place at elite firms might find the environments toxic and unwelcoming. The Vault-MCCA study shows that women of color are also overrepresented in departures from law firms.<sup>66</sup> In 2016, according to the most recent data available from their research, Black women lawyers departed firms at the highest rates among all women at 18.4 percent. Asian American women were next (14.4 percent), followed by Latinas (12.4 percent), and white women were the least likely among women to depart law firms (11.6 percent), which was still higher than that of white men (9.1 percent).<sup>67</sup> Obvious questions arise from the fact that women comprise nearly 50 percent of associates at law firms but make up only 19.8 percent of equity partners.<sup>68</sup> General counsel positions are equally stratified, even while “progress has certainly occurred since . . . there were only 11 minorities who were general counsel” at Fortune 500 companies in 1999.<sup>69</sup> According to a study focused on diversity and the bar, much of the slow but seemingly steady progress among women as general counsels has been concentrated among white women.<sup>70</sup>

Data on American courts tell a similar story. The Gavel Gap research focuses on state courts and, although we are concerned with the federal bench, their data provides an important parallel to our work. For instance, “people of color are 40% of the population, but less than 20% of state judges.”<sup>71</sup> In state courts, only 30 percent of judges are women, and, overall, 80 percent of judges are white.<sup>72</sup> The researchers find this data troubling—and for good reason. They write, “We find that courts are not representative of the people whom they serve—that is, a gap exists between the bench and the citizens.”<sup>73</sup>

Similar patterns exist in the federal judiciary. Despite the additions of Justices Sotomayor and Kagan to the Supreme Court (both appointed by a Democratic president, Barack Obama), women remain critically underrepresented in the judiciary at every level and barely crest a third of those presently serving on courts.<sup>74</sup> This long-standing problem of imbalanced or nonexistent representation of women in the American judiciary dates back to the founding and incorporation of the American

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66. *Id.*

67. *Id.*

68. *Nearly Half of Practicing Lawyers in Canada Are Women*, CATALYST (Oct. 2, 2018), <https://www.catalyst.org/knowledge/women-law> [<https://perma.cc/J9ND-3YGE>].

69. *The Concrete Ceiling: One Woman at a Time*, DIVERSITY & B. MAG., Winter 2017, at 9, 9, [http://www.diversityandthebardigital.com/datab/winter\\_2017/](http://www.diversityandthebardigital.com/datab/winter_2017/) [<https://perma.cc/7L72-A75R>].

70. *Id.*

71. GAVEL GAP, *supra* note 62.

72. TRACEY E. GEORGE & ALBERT H. YOON, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? 2, 12 (2016), <http://gavelgap.org/pdf/gavel-gap-report.pdf> [<http://perma.cc/8VZA-JU5K>].

73. *Id.* at 3.

74. Comm’n on Women in the Profession, *A Current Glance at Women in the Law*, A.B.A. 4 (Jan. 2018), <https://www.americanbar.org/content/dam/aba/administrative/women/a-current-glance-at-women-in-the-law-jan-2018.authcheckdam.pdf> [<https://perma.cc/8Z4L-TSXX>]. See generally Collins, Manning & Carp, *supra* note 60.

judiciary. In part, this could be explained by the prohibition of women serving as lawyers.<sup>75</sup> In its decision in *In re Goodell*,<sup>76</sup> the Wisconsin Supreme Court explained exactly why it believed women should be excluded from the practice of law:

We cannot but think the common law wise in excluding women from the profession of the law. . . . The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. . . . There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife.<sup>77</sup>

This decision echoed the U.S. Supreme Court's decision in *Bradwell v. Illinois*,<sup>78</sup> where the justices upheld legislation prohibiting women law graduates from practicing law.<sup>79</sup> Notably, Justice Joseph Bradley reasoned that law and nature deemed it "repugnant" for a woman to assume "a distinct and independent" civic life from her husband because by law she lacked fundamental capacities.<sup>80</sup> Thus, while it had been true that "civil law" imposed a "wide difference in the respective spheres and destinies of man and woman," male judges deflected their complicity and direct role in subordinating women's vocations.<sup>81</sup>

In *Bradwell*, the Court asserted that "nature herself" destined women to the domain of subservience in "[t]he constitution of the family organization."<sup>82</sup> Male judges attributed *their* discriminatory and stereotypic views of women to "nature." For example, Justice Bradley wrote that nature demanded a "proper timidity" in women and noted that it was a cardinal rule that a "woman had no legal existence separate from her husband."<sup>83</sup> He explained that "the paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother."<sup>84</sup> Most certainly, this had not been a cardinal rule in the United States for indigenous women, female immigrants, indentured servants, or women relegated to the cruel conditions of slavery, who were expected to toil and labor and had virtually no means of appealing to American courts to obtain a life of quiet, motherly repose.<sup>85</sup>

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75. See generally *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872); *In re Goodell*, 39 Wis. 232 (1875).

76. 39 Wis. 232 (1875).

77. *Id.* at 244–45.

78. 83 U.S. (16 Wall.) 130 (1872).

79. *Id.* at 139.

80. *Id.* at 141 (Bradley, J., concurring).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. See generally, e.g., HARRIET ANN JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL (1861) (telling the story of a woman growing up in slavery).

In reality, excluding women from obtaining licenses to become lawyers resulted in denying them the ability to practice law or ascend in myriad occupations within the legal profession, including the judiciary. Ultimately, this exclusion by men inured to the benefit of men and created monopolies in law governed by men. Law is only an example of this—similar patterns occurred in medicine.<sup>86</sup>

This historic problem continues to pervade the American judiciary. In this project, we report data on the federal appeals courts. Table 1 below places in context the concerns we raise: It was more than a century after *Bradwell* before female judges had a seat on all but two of the federal appellate courts.

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86. Harriot Kezia Hunt, one of the most famous early women doctors, was blocked from earning a medical degree for twenty years. Famously, male students at Harvard even protested her attendance at classes. See *Exhibitions: Changing the Face of Medicine: Celebrating America's Women Physicians*, NAT'L INST. HEALTH & HUM. SERVICES LIBR. MED., <http://www.nlm.nih.gov/hmd/about/exhibition/changingthefaceofmedicine.html> [https://perma.cc/7SVK-4XPQ] (last visited Apr. 10, 2019) (“Yet, when medicine became established as a formal profession in Europe and America, women were shut out. Nevertheless, they waged a long battle to gain access to medical education and hospital training . . . .”); *Harriot Kezia Hunt: American Physician*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Harriot-Kezia-Hunt> [https://perma.cc/G2A3-95UL] (last visited Apr. 10, 2019). See generally Laura Jefferson, Karen Bloor & Alan Maynard, *Women in Medicine: Historical Perspectives and Recent Trends*, 114 BRIT. MED. BULL. 5 (2015); Anthony T. Lo Sasso et al., *The \$16,819 Pay Gap for Newly Trained Physicians: The Unexplained Trend of Men Earning More Than Women*, 30 HEALTH AFF. 193 (2011); Allison Brown & Shannon Ruzycski, *The Idea That Medicine Is Above Sexism Is False—and Destructive*, HEALTHY DEBATE (June 13, 2018), <https://healthydebate.ca/opinions/sexism-in-medicine> [https://perma.cc/EA7D-ULJZ]; Dhruv Khullar, *Being a Doctor Is Hard. It's Harder for Women.*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/upshot/being-a-doctor-is-hard-its-harder-for-women.html> [https://perma.cc/C9ZD-9WW8].

Table 1: *Integration of Women in the Federal Appellate Judiciary*

Circuit	Year of Founding <sup>87</sup>	Year First Woman Appointed	First Woman Appointed	Appointing President
First	1891	1995	Sandra Lea Lynch	W. Clinton
Second	1891	1979	Amalya Lyle Kearse	J. Carter
Third	1891	1979	Dolores Korman Sloviter	J. Carter
Fourth	1891	1992	Karen J. Williams	H. W. Bush
Fifth	1891	1979	Phyllis A. Kravitch	J. Carter
Sixth	1891	1934	Florence E. Allen	F. Roosevelt
Seventh	1891	1992	Ilana Kara Diamond Rovner	H. W. Bush
Eighth	1891	1994	Diana E. Murphy	W. Clinton
Ninth	1891	1968	Shirley Ann Mount Hufstedler	L. Johnson
Tenth	1929	1979	Stephanie Kulp Seymour	J. Carter
Eleventh	1980	1981	Phyllis A. Kravitch	J. Carter
D.C.	1948	1979	Patricia Ann McGowan Wald	J. Carter
Federal	1893	1982	Helen Wilson Nies	R. Reagan

Women did not join the court until well after the courts of appeals were established. The first woman appointed to a U.S. court of appeals was Florence Allen in 1934, appointed to the Sixth Circuit by President Franklin D. Roosevelt.<sup>88</sup> However, she remained the only woman to serve on a U.S.

87. See *Court of Appeals of the District of Columbia*, FED. JUD. CTR., <https://www.fjc.gov/history/timeline/court-appeals-district-columbia> [<http://perma.cc/HE2K-CZ2T>] (last visited Apr. 10, 2019); *Eleventh Circuit*, FED. JUD. CTR., <https://www.fjc.gov/history/timeline/eleventh-circuit> [<https://perma.cc/XK9G-P8RK>] (last visited Apr. 10, 2019); *Tenth Circuit Reestablished*, FED. JUD. CTR., <http://www.fjc.gov/history/timeline/tenth-circuit-reestablished> [<https://perma.cc/MFJ4-LV6J>] (last visited Apr. 10, 2019); *U.S. Circuit Courts of Appeals*, FED. JUD. CTR., <http://www.fjc.gov/history/timeline/u.s.-circuit-courts-appeals-0> [<https://perma.cc/P66N-X3GE>] (last visited Apr. 10, 2019).

88. See *Florence Ellinwood Allen*, NAT'L WOMEN'S HALL FAME, <http://www.womenofthehall.org/inductee/florence-ellinwood-allen/> [<http://perma.cc/C7MX-57A4>] (last visited Apr. 10, 2019).

court of appeals until her departure in 1959. Another woman would not be seated until 1968, when President Lyndon B. Johnson appointed Shirley Ann Mount Hufstedler to the Ninth Circuit.<sup>89</sup>

In our research, we tracked these appointments. As of 2018, 754 judges had served on the U.S. courts of appeals and only 91 of those judges have been women. That is, roughly 12 percent of all court of appeals judges have been women. Currently, there are 269 sitting judges in the federal circuit courts, but only 73 of those judges are women. We emphasize this data to illumine two important matters. First, of the 91 women to ever sit on the courts of appeals, 73 are currently serving. This underscores both the historic legacy of women's exclusion and the recent trickling of inclusion. Second, women only represent roughly 27 percent, or a little over a fourth, of the judges currently serving on the bench. In some circuits, as few as two women have ever served as a judge.

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89. See *Hufstedler, Shirley Ann Mount*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/hufstedler-shirley-ann-mount> [<https://perma.cc/4BB9-MKAT>] (last visited Apr. 10, 2019).



*Table 2: Women of Color (WOC) Integrating the Federal Appellate Judiciary*

<b>Circuit</b>	<b>Year of Founding</b>	<b>Year First WOC Appointed</b>	<b>First WOC Appointed</b>	<b>Appointing President</b>
First	1891	2010	Ojetta Rogeriee Thompson	B. Obama
Second	1891	1979	Amalya Lyle Kearse	J. Carter
Third	1891	—	—	—
Fourth	1891	2003	Allyson Kay Duncan	H. W. Bush
Fifth	1891	—	—	—
Sixth	1891	2011	Bernice B. Donald	B. Obama
Seventh	1891	1999	Ann Claire Williams	W. Clinton
Eighth	1891	—	—	—
Ninth	1891	1998	Kim McLane Wardlaw	W. Clinton
Tenth	1929	—	—	—
Eleventh	1980	—	—	—
D.C.	1948	1994	Judith Ann Wilson Rogers	W. Clinton
Federal	1893	2015	Kara Farnandez Stoll	B. Obama

Importantly, the lack of diversity on the federal bench is not limited to sex or gender. The majority of female judges serving at both state and federal levels are white. White women are more likely to be nominated than nonwhite women to the federal judiciary. A look at appointments by presidents illustrate the change in the federal judiciary's composition. According to the Congressional Research Service, "of all the district court judges appointed by President Carter, 67% were white men; 11% were white women; 19% were non-white men; and 3% were non-white women."<sup>90</sup> In total, 86 percent of Carter's appointees were men. Surprising as it may seem given those statistics, President Carter broke ground with the number of

90. BARRY J. McMILLION, CONG. RESEARCH SERV., R43426, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS 21–22 (2017).

women he nominated to the federal bench. He nominated more women to circuit courts than all prior presidents combined.<sup>91</sup>

Even under President Barack Obama's administration, nonwhite women were significantly less likely as a group to be nominated to the federal judiciary.<sup>92</sup> During his administration, 15.7 percent of his district court appointees were nonwhite women, while 20.9 percent were nonwhite men and 25.4 percent were white women.<sup>93</sup> Almost 40 percent of President Barack Obama's district court appointees were white men.<sup>94</sup> That said, what action President Obama undertook to appoint women of color to the federal bench has been described as historic and unprecedented, and this likely reflects the near absence of consideration of women of color for federal judgeships during prior administrations. President Obama appointed seven of the nine Asian American women (or 78 percent) "to ever serve as federal district court judges. He also appointed each of the four multiracial women to ever serve as district court judges."<sup>95</sup> In total, "he . . . appointed 42 (or 45%) of the 93 non-white women to ever serve as U.S. district court judges."<sup>96</sup>

However, even with such an impressive record of appointments, as Table 2 indicates, the integration of women of color to the federal appellate judiciary has been a slow and incomplete process. No women of color have ever served as circuit judges in the Third, Fifth, Eighth, Tenth, or Eleventh Circuits.<sup>97</sup> Notably, these circuits include Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, New Mexico, and Texas, among other states. Common among each of the states identified are historically dense populations of people of color, as well as histories of racial subordination buttressed by institutional impediments of slavery and entrenched Jim Crow practices.

Perhaps one of the most powerful witnesses to the tragic normalcy or banality of Jim Crow racism in Southern states was Ms. Fannie Lou Hamer. Ms. Hamer's searing testimony before the Democratic National Convention in 1964 offers a potent lens into Jim Crow practices in the South.<sup>98</sup> Ms. Hamer had been arrested multiple times while attempting to exercise her constitutional right to vote. A transcription of a speech she gave elsewhere offers further background of her experience while attempting to vote:

I was led out of that cell and to another cell where they had two Negro prisoners. Three white men in that room and two Negroes. The state

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91. See *The Higher Education of the Nation's Black Women Judges*, 16 J. BLACKS HIGHER EDUC., Summer 1997, at 108, 108.

92. McMILLION, *supra* note 90, at 22.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. See *infra* Part III.

98. See *Fannie Lou Hamer (1917–1977): Testimony Before the Credentials Committee, Democratic National Convention*, AM. PUB. MEDIA, <http://americanradioworks.publicradio.org/features/sayitplain/flhamer.html> [<https://perma.cc/DUV5-8MCK>] (last visited Apr. 10, 2019).

highway patrolman ordered the first Negro to take the blackjack; it was a long leather blackjack and it was loaded with something heavy. And they ordered me to lay down on my face on a bunk bed. And the first Negro beat me. He had to beat me until the state highway patrolman give him orders to quit. Because he had already told him, said, "If you don't beat her," said, "you know what I'll do to you." And he beat me I don't know how long. . . . And it was a horrible experience.

And the state highway patrolman told the second Negro to take the blackjack. And I asked at this time, I said, "How can you treat a human being like this?"

The second prisoner said: "Move your hand, lady. I don't want to hit you in your hand." But I was holding my hand behind on the left side to shield some of the licks, because I suffered from polio when I was six years old and this kind of beating, I know I couldn't take it. So I held my hands behind me, and after the second Negro began to beat me, the state highway patrolman ordered the first Negro that had beat me to set on my feet to keep me from working my feet. And I was screaming, and I couldn't help but scream, and one of the white men began to beat me in my head and told me to "stop screaming." And the only way that I could stop screaming was to take my hand and hug it around the tip to muffle out the sound. My dress worked up from this hard blackjack and I pulled my dress down, taking my hands behind and pulled my dress down. And one of the city policemen walked over and pulled my dress as high as he could.

Five mens in this room while I was one Negro woman, being beaten, and at no time did I attempt to do anything but scream and call on God. I don't know how long this lasted, but after a while I must have passed out.<sup>99</sup>

All of this because an African American woman of the South desired to vote. States' leaders, including governors and legislators, directly orchestrated infringements on voting access (in some states requiring Blacks to guess the number of bubbles on bars of soap).<sup>100</sup> At the same time, state leaders undermined integration efforts related to schooling<sup>101</sup> and denied access to

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99. Fannie Lou Hamer, "We're on Our Way," *Speech Before a Mass Meeting Held at the Negro Baptist School in Indianola, Mississippi (September 1964)*, VOICES DEMOCRACY, <http://voicesofdemocracy.umd.edu/hamer-were-on-our-way-speech-text/> [https://perma.cc/HX6P-PYX8] (last visited Apr. 10, 2019).

100. See Maya Rhodan, *Transcript: Read Full Text of President Barack Obama's Speech in Selma*, TIME (Mar. 7, 2015), <http://time.com/3736357/barack-obama-selma-speech-transcript/> [https://perma.cc/SLN8-Z5AJ].

101. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

parks, swimming pools,<sup>102</sup> drinking fountains,<sup>103</sup> bathrooms,<sup>104</sup> lunch counters,<sup>105</sup> and accommodations.<sup>106</sup>

The legacies of Jim Crow and slavery continue to be litigated in some of these states, particularly with regard to voting rights, women's reproductive freedoms, and discrimination specifically experienced by or targeting Black women.<sup>107</sup> Likely for these reasons, people of color and other vulnerable populations have long articulated the importance of diverse representation within the judiciary. Part II further explores both why integrating the bench matters and the challenges of homogeneity within the judiciary.

## II. HOMOGENEITY AND THE COURTS

Despite crucial advancements in the rights of women and girls brought about through legislative and judicial victories, historically, the Supreme Court has shown antipathy or, at best, disregard for the rights and concerns of women. Could this be explained by homogeneity on the Court?

### A. Reproductive Health

Women's presence within the legal profession, and specifically the courts, matters because men have too often failed to uphold the civil liberties and civil rights of women, particularly when women have been most vulnerable to abuse by state authorities. Perhaps no case illustrates this concern better than the 1927 decision *Buck v. Bell*. In that case, the Supreme Court upheld a Virginia law permitting the compulsory sterilization of individuals deemed socially, morally, or mentally "unfit."<sup>108</sup>

Carrie Buck, raped and impregnated at age sixteen, was involuntarily confined by the state of Virginia at its "[c]olony"—the same colony that Carrie's mother, Emma, was sent to in 1920.<sup>109</sup> There, the state forcibly sterilized girls as young as ten and eleven under the theory that the procedure would prevent them from birthing "unfit" individuals who would overwhelm

102. See Niraj Chokshi, *Racism at American Pools Isn't New: A Look at a Long History*, N.Y. TIMES (Aug. 1, 2018), <https://www.nytimes.com/2018/08/01/sports/black-people-pools-racism.html> [<https://perma.cc/353A-JPEY>].

103. See generally Elizabeth Abel, *Bathroom Doors and Drinking Fountains: Jim Crow's Racial Symbolic*, 25 CRITICAL INQUIRY 435 (1999).

104. See generally *id.*

105. See *Equal Access to Public Accommodations*, VA. MUSEUM HIST. & CULTURE, <https://www.virginiahistory.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/equal-access> [<https://perma.cc/AH8N-LUKB>] (last visited Apr. 10, 2019).

106. See *id.*

107. See generally *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750 (8th Cir. 2018) (relitigating, substantively, abortion-access laws struck down by the Supreme Court prior to Justices Kavanaugh and Gorsuch serving on the Court); *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018 (11th Cir. 2016) (upholding the district court decision denying the plaintiff relief for discrimination based on her chosen "natural" hairstyle); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (challenging the Texas voter identification law);

108. *Buck v. Bell*, 274 U.S. 200, 207 (1927). See generally ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* (2016).

109. *Buck*, 274 U.S. at 205.

state resources.<sup>110</sup> In a chilling decision, the Supreme Court upheld the eugenics law. Chief Justice Oliver Wendell Holmes wrote the Court's opinion, stating that "three generations of imbeciles are enough"<sup>111</sup> and the very authority that gives states the power to vaccinate is broad enough to compel the sterilization of women and men deemed socially unfit.<sup>112</sup> In Carrie Buck's case, the state of Virginia measured her undesirability with a eugenics yardstick, which left very little room for social circumstances.<sup>113</sup>

The state invoked Carrie's poverty, perceived intellectual shortcomings, teenage pregnancy, and family history of alcoholism to justify its program.<sup>114</sup> Thousands of Virginians and others throughout the United States were surrendered to public health officials for compulsory sterilizations.<sup>115</sup> In the arranged test case that followed, Holmes reduced Buck's Fourteenth Amendment claims to a frivolous "last resort."<sup>116</sup> He wrote:

It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.<sup>117</sup>

Justice Holmes concluded that "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."<sup>118</sup> The Court's lone dissenter, Justice Pierce Butler, did not author an opinion. Despite the Court's opportunity to overturn *Buck* in *Skinner v. Oklahoma*,<sup>119</sup> the Court did not do so—the case and its underlying principle remain good law.<sup>120</sup>

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110. *Id.* at 207–08.

111. *Id.* at 207.

112. *See id.* The state of Virginia claimed that Buck possessed low social character and intelligence; it predicted that, were she to have more children, they would be born with inferior intelligence. She and others like her were collected by public health officials to be sterilized. However, years after the case, Holmes and public health officials in Virginia were proven wrong: Buck's daughter, Vivian, was described as "very bright" and, after reviewing her school records, Harvard biologist Stephen Jay Gould found "that she received strong grades in 'development' and did reasonably well in her academic subjects." *See* COHEN, *supra* note 108, at 292. He also "concluded that Vivian was a 'quite average student' and perfectly normal." *Id.*

113. *See, e.g.*, Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 51–54 (1985).

114. *See id.* at 62.

115. *See id.* at 31.

116. *Buck*, 274 U.S. at 208; *see also* Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and the History of Equal Protection*, 90 MINN. L. REV. 106, 107 (2005). Holmes's other famous epigram from the infamous case has been far less scrutinized. Siegel, *supra*, at 107.

117. *Buck*, 274 U.S. at 207.

118. *Id.*

119. 316 U.S. 535 (1942).

120. *Id.* at 544 (Stone, C.J., concurring).

The Court's later ruling in *Roe v. Wade*,<sup>121</sup> finding that the Constitution establishes a woman's reproductive autonomy and privacy, marked a stark contrast to *Buck*. In *Roe*, Justice Harry Blackmun, writing for the majority, canvassed history to show that abortion was not criminalized at the founding of the United States and, more importantly, to illustrate that women suffer significant harm when the state prohibits them from controlling their reproductive health and family planning.<sup>122</sup> However, as Justice Ginsburg reminded members of the Senate during her confirmation hearing for the Supreme Court, *Roe* was "as much [a decision about] a doctor's right to freely exercise his profession" as it was about women's liberty interests in making decisions about their personal lives.<sup>123</sup> In response to Senator Metzenbaum, Ginsburg reflected on what she called an "adjustment" in "moving from *Roe* to *Casey*," where, in the former, "the right of the doctor to freely exercise his profession" was central.<sup>124</sup> In the latter, she explained,

at least the opinion of three of the Justices in that case, makes it very clear that the woman is central to this. She is now standing alone. This is her right. It is not her right in combination with her consulting physician. The cases essentially pose the question: Who decides; is it the State or the individual? In *Roe*, the answer comes out: the individual, in consultation with her physician. We see in the physician something of a big brother figure next to the woman. The [*Casey*] decision, whatever else might be said about it, acknowledges that the woman decides.<sup>125</sup>

One meaningful distinction between the *Roe* Court and the composition of the Court at the time of *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>126</sup> was the addition of Justice Sandra Day O'Connor.

Despite the principles undergirding *Roe* and the Court's subsequent decision in *Casey*, some state legislatures—particularly those with marginal representation of women, such as Mississippi,<sup>127</sup> Texas,<sup>128</sup> Louisiana,<sup>129</sup> and Alabama,<sup>130</sup> among others—persist in their attempts to infringe upon those rights. For this reason, contemporary threats to dismantle reproductive health care rights and forging that platform through courts adds urgency to evaluating the legitimacy of the judiciary.<sup>131</sup> In the reproductive health realm, these are life and death matters.

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121. 410 U.S. 113 (1973).

122. *Id.* at 138–41.

123. *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 208 (1993).

124. *Id.* at 150.

125. *Id.*

126. 505 U.S. 833 (1992).

127. Women comprise 13.8 percent of the Mississippi legislature. *Women in State Legislatures for 2019*, NAT'L CONF. ST. LEGISLATURES (Feb. 14, 2019), <http://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-in-state-legislatures-for-2019.aspx> [https://perma.cc/4W4W-SSCT].

128. Women comprise 23.2 percent of the Texas legislature. *Id.*

129. Women comprise 15.3 percent of the Louisiana legislature. *Id.*

130. Women comprise 15.7 percent of the Alabama legislature. *Id.*

131. Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016, 10:00 PM), <https://www.cnbc.com/2016/10/19/trump->

Simply put, women in the United States now die during pregnancy at unprecedented rates.<sup>132</sup> Texas holds the regrettable distinction of the deadliest state in the developed world to birth a child.<sup>133</sup> It is also a state with an overwhelmingly male legislature, which prides itself on enacting the most restrictive abortion laws in the nation.<sup>134</sup> As the *Texas Tribune* wrote in 2017, “[O]nce again, the Texas Legislature is mostly, white, male, [and] middle-aged.”<sup>135</sup> At that time, men held nearly “80 percent of the Legislature’s seats.”<sup>136</sup>

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ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html [http://perma.cc/45WL-V62Z]; Anna North, *How Trump Helped Inspire a Wave of Strict New Abortion Laws*, VOX (Nov. 21, 2018, 4:07 PM), <https://www.vox.com/2018/3/22/17143454/trump-ohio-heartbeat-bill-abortion-ban-mississippi> [https://perma.cc/JX9V-56QP]; Michael D. Shear & Maggie Haberman, *Trump Interviews 4 Supreme Court Prospects in Rush to Name Replacement*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/us/politics/trump-supreme-court-nomination.html> [https://perma.cc/32W9-LFQD] (“In one debate, Mr. Trump said he would appoint two or three anti-abortion justices to the court, so a more conservative majority could overturn *Roe v. Wade*.”).

132. See generally, e.g., IEG WORLD BANK ET AL., DELIVERING THE MILLENNIUM DEVELOPMENT GOALS TO REDUCE MATERNAL AND CHILD MORTALITY: A SYSTEMATIC REVIEW OF IMPACT EVALUATION EVIDENCE (2016), <https://www.oecd.org/derec/norway/WORLDBANKDeliveringtheMDGtoreducematernalandchildmortality.pdf> [http://perma.cc/WEY5-ESMG]; Marian F. MacDorman et al., *Recent Increases in the U.S. Maternal Mortality Rate*, 128 OBSTETRICS & GYNECOLOGY 447 (2016); U.S. “Most Dangerous” Place to Give Birth in Developed World, *USA Today Investigation Finds*, CBS NEWS (July 26, 2018, 6:15 AM), <https://www.cbsnews.com/news/us-most-dangerous-place-to-give-birth-in-developed-world-usa-today-investigation-finds/> [https://perma.cc/D2QE-WY9Y]; *The World Factbook—Country Comparison: Maternal Mortality Rate*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2223rank.html> [https://perma.cc/FCN2-ARW7] (last visited Apr. 10, 2019).

133. Sophie Novack, *Texas’ Maternal Mortality Rate: Worst in Developed World, Shrugged Off by Lawmakers*, TEX. OBSERVER (June 5, 2017, 6:04 PM), <http://www.texasobserver.org/texas-worst-maternal-mortality-rate-developed-world-lawmakers-priorities> [https://perma.cc/U2VS-FXVL] (noting that the Texas maternal mortality rate “now exceeds that of anywhere else in the developed world”); Katha Pollitt, *The Story Behind the Maternal Mortality Rate in Texas Is Even Sadder Than We Realize*, NATION (Sept. 8, 2016), <http://www.thenation.com/article/the-story-behind-the-maternal-mortality-rate-in-texas-is-even-sadder-than-we-realize> [https://perma.cc/C6CY-PKK7] (“Unbelievably, Texas now has the highest rate of maternal mortality in the developed world.”).

134. Alex Zielinski, *The Growing List of Anti-Abortion Bills Texas Conservative Lawmakers Hope to Pass This Year*, SAN ANTONIO CURRENT (Jan. 25, 2017, 6:30 AM), <https://www.sacurrent.com/the-daily/archives/2017/01/25/the-growing-list-of-anti-abortion-bills-texas-conservative-lawmakers-hope-to-pass-this-year> [https://perma.cc/39NG-Y69P] (“In the past few months, state lawmakers have filed no less than 17 anti-abortion bills (and judging by past legislative sessions, more are on the horizon).”).

135. Alexa Ura & Jolie McCullough, *Once Again, the Texas Legislature Is Mostly White, Male, Middle-Aged*, TEX. TRIB. (Jan. 9, 2017, 12:00 AM), <https://www.texastribune.org/2017/01/09/texas-legislature-mostly-white-male-middle-aged/> [https://perma.cc/D28H-2HWR] (“The members of the Texas Legislature may be elected to represent all corners of the state, but they’re not necessarily reflective of it.”).

136. *Id.*

The erosion of reproductive health care rights and access,<sup>137</sup> as well as the criminalization of women's conduct during pregnancy,<sup>138</sup> underscore the importance of scrutinizing the Court and its lower branches. Even while *Casey* and the basic principles of the Court's decision in *Roe* still stand, these cases are increasingly vulnerable and regularly under attack.<sup>139</sup> A study issued by the American Civil Liberties Union reports that thirty-five states proposed over 300 abortion rights restrictions in 2013 alone.<sup>140</sup> In part, this accounts for the rise of the Tea Party, an evangelical, conservative movement that swept into American legislatures shortly after Barack Obama's election. From 2010 to 2015, state legislatures proposed and succeeded in enacting more regulations to restrict abortion and contraceptive access than in the prior three decades combined.<sup>141</sup>

In 2014, the Guttmacher Institute published a report placing this legislative movement in context. The report explained that "[t]he goal of antiabortion advocates is to make abortion impossible to obtain by layering multiple restrictions, even though many claim that their motivation is only to protect women's health."<sup>142</sup> These efforts to derail women's privacy rights are well funded and coordinated in legislatures throughout the nation. During this period, seventy antiabortion restrictions were enacted in twenty-two states<sup>143</sup>—the second highest number of restrictions passed in one legislative session. In fact, "[n]o year from 1985 through 2010 saw more than 40 new abortion restrictions; however, every year since 2011 has topped that number."<sup>144</sup>

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137. See 2 CTR. FOR REPROD. RIGHTS, EVALUATING PRIORITIES: MEASURING WOMEN'S AND CHILDREN'S HEALTH AND WELL-BEING AGAINST ABORTION RESTRICTIONS IN THE STATES (2017), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/USPA-lbis-Evaluating-Priorities-v2.pdf> [<https://perma.cc/4YFW-7R3B>] (highlighting the number of abortion restrictions introduced by year and by state).

138. See generally Michele Goodwin, *How the Criminalization of Pregnancy Robs Women of Reproductive Autonomy*, 47 HASTINGS CTR. REP., Nov./Dec. 2017, at S19.

139. Recently, the Fifth, Eighth, and Eleventh Circuits released opinions that aim to dismantle *Roe* and ultimately reduce access to abortion. See *June Med. Servs. LLC v. Gee*, 905 F.3d 787 (5th Cir. 2018); *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750 (8th Cir. 2018); *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310 (11th Cir. 2018), *petition for cert. filed*, No. 18-837 (Jan. 3, 2019).

140. *Abortion Access Under Attack in 2013*, ACLU, <http://www.aclu.org/maps/states-where-they-think-were-stupid-abortion-access-under-attack-2013> [<https://perma.cc/LJ3C-VY4R>] (last visited Apr. 10, 2019).

141. Laura Bassett, *More Abortion Laws Enacted in Past 3 Years Than in Entire Previous Decade*, HUFFINGTON POST (Dec. 6, 2017), [http://www.huffingtonpost.com/2014/01/03/states-abortion-laws\\_n\\_4536752.html](http://www.huffingtonpost.com/2014/01/03/states-abortion-laws_n_4536752.html) [<https://perma.cc/P7W2-XWB7>].

142. Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 GUTTMACHER POL'Y REV. 70, 70 (2015).

143. Those twenty-two states were: Alabama, Arizona, Arkansas, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, and Wisconsin. For the specific provisions passed by each, see Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, 17 GUTTMACHER POL'Y REV. 9, 11 (2014).

144. *Id.* at 9 (explaining that states enacted ninety-two abortion restrictions in 2011, forty-three restrictions in 2012, and seventy restrictions in 2014).



In this regard, our intervention is unique. Legal theorists have long tussled with measuring the Court's legitimacy—some concluding that it is simply countermajoritarian.<sup>145</sup> We take an alternative view. Given the history of sex bias located in the Court's jurisprudence and its perpetuation of harmful sex stereotypes in relation to women's rights and authority over their lives,<sup>146</sup> one measure of judicial legitimacy is sex representation and not simply how judges cast their votes. Who sits on courts matters not simply for political persuasion but also for gender and sex competency.<sup>147</sup>

A lack of critical mass<sup>148</sup> in any polity risks producing both sociological and normative illegitimacy, including within courts. Our concern is that this illegitimacy produces spillage that leaks into women's rights and drowns their interests behind the façade of neutrality and rationality. A body that lacks a critical mass of women can produce and reify tokenism, and it can create barriers to meaningful participation and persuasion.<sup>149</sup> Further, a critical mass within an organization has the potential to enhance governance

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145. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–18 (2d ed. 1986).

146. *See, e.g.*, *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (“[W]oman is still regarded as the center of home and family life.”); *Buck v. Bell*, 274 U.S. 200, 207–08 (1927); *see also* *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) (finding an article of the Louisiana state constitution that limited female jury service to be unconstitutional), *abrogated by* *Taylor v. Louisiana*, 419 U.S. 522 (1975).

147. Currently at least two of nine justices on the U.S. Supreme Court have been accused of sexual harassment or sexual assault. *See generally* JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994); *supra* note 2 and accompanying text. Some women have gone so far as to urge the impeachment of Justice Thomas. *See, e.g.*, Jill Abramson, *Do You Believe Her Now?*, N.Y. MAG. (Feb. 19, 2018), <http://nymag.com/intelligencer/2018/02/the-case-for-impeaching-clarence-thomas.html> [<https://perma.cc/V5UM-S8SX>] (“[G]iven the evidence that’s come out in the years since, it’s also time to raise the possibility of impeachment. Not because he watched porn on his own time, of course. Not because he talked about it with a female colleague—although our understanding of the real workplace harm that kind of sexual harassment does to women has evolved dramatically in the years since, thanks in no small part to those very hearings. Nor is it even because he routinely violated the norms of good workplace behavior, in a way that seemed especially at odds with the elevated office he was seeking. It’s because of the lies he told, repeatedly and under oath, saying he had never talked to Hill about porn or to other women who worked with him about risqué subject matter.”).

148. The theory of critical mass refers to a minimum or sufficient percentage of individuals who share ideology or affinity, collectively believe in an ideal, or contribute to an action such that they are able to exert influence, inspire interest in their platforms, produce desired outcomes, and avoid tokenism. *See* ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 206–21 (1977); Drude Dahlerup, *From a Small to a Large Minority: Women in Scandinavian Politics*, 11 *SCANDINAVIAN POL. STUD.* 275, 280 (1988); Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 *AM. J. SOC.* 965, 966, 969–77 (1977); *see also* Pamela Oliver et al., *A Theory of the Critical Mass. I. Interdependence, Group Heterogeneity, and the Production of Collective Action*, 91 *AM. J. SOC.* 522, 524 (1985) (calling attention to collective action depending on a critical mass). *See generally* MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

149. Professors Lord and Saenz argue that tokenism can result in deficits, such as decreases in performance. *See generally* Charles G. Lord & Delia S. Saenz, *Memory Deficits and Memory Surfeits: Differential Cognitive Consequences of Tokenism for Tokens and Observers*, 49 *J. PERSONALITY & SOC. PSYCHOL.* 918 (1985).

and achieve substantive equality goals.<sup>150</sup> As one of the foundational works on critical mass theory explains, “[g]roups fortunate enough to have a critical mass can enjoy the collective good,” such as rights and privileges, but “less fortunate groups cannot.”<sup>151</sup>

Given what is at stake—laws that would seek to undermine the health and safety of women—who sits on courts, in the legislature, and in the White House is more than a lofty academic concern. As Justice Breyer has noted, women are fourteen times more likely to die carrying a pregnancy to term than terminating the pregnancy.<sup>152</sup> Consequentially, the active presence of women in the body politic is a question of women’s basic personhood, which implicates quality of health, life, and even death. Thus, state efforts to force women into continuing pregnancies by banning abortion, undermining access to reproductive health information, or imposing unconstitutional constraints on providers, directly implicate more than financial concerns; they involve whether pregnant women have a right to life and information.

### B. *The Broader Problem of Homogeneity*

Even while our research takes up the case of women on federal courts of appeals, it is worth pointing out that the lack of diversity within the federal judiciary extends beyond sex to include other demographic factors—namely, race, class, religion, geography, and even where judges matriculate. Elsewhere, commentators highlight some of the concerns we identify. For example, every justice on the Supreme Court has attended either Harvard or Yale Law School.<sup>153</sup> Out of more than 250 accredited law schools in the United States, the Court is comprised of graduates from only three: Yale, Harvard, and Columbia.<sup>154</sup> Moreover, these three schools share many similarities—for example, all three are on the East Coast. In the case of Columbia, but for Justice Ginsburg transferring to that school, she likely would have graduated from Harvard Law School, which further narrows the Court’s academic diversity to two law schools.

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150. VICKI W. KRAMER, ALISON M. KONRAD & SUMRU ERKUT, *CRITICAL MASS ON CORPORATE BOARDS: WHY THREE OR MORE WOMEN ENHANCE GOVERNANCE* iv (2006), <https://www.wcwonline.org/vmfiles/WCW11.pdf> [<https://perma.cc/3NCU-97EW>] (“Many of our informants believe that women are more likely than men to ask tough questions and demand direct and detailed answers.”).

151. Oliver et al., *supra* note 148, at 542.

152. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016); *see also* Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *OBSTETRICS & GYNECOLOGY* 215, 215–19 (2012).

153. We also recognize that the justices may differ radically in philosophy even if they graduate from the same law schools. Nevertheless, judicial nominations that implicitly narrow candidates by where they attended law school seems arbitrary. *See* William Wan, *Every Current Supreme Court Justice Attended Harvard or Yale. That’s a Problem, Say Decision-Making Experts.*, WASH. POST (July 11, 2018), <https://www.washingtonpost.com/news/speaking-of-science/wp/2018/07/11/every-supreme-court-justice-attended-harvard-or-yale-thats-a-problem-say-decision-making-experts/> [<https://perma.cc/CC67-2KMY>].

154. In Justice Ginsburg’s case, she began her legal studies at Harvard and then graduated from Columbia. *Id.*

Notably, other elite academic institutions admit and graduate students of comparable academic caliber and experience. Equally exceptional law students matriculate at law schools that do not share the ranks of Harvard, Yale, or Columbia. In light of studies supporting the conclusion that diversity leads to more nuanced arguments and decision-making, what should be made of the silo effect at the Supreme Court?<sup>155</sup> At the very least, homogeneity within the Court should not be ignored as it suggests the possibility that the justices may be out of touch with the common realities of the American people, especially those from historically marginalized backgrounds, including people of color, the working poor, and, specifically to our project, women of all backgrounds.<sup>156</sup>

### 1. Prior Employment

People on the Court and within the pipeline to the Court are homogenous not just with respect to their academic institutions, but also their prior employment. In fact, “[a]t no other time in American history has the Court been composed of justices so alike in terms of their career experience,”<sup>157</sup> academic credentials,<sup>158</sup> and religions.<sup>159</sup> In a 2003 law review article, Professors Lee Epstein, Jack Knight, and Andrew Martin argue that the “norm of prior judicial experience—one that makes previous service on the (federal) bench a near prerequisite for office”—results in the Court losing an important dimension of diversity: career diversity.<sup>160</sup> As they point out, “the lack of career diversity apparently resulting from the norm of prior judicial experience” ultimately hampers “the ability of the decision-making group to perform its responsibilities.”<sup>161</sup>

Professor Epstein and her colleagues offer two reasons why homogeneity on the Court is a point of concern. First, “[t]he current Court’s career homogeneity suggests that it is not making optimal choices, or at least choices less optimal than those made by its more diverse predecessors.”<sup>162</sup> Second, as they explain it, “since women and members of racial/ethnic minorities are less likely than White men to hold the positions that are currently steppingstones to the bench, the norm of prior judicial experience is working to limit not only career diversity, but also gender and racial/ethnic

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155. *Id.*

156. See Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903, 905 (2003).

157. *Id.* at 908–09.

158. Five of the sitting justices attended Harvard, and four attended Yale. See *Current Members*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/K6YD-VKHK>] (last visited Apr. 10, 2019).

159. Six of the sitting justices are Catholic, and three are Jewish.

160. Epstein, Knight & Martin, *supra* note 156, at 906.

161. *Id.* at 908 (arguing that “there now exists a norm of prior judicial experience that induces a highly problematic level of career homogeneity on the Court”).

162. *Id.*

diversity.”<sup>163</sup> To this latter point, the lack of racial diversity and the lack of religious diversity on the Court are equally important considerations.

## 2. Religious Affiliation

Religious affiliation on the Court has come to matter in significant ways, given the state-level challenges to reproductive rights and efforts to undermine *Roe v. Wade*. Currently, six Catholic justices serve on the Court, while the other three are Jewish.<sup>164</sup> Of the Court’s conservative justices, all are male and Catholic: Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh. Catholic conservative male justices currently comprise the majority of the Court. However, fewer than 24 percent of Americans identify as Catholic.<sup>165</sup> This matters not only because of the Catholic Church’s policies related to women and reproductive health and rights,<sup>166</sup> but also in terms of the justices’ voting records on the Court or their records before serving on the Court. However, a judge’s religion need not dictate or reflect his voting record on the Court.

In this instance, the reproductive rights voting records of the Court’s majority overlaps with restrictive family planning policies of the Catholic Church. Those policy positions include opposition to both abortion and mandated contraceptive health coverage in insurance plans.<sup>167</sup> In recent years, the conservative justices’ votes in *Hobby Lobby*, *Whole Woman’s Health v. Hellerstedt*,<sup>168</sup> and *National Institute of Family & Life Advocates* are more in line with Catholic doctrine than the Court’s precedent. In each case, the Court’s conservative justices collectively engaged in

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163. *Id.*

164. Justice Gorsuch was raised Catholic, but while he was a Tenth Circuit judge he worshipped at an Episcopalian church in Denver. See Daniel Burke, *What Is Neil Gorsuch’s Religion? It’s Complicated*, CNN (Mar. 22, 2017, 2:37 PM), <https://www.cnn.com/2017/03/18/politics/neil-gorsuch-religion/index.html> [<https://perma.cc/C2MA-E9YQ>]; Julie Zauzmer, *Neil Gorsuch Belongs to a Notably Liberal Church—and Would Be the First Protestant on the Court in Years*, WASH. POST (Feb. 1, 2017), <https://www.washingtonpost.com/news/acts-of-faith/wp/2017/02/01/neil-gorsuch-belongs-to-a-notably-liberal-church-and-would-be-the-first-protestant-on-the-court-in-years/> [<https://perma.cc/5WGL-3LPH>]. Because of his Catholic upbringing and self-identification in the past, this Essay categorizes him as Catholic. See, e.g., Sarah McCammon & Domenico Montanaro, *Religion, the Supreme Court and Why It Matters*, NPR (July 7, 2018, 11:42 AM), <https://www.npr.org/2018/07/07/626711777/religion-the-supreme-court-and-why-it-matters> [<https://perma.cc/79NG-4HCL>] (“Today, six of the nine justices are Catholic—if you count Neil Gorsuch, who was raised Catholic and has attended an Episcopal Church.”).

165. See David Masci & Gregory A. Smith, *7 Facts About American Catholics*, PEW RES. CTR. (Oct. 10, 2018), <http://www.pewresearch.org/fact-tank/2018/10/10/7-facts-about-american-catholics/> [<https://perma.cc/G4WS-XLQ8>].

166. See, e.g., Rosemary Radford Ruether, *Contraception, Religion in Public Policy, Essay: Women, Reproductive Rights and the Church*, CATHOLICS FOR CHOICE (May 2006), [http://www.catholicsforchoice.org/issues\\_publications/women-reproductive-rights-and-the-church-2/](http://www.catholicsforchoice.org/issues_publications/women-reproductive-rights-and-the-church-2/) [<https://perma.cc/84ZR-5CYG>].

167. *Id.*

168. 136 S. Ct. 2292 (2016).

exceptionalism<sup>169</sup>: in each case, their votes against advancing women’s reproductive health carved out an exception to existing law.

Table 3: *The Supreme Court: Race, Religion, and Law School*

Judge	Year Appointed	Ethnicity/ Racial Identity	Law School	Religion
Chief Justice John Roberts	2005	White	Harvard	Catholic
Justice Clarence Thomas	1991	Black	Yale	Catholic
Justice Ruth Bader Ginsburg	1993	White	Columbia (Harvard)	Jewish
Justice Stephen Breyer	1994	White	Harvard	Jewish
Justice Samuel Alito	2006	White	Yale	Catholic
Justice Sonia Sotomayor	2009	Latina	Yale	Catholic
Justice Elena Kagan	2010	White	Harvard	Jewish
Justice Neil Gorsuch	2017	White	Harvard	Catholic
Justice Brett Kavanaugh	2018	White	Yale	Catholic

### 3. Pipeline Exclusion and Rejection

A common reason given for so few people of color, women of color, and white women in various elite legal careers is that the pools are not sufficient in mass or quality: *it is the failure of the marketplace to produce strong talent*. In part, this may be true; systemic exclusion and state-level segregation undermines the enterprise of inclusion and building strong pipelines of talent. Exclusion of historically vulnerable and marginalized populations at elite and non-elite law schools, as well as the marketplace outright rejecting “qualified” candidates, combine to create homogenous

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169. In *Hobby Lobby*, the Court stated that its ruling, establishing religious personhood in closely held corporations such that those businesses could legally deny their female employees insurance coverage for certain contraceptives, applied only to the facts of that case and thus did not extend to religions that oppose vaccination or blood transfusion. 134 S. Ct. 2751, 2783 (2014). In *Whole Woman’s Health*, one of the Court’s conservative justices dissented in a ruling that struck down a Texas law that imposed unconstitutional burdens on a woman’s access to abortion. 136 S. Ct. at 2321 (Thomas, J., dissenting). In *National Institute of Family & Life Advocates v. Becerra*, the Court struck down a California law and retreated from decades-long jurisprudence upholding state notification requirements that protect consumers. 138 S. Ct. 2361, 2378 (2018). In that case, the Court ruled that crisis pregnancy centers need not post whether they are licensed medical facilities. *Id.* Nor were they required to post information about state abortion services. *Id.* at 2375–76.

silos in law, including in American courts.<sup>170</sup> Yet, as much as the marketplace rationale holds to justify or explain siloed courts and thin legal career pipelines for women, the argument has weaknesses.

The notable experiences of Justices Ruth Bader Ginsburg and Sandra Day O'Connor struggling to secure employment after distinguished performances at elite law schools highlight the enduring fallacy that talented, "qualified" women are simply not available for the profession—both women graduated at the top of their classes.<sup>171</sup> Their experiences represented a far more systemic, rather than episodic, pattern of discrimination against talented women law graduates at the time. Women of color suffered similarly, encountering both racism and sexism. Sometimes the sexism they encountered emanated from within their communities. In Pauli Murray's case, not only did she graduate first in her class from Howard University Law School, she was denied admission at Harvard University because of her sex, even though "[t]he usual reward for graduating in this position is a prestigious fellowship at Harvard University."<sup>172</sup>

In Murray's case, as with so many other Black students of her era, many law schools, elite and otherwise, simply refused to admit Black students or imposed quotas. Famously, because the University of Maryland barred Black students from admission, Justice Thurgood Marshall, a Baltimore native, attended Howard University Law School instead.<sup>173</sup> The University of Texas also banned Black students from admission, leading to the Supreme Court ruling in *Sweatt v. Painter*,<sup>174</sup> which ordered the school to admit Herman Sweatt. He later withdrew given the racial hostility directed toward him.<sup>175</sup>

Judge Harry Edwards's paper given at the 2017 University of Michigan Law School's African American Alumni Reunion spoke in part to the concern that there simply are not qualified candidates.<sup>176</sup> In one passage of his paper, Judge Edwards reflected on his graduation from the University of Michigan Law School:

When I graduated from the University of Michigan Law School in 1965, I was the only black student in the school, and there were no African

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170. Harry T. Edwards, Reflections on Racial Stigmas and Stereotyping 2 (Mar. 25, 2017), [http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Publications+-+HTE+-+2017+-+Reflections+on+Racial+Stigmas+and+Stereotyping/\\$FILE/2017+-+Reflections+on+Racial+Stigmas.pdf](http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Publications+-+HTE+-+2017+-+Reflections+on+Racial+Stigmas+and+Stereotyping/$FILE/2017+-+Reflections+on+Racial+Stigmas.pdf) [<https://perma.cc/QMN2-3Z4J>]; see also Michele Goodwin, *The Death of Affirmative Action?*, 2013 WIS. L. REV. 715, 715–17.

171. See, e.g., LINDA HIRSHMAN, SISTERS IN LAW: HOW SANDRA DAY O'CONNOR AND RUTH BADER GINSBURG WENT TO THE SUPREME COURT AND CHANGED THE WORLD 13–14 (2016).

172. *Timeline*, PAULI MURRAY PROJECT, <https://paulimurrayproject.org/pauli-murray/timeline/> [<https://perma.cc/8TVK-3YGQ>] (last visited Apr. 10, 2019).

173. *Thurgood Marshall, Civil Rights Lawyer*, BALTIMORE SUN (Feb. 26, 2007), <https://www.baltimoresun.com/features/black-history-month/bal-blackhistory-thurgood-story.html> [<https://perma.cc/X4E6-83VC>].

174. 339 U.S. 629 (1950).

175. *Id.*

176. Edwards, *supra* note 170, at 3.

Americans on the faculty. I had a very strong academic record, but that did not help me when I interviewed for jobs. The recruiting partners from major law firms in a number of large metropolitan areas openly told me that their firms would not hire a “Negro.”<sup>177</sup>

Judge Edwards would be among the first to point out the progress made by law schools admitting more students of color and those students’ eventual ascendance to high offices in government, the judiciary, and practice.<sup>178</sup> In his essay, he spoke to the relevance and importance of developing strong pipelines to the legal profession, explaining:

So what happened when the racial barriers started to fall during the 1970s? Two things are noteworthy. First, the African Americans who entered the elite law schools in the 1970s made it clear that qualified blacks are fully able to perform in any law school and excel in positions of significance in the legal profession and the legal academy.

Second, our successes confirmed that graduation from elite law schools matters a great deal. There is no doubt in my mind that blacks would not have made significant advancements in the legal profession if we had not gained admission to *all* law schools, including those ranked as “elite.”<sup>179</sup>

This success, however, can be deceiving. At the nation’s top fourteen law schools (the “T-14”), “the enrollment of blacks has declined steadily from 1999 to the present.”<sup>180</sup> In 1999, “African American students made up 8.2 percent of students at these elite schools. Today the percentage is 6.5 percent.”<sup>181</sup> In raw numbers, “there were 1,056 African American law students” at the T-14 in 1999, and “today there are 880.”<sup>182</sup> As a case study, Judge Edwards pointed to the University of Michigan Law School to point out that between 1986 and 2001, “the average number of black students in each entering class was 31.”<sup>183</sup> However, today, “the average number of black students in each entering class has dropped to 19.5.”<sup>184</sup> Similarly, the percentage of Black students relative to the overall student body has declined.<sup>185</sup>

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177. *Id.* at 2 (footnotes omitted).

178. *Id.* at 4.

179. *Id.* at 2.

180. *Id.* at 3.

181. *Id.* Judge Edwards calculated these percentages from an article in the *Journal of Blacks in Higher Education* and the ABA’s required disclosures database. See *The Progress of Black Students and Faculty at the Nation’s Highest Ranked Law Schools*, 26 J. BLACKS HIGHER EDUC., Winter 1999–2000, at 48, 48; 509 *Required Disclosures*, A.B.A., <http://abarequireddisclosures.org/Disclosure509.aspx> [<https://perma.cc/U2NL-YAWM>] (last visited Apr. 10, 2019). For the ABA’s required disclosures database, Judge Edwards selected “2016” and “J.D. Enrollment and Ethnicity (academic year)” and tallied the columns “#Total Total” and “#Black or African American Total” for the T-14 schools, then divided the sum of “#Black or African American Total” by the sum of “#Total Total.” Edwards, *supra* note 170, at 11 nn.16–19.

182. Edwards, *supra* note 170, at 3.

183. *Id.*

184. *Id.*

185. This data both refutes the claim that talented Black lawyers with elite academic credentials are not in the workforce or do not exist and causes alarm about the thinning or clogged pipeline for people of color in the legal profession. See *id.*

In conclusion, we emphasize two points, one empirical and the other normative. Empirically, women continue to encounter barriers to nomination and confirmation to the federal bench (and other senior positions within the legal profession).<sup>186</sup> And women experience fewer nominations to the federal bench by raw number and percentage.<sup>187</sup> Today, this cannot be explained away by a lack of women law graduates or women's diminished intellectual capacity in relation to their male colleagues. Second, from a normative point of view, homogeneity on the Court is problematic and "fraught with dangers."<sup>188</sup>

### III. THE CASE OF REPRODUCTIVE RIGHTS

Our study launched with the question: *Do women judges, appointed by conservative presidents, review and judge reproductive-rights cases outside the party line?* In short, they do.<sup>189</sup> However, the answer, like the question, is not so simple. We could ask a similar question about women appointed by Democratic presidents. We framed our question and the refined subsequent questions on Republican axes specifically because the Republican Party platform explicitly targets the dismantling of women's reproductive civil liberties and rights in several ways, including denying abortion access, limiting contraception, and abolishing or reshaping sex education. At least these aspects of the platform stand in strong contrast to the majority of lay women's views on these matters. Might women on the bench share the perspectives of the majority of American women?

We acknowledge limitations and assumptions in this project. First, presidents may nominate individuals to the bench who do not share their views or party affiliation. Justice Pierce Butler, the lone dissenter in *Buck v. Bell*, was a Democrat nominated by Republican President Warren Harding.<sup>190</sup> Second, our project acknowledges that, by grouping women and men, the potential for bias exists. We understand that not all women think alike—and neither do all men. Moreover, we too are concerned about essentializing women. Women who become lawyers and later judges may have dramatically different paths to those positions based on their social status, access to opportunity, race, class, religion, and other factors. Third, we recognize that female judges value judicial independence. As such, judges deliberate on each case, and each case brings its own individual set of

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186. Women lawyers account for 20 percent of law firm equity partners and 30 percent of non-equity partners, despite comprising over 50 percent of law school classes nationwide. See NAT'L ASS'N WOMEN LAWYERS, REPORT OF THE 2018 NAWL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 2, 7 (2018), <https://www.nawl.org/p/cm/ld/fid=1163> [<https://perma.cc/6QGC-YGUK>].

187. See generally Lindsay & Goodwin, *supra* note 33.

188. Epstein, Knight & Martin, *supra* note 156, at 909.

189. The next phase of our research studies how male judges respond to reproductive-rights cases and whether they tend to cast votes more consistent with the ideologies of the president who nominated them.

190. *Pierce Butler, 1923–1939*, SUP. CT. HIST. SOC'Y, [https://supremecourthistory.org/timeline\\_butler.html](https://supremecourthistory.org/timeline_butler.html) [<https://perma.cc/AXZ8-9XYX>] (last visited Apr. 10, 2019).



facts. We make no presumption that judges sidestep the important processes of closely reviewing facts and deliberating with independent judgment on each case.

Central to our original question, we wanted to know whether women's judicial votes were more consistent with the ideology of the nominating president. In other words, are Republican-nominated women more likely to oppose abortion rights and are Democratic-nominated women more likely to support reproductive rights? In this project, we wanted to tease out and test the assumption that women appointed to federal courts by conservative presidents also share conservative views in relation to women's reproductive interests and rights. An obvious place to start would have been the U.S. Supreme Court. However, that Court is less than ideal precisely because of the problems identified in this work: a lack of diversity and too few women over time to test our theory. Thus, our project examines circuit court rulings.

Our hypothesis is that women judges, even if appointed by a Republican president,<sup>191</sup> will not be absolutely opposed to abortion—even if the president happens to be. This, we believe, is because social circumstances and experiences may inform how judges evaluate cases. Also gleaned from this research is that women judges will write or join pro-choice opinions more often than not, even dissenting or concurring opinions.<sup>192</sup> Finally, of the 299 cases decided during the relevant period of our study (regarding the right to abortion), only 157 of those cases had at least one woman sitting on the three-judge panel or en banc with the entire court.<sup>193</sup> That represents 52.5 percent of the cases.<sup>194</sup> However, of those cases, 89 were pro-choice, 35 were anti-choice, and 33 had mixed holdings.<sup>195</sup>

#### A. *The Body Politic: Social Norms Inform Policies and Law*

Ultimately, social norms inform law. Research informs us that men think about and imagine the world from the space of their biological experiences and understandings, which are often masculinized or hypermasculinized.<sup>196</sup>

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191. Republican presidents since Ronald Reagan have sought to restrict abortion rights. For example, Ronald Reagan first established the Mexico City policy, or the “Global Gag Rule,” in 1984, which “denies foreign organizations receiving U.S. family planning assistance the right to use their own non-U.S. funds to provide information, referrals or services for legal abortion or advocate for the legalization [of] abortion in their country.” *How the Global Gag Rule Undermines U.S. Foreign Policy and Harms Women’s Health*, IMPASSIONED ADVOCATES FOR GIRLS & WOMEN 1 (Mar. 2015), <http://pai.org/wp-content/uploads/2010/06/PAI-Gag-PIB.pdf> [<https://perma.cc/SEC3-GJ6T>]. Since President Reagan’s introduction of the Global Gag Rule at the United Nations International Conference on Population in Mexico City, each Democratic president has rescinded the rule and each Republican president has reinstated it. *Id.*

192. See Lindsay & Goodwin, *supra* note 33.

193. See *id.*

194. See *id.*

195. See *id.*

196. See Mike Donaldson, *What Is Hegemonic Masculinity*, 22 *THEORY & SOC’Y* 643, 645 (1993) (“Hegemony . . . is about the winning and holding of power and the formation (and destruction) of social groups in that process. In this sense, it is importantly about the ways in which the ruling class establishes and maintains its domination.”).

Notably, Freedom Caucus attacks on reproductive health—which were a key element in their efforts to repeal the PPACA—focused exclusively on reproductive and sexual health benefits for women—and not the benefits men receive. However, men have long and silently benefited from what might be considered “non-essential” mandated prescription coverage for drugs such as Viagra, which “the FDA has approved . . . only to treat erectile dysfunction in men.”<sup>197</sup>

In 1998, the Department of Health and Human Services (HHS) issued a letter to state Medicaid directors to “advise States about the appropriate coverage of Viagra through the Medicaid program and to encourage States to ensure that appropriate medications are provided to the Medicaid population.”<sup>198</sup> The letter stated that “the law requires that a State’s Medicaid program cover Viagra when medical necessity dictates such coverage for the drug’s medically accepted indication.”<sup>199</sup> The letter, signed by the director of the Health Care Financing Administration (now the Centers for Medicare & Medicaid Services), offered the agency’s assistance in making sure that Medicaid “provide[s] appropriate access to new drugs,” like Viagra.<sup>200</sup> Medicare Part B covers pumps to treat men with erectile dysfunction and provides an 80 percent savings for male consumers.<sup>201</sup>

By contrast, much is often made of contraceptive access, including claims that contraception is a female “lifestyle drug” for which men should not be required in insurance plans to absorb some of the costs.<sup>202</sup> Members of the powerful Freedom Caucus made such arguments. Yet, they failed to account for research from the Centers for Disease Control and Prevention related to the millions of unintended pregnancies that result each year in the United States. Their analysis also overlooks the World Health Organization “clearly recogniz[ing] that the Pill [is] an ‘essential medicine,’ one that [meets] ‘the priority health care needs of the population’ because of its public health relevance, evidence of efficacy and safety, and comparative cost-effectiveness.”<sup>203</sup>

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197. Letter from Sally K. Richardson, Dir., Health Care Fin. Admin., Dep’t of Health & Human Servs., to State Medicaid Dir. (Nov. 30, 1998), <https://www.medicaid.gov/Federal-Policy-Guidance/downloads/smd103098.pdf> [<https://perma.cc/794S-XDK2>].

198. *Id.*

199. *Id.*

200. *Id.*

201. Richard, *Does Medicare Cover Erectile Dysfunction?*, AM. MALE MED. (Aug. 24, 2018), <https://americanmalemedical.com/medicare-cover-erectile-dysfunction/> [<https://perma.cc/Z24P-EUDZ>].

202. See, e.g., Elizabeth Siegel Watkins, *How the Pill Became a Lifestyle Drug: The Pharmaceutical Industry and Birth Control in the United States Since 1960*, 102 AM. J. PUB. HEALTH 1462, 1463 (2012) (“Pharmaceutical companies never marketed oral contraceptive products as beneficial to public health in the United States; their sales targets were individual physicians who catered to private patients.”); Angela Chen, *Covering Viagra, but Not Birth Control?*, JSTOR DAILY (Feb. 23, 2016), <https://daily.jstor.org/cover-viagra-but-not-birth-control/> [<https://perma.cc/6PWN-EJTX>].

203. Watkins, *supra* note 202, at 1463 (quoting *Essential Medicines*, WORLD HEALTH ORG., [http://www.who.int/topics/essential\\_medicines/en](http://www.who.int/topics/essential_medicines/en) [<https://perma.cc/5YE2-DNC7>]).

However, accommodating the concerns of the male body is nothing new and worth brief comment here. The politics of the body exist within the political sphere as well as the social sphere and, quite simply, men's bodies seize and acquire more space (even if unnecessarily so).<sup>204</sup> Accommodating men's bodies results in how temperatures are set in our rooms.<sup>205</sup> Companies default to male bodies in the discovery of new medicines<sup>206</sup> and even to test the safety of cars (even though women drive more than men).<sup>207</sup>

Yet, these are not simply matters of biology and commercial response to men's comforts. Thinking about how women "carry" their bodies in society raises important questions for law, medicine, sociology, and psychology. As

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204. See Emma G. Fitzsimmons, *A Scourge Is Spreading. M.T.A.'s Cure? Dude, Close Your Legs.*, N.Y. TIMES (Dec. 20, 2014), <https://www.nytimes.com/2014/12/21/nyregion/MTA-targets-manspreading-on-new-york-city-subways.html> [<https://perma.cc/Z7RH-3NFC>] ("It is *manspreading*, the lay-it-all-out sitting style that more than a few men see as their inalienable underground right. Now passengers who consider such inelegant male posture as infringing on their sensibilities—not to mention their share of subway space—have a new ally: the Metropolitan Transportation Authority."); see also Christina Cauterucci, *If Men Aren't Built to Manspread, Why Is There Manspreading?*, SLATE (Jan. 15, 2016, 5:06 PM), <https://slate.com/human-interest/2016/01/if-men-aren-t-built-to-manspread-why-is-there-manspreading.html> [<https://perma.cc/ZAZK-G6BJ>].

205. Women constitute about half of the workforce. See Mark DeWolf, *12 Stats About Working Women*, U.S. DEP'T LAB. BLOG (Mar. 1, 2017), <https://blog.dol.gov/2017/03/01/12-stats-about-working-women> [<https://perma.cc/9D3C-3LNR>]. However, the formula used to determine the appropriate thermal setting in office buildings, the "thermal comfort model," is based on the clothing worn by and metabolism of a man in his forties weighing 154 pounds. The formula was developed more than fifty years ago. See Pam Belluck, *Chilly at Work? Office Formula Was Devised for Men*, N.Y. TIMES (Aug. 3, 2015), <https://www.nytimes.com/2015/08/04/science/chilly-at-work-a-decades-old-formula-may-be-to-blame.html> [<https://perma.cc/XNC4-NNFN>] ("[M]ost office buildings set temperatures based on a decades-old formula that uses the metabolic rates of men."); see also Boris Kingma & Wouter van Marken Lichtenbelt, *Energy Consumption in Buildings and Female Thermal Demand*, 5 NATURE CLIMATE CHANGE 1054, 1054 (2015).

206. See BRIGHAM & WOMEN'S HOSP., SEX-SPECIFIC MEDICAL RESEARCH: WHY WOMEN'S HEALTH CAN'T WAIT 10 (2014), <https://www.brighamandwomens.org/assets/BWH/womens-health/pdfs/ConnorsReportFINAL.pdf> [<https://perma.cc/G3BD-XSLQ>]; Katherine A. Liu & Natalie A. Dipietro Mager, *Women's Involvement in Clinical Trials: Historical Perspective and Future Implications*, 14 PHARMACY PRAC. 1, 2 (2016) (studying the "history and progress in the U.S. of inclusion of women of child-bearing potential in clinical trials for prescription drugs" and finding that, historically, women have been underrepresented in human drug trials); Amy Westervelt, *The Medical Research Gender Gap: How Excluding Women from Clinical Trials Is Hurting Our Health*, GUARDIAN (Apr. 30, 2015, 3:32 PM), <https://www.theguardian.com/lifeandstyle/2015/apr/30/fda-clinical-trials-gender-gap-epa-nih-institute-of-medicine-cardiovascular-disease> [<https://perma.cc/6YCM-AVGM>] ("[O]nly one third of cardiovascular clinical trial subjects are female and only 31% of cardiovascular clinical trials that include women report results by sex.").

207. A study conducted by the University of Virginia's Center for Applied Biomechanics reported that "seat-belted female drivers in actual crashes had a 47 percent higher chance of serious injuries than belted male drivers in comparable collisions" and that, "[f]or moderate injuries, that difference rose to 71 percent." Katherine Shaver, *Female Dummy Makes Her Mark on Male-Dominated Crash Tests*, WASH. POST (Mar. 25, 2012), [https://www.washingtonpost.com/local/trafficandcommuting/female-dummy-makes-her-mark-on-male-dominated-crash-tests/2012/03/07/gIQANBLjaS\\_story.html](https://www.washingtonpost.com/local/trafficandcommuting/female-dummy-makes-her-mark-on-male-dominated-crash-tests/2012/03/07/gIQANBLjaS_story.html) [<https://perma.cc/NRV6-9NG2>] ("The star-rating system's frontal crash test uses only the male dummy in the driver's seat. Consumer advocates say the female dummy's subpar performance in some top-selling vehicles reveals a need to better study women and smaller people in collisions.").

researchers at the Connors Center for Women's Health and Gender Biology found:

The science that informs medicine—including the prevention, diagnosis, and treatment of disease—routinely fails to consider the crucial impact of sex and gender. This happens in the earliest stages of research, when females are excluded from animal and human studies or the sex of the animals isn't stated in the published results. Once clinical trials begin, researchers frequently do not enroll adequate numbers of women or, when they do, fail to analyze or report data separately by sex. This hampers our ability to identify important differences that could benefit the health of all.<sup>208</sup>

If men legislate and judge from the body politic, they are likely to place their bodies at the center of that discourse. Men are likely to make judgments about the body politic—and women's bodies in particular—even if their bodies do not share basic experiences in common with women's bodies, such as bleeding every month or experiencing pregnancy. Women understand their bodies in a manner wholly different from how men view and understand women's bodies. This should not surprise any reader. And, while there are physiological experiences common to both male and female bodies, the former are spared the tribulations of the woman's body, including pregnancy's myriad side effects, such as high blood pressure, gestational diabetes, preeclampsia, preterm labor, miscarriage, stillbirth, and possible death.<sup>209</sup> Not all women will choose to become pregnant (and some may become pregnant without any choice involved due to rape or incest). However, all girls and women who do become pregnant are exposed to equally daunting, if not horrifying, risks.<sup>210</sup>

### *B. Judging from the Body Politic*

Building on two years of empirical research, we probe each federal appeals court's abortion cases and each judge's vote on these cases in order to examine the voting patterns of women nominated by Republican presidents.<sup>211</sup> We excluded the U.S. Supreme Court from our analysis

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208. BRIGHAM & WOMEN'S HOSP., *supra* note 206, at 5 (footnotes omitted).

209. See *What Are Some Common Complications of Pregnancy?*, NAT'L INST. HEALTH (Jan. 31, 2017), <https://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo/complications> [<https://perma.cc/L2UF-UTTR>]; see also Lee Jared Vinsel, *Why Carmakers Always Insisted on Male Crash-Test Dummies*, BOSTON.COM (Aug. 22, 2012), <https://www.boston.com/cars/news-and-reviews/2012/08/22/why-carmakers-always-insisted-on-male-crash-test-dummies> [<https://perma.cc/4U6S-3HCC>] (“Beginning with 2011 model-year vehicles, federal regulators have required automakers to use petite female crash dummies in frontal automotive crash tests.”).

210. *What Are Some Common Complications of Pregnancy?*, *supra* note 209 (“Even women who were healthy before getting pregnant can experience complications. These complications may make the pregnancy a high-risk pregnancy.”).

211. Data for this study was generated by the use of legal research databases Lexis and Westlaw. Case searches focused on the term “abortion.” We excluded U.S. Supreme Court cases and focused only on cases that were adjudicated at the federal appellate level. We narrowed this pool to only those cases that actually addressed a question related to abortion and focused specifically on the votes of female judges. Of this cohort, we narrowed our focus

because the U.S. Supreme Court has had only one woman justice appointed by a Republican president: Justice Sandra Day O'Connor. Our research shows that the representation of women in the judiciary correlates to the advancement of reproductive justice.<sup>212</sup> Anecdotally, we find, women nominated by Republican presidents are more reliable than men nominated by Republican presidents in promoting sex equality and advancing reproductive liberty. Thus, we predict, broader representation of women in the judiciary could lead to greater protections for reproductive health and rights. This is likely to occur, however, only with achieving a critical mass of women in the judiciary and avoiding tokenism.

Women, no matter the party of the appointing president, are more committed to the autonomy, liberty, and reproductive rights of women than their male counterparts. In every circuit apart from the Fifth Circuit, in cases regarding abortion for which one or more women were sitting on the three-judge panel, female judges were more likely to join or write an opinion upholding reproductive rights.<sup>213</sup> This was true regardless of whether the woman was nominated by a Democrat or Republican president. In en banc decisions, we found “mixed holding” opinions, where the ruling could be categorized as simultaneously pro-choice and anti-choice.<sup>214</sup> Our research reveals that in the majority of cases where abortion was the subject matter, female judges tended toward pro-choice opinions. In this preliminary Essay, we briefly offer examples.

### 1. Sixth Circuit

The United States Court of Appeals for the Sixth Circuit encompasses Kentucky, Michigan, Ohio, and Tennessee. Twelve women have been appointed on the Sixth Circuit, beginning in 1934.<sup>215</sup> Nine of these women

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to the votes of judges appointed by a Republican president. Votes were coded according to the judge’s vote in an abortion related case, either anti-choice, pro-choice, or mixed. In other words, did the judge vote to uphold legislation that could be read as antiabortion (e.g., targeted regulations of abortion providers or laws that criminalize abortion procedures)? Or did the judge seek to strike such laws? In some instances, the judges wrote opinions, but not always. If there was not a written opinion by the judge, we focused only on the vote. In cases that were mixed, a judge may have entered a concurrence (concurring with one aspect of the decision and not another).

212. Loretta Ross defines reproductive justice as “the complete physical, mental, spiritual, political, social, and economic well-being of women and girls, based on the full achievement and protection of women’s human rights.” Loretta Ross, *What Is Reproductive Justice?*, PRO-CHOICE PUB. EDUC. PROJECT, <http://www.protectchoice.org/section.php?id=28> [https://perma.cc/MRK9-9XZ5] (last visited Apr. 10, 2019).

213. See Lindsay & Goodwin, *supra* note 33.

214. See, e.g., *Evergreen Ass’n v. City of New York*, 740 F.3d 233 (2d Cir. 2014); *Centro Tepeyac v. Montgomery County*, 722 F.3d 184 (4th Cir. 2013); *McCormack v. Hiedeman*, 694 F.3d 1004 (9th Cir. 2012); *Planned Parenthood of Minn. v. Rounds*, 653 F.3d 662 (8th Cir. 2011); *Choose Life Ill., Inc. v. White*, 547 F.3d 853 (7th Cir. 2008); *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

215. See *U.S. Court of Appeals for the Sixth Circuit: Judges*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/u.s.-court-appeals-sixth-circuit-judges> [https://perma.cc/2ZUF-T4GP] (last visited Apr. 10, 2019).

remain and are currently still serving on the court.<sup>216</sup> The first woman to ever serve on a federal circuit court was appointed to the Sixth Circuit in 1934.<sup>217</sup> Florence Allen was nominated by Franklin D. Roosevelt on March 6, 1934.<sup>218</sup> She was confirmed by the Senate on March 15, 1934, and received her commission on March 21, 1934.<sup>219</sup> She remained on the court until her death on September 12, 1966.<sup>220</sup> Another woman would not be appointed to this court or any circuit court until 1979 as part of President Jimmy Carter's push to diversify the courts.<sup>221</sup>

The Sixth Circuit Court of Appeals has been fairly active in its abortion jurisprudence. During the relevant time period, twenty-seven abortion cases were decided.<sup>222</sup> Of those twenty-seven cases, sixteen were decided with one female on the panel of judges. Importantly, there was never more than one woman sitting on the panel in any of the sixteen cases.<sup>223</sup> Not only were women unrepresented on a significant number of these cases (eleven), in the cases in which they did play a role, they were always in the minority. Seven of the sixteen decisions were clearly pro-choice; three were clearly anti-choice; and six included a combination of pro-choice and anti-choice holdings.<sup>224</sup> This is important because, although it is a slight majority, the majority of the cases were pro-choice.

In the Sixth Circuit, Judge Cornelia Kennedy, long recognized for conservative opinions,<sup>225</sup> joined, and even wrote, several opinions upholding reproductive rights.<sup>226</sup> Judge Kennedy identified as a Republican and was

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216. *See id.*

217. *See Florence Ellinwood Allen, supra* note 88.

218. *See Allen, Florence Ellinwood*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/allen-florence-ellinwood> [<https://perma.cc/T7EH-5CUY>] (last visited Apr. 10, 2019).

219. *See id.*

220. *See id.*

221. *See* Derrick Johnson, *Trump Is Undoing the Diversity of the Federal Bench*, WASH. POST (Jan. 22, 2019), [https://www.washingtonpost.com/opinions/trump-is-undoing-the-diversity-of-the-federal-bench/2019/01/22/29d4a4fe-1e8c-11e9-9145-3f74070bbdb9\\_story.html](https://www.washingtonpost.com/opinions/trump-is-undoing-the-diversity-of-the-federal-bench/2019/01/22/29d4a4fe-1e8c-11e9-9145-3f74070bbdb9_story.html) [<https://perma.cc/2TT4-K5LX>] (“Forty years ago, President Jimmy Carter appointed seven black women to judgeships. Signaling that judicial diversity is not a partisan issue, President George W. Bush appointed eight black women, including two to appellate courts. Obama appointed a record 26 African American women to the judiciary.”).

222. *See* Lindsay & Goodwin, *supra* note 33.

223. *See id.*

224. *See id.*

225. Douglas Martin, *Cornelia G. Kennedy, a Pioneering Federal Judge, Dies at 90*, N.Y. TIMES (May 23, 2014), <https://www.nytimes.com/2014/05/25/us/cornelia-g-kennedy-pioneering-federal-judge-dies-at-90.html> [<https://perma.cc/FD73-B7Q9>]. Immediately after her appointment, Judge Kennedy was scrutinized for being too conservative:

After examining her record as a federal district judge, the NAACP Legal Defense and Educational Fund Inc. said that in every case that had come before her involving charges of racial discrimination against the police and the prisons, Judge Kennedy had ruled against the plaintiff.

Other liberal opponents of the nomination said she was simply too conservative.

*Id.*

226. *See* Norton v. Ashcroft, 298 F.3d 547 (6th Cir. 2002); Blackard v. Memphis Area Med. Ctr. for Women, Inc., 262 F.3d 568 (6th Cir. 2001); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997).

appointed by President Richard Nixon to the U.S. District Court for the Eastern District of Michigan and later to the Sixth Circuit by President Jimmy Carter.<sup>227</sup> She served for nearly twenty years on the Sixth Circuit.<sup>228</sup> She was succeeded by Judge Susan Bieke Neilson.<sup>229</sup>

Judge Kennedy joined and wrote anti-choice opinions as well as opinions containing both anti-choice and pro-choice holdings.<sup>230</sup> One point of significance is that Judge Kennedy's final three opinions before retirement all supported reproductive rights. Over time, we chart her opinions as moving solidly toward protecting reproductive rights. Of her three opinions upholding reproductive rights, one upheld the constitutionality of the Freedom of Access to Clinic Entrances Act.<sup>231</sup> Another protected a doctor from liability for not obtaining parental consent where a consent statute was barred from enforcement for failing to have proper judicial bypass procedures.<sup>232</sup> The third opinion held that a ban on dilation and evacuation abortions unconstitutionally placed a substantial obstacle in the way of women seeking abortions.<sup>233</sup>

Likewise, Judge Deborah L. Cook, appointed by President George W. Bush in 2003, has voted to uphold reproductive rights. In *Northland Family Planning Clinic, Inc. v. Cox*,<sup>234</sup> Judge Cook joined the pro-choice majority in finding that Michigan's Legal Birth Definition Act was unconstitutional as it placed an undue burden on the right to abortion.<sup>235</sup> The Act had essentially banned "partial-birth abortion[s]."<sup>236</sup>

These voting records could suggest that while abortion has been articulated by male judges and justices as an ideological issue, for female judges, party affiliation and ideology may play less of a role (or none at all) in evaluating constitutional questions related to abortion. At the very least, ideology may not be the only factor in consideration for female judges evaluating the constitutionality of laws that might infringe abortion rights. In other words, the fact that ideologically conservative female judges vote to uphold

227. See *Kennedy, Cornelia Groefsema*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/kennedy-cornelia-groefsema> [<https://perma.cc/A8KW-GQ7K>] (last visited Apr. 10, 2019).

228. See *id.*

229. See *Neilson, Susan Bieke*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/neilson-susan-bieke> [<https://perma.cc/5FUB-47RG>] (last visited Apr. 10, 2019).

230. See generally *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (6th Cir. 1995); *Cleveland Surgi-Center, Inc. v. Jones*, 2 F.3d 686 (6th Cir. 1993); *Volunteer Med. Clinic, Inc. v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991); *Akron Ctr. for Reprod. Health, Inc. v. City of Akron*, 651 F.2d 1198 (6th Cir. 1981), *aff'd in part, rev'd in part*, 462 U.S. 416 (1983).

231. See *Norton*, 298 F.3d at 552.

232. See *Blackard v. Memphis Area Med. Ctr. for Women, Inc.*, 262 F.3d 568, 581 (6th Cir. 2001).

233. See *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 209–10 (6th Cir. 1997).

234. 487 F.3d 323 (6th Cir. 2007).

235. *Id.* at 327.

236. *Id.* ("[The Act] creates a protected legal status for a partially-delivered fetus that it terms a 'perinate.' A perinate is defined by the Act as 'a live human being at any point after which any anatomical part of the human being is known to have passed beyond the plane of the vaginal introitus until the point of complete expulsion or extraction from the mother's body.'" (citation omitted)).

reproductive rights and even write opinions to do so, highlights that evaluating women's reproductive health may be less of an ideological issue for them.

Consider, for example, the opinions joined and written by Judge Julia Smith Gibbons (also of the Sixth Circuit) that can be characterized as both pro-choice and anti-choice. Judge Gibbons was appointed to the Sixth Circuit by President George W. Bush in 2002.<sup>237</sup> Judge Gibbons participated in two of the abortion cases on this circuit, both of which had both pro-choice and anti-choice holdings. The first case for which she was on the three-judge panel dealt with two provisions of an Ohio abortion statute. In *Cincinnati Women's Services, Inc. v. Taft*,<sup>238</sup> the court held that the judicial bypass provision, which limited minors to one judicial bypass petition per pregnancy, was an undue burden on the constitutional right to abortion:

Applying *Casey* to the Single-Petition Rule before us, we find that the group of women for whom the restriction actually operates are women who are denied a bypass and who have changed circumstances such that if they were able to reapply for a bypass, it would be granted. The group of women who will be deterred from procuring an abortion because of the restriction are women with changed circumstances who would apply for another bypass if allowed. The record shows that second petitioners exist under Ohio's current bypass scheme, and that practically all second petitioners allege changed circumstances such that, if believed, a reviewing court must issue a bypass. The changed circumstances that affect abortion-seeking minors include increased maturity, increased medical knowledge about abortion, and pregnant minors who discover that their fetus has a medical anomaly such as gastroschisis. The record further shows that most women who are denied a bypass but who experience a change in their circumstances will subsequently seek another bypass procedure. Because Ohio's law preventing more than one petition per procedure acts as a substantial obstacle to a woman's right to an abortion in a large fraction of the cases in which the single petition is relevant, we find that the Single-Petition Rule is an undue burden and, therefore, is facially unconstitutional.<sup>239</sup>

Here, the court took into account the actual life experiences of young women and that young women should have an opportunity to grow, learn, and mature. The court found that, therefore, minors should be entitled to reconsideration of the denial of their judicial bypass petitions. This ruling is clearly pro-choice. That said, the remainder of the decision could be categorized as anti-choice. The court found the single petition provision to be severable, so its invalidation did not lead to the invalidation of the entire statute.<sup>240</sup>

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237. See *Gibbons, Julia Smith*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/gibbons-julia-smith> [<https://perma.cc/XL4Z-UF7Z>] (last visited Apr. 10, 2019).

238. 468 F.3d 361 (6th Cir. 2006).

239. *Id.* at 370.

240. *Id.* at 371.



The second provision the court addressed requires in-person, informed consent by a physician twenty-four hours prior to the performance of the abortion.<sup>241</sup> The court held that this was not an undue burden on the constitutional right to abortion because it does not affect enough women to be deemed a significant obstacle.<sup>242</sup> Thus, while the court was obviously aware of the impact of both provisions on women's ability to obtain an abortion, it upheld one despite this harm because it does not affect enough women. It is critical to point out that this opinion did not fall within the category of absolute anti-choice. We note that Judge Gibbons joined the majority.<sup>243</sup>

The pattern we highlight here among women of the Sixth Circuit is more consistent with the patterns we tracked in other circuits and is not an anomaly. We identify similar patterns among female judges who sit on the Seventh Circuit as well.<sup>244</sup> There, women nominated by Republican presidents also demonstrate judicial independence with regard to reproductive rights such that they vote outside of the party platform and ideology of the nominating president.

## 2. Seventh Circuit

The U.S. Court of Appeals for the Seventh Circuit encompasses Illinois, Indiana, and Wisconsin. Only six women have served as judges on the Seventh Circuit, beginning in 1992.<sup>245</sup> Five of the six women are currently serving on the court.<sup>246</sup>

The first woman to serve on the Seventh Circuit was Judge Ilana Kara Diamond Rovner, appointed by President George H. W. Bush in 1992.<sup>247</sup> Following Judge Rovner, the next female judge appointed was Diane Pamela Wood, who was appointed by President William J. Clinton in 1995.<sup>248</sup> Judge Wood is currently serving as chief judge.<sup>249</sup> Judge Wood was the first liberal woman to be appointed to a circuit long dominated by conservative, white men. Her reputation precedes her as an intellectual and persuasive presence

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241. *Id.* at 372.

242. *See id.* at 374.

243. *See id.* at 363.

244. *See infra* Part III.B.2.

245. *See U.S. Court of Appeals for the Seventh Circuit: Judges*, FED. JUD. CTR., <http://www.fjc.gov/history/courts/u.s.-court-appeals-seventh-circuit-judges> [<http://perma.cc/GVK3-Z6EN>] (last visited Apr. 10, 2019).

246. *See id.*

247. *See Rovner, Ilana Kara Diamond*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/rovner-ilana-kara-diamond> [<https://perma.cc/ES3S-2945>] (last visited Apr. 10, 2019). Judge Rovner was born in Latvia and immigrated to the United States with her parents, fleeing Hitler. *See id.*; *see also* William Hageman, *Remarkable Woman: Ilana Rovner*, CHI. TRIB. (Nov. 25, 2011), [www.chicagotribune.com/lifestyles/ct-tribu-remarkable-rovner-20111125-story.html](http://www.chicagotribune.com/lifestyles/ct-tribu-remarkable-rovner-20111125-story.html) [<https://perma.cc/J68J-PQ5D>].

248. *See Wood, Diane Pamela*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/wood-diane-pamela> [<https://perma.cc/X3ZD-UWGZ>] (last visited Apr. 10, 2019).

249. *See id.* Chief judges serve for a term of seven years and continue to serve until another judge is eligible. *See* 28 U.S.C. § 45 (2012).

on the court.<sup>250</sup> Following Judge Wood's confirmation in 1995, Ann Claire Williams was appointed by President Clinton in 1999.<sup>251</sup> Judge Williams is the first and only person of color to be appointed to the Seventh Circuit. Judge Williams was also the third African American woman to serve on any U.S. court of appeals.<sup>252</sup> The fourth woman to be appointed on to the Seventh Circuit was Diane S. Sykes.<sup>253</sup> Judge Sykes was nominated by President George W. Bush in 2003 and received her commission in 2004.<sup>254</sup> She is a self-described "originalist-textualist."<sup>255</sup>

In nearly all the cases in which Judge Ilana Rovner, appointed by President George H. W. Bush, served on the panel, she joined the pro-choice opinion.<sup>256</sup> Judge Rovner, first appointed by President Ronald Reagan to the U.S. District Court for the Northern District of Illinois in 1984, was later nominated by President George H. W. Bush to succeed Judge Harlington Wood, Jr. on the Seventh Circuit.<sup>257</sup>

Judge Sykes, appointed by President George W. Bush, has a similar record of judicial independence. Originally appointed to the Wisconsin Supreme Court by Republican Governor Thomas Thompson and later to the Seventh Circuit, she has only joined one anti-choice opinion.<sup>258</sup> The two other abortion-related cases for which she wrote the majority opinion were either neutral in holding or had a mixed holding.<sup>259</sup> Again, this suggests that ideology is not the only factor in these cases and that female judges bring a differing understanding of the issues facing women in comparison to their male counterparts.

In addition to these case examples from the Sixth and Seventh Circuits, similar patterns can be seen in the Third, Fourth, Fifth, Ninth, Tenth, and

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250. See Sheryl Gay Stolberg, *Judicial Bouts Reveal Power of Persuasion*, N.Y. TIMES (Apr. 21, 2010), <https://www.nytimes.com/2010/04/22/us/politics/22court.html> [<https://perma.cc/NH92-6KN2>].

251. See *Williams, Ann Claire*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/williams-ann-claire> [<https://perma.cc/YE3S-FFM4>] (last visited Apr. 10, 2019).

252. *Hon. Ann Claire Williams*, CORNELL L. SCH., <https://www.lawschool.cornell.edu/womenandjustice/About-Us/Williams.cfm> [<https://perma.cc/B6DF-YF9M>] (last visited Apr. 10, 2019).

253. See *Sykes, Diane S.*, FED. JUD. CTR., <http://www.fjc.gov/history/judges/sykes-diane-s> [<https://perma.cc/6WRJ-8LBP>] (last visited Apr. 10, 2019).

254. See *id.*

255. Michele Gorman, *A Look at Diane Sykes, Possible Trump SCOTUS Nominee*, NEWSWEEK (Dec. 13, 2016, 5:50 PM), [www.newsweek.com/profile-diane-sykes-trumps-possible-scotus-nominee-531588](http://www.newsweek.com/profile-diane-sykes-trumps-possible-scotus-nominee-531588) [<https://perma.cc/WV8C-2H5V>].

256. See *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), *rev'd*, 537 U.S. 393 (2003); *Hope Clinic v. Ryan*, 249 F.3d 603 (7th Cir. 2001); *Karlin v. Foust*, 198 F.3d 620, 621 (7th Cir. 1999) (Wood, J., dissenting); *Hope Clinic v. Ryan*, 197 F.3d 876, 877 (7th Cir. 1999) (Wood, J., dissenting); *Hope Clinic v. Ryan*, 195 F.3d 857, 876 (7th Cir. 1999) (Posner, J., dissenting), *vacated*, 530 U.S. 1271 (2000); *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463 (7th Cir. 1998).

257. See *Rovner, Ilana Kara Diamond*, *supra* note 247.

258. See *generally* *Women's Health Link, Inc. v. Fort Wayne Pub. Transp. Corp.*, 826 F.3d 947 (7th Cir. 2016).

259. See *generally* *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962 (7th Cir. 2012); *Choose Life Ill., Inc. v. White*, 547 F.3d 853 (7th Cir. 2008).

D.C. Circuits. Women, regardless of ideology, will join pro-choice or mixed-holding cases.

### 3. Tenth Circuit

The U.S. Court of Appeals for the Tenth Circuit encompasses Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. To date, the Tenth Circuit has had six women serve on the court, including Judge Allison Hartwell Eid, who was nominated by President Donald Trump in 2017 and received her commission on November 3, 2017.<sup>260</sup> The first woman to be appointed to this circuit was Stephanie Kulp Seymour.<sup>261</sup> Judge Seymour was appointed by President Carter in 1979, followed by Judge Deanell Reece Tacha, who was appointed by President Ronald Reagan and received commission in 1985.<sup>262</sup> It would take another ten years before the next female judge was appointed—Mary Beck Briscoe, who was nominated by President Clinton in 1995.<sup>263</sup> It took roughly another twenty years for the next women to be nominated to this circuit: Carolyn Baldwin McHugh and Nancy Louise Moritz in 2014, both appointed by President Obama.<sup>264</sup> Only two people of color have sat on this court and both are men;<sup>265</sup> no women of color have ever served on this court.

Tenth Circuit abortion jurisprudence is exactly what we expected to see as far as the role of women on the court in deciding abortion cases. The majority of cases that women were involved in had pro-choice outcomes.<sup>266</sup> Where the opinions were anti-choice, the female judge dissented or was bound by Supreme Court jurisprudence. In this circuit, women have often dissented from anti-choice opinions and men have dissented from pro-choice opinions.

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260. See *Eid, Allison Hartwell*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/eid-allison-hartwell> [<https://perma.cc/6A7B-SAKJ>] (last visited Apr. 10, 2019); *U.S. Court of Appeals for the Tenth Circuit: Judges*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/u.s.-court-appeals-tenth-circuit-judges> [<https://perma.cc/J2CH-4AXC>] (last visited Apr. 10, 2019).

261. See *U.S. Court of Appeals for the Tenth Circuit: Judges*, *supra* note 260.

262. See *Seymour, Stephanie Kulp*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/seymour-stephanie-kulp> [<https://perma.cc/WYS7-NU4Z>] (last visited Apr. 10, 2019); *Tacha, Deanell Reece*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/tacha-deanell-reece> [<https://perma.cc/BAA7-6VT2>] (last visited Apr. 10, 2019).

263. See *Briscoe, Mary Beck*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/briscoe-mary-beck> [<https://perma.cc/42Y6-WXPE>] (last visited Apr. 10, 2019).

264. See *McHugh, Carolyn Baldwin*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/mchugh-carolyn-baldwin> [<https://perma.cc/K7DY-D78W>] (last visited Apr. 10, 2019); *Moritz, Nancy Louise*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/moritz-nancy-louise> [<https://perma.cc/UFH4-TSM4>] (last visited Apr. 10, 2019).

265. Judge Carlos F. Lucero is a Latino man and the first person of color to serve on the Tenth Circuit. He was confirmed in 1995. *Lucero, Carlos F.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/lucero-carlos-f> [<https://perma.cc/R389-AR74>] (last visited Apr. 10, 2019). Judge Jerome Holmes, a Black man, was the second person of color to be nominated to the Tenth Circuit. He was confirmed in 2006. *Holmes, Jerome A.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/holmes-jerome> [<https://perma.cc/575H-PHNF>] (last visited Apr. 10, 2019).

266. See *Lindsay & Goodwin*, *supra* note 33.

Of the twenty-two abortion cases decided since 1979, women sat on the three-judge panel for fourteen cases.<sup>267</sup> Only in one of those cases was more than one woman represented on the panel.<sup>268</sup> Ten of the fourteen decisions were pro-choice, two were anti-choice, and two were mixed. The following will analyze each case in turn.

For example, in *Hern v. Beye*,<sup>269</sup> Judge Tacha, appointed by President Ronald Reagan, wrote a pro-choice majority opinion. In *Hern*, the plaintiffs—a physician and three women’s health-care facilities—challenged various sections of Colorado’s constitution, statutes, and regulations that forbade the use of state funds to pay for abortion services unless the life of the mother is at risk.<sup>270</sup> The district court granted an injunction prohibiting the enforcement of these provisions and held that any state that participates in the federal Medicaid program must cover abortions for pregnancies resulting from rape or incest.<sup>271</sup> Judge Tacha, writing for the majority, affirmed.<sup>272</sup> Relying on the Supreme Court case *Harris v. McRae*,<sup>273</sup> Judge Tacha held that, under Medicaid, as amended by the Hyde Amendment, states are obligated to cover abortion for which federal funding is available.<sup>274</sup> Judge Tacha further held that Colorado’s funding restriction on abortion violated the requirements of federal law:

First, Colorado’s Medicaid program as amended by the abortion funding restriction impermissibly discriminates in its coverage of abortions on the basis of a patient’s diagnosis and condition. While 42 C.F.R. § 440.230(c) allows states to use medical need as a criterion for placing appropriate limits on coverage, a state may not single out a particular, medically necessary service and restrict coverage to those instances where the patient’s life is at risk. . . .

Second, Colorado’s restriction violates 42 U.S.C. § 1396a(a)(17) because it is inconsistent with the basic objective of Title XIX—to provide qualified individuals with medically necessary care.<sup>275</sup>

Here, Judge Tacha identifies both the discrimination that the funding restriction is based on and that abortion is medically necessary care that must be covered by Medicaid in the case of rape or incest. The court ultimately held that, as long as Colorado continues to participate in the federal Medicaid program, it must cover abortion in the case of rape or incest for all eligible individuals.<sup>276</sup>

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267. *See id.*

268. *See* Planned Parenthood Ass’n of Utah v. Herbert, 839 F.3d 1301, 1302 (10th Cir. 2016).

269. 57 F.3d 906 (10th Cir. 1995).

270. *See id.* at 907.

271. *Id.* at 908.

272. *See id.* at 907–08.

273. 448 U.S. 297 (1980).

274. *Hern*, 57 F.3d at 909.

275. *Id.* at 910–11.

276. *See id.* at 913.

## 4. Fifth Circuit Outlier

The U.S. Court of Appeals for the Fifth Circuit encompasses Louisiana, Mississippi, and Texas. Seven women have been appointed to the Fifth Circuit, beginning in 1979.<sup>277</sup> All but one of these women remain on the court.<sup>278</sup> Thus, nearly every woman to have been appointed to the Fifth Circuit remains on the Fifth Circuit today. The first female judge, Phyllis A. Kravitch, to integrate the circuit was nominated in 1979, the first year since 1934 that any woman was appointed to a circuit court.<sup>279</sup> She was appointed by President Jimmy Carter.<sup>280</sup>

Judge Kravitch was the third woman to be appointed to any federal circuit court.<sup>281</sup> Her appointment was quickly followed by the appointment of Carolyn Dineen King the same year.<sup>282</sup> The third woman to be appointed to the court was Edith Hollan Jones.<sup>283</sup> Judge Jones was nominated by President Ronald Regan on February 27, 1985, and confirmed on April 3, 1985, by the Senate.<sup>284</sup> However, no additional women were appointed to this circuit for sixteen years.<sup>285</sup> That ended with the appointment of Edith Brown Clement, nominated by President George W. Bush on September 4, 2001.<sup>286</sup> Four years later, the fifth woman to be appointed to this circuit was Priscilla Richman Owen in 2005, also by President Bush.<sup>287</sup> The last two women appointed to the Fifth Circuit were Jennifer Walker Elrod in 2007 and Catharina Haynes in 2008, both also appointed by President Bush.<sup>288</sup>

Importantly, no women of color and only four men of color have served on this court. The first persons of color to be confirmed to serve on the Fifth Circuit were Fortunato Pedro Benavides and Carl Stewart, each of whom received their commissions on May 9, 1994, after nomination by President

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277. See *U.S. Court of Appeals for the Fifth Circuit: Judges*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/u.s.-court-appeals-fifth-circuit-judges> [<https://perma.cc/7W8W-6JLB>] (last visited Apr. 10, 2019).

278. See *id.*

279. See *Kravitch, Phyllis A.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/kravitch-phyllis> [<https://perma.cc/6YTA-V68C>] (last visited Apr. 10, 2019).

280. See *id.*

281. Daniel E. Slotnik, *Phyllis Kravitch, Judge Who Opened Doors for Herself, Dies at 96*, N.Y. TIMES (June 21, 2017), <https://www.nytimes.com/2017/06/21/us/obituary-phyllis-kravitch-dead-court-of-appeals-judge.html> [<https://perma.cc/Q8NP-2L7T>].

282. See *King, Carolyn Dineen*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/king-carolyn-dineen> [<https://perma.cc/2YEE-VHGZ>] (last visited Apr. 10, 2019).

283. See *Jones, Edith Hollan*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/jones-edith-hollan> [<https://perma.cc/9TVZ-S3U6>] (last visited Apr. 10, 2019).

284. See *id.*

285. See *U.S. Court of Appeals for the Fifth Circuit: Judges*, *supra* note 277.

286. See *Clement, Edith Brown*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/clement-edith-brown> [<https://perma.cc/65VH-S8QE>] (last visited Apr. 10, 2019).

287. See *Owen, Priscilla Richman*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/owen-priscilla-richman> [<https://perma.cc/4WZ8-4JRC>] (last visited Apr. 10, 2019).

288. See *Elrod, Jennifer Walker*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/elrod-jennifer-walker> [<https://perma.cc/67W6-JAHN>] (last visited Apr. 10, 2019); *Haynes, Catharina*, FED. JUD. CTR., <http://www.fjc.gov/history/judges/haynes-catharina> [<https://perma.cc/W9N2-GMET>] (last visited Apr. 10, 2019).

Clinton.<sup>289</sup> Given that this circuit encompasses Texas, Louisiana, and Mississippi, its lack of racial diversity is stunning.

In the context of abortion jurisprudence, the Fifth Circuit has upheld some of the most notable and restrictive abortion laws to have been vetted by U.S. courts. Moreover, as a circuit, it has reviewed one of the highest numbers of abortion restrictions of the fifty states.<sup>290</sup> In the last year of our study (2017), the Texas legislature enacted another abortion restriction.<sup>291</sup> Of the female judges appointed to the court, all have been white and nearly all were appointed by Republican presidents. This composition may be the reason that the Fifth Circuit is an outlier jurisdiction on abortion. That is, women on the Fifth Circuit appointed by Republican presidents tend to vote closer to the ideological party line of the nominating president.

Currently, there are twenty-two judges sitting on the Fifth Circuit.<sup>292</sup> Only six of these twenty-two are women and only four are men of color.<sup>293</sup> Specifically, of the sitting judges on this circuit, currently twelve are white men, six white women, and four men of color.<sup>294</sup> Unlike other circuits we studied, the majority of the opinions decided with women on the panel in the Fifth Circuit were anti-choice. This held even in instances with a higher percentage of women serving on the panel.

In short, the court has decided forty-one cases regarding the right to abortion since the first woman was appointed to the court in 1979. Of these forty-one cases, women were on the panel for twenty-two of the cases, which is a higher rate on average of female representation on a circuit panel in an abortion decision. Nevertheless, the integration of women such that it results in greater representation of female judges on abortion cases remains an important goal. Of those twenty-two cases, one case had five women on the panel of judges; three cases had three women; seven cases had two women; and eleven cases had one woman.

Of those twenty-two cases, thirteen were clearly anti-choice, five were clearly pro-choice, and four had a mix of both pro-choice and anti-choice holdings. Importantly, one of the pro-choice decisions was a majority pro-choice per curiam opinion, with Judge Edith Hollan Jones writing an anti-choice dissenting opinion.<sup>295</sup> Further, another pro-choice opinion was joined

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289. See *Benavides, Fortunato Pedro*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/benavides-fortunato-pedro> [<https://perma.cc/F4LA-B952>] (last visited Apr. 10, 2019); *Stewart, Carl E.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/stewart-carl-e> [<https://perma.cc/97VS-F3TP>] (last visited Apr. 10, 2019).

290. See CTR. FOR REPROD. RIGHTS, *supra* note 137; *An Overview of Abortion Laws*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [<https://perma.cc/FPX9-S2YV>] (last visited Apr. 10, 2019).

291. *Center for Reproductive Rights Vows to Fight Texas' Latest Attempt to Restrict Abortion*, CTR. FOR REPROD. RIGHTS (June 6, 2017), <https://www.reproductiverights.org/press-room/center-for-reproductive-rights-vows-to-fight-texas-latest-attempt-to-restrict-abortion> [<https://perma.cc/H44W-FLWA>].

292. See *U.S. Court of Appeals for the Fifth Circuit: Judges*, *supra* note 277.

293. See *id.*

294. See *id.*

295. See *Causeway Med. Suite v. Ieyoub*, 123 F.3d 849 (5th Cir. 1997).

by a female judge, but one sitting by designation from the Eastern District of Louisiana.<sup>296</sup> Another one of the pro-choice opinions was pro-choice only after the Supreme Court reversed and remanded the original, mostly anti-choice, decision by the same judges.<sup>297</sup> Finally, only in eleven of these twenty-two abortion cases did a woman write an opinion (majority, concurrence, or dissent).

Importantly, all but two of the women serving on this court were appointed by Republican presidents. Judges Clement, Elrod, Haynes, and Owen were appointed by President George W. Bush; and Judge Jones was appointed by President Reagan. Alternatively, Judges King and Kravitch were appointed by President Carter. Judge Kravitch left the Fifth Circuit in 1981, when Alabama, Florida, and Georgia split from the Fifth Circuit to become the Eleventh Circuit.<sup>298</sup> However, prior to leaving the Fifth Circuit, Judge Kravitch was able to sit on the panel of one case dealing with abortion and she joined the pro-choice majority opinion.<sup>299</sup> Judge Clement joined a majority anti-choice opinion in five cases.<sup>300</sup> Judge Elrod wrote or joined anti-choice opinions in four cases and joined a pro-choice opinion in one case.<sup>301</sup> Judge Haynes joined anti-choice decisions in four cases and a pro-choice decision in one case.<sup>302</sup> Judge Jones joined and wrote anti-choice opinions in nine cases.<sup>303</sup> Judge King joined two anti-choice decisions.<sup>304</sup> Finally, Judge Owen wrote or joined anti-choice decisions in three cases and joined a pro-choice opinion in one case.<sup>305</sup> Based on our research, we can conclude that there is a prevalence of the anti-choice sentiment on this circuit.

#### CONCLUSION

In 2018, Justice Anthony Kennedy, nominated by President Ronald Reagan to the U.S. Supreme Court, announced his retirement. For many legal scholars concerned about civil liberties and civil rights, Justice Kennedy's retirement signaled a worrying period ahead for the Supreme Court, particularly as liberals and conservatives viewed Kennedy as the Court's "swing" voter. They wondered what would come next on important civil liberties and civil rights issues. Pundits and his fellow justices suggest

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296. See *Tompkins v. Cyr*, 202 F.3d 770 (5th Cir. 2000).

297. See *Whole Woman's Health v. Hellerstedt*, 833 F.3d 565 (5th Cir. 2016); *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *rev'd*, 136 S. Ct. 2292 (2016).

298. See Thomas E. Baker, *A Legislative History of the Creation of the Eleventh Circuit*, 8 GA. ST. U. L. REV. 363, 363 (1992) ("October 1, 1981, marked a milestone in the history of our federal courts. On that day the Fifth Circuit Court of Appeals Reorganization Act of 1980 (Reorganization Act) divided the 'former fifth circuit' into the 'new fifth circuit,' composed of the District of the Canal Zone, Louisiana, Mississippi, and Texas, and the new 'eleventh circuit,' composed of Alabama, Florida, and Georgia." (footnotes omitted)).

299. See *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981).

300. See *Lindsay & Goodwin*, *supra* note 33.

301. See *id.*

302. See *id.*

303. See *id.*

304. See *id.*

305. See *id.*

there will be a void on the Court; they point to Kennedy's commitment to the dignity of persons as part of what they believe will be his enduring legacy. Kennedy's pivotal record on marriage equality in the landmark *Obergefell v. Hodges*<sup>306</sup> and *United States v. Windsor*<sup>307</sup> decisions certainly speak to that.

Yet, Justice Kennedy's record is far more complicated. Before retiring, he voted with the majority in a series of alarming 5-4 decisions related to women's economic, health, and reproductive interests. The Court struck down a California law enacted to promote women's health and protect them from fraud and deception at crisis pregnancy centers.<sup>308</sup> Justice Kennedy cast crucial votes limiting women's rights to file suit under Title VII of the Civil Rights Act for gender pay claims (*Ledbetter v. Goodyear Tire & Rubber Co.*<sup>309</sup>); denying women plaintiffs class action status in a gender discrimination against their employer (*Wal-Mart Stores, Inc. v. Dukes*<sup>310</sup>); and finding "that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law . . . they judge incompatible with their sincerely held religious beliefs" in a case denying female employees contraceptive coverage (*Hobby Lobby*);<sup>311</sup> to name a few recent cases. Notably, in each case, all the women serving on the Supreme Court dissented.

Ultimately, these decisions offer a compelling case that representation matters, not only in the legislative and executive branches of government, but also in our courts. Ultimately, these harmful decisions to women's interests offer a compelling argument that representation matters, not only in the legislative and executive branches of government, but also in our courts.

This project emerges at a time in which the efficacy of the Supreme Court and its lower branches to protect civil liberties and civil rights, let alone the interests of women in matters of health, economics, and reproductive rights, is called into question. The enduring problem of women's marginal inclusion in government results in policies, legislation, and judicial opinions that too often threaten or undermine the interests of women. For example, the many U.S. Supreme Court decisions, rooted in stereotypes, that banned women from serving on juries, denied them equal rights to contract for longer workdays as men could, or restricted their range of employment exemplify this inequality. The sex blind spot is a deep and abiding problem; it will persist in American politics and within courts until more women attain these offices. However, the promise of our research is that with more women on the bench, the interests of all women will advance.

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306. 135 S. Ct. 2584 (2015).

307. 133 S. Ct. 2675 (2013).

308. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

309. 550 U.S. 618 (2007).

310. 564 U.S. 338 (2011).

311. 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting).