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## Gender and Securities Law in the Supreme Court

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## GENDER AND SECURITIES LAW IN THE SUPREME COURT

*Lyman Johnson,\* Michelle Harner\*\* & Jason A. Cantone\*\*\**

### INTRODUCTION

The 2010 appointment of Elena Kagan to the United States Supreme Court meant that, for the first time, three female justices would serve together on that court.<sup>1</sup> The appointment, among both supporters and detractors, was recognized as historic.<sup>2</sup> Less clear, then and now, is whether Justice Kagan's gender will really matter in how she votes as a justice. This question is an especially visible aspect of a larger issue: do female judges display gendered voting patterns in the cases that come before them?<sup>3</sup>

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<sup>1</sup> David Jackson, *Senate Confirms Elena Kagan to Supreme Court*, USA TODAY (Aug. 5, 2010, 6:59 PM), <http://content.usatoday.com/communities/theoval/post/2010/08/supreme-court-justice-elena-kagan-confirmed-by-senate/1>.

<sup>2</sup> See, e.g., Robert Barnes, *High-court Divide Has a New Dynamic*, WASH. POST (Oct. 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/02/AR2010100203956.html>; Press Release, National Organization for Women, NOW Applauds President Obama's Historic Nomination to Supreme Court (May 10, 2010), available at <http://www.now.org/press/05-10/05-10.html>.

<sup>3</sup> See *infra* Part II.

Understandably, with relatively few women judges serving on American courts until the latter part of the 20<sup>th</sup> century, the relationship of gender and judicial voting patterns has received serious scholarly attention for fewer than twenty years.<sup>4</sup> Numerous studies, using diverse methodologies, have examined the voting behavior of women judges sitting on different courts and ruling on a variety of substantive law issues. Along with these empirical findings, several theories have been advanced as to why women judges might—and might not—be expected to vote differently than their male colleagues on particular legal subjects.<sup>5</sup>

This article makes a novel contribution to the growing literature on female voting patterns. We investigated whether female justices on the United States Supreme Court voted differently than, or otherwise influenced, male justices on securities law issues decided by that court over the four decades spanning the years 1971-2010. To our knowledge, no prior empirical study has examined gender and judging in the securities area on any court, and only one study has assessed that topic in the related field of corporate law.<sup>6</sup>

Our study's findings revealed no discernible gender impact on the outcome of securities cases in the Supreme Court. Neither female Justices on an individual basis, nor panels including female Justices, showed any significant difference in the resolution of securities law issues. In this respect, our findings are consistent with the majority of judicial voting studies showing that gender primarily impacts judicial decision-making in cases involving feminist issues, particularly sex discrimination.<sup>7</sup> They also tend to support, indirectly, the position that females in the corporate boardroom may not change decision outcomes.<sup>8</sup>

Nevertheless, our data do suggest several interesting and meaningful trends in securities cases involving female Justices. For example, a comparison between all-male panels and female-included panels showed that a female-included panel was marginally more likely to leave open the possibility of sanctions for securities violations, as opposed to declining to impose sanctions altogether, which an all-male panel most often held.<sup>9</sup> All-male panels also were more likely than female-included panels to demonstrate a pro-corporate bias, measured by whether the Court held for the corporate party and whether that corporate party was the defendant in the lower court action.<sup>10</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See Christina Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390, 397 (2010), available at <http://epstein.usc.edu/research/genderjudging.pdf>.

<sup>7</sup> See *infra* Part II.B.

<sup>8</sup> *Id.*

<sup>9</sup> See *infra* Part IV.

<sup>10</sup> See *infra* Part IV.B.1.

A further breakdown of the female-included panels suggests that although the Court ruled in favor of corporations and found for the petitioner a majority of the time under panels with Justice O'Connor and Justice Ginsburg, as well as Ginsburg-only panels,<sup>11</sup> such an outcome was less prevalent than with all-male panels. However, only a small percentage of cases yielded these pro-corporate results when O'Connor was the only female Justice. In addition, our data revealed that unanimous verdicts were reached more often with female-included panels.<sup>12</sup> Accordingly, our data tend to suggest that female Justices may induce collaboration among the Justices and produce a panel effect on the Court's deliberation process—findings similar to those in the corporate boardroom context where some commentators suggest that female board members add this intangible value to the decision-making process.<sup>13</sup>

Part II of this article provides background and context for our study by briefly summarizing the current state of the scholarly literature on female judges' voting patterns. Part III describes the methodology of our study. Part IV reports our findings in detail, offers analysis of certain striking findings on female justice involvement in the securities law area, and suggests directions for future study.

In addition, by collecting and assessing case data reaching back almost forty years, our study establishes a baseline for determining whether the unprecedented presence of a third female Justice, Elena Kagan, will itself influence voting patterns on our highest court in different ways in the years ahead. This is especially important given the Supreme Court's recent renewed interest in securities cases,<sup>14</sup> and the likelihood it will decide many more such cases in the wake of the Dodd-Frank Act, also a historic legal development of 2010.<sup>15</sup>

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<sup>11</sup> See *infra* Part IV.B.2.

<sup>12</sup> See *infra* Part IV.

<sup>13</sup> See *infra* Part II.B.

<sup>14</sup> In the term that just ended in June 2011, the Supreme Court issued three decisions on securities law issues and a fourth decision, which, although centered more generally on class action lawsuits, holds important implications for securities litigation. The three securities decisions are *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011), and *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011). The class action ruling, while dealing with an employment dispute, addressed the requirements for member inclusion in a class more generally and will dramatically affect, not only current mortgage securities litigation, but also other securities class actions. See *Wal-Mart Stores, Inc. v. Dukes* 131 S. Ct. 2541, 2550-52 (U.S. 2011). In addition, for the current October 2011 term, the Supreme Court has agreed to hear another important case. See *Credit Suisse Securities v. Simmonds*, 638 F. 3d 1072 (9<sup>th</sup> Cir. 2010), *cert. granted*, 131 S. Ct. 3064 (2011).

<sup>15</sup> The Wall Street Reform and Consumer Protection (Dodd-Frank) Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The Securities and Exchange Commission ("SEC") has been involved in at least one significant case concerning the exercise of its new authority under the Dodd-Frank Act. See *Business Roundtable v. Securities and Exch. Comm'n*, 647 F.3d 1144 (D.C. Cir. 2011). Although the SEC has indicated that it will not seek a rehearing or appeal the *Business Roundtable* decision, other litigation is likely to arise as the rules implementing the Dodd-Frank Act take effect and the SEC continues to test its new authority under the Act. See Press Release, U.S. Sec. and Exch. Comm'n,

## I. THE STATE OF THE GENDER AND JUDGING LITERATURE

## A. Theories

Prior scholarship exploring the impact of gender on judicial voting has focused on two main questions: whether female judges vote differently than male judges on particular legal issues — typically referred to as “individual effects” — and whether the presence of a female judge affects her colleagues’ voting behavior — commonly referred to as a “panel effect.”<sup>16</sup> Both in theoretical and empirical terms, the field has been highly fractured, with different studies in the same area reaching mixed findings.<sup>17</sup> We first describe existing theories and then turn to the actual findings of various studies.

Theories in the gender and judging field can be divided into four schools of thought. The first school became known as the different voice theory, named after Carol Gilligan’s work, *In a Different Voice*.<sup>18</sup> Gilligan and her followers believe that men and women develop different worldviews due to their different experiences, and therefore, that they relate to and perceive society in different ways.<sup>19</sup> As applied to judicial voting patterns, the *different voice* theory predicts differences in behavior between a female judge and her male counterpart over a broad range of issues.<sup>20</sup> However, the theory does not expect much cross-influence between male and female worldviews and therefore, would not expect the presence of a female judge to produce a panel effect on her male colleagues.<sup>21</sup>

The second theory, called representational theory, is influenced by Hanna Pitkin’s work, *The Concept of Representation*.<sup>22</sup> The representational account holds that female judges represent other females before the law, and that they will rule to protect the gender’s interest in

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Statement by SEC Chairman Mary L. Schapiro on Proxy Access Litigation (Sept. 6, 2011), available at <http://www.sec.gov/news/press/2011/2011-179.htm>; see also, Matthew Ingber, *Litigation: Dodd-Frank: One Year Later*, INSIDE COUNSEL (July 28, 2011), <http://www.insidecounsel.com/2011/07/28/litigation-dodd-frank-one-year-later> (discussing, among other topics, potential litigation in connection with the SEC’s broader authority concerning aiding and abetting claims).

<sup>16</sup> See Boyd et al., *supra* note 6, at 389.

<sup>17</sup> See, e.g., Susan W. Johnson & Donald R. Songer, *Judge Gender and the Voting Behavior of Justices on Two North American Supreme Courts*, 30 JUST. SYS. J. 265, 266 (2009); Madhavi McCall, *Structuring Gender’s Impact: Judicial Voting Across Criminal Justice Cases*, 36 AM. POL. RES. 264, 265-66 (2008). See also Paula A. Monopoli, *Gender and Justice: Parity and the United States Supreme Court*, 8 GEO. J. GENDER & L. 43, 51 n.36 (2007) (listing representative studies).

<sup>18</sup> CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

<sup>19</sup> See Boyd et al., *supra* note 6, at 390.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> See generally HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* (University of California Press 1967).

litigation.<sup>23</sup> The theory is narrower than the different voice theory, and places its main emphasis on women's issues such as abortion, affirmative action, sex discrimination in employment, and sexual harassment.<sup>24</sup> Representational theory expects individual effects only on the issues that "are likely to have a more immediate and direct impact upon significantly larger numbers of women than men."<sup>25</sup> As with different voice theory, representational theory does not anticipate any panel effects on male judges.<sup>26</sup>

The third theory, known as informational theory, focuses on the unique experiences and valuable information on which female judges can draw to decide cases and influence male colleagues.<sup>27</sup> Informational theory predicts individual effects only where particular female judges have expertise or knowledge beyond their understanding of the law.<sup>28</sup> Informational theory also predicts panel effects in cases that exhibit individual effects because male judges are expected to find their female colleagues possessing credible and persuasive information gained from their gender specific experiences in certain areas.<sup>29</sup>

The fourth theory, commonly called the organizational account, emphasizes the commonalities among all judges: similar experiences in law school, similar work experiences, identical confirmation procedures, and identical constraints through the practice of following precedent.<sup>30</sup> Organizational theory predicts that these common professional experiences will overcome any gender-based differences.<sup>31</sup> The theory therefore posits that there will be no individual or panel effects in any area of the law, when viewed along gender lines.<sup>32</sup>

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<sup>23</sup> See Boyd et al., *supra* note 6, at 390–91.

<sup>24</sup> See *id.*

<sup>25</sup> Susan J. Carroll, *Women Candidates and Support for Feminist Concerns: The Closet Feminist Syndrome*, 37 W. POL. Q. 307, 308 (1984).

<sup>26</sup> See *id.* Boyd et al., *supra* note 6, at 390–91.

<sup>27</sup> See Boyd et al., *supra* note 6, at 391–92.

<sup>28</sup> See *id.*

<sup>29</sup> See, e.g., *id.* at 392.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* (citing Darrell Steffensmeier & Chris Herbert, *Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendant?*, 77 SOC. FORCES 1163, 1165 (1999)).

<sup>32</sup> Social psychological theories can also be used to explain gender differences. Self-referencing posits that, when a person makes a decision about how others perceive a situation, they first consider how they would respond. Self-referencing research has found that women, as compared to men, are more likely to find that Title VII sexual discrimination has occurred, partially because they are more likely to have experienced sexual harassment. See generally Richard L. Wiener & Linda E. Hurt, *How Do People Evaluate Social Sexual Conduct at Work? A Psycholegal Model*, 85 J. APPLIED PSYCHOL. 75, 75-85 (2000); Maria Rotundo, Dung-Hanh Nguyen & Paul R. Sackett, *A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 86 J. APPLIED PSYCHOL. 914, 914-22 (2001). Self-referencing research could explain prior research on how female Justices differ in their Title VII decisions. A Social Identity Theory model postulates that people do not use themselves as the anchor for analysis but, rather, protect members of their in-groups and discriminate against out-groups. See generally Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior in*

### B. Findings

Scholars have explored a wide variety of case law in searching for and measuring gender effects. Studies typically seek to control for ideology or political party, and will often control for several other factors, which may include the makeup of the court the judge sits on, region, the age of the judge, the year of decision, the ideological makeup of the Supreme Court, or the direction of the lower court decision.<sup>33</sup>

In criminal law studies, to illustrate, the findings of the effect of gender on judicial voting have been mixed. McCall examined cases with strong and moderate gender interest,<sup>34</sup> and found individual effects and panel effects in both areas.<sup>35</sup> However, McCall also found significant gender effects in search and seizure cases, where there is no identifiable gender factor, suggesting the gender effect in criminal law goes beyond only those cases directly affecting women.<sup>36</sup> Davis also found that female judges were approximately 7% more likely than male judges to vote liberally in search and seizure cases.<sup>37</sup> Songer, however, found no gender difference in search and seizure cases.<sup>38</sup>

Songer and Crews-Meyer examined gender in the context of capital punishment cases and found both individual and panel effects, although surprisingly, only male judges—not female—showed signs of the panel effect.<sup>39</sup> This suggests that female judges have little or no effect on each other in this area. However, more recently, Boyd, Epstein and Martin examined capital penalty cases in their thirteen-part study and found neither individual nor panel effects.<sup>40</sup>

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PSYCHOLOGY OF INTERGROUP RELATIONS 7, 7–24 (Stephen Worchel & William G. Austin eds., 1986). While Social Identity Theory has not been found to predict how men and women perceive alleged acts of sexual harassment, in-group/out-group perceptions play a role in how men and women perceive alleged acts of religious discrimination in workplace settings. See Jason A. Cantone & Richard L. Wiener, *Religion at Work: Evaluating Religiously Hostile Work Environment*, presented at 2011 Annual American Psychological Association Conference in Washington, D.C. (Aug. 2011) (on file with authors).

<sup>33</sup> See Boyd et al., *supra* note 6, at 397; McCall, *supra* note 17, at 269-81; Donald R. Songer & Kelley A. Crews-Meyer, *Does Judge Gender Matter? Decisionmaking in State Supreme Courts*, 81 SOC. SCI. Q. 750, 754-56 (2000).

<sup>34</sup> See McCall, *supra* note 17, at 272. McCall categorized the area of domestic abuse as one of strong gender interest and the subject of juveniles being tried as adults as one of moderate gender interest.

<sup>35</sup> *Id.* at 286-87.

<sup>36</sup> See *id.* at 285.

<sup>37</sup> Sue Davis, Susan Haire, & Donald R. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 132 (1993) [hereinafter *Voting Behavior*].

<sup>38</sup> *Id.* at 98 (citing Donald Songer, Sue Davis, & Susan Haire, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 433-34 (1994)).

<sup>39</sup> See Songer & Crews-Meyer, *supra* note 33, at 757 (2000) (finding a 14% increase in likelihood of a liberal vote in death penalty cases if the judge was female).

<sup>40</sup> Boyd et al., *supra* note 6, at 406 (concluding that the presence of women in the judiciary rarely has an appreciable empirical effect).

Songer and Crews-Meyer also examined gender effects in obscenity cases and found that a female judge was 15% more likely than her male counterpart to be *less* restrictive of allegedly obscene materials.<sup>41</sup> However, Davis' study disputes this finding by reporting no significant differences in general voting patterns in obscenity cases.<sup>42</sup>

Unlike other areas of the law, studies examining Title VII sex discrimination cases have consistently reported substantial gender effects.<sup>43</sup> These studies have found that a female judge is between 10% to 37% more likely than her male counterpart to vote for the plaintiff in a sex discrimination case.<sup>44</sup> Panel effects have also consistently been found in sex discrimination cases, with one study finding a 12-14% increase in the likelihood of the plaintiff winning if one member of the panel was female,<sup>45</sup> and another finding that the plaintiff's chance of winning an average male judge's vote tripled in that same situation.<sup>46</sup>

Many scholars have attempted to explain why gender effects have consistently been found in Title VII sex discrimination cases but have not been consistently found in any other area. Proponents of the different voice theory believe that it is gender itself that makes a difference, but are hard pressed to explain why the gender effects are not widespread. Representational theory proponents believe that sex discrimination is the area in which female judges are the most determined to protect their gender. Informational theory would anticipate a unique gender effect in sex discrimination cases because many of the women currently on the bench went to law school in the 1960s or 1970s, where they likely experienced discrimination both in law school culture and while attempting to find, or advance in, their jobs.<sup>47</sup> For example, Dixon argues that Justices O'Connor's and Ginsburg's high level of support for plaintiffs in sex discrimination cases is a product of their own experiences of discrimination throughout their careers.<sup>48</sup> She suggests that this experience makes the justices and other female judges of the same generation more sensitive and

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<sup>41</sup> Songer & Crews-Meyer, *supra* note 33, at 757.

<sup>42</sup> See Kenney, *supra* note 37, at 97 (citing *Voting Behavior*, *supra* note 37 at 131-33).

<sup>43</sup> See, e.g., Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination*, 21 YALE J.L. & FEMINISM 297, 312 (2009).

<sup>44</sup> Boyd et al., *supra* note 6, at 401; Kenney, *supra* note 37, at 98 (citing Donald R. Songer et al., *supra* note 38, at 425-29). See also Dixon, *supra* note 43, at 312 (citing Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in Federal Appellate Courts*, 114 YALE L.J. 1759, 1776 (2005) (finding increase of 65% in likelihood of vote for plaintiff in sex discrimination cases)); Kenney, *supra* note 37, at 97 (citing *Voting Behavior*, *supra* note 37, at 131 (finding a difference of 17%)); Kenney, *supra* note 37, at 96 (citing Jon Gottschall, *Carter's Judicial Appointments*, 67 JUDICATURE 164, 165-73 (1983) (finding "some" differences between male and female judges' votes in sex discrimination cases)).

<sup>45</sup> Boyd et al., *supra* note 6, at 406.

<sup>46</sup> See Peresie, *supra* note 44, at 1778.

<sup>47</sup> Dixon, *supra* note 43, at 306-07 (discussing the discrimination experienced by Justices O'Connor and Ginsburg).

<sup>48</sup> *Id.*



sympathetic to female plaintiffs in sex discrimination cases and therefore also better able to influence their male peers.<sup>49</sup> For Dixon, however, the effect is likely time-limited because future female judges will be less likely to have experienced sex discrimination in law school and in the work place.<sup>50</sup>

Scholars also have examined a possible link between a judge's gender and affiliated political party such that ideology, not gender, may lie behind voting patterns. Some studies have found that female judges vote for liberal outcomes more frequently than their male counterparts in at least some areas.<sup>51</sup> Since these liberal votes occurred in the civil liberties area and mainly in sex discrimination cases, it may well be a residual effect of the gender difference.<sup>52</sup> Other studies have suggested that it is a by-product of the different impact of gender in each political party. Songer and Crews-Meyer found in death penalty and obscenity cases, female judges appointed by Democratic presidents are more liberal than male judges appointed by the same presidents, but that female judges appointed by Republican presidents are neither more liberal nor more conservative than male judges also appointed by Republican presidents.<sup>53</sup> Davis had a similar finding in her study of sex discrimination and search and seizure cases.<sup>54</sup> Songer and Crews-Meyer speculated that this difference might occur because Democratic presidents perceive a larger political advantage in appointing liberal female candidates as opposed to women of moderate political views, while Republican presidents favor women who can argue "that they are 'no different' [politically] from their male competitors."<sup>55</sup>

In addition, several studies have specifically analyzed the appointment and voting records of U.S. Supreme Court female Justices, both as individuals and as to their influence on their male colleagues. After her appointment as the first woman on the Supreme Court, for example, Justice O'Connor voted for the plaintiff in approximately 89% of Title VII sex discrimination cases.<sup>56</sup> After joining the Court in 1993, Justice Ginsburg voted for the plaintiff in 92% of Title VII sex discrimination cases.<sup>57</sup> Those voting records are consistent with overall female voting patterns in Title VII cases. Strikingly, however, O'Connor and Ginsburg's agreement in sex discrimination cases did not translate to other areas. In civil liberties, criminal, and torts cases, Justice O'Connor was more conservative

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<sup>49</sup> See *id.* See *infra* note 60 and accompanying text.

<sup>50</sup> See Dixon, *supra* note 43, at 308.

<sup>51</sup> See Songer & Crews-Meyer, *supra* note 33, at 760 (finding that female judges tend to vote more liberally than male judges in civil liberties cases); see also Boyd et al., *supra* note 6, at 395 (finding that female Court of Appeals judges who voted in Title VII sex discrimination lean noticeably to the left).

<sup>52</sup> See Boyd et al., *supra* note 6, at 401.

<sup>53</sup> See Songer & Crews-Meyer, *supra* note 33, at 758.

<sup>54</sup> See Kenney, *supra* note 37, at 97 (citing *Voting Behavior*, *supra* note 37, at 129-33).

<sup>55</sup> See Songer & Crews-Meyer, *supra* note 33, at 760.

<sup>56</sup> See Dixon, *supra* note 43, at 301.

<sup>57</sup> *Id.*

than Justice Ginsburg and the average male justice, while she was slightly more liberal than her male colleagues in equality cases.<sup>58</sup> On the other hand, Justice Ginsburg was more liberal than the average male in all four categories.<sup>59</sup> While Justices O'Connor and Ginsburg agree in their support of plaintiffs in sex discrimination cases, they consistently agree on little else.

Justice O'Connor also made a difference in the voting records of her male peers. After her appointment to the Supreme Court, support for female plaintiffs in sex discrimination cases rose from 63% to 74%, thus providing evidence of a panel effect by Justice O'Connor on her male peers.<sup>60</sup> However, the addition of Justice Ginsburg — a noted women's rights advocate before her appointment — did not significantly change the Court's support for women's rights.<sup>61</sup> Davis found that some Justices increased their support, but other Justices' support dropped dramatically.<sup>62</sup> These studies suggest that appointment of the first woman to a panel is likely to raise support for women's rights among male colleagues, especially in sex discrimination cases, but additional women judges or justices may meet a more mixed reaction.<sup>63</sup> Of course, if the initial female judge or justice did substantially influence her male colleagues, there might be little room for further change to male voting patterns by the addition of a second woman.<sup>64</sup> Conversely, where the first woman's influence is more modest, the addition of a second (or third) judge or justice may result in greater changes. This is an important issue, both in the securities area and more generally, with Justice Kagan as the Supreme Court's third female Justice.

In short, studies have found clear signs of gender effects in Title VII sex discrimination cases but have found decidedly gender-neutral or mixed outcomes in all other areas.<sup>65</sup> This has held true for the Supreme Court, lower federal courts, and state courts.<sup>66</sup>

Little theoretical or empirical attention, however, has been given to possible gender voting differences in the business and commercial law

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<sup>58</sup> Johnson & Songer, *supra* note 17, at 270.

<sup>59</sup> *Id.*

<sup>60</sup> Barbara Palmer, *Justice Ruth Bader Ginsburg and the Supreme Court's Reaction to Its Second Female Member*, 24 *WOMEN & POL.* 1, 7 (2002) (citing Karen O'Connor & Jeffrey Segal, *Justice Sandra Day O'Connor and the Supreme Court's Reaction to Its First Female Member*, 10 *WOMEN & POL.* 95, 97 (1990)).

<sup>61</sup> *See id.* at 11 (finding only a 0.9% increase in support for women's rights claims).

<sup>62</sup> *See* Dixon, *supra* note 43, at 315-16. In particular, after Justice Ginsburg was appointed, the Justices appointed before O'Connor (Blackmun, Stevens, and Rehnquist) and some Justices appointed after O'Connor (Kennedy and Souter) increased their support, while other Justices appointed after O'Connor (Thomas and Scalia) reduced their support dramatically. Palmer, *supra* note 60, at 11-14.

<sup>63</sup> *See* Palmer, *supra* note 60, at 11-14.

<sup>64</sup> *See id.* at 12-14.

<sup>65</sup> *See* Peresie, *supra* note 44, at 1763 (describing prior studies of state supreme courts and federal appellate courts). *See also* Dixon, *supra* note 43, at 301.

<sup>66</sup> *See* Peresie, *supra* note 44, at 1762-65. *See also* Dixon, *supra* note 43, at 301.

area. Boyd and her co-authors reported in a 2010 study of federal judges that they found no gender differences in corporate veil piercing cases.<sup>67</sup> No study appears to have examined gender voting patterns in federal securities cases in the federal court system.

This article seeks to fill that void, providing data and analyses concerning Supreme Court voting patterns in securities cases both before and after Justice O'Connor's appointment to the Court. The article also draws upon the growing body of literature discussing the presence of women in corporate boardrooms and the role of women in influencing group decision-making.<sup>68</sup> Although this literature is still developing and is somewhat inconclusive regarding outcome effects,<sup>69</sup> several studies identify a difference in male and female behaviors in the group decision-making context.<sup>70</sup> We consider aspects of those studies here to provide a

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<sup>67</sup> Boyd et al., *supra* note 6, at 403.

<sup>68</sup> See generally DOUGLAS M. BRANSON, *NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM* (New York University Press 2007); LOIS JOY ET AL., CATALYST INC., *THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN'S REPRESENTATION ON BOARDS* (2007), available at [www.catalyst.org/publication/200/the-bottom-line-corporate-performance-and-womens-representation-on-boards](http://www.catalyst.org/publication/200/the-bottom-line-corporate-performance-and-womens-representation-on-boards); VICKI W. KRAMER ET AL., *CRITICAL MASS ON CORPORATE BOARDS: WHY THREE OR MORE WOMEN ENHANCE GOVERNANCE* (2006) (This report is available for purchase and the *Executive Summary* can be downloaded for free at [http://www.wcwonline.org/component/option,com\\_virtuemart/Itemid,217/keyword,kramer/lang,en/page,shop.browse/vmchck,1/](http://www.wcwonline.org/component/option,com_virtuemart/Itemid,217/keyword,kramer/lang,en/page,shop.browse/vmchck,1/)); Renée B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291 (2009); Jayne W. Barnard, *More Women on Corporate Boards? Not So Fast*, 13 WM. & MARY J. WOMEN & L. 703 (2007).

<sup>69</sup> Compare David Carter et al., *The Diversity of Corporate Board Committees and Financial Performance* (Working Paper, Mar. 24, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1106698](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1106698) (suggesting positive effects), with Kathleen A. Farrell & Philip L. Hersch, *Additions to Corporate Boards: The Effect of Gender*, 11 J. CORP. FIN. 85 (2005) (suggesting no effects). See also, Adams & Ferreira, *supra* note 68, at 301 (concluding that the fraction of women on corporate boards significantly impacts "the sensitivity of CEO turnover to stock return performance"); Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809, 822, 837 (2011) (finding that gender bias of institutional investors impacts firm performance and, thus, women on corporate boards may negatively influence stock performance).

<sup>70</sup> See, e.g., Linda L. Carli, *Gender and Group Behavior*, in *HANDBOOK OF GENDER RESEARCH IN PSYCHOLOGY* 337 (Joan C. Chrisler & Donald R. McReary eds., 2010) (reviewing literature and noting that "[r]esearch indicates that women exhibit greater amounts of communal behavior than men do, and men exhibit greater amounts of agentic behavior than women do . . . [and] women display more warmth, collaboration, and support."); Rebecca J. Hannagan & Christopher W. Larimer, *Does Gender Composition Affect Group Decision Outcomes? Evidence from a Laboratory Experiment*, 32 POL. BEHAV. 51, 60 (2010) (reviewing literature about the gendered decision making processes and finding in laboratory comparison that, compared to all male groups, "female and mixed groups produc[ed] outcomes closer to the universal mean."); Rebecca J. Hannagan & Christopher W. Larimer, *Assessing Gender Dynamics in Local Government: Results from a Statewide Field Experiment* (Feb. 15, 2011) (paper prepared for presentation New Research on Gender in Political Psychology Conference at Rutgers University, Mar. 4-5, 2011), available at <http://empowerfitnesssevents.com/files/newresearch/ckfinder/files/Larimer%20and%20Hannagan%20-%20Assessing%20Gender%20Dynamics%20in%20Local%20Government%2015-11.doc> (study finding that "the presence of females tends to dampen down [sic] the variance and bring preferences closer to the mean."). See also Drude Dahlerup, *The Story of the Theory of Critical Mass*, 2 POL. &

more complete picture of the Court's decisions in securities cases. Taken together, these various projects provide us with a better understanding of female influence in an array of institutional settings.

## II. STUDY METHODOLOGY

The study's primary objective is to analyze voting patterns in Supreme Court cases addressing issues raised under federal securities laws to discern any effects related to the presence of one or two female Justices on the bench. As described below, we designed the database to achieve this particular objective. The database is not, however, restricted to this purpose. The breadth of the data collected facilitates a broader analysis of general trends in securities cases and provides a format that can be supplemented as the gender make-up of the Supreme Court continues to change over time. The following discussion explains the components of the case database and the general design and scope of the study.

### A. *The Case Database*

The case database consists of eighty-eight federal securities cases decided by the Supreme Court between October 1971 and June 2010. This period captures all securities cases decided by the Supreme Court from ten years before Justice O'Connor's first term on the Court in September 1981, through the last complete session before this study in 2010. During this period, Justice O'Connor was the only female on the bench until August 1993, at which time Justice Ginsburg joined the Court. Justice O'Connor resigned from the Court in January 2006; Justice Ginsburg was then the only female Justice until Justice Sotomayor joined the Court in August 2009.<sup>71</sup> Inclusion of the ten-year period of all-male Justice panels prior to

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GENDER 511, 519-20 (2006) (arguing that although the exact percentages and measurements of critical mass theory are of minor importance, increasing women's political representation remains an important goal); Lissa Lamkin Broome, *The Corporate Boardroom: Still a Male Club*, 33 J. CORP. L. 665, 679-80 (2008) (criticizing Douglas M. Branson's argument, *supra* note 68, that greater board diversity would not increase corporate performance and explaining other, non-tangible benefits to including women and increasing diversity on corporate boards); Lissa Lamkin Broome et al., *Does Critical Mass Matter? Views from the Boardroom*, 34 SEATTLE U. L. REV. 1049, 1079 (2011) (observing that "as female directors, [respondents] feel more at ease and less like tokens or group representatives when there is a significant minority of women on the board," which likely enables board members to function more effectively) [hereinafter *Does Critical Mass Matter?*].

<sup>71</sup> The database used for this article — with data collection ending as of June 2010 — captures only the first year of Justice Sotomayor's service on the Court and does not include any cases decided after Justice Kagan's appointment to the Court. We believe this facilitates a retrospective analysis of gender and securities cases during periods where there was no female Justice or only one or two female Justices, while also establishing a baseline for studying whether in 2011 and thereafter the presence of three female Justices alters voting patterns.

Justice O'Connor's appointment provides a baseline for several of the analyses set forth *infra* Part IV.

We used two different processes to identify cases that satisfied our subject matter and time period restrictions. First, we searched the Westlaw Supreme Court Database for all cases decided by the Court between October 1971 and June 2010 that were coded as "Securities Regulation," or included the Securities Act of 1933 ("Securities Act"), the Securities Exchange Act of 1934 ("Exchange Act"), or the Investment Company Act of 1940 in the case headnotes. Second, we searched the U.S. Supreme Court Database for all cases decided by the Court between October 1971 and June 2010 that were coded as "Securities Regulation." In this second search, we also reviewed other cases coded as "Economic Activity" cases to confirm the identification of all securities cases. We then reconciled the two searches, which yielded forty-eight securities cases decided during the pre-O'Connor period and forty-three such cases decided subsequent to Justice O'Connor's appointment. The large number of cases decided in the one decade prior to O'Connor's appointment, in comparison to the number in the almost three decades thereafter, is itself a striking finding, revealing an overall dramatic decline in the Court's attention to securities cases after the 1970's.<sup>72</sup> We removed three cases after further review because they did not involve securities law issues, leaving eighty-eight cases for the database.<sup>73</sup>

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<sup>72</sup> Although it is difficult to isolate a single cause for the decline in securities cases decided by the Court, it is likely attributable to several factors, including the business and social climate of that time period, the leadership at the SEC, and the makeup of the Court. In fact, at least one study suggests that "Justices who are ideologically aligned on the merits tend to vote together on certiorari much more consistently than those Justices who are ideologically opposed on the merits, suggesting that there is a significant merits-oriented component to the Justices' certiorari formulas." Margaret Meriwether Cordray & Richard Cordray, *Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits*, 69 OHIO ST. L.J. 1, 2 (2008).

<sup>73</sup> Given the small sample size, we opted to code and analyze all eighty-eight cases, rather than limit the sample pool through a random selection process. In addition to the case data collected by the coding team, we also added information to the database regarding the individual Justices to serve as control variables in the various analyses. As described *infra* Part IV, although we found certain striking gender-related voting patterns, the presence of a female Justice on the Court did not produce any statistically significant effects on overall case outcomes. Accordingly, we did not find a need to invoke personal attributes, such as education, socio-economic status, family status, etc., as control variables in regression analyses. Nevertheless, as noted *infra* Part IV, anecdotal evidence suggests that ideology may impact the resolution of securities cases before the Supreme Court and may warrant further study. Prior studies of judicial decisions in general have suggested an ideological effect. *See supra* notes 51-55 and accompanying text. *See also* Joshua B. Fischman & David S. Law, *What is Judicial Ideology, and How Should We Measure It?* 29 WASH. U. J.L. & POL'Y 133, 135 (2009) (acknowledging that political "ideology plays a significant role in judicial decision-making," while criticizing the methods of measuring political ideology); Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naïve Legal Realism*, 83 ST. JOHN'S L. REV. 231, 235-36 (2009) (explaining the theory of "judicial politics," which supports the idea that judges decide the outcome of a case according to their "ideology.").

The data collected and included in the database provides a wealth of information about the Supreme Court's conduct in securities cases since October 1971. The database also can be expanded upon for future studies to include securities cases decided by the Court after June 2010, thereby examining Justice Kagan's voting behavior and influence, as well as to include a larger cross-section of business law cases that are not specifically securities law centric. This article, however, specifically reports on gender-related voting in the securities area.

### *B. The Study's Design and Scope*

We devoted significant time to creating, testing, and refining the project-coding scheme. The final coding scheme included twenty primary variables, with multiple sub-variables, developed specifically to identify key factors relevant to the questions underlying our study.<sup>74</sup> The variables targeted information in the following general categories: basic case information, party identities, amici participation, legal issues presented, holdings of the Court as to whether sanctions were imposed or at least held open as a possibility, and the different Justices' votes. A basic description of each of the variables and sub-variables is set forth in Appendix A. We tested and refined the coding scheme through multiple practice rounds of coding with our coding team. We ultimately achieved an acceptable inter-coder reliability rate and proceeded to code the eighty-eight cases.<sup>75</sup>

During the actual study, each member of the coding team worked independently to code his or her assigned cases. This process required each member to review the particular Supreme Court decision and information included in the LEXIS Supreme Court Database regarding amicus briefs filed in the case.<sup>76</sup> Upon completion of the coding, we reviewed and reconciled any inconsistencies in the database, which required only minor, non-substantive changes. We then finalized the database and proceeded with our analyses of the data.

As described below, we performed several sets of analyses with the data. We first considered the data in the context of general trends in securities cases. These analyses focused on variables such as legal issues presented, the presence of amici, and the Court's holding. These analyses

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<sup>74</sup> In addition to sub-variables, the coding scheme also included detailed instructions for coding each variable that were developed through the practice coding rounds. These instructions helped coders approach each variable in a consistent, objective manner. Some key instructions are included in footnotes to Appendix A.

<sup>75</sup> Across the twenty primary variables and multiple sub-variables, inter-coder reliability between the five coders was higher than 90% for all variables, with a high of 100% agreement for multiple variables.

<sup>76</sup> An initial review of the Westlaw and LEXIS databases indicated similar but not always identical inventories of Supreme Court amicus briefs. We instructed all coders to use the LEXIS Supreme Court Database for the amicus brief variable because one member of the coding team did not have access to Westlaw and we wanted to maintain consistency in the data collection process.

are only summarized in this article to provide context for the gender findings; we anticipate providing a full exploration of these data in a separate article or forum.

We then scrutinized the data and general analyses in light of the Supreme Court's gender composition at the time of the decision. These analyses were designed to focus on the impact of female Justices on the Court's holdings in securities cases. We evaluated both individual Justice voting patterns, as well as potential panel effects. In addition, we performed a separate substantive review of certain cases in the database that presented striking, but not necessarily statistically significant, results in our quantitative analyses. The results of our various analyses in the gender context are set forth in detail below.

### III. DATA REPORT AND ANALYSIS

In seeking to identify and analyze any gender impact on securities cases decided by the Supreme Court, our basic hypothesis was that the presence of one or more female Justices on the Court would not significantly affect the outcome of the cases. We based this hypothesis on the majority of judicial voting studies showing gender impact almost exclusively in the context of cases involving traditional feminist issues.<sup>77</sup> The data tend to prove our hypothesis.

Securities cases typically do not raise gender sensitive or traditionally feminist issues. Female Justices likely have similar experiences to their male colleagues with securities law issues; additionally, most cases do not involve a particular issue unique to gender that warrants special consideration or to which female Justices bring gender-specific expertise or knowledge. Consequently, our findings also garner support under the various theories of gender and voting discussed in Part II.A.<sup>78</sup>

Perhaps just as important are the study's secondary findings that suggest several intriguing associations and trends in securities cases involving female Justices. For example, all five female-authored majority opinions involving alleged violations of Section 10(b) of the Exchange Act remand at least one issue to the lower court, and focus more on serving legislative intent than showing a pro-plaintiff or pro-defendant bias.<sup>79</sup> Moreover, all-male panels were marginally more likely to decline to impose sanctions than panels including at least one female Justice, which were marginally more likely to leave open the possibility for sanctions.<sup>80</sup>

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<sup>77</sup> See *supra* notes 32-50 and accompanying text.

<sup>78</sup> See *supra* Part II.A.

<sup>79</sup> See *infra* Part IV.D.1.f.

<sup>80</sup> See *infra* Part IV.D.1.

The Court also was more likely to decide a case by a unanimous decision when at least one female Justice was present on the panel.<sup>81</sup>

We believe these data support meaningful inferences that may provide a foundation for further study. Specifically, the presence of a female Justice may change the dynamics of deliberations and facilitate collaborative decisions. Although studies debate whether females in the corporate boardroom impact firm financial performance, several commentators emphasize the cultural and other non-outcome related value to having female group members.<sup>82</sup> Our study suggests that such intangible value may exist, not only in the boardroom, but also in the courtroom.<sup>83</sup>

This section first presents basic descriptive and background data that identify the attributes of the eighty-eight cases included in the database. The data suggest significant findings with respect to the presence of amicus briefs in the case. These findings appear driven primarily by the amicus filings themselves, and not by the gender of the Justices. Nevertheless, we provide some of the key data for context and potential further study. The section then delves into the gender-specific data. It presents both the overall findings, as well as discrete analyses performed on specific gender data. The section concludes by synthesizing the gender data and suggesting opportunities for future studies.

### A. Background Data Analysis

#### 1. Variables of Interest in Database

We first examined the frequencies of the variables of interest to make sure we had adequate variation to perform the analyses. For example, we investigated the legal issue before the U.S. Supreme Court. In order of frequency, the legal issues from the eighty-eight case opinions were: the

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<sup>81</sup> See *infra* note 124 and accompanying text.

<sup>82</sup> See *supra* notes 69-71. See also Diana Bilimoria, *Building the Business Case for Women Corporate Directors*, in *WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL CHALLENGES AND OPPORTUNITIES* 25, 27 (Ronald J. Burke & Mary C. Mattis eds., 2000) (referencing studies that posit female board members “generate a more productive discourse around the board table. . . .”); Zena Burgess & Phyllis Tharenou, *Women Board Directors: Characteristics of the Few*, 37 *J. BUS. ETHICS* 39, 40 (2002) (explaining reasons often offered for including women on boards of directors, including their “influence on decision making and leadership styles of the organization” and “ensuring ‘better’ board-room behavior”); KRAMER ET AL., *supra* note 68 (study finding that women in the boardroom “bring a collaborative leadership style that benefits boardroom dynamics.”). *But see Does Critical Mass Matter?* *supra* note 70, at 1080 (urging skepticism towards studies suggesting different outcomes based on a critical mass theory because “[a]lthough increased minority representation could enhance opportunities for collaboration and support . . . other scenarios are also plausible.”).

<sup>83</sup> See also Linda S. Maule, *A Different Voice: The Feminine Jurisprudence of the Minnesota State Supreme Court*, 9 *BUFF. WOMEN’S L.J.* 295, 315 (2000-01) (finding in a study of Minnesota Supreme Court that, “[a]lthough the level of consensus for the court as a whole increased as more women were placed on the bench, the female justices also began to dissent more frequently.”).



Exchange Act (forty-five, 51.1%); both the Exchange Act and Securities Act (eleven, 12.5%); other (eleven, 12.5%); the 1940 Investment Company Act (six, 6.8%); the Securities Act (five, 5.7%); the Exchange Act and other (four, 4.5%); the Securities Act, Exchange Act, and the 1940 Act (two, 2.3%); state securities laws (two, 2.3%); the 1940 Act and other (one, 1.1%); and a state securities law and other (one, 1.1%).

We then examined the case holdings. The Court found for the petitioner in fifty-three (60.2%) cases, the respondent in thirty-two (36.4%), neither in two (2.3%), and both (in some manner) in one (1.1%) of the opinions. Looking to what the Court held, the Court declined to impose sanctions or liability under the securities laws in forty (45.5%) of the opinions, left open the possibility of some type of sanction or liability in thirty (34.1%) of the opinions, did not discuss sanctions or liability in eleven (12.5%) of the opinions, imposed monetary sanctions in four (4.5%) of the opinions, and imposed other liability or non-monetary sanctions in three (3.4%) of the opinions. With respect to the Court's treatment of the lower court's decision, the Court affirmed in thirty (34.1%); reversed in twenty-three (26.1%); reversed and remanded in twenty (22.7%); vacated in four (4.5%); vacated and remanded in three (3.4%); affirmed in part, reversed in part, and remanded in three (4.5%); and remanded in two (2.3%) of the opinions — in one opinion, the Court affirmed in part and remanded, and, in another opinion, the Court reversed in part and remanded.

Additionally, we investigated the amicus curiae briefs. Of the eighty-eight case opinions, twenty-two (25.0%) did not have an amicus brief filed for either party, thirty (34.1%) had an amicus brief for one of the parties, and thirty-six (40.9%) had amicus briefs filed for both parties. Of the thirty case opinions with an amicus brief for only one of the parties, the brief was filed for the petitioner in twelve of the case opinions and for the respondent in eighteen of the case opinions.

We then further investigated the parties in the case, specifically whether the Court ultimately finds more often for the original petitioner or respondent. In a cross tabs analysis of for whom the Court found, and which party was the defendant in the lower court action, we found that the Court finds for the defendant in fifty-four of the opinions and for the plaintiff in thirty-one of the opinions. This is almost perfectly reversed from the Court's finding for the petitioner in fifty-three opinions and for the respondent in thirty-two of the opinions. It may indicate an association between the party identity of petitioners in the U.S. Supreme Court and defendants in the related lower court action. As discussed *infra* Part IV.B.2, the data suggest that, when the Court holds in favor of a corporate petitioner, that corporation likely was the defendant in the lower court action.

## 2. The Role of Legal Issue

With the above frequencies in mind, we then investigated whether the legal issue before the Court affected the Court's ultimate holding (e.g., for whom the Court found, what the Court found, and how the Court treated the lower court's decision). Regarding for whom the Court found, the legal issue did not make a significant difference.<sup>84</sup> The Court found for the petitioner in 60.2% of the cases, and found for the petitioner in 60% of the forty-five Exchange Act cases, which comprised more than half of the sample, after the three cases were removed where the Court found for both or neither party. One interesting finding is that cases involving both the Securities Act and Exchange Act were disproportionately more likely to result in a holding for the petitioner (80.0% do, as compared to 60.2% of the overall sample, 60.0% for the Exchange Act alone and 60.0% for the Securities Act alone).<sup>85</sup>

Overall, the legal issue before the Court did not affect whether the Court imposed or declined to impose sanctions.<sup>86</sup> Cases involving the Exchange Act did not differ significantly from the overall case set.<sup>87</sup> The Court declined to impose sanctions or liability under securities laws in 46.7% (45.5% overall), left open the possibility of some type of sanction or liability in 31.1% (34.1% overall), did not discuss sanctions or liability in 15.6% (12.5% overall), imposed monetary sanctions in 6.6% (4.5% overall), and imposed other liability or non-monetary sanctions in none (3.4% overall). Cases involving both the Securities and Exchange Acts are more likely to result in the Court leaving open the possibility of sanctions (in 45.5% of cases, as compared to 34.1% overall, 31.1% for the Exchange Act alone and 40.0% for the Securities Act alone). All four of the cases where the Court imposed monetary sanctions involved the Exchange Act, while all three of the cases resulting in the imposition of other non-monetary sanctions involved the Securities Act. The sample size for these findings is too small to draw initial conclusions, but each finding warrants further research to examine the role of the legal issue on imposition of sanctions.

To further examine the unique role of cases involving both the Securities and Exchange Acts, we then explored whether the Court treated their lower court decisions differently. Results found that the Court did; cases involving both the Securities and Exchange Acts were those most likely to be reversed (in 54.5% of these cases, as compared to 26.4% of the overall cases, 25.0% of the Exchange Act cases, and 20.0% of the

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<sup>84</sup>  $X^2(27) = 11.29, p = .997$ ; the result remains non-significant,  $X^2(27) = 4.21, p = .887$ , even after removing the three cases where the Court found for both or neither party.

<sup>85</sup> *See id.*

<sup>86</sup>  $X^2(36) = 43.39, p = .185$ .

<sup>87</sup> *See id.*

Securities Act cases). There were no other significant trends when comparing the treatment of lower court decision and the raised legal issue. Overall, it appears that when the Court was provided a complex case involving both the Securities and Exchange Acts, the Court was more likely to find for the petitioner, leaving open the possibility of sanctions (but not imposing them), and/or reversing the lower court's decision.

### 3. The Role of Amicus Briefs

We then explored whether the presence of amicus briefs affected the Court's holding. This analysis consisted of three parts: the role of amicus briefs overall and then the role of petitioner and respondent amicus briefs.

Overall, when an amicus brief was filed in the case, the Court was significantly more likely to find for the respondent.<sup>88</sup> In particular, the Court found for the respondent in 44.4% (twenty-eight of sixty-three) of the cases where an amicus brief for either party was filed, while the Court found for the petitioner in 18.2% (four of twenty-two) of the cases when no amicus brief was filed for either party. The presence of an amicus brief (for *either* party) mitigated the Court's general trends discussed *supra* Part IV.A.1 to find in favor of petitioners. This effect, however, focused on only whether any amicus brief was filed, not on which party was supported.

The Court declined to impose sanctions in 40.9% of cases (twenty-seven of sixty-six) when an amicus brief was filed for either party and declined to impose sanctions in 59.1% of cases (thirteen of twenty-two) with no amicus brief. However, no significant effect emerged when examining whether the presence of an amicus brief affected our composite variable concerning the Court's decision to impose sanctions and, if relevant, what type of sanctions were imposed.<sup>89</sup> The presence of an amicus brief likewise had no effect on how the Court treated the lower court's decision.<sup>90</sup> Accordingly, the primary impact of amicus briefs in the analysis so far is the finding that the Court was more likely to hold in favor of the respondent when an amicus brief is filed.

From this set of findings, one would assume that the majority of amicus briefs in this analysis were filed in support of the respondent. As expected, when there was an amicus brief filed for the respondent (in 46.2% of cases, twenty-four of fifty-two), the Court was significantly more likely to find for the respondent, as compared to cases where no amicus brief for the respondent was filed (in 24.2% of cases, eight of thirty-three).<sup>91</sup> While the filing of an amicus brief for the respondent generally improved the likelihood that the Court would find for the respondent, the Court was still

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<sup>88</sup>  $X^2(1) = 4.79, p < .05$ .

<sup>89</sup>  $X^2(4) = 5.24, p = .26$ .

<sup>90</sup>  $X^2(8) = 6.37, p = .61$ .

<sup>91</sup>  $X^2(1) = 4.13, p < .05$ .

more likely to find for the petitioner. In addition, the presence of an amicus brief for the respondent did not affect whether sanctions were imposed,<sup>92</sup> or how the Court treated the lower court's opinion.<sup>93</sup>

Surprisingly, the presence of an amicus brief for the petitioner did not affect for whom the Court held.<sup>94</sup> For example, the Court found for the petitioner in 65.8% (twenty-five of thirty-eight) of the cases without a petitioner amicus brief and found for the petitioner in 59.6% (twenty-eight of forty-seven) of the cases with a petitioner amicus brief. While these findings were statistically non-significant, they represent the opposite of what is to be expected. As with the respondent briefs, a petitioner amicus brief did not affect sanctions liability,<sup>95</sup> or how the Court treated the lower court's opinion.<sup>96</sup>

#### 4. Changes Over Time Concerning Amicus Briefs

We then sought to explore whether the presence of amicus briefs has changed over time. Again, our stratified sample included cases from 1971 until 2010 to effectively gauge the effect of adding female Justices to the U.S. Supreme Court. Throughout this period, the presence of amicus briefs increased in general.<sup>97</sup> The likelihood that a case would have an amicus brief for the petitioner also significantly increased,<sup>98</sup> however, there was only a marginally significant increase in the likelihood that the case would have an amicus brief for the respondent.<sup>99</sup> This is especially interesting given the above finding that respondent amicus briefs had a significantly stronger effect on Court holdings than petitioner amicus briefs.

We then examined if cases were more likely to have amicus curiae briefs, over time, before the appointment of the first female Justice. Before the appointment of the first female Justice, cases were already receiving increasingly more amicus briefs filed for the petitioner,<sup>100</sup> overall,<sup>101</sup> but not for the respondent.<sup>102</sup> This matches the trend that continued when female Justices were added to the Court. Thus, it appears that it is the effect of time, and not the addition of female Justices, which led to the increase of amicus curiae briefs. Additionally, the party for which the Court held did not significantly change over time.<sup>103</sup>

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<sup>92</sup>  $X^2(4) = 7.00, p = .14.$

<sup>93</sup>  $X^2(8) = 6.15, p = .63.$

<sup>94</sup>  $X^2(1) = 0.35, p = .56.$

<sup>95</sup>  $X^2(4) = 0.64, p = .96.$

<sup>96</sup>  $X^2(8) = 4.86, p = .77.$

<sup>97</sup>  $F(35, 87) = 1.83, p < .05.$

<sup>98</sup>  $F(35, 87) = 1.76, p < .05.$

<sup>99</sup>  $F(35, 87) = 1.56, p = .07.$

<sup>100</sup>  $p < .05.$

<sup>101</sup>  $p < .05.$

<sup>102</sup>  $p = .08.$

<sup>103</sup>  $F(35, 84) = 1.04, p = .44.$

### *B. The Role of Female Justices*

Our research sought to investigate whether the presence of one or more female Justices on the Court affected decisions in securities cases. The results presented below will analyze the differences between the all-male Court and the Court after the addition of female Justices, as well as the differences among the various female compositions on the Court. In addition, Appendix B presents regression analyses showing the predictive effect, if any, of the variables of interest coded in the database. Overall, the regression results showed that there is no overall effect for gender across the entire case sample. However, when evaluating the cases after the addition of female Justices, whether a female Justice authored the majority opinion significantly predicted what the Court held.<sup>104</sup>

In the eighty-eight cases examined, twenty different Justices participated in the opinions and each was provided with his or her own code. When examining the majority opinions, concurrences, and dissents, there were ninety-two different combinations of Justices, each provided with its own code. We then split the variables into those including female Justices and those without female Justices. Of the eighty-eight cases examined for this study, forty-nine of the opinions were issued by all male-panels and thirty-nine of the opinions were issued by the Court when one or more female Justice was involved.

#### 1. The Panel Effect of Female Justices

This initial set of analyses did not consider the role female Justices played (*i.e.*, were they in the majority, concurrence, dissent, split amongst themselves) but, rather, looked to differences in the study variables between the all-male and female-included panels.

*Primary Finding: Female-Included Panels Do Not Differ Significantly from All-Male Panels in Types of Claims or Decision Outcomes*

First, we wanted to determine if the female-included panels faced different types of claims or different types of claimants than the exclusively male panels. Neither the type of petitioners nor type of respondents differed between the panels. For example, both panels had nineteen cases each with individual respondents and four cases each with institutional investors, while the male-only panels had eighteen corporations as respondents (female-included panels had twelve) and eight governmental respondents (female-included panels had four).<sup>105</sup> The issues presented also did not significantly differ between the female-included and all-male

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<sup>104</sup> See *infra* Appendix B.

<sup>105</sup>  $X^2(3) = 1.42, p = .70$ . Additionally, the parties did not “switch sides” in a differential manner between the two types of panels. When examining whether the petitioners or respondents were originally petitioners or respondents at the trial court level, there was no significant difference ( $p = .11$ ).

panels.<sup>106</sup> For both panels, the majority of cases involved the Exchange Act (51% of both the all-male and female-included panels), and a similar few involved the Securities Act (discussed in 20% of the all-male and 21% of the female-included panels' opinions). Other issues, such as the 1940 Investment Company Act and state securities laws, were rare in the sample. Because eighty-six of the eighty-eight cases (98%) came from federal courts, we did not analyze any difference between cases which did or did not come from a federal court.

Second, decision outcomes also did not differ between the all-male and female-included panels. Panel composition did not meaningfully influence whether the Court found for the respondent (thirty (61%) for the all-male as compared to twenty-three (59%) of the female-included) or petitioner (in sixteen in each of the all-male and female-included panels, 33% and 41% respectively).<sup>107</sup>

*Secondary Trend: Female-Included Panels Less Likely than All-Male Panels to Show Pro-corporate Bias*

A simple analysis of whether the Court held for the petitioner or respondent does not consider the type of party potentially benefitting from the Court's holding or that party's likely position before the Court. To explore these factors, we re-coded the type of petitioner and respondent so we could further examine when the Court held for a corporation or held against a corporation when only one party was a corporation. We excluded cases where both parties were corporations or where neither was a corporation because each would require the Court to hold for or against a corporation, unless it found for neither or both. The all-male panel found for a corporation in eighteen (69%) of these selected cases and against a corporation in eight (31%). The female-included panel found for a corporation in fourteen (58%) of these selected cases and against a corporation in ten (42%).<sup>108</sup> We then examined whether the corporation's original status as plaintiff or defendant affected the Court's decision.

We first examined the all-male panels, looking only at the corporate parties. When the Court found for the corporate petitioner, the corporation was the defendant in the lower court action in every case. When the Court found for the corporate respondent, the corporation was the defendant in 66% of the cases (and plaintiff in 33% of the cases). This shows a strong trend of the Court finding for corporations when they are originally defendants, the party sued under the securities laws.

In the female-included panels, when the Court found for the petitioner corporation, the corporation was originally the defendant in 77% of the

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<sup>106</sup>  $X^2(9) = 6.74, p = .67$ . For example, coders identified whether cases involved the 1933 Securities Act, the 1934 Securities Exchange Act, the 1940 Investment Company Act, or stated securities laws.

<sup>107</sup> The remainder of the holdings either found for both parties or neither party.

<sup>108</sup> There was not a significant difference in either this limited sample or the entire sample, with the other cases coded "both corporations" or "neither corporation."

cases, and the plaintiff in 23% of the cases. When the Court found for the respondent corporation, the corporation was originally the defendant in 57% of the cases and the plaintiff in 43% of the cases. Although some studies suggest an increasing pro-business bias on the Court, our data suggest that this trend, at least measured by the identity of the party, is not as prominent in the securities context.

*Secondary Trend: Female-Included Panels Less Likely than All-Male Panels to Decline Imposition of Sanctions*

While the panels did not significantly differ in whether they imposed sanctions,<sup>109</sup> the all-male panels were marginally more likely to decline to impose sanctions and the female-included panels were marginally more likely to leave open the possibility for sanctions. Very few of the holdings in either panel imposed any type of monetary or nonmonetary sanctions.<sup>110</sup>

Although related more to changes over time than gender composition, the female-included panels were significantly more likely to have cases with an amicus curiae brief for the petitioner (in 72% of cases, as compared to 59% for the all-male panels),<sup>111</sup> and more likely to have cases with an amicus curiae brief for the respondent (in 74% of cases, as compared to 49% for the all-male panels).<sup>112</sup> The female-included panels were also significantly more likely to have amicus curiae briefs filed for both respondent and petitioner, as seen in Figure 1.<sup>113</sup> Overall, 85% of opinions with a female in the majority included at least one amicus curiae brief, as compared to 67% of all-male majority opinions.

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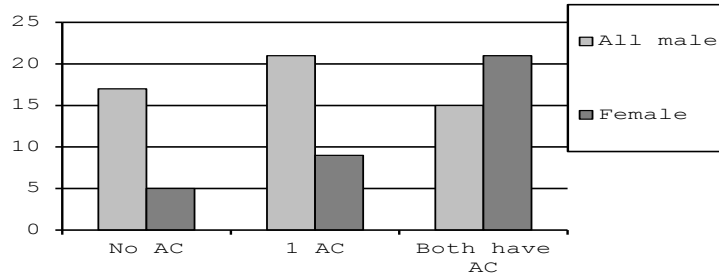
<sup>109</sup>  $X^2(4) = 7.18, p = .13$ . Post-hoc analyses found that the all-male Court declined to impose sanctions in 53% of their cases, while the female-included Court declined to impose sanctions in 43% of their cases. Interestingly, the female-included Court left open the possibility of sanctions in 44% of their cases, while the all-male Court left open the possibility in 27%.

<sup>110</sup> The all-male Court imposed monetary sanctions in one case and nonmonetary sanctions in three, while the female-included Court imposed monetary sanctions in three cases, but never nonmonetary sanctions.

<sup>111</sup>  $X^2(1) = 8.41, p < .01$ .

<sup>112</sup>  $X^2(1) = 4.99, p < .05$ .

<sup>113</sup>  $X^2(2) = 9.04, p < .05$ .



*Figure 1.* Use of amicus curiae (AC) by all-male or female-included majority opinions.

Thus, it does not appear that there were any significant differences in outcomes between the all-male and female-included panels as a whole, but there were differences in favoring corporations and the possibility of sanctions. Additionally, as stated *supra*, the significant effects of amicus curiae briefs may not have any relationship to the gender composition of the Court but, rather, could be a result of the overall increase of such briefs over time.

## 2. The Effect of Individual Justices

But what about the voting patterns of the individual female Justices themselves? Could there be significant differences in voting behavior based upon whether the female-included Court involved only Justice O'Connor, both Justices O'Connor and Ginsburg, solely Justice Ginsburg, or both Justices Ginsburg and Sotomayor? Table 1 displays the frequencies of each female Justice combination in the sample.



<u>Female Justices</u>	<u>Frequency</u>	<u>Percentage</u>
All male Court	49	55.7
O'Connor	22	25.0
O'Connor and Ginsburg	9	10.2
Ginsburg	5	5.7
Ginsburg and Sotomayor	3	3.4
Total	88	100.0

*Table 1.* Distribution of Female Justices Across Sample

In the thirty-nine cases with females on the bench, at least one female Justice was in the majority opinion for thirty-five of the cases. In the remaining four cases, O'Connor did not participate in one, O'Connor concurred in part and dissented in part for one, Ginsburg dissented in one, and Ginsburg and Sotomayor dissented together in one. Additionally, at least one female Justice was in the dissent for eight of the thirty-nine cases: O'Connor was in the dissent in three, O'Connor concurred in part and dissented in part for one, O'Connor was in the majority and Ginsburg dissented in one, O'Connor was in the majority and Ginsburg concurred in part and dissented in part in one, Ginsburg dissented in one, and Ginsburg and Sotomayor dissented in one.

Of the thirty-nine female-included panels, only twelve included more than one female Justice. While Justice Sotomayor is still relatively new to the bench and there were only three cases in our sample with her on the panel, it is interesting to note that the rate of agreement between Ginsburg and Sotomayor is at 100.0%, whereas it was at 55.6% between Ginsburg and O'Connor, who were on nine panels in the sample. *See* Table 2.

Female Justices	Agree in Majority	Agree in Dissent	Disagree
O'Connor and Ginsburg	5 (55.6%)	0 (0%)	4 (44.4%)
	Overall Agreement: 55.6%		
Ginsburg and Sotomayor	2 (66.6%)	1 (33.3%)	0 (0%)
	Overall Agreement: 100%		

Table 2. Agreement Among Female Justices Across Sample

We then explored potential case differences between the all-male, O'Connor-only, O'Connor and Ginsburg, Ginsburg-only, and Ginsburg and Sotomayor panels (referred to as "Justice-specific panels"). The Justice-specific panels differed on type of petitioner,<sup>114</sup> although this is likely because the government was a petitioner only in the all-male and O'Connor and Ginsburg panels. The panels did not differ based upon type of respondent,<sup>115</sup> but it is interesting to note that in all three of the cases with Ginsburg and Sotomayor, the petitioner was a corporation. The respondent in these three cases was either an institutional investor or the U.S. government. The Exchange Act was the most common legal issue presented for every Justice-specific panel, except for the panels with Ginsburg and Sotomayor. The Exchange Act was considered in 71% of the cases overall, but in only one of the three Ginsburg-Sotomayor cases.

The Justice-specific panel's opinions also differed based upon the presence of amicus curiae for the petitioner<sup>116</sup> and respondent.<sup>117</sup> As described *supra* in Part IV.C.4, cases brought to the all-male Court included amicus curiae for the petitioner 41% of the time, as compared to at least 68% of the time for the female-included panels, including in 100% (three for three) of the Ginsburg and Sotomayor cases. Again, this is very likely due to changes over time rather than gender composition.

Looking to the holdings of the securities cases, the Court was more likely to hold for the petitioner in every Justice-specific panel, except for the O'Connor-only and the Ginsburg and Sotomayor panels. The Court found for the petitioner 61% of the time for the all-male panel, 78% of the time for the O'Connor and Ginsburg panel, and 80% of the time for the

<sup>114</sup>  $\chi^2(12) = 19.20, p = .08$ . Post-hoc analyses found significant differences based upon the number of government petitioners, as described in the text.

<sup>115</sup>  $\chi^2(12) = 7.39, p = .83$ .

<sup>116</sup>  $\chi^2(4) = 9.72, p < .05$ .

<sup>117</sup>  $\chi^2(4) = 9.80, p < .05$ .

Ginsburg-only panel, but found for the petitioner 50% of the time for the O'Connor-only panel and 33% of the time (just one of three) in the Ginsburg and Sotomayor panel.

*Secondary Trend: Change in Pro-Corporate Bias Occurred upon Appointment of Justice O'Connor and Not Gradually; Potential for Influence of Confounding Factors*

When examining whether the Court found for or against a corporation, we again examined how many of the parties (both, one, or neither) were corporations. Looking solely to when one of the parties was a corporation and the other was not, all of the Justice-specific panels were more likely to find in favor of the corporate party, except when Justice O'Connor was the only female. *See* Table 3. Combined, it appears that the Court with O'Connor as the only female Justice was least likely, compared to the other Justice-specific panels, to hold in favor of either the corporate party, or the petitioner.

As stated *supra*, the all-male panels had a stronger pro-corporate bias; every time the Court found for a petitioner corporation, the corporation was the defendant in the lower court action. This additional analysis shows that the reduction in a potential pro-corporate bias started almost immediately after the addition of Justice O'Connor to the Court, rather than gradually over time with the addition of female Justices. We were not able to isolate gender as having a significant effect on any pro-corporate bias in the Court. As such, factors such as the ideology of the Justices, the economic and regulatory environment at the time of the decision, and similar factors may have influenced this trend.<sup>118</sup> Anecdotal evidence suggests that the Court is showing increased interest in corporate and securities cases even as the Court has reduced the number of decisions it renders each term, and at least one study suggests that the Court is returning to a pro-corporate trend.<sup>119</sup>

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<sup>118</sup> For an acknowledgement of the potential role of ideology in securities cases, *see infra* note 145 and accompanying text.

<sup>119</sup> *See, e.g.,* Shannon Green, *Review of 2011 Securities Litigation Forecasts for 2012 and Beyond*, LAW.COM (Feb. 13, 2012), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202542022439> (noting that "in 2010 and 2011 . . . there's been an unusual level of activity from the U.S. Supreme Court in securities cases"); Lee Epstein et al., *Is the Robert Court Pro-Business?*, UNIV. OF S. CAL. (Dec. 17, 2010), <http://epstein.usc.edu/research/RobertsBusiness.pdf>.

<u>Justices</u>	<u>For Corporation</u>	<u>Against Corporation</u>
All male Court	18	8
O'Connor	7	7
O'Connor and Ginsburg	3	1
Ginsburg	2	1
Ginsburg and Sotomayor	2	1
Total	32	18

*Table 3. Corporate Bias Across Justice-specific Panels*

*Secondary Trend: Potential for Female-Included Panels to Decline Imposition of Sanctions Increased Over Time*

The Justice-specific panels did not significantly differ in their dispositions of cases (*i.e.*, affirmed, reversed, remanded)<sup>120</sup> or whether or not they imposed sanctions<sup>121</sup>, but an interesting trend emerged with refusals to impose sanctions. While the all-male panels declined to impose sanctions in 53% of cases and left open the possibility of sanctions in 27% of cases, this ratio continued to erode over time. Both the O'Connor, and the O'Connor and Ginsburg panels either declined to impose sanctions or left open the possibility of sanctions in an equal number of cases (36% each for the O'Connor cases and 44% each for the O'Connor and Ginsburg cases). Then, post-O'Connor, the cases with Ginsburg as the only female Justice left open the possibility of sanctions in 60% of cases and declined to impose sanctions in the remaining 40%, while the Ginsburg-Sotomayor-included cases left open the possibility of sanctions in 66% of the cases and did not discuss sanctions in the third case. *See* Figure 2. It appears that Justices, over time, were less likely to decline to impose sanctions and more likely to leave open the possibility of sanctions.

<sup>120</sup>  $X^2(32) = 42.32, p = .11$ .

<sup>121</sup>  $X^2(16) = 14.12, p = .59$ . As noted earlier, however, female-included panels were marginally more likely to leave open the possibility of sanctions.

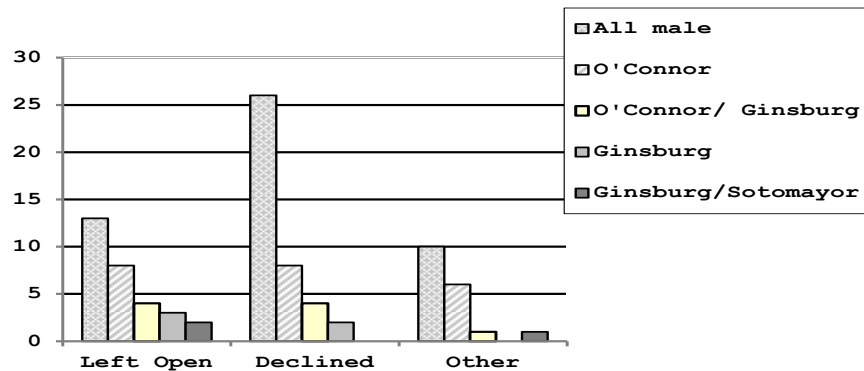


Figure 2. The rate of imposing sanctions by Justice-specific panels.

#### *a. Female-Included Majority Opinions*

While there were some interesting trends across the different Justice-specific panels, the gender composition of the Court panels was not the cause of such significant differences. Of the thirty-nine female-included panels, a female Justice was in the majority opinion for thirty-five of the cases. This initially supposes that women are either prone to agree with the majority or work as unifiers, bringing the Justices together into a majority opinion.

Because of the paucity of cases where women were on the Court but not in the majority opinion, statistical analyses were unlikely to define variability between cases with and without female-included majority opinions. As expected, no significant differences emerged. Still, we decided to examine both the thirty-five cases with female-included majority opinions and three female-included cases with women in the dissent and/or concurrence, but not in the majority.<sup>122</sup> Future research might expand the

<sup>122</sup> Note that this excludes the one case where Justice O'Connor did not take part in the judgment.

scope to include more cases and a greater variety of cases, in order to broaden the sample of cases where a female Justice is involved in the decision, but is not a member of the majority.

Cases with a female joining the majority opinion and cases with an all-male panel were equally likely to find for the petitioner or respondent,<sup>123</sup> with a slight bias toward the petitioner, and equally likely to hold for a corporation.<sup>124</sup> The three groups (female in majority, all male, and female in concurrence or dissent) did not differ in the issues presented, as all three were significantly more likely to involve the Exchange Act.<sup>125</sup>

These three groups significantly differed, however, in imposition of sanctions, as discussed above regarding all-male versus female-included panels.<sup>126</sup> The all-male panels declined to impose sanctions in 53% of cases and left open the possibility of sanctions in 27% of cases, while the cases with a female in the majority declined to impose sanctions in 34% of cases and left open the possibility of sanctions in 49% of cases. In the three cases where female Justices joined either the concurrence or dissent, one Court imposed monetary sanctions, one declined to impose, and sanctions were not discussed in the third. None of the three left the sanction issue open.

The split of the Court was significantly different among the three groups.<sup>127</sup> All three groups significantly differed from each other at the  $p < .05$  level. Post-hoc analyses found that the Court split 5-4 in all three of the cases where a female Justice took part in the decision but did not join the majority. There was a 5-4 split in only 11% of the cases with a female Justice in the majority and only 18% of the all-male cases. Additionally, 40% of the cases with at least one female Justice in the majority had a unanimous decision, compared to zero of the cases with a female taking part in the decision but not joining the majority and 16% of the all-male cases.<sup>128</sup>

The findings that 5-4 decisions versus unanimous decisions were dependent on whether a female Justice voted with the majority are striking. They support an inference that female Justices bring a different approach

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<sup>123</sup>  $\chi^2(6) = 2.51, p = .87$ .

<sup>124</sup>  $\chi^2(6) = 2.90, p = .82$ .

<sup>125</sup> In 70% of the all-male cases, 71% of the female in majority cases, and 66% (two of three) of the female in concurrence or dissent cases. Resulting statistical analyses found these differences to not be statistically different.

<sup>126</sup>  $\chi^2(8) = 15.65, p < .05$ .

<sup>127</sup>  $F(2, 87) = 5.75, p < .01$ .

<sup>128</sup> The significant percentage (40%) of cases with at least one female Justice in the majority that reached a unanimous verdict may suggest that a female presence and/or voice contributed to a greater collaborative effort. In contrast, there seems to have been more difficulty in reaching a consensus with an all-male bench, where only 16% of cases yielded a unanimous verdict.

both to the bench and deliberations concerning decisions. This type of inference corresponds with gender studies that suggest that women are more collaborative in their negotiations and decision-making, and that they work to build consensus.<sup>129</sup> We were not able, however, to isolate an effect so this inference, like many generalizations, should be noted with caution and explored more deeply.

*b. Female-Authored Majority Opinions*

Women were part of thirty-five of the thirty-nine majority opinions, but authored only five of those thirty-five opinions. While a significant difference emerged for type of petitioner held for,<sup>130</sup> this effect was solely due to the low number of female-authored opinions. For instance, in the male-authored majority opinions, petitioners were split among seventeen (49%) individual petitioners, fifteen (43%) corporation petitioners, two (6%) institutional investors, and one (3%) government party. For the female-authored majority opinions, two (40%) involved a government petitioner, while an individual, an institutional investor, and a corporation each comprised one petitioner (20% each).

As with the female-included majority opinions, we also chose to determine if any differences existed between the five female-authored and thirty-five male-authored majority opinions. Though not significant, it is interesting to note that four of the five female-authored opinions had individuals as respondents; four had amicus curiae for the petitioner and three had amicus curiae for the respondent.

For female-authored majority opinions, the final court decision was about evenly split (the Court found for the petitioner in three (60%) and for the respondent in two (40%)). Three of the decisions (60%) left open the possibility of sanctions, while one (20%) imposed monetary sanctions and one (60%) declined to impose sanctions. The type of holding, however, did produce a significant effect, as four female-authored opinions (80%) reversed and remanded and one (20%) affirmed in part and remanded.<sup>131</sup> While only a small number of opinions were examined, it is intriguing that they clustered around a single holding, such as a reversal. Additional research using a stratified sampling method to more equally compare female-authored and male-authored opinions is necessary to further explain this result.

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<sup>129</sup> See *supra* notes 69-71 and accompanying text.

<sup>130</sup>  $\chi^2(3) = 10.60, p < .05$ .

<sup>131</sup>  $\chi^2(6) = 15.62, p < .05$ .

Nevertheless, we were intrigued by these trends and decided to examine these five female-authored majority opinions more closely to determine whether any qualitative associations existed. All five cases involved at least one alleged violation of Section 10(b) of the Exchange Act.<sup>132</sup> As noted above, they all also remand at least one issue to the lower court. Justice O'Connor authored three of the decisions and Justice Ginsburg authored two of the decisions. Although each decision recognizes the importance of the anti-fraud objectives of the securities laws, two of the decisions, *Tellabs* (written by Ginsburg) and *Shearson* (written by O'Connor), focused on the provisions of other applicable laws to rule in favor of the original defendants on the particular issue in the securities cases.<sup>133</sup> *McMahon* upholds the validity of an agreement to arbitrate a Rule 10b-5 claim, and, of course, once the claim is in arbitration, the claimant may prevail.<sup>134</sup> Likewise, two of the decisions, *O'Hagan* (written by Ginsburg) and *Edwards* (written by O'Connor), interpret federal securities laws in a way that broadens the behavior to which those laws extend.<sup>135</sup> At least in these five decisions, the approaches of Ginsburg and O'Connor in securities cases appear similar. Interestingly, differences do emerge between Ginsburg and O'Connor in other securities cases. As discussed *infra*, these differences may relate more to ideology, however, than to a female perspective on business or securities cases.<sup>136</sup>

### c. Female-Included Concurrences

Overall, forty-eight (43.2%) of the cases examined included a concurrence. The number of Justices taking part in the concurrence included one (eighteen cases), two (five cases), three (ten cases), four (three cases), and five (two cases). Of the forty-eight cases with a

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<sup>132</sup> See *Tellabs v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *SEC v. Edwards*, 540 U.S. 389 (2004); *United States v. O'Hagan*, 521 U.S. 642 (1997); *Shearson/Am. Express v. McMahon*, 482 U.S. 220 (1987); *Randall v. Loftsgaarden*, 478 U.S. 647 (1986).

<sup>133</sup> See *Tellabs*, 551 U.S. at 324 (interpreting the "strong inference" standard under § 21D(b)(2) of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.)); see also *Shearson*, 482 U.S. at 225-26 (deferring to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2006), mandating enforcement of agreements to arbitrate statutory claims).

<sup>134</sup> See *McMahon*, 482 U.S. 220.

<sup>135</sup> See *O'Hagan*, 521 U.S. at 653, 659 (applying the misappropriation theory to find that the defendant's trading on misappropriated information was a violation of § 10(b)); see also *Edwards*, 540 U.S. at 396-97 (finding that an investment scheme promising a fixed rate of return is subject to federal securities laws because the scheme fell within the definition of an investment contract).

<sup>136</sup> See *infra* Part IV.B.2(f).



concurrence, five included a female Justice. Of those five cases, a female Justice was the sole author of none of the concurrences.<sup>137</sup>

#### *d. Female-Included Dissents*

Fifty one (58%) of the cases in which female Justices participated included a dissent. The number of Justices included in the dissent were one (fifteen cases), two (five cases), three (sixteen cases), and four (fifteen cases). Female Justices participated in eight dissents.

We then attempted to identify any differences between all-male and female-included dissents. Of the eighty-eight opinions, eight included dissents involving female Justices. Again, the low number affects the ability to perform analyses. However, significant differences still emerged.<sup>138</sup> Female-included dissents were significantly more likely to include an amicus curiae brief for the petitioner (in 51% of the all-male dissents versus 88% of the female-included dissents),<sup>139</sup> but not for the respondent.<sup>140</sup> Interestingly, while male-only dissents were more evenly split among cases with no amicus curiae briefs (26%), one amicus curiae brief (38%), and both with amicus curiae briefs (36%), female-included dissents either did not include an amicus curiae brief (13%) or included an amicus curiae brief for both parties (88%).<sup>141</sup> No other significant differences emerged.

#### *e. Female-Authored Dissents*

Female Justices co-authored three of the eight dissents, but were the sole author of no dissents in the sample. There were no significant differences between the three female-authored dissents and the thirty-seven male-authored dissents. Interestingly, but not significantly due to the low number of female-authored dissents, all three female-authored dissents included amicus curiae for both the respondent (73% for the male-authored dissents) and the petitioner (70% for the male-authored dissents), and all

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<sup>137</sup> See also Maule, *supra* note 83, at 315 (“Concurrences were rarely used as a vehicle by the female justices on the Minnesota State Supreme Court to express any voice, let alone a different voice. Female justices, on the whole, either agreed with both the outcome of and the legal reasoning behind a decision or they disagreed with the decision altogether.”).

<sup>138</sup> A significant difference emerged regarding the type of petitioner ( $X^2(3) = 9.27, p < .05$ ). However, this is likely due to the small number of dissents with female Justices. For example, while an institutional investor was the petitioner in two of the all-male and two of the female-included dissents, their percentage, as compared to the overall cases, is 2.5% and 25.0%.

<sup>139</sup>  $X^2(1) = 3.86, p < .05$ .

<sup>140</sup>  $X^2(1) = 2.54, p = .11$ .

<sup>141</sup>  $X^2(2) = 8.22, p < .05$ .

three female-authored dissents found for the petitioner (54% for the male-authored dissents).

For the three female-authored dissents, two (67%) had a corporation as a petitioner and an individual respondent, and one (33%) had an individual petitioner and a corporation as the respondent. Again, while this differs from the male-authored dissents where fourteen (38%) of cases had corporations as petitioners and seventeen (46%) had individual petitioners, eighteen (49%) of the cases had individual respondents and twelve (32%) had corporations as respondents.

### *f. Justices O'Connor and Ginsburg*

We then explored the five cases with O'Connor and Ginsburg in the majority, as well as the three cases with O'Connor in the majority and Ginsburg in the dissent, in order to obtain a more descriptive understanding of these cases. Interestingly, there were no cases with Ginsburg in the majority and O'Connor in the dissent.

For the five cases with both O'Connor and Ginsburg in the majority, the petitioner was either a corporation (two) or the government (three), and the respondent was an individual (four) or a corporation (one). The Court held for the petitioner corporation in two of the cases and, in both cases, the corporation was originally the defendant. The Court held for the government as a petitioner in two cases. The Court held for the individual respondent (who was originally the plaintiff) in one of the cases.

The cases generally focused on the Exchange Act (three), with one involving both the Securities and Exchange Acts, and one involving the Exchange Act and a separate issue. The majority opinions left open the possibility of sanctions in three of the cases, imposed monetary sanctions in one and declined to impose sanctions in one. The court affirmed in one of the opinions, reversed in one of the opinions, and reversed and remanded in three of the opinions. Surprisingly, all five of the opinions with both O'Connor and Ginsburg in the majority were unanimous opinions, though one case also had a concur-in-part/dissent-in-part opinion in which three Justices joined.

For the three cases with O'Connor in the majority and Ginsburg in the dissent, the petitioner was either an individual (two) or institutional investor (one), and the respondent was either a corporation (two) or institutional investor/business entity (one).<sup>142</sup> The Court found for the

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<sup>142</sup> Two of the cases involved the Exchange Act and one involved the Securities Act. The Court majority declined to impose sanctions in all three cases. The Court affirmed in one of the opinions, reversed in one of the opinions, and reversed and remanded in one of the opinions. One was a 7-2

petitioner in two of the opinions, but all three of the majority opinions limited the protections of the securities laws. For example, in *Gustafson v. Alloyd Co.*, the Court held that Section 12(2) of the Securities Act does not extend to private sale contracts;<sup>143</sup> in *Plaut v. Spendthrift Farm, Inc.*, the Court held Section 27(A)(b) of the Exchange Act, permitting reinstatement of certain actions previously dismissed as time barred, to be unconstitutional, preventing the original plaintiffs from pursuing their securities law claims against the original defendant;<sup>144</sup> and in *Central Bank of Denver v. First Interstate Bank of Denver*, the Court held that a private party may not bring an aiding and abetting lawsuit under Section 10(b) of the Exchange Act.<sup>145</sup> Moreover, in Justice Ginsburg's dissent in *Gustafson*—where ideologically liberal Justice Breyer and ideologically conservative Justices Thomas and Scalia also dissented—and in Justice Steven's dissent, joined by Ginsburg, in *Plaut*, both Justices suggest that the majority decisions ignored “longstanding scholarly and judicial understanding” of the respective sections of the securities law to reach policy decisions.<sup>146</sup>

As discussed *supra*, our data indicate that any pro-corporate bias in the Court weakened upon the appointment of Justice O'Connor to the bench.<sup>147</sup> The data do not, however, show any significant gender impact on a pro-corporate bias. Moreover, this anecdotal evidence suggests that when a pro-corporate bias was suggested by a decision easing regulations or making prosecution more difficult, Justices O'Connor and Ginsburg were more likely to part ways. O'Connor voted to foreclose relief in the three cases, while Ginsburg voted to provide it. At least in the context of securities cases, this observation may suggest that ideology, rather than gender, more often influences decisions.<sup>148</sup> Although beyond the scope of

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majority opinion and two were 5-4 opinions. One had a concurrence, which neither O'Connor nor Ginsburg joined.

<sup>143</sup> 513 U.S. 561 (1995).

<sup>144</sup> 514 U.S. 211 (1995).

<sup>145</sup> 511 U.S. 164 (1994).

<sup>146</sup> *Gustafson*, 513 U.S. at 561; *Cent. Bank of Denver*, 511 U.S. at 193-94.

<sup>147</sup> See *supra* note 115 and accompanying text.

<sup>148</sup> See Dixon, *supra* 43, at 313-14 (stating Justice O'Connor and Justice Ginsburg's well-recognized political affiliation as a reputable conservative justice and equally renowned liberal justice, respectively). The then-President's political affiliation is often mirrored through his appointed Justice's voting behaviors. *Id.* at 314. See also Matthew Sag et al., *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CAL. L. REV. 801, 851 (2009) (noting that ideology influences judicial decision-making in corporate tax law and economic cases); Lee Epstein & Jeffrey A. Segal, *Trumping the First Amendment?*, 21 WASH. U. J.L. & POL'Y 81, 85-86 (2006) (discussing the impact ideology has on judicial decision-making); Lee Epstein, Barry Friedman & Nancy Staudt, *On the Capacity of the Roberts Court to Generate Consequential Precedent*, 86 N.C. L. REV. 1299, 1317 (2008) (finding that ideology plays a significant role in the “production of noteworthy decisions”).

this article, we believe that further research on this issue is warranted. Such research also may make a meaningful contribution to the current debate regarding the position of the Roberts Court in business cases.

### *C. Gender in Securities Cases*

Our general finding that from 1971 through 2010, gender does not have an overall effect on the resolution of securities cases is a solid starting point for considering the future of those cases in the Supreme Court, particularly as an additional female Justice (Kagan) has taken the bench. Moreover, our discrete analyses suggesting meaningful trends in, and associations among, the data further inform this analysis. The tendency of female-included panels to encourage unanimity while also being more likely to leave open the possibility of sanctions suggests some gender relevance. Gender may not be outcome determinative in securities law cases, but it still may play a role in deliberations and the Court's decision-making process. We believe that further research should explore these possible effects, as well as the potential influence of ideology in securities cases.

## V. CONCLUSION

Two developments underscore the importance of our findings: commentators suggest that the Court is more willing to grant certiorari to business law cases than in the past, and therefore, the Court will decide many of these cases with at least three female Justices on the bench.<sup>149</sup> Our study demonstrates that, despite no discernible gender impact on the outcome of securities cases, several issues call for further study and ongoing observation in light of these two developments. For example, our data suggest that the presence of one or two female Justices may influence the way in which the Court deliberates about securities cases, and may facilitate decisions built around consensus. Perhaps a third Justice will amplify this effect. This inference may be bolstered (or disproven) by future securities cases in which Justice Kagan participates, and may be applicable to other contexts as well. Likewise, further analysis may uncover quantitative support for our anecdotal observation that ideology

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<sup>149</sup> See, e.g., Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943, 946 (2009) (noting that the Roberts Court has had business cases account for one-third to one-half of the Court's docket in recent years, giving the Court a pro-business reputation); Matt Carter, Note & Comment, *Punting on Logic: The Roberts Court to Sack Small Business Once Again in American Needle v. NFL*, 30 LOY. L.A. ENT. L. REV. 477, 494 (2010) (noting that 40% of the Roberts Court cases granted certiorari involved business interests, which is an increase of 10% compared to the Rehnquist Court).

may influence the Court's decisions in securities cases. In addition, the tempering effect that female Justices have on any pro-corporate bias, at least in the securities law context, warrants further study. Our study provides an important baseline for further inquiry to enrich our understanding of the Court's conduct in, and the influence of female Justices on, securities cases that are vital to our capital markets.

## APPENDIX A

## Final Coding Scheme Variables

Variable No.	Variable Description
1a	Date
1b	Year
2	Identity of Lead Petitioner/Code <sup>150</sup>
3	Identity of Petitioner/Narrative
4	Identity of Respondent/Code <sup>151</sup>
5	Identity of Respondent/Narrative
6	Identity of Plaintiff in Original Complaint
7	Identity of Defendant in Original Complaint
8a	Whether Amici Curiae Supporting Petitioner Involved
8b	Identity of any Amici Curiae Supporting Petitioner
8c	Whether Amici Curiae Supporting Respondent Involved
8d	Identity of any Amici Curiae Supporting Respondent
9	History of Case/Appeal from Federal or State Court?
10	Securities Law Issue Before Supreme Court/Code
11	Securities Law Issue Before Supreme Court/Narrative
12	Holding of Court/Party
13	Holding of Court/Impose Sanction or Liability
14	Holding of Court/Narrative
15	Holding of Court/Treatment of Lower Court's Decision
16a	Number of Votes in Majority <sup>152</sup>
16b	Justices in Majority
16c	Author of Majority Opinion
17a	Number of Concurring Votes <sup>153</sup>
17b	Justices Concurring
17c	Author of Concurring Opinion
18a	Number of Votes in Dissent <sup>154</sup>
18b	Justices in Dissent
18c	Author of Dissenting Opinion
19a	Number of Justices Abstaining

<sup>150</sup> Coders could choose from Individual, Institutional Investor (defined as any entity in its capacity as shareholder of issuer), Corporation, Government, Other. In identifying the petitioner and respondent, we instructed coders to focus on the first party listed or the "lead" party. Accordingly, the data collected may not represent every type of party included as a petitioner or a respondent in any given case. We elected to focus on lead parties for consistency in the database.

<sup>151</sup> See *supra* note 146.

<sup>152</sup> We instructed coders to include all Justices joining the majority opinion, as well as any Justice concurring in judgment.

<sup>153</sup> We instructed coders to include all Justices concurring in whole or in part.

<sup>154</sup> We instructed coders to include all Justices dissenting in whole or in part.

38

*WOMEN'S RIGHTS LAW REPORTER*

[Vol. 33

19b

Justices Abstaining

20

Vote Count/Narrative

## Appendix B Regression Results and Discussion

### *Predicting Who the Court Held For*

We performed a regression to determine which of our legal variables predicted whom the court finds for, both for the female-included and overall case samples. This analysis sought to determine which variables led to a decision for the petitioner or respondent or for both or neither.

We performed a regression to determine the role of the major legal variables assessed in this study. We first examined how the variables of interest affected whom the court voted for in the female-include only cases ( $N = 39$ ).

As seen in Table 1, the overall model is significant. Both the occurrence of an amicus curiae brief for the respondent and the holding (what the Court held) significantly predicted whom the Court held for. While the gender variables did not have an effect, whether the majority opinion was authored by a female did approach significance.<sup>155</sup>

Outcome	Model Summary		Coefficient Summary		
	R <sup>2</sup>	F-test	Predictors	Beta	t-test (sig)
Holding (WHO) <i>F</i> (7,39)	.42	3.21 ( $p < .05$ )*	Year	.10	.68 (.50)
			AC-P	-.26	-1.53 (.14)
			AC-R	.41	2.52 (.02)*
			Issue	-.11	-.65 (.52)
			Sanctions	.03	.19 (.85)
			Holding-What	-.51	-2.92 (.01)**
			Fem Maj Auth	.31	1.76 (.09)

\*\*\*  $p < .001$ , \*\*  $p < .01$ , \*  $p < .05$ , ^  $p < .06$ .

Table 1. Regression with legal measures predicting holding.

We then performed the regression analyses for the overall case sample (88 cases). As shown in Table 2, the overall model is not significant. Only respondent amicus curiae is a significant predictor of

<sup>155</sup> A complete model with all of the variables was also tested. Females in dissent, female author of dissent, and the female concurrence variables did not have a significant effect in any of the regressions.



holding (who), with holding (what) marginally significant. Female author no longer approaches significance in the overall sample.<sup>156</sup>

Outcome	Model Summary		Coefficient Summary		
	R <sup>2</sup>	F-test	Predictors	Beta	t-test (sig)
Holding (WHO) <i>F</i> (7,85)	.10	1.27 ( <i>p</i> = .28)	Year	-.10	-.09 (.93)
			AC-P	-.10	-1.53 (.14)
			AC-R	.24	2.00 (.049)*
			Issue	.06	.57 (.57)
			Sanctions	-.12	-1.02 (.31)
			Holding- What	-.22	-1.86 (.06)^
			Fem Maj Auth	.02	.16 (.87)

\*\*\* *p* < .001, \*\* *p* < .01, \* *p* < .05, ^ *p* < .06.

Table 2. Regression with legal measures predicting holding.

Additional regressions also determined that a female Justice on the bench did not significantly predict whom the Court held for, neither when the only gender-based variable in the regression equation nor when it was included along with whether a female authored the majority opinion. Overall, these regression analyses show that including a female Justice does not predict whether the Court finds for the respondent or petitioner.

#### *Predicting What the Court Held*

We then performed the regression analyses to determine if the variables of interest predicted what the Court holds.

For the smaller sample of cases with female Justices on the bench, the overall model predicting what the Court held is significant. Both who the Court held for and whether the majority opinion was written by a female predicted what the Court held. Thus, we do have a gender effect here. *See* Table 3.

<sup>156</sup> The degrees of freedom differ from the overall number of cases because not every case had every variable coded.

Outcome	Model Summary		Coefficient Summary		
	R <sup>2</sup>	F-test	Predictors	Beta	t-test (sig)
Holding (WHAT) <i>F</i> (7,39)	.53	4.95 ( <i>p</i> < .001)***	Year	.17	1.36 (.18)
			AC-P	.24	1.53 (.14)
			AC-R	.09	.58 (.57)
			Issue	-.19	-1.29 (.21)
			Sanctions	-.06	-.43 (.67)
			Holding-Who	-.42	-2.92 (.006)**
			Fem Maj	.43	2.99 (.005)**
			Auth		

\*\*\* *p* < .001, \*\* *p* < .01, \* *p* < .05, ^ *p* < .06.

Table 3. Regression with legal measures predicting holding.

In the overall sample, the overall model is significant, with whether there is a female-authored majority opinion as a significant predictor of what the Court holds. However, it is not a strong model, with  $R^2 = .19$ .

Outcome	Model Summary		Coefficient Summary		
	R <sup>2</sup>	F-test	Predictors	Beta	t-test (sig)
Holding (WHAT) <i>F</i> (7,85)	.19	2.58 ( <i>p</i> < .02)*	Year	.13	1.10 (.28)
			AC-P	.05	.43 (.67)
			AC-R	-.05	-.42 (.68)
			Issue	.00	-.002 (.99)
			Sanctions	-.18	-1.62 (.11)
			Holding-Who	-.20	-1.86 (.06)^
			Fem Maj	.22	2.03 (.04)*
			Auth		

\*\*\* *p* < .001, \*\* *p* < .01, \* *p* < .05, ^ *p* < .06.

Table 4. Regression with legal measures predicting holding.

Still, these regression analyses find that while the addition of female Justices did not significantly affect who the Court held for or what

the Court held, whether the majority opinion was authored by a female Justice was a significant predictor of what the Court found.