
PRESIDENT OBAMA AND THE SUPREMES: OBAMA’S LEGACY—THE RISE OF WOMEN’S VOICES ON THE COURT

*Taunya Lovell Banks**

ABSTRACT

For approximately 200 years, all of the United States Supreme Court Justices were male. Now there are three women on the Court, two appointed during the Administration of President Barack Obama. With the appointment of Justices Sotomayor and Kagan to the Court, women’s voices literally are more prominent, especially during oral argument. This Article speculates on whether the presence of these three women on the Court will influence the substance of decisions. It asks whether we are witnessing the emergence of a definable “women’s” voice, in the collective sense, or whether there is simply a greater representation of women on the Court; women Justices, who like their male counterparts, sometimes agree and sometimes do not. In addition, this Article asks whether the reaction of some commentators, and male Justices, to the increased participation of women Justices during oral argument suggests implicit gender bias, another possible byproduct of President Obama’s legacy.

TABLE OF CONTENTS

I. Introduction	912
II. Are Women Dominating Oral Arguments?	915
A. <i>Whole Woman’s Health</i>	915
III. Empirical Analysis of Voting Patterns	918
IV. Why Women’s Voices Count	922
A. Justices O’Connor and Ginsburg	922
B. Justices Sotomayor and Kagan	928
V. Implicit Gender Bias During Oral Argument	933
A. Interruptions During Oral Argument	933
B. Implicit Bias in Perceptions of Oral Arguments	936
VI. Conclusion	940

* Jacob A. France Professor, University of Maryland William King Carey School of Law. The Author thanks Mildred Robinson for her comments on an earlier draft; Jason Hawkins, Ava Claypool, Class of 2018, and Susan McCarty for their research assistance.

I. INTRODUCTION

Today it is somewhat hip to refer in casual conversation, and even in law school classrooms, to the Justices of the United States Supreme Court as the “Supremes.” Of course for most of the Court’s history, these “Supremes,” unlike the popular all-female Motown group of the 1960s, were all male. The appointment of women to national constitutional courts around the world is a fairly recent phenomenon.¹ For approximately 200 years, all of the U.S. Supreme Court Justices were male.² In 1981, President Ronald Reagan appointed the Court’s first woman Justice, Sandra Day O’Connor.³ It took 12 more years before O’Connor was joined by another woman, Ruth Bader Ginsburg, a President Bill Clinton appointee.⁴ The two women spent 13 years together on the Supreme Court.⁵ By 2011, five years after Justice O’Connor retired, and for the first time in the history of the U.S. Supreme Court, one-third of the Justices were women.⁶ The increased presence of women’s voices on the Court occurred during the Obama presidency and is part of his legacy.⁷

A woman’s seat on the Supreme Court is not assured. In 2006, when Justice O’Connor stepped down from the Court, President George Walker Bush replaced her with a man, Justice Samuel Alito, leaving only one woman

1. Erna Scheffler, appointed to the German Federal Constitutional Court in 1951, is believed to be the first woman appointed to a national constitutional court. Beverley Baines, *Women Judges and Constitutional Courts: Why Not Nine Women?*, in CONSTITUTIONS AND GENDER (Helen Irving, ed.) (forthcoming 2017) (manuscript at 10–11), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2840297. Helga Pedersen, appointed to the Danish Supreme Court in 1964, was the second. *Id.*

2. See *Timeline of the Justices*, SUP. CT. HIST. SOC’Y, http://www.supremecourt.history.org/history_timeline.html [<https://perma.cc/X4Z5-N2S3>] (last visited Aug. 16, 2017).

3. Steven R. Weisman, *Reagan Nominating Woman, an Arizona Appeals Judge, to Serve on Supreme Court*, N.Y. TIMES (July 7, 1981), <http://www.nytimes.com/learning/general/onthisday/big/0707.html>.

4. Sam Fulwood III, *Ginsburg Confirmed as 2nd Woman on Supreme Court*, L.A. TIMES (Aug. 4, 1993), http://articles.latimes.com/1993-08-04/news/mn-20339_1_supreme-court.

5. Justice O’Connor retired in 2006. *Timeline of the Justices*, *supra* note 2.

6. Justice Sotomayor was appointed in 2009 and Justice Kagan was appointed in 2010. *Members of the Supreme Court of the United States*, SUP. CT. U.S., <http://www.supremecourt.gov/about/members.aspx> (last visited Aug. 16, 2017).

7. Tony Mauro, *The Supreme Court: Sotomayor and Kagan*, 97 JUDICATURE 57, 58 (2013) (“[I]t appears likely that the appointments of Sotomayor and Kagan will rank among the most significant achievements of Obama’s presidency.”).

on the nine-member Court.⁸ The replacement of Justice O'Connor with Justice Alito disappointed many Court observers.⁹ Some complained that Justice Alito was much more conservative than the centrist Justice O'Connor.¹⁰ Others opined that Justice Alito was taking a woman's seat on the Court.¹¹ Feminists argued for the appointment of more women on the Court, and even a female majority.¹² They reasoned that more women on the Court would result in "significant substantive, as well as symbolic, benefits" to women.¹³

When Justice David Souter retired from the Court in 2009, President Barack Obama appointed a woman, Sonia Sotomayor, to replace him.¹⁴ Not only is Justice Sotomayor a woman, she also is a Latina, increasing the Court's racial and gender diversity.¹⁵ Justice Sotomayor's appointment was roundly applauded. Perceived as ideologically on par with Justice Souter, many predicted that her presence on the Court would not substantially change the voting dynamic.¹⁶ More importantly, her appointment was seen as reclaiming the second woman's seat, and heralding a Court that was more racially diverse than it had ever been in its entire history.

A year later, when the Court's most progressive Justice, Justice John Paul Stevens, retired, President Obama replaced him with another woman, Elena Kagan.¹⁷ There were now *three* women on the Court. Justice Ruth Bader Ginsburg, commenting on this change, characterized it as "'one of the most exhilarating developments,' to be joined by two women."¹⁸

The two Obama appointees are more active in oral arguments than the

8. Dana Bash, *Bush Nominates Alito to Supreme Court*, CNN POL. (Nov. 1, 2005), <http://www.cnn.com/2005/POLITICS/10/31/scotus.bush/>.

9. *See id.*

10. *Id.*

11. *Id.*

12. Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination*, 21 YALE J.L. & FEMINISM 297, 298 (2010).

13. *Id.* at 297.

14. Charlie Savage, *Sotomayor Confirmed by Senate*, 68-31, N.Y. TIMES (Aug. 6, 2009), <http://www.nytimes.com/2009/08/07/us/politics/07confirm.html>.

15. *See generally id.*

16. *Id.*

17. Paul Kane & Robert Barnes, *Senate Confirms Elena Kagan's Nomination to Supreme Court*, WASH. POST (Aug. 6, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/05/AR2010080505247.html>.

18. Mauro, *supra* note 7, at 58.

men they replaced.¹⁹ On March 2, 2016, Dahlia Lithwick of *Slate Magazine* wrote that the three women Justices, Ginsburg, Sotomayor, and Kagan, had “take[n] over” the oral argument during *Whole Woman’s Health v. Hellerstedt*.²⁰ In other words, the three women Justices were dominating a part of the oral argument. *Whole Woman’s Health* involved a challenge to two provisions of a Texas law regulating abortions.²¹ The women, joined by two other Justices, found that the Texas law violated the U.S. Constitution by placing a substantial burden on women seeking an abortion.²²

This Article contains preliminary comments about whether the increased prominence of women’s voices during oral argument at the Court will be a lasting part of President Obama’s Supreme Court legacy.²³ It also speculates on whether the presence of these three women on the Court will influence the substance of decisions. In other words, it asks whether we are witnessing the emergence of a definable “women’s” voice, in the collective sense, or whether there is simply greater representation of women on the Court—women Justices who, like their male counterparts, sometimes agree and sometimes do not. In addition, this Article asks whether the reaction of some commentators and male Justices to the increased participation of women Justices during oral argument suggests implicit gender bias, another possible byproduct of President Obama’s actions.

The next Part of this Article explores whether there is an empirical basis for the assumption expressed by some feminist legal scholars that more women on courts would give rise to a collective women’s voice.²⁴ The analysis looks more closely at Dahlia Lithwick’s claim that the women Justices took over the oral argument in *Whole Woman’s Health* by examining the trial transcript in *Whole Woman’s Health*.²⁵ The Part that

19. A.E. Dick Howard, *Now We Are Six: The Emerging Roberts Court*, VA. L. REV. IN BRIEF, Apr. 2012, at 1, 6 (“The replacement of Souter and Stevens with Sotomayor and Kagan has done little to alter the Court’s overall ideological balance.”).

20. Dahlia Lithwick, *The Women Take Over*, SLATE (Mar. 2, 2016), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2016/03/in_oral_arguments_for_the_texas_abortion_case_the_three_female_justices.html.

21. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016). One provision required physicians who perform abortions to have admitting privileges at a nearby hospital. *Id.* at 2300. The second provision required abortion clinics in the state to have facilities comparable to an ambulatory surgical center. *Id.*

22. *Id.* at 2300–30.

23. *See infra* Part II.

24. *See infra* Part III.

25. *See* Lithwick, *supra* note 20.

follows looks at the voting record of Justices Sotomayor and Kagan through the 2015 Supreme Court term to determine whether their presence, along with Justice Ginsburg, suggests a growing “women’s block” on the Court, and whether this block extends beyond gender to race issues.²⁶ The next Part looks more closely at the similarities and differences between the first generation of women Justices, O’Connor and Ginsburg, and the second generation, Sotomayor and Kagan, to assess the second generation’s potential impact on Supreme Court jurisprudence.²⁷ The final Part asks whether the attention paid by commentators to the women Justices’ participation in oral argument contains seeds of implicit gender bias.²⁸

II. ARE WOMEN DOMINATING ORAL ARGUMENTS?

A. Whole Woman’s Health

Technically the only thing “extraordinary” about the exchange between the Justices and counsel during the oral argument in *Whole Woman’s Health* was that three of the questioners during the oral argument were women who asked questions in sequence.²⁹ In characterizing the exchange between Texas Solicitor General Scott Keller, counsel for the respondent, and the women Justices by stating that the women Justices were “tak[ing] over” the oral argument, Lithwick provides the reader with a detailed description (with personal annotations) of the argument.³⁰ Her characterization of this exchange merits closer attention to ascertain both the accuracy of her description and its implicit meaning.³¹

Reading the transcript of the oral argument, once Keller starts his defense of the Texas law, Justices Ginsburg, Sotomayor, and Kagan, along with Justice Breyer, dominate the rest of the argument.³² What concerned these Justices was the impact of the Texas law on women’s access to abortion for women in that state.³³ After Keller, in his opening, says, “Abortion is

26. See *infra* Part III.

27. See *infra* Part IV.

28. See *infra* Part V.

29. See Transcript of Oral Argument *passim*, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274) [hereinafter Transcript of Oral Argument, *Whole Woman’s Health*].

30. Lithwick, *supra* note 20.

31. See *id.*

32. Transcript of Oral Argument, *Whole Woman’s Health*, *supra* note 29, at 36–73.

33. See *id.* at 36–37.

legal and accessible in Texas. All the Texas metropolitan areas that have abortion clinics today will have open clinics if the Court affirms, and that includes the six most populous areas”³⁴ Justice Ginsburg asks: “Well, how many women are located over 100 miles from the nearest clinic?”³⁵ Keller, questioned closely by Ginsburg, struggles to justify his claims that abortion facilities were readily available for women in Texas.³⁶

Two questions later, Justice Kagan challenges Keller’s accessibility claim:

JUSTICE KAGAN: Mr. Keller, the—the statistics that I gleaned from the record were that 900,000 women live further than 150 miles from a provider; 750,000, three-quarters of a million, further than 200 miles. Now, that’s as compared to just in 2012, where fewer than 100,000 lived over 150 miles, and only 10,000 lived more than 200 miles away.³⁷

Keller struggles again to put a good face on the damning statistics, citing prior Court decisions as support.³⁸ Justice Sotomayor interrupts, asking Keller to spell out why, under the undue burden standard, travel time is not a factor.³⁹ She continues her questioning, asking whether the state’s claimed benefit of the provisions is sufficient to burden Texas women’s access to abortion facilities.⁴⁰ Justice Ginsburg interrupts Justice Sotomayor with five more questions about the health benefits of the law’s surgical and admitting requirements.⁴¹ Finally, Justice Kennedy interrupts Keller with three questions, followed by Chief Justice Roberts who asks two questions, before Justice Kennedy asks another.⁴² Justice Kennedy is followed by Justice Breyer who asks seven questions before any of the women justices speak again.⁴³

Pushing by Justice Sotomayor, Justice Kagan asks three questions,⁴⁴ and as Justice Sotomayor attempts to ask another question, she is

34. *Id.* at 36.

35. *Id.* at 36–37.

36. *See id.* at 37–38.

37. *Id.* at 38–39.

38. *Id.* at 39.

39. *Id.* at 39–40.

40. *Id.* at 40.

41. *Id.* at 40–43.

42. *Id.* at 43–46.

43. *Id.* at 46–50.

44. *Id.* at 50–51.

interrupted by Justice Alito.⁴⁵ Three questions later, Justice Ginsburg returns for three questions followed by Justice Sotomayor with six more questions.⁴⁶ Then Justice Breyer asks several questions before Justice Ginsburg interrupts.⁴⁷ The rest of the argument proceeds similarly.⁴⁸ With the exception of Justice Thomas, who seldom asks questions during oral argument,⁴⁹ the full Court was actively engaged in the questioning.⁵⁰ It was a “hot bench.”⁵¹

The exchange involving just the women Justices consumes approximately 8 pages of a 93-page transcript,⁵² and their voices were not equal. The dominant voice during that exchange, and the remaining argument, was Justice Ginsburg.⁵³ Yet the impression Lithwick conveys in her article was that *women’s* voices (and Breyer’s) dominated the last half of the oral argument.⁵⁴

Since there is only one more female voice on the Court than during the O’Connor–Ginsburg era, one wonders whether a critical mass of women on the Court makes the voices of three women Justices seem louder and thus more prominent. Another explanation is that the newer Justices are simply more active during arguments than their male predecessors. Still another explanation is that the subject matter of *Whole Woman’s Health*—women’s reproductive freedom—made the women’s voices more noticeable. When three women question a representative of a state with a restrictive abortion

45. *Id.* at 51. I comment on interruptions among Justices during oral argument in Part V.A of this Article.

46. *Id.* at 53–56.

47. *Id.* at 56–57.

48. *See id.* at 57–77.

49. Jeff Nesbit, *The Real Reason Clarence Thomas Rarely Speaks*, U.S. NEWS (Mar. 30, 2016), <https://www.usnews.com/news/articles/2016-03-30/why-clarence-thomas-rarely-speaks-from-the-supreme-court-bench>.

50. Due to the death of Justice Scalia a few weeks earlier, only eight members of the Court heard the oral argument.

51. Transcript of Oral Argument, *Whole Woman’s Health*, *supra* note 29 *passim*; see Jo Becker & Adam Liptak, *Sotomayor’s Blunt Style Raises Issue of Temperament*, N.Y. TIMES (May 28, 2009), http://www.nytimes.com/2009/05/29/us/politics/29judge.html?_r=0 (describing a hot bench as “when a judge asks a lawyer a lot of questions”).

52. Transcript of Oral Argument, *Whole Woman’s Health*, *supra* note 29, at 39–42, 50–51, 54–55.

53. *See id.*

54. Lithwick, *supra* note 20.

law enacted primarily by men, their presence seems magnified, at least in the mind of some commentators. The danger, however, is that writers like Lithwick, and supporters of women's rights, may mistakenly believe that the presence of a critical mass of women on the Court means that these Justices will speak with a single and equal voice on women's issues.⁵⁵ Although, as discussed in the next Part, the empirical evidence suggests that the three women currently on the Court have a strong voting agreement rate, the high level may be the result of ideology and life experiences rather than gender per se.

III. EMPIRICAL ANALYSIS OF VOTING PATTERNS

In the 410 cases decided by the Supreme Court since Justice Kagan joined in 2011 through the end of the 2015 Supreme Court term, where all three women Justices participated (early on Justice Kagan recused herself from several cases), the trio voted together with the majority of the Court in 253 cases (62 percent).⁵⁶ The three women Justices voted together in the

55. See *id.* (discussing the force the female Justices brought to the *Whole Woman's Health* oral arguments).

56. These statistics were obtained from *The Supreme Court Database* using a basic search. *Analysis Specifications—Modern Data (1946–2015)*, WASH. U. L.: SUP. CT. DATABASE, <http://scdb.wustl.edu/analysis.php> (last visited Aug. 17, 2017). This data source is the basis for a substantial number of studies about the Supreme Court's jurisprudence. The data used in this Article comes from the Modern Database, 2016 Release 1, which covers the terms 1946 to 2015. *Id.* The data allows researchers to examine the vote of an individual Justice in a case, how Justices vote in relation to other Justices, and the subject area or issue for each case. *Id.* The authors of the Supreme Court Database provide an online codebook for all the fields and variables in the database. *Id.* The coding is extensive and has a high degree of reliability. The Supreme Court Database provides researchers with both "Case Centered" and "Justice Centered" datasets. *Id.* The Case Centered datasets provide data about each case, but do not include data on specific Justice information. *Id.* The Justice Centered data includes specific vote information for each Justice. *Id.*

By downloading the Case Centered dataset "Cases Organized by Supreme Court Citation" and the Justice Centered dataset "Cases Organized by Issue/Legal Provision" as Microsoft Excel files and importing them into Microsoft Access as tables, it is possible to link the datasets and create queries and reports based on the data. Linking these datasets made it possible to generate queries and reports, organized by case name, issue, sub-issue, and vote of the Justice, for every case in which all three women Justices—Ginsburg, Kagan, and Sotomayor—participated. It is also possible to generate reports showing when all three Justices voted together in the majority or plurality opinion, in the dissent, and in concurring decisions.

minority in 45 cases.⁵⁷ There were four cases where the three Justices voted together in a regular concurrence, i.e., when the Justice agrees with the Court's opinion as well as its disposition.⁵⁸ There were two cases where the Justices voted together in a special concurrence, i.e., when the Justice agrees with the Court's disposition but not its opinion.⁵⁹ Thus, the three women Justices did not vote together in 106 decisions—a little more than 25 percent of the time.⁶⁰ In sum, the data show that Justices Ginsburg, Sotomayor, and Kagan voted together about 75 percent of the time.⁶¹

The high rate of voting agreement between the three women Justices includes, with one exception, race-based, higher-education affirmative action cases. In *Fisher v. University of Texas (Fisher I)*, an affirmative action plan at the University of Texas used a system of accepting students in the top 10 percent of the graduating class at all state high schools,⁶² and after that considered race as a factor for admissions.⁶³ The University denied admission to Abigail Fisher, a white student who did not graduate in the top 10 percent of her high school, and she sued.⁶⁴ The issue in *Fisher I* was whether the lower courts, in upholding the University's 10-percent plan, had applied the proper standard.⁶⁵ In a 7–1 decision, the Supreme Court reversed the lower court's decisions and remanded the case with instructions to apply the strict scrutiny standard when determining whether the program violated the Equal Protection Clause.⁶⁶ Justice Sotomayor voted with the majority and Justice Ginsburg filed the sole dissent.⁶⁷

Yet in 2016 when the Court reheard the case and reached the substantive issue—the constitutionality of the University's race-conscious admissions programs—Justices Ginsburg and Sotomayor voted with the

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. The “Top Ten Percent Law” was implemented by the Texas State Legislature in 2009. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2416 (2013) (citing TEX. EDUC. CODE ANN. § 51.803 (West 2017)).

63. *Id.*

64. *Id.* at 2417.

65. *Id.*

66. *Id.* at 2421–22, 2432–34.

67. *Id.* at 2414, 2432. Justice Kagan did not take part in the consideration of this case. *Id.* at 2422.

majority in a 4–3 decision upholding the program.⁶⁸ Justice Scalia died and Justice Kagan recused herself.⁶⁹ Justice Sotomayor’s votes in *Fisher I* and *Fisher II* are unremarkable; she is on record as crediting affirmative action as a factor in her admission to Princeton University on a full scholarship.⁷⁰ In 2009 she stated: “I am the perfect affirmative action baby[.]” and without affirmative action “it would have been highly questionable if I would have been accepted.”⁷¹ Thus, her support of the majority in *Fisher I* was not necessarily a signal of her opposition to this affirmative action plan. Justice Sotomayor may have agreed with the majority that the lower court used the wrong standard, whereas Justice Ginsburg took issue with the majority’s decision that strict scrutiny was the appropriate standard.⁷²

This explanation is supported by their positions on another significant race-based case concerning affirmative action in higher education, *Schuetz v. Coalition to Defend Affirmative Action*.⁷³ Justice Kagan did not participate in *Schuetz* where a plurality of the Court, in an opinion written by Justice Kennedy, upheld a 2006 Michigan state constitutional amendment prohibiting state universities from considering race as part of their admissions processes.⁷⁴ This time, Justice Ginsburg joined Justice Sotomayor’s dissent in that case.⁷⁵

What is more interesting in *Fisher II* is the interaction between Justices Ginsburg and Sotomayor during the oral argument where they have a back-and-forth with Bert W. Rein, counsel for the petitioner, completely

68. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2204 (2016).

69. Kagan had a conflict of interest. Stephen Wermiel, *SCOTUS for Law Students (Sponsored by Bloomberg Law): Justice Kagan’s Recusals*, SCOTUS BLOG (Oct. 9, 2012, 9:50 PM), <http://www.scotusblog.com/2012/10/scotus-for-law-students-sponsored-by-bloomberg-law-justice-Kagans-recusals>.

70. Elizabeth Landau, *Cricket, Ivy League Classmates Startled Student Sonia Sotomayor*, CNN (July 15, 2009), <http://www.cnn.com/2009/US/07/15/sotomayor.college/index.html?s=PM:US>.

71. Bill Mears, *Sotomayor Says She Was ‘Perfect Affirmative Action Baby’*, CNN POL. (June 11, 2009), <http://www.cnn.com/2009/POLITICS/06/11/sotomayor.affirmative.action/index.html>.

72. *Fisher I*, 133 S. Ct. at 2434 (Ginsburg, J., dissenting).

73. *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1651–83 (2014).

74. *Id.* at 1638.

75. *Id.* at 1651 (Sotomayor, J., dissenting).

controlling the argument.⁷⁶ This pattern of tag-team questioning by the women in these cases is what some commentators find different.⁷⁷ It is not that Justices O'Connor and Ginsburg never asked questions during oral argument; rather it is the presence of a critical mass of women asking questions in sequence that is so different from past Courts.

The high rate of agreement between the three women Justices raises the question of whether their agreement rate reflects the ideological leanings of the women Justices, or whether their gender plays some role. In 2009 Rosalind Dixon, an Australian law professor, conducted an empirical analysis comparing the positions of women and men Supreme Court Justices in Title VII sex discrimination cases decided between 1981 and 2000.⁷⁸ Comparing the positions of Justices O'Connor and Ginsburg with their male counterparts, Dixon found that "there is little doubt that both Justices O'Connor and Ginsburg made a significant contribution to the achievement of substantive feminist goals on the Court, not only absolutely but also when compared to their male counterparts."⁷⁹ For the purposes of her study, Dixon defines feminist goals as "a shared commitment to the 'advancement of the legal, social and political equality of women with men.'"⁸⁰

In sex discrimination or harassment cases decided from 1981 to 1992, Justice O'Connor voted with "the most liberal members of the Court 88% to 89% of the time in such cases, whereas her conservative male colleagues joined such opinions in fewer than 50% of Title VII cases."⁸¹ Justice O'Connor's rate of agreement with the most liberal Court members in this area dropped slightly:

Between 1993 and 2000, she voted for the plaintiff in approximately 82% of cases, making her the conservative justice most likely to favor the plaintiff. . . . [This is] a rate less than 2% below that of Justice Stevens, while Justice Kennedy voted for the plaintiff in approximately 67% of cases, Justice Rehnquist in 50% of cases, and Justices Thomas

76. Transcript of Oral Argument at 4–11, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981).

77. Adam Liptak, *Three Justices Bound by Beliefs, Not Just Gender*, N.Y. TIMES (July 1, 2013), <http://www.nytimes.com/2013/07/02/us/bound-together-on-the-court-but-by-beliefs-not-gender.html?mcubz=o> (discussing the female Justices' domination of the Supreme Court arguments in 2013).

78. Dixon, *supra* note 12 *passim*.

79. *Id.* at 301.

80. *Id.*

81. *Id.*

and Scalia in approximately 25% of cases. During this period, Justice Ginsburg was the justice who, together with Justice Souter, was most likely to support the plaintiff. Like Souter, she voted for the plaintiff in approximately 92% of Title VII cases, whereas in broader “civil liberties” cases, she lagged behind both Stevens and Souter in voting for the plaintiff.⁸²

Dixon calls the correlation between a judge’s gender and her voting habits for a plaintiff in Title VII sex-based employment discrimination cases the “targeted gender effect.”⁸³ In those cases, Dixon found that women judges voted for women plaintiffs 63 percent of the time, whereas male judges voted for women plaintiffs 46 percent of the time.⁸⁴ Furthermore, a 2005 study found that “in sex discrimination cases the probability that an appellate judge would find for the plaintiff increased by 65% if that judge was [a woman] (from 17% to 28%).”⁸⁵ As the next Part explains, the targeted gender effect may be explained by looking not only at the Justices’ ideologies, but their backgrounds and the experiences they bring with them to the Court. The next Part briefly describes the backgrounds and legal careers of the women Justices.

IV. WHY WOMEN’S VOICES COUNT

In some respects, the ideology of both the first and second generation of women Supreme Court Justices may have been shaped by the time they entered law school and the legal profession. This Part briefly explores and compares the differences between the two generations of women Justices.

A. Justices O’Connor and Ginsburg

The three-year age gap between Justice O’Connor, born in 1930,⁸⁶ and Justice Ginsburg, born in 1933,⁸⁷ makes them contemporaries. They are

82. *Id.*

83. *Id.* at 311.

84. *Id.* at 312.

85. *Id.* (citing Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1776 (2005)).

86. LINDA HIRSHMAN, *SISTERS IN LAW: HOW SANDRA DAY O’CONNOR AND RUTH BADER GINSBURG WENT TO THE SUPREME COURT AND CHANGED THE WORLD* 3 (2015).

87. Herma Hill Kay, *Ruth Bader Ginsburg: Law Professor Extraordinaire*, in *THE LEGACY OF RUTH BADER GINSBURG* 12 (Scot Dodson ed., 2015).

women who graduated from law school—O'Connor in 1952⁸⁸ and Ginsburg in 1959⁸⁹—and entered the legal profession before the onslaught of second-wave feminism and the substantial increase in women law students. They were not necessarily in agreement ideologically; O'Connor, a former politician and a centrist,⁹⁰ was a Republican appointee, and Ginsburg, a progressive and advocate for women,⁹¹ was a Democrat appointee. Although they experienced similar forms of sex-based discrimination, their careers after law school also differed.⁹²

Married and the mother of a small child, Ruth Bader Ginsburg had difficulty securing a clerkship following her graduation from Columbia Law School, despite being first in her class.⁹³ Justice Felix Frankfurter refused to hire Ginsburg because of her gender.⁹⁴ Ginsburg joined the Rutgers Law faculty in 1963 only to learn that she was being paid less than her male colleagues because her husband had a good-paying job.⁹⁵ In 1970 she co-founded the *Women's Rights Law Reporter*, the oldest legal periodical dedicated exclusively to women's issues.⁹⁶

By the 1970s, Justice Ginsburg was a well-known legal advocate for women's rights, having established the Women's Rights Project at the American Civil Liberties Union (ACLU) in 1972.⁹⁷ During this period, she

88. HIRSHMAN, *supra* note 86, at 12.

89. Kay, *supra* note 87, at 13.

90. *Id.* at 221.

91. *Id.* at 273–88.

92. See generally *id.* at 12–14, 18–31 (explaining Justices O'Connor's and Ginsburg's early careers).

93. Nina Totenberg, *Notes on a Life*, in THE LEGACY OF RUTH BADER GINSBURG 3, 5 (Scot Dodson ed., 2015).

94. HIRSHMAN, *supra* note 86, at 21; Neil A. Lewis, *The Supreme Court: Woman in the News; Rejected as a Clerk, Chosen as a Justice: Ruth Joan Bader Ginsburg*, N.Y. TIMES (June 15, 1993), <http://www.nytimes.com/1993/06/15/us/supreme-court-woman-rejected-clerk-chosen-justice-ruth-joan-bader-ginsburg.html?pagewanted=all>. She went on to clerk for two years with Federal District Judge Edmund L. Palmieri of the U.S. District Court for the Southern District of New York. David Margolick, *Trial by Adversity Shapes Jurist's Outlook*, N.Y. TIMES (June 25, 1993), <http://www.nytimes.com/1993/06/25/us/trial-by-adversity-shapes-jurist-s-outlook.html?pagewanted=all>.

95. Adam Liptak, *Kagan Says Her Path to Supreme Court Was Made Smoother by Ginsburg's*, N.Y. TIMES (Feb. 10, 2014), <https://www.nytimes.com/2014/02/11/us/kagan-says-her-path-to-supreme-court-was-made-smoother-by-ginsburg.html>.

96. *About the Reporter*, WOMEN'S RTS. L. REP., <https://web.archive.org/web/20080708192947/http://pegasus.rutgers.edu/~wrlr/index.html> (last visited Aug. 21, 2017).

97. *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU,

argued—and won—some of the seminal Supreme Court women’s rights cases: *Reed v. Reed* (1971),⁹⁸ *Frontiero v. Richardson* (1973),⁹⁹ and *Weinberger v. Wiesenfeld* (1975).¹⁰⁰ Ginsburg filed an amicus brief on behalf of the ACLU in *Craig v. Boren* (1976).¹⁰¹ In *Duren v. Missouri* (1979), Ginsburg, along with Lee Nation, argued on behalf of the appellant.¹⁰² She argued these cases before an all-male Supreme Court.¹⁰³ By the time Justice O’Connor was appointed to the Supreme Court in 1982, Justice Ginsburg was a federal judge.¹⁰⁴

Similarly, Sandra Day, despite graduating third in her class from Stanford Law School, could not find a paid position as a lawyer.¹⁰⁵ Six months after graduation, she married John O’Connor.¹⁰⁶ When her husband was drafted and sent to Germany, she moved with him, working as a civilian attorney for the U.S. Army Quartermaster Corps.¹⁰⁷ When they returned to the United States three years later, they settled in Arizona where O’Connor became active in Republican politics.¹⁰⁸ In Arizona, she worked as an assistant attorney general before being appointed to fill a vacant state senate

<https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff> (last visited May 15, 2017).

98. *Reed v. Reed*, 404 U.S. 71 *passim* (1971) (holding Equal Protection guarantee applied to gender).

99. *Frontiero v. Richardson*, 411 U.S. 677 *passim* (1973) (striking down gender-specific housing allowances for service members).

100. *Weinberger v. Wiesenfeld*, 420 U.S. 636 *passim* (1975) (striking down gender-specific Social Security survivor benefits).

101. *Craig v. Boren*, 429 U.S. 190, 190 (1976) (striking down state law imposing different minimum drinking ages for women and men).

102. *Duren v. Missouri*, 439 U.S. 357 *passim* (1979) (striking down state law making jury service for women voluntary).

103. *Members of the Supreme Court of the United States*, *supra* note 6.

104. HIRSHMAN, *supra* note 86, at xvii.

105. ‘Out of Order’ at the Court: O’Connor on Being the First Female Justice, NPR (Mar. 5, 2013), <http://www.npr.org/2013/03/05/172982275/out-of-order-at-the-court-oconnor-on-being-the-first-female-justice> [hereinafter ‘Out of Order’]; Sandra Day O’Connor, SANDRA DAY O’CONNOR INST., <http://oconnorinstitute.org/programs/oconnor-history/sandra-day-oconnor-library-and-archives/biography/> (last visited Sept. 9, 2017). She worked as an unpaid deputy county attorney in San Mateo, California. ‘Out of Order’, *supra*.

106. JOAN BISKUPIC, SANDRA DAY O’CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 27–28 (2005).

107. *Id.* at 28.

108. *Id.* at 30–31.

seat which she subsequently won outright.¹⁰⁹ She served as Arizona's (and the nation's) first woman state senate majority leader until leaving that position to run for a superior court judgeship.¹¹⁰ Four years later, she was elevated to the Arizona State Court of Appeals where she remained until her appointment to the U.S. Supreme Court.¹¹¹ Along the way, she raised three children.¹¹²

Once on the Supreme Court, Justice O'Connor surprised some by becoming a pivotal voice in several gender cases. In 1982, three years after Sotomayor graduated and while Kagan was still in law school, Justice O'Connor wrote the majority opinion in *Mississippi University for Women v. Hogan*,¹¹³ which "declared a state university's policy admitting only women to its nursing program was a violation of the Equal Protection Clause."¹¹⁴ The Mississippi law was the same type of gender-based limitation on women that Justice Ginsburg opposed as a lawyer, only the petitioner was a man, not a woman.¹¹⁵ Justice O'Connor's position was consistent with Justice Ginsburg, who in *Craig v. Boren* argued against a law that disfavored the male appellant.¹¹⁶ In *Hogan*, Justice O'Connor, relying on *Reed* and other precedents, rejected "the stereotyped view of nursing as an exclusively woman's job."¹¹⁷ She opposed gender stereotypes like those embodied in *Hogan*; the same kinds of restrictions she no doubt faced as a young lawyer.¹¹⁸

Hogan laid the groundwork for the Court's decision in *United States v. Virginia* (1996), striking down Virginia Military Academy's male-only

109. Marjorie Williams, *How Sandra Day O'Connor Became the Most Powerful Woman in 1980s America*, WASH. POST (Mar. 29, 2016), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2016/03/29/how-sandra-day-oconnor-became-the-most-powerful-woman-in-1980s-america/?utm_term=.357bb9cd5ca2.

110. *Id.*

111. BISKUPIC, *supra* note 106, at 68.

112. *Id.* at 34.

113. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 719 (1982).

114. Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to "Foreclose the Unanticipated"*, 39 AKRON L. REV. 373, 378 (2006).

115. Compare *Miss. Univ. for Women*, 458 U.S. 718 with *Weinburger v. Wiesenfeld*, 420 U.S. 636 (1975) and *Frontiero v. Richardson*, 411 U.S. 677 (1973) and *Reed v. Reed*, 404 U.S. 71 (1971).

116. See *Craig v. Boren*, 429 U.S. 190, 191 (1976).

117. *Hogan*, 458 U.S. at 728–30.

118. See *id. passim*.

enrollment restriction.¹¹⁹ This time Justice Ginsburg wrote the opinion for the majority, which included Justice O'Connor and four other Justices.¹²⁰ The two women seemed in accord as to overt gender-based discrimination.¹²¹

But Justice O'Connor's position in *City of Akron v. Akron Center for Reproductive Health* was another matter.¹²² In *Akron*, the Court in a 6–3 decision struck down a state provision imposing a 24-hour waiting period and counseling requirement informing the patient of the stage of fetal development, the supposed health risks of abortion, and the availability of adoption and childbirth resources.¹²³ Justice O'Connor, joined by Justices White and Rehnquist, dissented.¹²⁴ Justice O'Connor worried that the trimester analysis set forth in *Roe v. Wade* would not sufficiently protect a woman's right to an abortion, arguing that the Court should apply the "undue burden" test used in two prior cases, *Maher v. Roe* (1977) and *Bellotti v. Baird* (1979).¹²⁵ The Court ultimately adopted Justice O'Connor's standard in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) when it overruled *Akron City for Reproductive Health*.¹²⁶ Justice O'Connor wrote the opinion for the plurality.¹²⁷

Commentators disagree over whether, as a whole, Justice O'Connor consistently and pragmatically took positions in the abortion cases that would secure the right for women.¹²⁸ Feminists who disliked the undue burden test argue that it is too restrictive with regard to pre-abortion requirements.¹²⁹ Other feminists supported the standard when Justice

119. *United States v. Virginia*, 518 U.S. 515 *passim* (1996).

120. *Id.* at 519.

121. *See id.*

122. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 452–53 (1983), overruled by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

123. *Id.* at 452.

124. *Id.* at 452–75.

125. *Id.* at 452–53; *see Bellotti v. Baird*, 443 U.S. 622, 640 (1979); *Maher v. Roe*, 432 U.S. 464, 473 (1977); *Roe v. Wade*, 410 U.S. 113, 163 (1973).

126. *Planned Parenthood of Se. Pa.*, 505 U.S. at 882.

127. *Id.* at 833.

128. Stewart Jay, *Ideologue to Pragmatists? Sandra Day O'Connor's Views on Abortion Rights*, 39 ARIZ. ST. L.J. 777 *passim* (2007) (discussing Justice O'Connor's involvement with various abortion cases); Margaret A. Miller, *Justice Sandra Day O'Connor: Token or Triumph from a Feminist Perspective*, GOLDEN GATE U. L. REV. 493, 520–24 (1985) (noting that Justice O'Connor did not strongly endorse a woman's right to an abortion).

129. *See* Miller, *supra* note 128, at 520–23; Meaghan Winter, *Roe v. Wade Was Lost*

Ginsburg relied on it in her dissent to *Gonzales v. Carhart*, the partial-birth abortion case.¹³⁰ While Justice O'Connor's position preserved access to abortion in principle, the undue burden test she espoused tended to disadvantage poor women by allowing the kinds of pre-abortion regulations that the petitioner in *Whole Woman's Health* opposed.¹³¹

Impressions of the first generation women Justices vary. Justice O'Connor is thought to be more powerful than Justice Ginsburg. Described as "in control," lawyers arguing before the Court believed that she was the only Justice who mattered.¹³² Commentators also referred to Justice O'Connor during her tenure on the Court as "the 'real' Chief Justice."¹³³ These commentators argued that she used her "concurring opinions . . . [as] a conscious strategy to maximize her power and leadership on the Court."¹³⁴

In contrast, Justice Ginsburg describes herself as someone who champions collegiality in the Court.¹³⁵ She believes judges should write separately sparingly,¹³⁶ writing: "[O]verindulgence in separate opinion writing . . . may undermine both the reputation of the judiciary for judgment

in 1992, SLATE (Mar. 27, 2016), http://www.slate.com/articles/double_x/cover_story/2016/03/how_the_undue_burden_concept_eroded_roe_v_wade.html.

130. *Gonzales v. Carhart*, 550 U.S. 124, 169–91 (2007).

131. See Judith Olans Brown, Wendy E. Parmet & Mary E. O'Connell, *The Rugged Feminism of Sandra Day O'Connor*, 32 IND. L. REV. 1219, 1227 (1999) ("[I]t seems quite likely that Justice O'Connor, an upper middle class, highly educated, married woman who had experienced gender discrimination, could appreciate the indignity of having to ask her husband for permission to have an abortion. She could much less readily understand the problems poor women face when they must take two days off from work to undergo the procedure."); Nadine Strossen, *Reproducing Women's Rights: All Over Again*, 31 VT. L. REV. 1, 28 (2006) ("In particular, what would not look like an undue burden to, say, Sandra Day O'Connor, would in fact be an impossible burden, especially for poor women and working women who had to travel far and to take extra time off work.").

132. Erwin Chemerinsky, *Justice O'Connor and Federalism*, 32 MCGEORGE L. REV. 877, 877 (2001); see generally Huhn, *supra* note 114 *passim* (discussing Justice O'Connor's contribution to the court).

133. Diane Lowenthal & Barbara Palmer, *Justice Sandra Day O'Connor: The World's Most Powerful Jurist?*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 211, 211 (2004).

134. *Id.* at 215.

135. Kathleen J. Sullivan, *U.S. Supreme Court Justice Ruth Bader Ginsburg Talks About a Meaningful Life*, STAN. NEWS (Feb. 6, 2017), <http://news.stanford.edu/2017/02/06/supreme-court-associate-justice-ginsburg-talks-meaningful-life/>.

136. Elijah Yip & Eric K. Yamamoto, *Justice Ruth Bader Ginsburg's Jurisprudence of Process and Procedure*, 20 U. HAW. L. REV. 647, 661–62 (1998).

and the respect accorded court dispositions.”¹³⁷ Her approach may explain why a commentator in the late 1990s described her as a “judge’s judge,” less powerful than Justice O’Connor.¹³⁸

A reviewer of Linda Hirshman’s book on Justices Ginsburg and O’Connor wrote, while the two Justices “were outsiders as women . . . [they] were insiders as elites, and that made a world of difference.”¹³⁹ Both women circulated in an elite social circle due in large part to their influential lawyer husbands.¹⁴⁰ The reviewer suggests that these talented and intelligent women benefitted by knowing people who knew people and who “forge[d] relationships with those in power *as part of the ruling class*.”¹⁴¹ But then this same observation applies to some men who are appointed to the Court, suggesting the importance of social class as opposed to gender.

B. Justices Sotomayor and Kagan

Like Justices O’Connor and Ginsburg, Justice Kagan, born in 1960,¹⁴² and Justice Sotomayor, born in 1954,¹⁴³ are contemporaries. They are also a generation younger than the two women who preceded them on the Court. Significantly, for most of their legal lives, there has been at least one woman on the Supreme Court. Justice Sotomayor graduated from Yale Law School in 1979, a few years before Justice O’Connor’s appointment to the Court.¹⁴⁴ Justice Kagan graduated from Harvard Law School in 1986, five years after Justice O’Connor joined the Court.¹⁴⁵

Unlike Justices O’Connor and Ginsburg—who found it difficult to

137. *Id.* at 661 (alteration in original) (quoting Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1191 (1992)).

138. *Id.* (quoting Peter W. Huber & Richard Taranto, *Ruth Bader Ginsburg, A Judge’s Judge*, WALL ST. J., June 15, 1993, at A18).

139. Corrina Barrett Lain, *Feminist Justice, Review of Sisters in Law: How Sandra Day O’Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World*, by Linda Hirshman, NEW RAMBLER (Apr. 25, 2016), <http://newramblerreview.com/book-reviews/biography-memoir/feminist-justice>.

140. *Id.*

141. *Id.*

142. *Elena Kagan*, OYEZ, https://www.oyez.org/justices/elena_kagan (last visited Apr. 28, 2017).

143. *Sonia Sotomayor*, OYEZ, https://www.oyez.org/justices/sonia_sotomayor (last visited Apr. 28, 2017).

144. *Id.*

145. *Elena Kagan*, *supra* note 142.

secure jobs as lawyers—Justices Sotomayor and Kagan had an easier time graduating from law school as second-wave feminism and feminist legal jurisprudence were emerging.¹⁴⁶ Justice Kagan, during her tenure as dean at Harvard Law School, said she “did not perceive differential treatment from colleagues on account of her gender[.]” noting that her gender was “something that in many ways . . . seemed remarkably not relevant in the job.”¹⁴⁷ While Justice Sotomayor’s experiences in many ways are similar to those of Justice Kagan in that “she was never the first or only female in the professional contexts in which she served, she was often the first and only Hispanic woman.”¹⁴⁸

Justice Kagan’s appointment both excited and disappointed Court watchers and commentators.¹⁴⁹ One Court commentator wrote, “The replacement of Souter and Stevens with Sotomayor and Kagan has done little to alter the Court’s overall ideological balance.”¹⁵⁰ Court observers predicted that Justice Kagan would be more moderate than her predecessor, Justice Stevens.¹⁵¹ Another commentator comparing Justice Kagan to Justice Brennan characterized her as “a bridge builder and diplomat.”¹⁵² It is unclear as to whether there is a difference in the minds of commentators between Justice Kagan, the bridge builder–diplomat and Justice Ginsburg, the “champion of collegiality.”¹⁵³ Still another commentator wrote: “As dean of Harvard Law School, Kagan . . . gained the reputation of a skilled tactician who was able to work with, and placate, conservatives on the faculty. . . . As a justice, she . . . continued the bridge-building, going hunting with Scalia on more than one occasion.”¹⁵⁴ Hunting with Justice Scalia seems to speak more of collegiality than bridge-building, unless both terms mean essentially the

146. See generally Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 *passim* (1988) (analyzing jurisprudence evolution and the impact of feminism).

147. Naomi Schoenbaum, *The New Republic: The Post-Gender Justice*, NPR (July 12, 2010), <http://www.npr.org/templates/story/story.php?storyId=128460013>.

148. Dixon, *supra* note 12, at 310.

149. Peter Baker, *Kagan Nomination Leaves Longing on the Left*, N.Y. TIMES (May 10, 2010), <http://www.nytimes.com/2010/05/11/us/politics/11nominees.html>.

150. Howard, *supra* note 19, at 6.

151. See, e.g., Erwin Chemerinsky et al., *The Supreme Court 2009 Term Overview and 2010 Term Preview*, 27 *TOURO L. REV.* 33, 38 (2011); John P. Avlon, *Is Elena Kagan a Liberal—or a Centrist?*, CNN (June 30, 2010), <http://www.cnn.com/2010/OPINION/06/29/avlon.kagan.centrist/>.

152. Howard, *supra* note 19, at 7.

153. See *id.*; Sullivan, *supra* note 135.

154. Mauro, *supra* note 7, at 59.

same thing.

Like Justice Kagan, before her nomination to the Supreme Court, the *American Bar Association Journal* characterized Justice Sotomayor as “a political centrist.”¹⁵⁵ In an interview published in 2014 by noted Supreme Court commentator Linda Greenhouse, Justice Sotomayor admitted relying much more on the facts of each case to the consternation of some critics, thus seemingly eschewing any political feminist predisposition.¹⁵⁶ She explained:

I really learned that the law should be announced based on a factual record that exists, not a supposition of how you would like a case to come out or the principle to come out, but to ground the principle in a record and in facts, because that will permit you to have some flexibility in the future development of the law. If you are someone like me, who appreciates the complexity and nuance of the human condition, broad absolute rules don't really suit me, because I can always imagine—and do—the next case.¹⁵⁷

Justice Sotomayor, who as a judge on the lower courts largely followed the voting pattern in Title VII cases of Justices O'Connor and Ginsburg,¹⁵⁸ continued that pattern after her elevation to the Supreme Court.¹⁵⁹

In a 2002 symposium at the University of California, Berkeley, then-Judge Sotomayor expressed her view on how gender affects judicial decision-making, arguing that it is impossible to be completely impartial because “it denies the fact that we are by our experiences making different choices than others.”¹⁶⁰ But she distinguished herself from Justice O'Connor by saying:

[O]ur gender and national origins may and will make a difference in our judging. Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding

155. *Who Will Replace Justice Souter*, ABA J. (May 1, 2009), http://www.abajournal.com/news/article/who_will_replace_justice_souter.

156. Sonia Sotomayor & Linda Greenhouse, *A Conversation with Justice Sotomayor*, 123 YALE L.J. F. 375, 379 (2014).

157. *Id.*

158. See NAT'L WOMEN'S LAW CTR., THE RECORD OF JUDGE SONIA SOTOMAYOR ON CRITICAL LEGAL RIGHTS FOR WOMEN 13–17 (2009), <https://nwlc.org/wp-content/uploads/2015/08/SotomayorReport.pdf>.

159. See *supra* notes 62–75 and accompanying text.

160. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 91 (2002).

cases. I am . . . not so sure that I agree with the statement. First, . . . there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.¹⁶¹

In contrast to Justice Kagan, one commentator characterized Justice Sotomayor as “[p]assionately and blunt, . . . the Roberts Court’s version of Thurgood Marshall.”¹⁶² Some observers may construe this characterization as stereotyping Justice Sotomayor based on her Puerto Rican ancestry.¹⁶³

The intersection of gender *and* race in perceptions of Justice Sotomayor raises the question of whether, as a woman of color, race or ethnicity—like gender—are an influence. Some commentators say that Justice Sotomayor has a “complex approach to race, discrimination[,] and the law,”¹⁶⁴ negating some who were concerned over whether her identity (or supposed temperament) as a Latina would influence her decisions on the bench.¹⁶⁵ While a federal district judge, Sotomayor “earned a reputation as a sharp, outspoken and fearless jurist, someone who does not let powerful interests bully, rush or cow her into a decision.”¹⁶⁶ Sotomayor, while on the Second Circuit, never dissented in 50 appeals involving race in which she participated.¹⁶⁷ Significantly, “In 45 of those cases, a three-judge panel

161. *Id.* at 92.

162. Howard, *supra* note 19, at 7.

163. One negative stereotype is that Latinas are “spit fires”: hot blooded and hot tempered. Waleska Suero, Note, “*We Don’t Think of it as Sexual Harassment*”: *The Intersection of Gender and Ethnicity on Latinas’ Workplace Sexual Harassment Claims*, 33 CHICANO-LATINO L. REV. 129 *passim* (2015).

164. Jerry Markon, *Supreme Court Nominee Sotomayor’s Votes Cross Ideological Lines*, WASH. POST (June 7, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/06/AR2009060601966.html>.

165. Born of immigrant parents, Justice Sotomayor has strong ties to the Latino/a community, and has been vocal about these ties throughout her legal career. She was an active member of the board of directors for the Puerto Rican Legal Defense and Education Fund. While in law school, she filed a formal complaint against a law firm who suggested that she only made it to Princeton through affirmative action, and she’s said that it is “shocking” that there were so few minority women on the federal bench. Peter Nicholas & James Oliphant, *Two Sides to Sonia Sotomayor*, L.A. TIMES (May 31, 2009), <http://www.latimes.com/nation/la-na-sotomayor-profile31-2009may31-story.html>.

166. James C. McKinley Jr., *Baseball: Woman in the News; Strike-Zone Arbitrator—Sonia Sotomayor*, N.Y. TIMES (Apr. 1, 1995), <http://www.nytimes.com/1995/04/01/us/baseball-woman-in-the-news-strike-zone-arbitrator-sonia-sotomayor.html>.

167. Nicholas & Oliphant, *supra* note 165.

rejected the discrimination claim”¹⁶⁸ An expanded study showed that Sotomayor decided 96 cases involving a claim of discrimination and rejected those claims nearly 90 percent of the time.¹⁶⁹ Another examination of Second Circuit split decisions in cases that dealt with race and discrimination showed no clear ideological pattern in her opinions.¹⁷⁰ Justice Sotomayor says she has to “unhook” herself to stay impartial and objective when dealing with cases that may evoke an emotional response.¹⁷¹ Thus, before joining the Court she had no discernable pattern in race cases.

Justice Sotomayor’s position on abortion may be complex. While she voted in favor of access to abortion in *Whole Woman’s Health*,¹⁷² in *Center for Reproductive Law and Policy v. Bush*, then-Judge Sotomayor wrote an opinion affirming the district court’s ruling upholding a law banning foreign organizations receiving U.S. funding from performing or promoting abortions.¹⁷³ Perhaps the difference between these two cases explains Justice Sotomayor’s different positions: Supreme Court jurisprudence guarantees women in the United States access to abortion, while Congress has the power to limit the use of U.S. tax money for women seeking abortions outside the country.¹⁷⁴

Despite their differences in style, Justices Sotomayor and Kagan “have much in common . . . : Both women . . . achieved success in male-dominated institutions, and they are both New Yorkers and graduates of Princeton University.”¹⁷⁵ Their similarities as contemporaries and New Yorkers who graduated from elite law schools, as opposed to their gender, may explain the “high degree of affinity in their voting: 94 percent in the 2010-2011 term and 84 percent in the 2011–2012 term.”¹⁷⁶ Unlike their women predecessors on the Court, Justices Sotomayor and Kagan do not have children or

168. *Id.*

169. Tom Goldstein, *Judge Sotomayor and Race—Results from the Full Data Set*, SCOTUS BLOG (May 29, 2009, 10:27 PM), <http://www.scotusblog.com/2009/05/judge-sotomayor-and-race-results-from-the-full-data-set/>.

170. Markon, *supra* note 164.

171. *Id.*

172. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2299–300 (2016).

173. *Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183 *passim* (2d Cir. 2002).

174. *Compare Whole Woman’s Health*, 136 S. Ct. at 2300 with *Ctr. for Reprod. Law & Policy*, 304 F.3d at 187.

175. Mauro, *supra* note 7, at 57.

176. *Id.*; accord Howard, *supra* note 19, at 4–5 (94 percent agreement in 2011).

spouses.¹⁷⁷ They are career women without families who ascended to the bench without the aid of influential husbands.¹⁷⁸ In this respect they are more social outsiders than their women predecessors. But as the next Part explains, life at the Supreme Court is not bias free.

V. IMPLICIT GENDER BIAS DURING ORAL ARGUMENT

This Part briefly asks whether one unexpected aspect of Obama's legacy is the reaction of Justices, advocates, and commentators to more prominent roles of women Justices during oral argument. Specifically, it asks whether the reaction of some Justices and commentators to women Justices during oral argument bespeaks implicit gender bias and asks whether its existence is one reason why more women's voices are needed.

Gender bias by male Justices on the Court is not new. In *Sisters in Law*, Linda Hirshman recounts numerous incidences of gender bias, such as the unwillingness of any Justice, including the liberal Justice Brennan, to hire a woman law clerk when Justice Ginsburg graduated in 1959.¹⁷⁹ Hirshman writes, "Even after five years on the tribunal, . . . Burger never assigned O'Connor to write the Court's opinion in any big cases."¹⁸⁰ Then there was Justice Blackmun's "wicked imitation of [O'Connor's] distinctive loud, nasal diction"¹⁸¹ and his characterization of Justice Ginsburg's comments on an opinion as "an emotional event."¹⁸² Thus the arrival of women Justices did not end the sexism they previously experienced in the workplace. Today the signs are less overt.

A. Interruptions During Oral Argument

Women often anecdotally complain about the phenomenon of men interrupting or silencing women in the workplace. Not only are interruptions of another's conversation considered rude, such interruptions hinder

177. Lisa Belkin, *Judging Women*, N.Y. TIMES (May 18, 2010), <http://www.nytimes.com/2010/05/23/magazine/23FOB-wwln-t.html>.

178. *Id.*

179. Lain, *supra* note 139, at n.4 (citing HIRSHMAN, *supra* note 86, at 21). Justice Douglas hired the first woman law clerk, Lucile Lomen (born Helen Lucile Lomen) in 1944, 22 years before another woman was hired. Linda Greenhouse, *Women Suddenly Scarce Among Justices' Clerks*, N.Y. TIMES (Aug. 30, 2006), <http://www.nytimes.com/2006/08/30/washington/30scotus.html>.

180. HIRSHMAN, *supra* note 86, at 169.

181. *Id.* at 225.

182. *Id.* at 227–28.

communication.¹⁸³ Social scientists assert that interruptions constitute more than a mere breach of social courtesy, rather “interruptions are a ‘violation of a current speaker’s right to complete a turn.’ Research suggests that interruptions are attempts by speakers to maximize their power positions in group settings through assertions of dominance.”¹⁸⁴ When these interruptions occur during oral argument before the Supreme Court and women Justices are disproportionately interrupted, implicit gender bias may be at play.

A recent empirical study of interruptions during oral arguments before the Supreme Court during the 2015 term found that “even though female justices speak less often and use fewer words than male justices, they are nonetheless interrupted during oral argument at a significantly higher rate.”¹⁸⁵ Further, Justice Kennedy and Chief Justice Roberts interrupted women Justices the most during the 2015 term.¹⁸⁶ Looking at oral arguments during the 1990 and 2002 terms, the authors conclude that the practice is longstanding.¹⁸⁷ While other factors like seniority and ideology influence who is interrupted and by whom, the authors found that the effect of gender “dwarfed” these other factors.¹⁸⁸

Not only do male Justices interrupt female Justices more often, lawyers appearing before the Court also “interrupt female justices at a higher rate than they interrupt the male justices,”¹⁸⁹ even though this behavior clearly violates Court rules.¹⁹⁰ Tonja Jacobi and Dylan Schweers cite as a “clear

183. Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. (forthcoming Fall 2017) (manuscript at 12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2933016.

184. *Id.* at 15 (quoting Don H. Zimmerman & Candace West, *Sex Roles, Interruptions and Silences in Conversation*, in LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE 105, 123 (1975)) (citing Julia A. Goldberg, *Interrupting the Discourse on Interruptions: An Analysis in Terms of Relationally Neutral, Power and Rapport-Oriented Acts*, 14 J. PRAGMATICS 883, 884 (1990)).

185. *Id.* at 4.

186. *Id.* at 9.

187. *Id.* at 3.

188. *Id.* at 6.

189. *Id.* at 22.

190. *Id.* at 4. “Never interrupt a Justice who is addressing you. Give your full time and attention to that Justice. . . . [.] If you are speaking and a Justice interrupts you, cease talking immediately and listen.” *Id.* at 4 n.13 (quoting GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 9 (2015),

example” of this practice an exchange between Justice Sotomayor and Bert W. Rein, the petitioner’s counsel, during the oral argument in *Fisher II*.¹⁹¹ As the excerpt below displays, “Rein has an extensive argument with Sotomayor, in which he interrupts her repeatedly.”¹⁹²

Sonia Sotomayor: I—I—I—what you’re saying, basically, is, is this is what the Fifth Circuit concluded and which the school basically agrees, okay? If you don’t consider race, then holistic percentage, whatever it is, is going to be virtually all white.

Bert W. Rein: And that is incorrect.

Sonia Sotomayor: All white.

Bert W. Rein: And that is an assumption —

Sonia Sotomayor: And to say —no —

Bert W. Rein: —that has no basis in this record.

Sonia Sotomayor: Oh, but there is —

Bert W. Rein: It’s a stereotypical —

Sonia Sotomayor: No, it’s not —

Bert W. Rein: —assumption. That is what it is.

Sonia Sotomayor: It’s not, because the reality —

Bert W. Rein: With all deference —

Sonia Sotomayor: —that Justice —

John G. Roberts, Jr.: Mr. Rein —

Sonia Sotomayor: —Alito wants to rely on. Let me finish my point. He’s right. For their educational needs, there are competing criteria.¹⁹³

Jacobi and Schweers point out that Chief Justice Roberts allows Rein

<https://www.supremecourt.gov/casehand/guideforcounsel.pdf>).

191. *Id.* at 22.

192. *Id.*

193. *Id.*

to speak over Justice Sotomayor six times before he says something, and his interruption comes at the end of the argument.¹⁹⁴

B. Implicit Bias in Perceptions of Oral Arguments

Not only is implicit gender bias on display during oral arguments, it also seems to color some Court commentators' views of these arguments. During oral argument in the landmark voting rights case, *Shelby County v. Holder*, Justices Sotomayor and Kagan formed a tag team.¹⁹⁵ A commentator, remarking on the questioning, characterized Justice Sotomayor as "emotional and combative," and Justice Kagan as "calm and strategic."¹⁹⁶ The issue involved the constitutionality of two provisions of the Voting Rights Act of 1965: Section 4(b) and Section 5.¹⁹⁷ Section 5 required certain states and localities with past histories of low minority voter registration to obtain preclearance from the federal government before making any changes to their voting laws or practices.¹⁹⁸ Section 4(b) contained the formula for determining which jurisdictions were subject to the Section 5 preclearance requirement.¹⁹⁹ The Court in a 5–4 decision struck down Section 4(b), leaving Section 5 essentially toothless unless Congress enacts a new coverage formula.²⁰⁰

Justices Sotomayor and Kagan, along with Justice Breyer, joined Justice Ginsburg's dissent in that case.²⁰¹ No mention is made of Justice Ginsburg who also participated in the initial tag-team questioning of the petitioner's counsel, Bert W. Rein.²⁰² Once more, a close examination of the transcript is warranted. As the excerpt from the transcript of the argument below discloses, during the petitioner's argument, the women Justices, starting with Justice Sotomayor, ask eight questions before a male Justice asks a single question.²⁰³

194. *Id.*

195. Transcript of Oral Argument at 4–10, *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12–96) [hereinafter Transcript of Oral Argument, *Shelby Cty.*]; see *Shelby Cty.*, 133 S. Ct. 2612.

196. Mauro, *supra* note 7, at 57.

197. *Shelby Cty.*, 133 S. Ct. at 2618–19.

198. *Id.* at 2632.

199. *Id.* at 2620.

200. *Id.* at 2617, 2631.

201. *Id.* at 2632–52.

202. Transcript of Oral Argument, *Shelby Cty.*, *supra* note 195, at 4–10.

203. *Id.*

JUSTICE SOTOMAYOR: May I ask you a question? Assuming I accept your premise, and there's some question about that, that some portions of the South have changed, your county pretty much hasn't.

MR. REIN: Well, I —

JUSTICE SOTOMAYOR: In—in the period we're talking about, it has many more discriminating—240 discriminatory voting laws that were blocked by Section 5 objections.

There were numerous remedied by Section 2 litigation. You may be the wrong party bringing this.

MR. REIN: Well, this is an on-face challenge, and might I say, Justice Sotomayor —

JUSTICE SOTOMAYOR: But that's the standard. And why would we vote in favor of a county whose record is the epitome of what caused the passage of this law to start with?

MR. REIN: Well, I don't agree with your premises, but let me just say, number one, when I said the South has changed, that is the statement that is made by the eight Justices in the Northwest Austin case. And I certainly—

JUSTICE GINSBURG: And Congress—Congress said that, too. Nobody—there isn't anybody in—on any side of this issue who doesn't admit that huge progress has been made. Congress itself said that. But in line with Justice Sotomayor's question, in the D.C. Court of Appeals, the dissenting judge there, Judge Williams, said, "If this case were about three States, Mississippi, Louisiana, and Alabama, those States have the worst records, and application of Section 5 to them might be okay."

MR. REIN: Justice Ginsburg, Judge Williams said that, as he assessed various measures in the record, he thought those States might be distinguished. He did not say, and he didn't reach the question, whether those States should be subject to preclearance. In other words, whether on an absolute basis, there was sufficient record to subject them—

JUSTICE KAGAN: But think about this State that you're representing, it's about a quarter black, but Alabama has no black statewide elected officials. If Congress were to write a formula that looked to the number of successful Section 2 suits per million residents,

Alabama would be the number one State on the list.

If you factor in unpublished Section 2 suits, Alabama would be the number two State on the list. If you use the number of Section 5 enforcement actions, Alabama would again be the number two State on the list.

I mean, you're objecting to a formula, but under any formula that Congress could devise, it would capture Alabama.

MR. REIN: Well, if—if I might respond because I think Justice Sotomayor had a similar question, and that is why should this be approached on face. Going back to Katzenbach, and all of the cases that have addressed the Voting Rights Act preclearance and the formula, they've all been addressed to determine the validity of imposing preclearance under the circumstances then prevailing, and the formula because Shelby County is covered, not by an independent determination of Congress with respect to Shelby County, but because it falls within the formula as part of the State of Alabama. So I—I don't think that there's any reluctance upon on this—

JUSTICE SOTOMAYOR: But facial challenges are generally disfavored in our law. And so the question becomes, why do we strike down a formula, as Justice Kagan said, which under any circumstance the record shows the remedy would be congruent, proportional, rational, whatever standard of review we apply, its application to Alabama would happen.

MR. REIN: There—there are two separate questions. One is whether the formula needs to be addressed. In Northwest Austin, this Court addressed the formula, and the circumstances there were a very small jurisdiction, as the Court said, approaching a very big question.

It did the same in Rome, the City of Rome. It did the same in Katzenbach. The—so the formula itself is the reason why Shelby County encounters the burdens, and it is the reason why the Court needs to address it.

JUSTICE SOTOMAYOR: Interestingly enough, in Katzenbach the Court didn't do what you're asking us to do, which is to look at the record of all the other States or all of the other counties. It basically concentrated on the record of the two litigants in the case, and from that extrapolate—extrapolated more broadly.

MR. REIN: I don't think that—

JUSTICE SOTOMAYOR: You're asking us to do something, which is to ignore your record and look at everybody else's.²⁰⁴

As this excerpt from the transcript reveals, Justice Sotomayor asked most of the questions. The prominence of her voice compared with those of Justice Ginsburg and Justice Kagan along with Justice Sotomayor's sharp questioning may explain the commentator's characterization of her as combative.²⁰⁵ But her words do not seem "emotional."²⁰⁶ On its face the commentator's characterization of Justice Sotomayor as "emotional and combative" has sexist overtones projecting stereotypical notions of how women and Latinas behave in formerly all-male domains.²⁰⁷ Perhaps the male commentator was reacting negatively to qualities like the ability to assert tough and direct questions, which typify strong male judges but seem "unnatural" when displayed by women judges, raising again the question of implicit bias.²⁰⁸

As a federal appellate judge, Sotomayor "develop[ed] a reputation for asking tough questions at oral arguments and for being sometimes brusque and curt with lawyers who were not prepared to answer them."²⁰⁹ Her fellow judges on the Second Circuit thought then-Judge Sotomayor's "tough and direct questioning reflects engagement and, sometimes, an effort to persuade her colleagues. Those qualities, coupled with a gregarious personality, they said, make her a powerful force behind the scenes . . ."²¹⁰ She was known for extensive preparation for oral arguments and for running a "hot bench," where judges ask lawyers many questions during argument.²¹¹ Thus, it is her brusque and curt treatment of lawyers, as well as her reputation for interrupting during oral arguments—conduct that seems "unladylike"—that rankles some lawyers.²¹² Implicit gender bias about

204. *Id.* at 3–7.

205. *See id.*

206. *See* Mauro, *supra* note 7, at 57.

207. *See id.*

208. *See id.*

209. Sheryl Gay Stolberg, *Sotomayor, a Trailblazer and a Dreamer*, N.Y. TIMES (May 26, 2006), <http://www.nytimes.com/2009/05/27/us/politics/27websotomayor.html>.

210. Becker & Liptak, *supra* note 51.

211. *Id.*

212. Stolberg, *supra* note 209 ("The 2009 edition of the Almanac of the Federal Judiciary, which includes anonymous comments evaluating judges by lawyers who appear before them, presents a mixed portrait of Judge Sotomayor. Most of the unnamed

women speaking out in formerly and predominantly male domains may explain the attention paid to women Justices during oral argument.

VI. CONCLUSION

The comments in this Article about President Obama's legacy are highly speculative. There have been three women Justices on the Court for seven years.²¹³ Thus, it is important to wait for more of a record before drawing any definitive conclusions about the impact of President Obama's Supreme Court nominations on constitutional law jurisprudence. President Obama's legacy so far is that (1) he appointed two women Justices under the age of 60;²¹⁴ (2) he appointed the first Latina Justice;²¹⁵ (3) he was the first President to govern while three women Justices were on the Supreme Court;²¹⁶ and (4) hopefully, he "normalized" the presence of at least two to three women Justices on the Supreme Court.

Thanks to President Obama, two women, one of whom is a person of color, will remain on the bench for many years beyond his presidency, perhaps even a generation. Hopefully, the second woman's seat on the Court is secure for the near future; whether the third seat will remain is more in doubt. But importantly, the two younger women Justices whom President Obama appointed are not shrinking violets, and we will continue to see "hot benches" where the women are robust participants. Thus, women's voices will be more prominent in the short run.

Notably, the empirical data collected by Jacobi and Schweers suggest that the women Justices are adapting to the male-oriented nature of oral argument.²¹⁷ The authors write: "We find evidence that all four female justices have learned to change their speech patterns, transitioning from a

lawyers interviewed said she had good legal ability and wrote good opinions. But several also spoke very negatively of her manner from the bench, saying she could be abusive of lawyers appearing before her and using words like 'bully,' 'nasty' and 'a terror.');" *see id.* (describing Justice Sotomayor as brusque and curt).

213. *About the Court: Current Members*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Aug. 22, 2017).

214. *Supreme Court Appointments*, SUP. CT. HIST. SOC'Y, http://supremecourt.history.org/timeline_SCOTUSAppointments.html (last visited Aug. 22, 2017).

215. Amy Goldstein, *Sotomayor Becomes First Hispanic Justice in Supreme Court History*, WASH. POST (Aug. 9, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/08/AR2009080800982.html?sid=ST2009080800983>.

216. *Supreme Court Appointments*, *supra* note 214.

217. Jacobi & Schweers, *supra* note 183, at 44.

less assertive questioning style to a more direct, aggressive style that men typically use”²¹⁸ To be more effective and combat the implicit bias they face, Jacobi and Schweers suggest that the women on the Court adopt a speaking pattern and behavior of their male counterparts—assimilation does not constitute equality.²¹⁹

In the final analysis, both Presidents Clinton and Obama were able to manipulate the appointment process to get well-prepared and able female Justices with progressive outlooks. Perhaps they were betting that the women’s temperaments would enable them to successfully challenge the persistently sexist attitudes they would encounter even on that level. In addition, it is important to remember that progressive Democrat presidents appointed Justices Ginsburg, Sotomayor, and Kagan who today are members of an ideologically deeply divided Court.²²⁰

In 2017 President Donald Trump nominated and the Senate confirmed Neil Gorsuch to replace Justice Scalia.²²¹ There is disagreement among commentators about whether the addition of a very conservative white male to the Court will dramatically change anything.²²² More concerning is that the advancing age and health challenges of Justice Ginsburg make it unlikely that she will remain on the bench should President Trump earn a second term. Whether President Trump will appoint a woman to replace her is unclear. If he does, there will be three women on the Court, but there probably will be sharper ideological differences between them.

Justice O’Connor once said: “Asking whether women attorneys speak with a ‘different voice’ than men do is a question that is both dangerous and unanswerable.”²²³ It is unclear to me whether her admonition applies to women Justices as well. What seems clear, however, is when the judicial

218. *Id.* at 6.

219. *Id.* at 75–76.

220. Alicia Parlapiano & Karen Yourish, *Where Neil Gorsuch Would Fit on the Supreme Court*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-supreme-court-nominee.html>.

221. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by the Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html?_r=0.

222. Lisa Marshall Manheim, *The Gorsuch Fight Changed the Senate. Will It Change the Court?*, N.Y. TIMES (Apr. 8, 2017), <https://www.nytimes.com/2017/04/08/opinion/the-gorsuch-fight-changed-the-senate-will-it-change-the-court.html>.

223. Lowenthal & Palmer, *supra* note 133, at 215 (quoting Sandra Day O’Connor, *The Wisdom of Women*, THE RECORDER, Dec. 20, 1991, at 6).

bench is more diverse—racially and gender-wise—the Justices bring with them a broader range of real life experiences that impact their understanding of the issues they face on the Court.

Lastly, it is important to remember that in the roughly 228 years since the Supreme Court began, only four women have served on that Court.²²⁴ During a 2010 ABC interview by Diane Sawyer with Justice Ginsburg and former Justice O'Connor, O'Connor remarked that "she attended a recent Supreme Court argument and . . . found that having three women justices was 'dazzling.'"²²⁵ When Sawyer asked, "How many women would be enough?"²²⁶ Justice Ginsburg replied "Nine. . . . There have been nine men there for a long, long time, right? So why not nine women?"²²⁷ While it is unlikely that there will ever be nine women Justices on the Supreme Court at the same time, four women Justices, including a woman Chief Justice, is a realistic expectation.

224. *About the Court: History and Traditions*, SUP. CT. U.S., <https://www.supremecourt.gov/about/historyandtraditions.aspx> (last visited Aug. 22, 2017); *Supreme Court Appointments*, *supra* note 214.

225. Debra Cassens Weiss, *Justice Ginsburg Says Nine Women on Supreme Court Would Be Enough*, ABA J. (Oct. 27, 2010), http://www.abajournal.com/news/article/justice_ginsburg_say_nine_women_on_supreme_court_would_be_enough/.

226. *Id.*

227. *Id.*