GENDERED JUSTICE: DO MALE AND FEMALE JUDGES RULE DIFFERENTLY ON QUESTIONS OF GAY RIGHTS?

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The problem of the twenty-first century is the problem of the gender line.¹

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A political firestorm rages. In the past year, issues related to gay rights have suffused America’s political imagination—and two court decisions helped create the controversy. In July of 2003, the U.S. Supreme Court announced in *Lawrence v. Texas* that statutes criminalizing homosexual sodomy violated key constitutional principles. Only four months after the Court announced its decision, the Massachusetts Supreme Judicial Court held in *Goodridge v. Department of Public Health* that same-sex couples had a right to marry under the Massachusetts state constitution. Legal scholars and sociologists alike will undoubtedly grapple with these decisions. For legal technicians, these cases raise questions about the future of due process, equal protection, and freedom of association jurisprudence. And for sociologists, these decisions raise questions about America’s evolving definition of family and the efficacy of religious-based activism. Yet, upon further inspection, one of the intellectually rich issues of *Lawrence* and *Goodridge* is subtler.

One notable quality of cases like *Lawrence* and *Goodridge* is the gender composition of the appellate judges who crafted them. In *Lawrence*, both of the females on the Court ruled with the majority in its 6-3 ruling. Similarly, in *Goodridge*, two of the three women on the court ruled with the majority in its 4-3 decision. Indeed, both decisions contained opinions written by female judges finding in favor of the gay plaintiffs on their equal protection claims. This Note invites readers to consider whether these decisions stand as evidence of a broader trend. If one were to test for a correlation between gender and legal conclusions on gay rights in federal and state judicial decisions using statistical analysis, would one exist? This is my primary research question.

There are two principal academic universes in which I situate this research question and related findings: (1) judiciary-specific research on the effects of the diversification of American courts, and (2) public opinion research on “gender gaps” in mass public opinion on political questions. Less directly, my research also has implications for work on the relative importance of “substantive” and “descriptive” representation, as well as the link between elite and mass public opinion. The commonalities of these fields may not be readily

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2. I borrow this Part’s title from Paula Giddings’s historical work on African American women’s political role. *See Paula Giddings, When and Where I Enter: The Impact of Black Women on Race and Sex in America* (1996).

3. A Lexis-Nexis search of major newspapers revealed that in 2004, the phrase “gay rights” occurred over three thousand times.


apparent. Yet, as the Parts of this Note unfold, readers will likely see the extent
to which my research is germane to each of these arenas.

Gender diversification of American courts. For the vast majority of the
United States's history, its judiciary was predominantly—if not exclusively—
white and male.\textsuperscript{8} Only thirty years ago did law schools begin to admit women
in meaningful numbers.\textsuperscript{9} A quarter-century ago, the courts started to reflect this
change. President Carter appointed eleven women to the federal appellate
courts, and President Reagan continued the trend, even appointing the first
woman in history to serve on the U.S. Supreme Court—Sandra Day
O'Connor.\textsuperscript{10} These changes motivated sociologists, political scientists, and
gender theorists to investigate their effects.

When scholars first began to analyze the role of gender in the judicial
branch about twenty-five years ago, many expected that there would be
statistical differences in the way judges ruled.\textsuperscript{11} As females first appeared on
the federal bench in the late 1970s, one social scientist boldly asserted that
"common sense as well as sociological theory suggests that socialization
experiences of men and women are significantly different," and that these
differences would likely find a home in federal judicial decisions.\textsuperscript{12} Other
social scientists generated studies that undermined the notion that female
judges would be more "liberal" than nonliberal judges.\textsuperscript{13}

Alongside the work of sociologists and political scientists sits work done
by feminist legal theorists, who have offered a more nuanced approach to
studying gender in the federal judiciary than the binary liberal versus
conservative paradigm.\textsuperscript{14} They have explained that not all "liberal" issues or

\begin{enumerate}
\item See Palmer, "To Justify," supra note 8, at 236. For a treatment of women's current experiences in law school, see Comm'n on Women in the Profession, Am. Bar Ass'n, Elusive Equality: The Experiences of Women in Legal Education (1996).
\item For further data on the appointment and biographies of federal judges, see Fed. Judicial Ctr., Federal Judicial Center, at http://www.fjc.gov (last visited May 6, 2005).
\item See, e.g., Herbert M. Kritzer & Thomas M. Uhlman, Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition, 14 Soc. Sci. Q. 77 (1977).
\item Id. at 86, quoted in David Songer et al., A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Court of Appeals, 56 J. Pol. 425, 426 (1994).
\item See, e.g., Beverly B. Cook, Will Women Judges Make a Difference in Women's Legal Rights?, in Women, Power, and Political Systems 216 (Margherita N. Rendel ed. 1981); David W. Allen & Diane E. Wall, The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?, 12 Just. Sys. J. 232 (1987); Sue Davis, Do Women Judges Speak "In a Different Voice?" Carol Gilligan, Feminist Legal Theory and the Ninth Circuit, 8 Wis. Women's L.J. 143 (1992-1993). The work of Songer et al., supra note 12, which includes a metaanalysis of prior research, was particularly helpful in locating these
\end{enumerate}
"conservative" issues are gendered, and instead have hypothesized that when legal questions allow female judges to create a more inclusive American community, they will do so more often than their male counterparts.15

Donald Songer, Sue Davis, and Susan Haire tested the above hypothesis from feminist legal theory in their insightful work A Reappraisal of Diversification in Federal Courts: Gender Effects in the Court of Appeals. They found that when one controlled for relevant factors such as political affiliation, there were not significant differences in the way men and women on federal appellate courts ruled in two areas—obscenity and criminal search and seizure—but that there were gender differences in the way judges ruled in sex discrimination cases.16 Yet, there were three limitations to Songer et al.'s scope and methodology, some of which create complications for their findings.

First, on the issue of scope, it is important to consider that pornography and criminal search and seizure issues are not the areas that receive the most attention and discussion in the public sphere. There are other issues that are far more prevalent in political discourse and that plausibly play a larger role in the gender socialization process.17 For example, percentage divisions materialize between men and women when one explores issues such as gay rights and the appropriate scope of government services.18 Thus, while the issues Songer et al. chose to explore were useful for answering the limited questions they posed,19 these issues are not predictive in determining whether the political gender divisions that appear in public opinion data operate in the American court system as well. Further, tangentially related to the scope issue is the question of how many of the "discrimination" cases that served as the object of their analysis were actually legal challenges to affirmative action laws. Without this information about the fact patterns in the cases they examined, one cannot

15. See Songer et al., supra note 12, at 428.


17. According to a Lexis-Nexis search, between the dates January 1, 2004, and August 31, 2004, only one article in major newspapers contained the phrase "criminal search and seizure."


19. That is, are female justices more liberal and do they react differently to legal questions based on inclusion?
reach a conclusion about the extent to which men and women have different judicial attitudes toward questions of inclusion.

Second, Songer et al. excluded from analysis all cases in which female judges issued an opinion concurring in part and dissenting in part. Methodologically, this creates major complications and limitations. The decisions in which judges issue nuanced decisions are likely to be the ones that are most important to include in a discussion about the role of gender in federal judicial decisions. This is because the mere fact that there are multiple opinions arising from the same case means that multiple possible judicial interpretations exist. And indeed, it is precisely when there are multiple interpretations of the same issue that one would expect sociological factors such as gender or race to be most relevant.

Third, also on the methodological front, the researchers' decision to look solely at the federal courts of appeals creates sample size considerations. The study looked at the federal circuit courts between 1981 and 1990; during that time eighteen women served on the federal appellate bench. Alternatively, the authors could have created a larger, more rigorous sample by including more appellate courts (such as state supreme courts). Further research could prove even more fruitful today—eleven years later—because a stronger sample would emerge from looking at post-1990 cases.

This Note complements the work of Songer et al. and others who have studied gender in the American appellate judiciary by refocusing the analytical scope and using more exacting methodology than has been previously employed. I focus on an increasingly prevalent legal issue: gay rights. This Note answers more than the broad question of how often male and female judges who addressed these issues found that statutes violated gays' constitutional rights. I also subdivide these issues when practical and relevant. By "subdivide," I mean that I control for differences in the legal doctrines employed in the cases. For example, this approach would acknowledge the difference between a judge striking down a sodomy statute on equal protection grounds and a judge ruling that gay Americans have a First Amendment right to form an organization.

In addition to the shifted scope, my methodology differs from previous work. By including cases from a wide range of jurisdictions during the time period of 1983-2003, this analysis not only employs a strong sample size, but also controls for factors such as region, method of judicial selection, and

20. See Songer et al., supra note 12, at 430.
21. President Carter appointed eleven women and, during the period of Songer's analysis, Presidents Reagan and Bush had appointed six. See id. at 426.
22. By "constitutional," I refer to the U.S. Constitution (namely the First Amendment's Freedom of Association Clause and germane Fifth Amendment and Fourteenth Amendment precedent) and parallel portions of state constitutions.
23. In other words, was the judge appointed or elected?
political party. This Note also controls for age and time served on the judiciary—factors that were more difficult to control for thirteen years ago when the courts were more homogeneous.

Gender gaps in mass political public opinion. In the early 1980s, scholars first made note of the now proverbial "gender gap," a reference to differences in men and women's attitudes on key political questions. Observers unearthed this emerging gap by noting that men and women's presidential voting patterns significantly diverged in 1980, with women being more likely to vote for the Democrat than their male counterparts. Twenty years later, social scientists have conducted a significant amount of work on the subject—especially as statistical differences in men's and women's political attitudes remain potent. Researchers have posed theoretical and practical questions about why the gender gap exists, the role of religion in the gap, the role of race in the gap, and some of the political implications of these attitudinal disparities.

Most of these discussions, however, have taken place on a similar analytic plane. The focus has been primarily on men and women voters. Yet, within the sphere of political action, Americans are more than voters. Men and women serve, for example, as activists, politicians, and judges. Indeed, a smattering of scholarly attention has been given to the demographic makeup of activists on various political matters. And likewise, some attention has been given to the question of whether congressmen and congresswomen have quantifiably different political approaches or beliefs. However, previous studies on the

24. In other words, when applicable, what party did the executive official belong to who appointed the judge?


role of gender in the judicial branch of American government leave questions that deserve particular exploration. Specifically, do the gender gaps that appear in public opinion data on political questions reappear when one looks at how appellate judges rule on parallel or related questions?

Indeed, if the gender gaps in mass public opinion do appear in judicial rulings, this phenomenon has implications for other research debates, including discussions about the relative importance of substantive and descriptive representation and the direction of any causal link between elite and mass public opinion. Let us, then, revisit the chief pillars of these research debates.

**Forms of representation.** "Descriptive" representation refers primarily to sociological traits, whereas "substantive" representation privileges a more tangible way of defining representation. In a congressional setting, for example, descriptive representation refers to the extent to which a congressman’s sociological traits correlate with those of his constituents—traits such as race and gender. Alternatively, measures of substantive representation would include legislation proposed by a congressman, or bills the representative voted on—and how these acts correspond to the political needs or beliefs of the people in his district.

Among those who have studied minority political representation in the United States, much debate has unfolded around the relative importance of descriptive and substantive representation. If male and female judges rule differently on questions of gay rights, however, this provides empirical evidence to suggest that descriptive and substantive forms of representation are not necessarily severable. Descriptive representation may indeed lead to more effective substantive representation. My research here will test this proposition.

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37. See generally Tate, supra note 35. Also, Part III of this Note discusses the link between descriptive representation and substantive representation more thoroughly.
Elite and mass public opinion. For at least a half-century, scholars have engaged in debates about the direction of any causal link that exists between elite and mass public opinion. Some argue that mass public opinion shapes the actions of the elite, while others have contended that the actions of the elite shape mass public opinion. In the implications Part of this Note, I discuss the nature and tenets of these arguments with heightened detail. I also contend that if male and female members of the elite rule differently on questions of gay rights, and these differences mirror gaps in public opinion, this suggests that there are contexts in which private-level discourse has a simultaneous impact on public opinion and elite actions. This would heavily complicate causal stories about which group (the general public or the elite) more heavily influences the other.

Hypotheses and methodology. Based on prior scholarship, there are several hypotheses one might form when testing the correlation between gender and decisions on questions of gay rights. One hypothesis is based upon research on the gender diversification of American courts. Consistent with the prior research, one could expect that there would be no differences in the way male and female judges rule on gay rights—because few differences have been found when social scientists explore other legal areas. Conversely, some public opinion research might lead one to hypothesize that there would be gender gaps in the way judges ruled, because gaps reside in polling data on parallel or related questions.

To assess the correlation between gender and gay rights decisions, I draw from five chief data sources: government documents from the Federal Judicial Center, Lexis-Nexis, Westlaw, the Almanac of the Federal Judiciary, and The American Bench: Judges of the Nation. More specifically, Lexis-Nexis and Westlaw served as useful tools to identify germane gay rights cases. Both contain the full texts of decisions and laws from across the United States, with information that dates back to the nation’s inception. The Almanac of the Federal Judiciary and The American Bench—teamed with Westlaw—provided biographical information on the judges.

38. A pioneering work in this debate was V.O. Key, Politics, Parties and Pressure Groups (1942).
41. See Songer et al., supra note 12, at 426-27.
42. In Part I, I provide General Social Survey data that demonstrate correlations between gender and opinions about homosexuality.
The cases studied in this Note generally involve plaintiffs who charged that a law or set of laws violated gay Americans' equal protection, due process. Among the cases examined is the U.S. Supreme Court's landmark equal protection decision in Romer v. Evans, 517 U.S. 620 (1996). The case involved a Colorado state constitutional amendment that, in the words of Justice Ruth Bader Ginsburg, in effect stated that gays "shall not participate in the political process, period." Transcript of Oral Argument, Romer, 517 U.S. 620 (No. 94-1039), available at 1995 WL 605822. The amendment forbade local governments from passing ordinances protecting individuals from discrimination on the basis of sexual orientation. The Supreme Court found in a 6-3 decision that no rational basis underlay this amendment and overturned it, with both women ruling in the majority.

In addition to cases that have dealt with the exclusion of gays from the political process, courts have also used equal protection clauses in cases dealing with gay adoption rights. Indeed, state courts of last resort have addressed the topic with diverging results. The New Hampshire Supreme Court, for example, ruled in 1987 that it was constitutionally permissible to bar gays from adopting, see Opinion of the Justices, 525 A.2d 1095 (N.H. 1987). Additionally, the State of Florida addressed the issue in Cox v. State Department of Health and Rehabilitative Services, 656 So. 2d 902 (Fla. 1995). The Florida case involved a law that barred gays from adopting in the state, and the state supreme court remanded the issue for further proceedings, concluding that the factual record was too incomplete to issue an opinion.

Further, at the federal level, the Eleventh Circuit Court of Appeals ruled in 2004 that Florida’s ban was constitutional. See Lofton v. Sec’y of the Dep’t of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004), en banc reh’g denied, 377 F.3d 1275 (2004). In response to the court’s denial of an en banc rehearing, Judge Rosemary Barkett wrote a strongly argued dissent, issuing legal conclusions on the merits. Lofton, 377 F.3d at 1290 (Barkett, J., dissenting from denial of rehearing).

Courts have also used equal protection principles to address an issue that may rival gay adoption in controversy: gay marriage rights. State appellate courts of last resort in Hawaii, Vermont, and Massachusetts have addressed the question. See Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Baker v. State, 744 A.2d 864 (Vt. 1999).

The issues enumerated in this footnote are not exhaustive. See Appendix A for a full list of germane cases.

One of the most prominent cases dealing with gay Americans’ right to privacy arrived in 1986. The case was Bowers v. Hardwick, 478 U.S. 186 (1986). In the 1980s, police arrested an Atlanta resident for engaging in consensual sodomy with a member of the same sex. While the charges were eventually dropped, the man whom police arrested challenged the law, invoking the Due Process Clause. The Supreme Court ruled that the Georgia sodomy statute survived constitutional scrutiny, ruling that as an agent of the federal judiciary, the Court was not “inclined to take a more expansive view of our authority to discover the fundamental rights imbedded in the Due Process Clause.” Id. at 194. The majority in this 5-4 decision further reasoned that if they ruled in favor of the appellant, “it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home.” Id. at 195. After this decision, the movement to overturn statutes banning same-sex conduct moved to state courts and legislatures.

During the time period explored in this paper (1983-2003), ten state appellate courts addressed the constitutionality of statutes that (1) ban same-sex sodomy or (2) ban both opposite-sex and same-sex sodomy. Six of these ten courts found that these statutes violated their state constitutions. These six states were Arkansas, see Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002), Georgia, see Powell v. State, 510 S.E.2d 18 (Ga. 1998), Kentucky, see Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992), Montana, see Gryczan v. State, 942
or freedom of association rights. To determine which cases met these criteria, I reviewed decisions from all U.S. circuit courts of appeals as well as the courts of last resort for each of the fifty states. After identifying these cases, I perused the majority decisions and, when applicable, concurring and dissenting opinions as well. Reading each of these decisions allowed me to determine how each judge ruled in given cases. After determining how judges ruled, I also tracked factors such as the judges' genders, their dates of appointment, their methods of appointment, where they were born, when they were born, and, when possible, their political affiliation and race. With this information, I assessed whether there is a correlation between a judge's gender and his or her likelihood to rule that acts, laws, or sets of laws violate gays' constitutional rights.

In order to understand the nature of the patterns that emerged in the judiciary, I ran two additional tests. First, I reviewed legislation from the U.S. Congress concerning issues related to gay marriage. By looking at how legislators voted on the 1996 Defense of Marriage Act, I extrapolated whether the patterns found in the judicial context likely hold in a legislative context. I then ran a second test, a test that involved extracting General Social Survey data and analyzing this data through cross-tabulations and regressions.

Outline. In Part I of this Note, I enumerate my primary research findings. Here, I examine relevant cases from the Supreme Court, the federal circuit


48. I say "generally" because I also include a few cases in which individuals challenged the constitutionality of statutes protecting gay rights. Two cases that have served as particularly high-profile examples of cases in which gay rights laws were successfully challenged via the Freedom of Association Clause of the First Amendment are Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995), and Boy Scouts of America v. Dale, 530 U.S. 640 (2000). In Hurley, the U.S. Supreme Court unanimously overturned a decision by the Massachusetts Supreme Court, ruling that an Irish group could not be forced to allow a gay Irish organization to march in its parade. And a few years later, a divided court ruled in Dale that the Boy Scouts had a constitutional right to remove openly gay individuals from leadership roles.

49. The term "court of last resort" refers to the highest state appellate court. This is often, though not always, the state's "supreme court."

50. "Act," here, means more than a law or statute. It refers to the broader definition, "the process of doing or performing." BLACK'S LAW DICTIONARY 26 (8th ed. 1999). Under this conception, examples of governmental acts include certain hiring decisions or policing practices in which government deeds or performances may not be tied to official law or even policies.
courts of appeals, states’ courts of last resort, and other state appellate courts when the states’ courts of last resort have not revisited the case—as well as how male and female judges ruled therein. Through cross-tabulation, linear regression, and logistical regression, I present evidence demonstrating that there is a correlation between American judges’ gender and their conclusions on issues related to gay rights. Specifically, women are more likely than their male counterparts to rule that acts, laws, or sets of laws violate gay Americans’ constitutional rights.

Part II elucidates the underlying sources of the findings in the previous Part. To accomplish this aim, I run the two peripheral research tests described earlier. The first of these tests includes assessing correlations between gender and legislative votes on gay rights legislation. The second involves analyzing General Social Survey data. Part II also reviews secondary source data that examines male and female law students’ political attitudes and the manner in which law school affects these views. With these findings as my foundation, I assess the character of the results in Part I. I offer two arguments for why men and women rule differently on gay rights questions:

(1) Gender gaps in public opinion on issues of gay rights are particularly sharp among highly educated men and women—including law school graduates.

(2) Related to the first argument, the women who decide to attend law school have less traditional conceptions of gender roles than the general female population.

After outlining these arguments, I shift to the final Part, which assesses the implications of the data and arguments presented in the previous Parts.

I. GENDERED JUSTICE

On questions of gay rights, striking discordance exists between the rulings of female and male judges.51 More specifically, female judges are more likely than males to rule that acts, laws, or sets of laws violate gay Americans’ constitutional rights.52 This correlation remains potent even when one controls

51. Specifically, this Note analyzes judicial conclusions on due process, equal protection, and First Amendment questions centered around gay rights.

52. One can imagine cases termed “gay rights” that do not implicate constitutional rights. Indeed, during the time period reviewed in this Note, such cases might include child custody cases, sexual harassment issues, and private employment disputes. The law on each of these issues, however, varies widely from state to state. See generally WILLIAM RUBENSTEIN, SEXUAL ORIENTATION AND THE LAW 433-506 (1996). In addition, these types of cases implicate complex and varied fact patterns that would heavily complicate any attempts to measure whether male and female judges rule differently. Therefore, this Note adopts an alternative methodology and looks at whether judges ruled that acts, laws, or sets
for variables such as the judge's party, year of birth, geographic region, law school completion year, year appointed, and jurisdictional level, as well as the year judges issued the decisions. Pillaring this claim is a data set that includes judicial decisions from federal and state appellate courts.

A. The Data Set

For the data set used in this Note, the units of analysis are judges' legal conclusions. That is, this Note explores how each judge ruled in the relevant cases between 1983 and 2003. My use of the term "legal conclusion," however, differs from the term "judicial opinion." In the legal sense, the word "opinion" generally refers to "a court's written statement explaining its decision in a given case, usually including the statement of facts, points of law, rationale, and dicta." However within a judicial opinion, judges can issue multiple legal conclusions. For example, in the same opinion in which a judge rules that a law encroaches upon equal protection rights, he or she can also conclude that the law does not implicate due process rights. Analyzing legal conclusions, then, means considering what each judge concluded about each relevant legal question.

The data set I assembled includes 424 legal conclusions by 244 judges. Because the judiciary is predominantly male, the data set included substantially more male conclusions than female conclusions: 75 conclusions by females and 348 conclusions by males. Additionally, this sample included judges from twelve of the thirteen circuit courts of appeals, seventeen state appellate courts, and the U.S. Supreme Court.

The ideal sample would have included judges from a larger number of state courts. However, many state courts did not address the constitutional questions explored in this Note during the relevant time period. Arizona, New York,

53. Another demographic factor one might consider controlling for is race. However, identifying the race of the state judges proved particularly difficult. The biographical, survey-based data from judges in AMERICAN BENCH, supra note 45, and the documents from the Federal Judicial Center showed that about twenty of the legal conclusion scores in this Note were produced by black Americans. Due to my uncertainty, however, about how many others in the sample were also black, controlling for race would have been counterproductive. Further, among the twenty judges in the sample that were identified as black, there was not a statistically significant relationship between race and legal conclusion scores (p-value = .576).

54. BLACK'S LAW DICTIONARY 1125 (8th ed. 1999).

55. This figure is comparable to the judiciary more generally. About twenty percent of the federal judiciary is female, according to Federal Judicial Center documents. See Fed. Judicial Ctr., supra note 10. Further, women make up about a quarter of judges on state courts of last resort. See COMM'N ON WOMEN IN THE PROFESSION, supra note 9.


Rhode Island and Alaska, for example, addressed the constitutionality of their sodomy statutes prior to 1983. To help expand the number of states represented, I included cases by intermediate state appellate courts if the state’s court of last resort did not revisit the decision. Further, when one takes into account where each judge was born, the number of states represented swells. When one considers this factor and the jurisdictions they represent, forty-six states are represented in the sample as well as three countries.

More importantly, it is in some ways objectionable to call the group explored in this Note a “sample.” The group more closely resembles a discrete population than a sample. They are the judges who have ruled on the topics explored in this Note, not merely a randomly selected sample. Thus, it would be impracticable to weight the data set to include more states—or more women. And in the end, the study of this population conclusively proves that male judges and female judges have ruled differently on questions of gay rights.

B. Results

For purposes of cross-tabulation analysis, each legal conclusion received a score of “1,” “0,” or “P.” A score of “1” means that the judge ruled in favor of the gay litigants. Likewise, a score of “0” means that the judge ruled against the gay litigants on the germane legal question—and a score of “P” means that the judge declined to reach the merits of a particular constitutional question for procedural reasons. This scoring system reveals colossal, statistically significant gaps between how male and female judges rule on questions concerning gay rights.


As Figure 1 demonstrates, legal conclusions by male judges scored 0s in 55% of the cases studied, whereas conclusions by women scored 0s 31% of the time. The inverse also holds. While female conclusions scored 1s in 56% of the conclusions studied, 34% of male conclusions scored 1s.60 As one might expect, the difference in the percentage of male conclusions and female conclusions that scored 0s is negligible. The difference, in fact, is so negligible that it is more useful to analyze the numbers without them.

When one excludes the rulings in which a judge declined to reach the merits of the case, the stark quality of the judicial gender gap becomes even clearer. 64.62% of legal conclusions by females were favorable to gay litigants, compared to 38.19% of male legal conclusions. This 26-percentage-point gap is statistically significant to the point of certainty (effectively, 100%). The p-value from this cross-tabulation is < .0005.61

60. The p-value equals .001, meaning that if there were no correlation between gender and conclusion scores, then 99.9% of the time, the apparent linkage caused by random noise would not be as strong as this link appears to be.

61. The term “p-value” is not one that frequently appears in legal journals. (According to a Lexis search, it appeared in just sixty-five articles in U.S. law journals in 2003). This fact—coupled with my heavy reliance on the statistical concept—demands that I explain it more carefully here. It is a theoretically and practically simple concept. A p-value of .05 means that if there were really no relationship between the variables analyzed, 95% of the time random fluctuations would not demonstrate a relationship as pronounced as the one
Odds-ratio-based analysis also demonstrates the correlation between gender and conclusion scores—and the strength of this correlation. When applying an odds ratio formula to the gender-conclusion correlation, I found that the odds of a male’s legal conclusion score being 0 are 2.96 times greater than the odds of a female’s legal conclusion score being 0.62.

It is important, however, to scrutinize even the strongest correlations. By doing so, one learns whether apparent causal associations are rendered spurious when one controls for other variables. In the case of judicial legal conclusions on gay rights, other germane variables to consider include a judge’s age, region of the country, political party, jurisdictional level, and method of appointment. Likewise, it is useful to explore the nature of the conclusions themselves—including the specific legal rights that these conclusions implicated.

1. Age and decision year

Age rests atop the list of alternative variables one should consider when analyzing associations between gender and judicial rulings. Public opinion data consistently shows that younger Americans have more accepting attitudes toward gay rights than older Americans.63 And further, because the judiciary was almost exclusively male until a quarter-century ago, there is reason to believe that the average male on the judiciary is older than the average female.

Indeed, linear regression tests and basic averaging calculations indicate that males in the judiciary are older than the females in the judiciary. This correlation holds whether one uses birth year as the measure of age or the year the judge graduated from law school. Regression reveals a linear association between gender and birth year—a relationship that is both strong and statistically significant. These variables produce a regression coefficient of -8.26764 and produce a p-value of < .0005. Because the data set I created includes the birth year of 87% of the judges rather than 100%, however, I also ran an alternative regression using the year that judges graduated from law school. This second regression yields similar results, lending even more credence to the first.65 Indeed, for perspective on the strength of the correlation observed. A p-value of .04 means random chance would not demonstrate a relationship as pronounced 96% of the time—.03, 97% of the time, and so on.

62. The odds ratio formula is as follows: [(Probability of option 1 in group a) / (Probability of option 2 in group a)] / [(Probability of option 1 in group b) / (Probability of option 2 in group b)].

63. Consider General Social Survey data—which indicates that age and opinions about homosexual marriage are correlated at a < .0005 level. The General Social Survey data is available online, see Nat’l Opinion Research Ctr. at the Univ. of Chi., General Social Survey 1972-2000 Cumulative Codebook, at http://webapp.icpsr.umich.edu/GSS (last visited May 6, 2005) [hereinafter GSS Website].

64. According to information available at Fed. Judicial Ctr., supra note 10, the oldest included judge was born in 1897—the youngest in 1958.

65. This second regression produced a coefficient of -9.358.
between age and gender, looking at the median age of the judges is perhaps the most intuitive method. The median birth year for the males in the data set was 1933; for the females, 1940.\footnote{According to information available at Fed. Judicial Ctr., supra note 10, the mean birth year for men was 1932, whereas for women it was 1938.}

The difference in age of the males and females on the bench, though, has little if any impact on the massive gender gaps cited earlier. Indeed, there is not a statistically significant relationship between one’s age and how he or she rules on gay rights questions. A regression of legal conclusion on birth year yields a p-value of .5. And thus, if one controls for birth year, it has a negligible impact on the gender gap itself. When controlling for this variable, the relationship between gender and legal conclusion produces a coefficient of -0.257 rather than -0.264\footnote{The coefficient estimate obtained without controlling for birth year is -0.264.}—and the p-value remains < .0005. Thus, the gender gaps in legal conclusions are not a result of the two groups’ difference in age.

The fact that the age difference does not provoke the gender gap does not make the more general issue of age altogether moot. Related to age is the question of when the legal conclusions were issued. It is reasonable to suspect that many of the women on the judiciary were appointed after many of the men. Further, it is equally reasonable to suspect that as attitudes have changed toward homosexuality, the number of legal conclusions scoring 1s would increase—while the number of conclusions scoring 0s would decrease. As a result, one might tentatively conclude that decision year rather than gender induces the correlations examined in this Note.

The data in fact reveals that there is a strong correlation between the year a judge was appointed and gender. A linear regression of these two variables produces a particularly high coefficient of -5.197, with a p-value of < .0005. Indeed, the median appointment year for the males in the data set was 1983, whereas for the females it was 1990. Perhaps more alarming, though, is that there is also a statistically significant correlation between the years that decisions were issued and the legal conclusion scores. It would be negligent, then, not to control for the year that decisions were issued before concluding that a meaningful gender gap exists.

To that end, I ran a multivariate regression in which the independent variables were gender and decision year, and the dependent variable was the legal conclusion score. In this regression, both independent variables maintain strong, statistically significant relationships with the dependent variable. Indeed, when one controls for decision year, the gender coefficient only changes slightly, from -0.26 to -0.23. The p-value is .001, meaning this strong correlation would only be a result of chance 0.1% of the time.
2. Region

One could postulate that geographic region accounts for the gender differences in the legal conclusion scores. In order for this claim to be true, one would have to conclude that there is a region of the country from which female judges are likely to emerge. Further, one would have to conclude that the region women are particularly likely to come from has a particularly positive record on gay rights. Or, alternatively, one would have to conclude that there is a region of the country that female judges are particularly unlikely to come from, and that this region has a particularly negative record on gay rights. All of these premises, however, are inaccurate.

**FIGURE 2: GEOGRAPHIC REGIONS OF JUDGES**

![Figure 2 showing geographic regions of judges](image)

Figure 2 helps demonstrate three points that collectively help disprove the alternative theory that region rather than gender causes the relationship gaps in question. First, men’s and women’s geographic regions do not vary significantly.68 Second, there is not a region of the country from which female judges are particularly likely to emerge, though a plurality (32.35%) comes from the southeastern United States. Third, there is not a region of the country from which women are particularly unlikely to emerge.

More importantly, there is not a statistically significant relationship between region and legal conclusion scores. Cross-tabulation analysis of these variables produces a p-value of .892. Further, when one excludes procedural scores, 60% of the legal conclusion scores from the southeastern United States were 0s. Again, this was the region a plurality of female judges in the data set came from. When assessing how a judge will rule on questions related to gay rights, gender is a far more accurate predictor than region.

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68. I am referring solely to the regions in which legal conclusion scores on gay rights were implicated—not the judiciary more generally.
3. Political party

There are plausible reasons why one might expect political party to affect the gender gap. Democrat Jimmy Carter, after all, was the first president to appoint multiple women to the federal appellate courts. Further, studies have demonstrated that women are more likely to be Democrats than men—and that Democrats have more favorable attitudes on gay rights than Republicans. One might suspect, then, that these trends extend to the American judiciary. If women are more likely to be appointed by Democrats, and Democrats are more likely to vote in favor of gay rights, one could deduce that it is party rather than gender that is correlated with the legal conclusion scores reported earlier.

Before continuing, though, note that even if, arguendo, party were responsible for the gender gap, this fact would not make the gender gap irrelevant. It would mean that women are ruling differently from men—and that there may be an apparent ideological basis for this phenomenon. A political party variable that proved stronger than gender might create its own set of rich questions. In the case of legal conclusions on gay rights, however, these rich questions need not be asked or answered. Even when one controls for party, the gender variable is still highly correlated with legal conclusion scores on gay rights.

It is true that the women on the courts are more likely to be affiliated with the Democratic Party than the Republican Party. A cross-tabulation of the gender and party variables confirms this: 50.7% of the female judges in the data set were affiliated with the Democratic Party, compared to 45.1% who were affiliated with the Republican Party. Alternatively, 38.5% of the men in the data set were affiliated with the Democratic Party, while 51.9% were affiliated with the Republican Party. This means that there is a 14-percentage-point difference between the percentage of women who are Democratically affiliated and the percentage of men who are. And though the p-value of political party (.10) in the regression of outcome on party and gender is lower than the ideal .05, it is at least low enough to make political party a viable control variable.

The trend in the preceding paragraph gains even greater potency when one considers that there is a strong, statistically significant correlation between

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69. Palmer, “To Justify,” supra note 8, at 236.
70. See supra note 27.
71. By “affiliated,” I primarily mean appointed by a Republican or Democrat. The vast majority of judges are technically nonpartisan. If a judge was elected rather than appointed, I generally did not assign them a partisan identifier, unless their self-provided biographies in works like AMERICAN BENCH, supra note 45, specifically mentioned a political party. Three-hundred seventy-nine of the 416 data points received a partisan identifier of Democrat, Republican, or nonpartisan. All federal judges received such a modifier, while some state judges did not. In part to account for this fact, later in this Note I control for whether a judge is a federal or state judge, and find gender gaps at both levels.
72. These totals do not equal 100% because of the presence of nonpartisan judges in the sample.
party affiliation and legal conclusion scores. A cross-tabulation with these variables produces a p-score of < .0005. Figure 3 helps demonstrate the extent to which party is a strong predictor of how a judge will rule on gay rights issues.

**FIGURE 3: LEGAL CONCLUSION BY PARTY**

![Figure 3: Legal Conclusion by Party](image)

The above chart suggests that while Democratic judges and nonpartisan judges rule similarly, there is a substantial difference in the way Democrats and Republicans rule on these issues. Republican judges are far more likely to score a 0 than Democratic judges—and Democratic judges are more likely to score 1 than their Republican colleagues. In fact, there is a 35-percentage-point difference between Republicans and Democrats on these issues. This percentage difference is even larger than the 26-percentage-point gap in the way men and women rule on these issues. On a prima facie level, then, there is a stronger causal association between party and legal conclusion scores than there is between gender and legal conclusion scores. Upon further inspection, however, more thorough cross-tabulation and logistical regressions unearth a story colored with more complexity.

Intraparty and interparty analyses reveal that the correlation between gender and legal conclusion scores transcends political party. It is true that female Republicans are more likely to score 0s than female Democrats. Yet, it is also true that female Republicans are less likely to score 0s than male Republicans. Likewise, female Democrats are far more likely to score 1s than male Democrats. Consider Table 1.
TABLE 1: LEGAL CONCLUSION BY GENDER AND PARTY

<table>
<thead>
<tr>
<th>Group</th>
<th>Score 0</th>
<th>Score 1</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female Democrats</td>
<td>13.33%</td>
<td>86.67%</td>
<td>100%</td>
</tr>
<tr>
<td>Male Democrats</td>
<td>46.6%</td>
<td>53.4%</td>
<td>100%</td>
</tr>
<tr>
<td>Female Republicans</td>
<td>57.14%</td>
<td>42.86%</td>
<td>100%</td>
</tr>
<tr>
<td>Male Republicans</td>
<td>77.78%</td>
<td>22.22%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Even when one looks within the different political parties, there are differences in how male and female judges rule. There is a 21-percentage-point gap between male Republicans and female Republicans, and a robust 33-percentage-point gap between male Democrats and female Democrats.

Multivariate probit regression provides another method to further understand the way party and gender simultaneously interact with legal conclusion scores on gay rights. For this type of regression model, nonpartisan judges were removed from consideration in order to create three binary variables. Before controlling for party affiliation, probit regression reaffirmed that gender and legal conclusion are correlated to almost a 100% degree of certainty. During this test, the absolute value of the coefficient was 0.675. After controlling for party, however, the absolute value of this coefficient actually increased to 0.772, showing that gender had an even stronger impact on legal conclusion scores when political party was accounted for.

4. Selection method and jurisdictional level

Among the final variables that could conceivably impact a judge's legal conclusions are selection method and jurisdictional level. By “selection method,” I mean whether the judge was appointed or elected. And, for the purposes of this Note, “jurisdictional level” simply refers to whether the judge is a federal or state judge. These two variables are related because all federal judges were appointed, whereas many state judges were elected.

The reasons one might control for selection method and jurisdiction are that (1) prejudices may make it easier for women to get appointed to judgeships than elected, and, concomitantly, (2) more female judges may serve in the federal judiciary than the state judiciary. This distinction could be important if political pressures are stronger on elected judges than appointed judges. In my data set, however, the proportion of women who were appointed was comparable to the number of men.
At first glance, the chart above does hint that women may be more likely to be appointed than their male counterparts. Yet, neither the chi-squared score of 1.79 or p-value of .408 inspires confidence that any of the differences above are statistically significant. Further, the above chart also shows that roughly 65% of males and females in the data set were federal judges—that is, appointed by the president. This strongly suggests that neither method of appointment nor jurisdictional level explains a substantial amount of the gender gap.

C. Controlling for Legal Doctrines

One way to better illuminate the nature of the gender gaps reported thus far in this Part is to examine more thoroughly their relationship to the rights implicated in each case. Does the gender gap, for example, appear in equal protection questions but not in due process questions? Likewise, how does the inclusion of cases like Hurley v. Irish-American Gay, Lesbian and Bisexual Group and Boy Scouts of America v. Dale—in which the question was one of freedom of association rather than equal protection or due process—affect the gender gaps I reported? These questions can be answered through disaggregating the data by legal doctrine and—to a lesser extent—fact patterns. This method demonstrates that men and women ruled differently on questions of gay rights based on both equal protection law and privacy-rooted due process rights.

Consider cases based on equal protection rights. To measure the gender gap in these cases, it was important to first disaggregate the data. Additionally, to create binary variables, I removed cases in which judges received a score of “P.” A cross-tabulation of these 129 legal conclusion scores generates stark results, results reproduced in Figure 4.

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73. See supra note 48. As a reminder, in both Hurley and Dale it was not the gay litigants who charged that their constitutional rights were being violated. Rather, these cases involved appellants who challenged the enforcement of antidiscrimination laws—arguing that these laws violated the First Amendment. When these cases are removed, then, how does this affect the gender gap?
On equal protection claims, over 72% of the legal conclusions produced by women were in favor of the gay plaintiffs, compared to fewer than 39% of the conclusions issued by men. The p-value for this cross-tabulation was .003, implying that 99.7% of the time, random chance would not create a discrepancy this large. On gay-rights-based questions of equal protection, it is difficult to imagine a gap larger than the 33-percentage-point gap shown above.

Equal protection jurisprudence is not the only area of jurisprudence, though, that reveals a gender gap in legal conclusions on gay rights. Men and women rule differently on due-process-based questions as well. On these questions the gap is not as large as it is on equal protection questions, but it is still statistically significant. Such legal conclusions by women scored 1s 62.5% of the time, compared to 40.7% of conclusions by men. This 22-percentage-point gap is accompanied by a p-value of .05.74

The only doctrinal issue in which there is not a statistically significant difference in men and women's rulings is First Amendment jurisprudence.75 Most of the First Amendment questions in my sample, however, did not involve the First Amendment rights of gay Americans. They involved laws in which individuals challenged certain provisions in antidiscrimination laws that protected gays, charging that the laws violated their First Amendment rights. In my data set, a score of 0 in these types of cases meant that the judge ruled in favor of the individuals challenging the antidiscrimination laws. Interestingly,

74. Excluding cases resolved on procedural grounds, there were 127 equal protection data points and 140 due process data points.
75. More females sided with gay plaintiffs on First Amendment cases than males. The p-value, however, was .66.
these types of First Amendment questions are the only questions in the sample that do not involve a law or set of laws that implicate gay Americans’ constitutional rights. I included them in the data set because, in a broad sense, they fit under the rubric of both gay rights and constitutional rights. But, after reflection, the finding that men and women do not rule differently on these First Amendment questions does not directly affect my original research question: whether females are more likely than males to conclude that acts, laws, or sets of laws violate gay Americans’ constitutional rights.

Indeed, on First Amendment questions that involve gays’ constitutional rights, the data inconclusively suggests that men and women do rule differently. I say inconclusively because there was only a 12-percentage-point gap in the way men and women ruled on this subset of issues, with a sample size of fifty-three. This small sample size led to a p-value of just .29, meaning that even if there were no relationship between judges’ genders and their voting patterns in these cases, discrepancies this large could be expected to occur almost 30% of the time just by random chance. Thus, with strong qualification, I submit that the data hints that men and women may rule differently on First Amendment questions related to gay Americans’ constitutional rights—but a larger sample size is needed to answer this question conclusively.

As a tangential note, though, the trend is not that women become less likely to score 1s in cases involving gay Americans’ First Amendment rights than on other issues. Rather, the trend is that men become more likely to rule in gay Americans’ favor here than on other issues. On these questions, 76% of male-produced legal conclusions were 1s, compared to 88% of female-produced legal conclusions.

D. Alternative Methodological Considerations

As this project progressed, it became clear there were at least two primary methods to measure the correlation between gender and decisions on gay rights. The first option, which I chose, invoked a legal-conclusion-centered approach. The second option involved a judge-centered approach. The advantage to the first approach is that it allowed me to review judges’ decisions in a nuanced way, accounting for each time judges applied the law to a set of facts. The chief disadvantage to this approach, however, is that some judges are included multiple times, while others are not. Some members of the U.S. Supreme Court, for example, appear in the data set as many as five times, because of their presence in Bowers v. Hardwick, Hurley, Romer v. Evans, Dale, and Lawrence.

76. That is, questions implicating the First Amendment rights of gay Americans.
77. 478 U.S. 186 (1986).
To a certain extent, the fact that some judges play a role in multiple observations is not a cause for concern. By using the legal conclusion as the unit of analysis, each instance in which a judge made a legal decision constitutes an opportunity for gender to influence the outcome. Yet, there are limits to this approach. For illustrative purposes, suppose there had merely been two judges in my sample: one man and one woman. And, suppose these two judges issued 424 legal conclusions. Could these 424 legal conclusions be used to illustrate a meaningful, statistically significant gender correlation? Probably not. It is true that the legal conclusions in my data set came from 244 judges rather than two. And further, as I have noted, it is more accurate to call the group I studied a population rather than a sample. However, my hypothetical example does help illustrate a risk in the method I ultimately invoked. The 424 observations I entered into the statistical program Stata emerged from 244 judges—a factor that the regressions previously reported in this Part did not directly take into account.

This leads to the second method one could employ to study my research question. One could use a judge-centered approach, using the following question: when presented with a gay rights-based question, has the judge ever ruled that an act, law, or set of laws violates gay Americans’ constitutional rights? This method does not allow for the legal and factual nuance of the first approach. It does not focus on how judges have ruled each time on each question before them. Yet, the second method does have some merits, in that it avoids some of the risks involved in the first approach. Therefore, it is valuable to explore whether one would obtain different results by utilizing it. Indeed, if this second method produced different statistical results, this fact would severely complicate the findings I reported.

**FIGURE 5: LEGAL SCORING BY JUDGE (METHOD 2)**

![Bar chart showing legal scoring by judge (Method 2)]
Using the second method does not produce results particularly different from the first. Before control variables, when the judge is the unit of analysis, men and women still rule differently, with women being more likely than their male counterparts to rule that a law or set of laws violates gay Americans’ constitutional rights. Of the judges who have addressed these questions, there is a 26-percentage-point gap between the number of male judges who have answered favorably and the number of women who have.

Further, multivariate regression models confirm that the correlation discovered via the second model also survives control tests. A regression that only includes the variables of gender and score produces a coefficient of -0.255, with a constant of 0.7105 and a p-value of .004. These numbers are a less intuitive method of reporting the results in the preceding paragraph. It reflects the same 25.6-percentage-point gap between male and female judges on these issues. Yet, when one controls for age, decision year, party, method of appointment, date appointed, and jurisdictional level, the absolute value of the coefficient actually increases to 0.296. The p-value is .01.

Both plausible methods of testing the correlation between gender and legal conclusion scores, then, produce similar results. To a high degree of statistical significance, men and women rule differently on questions of gay rights, even when one controls for germane alternative variables. Still, what is the source of the relationship? And what are the implications therein?

II. UNDERSTANDING THE JUDICIAL GENDER GAP

It has now been established that gender and legal conclusion scores on questions of gay rights are highly correlated. Even when party affiliation, jurisdictional level, and age are accounted for, the gender gap persists. Such findings demand further discussion. This Part argues that this gap is actually a result of gender role conceptions among highly educated women in the United States. In support of this claim, I marshal evidence from legislative roll call votes and General Social Survey data.

A. Legislative Data: Congress and the Defense of Marriage Act

Examining roll call votes on gay rights issues in a legislative context can help illuminate the findings in Part I. Consider the possibility that male and female legislators are voting differently on gay-centered issues similarly to the way male and female judges are ruling on these questions. This would suggest that the Part I findings are not judiciary-specific phenomena, and would suggest

79. The number, more precisely, is 25.6. Method 1 also revealed a 26-point-difference in male and female legal conclusion scores.
80. The p-value is .004.
the need for an expanded theoretic scope with which to understand the gender gap in the judiciary. Alternatively, if male and female legislators are not voting differently, this encourages a more narrowly tailored approach to understanding why male and female judges rule differently on gay rights questions. This reasoning inspires my discussion of the quintessential legislative body: the House of Representatives.

In 1996, during the 104th Congress, members of the House and the Senate voted on an issue related to same-sex marriage. The act, called the Defense of Marriage Act (DOMA), asserts that states are not required to legally recognize same-sex marriages performed in other states. The act passed overwhelmingly—and President Bill Clinton signed it into law.

Relevant for the purposes of this Note is the gender breakdown of the representatives who voted for and against DOMA’s passage. To that end, the evidence shows that there is not a statistically significant causal relationship between gender and how members of Congress voted on DOMA. A cursory glance at this roll call vote does suggest a relationship. Eighty-five percent of men voted for DOMA, compared to 65% of women. And while a p-value of .001 accompanies these numbers, they are highly misleading standing alone. Key control variables—like political party and race—dismantle this apparent statistically significant correlation between gender and votes.

Together, both interparty cross-tabulation and multivariate logistical regression clarify the spurious nature of the above correlation. Seventeen Republican women voted on DOMA. Seventeen Republican women voted “Yes.” Their unanimous solidarity on this issue virtually mirrored that of their male Republican colleagues. Two-hundred eleven of the two-hundred thirteen male Republicans voted for the act as well. Figure 6 demonstrates the extent to which male and female Republicans voted similarly on DOMA.

FIGURE 6: REPUBLICAN VOTING ON DOMA BY GENDER

![Bar chart showing Republican voting on DOMA by gender.]

On the Democratic side of the aisle, the story is more complex. Prima facie, Democratic women were more likely than Democratic men to vote against DOMA. Fifty-five percent of them, in fact, voted against the bill, compared to 32% of their male colleagues. Packed underneath these numbers, however, is an important racial consideration. Of the fifteen Democratic women who voted against the bill, 20% of them were black. This is important because blacks were substantially more likely to vote against the bill than whites—even when one controls for party.\(^8\) Indeed, there was a 42-percentage-point gap between the way blacks and nonblacks voted on DOMA.\(^4\)

A logistical regression—in which party and race are controlled for—adds more credibility to the conclusion that there was no causal relationship between gender and DOMA votes. This regression pushed the gender/DOMA vote p-value out of the bounds of statistical significance at a .05 level. This suggests that while male and female judges rule differently on questions of gay rights,

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83. For further discussion of this trend, see CATHY COHEN, THE BOUNDARIES OF BLACKNESS: AIDS AND THE BREAKDOWN OF BLACK POLITICS (1999).

84. Among Democrats, 57.7% of black representatives voted against the bill, compared to 32.7% of white representatives—a 25-percentage-point gap. To find these numbers, I assessed roll call votes cataloged on Library of Congress, Thomas: Legislative Information on the Internet, at http://thomas.loc.gov/home/thomas.html (last visited May 6, 2005). I then identified the race of the representatives using SINGH, supra note 82, at 30-32.
male and female members of Congress do not necessarily vote differently. One might need to evaluate more roll call votes than that over DOMA to prove this point more conclusively. Since this was only a peripheral research question for my work here, I did not build such a data set.

For the purposes of this Note, the DOMA vote does provide a foundation to draw reasonable extrapolations about the nature of the gender gaps found in Part I. The gaps reported therein—using a comparable number of data points—are substantial, pervasive, and transcend key control variables. Thus, the fact that 410 men and women in the U.S. Congress voted similarly on any gay rights issue should give social scientists pause. This is particularly true when one considers the differences in the presumed natures of the judiciary and legislature.

At the United States’s inception, in Alexander Hamilton’s Federalist Paper No. 78, he outlined his philosophy for the judicial branch of American government. He argued that the judiciary “is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”85 Echoes of this vision of the judiciary—as a beacon of impartiality—likely reverberate today.

Alternatively, the legislature has been considered one area of government in which both public opinion and an official’s personal judgment play a role in legal outcomes. Indeed, as coauthors of the U.S. Constitution expressed in Federalist Paper No. 52, they expected the legislative branch to have “immediate dependence on, and an intimate sympathy with, the people.”86 Today, then, on the issue of gay rights, why is the judiciary dependent on demographic factors that appear less relevant in the legislative context?

This question gains momentum when one considers two aspects of prior research that has been done on the judiciary. First, as discussed in the Introduction, scholars who have studied the effects of gender on the judiciary have often concluded that men and women do not rule differently on most legal issues that have been tested. Second, when early scholars theorized about the effects of gender on the judiciary, they provided rationales that one would expect to hold in both a judicial and legislative context.

As noted above, one early theorist justified his belief that women would rule differently by declaring that “common sense as well as sociological theory suggests that socialization experiences of men and women are significantly different.”87 And feminist scholars discussed the potential for a more inclusive “different voice.”88 But why, though, is this different voice appearing on this

87. Songer et al., supra note 12, at 426.
88. The phrase “different voice” appears in the title of Davis, supra note 14.
issue and not others—such as obscenity cases? And why is this different voice in regard to gay rights so pronounced in the judiciary rather than the legislature? Clues to answer this question may lie in General Social Survey data.

B. General Social Survey Data

Annually, a research project based at the University of Michigan collects survey data from Americans on a wide range of issues. In the last twenty years, researchers who have conducted the General Social Survey (GSS) have collected responses from tens of thousands of people on issues ranging from political attitudes to demography. Among the questions the survey poses, two are particularly relevant for the purposes of this Note. The first of these questions extracts opinions on the morality of homosexuality, while the second deals with the legality of same-sex marriage.

Let us first explore the GSS question on the morality of gay relationships. It is true that the morality of homosexuality is not a gay rights issue per se. One could morally object to same-sex relationships, while simultaneously favoring certain legal rights for gay Americans. Conversely, one could oppose certain legal rights for gay couples without morally objecting to gay relationships. I introduce this variable, however, for three reasons: (1) beliefs about the morality of homosexuality and opinions about gay rights are highly correlated; (2) researchers who conduct the GSS have asked about the morality of homosexuality more often than they have asked about gay rights, creating a larger sample size; and (3) if opinions on this topic reveal gender gaps, the nature of these gaps may provide insight into why male and female judges rule differently on questions related to gay rights.

89. See the discussion of Songer et al.'s work, supra note 12, in the Introduction. When doing so, consider that General Social Survey data suggests that men and women feel differently about the issue of pornography. In a sample size of 27,070 respondents, 48.2% of the females questioned expressed that they believe pornography should be illegal for all Americans, regardless of age—compared to 29.8% of men. Among those with 17-20 years of education, the gap remains. In this group, 37.3% of women answered that pornography should be illegal to all, compared to 22.6% of men. These claims are based on data from GSS Website, supra note 63.

90. For example, GSS data demonstrates that opinions about the morality of homosexuality and the legality of gay marriage are highly correlated. A linear regression of respondents' opinions of the morality of homosexuality on their opinions of whether gay marriage should be legal produced a regression coefficient of -0.587, and a p-value of < .0005. Linear regression was the appropriate statistical model here because although the two variables are not continuous, the answers to both questions are ordinal. In the case of gay morality, the potential answers were "always wrong," "almost always wrong, "sometimes wrong," and "not wrong at all." For gay marriage legality, the potential responses were "strongly agree," "agree," "neither agree nor disagree," "disagree," and "strongly disagree." I provide more information about these two variables in the following pages.
The GSS poses the following question regarding the morality of homosexuality: "What about sexual relations between two adults of the same sex—do you think it is always wrong, almost always wrong, wrong only sometimes, or not wrong at all?" The differences in men's and women's answers to this question are statistically significant in the technical sense. However, both common sense and odds ratio analysis demonstrate that men and women's attitudes are indistinguishable in the practical sense.

FIGURE 7: RESPONSES TO THE GENERAL SOCIAL SURVEY QUESTION ON THE MORALITY OF HOMOSEXUAL RELATIONSHIPS

The above chart shows a mere 2-percentage-point difference in the way that men and women responded "always wrong" and "not wrong at all" to the morality question. Viewed in the context of the 25-percentage-point gaps discussed in Part I, then, the chart above offers few explanatory tools to account for why men and women ruled differently on questions of gay rights. Likewise, the odds ratio for men's and women's responses is merely 1.08, compared to the 2.95 odds ratio when one looks at the differences in how men and women ruled on questions of gay rights. This portion of GSS data, then,

91. GSS Website, supra note 63.

92. If the percentage of men and women who answered "always wrong" seems high, consider that I included all responses to the question between the years 1982 and 2003. I did this in order to ensure congruence between these dates and the dates found in my primary data set.

93. To get the 1.08 figure, I produced dummy scores of 0 and 1 to create binary variables. A score of 0 meant "always wrong" or "sometimes wrong," whereas the remaining responses received a score of 1. Compare 1.08 to the odds ratio that was revealed in Part I, related to legal conclusion scores. The odds of women receiving a legal conclusion score of 1 are about three times the odds of a man receiving this score. Yet, the odds of a woman approving of gay relationships are 1.08 times the odds of a man doing so. This number, a priori, is less than compelling.
adds yet another enigmatic layer to the gender gaps in men’s and women’s rulings on gay rights questions. How can there be a gender gap in the judiciary on an issue for which there is no corresponding gender gap in the public sphere? The pieces of this puzzle start to fit when one explores an additional variable: education.

The most educated GSS respondents provide the clues on how to piece the above puzzle together. By “most educated,” I mean those with at least seventeen years of education—the category that likely captures those with graduate and professional degrees. Most lawyers and judges, for example, likely fall into this group—though they are not alone. Over the past twenty years, 10.1% of respondents have claimed to have between seventeen and twenty years of education. How exactly did this group respond to questions about the morality of homosexuality?

Unlike the population at large, those with the most education were less likely than the population at large to believe that homosexuality was wrong. Over 50% of highly educated individuals answered “not wrong at all” or “sometimes wrong” to the question about the morality of homosexual relations. In the population at large, only about 28% of men and women answered “not wrong at all” or “sometimes wrong.” There is a strong linear relationship between education and how one responds to the morality question.

Another education-based feature of morality responses, though, is even more salient than the direct correlation adduced above. That is, there is a correlation between education and the gender gap itself. Consider Table 3.

TABLE 3: RESPONSES OF HIGHLY EDUCATED Respondents TO THE General SOCIAL SURVEY QUESTION ON THE Morality OF Homosexual RELATIONSHIPS

<table>
<thead>
<tr>
<th>Response</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always Wrong</td>
<td>47%</td>
<td>39%</td>
</tr>
<tr>
<td>Almost Always Wrong</td>
<td>6.4%</td>
<td>6.1%</td>
</tr>
<tr>
<td>Sometimes Wrong</td>
<td>14.4%</td>
<td>14.8%</td>
</tr>
<tr>
<td>Not Wrong at All</td>
<td>32.1%</td>
<td>40.1%</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Take a moment to view the percentages of highly educated men and women who answered “always wrong” and “not wrong at all” to the question.

94. A total of 40% of highly educated individuals answered “not wrong at all.”
95. A linear regression with these variables produced a coefficient estimate of .10 and a p-value of < .0005.
96. The number of respondents here is 1843.
There is an 8-percentage-point gap in each case, producing what GSS coding reveals to be a strong, statistically significant relationship between gender and opinions about the morality of sexual relations between two members of the same sex. I will review secondary source data that will help elucidate the meaning of these numbers. First, however, let us turn to GSS responses to questions about the legality of same-sex marriage.

Any discussion about GSS respondents’ opinions about homosexual marriage should be prefaced by noting the limited sample size. Because survey organizers only posed the question between 1988 and 1991, not only are the numbers dated, but just 1307 individuals have answered the question. Thirteen hundred responses under other circumstances would undoubtedly be more than sufficient. However, my theory compels one to ultimately focus on respondents with seventeen years of education—and 110 male and females in this category answered the same-sex marriage question. Still, when viewed in the context of the morality responses, the numbers are instructive.

The question about gay marriage’s legality reads, “Do you agree or disagree? Homosexual couples should have the right to marry one another.” Respondents then chose between the following five answers: “strongly agree,” “agree,” “neither agree nor disagree,” “disagree,” and “strongly disagree.” In the general population, there was a 6-percentage-point gap between the number of men and women who “strongly disagreed” with the statement that gay couples should “have the right to marry one another,” with more women than men disagreeing. No other gap exceeded 3 points.

Focusing on highly educated respondents, though, reveals massive gender gaps. Consider Figure 8.

97. By “limited,” I mean compared to questions about the morality of homosexuality—or the education variable.

98. Perhaps this question was only asked for three years because of its awkward—if not inaccurate—phraseology. See Nat’l Opinion Research Ctr. at the Univ. of Chi, supra note 63. In America, couples do not marry “one another”—that would be polygamy. Individuals within couples marry one another. A better question might read, “Do you agree or disagree? It should be legal for two members of the same sex to marry each other.”
There was a 20-percentage-point gap between the number of highly educated men who answered “strongly disagree” and the number of similarly situated women who did. 46.3% of men answered “strongly disagree,” compared to 26.8% of women—producing z-statistic scores with absolute values of 2.13. The chart also shows a 12-point gap between the number of men and women who “agree” that gay couples should have the right to marry, producing a z-score of 1.89.

At least three conclusions, then, can be extracted from the GSS data. The first such conclusion is that there is a correlation between educational attainment and opinions about both homosexuality and homosexual marriage. Second, there is an even stronger correlation between educational attainment and the gender gap in attitudes about topics related to gay rights. And three,

99. These scores signify that mere random chance would create a disparity this large only about 2% of the time.
100. These scores signify that mere random chance would create a disparity this large only somewhere between 5% and 10% of the time.
highly educated men and women show wider disparities in their opinions about gay marriage than in their opinions about the morality of homosexuality. These last two conclusions have direct implications for the research findings in Part I. That is because judges certainly fall into the definition I set for highly educated men and women. Still, is the education variable causing these gender gaps—or is education interacting with another, overriding variable to produce these effects? Secondary scholarly research can shed light onto this question.

C. Role of Law School

In 2003, an article appeared in the *Journal of Legal Education* entitled *The Effect of Law School on Political Attitudes: Some Evidence from the Class of 2000.* In the article, J.D. Droddy and C. Scott Peters report data they collected from twenty-eight law schools in the United States. The authors surveyed students at the beginning of their first year of law school and at the end of their third year of law school. Two-hundred seventy-eight members of the class of 2000 completed both surveys, surveys that allowed the researchers to gauge the extent to which the law school experience influenced students’ political beliefs.

Droddy and Peters’s answers to three questions have a direct bearing on how one should interpret my findings that men and women rule differently on gay rights questions. Were there differences between men’s and women’s political attitudes when the students entered law school—especially on issues related gay rights? Similarly, what differences were there between men’s and women’s political attitudes when they graduated from law school? And finally, how do law students’ attitudes compare to those of the broader college-educated population?

There were differences in male and female law students’ political attitudes, differences that first appeared during students’ first year of law school. To measure these differences, Droddy and Peters used well-tested National Election Survey questions. Students received a score of 1 to 7 on fourteen different measures, including topics such as defense spending, taxes, abortion, women’s rights, affirmative action, and gay rights. Women expressed more liberal attitudes on all fourteen measures. Below, I have reproduced a table that shows the five categories for which the difference of means was the highest. A score of 1 represents the most liberal score a student can receive and a score of 7 represents the most conservative.

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102. The authors reported that there were no statistically significant differences between the group of students who completed both surveys and the group of students who only completed the first survey. *Id.* at 37.
Male and female law students’ attitudes on the “gay rights” category varied more than any other ideological category measured. Indeed, of all the variables, women’s score on the gay rights variable was the second most liberal.\textsuperscript{103}

Equally important is that the gender differences reported during students’ first year of law school did not appreciably change during students’ three years of law school. That is, to the slight extent that students’ aggregated opinions changed over the three-year period, gender was not a statistically significant variable in this change.\textsuperscript{104} This study of law school students, then, provides empirical evidence suggesting that law school is not responsible for the differences in male and female opinions on gay rights issues. In the words of the study’s authors, “self-selection may account for part of any attitudinal differences that exist between lawyers and the rest of society.”\textsuperscript{105}

The law school study provides at least one additional reason to believe that self-selection accounts for the gender gaps in male and female law students’ political attitudes. There were no statistically significant differences between the political attitudes of male law students and those of college-educated men.\textsuperscript{106} Alternatively, the political attitudes that female law students reported in the survey diverged from the attitudes of other college-educated women. On the broad ideology scale, the average female law student’s score was 3.18, while the average college-educated woman’s\textsuperscript{107} score was 3.56. As the authors reported, “Women 1L’s are not only more liberal than their male classmates, but are more liberal on key social issues than are other college-educated women.”\textsuperscript{108} This provides more evidence, then, that the differences in male and female law students’ political attitudes are attributable to self-selection.

\begin{table}
\centering
\begin{tabular}{|l|c|c|c|c|}
\hline
Category & Male 1L & Female 1L & Means Difference & p-Value \\
\hline
Gay Rights & 2.99 & 1.92 & 1.06 & p < .001 \\
Affirmative Action for Women & 4.88 & 3.9 & 0.99 & p < .001 \\
Reduce Crime & 3.57 & 2.62 & 0.94 & p < .001 \\
Defense Spending & 3.75 & 2.93 & 0.83 & p < .001 \\
Abortion & 3.26 & 2.5 & 0.76 & p < .01 \\
\hline
\end{tabular}
\caption{Political Opinions of Incoming 1Ls in the Class of 2000}
\end{table}

\textsuperscript{103.} The category “equal rights for women” placed first.
\textsuperscript{104.} Droddy & Peters, \textit{supra} note 101, at 45.
\textsuperscript{105.} \textit{Id.} at 43.
\textsuperscript{106.} \textit{Id.} at 41.
\textsuperscript{107.} Droddy and Peters based their comparisons on National Election Survey data. \textit{Id.} at 40-43.
\textsuperscript{108.} \textit{Id.} at 43.
If self-selection induces the gender gap in law students' attitudes, this also provides compelling evidence that self-selection is ultimately responsible for the gender differences in males' and females' conclusions on gay rights questions. Male and female judges likely reach different conclusions on these issues because the men and women who choose to attend law school have diverging political perspectives, especially on the topic of gay rights.

D. Gender Role Attitudes

Still, there are ways in which the self-selection thesis is not fully satisfactory. As discussed in the Introduction, men and women do not rule differently on most topics scholars have explored—with sex discrimination cases standing as an exception. If women are generally more liberal than men, would we not expect there to be differences in the way they ruled, for example, in criminal search and seizure cases? Why do gender-based differences exist in sex discrimination cases and gay rights cases—while no gender differences exist in criminal search and seizure cases?

I offer two contingent explanations for this conundrum. First, the differences in male and female law students' opinions on gay rights were larger than the differences in means on any other issue. And more importantly, it may not be a coincidence that sex discrimination and gay rights are among the areas in which male and female judges rule differently. Both types of cases directly implicate gender roles. Like questions about whether women should serve in the workplace, questions about the morality of homosexuality ultimately depend, almost ipso facto, on arguments about the proper role of men and women in society. And indeed, it is reasonable to suspect that the women who attend professional school would be particularly less responsive to these arguments than men, or even women at large.

The second explanation offered in the preceding paragraph, I reiterate, is conditional. This Note only reports circumstantial evidence that highly educated women have different gender role conceptions than the population at large. That is, men and women rule differently on gay rights and sex discrimination cases, two areas that implicate gender roles. A direct and effective way to test this qualitative claim, however, might involve interview-

109. See Massie et al., supra note 16, at 12 (finding that gender-based differences in federal appellate judges' rulings were pronounced in cases involving issues "traditionally considered to be 'women issues,' such as the discrimination against women in the workplace.").


111. See generally Larry R. Petersen & Gregory V. Donnenwerth, Religion and Declining Support for Traditional Beliefs About Gender Roles and Homosexual Rights, 59 SOC. RELIGION 353, 357 (1998) (noting that beliefs about traditional gender roles and "intolerance" toward gay rights are often concentrated in the same groups).
based research. Kristen Luker’s work on the worldviews and gender role conceptions of abortion activists might serve as a model. I offer the gender role hypothesis here as a theory, a theory that qualitative, empirical data could ultimately support or disprove.

The empirical data presented in this Note thus far still strongly supports two claims. The first is that male and female judges rule differently on gay rights questions. The second is that these gender differences are likely attributable to self-selection—women who attend graduate and professional schools view gay rights more favorably than their male counterparts. What still may not be imminently apparent, though, is why either of these differences matters at all. The final Part answers this question.

CONCLUSION: IMPLICATIONS AND FUTURE EXPECTATIONS

Male and female judges rule differently on issues related to gay rights, with women being more likely to rule that an act, law, or set of laws violates gay Americans’ constitutional equal protection and due process rights. These differences reflect gender gaps in highly educated men’s and women’s opinions on gay rights topics, a difference demonstrably attributable to self-selection. Women who attend law school, for example, are more likely to hold favorable opinions about gay rights and gay relationships—perhaps in part due to the extent to which opinions of homosexuality are intertwined with gender role conceptions.

Still, one could respond to my conclusions with the following question: Why do these results matter? I submit that these results are relevant in a wide variety of academic and practical contexts. Political theorists and historians, for example, could juxtapose these results against the ideal expressed in the *Federalist Papers*, which describe the normative impartiality-based ideal of the judiciary in the context of America’s separation of powers. Others could discuss how these results fit into prior behaviorist or positivist models for describing the judiciary. In this Part, however, I have narrowed my focus to three other theoretical and practical implications of my research findings:

112. See Luker, supra note 31.

Legal positivism is “[t]he theory that legal rules are valid only because they are enacted by an existing political authority or accepted as binding in a given society, not because they are grounded in morality or in natural law.” Black’s Law Dictionary 915 (8th ed. 1999). The theory asserts that social realities, rather than objective meritocratic notions, create the law.
They suggest that researchers studying the role of gender diversity in the judiciary should refocus their scope to cases that implicate gender role conceptions.

They provide empirical evidence for debates about the relative importance of substantive and descriptive representation.

They complicate conceptions about the causal link between actions of the elite and mass public opinion.

After discussing each of these three implications in greater detail, I provide a predictive model which helps readers consider whether the patterns enumerated in this Note are likely to continue.

Implications for judiciary-specific research. Researchers have tested for differences in male and female judges’ actions for the past quarter-century. And in the case of appellate courts, scholars have generally concluded that men and women do not rule appreciably differently across most issue areas that have been examined. It is instructive, however, to consider the few issue areas in which scholars have found that men and women rule differently, and the potential commonalities of these issue areas.

David Allen and Diane Wall have published an article on state supreme court justices, concluding that female justices are likely to be the most “pro-women” members of their respective courts. Further, others have found that in sex discrimination cases, men and women do rule differently. And in this Note, I concluded that men and women rule differently on questions of gay rights. There may be points of commonality in these findings.

“Pro-woman” decisions, sex discrimination cases, and gay rights cases all have the potential to implicate judges’ conceptions of gender roles. I explain

114. One of the most recent examples of such a test occurred in 1999, when Darrell Steffensmeier and Chris Hebet explored whether gender influenced judges’ sentencing decisions. They concluded that women dole out harsher penalties for certain subgroups of defendants. See Darrell Steffensmeier & Chris Hebert, Women and Men Policymakers: Does the Judge’s Gender Affect the Sentencing of Criminal Defendants?, 77 SOC. FORCES 1163 (1999).

115. See Songer et al., supra note 12. Songer’s work includes a concise metaanalysis of prior research on the role of gender in the American judiciary.

116. See Allen & Wall, supra note 14. For a moment, let us overlook the severe methodological and analytic problems with Allen and Wall’s research and consider their conclusions at face value. I would be remiss, however, not at least to enumerate these flaws. One problem with their analysis is the fact that only twenty-four women were included in their “statistical” analysis. Worse, though, was the nebulous way they defined the arguably essentialist term “pro-woman.” The closest they come to defining which cases they included in their research came in the following sentence: “Sex discrimination, sexual conduct and abuse, medical malpractice, property settlements, and the relationship between child and parent all appear to be viewed as integral parts of an agenda.” Id. at 239. Whether malpractice and property settlements should be included in an analysis of the “pro-woman” nature of certain judges is a matter readers should consider as I cite this work.

117. See Massie et al., supra note 16; Songer et al., supra note 12.
the basis of this theory in Part II, but reiterate it here to place it in the context of
the other research that has been done on the American judiciary. Together, this
research suggests that future research on the effects of gender in the judiciary
should consider cases which, implicitly or explicitly, involve gender role
conceptions.

Implications for representation debates. The idea that women rule
differently than men—especially on topics related to conceptions of gender—
also has implications for research debates on the relative importance of
"substantive" and "descriptive" representation. Though scholars tend to
agree that substantive representation is important, such consensus does not
exist on the question of descriptive representation's importance. The research
in this Note, however, strongly suggests that substantive representation and
descriptive representation are not severable concepts, because descriptive
representation may enhance the likelihood of effective substantive
representation.

Theorist Jane Mansbridge is among those who have proposed that
descriptive representation may enhance substantive representation. While
embracing this proposition, she also notes some of the dangers of this theory,
such as its potential to propagate essentialist notions of gender. My Note,
though, supplies empirical evidence for a theoretical claim, while providing
a sociological rather than essentialist explanation for the results. To that extent,
this Note may serve as a helpful contribution to the debate about the relative
importance of these forms of representation.

Implications for the elite/masses causation debate. To what extent does
public opinion color policy in the United States? Scholars have attempted to

118. See supra text accompanying notes 33-37 for definitions of the terms
"descriptive" and "substantive" representation.
119. See generally Mansbridge, supra note 35.
120. Id. at 637.
121. Cindy Rosenthal has tested this empirical claim in a legislative context, and found
differences in males' and females' representation conceptions. See Rosenthal, supra note
32, at 128. Katherine Tate has also tested the claim as it applies to race-based descriptive
representation, see generally Tate, supra note 35. Compare this to arguments for the bonum
in se nature of descriptive representation—arguments that it is beneficial for reasons
unrelated to substantive representation. In one of Rosenthal's earlier works, she explores
voters' preferences for gender-based descriptive representation. See generally Rosenthal,
supra note 34.
122. This debate is not merely academic. In 2007, Congress will consider the
reauthorization of the Voting Rights Act—and questions about the importance of descriptive
representation surround the debate. The Act has led to increased descriptive representation in
the political sphere, including the U.S. House of Representatives. Scholars such as Abigail
Ternstrom and Carol Swain have questioned whether this descriptive representation is
necessary. See Swain, supra note 35, at 5, 210-16; Ternstrom, supra note 35, at 211-27.
Alternatively, celebrated law professor Lani Guinier has questioned whether this form of
representation is sufficient. See generally Lani Guinier, The Tyranny of the Majority
(1994).
answer that question for at least the last half-century,\textsuperscript{123} often with fundamentally different results—creating what some have called "conclusions that cannot easily be reconciled."\textsuperscript{124} Jeff Manza, Fay Cook, and Benjamin Page have contended that "three images" emerge from reading current research on the connection between public opinion and policy. The first image is one in which public opinion "exerts enduring effects" on public policy. The second image revolves around the notion that public opinion only plays an inconsequential or declining role in affecting public policy. Projectors of a third image contend that there is historical and institutional variation in the extent to which public opinion influences policy.\textsuperscript{125}

All three of the above images are premised upon the existence of a causal link between the elite's actions and the public's opinions (or the converse). Consider, for example, the work of John Zaller, who writes about the manner in which actions by "elites" influence mass public opinion.\textsuperscript{126} I cite his work in particular because it stands as one of the most theoretically rapacious, analytically rigorous works on public opinion written to date.\textsuperscript{127} His 1994 \textit{The Nature and Origins of Mass Opinion} exemplifies a work in which: (1) an elite-to-masses causal argument is pervasive; and, therefore, (2) the extent to which private-level discourse may simultaneously affect elites and the general public is not fully considered.

According to \textit{The Nature and Origins of Mass Opinion}, the "elite" have tremendous influence over public opinion, resulting in individual-level shifts in public opinion. Zaller argues that socialization contributes to individuals' general political predispositions, and that the elite give the public conflicting "considerations" that are handled differently depending on these prior predispositions.\textsuperscript{128} These colliding considerations create ambivalence in Americans' opinions, so much so that respondents' answers to survey questions depend primarily on which of these considerations are most readily available to them at the time of the interview.\textsuperscript{129}

Zaller's model, however, does not compensate for the nonelite-level discourse that can shape American public opinion and even American public policy. Take for example his discussion of homosexuality, and the changes in Americans' attitudes on this topic.\textsuperscript{130} He discusses elite-level actors, such as the American Psychological Association and celebrity activist Anita Bryant. Yet, what he does not discuss, and what his model does not fully accommodate,

\begin{itemize}
\item \textsuperscript{123} See, e.g., Key, supra note 38.
\item \textsuperscript{124} Jeff Manza et al., \textit{Introduction} to \textit{Navigating Public Opinion} 28 (2002).
\item \textsuperscript{125} Id. at 17.
\item \textsuperscript{126} Zaller, supra note 40.
\item \textsuperscript{127} The book received the American Political Science Association's Best Book Award in 1994.
\item \textsuperscript{128} Zaller, supra note 40, at 42-47.
\item \textsuperscript{129} Id. at 48.
\item \textsuperscript{130} Id. at 321.
\end{itemize}
is the interpersonal contact and interactions that can influence public opinion—interactions independent of public policy changes and public discourse.

With increasing numbers of gays "coming out" to their families and friends, is it not plausible (if not presumable) that many shifts in public opinion on the topic result from activities in the private realm of American life? If so, this means there are situations in which Zaller's "elite to masses" causal story is either backward or moot. Backward, because on topics such as this, the elite may change their policy positions based on the public's shifts on given topics rather than the alternative. Moot, because it's possible that on topics such as gay rights, the relationship between the public and private is too complex to fit into a neat causal story in either direction. This is because members of the elite also have private lives, just as other members of the public. Thus, shifts in private-level discourse are likely to affect them in ways similar to how they affect the rest of Americans.

My research provides support for the proposition that private-level phenomena have a dual impact on elite actors, complicating both elite-to-masses and masses-to-elite causal stories. In Parts II and III, I examined disaggregated judicial decisions, and considered how the patterns therein mirror disaggregated public opinion data. In doing so, it served as a reminder that before individuals were members of the elite, they were members of the general public. To some extent it seems reasonable to assume that they still are influenced by the same private-level forces—such as conceptions of gender roles—that influence other members of the public. Therefore, my work suggests that in future research on public opinion, scholars should consider more thoroughly the interplay and overlap between the private realm and the elite realm.¹³¹

**Looking forward: The future of the gender gap.** As this Note closes, I propose one final question. Under what conditions might one expect the gender gap in the judiciary to expand and contract in the future? The results of this Note suggest that there are at least two methods to assess the long-term viability of gender gaps in the American judiciary, especially as the gap applies to issues of gay rights. The first approach involves quantitative methodology, while the second requires the insertion of qualitative methodological models.

Extracting survey data from young preprofessionals is one way to measure the prospective longevity of the gender gap in the American judiciary. The existence of a gender gap—especially on questions that involve gender role considerations—serves as a strong indicator that future male and female judges will continue to rule differently on these questions. The secondary source data from law students discussed in Part II is an example of such a survey. A continued gender gap among law students in particular suggests that the

¹³¹ For a fuller discussion (and different perspective) on the interplay between the public and private realms of discourse, see Jurgen Habermas's seminal work, JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (1989).
differences in male and female appellate rulings will be a long-term phenomenon.  

Quantitative data, however, is not the sole method one might employ to measure the potential durability of the gender gap. Interview-based data could more precisely pinpoint the operational framework that perpetuates the gender gap. This type of research could focus squarely on the role of gender in the law school experience. Sociological qualitative methods may even demonstrate that while male and female political opinions do not change significantly in law school, peoples' level of gender-consciousness may. This could account for the disparities in judicial legal conclusions on issues that entail gender roles, while explaining why similar disparities do not occur in other types of cases.

It is still significant, though, that quantitative research exposes differences in male and female law students' opinions on questions of gay rights. It strongly suggests that the differences in male and female judicial voting patterns will continue for at least a generation, as the lawyers of today morph into the judges of tomorrow. Male and female judges not only rule differently on issues of gay rights, but this gendered justice is apparently an efficacious trend.

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132. One may even be able to test for evidence of whether the gender gap will expand in the future. Consider also monitoring gender gaps among undergraduates and finding gender gaps therein. If the linear relationship between education and opinions about homosexuality continues, one might expect these gaps to (1) only expand (due to self-selection) when these students enter law school, and, concomitantly, (2) be reproduced in the American judicial context.

133. In Lani Guinier's Becoming Gentlemen, for example, she explores the experiences of female law students in part through interviews and anecdotes, anecdotes that include her own. LANI GUINIER ET AL., BECOMING GENTLEMEN (1997).

134. See Droddy & Peters, supra note 101.

135. At least two pieces of evidence lend credence to the idea that women's level of gender-consciousness may increase while in law school. The first is the American Bar Association's 1996 Report, which discusses the "isolating elements" of the American law school experience and the extent to which women feel more isolated than men. COMM'N ON WOMEN IN THE PROFESSION, supra note 9, at 11-12. One can infer that this may lead to increased gender-consciousness. The second piece of evidence is work done on African American public opinion which suggests that blacks' conceptions of "linked fate" have a positive associational relationship with education. "Linked fate" is the extent to which one views one's own self-interest as connected to one's group interest. See MICHAEL DAWSON, BEHIND THE MULE 77 (1994). By analogy, one might deduce that a similar trend may be present among women.
APPENDIX A: CASES

**Supreme Court**

**D.C. Circuit**
Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987)
Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993)
Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994)

**Second Circuit**
Able v. United States, 88 F.3d 1280 (2d Cir. 1996)
Boy Scouts of Am. v. Wyman, 335 F.3d 80 (2d Cir. 2003)

**Third Circuit**
Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000)

**Fourth Circuit**
Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996)

**Fifth Circuit**
Baker v. Wade, 769 F.2d 289 (5th Cir. 1985)
Gay Student Servs. v. Tex. A & M Univ., 737 F.2d 1317 (5th Cir. 1984)

**Sixth Circuit**
Equality Found. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995)

**Seventh Circuit**
Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989)

**Eighth Circuit**
Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996)

**Ninth Circuit**
Hensala v. Dep’t of Air Force, 343 F.3d 951 (9th Cir. 2003)
Holmes v. Cal. Army Nat’l Guard, 124 F.3d 1126 (9th Cir. 1997)
High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990)
Meinhold v. U.S. Dep’t of Def., 34 F.3d 1469 (9th Cir. 1994)
Meinhold v. U.S. Dep’t of Def., 131 F.3d 842 (9th Cir. 1997)
Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997)
Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991)
Watkins v. U.S. Army, 721 F.2d 687 (9th Cir. 1983)
Watkins v. U.S. Army, 847 F.2d 1329 (9th Cir. 1988)
Watkins v. U.S. Army, 847 F.2d 1362 (9th Cir. 1988)
Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989)136

Tenth Circuit
Jantz v. Muci, 976 F.2d 623 (10th Cir. 1992)
Rich v. Sec’y of Army, 735 F.2d 1220 (10th Cir. 1984)

Eleventh Circuit
Doe v. Pryor, 344 F.3d 1282 (11th Cir. 2003)
Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997)
Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985)
Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997)

Federal Circuit
Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989)

Arkansas
Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002)

Colorado
Evans v. Romer, 882 P.2d 1335 (Colo. 1994)

District of Columbia

136. In cases in which a judge ruled twice in the same case—and rendered the same
legal conclusion—only one score was recorded. Also, in Watkins v. United States Army, one
case was included in which the common law contract principle of “equitable estoppel” was
employed rather than an official due process right. This common law principle, however,
acted as a due process right in the case in all but name.

**Florida**
Cox v. State Dep’t of Health & Rehabilitative Servs., 656 So. 2d 902 (Fla. 1995)

**Georgia**
Christensen v. State, 468 S.E.2d 188 (Ga. 1996)

**Kentucky**
Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992)

**Louisiana**
State v. Smith, 766 So. 2d 501 (La. 2000)

**Massachusetts**
Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993)\(^{137}\)

**Missouri**
State v. Walsh, 713 S.W.2d 508 (1986)

**Montana**
Gryczan v. State, 942 P.2d 112 (Mont. 1997)

**New Hampshire**
Opinion of the Justices, 525 A.2d 1095 (N.H. 1987)

**New Jersey**
Dale v. Boy Scouts of Am., 734 A.2d 1196 (N.J. 1999)

**Oklahoma**

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\(^{137}\) This case indirectly implicates due process rights, relying on the "natural parents' legal rights" to reach their decision. See 619 N.E.2d at 320 n.5.
Oregon

Rhode Island

Tennessee
Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996)

Texas
State v. Morales, 869 S.W.2d 941 (Tex. 1994)

Vermont
APPENDIX B: RESULTS

TABLE B.1: REGRESSION RESULTS, METHOD 1

<table>
<thead>
<tr>
<th>METHOD 1</th>
<th>Score</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>t</th>
<th>p &gt; t</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td>-0.247</td>
<td>0.073</td>
<td>-3.36</td>
<td>.001</td>
<td></td>
</tr>
<tr>
<td>Level</td>
<td>0.165</td>
<td>0.064</td>
<td>2.56</td>
<td>.011</td>
<td></td>
</tr>
<tr>
<td>Method</td>
<td>-0.409</td>
<td>0.450</td>
<td>-0.91</td>
<td>.365</td>
<td></td>
</tr>
<tr>
<td>Birthyear</td>
<td>-0.002</td>
<td>0.004</td>
<td>-0.51</td>
<td>.613</td>
<td></td>
</tr>
<tr>
<td>Decyear</td>
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<td>0.006</td>
<td>2.37</td>
<td>.019</td>
<td></td>
</tr>
<tr>
<td>Dateappointed</td>
<td>-0.001</td>
<td>0.005</td>
<td>-0.33</td>
<td>.739</td>
<td></td>
</tr>
<tr>
<td>Party</td>
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<td>0.056</td>
<td>-5.18</td>
<td>&lt;.0005</td>
<td></td>
</tr>
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<td>Constant</td>
<td>-18.95</td>
<td>10.39854</td>
<td>-1.82</td>
<td>.069</td>
<td></td>
</tr>
</tbody>
</table>

"Level" refers to jurisdictional level—whether the legal conclusion was written by a federal or state judge. "Decyear" refers to the year the decision was rendered.

TABLE B.2: REGRESSION RESULTS, METHOD 2

<table>
<thead>
<tr>
<th>METHOD 2</th>
<th>Score</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>t</th>
<th>p &gt; t</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
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<td>0.105</td>
<td>-2.83</td>
<td>.005</td>
<td></td>
</tr>
<tr>
<td>Level</td>
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<td>0.089</td>
<td>1.95</td>
<td>.054</td>
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</tr>
<tr>
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<td>0.455</td>
<td>0.57</td>
<td>.568</td>
<td></td>
</tr>
<tr>
<td>Birthyear</td>
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<td>0.005</td>
<td>-0.51</td>
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</tr>
<tr>
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<td>0.008</td>
<td>0.17</td>
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<td></td>
</tr>
<tr>
<td>Dateappointed</td>
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<td>0.007</td>
<td>0.3</td>
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</tr>
<tr>
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<td>0.077</td>
<td>-4.74</td>
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</tr>
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<td>13.746</td>
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</tr>
</tbody>
</table>
## Table C.1: Logistical Regression Table

<table>
<thead>
<tr>
<th></th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>z</th>
<th>p &gt; z</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td>0.766</td>
<td>0.423</td>
<td>1.81</td>
<td>.07</td>
</tr>
<tr>
<td>Party</td>
<td>4.022</td>
<td>0.731</td>
<td>5.5</td>
<td>&lt; .0005</td>
</tr>
<tr>
<td>Race</td>
<td>0.925</td>
<td>0.439</td>
<td>2.11</td>
<td>.035</td>
</tr>
<tr>
<td>Constant</td>
<td>-0.879</td>
<td>0.516</td>
<td>-1.7</td>
<td>.088</td>
</tr>
</tbody>
</table>

## Table C.2: Probit Regression Table

<table>
<thead>
<tr>
<th></th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>z</th>
<th>p &gt; z</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td>0.434431</td>
<td>0.250844</td>
<td>1.73</td>
<td>.083</td>
</tr>
<tr>
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<td>&lt; .0005</td>
</tr>
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<td>0.268775</td>
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<td>-1.65</td>
<td>.099</td>
</tr>
</tbody>
</table>

138. All variables on this chart are binary.