

**Public Perception of Gender and Legitimacy on the  
Court: a Study of Descriptive and Substantive  
Representation**

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## **Abstract**

Conventional wisdom holds that officeholders or judges who share demographic traits like race or gender with a given group may approach their legislative or judicial work with a greater degree of sensitivity to the needs and interests of that group and that, by extension, members of that group may report greater trust in those lawmakers or members of the bench. Yet, little research exists to corroborate this notion that descriptive representation produces greater trust in representatives or judges, particularly on the Supreme Court. In this study, I seek an answer to the question as to whether descriptive representation matters to female onlookers of the Court on the issue of abortion rights. I gather and analyze data to determine whether female onlookers of the Supreme Court in particular exhibit greater trust for fellow women on the Supreme Court using survey questions that offer hypothetical case narratives with varying outcomes and ask respondents to rate their trust in justices coded implicitly by gender and ideology. I find no significant difference between the reaction of male and female respondents to male and female justices and conclude that no positive relationship appears to exist between women's reported degree of trust in justices and descriptive representation by gender; instead, justices' ideology seems to yield a significant effect on female respondents' degree of trust in their decisions on the issue of abortion. In a departure from conventional wisdom, these findings offer evidence to suggest that substantive representation may hold greater weight in determining the degree of women's trust in justices on the Supreme Court on the issue of abortion than descriptive representation by gender.

## ***Introduction***

Nearly 200 years after its founding, Sandra Day O'Connor joined the ranks of the Supreme Court as its very first female justice. Many celebrate her tenure on the bench as a milestone of progress toward a Court that more faithfully reflects the demographic makeup of the United States, along with those of justices Thurgood Marshall, Clarence Thomas, Sonia Sotomayor and Ruth Bader Ginsberg. Today, the nomination of Judge Ketanji Brown Jackson represents another remarkable milestone in the Court's long history. Among the lower courts, female judges and judges of color continue to make strides in closing the significant gap between the gender and racial makeup of the bench and the communities in their jurisdiction. On the

federal courts in particular, numbers of female judges and judges of color have increased but still shy far from representative of the population.<sup>1</sup>

Each nomination and confirmation to the Supreme Court brings expectations of how a new justice will carry out the work of judicial decision making informed by conventional wisdom and scholarship regarding descriptive and substantive representation. Scholars and onlookers of the Court often take for granted that justices will issue decisions with a higher degree of sensitivity toward the interests of those demographic groups of which they are a part relative to their counterparts on the bench outside those groups. The confirmation of female justices brings a set of assumptions reinforced by cultural and scholarly discourse alike regarding their proclivity to exhibit traits coded as feminine or defer to ideas classically ascribed to women in their voting behavior,<sup>2</sup> as well as the broadly accepted notion that women in large part will celebrate the confirmation of a woman and expect that she may issue decisions with greater sympathy for “women’s issues” than her male counterparts on the basis of their shared gender.

Yet, the degree to which the gender of a justice influences onlookers’ trust in their decisions represents an under-explored area of research on public perception of the Court - particularly in those cases in which gender plays a salient role. At minimum, ideological variance among female justices suggests that descriptive representation may not necessarily inspire greater trust among women in the decisions of fellow women on the Court on the basis of descriptive representation alone. Existing research has focused in large part on public perception of judges on the lower courts and women elected to political office and finds that female judges and officeholders broadly face more harsh criticism than do men in the same roles,<sup>3</sup> but the question remains as to the degree to which descriptive representation on the Supreme Court matters to women, particularly on issues relevant to their interests.

I attempt to answer this question using survey experiments that provide respondents with hypothetical Supreme Court cases and ask them to report the degree of their trust in judges’ decisions, focusing specifically on the issue of abortion, and coding the judges in the

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<sup>1</sup> [https://www.acslaw.org/?post\\_type=acsblog&p=7488](https://www.acslaw.org/?post_type=acsblog&p=7488)

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<https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2017/11/28132902/Public-Perceptions-of-Gender-Bias-in-the-Decisions-of-Female-State-Court-Judges.pdf>

<sup>3</sup> <https://www.jstor.org/stable/23012032>

hypotheticals as male and female by name. I vary the outcomes of the hypothetical cases in order to compare the effects of descriptive and substantive representation on respondents' reactions, allowing us to observe the degree of respondents' trust in liberal versus conservative justices and measure the effect of substantive representation. Ultimately, I aim to observe whether men and women exhibit reactions to justices' gender that vary significantly to determine the extent to which descriptive representation influences onlookers' perception of Court legitimacy. I am also interested in the effect of age on respondents' reaction to the survey questions.

### ***Descriptive v. Substantive Representation and Conventional Wisdom***

Existing research emphasizes the popularity and benefits of descriptive representation by political officeholders - or, the representation of constituents by members of the same demographic groups, including race, sex, and ethnic background.<sup>4</sup> Conventional wisdom holds that members of a group in political office will likely practice substantive representation on behalf of that group - advocating for the interests of the identity or community of which they are a part.<sup>5</sup> Jane Mansbridge of Harvard University describes a variety of benefits that arise from political representation by marginalized people of their own communities and groups, including bolstering the legitimacy of the office, increasing turnout and civic engagement among historically underrepresented groups, and bringing insight into the unique experiences and challenges faced by their group to the white male-dominated legislature (Mansbridge 1999).

Operating under this perspective on the benefits of descriptive representation, onlookers of the Supreme Court may expect that female Supreme Court justices would honor and pursue "women's interests" with greater attention and awareness than their male counterparts - an expectation that relies on the belief in a uniform set of interests that women generally share. Research by scholars Fix and Johnson in their article "Public Perception of Gender Bias in the Decisions of Female State Court Judges" published in the *Vanderbilt Law Review* demonstrates that many members of the public maintain their perception of female judges as inclined to defer more heavily to ideology than to law relative to male judges.<sup>6</sup> Professor Mary L. Clark argues that "women as women, bring something different to the bench, shaping judicial outcomes in

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<sup>4</sup> <https://plato.stanford.edu/entries/political-representation/#DesRep>

<sup>5</sup> Ibid

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<https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2017/11/28132902/Public-Perceptions-of-Gender-Bias-in-the-Decisions-of-Female-State-Court-Judges.pdf>

different ways” (Clark 2004). On a similar vein, professor Suzanna Sherry of Vanderbilt Law holds that women by nature of their gender will naturally defend and pursue “women’s interests” on the court, writing that “women’s experiences as women give them greater empathy and insight into women’s problems” (Sherry 1986).

Clark and Sherry’s arguments naturally subscribe to the logic of descriptive representation and its benefits, operating under the assumption that shared experiences based on a given trait prompt voting behavior informed by a sensitivity to those experiences. Other scholars commenting on the confirmation of women to the Supreme Court also argue that female judges share important aspects of their approach to judicial decision making and, by extension, may exhibit more sympathy for and attention to the unique legal problems women face. In her article “Men and Women on the Bench: Vive la Difference?” scholar Elaine Martin suggests that female judges will likely offer substantive representation on the court attuned to matters salient to women and thus issue more liberal votes than their male counterparts, especially in cases in which gender plays an meaningful role (Martin 1990). Yet, differences in voting behavior among female justices on the Court alone betray a lack of uniformity regarding their conception of “women’s interests,” and these celebratory ideas regarding the nomination of women to the Court suffer from a lack of prior research into whether female onlookers of the Court report significantly greater trust in female justices, presumably operating under this conventional notion that women will fight for the “interests of women” by virtue of their gender alone.

### ***Prior Research***

While a gap in research exists regarding trust in justices bolstered by descriptive representation among the demographic groups to which those justices belong, studies have yielded compelling evidence to elucidate the impact of justices’ race and gender on public perception of their qualifications and competency. A 1994 study on court diversity by Sheldon Goldman and Matthew D. Saraonson finds that much of the general public regards Black and female judges as “nontraditional” and by extension holds that the “traditional” judge is white and male (Sheldon et. al 1994). A similar study by Susan B. Haire conducted between 1977 and 1994 and described in her 2015 book *Diversity Matters: Judicial Policy Making in the U.S. Courts of Appeals* finds that female and Black judges on the US Court of Appeals received lower

evaluation scores issued by the American Bar Association than their white male counterparts (Haire 2015). In their 2011 study conducted in Nevada on the equity of judicial performance evaluations by race and gender, Rebecca D. Gill, Sylvia R. Lazos and Mallory M. Waters analyze judicial evaluation scores of sitting area judges provided by attorneys for the Las Vegas Review Journal. While judges' rankings on reversals, experience, and ethical complaints did not vary significantly by gender, their analysis finds that female judges received scores significantly lower than male judges ranked in the survey (Gill et. al 2011). In our study, I seek an answer to the question as to whether these disparate responses to judges by gender in matters of competency and approach to judicial decision making extend to a more positive reaction by survey respondents to hypothetical judges of the same gender in terms of trust, lending support to the notion that descriptive representation by gender matters to onlookers of the Court and especially to women in cases relevant to "women's interests" like birth control access, equal pay, and abortion.

In their article "Public Perceptions of Gender Bias in the Decisions of Female State Court Judges," Vanderbilt scholars Michael P. Fix and Gbemende E. Johnson present findings from their study on the effect of judges' gender on public perception of their decisions, expanding on existing research on the impact of gender on voting behavior and judges' approval ratings by lawyers and the American Bar Association. The study specifically focuses on cases in which gender is relevant, especially those concerned with reproductive rights and family law. As in our study, the researchers present respondents with hypothetical cases and vary judges' gender and case outcomes, seeking to determine to what extent the public seems to believe that the gender of a gender biases his or her ruling and test the conventional notion that onlookers of the courts perceive female judges as more heavily reliant on ideology than their male counterparts, who defer instead primarily to the letter of the law. Ultimately, the study finds that substantive representation seems to play an increasingly important role in public perception of the legitimacy of the courts.<sup>7</sup>

Results from this study demonstrated that respondents viewed both male and female judges as biased by their gender in various cases and that judges' votes yielded a greater effect

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<https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2017/11/28132902/Public-Perceptions-of-Gender-Bias-in-the-Decisions-of-Female-State-Court-Judges.pdf>

on respondents' reaction than their gender.<sup>8</sup> The results also elucidated the importance of context, as respondents reacted more strongly to the gender of litigants than judges and reported greater trust in those outcomes that favored litigants of their own gender.<sup>9</sup> Though the researchers note that "perceptions of gender influences in judicial decisionmaking are stronger when dealing with women's issues" (Fix and Johnson 2017), they ultimately find no significant difference between respondents' reaction to case outcomes by judge gender and posit that "the assignment of traditional gender stereotypes to the role of judge may be decaying over time, as respondents appeared to care less about the gender of the judge and more about the outcome of the case" (Fix and Johnson 2017). My study expands on this finding, and I expect to yield a similar result - that substantive representation outweighs the importance of descriptive representation by gender on the Supreme Court, especially for women reacting to hypothetical cases on the issue of abortion. I predict that, though gender may play a role in the degrees of difference between hypothetical judges of similar ideologies - i.e., male liberals may trust male liberal justices more than female liberal justices - the gender of a justice will not outweigh the content of his or her decision in terms of respondents' degree of trust in that vote.

### ***Hypotheses***

I seek to determine the extent to which descriptive representation by gender matters to onlookers of the Supreme Court, focusing in particular on female respondents reacting to hypothetical cases on abortion. I test two hypotheses. First, I expect that the gender of judges will not produce significantly different reactions among male and female respondents by gender in terms of their degree of trust in hypothetical justices; rather, substantive rulings should wage a significant effect on the reaction of respondents and especially female respondents. Second, I expect this finding to remain consistent across age groups.

### ***Method***

I collected my data from a survey which included questions to identify respondents' race, gender, level of education, political partisanship, and age and allowed me to control for these factors. The survey provided respondents with hypothetical court cases in which I coded the

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<sup>8</sup> Ibid

<sup>9</sup> Ibid

gender of judges implicitly by name. The cases vary broadly in subject matter. This paper focuses on those cases dealing with the matter of abortion in order to measure the impact of justices' gender on respondents' level of trust in those justices issuing votes pertinent to women's interests. After reading the cases, the survey prompted respondents to evaluate the judge and the Court in light of his or her decision. The survey in specific asked respondents to rate their level of trust in the hypothetical justice and in the Court as a system after reading the case summary. In addition, the survey prompted respondents to rate the degree to which they believed the hypothetical judge was "biased" in reaching their decision. Finally, the survey asked a number of questions to gauge respondents' beliefs about the court, political leanings, and prejudices toward members of various demographic groups, including race and gender.

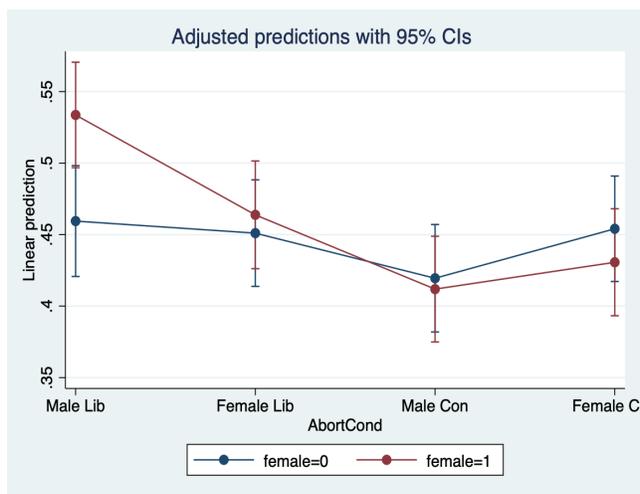
I gathered this data between October 21st and October 24th, 2021. I distributed the survey using the survey tool offered by Lucid Theorem, which reaches respondents using a quota system that creates a sample approximating the U.S. population regarding age, gender, data, ethnicity and region using data from the census. Though I did not use random samples, the survey groups created by Lucid Theorem offer highly reliable data from experimental analyses like ours and a more accurate representation of political variable like partisanship and ideology than that yielded from other convenience samples. The mean age represented in my sample was 46.3 years. Broken down by race, 71% of the sample identified as white, 12% identified as Black, and 11% identified as Hispanic. By gender, the sample was split in half. 42% of the sample reported holding a 2-year college degree or higher. 49% of the sample self-identified as Democrat, 14% as Independent, and 37% Republican. By ideology, 35% of the sample self-described as liberal, 36% as moderate, and 29% as conservative.

I am interested in the reaction of respondents to justices of their same gender ruling on issues in which gender represents a salient factor and seek specifically to determine whether descriptive representation yields a significant impact on female onlookers' trust in individual justices. I expect to find no significant difference between the reaction of male and female respondents to judges on the basis of gender and predict that, though gender biases may produce greater trust overall in male justices, substantive rulings will wage the greatest observable effect on respondents' reported levels of trust.

## ***Results***

My survey results yielded little data of statistical significance, lending support to my expectation that I would not find a dramatic difference between male and female respondents' reactions to justices of different genders that would indicate a strong positive relationship between trust in judges and descriptive representation by gender. I do not find that women report greater trust in female justices. Rather, I find that substantive rulings produce the greatest effect on bolstering trust and the most significant differences between male and female respondents' reactions. These findings support my expectation that descriptive representation on the Court by gender would not outweigh the importance of substantive representation for female respondents, who would exhibit greater concern for the content of justices' rulings and may even display greater trust for male justices, in accordance with existing research on gender biases in perception of judges' competency by gender.

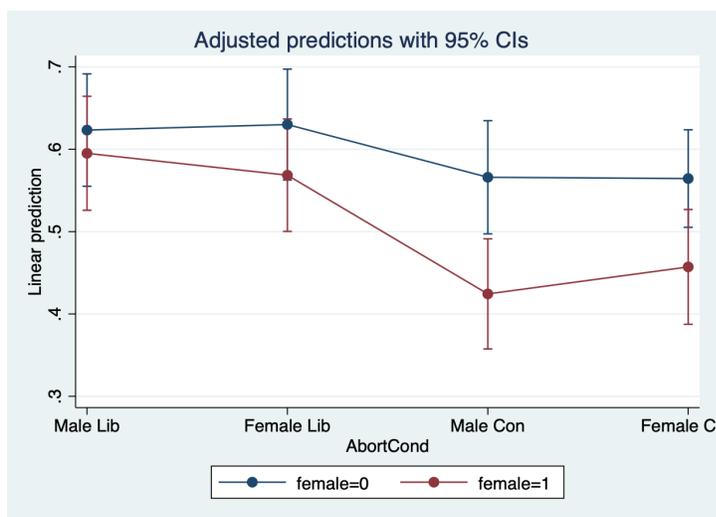
### ***Abortion without Age or Party - Trust***



The graph above displays results from my survey question prompting respondents to report their degree of trust in hypothetical justices issuing rulings that vary by ideology on a hypothetical abortion case, represented here on the Y axis from least (.35) to greatest (.55) degree of trust. Here, I find no statistically significant difference between the reactions of men and women, represented in blue and red respectively, from the rulings of female liberal, male conservative and female conservative justices. I also find that women reported greater trust in the male liberal justice ruling on abortion than did men, as well as lower trust in female liberal

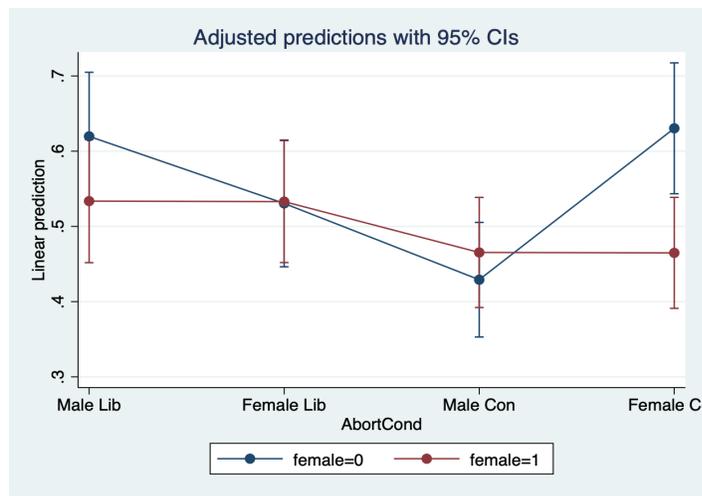
justices. This finding lends support to my hypothesis that substantive rulings would produce the most significant effect on levels of reported trust and to our expectation that gender bias may even produce greater trust in male justices among female respondents between two justices of the same ideological category. In this part of the data, I find that descriptive representation by justices ruling on an case pertinent to women's interests does not produce a statistically significant increase in female respondents' trust. Women did not report greater trust in neither the female conservative nor female liberal justice, which would indicate that descriptive representation by gender waged a significant positive effect.

### *Trust - Generation 2*



This graph displays results from respondents in Generation 2, the age group of 25 to 40, reporting their degree of trust in justices again ruling on a hypothetical abortion case. As in the previous graph, the Y axis displays reported degree of trust in justices from least (3) to most (7) trust. I find a statistically significant difference between male and female respondents' reaction to the hypothetical justices only in that of the male conservative justice, for whom men reported a higher degree of trust than women. Again, I do not find here that women exhibit a higher degree of trust in female justices than do men or statistically significant differences between degrees of trust for male and female justices of the same ideological identification. I find that female respondents report slightly less trust in conservative justices than liberal justices. Though slight, this difference lends to support to my expectation that substantive representation would yield a more visible impact on women's degree of trust in judges from our hypotheticals.

### *Trust - Generation 3*



This graph displays results from the same hypotheticals on abortion among respondents in Generation 3, the age group of 41 to 56 years. Here, I find that male respondents reported greater trust in female conservatives ruling on abortion than did women in the same age group in support of our hypothesis that descriptive representation by gender may not necessarily inspire greater trust in a justice of the same gender, as conventional wisdom might suggest. Had descriptive representation waged a significant impact on female respondents' degree of trust, the opposite result may have appeared in the data - or, a greater degree of trust in female conservative justices among women than men on the basis of their shared gender. Instead, I find no significant difference in degree of trust reported by women in any particular justice - again offering support to my hypothesis that the gender of judges would not produce significant differences in the reactions of male and female respondents by gender in terms of their degree of trust in hypothetical justices or among individual justices for respondents of a single gender. In combination with the previous graph displaying results from Generation 2, the 25 to 40-year age group, this data offers support to my hypothesis that my findings would remain consistent across age groups.

### *Conclusion*

While the confirmation of women to the Supreme Court undoubtedly carries importance worthy of celebration for many women, these results from my survey lend support to my hypothesis that descriptive representation by gender alone may not wage as significant an impact on the degree of trust female onlookers of the Court report in individual female justices as conventional wisdom and scholarship may hold and that substantive representation in the form of votes aligned with a distinct ideology - i.e., liberal or conservative - yield a greater impact on onlookers' perception of legitimacy on the bench. Also in support of my hypothesis, this finding remains consistent across age from 25 to 56. As expected, I did not find significant differences between the reaction of male and female respondents to male and female justices, nor did women report greater trust in female justices that would reasonably have arisen from a positive relationship between descriptive representation by gender and perception of legitimacy. My conclusions fall in line with those reached by Vanderbilt scholars Michael P. Fix and Gbemende E. Johnson in their study on public perception of the Court by gender - namely, that "respondents appeared to care less about the gender of the judge and more about the outcome of the case" (Fix and Johnson 2017).

My study leaves much room for additional research. My survey includes hypothetical cases focused on other issues in which gender plays a relevant role outside the matter of abortion, and an analysis of these cases in combination with the data from hypothetical cases on abortion would offer a more broad view of the effect of gender salience in cases on respondents' reaction to the gender of justices. This increase in variety of case subject matter would expound on Fix and Johnson's conclusion that context plays an important role in public perception of the Court and offer an opportunity for comparison by issue. In addition, Fix and Johnson find that the gender of a litigant represents a meaningful factor in respondents' reaction to hypothetical cases, concluding that a respondent of the same gender as a hypothetical litigant exhibits a more positive reaction to rulings in favor of that litigant. This finding, too, represents an opportunity for further research to complicate and increase the complexity of my study. My study would also benefit from an additional focus on other demographic characteristics relevant to descriptive representation, particularly race.

Still, this study begins to fill a gap in existing research on the importance of descriptive and substantive representation by gender on the Court and challenges the conventional notion that women in particular expect that fellow women on the Court will reliably vote with a higher

degree of sensitivity to issues relevant to them, which operates under the nebulous concept of a universal set of women's interests and desires. While my findings do not dispute the symbolic importance of a more gender diverse Court or prior research to demonstrate pervasive bias in perception of the competency of female judges on the basis of their gender, they offer evidence to suggest that conventional wisdom may not align with the actual role of descriptive representation in onlookers' reaction to Court decisions and the justices that issue them.

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