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Well said!: Professional norms and female justices' evaluation of lower court opinion text

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Abstract
Supreme Court justices' opinions shape the contours of case law binding throughout the United States. Importantly though, justices do not write their opinions de novo. Rather, they routinely draw on lower court judges' opinion language when crafting opinions. In doing so, justices stretch the substantive impact of lower court judges' reasoning beyond the boundaries of their circuits. However, justices do not draw equally on lower court opinions; while previous work often ties this to judges' professional qualifications, we draw on work stressing female supervisors are more likely to enforce professional norms on subordinates. We argue female justices are more likely to draw upon lower court opinions complying with professional norms because of greater implicit norm internalization over the course of their careers. We test this proposition with a quantitative textual analysis of the justices' opinions and lower court opinions. We find support for our argument. This raises normative concerns about the overall impact of greater judicial diversity.

1 | INTRODUCTION

Scholars, policymakers, and presidents have highlighted the normative value of judicial diversity for decades (see for instance: Abraham, 2008; Solberg & Diascro, 2020; Songer, Davis, & Haire, 1994). Bringing diverse voices into the judicial decision-making process as counsel (Gleason & Smart, 2023), law clerks (Kromphardt, 2017), and jurists (Boyd et al., 2010) prompts descriptive representation (Pitkin, 1967). This is consequential for public support and perceptions of legitimacy (see for instance: Badas & Stauffer, 2019; Ladam et al., 2018). Diversity can also lead to substantively different outcomes in some instances, though it is conditioned by the judicial hierarchy (Boyd, 2013; Boyd et al., 2010; Scheurer, 2014). Save for the Supreme Court, all federal jurists are subject to subsequent review from superior courts (Songer, Segal, &

Cameron, 1994). Though rare, review can enhance or inhibit diverse jurists' impact on case law both within the case at hand and across circuits (e.g., Choi et al., 2008–2009; Collins et al., 2015; Sen, 2014). Accordingly, diverse jurists must be favorably evaluated by justices on the Supreme Court to substantively impact case law.

When justices consider appeals, they are ultimately evaluating lower court judges' legal reasoning and rationale (Songer, Segal, & Cameron, 1994). Evaluations in hierarchies, whether in the federal judiciary or otherwise, are complex processes hinging in part on subordinates' compliance with professional norms (see for instance: Cooper, 1997; Eagly & Carli, 2007). Professional norms are implicit expectations governing behavior in a given occupation inclusive of manner of dress, type of speech, body posture, and others (e.g., McCluney et al., 2021). For jurists, professional norms stress dispassionate analysis of the issue at hand (George, 1993; Varsava, 2021). Intuitively, complying with professional norms should lead to professional success. However, professional norms are often conditioned by *who* is doing the evaluation. Women in male dominated professions often internalize professional norms more than their male peers (e.g., Ellemers, 2014; Ellemers et al., 2004; Faniko et al., 2021). Consequently, high ranking women, such as justices, are often the most ardent enforcers of professional norms albeit on an unconscious level (Faniko et al., 2021; Veldman et al., 2017). Thus, increased diversity on the Bench may make it more difficult for lower ranked members to be favorably evaluated. This should be particularly problematic for lower ranked women, who must balance competing professional and gendered expectations (e.g., Rhode, 1994). This raises a number of questions about what changes are needed to truly make the federal judiciary more inclusive as an institution and allow diverse voices to permeate.

We could focus on professional norms in the judiciary in numerous modalities. However, we focus on language here. Language is an essential aspect of jurists' work (Tiller & Cross, 2006) and is individualized to each judge (Budziak & Lempert, 2023). Moreover, language is the only formal way lower court jurists communicate with justices about cases (Hinkle et al., 2012). Additionally, opinion text is the key way jurists have a lasting impact beyond the resolution of the immediate case (Maltzman et al., 2000). Accordingly, when justices incorporate language from lower court opinions, the substantive impact of the lower court judge stretches beyond the boundaries of her circuit to constrain other jurists and actors (Corley et al., 2011; Tillman & Hinkle, 2018).

We utilize quantitative textual analysis of all signed opinions appealed from the federal courts of appeals from 1993 to 2018 to examine how lower court judges' compliance with professional norms shapes justices' propensity to incorporate that language into their own opinions. Via the Linguistic Inquiry Word Count software (hereafter: LIWC), we extract professional norm compliance from lower court opinions (Pennebaker et al., 2007). We subsequently use the WCopyfind software to determine the percentage of opinions "copied" from the lower court opinion into justices' opinions (Bloomfield, n.d.; Corley, 2008). We find female justices are more likely than their male counterparts to incorporate language from lower court opinions written by both male and female judges adhering to professional norms.

2 | PROFESSIONAL NORMS AND EVALUATIONS OF LOWER COURT JUDGES

Judicial outcomes are often operationalized in terms of winners and losers; however, the true impact of a case is found in opinion text (Budziak et al., 2019; Corley, 2008). The contours of opinion language are consequential for both the resolution of the immediate dispute and as precedent for future courts (Corley & Wedeking, 2014; Hansford & Spriggs, 2006). Though opinions are collaborative efforts, authors have a great deal of power over their structure and language incorporated (Maltzman et al., 2000). This means authors choose their phrasing

carefully (Hinkle et al., 2012). However, as legal generalists with finite time, justices draw on the record for background and phrasing (Corley, 2008; Feldman, 2017). While the record contains a multitude of sources, scholars increasingly note the privileged place of lower court opinions (Bowie & Savchak, 2022; Corley et al., 2011; Feldman, 2017). Lower court opinions are intuitively attractive because they perform the same functions as justices' own opinions. Whereas briefs expressly advocate for an attorney's client, opinions consider multiple legal perspectives in an ostensibly dispassionate analysis in search of the legally "correct" outcome (George, 1993; Lebovits & Hidalgo, 2009; Strong, 2015). Indeed, lower court opinions are effectively "first drafts" for justices.

While justices draw heavily on lower court opinions (Feldman, 2017), they do not do so uniformly. Many factors shape justices' propensity to utilize a given opinion (see for instance: Bowie & Savchak, 2022; Corley et al., 2011; Owens & Wedeking, 2011). Compliance with normative expectations plays a pivotal, but implicit, role (e.g., Black et al., 2016; Gleason et al., 2019). In general, jurists' professional norms value direct and dispassionate analysis (Black et al., 2016; Corley & Wedeking, 2014; Enquist & Oates, 2013; George, 1993; Lebovits & Hidalgo, 2009). Complying with these expectations makes lower court opinions more attractive to justices.

The precise manner in which norms manifest and are evaluated differs by context. In the federal judiciary, which is historically male dominated, professional norms are coextensive with male gender norms. As such, women must navigate a double bind between the two (Rhode, 1994). While the double bind is common to women in a host of roles at the Court (e.g., Gleason, 2020), its precise manifestation is context sensitive (Gleason, 2024; Gleason & Smart, 2023). Critically, prior work is attorney centric. Any explanation for jurists must consider the unique impact of the judicial hierarchy.

Women in supervisory roles in male dominated professions often internalize professional norms and unconsciously enforce them on subordinates, both male and female, more vigorously than similarly situated men (e.g., Derks et al., 2010; Ellemers et al., 2004; Faniko et al., 2021). This is because of the more difficult path women face entering traditionally masculine spaces. Thus, while a number of studies suggest increased judicial diversity will usher in a fully different voice (e.g., Collins et al., 2010), we argue the internalization of professional norms over the course of law school, practice, and time on the bench (e.g., Haire & Moyer, 2015; Norgren, 2018) conditions female justices to unconsciously adhere to and enforce professional norms more vigorously than their male counterparts (e.g., Jones, 2016). Accordingly, we posit female justices are more likely to draw on lower court opinions complying with professional norms, norms coextensive with male gender norms, whether they be written by male or female lower court judges. This demonstrates increased diversity does not automatically translate into a different voice (e.g., Sterk et al., 2018). We now turn to a detailed account of our expectations.

3 | PROFESSIONAL NORMS AND LOWER COURT OPINION SUCCESS

Judicial decision making's key output is not the binary distinction of whether a party wins or loses; it is opinion text. Opinion text establishes binding precedent constraining future courts throughout the judicial hierarchy (Hansford & Spriggs, 2006) and shapes other actors' actions (Corley & Wedeking, 2014; Owens & Wedeking, 2011). Consequently, opinion writing is a strategic dialogue with exacting calculations (Hinkle et al., 2012; Maltzman et al., 2000; Murphy, 1964). In this process, justices utilize party briefs (Black et al., 2016; Corley, 2008), amicus briefs (Collins et al., 2015; Spriggs & Wahlbeck, 1997), foundational legal texts (Corley et al., 2005), oral arguments (Johnson et al., 2006; Ringsmuth et al., 2013), and lower court

opinions (Bowie et al., 2024; Bowie & Savchak, 2022; Corley et al., 2011). With respect to written sources, justices often incorporate language verbatim into their opinions (Feldman, 2017). Accordingly, any source utilized exercises influence over the content of that justice's opinion and shapes case law (Corley, 2008).[1] Thus, a lower court judge leaves her largest impact not via affirmation on appeal, but by having language incorporated into justices' opinions.

While scholars increasingly explore how written language at the Court shapes outcomes (see for instance: Corley & Wedeking, 2014; Gleason et al., 2019; Wedeking & Zillis, 2018), relatively few studies explore justices' use of lower court opinions. This is surprising as lower court opinions intuitively hold a privileged place in the opinion writing process because of the formal hierarchical link between justices and lower court judges (e.g., Hazelton et al., 2016; Songer, Segal, & Cameron, 1994). Additionally, lower court opinions are especially attractive because the skills needed for judging are distinct from those needed for advocacy (Sheppard, 2008; Strong, 2015). Whereas briefs explicitly advocate for client interests (e.g., Collins & Martinek, 2015), lower court and justices' opinions are to be impartial and collaborative evaluations of competing interests via careful analysis (Aldisert, 2009; George, 1993; Lebovits & Hidalgo, 2009; Varsava, 2021). These skills, while covered to some extent in law school, differ from effective brief writing. This stark shift renders opinion writing one of the hardest adjustments when transitioning to the bench (George, 1993). To this end, numerous guidebooks and "how-to" primers by law professors and jurists alike exist (Abrams, 2010; Aldisert, 2009; Federal Judicial Center, 2013; Wanderer, 2002). While jurists can (and do) disagree over best practices, they agree opinion format and structure are pivotal (e.g., Posner, 1995; Terrell, 1999; Wald, 1995).

Opinions are highly formulaic. Emotion is best avoided.[2] Simple and direct language is best, though challenging to put into practice. Justice Thomas sums up the challenge of legal writing as "putting a ten dollar idea in a 5 cent sentence" (Friedersdorf, 2013). Judge Aldisert emphasizes careful editing with an eye toward clarity and precision. One anonymous judge interviewed for the FJC's (, 2013) new judge guide referred to editing opinion as "clearing away … [the] underbrush" (25). Ultimately, "good" opinions should be direct and in relatively neutral terms (Enquist & Oates, 2013; Lebovits & Hidalgo, 2009; Posner, 1995). Thus, professional sounding opinions are defined by underlying structural features.

The utility of any lower court opinion is context dependent (Corley et al., 2011; Feldman, 2017; Hinkle et al., 2012). This is highlighted by the limited literature on the topic. Corley et al. (2011) find justices are most likely to borrow language from lower federal court opinions written by ideologically proximate judges with clear writing and high ABA scores.[3] Context here can be grouped as case-level factors, the external political environment, and jurist-level factors. Collectively, individual level factors are key predictors of jurists' writing style (Budziak et al., 2019) and language is pivotal to the law (Tiller & Cross, 2006). Beyond these factors though, there is evidence that a number of unconscious factors may also be at play.

In a host of contexts, male and female jurists behave differently. Women write longer opinions containing more citations than men (see for instance Boyd, 2015; Haire et al., 2013; Leonard & Ross, 2016; Moyer et al., 2021; Moyer et al., 2020). Moreover, female authors' majority opinions tend to command larger coalitions (Leonard & Ross, 2020). Logically, justices should then draw more extensively on female judges' lower court opinions (e.g., Corley et al., 2011); however, women are less likely to be assigned published opinions and are less likely to be cited (Szmer et al., 2023; Tillman & Hinkle, 2018). Women also receive lower ABA scores on average, further reducing the probability of favorable evaluation (Sen, 2014). This juxtaposition highlights that evaluators implicitly draw on gendered expectations.

Despite increasing diversity at all levels, the American legal profession is decidedly male in culture broadly (Collins et al., 2017; Szmer et al., 2021). Though overt sexism is largely a thing of the past (e.g., Haire & Moyer, 2015; Norgren, 2018), implicit sexism remains (e.g., Gleason & Smart, 2023; Patton & Smith, 2020). This is the product of professional norms

internalized subconsciously over the course of a career, particularly in the upper levels of the judicial hierarchy (Szmer et al., 2010; Szmer et al., 2013; Szmer et al., 2023).

Evaluations in professional and personal contexts are implicitly guided by compliance with normative behavioral expectations learned as early as childhood (Cunningham, 2001). Violating norms is usually met with sanctions ranging from social consequences to lower success (see for instance: Carli, 2001; Eagly et al., 1992; Eagly & Wood, 2012). Moreover, a robust literature from management and psychology stresses norm compliance predicts outcomes (see for instance: Carli, 1990; Ford et al., 2021; Gorman, 2005). Specific to the Court, Gleason and his colleagues note female attorneys are more successful when eschewing professional norms for gender norms (Gleason, 2020; Gleason et al., 2019). While norms can exist for any role or identity, two of the most pivotal in the legal profession are professional and gender norms (e.g., Black et al., 2016; Gleason, 2020; Patton & Smith, 2020).

While all supervisors enforce professional norms in areas as diverse as law enforcement (Veldman et al., 2017), academia (Ellemers et al., 2004; Faniko et al., 2021), and the corporate sector (Derks et al., 2010), Faniko et al. (2016) note senior women enforce professional norms more than their male counterparts on both male and female subordinates (see also, Sterk et al., 2018; Veldman et al., 2021). This work collectively suggests female justices should be most likely to enforce professional norms on lower court judges. Thus, the judiciary likely becomes more professional as the bench diversifies. While it is intuitive that a judge deviating from professional norms should be less successful, navigating professional expectations is more difficult for women because professional norms are often at odds with female gender norms.

Gender norms are subtle expectations about how men and women should act in a host of contexts (Eagly & Carli, 2007). For example, women are expected to smile and avoid angry facial expressions whereas it is acceptable for men to display anger (Boussalis et al., 2021). Women should avoid conflict, especially initiating it (e.g., Szmer et al., 2013; Wofford, 2017). Men's language should be forceful and persuasive whereas women's should be conciliatory and interpersonally warm (Chaplin, 2015). Professional and gender norms are coextensive for men in many contexts; to act professional is to act male. For women, professional and gender norms are often at odds, placing them in a double bind (Rhode, 1994). This is particularly true in masculine workplace cultures (Ellemers et al., 2004). Despite considerable increases in the percentage of women as counsel and jurists (ABA, 2018; Haire & Moyer, 2015), the legal profession retains an overall masculine culture (Collins et al., 2017; Gleason & Smart, 2023; Szmer et al., 2021).

While greater diversity in the legal profession has ushered in different judicial decision-making approaches under some conditions, (e.g., Boyd et al., 2010), increased presence does not automatically increase women's success within organizations (Childs & Krook, 2006). To succeed in an organization, women often must conform with prevailing professional expectations (Sterk et al., 2018; Veldman et al., 2021). Accordingly, women often internalize professional norms and unconsciously become those norms' most ardent enforcers (Faniko et al., 2021). A similar process is likely at play in the federal judiciary.

Justices effectively serve as supervisors for lower federal court judges via judicial review (Hazelton et al., 2016; Songer, Segal, & Cameron, 1994). As people enter the legal profession and ascend the ranks from attorney to judge, they internalize professional norms and unconsciously enforce them. Because of their "outsider" status, women do so to a greater degree than men (e.g., Anzia & Berry, 2011; Jones, 2016; Leonard & Ross, 2016; Tillman & Hinkle, 2018). Accordingly, we expect female justices will be the most strident enforcers of professional norms in their evaluations of lower court judges (e.g., Faniko et al., 2016).

To be clear, we do not contend senior women in organizations consciously hold subordinates to professional norms more so than senior men. Norms are typically generated as a manner of self-interest (Posner, 2002) and organizations often generate collective norms as a code of conduct (Chung & Rimal, 2016). For the judiciary, collective norms stress professional writing

and abstaining from commenting on politics. However, people translate collective norms *as they understand them* to the individual level (Chung & Rimal, 2016; Lapinski & Rimal, 2005). Moreover, people who strongly identify with a group are more likely to both internalize norms (Lapinski & Rimal, 2005) and then adamantly enforce them (e.g., Faniko et al., 2016). We contend the process of norm enforcement in the judiciary, as in a host of other contexts, occurs at the unconscious level.

While there are routine social interactions between jurists on and between courts (Collins et al., 2010; Hazelton et al., 2023), the only formal way lower court judges can communicate with their superiors about a given case is through opinion language (Budziak & Lempert, 2023; Tiller & Cross, 2006). Critically, language is also a key site where norm compliance is evaluated (Cheng et al., 2011). Whereas gender norms rather than professional norms are powerful predictors of attorney brief success (Black et al., 2016; Gleason et al., 2019), this likely does not translate to jurists' opinions. Advocacy and judging are fundamentally different pursuits; attorneys are zealous advocates and jurists strive for impartial arbitration (George, 1993). Opinion writing is accordingly formulaic and difficult to master (Abrams, 2010; Aldisert, 2009; FJC, 2013; Sheppard, 2008); jurists often cite it as the most challenging part of transitioning to the bench (Strong, 2015). To this end, judicial guides stress judges should utilize dispassionate and highly structured language (Wanderer, 2002). Consequently, opinion writing is a key site where professional norms are implicitly performed (e.g., Enquist & Oates, 2013; George, 1993; Lebovits & Hidalgo, 2009). Over the course of a career, jurists internalize these norms and their expectations of others. Since superiors have internalized norms over the course of their careers, this ultimately has consequences for how lower court judge opinions are evaluated by justices.

While a formulaic process may suggest uniform opinions devoid of individuality and markers like emotion, there is considerable variation in the way male and female jurists write and are thus evaluated (e.g., Choi & Gulati, 2005; Phillips, 2020; Sulam, 2018). This often occurs via function words (Cheng et al., 2011; Jones, 2016; Pennebaker, 2011). Function words are seemingly benign parts of speech inclusive of prepositions, articles, pronouns, conjunctions, and auxiliary verbs (ex. "at," "she," "and," "be"). Thus, while function words are the "synthetic backbone of language" (Gonzales et al., 2010), they convey little meaning on their own. Indeed, they were historically treated as "junk" words in text-analysis (Jones, 2016).

While work on function words spans fields (e.g., Pennebaker, 2011), scholars often utilize them to explore law clerk contributions to opinions (Choi & Gulati, 2005; Phillips, 2020; Rosenthal & Yoon, 2010–2011; Sulam, 2018). More specific to the current context, function word usage varies between people generally (Phillips, 2020) and between men and women particularly (Chung & Pennebaker, 2007; Mulac & Lundell, 1994). Importantly, in increasingly masculine political spaces, function word usage is less common (Jones, 2016).

Women use more function words than men. This expectation is so deeply ingrained in gender norms that readers can predict the sex of an unknown author by implicitly noting function word usage with a high degree of accuracy (see for instance: Chung & Pennebaker, 2007). Since opinion authorship is known to the justices, those fingerprints do not signal *who* the author is. Rather, they serve as an unconscious signal of whether an author is complying with professional norms. As justices read lower court opinions, a myriad of factors implicitly shape evaluations (Corley et al., 2011). Norm compliance by lower court jurists is a key component. While all justices enforce professional norms, senior women in male dominated occupations are particularly likely to internalize and more vigorously enforce them (e.g., Faniko et al., 2016; Lapinski & Rimal, 2005). Thus, female justices likely unconsciously enforce professional norms on subordinates. This poses few problems for male lower court judges; professional and gender norms are coextensive for them. However, this poses difficulties for female lower court judges who must navigate competing expectations.

Given this, we expect:

Hypothesis 1. Female justices are more likely to utilize language from lower court opinions which comply with professional norms.

4 | METHODS

We test our expectations with all signed Supreme Court majority, concurring, and dissenting opinions in cases with either a signed majority or judgment opinion from the 1993–2018 terms and the corresponding federal appellate court majority opinions from the 11 numbered circuits and the District of Columbia Circuit.[4] In order to isolate the impact of lower court judges' compliance with professional norms, we restrict analysis to cases with only one federal appellate court decision in the prior record.[5] We generate a list of opinions via the Supreme Court Database and then collect opinion text from Westlaw (Spaeth et al., 2021).[6] The individual Supreme Court opinion: lower court majority opinion dyad is our unit of analysis. This results in 903 observations.

4.1 | Dependent variable

Our dependent variable is the percentage of the lower court's opinion incorporated into the justice's opinion.[7] We create this measure following the coding rules employed by previous studies examining how lower court opinions shape high court opinion content (e.g., Bowie & Savchak, 2022; Corley et al., 2011; Savchak & Bowie, 2016). Using the WCopyfind software (Bloomfield, n.d.), we measure the percentage of the Court's majority opinion "plagiarized" from the corresponding lower court opinion (Corley, 2008).[8] 4.4% of the average opinion appears in justices' opinions, although values ranges from 0% to 31%.

4.2 | Primary independent variables

Our primary independent variables focus on the justice authoring the Supreme Court opinion and the extent to which the lower court opinion complies with professional norms. We measure opinion author sex with a dichotomous variable set to "1" if the opinion is authored by a female justice and "0" for a male justice (FJC, 2021). Guided by previous work on the underlying psychological features of attorney briefs (Black et al., 2016; Gleason et al., 2019), we analyze each lower court opinion with LIWC. LIWC extracts multiple features of language, such as cognitive complexity, affect, and prepositions (Pennebaker et al., 2007). Even within LIWC, there are numerous ways to measure norm compliance. For example, many studies of attorney success utilize affective content (e.g., Gleason, 2020; Gleason, 2024; Gleason & Smart, 2023). However, norm manifestation is heavily context dependent (e.g., Gleason, 2024; Gleason & Ivy, 2021; Jones, 2016). As noted above, the fundamental differences between opinion writing and brief writing render affect inappropriate. Function words are a better option. Accordingly, we utilize LIWC's function word measure to note professional norm compliance. Lower values are coextensive with professional norms (George, 1993; Gleason et al., 2019; Jones, 2016).[9] To illustrate, consider the following two excerpts from cases in our data. The first, *Shady Grove Orthopedic v. Allstate Insurance*[10] written by Judge Rosemary Pooler, contains low function word usage. The second, *Henson v. Santander Consumer USA*[11] written by Judge Paul Niemeyer, contains high function word usage. Function words appear in bold.

It is evident **that by including the** penalty exception **in** CPLR 901(b), **the** Legislature declined **to** make class actions available **where** individual plaintiffs **were** afforded sufficient economic

encouragement **to** institute actions (**through** statutory provisions awarding **something beyond or** unrelated **to** actual damages), **unless a** statute expressly authorized **the** option **of** class action status.

The material distinction **between a** debt collector **and a** creditor **at** least **with** respect **to the** second definition **of** "debt collector" provided **by** 1692a(6) **is therefore whether a** person's regular collection activity **is only for itself** (**a** creditor) **or whether it regularly** collects **for others** (**a** debt collector) **not, as the** plaintiffs urge, **whether the debt was in** default **when the** person acquired **it**.

The bolded function words are ostensively benign. It is not possible to construct an argument or a sentence without some function word usage. However, it is important to recall people evaluate function words implicitly (Gleason, 2023; Pennebaker, 2011). Moreover, professional norms dictate fewer function words (Chung & Pennebaker, 2007; Jones, 2016). Thus, while justices do not consciously note the number of function words, they are implicitly noted and consequential in evaluations. Since we posit female justices unconsciously enforce professional norms on lower court judges more so than male justices, we interact justice sex with standardized function word score. This constitutes our primary independent variable.

4.3 | Control variables

We employ several control variables which previous research notes impact judicial decision making. Since female jurists must balance competing professional and personal norms, we include a binary marker noting whether the lower court opinion author is female (FJC, 2021). Justices draw more from prestigious judges' opinions; so we note lower court judges' appellate nomination ABA scores (Corley et al., 2011). This is set to "1" for qualified and "2" for well qualified.[12] The broader context of the lower court opinion also shapes justices' evaluations. The presence of a dissent may prompt more fully developed opinions (Epstein et al., 2011); we include a dichotomous measure noting whether a dissenting opinion is present at the appellate court.[13] While longer opinions contain more detailed legal reasoning, justices often stress the value of short and concise arguments (Corley et al., 2011; Wanderer, 2002); we include lower court opinion logged word count.[14] Likewise, it is easier to process and utilize more readable opinions.[15] Accordingly, we include the Flesch–Kincaid Reading Difficulty score (e.g., Bowie & Savchak, 2022). Higher values represent texts which are more difficult to read.[16] Circuit conflict affords justices multiple lower court opinions to draw upon (though not present in the record of the immediate case); we include a dichotomous variable measuring whether the Court noted conflict between circuits when granting certiorari (Beim & Rader, 2019; Spaeth et al., 2021).

The identity of the justice and the context she writes in is consequential. Since jurists are more likely to draw on ideologically proximate sources, we note the absolute ideological distance between the lower court opinion author and the justice via Judicial Common Space scores (Epstein et al., 2007). It is intuitive to draw upon sources supporting one's position; we include a binary marker noting whether the justice's opinion supports the respondent (Spaeth et al., 2021). Often, people become more entrenched in professional norms over their time as supervisors (Derks et al., 2016; Faniko et al., 2021). To this end, we include the logged number of years the justice has been on an appellate bench.[17]

The Court's most frequent source for opinion language is party briefs (Collins et al., 2015; Corley, 2008). Moreover, justices draw more on lower court opinions when also utilizing party briefs (Feldman, 2017). Accordingly, we include the percentage of the petitioner and respondent briefs incorporated into the justice's opinion via the same approach employed to create the dependent variable.[18] Since the justices have less time to write and are thus more inclined to copy content as the term draws to a close, we note the number of days remaining in the term at opinion announcement (Corley, 2008; Corley et al., 2011). The justices may be more likely to

copy text as workload increases. We include a count of the total number of opinions assigned to each justice that term. Since dissents and concurrences are created via different writing processes (e.g., Bryan & Ringsmuth, 2016; Wahlbeck et al., 2002), we include a dichotomous marker for justices writing a majority opinion.[19]

4.4 | Model specifications

Since our dependent variable is a percentage bound by "0" and "1," we utilize a fractional regression model (Papke & Wooldridge, 1996).[20] Because there are justice-level idiosyncrasies in opinion writing (e.g., Wahlbeck et al., 2002) and utilizing material from the record (Corley, 2008; Corley et al., 2011), we cluster standard errors on justices.[21]

5 | RESULTS

Our results demonstrate female justices are more likely to unconsciously draw on lower court opinions complying with professional norms than their male colleagues. This highlights work from other fields noting senior women internalize professional norms differently than their male counterparts (e.g., Faniko et al., 2017) and often become the most ardent enforcers of professional norms (Sterk et al., 2018). This raises normative concerns about whether increased descriptive representation on the Bench translates into more inclusive case law. We now turn to descriptive and predictive results.

5.1 | Descriptive results

Before proceeding to our model, we begin with descriptive statistics. Table 1 displays the distribution of variables in the model. The last column notes any statistically significant differences between male and female justices for that variable. We note female justices use fewer function words in opinions than male justices. Moreover, female justices tend to complete their opinions with more time to spare and draw more extensively on sources in the record, including the lower court opinion and the party briefs. This is consistent with prior work noting women tend to internalize norms more so than men (e.g., Anzia & Berry, 2011; Leonard & Ross, 2016).

Table 2 explores the data with a closer focus on differences in how male and female justices write opinions. Female justices write just 21.9% of all opinions but write 24.8% of majority opinions. Female justices also write 18.2% of dissents and 18.8% of concurring opinions. This low portion of non-majority opinions bespeaks women's ability to marshal coalitions (e.g., Leonard & Ross, 2020). Female justices are more likely to incorporate information from lower court opinions than male justices. Thus, when a female justice writes an opinion, lower court judges have a larger impact on the shape of case law. Both male and female justices draw considerably less information from female lower court judges' opinions. Male justices draw, on average, 4% from male lower court judges while female justices use 5.8%. Male justices draw 3.8% from female lower court judges and female justices draw 5.3%. This suggests the importance for lower court judges, particularly women, to comply with professional expectations to maximize their success (e.g., Faniko et al., 2021).

Table 3 shifts focus to lower court judges. While the federal judiciary has become increasingly diverse in recent years (Solberg & Diascro, 2020), female judges constitute just 20.7% of lower court majority opinion authors (e.g., Tillman & Hinkle, 2018). Women disproportionately write in cases with circuit conflict. They are, however, less likely to write on panels with dissent. This underscores women's tendency to engineer consensus. We note female judges tend

TABLE 1 Descriptive statistics by justice sex.

	Male justices	Female justices	All justices	
	705 (78.1%)	198 (21.9%)	903 (100.0%)	M/F difference
Lower court judge sex				
Male lower court judge	546 (77.4%)	170 (85.9%)	716 (79.3%)	
Female lower court judge	159 (22.6%)	28 (14.1%)	187 (20.7%)	
Judicial experience	3.024 (.544)	2.949 (.459)	3.007 (.528)	
Lower court judge ABA score	1.594 (.491)	1.616 (.488)	1.599 (.490)	
Ideological distance	.534 (.371)	.483 (.330)	.523 (.363)	
Justice agrees with lower court				
Male lower court judge	421 (59.7%)	112 (56.6%)	533 (59.0%)	
Female lower court judge	284 (40.3%)	86 (43.4%)	370 (41.0%)	
Lower court dissent present	.268 (.443)	.242 (.430)	.262 (.440)	
Lower court opinion length	8.599 (.600)	8.539 (.642)	8.586 (.609)	
% petitioner brief	.024 (.023)	.031 (.027)	.025 (.024)	***
% respondent brief	.019 (.021)	.026 (.024)	.021 (.022)	***
Days left in term	66.852 (59.863)	86.167 (70.868)	71.087 (62.911)	***
Justice majority opinion	.535 (.499)	.626 (.485)	.555 (.497)	*
Lower court circuit conflict	.396 (.489)	.556 (.498)	.431 (.495)	
Document readability	55.438 (5.925)	56.170 (6.179)	55.599 (5.986)	
Justice workload	7.997 (1.291)	8.101 (1.337)	8.020 (1.301)	
Function words	.085 (.975)	−.077 (1.056)	.050 (.995)	*

*$p < .05$; **$p < .01$; ***$p < .001$.

TABLE 2 Characteristics of justice opinions by sex.

	All justices	Female justices	Male justices
Opinions			
Total written	903	198 (21.9%)	705 (78.1%)
Majority opinions	501	124 (24.8%)	377 (75.2%)
Concurring opinions	160	30 (18.8%)	130 (81.8%)
Dissenting opinions	242	44 (18.2%)	198 (81.8%)
% incorporated from lower court	4.30%	5.70%	3.90%
% copied from male judges	4.40%	5.80%	4.00%
% copied from female judges	4.00%	5.30%	3.80%

to write longer opinions and have lower ABA scores on average. Interestingly, female judges use considerably fewer function words in their opinions than their male counterparts. This is consistent with prior work on attorneys finding women use more masculine speech than men in professional spaces, perhaps to downplay the salience of difference (Gleason et al., 2017; Jones, 2016). We contend this should lead to female lower court judges being more favorably evaluated by female justices because of greater adherence to professional norms at the unconscious level. We now turn to our model to fully evaluate this hypothesis.

TABLE 3 Characteristics of lower court judge opinions by sex.

	All judges	Female judges	Male judges
Opinions			
Total written	903	187 (20.7%)	716 (79.3%)
Writes with circuit conflict	187	72 (38.5%)	115 (61.5%)
Writes with dissent on panel	237	44 (18.5%)	193 (81.4%)
Justice agrees with judge	370	76 (20.5%)	294 (79.5%)
Reading ease	55.6	53.9	56
Average ABA score	1.6	1.5	1.6
Logged opinion length	8.6	8.7	8.6
Ideological distance from justice	.52	.55	.52
Standardized function word usage	.05	.01	.06
% included in justice's opinion	4.30%	4.00%	4.40%

5.2 | Empirical model results

Our model is presented in Table 4. At first glance, it indicates function word usage is insignificant and female justices are more likely to copy language from lower court opinions. However, recall we posit that the importance of function words in predicting lower court opinion usage

TABLE 4 Lower court opinion success.

	Coefficient	Standard error
Function words	−.009	.013
Female justice	.088*	.04
Female justice × Function words	−.048***	.012
Female lower court judge	.011	.025
Lower court judge ABA score	−.002	.016
Lower court dissent present	.007	.027
Lower court opinion length	−.223***	.02
Document readability	−.004*	.001
Lower court circuit conflict	−.114***	.021
Ideological distance	−.006	.046
Justice agrees with lower court	.055**	.02
Judicial experience	.003	.041
% petitioner brief	5.602***	.678
% respondent brief	4.159***	.451
Days left in term	.000	.000
Justice workload	.019*	.01
Justice majority opinion	.334***	.029
Constant	−.287	.246
AIC	327.59	
BIC	399.676	
Observations	903	

*$p < .05$; **$p < .01$; ***$p < .001$.

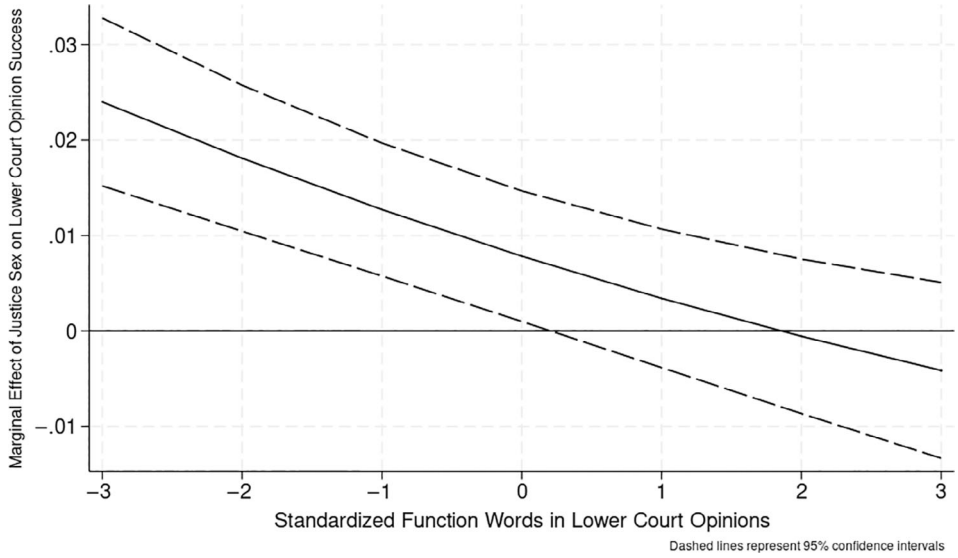

FIGURE 1 Interaction between professional norm compliance by lower court judge and justice sex.

by justices is conditional on justice sex. Thus, the true evaluation of our model is the interaction between justice sex and professional norm compliance. While the interaction term is significant, it cannot be assessed like an additive term; it is best assessed graphically (Brambor et al., 2006).

Figure 1 shows the interaction between function word usage and female justices. The x-axis notes the standardized value of function words in the lower court opinion. Lower values are more in line with professional norms and higher values deviate from professional norms. The y-axis displays the marginal effect of justice sex on lower court opinion success at that level of function words. Should the reference line at $y = 0$ be included in the dashed 95% confidence intervals, the interaction is not significant at that particular level. The negatively sloped line indicates that when lower court judges use low levels of function words in their opinions, female justices are more likely to incorporate language from the lower court opinion into their own opinion. As a judge uses more function words, she deviates from professional norms and decreases the probability of female justices incorporating language from the lower court opinion into her opinion. More specifically, when a lower court opinion contains the lowest level of function words observed (three standard deviations below the mean), the predicted probability of female justices incorporating language from that opinion is .024. However, an opinion that includes the mean level of function word usage is less likely to be included in the justice's opinion. Here, the predicted probability is only .008. Once function word usage reaches roughly 1.25 standard deviations above the mean, the impact of function word usage on incorporation of language into the justice's opinion is rendered insignificant. This provides support for our expectations.

5.3 | Control variable results

Several control variables reach significance. Justices are more likely to incorporate language from concise opinions. Increasing the logged length of lower court opinions from the mean to one standard deviation above the mean reduces the predicted probability of language incorporation from .042 to .031. Justices are less likely to utilize language from less readable lower court opinions. Moving from the mean reading difficulty level to one standard deviation above

the mean decreases the predicted probability of utilizing language from the lower court opinion from .043 to .042. When justices agree with the lower court's disposition, the predicted probability of utilizing language is .36; when disagreeing, the predicted probability falls to .032. The predicted probability of justices drawing on lower court opinion language decreases from .037 to .029 when there is circuit conflict. Justices are more likely to incorporate lower court language when also using language from the party briefs. A one standard deviation increase in language used from the petitioner brief increases the predicted probability of drawing language from the lower court opinion from .039 to .051. Likewise, a one standard deviation increase in language used from the respondent brief increases the predicted probability of incorporating language from the lower court opinion from .040 to .048. This suggests there is a particular kind of case where justices are more inclined to draw from the record, briefs and opinions inclusive.

Justices are more likely to draw language from lower court opinions in majority opinions. The predicted probability of utilizing language from the lower court opinion increases from .022 to .046 compared to dissents and concurrences perhaps because dissents and concurrences are written for different audiences and by a different process than majority opinions (Bryan & Ringsmuth, 2016; Rosenthal & Yoon, 2010–2011). Finally, justices are more likely to include language from the lower court opinion as their workload increases. Moving from the mean level of assigned majority opinions to one standard deviation above the mean increases the predicted probability of copying language from .043 to .045.

6 | DISCUSSION

Justices utilize many sources during opinion writing, not the least of which are lower court opinions (Corley et al., 2011; Feldman, 2017). These are inherently attractive sources; they perform many of the same functions as justices' opinions. While portions of lower court opinions often appear verbatim in justices' opinions (e.g., Bowie & Savchak, 2022), usage is not uniform. Rather, it is driven by factors surrounding the jurist in the case at hand. We demonstrate, in line with recent work on the role of sex, gender, and evaluation (see for instance: Gleason & Smart, 2023; Patton & Smith, 2020; Sen, 2014), justice sex shapes lower court opinion incorporation. More specifically, female justices implicitly evaluate lower court judges' compliance with professional norms more stringently than male justices. This is because female supervisors often internalize professional norms more so than male justices and unconsciously become professional norms' most ardent enforcers (e.g., Faniko et al., 2016; Lapinski & Rimal, 2005). Particularly as the Bench diversifies, the importance of this balance will only increase (e.g., Faniko et al., 2021). This raises normative concerns about how effectively female jurists can impact the substantive shape of case law. This highlights a number of implications ranging from how jurists evaluate the sources available to the legal profession's broader culture. While the full scope of implications are beyond the present study, we now highlight a number of avenues for future research to more fully understand how jurists unconsciously evaluate information.

There is ample work finding female jurists employ different decision-making calculi under some conditions (see for instance: Boyd, 2015; Harris & Sen, 2019; Songer, Segal, & Cameron, 1994). We find this is conditional on professional norm compliance. Since enforcing professional norms is in line with the prevailing status quo, this clashes with work finding a critical mass of diverse jurists ushers in a different judicial decision-making calculus (e.g., Collins et al., 2010; Scheurer, 2014). Yet, our findings are consistent with work from a variety of other fields noting senior women are often the most ardent enforcers of professional norms (e.g., Cooper, 1997; Faniko et al., 2021). This perhaps suggests institutional environment is key to explaining how diversity alters decision making. To explore this, scholars should turn to work on courts beyond the US Supreme Court and explorations of how professional socialization occurs in the legal profession.

Perhaps the biggest limitation of this study is the low number of women who have served on the Court. Indeed, it is possible we are observing a Justice Ginsburg effect rather than a female justice effect. This can be remedied by expanding the temporal scope of the study. For example, with four women now serving on the Court, gender norms' operation may change (e.g., Gleason & Smart, 2023). However, a better approach is exploring federal appellate courts' evaluation of district court judges and state supreme courts' evaluation of their inferior courts. This approach is particularly attractive because of the varying levels of diversity on these benches (e.g., Moyer et al., 2020; Scheurer, 2014). It also allows for greater generational variation; women from the trailblazer generation often had experiences unique from their younger counterparts (Norgren, 2018) shaping decision-making approaches (Haire & Moyer, 2015). State supreme courts are a particularly fruitful avenue because of variation in both institutional design and membership (Gill & Eugenis, 2019; Goelzhauser, 2018). Given recent work highlighting female chief justices' ability to engineer consensus (Leonard & Ross, 2020; Norris, 2022), we suspect this manifests differently over time even on the same court (e.g., Gleason & Smart, 2023). Similarly, cross-national work is warranted (Escobar-Lemmon et al., 2021). The Supreme Court of Canada and the Supreme Court of the United Kingdom are particularly promising; though sharing the common law tradition with the US Supreme Court, they differ remarkably in terms of diversity (e.g., Bowie et al., 2024; Johnson & Masood, 2023; Kaheny et al., 2015).

Professional norms, like all norms, are socialized and internalized throughout a training and acclimation process (e.g., Cunningham, 2001). Law school and early practice seem the logical points to begin (e.g., Collins et al., 2017); accordingly, scholars may find the cause of this in the structure of legal training (e.g., Sotomayor, 2013) or society writ large (Cunningham, 2001). We suspect though, this may operate on a lag. While the culture in law schools may change, recent graduates will soon join older colleagues and jurists whose worldviews were shaped in the past. So, examining changing professional and gender norms is likely a generational process (e.g., Faniko et al., 2021; Haire & Moyer, 2015).

Lived experiences are also a key point to further explore (Haire & Moyer, 2015; Moyer, 2013). For example, whereas Justices Ginsburg and Sotomayor previously served on the federal appellate courts, Justices O'Connor and Kagan came to the Court via state government and the Office of the Solicitor General respectively. These different career trajectories may alter professional norm internalization. The recent confirmations of Justices Barrett and Jackson add additional complexity. Whereas Justice Barrett was a law professor, Justice Jackson was a federal public defender. Particularly examining apex courts where biographies are readily accessible, it is possible to examine how lived experiences impact views on gender and the profession (e.g., Glynn & Sen, 2015).

In addition to examining professional norm enforcement on subordinates, it is key to understand professional norms between peers. Majority opinions are not the product of a single jurist working in isolation. Rather, they are often collaborative efforts where multiple jurists work in tandem. While the opinion author wields considerable influence in the coalition (Black & Owens, 2013), the composition of the coalition shapes the manner in which the opinion is written (Boyd et al., 2010; Haire et al., 2013; Hinkle, 2017; Leonard & Ross, 2020). Moreover, a single justice has the ability to demand changes in a 5–4 decision that she could not in a 7–2 decision (Maltzman et al., 2000). This takes on particular importance since women are better at engineering consensus (Leonard & Ross, 2020) and internal group dynamics shape collaborative projects (Hazelton & Hinkle, 2022).

Diversity has moved beyond traditional binaries and conceptualizations. The role of sex in decision making is increasingly intersectional (Collins & Moyer, 2008; Haire & Moyer, 2015). Intersectional jurists often face layered discrimination not fully captured by a sex or race binary alone (Crenshaw, 1990–1991). Particularly on state supreme courts, future scholars should explore how race and gender jointly shape decision making (e.g., Collins et al., 2017; Kang

et al., 2020; Szmer et al., 2015). Future work should also explore how male justices evaluate lower court judges. Much as there are different processes predicting the evaluation of female attorneys and judges, there is likely a distinct process by which male jurists evaluate others. This is likely rooted in the concept of masculinity (Gill et al., 2017). To this end, we encourage future scholars to more fully explore how masculinity shapes decision making.

Our study also has several limitations. First, law clerks often write first drafts (Rosenthal & Yoon, 2010–2011) and their "fingerprints" persist through successive drafts (Wahlbeck et al., 2002). While this surely raises the specter that we are measuring law clerk compliance with professional norms, there are three reasons to not be concerned. First, law clerks often emulate their jurist's writing style and justices routinely edit clerks' writing (Lebovits & Hidalgo, 2009); although the precise level of editing varies by justice (Wahlbeck et al., 2002). Second, even with annual turnover in law clerks, function words remain a highly accurate predictor of opinion authorship across terms (Choi & Gulati, 2005; Sulam, 2018). Finally, justices routinely view some lower court judges as "better" sources of information (Corley et al., 2011) indicating that justices view opinions as the product of jurists rather than clerks. All of that said, there is great utility in exploring clerks' role in opinion writing. In particular, we encourage future studies to explore function word usage across jurists from the time they are clerks until the time they are judges. Additionally, while we contend function words are a powerful way to measure professional norm compliance, it is important to recall it is a proxy. We accordingly encourage future scholars to find robust ways to more directly measure norm compliance.

Lower court judges are key information sources for justices. We demonstrate the extent lower court judges conform with professional norms predicts female justices' propensity to draw on their opinions. This occurs on the unconscious level due to female justices' internalization of professional norms. Our results underscore the impact of judicial diversity is nuanced and not strictly linear. Our results raise a number of new questions which future scholars should more fully explore.

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DATA AVAILABILITY STATEMENT

Replication data will appear on the first author's website 6 months after the article appears in print.

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ENDNOTES

[1] Justices may draw upon an opinion only to conclude the rationale is lacking (e.g., Anderson, 2011). While a negative evaluation, we follow the lead of Corley (2008) and argue that any language included in the Court's opinion shapes case law.

[2] This is less true for dissenting opinions, which are often written for future courts (Bryan & Ringsmuth, 2016) and concurring opinions which are the sincerest expression of justice preferences (Wahlbeck et al., 2002).

[3] Bowie and her colleagues extend these findings to state supreme (Bowie & Savchak, 2022) and comparative courts (Bowie et al., 2024; Masood & Bowie, 2023).

[4] We exclude appellate court concurring and dissenting opinions for two reasons. First, their inclusion makes it difficult to isolate a given judge's influence apart from that of her colleagues (e.g., Gleason, 2020). Second, unlike at the Supreme Court, many federal appellate court non-majority opinions are approximately a paragraph long; this makes accurately measuring the dependent variable difficult.

[5] While including cases with multiple federal appellate court decisions would surely introduce a richer level of complexity, it would be impossible to isolate the impact of a given judge relative to other lower court opinion authors (e.g., Gleason, 2020; Gleason & Ivy, 2021).

[6] Cases before 2004 are from Lexis.

[7] While the justices surely incorporate ideas via paraphrasing, we use this approach for two reasons. First, the amount of language copied is an established measure of legal actors' success in shaping justices' opinions (see for instance: Black et al., 2016; Corley, 2008; Gleason et al., 2019). Second, this measure makes statistical significance more difficult to obtain and allows for greater confidence in results.

[8] Following standard practice, we set the shortest match to six words and 100 characters. We allow for a maximum of two imperfections, and require at least an 80% match between the lower court and Supreme Court opinions. We ignore outer punctuation, numbers, letter case, and non-words such as case citations (e.g., Corley, 2008).

[9] Keeping with standard practice, we standardize the resulting value (Wedeking, 2010).

[10] 2nd Circuit, 549 F.3d 137 (2008).

[11] 4th Circuit, 817 F.3d 131 (2016).

[12] No judges in our data received an unqualified (0). Alternatively, justices may defer to jurists who attended elite law schools. We run an alternative model specification with a binary variable noting whether the lower court judge attended a top-14 law school (Szmer et al., 2010). The results, presented in the Supporting Information: Appendix, are substantively unchanged.

[13] We run an alternative specification noting the presence of dissent or concurrence. The results, presented in the Supporting Information: Appendix, are substantively unchanged.

[14] We also run models with unmodified word counts. The results, presented in the Supporting Information: Appendix, are substantively unchanged.

[15] Since function word usage is tied to textual clarity, it is possible function words and readability are related. These two measures are weakly negatively correlated (−.084). Accordingly, we are confident they are distinct measures.

[16] We run an alternative specification with the Flesch–Kincaid Grade Level measure. The results, presented in the Supporting Information: Appendix, are substantively unchanged.

[17] This value includes time on lower appellate courts and the US Supreme Court (e.g., Houston et al., 2021).

[18] In a small number of consolidated cases, multiple briefs are filed for the petitioner (respondent). Since it is difficult to tell which brief is impacting the Court's decision, we exclude cases with multiple petitioner (respondent) briefs from analysis (Gleason, 2020).

[19] Given differences between majority and concurring/dissenting opinions, we run an alternative specification where analysis is limited to just majority opinions. While fractional regression models fail to converge, ordinary least squares regression results are substantively unchanged from the models presented below. The results of the ordinary least squares regression are presented in the Supporting Information: Appendix.

[20] We run an ordinary least squares regression model as a robustness check. The results, presented in the Supporting Information: Appendix, are substantively unchanged.

[21] Since there could be issue area effects, we estimate an alternative specification with errors clustered on issue area (Spaeth et al., 2021). The results, presented in the Supporting Information: Appendix, are substantively unchanged.

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SUPPORTING INFORMATION

Additional supporting information can be found online in the Supporting Information section at the end of this article.

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