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The Personal is Juridical: Explaining the Variation in the Legal Treatment of Women and Men in the United States Supreme Court

DISSERTATION

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by

Kristine Coulter

Dissertation Committee:
Assistant Professor Diana Kapiszewski, Co-Chair
Associate Professor Matthew Beckmann, Co-Chair
Associate Professor Catherine Bolzendahl
Professor Louis DeSipio
Professor David S. Meyer

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DEDICATION

To the women who fought for my rights so that my biology did not become my destiny.

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ACKNOWLEDGMENTS

For a number of years, I ran from the law. I ignored all the signs telling me that I was going to study the Supreme Court, and there were many. Prior to attending graduate school, I read books on landmark cases and biographies of the justices—in my free time and *for fun*. When Justice O'Connor gave a speech at the University of Minnesota the spring before I began my graduate program, I tried to sweet talk my way backstage in an effort to secure an autograph. During my first year of graduate school, I got a pet fish and named it after Justice O'Connor. After the fish died, I considered acquiring more just so I could name them after other favorite Supreme Court justices (Justice Ginsburg and Justice Blackmun, in case you're wondering). The best parts of my first trip to Washington, D.C. were visits to the Supreme Court and to pay my respects to Justice Marshall and Justice Blackmun at Arlington National Cemetery.

I didn't take my first public law course until my second year in graduate school, and even then, I resisted the law. It was not until the beginning of my third year, when I found myself *yet again* in the library's law section that I finally admitted to myself that I was going to study law and the Supreme Court.

I guess you could say that I fought the law, and the law won.

Several people nurtured my interest in gender and the Supreme Court, and to everyone who supported me throughout the dissertation process, thank you.

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CURRICULUM VITAE

EDUCATION

2014	Ph.D., Political Science, University of California, Irvine
2010	M.A., Political Science, University of California, Irvine
2004	B.A., Political Science, University of Minnesota, Twin Cities

FIELD OF STUDY

American Politics, Public Law, Courts, Gender, Race and Ethnicity

PUBLICATIONS

"High Profile Rape Trials and Policy Advocacy" (with David S. Meyer). *Journal of Public Policy* September 2014, 1-27.

"Representing the Underrepresented: Descriptive Representation and Political Interest of Blacks and Women in the 2008 Election" (with Jennifer R. Garcia and Christopher T. Stout). *Ralph Bunche Journal of Public Affairs* 3:1 (2014), 83-102.

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ABSTRACT OF THE DISSERTATION

The Personal is Juridical: Explaining the Variation in the Legal Treatment of Women and Men in the United States Supreme Court

By

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Doctor of Philosophy in Political Science

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Assistant Professor Diana Kapiszewski, Co-Chair
Associate Professor Matthew Beckmann, Co-Chair

This dissertation examines the legal treatment of women and men in United States Supreme Court gender classification cases. Employing multi-methods research techniques, it investigates all judicial opinions and votes from the 50 gender classification cases the Court decided from 1971 to 2001. The quantitative component examines how and why justices construct gender—that is, assign roles, characteristics, and behaviors to women and men—as they do in all 145 majority, concurring, and dissenting opinions. It also examines the justices' votes in order to explain why they provide women and men the same rights and opportunities in some cases and not others. The qualitative part of the study employs small-N qualitative analyses to examine the influence of gender on judicial behavior. It draws on archival data and 67 semi-structured interviews in an effort to explain why gender affects female justices' decision making and whether female justices alter the behavior of their male colleagues.

I argue that the legal treatment of women and men in the Supreme Court is driven by Court membership. It is a result of justices' gender and political ideology, as well as their personal experiences and relationships. I find that gender differences in judging resulted from

gender differences in personal experiences. Female justices' experiences with sex discrimination instilled in them a belief that gender stereotypes and discrimination were unjust, so they sought to remove barriers restricting women's and men's opportunities.

Male justices' personal experiences and relationships had a profound effect on their judging, so much so that serving with female justices had little impact on their gender attitudes. Instead, male justices' egalitarian attitudes were a product of their political ideologies and broader commitment to gender equality, or a result of familial influences and personal experiences.

In short, judicial decision making in gender classification cases is largely due to *who* is on the Supreme Court. Justices are first and foremost influenced by their own attitudes and values, experiences, and relationships. These are the lenses through which justices approach cases and interpret and apply the law.

CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

Gender inequality is a relevant issue in the United States and throughout the world. It can have dire implications for women's life chances, quality of life, and their economic, social, and political power (Epstein 2007). Around the world, there are gender disparities in literacy, labor force participation, and political representation (Inglehart and Norris 2003: 4). Women make up a disproportionate percentage of those living in poverty around the world (Epstein 2007). Some women lack access to education, and they make up the majority of those who cannot read and write. The lack of rights and pervasive inequalities severely limit women's opportunities and social, political, and economic power.

Though women have achieved major political, economic, and legal gains in the United States, one of the most developed countries in the world, gender inequality remains a critical issue. Women are elected to state and federal governments at increasing rates, and a few have run for president and vice president. Yet, their representation in government remains low; for example, women have yet to achieve parity in state legislatures and they are only 18.5% of Congress (Center for American Women and Politics 2014). More and more women work outside the home, head up major corporations and businesses, and they have closed the gender gap in educational attainment. Yet, sex discriminate on and unequal pay persist, and women are disproportionately represented in low wage work (Epstein 2007).

Gender inequality has come before the United States Supreme Court several times, but ever since it first considered the issue in *Bradwell v. Illinois* in 1873, it has responded unevenly. In *Bradwell*, justices confronted the question of whether an Illinois statute could prohibit women from practicing law. Myra Bradwell passed the Illinois bar exam and applied for a law license,

but she was denied on account of sex. Senator Matthew Hale Carpenter represented Bradwell, arguing that the privileges and immunities clause of the 14th amendment extended to the practice of law, which was rejected in the majority opinion, written by Justice Miller. Though Miller made no mention of Bradwell's sex in that opinion, Justice Bradley wrote a concurring opinion that did. Bradley wrote that "the constitution of the family organization…indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood" (*Bradwell v. Illinois*, 83 U.S. 130(1873)). His opinion reinforced predominant gender attitudes of the time, summed up by his conclusion that "the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother" (*Bradwell v. Illinois*, 83 U.S. 130 (1873)).

In their opinions and rulings, Supreme Court justices articulate the appropriate roles, characteristics, and behaviors of women and men, ultimately deciding whether they should have the same rights and opportunities. For example, in *Bradwell*, Justice Bradley discussed gender in a way that reinforced differences between women and men. Women's roles were to be wives and mothers, and they were therefore unfit for work outside the home, and in this case, in the legal arena.

Nearly 100 years after *Bradwell*, the Supreme Court struck down a law discriminating on the basis of sex in *Reed v. Reed* in 1971. After the death of their teenage son, divorced parents Sally and Cecil Reed applied for administrative control of his estate. Due to an 1864 Idaho statute that automatically preferred men over women in the administration of estates, Cecil was selected over Sally. The statute was rooted in the belief that men had more financial and business experience than women did. Sally subsequently challenged the law in the Idaho Supreme Court, which rejected her claim that the law was discriminatory. She appealed to the United States Supreme Court, and for the first time, it provided women and men with equal rights.

For the next thirty years, the Supreme Court adjudicated a number of cases involving laws that treated people differently because of their sex. In several cases, it continued striking down discriminatory laws across a number of issue areas. It invalidated the systematic exclusion of women from juries in *Taylor v. Louisiana* (1975) and single-sex schools in *Mississippi University for Women v. Hogan* (1982) and *United States v. Virginia* (1996). It rejected the argument that freedom of association allowed private organizations to restrict its membership to men in *Roberts v. Jaycees* (1984), *Board of Directors of Rotary International v. Rotary Club of Duarte* (1987), and *New York State Club Association v. New York* (1988).

However, in other cases, the Supreme Court condoned differential treatment between women and men. For instance, it upheld the Military Selective Service Act, which required men, but not women, to register for the draft in *Rostker v. Goldberg* (1981) and an affirmative action policy in *Johnson v. Transportation Agency, Santa Clara County* (1987). More recently, the Court upheld a provision of the Immigration and Nationality Act that imposed additional requirements on the ability of unwed fathers, but not unwed mothers, to transmit their citizenship to their children born abroad in *Miller v. Albright* (1998) and *Tuan Anh Nguyen v. Immigration and Naturalization Service* (2001).

This chapter proceeds as follows: I begin with a discussion on the importance of this research before moving on to provide an overview of this study. Next, I briefly discuss the theoretical framework and my argument. I conclude with an overview of the dissertation.

1.2 THEMES AND DEBATES

This study is broadly concerned with the role the Supreme Court plays in the trajectory of gender equality in the United States. It examines the ways in which justices discuss gender in their opinions and why they cast votes treating women and men the same or differently in cases

involving gender issues. This study speaks to broader debates and issues involving power and inequality, lawmaking, and the role of courts in a political system.

1.2.1 Power and Inequality

Political institutions play a critical role in shaping power and inequality in the United States and around the world. Institutions are seemingly neutral, but the values and norms embedded within institutions can privilege some groups over others (Hall and Taylor 1996: 938; Immergut 1998: 17; Kenny 2007). This study is an inquiry into the role one institution, the Supreme Court, plays in shaping gender equality.

According to some scholars, institutions are seemingly gender neutral, but some are inherently gendered (see Acker 1992; Kenney 1996; Lovenduski 1998; Beckwith 2005; Chappell 2006). For instance, Acker (1992) argues that institutions were historically developed by and dominated by men, so they consequently reflect and privilege masculine norms and values. Some institutions play important roles in the production and reproduction of gender (Chappell 2006) because they produce laws that "constitute the roles, relations, and identities of women and men" (Htun and Weldon 2010: 208). Moreover, institutions such as courts have the capacity to re/produce gender expectations by producing the rulings that prescribe and proscribe appropriate feminine and masculine behaviors, rules, and values (Chappell 2006).

This does not mean that the Supreme Court is doomed to uphold power disparities and inequalities. Institutions are gendered, but they can be regendered (Kenny 1996; Beckwith 2005), meaning that they can re/produce equality and equitable distributions of power. For example, the ways in which justices treated women and men before the law changed over time and across cases. For example, in 1971 in *Reed*, nearly 100 years after *Bradwell*, Supreme Court justices reconstructed gender by prohibiting discrimination on the basis of sex. Decisions such as *Reed*

can promote gender equality by "dismantling the hierarchies of power that privilege men and the masculine" (Htun and Weldon 2010: 208).

Institutions can remedy inequality and produce policy outcomes that change power dynamics (see Kenny 1996; Thelen 1999; Beckwith 2005). The ways in which historically disadvantaged groups attain policy changes that strengthen their status in society and further equal rights has been the subject of a great deal of research. Among scholars of gender politics, some argue that the substantive representation of women occurs through their descriptive representation in government (see Thomas 1994; Mansbridge 1999; Reingold 2000; Carroll 2002; Swers 2002; Wolbrecht 2002). In other words, attaining policies that further gender equality occurs because female legislators introduce and support legislation favorable to women's rights and interests.

However, others contend that the influence of women's movements and supportive allies in government enhances women's substantive representation (see Weldon 2002, 2011; McMahon-Howard, Clay-Warner, Renzulli 2009; Banaszak 2010). Policy changes advancing gender equality can occur when elite allies respond to movement claims. Other scholars agree that the number of female representatives in government is irrelevant to the substantive representation of women. Rather, the substantive representation of women occurs when "critical actors" take the initiative to represent women's interests (Celis, Childs, Kantola, and Krook 2008: 102-103; Childs and Krook 2009: 138). Regardless of the number of women in government, a critical actor, who may or may not be a woman, takes action to further gender equality.

In sum, a study on the Supreme Court and gender equality speaks to larger concerns with respect to institutions, power, inequality, and political change. Institutions are not inherently

neutral, and instead, they potentially reinforce disparities in power and inequalities. However, they are not inured to change and there are a number of ways groups seeking to further equality can induce policy change.

1.2.2 Interactive Lawmaking and the Role of Courts

This research is also important for how we think about lawmaking. A study on the Supreme Court will help provide insight into how the branches of government help shape political outcomes in the United States. Policymaking is not the responsibility of one branch; rather, it is a shared endeavor among the Supreme Court, Congress, and the president (Barnes and Miller 2004; Barnes 2007). It is not as though Congress is solely responsible for making laws and the Supreme Court just acts as a rubber stamp (Barnes 2007). Instead, there are times in which the Supreme Court strikes down laws or Congress overrides the Supreme Court.

Of course, there are plenty of times in which the Supreme Court upholds laws and Congress does not issue an override. The point is that these interactions shape policy outcomes, and to understand the trajectory of gender equality, or more broadly, any policy issue, we cannot overlook the Supreme Court.

This research also speaks to the role of courts in a political system. When issuing decisions, judges are by default making policy. In doing so, unelected judges have the capacity to strike down legislation enacted by an elected body of government, which is inherently undemocratic (Bickel 1962). Viewed in this manner, courts are countermajoritarian institutions, acting against the representatives of the people and violating democratic principles (Bickel 1962). As such, on the one hand, it may be inappropriate for judges to weigh in on important issues considering that they lack a constituency and cannot be held accountable.

However, on the other hand, courts are not necessarily undemocratic and can be a representative institution. For example, if legislators are unresponsive and judges resolve an issue, courts are democratic because otherwise the issue would go unresolved (Graber 1993: 72). Moreover, that the Supreme Court is more likely to grant certiorari when one or more amicus curiae briefs is filed suggests that it is a responsive and representative institution (Caldeira and Wright 1988). In short, the boundaries of the separation of powers model are blurry and responsibilities among the branches overlap, raising larger questions revolving around the role of judges and democratic ideals.

1.3 PRIOR RESEARCH ON GENDER POLITICS AND THE SUPREME COURT

This dissertation seeks to examine the Supreme Court's influence on gender equality in the United States by examining the ways in which justices discuss gender in their opinions and why they sometimes cast votes providing the same legal treatment to women and men. Law can reinforce or dismantle inequality, but the Supreme Court is often overlooked by most gender politics scholars who tend to focus on the federal and state levels of government (see Freeman 1975; Gelb and Palley 1996; Costain 1988, 1992; Weldon 2002; McCammon and Campbell 2001; Mansbridge 1984; Soule and Olzak 2004; McMahon-Howard, Clay-Warner, Renzulli 2009), with few examining the judiciary—at any level. This is surprising given that the Supreme Court issued a number of important holdings[1] concerning gender equality. For example, it legalized abortion in *Roe v. Wade* (1973) and prohibited sexual harassment in *Meritor Savings Bank v. Vinson* (1986).

Moreover, the Court receives thousands of requests for certiorari[2] each year. As the Senate confirmation battles surrounding judicial appointments suggest, the Supreme Court plays

[1] A holding is the Court's ruling in a case.
[2] A request by the losing party that the Supreme Court review the decision issued by the lower court.

a crucial role in our political system. As a national policymaker and as the highest court in the United States, the Supreme Court's holdings have critical implications. Not only does it shape public policy and determine the bounds of what is constitutional, its decisions set the precedent for all lower courts to follow. As such, that the influence of the Supreme Court on gender equality has gone understudied is surprising, and this dissertation seeks to fill that lacuna.

Research on the Supreme Court in this issue area tends to be more descriptive, as scholars examine the number of sex discrimination cases adjudicated and the holdings. For example, O'Connor and Epstein (1983) identify how often the Court as a whole and each individual justice supported gender-based discrimination claims from 1969 to 1981. They speculate that justices' voting behavior is due to ideology or the nature of the cases, but do not test these possibilities.

In other research, scholars identify which interest groups litigate, how often, and how many times they win—but not why. O'Connor and Epstein (1983) examine cases concerning gender equality from 1969 to 1980, identifying the number of cases litigated by various women's rights groups and finding that these groups were successful in 63% of the cases litigated. They also find that compared to the National Organization for Women (NOW), the Women's Education Action League, and the Women's Legal Defense Fund, the American Civil Liberties Union (ACLU) litigated the most cases before the Court. George and Epstein (1991) extend this study to 1981 to 1990 and find that women's rights groups continued their success before the Court, winning 72% of the cases litigated (George and Epstein 1991: 316). More groups became involved, either by litigating a case or submitting an amicus brief, and the ACLU and NOW continued their involvement in litigation throughout the 1980s (George and Epstein 1991: 316-317).

Other scholars also focus on legal mobilization by examining women's rights groups' litigation strategies and resources. O'Connor (1980), for example, studies why organizations litigate, concluding that some litigate to change policy while others aim to generate publicity, enhance their organization's credibility, and attract supporters. In a similar vein, Cowan (1976) looks at the litigation efforts of the Women's Rights Project (WRP) in the Supreme Court from 1971 to 1976. She contends that much of its success is due to the types of cases litigated and resources such as money, staff, and legal expertise. By challenging discriminatory laws in the workplace, the WRP took advantage of public support for equal opportunity in employment, believing that this strategy would increase its chances of winning.

A few scholars examine why Supreme Court justices prohibit sex discrimination in some cases and not others. Segal and Reedy's (1988) study is one of the first to focus on explaining what accounts for variation in judicial behavior in this issue area. Analyzing sex discrimination cases from 1971 to 1984, they argue that the position taken by the Solicitor General was a significant predictor of whether justices prohibited sex discrimination.[3] Finally, other research considers if there are gender differences in judicial behavior, particularly in cases concerning sex discrimination and sexual harassment (see Allen and Wall 1993; Segal 2000; Boyd, Epstein, Martin 2010).

In short, research on gender equality in the United States at any court level is understudied. Very few scholars examine judicial behavior in this issue area in the appellate or state courts (see Gryski, Main, Dixon 1986; McCall 2003; Moyer and Tankersley 2012), and this study seeks to fill that gap.

1.4 OVERVIEW OF THE STUDY

[3] Additional literature relevant to this study will be discussed in detail in chapter two.

This dissertation builds upon and contributes to the literatures on judicial behavior and gender politics by examining the legal treatment of women and men in United States Supreme Court gender classification cases. Cases concerning a gender classification have at their heart, a law, policy, or action that treats people differently on account of sex. This study examines all Supreme Court opinions (majority, concurring, dissenting) and judicial votes from the 50 gender classification cases the Court decided on the merits[4] between 1971 and 2001. The study begins in 1971 because that year marks the beginning of the era in which the Court adjudicated the majority of these cases, and ends in 2001 because that is the last time the Court adjudicated such a case.

To select cases for this study, I used the keyword search function in LexisNexis. I searched all parts of the case and all available dates using keywords such as woman, gender discrimination, and equal protection clause. Cases selected for this study resolve whether 1) the gender classification is permissible and/or constitutional; or 2) whether the law discriminates on the basis of sex or gender.[5]

In the first part of the study, I employ quantitative methods to examine how and why justices construct gender—that is, assign roles, characteristics, and behaviors to women and men—as they do in all 145 majority, concurring, and dissenting opinions.[6] There are four approaches justices can take when constructing gender in their opinions. The first is a *sameness* approach, and here, justices construct women and men as the same. Any discussion of traits, roles, and behaviors is gender neutral, and laws are understood to apply to both women *and* men,

[4] A decision rendered by the Court based on the facts of the case and application of the law.
[5] See chapter three for a detailed discussion on case selection and methodological appendices.
[6] Each case usually contains a majority and dissenting opinion. Justices may also choose to write a concurring opinion, in which they explain why they concur in the judgment of the Court but for different reasons. Similarly, justices may also write separately to articulate their own reasons for dissenting. As a result, cases can contain multiple opinions. Several of the cases under study contain concurring opinions and multiple dissents, resulting in 145 opinions written in 50 cases.

and neither is singled out. By contrast, when justices construct women and men as different, they advance a *difference* approach. The first difference approach is *gender role stereotypes*, which are generalizations and assumptions regarding women's and men's abilities, characteristics, and roles in society. The second difference approach is *reproductive differences*, and here, justices discuss reproductive, biological, or sexual differences between women and men. Finally, justices might mention *unsubstantiated* gender differences when advancing a difference approach. They may state that women and men are different but not discuss how or why.

The first part of the study also examines the justices' votes in order to explain why they sometimes provide women and men the same rights and opportunities and sometimes do not, again using quantitative methods. When voting in gender classification cases, justices make a recommendation as to how women and men should be legally treated, thereby advancing a gender distinction. When justices advance a *sameness* distinction, they provide the same legal treatment to women and men. By contrast, when justices advance a difference distinction, they grant differential legal treatment to women and men. Data on justices' opinions and votes for the first part of this study were derived from LexisNexis.

The second part of the study employs small-N qualitative analyses to examine the influence of female justices on judicial behavior. In an effort to explain why gender affects female justices' decision making, I examine Justice O'Connor's and Justice Ginsburg's decision making in *Mississippi University for Women v. Hogan* (1982), *Johnson v. Transportation Agency, Santa Clara County* (1987), *United States v. Virginia* (1996), and *Miller v. Albright* (1998). To determine whether serving with female justices alters the behavior of their male colleagues, I examine *Mississippi University for Women v. Hogan* (1982), *Meritor Savings Bank v. Vinson* (1986), *United Auto Workers v. Johnson Controls* (1991), *J.E.B. v. Alabama* (1994),

United States v. Virginia (1996), and *Tuan Anh Nguyen v. Immigration and Naturalization Service* (2001). Data for this part of the study were derived from 67 semi-structured interviews with former Supreme Court law clerks, litigants, amici,[7] and legal experts, as well as the papers of Justices Blackmun, Brennan, Marshall, Powell, and White at the Library of Congress. I also gathered data from secondary sources, such as books and articles written about the cases or justices under study.

This study engages and contributes to research on judicial behavior and gender politics, and it is innovative for a few reasons. First, it is unique because of it substantive focus. While gender politics scholars tend to concentrate on the formation of gender policy in Congress or state legislatures, few judicial behavior scholars examine the factors shaping the legal treatment of women and men in United States Supreme Court gender classification cases. As a result, there are theories explaining why legislators advance or restrict gender equality, but we do not know if the factors shaping legislative behavior carry over to the judiciary. This is important to understand because the two branches are meant to be distinct; legislators and justices have their own responsibilities, constituencies, norms, and procedures, so the factors driving behavior in one branch may not apply to the other. Similarly, there are theories explaining judicial decision making across a wide range of issues, but whether they also apply to a specific issue area—gender equality—is unknown. It is possible that the factors shaping judicial behavior are contingent upon the type of case and its context.

Second, in contrast to prior research on judicial behavior, this study examines not only judicial votes, but the full set of judicial opinions (majority, concurring, dissenting) written in connection with the cases under study. Most research focuses on why justices vote to affirm or

[7] Amici are "friends of the Court" and submit amicus briefs persuading the justices to affirm or reverse a lower court decisions.

reverse a lower court decision, or why they cast a liberal or conservative vote. However, judicial decision making is more than how justices vote; it also includes the content of their opinions. Here, justices offer up the legal reasons for why they voted as they did.

Very few studies of judicial behavior examine the content of the opinions (see Corley 2008), and failure to do so overlooks the legal reasoning surrounding judicial decision making and variation in how justices formulate their arguments and define and construct critical concepts across cases, opinions, and time. While judicial opinions are used to justify the holding in a case, they also present justices with the opportunity to innovate and plant the seeds for new legal concepts. It is also not the case that only opinions from landmark cases are potentially important. For instance, the majority opinion in *United States v. Carolene Products* (1938), a case concerning the application of the commerce clause that few would consider critical, is well known for footnote #4. Here, Justice Stone proposed a heightened level of scrutiny for minority groups, which had never been done before.

Given the Supreme Court's ability to establish precedents for lower courts, its opinions are mined by future Supreme Court justices and lower court judges. Judges and justices themselves can be persuaded by and apply the precedents and arguments established in opinions in previous cases. Finally, examining judicial opinions is also important to understanding how gender constructions have evolved over time, across opinions, and across justices. While judicial holdings signify the Court's action, upholding or striking down a law, judicial opinions articulate why. Understanding why justices construct gender as they do in their opinions can be the first step towards understanding why they vote to uphold or strike down a law, policy, or action containing a gender classification. Ultimately, the study of judicial behavior contains two facets;

the first focuses on the content of opinions supporting votes in all directions, and the second on the vote.

Finally, the use of multi-methods research makes this study innovative. Much of the research on judicial behavior on the Supreme Court or lower courts or gender policy in federal or state legislatures employs quantitative research methods. While this method is useful for identifying the significant independent variables, it does not tell us *why* those variables produce a particular outcome. As such, I use quantitative and qualitative methods together to develop a theory of judicial behavior that explains not just what factors influence justices' approaches to constructing gender in their opinions and their voting behavior, but also why.

1.5 THEORETICAL FRAMEWORK & ARGUMENT

This study engages and contributes to the literatures on judicial behavior and gender politics. The factors shaping the approaches justices take when constructing gender in their opinions and when voting in gender classification cases fall into three broad categories: the legal model, Court membership, and new institutionalism.

According to the traditional legal model, judicial decision making is the interpretation and application of the law. Here, justices do not make law, they *find* it. Neutral and impartial actors, justices are immune to any internal or external influences, and their duty is to apply the law and arrive at decisions that can be applied in future cases (Epstein and Kobylka 1992: 11; Tiller and Cross 2006: 518; Kahn 1999: 180; Wechsler 1959: 6, 19). As such, the legal model is often conceptualized as the norm of stare decisis, wherein the holding from one case becomes the law, which is then applied to future cases (Levi 1948: 501; George and Epstein 1992; Spriggs and Hansford 2002; Bailey and Maltzmann 2008).

Justices are not purely neutral actors immune to extralegal influences, and they cannot help but to bring with them to the bench their personal experiences, ideologies, attitudes and values. Accordingly, to some degree, judicial rulings are shaped by *who* is on the Court. When attempting to explain judicial behavior in gender classification cases, it is important to consider the justices' political ideology and gender.

According to the attitudinal model of judicial decision making, "cases are decided in light of the facts of the case vis-a-vis the ideological attitudes and values of the justices" (Segal and Spaeth 1993: 65). Here, justices' ideological attitudes and values influence how they interpret and apply legal rules, statutes, the constitution, and precedent. In addition, the attitudinal model conceptualizes justices as political actors with policy preferences that they seek to advance. As such, not only might it be impossible for justices to withhold their ideologies, attitudes, and values, they may not want to.

Besides political ideology, another characteristic of the justices to consider when evaluating their decision making in gender classification cases is their gender. Some scholars suggest that gender differences in judging arise because female judges play a representative role and seek to further women's interests (Allen and Wall 1993: 159; Martin and Pyle 2005). Other scholars assert that gender differences in judging result from gender differences in professional experiences. According to the informational accounts theory, women acquire unique information based upon their professional experiences as women, such as sex discrimination (Gryski, Main, Dixon 1986; Boyd, Epstein, Martin 2010).

In addition to having an individual effect on judicial behavior, gender could also have a panel effect. In other words, the presence and influence of serving with a female justice could affect the behavior of male justices. Again, drawing on the informational accounts theory

(Gryski, Main, Dixon 1986; Boyd, Epstein, Martin 2010), male justices may believe that their female colleagues are more knowledgeable in gender classification cases and so they follow their lead or heed their advice.

Given that justices are unelected and hold lifetime appointments, conditional on good behavior, they are seemingly unconstrained and able to promote their policy preferences. However, according to new institutionalist accounts of judicial behavior, the Supreme Court is part of a larger political and social system, and justices face a variety of institutional constraints that constrain their behavior (Clayton and Gillman 1999: 4; Ginsburg and Kagan 2005; 2). I focus on two strands of new institutionalism: historical institutionalism and rational choice institutionalism.

According to rational choice institutionalism, justices seek to advance their policy preferences, but their ability to do so depends upon the preferences of actors outside the judiciary, such as the president, Congress, or interest groups (Epstein and Knight 1998). Therefore, they might act strategically by attempting to predict the preferences and responses of those actors (Epstein and Knight 1998: 12; Whittington 2000: 612). There are at least two reasons why they might act strategically: to preserve the Court's institutional legitimacy or to further their policy goals.

The Supreme Court lacks the power of the purse and the sword, and its power is derived from its institutional legitimacy, which is an institution's authority to mandate judgments (Gibson, Caldeira, Spence 2003: 537). Seeking to retain its authority as a legitimate political institution, justices may be reluctant to issue decisions beyond the bounds of public acceptability. Issuing too many unpopular decisions could attract negative attention and chip away at the Court's legitimacy (Stimson, Mackuen, Erikson 1995: 555; Casillas, Enns, Wohlfarth 2010).

Given that justices lack the ability to enforce their decisions, another reason why they might act strategically is because they seek to further their policy goals. Justices cannot induce compliance, and other political actors may simply ignore their decision, thus thwarting their efforts to write their policy preferences into law. As a result, institutional legitimacy and policy goals are interconnected: the Court's power, which compels compliance with its decisions, is derived from its legitimacy.

In contrast to rational choice institutionalism, historical institutionalism provides an historical account of institutional development. It recognizes that judicial behavior is structured by institutions but is also constituted by them (Gillman and Clayton 1999: 6). Historical institutionalists broadly conceptualize institutions, which includes not just other political actors, formal rules, and structures, but also informal rules and norms (Hall and Taylor 1996: 938; Gillman and Clayton 1999: 4). Here, justices are deeply embedded in political and social contexts (Whittington 2000: 616). Moreover, they are bound by history, as historical events and actions structure judicial decision making (Gillman 1993; Kahn 1999; Bussiere 1999).

To summarize, scholars have forwarded a number of theories that could help explain variation in the legal treatment of women and men in the Supreme Court. According to the legal model, judicial rulings are a product of the mechanical application and interpretation of the law. By contrast, other scholars point out the subjective nature of judicial behavior and the ways in which justices' personal attributes—political ideology and gender—influence their decision making. Lastly, new institutionalist accounts emphasize the institutional constraints that shape and constrain judicial behavior.

1.5.4 Argument

I argue that the legal treatment of women and men in the Supreme Court is driven by the Court's membership. In particular, it is a result of justices' gender and political ideology, as well as their personal experiences and relationships. As the attitudinal model suggests, it is difficult, if not impossible for justices to set aside their personal backgrounds when judging. Though the legal model posits that justices shed their identities when they adjudicate, the reality is that they cannot and do not. Their backgrounds serve as the backdrop against which they interpret and apply the law, legal rules, and the constitution.

Gender differences in judicial behavior resulted from gender differences in personal experiences. For Justice O'Connor and Justice Ginsburg, experiences with sex discrimination during law school and their careers instilled in them a belief that gender stereotypes and the discrimination that resulted from them were unjust. For example, both graduated law school at the top of their respective classes, but they struggled to secure gainful employment because they were women. Justice O'Connor applied for a number of jobs but was offered only one, as a legal secretary. Similarly, Justice Ginsburg was recommended for a Supreme Court clerkship but was turned down. As a result, both acquired firsthand experience of the ways in which stereotypes and discrimination harmed women *and* men. As justices, both acted in ways that removed the barriers restricting women's and men's opportunities.

Male justices were also influenced by their personal experiences and relationships, which had a profound effect on their judging. In fact, their backgrounds were so influential that serving with female justices had little impact on their behavior. Instead, some male justices' egalitarian attitudes were a product of their political ideologies and their broader commitment to gender equality. Others had wives and daughters who contributed to their shift away from traditional

gender attitudes. Lastly, some male justices had personal experiences that contributed to their support for gender equality.

In short, judicial decision making in gender classification cases is largely due to *who* is on the Supreme Court. Although justices face a variety of institutional constraints, they are first and foremost influenced by their own attitudes and values, experiences, and relationships. Not only do these mediate the effects of the broader political and social environment, but they are the lenses through which justices approach cases and interpret and apply the law.

1.6 PLAN OF THE DISSERTATION

This chapter introduced the purpose of this dissertation, which is to explain the variation in the legal treatment of women and men in the United States Supreme Court. To address this issue, I employ quantitative methods to examine why the ways in which justices construct gender vary across all majority, concurring, and dissenting opinions written in gender classification cases from 1971 to 2001. I also examine justices' votes in order to explain why they provide the same legal treatment to women and men in some cases and not others. Lastly, I conduct small-N qualitative analyses in an effort to determine how and why gender shapes female justices' behavior as well as the behavior of their male colleagues.

In the next chapter, I review various theories that could help explain judicial behavior in gender classification cases. Drawing on the literatures in judicial behavior and gender politics, I consider the ways in which justices' approaches to constructing gender and voting behavior could result from legal constraints, their personal attributes, and institutional constraints. I conclude this chapter with a discussion of my argument.

Chapter three discusses some problems with assessing the Supreme Court's impact on gender equality. It provides an overview of how gender equality is often conceptualized—same

or different treatment of women and men—and how it has evolved in the women's movement and in the Supreme Court. I also introduce the research question, research methods, and case selection. I conclude this chapter with a discussion of the Supreme Court cases under study and how justices have legally treated women and men in their opinions and votes.

The fourth chapter contains a quantitative analysis of the approaches justices take when constructing gender in their opinions and voting in gender classification cases. I find that the personal characteristics of the justices—political ideology and gender—significantly influenced justices' discussions about gender in their opinions and whether they granted the same or different legal treatment to women and men in their votes. Compared to liberal justices, conservative justices were more likely to advance gender differences in their opinions and votes. Gender had an individual and panel effect on judicial behavior. Compared to male justices, female justices were more likely to advance a sameness approach in their opinions and cast votes treating women and men the same. When there were more women on the Supreme Court, male justices were more likely to further a sameness approach when constructing gender in their opinions, but they were more likely to reinforce gender differences in their votes. I argue that the legal treatment of women and men is largely driven by Court membership, particularly the political ideology and gender of the justices.

In chapter five, I conduct a small-N analysis in order to determine why gender had an individual effect on female justices' behavior. One proposed theory is that female justices assume a representative role and seek to promote women's interests, and another is that female justices' professional experiences with sex discrimination inform their judging. I argue that gender differences resulted from the latter. Due to their professional experiences, Justice O'Connor and Justice Ginsburg became attuned to the ways in which gender stereotypes and the

discrimination that resulted from them restricted women's and men's rights and opportunities. As justices, both acted in ways that furthered gender equality when adjudicating gender classification cases.

The sixth chapter examines whether gender had a panel effect on judicial behavior and concludes that it did not. Justice O'Connor and Justice Ginsburg did not affect the ways in which male justices discussed gender in their opinions or voted in gender classification cases. Instead, male justices' decision making in gender classification cases was influenced by their own ideologies, personal experiences, and relationships.

I conclude with a summary of the findings and implications of this research in chapter seven. I consider the ways in which all justices' personal experiences are brought to bear in their decision making, the implications of this research, and some ways in which women could make a difference in the Supreme Court. I conclude with some avenues for future research.

CHAPTER 2: THEORIES OF JUDICIAL BEHAVIOR AND GENDER POLITICS

2.1 INTRODUCTION

In 1973 in *Frontiero v. Richardson*, the Supreme Court invalidated a military rule automatically granting married servicemen an increased housing allowance. By contrast, married servicewomen had to demonstrate that their husbands were financially dependent upon them to obtain this same benefit. Although eight justices struck down this gender classification, they were divided over level of scrutiny, leading Justice Brennan to write for the plurality[8] and Justice Stewart and Justice Powell to write their own concurring opinions. Justice Brennan employed strict scrutiny,[9] which was a major point of contention. While he believed that "classifications based upon sex, like classifications based upon race...are inherently suspect and must therefore be subjected to close judicial scrutiny" (*Frontiero v. Richardson*, 411 U.S. 677 (1973)), the others disagreed, confident that the American states would ratify the Equal Rights Amendment and thus obviate the need for judicial action (Campbell 2002: 193). According to Justice Powell, it is "unnecessary for the Court in this case to characterize sex as a suspect classification" and that such matters should be left up to the will of the people and the political process (*Frontiero v. Richardson*, 411 U.S. 677 (1973); Strebeigh 2009: 58-59), suggesting that in this and other cases, justices recognized that the Supreme Court is part of, anticipates, and reacts to its political environment.

Justice Brennan did not give up the fight to establish the use of strict scrutiny in gender classification cases, and he got his chance in 1976 in *Craig v. Boren*. An Oklahoma statute allowed women to purchase beer at the age of 18 and men at the age of 21 on the grounds that it

[8] A plurality opinion obtains more co-signers than any other opinion on a case, but not a majority of the Court. Plurality opinions do not set precedent.

[9] Strict scrutiny is the highest standard of review justices can employ when assessing the constitutionality of a classification, or an instance in which people are treated differently before the law on the account of sex, race, disability, or age, for example. If justices apply strict scrutiny, they determine whether a government action is necessary to achieve a compelling governmental purpose. It they decide that it is, they uphold it.

protected the public's health and safety. Its law was based upon survey results showing that males under the age of 21 were more likely to drink and drive, get arrested for public intoxication or for driving under the influence, and get into traffic accidents than their female counterparts. Curtis Boren, a 20 year-old man, and Carolyn Whitener, co-owner of a convenience store that sold beer, challenged the law under equal protection grounds.

After the oral argument and in conference,[10] instead of articulating his most preferred standard of review, Justice Brennan instead offered a level in between rational basis review and strict scrutiny (Epstein and Knight 1998: 5). As the most senior member of the majority, he assigned the opinion to himself.[11] Brennan secured the support of Justices White and Marshall, both of whom demonstrated support for strict or an in-between level at the conference vote. Interestingly, Justices Blackmun, Powell, and Stevens also signed onto Brennan's opinion, altering their positions after the conference vote.[12] Ultimately, Brennan marshalled a majority, establishing intermediate scrutiny as the standard of review for gender classifications, even though it was not his most preferred position. In addition, half of those in the majority switched votes between the conference vote and final disposition.

How can we make sense of justices' decision making in *Craig v. Boren*? Scholars of judicial behavior and gender politics offer various explanations that can help account for the variation in the legal treatment of women and men in the United States, and I bridge these two literatures in this chapter. These scholars tend to have different foci, with judicial behavior scholars concentrating on state and federal courts and gender politics scholars focusing on policy

[10] At conference, justices cast their initial votes in a case and the Chief Justice assigns the author of the majority opinion.

[11] If the Chief Justice is in the majority, s/he assigns the opinion. If s/he is not, the most senior justice in the majority assigns it instead.

[12] Blackmun was undeclared at the conference vote, Powell favored rational basis review, and Stevens proposed a level above rational basis review but not necessarily an in-between standard (Epstein and Knight 1998: 5).

outcomes in state and federal legislatures. However, the theories they both generate can help explain judicial behavior in Supreme Court gender classification cases.

I begin with a review of the factors shaping judicial behavior, which fall into three broad categories: the legal model, Court membership, and new institutionalism. Though judicial behavior is shaped by justices' personal attributes, including political ideology and gender, I also consider how institutional forces in the environment, such as legal rules, political actors, and interest groups can constrain it. I then conclude with a theory of judicial behavior that considers the influence of justices' personal experiences and relationships.

2.2 THE LEGAL MODEL

The traditional legal model, dominant in the 1940s (George and Epstein 1992: 324), contends that judicial behavior is rooted in the law, or the idea that "the law...drives itself" (Epstein and Kobylka 1992: 10). Also known as mechanical jurisprudence, the theory is that justices do not make law; rather, they *find* it. Segal and Spaeth (2002: 48) sum it up as "the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent." In short, judicial behavior is simply the interpretation and application of case law, statutes, and the constitution.

One of the tenets of the legal model is that the socialization process of law school instills in students overarching norms and principles—that judges are guided by the law and reason by example (Baum 1997; Kahn 1999; George and Epstein 1992: 324). Law students also learn the role judges play in the political system. As judges, they are to exercise legal restraint and leave the policymaking up to the political process and elected branches of government (Baum 1997; Kahn 1999; Bailey and Maltzmann 2008). In contrast to legislators, judges are supposed to

assess the facts of a case and resolve cases, remaining neutral and withholding their personal beliefs.

Even though justices are, by definition, political actors, the legal model rests upon the notion that they are neutral and impartial arbiters. According to this model, judicial decisions are meant to be free from political or personal contamination, and justices are immune to any and all personal and external influences (Epstein and Kobylka 1992: 11; Tiller and Cross 2006: 518). A judge's duty is to apply the law and arrive at principled and neutral decisions that can be applied to future cases (Kahn 1999: 180; Wechsler 1959: 6; 19). As such, some scholars conceptualize the legal model as the norm of stare decisis (George and Epstein 1992; Spriggs and Hansford 2002; Bailey and Maltzmann 2008). Here, the holding from one case becomes the law, and then judges apply that holding to similar cases adjudicated in the future (Levi 1948: 501). The first case becomes a "controlling case," meaning that its holding serves as precedent and guides judicial decision making in future cases like it.

However, other scholars shift the focus of the legal model away from precedent and on to how other facets of the law shape judicial behavior. Richards and Kritzer (2002: 306) argue that "law...is to be found in the structures the justices create to guide future decision making." It is not solely the outcome of a case that guides future decisions; legal rules, standards, and doctrinal tests do too. This array of factors can be thought of as a jurisprudential regime, which refers to "a key precedent, or a set of related precedents, that structures the way in which the Supreme Court justices evaluate key elements of cases in arriving at decisions in a particular legal area" (Richards and Kritzer 2002: 308). Jurisprudential regimes establish which case factors are relevant and how much weight should be given to each one. After a key precedent is issued, the weights of each factor should change, which provides evidence that justices are adhering to the

law. As an example, the Supreme Court proposed the undue burden test in 1992 in *Planned Parenthood v. Casey*, a case involving the constitutionality of a variety of abortion restrictions. In this case and in future cases, laws restricting abortion access could not impose an undue burden on a woman's ability to terminate her pregnancy; otherwise, they were deemed unconstitutional.

To some extent, the legal model has some validity. The Supreme Court operates according to a set of institutional rules and norms distinct from executives and legislatures. As such, justices might interpret and apply the law because that is what they are supposed to do (Whittington 2000: 624). Moreover, justices must appear to base their decisions in the law, and when writing the opinions that justify their votes, they refer to past cases, statutes, legal rules, and the constitution. They must "give" reasons and consider the alternatives before issuing a decision, and this potentially constrains justices who may otherwise act in their own interests (Shapiro 1992: 184).

However, there are some reasons why the legal model may not explain judicial behavior. First, no two justices are likely to interpret the law in the same way. According to Pound (1931: 707), the act of interpreting and applying the law is not science, and rather than being uniform, it is subjective. For instance, according to the legal model, when issuing a decision, justices should draw on the "plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent," but in practice, it is difficult, if not impossible, to determine what constitutes "plain meaning" (Segal and Spaeth 2002: 48). There are multiple interpretations of legal rules, case law, statutes, and the constitution, and variation in which constitutional clauses justices choose to be bound by. Further, the ways in which justices interpret and apply these are likely influenced by extralegal factors, such as their personal experiences, attitudes, and values. While the legal

model stresses neutrality and objectivity, judicial decision making may be more subjective than anticipated.

The legal model also seems to imply that each case contains one "correct" ruling at which all justices will arrive (Gillman 2001: 472), but in reality, they sometimes arrive at different outcomes. If judging were simply the uniform application and interpretation of laws and legal principles, justices would issue unanimous decisions, not concurring opinions and dissents. Not only that, but if it was possible to attain one "correct" ruling, judging could be conducted by one judge instead of collegial courts, and appeals courts would be rendered unnecessary.

Another reason why the legal model provides a limited explanation of judicial behavior is that although justices might reference the law in their opinions, it is difficult to determine if they do so sincerely. They may claim their decisions are rooted in neutral interpretations of case law, statutes, and the constitution, but because multiple interpretations exist, we do not know if justices instead interpret the text in a way that supports their personal preferences. In other words, it is difficult to know if justices sincerely apply the law, or if the law is the vehicle through which they advance their own agendas.

Lastly, if judicial decision making was a purely neutral and impartial endeavor, battles over judicial nominations would be non-existent. A candidate's nomination to the Supreme Court would be uncontested, assuming s/he had the necessary professional qualifications to do the job. Candidates would not be asked their position on hot button issues such as abortion, and combing through their opinions or articles to glean insight into their policy positions would be pointless. The term "borking"[13] would not exist, Senators would have little reason to oppose nominees, and interest groups would not bother protesting or testifying at confirmation hearings.

[13] Robert Bork was nominated to the Supreme Court in 1988, and it was later revealed that he was extremely conservative. The term "bork" was born out of his confirmation hearings, and it means to vilify, defame, or obstruct a nomination.

Political battles over judicial nominations have intensified in the past 30 years (Epstein and Segal 2005: 2), and that people care deeply about who becomes a Supreme Court justice suggests that other factors drive judicial behavior.

2.3 COURT MEMBERSHIP

Scholars studying political behavior in courts and legislatures agree that to an extent, policy outcomes are largely driven by the membership of that institution. Judicial behavior scholars examine how court membership—turnover and characteristics of the justices—affects voting behavior (Gryski, Main, Dixon 1986; Segal and Spaeth 1993: 65; Allen and Wall 1993; Martin and Pyle 2005; Peresie 2005; Boyd, Epstein, Martin 2010). Similarly, in legislative studies, some gender politics scholars turn their attention to the role that social movement allies in government play in advancing gender equality. They argue that elite allies who sympathize and support gender equality respond to women's movement's claims, instigating and supporting legislative change favorable to women's rights (Costain 1992; McCammon, Hewitt, Smith 2004; Weldon 2002, 2011). In short, scholars of judicial behavior and gender politics suggest that *who* is included in political institutions likely has a major influence on political outcomes. When assessing the influence of Supreme Court membership on decision making involving gender issues, two relevant factors to consider are the justices' political ideology and gender.

2.3.1 Justices' Political Ideology

During the legal realist movement[14] of the 1920s, legal realists concluded that judges do indeed make law, and they called for empirical studies of judicial behavior (Segal and Spaeth 2002: 87-88). A main point underscoring legal realism, also known as realistic jurisprudence, is the belief that law is subjective. Llewellyn (1931: 1243) points out that we are not "a government

[14] The legal realist movement, led by Karl Llewylln and Jerome Frank, developed in response to the legal model of judicial behavior. A major point underscoring legal realism is that the law is fluid and adapts to society (Segal and Spaeth 2002: 87).

of laws, but one of law through men." Laws are not made by machines or robots; they are made by people. Justices are not necessarily the impartial actors the legal model believes them to be, and instead, they are people who bring their values, perspectives, and experiences with them to the bench. It is difficult for justices to set aside their personal beliefs because justices, "like any other human beings, are influenced by the values and attitudes learned in childhood" (Frank 1950). As Llewellyn (1931: 1222) states, "behind decisions stand judges; judges are men; as men they have human backgrounds," and we should take judges' characteristics into consideration when assessing their behavior (Llewellyn 1931: 1242-1243).

A substantial body of literature suggests that justices' ideological attitudes and values are largely responsible for their voting behavior. Pritchett (1948) was among the first to suggest that justices inject their personal ideologies in their judicial decisions. By examining Supreme Court outcomes from 1937 to 1947, he found that justices formed voting blocs based on their attitudes on economic issues and individual rights (Pritchett 1948: 262-263). Ulmer (1960: 652) observed a similar phenomenon when he investigated civil liberties cases adjudicated by the Supreme Court in the 1958 term, finding that justices formed voting blocs with other justices who shared their attitudes, philosophies, and backgrounds. These findings suggest that judicial decision making is not simply the neutral application of the law; otherwise, voting blocs would be non-existent. That these voting blocs were formed along ideological lines suggests that, intentionally or not, justices fail to withhold their personal attitudes and values when judging.

Other scholars furthered research in this area. Schubert (1965) examined Supreme Court decisions from 1946 to 1963 and argued that they are a product of justices' social, political, and economic values. He is credited with being the first proponent of the attitudinal model of judicial behavior (Segal and Spaeth 2002). This model contends that "cases are decided in light of the

facts of the case vis-à-vis the ideological attitudes and values of the justices" (Segal and Spaeth 1993: 65). As Segal and Spaeth (1993: 65) succinctly put it, "Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal."

This line of scholarship argues that justices' ideological attitudes and values shape their application and interpretation of the facts of a case, legal rules, case law, statutory law, and the constitution. In short, justices' ideologies are the lenses through which they interpret information, view the world, and make sense of it. As such, their ideologies likely shape their attitudes regarding gender roles, expectations, and the legal treatment of women and men.

In addition, according to the attitudinal model, justices are political actors with the potential to significantly influence politics and policy, so they may also be reluctant to withhold their ideologies and attitudes when deciding cases. Like legislators, justices have policy preferences and goals (Fenno 1973; Epstein and Knight 1998: 23). Recognizing that justices' political ideologies shape their behavior and building off of Schubert's work, Rohde and Spaeth (1976) examine *why* justices allow their ideologies to infiltrate their decisions. They theorize that justices, like other political actors, are goal oriented and choose the policy alternative that best helps them achieve their goals (Rohde and Spaeth 1976: 70). Accordingly, not only is it virtually impossible for justices to prevent their attitudes, values, and ideologies from seeping into their decisions, they may *not* want to restrain themselves and instead seek to proactively advance their policy preferences.

2.3.2 Justices' Gender

Another characteristic to consider when assessing judicial behavior involving gender issues, but not necessarily other types of cases, is a justice's gender. A large body of research

located in the gender politics literature contends that women's descriptive representation produces their substantive representation (see Thomas 1994; Mansbridge 1999; Reingold 2000; Carroll 2002; Swers 2002; Wolbrecht 2002). As more women attain positions of power, the theory predicts, they will work to advance women's interests by introducing and supporting policies favorable to women's rights. Therefore, drawing on this scholarship, gender differences among Supreme Court justices could produce gender differences in judicial behavior. Compared to male justices, female justices may be more likely to act in a way that produces rulings favorable to women.

Rooted in Hanna Pitkin's models of representation, some gender politics scholars contend that the representation of women in government is critical to furthering gender equality in the United States and around the world. According to Pitkin (1967: 60), descriptive representation occurs when the representative resembles those s/he represents. In other words, representatives and constituents share certain characteristics, and the legislature "mirrors" those who are represented (Pitkin 1967: 61). In contrast to descriptive representation, substantive representation occurs when a representative acts on behalf of or in the interest of another person (Pitkin 1967: 113). Here, a representative acts in a way that benefits a particular group of people and furthers their interests. Although descriptive representation sometimes produces substantive representation, these two models are distinct. While the former emphasizes what representatives look like, the latter is concerned with what they do.

Drawing on Pitkin's work, a number of scholars contends that women's descriptive representation leads to their substantive representation. Some scholars theorize that women have shared experiences, perspectives, and values that compel female representatives to act on behalf of their female constituents and represent their interests (see Reingold 2000; Carroll 2002; Swers

2002; Wolbrecht 2002). Not only that, but some scholars contend that the common bonds among women are presumed to be so strong that female representatives also act as surrogate representatives, seeking to further the interests of all women, not just those they represent (Mansbridge 1999; Carroll 2002). Empirical evidence suggests this is true. Women and men have different legislative priorities and agendas, and women tend to prioritize social welfare and gender issues, especially concerns unique to women that may have previously gone unaddressed by male legislators (Thomas and Welch 1991; Wolbrecht 2002: 175).

Indeed, gender differences in legislative behavior are evident, and throughout the legislative process, female legislators play important roles in furthering gender equality. Scholars find that women are more likely than men to introduce and cosponsor bills concerning gender issues (Thomas and Welch 1991; Thomas 1994; Bratton and Haynie 1999; Swers 2002; Wolbrecht 2002; Bratton 2005: 111; Gerrity, Osborn, Mendez 2007: 190). In committees and floor debates, women use their positions to further gender equality and speak on behalf of women (Berkman and O'Connor 1993: 115; Swers 2002: 96, 111; Pearson and Dancey 2011). In terms of roll-call votes, women are more likely than men to support women's rights (Thomas 1994: 83; Norton 1999; Reingold 2000). These gender differences are not specific to the United States. Other scholars conducting cross-national studies also find evidence that women's descriptive representation is critical to advancing gender equality (see O'Regan 2000; Bolzendahl and Brooks 2007).

Prior research provides support for the theory that the substantive representation of women occurs through their descriptive representation. With the increasing number of female judges in state supreme courts and federal courts, other scholars turn their attention to examining whether a similar pattern occurs there as well. This is possible, but the process through which it

occurs will be different in courts than in legislatures. While female legislators can introduce and sponsor legislation benefitting women, given that cases must be litigated, female judges are limited in the degree to which they can take proactive measures to advance women's rights. Female legislators can also freely articulate a desire to further women's interests, and they have a constituency to represent. By contrast, female judges, at least those who are appointed, have no constituency. As judges, they are, in theory, supposed to be neutral and impartial (Tiller and Cross 2006: 518) and are instead beholden to the law.

This does not necessarily imply that is impossible for female judges to substantively represent women. Scholars suggest that one reason why gender differences in judging arise is because female judges seek to play a representative role and advance women's interests (Allen and Wall 1993; Martin and Pyle 2005). For instance, Allen and Wall (1993) examined the behavior of State Supreme Court Justices and found that compared to male justices, female justices tend to be pro-woman and support the expansion of women's rights. Other research focusing on sex discrimination and sexual harassment cases finds further evidence of gender differences in cases involving gender issues. Studies on the federal courts of appeals find that women judges support employment discrimination victims more than men judges (Davis, Haire, Songer 1993; Songer, Davis, and Haire 1994: 436; Boyd, Epstein, Martin 2010: 401), and female judges are more likely to support victims of sexual harassment than male judges (Peresie 2005: 1776). Given the potential for cases concerning gender issues to influence gender equality, female judges may be more compelled to act on behalf of women. When confronting those types of cases, as opposed to other types, female judges appear to assume representative roles, acting as surrogate representatives (Mansbridge 1999), which is consistent with survey research

demonstrating that female judges feel a certain sense of responsibility to represent women (Martin 1993: 170).

Another reason why we observe gender differences in judicial behavior could be because women judge "in a different voice" (Gilligan 1993). According to Gilligan (1993), women and men are guided by different moral compasses, have distinct worldviews, and are connected to society differently. Other scholars agree that while men prioritize individuality and autonomy, women are more interconnected (Sherry 1986: 163; West 1988; Bartlett 1990; Gilligan 1993: 62-63). As such, according to Sherry (1986: 544), women may have gendered interpretations of the law, leading to a feminine jurisprudence.

However, empirical evidence does not seem to support the theory that women speak in a different voice in the judiciary. A number of studies suggest that women and men judge differently, but only in cases pertaining to gender issues. Even though Allen and Wall (1993) found that female and male State Supreme Court justices voted differently in women's rights issues, gender differences were absent in cases concerning criminal rights or economics. Similarly, in a study on federal appellate court judges, scholars examined 13 issue areas, including capital punishment, affirmative action, disability, federalism, and they found gender differences only in cases concerning sex discrimination (Boyd, Epstein, Martin 2010). If women judged "in a different voice," we would expect to see gender differences in some of these other issue areas, not just those involving gender issues (Sherry 1986: 160). Even in areas in which we might expect to see differences in moral guidance or communitarian principles manifest themselves, such as criminal rights or the death penalty, scholars find no evidence that women and men judge differently (Allen and Wall 1993; Boyd, Epstein, Martin 2010).

Lastly, scholars suggest that gender differences in cases concerning gender issues, but specifically sex discrimination and sexual harassment, could arise because women, relative to men, acquire unique and valuable information based upon their shared professional experiences *as women* (Gryski, Main, Dixon 1986; Peresie 2005; Boyd, Epstein, Martin 2010). For example, even though female judges are in a position of power and prestige, some experienced discrimination and prejudice as they entered employment and educational arenas traditionally reserved for men, including law. Scholars contend that this effect is likely to manifest itself primarily in employment cases, as this is when women's experiences as women could offer an informational advantage that could produce gender differences in voting behavior (Boyd, Epstein, Martin 2010: 391). Evidence that gender differences persists only in cases involving sex discrimination and sexual harassment provides some support for the informational accounts theory.

2.3.3 The Limited Impact of Women's Descriptive Representation

A justice's gender could have a critical influence on her judging, and there are reasons to believe that women's descriptive representation in the Supreme Court improves their substantive representation. However, other scholars point out that women's representation in government does not necessarily lead to their substantive representation (hooks 1984; Crenshaw 1991; Phillips 1995; Collins 2000; Dovi 2007; Celis, Childs, Kantola, and Krook 2008; Childs and Krook 2009). One reason is that women are not a monolithic group, therefore making it difficult to identify what constitutes substantive representation, and another is that male policymakers can and do take action to advance gender equality.

a) Women are not Monolithic Group

The literature on gender differences in legislative and judicial behavior is critiqued for constructing women as a monolithic group who share a unified set of experiences and beliefs, political interests, and policy goals. More accurately, critics point out that women have different experiences, attitudes, and values resulting from their differences in race, ethnicity, class, and sexuality (hooks 1984; Crenshaw 1991; Collins 2000). Some of these differences could explain why some scholars find no evidence that women and men judge differently.

For instance, Walker and Barrow (1985) conducted one of the earliest studies to determine whether President Carter's efforts to diversify the federal bench produced gender differences in judicial behavior. In their study on district court judges, the authors analyzed affirmative action cases and found no evidence that gender shaped voting behavior. They concluded that women were no more receptive to the demands of disadvantaged groups or more sympathetic to women's and minority interests than were men (Walker and Barrow 1985: 614).

In a similar study, Segal (2000) examined the behavior of federal appellate court judges appointed between 1993 and 1996 and did not find evidence that women and men voted differently in a variety of issue areas, including those relating to women, minorities, and criminal rights. She suggested that female judges were not compelled to represent women's interests and that the heterogeneity among women made substantive representation difficult (Segal 2000: 145). Women are a diverse group and lack a unifying set of experiences, attitudes, and beliefs, so some female judges may not identify with other women or feel compelled to act on their behalf.

Along those lines, another reason why the substantive representation of women may not occur through their descriptive representation is because there is much disagreement over what it means to substantively represent women. According to some scholars, it is difficult, if not impossible, to determine what constitutes "women's interests" (Phillips 1995; Dovi 2007: 301).

For example, some women believe that subsidized day care is a women's interest, but others would disagree. Not all women have children, and some women believe that day care is a private issue best kept out of the purview of the government. Dovi (2007: 304) argues that the notion that an identifiable set of "women's interests" exists assumes there is an essential understanding of what it means to be a woman and that all women share a common identity. Other scholars agree that this line of thinking inevitably overlooks the interests of some women and produces an uneven distribution of representation (Crenshaw 1991; Collins 2000).

For instance, women are divided by more than race, class, and sexuality; they are also ideologically divided. The notion that women's interests are synonymous with feminist interests and that only liberal women can act on behalf of women is contested. Studies on conservative women's political activism demonstrate that they also strive to and purport to represent women and promote their interests (Klatch 1987; Schreiber 2008). There is a fundamental disagreement among feminist women and conservative women over the proper roles of women and men (Klatch 1987: 139), and therefore what will benefit women and enhance their standing and status in society. While feminists encourage economic independence, for example, conservative women reinforce traditional gender roles and work to protect and advance women's rights in marriage and the family (Klatch 1987: 139). As an example, through this lens, feminists would view no-fault divorce laws as important to women's liberation, enabling them to leave abusive marriages. By contrast, socially conservative women believe no-fault divorce violates women's rights by allowing husbands to shirk their responsibilities to financially support their wives. In short, equating substantive representation with feminist representation means that the descriptive representation of *some* women only produces the substantive representation of *some* women.

It is important to take these critiques seriously and recognize that attempts to define what it means to represent all women leave some women out, whether it is due to differences in ideology, race, or class. When some women's voices are silenced and their interests are marginalized, it can hardly be said that women are substantively represented. As Dovi (2007: 315) suggests, having women with different interests, opinions, and perspectives in government is necessary to ensure the "adequate representation of women."

However, it is possible to acknowledge some similarities among women without denying their differences. Some issues unite some women and not others, such as welfare rights or maternity leave, but women likely share *some* common ground and experiences. Therefore, the conditions under which women's descriptive representation produces their substantive representation may depend on the issue area. As Htun and Weldon state, some "injustices affect all women in some way regardless of their other social positions" (Htun and Weldon 2010: 209). For instance, they note that any woman is susceptible to sexual harassment, sex discrimination, rape, or domestic violence regardless of her race, class, sexuality, ideology (Htun and Weldon 2010: 209). Moreover, gendered structures in society reinforce the sexual division of labor, placing the responsibility of childcare and housework on women (Young 1994: 736; Htun and Weldon 2010: 209).

b) Men and Indirect Gender Effects

The literature on the substantive representation of women also overlooks the role of men, who are and can be important sources of legal change. Some scholars theorize that men can "initiate policy proposals on their own...regardless of the number of female representatives" (Celis, Childs, Kantola, and Krook 2008: 102-103; Childs and Krook 2009: 138). In doing so, men act as "critical actors" by making an effort to represent women's interests (Celis, Childs,

Kantola, and Krook 2008: 102-103; Childs and Krook 2009: 138). Though this concept does not help us resolve what constitutes "women's interests" or what it means to substantively represent women, it is useful in that it allows men a greater role in the policymaking process involving gender issues. To give an example, when Justice Blackmun wrote the majority opinion in *Roe v. Wade* in 1973, in which he found that women had a constitutional right to privacy, thereby decriminalizing abortion, he could be considered a critical actor. There were no women on the Supreme Court at the time, yet he took the initiative to act in a way that arguably advanced gender equality.

As critical actors, men may promote gender equality on their own accord, but they may also do so because of the indirect effects of gender on their political behavior. In other words, some scholars contend that female judges' presence and influence could alter their male colleagues' behavior (Gryski, Main, Dixon 1986; Peresie 2005; Boyd, Epstein, Martin 2010). According to informational accounts, this panel effect of judicial behavior could be due to the knowledge and information women are understood to accrue because of their professional experiences as women. Boyd and her colleagues (2010: 391) suggest that men may perceive women as having more credibility and experience in certain issue areas, particularly those involving sex discrimination or sexual harassment, and so they follow their lead.

Several studies examine the influence of women's membership on a court on her male colleagues' behavior and find a panel effect in cases concerning gender issues. Gryski, Main, and Dixon (1986) examine sex discrimination cases from 1971 to 1981 and find that state high courts were more likely to uphold sex discrimination claims when there was at least one female judge on the bench. In a study on sexual harassment and sex discrimination cases decided by the federal courts of appeals from 1999 to 2001, Peresie (2005) finds that male judges who sat on the

panel with at least one female judge were more likely to rule in favor of the plaintiff. Using a different methodological technique, Boyd and her co-authors (2010: 406) examine these same cases, albeit from 1995 to 2002, and confirm this finding. Fewer studies have been conducted at the Supreme Court, given that there is a fewer number of justices and an even fewer number of women. However, some suggest that after the first female justice, Justice O'Connor, joined the Supreme Court in 1981, male justices' support for sex discrimination claims increased (O'Connor and Segal 1990; Palmer 2002).

Justices' ideology and gender likely help to explain their behavior in the Supreme Court. It is difficult, if not impossible, for justices to set their ideologies, experiences, and perspectives aside when deciding a case. Moreover, they may not want to do so. Compared to legislators, justices are not accountable to an electorate—they are neither elected, nor do they face reelection, and thus do not answer to a constituency. By contrast, Congressmembers, who are "single-minded seekers of reelection," take their constituents' preferences into consideration when legislating (Kingdon 1973: 29; Mayhew 2004: 5). After all, making policy is one of the paramount goals of Congressmembers, but it is an impossible one if they are not reelected. The lack of accountability, along with their lifetime tenures, provides justices with an excellent opportunity to inject their personal beliefs and policy preferences into their decisions. In other words, justices have little reason to discard their political ideologies, experiences, and perspectives when issuing a decision.

However, the reality is that justices cannot unilaterally shape policy. They must navigate a variety of constraints—rules, procedures, fellow justices, and other political actors—if they want their policy goals to be realized. Moreover, though they lack constituents, they may take societal views into account when ruling. As such, given their constitutional role as defenders of

the constitution, justices are limited to some degree in their ability to "legislate from the bench." In the next section, I take a closer look at these various constraints and how justices attempt to negotiate them.

2.4 NEW INSTITUTIONALISM

Up to this point, I considered how legal considerations and characteristics of the justices affect legal change, but not their interactions with one another or actors beyond the Supreme Court. While many scholars believe justices' personal attributes explain their behavior, others turn their attention to the institutional constraints justices face and situate the Supreme Court in the larger political and social system (Clayton and Gillman 1999: 4; Ginsburg and Kagan 2005: 2). According to new institutionalism, justices' capacity to act in their own self-interest is restricted by constraints that limit the range of alternatives available to them and impose costs on their actions (Whittington 2000: 612). Inside the Court, justices are constrained by one another as well as by legal rules and procedures. Here, new institutionalist accounts of judicial decision making overlap with the legal model. Outside the Court, political actors, interests groups, and the environment constrain judicial behavior.

2.4.1 Rational Choice Institutionalism

A distinct feature of rational choice institutionalism is its emphasis on the strategic nature of judicial behavior. According to Epstein and Knight (1998), justices seek to advance their policy preferences, but their ability to do so depends upon the preferences and actions of other actors inside and outside the judiciary. As a result, justices act strategically, anticipating and negotiating the likely responses of those actors (Epstein and Knight 1998: 12; Whittington 2000: 612). Judicial decision making is an interdependent endeavor; that is, actors' choices and actions are partly a function of how they expect others to react (Epstein and Knight 1998).

At first glance, it seems counterintuitive that Supreme Court justices engage in strategic behavior because it is difficult to hold them accountable for their actions. However, like legislators, justices cannot make public policy alone. Like a member of Congress, Supreme Court justices must first obtain the support of their colleagues, building coalitions and compromising with one another. Of course, judicial behavior is not completely analogous to that of Congresspeople as the two face different institutional constraints and hurdles. Nonetheless, justices "bargain and accommodate" one another, circulating opinions, revising them, and incorporating their colleagues' suggestions in order to obtain their support (Epstein and Knight 1998: 31).

Scholars also contend that aside from the justices themselves, other actors, including the president, Congress, and interest groups also constrain judicial actions (Gillman and Clayton 1999: 6; Whittington 2000: 612). The separation of powers system, by its very nature, prevents the Supreme Court, or any branch of government from behaving solely in its own interest. Each branch has distinct responsibilities and duties, but the three share policymaking powers (Barnes 2007). As such, the way in which justices interact with political actors external to the Supreme Court is also understood by some to be strategic, as they all strive to advance and maximize their policy preference and/or power while making calculations concerning the preferences and power of other actors (McCann 1999: 65). There are at least two reasons why justices might act strategically: to further their institutional legitimacy or to achieve their policy goals.

a) Institutional Legitimacy

While Congress has the power of the purse and the president the sword, scholars argue that the Supreme Court's power comes from its institutional legitimacy and that justices have an interest in retaining it (Epstein and Knight 1998; McGuire and Stimson 2004; Casillas, Enns,

Wohlfarth 2011). Institutional legitimacy refers to an institution's authority to issue judgments to a polity (Gibson, Caldeira, Spence 2003: 537). The Supreme Court's authority comes from its diffuse support,[15] or a "reservoir of favorable attitudes or good will that helps members [of the polity] to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants" (Easton 1965: 273). As Caldeira and Gibson (1992: 637) point out, it relies upon this reservoir of goodwill and political capital so that when people disagree with a specific decision, they will still view the Court as a legitimate political institution. As a result, scholars maintain that justices do not want to issue too many unpopular decisions that could attract negative attention and weaken their implicit authority (Stimson, Mackuen, Erikson 1995: 555; Casillas, Enns, Wohlfarth 2010).

Given justices' concern with protecting the Supreme Court's institutional legitimacy, the nature of the separation of powers system poses a constraint on their behavior. Even though justices are motivated by their own ideologies, they want to avoid the risk of public defeat (Stimson, Mackuen, Erikson 1995: 555). Without the power to enforce or implement their decisions, justices rely on the president and Congress to do so. If they refuse or simply ignore a ruling, it harms the Court's reputation and chips away at its legitimacy. If this occurs repeatedly, the Court runs the risk of being perceived as an impotent policymaking institution, and eventually an irrelevant one. As such, justices may be reluctant to defy the president or Congress if they suspect those actors will not enforce or implement a particular ruling (Casillas, Enns, Wohlfarth 2011).

Aside from ignoring an undesirable decision, scholars contend that another way in which the other branches of government could threaten the Court's legitimacy is by retaliating (Segal,

[15] Diffuse support is in contrast to specific support, which refers to support for specific judicial decisions (Caldeira and Gibson 1992: 637).

Westerland, and Lindquist 2011: 92). The president and Congress could do this in a number of ways, such as removing the Court's appellate jurisdiction, altering its size, or reducing its budget (Epstein, Knight, and Martin 2001). Even an attempt to curb judicial authority is costly to the Supreme Court and hurts its legitimacy (Epstein, Knight, and Martin 2001), and empirical evidence suggests that the mere threat of court curbing alters justices' behavior (Clark 2009).

The relationship between court curbing and judicial behavior is difficult to parse out. On one hand, as Clark (2009) argues, the lack of court curbing attempts indicates that justices are institutionally constrained. The logic is that in an effort to preempt retaliation, they consider other political actors' policy preferences when issuing a ruling, so the mere threat of court curbing, or the negative press that could result from such attempts, is enough to constrain justices. On the other hand, any threat to curb the Court could be hollow, so justices need not consider the policy preferences and actions of the president or Congress. While these political actors might publicly criticize a judicial decision, they have made very few attempts to curb the Court and are rarely successful (Rosenberg 1992; Hansford and Damore 2000). Moreover, instead of constraining justices, the lack of retaliation attempts by other actors could indicate that the Court has a stock of institutional legitimacy and that other branches of government would lose face by seeking to curb it.

In short, a lack of court curbing does not mean that justices are not constrained, but it still may not be the mechanism by which the president and Congress shape justices' behavior. Rather, other reasons may better explain why justices act strategically.

i) Women's Social Power

To protect their institutional legitimacy, justices may avoid issuing decisions outside the bounds of what they believe the public will support. As such, justices may respond to changes in

the environment, which judicial behavior scholars usually measure using public opinion (Flemming and Wood 1997; McGuire and Stinson 2004; Giles, Blackstone, Vining 2008; Casillas, Enns, Wohlfarth 2010). Relevant to this study would be views on changing gender roles and support for gender equality, which gender politics scholars suggest may be reflected by women's social power.

Women's social power, which refers to their status and standing in society, reflects broader gender attitudes that could constrain judicial behavior. Gender politics scholars theorize that women's social power helps dispel long-held gender stereotypes (McCammon and Campbell 2001). In other words, women's status and standing shapes how they are viewed in society, and as such, measures of women's social power are often used as a proxy for gender attitudes. For instance, McCammon and her colleagues (2001) argue that women's increasing social power was a major reason why some states adopted suffrage laws before others. They conclude that when more women entered the labor force or obtained higher education, gender attitudes became more egalitarian, thus increasing the probability that states granted women voting rights (McCammon, Campbell, Granberg, Mowery 2001: 61).

Although justices are cognizant of the environment in which they operate, gender attitudes are hardly uniform across the United States. This makes it difficult to gauge their effect on judicial behavior and definitively conclude that they are influential. Further, in contrast to the president or Congress, women's social power is an abstract concept that, in and of itself, cannot sanction justices. However, while it may not directly alter justices' behavior, it could indirectly shape it as the influence of women's social power could manifest itself in the political power women wield in the Supreme Court.

When women attain a higher status and standing in society, Minkoff (1997: 791) theorizes that they have the resources to organize and push for policy change, thereby converting their social power into political power. Soule, McAdam, McCarthy, Su (1999) test this theory when they examine congressional action on women's rights issues from 1956 to 1979, theorizing that women's labor force participation is an indicator of women's share of societal resources. They find that labor force participation was positively related to levels of collective action as well as the number of roll call votes on women's issues in the United States House of Representatives and Senate (Soule, McAdam, McCarthy, Su 1999: 250-251). Claiming that "money talks," they conclude that women's social power empowered women to take action and that it purchased institutional access (Soule, McAdam, McCarthy, Su 1999: 251).

There is evidence that women's social power leads to legal mobilization in the Supreme Court, so the extent to which it shapes judicial behavior could be a function of women's political power as litigants and amici. Legal, organizational, and financial resources are important to litigation success. According to Cowan (1976: 384-386), a major reason why the WRP won a number of cases was due to the money, staff, legal expertise, and network of communications provided by the American Civil Liberties Union.

Resources are important to other rights-based groups. Research demonstrates that from 1960 to 1990, various groups won equal rights rulings in the Supreme Court because of the financing and support structure created by rights-advocacy organizations and lawyers (Epp 1998). Although money is important, scholars argue that historically disadvantaged groups without ample funding can compensate by forming coalitions, pooling their resources, and supporting one another as amici (Kuersten and Jagemann 2000). In sum, women's social power

could directly constrain judicial behavior, or it could operate as an indirect influence, reflected by the political pressure women's rights groups apply in the judiciary.

ii) Interest Groups

Interest groups are another potential constraint on judicial behavior, as justices may use interest group pressure and the arguments groups make to gauge how a decision might be received by the public and therefore affect the Court's institutional legitimacy. While interest groups can lobby the judiciary as they can Congress, rules and procedures specific to the Supreme Court channel how they do it. One of the most common ways they attempt to exert their influence is by submitting an amicus brief (Caldeira and Wright 1988), which supplements the arguments of the parties litigating a case and provides them with the opportunity to persuade justices to vote in favor of a particular side. Interest groups do this by articulating who might be affected by a decision and in what ways and by conveying how an outcome might affect society. Justices may then use the information as a crude measure of interest group and public support (Collins 2004).

The judicial behavior and gender politics literature suggests that justices respond to interest group pressure. For one, there is evidence that justices incorporate arguments from amicus briefs into their opinions, suggesting that they take them seriously and that the briefs are influential (Whittington 2000: 625; Collins 2004; Corley 2008). Moreover, if interests groups did not think they had the potential to sway justices, they would not waste their time filing amicus briefs (Whittington 2000: 624). The capacity for interest groups to shape political outcomes is not specific to the judiciary, of course. A number of scholars contend that legislative institutions enacted policies advancing gender equality in response to the political pressure applied by the women's movement (Costain 1992; McCammon, Hewitt, Smith 2004; Weldon 2002, 2011).

Although legislators and justices respond to interest groups for different reasons—concerns over reelection versus institutional legitimacy—interest groups may be as influential in the judiciary as they are in legislatures.

Given that justices care a great deal about their reputation and authority (Caldeira and Wright 1992; Epstein and Knight 1998), they might defer to other branches of government or respond to women's social power or interest group pressure. They may also defer to "legalistic" factors, such as precedent or original intent, in an effort to shore up public support and avoid appearing too partisan (Epstein and Knight 1998). Again, this is another way in which the legal model overlaps with rational choice institutionalism: the mechanism by which legal factors help to account for justices' behavior could be their desire to retain their institutional legitimacy.

However, it is possible that justices care very little about the Supreme Court's institutional legitimacy. After all, the logic of this institutional constraint rests upon the notion that people care about or pay attention to whether justices legally constrain themselves. Some may not know enough about the law to know whether justices follow it, and others may not care because the characteristics and actions valued in a justice will differ from person to person.

Justices may have other reasons for restraining themselves when issuing decisions. They have various goals, which of course vary across justices, and one of them is to make policy (Baum 1994: 752). As such, protecting the Court's institutional legitimacy may not be an end in itself, and as Epstein and Knight (1998: 48-49) contend, it may be "a means to an end—a policy end." In other words, justices may care about institutional legitimacy only insofar as it affects their ability to remain authoritative enough to receive cases and advance their policy goals.

b) Separation of Powers and Justices' Policy Goals

If we believe justices care about the content of public policy and maximizing their power, the reasons for strategic behavior become even clearer. Aware that they cannot compel compliance and knowing that other actors can simply ignore their decisions, justices may make an effort to issue decisions within the confines of others' policy preferences. If they fail to do so, and if a decision goes unenforced, justices' policy goals are not realized. Furthermore, scholars contend that any attempt to modify or override a judicial decision moves a policy further away from justices' most preferred position (Stimson, Mackuen, Erikson 1995: 555; Epstein, Knight, Martin 2001: 598). Congress can introduce legislation tampering with a decision, and the president can pressure Congress to do so.

The relationship between institutional legitimacy and compliance are interdependent and cyclical. Legitimacy produces compliance, which helps justices achieve their policy goals, and then compliance reinforces the Supreme Court's legitimacy. Scholars suggest that any disruption in this process harms justices' policy goals, which could be why they engage in "rational anticipation," strategically reacting to and anticipating the reactions of other branches of government when issuing a judicial ruling (Stimson, Mackuen, Erikson 1995; Epstein and Knight 1998; McGuire and Stimson: 2004).

Interest groups present a potential threat to Supreme Court justices' ability to advance their policy preferences because of their capacity to mobilize and seek recourse in another branch of government, which is not uncommon (Kagan 2004: 14). According to den Dulk and Pickerill (2003: 426), interest groups "bridge" lawmaking institutions, strategically seeking to achieve their policy goals in the Supreme Court and in Congress, providing information to both branches when they seek to change the status quo or defend it. Evidence suggests that interest groups give policymakers the ability to potentially tamper with a judicial decision, as congressional overrides

can be attributed to the pressure applied by interest groups who lost in the Supreme Court (Baum and Hausegger 2004: 114). For instance, in response to the Supreme Court's rulings that pregnancy discrimination did not constitute sex discrimination in *Geduldig v. Aiello* in 1974 and *General Electric v. Gilbert* in 1976, Congress overrode both decisions by passing the Pregnancy Discrimination Act in 1978 (Vogel 1990: 14).

Succeeding elsewhere has the potential to move a policy further away from justices' most preferred position, which could be why justices respond to interest group pressure and the content of amicus briefs. Scholars point out that justices operate in an environment of incomplete information (Epstein and Knight 1998), so they must seek out information regarding which policies will be best and which ones will maximize their policy preferences (Collins 2004). Moreover, interest groups can use amicus briefs to suggest how other branches of government might react or to explicitly or implicitly signal they will go elsewhere if justices fail to respond favorably to their claims (Whittington 2000: 624). Thus, it may be in justices' best interests to issue a decision within the limits of what other political actors will tolerate rather than their most preferred policy preference.

However, despite the president's and Congress' ability to tamper with a judicial decision in theory, the reality is that this is a somewhat hollow threat. Although legislators are unconstrained in their ability to introduce bills and amendments, few of these come to fruition. Lawmaking is a difficult and cumbersome process, with numerous veto points in the legislative process. As a result, some scholars conclude that overriding a judicial decision—statutory or constitutional—is rare (Henschen 1983: 452; Epstein, Knight, Martin 2001: 596; Hettinger and Zorn 2005: 6), but this point is contested (Dahl 1957; Meernik and Ignagni 1997). That this point is disputed calls into the question the plausibility of separation of powers explanations of judicial

decision making. On the one hand, the ability for other branches of government to sanction the Supreme Court is debated, but on the other hand, empirical evidence demonstrates that the ideological leanings of the executive and legislative branches affect whether justices uphold or strike down laws (Hansford and Damore 2000; Lindquist and Solberg 2007; Segal, Westerland, Lindquist 2011). In sum, while the extent to which the Supreme Court can be sanctioned is unclear, justices are not isolated and act in the larger political and social environment. They face institutional constraints that could, to some degree, potentially shape their behavior.

2.4.2 Historical Institutionalism

While rational choice institutionalists view justices as strategic, calculating actors seeking to maximize their preferences, historical institutionalists view them as actors whose behavior structures and is structured by institutions (Gillman and Clayton 1999: 6). According to historical institutionalists, justices are deeply embedded in institutions, which are broadly defined. Institutions include not only formal rules, procedures, and other political actors, but also informal rules and procedures, norms, routines, and habits of thought (Hall and Taylor 1996: 938; Gillman and Clayton 1999: 4). This broad conceptualization enables us to fully understand how justices are embedded within social and political contexts (Whittington 2000: 616).

To some degree, justices could be influenced by institutional context, which has the capacity to shape their actions, and then their resulting decisions structure the political and social environment in which they operate. Furthermore, as discussed in a previous section, women's social power, a feature of the social environment relevant to this study, potentially influences judicial behavior. In short, justices are not insulated and instead, they are embedded in their institutional context and are products of their environment.

For example, Kahn (1999: 45) examines pairs of landmark Supreme Court cases to demonstrate how "beliefs about social reality," or social facts, influence judicial rulings. For instance, the belief that women and men occupied separate spheres—women in the home and men in the labor force—fueled the Court's decision to deny women law licenses in *Bradwell v. Illinois* (1873), which then reinforced the notion of separate spheres. According to Kahn (1999), when justices confront subsequent cases, they have new social facts to consider, which then shape their behavior. One hundred years after *Bradwell* in 1973 in *Roe v. Wade*, the Court decriminalized abortion, and it had the opportunity to overturn that decision in 1992 in *Planned Parenthood v. Casey*. Even though one of the reasons why six of the justices were appointed was to overrule *Roe*, Kahn (1999: 49) argues that they declined because of their understanding of social reality at the time. Women were participating in the political, economic, and social arenas in higher numbers than in 1973, making abortion rights even more important in 1992 than in 1973 (Kahn 1999: 49). In other words, fertility control was critical to women's participation in the public sphere.

Another major tenet of historical institutionalism is its focus on institutional development over time. As Whittington (2000: 616) states, "the past matters for present politics," and historical events and actions structure judicial decision making in the present and the future. For example, Gillman (1993) argues that Supreme Court justices invalidated social legislation during the turn of the 20th century because they sought to preserve the mission of the framers of the constitution. The framers' goal was to create a neutral state, and they did not support legislation designed to benefit a particular group of people (Gillman 1993). Their goal to maintain government neutrality constrained the justices, who made a distinction between legislation that benefitted the community as a whole and legislation that benefitted a special class (Gillman

1993). As such, in order to further government neutrality, justices struck down legislation designed to benefit particular groups.

In a similar vein, Bussiere (1999) examines why the liberal Warren Court did not constitutionalize a right to welfare when presented with the opportunity in 1968 in *Shapiro v. Thompson*. Here, welfare rights advocates challenged state policies requiring that Aid to Families with Dependent Children recipients live in a state for one year before receiving benefits from that state. The Warren Court declined to address the question of whether there was a constitutional right to welfare because it was constrained by *United States v. Carolene Products* (1938). There, that Court declared it would exercise judicial restraint in cases involving economic issues, a commitment the Warren Court adhered to in *Shapiro* (Bussiere 1999: 160). Given that state residency requirements were an economic and not welfare rights issue, the Warren Court was constrained by a past decision and declined to constitutionalize welfare rights.

Another category of historical events that structures judicial decision making is precedent, and here, historical institutionalism overlaps with the legal model of judicial behavior. Returning to the question of why the Court did not overturn *Roe* in *Casey*, Kahn (1999: 178) argues that justices subordinated their personal preferences and followed the norm of stare decisis. A majority of the justices recognized that women relied on *Roe*, so overturning it could create burdens for those seeking to obtain an abortion (Kahn 1999: 181). As such, justices adhered to precedent instead of partisan politics (Kahn 1999: 178).

Given that Supreme Court justices are unelected and unaccountable, that they are bound by history may seem counterintuitive. However, scholars suggest that justices share an institutional mission, which is an "identifiable purpose or a shared normative goal" (Gillman 1999: 79; Kahn 1999: 176). Their goal is to do their job, resolving legal disputes and following

certain legal principles, norms, procedures, expectations, and responsibilities (Gillman 1999: 80; Kahn 1999: 175-176). In doing so, justices use the law, judicial doctrine, and legal rules to justify their decisions (Kahn 1999: 176). In other words, justices invoke decisions and legal rules that were established over time to justify their rulings. They do this in order to demonstrate that the principles upon which their decisions rest are appropriate and in order to maintain their prestige and the respect of their colleagues, other political actors, and citizens (Kahn 1999: 175-176). Moreover, justices seek to defend their judicial authority and maintain their institutional legitimacy (Keck 2007: 335-336). In short, history may constrain justices because they aim to further their institutional mission and protect the Court's legitimacy.

In other respects, it makes sense that history constrains judicial behavior and limits justices' courses of action. Due to the nature of path dependency, when an institution selects a certain path, it becomes "locked in" (Thelen 1999: 385; Pierson and Skocpol 2002: 699). For example, the Court established the right to privacy that decriminalized abortion in *Roe v. Wade* in 1973. Because of this precedent, a majority of the Court chose not to overturn *Roe* nearly twenty years later in *Planned Parenthood v. Casey*. One reason is that reversing course is difficult and costly because there are start-up costs to changing paths and starting down a new one (Pierson 1997: 252, 254; Thelen 1999: 385). Justices realized that women had come to count on *Roe*, and they were therefore reluctant to change course (Kahn 1999: 181).

However, like the legal model, historical institutionalism suffers from some of the same limitations. For one, justices have little reason to allow history to constrain their behavior given that they serve lifetime appointments. Furthermore, their decision to be bound by certain historical events is at their discretion, and as I discussed earlier in this chapter, justices can choose which precedents to adhere to and when.

2.5 A THEORY OF JUDICIAL BEHAVIOR

There are several explanations that could explain the variation in legal treatment of women and men in the United States Supreme Court. Building on theories that center on justices' personal attributes, I argue that Court membership drives judicial decision making in gender classification cases. However, in addition to justices' gender and political ideology, the legal treatment of women and men is also shaped by their personal experiences and relationships. Each of these influence how justices interpret the law, shape their policy preferences, and mediate the social and political environment in which they operate.

This study employs multi-methods research techniques, and the quantitative analysis identified the factors shaping judicial behavior, and the qualitative component revealed why. While justices' political ideology and gender shaped their approaches to constructing gender and voting behavior, gender also had a partial panel effect on male justices' behavior. Aside from this puzzling and counterintuitive finding, the quantitative analysis left other unanswered questions, namely *why* gender differences in judging arose. As such, the qualitative component examines why gender shapes female justices' behavior and when and why serving with female justices alters male justices' decision making.

Though the legal model holds that justices faithfully and impartially interpret the law, the reality is that justices are people who bring their backgrounds with them to the bench. In addition to their gender and political ideology, justices have deeply influential personal experiences and relationships that shape their gender attitudes and judging. My theory of judicial behavior builds upon the attitudinal model, which holds that justices' ideological attitudes and values influence their decision making. Justices do not approach gender classification cases as blank slates, and it is difficult, if not impossible for them to set aside their ideologies when judging. However, their

identities cannot be parsed out and separated. As I discovered from the qualitative analysis, when justices judge, they bring their whole selves to the bench, not just their political ideology or gender.

I depart from the attitudinal model, as well as strategic accounts, and disagree that justices are personally and politically motivated. Rather than acting in their own self-interest and seeking to assert their policy goals, justices simply cannot help but to bring their personal backgrounds to bear when deciding cases. Their attitudes, values, and experiences are a subconscious, and not necessarily conscious, influence on their decision making (Interview 262, 37, 35, 374).

I argue that gender differences in personal experiences produced gender differences in judicial behavior. Justice O'Connor and Justice Ginsburg confronted blatant sex discrimination in law school and following graduation. Though both graduated at the top of their classes from top law schools, both were denied employment solely on account of sex (Gilbert and Moore 1981: 158; O'Connor 1991: 1549; Strum 2002: 57; Klebanow and Jonas 2003: 358; Biskupic 2005: 30). Justice O'Connor was offered one job, as a legal secretary, and Justice Ginsburg was denied a clerkship at the Supreme Court. Their difficulty in securing gainful employment stemmed from gender stereotypes, as the legal profession was traditionally reserved for men and deemed inappropriate for women. Moreover, employers worried that women would be distracted by their parental responsibilities and unable to fully dedicate themselves to their jobs (Ginsburg in Klebanow and Jonas 2003: 358). Despite their setbacks, Justice O'Connor started her own law practice and Justice Ginsburg became a law professor.

These personal experiences instilled in Justice O'Connor and Justice Ginsburg a belief that gender stereotypes were harmful and that people should be treated according to merit and

not sex (Interview 14, 374, 42, 242, 177; Gilbert and Moore 1981: 153; Ginsburg 1993: 140; Klebanow and Jonas 2003: 361; Strebeigh 2009: 19). Later in their careers, they acted on those beliefs and fought sex discrimination and stereotyping prior to their tenures as justices. As an Arizona state legislator, Justice O'Connor supported the Equal Rights Amendment and led successful efforts to repeal discriminatory laws based on sex (Maveety 1996: 15; O'Connor 2003: 196; Biskupic 2005: 52). Justice Ginsburg founded the American Civil Liberties Union's Women's Rights Project and challenged discriminatory laws in the Supreme Court (Campbell 2003; Strebeigh 2009). As Supreme Court justices, O'Connor and Ginsburg continued opposing gender stereotypes and discrimination. In their opinions and votes in gender classification cases, they tended to further the same legal treatment of women and men.

It was not only female justices who brought their personal backgrounds to bear in their decision making. Male justices were also deeply influenced by their personal experiences, as well as their personal relationships, which was why serving with a female justice had a limited impact on male justices' behavior. Although the quantitative analysis revealed modest support for a panel effect of gender, the qualitative analysis found none. A shift towards egalitarian attitudes, brought on by male justices' experiences and relationships, likely correlated with the addition of Justice O'Connor and Justice Ginsburg to the bench.

By the time Justice O'Connor joined the Court in 1981 and Justice Ginsburg in 1993, many male justices already harbored egalitarian attitudes. For some, such as Justice Brennan and Stevens, support for gender equality was part of their worldview, liberal ideology, and broader commitment to social justice and equal rights (Interviews 177, 135, 193, 14, 73). Other male justices' egalitarian attitudes resulted from the influences of their wives and daughters (Interview 28). For instance, Justice Blackmun and Justice Breyer had strong and influential wives and

daughters who sensitized them to gender equality issues. Similarly, Justice Powell's three daughters, each of whom wanted to work outside the home, taught him that law should not restrict women's opportunities (Interview 69; Jeffries 1994: 204).

Lastly, some male justices had formative experiences that produced a support for gender equality and egalitarian attitudes. For instance, Justice Marshall was committed to racial equality, and as chief counsel for the National Association for the Advancement of Colored People Legal Defense and Education Fund, he developed a litigation strategy and challenged discriminatory laws in the Supreme Court (Interview 21). Moreover, as a black man, he had firsthand experience with racial discrimination, which led him to oppose any form of discrimination (Interview 52, 37, 21). As another example, prior to his tenure on the Court, Justice White worked for the Kennedy administration and was tasked with implementing its civil rights agenda (Interview 124, 62; Hutchinson 1998). As a result, he developed a commitment to racial equality that carried over into a commitment to gender equality (Interview 124, 62). In short, male justices' ideologies, experiences, and personal relationships produced egalitarian attitudes and a support for gender equality that then shaped their decision making in gender classification cases.

This research demonstrates the powerful influence of male justices' backgrounds on judicial behavior. Their ideologies, experiences, and relationships trumped the possibility of collegial influence. In other words, while Court membership was largely responsible for the ways in which women and men were legally treated, it was because justices' personal attributes, experiences, and relationships had an individual effect on their judging and not a panel effect.

As I discussed, my theory of judicial behavior builds upon the attitudinal model, but it contradicts new institutionalist accounts. To some degree, justices are constrained by legal

factors. After all, they invoke legal arguments, rules, and precedent in the opinions written to justify their votes. Moreover, if justices attempt to persuade their colleagues to join an opinion, they appeal to legal reasoning and not personal pleas (Interview 37, 177, 254).

However, justices face few other institutional constraints. In theory, there are ways in which the executive and legislative branches can check the Supreme Court if either one disagrees with a ruling. In reality, these mechanisms are rarely used (Henschen 1983: 452; Epstein, Knight, Martin 2001: 596; Hettinger and Zorn 2005: 6) and are therefore a seemingly hollow constraint. I do not dispute that Supreme Court justices recognize that they are part of a larger political and social environment, but assessing the extent to which various external influences shape their behavior and why is difficult. At the same time, I do not mean to suggest that justices freely inject their personal preferences into their decisions. Rather, their backgrounds mediate the effects of factors in the broader institutional context. In short, justices' decision making and their interpretation and application of the law occurs against the backdrop of their political ideologies, experiences, and relationships.

This theory of judicial behavior is applicable to other courts and judges, issue areas, and equal rights claims, discussed in more detail in chapter seven. I expect unelected judges serving on independent judiciaries to be more likely to consciously or subconsciously bring their backgrounds to bear when deciding cases. If judges cannot be easily sanctioned by other political actors and/or constituents, they are unlikely to feel constrained by such external influences and take them into consideration. Judges' personal experiences should also shape their judging across a variety of cases, depending upon the issue area, facts of the case, and context. Finally, I expect judges who are members of a historically disadvantaged and excluded group to be sympathetic to equal rights claims of other groups.

2.6 CONCLUSION

This chapter bridges the literatures on judicial behavior and gender politics in an effort to account for decision making in the United States Supreme Court. I began with a discussion of the legal model, which holds that justices are neutral and impartial arbiters who simply interpret and apply the law. While this approach views judging as an objective endeavor, some scholars suggest that it is a subjective, not mechanical, exercise. Given that justices are people, they do not shed their personal attributes—political ideology and gender—when judging. According to the attitudinal model, judicial behavior is driven by justices' ideological attitudes and values, as well as their policy goals. However, even though justices are unelected and unaccountable, they are not necessarily free to further their policy preferences. Rather, according to new institutionalist accounts, justices face various institutional constraints—political actors, interest groups, women's social power—that hinder their ability to act solely in their self-interest.

I argue that the legal treatment of women and men in the Supreme Court is largely due to Court membership. Though judicial behavior is shaped by justices' personal attributes, political ideology and gender, it is also influenced by their personal experiences and relationships. In short, justices' backgrounds produce the gender attitudes that then inform their judging.

Court membership, particularly the presence of female justices, was a critical influence on the legal treatment of women and men. However, one must tread carefully and not presume that simply increasing the number of female justices will further gender equality in the United States. Aside from the fact that women are not a monolithic group and do not share a unified set of experiences, values, and policy preferences, the notion of gender equality and what it takes to attain it is subject to debate. It is a point of contention among scholars and feminists, with some arguing that gender equality requires women and men to be treated the same and others

countering that gender differences between women and men sometimes warrant differential treatment. In the next chapter, I discuss the equality versus difference debate, how meanings of gender equality evolved among feminists, and changes in the legal treatment of women and men over time in the Supreme Court.

CHAPTER 3: GENDER EQUALITY IN THE UNITED STATES SUPREME COURT

3.1 INTRODUCTION

The California Unemployment Insurance Code provided financial benefits to employees unable to work due to temporary disabilities. All employees were required to contribute one percent of their salary to the insurance program. In return, they received benefits as long as the condition causing their temporary disability was covered by the program. Although a number of conditions were covered, some of which were sex-specific,[16] pregnancy was not one of them.

A group of four women, three of whom suffered complications during their pregnancy, sought disability benefits but were denied. They filed suit, claiming that the pregnancy exclusion constituted sex discrimination and violated the equal protection clause of the 14th amendment. A majority of the Supreme Court justices disagreed and found for the state of California in *Geduldig v. Aiello* in 1974.

The logic underscoring the Court's holding is that allowing women to claim benefits for disabilities arising from pregnancy is unfair because men cannot claim benefits for the same reason. Writing for the majority, Justice Stewart wrote that "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not" (*Geduldig v. Aiello*, 417 U.S. 484 (1974)). On the one hand, ruling that the state include pregnancy coverage contributes to gender inequality by providing women with special treatment not extended to men. On the other hand, ruling that the state can continue excluding pregnancy coverage reinforces gender inequality because only women are harmed by the law.

Supreme Court decision making in cases such as *Geduldig* potentially shapes the trajectory of gender equality in the United States. By extending the same—or different—treatment to women and men, justices' behavior can restrict or advance gender equality.

[16] Some sex-specific conditions included prostatectomies or circumcision.

However, what constitutes equality and how best to secure it is subject to debate and has evolved over time.

This chapter begins with a discussion of how gender equality has been conceptualized—same or different treatment—among scholars and feminists and why it is difficult to assess the Supreme Court's effect on it. I then compare how notions of gender equality in the Supreme Court evolved across the first and second waves of feminism. Next, I move on to discuss the research question in this study, which examines the Supreme Court's treatment of women and men in justices' opinions and votes in cases concerning gender. In the rest of the chapter, I discuss some ways in which Supreme Court justices legally treated women and men in their opinions and votes, case selection, and the cases under study.

3.2 CONCEPTUALIZING GENDER EQUALITY: SAMENESS VERSUS DIFFERENCE

It is difficult, if not impossible, to assess the impact of United States Supreme Court decisions on gender equality. For one, there is no consensus as to what constitutes gender equality and how best to advance it. Another reason is that women are not a monolithic group, and laws and policies that enhance gender equality for some women may not for others.

A long standing debate among scholars and feminists is the question of whether gender equality results from treating women and men the same or differently. Rooted in the tradition of liberalism and individual rights, equality feminists contend that women and men should be treated equally, or the same (Kaminer 1990; Lorber 2000; Rosen 2006). This perspective seeks to minimize gender differences (Rosen 2006) and implicitly reinforces the notion that men are the standard and women are the other, so in order to achieve equality, women must be treated like men.

One of the critiques of equality feminism is that because women and men are inherently different, they should be treated differently in order to further gender equality. Difference feminists argue that women should not strive to be like men in an effort to improve their status in society, and they criticize equality feminists for reinforcing the notion that men are the standard and women are the other. Instead of trying to act like men, women should embrace their differences from them. Difference feminists argue that women should not assimilate and adopt male norms and standards because doing so erases their special and unique qualities, values, and needs (see Vogel 1990; Anleu 1992; Jacquette 2001: 122; Verloo and Lombardo 2007).

In a similar vein, another critique of equality feminism is that it implicitly relegates motherhood and femininity to inferior statuses. In an attempt to abolish gender differences and treat women and men the same, it privileges masculine experiences, values, and qualities over feminine ones (Jacquette 2001: 122). Equality feminism is perceived as requiring that women deny their sexual differences from men and "negate the reproductive and nurturing roles disproportionately associated with women" in order to attain gender equality (McDonagh 2002: 548). In response, difference feminists contend that equality feminism devalues pregnancy, motherhood, and more broadly, women's "uniqueness" from men (Vogel 1990: 23). However, in response, equality feminists argue that difference feminism reinforces the traditional gender roles and stereotypes that provide the basis for male dominance and gender inequality (Jacquette 2001: 122).

Another critique of difference feminism is that it reinforces the notion that gender differences are natural and immutable, thus homogenizing and essentializing women and men (see Anleu 1992; Felski 1997). It constructs and maintains a single line of difference based upon biology, and then treats the women and men on each side as unitary (Scott 1988: 46). In other

words, difference feminism presumes that women (and men) have a set of shared common experiences, perspectives, and values distinct from men (women) and based solely upon their sex.

Not surprisingly, these opposing perspectives result in disagreement as to how laws and policies should treat women and men in order to advance gender equality. According to equality feminists, all laws and policies should be gender neutral, meaning that neither women nor men are singled out for different, or special, treatment (Kaminer 1990; Lorber 2000: 86). Equality feminists favor equal rights and the removal of any barriers to participation in the political and economic arenas on the basis of sex.

However, difference feminists disagree and critique equality feminists for equating equality with treating women and men as the same and inequality with treating women and men as different (Scott 1988: 43). In response, difference feminists counter that gender equality is unattainable as long as women seek equality on the same basis as men. According to difference feminists, there are instances in which differential treatment, or special treatment, is a justifiable means to achieving gender equality (Law 1983; Kay 1985). Simply treating women and the men the same is insufficient, and difference feminists instead contend that laws and policies must accommodate women's needs and roles as mothers (Lambert and Scribner 2009: 343). Women's capacity to get pregnant warrants their special treatment in the workplace for instance, and as such, maternity leave policies are a means for advancing, not hindering, gender equality because they enable women to retain their jobs (Vogel 1990: 15, 23).

Though difference feminists argue that different treatment is not antithetical to equality, there is disagreement over which gender differences justify differential treatment before the law—and when. Some scholars contend that biological differences warrant special treatment

(Law 1983; Kay 1985; Vogel 1990), but other scholars focus on the consequences of laws, arguing that women should be treated differently from men if they are or have historically been disadvantaged by a particular practice (Scales 1986; Rhode 1990; Squires 2005). As an example, this perspective might advocate for subsidized child care, which could help advance gender equality by relieving women of the burden of caregiving and enabling them to combine work and motherhood.

Aside from the lack of consensus over how gender equality is conceptualized and how best to advance it, another reason why it is difficult to assess the Supreme Court's influence is that women are not a monolithic group. There are within-group differences resulting from differences in race, ethnicity, class, and sexuality, and women do not have a shared vision of equality (hooks 1984; Crenshaw 1991; Collins 2000). Therefore, efforts to further equal rights inevitably overlook some women, and laws and policies that enhance gender equality for some women may not for others. As an example, efforts to ensure that health care plans cover contraceptives do little for women who lack health insurance and health care access.

Furthermore, given that women do not have a shared set of needs and interests, efforts to advance gender equality may require a focus on more than just inequalities resulting from women's position in society as women. For example, scholars such as Htun and Weldon (2010: 209) make the distinction between status-based and class-based policies. Status-based policies aim to remedy gender inequalities resulting from women's status as a woman, such as sex discrimination, sexual harassment, and rape (Htun and Weldon 2010: 209). The focus of such policies is on inequalities that result from women's status *as women*, regardless of their other positions in society that arise from their race or class. Though class-based policies have the same goal, they strive to remedy gender inequalities arising from class inequalities (Htun and Weldon

2010). Examples include paid maternity leave and subsidized day care, which relieve all women of their domestic and reproductive responsibilities (Htun and Weldon 2010: 210).

To summarize, the means to achieving gender equality is contested among scholars and feminists. On the one hand, equality feminists maintain that treating women and men as the same is the best way to attain gender equality. On the other hand, difference feminists contend that there are circumstances under which women should be treated differently from men, particularly when it comes to pregnancy and caregiving. Moreover, women are not a monolithic group, so efforts to further gender equality inevitably benefit some women and not others. In short, against this backdrop, Supreme Court rulings are only sometimes perceived as advancing gender equality.

3.3 THE EVOLUTION OF GENDER EQUALITY IN THE SUPREME COURT

During the first and second waves of feminism,[17] the arguments feminists advanced in the Supreme Court were rooted in the same or different treatment. The rulings justices issued had implications for gender equality and affected different people in different ways. Notions of gender equality were bound by time period, and to first wave feminists, some rulings that upheld differential treatment were interpreted as advancing gender equality. By contrast, during the second wave, equality feminists challenged discriminatory laws, instead pursuing the same treatment. Though the Supreme Court struck down several of these laws, the sameness versus difference debate persisted, and the meaning of gender equality varied across issue areas and the context surrounding a case.

3.3.1 Sameness, Difference, and Gender Equality during the First Wave of Feminism

[17] First wave feminism refers to the period between the Seneca Falls Convention in 1848 to the passage of the 19th amendment granting women suffrage in 1920 (Cott 1987), and second wave feminism refers to the period during the late 1960s and 1970s (Rosen 2006).

Early Supreme Court cases concerning gender involved women seeking rights on the same basis as men. Under the rubric of equality feminism, feminists sought removal of the legal barriers preventing them from participating in the economic and political arenas. In the first gender classification case the Court considered, justices confronted the question of whether women had the right to practice law on the same basis of men.

In 1869, Myra Bradwell passed the Illinois bar exam and applied for her law license at the Illinois Supreme Court. She was denied, presumably on the account that she was a married woman.[18] Under the law of coverture, Bradwell was under the "cover" of her husband and could not enter into contracts in her own name. The logic likely used by the Illinois Supreme Court was that because Bradwell could not enter into contracts with clients, she could not be a lawyer (Olsen 1986: 1524). In response, Bradwell pointed out that the Illinois Married Women's Acts of 1861 and 1869 allowed women to enter into contracts for the purposes of practicing law, a move that then prompted the Illinois Supreme Court to issue a written opinion (Olsen 1986: 1524). This time, the court concluded that Bradwell could not be a lawyer because she was a woman.

Bradwell appealed her case to the United States Supreme Court, which affirmed the lower court decision in 1873 in *Bradwell v. Illinois*. A unanimous Court denied Bradwell the right to practice law, solely because of her sex. Justices reasoned that compared to men, women had different roles, responsibilities, and abilities that prevented them from participating in the labor force, an attitude reflected in Justice Bradley's concurring opinion. He wrote that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life" (*Bradwell v. Illinois*, 83 U.S. 130(1873)). As a result,

[18] The Illinois Supreme Court did not issue a written opinion.

Bradwell was denied a right granted to men because "the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother" (*Bradwell v. Illinois,* 83 U.S. 130 (1873)).

Despite the setback in *Bradwell*, feminists continued seeking equal rights to men in the Supreme Court, albeit unsuccessfully. After failing to obtain a constitutional amendment extending suffrage to women, the National Woman Suffrage Association (NWSA) changed strategies and decided to lobby the courts. This plan was initiated by Susan B. Anthony, Virginia Minor, and her husband Francis, who pointed out that as citizens, women were already enfranchised by the 14th amendment (O'Connor 1980: 36). As such, instead of lobbying Congress for a constitutional amendment, unnecessary according to this logic, NWSA brought three voting rights cases to the federal courts, two of which reached the Supreme Court.[19] By challenging laws restricting the vote to men, NWSA became the first women's rights organization to launch a litigation campaign (O'Connor 1980: 7).

In 1875, the Supreme Court agreed to hear *Minor v. Happersett*, making it the second gender classification case it ever considered. Consistent with its ruling in *Bradwell*, a unanimous Court upheld a statute discriminating on the basis of sex in *Minor*. While the justices agreed that women were citizens of the United States, they disagreed with the argument that the right to vote naturally followed. They asserted that the conferral of citizenship did not automatically confer suffrage and that one did not attain voting rights simply by virtue of being a citizen. Rather, state governments, not citizenship, determined who had the right to vote and could therefore restrict it on the basis of sex.

[19] There is no written record of *Spencer v. Board of Inspectors*, but it appears that the Supreme Court affirmed a lower court decision to deny women the right to vote (O'Connor 1980: 40).

Early efforts to advance gender equality by obtaining rights equal to men thus failed in the Supreme Court in the 1870s. This failure could reflect prevailing gender norms and attitudes in society at the time. Maintaining separate spheres and rigid gender lines was so pervasive that when fighting for suffrage, feminists were careful not to argue that women should have voting rights because they deserved rights equal to men. Instead, they claimed that women should have the right to vote precisely because of their differences from men and the different perspectives and special insights they would bring to the ballot box (McCammon, Hewitt, Smith 2004: 532).

It was not until the early 1900s, beginning with *Muller v. Oregon* in 1908, that feminists began winning Supreme Court cases. However, it was not because justices changed course and began extending the same treatment to women and men. Rather, it was because feminists stopped seeking the same legal treatment as men as they did in *Bradwell* and *Minor* and instead sought to defend laws treating women and men differently. Adhering to a difference feminism approach, they embraced women's unique roles as mothers and wives, fighting for laws that protected their rights *as women* instead of rights on the same basis as men.

The litigation campaign to defend protective labor laws targeting women was instigated by the National Consumers' League (NCL), which was formed in the late 1890s, when several women's organizations joined forces to improve working conditions for women. Though it was one organization in a broader movement to raise labor standards for women *and* men, the NCL concentrated their efforts on female workers, who were particularly vulnerable in the workplace—low wages, long hours, sexual harassment, and a lack of union support (Storrs 2000: 3). Using public education drives and boycotts, the NCL targeted exploitative employers in an effort to induce them to change their practices.

Realizing these methods only went so far in improving working conditions, the NCL lobbied state legislatures and successfully persuaded many to enact protective labor laws for women (O'Connor 1980: 66). Examples of these laws include limiting the number of hours women work in a day, restricting women from overnight work, or instituting a minimum wage. Although protective labor laws targeted women, the NCL's goal was to acclimate employers, lawmakers, and judges to the practice of raising labor standards for women, with the intention of eventually getting such laws extended to men (Lipschultz 1996: 117). The likely logic was that protecting women in the workplace would probably garner more sympathy and support than efforts to protect men, largely because women were considered more vulnerable.

Instead of bringing cases to the judiciary like the NWSA, the NCL was forced into the courtroom to fend off constitutional challenges to the laws it worked so hard to get enacted (O'Connor 1980: 69). After a state attorney general failed to defend a law prohibiting women from working after a certain hour, resulting in its repeal in a state court of appeals, the NCL resolved to never again rely on states' attorneys general to defend protective labor legislation (O'Connor 1980: 69). Under the leadership of Florence Kelley, the NCL put forth lawyers to defend these laws in state courts and in the Supreme Court (O'Connor 1980: 69).

Much of the NCL's litigation activity in the Supreme Court occurred in the early 1900s. It successfully defended a state law limiting women to ten-hour workdays in *Muller v. Oregon* in 1908. The majority opinion, written by Justice Brewer for a unanimous Court, echoes *Bradwell* and reinforces differential treatment and women's roles as mothers. He wrote "that woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious...legislation designed for her protection may be sustained,

even when like legislation is not necessary for men and could not be sustained' (*Muller v. Oregon*, 208 U.S. 412 (1908)).

It may seem counterintuitive, but *Muller* was considered a victory for women's rights. The NCL subscribed to difference feminism, seeking to advance women's interests and protect them in their roles as wives and mothers. Therefore, laws reinforcing women's differences from men and prioritizing their roles as mothers and homemakers did not undermine their rights. Rather, they were a means to furthering gender equality because they addressed and legally accommodated women's differences from men (Lipschultz 1996: 125). Accounting for their specific experiences and circumstances relative to men benefitted women because it enabled them to fulfill their roles as workers *and* mothers. In other words, treating women like *women* instead of men was perceived as helping advance gender equality.

After *Muller*, challenges to gender-based protective labor laws produced a wave of gender classification cases in the Supreme Court, ending in 1948 with *Goesaert v. Cleary*. From 1908 to 1948, the Court adjudicated ten cases concerning protective labor laws targeting women, including laws fixing wages (*Adkins v. Children's Hospital* (1923), *Morehead v. New York Ex Rel Tipaldo* (1936), *West Coast Hotel v. Parrish* (1937)), restricting the number of hours women could work (*Muller v. Oregon* (1908), *Riley v. Commonwealth of Massachusetts* (1914), *Bosley v. McLaughlin* (1915), *Miller v. Wilson* (1915)), restricting overnight work to men (*Radice v. People of the State of New York* (1924)), prohibiting women from working as bartenders (*Goesaert v. Cleary* (1948)), and imposing taxes on laundries that employed men, but not women (*Quong Wing v. Kirkendall* (1912)). A majority of the justices condoned the differential treatment of women and men in eight of those cases.

The NCL defended protective labor legislation in six cases, losing once in *Adkins v. Children's Hospital* in 1923 when the Court struck down a minimum wage law for women. Due to the passage of the 19th amendment in 1920, a majority of the justices believed that women's newly won voting rights indicated social progress and emancipation "from the old doctrine that she must be given special protection" (*Adkins v. Children's Hospital*, 261 U.S. 525 (1923)). After *Adkins*, the NCL suffered a series of losses in the lower courts, which it interpreted as evidence that protective labor laws would become less defensible over time. As a result, the NCL began dissuading states from adopting new legislation (O'Connor 1980: 74). Although it felt defeated in the courtroom, the NCL's protective labor legislation prevailed when the Supreme Court overruled *Adkins* in 1937 in *West Coast Hotel v. Parrish* and upheld a law prohibiting women from working as bartenders in 1948 in *Goesaert v. Cleary*.

For the most part, Supreme Court justices were consistent in their legal treatment of women and men during the late 1800s and early half of the 1900s. Of the 16 cases adjudicated, a majority of the justices voted to treat women and men differently in 13 of them. However, given the lack of consensus over how to further gender equality, the rulings in a number of these cases were not necessarily perceived as restricting women's rights.

3.3.2 Sameness, Difference, and Gender Equality during the Second Wave of Feminism

By the time the second wave of the women's movement emerged in the mid-1960s (Ryan 1992: 40; Banaszak 2010: 167), the NCL's earlier victories in the Supreme Court were controversial. Protective labor laws targeting women divided the NCL and the National Woman's Party in the early 1900s, and it would continue to divide second wave feminists. The President's Commission on the Status of Women (PCSW), established in 1961 by President Kennedy to advise him on policies concerning women, was on one side of the debate. The

PCSW was committed to social justice for women, but not necessarily equal rights, and was a staunch advocate of protective labor legislation (Pedriana 2006: 1733). Consistent with difference feminism, it sought to develop "recommendations for services which will enable women to continue their role as wives and mothers while making a maximum contribution to the world around them" (PCSW 1961 in Pedriana 2006: 1733). On the other side of the debate was the National Organization for Women (NOW), which advocated for equality feminism and equal treatment under the law. It opposed protective policies and sought to repeal the policies the NCL worked so hard to put into place and defend.

As of 1965, most states still had protective labor legislation for women on the books (Pedriana 2006: 1733). In 1964, Congress passed Title VII of the Civil Rights Act, making it illegal to "segregate, classify, or otherwise discriminate" on the basis of sex. However, whether Title VII was meant to void all gender-based protective labor legislation was unclear to women's groups and even the Equal Employment Opportunity Commission (EEOC), which was established to enforce it (Pedriana 2006: 1735). Because Title VII allowed differential treatment when sex was a bona fide occupational qualification (BFOQ), some believed it could be interpreted in a way that would permit states to continue their practice of setting separate employment standards for women and men.

Given Title VII's failure to definitively resolve the permissibility of protective labor laws in practice, the debate over their impact on women persisted. Some women's groups, such as the PCSW, supported differential treatment only in the narrowest circumstances so that employers could not invoke gender stereotypes to restrict women's employment opportunities (Pedriana 2006: 1737). Some feminists were reluctant to abandon differential treatment and subscribe to arguments that women and men should be treated the same.

By contrast, other groups such as NOW, rejected difference arguments and advocated for equal treatment between the sexes. According to equality feminists, women's differences from men were historically used to justify inequality and prevent their full participation in the political and economic spheres (Rosen 2006: 76). Operating under a liberal feminist framework, they believed that eliminating sex differences in the law was key to advancing gender equality and that treating women and men differently only served to reinforce women's inferior status to men (Rosen 2006: 75-76).

Among its other efforts to abolish sex discrimination, NOW was among one of the first women's rights groups to launch a litigation campaign during the second wave of feminism (O'Connor 1980: 93). In addition to NOW's Legal and Defense Education Fund, other groups, such as the Women's Equity Action League, the Women's Law Fund, and the American Civil Liberties Union Women's Rights Project (WRP), mobilized to challenge discriminatory laws in the Supreme Court. These groups won a number of cases in the Supreme Court in the 1970s, enjoying a success similar to that of the NCL in the early 1900s.

However, dominant conceptualizations of litigation success and therefore what constituted gender equality were different during the second wave of feminism compared to the first wave. While the NCL advocated for difference feminism and fought to protect legislation that legally sanctioned sex differences between women and men, groups in the second wave fought for the repeal of such laws. They urged the Supreme Court to strike down discriminatory laws, which it did in a number of cases, arguably furthering gender equality. However, it is important to remember that what was considered discriminatory was as contested as what constituted gender equality.

One of the major hurdles women's rights litigants and amici had to overcome was convincing the justices that gender classifications should be subject to a heightened level of scrutiny.[20] If they could not, they would have a very difficult time convincing justices to invalidate discriminatory laws. According to the Supreme Court, some classifications warrant a heightened level of scrutiny because they are "suspect." Therefore, classifications due to race or national origin are inherently suspect because they are immutable characteristics bearing no relationship to ability and irrelevant to governmental objectives (Mezey 2003: 11). As a result, most racial classifications receive the strict scrutiny test and are therefore usually invalidated (Mezey 2003: 11).

A major goal for women's rights advocates was to convince a majority of the justices that gender was also a suspect classification. Under the leadership of Ruth Bader Ginsburg in 1971 in *Reed v. Reed*, the WRP pushed for a heightened level of scrutiny—strict scrutiny—or at least a standard more stringent than rational basis review, which it called intermediate scrutiny. In her merits brief,[21] Ginsburg linked sex to race, arguing that both "are comparable classes, defined by physiological characteristics, through which status is fixed from birth" (Brief for the Appellant, *Reed v. Reed*, 404 U.S. 71 (1971)). Ginsburg used this comparison to persuade justices to strike down discriminatory laws and to elevate sex to a suspect classification. She continued: "Legislative discrimination grounded on sex, for purposes unrelated to any biological differences between the sexes, ranks with legislative discrimination based on race, another condition of birth,

[20] When the Supreme Court faces the question of whether people can be treated differently on the account of sex, race, sexuality, age, religion, or disability, for example, it administers a test of scrutiny. This entails looking closely at the governmental action in question and employing one of two tests of scrutiny: rational basis review or strict scrutiny. If justices administer rational basis review, they look to see if a government action has a "rational" relationship to a "legitimate" governmental objective. If they decide that it does, they uphold it. By contrast, if justices apply strict scrutiny, they determine whether a government action is necessary to achieve a compelling governmental purpose. It they decide that it is, they uphold it. In short, rational basis review is an easy test of scrutiny, and the government usually passes (Strebeigh 2009: 33). By contrast, strict scrutiny is a hard test, and the government usually fails (Strebeigh 2009: 33).

[21] Litigants on each side of a particular case submit a merits brief, which contains the arguments they employ.

and merits no greater judicial deference. Each exemplifies a "suspect" or "invidious" classification" (Brief for the Appellant, *Reed v. Reed*, 404 U.S. 71 (1971)). The Court was somewhat responsive. Though it did not employ strict scrutiny, it struck down the classification, thereby implicitly acknowledging that gender classifications warranted rational basis review (Mezey 2003: 13).

In 1973, in *Frontiero v. Richardson*, women's rights groups came closer to achieving their goal. Four justices, led by Justice Brennan, concluded that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny" (*Frontiero v. Richardson*, 411 U.S. 677 (1973)). However, without commanding a majority in *Frontiero*, Justice Brennan continued trying to elevate gender classifications from rational basis review to strict scrutiny. He was finally somewhat successful in 1976 when a majority of the justices employed intermediate scrutiny in *Craig v. Boren.* Here, it was decided that gender classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives" (*Craig v. Boren*, 429 U.S. 190 (1976)). In other words, a government action must be substantially related to achieving an important governmental purpose in order to remain constitutional. This meant that although gender classifications were still not subjected to the hardest test, they would have to survive a heightened level of scrutiny and withstand a harder test than rational basis review.

The Supreme Court continued employing intermediate scrutiny in subsequent cases until 1996 in *United States v. Virginia*. In the majority opinion, Justice Ginsburg implicitly employed a level of scrutiny even higher than intermediate. She wrote that gender classifications must have an "exceedingly persuasive justification" to remain valid (*United States v. Virginia*, 523 U.S. 75

(1996)), suggesting that the Court adopted a level of scrutiny between intermediate and strict. Even though Ginsburg invoked a "skeptical scrutiny" (*United States v. Virginia*, 523 U.S. 75 (1996)), gender classifications never attained the strict scrutiny afforded to racial classifications.

At its core, the level of scrutiny Supreme Court justices employ in gender classification cases impacts the likelihood that they will invalidate a law, and thereby whether they treat women and men the same or differently. When justices employ strict scrutiny and subject a gender classification to the "hard" test, they usually strike it down, therefore advancing equal treatment. Even though Ruth Bader Ginsburg and the WRP sought to persuade the Supreme Court to use strict scrutiny in the 1970s, believing that justices would therefore be more likely to invalidate gender classifications, feminists would later be divided over this strategy. According to some feminists, some gender classifications benefitted women, such as those involving affirmative action, but they would be unlikely to withstand strict scrutiny (Chemerinsky 2005). However, if justices instead used intermediate scrutiny to assess gender classifications, those that were meant to benefit women and further gender equality would have a greater chance of being sustained.

In sum, the meaning of gender equality shifted from the first to the second waves of feminism. While difference feminists advocated for protective labor legislation during the first wave, equality feminists sought to repeal them during the second wave. Moreover, the sameness versus difference debate permeated all stages of judicial decision making, affecting the arguments women's rights groups advanced, the level of scrutiny justices employed, and the Court's rulings. The following sections illustrate the tensions between sameness and difference and the variation in justices' treatment of women and men in cases involving employment and policies intended to benefit women.

a) Employment Policies

During the second wave of feminism, many of the gender cases the Supreme Court adjudicated involved the treatment of women and men in the workplace. Title VII invalidated protective labor laws previously upheld in the early 1900s, but the Court was left to resolve the circumstances under which sex was a BFOQ or whether pregnancy discrimination constituted sex discrimination. In cases involving policies concerning physiological and reproductive differences between women and men, a majority of the justices extended equal treatment in some cases but not others. This variation illustrates the ways in which equal or different treatment depended upon the issue area and context of the case.

i) Pregnancy Discrimination

In response to second wave feminists' efforts to secure women's equal treatment to men, the Supreme Court struck down a number of what equality feminists considered to be discriminatory laws. However, as increasing numbers of women entered the labor force, there was arguably no other issue area in which the debate over equal or different treatment was more relevant or contested. When it came to pregnancy, justices were faced with whether what could not "happen to man" (Ginsburg in Strebeigh 2009: 82) justified differential legal treatment.

The Supreme Court first adjudicated the issue of pregnancy discrimination in 1974 in *Cleveland Board of Education v. LaFleur*. Jo Carol LaFleur and Ann Nelson were junior high school teachers challenging Cleveland school board's mandatory maternity leave. This modern-day protective labor rule required a pregnant woman to relinquish her job at least five months before her due date, without pay. If she was reemployed by the school after giving birth, she could return to her job only after her child was at least three months *and* if a doctor attested that she was fit for work.

LaFleur reinvigorated earlier debates over whether policies could mandate differential, or special, treatment in the workplace due to women's roles as wives and mothers. Historically, reproductive and physiological differences between women and men were the basis for protective labor legislation. In a similar vein, the school board defended its policy on the grounds that some women become physically incapacitated by pregnancy and that mandatory maternity leaves were necessary to protect the health of the mother and unborn child. A majority of the Court rejected this argument and issued a decision that ran counter to its earlier decisions upholding protective labor laws. In *LaFleur,* justices contended that Cleveland's policy was too broad and that not all pregnant women become physically disabled. Moreover, as Justice Stewart wrote in the majority opinion, the policy violated the "freedom of personal choice in matters of marriage and family life" guaranteed by the due process clause of the 14th amendment, as well as "unduly penalize[d] a female teacher for deciding to bear a child" (*Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974)).

The Supreme Court confronted pregnancy discrimination again in *Nashville Gas Company v. Satty* in 1977. Nora Satty took a mandatory maternity leave while employed for the Nashville Gas Company. When she returned, she tried to return to her former job, but it was eliminated. Satty applied for three other positions in the company, which were awarded to employees who began working for the company after her. Given her seniority, had she not gone on maternity leave, she would have received any of those jobs, but her seniority clock restarted after her absence. Satty challenged the gas company's policy of denying accumulated seniority to pregnant women, claiming that it violated Title VII.

In contrast to *LaFleur,* a unanimous Court extended differential treatment to women in *Nashville Gas Company*. Justices contended that work absences due to pregnancy should not

lead to a loss of seniority even if employees lose seniority for absences due to other reasons. Employing the language of difference feminism, justices appear to subscribe to the belief that pregnancy is a circumstance warranting special treatment to protect women's employment opportunities. In the majority opinion, Justice Rehnquist wrote that the company's seniority policy "deprives [pregnant women] of employment opportunities" in a way that "adversely affect [their] status as an employee" (*Nashville Gas Company v. Satty*, 434 U.S. 136 (1977)). It "imposed on women a substantial burden that men need not suffer" (*Nashville Gas Company v. Satty*, 434 U.S. 136 (1977)).

In *LaFleur* and *Nashville Gas Company*, the Supreme Court maintained that women could not be penalized and denied employment solely on the basis of pregnancy. While the Court extended the same legal treatment to women and men in *LaFleur*, it condoned differential treatment in *Nashville Gas Company*. However, in contrast to the logic invoked in the early 1900s, it was not because women were the weaker sex, dependent upon men, or mothers first and workers second. Rather, it was rooted in the idea that women should be able to participate in the labor force in the same capacity as men, and their employment opportunities could not be limited because of pregnancy.

In *Geduldig v. Aiello* in 1974, the Supreme Court again grappled with pregnancy discrimination. As discussed earlier in this chapter, California had an insurance program that provided benefits to employees who were temporarily disabled for a variety of medical reasons but not pregnancy. Four women challenged the program's pregnancy exclusion, but even though pregnancy could not "happen to a man," the Supreme Court rejected the argument that pregnancy was linked to sex and that such exclusions constituted sex discrimination.

In the majority opinion, Justice Stewart wrote that such programs "divide potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes" (*Geduldig v. Aiello*, 417 U.S. 484 (1974)). Justices in the majority reasoned that the pregnancy exclusion did not discriminate against women because not all women were pregnant. In other words, because the pregnancy exclusion made a distinction among people based on pregnancy, not sex, it did not constitute sex discrimination. This logic was echoed in subsequent cases in which a majority of the justices continued affirming pregnancy exclusions in other challenges to disability benefits programs in *General Electric v. Gilbert* (1976), unemployment benefits in *Wimberly v. Labor and Industrial Relations Commission* (1987), and sick pay in *Nashville Gas Company v. Satty* (1977).

Extending the same treatment to women and men in these cases continued to fuel debates over sameness and difference. Pregnancy exclusions were consistent with equality feminism, which opposed "female-specific legislation," exemplified by *Geduldig* and its progeny (Vogel 1990: 19). However, under difference feminism, pregnancy exclusions disadvantaged women by failing to take into consideration the "real sexual difference constituted by pregnancy" (Vogel 1990: 15). Difference feminists perceived the Supreme Court's holdings as impediments to gender equality because pregnancy exclusions create financial burdens imposed only upon women.

In cases concerning pregnancy discrimination, Supreme Court justices recommended differential treatment when women's jobs were at stake, but not when women tried to claim welfare state benefits. One reason for this disparity could be due to the nature of the United States' liberal welfare state. Grounded in equality of opportunity and meritocracy (McCloskey and Zaller 1984; Lipset 1996), these guiding values discourage reliance on the government for

social support, even when it is intended to remedy inequalities (Lipset 1996). It is possible that justices viewed pregnancy as an obstacle to equality of opportunity, hence advocating for differential treatment so women could freely compete with men in the labor force. By contrast, because some justices believed that pregnancy constituted an *"additional* risk, unique to women" (*General Electric v. Gilbert*, 429 U.S. 125 (1976)), its omission from benefits programs could have been perceived as justifiable given that such benefits were not meant to remedy inequality.

However, the disparity in the Court's treatment of pregnancy discrimination could also be due to a majority of the justices' underlying gender attitudes and expectations. In cases concerning benefits programs, pregnant women faced skeptical justices who questioned their desire to return to the workplace (Campbell 2003: 216). Such programs reflected the assumption that women were mothers first and employees second and that they would quit their jobs and become full-time homemakers after giving birth. As such, an underlying concern in these cases could have been that without the pregnancy exclusion, pregnant women would take advantage of the system, take their benefits, and then quit their jobs. Of course, given that the decisions in these cases were not unanimous, not all justices harbored such suspicious views.

In contrast to the cases involving pregnancy exclusions in benefits programs, in *LaFleur* and *Nashville Gas Company*, the motives of pregnant women were never questioned. As Ginsburg noted, "Perhaps the able pregnant woman seeking only to do a day's work for a day's pay is a sympathetic figure before the Court, while a woman disabled by pregnancy is suspect" (Campbell 2003: 216). In short, the ways in which justices treated women in pregnancy discrimination cases varied a great deal during the second wave of feminism, and this study seeks to explain why.

ii) Protective Legislation

In the early 1900s, protective labor legislation was intended to shield women from various hazards and exploitation in the workplace. These laws were framed as a benefit to women, thereby advancing their rights by protecting them from such dangers. By the 1970s, however, equality feminists instead perceived protective labor laws as efforts to restrict women's employment opportunities and obstruct gender equality. As Justice Brennan put it, "such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage" (*Frontiero v. Richardson*, 411 U.S. 677 (1973)). Title VII invalidated a number of protective labor laws, but the Supreme Court supported efforts to protect women in some cases but not others.

Dianne Rawlinson was a 22-year-old college graduate who applied to be a correctional counselor trainee, or what Alabama called a prison guard. She was denied employment because she failed to meet the height and weight requirements. However, had she met these requirements, she would have still been ineligible for employment on account of her sex. The penitentiary system segregates its inmates by sex, and because there are four maximum-security male prisons compared to one female prison, women are eligible for only 25% of the available positions.

Alabama claimed that sex was a BFOQ and defended its practice of restricting women's employment, an argument accepted by a majority of the Court in 1977 in *Dothard v. Rawlinson*. In the majority opinion, Justice Stewart expressed concern over women's safety, arguing that "a woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood" and the "likelihood that inmates would assault a woman because she was a woman would pose a real threat" (*Dothard v. Rawlinson*, 433 U.S. 321 (1977)). Furthermore, "the employee's very womanhood

would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility" (*Dothard v. Rawlinson,* 433 U.S. 321 (1977)).

Although protecting women from potential dangers in the workplace resonated with justices in the late 1970s, in 1991 in *United Auto Workers v. Johnson Controls,* a unanimous Court rejected such practices. Johnson Controls was a battery manufacturing company that prohibited women from working in jobs involving lead exposure because it could endanger their fertility and harm potential fetuses. Three employees challenged the company's fetal protection policy, claiming that it constituted sex discrimination and violated Title VII.

Contending that restricting women's employment harmed them instead of benefitting them, Justice Blackmun wrote that "concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities" in the majority opinion (*United Auto Workers v. Johnson Controls*, 499 U.S. 187 (1991)). Furthermore, "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job" (*United Auto Workers v. Johnson Controls*, 499 U.S. 187 (1991)). Like *LaFleur* and *Nashville Gas Company*, justices maintained that women's employment could not be restricted based upon their capacity to get pregnant or their decision to bear children.

In *Dothard* and *Johnson Controls*, the Supreme Court confronted employment practices established to protect the safety of female workers. A majority of the justices accepted such practices when they were based upon physiological differences between women and men in *Dothard,* but unanimously rejected those that were specific to reproductive differences in *Johnson Controls*. This disparity could be due to the belief that physiological differences, such as size and strength, bear a relevant relationship to the ability to perform one's job and maintain

control and order in a maximum-security prison. By contrast, justices may have believed that the capacity to get pregnant bears no relation to job performance. Regardless, both cases highlight the inconsistent nature of justices' decision making and the circumstances under which they granted women and men the same or different legal treatment, a variation that this study seeks to explain.

b) Policies Benefitting Women

In contrast to adjudicating cases concerning employment policies that made reproductive and physiological distinctions between women and men, the Supreme Court also confronted cases involving policies meant to benefit women and remedy gender inequality. For instance, justices faced the question of whether welfare state benefits intended to benefit women violated the constitution. In other cases, justices addressed the permissibility of an affirmative action policy designed to compensate women for past injustices and sex discrimination. This difference in intention places these types of cases and the discussions surrounding them on slightly different footing than cases involving employment policies, but as in the earlier cases discussed, what it meant to help women was a matter of perspective and subject to debate. Moreover, as in the employment cases, there were some inconsistencies in justices' treatment of women and men when it came to policies designed to benefit women.

In 1974, in *Kahn v. Shevin*, Mel Kahn challenged a Florida statute that provided an annual tax exemption only to widows. Its purpose was to relieve women of financial hardships, a legitimate governmental purpose according to a majority of the justices. In the majority opinion, Justice Douglas[22] wrote that "There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man...While the widower

[22] Ginsburg argued the case, but she received no sympathy from Justice Douglas, who at the age of six, witnessed the difficulties his mother experienced by being left destitute following the death of his father (Strebeigh 2009: 63).

can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer" (*Kahn v. Shevin*, 416 U.S. 351 (1974)).

In most cases, however, the Supreme Court struck down gender classifications in cases involving policies intended to benefit women, choosing to treat women and men the same. *Kahn* was somewhat of an aberration, perhaps because it had the appearance of a man attempting to usurp benefits considered unnecessary for men but critical for improving women's financial standing (Strebeigh 2009: 65).[23] Instead, justices were more sympathetic in cases involving laws containing what Ruth Bader Ginsburg called double-edged swords. Such laws were based upon stereotypes and harmed women *and* men. By choosing to challenge these types of laws, Ginsburg sought to demonstrate that sex discrimination was an issue of human rights, not just women's rights (Campbell 2003: 200). Moreover, Ginsburg believed that an all-male Supreme Court would be more sympathetic to sex discrimination claims that harmed men (Kenney 2013: 7).

Weinberger v. Wiesenfeld, adjudicated in 1975, was one such case in which Ginsburg hoped the justices would put themselves in Stephen Wiesenfeld's shoes. Paula Wiesenfeld was a math teacher with a master's degree in education, and she was studying for her PhD so she could become a school principal. Stephen owned a computer consulting business, which allowed him to work at home and set his own hours. Paula's income was higher than Stephen's, so when they learned she was pregnant, both agreed he would continue working from home and be the primary caretaker.

[23] The WRP was forced to take on *Kahn* after the Florida ACLU failed to first obtain approval from the national ACLU office before initiating litigation (Campbell 2003: 196).

The Wiesenfeld's plan never came to fruition, and Paula died in childbirth. Single fatherhood was such a foreign concept at the time that Stephen was encouraged to give his son up for adoption, but he refused. Although Stephen found a job, he had difficulty securing reliable day care. He learned that the Social Security office provided a "mother's insurance benefit" to widows so they could stay home and care for their children. There was no such benefit provided to widowers.

In her oral argument, Ginsburg demonstrated that the Social Security benefit discriminated against women *and* men. Paula made Social Security contributions on the same basis as male workers, but her family was denied her insurance benefits after her death solely because of her sex. Had Stephen been a woman whose husband had died, he would have been awarded these benefits.

Ginsburg's strategy worked and a unanimous Court struck down the gender classification. Writing for the majority, Justice Brennan stated that "such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support" (*Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)). In a concurring opinion, Justice Powell noted that "When the mother is a principal wage earner, the family suffer as great an economic deprivation upon her death as would occur upon the death of a father wage earner" and that "a surviving father may have the same need for benefits as a surviving mother" (*Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)).

After *Weinberger*, a majority of the justices continued extending the same treatment to women and men in some cases but not others. The Court invalidated a gender classification requiring widowers, but not widows, to prove their dependency in order to receive Social Security survivors' benefits in *Califano v. Goldfarb* in 1977. However, in 1984 in *Heckler v.*

Mathews, it reversed itself and advocated differential treatment between women and men. Yet in other instances, justices invalidated a gender classification requiring widowers to prove their dependency in order to obtain death benefits in 1980 in *Wengler v. Druggists Mutual Insurance*, and a statute requiring husbands, but not wives, to pay alimony in 1979 in *Orr v. Orr*.

Similar to *Kahn*, the Supreme Court recommended differential treatment and upheld a policy seeking to remedy past injustices and arguably benefit women. In an effort to compensate women for past discrimination and their underrepresentation in employment, the Santa Clara County Transit District Board of Supervisors adopted an Affirmative Action Plan that would allow the County Transportation Agency to take sex into consideration in hiring and promoting employees. Paul Johnson and Diane Joyce were among twelve applicants for a promotion and among the nine who met the qualifications for the job. In the end, the job was awarded to Joyce, and Johnson believed it was on account of sex.

In a 6-3 ruling in *Johnson v. Transportation Agency* in 1987, the Supreme Court upheld Santa Clara's affirmative action plan. Writing for the majority, Justice Brennan stated that its affirmative action plan was permissible and "consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace" (*Johnson v. Transportation Agency*, 480 U.S. 616 (1987)). Here, a majority of the justices upheld a policy meant to advantage women, helping to fuel debates over what constitutes advancing gender equality.

In sum, in cases concerning compensation and benefits intended to benefit women, the Supreme Court usually extended the same treatment to women and men. It struck down laws containing "double-edged swords" and upheld pregnancy exclusions, advancing equal treatment even when doing so was arguably detrimental to gender equality. As I discussed earlier, such

treatment is consistent with the values of the liberal welfare state and minimal governmental support. However, this does not mean that justices failed to accommodate reproductive differences between women and men. In *Nashville Gas Company* and *Johnson Controls*, the Court sought to remove barriers to women's employment opportunities. Whether justices acted in ways that furthered gender equality is debatable. On the one hand, difference feminists would support these rulings, contending that they help women. On the other hand, equality feminists would argue that women are hurt by these rulings because differential treatment risks reinforcing the notion that women are inferior to men and capable of succeeding only when given an advantage.

With respect to affirmative action, justices treated women and men differently in an effort to remedy inequality. On one hand, this is not surprising given that in the 1970s and thereafter, the Court had a tendency of removing obstacles restricting women's employment opportunities. Its ruling in *Johnson* was consistent with its efforts to help women advance in the workplace and compete with men. On the other hand, it is peculiar that justices did not consider affirmative action an unfair advantage and prohibit it. After all, in *Geduldig* and its progeny, justices upheld pregnancy exclusions on account that including coverage for pregnancy was unfair to men. However, as I discussed, the discrepancy could be a product of the United States' liberal welfare state and the belief that social support should not be used to remedy inequality. In short, the Court's treatment of women and men—sameness or difference—varied by the issue area, case, and its context, raising the question of what drives judicial behavior.

3.4 RESEARCH QUESTION AND DEPENDENT VARIABLE

The ways in which Supreme Court justices' discuss gender in their opinions and whether they vote to treat women and men the same or differently in gender cases have important

implications for gender equality. This study aims to explain the variation in the justices' legal treatment of women and men in cases involving a gender classification. It asks: *How do United States Supreme Court justices legally treat women and men in their opinions and votes, and why does this treatment vary across cases concerning gender classifications?* There are two dependent variables, discussed in more detail below. The first is the approach justices take when they discuss and reason about gender, or construct it, in their opinions. The second is the gender distinction justices advance—sameness or difference—when voting in gender classification cases.

3.4.1 Constructing Gender in Judicial Opinions

A gender construction refers to "the socially constructed roles and learned behaviors of women and men associated with the biological characteristics of females and males" (Inglehart and Norris 2003: 8). It is not an attribute of individuals; rather it is an outcome emerging from various social situations, structures, and institutions (West and Zimmerman 1987: 148; Htun 2005: 157). Gender is a means of organizing society and a social system that creates and maintains distinctions between women and men. These distinctions are not a natural outcome flowing from biology and are what I seek to explain in this study.

When justices construct gender in Supreme Court opinions, they assign distinct roles, characteristics, and behaviors to women and men. The following table displays the approaches Supreme Court justices take when constructing gender in their opinions in gender classification cases.

< insert Table 3.1 here >

There are two main approaches: *sameness* and *difference*. When justices advance a *sameness* approach, they construct women and men as the same (Kaminer 1990; Lorber 2000).

Here, traits and roles are gender neutral, and any law, policy, or action applies to both women *and* men. For example, in 1973, in *Frontiero v. Richardson,* Justice Brennan wrote that "sex characteristic bears no relation to ability" (*Frontiero v. Richardson*, 411 U.S. 677 (1973)). As another example, in a case in which the Court was faced with the question of whether same-sex sexual harassment violated Title VII of the Civil Rights Act, Justice Scalia stated that "Title VII's prohibition of discrimination protects men as well as women" (*Oncale v. Sundowner Offshore Service, Inc.*, 523 U.S. 75 (1998)).

By contrast, when justices construct women and men as different, they advance a difference approach. The first of three difference approaches is *gender role stereotypes*. Here, justices invoke beliefs and assumptions regarding women's and men's abilities, characteristics, and roles in society. There are two intertwining dimensions to gender role stereotypes, which are often used to justify inequality (Jelen 1988: 353). The first contends that women are weak, incompetent, and unfit for tasks traditionally assigned to men, such as politics and employment (Jelen 1988: 353-354). The second highlights women's and men's distinct characteristics that naturally lead to different areas of expertise (Fridkin and Kenney 2009: 306; Jelen 1988: 354). For instance, women are perceived as warm, gentle, kind, and passive, while men are perceived as assertive, tough, and aggressive (Huddy and Terkildsen 1993: 122). As a result, women are deemed more suitable for child rearing, while men are considered more fit for working outside the home.

In 1980, in *Wengler v. Druggists Mutual Insurance Company,* Justice White stated that "men are more likely than women to be the primary supporters of their spouses and children" in the majority opinion (*Wengler v. Druggists Mutual Insurance Company*, 446 U.S. 142 (1980)). To offer another example, in 1998 in *Miller v. Albright*, a case concerning gender-based

differences in the transmission of citizenship from unwed parents to their children, Justice Stevens wrote that "fathers are less likely than mothers to have the opportunity to develop relationships" (*Miller v. Albright*, 523 U.S. 420 (1998)).

There is the possibility that some gender constructions categorized as stereotypes are not baseless stereotypes and are instead empirical facts, but I do not make a distinction between the two. One reason is that empirical facts fuel stereotypes and vice versa. For instance, Justice White's assertion could reflect an empirical reality, but it also reinforces traditional gender roles and expectations. Another reason is that it is difficult to determine which stereotypes, if any, are actually facts and which ones are not. Any stereotype, baseless or not, does not reflect the empirical reality of *all* women or *all* women.

While these two approaches to constructing gender—*sameness* and *gender role stereotypes*—are commonly referenced in the literature, there are two additional ways justices can construct gender differences. One is a *reproductive difference* approach, in which justices discuss immutable reproductive, physiological, or sexual differences between women and men. For example, Justice White spoke of "the biological role of the mother in carrying and nursing an infant" when determining whether Illinois could classify children of unwed fathers, but not unwed mothers, as wards of the state upon the death of the other parent (*Stanley v. Illinois*, 405 U.S. 645 (1972)). In *General Electric v. Gilbert*, Justice Rehnquist wrote that "only women can become pregnant" (*General Electric v. Gilbert*, 429 U.S. 125 (1976)).

Finally, justices sometimes state that women and men are different but not why or how–that is, their construction of gender differences is *unsubstantiated*. For instance, in a case concerning a Navy policy that provided 13 years to women and nine years to men to obtain a promotion, Justice Stewart pointed out that "the sexes are not similarly situated" (*Schlesinger v.*

Ballard, 419 U.S. 498 (1975)). In that same year, Justice White said "the two sexes are not fungible" when faced with the question of whether women, but not men, could be systematically excluded from jury service (*Taylor v. Louisiana*, 419 U.S. 522 (1975)). In these instances, justices constructed a gender difference between women and men but offered no further details.

When justices construct gender in their opinions, they discuss gender roles, expectations, and characteristics of women and men. By contrast, when casting a vote in a gender classification case, they make a recommendation as to how women and men should be treated before the law. In the next section, I consider the gender distinctions justices can advance in their votes.

3.4.2 Gender Distinctions in Judicial Votes

When upholding or striking down a law, policy, or action containing a gender classification, justices can advance one of two possible gender distinctions, displayed in Table 3.2.

< insert Table 3.2 here >

The first is a *sameness* distinction, which occurs when a judicial vote grants women and men the same rights and opportunities. When a justice casts a *sameness* vote, s/he makes no gender distinction and provides the same legal treatment to women and men. For example, justices who vote to prohibit single-sex enrollment policies in schools (*Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *United States v. Virginia*, 518 U.S. 515 (1996)) or the systematic exclusion of women from juries (*Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979); *J.E.B. v. Alabama*, 511 U.S. 127 (1994)) advance a sameness distinction.

By contrast, there are times in which a justice's vote advances a *difference* distinction. Here, a justice recommends or condones the differential treatment of women and men. For example, justices who uphold gender-based differences in statutory rape laws that define victims as girls, but not boys, advances a difference vote (*Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981)). As another example, justices advance a difference distinction when they allow unwed mothers, but not unwed fathers, to bring wrongful death lawsuits (*Parham v. Hughes*, 411 U.S. 347 (1979)).

An analysis of judicial votes is important in order to determine why justices condone the same or different treatment of women and men in some cases and not others. After all, justices are national policymakers and co-governors in our political system, and by voting to uphold or strike down a gender classification, they contribute to the development of law. Moreover, by sometimes providing women and men with the same rights and opportunities, justices' actions have important implications for gender equality in the United States even if they are difficult to assess.

However, though much of the research on judicial behavior focuses on how justices vote in certain cases, it is important to also examine their opinions. While a vote is simply a justices' decision to uphold or strike down a gender classification, the opinion contains the legal reasoning behind their decision making. Here, justices explain their votes and offer the reasons as to why they voted the way they did.

Judicial opinions are distinct from votes, but they also shape the course of law. In their opinions, justices articulate the legal rules and conditions under which women and men can be treated the same or differently. For example, in *Reed v. Reed* (1971), a unanimous Court struck down an Idaho statute that automatically preferred men over women in the administration of

estates. In the majority opinion, Chief Justice Burger rejected the argument that gender classifications based on an effort to reduce the workload of probate courts were rationally related to a legitimate state purpose (*Reed v. Reed*, 404 U.S. 71 (1971)). Burger established that treating women and men differently for no other reason than "administrative convenience" (*Frontiero v. Richardson*, 411 U.S. 677 (1973)) was unconstitutional, a legal rule against which justices assessed gender classifications in *Frontiero v. Richardson* and future cases. While the nine justices' votes in *Reed* tell us that states cannot automatically prefer men over women in the administration of estates, Burger's opinion tells us why. Without it, we would not know that administrative convenience is not a condition under which women and men can be treated differently.

Opinions present justices with the opportunity to innovate, try out new ideas, and enact new legal rules and standards, and not just for those in the majority. For instance, in her dissent in *Akron v. Akron Center for Reproductive Health* (1983), a case involving the constitutionality of a number of abortion restrictions, Justice O'Connor wrote that an abortion regulation is permissible unless it "unduly burdens the right to seek an abortion" (*Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983)). Nearly ten years later, O'Connor had the chance to write the undue burden standard into law in *Planned Parenthood v. Casey* (1992). Co-writing for the majority, O'Connor wrote that abortion restrictions were constitutional so long as they did not impose an "undue burden" on women's ability to obtain an abortion (*Planned Parenthood v. Casey*, 505 U.S. 833 (1992)). Furthermore, not only can legal rules developed in dissenting opinions eventually become case law, they can also supplant old standards. The undue burden test replaced Justice Blackmun's trimester framework designed in *Roe v. Wade* (1973), which

held that states could not restrict women's abortion access during the first trimester, except to protect maternal health (*Roe v. Wade*, 410 U.S. 113 (1973)).

Justices' opinions also attract different types of audiences who use them for different purposes. Opinions in one case are mined by future Supreme Court justices and lower court judges confronting similar legal questions in other cases. These jurists apply the legal reasoning and legal rules from Supreme Court opinions to their own, using those opinions to arrive at their decisions.

Judicial opinions in one case also supply the language for legal arguments advanced by lawyers, interest groups, and amici litigating in the Supreme Court in subsequent cases. For instance, those seeking to defend a gender classification must demonstrate that it was not designed for administrative convenience and that it instead serves some other legitimate governmental interest. As another example, those challenging an abortion restriction must argue that it creates an undue burden on women's constitutional right to abortion.

Given that judicial votes and judicial opinions serve distinct purposes, it is important to examine both when studying judicial behavior. There are instances in which the approaches justices take when constructing gender in their opinions do not align with their voting behavior. For example, justices might construct women and men as different in their opinions, yet vote to provide them with the same legal treatment. As such, examining opinions as well as votes is important to parse out the mechanisms and factors driving judicial behavior. For one, it can provide insight into how justices arrive at their decisions and the logic and legal reasoning surrounding why they uphold or strike down a gender classification. Moreover, the processes governing what justices write in their opinions could be different from the ones influencing how they vote.

3.5 CASE SELECTION

To select cases for this study, I used LexisNexis, a well-known online source containing all Supreme Court majority, concurring, and dissenting opinions since 1790, the year of the earliest dated opinions. Other possible online sources include the Supreme Court's website, the Oyez Project, and Westlaw. I immediately ruled out the Supreme Court's website because it contains only opinions on cases decided prior to 1991, and it does not allow users to systematically search for cases using keywords. Instead, users must sift through and read the opinions of every case. The Oyez Project does not contain all Supreme Court opinions, particularly for cases prior to the early 1900s. Though LexisNexis is comparable to Westlaw, I chose the former over the latter due to its accessibility and ease of use. There are existing databases that have compiled sex discrimination cases, such as the Policy Agendas Project and the Supreme Court Database, but I chose not to use those because they do not contain judicial opinions and contain only judicial votes.

3.5.1 Gender Classifications

This dissertation examines United States Supreme Court cases concerning gender classifications, which can exist in two forms. The first is a facial gender classification, which explicitly treats people differently because of their sex. For example, a law fixing wages for women, but not men, contains a facial gender classification.

The second is a facially neutral gender classification, which does not make an explicit distinction among people based on sex, but potentially makes an implicit distinction if it disproportionately impacts women or men. If a practice is more likely to affect members of one particular group than members of another, those in the former may claim that it has a disproportionate impact and challenge it on the grounds that it contains a facially neutral

classification and therefore constitutes discrimination.[24] For example, *Personnel Administrator of Massachusetts v. Feeney* (1979) concerned an employment policy that granted veterans preferential treatment in hiring. Though the policy did not make an explicit distinction based on sex, given that veterans tend to be men, the respondent argued that it disproportionately impacted women. As such, the major question stated in the case was if the veterans' preference constituted gender discrimination and it was challenged on those grounds.

Cases involving facial and facially neutral gender classifications are identifiable because the major question in either type of case is whether a law, policy, or action discriminates on the basis of sex or gender. To clarify, whether a case contains a facially neutral gender classification is not my judgment. Rather, it is a judgment made by the challenger(s) of a particular practice. Therefore, to be included in my dissertation, the grounds under which a law, policy, or action were challenged in a case had to be sex or gender discrimination. This criteria ensured the inclusion of cases containing facial or facially neutral gender classifications, both of which, at their core, involve the conditions under which people can be treated differently on the basis of sex.

3.5.2 Categories of Gender Cases

I classified cases concerning gender into three categories: gender classification cases, administrative/procedural cases, and tangential gender cases. The first category involves the constitutionality or legality of gender classifications, either facial or facially neutral. The major question in these types of cases is whether a law, policy, or action can treat people differently based on sex. Examples include: Is restricting the practice of law to men unconstitutional? Do gender-based employment policies violate Title VII of the Civil Rights Act? Is it unconstitutional to prohibit men, but not women, from enrolling in a nursing school?

[24] Justices sometimes reject such claims, thereby also rejecting the existence of a facially neutral classification.

The second category of gender cases consists of what I call administrative/procedural cases. In contrast to gender classification cases, the major question in these types of cases is not whether a gender classification is constitutional or legal. Instead, the major question touches on the administration and/or application of legal rules and procedures, such as the terms under which damages can be recovered or the number of days one has to file discrimination claims. Examples of the major questions in cases such as these include: Under what conditions can an employee recover damages under Title VII? Is direct evidence necessary to bring a sex discrimination suit under Title VII? Do certain abortion restrictions constitute an undue burden to abortion access and thereby violate the constitution?

A final category of cases is tangentially related to gender and does not contain a gender classification. In this set of cases, justices might discuss gender, women, or men in their opinions in some way, but the case is unrelated to gender. For instance, a justice might mention women and men in an obscenity case, but the major questions regards free speech.

Each of these categories of cases potentially shapes gender equality in the United States, but I restrict this study to cases involving gender classifications and exclude those involving administrative/procedural issues and those that are tangentially related to gender. A major reason is that focusing on gender classification cases best helps me achieve my research goal, which is to explain why justices sometimes provide the same rights and opportunities to women and men.

Although this study has implications for gender equality, its purpose is not to determine the Supreme Court's impact on it. For reasons stated earlier in this chapter, it is difficult to determine what constitutes gender equality because there are competing visions of it and disagreement over how to advance it. Further, the goal is not to examine every case involving an aspect of gender, so I instead concentrate on a subsection of gender cases.

3.5.3 Keyword Search

To select gender classification cases for this study, I used the keyword search in LexisNexis, which allows users to search all text-based aspects of a case by citation, party names, legal topics, summary, judges, attorneys, or the number of times the keyword turns up in the case. The keyword search yields all opinions written on the case and the case summary, which outlines the procedural posture, overview, and outcome of the case. The procedural posture is a one to two sentence account of the facts of the case and how the case arrived at the Supreme Court. The overview contains a five to six sentence description of the facts of the case and the major question, and the outcome contains the Supreme Court's holding. I searched all parts of the case (including the summary, syllabus, majority, concurring, and dissenting opinions, headnotes, and footnotes) and all available dates, thereby identifying the first case concerning a gender classification.[25]

3.5.4 Filtering Cases

After conducting the keyword search, I sorted the cases and discarded those that were not applicable for this study. [26] First, I discarded cases that were denied certiorari,[27] vacated and remanded,[28] or dismissed.[29] To select the cases relevant for this study, I read the case summaries and included the case if 1) it was decided on the merits and 2) a law containing a gender classification was challenged or 3) the major question in the case was if a law or action constituted sex or gender discrimination.

[25] See Appendix 3.1 for more details on the keyword search.
[26] I recognize that discarded cases could provide insight for this study, but I had to set limits when selecting cases.
[27] When the Supreme Court denies certiorari, it does not grant judicial review.
[28] Cases that were vacated and remanded were granted certiorari but were not decided on the merits.
[29] The Supreme Court terminates a case and allows the lower court ruling to stand.

During the filtering process,[30] I recorded the number of cases yielded after each keyword search, 8813, and the number of cases yielded after reading the case summaries following each keyword search, 646. Table 3.3 displays this information, along with the number of gender classification cases that were vacated and remanded, dismissed, and denied certiorari after each keyword search. I also include the number of procedural cases yielded after each keyword search, 620, and examples of types of cases discarded after reading the case summaries for each search.

< insert Table 3.3 here >

After reading the case summaries (or in rarer instances, the majority opinion), I discarded the majority of the cases yielded by each keyword search. There are a couple reasons why most of these cases were not applicable to my study. For one, the keyword search terms I used were narrow enough to yield cases applicable to this study, but broad enough to yield many inapplicable cases. Moreover, considering that the keyword search function turns up all cases in which the keyword appears in any part of the case—opinions, headnotes, footnotes—most cases netted did not have to do with gender.

For example, keyword search terms such as woman or gender discrimination yielded cases concerning criminal rights, property, obscenity, other types of discrimination, and voting rights. Some cases I discarded were specific to the keyword search term, such as the keyword search term 'sex,' which yielded a number of cases about sex offenders, obscenity, criminal rights, voting, sex crimes, miscegenation, and same-sex relations. There were also many instances in which justices cited a gender classification case in a case that did not pertain to gender. For example, in a case concerning peremptory challenges[31] on the basis of race in jury

[30] See Appendix 3.2 for more details on the filtering process.
[31] Peremptory challenges are used by lawyers to strike someone from a jury without giving a reason.

selection, justices might discuss peremptory challenges on the basis of sex and cite *Duren v. Missouri* (1979).

Of the cases remaining after I read the case summaries, many were either included in the study or turned out to be administrative/procedural cases. This is not surprising given that the latter type of cases may have an indirect effect on gender equality. However, as I discussed previously, I do not include those types of cases because the primary aim of this study is to examine the legal treatment of women and men and explain why they are sometimes provided the same rights and opportunities.

I also found that very few gender classification cases were vacated and remanded, dismissed, or denied certiorari. This suggests that justices did not shy away from an opportunity to adjudicate these types of cases. Consequently, I can be more confident in the conclusions of my study given that I have selected all of the gender classification cases adjudicated in the Supreme Court.

There are a couple reasons why Supreme Court justices may have had a tendency to grant certiorari to gender classification cases. One is that these cases may have caused intercircuit conflicts, which occurs when circuit courts arrive at different decisions. Also known as "conflict cases," justices tend to grant certiorari to these types of cases, and they make up a significant number of cases on the Supreme Court's docket (Lindquist and Klein 2006: 136). Another possibility is that justices grant certiorari to gender classification cases because they have a vested interest in its outcome. Justices have policy preferences and seek to advance them (Segal and Spaeth 1993), and affirming or reversing a lower court decision presents them with an opportunity to do so.

3.6 ANALYTICAL METHODS

This study employs multi-methods research techniques in an effort to explain why United States Supreme Court justices decide gender classification cases as they do. The quantitative component examines all Supreme Court cases under study in order to identify which factors shape justices' approaches to constructing gender in their opinions and their voting behavior. In the qualitative component, I aim to explain *why* those factors influenced justices' decision making by conducting small-N analyses of eight Supreme Court cases—*Mississippi University for Women v. Hogan* (1982), *Meritor Savings Bank v. Vinson* (1986), *Johnson v. Transportation Agency, Santa Clara County* (1987), *United Auto Workers v. Johnson Controls* (1991), *J.E.B. v. Alabama* (1994), *United States v. Virginia* (1996), *Miller v. Albright* (1998), and *Tuan Anh Nguyen v. Immigration and Naturalization Service* (2001).

The quantitative and qualitative components complement one another and further our understanding of Supreme Court decision making. Some advantages to using quantitative methods are that they enable researchers to analyze a large number of observations, draw causal inferences, and choose between rival hypotheses or theories (Lieberman 2005; Wolf 2010: 146). However, while regression results demonstrate the individual effect each independent variable has on the dependent variable, they reveal correlation, but not causation. As such, the purpose of the quantitative analyses is to identify the significant factors that shaped justices' behavior, and in the qualitative analysis, I aim to discover why (see George and Bennett 2005: 34-35; Lieberman 2005: 442). Using small-N analyses, I seek to identify the mechanisms by which the independent variables shape how justices construct gender in their opinions and vote in gender classification cases.

The quantitative analysis will motivate the qualitative analysis and the cases selected for the small-N analyses, discussed in more detail in chapters five and six. Quantitative results

demonstrate that gender had an individual effect on justices' behavior, but it does not illustrate why—it could be that female justices acquire unique information relative to male justices or that female justices are compelled to act as representatives of women (Gryski, Main, Dixon 1986; Allen and Wall 1993; Peresie 2005; Martin and Pyle 2005; Boyd, Epstein, Martin 2010). Regression results also reveal that gender had a panel effect on male justices' behavior, but again, not why. Some proposed logics are that male justices believe their female colleagues have more knowledge and experience with gender issues, so they heed their advice or follow their lead or that serving with a female justice fosters egalitarian attitudes (Gryski, Main, Dixon 1986; Peresie 2005; Boyd, Epstein, Martin 2010). Another possibility is that male justices act insincerely in an effort to protect their reputation and avoid being perceived as harboring sexist attitudes.

In sum, although the regression analyses revealed that gender had an individual and panel effect, it did not tell us which theories best explain judicial behavior in these contexts. Therefore, I employ qualitative methods to determine why gender shaped female justices' behavior and why serving with a female justice altered male justices' behaviors in gender classification cases.

3.7 UNITED STATES SUPREME COURT GENDER CLASSIFICATION CASES

Following the keyword search and after filtering the cases, 66 cases remained in my study. Figure 3.1 displays the number of gender classification cases adjudicated by the Supreme Court from 1873 to 2001.

<insert Figure 3.1 here>

From 1873 to 1970, the Supreme Court issued rulings in 16 gender classification cases, eight of which occurred prior to the passage of the 19th amendment in 1920. Interestingly, winning voting rights did not produce an increase in the number of cases adjudicated by the

Court. Though feminists were active in the Supreme Court in the early 1900s with the NCL, they concentrated their litigation efforts on defending protective labor legislation for women instead of challenging discriminatory laws across a broader range of issues. Their ability, or desire, to transfer the fight for voting rights into other battles to advance women's rights may have been limited. Though some women wanted to further the fight for gender equality in other areas, many appeared to be satisfied with winning voting rights, at least for the time being (Shanley and Schuck 1974).

The rise in gender classification cases in the early 1970s can be attributed to the concerted litigation efforts of several women's rights groups, including NOW, Women's Equity Action League, the Women's Law Fund, and the WRP. In contrast to the litigation activities in the late 1800s and early 1900s, in which a single organization was involved, multiple women's groups were involved in challenging discriminatory laws, either as litigants or as amici (O'Connor 1980: 93), ushering in a new era in litigation activity.

From 1971 to 2001, the ACLU and the WRP participated in 26 cases as litigants or amici, and NOW participated in 16. The rise in litigation was also the result of the increasing number of female lawyers during this period, which fostered the "support structure" for rights litigation (Epp 1998: 57; Banaszak 2010: 34). Increasing numbers of women enrolled in law school, but overt discrimination prevented many of them from practicing law upon graduation. As a result, many women entered government employment or supported women's rights litigation campaigns (Epp 1998: 57; Banaszak 2010: 34, 36). Together, these developments contributed to the onslaught of women's rights cases in the Supreme Court.

Another explanation as to why the number of gender classification cases peaked in the 1970s could be that these groups faced a hospitable political environment with supportive and

responsive allies in government. In the late 1960s and early 1970s, presidential administrations, Republican and Democratic alike, took action to advance gender equality. As I mentioned, President Kennedy established the Commission on the Status of Women, and President Johnson enacted an executive order prohibiting sex discrimination in employment. Congress also enacted legislation favorable to women's rights, such as the Equal Pay Act, the Equal Credit Opportunity Act, and Title VII of the Civil Rights Act.

In the 1980s, the number of gender classification cases adjudicated by the Supreme Court began to decline and continued to do so. This could reflect changes in the social and political environments, as well as the strength of the women's movement, which was stronger and more active when it emerged in the 1960s and peaked in the 1970s. By contrast, a number of developments produced a conservative backlash against the women's movement in the 1980s.

The backlash was rooted in the belief that feminism represented an assault on the family, moral norms, and traditional gender roles. Its roots can be traced to the 1960s with the advent of the Pill and the sexual revolution, both of which conservatives believed chipped away at the traditional family unit and led to moral decay (Klatch 1987: 120). Another major development involved the rapid changes in gender dynamics, with a rise in the number of women in the workplace, declining fertility, and no-fault divorce (Ryan 1992: 101; Rosen 2006: 331). In response to these changes, the "Moral Majority," a pro-family movement emerging in the late 1970s, advocated for a return to traditional values and lifestyles (Ryan 1992: 101). They believed that as the moral guardians in society, women had to fulfill their traditional roles or else chaos and moral decline would ensue (Rosen 2006: 330). Social conservatives saw feminism as an attack on the family and traditional values, and therefore, equal rights threatened marriage, the family, and society (Klatch 1987: 128; Rosen 2006: 333).

Aside from losing support in society in the 1980s, the women's movement also lost important support in government, particularly from presidential administrations. Prior to 1980, both Republican and Democratic presidents supported women's rights, but with the election of President Reagan in 1980, Republican administrations began opposing the goals of the women's movement (Banaszak 2010: 167). In contrast to previous presidents, despite nominating the first female justice to the Supreme Court, President Reagan appointed fewer women to the top levels of government and opposed the Equal Rights Amendment and abortion rights (Banaszak 2010: 169). Though President George H.W. Bush was more supportive of women's rights, he was pro-life and vetoed the Family Medical Leave Act (Banaszak 2010: 169).

In addition, the women's movement was dealt another loss with the failed ratification of the ERA in 1983. Passed by Congress in 1972, it was ratified by 22 states that same year, but ten years later, it was three states short of the two-thirds requirement (Ryan 1992: 68, 76). The ERA helped unify and motivate feminist activists, and its defeat marked the decline of the second wave of the women's movement (Ryan 1992: 77). Moreover, the drawn out nature of the battle over the ERA helped mobilize conservative women, who formed groups such as the Happiness of Motherhood Eternal, Women Who Want to Be Women, Females Opposed to Equality, and the Eagle Forum (Rosen 2006: 332). Several conservative women attained national prominence, legitimating the backlash against feminism (Rosen 2006: 332).

The loss of support for women's rights in the political and social environments, which likely contributed to the decline in movement activity, could explain the decrease in gender classification cases in the Supreme Court. Another potential explanation could stem from practical reasons. After the Court began striking down gender classifications in 1971, states

responded by repealing discriminatory laws, leaving few laws to challenge (Goldstein 1999: 209).

< insert Figure 3.2 here >

The declining number of cases could also have to do with the nature of gender cases adjudicated. Figure 3.2 displays the number of gender classification and procedural/administrative cases adjudicated from 1971 to 2001. In the 1970s, most of the government actions challenged concerned gender classifications, but by the late 1970s and thereafter, the Supreme Court heard increasing numbers of procedural/administrative cases instead.

When we consider the nature of gender cases, gender classification cases can be thought of as 1st generation cases. Here, justices first grappled with determining the conditions under which women and men could be treated differently on the basis of sex. After establishing the terms under which gender classifications are legal, justices instead faced procedural or administrative aspects of gender cases, which constituted 2nd generation cases. Though 1st generation cases dominated in the early 1970s, by the mid-1970s, justices began adjudicating 2nd generation cases at the same time. Eventually, by the end of the 1980s and thereafter, 2nd generation cases comprised the majority of gender cases and the number of 1st generation cases adjudicated were eventually phased out.

The Supreme Court adjudicated 66 gender classification cases from 1873 to 2001. Justices decided 16 cases during the late 1800s and early half of the 20th century, but most of the cases, 44, were decided during the 1970s and 1980s. Fewer cases, 6, were adjudicated in the 1990s and early 2000s. This rise and decline could be due to several factors, including the

strength of the women's movement and its support in the political and social environments, as well as the nature of the gender cases.

3.7.1 Cases under Study

The following table displays all gender classification cases adjudicated by the Supreme Court, year, issue area,[32] and issue.

< insert Table 3.4 here >

Examining a variety of cases across several issue areas is useful for assessing the legal treatment of women and men by the Supreme Court. For one, it removes the possibility that judicial behavior is largely driven by issue area or a particular type of case the justices hear. Moreover, the legal treatment of women and men has implications for gender equality, which is shaped by more than a single issue. As such, to get a clearer picture of the role justices play in the evolution of gender equality in the United States, it is important to examine their behavior across a range of issues.

Even though there were 16 gender classification cases adjudicated from 1873 to 1970, this study begins in 1971 for a few reasons. First, 1971 marks the beginning of the era in which the Court decided a vast majority of these types of cases. Another reason is that conducting a study spanning such a long period of time could be problematic given the vast changes in the political and social environment over time. For example, women's roles in the 1970s were markedly different compared to their roles in the 1870s.

[32] In cases concerning employment, family, marriage, jury, military, private clubs, and education, the major question in each of these cases concern whether women and men can be treat differently within that particular arena. Pregnancy discrimination, sex discrimination, abortion, and sexual harassment cases concern whether a law, policy, or action constitutes sex discrimination. Some cases, such as those pertaining to parental rights, concern the permissibility or constitutionality of laws treating unwed parents differently on the basis of sex. In cases concerning compensation or benefits, the major question asks if gender differences in unemployment benefits or retirement benefits, are permissible.

Lastly, I begin the study in 1971 due to data limitations, as data for some of the theories I test are not available. For instance, as I discussed in the previous chapter, a major factor shaping justices' behavior is political ideology. Though early scholars measured this variable by identifying the political party of the president appointing each justice, many scholars use the Judicial Common Space (JCS) scores (Epstein, Martin, Segal, and Westerland 2007). Given that justices' ideologies may change over time while serving on the bench, JCS scores are based upon their voting behavior and offer a more precise measure of ideology. However, the year for which these scores begin is 1937.

To summarize, this study examines Supreme Court decision making across a range of gender classification cases. For over a century, justices determined the conditions under which women and men should be treated the same or differently in a variety of issue areas that spans employment, parental rights, and the family. Though the first gender classification case was adjudicated in 1873, for methodological reasons, this study analyzes cases decided from 1971 to 2001.

3.7.2 Approaches to Constructing Gender in Opinions and Gender Distinctions in Votes

The ways in which Supreme Court justices constructed gender in their opinions and the gender distinctions they advanced in their votes varied a great deal from 1971 to 2001.[33] In some of their opinions, justices discussed gender, but sometimes they did not construct gender at all, thereby advancing no approaches. When they constructed gender, justices sometimes advanced only a difference approach or only a sameness approach. Finally, there were times when justices furthered a sameness *and* a difference approach in their opinions. In the next table, I present the

[33] See Appendix 3.3 for a table of Supreme Court gender classification cases and the presence of a sameness or difference approach to constructing gender in all majority, concurring, and dissenting opinions and the number of times justices advanced a sameness or difference distinction in their votes.

number of times justices advanced each of these approaches to constructing gender in all majority, concurring, and dissenting opinions and by opinion type.

< insert Table 3.5 here >

In all majority, concurring, and dissenting opinions, justices advanced a sameness approach most frequently. By contrast, they advanced a difference approach the fewest number of times. Interestingly, there were a number of times in which justices did not construct gender in their opinions. On the one hand, this is somewhat surprising because I expected that adjudicating a gender classification case would necessitate constructing gender. After all, when faced with the question of whether women and men can be treated differently, how can justices arrive at a decision without discussing gender differences or similarities? However, on the other hand, justices arrive at their decisions in multiple ways, and depending upon the content of the case and the grounds under which a gender classification is challenged, justices may issue a decision for reasons that do not require a discussion on gender.

For instance, the Rotary Club restricted its membership on the basis of sex, arguing that, as a private entity, it could do so because of its constitutional right to freedom of association. However, in *Board of Directors of Rotary International v. Rotary Club of Duarte* (1987), justices disagreed and a unanimous Court held that it must open its membership to women. However, justices did not reach this decision by discussing gender, discrimination, or equal rights, for example. Rather, justices discussed why the Rotary Club failed to meet some of the provisions that allow private groups the right to restrict its membership under the freedom of association clause, such as status as a religious organization.

Justices also advanced a sameness *and* a difference approach many times in their opinions. While justices recognized some ways in which women and men were the same, that

they also constructed gender differences demonstrates the pervasiveness of gender in society. Gender is a social system and a way of organizing society, and gender differences are constructed and reinforced at the institutional and individual level (West and Zimmerman 1987). There is a lot of effort at both of these levels to construct and maintain gender differences between women and men, and constructions generated at the institutional level reinforce constructions at the individual level and vice versa. For example, toys, clothing, and sports teams are sex segregated, and employers might provide maternity, but not paternity, leave. We behave accordingly, purchasing toys for girls and different toys for boys and wearing clothes designated for our respective sex. Not only that, but we reinforce gender differences by policing our own and others' behaviors and actions, sanctioning those who fail to act according to their gender (West and Zimmerman 1987). Given the pervasiveness of gender, although justices recognized gender similarities, it is not surprising that they highlighted gender differences as well.

Comparing opinion types shows that when justices advanced a sameness approach or both approaches, they did so more frequently in majority opinions compared to concurring and dissenting opinions. Given that these opinions are usually more visible, justices may have been susceptible to societal pressure and censored themselves. After all, they may engage in strategic behavior and act insincerely in an effort to retain institutional support and legitimacy (Epstein and Knight 1998). As such, justices were perhaps more sincere in their thoughts regarding gender when writing concurring or dissenting opinions. This could be why a sameness approach became the dominant approach in majority opinions while those concurring or dissenting were reluctant to acknowledge similarities between women and men.

Despite the frequency with which justices advanced a sameness approach in their opinions, they continued reinforcing differences between women and men. The following figure

presents the difference approaches—*gender role stereotypes*, *reproductive difference*, *unsubstantiated difference*—to constructing gender that justices advanced from 1971 to 2001 in their opinions in Supreme Court gender classification cases.[34]

< insert Figure 3.3 here >

When justices constructed gender differences between women and men, they highlighted unsubstantiated differences more often than gender role stereotypes and reproductive differences. The following table displays the summary statistics for the difference approaches justices invoked in their opinions.

< insert Table 3.6 here >

Justices advanced an unsubstantiated difference approach more frequently than reproductive differences or gender role stereotypes in each type of opinion. The findings seem to reflect justices' struggle to talk about the gender differences between women and men. Though justices seemed to recognize that it was increasingly socially unacceptable to discuss gender role stereotypes, that they tended to discuss unsubstantiated differences suggests that they were still grappling with how to talk about gender differences. Or, another possible interpretation is that this finding reflects the belief that, simply put, women and men are inherently different and offering a justification is unnecessary.

Overall, the results also reveal that in most opinions, justices did not construct gender. As I mentioned previously, there are a number of ways justices can justify their decisions, and discussing gender is only one of them. The results also reveal that when justices constructed gender in their opinions, they tended to advance only a sameness approach or both approaches to constructing gender. On fewer occasions, they advanced only a difference approach. These

[34] See Appendix 3.4 for a table of Supreme Court cases and presence of a sameness, gender role stereotypes, reproductive difference, or unsubstantiated difference approach to constructing gender in each opinion.

patterns could reflect some of the larger societal developments I discussed in the previous section. This is plausible given that justices face various institutional constraints and therefore may be influenced by forces in the social environment, such as the political pressure exerted by women's groups and changing gender attitudes and roles (O'Connor 1980; O'Connor and Epstein 1983; George and Epstein 1991; McCammon and Campbell 2001).

However, given how often justices advanced a sameness approach *and* a difference approach in their opinions, it appears they recognized that gender differences exist but were reluctant to completely abolish them. In short, women and men could simultaneously be the same in some ways but different in others. Again, as discussed earlier, this demonstrates how pervasive gender is in society, which has important implications for gender equality. The reinforcement of gender differences potentially perpetuates hierarchies of power that privilege men and masculinity while devaluing women and femininity (Htun and Weldon 2010: 208). When women are constructed as inherently different from men, it can provide grounds for differential and potentially unequal treatment.

Turning to justices' voting behavior in Supreme Court gender classification cases from 1971 to 2001, figure 3.4 displays the number of times justices cast individual votes advancing a sameness or difference distinction in Supreme Court gender classification cases from 1971 to 2001.

< insert Figure 3.4 here >

Although justices advanced a sameness distinction in many of their votes, advancing a difference distinction was also a common occurrence. Like feminists, justices likely disagreed as to whether advancing a sameness or difference distinction would benefit women, and a divided

Court could reflect the efforts of some justices to advocate differential treatment in order to further women's status in society.

It could also be the case that this finding reflects something else entirely, such as differences in justices' interpretations of statutes, case law, and the constitution, or differences in responses to the environment in which justices operate. Or, given that justices are meant to be neutral and withhold their policy views and goals (Epstein and Kobylka 1992: 11; Tiller and Cross 2006: 518), they may restrain themselves. They might not consider the impact of their ruling on gender equality, or if they do, they may not allow it to affect their decision.

Despite the frequency with which justices advanced both approaches to constructing gender, they voted to provide the same legal treatment to women and men more often than differential treatment. This suggests two things. One is that justices extended equal rights to women *because* of their differences from men. This was a reason why justices ruled that states could not systematically exclude women from juries. As Justice White wrote, "a distinct quality is lost if either sex is excluded" from juries (*Taylor v. Louisiana*, 419 U.S. 522 (1975)). Justices reasoned that due to gender differences between women and men, including both sexes was necessary in order for a jury to be truly representative of the population.

Another possibility is that although acknowledging gender differences between women and men, justices were trying to determine which ones justified differential legal treatment. They may have struggled to determine the conditions under which women and men should retain the same legal treatment despite their reproductive differences, which likely depended upon the context and issue. In the context of employment, justices likely extended differential treatment to women, enabling them to take maternity leaves without losing their jobs or any accrued seniority, for example. Given that equal opportunity in employment was the women's

movement's most broadly supported goal (Cowan 1976: 392), this is an instance in which justices may have been unlikely to penalize women for their capacity to get pregnant.

With respect to voting behavior, justices tended to promote a sameness distinction in their votes versus a difference one. However, even though they provided women and men with many of the same rights and opportunities, there remained instances in which they advocated for differential treatment. This variation in legal treatment illustrates the complex nature of navigating gender differences and the conditions under which women and men should be treated the same or differently.

a) Issue Area

From 1971 to 2001, the Supreme Court adjudicated 50 gender classification cases across nine issue areas. The following table displays the number of cases in each issue area and sub-issue area, as well as the variation this study seeks to explain: the approaches justices took when constructing gender—no approaches, only a difference approach, only a sameness approach, or a sameness *and* a difference approach—in their opinions and the gender distinctions advanced in their votes—sameness or difference—in gender classification cases.

< insert Table 3.7 here >

Many of the cases under study, 17, concerned employment. Here, the Court addressed various questions such as whether pregnancy discrimination, affirmative action, or sexual harassment constituted sex discrimination in the workplace. In six cases, justices also dealt with the treatment of women and men in policies involving employee compensation and benefits, such as retirement, disability, or pension benefits.

One reason why there were more gender classification cases in employment than in any other issue area could stem from the passage of legislation prohibiting sex discrimination and the

subsequent lack of enforcement. Congress established the EEOC to enforce Title VII, but the commission concentrated on enforcing the provision prohibiting racial discrimination instead of the provision prohibiting sex discrimination because it considered the former to be a more serious problem than the latter (Rosen 2006: 73). Likewise, the Equal Pay Act and Executive Order 11375, which prohibited sex discrimination in hiring and employment, were similarly unenforced. In response, women's rights groups such as NOW and the ACLU launched litigation campaigns to challenge discriminatory employment practices and induce enforcement (Cowan 1976: 378; O'Connor 1980: 93; Campbell 2003: 165).

In the 17 gender classification cases concerning employment, justices tended to advance either a sameness approach, doing so 52 times, or both approaches, which they did 45 times, to constructing gender in their opinions, particularly in cases involving pregnancy discrimination and compensation and benefits. For instance, Justice Scalia stated that "treating women differently on the basis of pregnancy constitutes discrimination on the basis of sex" (*United Auto Workers v. Johnson Controls*, 499 U.S. 187 (1991)). In other opinions, justices advanced both approaches to constructing gender. For instance, with respect to denying seniority to women who take maternity leaves, Chief Justice Rehnquist advanced both approaches, stating that "pregnancy, is, of course, confined to women" but that a policy cannot "impose on women a substantial burden that men need not suffer" (*Nashville Gas Company v. Satty*, 434 U.S. 136 (1977)).

In employment cases, justices advanced a sameness distinction twice as often as a difference one in their votes, doing so 98 times compared to 44 times. They removed various obstacles to women's employment opportunities, even ones arising from the capacity to get pregnant. Despite the reproductive differences between women and men, women could not be

denied participation in the labor force on the same basis as men. As for the employment cases involving sexual harassment, justices were unanimous and advanced a sameness distinction in their votes and a sameness approach in their opinions 18 times. For instance, Chief Justice Rehnquist wrote that "sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace" (*Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1987)).

Another major area of dispute concerned the family. Of the 12 cases adjudicated, nine involved the parental rights of unmarried parents. Here, justices resolved various questions concerning gender-based differences in the transmission of citizenship, inheritance, and adoption rights. In the remaining three cases involving the family, the Court addressed whether it was constitutional to dispense unemployment benefits to families only when the father was unemployed or Social Security benefits only to widows. Justices advanced only a difference approach 11 times in these types of cases. Instead, they chose to not construct gender in 31 instances, or they advanced a sameness approach or both approaches, doing so 27 or 30 times, respectively. In terms of their voting behavior, justices' votes were evenly divided in the gender classification cases concerning the family. They cast 48 votes advancing each distinction—difference or sameness—which likely stems from the cases concerning parental rights.

Several cases concerning the family dealt with parental rights and the conditions, if any, under which reproductive differences between women and men justified differential treatment between unwed mothers and fathers. In each of these nine cases, unwed fathers challenged laws denying them rights afforded to unwed mothers. In their opinions, justices advanced a sameness approach 16 times, recognizing that sex was not a determinant of fitness or desire for parenthood. For instance, Justice White stated that unwed fathers "are wholly suited to have

custody of their children" (*Stanley v. Illinois*, 405 U.S. 645 (1972)) when the Court confronted an Illinois law denying custody to unwed fathers upon the death of the mother. Moreover, in 1979 in *Caban v. Mohammed*, a case involving whether unwed fathers could block the adoption of their children, Justice Powell noted that "maternal and paternal roles are not invariably different in importance" (*Caban v. Mohammed*, 441 U.S. 380 (1979)).

However, despite advancing a sameness approach, justices also constructed gender differences in their opinions cases involving the rights of unwed parents. In 11 instances, they drew upon reproductive differences and gender stereotypes to justify why unwed fathers could be denied rights granted to unwed mothers, which they often condoned when voting in parental rights cases. The logic justices used to justify differential treatment was that childbirth was a transformative experience that naturally turned women into mothers, but not men into fathers. As Justice Stewart stated, given that the "mother carries and bears the child," there is an "undeniable social reality that the unwed mother is always an identifiable parent and the custodian of the child" (*Caban v. Mohammed*, 441 U.S. 380 (1979)). Chief Justice Burger also wrote that "unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers" (*Stanley v. Illinois*, 405 U.S. 645 (1972)).

Due to the reproductive differences between women and men, justices reasoned that unwed mothers should have rights not granted to unwed fathers and advanced a difference distinction 47 times. As Justice Kennedy asserted in a case concerning a law allowing only unwed mothers to transmit their citizenship to their children, there is an "undisputed assumption that fathers are less likely than mothers to have the *opportunity* to develop relationships...These assumptions are firmly grounded and adequately explain why Congress found it unnecessary to

impose requirements on the mother that were entirely appropriate for the father" (*Tuan Anh Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53 (2001)).

The Supreme Court also adjudicated ten cases concerning marriage, specifically the treatment of wives and husbands in a variety of circumstances. Gender classifications in these cases were rooted in traditional gender roles and the sexual division of labor, with an underlying belief that wives were naturally dependent upon their breadwinner husbands. Justices resolved questions regarding gender-based differences in alimony, social security benefits, and property, advancing a sameness distinction twice as often as a difference distinction.

In 27 instances in their opinions in these types of cases, justices did not construct gender. When they did, they usually advanced a sameness and a difference approach, which they did 20 times. Though justices recognized gender differences, they did not think they justified differential treatment, thereby furthering a sameness distinction 47 times. For instance, in 1975 in *Weinberger v. Wiesenfeld*, which provided Social Security benefits to widows, but not widowers, Justice Brennan stated that the "notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support" but that "such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support" (*Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)). Similarly, in a case concerning the constitutionality of requiring that men, but not women, pay alimony following a divorce, justices noted that there is a "disparity in economic condition between men and women" but "there is no reason, therefore, to use sex as a proxy for need. Needy males could be helped along with needy females" (*Orr v. Orr*, 440 U.S. 268 (1979)).

Justices also adjudicated whether systematically excluding women from jury service was unconstitutional. In all three cases the Court heard, justices tended to grant women and men the same legal treatment in their votes, doing so 22 times compared to five times. In nine instances, they advanced a sameness approach, and in 17 instances, they advanced both approaches to constructing gender in their opinions. Interestingly, justices constructed gender differences twice to justify why women should sit on juries, arguing that "restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial" (*Taylor v. Louisiana*, 419 U.S. 522 (1975)). Justice White went on to note that "women…are distinct from men" and that it was "no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex" (*Taylor v. Louisiana*, 419 U.S. 522 (1975)).

The gender distinctions justices advanced were fairly divided, 12 to 15, in cases concerning the military, and justices had a tendency to advance a sameness approach or both approaches to constructing gender in their opinions, which they did a total of 23 times. While in other cases, justices mentioned gender differences in an attempt to demonstrate why those differences did not justify differential treatment, here, they did the opposite. Despite recognizing some similarities between women and men, justices invoked differences to demonstrate why gender classifications were valid. For instance, in 1981 in *Rostker v. Goldberg*, a case in which the Court considered the constitutionality of male-only registration for the draft, Chief Justice Rehnquist stated that the "decision to exempt women from registration was not the "accidental byproduct of a traditional way of thinking about females" but rather that "men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft" (*Rostker v. Goldberg*, 453 U.S. 57 (1981)).

Supreme Court justices were rarely unanimous in gender classification cases, but they were in cases concerning whether private clubs and organizations could restrict its membership on the basis of sex. Justices usually did not construct gender in their opinions. When they did, they tended to advance only a sameness approach, doing so six times. For example, Justice Brennan noted that "this Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities" (*Roberts v. Jaycees*, 468 U.S. 609 (1984)).

Abortion was not the most divisive issue during this time period, with most justices voting to decriminalize the procedure. In their opinions, justices advanced only a difference approach eight times, which is not surprising given the subject matter. However, justices also advanced both approaches in their opinions and recognized that gender differences did not justify differential treatment in seven instances. Justice Blackmun noted that the state had a legitimate interest in "preserving and protecting the health of the pregnant woman," but that "the right of personal privacy includes the abortion decision" (*Roe v. Wade*, 410 U.S. 113 (1973)).

Similarly, in the two cases concerning sex discrimination in education, justices usually advanced a sameness distinction, which they did 12 times. They also mostly advanced only a sameness approach in their opinions, also doing so 12 times. For instance, in an opinion on whether a nursing school could restrict its enrollment to women, Justice O'Connor wrote that "policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job" (*Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)).

Finally, there were three cases that did not fit into any other issue area. In this category, justices confronted gender-based differences in the administration of estates (*Reed v. Reed*, 1971), purchase of beer (*Craig v. Boren*, 1976), and statutory rape laws (*Michael M. v. Superior Court of Sonoma County*, 1981). Here, justices advanced a sameness distinction more often than a difference one when voting in these cases, 18 compared to seven, and a sameness approach in their opinions. While a majority of the justices struck down gender classifications in *Reed* and *Craig*, it upheld one in *Michael M.*, on the account of the differences between women and men. Justices maintained that "young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse" (*Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981)), and as such, making men, but not women, criminally liable for statutory rape was declared constitutional.

In Supreme Court gender classification cases, justices took a number of different approaches when they constructed gender in their opinions. In cases involving employment, family, marriage, jury, and the military, justices tended to advance a sameness approach or both approaches. However, in each of these issue areas, justices maintained gender differences in their opinions quite frequently. By contrast, when adjudicating cases concerning private clubs, justices usually did not construct gender, and when they did, they constructed women and men as the same. In abortion cases, justices either reinforced gender differences, or if they advanced a sameness approach, they simultaneously furthered a difference one. In cases involving education, justices usually constructed women and men as the same in their opinions.

Justices' treatment of women and men in their votes was similarly inconsistent. They tended to advance a sameness distinction in most issue areas, including employment, marriage, jury, private clubs, abortion, and education. However, in many instances, justices still advocated

for differential treatment, and their votes were divided in every issue and sub-issue area except cases concerning sexual harassment and private clubs. Justices' votes were most divided in cases involving the family and the military, where they were fairly evenly split as to whether women and men should be treated the same or differently.

Justices' discussions of the characteristics, roles, and expectations of women and men, as well as the conditions under which justices cast votes providing the same or differential treatment varied across issue area and context. Though there are notable patterns in their treatment of women and men in their opinions and votes in these issue areas, inconsistencies remain. This variation in judicial behavior raises the important question of what drives justices to treat women and men the same in some cases and differently in others.

3.8 CONCLUSION

This chapter examined the legal treatment of women and men in the United States Supreme Court during the first and second waves of feminism. Early feminists sought equal rights on the same basis as men, but they were defeated in the Supreme Court in the late 1800s. They were arguably successful in the early 1900s, when the Supreme Court upheld a number of protective labor laws for women. Such laws were intended to protect women from danger and exploitation in the workplace, thereby helping them. Here, in an effort to advance gender equality, first wave feminists sought rights on a *different* basis as men—and won.

By the 1960s, feminists would come to reject protective legislation and fight for equal rights, not special treatment. During this second wave of feminism, women's rights groups were mostly successful at breaking down the legal barriers preventing women's full participation in the political, legal, and economic arenas. In contrast to the feminists active in the early 1900s, second wave feminists believed that seeking different treatment reinforced gender stereotypes

and hindered women's rights (Vogel 1990: 19; Jacquette 2001: 122; Rosen 2006: 75-76). However, the conflict over sameness and difference persisted—among feminists and in the Supreme Court.

Decision making in Supreme Court cases concerning gender has important implications for gender equality, even if its impact is often difficult to predict. To further our understanding, this study aims to explain why justices construct gender as they do in their opinions and why they cast votes granting women and men the same legal treatment in some cases and not others. It analyzes 50 gender classification cases across eight issue areas—employment, family, marriage, jury, military, private clubs, abortion, and education—from 1971 to 2001.

Using quantitative methods, I seek to identify the factors shaping the approaches justices took when constructing gender in their majority, concurring, and dissenting opinions. For the most part, justices did not construct gender, particularly in cases involving the membership policies of private clubs. However, when they did construct gender, justices usually advanced only a sameness approach or a sameness *and* a difference approach. Despite the frequency with which they constructed women and men as the same, they still reinforced gender differences, promoting a difference approach in a number of opinions across each of the issue areas.

I also employ quantitative methods to determine why justices sometimes cast votes granting the same or different legal treatment to women and men. Though justices had a tendency to further a sameness distinction when voting in gender classification cases, they were fairly inconsistent. Across the eight issue areas, justices' votes were quite divided and they frequently maintained gender differences.

This study uses multi-methods research to explain justices' legal treatment of women and men in their opinions and votes in gender classification cases. While the quantitative component

identifies the significant independent variables shaping justices' behavior, the qualitative component aims to explain why. Utilizing small-N analyses, it examines why gender had an individual and panel effect on the ways in which justices constructed gender in their opinions and how they voted in gender classification cases. In the next chapter, I conduct quantitative analyses in an effort to explain justices' behavior in this important issue area.

Table 3.1. Typology of Approaches to Constructing Gender in Opinions in United States Supreme Court Gender Classification Cases, 1873-2001.

Approach to Constructing Gender		Definition	Examples
Sameness		Justice constructs women and men as the same. Traits and roles are gender neutral. Laws and policies apply to both women *and* men.	"…sex characteristic bears no relation to ability" (*Frontiero v. Richardson* 1973). "Title VII's prohibition of discrimination protects men as well as women" (*Oncale v. Sundowner Offshore Services, Inc.* 1998).
Difference	Gender Role Stereotypes	Justice invokes overgeneralized beliefs and assumptions regarding women's and men's roles in society. Often used to justify inequality.	"…men are more likely than women to be the primary supporters of their spouses and children" (*Wengler v. Druggists Mutual Insurance Company* 1980). "…fathers are less likely than mothers to have the opportunity to develop relationships" (*Miller v. Albright* 1998).
	Reproductive Difference	Justice refers to reproductive, physiological, or sexual differences between women and men.	"Only women can become pregnant" (*General Electric v. Gilbert* 1976). "…biological role of the mother in carrying and nursing an infant" (*Stanley v. Illinois* 1972).
	Unsubstantiated Difference	Justice states that women and men are different, yet do not state how.	"The sexes are not similarly situated" (*Schlesinger v. Ballard* 1975). "…the two sexes are not fungible" (*Taylor v. Louisiana* 1975).

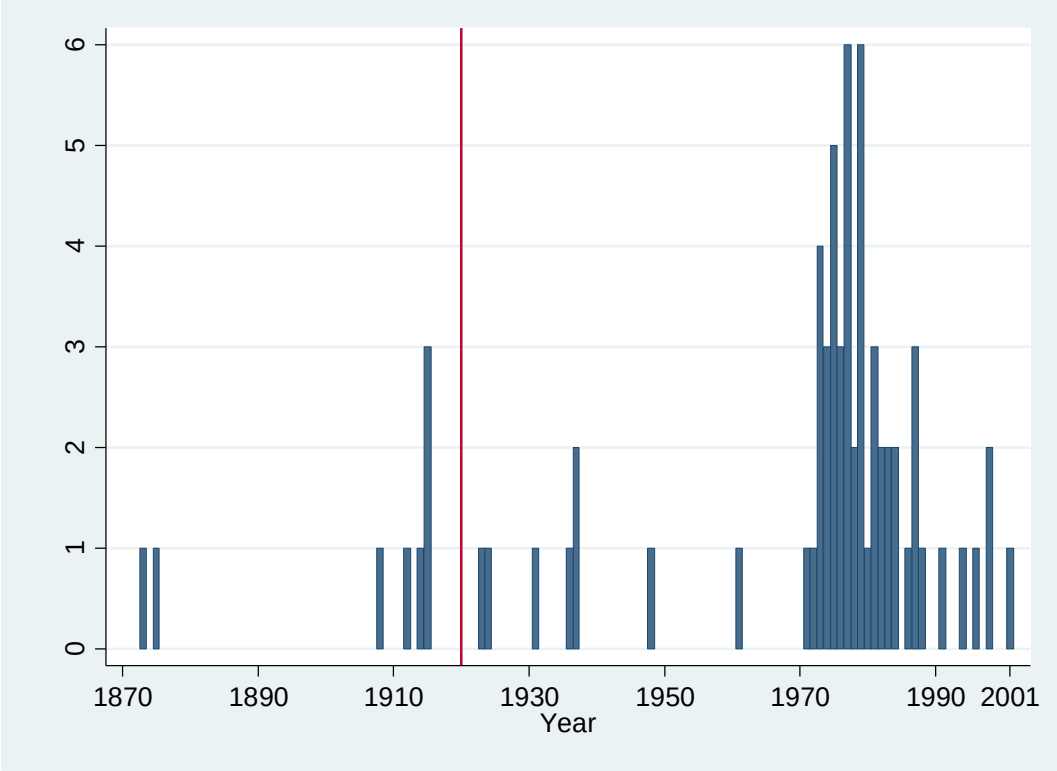
Table 3.2. Typology of Gender Distinctions in Votes in United States Supreme Court Gender Classification Cases, 1873-2001.

Gender Distinction	Definition
Sameness	A judicial vote makes no gender distinction; women and men are provided the same rights and opportunities.
Difference	A judicial vote recommends or condones the differential treatment of women and men.

Table 3.3. Number of United States Supreme Court Cases Yielded After the Keyword Search, Pre-Filtering, Post-Filtering, Vacated and Remanded, Dismissed, Denied Certiorari, Procedural, and Examples of Discarded Cases, 1873-2001.

Keyword	Pre-Filtering	Post-Filtering	Vacated and Remanded	Dismissed	Denied Certiorari	Procedural	Examples of Discarded Cases
Woman or Women	2183	66	2	1	3	69	criminal, property, obscenity, discrimination, voting
Woman and Man	706	37	1	0	1	29	criminal, property, obscenity, discrimination, voting
Women and Men	658	58	2	0	3	43	criminal, property, obscenity, discrimination, voting
Female	601	61	2	2	3	77	discrimination, obscenity, criminal rights, land ownership, freedom of slaves
Female and Male	303	52	1	2	3	50	land ownership, freedom of slaves, discrimination, obscenity, criminal
Gender Classification or Gender-Based Classification	41	21	0	1	1	6	procedural
Gender	172	38	1	1	1	34	discrimination, employment, jury, criminal
Gender Discrimination or Gender-Based Discrimination	69	23	0	1	0	19	criminal, discrimination
Sex	726	65	4	2	2	82	sex offender, obscenity, criminal, voting, sex crimes, miscegenation, same-sex
Sex Discrimination	174	46	4	2	0	66	procedural
Mother and Father	713	25	2	0	1	12	criminal, paternity, custody, child abuse, sexual abuse, Aid to Families with Dependent Children benefits, children, wills, insurance policies, damages, property
Equal Protection Clause and Male	158	38	1	1	2	18	discrimination, voting, redistricting, habeus corpus
Equal Protection Clause and Man or Men	549	43	0	0	2	20	discrimination, free speech, criminal rights, voting, redistricting, apportionment
Due Process Clause and Male	165	24	0	0	0	10	discrimination, obscenity, criminal
Due Process Clause and Man or Men	1075	26	0	0	0	17	discrimination, obscenity, criminal
Title VII	417	18	2	0	1	59	discrimination, criminal
Title IX	103	5	1	0	0	9	Racketeer Influenced and Corrupt Organizations Act, Civil Rights Attorney's Fees Act, discrimination
Total	8813	646	33	13	23	620	

Figure 3.1. Number of United States Supreme Court Gender Classification Cases per Year, 1873-2001.



*The red line denotes passage of the 19th amendment in 1920.

Figure 3.2. Number of Procedural/Administrative and Gender Classification Cases Adjudicated in the United States Supreme Court, 1971-2001.

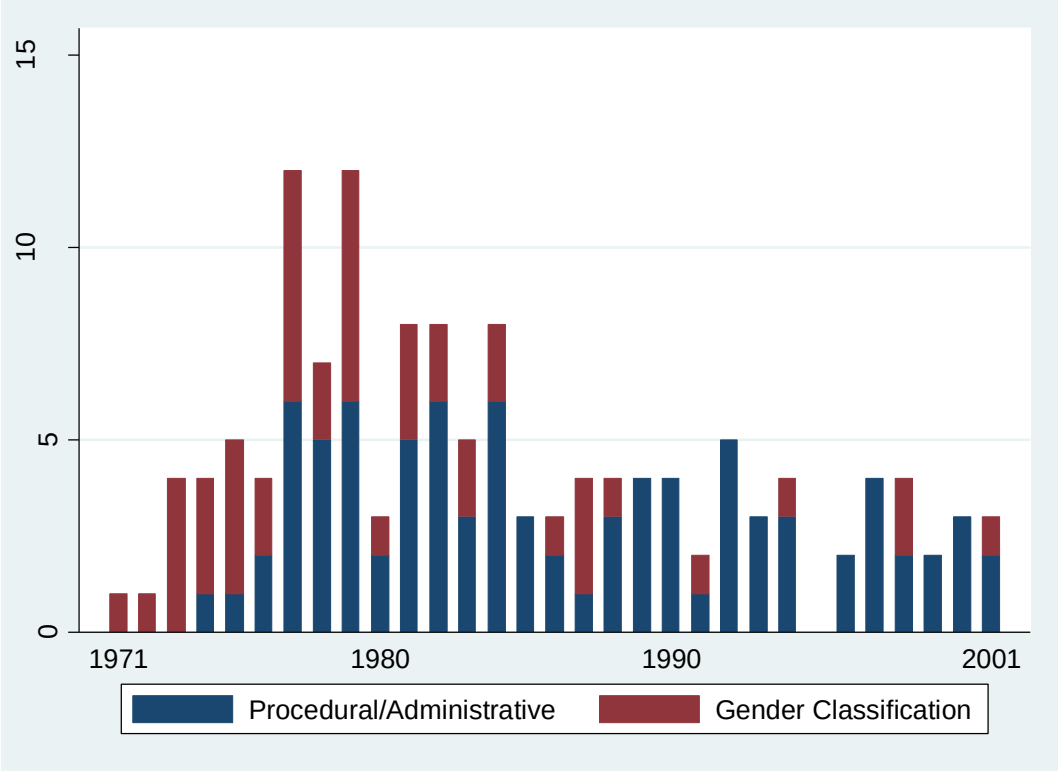


Table 3.4. United States Supreme Court Gender Classification Cases, Year, Issue Area, and Issue, 1873-2001.

Case	Year	Issue Area	Issue
Bradwell v. The State of Illinois	1873	employment	Restricting women from practicing law.
Minor v. Happersett	1875	voting	Women's suffrage.
Muller v. Oregon	1908	employment	Maximum-hour laws for women.
Quong Wing v. Kirkendall	1912	employment	Taxing laundries employing men.
Riley v. Commonwealth of Massachusetts	1914	employment	Maximum-hour laws for women.
Bosley v. McLaughlin	1915	employment	Maximum-hour laws for women.
Miller v. Wilson	1915	employment	Maximum-hour laws for women.
Mackenzie v. Hare	1915	marriage	Forfeiture of citizenship for women marrying foreign nationals.
Adkins v. Children's Hospital of the District of Columbia	1923	employment	Minimum-wages for women.
Radice v. People of the State of New York	1924	employment	Restricting overnight work to men.
Hoeper v. Tax Commission of Wisconsin	1931	marriage	Taxing husbands for their wives' income.
Morehead, Warden v. New York ex rel Tipaldo	1936	employment	Minimum-wages for women.
West Coast Hotel v. Parrish	1937	employment	Minimum-wages for women.
Breedlove v. Suttles	1937	sex discrimination	Poll tax exemptions for women.
Goesaert v. Cleary	1948	employment	Restricting women from working as bartenders.
Hoyt v. Florida	1961	jury	Systematic exclusions of women from jury service.
Reed v. Reed	1971	sex discrimination	Male preferences in the administration of estates.
Stanley v. Illinois	1972	family parental rights	Unwed fathers and custody of their children.
Roe v. Wade	1973	abortion	Criminalization of abortion.
Doe v. Bolton	1973	abortion	Criminalization of abortion.
Frontiero v. Richardson	1973	marriage employment military compensation/benefits	Dependency benefits in the military.
Pittsburgh Press Company v. Pittsburgh Commission on Human Relations	1973	employment	Sex segregated help wanted advertisements.
Cleveland Board of Education v. LaFleur	1974	employment pregnancy discrimination	Mandatory maternity leaves.
Kahn v. Shevin	1974	marriage compensation/benefits	Property tax exemptions for widows.

Geduldig v. Aiello	1974	employment pregnancy discrimination compensation/benefits	Pregnancy exclusions in a state's disability insurance system.
Schlesinger v. Ballard	1975	military	Gender-based differences in promotions in the Navy.
Taylor v. Louisiana	1975	jury	Systematic exclusions of women from jury service.
Weinberger v. Wiesenfeld	1975	family marriage compensation/benefits	Social security benefits to minor children and widows.
Stanton v. Stanton	1975	family	Gender-based differences in the age of majority.
General Electric v. Gilbert	1976	employment pregnancy discrimination compensation/benefits	Pregnancy exclusions in an employee disability plan.
Craig v. Boren	1976	sex discrimination	Gender-based differences in the purchase of beer.
Trimble v. Gordon	1977	family parental rights	Inheritance from unwed mothers.
Fiallo v. Bell	1977	family parental rights	Preferential immigration status to children of unwed mothers.
Califano v. Goldfarb	1977	marriage compensation/benefits	Dependency in social security benefits.
Califano v. Webster	1977	compensation/benefits	Gender-based differences in calculating social security benefits.
Dothard v. Rawlinson	1977	employment	Restricting women from working as prison guards.
Nashville Gas Company v. Satty	1977	employment pregnancy discrimination compensation/benefits	Denying seniority to women on maternity leave and pregnancy exclusions in sick pay.
Quilloin v. Walcott	1978	family parental rights	Unwed fathers and adoption.
City of Los Angeles Department of Water and Power v. Manhart	1978	employment compensation/benefits	Gender-based differences in contributions to pension funds.
Duren v. Missouri	1979	jury	Systematic exclusions of women from jury service.
Orr v. Orr	1979	marriage compensation/benefits	Alimony.

Caban v. Mohammed	1979	family parental rights	Unwed fathers and adoption.
Parham v. Hughes	1979	family parental rights	Unwed fathers and wrongful death suits.
Personnel Administrator of Massachusetts v. Feeney	1979	employment	Veterans' preference in hiring.
Califano v. Westcott	1979	family compensation/benefits	Unemployment benefits to fathers.
Wengler v. Druggists Mutual Insurance Company	1980	employment marriage compensation/benefits	Dependency in workers' compensation.
Kirchberg v. Feenstra	1981	marriage	Gender-based differences in property disposal.
Michael M. v. Superior Court of Sonoma County	1981	sex discrimination	Gender-based differences in statutory rape.
Rostker v. Goldberg	1981	military	Mandatory draft registration for men.
North Haven Board of Education v. Bell	1982	employment	Sex discrimination in employment.
Mississippi University for Women v. Hogan	1982	education	Single-sex nursing schools.
Lehr v. Robertson	1983	family parental rights	Unwed fathers and adoption.
Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris	1983	employment compensation/benefits	Gender-based differences in contributions to retirement benefits.
Heckler v. Mathews	1984	marriage compensation/benefits	Dependency in spousal-benefits provisions.
Roberts v. Jaycees	1984	private clubs	Sex discrimination in private clubs.
Meritor Savings Bank v. Vinson	1986	employment sexual harassment	Sexual harassment in the workplace.
Wimberly v. Labor and Industrial Relations Commission	1987	employment pregnancy discrimination compensation/benefits	Pregnancy exclusions in unemployment benefits.
Johnson v. Transportation Agency	1987	employment	Affirmative action.
Board of Directors of Rotary International v. Rotary Club of Duarte	1987	private clubs	Sex discrimination in private clubs.
New York State Club Association, Inc. v. City of New York	1988	private clubs	Sex discrimination in private clubs.
UAW v. Johnson Controls, Inc.	1991	employment	Fetal protection policies in the workplace.
J.E.B. v. Alabama ex rel. T.B. ex rel. T.B.	1994	jury	Peremptory challenges in jury selection.
United States v. Virginia	1996	education	Single-sex military schools.

Oncale v. Sundowner Offshore Services, Inc.	1998	employment sexual harassment	Same-sex sexual harassment.
Miller v. Albright	1998	family parental rights	Preferences to unwed mothers in transmitting citizenship.
Tuan Anh Nguyen v. Immigration and Naturalization Service	2001	family parental rights	Preferences to unwed mothers in transmitting citizenship.

Table 3.5. Approaches to Constructing Gender in Opinions in United States Supreme Court Gender Classification Cases, 1971-2001.

	Number of Times Each Approach to Constructing Gender was Advanced (percent of the total number of opinions)				Total Number of Opinions
	No Approaches	Difference	Sameness	Both Approaches	
All Opinions	108 (24.3)	69 (15.5)	140 (31.5)	128 (28.8)	445
Majority Opinions	48 (17.6)	28 (10.3)	104 (38.2)	92 (33.8)	272
Concurring Opinions	25 (37.3)	17 (25.4)	17 (25.4)	8 (11.9)	67
Dissenting Opinions	35 (33)	24 (22.6)	19 (17.9)	28 (26.4)	106

Figure 3.3. Difference Approaches to Constructing Gender in Opinions in United States Supreme Court Gender Classification Cases, 1971-2001.

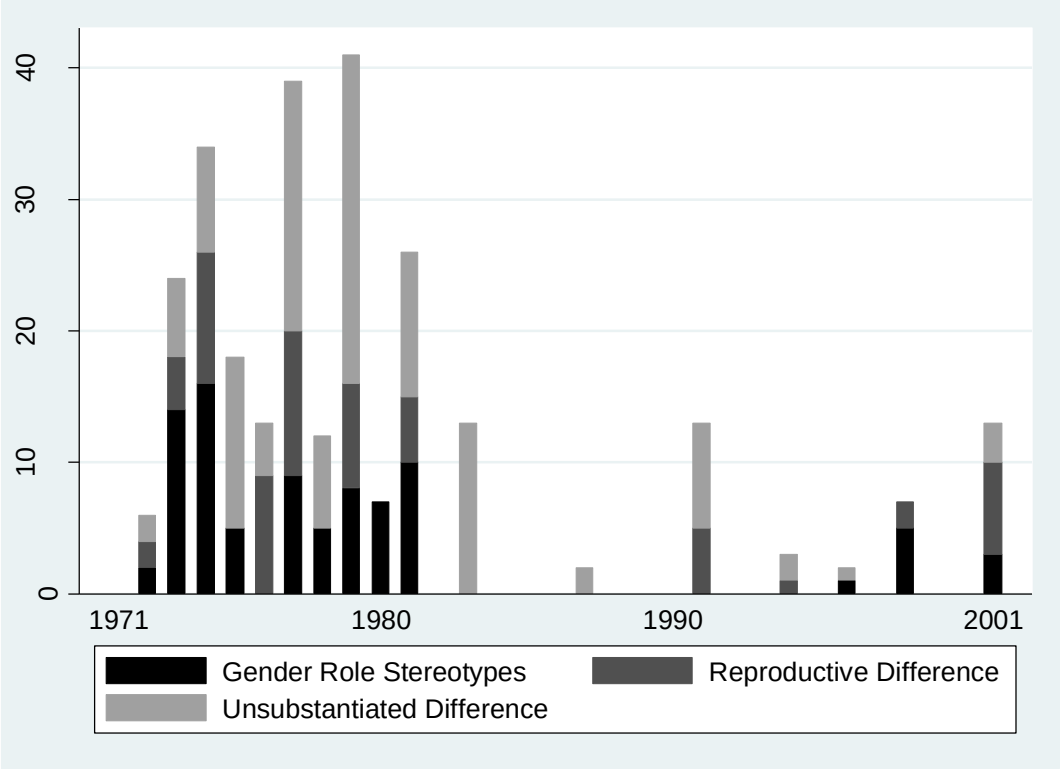
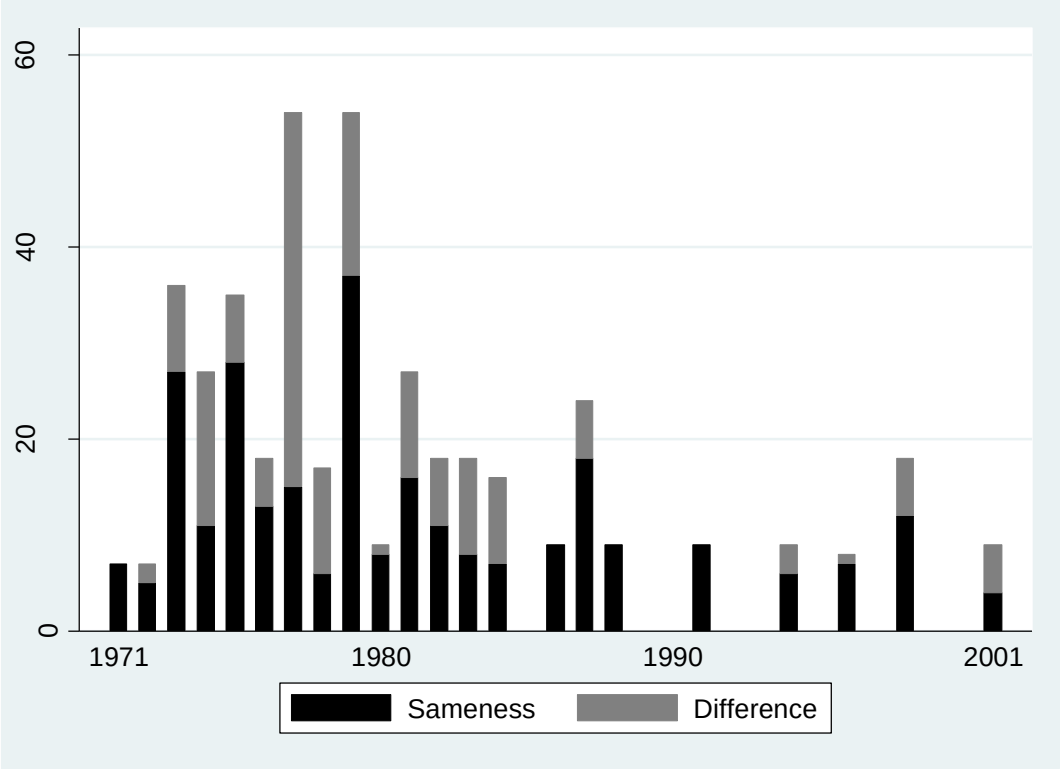


Table 3.6. Difference Approaches to Constructing Gender in Opinions in United States Supreme Court Gender Classification Cases, 1971-2001.

	Number of Times Each Type of Difference Approach to Constructing Gender was Advanced (percent of the total number of times any difference approach was advanced)			Total Number of Times Any Difference Approach was Advanced
	Gender Role Stereotypes	Reproductive Difference	Unsubstantiated Difference	
All Opinions	85 (31.1)	64 (23.4)	124 (45.4)	273
Majority Opinions	59 (33.5)	41 (23.3)	76 (43.2)	176
Concurring Opinions	11 (36.7)	5 (16.7)	14 (46.7)	30
Dissenting Opinions	15 (22.4)	18 (26.9)	34 (50.7)	67

Figure 3.4. Number of Times Each Type of Gender Distinction was advanced in United States Supreme Court Justices' Votes in Gender Classification Cases, 1971-2001.



N= 438

Table 3.7. Approaches to Constructing Gender in Opinions and Gender Distinctions in Votes in United States Supreme Court Gender Classification Cases Under Study, 1971-2001, by Issue Area.

Issue Area	Sub-Issue Area	Number of Cases	Number of Times Justices Advance					
			No Approach	Difference Approach	Sameness Approach	Both Approaches	Difference Distinction	Sameness Distinction
Employment	Total	17	22	25	52	45	44	98
	Compensation/Benefits	6	6	10	8	28	18	34
	Pregnancy Discrimination	5	3	13	8	20	17	27
	Sexual Harassment	2	0	0	18	0	0	18
Family	Total	12	31	11	27	30	48	48
	Parental Rights	9	26	11	16	29	47	32
	Compensation/Benefits	2	4	0	8	5	4	13
Marriage	Total	8	27	10	14	20	24	47
	Compensation/Benefits	7	11	10	7	16	20	24
Jury		3	0	2	9	17	5	22
Military		3	5	0	12	11	12	15
Private Clubs		3	17	0	6	0	0	23
Abortion		2	3	8	0	7	4	14
Education		2	4	1	12	0	5	12
Other		3	4	8	12	1	7	18

*Some cases fall into more than one issue area, so the total is greater than 50.

CHAPTER 4: EXPLAINING VARIATION IN APPROACHES TO CONSTRUCTING GENDER AND GENDER DISTINCTIONS IN UNITED STATES SUPREME COURT CASES

4.1 INTRODUCTION

In 1864, Idaho enacted a statute involving the administration of estates. It established a hierarchy of numerated classes of persons who could be an administrator—parents first, children second, and so on—and if two applicants in the same category sought control, a man was automatically selected over a woman. This statute was rooted in the assumption that men were more experienced in business and finance than were women.

Sally and Cecil Reed were divorced and had a son, Richard, who lived with his mother when he was a young child and then later with his father. As a teenager, Richard was in and out of a juvenile home and struggled with depression, eventually committing suicide at the age of 19 with his father's gun (Strebeigh 2009: 32). Sally blamed Cecil for their son's death, and she applied for administrative control over Richard's estate—clothes, a clarinet, record collection, and a small sum of money—and a few days later, so did Cecil (Strebeigh 2009: 32). Solely on account of sex, Cecil was chosen over Sally, who subsequently challenged the law in the Idaho Supreme Court. The Idaho court rejected the claim that the law was discriminatory, and Sally appealed to the United States Supreme Court in 1971.

Reed v. Reed was the first case in which the justices began eliminating distinctions between women and men in their opinions and votes, instead of reinforcing their differences. In the majority opinion, Chief Justice Burger wrote that "Regardless of their sex, persons within any one of the numerated classes are similarly situated with respect to that objective" (*Reed v. Reed*, 404 U.S. 71 (1971)). He maintained that "To give a mandatory preference to members of

either sex over members of the other…is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex" (*Reed v. Reed*, 404 U.S. 71 (1971)). In short, Idaho's statute contained an arbitrary gender classification, one that failed rational basis review, and women were deemed just as capable of serving as administrators as men. As a result, a unanimous Court voted to invalidate the law, granting women and men the same legal treatment.

Justices' attitudes regarding gender, gender roles, and gender equality may be reflected in the content of their opinions and their votes. In their opinions, justices assign roles, characteristics, and behaviors to women and men, or in other words, they construct gender. Following *Reed*, Supreme Court justices often constructed women and men as the same in their opinions in a number of cases. However, sometimes justices still maintained gender differences. For instance, in a case involving single-sex military schools, Justice Scalia stated that the "tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat" (*United States v. Virginia*, 518 U.S. 515 (1996)). Other times, justices did not construct gender in their opinions, and there are many times in which justices advanced a sameness *and* a difference approach in the same opinion. As an example, in a case concerning the constitutionality of peremptory challenges on the basis of sex, Justice O'Connor acknowledged that "in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case" but that the "jury pool must be representative of the community" (*J.E.B. v. Alabama*, 511 U.S. 127 (1994)).

When voting in gender classification cases, justices determine whether women and men should be subject to the same or different legal treatment. As already noted, for the first time, the Supreme Court voted to strike down a gender classification in 1971 in *Reed*, and continued doing so in several cases over the next thirty years. It invalidated the systematic exclusion of women in juries in *Taylor v. Louisiana* (1975), single-sex schools in *Mississippi University v. Hogan* (1982) and *United States v. Virginia* (1996), and sex discrimination in professional associations in *Roberts v. Jaycees* (1984), *Board of Directors of Rotary International v. Rotary Club of Duarte* (1987), and *New York State Club Association v. New York* (1988). However, in other cases, justices condoned differential treatment between women and men in their votes. The Court upheld gender classifications granting preferential treatment to unwed mothers in immigration and citizenship in *Fiallo v. Bell* (1977), *Miller v. Albright* (1998), and *Tuan Anh Nguyen v. Immigration and Naturalization Service* (2001). It also upheld male-only draft registration in *Rostker v. Goldberg* (1981) and affirmative action in *Johnson v. Transportation Agency* (1987).

This chapter seeks to explain what accounts for the variation in Supreme Court justices' treatment of women and men in their opinions and votes in gender classification cases from 1971 to 2001. With the emergence of the second wave of the women's movement in the late 1960s (Ryan 1992: 40; Banaszak 2010: 167), it is not surprising that justices began extending the same legal treatment to women and men in *Reed*. There was political support for women's rights, and attitudes regarding gender and women's roles in society were changing. However, despite these social changes and the progress of the women's movement, the Supreme Court's treatment of women and men varied a great deal during the next three decades.

I argue that the legal treatment of women and men in the Supreme Court is driven by the personal attributes of the justices. Aside from the influence of political ideology, judicial

decision making is also shaped by a justice's gender. Not only are there individual gender differences in judging, but .female justices appear to have a modest impact on their male colleagues' behavior, regardless of the male justices' ideologies. In short, the approaches to constructing gender that appear in judicial opinions and the gender distinctions advanced in judicial votes are largely attributed to membership of the Court.

This chapter proceeds as follows: I begin with a discussion of the theories I test and my hypotheses. Next, I move on to explain the data and methods before discussing the results, and lastly, I conclude with some implications of this research.

4.2 THEORY AND HYPOTHESES

This study on judicial decision making in Supreme Court gender classification cases engages and contributes to literatures on judicial behavior and gender politics. It tests various theories, drawing on different perspectives that fall into two broad categories: court membership and institutional constraints. In the following section, I discuss the relevant literature and present my hypotheses.

As discussed in chapter three, gender equality is complex, thus making it difficult to assess whether it is furthered by treating women and men the same or differently in justices' opinions and votes. In developing the following hypotheses, I equate sameness with gender equality, though I recognize the problems with doing so. However, I make this decision because it is compatible with the goals of the women's movement. The second wave of feminism was rooted in liberal feminism, or equality feminism. Second wave feminists did not want to draw attention to gender differences because these were historically used to exclude women from the political, economic, and social arenas (Rosen 2006: 76). They wanted the same rights enjoyed by men, so they sought to remove the barriers that prevented them from freely participating in

politics, education, and the labor force. Though I recognize the limitations, I adhere to the perspective feminists advanced during the second wave, which coincides with the period of time in which this study begins.

4.2.1 Court Membership

The ways in which justices constructed gender in their opinions may be influenced by several factors, one of which could be the justices themselves. The following table contains all Supreme Court justices serving on the Court between 1971 and 2001, years of their tenure, the number of opinions authored (if any), the number of times each justice advanced each approach to constructing gender in her/his opinion, and the number of times each justice cast votes treating women and men the same or differently.[35]

< insert Table 4.1 here >

Seventeen justices served on the Supreme Court during the years of this study, and sixteen wrote at least one opinion. Given that most gender classification cases were adjudicated in the 1970s and early 1980s, a majority of the cases were decided by nine justices (see Chief Justices Burger and Rehnquist and Justices Blackmun, Brennan, Marshall, Powell, Stevens, Stewart, and White). Not surprisingly, this is reflected in the number of opinions authored, as these justices wrote the most opinions.

Overall, there are no discernible patterns in the ways in which each justice constructed gender in her/his opinions. As a whole, as discussed in the previous chapter, justices tended to not construct gender in their opinions, choosing to advance no approaches in 42 opinions. When they constructed gender, they usually advanced a sameness approach, doing so in 38 opinions.

[35] See Appendix 4.1 for a table of approaches to constructing gender advanced by each Supreme Court justice, by opinion type and case.

On fewer occasions, 35, justices furthered a sameness *and* a difference approach in their opinions, and in 30 opinions, they advanced a difference approach.

With respect to voting behavior, justices had a tendency to provide the same legal treatment to women and men. In 273 instances compared to 165, justices cast a vote advancing a sameness distinction as opposed to a difference distinction. When we consider individual justices' voting behavior, we see that many of the justices—Brennan, Breyer, Douglas, Ginsburg, Kennedy, Marshall, O'Connor, Souter, Stevens, and White—usually voted to treat women and men the same. Some justices—Blackmun, Powell, Scalia, Stewart—were fairly divided and cast a vote furthering a sameness distinction about half the time. The remaining justices—Burger, Rehnquist, Thomas—tended to advocate for differential treatment when voting in gender classification cases.

When we turn to the percentage of cases in which justices wrote an opinion, an interesting pattern emerges: standardizing opinion authorship reveals that female Supreme Court justices were more active in their opinion writing on these types of cases compared to most of the male justices. Even though Justice O'Connor adjudicated only sixteen cases, she wrote an opinion in half of them. Justice Ginsburg was on the Court when it decided only five gender classification cases, but she wrote two opinions.

The patterns gleaned from this table indicate that judicial decision making could be contingent upon who is on the Court. Justices may try their best to stay above politics and remain neutral when deciding cases, but either consciously or subconsciously, their personal experiences, values, and attitudes infiltrate their decision making. Therefore, when examining the legal treatment of women and men in the Supreme Court, it is important to consider the characteristics of the justices, particularly their political ideology and gender.

a) Justices' Political Ideology

Supreme Court justices are not purely neutral actors who interpret and apply statutes, case law, and the constitution. Instead, they are people whose interpretations and applications of the law are likely influenced by their ideologies, values, and experiences. According to proponents of the attitudinal model of judicial decision making, "cases are decided in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices" (Segal and Spaeth 1993: 65). Simply put, conservative justices cast conservative votes and liberal justices cast liberal votes. As such, justices' political ideology likely shapes whether they believe women and men should be treated the same or differently when voting in gender classification cases.

Furthermore, justices' political ideology could influence their legal reasoning and the content of their opinions. Their ideologies likely shape their attitudes and values regarding gender, gender equality, and women's and men's roles in society, which should impact which approach to constructing gender they promote in their opinions. For example, scholars suggest that liberal ideologies are associated with egalitarian attitudes and the advancement of gender equality. In an examination of sexual harassment and sex discrimination cases decided by federal courts of appeals from 1999 to 2001, Peresie (2005: 1769) finds that judges appointed by Democratic presidents ruled in favor of the plaintiffs more often than judges appointed by Republican presidents. Given that liberal ideologies are associated with more progressive attitudes and a receptiveness to changing gender roles, I present the following hypothesis:

H1a: Liberal justices will be more likely than conservative justices to advance a sameness approach in their opinions in gender classification cases.

H1b: A liberal justice will be more likely than a conservative justice to cast a vote providing the same legal treatment to women and men in gender classification cases.

b) Justices' Gender: Individual and Panel Effects

Just as justices do not shed their ideologies upon entering a courtroom, neither do they shed their gender. Gender differences in justices' voting behavior could arise because female judges play a representative role and seek to advance women's interests (Allen and Wall 1993; Martin and Pyle 2005). Another possibility is that women speak "in a different voice" (Gilligan 1993) or accrue particular information because of their professional experiences (Gryski, Main, Dixon 1986; Peresie 2005; Boyd, Epstein, Martin 2010). Therefore, gender differences in experiences, perspectives, and values could produce gender differences in the gender distinction advanced in justices' votes. Further, these theories would suggest that female and male justices take different approaches when constructing gender in their opinions. For instance, compared to male justices, female justices may be less likely to believe that a woman's primary role is to be a wife and mother or that women are inherently inferior to men.

Aside from having an individual effect on judicial behavior, gender could also have a panel effect. The ways in which male justices construct gender in their opinions and the gender distinction they advance in their votes in gender classification cases could be due to the presence and influence of women on the Supreme Court. On the one hand, again, drawing on informational accounts, male justices may think their female colleagues are more knowledgeable in gender classification cases and follow their lead when constructing gender or voting (Gryski, Main, Dixon 1986; Peresie 2005; Boyd, Epstein, Martin 2010). This influence could be indirect, but it could also be direct. For example, a female justice may attempt to influence her male colleagues' behavior during or after conference.[36]

On the other hand, having a woman on the Supreme Court could also help dispel gender stereotypes and foster egalitarian attitudes and hence influence how male justices construct

[36] A private meeting among the justices following oral arguments of a case.

gender in their opinions and their voting behavior. Serving with a female justice may show male justices that women are just as capable or competent as men, for example. Male justices may conclude that individual merit, instead of sex, should govern the rights and opportunities provided to women and men.

H2ai: Female justices will be more likely than male justices to advance a sameness approach, rather than a difference approach, when constructing gender in their opinions in gender classification cases.

H2aii: The more women there are on the Supreme Court, the more likely justices will be to advance a sameness approach when constructing gender in their opinions.

H2bi: A female justice will be more likely than a male justice to cast a vote treating women and men the same in gender classification cases.

H2bii: When there are more women on the Supreme Court, a justice will be more likely to provide the same legal treatment to women and men when voting in gender classification cases.

4.2.2 Institutional Constraints

According to rational choice institutionalist accounts of decision making, Supreme Court justices face various institutional constraints in the political and social environment, including the president, Congress, women's social power, and interest group pressure. In an effort to maintain the Court's institutional legitimacy and further their policy goals, justices may exercise restraint when constructing gender in their opinions and when casting their votes. Due to the nature of the separation of powers system and their inability to enforce their decisions, [37] they may not have the liberty to freely advance their personal preferences.

[37] Indeed, this is why I hypothesize that the president and Congress will shape justices' voting behavior but not how they construct gender in their opinions. If other political actors disagree with a judicial ruling, there are mechanisms by which they can sanction the Court. For instance, they can attempt to modify a ruling or curb the Court, discussed

a) The President

One institutional actor with the potential to shape how justices vote in gender classification cases is the president. To examine how the president might constrain judicial behavior, some scholars focus on the solicitor general, who represents the federal government before the Supreme Court and wields considerable power in the judiciary (see Segal and Reedy 1988; Graham 2003; Bailey, Kamoie, Maltzman 2005; Lindquist and Solberg 2007). The logic is that justices have an incentive to defer to the solicitor general; by doing so, they indirectly defer to the president. Other scholars instead use a measure of the president's policy preferences to determine his influence on judicial behavior. For instance, Segal and his colleagues (2011: 100) examine Supreme Court decisions from 1954 to 2004 and find that when the ideological distance between the president and the Court is greater, justices are less likely to strike down laws.

H3a: When the current president is liberal, a justice will be more likely to cast a vote providing the same legal treatment to women and men in gender classification cases. By contrast, a justice will be more likely to provide differential treatment to women and men when voting in gender classification cases when the current president is conservative.

b) Congress

Congress is another political actor with the potential to influence whether justices advance the same legal treatment to women and men when voting in gender classification cases. For example, one reason women's rights groups were so successful in the Supreme Court in the 1960s and 1970s is because Congress also enacted legislation advancing women's rights (Cowan 1976). A common way scholars examine the influence of Congress' policy preferences on judicial behavior is by testing the effect of ideological compatibility between Congress and the

in more detail in chapter two. However, there are not mechanisms to sanction the Court if the president or Congress disagrees with an approach justices take when constructing gender in their opinions.

Court on judicial behavior. The logic is that when there is ideological congruence between the current Congress and Supreme Court, justices will uphold laws aligning with the current Congress' preferences.

Several scholars find that the ideological leaning of Congress influences justices' voting behavior. Lindquist and Solberg (2007) examine challenges to the constitutionality of statutes from 1969 to 2000. They find that the Supreme Court is less likely to strike down statutes that align with Congress' policy preferences (Lindquist and Solberg 2007: 84-85). In the study cited in the previous section, Segal and his colleagues (2011) also find that Supreme Court justices are less likely to strike down laws when the ideological distance between the Supreme Court and Congress is greater. Hansford and Damore (2000) examine Supreme Court decisions from 1963 to 1995, and they find that when Congress is more conservative than a given justice, s/he casts a conservative vote.

H3b: When the current Congress is liberal, a justice will be more likely to cast a vote treating women and men the same in gender classification cases. By contrast, a justice will be more likely to cast a vote providing differential treatment to women and men in gender classification cases when the current Congress is conservative.

c) Women's Social Power

Women's social power, which refers to their social standing, status, and influence in society, could also help to account for how justices construct gender in their opinions and vote in gender classification cases. Though judicial scholars have not examined the influence of women's social power on judicial behavior, scholars in other areas of research contend that it has a significant influence on legislative behavior at the federal and state levels (McCammon and Campbell 2001; McMahon-Howard, Clay-Warner, Renzuilli 2009). One reason is that women's

increasing social power could help eliminate gender stereotypes and contribute to more egalitarian attitudes among justices.

It is also possible that women convert their social power into political power. When women attain a higher social standing, they have the financial resources to mobilize and push for policies advancing gender equality (Minkoff 1997: 791). This is plausible, as economic and legal resources are necessary for launching successful litigation campaigns (Cowan 1976; Epp 1998).

H3ci: When constructing gender in their opinions on cases concerning gender classifications, justices will be more likely to adopt a sameness approach when there are higher rates of women's social power.

H3cii: A justice will be more likely to cast a vote providing the same legal treatment to women and men in gender classification cases as women's social power increases.

d) Interest Group Pressure

According to Caldeira and Wright (1988), the most common way interest groups attempt to exert their influence in the judiciary is by submitting an amicus brief. Doing so provides interest groups with an opportunity to persuade justices to adopt their understanding and vision of gender. Considering that justices respond to the legal arguments interest groups advance in their amicus briefs (Epstein and Kobylka 1992; Johnson, Wahlbeck, Spriggs 2006; Corley 2008), justices may incorporate those approaches to constructing gender in their opinions.

Interest groups can also use amicus briefs to influence justices' votes in particular cases. Justices may be responsive to such pressure given interest groups' ability to lobby other branches of government if they disagree with a Court decision. If interest groups succeed, a policy may be moved further away from justices' most preferred position, potentially weakening the Court's

legitimacy and inhibiting their policy goals. Indeed, evidence suggests that justices are responsive to interest group pressure (McGuire 1995: 193; Collins 2004).

However, the magnitude of interest group participation also likely influences whether justices integrate the views of these groups into their opinions. Given that justices operate in an environment of incomplete information, they seek out information that will help them maximize their policy preferences (Epstein and Knight 1998; Collins 2004). In an effort to influence a judicial holding, interest groups use amicus briefs to suggest who might be affected by a particular case and in what ways, and justices use this information to gauge interest group support and more broadly, public support (Epstein and Knight 1998). Evidence suggests this strategy works, as scholars posit that justices are more likely to vote for the litigant supported by the greater number of interest groups or amicus briefs (see McGuire 1995; Collins 2004, 2007). In short, not only do justices respond to the arguments advanced in briefs, they also respond to the magnitude of interest group participation.

H3di: The greater the number of interest groups that adopt a particular approach to constructing gender in their amicus briefs in a particular gender classification case, the more likely justices will be to adopt that approach in their opinions.

H3dii: The greater the number of interest groups advocating for a particular gender distinction, the more likely a justice will be to advance that distinction when voting in gender classification cases.

4.3 DATA MEASURES AND SOURCES

This chapter tests the influence of court membership and institutional constraints on the ways in which justices construct gender in their opinions and the gender distinctions they advance in their votes in United States Supreme Court gender classification cases from 1971 to

2001. Building on my discussion of the dependent variable in chapter three, to score the approaches justices took when constructing gender in their opinions, I read each opinion and identified each gender construction—trait, characteristic, or role assigned to women or men. Then I classified each construction according to the type of approach to constructing gender it advanced: sameness, gender role stereotypes, reproductive difference, or unsubstantiated difference discussed in chapter three.

Given the infrequency with which justices advanced each of the difference approaches, for methodological reasons, I collapse the three difference approaches into one variable representing whether justices constructed any gender difference between women and men. There are analytic costs to doing this, and one is that consolidating the difference approaches does not capture the possibility that different factors shape which difference approach justices take. Justices may have different reasons for advancing a particular difference approach, and this is overlooked by aggregating the three approaches. However, there is not enough variation within each of the difference approaches to properly estimate the model. Collapsing the approaches into one enables me to confidently interpret the results and produce a methodologically sound model, thereby strengthening my results and argument.

The unit of analysis in the first part of the analysis is a justice-opinion, and I attributed the approach to constructing gender to the opinion author and all co-signers. In total, this part of the study contains 445 observations.[38] For each opinion, I constructed an unordered categorical variable and scored whether no approaches to constructing gender, only a difference approach, only a sameness approach, or both approaches were present. I employ a multinomial regression

[38] There are 50 cases, so multiplied by the number of Supreme Court justices adjudicating each case (usually nine), yields 445 observations. However, there are ten instances in which justices recused themselves from a case, one case decided with only seven justices, and seven instances in which justices signed onto more than one opinion.

to analyze why justices construct gender as they do in their opinions and cluster the standard errors around each case.

To score the gender distinctions justices advanced in their votes, I first identified the major question in each case and examined the content of the law, policy, or action in question. Next, in each case, I determined whether each justice's vote struck down or upheld the gender classification. Finally, drawing upon the content of each case, I classified whether each justice's vote to uphold or strike down a gender classification condoned the same or different legal treatment of women and men, yielding one dichotomous score for each vote. The unit of analysis is a justice-vote, and the base category is a difference distinction. There are 438 observations[39] in this part of the study. I employ a logistic regression to predict justices' voting behavior in gender classification cases and cluster the standard errors around each case.

4.3.1 Independent Variables

In the following table, I present the dependent and independent variables, measures, and sources.[40]

< insert Table 4.2 here >

Judicial behavior may be influenced by the membership of the Court, particularly justices' personal attributes, one of which is their political ideology. To measure each justice's political ideology, I use the Judicial Common Space (JCS) scores, which place Supreme Court justices, the president, and both chambers of Congress in the same policy space (Epstein, Martin, Segal, and Westerland 2007). This allows researchers to assess the influence of one political actor's policy preferences on another actor's policymaking behavior. Data on justices' political ideology, available in an online database, are derived from the Martin-Quinn scores (Martin and

[39] Multiplying 50 cases by nine justices and subtracting the total number of recusals yields 438 observations.
[40] See Appendix 4.2 for the descriptive statistics for the independent variables.

Quinn 2002), which are an ideal point for each justice for each year, based on her/his voting patterns while on the Court (Martin and Quinn 2002). The JCS scores range from -1 to 1, with a negative number representing a liberal ideology and a positive number representing a conservative ideology. Each justice has one score for each year served on the bench.

One alternate measure of justices' political ideology is the appointing president's political party. However, JCS scores are a more common measure (see Lindquist and Solberg 2007; Boyd, Epstein, Martin 2010; Segal, Westerland, Lindquist 2011), and a major reason as to why I did not use the party identification of the appointing president is because justices' political ideology may change over time. Given that an average justice's tenure on the Court is 16 years, their attitudes and values could evolve from the time in which they are appointed to the end of their term. Using the appointing president's party identification would provide a justice's political ideology for one point in time, whereas JCS scores provide a score for each year a justice serves. Moreover, though appointing presidents attempt to determine a judicial candidate's ideology, there is no guarantee that their attitudes and beliefs align.

To assess the influence of gender, I account for the justice's gender and the gender composition of the Court. The latter variable is measured as the percent of women on the Supreme Court. I obtained these data from the Supreme Court of the United States' website.

To test the influence of the other branches of government on judicial behavior, I use the Judicial Common Space scores to measure the overall ideological leaning of the president, United States House of Representatives, and the United States Senate (Epstein, Martin, Segal, and Westerland 2007). These scores are derived from the NOMINATE Common Space scores (Poole and Rosenthal 1997), with each score representing the ideal point of the president and the median member of the House and Senate. Like the scores for the Supreme Court justices, these

scores also range from -1 to 1, with a negative number representing a liberal ideology and a positive number representing a conservative ideology.

I use JCS scores because they are transformed from the Martin-Quinn scores and the NOMINATE Common Space scores so that the political ideologies of the Supreme Court, president, and Congress are in the same policy space. In other words, the transformation enables researchers to assess the influence of one of these political actors on the policymaking behavior of another.

I considered alternate ways to measure the policy preferences of the president, such as executive orders or presidential speeches. However, with respect to executive orders involving gender issues, presidents rarely issued them and when they did, they were largely for ceremonial purposes, such as the establishment of a Women's History month. Presidents tended to not discuss gender issues in their State of the Union addresses. I also considered alternate ways to measure the preferences of Congress, such as whether it enacted legislation involving gender equality prior to each case, however, most enactments took place in the 1970s.

Women's social power is measured as the percent of women in managerial or professional occupations each year. These data are from the United States Census Bureau and are available online. This measure is lagged by five years to account for the possibility that the Supreme Court's decisions do not immediately reflect changes in the social environment.

There are limitations to using women's labor force participation to measure women's social power. These data do not differentiate between women who work full time versus part time, which is an important distinction because women who work part time may not have the resources for collective action. Moreover, this measure does not account for women who choose

not to work outside the home. Such decisions are not necessarily a reflection of unequal attitudes and values.

Despite these limitations, women's labor force participation is used by many scholars to measure women's social power (Soule, McAdam, McCarthy, Su 1999; McCammon and Campbell 2001; McMahon-Howard, Clay-Warner, Renzulli 2009). In an effort to overcome some of the weaknesses of this measure, I use the percent of women in managerial or professional occupations instead of a general measure of women's labor force participation which should better reflect women's resources and gender attitudes. Women who work in managerial or professional occupations should have higher wages, and their positions in such jobs could reflect egalitarian attitudes.

To assess the influence of interest group pressure on how gender is constructed in opinions and how justices vote in gender classification cases, I use three online databases to locate all 255 amicus briefs filed in connection with all of the cases under study: Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832-1978, LexisNexis, and Westlaw.

To construct a measure of interest group pressure on the approaches justices take when constructing gender in their opinions, I read each amicus brief and identified each gender construction. Using the same criteria to code the approaches to constructing gender advanced in the opinions, I classified each gender construction in each amicus brief according to the type of approach to constructing gender it advanced: sameness, gender role stereotypes, reproductive difference, or unsubstantiated difference. For each amicus brief, I collapsed the three difference approaches into one variable and then scored whether no approaches, only a sameness approach, only a difference approach, or both approaches to constructing gender was present or absent, yielding four dichotomous scores for each one.

Although I could have used the number of amicus briefs advancing each approach to constructing gender in a particular case to measure interest group influence on how justices constructed gender in their opinions, I did not because doing so presented an endogeneity problem. In our common law system, judicial decision making is an iterative process. Opinions written in one case influence the content of the amicus briefs submitted in subsequent cases, which then potentially shape future opinions. When submitting an amicus brief, interest groups might incorporate language from previous opinions, which makes it difficult to determine if amicus briefs or prior opinions influence judicial decision making.

There are theoretical reasons to believe that the ways in which interest groups construct gender shape how justices construct it in their opinions, so I still used the content of the amicus briefs. However, to minimize endogeneity, I developed a measure of interest group pressure that also incorporated the ways in which certain types of interest groups likely constructed gender. For example, Eagle Forum, a conservative group, would be more likely to advocate for gender role stereotypes compared to NOW. As such, interest group pressure is also measured using the ideological leaning of the groups that submit amicus briefs.

After scoring each approach to constructing gender, I identified every interest group that signed onto each amicus brief filed and identified its ideology.[41] To do so, I read each group's mission statement and classified it as liberal[42] if its goal was to advance one or more of the following: equal rights, the rights of a disadvantaged or minority group, human rights, or social justice. Next, I counted the number of liberal interest groups advocating each type of approach to constructing gender in each brief. Finally, I totaled the number of liberal interest groups

[41] I do not include amicus briefs signed by states, individuals, or governments.
[42] All other mission statements are simply classified as non-liberal, but not necessarily conservative.

advocating no approaches to constructing gender, only a sameness approach, only a difference approach, or both approaches in each case.

To score the influence of interest group pressure on whether justices advanced the same or different legal treatment when voting in gender classification cases, I used the same criteria used to score the gender distinction in judicial votes. In each case, I totaled the number of liberal interest groups advocating each gender distinction—sameness or difference.

I also control for attributes of the cases, given that justices may be more likely to advance a difference approach when a case concerns reproductive differences between women and men. As such, I control for whether the case concerns pregnancy discrimination or abortion, and I account for these issue areas together with a dichotomous variable.

4.4 RESULTS

4.4.1 Approaches to Constructing Gender in Judicial Opinions

I begin with an examination into why Supreme Court justices advanced a particular approach to constructing gender in all majority, concurring, and dissenting opinions in gender classification cases from 1971 to 2001. The comparison group is a difference approach to constructing gender.

< insert Table 4.3 here >

When we consider the influence of Court membership on the approaches to constructing gender that appeared in justices' opinions, the results demonstrate that ideology had a significant influence. Compared to constructing gender differences, conservative justices were less likely than liberal justices to advance a sameness approach or both approaches. Moreover, compared to advancing a sameness approach, they were more likely to advance no approaches to constructing

gender in their opinions.[43] In other words, compared to acknowledging similarities between women and men, conservative justices preferred to say nothing at all. This provides support for the theory that justices' ideological attitudes and values shape how they think about gender roles and expectations and therefore how they talk about gender in their opinions. It also suggests that liberal ideologies are associated with egalitarian attitudes and changing gender roles.

Gender also had an individual and panel effect on judicial behavior. Compared to male justices, female justices were unlikely to construct women and men as different in their opinions. Instead, they favored a sameness approach, both approaches, or they did not construct gender at all. This suggests that gender differences in attitudes, experiences, and values contributed to gender differences in how justices constructed gender in their opinions. This could indicate that compared to male justices, female justices were less likely to harbor traditional gender attitudes, believing that women were just as competent as men, for instance. It is also possible that Justice O'Connor and Justice Ginsburg consciously or unconsciously drew upon their personal experiences with the sex discrimination they faced during their legal careers. These professional experiences could have fueled their attitudes that women and men are not intellectually different or that women are just as capable as men.

The results also demonstrate that when there were more women on the Supreme Court, justices were more likely to advance a sameness approach versus a difference approach in their opinions. This could indicate that serving with women on the bench helps contribute to egalitarian attitudes and dispel gender stereotypes. In other words, the presence of a female justice may have resulted in a shift in male justices' gender attitudes, which was then reflected in their opinions. Another possibility is that in gender classification cases, male justices deferred to

[43] See Appendix 4.3 for the multinomial regressions predicting justices' approaches to constructing gender when the comparison group is a sameness approach.

the views of their female colleagues and followed their lead, believing that they have more expertise and credibility in gender classification cases. As such, male justices adopted the approach to constructing gender furthered by their female colleagues. This is possible, especially when we recall that Justice O'Connor and Justice Ginsburg wrote an opinion in approximately half the cases they adjudicated.

The results also demonstrate that compared to advancing no approach, a sameness approach, or both approaches, justices were less likely to invoke gender differences in their opinions as the percent of women in professional and managerial positions increased. It appears that justices were reluctant to reinforce only gender differences, providing some support for the theory that women's social power helps foster egalitarian attitudes. Witnessing women's increased social standing over time may have led justices to reevaluate their gender attitudes and expectations. In doing so, they may have realized that women are not intellectually different or inferior to men and that women and men are more similar than different.

The women's social power variable achieves significance in the institutional constraints model but not in the full model. When we include the effect of Court membership, women's social power falls out of significance. This suggests that who is on the Supreme Court, specifically the presence and influence of liberal justices and female justices, mediates the effects of the social environment on judicial behavior.

As expected, interest groups had a significant influence on the ways in which justices constructed gender in their opinions, but not exactly as they intended. When interest groups mentioned gender differences in their amicus briefs, justices responded and were more likely to advance a difference approach compared to advancing no approaches or both approaches. However, when interest groups did not construct gender, justices were responsive by being less

likely to advance a sameness approach or both approaches,[44] but they were also more likely to construct gender differences in their opinions. This demonstrates that while interest groups have the capacity to constrain judicial behavior, justices may respond unevenly to their arguments.

When faced with a case involving pregnancy discrimination or abortion, justices were more likely to advance a difference approach compared to no approaches in their opinions. Given that justices must consider the facts of the case when issuing a decision, that they discuss gender differences in these types of cases is not surprising. However, what is interesting is that justices were also more likely to advance a sameness *and* a difference approach in these types of cases.[45] It appears that justices recognized that sameness and difference were not necessarily mutually exclusive; women and men could be the same *and* different simultaneously, not one or the other.

Overall, the results demonstrate that the ways in which justices constructed gender in their opinions were largely driven by Court membership.[46] In other words, *who* was on the Supreme Court was the most important factor shaping judicial behavior. However, justices' behavior is driven by more than their political ideology or gender. They are people whose worldviews are also affected by their personal experiences and relationships, and whether conscious or not, these have the capacity to influence their gender attitudes and how they talk about gender in their opinions. As such, in chapters five and six, I also examine how these other facets of justices' backgrounds are brought to bear in their decision making.

When we consider the results with respect to justices' personal attributes and the gender composition of the Court together, it appears that the approaches to constructing gender

[44] See Appendix 4.4 for the multinomial regressions predicting justices' approaches to constructing gender when the comparison group is no approaches.
[45] See Appendix 4.4 for the multinomial regressions predicting justices' approaches to constructing gender when the comparison group is no approaches.
[46] See Appendix 4.5 for the marginal effects for models predicting how justices constructed gender in their opinions.

advanced in opinions were largely shaped by justices' individual characteristics. Given that the findings testing the impact of justices' ideology and gender were robust but the gender composition of the Court was not, it seems that justices' own attributes were more of an influence on their behavior than the attributes of those with whom they serve. In other words, while Court membership significantly shaped the content of opinions, it was because of each justice's individual influence and not necessarily because of the influence they exert on one another.

4.4.2 Gender Distinctions in Judicial Votes

Turning to voting behavior, the following table presents the results predicting why Supreme Court justices cast votes providing the same legal treatment to women and men in gender classification cases from 1971 to 2001.[47]

< insert Table 4.4 here >

In all four models evaluating the influence of justices' personal attributes on their voting behavior, as expected, the results indicate that a justice's political ideology was a significant influence. Conservative justices were less likely than liberal justices to cast a vote providing the same legal treatment to women and men. This supports the theory that justices' ideologies and values shape their attitudes with respect to gender roles and expectations. As a result, justices' gender attitudes affect whether they think women and men should have the same rights and opportunities and is therefore reflected in their voting behavior.

The results also reveal that gender had an individual and panel effect on justices' voting behavior. Across all four models, compared to male justices, female justices were more likely to cast a vote advancing a sameness distinction in gender classification cases, as expected. This

[47] The percent women on the Supreme Court and percent women in managerial and professional occupations are collinear, as are the scores representing the ideal point of the House of Representatives and the Senate, so I separate these variables in the models.

could be due to an effort to represent women and act on their behalf. The individual effect of gender could also result from female justices' experiences with sex discrimination, which may have spurred their belief that people should be judged on merit and not sex, leading them to provide the same rights and opportunities to women and men. In chapter five, I consider these possibilities as I attempt to identify why gender had an individual effect on justices' behavior.

When there was a greater percentage of women on the Supreme Court, justices were less likely to cast a vote advancing a sameness distinction, as evidenced by the first model. This finding is counterintuitive, as I hypothesized that serving with women on the bench would lead justices to provide the same legal treatment to women and men for a couple reasons. One is that having women on the Court would foster egalitarian attitudes and demonstrate to male justices that women are just as capable as men. Another is that male justices might defer to their female colleagues and either solicit their advice or follow their lead in gender classification cases, believing that they have more knowledge of the subject. That justices were more likely to vote to treat women and men differently when serving with female justices is unexpected, and I further examine this puzzling finding in chapter six.

Interestingly, in contrast to the analyses on judicial opinions, justices were not constrained by the status and standing of women in society when voting in gender classification cases. Women's social power had a modest effect on how justices reasoned about gender in their opinions, but as models three and four demonstrate, not whether they cast votes advancing the same or different legal treatment of women and men. When we consider the results from the analyses on opinions and votes together, it appears that women's social power had a minimal influence, if any, on judicial behavior. One reason is that women's social power is an abstract concept incapable of sanctioning justices. If the Court issues a decision incompatible with the

dominant gender attitudes in the social environment, women's social power is not a constraint that can directly sanction justices for "misbehaving."

Interest group pressure had a significant effect on judicial behavior in gender classification cases and in the expected direction in all four models. When a greater number of liberal interest groups advocated for a sameness distinction in their amicus briefs, justices were more likely to grant women and men the same legal treatment in their votes. Though the judicial opinions analysis found that justices responded erratically to the approaches to constructing gender advanced by interest groups, the results here show that they respond to interest groups in other ways. Instead of responding to interest groups in their opinions, justices responded to them when casting their votes, which is not surprising given that it is easier to monitor justices' votes than the content of their opinions.

This disparity could indicate that although interest groups institutionally constrain justices, it is due to the magnitude of interest group participation and not the ways in which they construct gender in their amicus briefs. It appears that justices use amicus briefs to gauge interest group and public support for a particular position (Collins 2004), responding to interest groups when voting in gender classification cases in an effort to prevent them from seeking recourse in another branch. If interest groups succeed elsewhere, it could thwart justices' policy goals *and* damage the Court's institutional legitimacy. In other words, justices appear to be persuaded by the number of interest groups urging them to affirm or reverse a lower court decision, not the content of their amicus briefs.

Each of the models reveals that when voting in gender classification cases, justices also were not constrained by the other branches of government. Justices did not seem to consider the overall ideological leaning of the president, House of Representatives, or the Senate when voting

in gender classification cases. One explanation for why the president and Congress failed to constrain the Court could be that justices are institutionally constrained, but only in theory. There are ways the president or Congress could sanction the Court or modify a judicial decision, but taking action is cumbersome. Consequently, court-curbing and override threats are hollow, and attempts to do so are rare (Rosenberg 1992; Epstein, Knight, Martin 2001). Aside from curbing the Court or tampering with a decision, there is little else the president and Congress can do to directly constrain judicial behavior. Though they can file amicus briefs,[48] they cannot directly lobby the Court, and they cannot give justices explicit directives.

When we also consider that the president cannot unilaterally tamper with a judicial ruling and that Congress is not a monolithic body, that the other branches are a hollow constraint on the Court becomes clearer. The president must persuade Congress to modify a ruling, or it can do so independently. However, this is difficult considering that there are 535 members with their own political ideologies, goals, and constituencies. Perhaps more important to consider is that Congressmembers are ultimately constrained by their constituents, some of whom may support a particular judicial decision. As such, if there is ideological incompatibility between the Court and the other branches, there is no guarantee that Congress will take action.

To summarize, there is little support for the theory that Supreme Court justices are institutionally constrained. Although interest group pressure had a partial effect on judicial behavior, specifically influencing whether justices voted to treat women and men the same or differently, other features of the political and social environment largely had no effect. Instead, it is clear that *who* is on the Supreme Court affects the content of judicial opinions and whether

[48] The president can do so through the Solicitor General and is usually successful (Segal and Reedy 1988; Graham 2003; Bailey, Kamoie, Maltzman 2005; Lindquist and Solberg 2007). Members of Congress can also submit amici, but are usually unsuccessful in persuading the Court (Heberlig and Spill 2000).

women and men are treated the same or different in justices' votes.[49] Though justices are socialized in law schools to be nonpartisan and neutral actors who simply find law, in reality, they consciously or subconsciously do not shed their personal attitudes, values, and experiences aside when judging. Even though justices cannot be held accountable and lack a constituency, this research demonstrates that regardless, they paid little attention to institutional constraints. Law schools attempt to mold people into justices, but justices are still people who cannot or will not set aside their personal influences, specifically their political ideology and gender.

4.4.3 The Individual and Panel Effect of Gender on Judicial Behavior

The next table compares the marginal effects of justices' ideology and gender, demonstrating that there are gender differences in judging in gender classification cases.

< insert Table 4.5 >

Within-group gender differences in judicial behavior provide support for the argument that female justices make a difference in the Supreme Court. Ideological divides in judicial behavior are not uncommon, but here, we see that there are also gender divides. For instance, amongst justices with conservative ideologies, being a male increased the likelihood of mentioning gender differences in an opinion by 21%. By contrast, conservative female justices did not advance a difference approach and instead, being female increased the probability of constructing women and men as the same in an opinion by 32%. By comparison, being male increased the probability that a justice advanced a sameness approach in his opinion by 25%. Conservative female justices were also more likely than conservative male justices to advance both approaches to constructing gender in their opinions. Being female increased the likelihood that conservative justices invoked gender differences and similarities by 43% compared to 26%

[49] See Appendix 4.6 for the marginal effects for models predicting how justices voted in gender classification cases.

for being male. With regard to voting behavior, being female increased the probability of voting to provide the same legal treatment to women and men by 76% compared to 50% for being male.

Gender differences in judging were apparent amongst liberal justices as well. For example, being male increased the probability that a liberal justice discussed gender differences in his opinion by 9%. By contrast, liberal female justices did not advance a difference approach in their opinions. Although liberal male justices were more likely than conservative male justices to construct women and as the same, they were still less likely to do so than liberal female justices. Being female increased the probability that liberal justices advanced a sameness approach in their opinions by 42%, whereas being male increased the likelihood by 39%. In addition, being a female justice increased the probability of constructing gender similarities and differences by 43%, but being a male justice increased the probability by 32%. Not only were there gender differences in how justices discussed gender in their opinions, there were also differences in their voting behavior. Being female increased the probability that a liberal justice cast a vote advancing a sameness distinction by 92%, but being male increased the probability by 78%.

The following figure displays these data graphically, presenting the differences in the marginal effects of gender on the approaches justices took when constructing gender in their opinions and when voting in gender classification cases.

< insert Figure 4.1 here >

We can more clearly see the gender differences in judicial behavior among conservative and liberal justices. However, the magnitude in gender differences is greater among conservative justices than liberal justices, which could result from the ideological differences in their gender attitudes and expectations. Compared to conservative justices, liberal justices are more

predisposed to harboring egalitarian attitudes, which could be why gender differences were less prominent. Amongst conservative justices, gender had its greatest effect on their decisions to advance a difference approach or both approaches to constructing gender in their opinions, as well as whether they treated women and men the same in their votes. Overall, this demonstrates that a conservative female justice was more likely than her male counterparts to minimize gender differences and further the same legal treatment of women and men in her opinions and votes.

Holding political ideology constant, the results reveal gender differences in how justices constructed gender in their opinions and how they voted in gender classification cases. These may have arose because female justices' assumed a representative role and attempted to act on behalf of women. It could also be that they attained special insight due to their professional experiences as women, specifically their experiences with sex discrimination. Though it is evident that there are individual gender differences in judicial behavior, we do not know why, and I examine this further in chapter five.

Gender had an individual effect on judicial behavior, and I next consider whether it also had a panel effect. In the following table, I present the marginal effects for male justices' behavior as the number of women on the Supreme Court increases.

< insert Table 4.6 here >

The results demonstrate that serving with a woman on the bench affected male justices' behavior, regardless of their ideology. As the number of female justices increased, conservative and liberal male justices alike became less likely to construct gender differences in their opinions. For instance, when there were no female justices, being a conservative justice increased the likelihood of invoking gender differences in an opinion by 27%. However, the probability went down to 14% with the addition of one female justice and 6% with the addition

of another. Similarly, when serving on an all-male Court, the probability that a liberal justice advanced a difference approach in an opinion increased by 12%. When serving with one woman, that number decreased to 5% and to 2% when serving with two.

Serving with more women on the bench increased the likelihood that male justices advanced a sameness approach in their opinions. Being a conservative justice increased the probability of constructing women and men as the same by 19% when the Court was all-male, but rose to 31% when there was one female justice and 45% when there were two. Likewise, being a liberal justice increased the likelihood of furthering a sameness approach in an opinion when there were no female justices by 33%, but rose to 47% after one female justice joined the bench and to 60% after the second female justice began her tenure.

Interestingly, as the number of women on the bench increased, male justices became less likely to cast votes promoting a sameness distinction. For instance, being a conservative justice increased the probability of voting to treat women and men the same by 56% when there were no female justices, 40% after one woman joined the Court, and 26% after two. The discrepancy in male justices' behavior in their opinions and votes when serving with female justices could be a product of the sameness versus difference debate and what constitutes gender equality. Male justices may believe that women and men are similar in many respects and should have equal rights and opportunities, which is reflected in the content of their opinions. However, when they vote, they are making policy decisions and are perhaps trying to do what they think is best for advancing gender equality. Hence, depending on their perspective and the context of the case, male justices might sometimes conclude that differential treatment is the best means to strengthening gender equality. The discrepancy between their behavior in their opinions and votes is puzzling, and that male justices were more likely to vote to treat women and men

differently when serving with female justices is unexpected, and I examine this in more detail in chapter six.

The following figure contains the changes in conservative and liberal male justices' behavior with the addition of one female justice to the Court and then with two.

< insert Figure 4.2 here >

We can better see gender's panel effect on the judicial behavior of male justices. Conservative and liberal justices alike altered their behavior, either consciously or subconsciously, once a female justice joined the Court and then again with the addition of a second female justice.

There do not appear to be notable differences in the magnitude of change in behavior among conservative and liberal justices, meaning that the panel effect of gender was not conditioned by ideology. However, there are some interesting differences in terms of when gender had a greater panel effect. The magnitude of change in marginal effects was greater for the advancement of a difference approach and sameness approach in justices' opinions and in their voting behavior. This provides some support for the theory that serving with a female justice alters male justices' behavior, but there appears to be only a partial panel effect of gender. On the one hand, male justices were more likely to advance a sameness approach rather than a difference approach in their opinions. On the other hand, they were more likely to vote to treat women and men differently instead of the same when serving with a female justice. In chapter six, I examine whether gender did indeed have a panel effect and if it did, why it did, in an effort to make sense of these peculiar findings.

4.5 DISCUSSION AND CONCLUSION

This chapter analyzed the variation in justices' approaches to constructing gender in their majority, concurring, and dissenting opinions and their voting behavior in United States Supreme Court gender classification cases from 1971 to 2001. Quantitative analyses reveal that judicial behavior is driven by the justices' personal attributes—political ideology and gender. Conservative justices were more likely than liberal justices to construct gender differences in their opinions and cast votes advocating differential treatment. By contrast, female justices were more likely than male justices to advance a sameness approach in their opinions and vote to extend the same legal treatment to women and men. Gender also had a partial panel effect on judicial behavior; when there were more women on the Court, justices were less likely to discuss gender differences in their opinions but more likely to vote for differential treatment.

Justices were largely unresponsive to institutional constraints. Though women's social power had a modest effect on the ways in which they constructed gender in their opinions, it had no effect on justices' voting behavior and neither did the ideological leanings of the president and Congress. Interest group pressure had a significant influence, but not necessarily as intended. Justices responded to the approaches to constructing gender unevenly, but they were responsive in their votes. When the number of interest groups advocating for a sameness distinction was greater, justices were more likely to cast votes providing the same legal treatment to women and men.

The factors influencing the approaches justices took when constructing gender in their opinions and their voting behavior were the same. This is not surprising given that justices cannot help but to bring their experiences, attitudes, and values, which arise from their political ideology and gender, with them when they judge. Plus, these affect their attitudes regarding gender, gender roles, and gender equality, and hence the content of their opinions. Moreover,

justices' experiences, attitudes, and values shape their policy preferences, which they seek to implement when voting in gender classification cases.

I argue that the legal treatment of women and men in the Supreme Court is primarily shaped by characteristics of the justices. The approaches they took when constructing gender in their opinions and the gender distinction advanced in their votes was driven by their political ideology and gender. Further, to some degree, characteristics of their fellow justices, specifically gender, had a partial impact on judicial behavior. On the one hand, this comports with the notion that justices are insulated from external forces in the political and social environment. On the other hand, it violates the idea that justices are purely neutral and set aside their personal attitudes, experiences, and values.

It is clear that justices' personal attributes shape their decision making, but we do not know why. There are several possible explanations as to why justices bring their personal attributes to bear when confronting gender classification cases. In the chapters that follow, I seek to discover which explanation best explains why justices constructed gender a certain way in their opinions and voted to treat women and men the same or differently. Given that the quantitative analyses revealed that gender had an individual and a partial panel effect on judicial behavior, in chapter five, I conduct a small-N analysis in an effort to explain why gender shaped female justices' decision making. In chapter six, I attempt to make sense of the puzzling findings from the quantitative analysis. Though serving with a female justice seemed to compel male justices to further a sameness approach in their opinions, it was also associated with an increased likelihood of voting to treat women and men differently. As such, I aim to determine whether gender had a panel effect on judicial behavior, and if it did, why it did.

Table 4.1. United States Supreme Court Justices and Number of Cases Adjudicated, Opinions Authored, Approaches to Constructing Gender in Opinions Authored, and Gender Distinctions in Votes in United States Supreme Court Gender Classification Cases, 1971-2001.

Supreme Court Justice (Tenure)	Number of Cases Adjudicated	Number of Opinions Authored	Percent Cases in which Justices Wrote an Opinion	Number of Times Justice Advances					
				No Approach	Difference Approach	Sameness Approach	Both Approaches	Difference Distinction	Sameness Distinction
Blackmun (1970-1994)	43	14	33	4	1	5	4	18	25
Brennan (1956-1990)	43	13	30	3	1	5	4	9	34
Breyer (1994-)	4	1	25	0	0	1	0	0	4
Burger (1969-1986)	39	8	21	2	4	1	1	24	15
Douglas (1939-1975)	12	2	17	1	2	0	0	4	8
Ginsburg (1993-)	5	2	40	0	0	1	1	0	5
Kennedy (1988-)	7	2	29	0	0	1	1	2	5
Marshall (1967-1991)	45	9	20	4	0	4	1	8	37
O'Connor (1981-2006)	16	8	50	4	0	2	2	4	12
Powell (1972-1987)	41	16	38	9	4	3	0	19	22
Rehnquist (1972-2005)	48	21	44	6	8	5	2	32	16
Scalia (1986-)	10	8	80	3	2	3	0	4	6
Souter (1990-2009)	6	0	0	-	-	-	-	0	6
Stevens (1975-2010)	38	13	35	3	3	1	6	14	24
Stewart (1956-1981)	33	14	32	1	2	4	7	16	17
Thomas (1991-)	4	1	25	0	1	0	0	3	1
White (1962-1993)	44	12	27	2	2	2	6	6	36
Total		144		42	30	38	35	165	273

Table 4.2. Independent Variables, Measures, and Sources.

Category	Variable	Measure	Data Source
Court Membership	Justice's Political Ideology	Justice's ideal point estimate, measured on a liberal to conservative continuum from -1 to 1.	Judicial Common Space Scores (Epstein, Martin, Segal, Westerland 2007).
	Justice's Gender	Justice's gender (0= male; 1= female).	Supreme Court of the United States.
	Gender Composition of the Supreme Court	Percent women on the Supreme Court.	Supreme Court of the United States.
Institutional Constraints	President	President's ideal point estimate, measured on a liberal to conservative continuum from -1 to 1.	Judicial Common Space Scores (Epstein, Martin, Segal, Westerland 2007).
	House of Representatives	Median member's ideal point estimate, measured on a liberal to conservative continuum from -1 to 1.	Judicial Common Space Scores (Epstein, Martin, Segal, Westerland 2007).
	Senate	Median member's ideal point estimate, measured on a liberal to conservative continuum from -1 to 1.	Judicial Common Space Scores (Epstein, Martin, Segal, Westerland 2007).
	Women's Social Power	Percent women in managerial or professional occupations.	United States Census Bureau.
	Interest Group Pressure	Number of liberal interest groups advancing approaches to constructing gender in their amicus briefs.	Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832-1978; LexisNexis; Westlaw.
		Number of liberal interest groups advancing each gender distinction in their amicus briefs.	Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832-1978; LexisNexis; Westlaw.
Case Attributes	Reproductive Difference	Case concerns pregnancy discrimination or abortion (0= no; 1= yes).	Calculated by the author.

Table 4.3. Multinomial Regression Results Predicting Justices' Approaches to Constructing Gender in Majority, Concurring, and Dissenting Opinions in United States Supreme Court Gender Classification Cases, 1971-2001.

Variable	Justice Advances No Approaches[a]			Justice Advances Only a Sameness Approach[a]			Justice Advances Both Approaches[a]		
	Court Membership	Institutional Constraints	Full Model	Court Membership	Institutional Constraints	Full Model	Court Membership	Institutional Constraints	Full Model
Conservative Justice	-.68[b]		-.70 [b]	-1.69**		-1.70**	-1.42**		-1.48**
	(.54)		(.56)	(.48)		(.50)	(.54)		(.57)
Female Justice	12.78**		12.74**	13.13**		13.24**	13.41**		13.19**
	(.56)		(.73)	(.51)		(.67)	(.56)		(.72)
Percent Women on the Supreme Court	.06			.09**			.03		
	(.04)			(.04)			(.05)		
Percent Women in Managerial or Professional Occupations		.25*	.24		.29*	.28		.23**	.22*
		(.14)	(.15)		(.17)	(.18)		(.12)	(.12)
Number of liberal interest groups advancing no approaches		-.14	-.15		-.06**[c]	-.07** [c]		-.17** [c]	-.18** [c]
		(.11)	(.11)		(.02)	(.03)		(.08)	(.08)
Number of liberal interest groups advancing only a difference approach		-.13*	-.13*		-.02	-.02		-1.00*	-1.02*
		(.07)	(.07)		(.05)	(.05)		(.54)	(.55)
Number of liberal interest groups advancing only a sameness approach		.01	.01		-.01	-.02		.02	.02
		(.05)	(.05)		(.04)	(.04)		(.02)	(.02)
Number of liberal interest groups advancing both approaches		.05	.05		.04	.04		-.09	-.09
		(.05)	(.05)		(.06)	(.06)		(.08)	(.09)
Case Concerns Pregnancy or Abortion	-1.83**	-1.57**	-1.56**	-1.66	-1.41	-1.41	-.41[d]	.63 [d]	.64 [d]
	(.62)	(.63)	(.62)	(1.15)	(1.39)	(1.45)	(.74)	(.70)	(.73)
(constant)	.53	-9.27	-8.93	.52	-10.96	-10.56	.64	-8.45	-7.98
	(.38)	(5.79)	(5.96)	(.41)	(6.84)	(7.18)	(.36)	(4.78)	(4.97)
Log Likelihood	-558.53	-540.48	-525.00	-558.53	-540.48	-525.00	-558.53	-540.48	-525.00
Number of Observations	445	445	445	445	445	445	445	445	445

* significant at 10%, ** significant at 5%

[a] Comparison group is a difference approach to constructing gender.

[b] Conservative justices were more likely to advance no approaches versus a sameness approach.

[c] Justices were less likely to advance a sameness or both approaches compared to advancing no approaches.

[d] Justices were more likely to advance both approaches versus no approaches.

Table 4.4. Logistic Regression Results Predicting Why Justices Advance a Sameness Distinction when Voting in United States Supreme Court Gender Classification Cases, 1971-2001.

Variable	Model 1	Model 2	Model 3	Model 4
Conservative Justice	-1.91**	-1.91**	-1.89**	-1.92**
	(.42)	(.43)	(.42)	(.44)
Female Justice	1.20**	1.22**	.88*	.98*
	(.46)	(.47)	(.50)	(.51)
Percent Women on the Supreme Court	-.07*	-.04		
	(.04)	(.05)		
Percent Women in Managerial or Professional Occupations			-.07	.01
			(.10)	(.13)
Number of Liberal Interest Groups Advancing a Sameness Distinction	.08**	.08**	.07**	.07**
	(.02)	(.02)	(.02)	(.02)
Number of Liberal Interest Groups Advancing a Difference Distinction	-.01	-.04	-.07	-.08
	(.14)	(.13)	(.12)	(.12)
Conservative President	.50	.59	.46	.67
	(.42)	(.44)	(.43)	(.46)
Conservative House of Representatives	1.73		-.44	
	(3.01)		(2.45)	
Conservative Senate		-2.50		-4.61
		(3.78)		(3.95)
Case Concerns Pregnancy or Abortion	.23	.14	.32	.21
	(.68)	(.64)	(.65)	(.62)
(constant)	.36	-.17	2.79	-.78
	(.47)	(.55)	(4.09)	(5.72)
Log Likelihood	-238.52	-238.25	-241.99	-239.56
Number of Observations	438	438	438	438

* significant at 10%, ** significant at 5%

Table 4.5. Marginal Effects Comparing Justices' Behavior by Political Ideology and Gender in United States Supreme Court Gender Classification Cases, 1971-2001.

Justice's Ideology	Justice's Gender	Justice Advances No Approaches	Justice Advances Only a Difference Approach	Justice Advances Only a Sameness Approach	Justice Advances Both Approaches	Justice Advances a Sameness Distinction
Conservative	Female Justice	.15	.00	.32	.43	.76
	Male Justice	.21	.21	.25	.26	.50
Liberal	Female Justice	.24	.00	.42	.43	.92
	Male Justice	.28	.09	.39	.32	.78

Figure 4.1. Differences in Marginal Effects for Female and Male Supreme Court Justices' Behavior in United States Supreme Court Gender Classification Cases, 1971-2001.

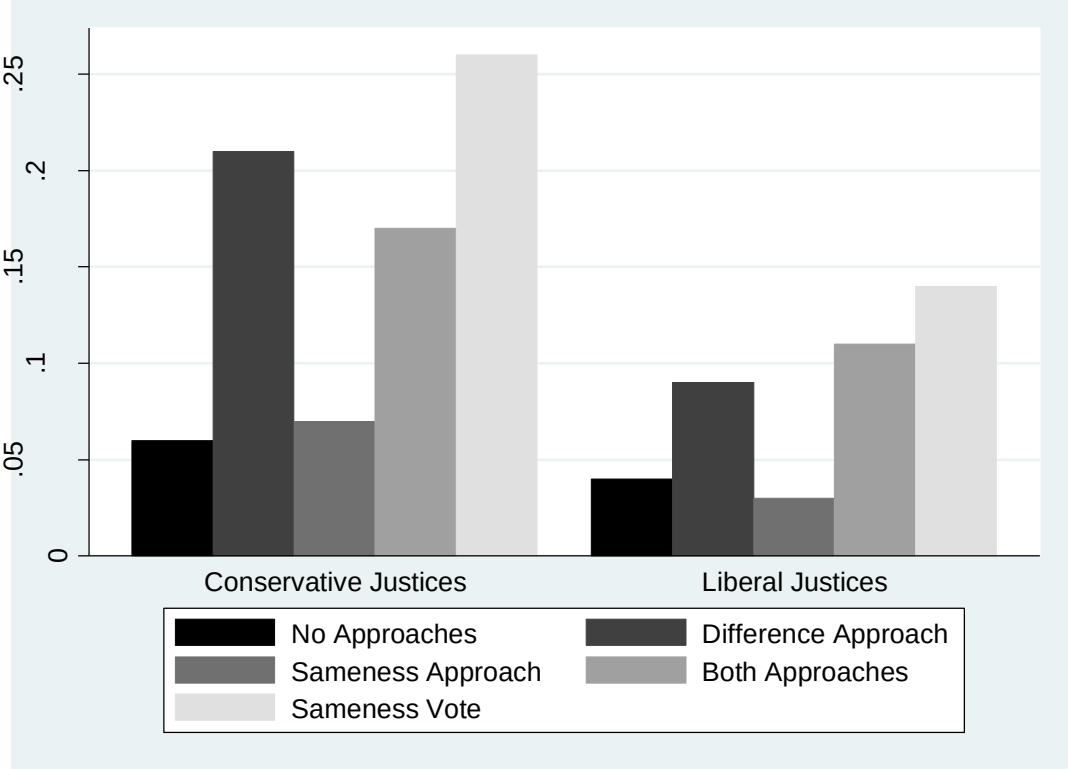
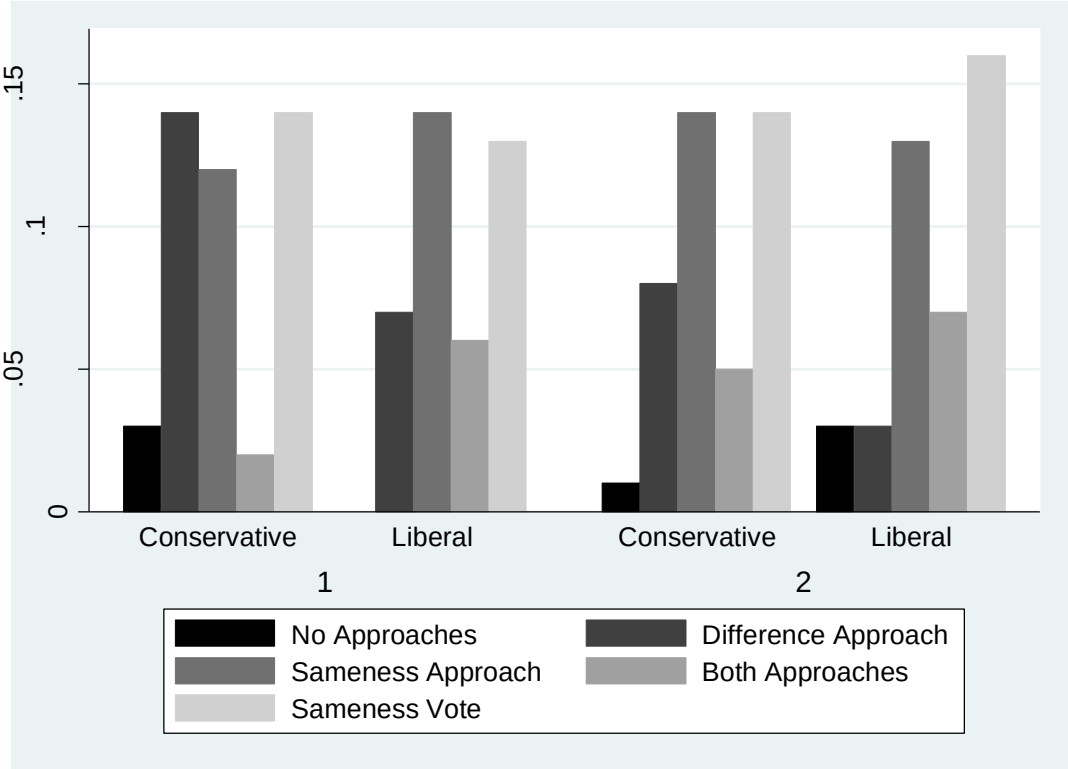


Table 4.6. Marginal Effects Comparing Male Justices' Behavior by Political Ideology and Gender Composition of the Supreme Court in United States Supreme Court Gender Classification Cases, 1971-2001.

Number of Women on the Supreme Court	Justice's Ideology	Justice Advances No Approaches	Justice Advances Only a Difference Approach	Justice Advances Only a Sameness Approach	Justice Advances Both Approaches	Justice Advances a Sameness Distinction
0	Conservative Justice	.27	.27	.19	.27	.56
	Liberal Justice	.21	.12	.33	.34	.81
1	Conservative Justice	.30	.14	.31	.25	.40
	Liberal Justice	.21	.05	.47	.28	.68
2	Conservative Justice	.29	.06	.45	.20	.26
	Liberal Justice	.18	.02	.60	.21	.52

Figure 4.2. Change in Marginal Effects for Male Supreme Court Justices' Behavior in United States Supreme Court Gender Classification Cases, 1971-2001, as the Number of Female Justices Increased.



CHAPTER 5: THE INDIVIDUAL EFFECT OF GENDER ON FEMALE JUSTICES' BEHAVIOR

5.1 INTRODUCTION

Friday, September 25, 1981 was a big day at the United States Supreme Court. Its 102nd justice was to be sworn in, and several thousand people requested seats for the investiture. Most were turned away, but many showed up anyway, along with photographers, journalists, Court employees, and tourists, to cheer on the soon-to-be-justice (Biskupic 2005: 99-100). Who commanded such attention? It was none other than Sandra Day O'Connor, who was about to be the country's first female Supreme Court justice.

Ever since Justice O'Connor joined the Court, scholars have wondered what difference her gender makes in judicial decision making and whether she decides cases differently from the male justices. Although some find evidence of gender differences (O'Connor and Segal 1990; Palmer 2002), both she and Justice Ginsburg, who joined the Court in 1993, repeatedly deny it (Ginsburg 1994: 5; O'Connor 2003: 191). When asked if they decide cases differently because they are women, O'Connor and Ginsburg both quote Minnesota Supreme Court Justice Jeanne Coyne and say that "a wise old man and a wise old woman will reach the same conclusion" (Ginsburg 1994: 5; O'Connor 2003: 193).

Despite their frequent denials, the quantitative analysis demonstrates that Justice O'Connor and Justice Ginsburg do indeed judge differently than their male colleagues, at least in gender classification cases. Compared to male justices, O'Connor and Ginsburg were more likely to construct women and men as the same in their opinions and cast votes granting them the same legal treatment. This raises the question of *why* gender differences in judicial behavior manifest themselves in gender classification cases.

In this chapter, I employ qualitative methods to identify the mechanisms by which gender shaped female justices' behavior when constructing gender and voting in gender classification cases. To do so, I examine four Supreme Court cases: *Mississippi University for Women v. Hogan* (1982), *Johnson v. Transportation Agency* (1987), *United States v. Virginia* (1996), and *Miller v. Albright* (1998). Two proposed possibilities are that female justices assume a representative role and work to advance women's interests or that female justices' experiences with sex discrimination inform their judging.

I argue that gender differences arose because Justice O'Connor and Justice Ginsburg were deeply affected by their professional experiences as women. As a result of their experiences with sex discrimination, both developed a profound understanding of how harmful gender stereotypes and the discrimination that resulted from them can be to women and men. Their experiences instilled in them the belief that sex should not be a barrier to one's rights and opportunities, leading them to oppose stereotypes and discrimination as Supreme Court justices.

I begin this chapter with a discussion of the research question and analytic goals. I then discuss case selection and the cases under study. Next I briefly discuss the theories I test and my hypotheses, as well as the data and methods. I then discuss the results of my research and conclude with some implications.

5.2 RESEARCH QUESTION AND ANALYTIC GOALS

This small N-analysis examines the influence of gender on female justices' behavior. The first analytic goal is to determine why gender shaped how Justice O'Connor and Justice Ginsburg constructed gender in their opinions and how they voted in gender classification cases. Table 5.1 displays the number of times they advanced each type of approach to constructing gender in their opinions and each gender distinction in their votes.

< insert Table 5.1 here >

Justice O'Connor and Justice Ginsburg adjudicated a total of 21 gender classification cases from 1981 to 2001. They tended to treat women and men as the same in their opinions and votes, doing so in 11 cases. This is not surprising; it was expected that compared to male justices, female justices would be less likely to harbor traditional gender attitudes. Moreover, they should be more likely to remove barriers to women's rights and opportunities.

However, they did not deny that there were differences between women and men. Though they acknowledged gender differences five times, they did not do so without also discussing similarities. It seems that both female justices sought to point out that gender differences did not justify differential legal treatment, which was reflected in their voting behavior. Even when they advanced both approaches to constructing gender in their opinions, they usually voted to grant the same legal treatment to women and men, doing so four times.

Compared to constructing only gender differences in their opinions, Justice O'Connor and Justice Ginsburg preferred to advance any other approach, sometimes even choosing not to discuss gender. In the five instances in which they advanced no approaches in their opinions, they furthered a difference distinction three times and a sameness distinction twice. While they seemed to recognize that in certain contexts, differential treatment was justifiable, thereby casting four votes furthering a difference distinction, they never advanced only a difference approach in their opinions.

For the most part, Justice O'Connor and Justice Ginsburg acted as expected and usually treated women and men the same in their opinions and votes. However, there are some instances in which they behaved contrary to the ways in which the quantitative analysis predicted they most often would. In four cases, Justice O'Connor voted to provide differential treatment to

women and men. This suggests that only under certain conditions does gender affect justices' individual behavior, and the second analytic goal of this small-N analysis to determine when.

5.3 CASE SELECTION AND CASES UNDER STUDY

To explain why and when gender had an individual effect on judicial behavior, I examine Justice O'Connor's and Justice Ginsburg's behavior in four Supreme Court cases.[50] Specifically, I aim to explain how and why gender affects female justices' approaches to constructing gender in their opinions and voting behavior in gender classification cases. The unit of analysis is a female justice-case. Table 5.2 displays the cases under study.

< insert Table 5.2 here >

In two of the cases, *Mississippi University for Women v. Hogan* (1982) and *United States v. Virginia* (1996), discussed in more detail below, gender had its expected effect. Both female justices advanced a sameness approach to constructing gender in their opinions and voted to provide women and men the same legal treatment.

In her first majority opinion written as a Supreme Court justice, Justice O'Connor advanced a sameness approach and held that the Mississippi University for Women's School of Nursing's enrollment policy was unconstitutional. Mississippi University for Women (MUW) was the oldest state-supported women's college in the United States. Located in Columbus, its School of Nursing awarded 4-year baccalaureate degrees—but only to women. Joe Hogan was a registered nurse working in Columbus, where he began working as a nursing supervisor in 1974 (*Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)). Hogan had a 2-year associate degree, but he wanted to earn his 4-year baccalaureate degree, but the only coeducational nursing schools available to him were over 100 miles away. In 1979, Hogan

[50] Justice Ginsburg joined the Supreme Court in 1993 and could not participate in deciding two of the four cases under study.

applied for admission to MUW and even though he was deemed qualified to attend, he was denied admission solely on account of sex (*Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)).

Hogan sued in the federal district court, claiming that MUW's admissions policy violated the equal protection clause of the 14th amendment. The United States District Court for the Northern District of Mississippi found for the state, but the Court of Appeals for the Fifth Circuit reversed in June of 1981. The United States Supreme Court granted certiorari, and in 1982 in a 5-4 decision, affirmed the circuit court decision.

Justice O'Connor and four other justices agreed with Hogan's claim that MUW's single-sex admissions policy violated the equal protection clause of the 14th amendment. In the majority opinion, O'Connor advanced a sameness approach, writing that if the "statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate" (*Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)).

Fourteen years later, the Court revisited the issue of state-supported single-sex schools in *United States v. Virginia*. Virginia Military Institute (VMI) was a male-only state-supported school established in 1839, with the intention that its graduates would go on to be leaders in civilian and military life, or citizen-soldiers. Although less than 20% of its cadets pursued military careers (Strum 2002: 108), VMI offered a unique educational program based upon the adversative method, notable for its rat line, or the hazing of freshmen, physical rigor, mental stress, spartan living conditions, and complete lack of privacy (Brodie 2000; Strum 2002). After the Justice Department received a letter from a high school female who sought admission to VMI

but was denied on account of sex, the United States sued Virginia and VMI, claiming that its admissions policy violated the equal protection clause of the 14th amendment (Strum 2002).

The United States District Court for the Western District of Virginia ruled in favor of VMI in 1992, but a year later, the Court of Appeals for the Fourth Circuit reversed and remanded the case, providing VMI with three options: admit women, establish a parallel program for women, or become a private school. In response, VMI established the Virginia Women's Institute for Leadership (VWIL), housed at nearby Mary Baldwin College, a private school for women.

Despite its parallel mission to produce citizen-soldiers, VWIL's program differed from VMI's in several ways (*United States v. Virginia*, 852 F. Supp. 471 (1994); Strum 2002). For one, instead of instituting a hierarchical leadership model, the adversative method was absent and VWIL adopted a cooperative and interactive model (Strum 2002: 205). There was no rat line or barracks, distinct features of VMI's educational program. Moreover, while VMI operated as a military base-in-training, where its cadets wore uniforms every day, were issued rifles and bayonets, and participated in physical training every day, VWIL operated differently (Strum 2002: 205). Its students were not issued arms nor did they wear uniforms, and instead of daily physical training, VWIL students participated in a "Cooperative Confidence Building" program consisting of various physical challenges twice a week (Strum 2002: 204). VMI contended that the difference in programs was not due to gender stereotypes; rather, it was due to empirical evidence attesting to the pedagogical differences between women and men (*United States v. Virginia*, 852 F. Supp. 471 (1994)).

In 1994, VMI returned to the District Court seeking approval of its remedial program, which it obtained from Judge Kiser. He agreed that the differences between VMI and VWIL

were "based on real differences between the sexes...and not stereotyped or generalized perceptions of differences," concluding that "If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination" (*United States v. Virginia*, 852 F. Supp. 471 (1994)). The United States appealed the decision, which was affirmed in the Fourth Circuit in 1995. The case was appealed at the United States Supreme Court, which granted certiorari, and by a 7-1 vote,[51] reversed the circuit court decision in 1996.

Justice Ginsburg, writing for the majority, including Justice O'Connor, disagreed with VMI and held that its admissions policy was unconstitutional. She advanced a sameness approach, pointing out that if VMI's mission is to produce citizen-soldiers, "surely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men" (*United States v. Virginia*, 518 U.S. 515 (1996)).

In *Hogan* and *Virginia*, Justice O'Connor and Justice Ginsburg behaved as expected based upon the results from the quantitative analysis, voting to treat women and men the same and advancing a sameness approach in their opinions. However, there were some instances in which Justice O'Connor advanced differential treatment in her votes, suggesting that the extent to which gender affects female justices' behavior depends upon certain circumstances. In an effort to determine when gender had an individual effect, I examine *Johnson v. Transportation Agency* (1986) and *Miller v. Albright* (1998).

In 1979, Paul Johnson and Diane Joyce were among twelve applicants for a road dispatcher promotion at the Santa Clara County Transportation Agency. Both were declared qualified for the job and advanced to the interview stage, where Johnson scored a 75 and Joyce scored a 73 (*Johnson v. Transportation Agency*, 480 U.S. 616 (1987)). The agency conducted a

[51] Justice Thomas recused himself because his son was a VMI cadet at the time.

second interview, and three supervisors recommended that Johnson receive the promotion (*Johnson v. Transportation Agency*, 480 U.S. 616 (1987)). In the meantime, Joyce, concerned that her application would not be fairly considered, contacted the County Affirmative Action Office, whose coordinator then recommended to the agency director that she receive the promotion (*Johnson v. Transportation Agency*, 480 U.S. 616 (1987)). The director concluded that Joyce should be awarded the job, claiming that he took into consideration her qualifications, expertise, background, as well as affirmative action (*Johnson v. Transportation Agency*, 480 U.S. 616 (1987)).

In 1978, the County Transportation Agency instituted an affirmative action plan that allowed sex to be taken into consideration when making promotions in jobs in which women were significantly underrepresented (*Johnson v. Transportation Agency*, 480 U.S. 616 (1987)). Though it did not institute a quota, it aimed to increase the numbers of women working in traditionally segregated jobs (*Johnson v. Transportation Agency*, 480 U.S. 616 (1987)). The plan reflected the agency's belief that women's historically limited opportunities to hold these jobs stifled their motivation to seek the training and employment of the skilled craft worker positions now available to them (*Johnson v. Transportation Agency*, 480 U.S. 616 (1987)).

Johnson filed a complaint with the Equal Employment Opportunity Commission and received a right-to-sue letter in March of 1981. He filed suit in the United States District Court for the Northern District of California, which invalidated the agency's plan in 1982 and claimed that sex was the determining factor for Joyce's promotion (*Johnson v. Transportation Agency*, 480 U.S. 616 (1987)). The Court of Appeals for the Ninth Circuit reversed in 1984, and the Supreme Court granted certiorari. In 1987, in a 6 to 3 vote, it affirmed the circuit court decision.

Justice O'Connor voted with the majority to uphold the policy and wrote a concurring opinion, in which she did not construct gender.

Female justices were divided in 1998 in *Miller v. Albright*. In 1970, Lorelyn Penero Miller was born in the Philippines to a mother who was a Filipino citizen and a father, Charlie Miller, who was a United States citizen. They did not marry, and there is no evidence that Charlie was present at his daughter's birth or that Lorelyn lived in the United States (*Miller v. Albright*, 523 U.S. 420 (1998)). In 1992, when Lorelyn was 21 years old, Charlie established his paternity (*Miller v. Albright*, 523 U.S. 420 (1998)). Lorelyn applied for United States citizenship but was denied because the Immigration and Nationality Act (INA) required unwed fathers to legitimate their relationships with their children before the age of 18 in order to transmit their citizenship (*Miller v. Albright*, 523 U.S. 420 (1998)). By contrast, unwed mothers need not take any action to transmit their citizenship.

In 1993, the Millers filed suit in the United States District Court for the Eastern District of Texas. They claimed that Lorelyn was a United States citizen because her father was a citizen and that the INA's provision violated the equal protection clause. The district court erroneously dismissed Charlie for lack of standing, which he did not appeal (Interview 475). Due to jurisdictional issues, the case was transferred to the District Court for the District of Columbia in 1993 (*Miller v. Albright*, 523 U.S. 420 (1998)). There, Lorelyn's claim was rejected because the district court concluded that federal courts lack the power to confer citizenship (*Miller v. Albright*, 523 U.S. 420 (1998)). In 1996, the Court of Appeals for the District of Columbia affirmed the district court decision, but for a different reason. The Court of Appeals concluded that the INA provision was justifiable because it ensured that children have ties to their citizen

parent and the United States (*Miller v. Christopher*, 96 F.3d 1467 (1996)).[52] In 1998, the Supreme Court granted certiorari and six justices, including Justice O'Connor, affirmed the circuit court decision.

A majority of the Court, including Justice O'Connor, rejected Lorelyn Miller's claim and held that imposing additional requirements on unwed fathers constituted a legitimate governmental interest. By contrast, Justice Ginsburg was in the minority and wrote a dissenting opinion. She maintained that the gender classification was "surely based on generalizations (stereotypes) about the way women (or men) are" (*Miller v. Albright*, 523 U.S. 420 (1998)).

To summarize, this small-N analysis examines female justices' approaches to constructing gender in opinions and voting behavior to determine why gender affects their individual behavior. However, there are instances in which gender did not have its anticipated effect. As such, I also seek to identify when gender does not affect female justices' voting behavior in the way the quantitative analysis predicted.

5.4 THEORY AND HYPOTHESES

Theories of judicial behavior and gender politics suggest that women may assume a representative role and seek to represent women's interests or that they accrue unique information based upon their professional experiences as women. I aim to evaluate which theory best explains judicial behavior in this issue area.

5.4.1 Representative Role

According to the representative role theory, female judges seek to represent women by acting in ways that furthers gender equality (Allen and Wall 1993; Martin and Pyle 2005). Gender classification cases present Justice O'Connor and Justice Ginsburg with the opportunity to promote women's interests. Thus, they may be more likely than male justices to advance a

[52] Miller brought suit against Warren Christopher, Secretary of State at the time.

sameness approach in their opinions and a sameness distinction in their votes because they strive to represent women and advance their rights and opportunities by eliminating gender differences and distinctions.

H1: Female justices advance a sameness approach in their opinions and a sameness distinction in their votes in gender classification cases because they seek to represent women.

5.4.2 Professional Experiences

Other scholars theorize that gender differences in judicial behavior result from gender differences in professional experiences (Gryski, Main, Dixon 1986; Peresie 2005; Boyd, Epstein, Martin 2010). Justice O'Connor and Justice Ginsburg may draw on their professional experiences and the insights gained by them when confronting gender classification cases. As such, compared to male justices, they might be more motivated to remove barriers to women's rights and opportunities. Moreover, they may be less likely to believe that there are any appreciable differences between women and men, thus furthering a sameness approach in their opinions and a sameness distinction in their votes.

H2: Female justices extend the same legal treatment to women and men in their opinions and votes because they acquire unique information and insight due to their professional experiences as women.

5.5 DATA AND METHODS

In the section that follows, I discuss the data and methods employed in the small-N analyses in this chapter and the one that follows.

5.5.1 Data Sources

Primary data sources for this analysis and the one in the following chapter include semi-structured interviews, judicial opinions, justices' speeches and writings, and justices'

confirmation hearings. I also examined the papers of select Supreme Court justices at the Library of Congress and online. The only papers that have been released are those of the justices who are deceased—Blackmun, Brennan, Marshall, White, and Powell.[53] Secondary data sources include books, academic articles, and newspaper and magazine articles relating to the cases under study or the justices.

5.5.2 Interview Invitations

I extended an interview invitation to all Supreme Court justices who adjudicated any of the cases under study and all law clerks who clerked during the term the case was decided.[54] In addition, I sought to interview all law clerks who clerked for Justice O'Connor or Justice Ginsburg from 1981 to 2001. I also invited litigants representing the petitioners and respondents in each case as well as those who submitted amicus briefs on behalf of women's rights groups to speak with me. Lastly, I attempted to interview legal experts, current and former Supreme Court journalists as well as academics whose research examined any of the cases under study. As I conducted interviews, I identified other potential respondents through snowball sampling.

Most persons, 319, were contacted via email, but I called 10 on the phone and sent letters to 32 in the mail.[55] Of those who were contacted using email and phone, I followed up with those who did not respond two additional times. Of those who were contacted via mail, I did not follow up with additional mailings or a phone call.

[53] The personal papers of Justices Blackmun, Brennan, Marshall, and White were accessed at the Library of Congress in Washington, D.C. Justice Powell's papers were accessed online at http://law.wlu.edu/powellarchives/page.asp?pageid=1279.

[54] The small-N analysis in the following chapter examines *Mississippi University for Women v. Hogan* (1982) and *United States v. Virginia* (1996), as well as *Meritor Savings Bank v. Vinson* (1986), *United Auto Workers v. Johnson Controls* (1991), *J.E.B. v. Alabama* (1994), and *Tuan Anh Nguyen v. Immigration and Naturalization Service* (2001).

[55] See Appendix 5.1 for the interview invitation phone script and Appendix 5.2 for the interview invitation email/letter.

In all, I contacted 8 justices, 278 law clerks, 41 litigants, 27 amici, and 10 legal experts. Table 5.3 displays the number of persons contacted, as well as the number of each type of response.

< insert Table 5.3 here >

Many of the people I sought to interview, 46.4%, did not respond to my email, phone call, or letter. Of those who responded, 30.5%, declined the interview. However, 22.5% of the people I contacted accepted my invitation to be interviewed. Table 5.4 displays the number of people interviewed, by interviewee category.

< insert Table 5.4 here >

A total of 82 people accepted my invitation to speak with me for this study.[56] The majority of the interviews conducted, 57.3%, were with former Supreme Court law clerks. Aside from the justices themselves, law clerks have a unique insight into the judicial decision making and inner workings of the Court. Each justice hires up to four law clerks to work for her/him for one year. Clerks work long hours every day and develop a close relationship with the justice for whom they clerk, one that often lasts far beyond their clerkship. They have many responsibilities, including drafting opinions and offering legal advice, as justices routinely discuss the cases with them. In short, clerks are justices' confidants, and given their vantage points, know the justices and the factors shaping their behavior very well. Even though clerks were bound by confidentiality, discussed in more detail below, they offered general impressions of the justices, cases under study, and Court as a whole, and many could speak to the question of whether gender shaped female justices' behavior and whether serving with female justices altered male justices' decision making.

[56] There are 13 pending interviews. See Appendix 5.3 for the date, time, location, duration, and recording information for each interview.

Litigants made up the next largest category of those interviewed, 28%. Given their role as lawyers for the petitioner or respondent, they provided important insights into the justices' decision making. Aside from law clerks, litigants are among those most knowledgeable about the cases and justices. Of course, litigants are very familiar with their cases, but they do not prepare their arguments in a vacuum. Rather, they study the justices' ideologies, backgrounds, and jurisprudence to gain insight into which ones are more or less likely to support their side (Interview 37, 488). Moreover, litigants tailor their arguments for specific justices, particularly those whose support is unknown, seeking to win their vote by advancing a persuasive argument that resonates with them (Interview 37, 488). Although litigants are actors external to the Supreme Court, they are very knowledgeable about the cases under study, justices, and the factors shaping their behavior.

Lastly, amici and legal experts comprised 11% and 6.1% of those interviewed, respectively. Though they were further removed from the cases under study, their expertise affords them unique insight into the justices' decision making. Amici submit amicus briefs because of their interest and knowledge of the case and issue area, and legal experts have spent extensive time studying the justices and the Court's rulings.

To summarize, I interviewed a variety of people with different perspectives of the cases under study and the justices. Doing so enabled me to study the issue of whether gender had an individual and panel effect on judicial behavior and if it did, why, from a variety of angles. An advantage to interviewing different categories of people is that it helps minimize biases so that I can be more confident in the conclusions I draw.

5.5.3 Data Limitations

Despite my attempts to minimize biases that could skew my results, I encountered a couple data limitations revolving around confidentiality concerns. For one, such concerns affected the quality of data derived from the justices' papers. There was little information yielded about the specific cases because justices saved little written correspondence. In an effort to maintain confidentiality, justices instructed their law clerks to throw all notes, drafts, and other documents in "burn bags" for shredding (Ward and Weiden 2006: 11). Instead, Justice White made his clerks burn his papers, which rendered his donation to the Library a symbolic one (Interview 62). The Court is so secretive about justices' papers that there was a controversy surrounding the release of Justice Marshall's papers by the Library of Congress. When Marshall bequeathed his papers, he gave the Library discretion as to when it could open up his papers to the public after his death. Marshall died a year and a half after his retirement, so the Library released his papers, which upset some members of the Court because many were still sitting justices (Ward and Weiden 2006: 17).

Confidentiality concerns also posed an obstacle to obtaining interviews with former law clerks. A major reason is that it is not uncommon for law clerks to view their relationship with their justice as one of attorney-client privilege,[57] regardless of the number of years since their clerkship or the status of their justice (Ward and Wasby 2010: 131-132). Law clerks were more likely to grant an interview if their justice was deceased, which was not an uncommon

[57] The Supreme Court's culture of secrecy and confidentiality presented obstacles to my data collection, and here I briefly provide the background that contributed to that culture. Throughout the Court's history, there were no formal security or confidentiality measures governing law clerk behavior (Lane 2005: 867). However, in the 1970s, security became more of a concern to the justices. For instance, any clerk caught talking to a reporter for longer than 90 seconds was immediately fired, and some justices instituted their own security policies (Ward and Weiden 2006: 11). Journalists Bob Woodward and Scott Armstrong wrote *The Brethren*, published in 1979, and exposed the Court's internal dynamics and portrayed some of its members in a negative light. Based upon interviews with 170 law clerks and 5 justices, the book compelled the Court to adopt stricter privacy policies (Ward and Weiden 2006: 15). Beginning in the October term of 1981, the Chief Justice began swearing clerks to secrecy at their initiation tea, and in that same year, the Court adopted a Code of Conduct for Law Clerks, which was amended in 1988 and 1998 (Lane 2005: 868; Ward and Weiden 2006: 16-17).

phenomenon (see Peppers 2006). In the following table, I display the number of law clerks contacted and each type of response, organized by the justice's status.[58]

< insert Table 5.5 here >

Of the 47 clerks who agreed to an interview, only 13 clerked for a retired justice and seven clerked for a sitting justice. While 27.3% of the clerks who clerked for deceased justices accepted my interview invitation, only 14.4% of clerks for retired justices and 7.9% of clerks for sitting justices did. The percent of declined invitations is highest among clerks who clerked for sitting justices compared to clerks for deceased justices.

Consequently, the distribution is skewed, with the majority of interviews, 40, conducted with the former law clerks of deceased or retired justices. In some ways, this potentially biases the results. For one, it provides a limited account of judicial decision making. The quality of the data may vary according to the justice's status, as I have more information on the judicial behavior of deceased and retired justices than sitting justices. In a similar vein, the quality of the data may also vary by the case under study. Given that I mostly spoke with clerks whose justices were deceased or retired, I obtained more interview data for the older cases under study than the more recent ones. A major reason is that one-third of the sitting justices under study adjudicated four of the eight cases, and as a result, less is known about them.

Confidentiality concerns and data availability presented obstacles to data collection, resulting in interviews and archival research on mostly deceased or retired justices. However, I draw on a variety of data sources in an effort to combat bias. First, I also examined justices' speeches and writings, confirmation hearings, and secondary sources. Second, I interviewed litigants, amici, and legal experts who, all together, made up nearly half of those interviewed. In

[58] See Appendix 5.4 for a table of law clerks contacted, by each type of response, justice, and justice's status.

particular, I spoke with litigants and amici involved in every case under study, displayed in table 5.6.

< insert Table 5.6 here >

Of the 68 litigants and amici contacted, 32 accepted my interview invitation. I spoke with at least one participant in each of the eight cases under study. Not only did this enable me to study judicial decision making from an angle other than the law clerks,' it also provided data on the more recent cases. Even though I could not obtain interviews with many of the clerks who clerked for justices currently on the Court, litigants and amici provided some insight in those justices' behavior.

5.6 RESULTS: INDIVIDUAL EFFECT OF GENDER

A number of interviewees emphasized the impact of justices' personal experiences on their judging, specifically asserting that female justices' experiences as women inevitably shaped their perspective, and hence, their decision making in cases involving gender issues (Interview 243, 135, 14, 42, 177). These data, along with evidence from secondary sources, opinions, and writings and speeches given by Justice O'Connor and Justice Ginsburg, provide support for the informational accounts theory. Their experiences with sex discrimination instilled in them the belief that gender stereotypes and discrimination were unjust, thereby producing gender differences in how they constructed gender in their opinions and voted in gender classification cases.

5.6.1 Personal Experiences with Sex Discrimination

In 1952, Justice O'Connor graduated from Stanford Law School, finishing third in her class. Despite pursuing employment with a number of law firms, she was offered only one job—as a legal secretary (O'Connor 1991: 1549). In a time when her male classmates did not struggle

to obtain jobs (O'Connor 2003:199), law firms explicitly stated their opposition to hiring a woman (Kenney 2013: 25). Years later, O'Connor pointed out that "I had graduated high in my law school class and done all the things that, today, would qualify one for a very good position in a law firm. It did in those days, too, if you were a man." (O'Connor in Biskupic 2005: 134).

O'Connor found work as a deputy county attorney, but after her husband John graduated from law school and was drafted into the army, the couple moved to Germany (Biskupic 2005: 28). In 1957, they moved to Phoenix, where O'Connor gave birth to their first child and sought to reenter the labor force. Again, law firms still refused to hire her because she was a woman, so she started her own law practice with a recent law school graduate (Biskupic 2005: 30).

Justice Ginsburg had similar experiences with sex discrimination during law school and thereafter. She began her law school education at Harvard, and as one of nine women in a class of 500 students, Ginsburg and the other female students received subtle and not-so-subtle messages that they were not welcome. At the dean's annual dinner for female students, Dean Griswold asked why she wanted to attend law school because she was "occupying a seat that could be held by a man" (Strum 2002: 56; Campbell 2003:161). As another example, one of the rooms in the law library was closed to women, which Ginsburg unsuccessfully tried to access to check a reference for Law Review (Gilbert and Moore 1981: 158; Ginsburg 1993: 134; Klebanow and Jonas 2003: 357). Instead, a male student was sent in her place. Looking back on her experiences in law school, Ginsburg admits that "there was no outrageous discrimination but an accumulation of small instances" (Ginsburg in Gilbert and Moore 1981: 158).

After her husband obtained employment in New York, Ginsburg transferred to Columbia Law School, where she graduated first in her class in 1959 (Klebanow and Jonas 2003: 358). However, solely on account of sex, she could not get a job and was denied clerkships by Justice

Felix Frankfurter and Judge Learned Hand (Gilbert and Moore 1981: 158; Strum 2002: 57; Klebanow and Jonas 2003: 358). Given that Ginsburg was married and had children, Frankfurter worried that she would be unable to work as hard as male clerks (Interview 459). She recognized that motherhood was an impediment to employment because employers feared "that I wouldn't be able to give my full mind and time to my legal work" (Ginsburg in Klebanow and Jonas 2003: 358). Judge Edmund Palmieri, a district court judge, agreed to hire Ginsburg as a law clerk, but only on a trial basis (Strebeigh 2009: 37). Given that he worked long hours, he did not know what his wife would think of his having a female clerk, and he also feared that Ginsburg's then four-year-old daughter would be a distraction and detract attention from the job (Gilbert and Moore 1981: 158; Strebeigh 2009: 37).

Ginsburg had other experiences with discrimination. When Ginsburg's husband enlisted in the military, the two moved to Oklahoma, where she got a job in a Social Security office. When she became pregnant, she was demoted (Klebanow and Jonas 2003: 356). In 1963, Ginsburg became a law professor at Rutgers, and even though the Equal Pay Act was passed that same year, she knew she was paid less than the male professors (Ginsburg 1997: 15). Resources were limited, the dean told her, and since her husband had a good job, it made sense to pay her less (Ginsburg 1997: 15). When she became pregnant with her second child, she hid the pregnancy for fear that her annual contract would not be renewed (Ginsburg 1997: 16).

Despite attending some of the best laws schools in the country and graduating at the top of their classes, Justice O'Connor and Justice Ginsburg struggled to obtain gainful employment for no other reason than sex. Moreover, both continued to experience sex discrimination even after beginning their careers.

5.6.2 Opposition to Gender Stereotypes and Discrimination

Data from primary and secondary sources demonstrate that Justice O'Connor and Justice Ginsburg were profoundly affected by their experiences with sex discrimination. As a result, they became keenly aware of the dangers of gender stereotyping and the ways in which it restricted women's opportunities and stifled their potential. Over time, O'Connor and Ginsburg arrived at the conclusion that judging people solely on the basis of sex was deeply unjust, and their attitudes and actions reflected their opposition to gender stereotypes and discrimination.

Interview data reveal that Justice O'Connor's attitudes on gender stereotypes and discrimination were shaped by her own experiences. Sex discrimination was an issue area in which she acted against her conservative ideological tendencies because these were very real and personal issues for her (Interview 14). As a Supreme Court justice, sex discrimination cases were the rare instances in which O'Connor sided with the plaintiff (Interview 12). In cases in which the plaintiff claimed discrimination on the basis of race or alienation, for example, O'Connor had little sympathy and usually voted according to her conservative ideology and sided with the state (Interview 12, 269). This discrepancy can be attributed to the fact that she knew what gender discrimination looked like and felt like, and that shaped her worldview and affected how she thought about gender equality (Interview 42, 243, 177, 374). O'Connor understood the importance of treating women and men on the basis of merit because she knew what it felt like to not be treated according to merit (Interview 374). Because she was conservative, opposing sex discrimination was not naturally a part of O'Connor's worldview, but her experiences led her to believe that it was unjust.

For Justice Ginsburg, the accumulation of various events produced the realization that the sex discrimination she experienced was unjust. While a law professor at Rutgers, Ginsburg was asked by a group of female law students to teach a course on women and the law (Klebanow and

Jonas 2003: 360; Strebeigh 2009: 19). Immersing herself in the topic, she set out to read everything on the subject, which, according to her, "proved not to be a burdensome venture" (Ginsburg in Strebeigh 2009: 19). Ginsburg's research on women and the law was an eye-opening experience; as she learned more and more about the inferior legal status afforded to women and the wealth of discriminatory laws, she asked herself "How have people been putting up with such arbitrary distinctions? How have I been putting up with them?" (Ginsburg in Gilbert and Moore 1981: 153; Strebeigh 2009: 19). Even though Ginsburg experienced sex discrimination, learning that it was legally codified contributed to her recognition that treating people differently on account of sex was inherently unfair.

It was not until Ginsburg read *The Second Sex* by Simone de Beauvoir that she connected her own experiences with legal and cultural discrimination. She realized that gender inequality was not due to biological differences between women and men; rather, it was rooted in a "culture created and controlled by men" (Klebanow and Jonas 2003: 361). As she reflected upon her own professional experiences, she realized that the obstacles she encountered resulted from a culture in which women were routinely denied rights and opportunities granted to men (Klebanow and Jonas 2003: 361). Her setbacks were not due to a personal shortcoming; instead, they were a product of pervasive discrimination for no other reason than sex.

At the confirmation hearings for her nomination to the Supreme Court in 1993, Ginsburg discussed how she was treated differently from men in college, law school, and the workplace. She concluded by stating that "People who have known discrimination are bound to be sympathetic to discrimination encountered by others, because they understand how it feels to be exposed to disadvantageous treatment for reasons that have nothing to do with one's ability, or

the contributions one can make to society" (Ginsburg 1993: 140). Ginsburg's experiences afforded her firsthand knowledge of how harmful it was to judge people not on merit or ability.

Because of their personal experiences with sex discrimination, Justice O'Connor and Justice Ginsburg recognized its injustice and the ways in which gender stereotypes restricted women's and men's opportunities. As a result, prior to becoming Supreme Court justices, O'Connor and Ginsburg worked to eliminate gender stereotypes and discriminatory laws—as an Arizona state legislator and a lawyer for the American Civil Liberties Union's Women's Rights Project, respectively.

O'Connor served in the Arizona state senate from 1969 to 1975. Though she was a fiscally conservative Republican, she held liberal beliefs when it came to gender discrimination and sought to repeal discriminatory laws (Maveety 1996: 15). An advocate of equal opportunities in the workplace and equal pay, O'Connor first worked to overturn a 1913 protective labor law that prohibited women from working more than eight hours in a day (Biskupic 2005: 52). She claimed that the limit restricted women from seeking and keeping good jobs, stating "Let's give the women a chance for a better life and a bigger pocketbook" in a senate floor speech (Biskupic 2005: 52). As a result of her efforts, the bill passed and was enacted in 1970.

Reflecting upon her career as a state legislator, O'Connor believes she made a substantive policy difference and that her efforts helped eliminate laws discriminating on the basis of sex (O'Connor 2003: 196). In addition to spearheading the repeal of protective labor legislation, she also championed efforts to provide farm loans to girls as well as boys and eliminate a provision that gave husbands sole control of a couple's assets (O'Connor 2003: 196). A supporter of the Equal Rights Amendment, she urged her fellow state senators to vote for its ratification. In a speech to the senate judiciary committee, O'Connor stated: "I do not share the concern expressed

by some that its ratification would threaten family life as we know it or that it would deprive women of their freedom. On the contrary, the ERA recognizes the fundamental dignity and individuality of each human being and rests on the basic principle that sex should not be a factor in determining the legal rights of men or women" (Biskupic 2005: 60-61). Her efforts, however, were unsuccessful, and in a 5-4 vote, with O'Connor in the minority, the senate judiciary committee did not recommend the measure for a full senate vote.

Like O'Connor, Ginsburg was also an advocate fighting sex discrimination prior to becoming a Supreme Court justice. After developing a course on women and the law and learning of the disparities in legal treatment between women and men, Ginsburg committed herself to advancing "equal justice for men and women under the law" (Klebanow and Jonas 2003: 360). While a law professor at Rutgers, she was consulted on a couple sex discrimination cases and was part of the legal counsel on *Reed v. Reed* (1971), writing the landmark brief that eventually served as the basis for the invalidation of gender classifications in that case and subsequent ones. In 1971, Ginsburg founded the ACLU's Women's Rights Project (WRP) in order to finish what she started in *Reed* and continue litigation efforts to eliminate gender classifications in all facets of women's and men's lives (Strebeigh 2009: 46).

Ginsburg is sometimes compared to Justice Thurgood Marshall, a former NAACP litigant and advocate instrumental to the advancement of civil rights. When President Clinton nominated her to the Supreme Court, he said "Many admirers of her work say that she is to the women's movement what former Supreme Court Justice Thurgood Marshall was to the movement for the rights of African-Americans" (Clinton 1993). From 1971 to 1980, Ginsburg participated in 34 cases before the Supreme Court, either as a litigant or amici (Campbell 2003: 158). Of those cases, she orally argued six of them, losing only once.

Justice O'Connor's and Justice Ginsburg's pre-Court efforts to abolish sex discrimination resulted from their personal experiences with sex discrimination. They believed that gender stereotypes and the gender distinctions resulting from them harmed women and men and restricted their rights and opportunities. As Ginsburg has said of the goals of the WRP, "The project's goal was to get decision-makers to understand what sex stereotyping is and how the notion that men are this way (frogs, snails, puppy dog's tails) and women are that way (sugar, spice, everything nice) ends up hurting both sexes" (Ginsburg in Gilbert and Moore 1981: 153). Both female justices firmly believed that gender stereotypes were detrimental and held women and men back, and they were dedicated to abolishing them, a commitment that also carried over into their judging in the Supreme Court.

5.7 ADVANCING SAMENESS IN JUDICIAL OPINIONS AND VOTES

A close examination of *Mississippi University for Women v. Hogan* (1982) and *United States v. Virginia* (1996) demonstrates that Justice O'Connor and Justice Ginsburg granted the same legal treatment to women and men in their opinions and votes because of their personal experiences with sex discrimination and the lessons imparted by them. In her first majority opinion written as a justice, O'Connor was compelled to combat stereotypes and discrimination in *Hogan*. Over a decade later, she maintained the belief that sex discrimination and stereotyping was unjust, signing onto Justice Ginsburg's majority opinion in *United States v. Virginia*. In this case, Ginsburg finished what she started as an advocate for the WRP and held that gender classifications and stereotypes were impermissible.

5.7.1 Mississippi University for Women v. Hogan

As I discussed earlier in the chapter, *Mississippi University for Women v. Hogan* involved the question of whether the nursing school's all-female enrollment policy violated the

equal protection clause. Conference notes from Justice Blackmun and Justice Powell reveal two issues emerging from the justices' debates: issuing a narrow ruling and skepticism over whether Hogan was a victim of sex discrimination (Blackmun box 359, folder 10; Powell 26). Speaking in order of seniority, Chief Justice Burger began by stating that he would reverse the Fifth Circuit's decision. He did not think MUW's admissions policy constituted sex discrimination, pointing out that there was "no invidious purpose when the college was formed" (Powell 26). Justice Brennan spoke next and while he voted to affirm, he thought the opinion should be written narrowly, stating that this was a "Narrow question. Only school of nursing involved...Need not reach broader issue of uni-sex schools" (Powell 26). Justice White agreed and said that he "could go as narrowly as WJB" (Blackmun box 359, folder 10; Powell 26). Justice Marshall voted to affirm for the same reason articulated by Justice Brennan (Powell 27), but Justice Blackmun cast a tentative vote to reverse (Powell 27).

Justice Powell spoke next and favored reversal. According to Powell, Hogan was not a victim of sex discrimination; he sought attendance at MUW solely for convenience (Blackmun box 359, folder 10). Justice Rehnquist was similarly unsympathetic to Hogan's discrimination claim (Powell 28) and also worried that the Court's decision would "spill over" and render all single-sex schools unconstitutional (Blackmun box 359, folder 10). Justice Stevens, however, subscribed to Justice Brennan's logic and voted to affirm, tying the vote at 4-4, with Justice O'Connor speaking last. Also agreeing with Justice Brennan, Justice O'Connor voted to affirm. Blackmun's conference notes reveal that O'Connor did not share her colleagues' concerns that the opinion be narrowly written (Blackmun box 359, folder 10).

For the male justices in the majority, a major point of contention involved narrowness. They wanted to issue an opinion applicable to nursing schools only and not all single-sex

schools, as they had no intention of requiring that all schools be coeducational. For the male justices in the minority, *Hogan* was not a sex discrimination case. From their point of view, MUW's admissions policy was not rooted in invidious discriminatory intent, and as a man, it was impossible for Joe Hogan to be discriminated against on account of his sex.

With Chief Justice Burger in the minority, Justice Brennan had the duty of assigning a justice to write the majority opinion. He delegated the task to Justice O'Connor, her first majority opinion. Justice Brennan, who did not hesitate or waver in his assignment, saw this as an opportunity for O'Connor to "stake out a position" on women's issues (Interview 14, 13). He thought that having a female justice write the majority opinion in an important sex discrimination case would be good for appearances (Interview 13). It appears that Justice Brennan believed this would give legitimacy to the Court's ruling.

The lone woman on the Court, Justice O'Connor was the only justice with firsthand knowledge of the detrimental impact of gender stereotypes and sex discrimination, which shaped the content of the opinion. To the male justices in the majority—Brennan, Marshall, White, Stevens—*Hogan* was a straight-forward case involving disparate treatment on the basis of sex. By contrast, to O'Connor, this case was deeply personal and also involved whether the state could reinforce gender stereotypes and deem certain careers as appropriate for women and others as appropriate for men (Interview 77). For O'Connor, it was not simply that MUW discriminated against men, it also perpetuated "the notion that some career fields are reserved for women or predominantly for women" (Interview 77). Furthermore, she understood the sting of discrimination, which was likely in the back of her mind when she confronted this case, and she understood the ways in which discrimination had real life implications (Interview 507, 487, 516).

Given Justice O'Connor's personal experiences and resulting opposition to gender stereotypes and discrimination, she articulated the problematic nature of MUW's admissions policy in a way that did not occur to the male justices. Though the justices in the majority were philosophically opposed to sex discrimination, they failed to see that by admitting only women, MUW did not just discriminate against men, it also reinforced gender stereotypes (Interview 77). This, however, was obvious to Justice O'Connor because she experienced discrimination and had clear memories of being stereotyped, and as a result, she knew it held back women and men (Interview 13, 77). From her perspective, just as thinking that law was a man's job, so too was thinking that nursing was a woman's job (Tushnet 2005: 123).

In the majority opinion, Justice O'Connor countered gender stereotypes. She reiterated that gender classifications that reflect "archaic and stereotypic notions" are invalid, and their validity "is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women" (*Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)). While MUW's School of Nursing argued that its admissions policy was meant to compensate women for past discrimination, O'Connor disagreed. She noted that instead, it "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy" (*Mississippi University for Women v. Hogan,* 458 U.S. 718 (1982)).

That Joe Hogan was a man did not matter to Justice O'Connor; she gave legitimacy to his sex discrimination claim and maintained that a heightened standard of review was applicable.

She asserted that "Because the challenged policy expressly discriminates against applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. That this statutory policy discriminates against males rather than against female does not exempt it from scrutiny or reduce the standard of review" (*Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)). The injustice of sex discrimination and gender stereotyping was not dependent upon sex, which O'Connor was sensitive to because of her personal experiences. At a time when she was firmly conservative and could be counted on to vote that way (Interview 124, 12), as well as during a term when she tended not to side with the plaintiff in discrimination cases, O'Connor found for Hogan because, as a woman, she understood the impact of sex discrimination (Interview 12).

By contrast, the notion that a man could be discriminated against on account of sex was a concept that Justice O'Connor's male colleagues in the minority failed to comprehend. For instance, Justice Blackmun, who consistently voted with the liberal bloc that term, was in the minority in *Hogan*. He likely upheld MUW's admissions policy because the plaintiff was a man, but had this been the usual sex discrimination case with a female plaintiff, he would not have (Interview 12). Though Blackmun's position was tentative in conference, he became more decisive, even resisting one of his female law clerk's efforts to convince him to join Justice O'Connor's opinion. On three different occasions, clerk Kit Kinports urged him to affirm the lower court decision on account that "the establishment of the University as a women's school is the result of "paternalistic stereotyping" and not a genuine effort to remedy past discrimination," (Blackmun box 359, folder 10). Despite her efforts, Justice Blackmun still dissented and was unsympathetic to Hogan's claims of sex discrimination. In his concurring opinion, he wrote that "It is not enough that his State of Mississippi offers baccalaureate programs in nursing open to

males at Jackson and at Hattiesburg. Mississippi thus has not closed the doors of its education system to males like Hogan...those doors are open and his maleness alone does not prevent his gaining the additional education he professes to seek" (*Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)). In short, Blackmun failed to conceptualize this case as one involving sex discrimination and gender stereotypes, which resulted in him finding for MUW.

Justice Powell was also immune to the arguments advanced by one of his law clerks, John Wiley, who tried to persuade him to side with Hogan. Wiley's bench memo[59] shows that he was skeptical that MUW's policy reflected a remedial affirmative action intent, and he instead concluded that "it appears that the school concentrates on traditional "female" subjects, such as nursing, secretarial, and homemaker training. There is certainly nothing wrong with such training...But these are the fields in which women always have excelled...Consequently, MUW's admissions policy looks more like the perpetuation of outdated stereotypes than an authentic effort to help women break free of such stereotypes" (Powell 18-19). Powell disagreed and maintained that this case was not about sex discrimination or gender stereotypes.

In the margins of the first draft of Justice O'Connor's majority opinion, Powell wrote that he agreed with her assertion that "if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate," but he countered that "none of this with present case" (Powell 38). His dictated comments to himself further reveal his objection to how O'Connor framed the case. Powell stated "The striking thing...is that it is written as if this were the typical sex discrimination case. The familiar language is repeated frequently. The label "stereotype" appears more than once...There is no history of discrimination against men" (Powell 51). He

[59] Prior to oral argument, clerks submit to their justices a bench memo, which contains a summary of the facts of the case, major questions, and the arguments advanced by the lawyers and amici. Bench memos also usually contain the clerk's recommendation as to how a justice should vote and why.

went on to note that "There is no history of discrimination against men in Mississippi. No claim of discriminatory intent. No claim of any injury whatever except inconvenience. The stereotype talk is nonsense" (Powell 55).

Contrasting the decision making of Justice Blackmun and Justice Powell with Justice O'Connor's illustrates how her personal experiences with sex discrimination informed her decision making in *Hogan*. It was irrelevant that the plaintiff was a man because her experiences contributed to her understanding that gender stereotypes harmed women *and* men, a concept lost on even the male justices in the majority. Moreover, O'Connor's experiences produced her belief that sex should not be a barrier to career opportunities, and therefore led her to lift the obstacles to men's opportunities in *Hogan*.

5.7.2 United States v. Virginia

The constitutionality of single-sex schools and gender stereotypes were issues the Supreme Court revisited fourteen years later in *United States v. Virginia*. For Justice Ginsburg, who wrote the majority opinion, and Justice O'Connor, who signed it, their decision making in *Virginia* was influenced by their own personal experiences with sex discrimination (Interview 165). Echoing Justice O'Connor's majority opinion in *Hogan*, Justice Ginsburg countered the use of gender stereotypes to restrict one's opportunities. She stated that "state actors controlling gates to opportunity...may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females" (*United States v. Virginia*, 518 U.S. 515 (1996)). Ginsburg also pointed out that "the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords" (*United States v. Virginia*, 518 U.S. 515 (1996)). For her, the case was deeply personal because VMI's admissions policy was based upon the overbroad generalizations that

prevented women from doing what they were capable of, and these were arguments that Ginsburg fought against as an advocate in the 1970s (Interview 147). Moreover, based upon her personal experiences, she understood the ways in which gender stereotyping were harmful and restricted one's opportunities (Interview 42, 243, 177, 374).

Justice Ginsburg went on to combat stereotypes and discrimination and rejected VMI's claim that its program was comparable to VWIL's. In addition to differences in educational method and military training, VWIL was inferior to VMI in terms of financial resources, degree offerings, and prestige. These differences resulted in a program "different in kind from VMI and unequal in tangible and intangible facilities" (*United States v. Virginia*, 518 U.S. 515 (1996)). Ultimately, Ginsburg rejected VMI's argument that the difference in programs was due to pedagogical differences and not stereotypes. She reiterated that "generalizations about "the way women are," estimates of what is appropriate for *most women,* no longer justify denying opportunity to women whose talent and capacity place them outside the average description" (*United States v. Virginia*, 518 U.S. 515 (1996)).

Though Ginsburg objected to gender stereotypes and maintained that they could not be used to justify differential treatment, she also pointed out that VMI's admissions policy was unconstitutional. Simply put, she believed "there was no justification for having laws and public policies that allow men to do one thing and not women" (Interview 259). She stated that "However "liberally" this plan serves the Commonwealth's son, it makes no provision whatever for her daughters. That is not *equal* protection" (*United States v. Virginia,* 518 U.S. 515 (1996)). Demonstrating her belief that opportunities should not be contingent on sex and stereotypes, Ginsburg contended that "neither the goal of producing citizen soldiers...nor VMI's implementing methodology is inherently unsuitable to women" (*United States v. Virginia*, 518

U.S. 515 (1996)). Like Justice O'Connor, Ginsburg's vote was influenced by her experiences with sex discrimination and there was "no way" that they would side with VMI (Interview 461, 459, 512). Experiencing sex discrimination enabled them to better recognize it (Interview 516), and VMI's exclusionary enrollment policy reminded Justice Ginsburg that sex discrimination was detrimental to both women and men (Interview 507).

Justice Ginsburg opposed gender stereotypes and advocated for the same treatment of women and men in her opinion and vote, but she did not condemn all gender classifications. In her opinion, Ginsburg made an important distinction as to when gender classifications were permissible, noting that reinforcing stereotypes was not one of them. She mentioned that "Sex classifications may be used to compensate women...to promote equal employment opportunity...to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women" (*United States v. Virginia*, 518 U.S. 515 (1996)). For Ginsburg, gender classifications were permissible if they expand women's opportunities, but not if they restricted them. This illustrates the complexity of gender equality and that differential treatment does not necessarily unequal treatment. Ginsburg went on to note that a justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and female" (*United States v. Virginia*, 518 U.S. 515 (1996)), demonstrating her belief that gender classifications were impermissible when based upon stereotypes and when they restricted rights and opportunities.

Compared to the male justices, Justice O'Connor and Justice Ginsburg brought unique perspectives to the Court based upon their personal experiences with sex discrimination (Interview 37, 258, 135). Their experiences contributed to their belief that gender stereotypes

were detrimental and that limiting one's opportunities solely because of sex was unjust. These beliefs fueled their pre-Court efforts as a state legislator and women's rights advocate to eradicate sex discrimination. Not surprisingly, when confronting gender classification cases as Supreme Court justices, both acted in ways that eliminated gender differences between women and men in *Hogan* and *Virginia*.

5.8 ADVANCING DIFFERENCE IN JUDICIAL VOTES

Although Justice O'Connor and Justice Ginsburg furthered the same treatment of women and men in their opinions and votes in *Mississippi University for Women v. Hogan* (1982) and *United States v. Virginia* (1996), gender did not seemingly appear to have its expected effect in other gender classification cases. In *Johnson v. Transportation Agency* (1987), Justice O'Connor voted to treat women and men differently, and *Miller v. Albright* (1998) divided the two female justices. In this section, I examine whether the impact of gender on female justices' behavior occurred only under certain conditions.

5.8.1 Johnson v. Transportation Agency

Even though Justice O'Connor eliminated gender differences in many of her opinions and votes, she advocated differential treatment in *Johnson v. Transportation Agency* by voting to uphold Santa Clara County's affirmative action plan. The transportation agency adopted this plan to increase the representation of women in jobs that were traditionally performed by men and historically unavailable to women, whether due to gender stereotypes or formal discrimination. Given Justice O'Connor's personal experiences with gender stereotyping and discrimination, as well as her actions in *Hogan*, implicit in her vote in *Johnson* is an effort to counter the notion that some women do not want to work or are unfit to work in traditionally masculine jobs. As such, her behavior is arguably consistent with her effort to eliminate gender stereotypes and

further gender equality. In other words, though it appears that gender had an unexpected effect, meaning that it produced a difference distinction instead of a sameness one and thereby hindered gender equality, it did not.

Due to her personal experiences and the gender attitudes produced by them, Justice O'Connor advanced a difference distinction in *Johnson*. Having felt the sting of sex discrimination and having been offered a job as a legal secretary, despite being a capable and smart lawyer, O'Connor was sympathetic to women like Diane Joyce (Interview 494). That there was a lack of women in traditionally masculine jobs resonated with O'Connor given her personal experiences (Interview 491). Not only was she turned down for several jobs following graduation from law school, but law was a field typically reserved for men (O'Connor 1991: 1547).

Justice O'Connor also recognized that gender stereotyping and discrimination would continue to be barriers to women's employment in the agency unless a governmental entity intervened (Interview 494). Women were so unwelcome in positions traditionally held by men that a member of the interview team referred to Joyce as a "rebel-rousing, skirt wearing person" (*Johnson v. Transportation Agency*, 480 U.S. 616 (1987)). This comment resonated with O'Connor, who recognized that views such as these held women back and made it difficult, if not impossible, for them to break into the higher paying and more prestigious jobs (Interview 494). Without an affirmative action plan, those "implicit negative feelings" among long-term male employees were going to continue to keep women out (Interview 494).

Even though Justice O'Connor was skeptical of affirmative action, she believed that there was a place for it in order to remedy proven discrimination (Interview 77). O'Connor wrote that affirmative action was permissible if it was a "remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination" (*Johnson v. Transportation Agency*,

480 U.S. 616 (1987)). According to O'Connor, the agency's plan was consistent with Title VII because Congress' intent was to "root out invidious discrimination against *any* person on the basis of race and gender" and to eliminate "the lasting effects of discrimination against minorities" (*Johnson v. Transportation Agency,* 480 U.S. 616 (1987)). To her, this case was an instance in which women and men could be treated differently in order to overcome past discrimination. Given that there were no women working in the agency's skilled craft positions, O'Connor concluded that the implementation of its affirmative action plan was justifiable.

By contrast, on these points Justice Scalia disagreed, and he dissented. He did not believe it necessary for the agency to remedy the underrepresentation of women. To him, it was not a worthy goal because women and men naturally gravitated to different careers. A "traditionally segregated job category" results not from invidious discrimination, but because such jobs have not been "regarded *by women themselves* as desirable work" (*Johnson v. Transportation Agency*, 480 U.S. 616 (1987)). Scalia believed that "the qualifications and desires of women may fail to match the Agency's Platonic ideal of a workforce" (*Johnson v. Transportation Agency,* 480 U.S. 616 (1987)).

Justice O'Connor's decision making in *Johnson* illustrates the difficulty of assessing what constitutes gender equality. To her, differential treatment was necessary for furthering gender equality, and treating women and men the same would instead perpetuate inequality. According to the scoring scheme I developed in the quantitative analysis of justices' votes, a sameness distinction was equated with gender equality. However, this small-N analysis reveals the complexity of gender equality. Sameness is not always equated with equality, nor does difference always imply inequality. Instead, gender equality is nuanced, and how to advance it is contingent upon the justice, context, and issue area.

At first glance, Justice O'Connor's vote in *Johnson* appears to be an aberration. In *Hogan* and *Virginia,* her personal experiences compelled her to oppose gender stereotypes and expand women's and men's opportunities. However, her behavior in *Johnson* was no different. To O'Connor, the agency had a legitimate reason for implementing its affirmative action plan in order to expand women's opportunities and facilitate their entry into jobs previously closed off to them, whether it was due to stereotypes or discrimination.

5.8.2 Miller v. Albright

In *Miller v. Albright* (1998), Justice O'Connor and Justice Ginsburg found themselves on opposing sides, an unusual place for them to be in cases involving gender classifications. Justice O'Connor's holding in *Miller* is peculiar, but that is because to her, this was not a gender classification case. Because Charlie Miller failed to appeal his erroneous dismissal, he was removed from the case, so O'Connor did not believe that Lorelyn Penero Miller had standing to bring a sex discrimination case. O'Connor began her opinion by stating that "although petitioner is clearly injured by the fact that she has been denied citizenship, the *discriminatory* impact of the provision falls on petitioner's father, Charlie Miller, who is no longer a party to this suit" (*Miller v. Albright,* 523 U.S. 420 (1998)). She further noted that "a party raising a constitutional challenge to a statute must demonstrate...that he is within the class of persons with respect to whom the act is unconstitutional" (*Miller v. Albright,* 523 U.S. 420 (1998)). Though the INA provision discriminated against unwed fathers on the basis of sex, Justice O'Connor believed that a sex discrimination claim could be brought by only Charlie, not Lorelyn.

As such, O'Connor did not consider *Miller* to be a gender classification case. She allowed Lorelyn to challenge the INA provision and make the claim that it discriminated between the *children* of unwed citizen fathers and the *children* of unwed citizen mothers. A classification

based on illegitimacy triggered rational basis review and not a heightened level of scrutiny. As a result, O'Connor concluded that the provision, despite being rooted in gender stereotypes, passed rational basis review and could therefore be sustained. She went on record, however, as stating that "it is unlikely, in my opinion, that any gender classifications based on stereotypes can survive heightened scrutiny, but under rational scrutiny, a statute may be defended based on generalized classifications unsupported by empirical evidence" (*Miller v. Albright*, 523 U.S. 420 (1998)). Here, she made it clear that the INA provision would otherwise fail constitutional review if challenged by an unwed father because then it would qualify as a gender classification claim.

By contrast, Justice Ginsburg viewed this case as one involving sex discrimination and ruled as expected given her personal experiences. In a dissenting opinion, Ginsburg opposed the INA provision, claiming that it "treats mothers one way, fathers another, shaping government policy to fit and reinforce the stereotype" (*Miller v. Albright*, 523 U.S. 420 (1998)). While unwed mothers automatically transmit their citizenship to their children through no other action than giving birth, unwed fathers must satisfy additional requirements, such as legitimating the relationship or providing financial support. The gender classification is rooted in the presumption that unwed mothers, but not unwed fathers, will automatically establish—and want—a relationship with their children. Moreover, it rests on the stereotype that motherhood is mandatory while fatherhood is optional.

Given Justice Ginsburg's experiences with sex discrimination, which she largely attributed to her role as a mother (Ginsburg in Klebanow and Jonas 2003: 358), she saw the importance of eliminating gender stereotypes and the classifications that resulted from them—for women *and* men. It was important to her that fathers be just as valued as mothers and that fathers

be equally involved in childrearing (Interview 420). Therefore, by invalidating the INA provision, Ginsburg combatted the stereotype that men did not want to be fathers.

Why did gender have its expected effect on Justice Ginsburg but not Justice O'Connor? It appears that the two justices had different interpretations of the law, and given these differences, Justice O'Connor felt bound by the law and the facts of the case in a way that Justice Ginsburg did not. These are constraints that O'Connor takes seriously (Interview 77, 258), and simply put, Lorelyn did not have standing, so she could not raise a gender classification claim that would have triggered a heightened level of scrutiny. Applying rational basis review, Justice O'Connor felt constrained and compelled to uphold the INA provision. Ultimately, Justice O'Connor and Justice Ginsburg brought with them their personal experiences when judging gender classification cases, but the conditions under which it was relevant to their decision making depended upon the degree to which they felt bound by facts of the case and the law.

5.9 CONCLUSION

This chapter examined why there were gender differences in the ways in which justices constructed gender in their opinions and voted in gender classification cases. I find that gender affected Justice O'Connor's and Justice Ginsburg's behaviors because they experienced sex discrimination during their careers. These experiences fueled a belief that gender stereotypes and the discrimination they produce are unjust and restrict women's and men's rights and opportunities. Prior to their careers as Supreme Court justices, O'Connor and Ginsburg sought to further gender equality as a state legislator and advocate, respectively, and they continued doing so once on the bench when confronting gender classification cases.

Both justices combatted gender stereotypes and discrimination in *Mississippi University for Women v. Hogan* and *United States v. Virginia*, advancing the same legal treatment to women

and men in their opinions and votes. By contrast, Justice O'Connor extended differential treatment in *Johnson v. Transportation Agency* and voted to uphold an affirmative action policy. However, her behavior was not necessarily an aberration and was still influenced by her personal experiences. O'Connor concluded that treating women and men differently in this circumstance was permissible to remedy past discrimination that kept women out of traditionally masculine jobs. Here, she considered a difference, rather than a sameness, distinction to be the best way to further gender equality.

The impact of gender, however, on female justices' behavior was not absolute. Justice O'Connor and Justice Ginsburg were divided in *Miller v. Albright*, suggesting that there are certain conditions under which gender is relevant to their behavior. While Ginsburg voted to strike down the gender classification, O'Connor acted in a way that upheld it. To her, *Miller* was not a gender classification case because she did not think the plaintiff had standing. As such, her gender was an irrelevant factor and instead, the facts of the case and the law influenced her vote.

Over time, gender differences in judicial behavior should diminish as women's experiences with sex discrimination recede. Both Justice O'Connor and Justice Ginsburg attended law school at a time when women made up less than 5% of its students (Strebeigh 2009: ix). They graduated law school at a time when overt sex discrimination was pervasive and prior to the passage of Title VII of the Civil Rights Act and the Equal Pay Act and when the Supreme Court began striking down discriminatory laws violating the equal protection clause.

Although Justice O'Connor and Justice Ginsburg both deny that they decide cases differently than male justices, they recognize the value of having women on the Court and in positions of power. Both assume a seemingly self-imposed "role model" role and seem to embrace their roles as female justices, seeking to inspire women and set an example. Moreover,

it is important to them that people become accustomed to seeing—and hearing—women in positions of power.

For example, after her investiture, O'Connor wrote to President Reagan: "My appointment has probably done more to give women confidence in true equal opportunity than a thousand speeches" (Biskupic 2005: 103). She was very aware that she was the only female justice and of her place in history (Interview 77) and understood that her performance as the first female justice would set the stage for future women's abilities to be justices (Interview 62, 384). In addition to serving as a role model for women lawyers and demonstrating that there were no limits to their careers (Interview 112), she showed the country and women that women have a place on the Supreme Court and in government (Interview 384), thereby changing the world by example instead of law (Interview 259).

In a similar vein, Justice Ginsburg also assumed a "role model" role. After Justice O'Connor's retirement, she worried about the public's perception of the Court: "Young women are going to think, 'Can I really aspire to that kind of post'?" (Biskupic 2009: 357). She embraced the idea that she would be a role model for young girls (Interview 420). In 2009, eleven days after undergoing surgery for pancreatic cancer, Ginsburg attended President Obama's joint session of Congress because "I wanted people to see that the Supreme Court isn't all male" (Biskupic 2009).

Ginsburg also believes that having women on the Court has subtle influences on the male justices, teaching them to listen to women and take them seriously. She stated "I think it's very important that my colleagues are getting accustomed to hearing a woman's voice and listening to it. There's an automatic tuning out when a woman is speaking—they're really not listening because they're not expecting anything that would be worth listening to. I certainly have seen

that change on this Court. When women are there on the bench, they [the male justices] are listening to women's voices in a way that they didn't before, and it extends to women advocates as well. Listening to women's voices I think is a major contribution" (Strum 2002: 82).

Justice Ginsburg provides an example of a subtle influence women have on their male colleagues, but they could also have a more direct effect. Serving with female justices yielded a partial panel effect on the content of male justices' opinions and votes. In the next chapter, I examine why Justice O'Connor and Justice Ginsburg shaped the male justices' decision making in gender classification cases.

Table 5.1. Number of Times Female United States Supreme Court Justices advanced Each Type of Approach to Constructing in Opinions and Number of Each Type of Gender Distinction advanced in Judicial Votes in United States Supreme Court Gender Classification Cases, 1981-2001.

Approach to Constructing Gender in Judicial Opinions	Gender Distinction Advanced in Judicial Votes		Total
	Difference	Sameness	
No Approaches	3	2	5
Difference	0	0	0
Sameness	0	11	11
Both Approaches	1	4	5
Total	4	17	

Table 5.2. Female United States Supreme Court Justices' Approach to Constructing Gender in Opinions and Gender Distinction advanced in Votes in United States Supreme Court Cases under Study, 1981-2001.

Approach to Constructing Gender in Opinions	Gender Distinction Advanced in Votes	
	Difference	Sameness
No Approaches	O'Connor*: *Johnson v. Transportation Agency* O'Connor*: *Miller v. Albright*	
Sameness		O'Connor*: *MUW v. Hogan* Ginsburg*: *U.S. v. Virginia* O'Connor: *U.S. v. Virginia*
Both Approaches		Ginsburg*: *Miller v. Albright*

* Denotes opinion author.

Table 5.3. Number of Persons Contacted and Each Type of Response, by Interviewee Category.

Interviewee Category	Contacted	Accepted (percent of contacted)	Declined (percent of contacted)	No Response (percent of contacted)
Supreme Court Justices	8	0 (0)	3 (37.5)	5 (62.5)
Supreme Court Law Clerks	278	47 (16.9)	91 (32.7)	140 (50.4)
Litigants	41	23 (56.1)	5 (12.2)	13 (31.7)
Amici	27	9 (33.3)	9 (33.3)	9 (33.3)
Legal Experts	10	5 (50)	2 (20)	3 (30)
Total	364	82 (22.5)	111 (30.5)	169 (46.4)

Table 5.4. Number of Persons Interviewed, by Interviewee Category.

Interviewee Category	Number Accepted (percent of interviewees)
Law Clerks	47 (57.3)
Litigants	23 (28.0)
Amici	9 (11)
Legal Experts	5 (6.1)
Total	82

Table 5.5. Number of United States Supreme Court Law Clerks Contacted and Each Type of Response, by Justice's Status.

Justice's Status	Number of Law Clerks Contacted	Accepted (percent contacted)	Declined (percent contacted)	No Response (percent contacted)
Deceased	99	27 (27.3)	26 (26.3)	46 (46.5)
Retired	90	13 (14.4)	27 (30)	50 (55.6)
Sitting	89	7 (7.9)	38 (42.7)	44 (49.4)
Total	278	47 (16.9)	91 (32.7)	140 (50.4)

Table 5.6. Number of Litigants and Amici Contacted and Each Type of Response, by Case.

Case	Contacted	Accepted	Declined	No Response
Mississippi University for Women v. Hogan (1982)	7	5	1	1
Meritor Savings Bank v. Vinson (1986)	6	2	1	3
Johnson v. Transportation Agency (1987)	7	2	2	3
United Auto Workers v. Johnson Controls (1991)	11	5	3	3
J.E.B. v. Alabama (1994)	4	3	1	0
United States v. Virginia (1996)	17	10	1	6
Miller v. Albright (1998)	6	1	1	4
Tuan Anh Nguyen v. Immigration and Naturalization Service (2001)	10	4	4	2
Total	68	32	14	22

CHAPTER 6: THE INFLUENCE OF IDEOLOGY, PERSONAL EXPERIENCES, AND RELATIONSHIPS ON MALE JUSTICES' BEHAVIOR

6.1 INTRODUCTION

When Justice O'Connor joined the Supreme Court in 1981, the male justices knew this day would come. A couple years prior, in anticipation of receiving a female justice, they dropped the "Mr." in the Mr. Justice that was their customary greeting to one another (Biskupic 2005: 101). Privately, they wondered if O'Connor was qualified, but Justice Rehnquist, her old friend from law school, reassured them of her qualifications (Biskupic 2005: 100).

Despite their reservations, the eight male justices welcomed O'Connor to the Court, treating her as one of their own and helping her acclimate (Interview 36, 69). Though O'Connor received a lot of publicity outside the Supreme Court, inside it, her sex was not particularly salient and it was paid no attention (Interview 28, 62, 35, 73). It did not take long for the other justices to realize that O'Connor was qualified and would be a good justice (Interview 28).

If the first question scholars and journalists asked after Justice O'Connor joined the Court was whether her sex affected her judging, the second question was whether she influenced how her male colleagues decided cases. Indeed, some scholars argue that their support for sex discrimination claims increased after her arrival (O'Connor and Segal 1990; Palmer 2002). In chapter four, the quantitative analysis revealed that serving with female justices had a significant influence on how male justices constructed gender and voted in gender classification cases. However, gender had only a partial panel effect. While male justices were more likely to advance a sameness approach in their opinions, they did the opposite in their votes and were more likely to further a difference distinction.

In this chapter, I employ qualitative methods to examine whether female justices altered their male colleagues' behavior. I do not find evidence that Justice O'Connor or Justice Ginsburg influenced the ways in which their male colleagues constructed gender or voted in gender classification cases. Instead, I argue that male justices' decision making was largely driven by their ideologies, personal experiences, and relationships, but within the confines of the law and the role of the Court in the political system.

At first glance, it appears that the results from the quantitative and qualitative analyses contradict one another. However, they do not necessarily conflict. Male justices furthered a difference distinction in their votes when there were more female justices on the bench, demonstrating that the panel effect of gender was not particularly strong. While the quantitative analysis revealed the limited impact of female justices on their male colleagues' behavior, so too did the qualitative analysis.

With respect to the ways in which male justices constructed gender in their opinions, the increased likelihood of adopting a sameness approach when serving with female justices could instead be a correlation. Female justices did not contribute to the development of their male colleagues' egalitarian attitudes; rather, male justices' ideologies, personal experiences, and relationships did. By the time Justice O'Connor joined the Court in 1981 and Justice Ginsburg in 1993, male justices' gender attitudes were already formed, or if they were not, they evolved as a result of their personal experiences and relationships.

This chapter proceeds as follows: I begin with a discussion of the research question and analytic goals, and then move on to discuss the theories as to why gender could have a panel effect and my hypotheses. Next, I discuss the case selection and the cases under study before discussing my findings. I identify some reasons as to why gender did not have a panel effect and

discuss the factors that shaped male justices' decision making in gender classification cases. I follow that with an analysis of their behavior in their opinions and votes in the cases under study and conclude with some implications of this research.

6.2 RESEARCH QUESTION AND ANALYTIC GOALS

Does serving with a female justice alter male justices' behavior? The quantitative analysis demonstrated that when there were more women on the Court, justices were more likely to advance a sameness approach versus a difference approach in their opinions. However, gender did not always have its anticipated panel effect on male justices' behavior. When there were more female justices on the Supreme Court, male justices were more likely to treat women and men differently in their votes.

This chapter seeks to determine whether female justices' presence on the Court influenced male justices' behavior, and one of the goals of this small-N analysis is to identify the conditions under which it did. Table 6.1 compares the number of times male and female justices advanced each type of approach to constructing gender in their opinions and each type of gender distinction in their votes.

< insert Table 6.1 here >

Like the female justices, male justices most frequently treated women and men the same in their opinions and votes, doing so 54 times. This consistency across opinions and votes is not surprising; if justices construct women and men as the same, they likely believe that rights and opportunities should also be equally extended. However, interestingly, sometimes justices advanced a sameness approach in their opinions but then cast a difference vote, which is what Justice Scalia and Justice Thomas did in *J.E.B. v. Alabama* in 1994. Here, justices were faced with the question of whether lawyers could strike potential jurors from a jury on account of sex.

Scalia and Thomas reasoned that since all potential jurors were subject to peremptory challenges[60] on the basis of sex, then lawyers could use sex to justify their decision to strike potential jurors. In other words, all jurors had an equal opportunity of getting struck from a jury, so peremptory challenges on the basis of sex did not violate the equal protection clause.

Compared to female justices, male justice were more likely to reinforce gender differences in their opinions and votes. In 7 instances, male justices furthered only a difference approach in their opinions, and in 42 instances, male justices advanced a difference distinction when casting their votes. By contrast, female justices did not construct only gender differences in their opinions, and they reinforced gender differences in their votes four times.

Unlike female justices, when male justices advanced both approaches to constructing gender in their opinions, they were split as to whether they granted the same or differential treatment to women and men in their votes. Whereas female justices advanced a sameness distinction in four of their votes, male justices' votes were divided. Though male justices acknowledged ways in which women and men were both the same *and* different, some were still reluctant to grant the same legal treatment.

When male justices did not construct gender in their opinions, they tended to reinforce differences in their votes, doing so 25 times compared to 19. It appears that male justices were reluctant to mention only gender differences in their opinions, which they did only seven times and instead sought to justify differential treatment with some other reason. For instance, those in the minority in *Mississippi University for Women v. Hogan* (1982) did not think the nursing school violated the equal protection clause by admitting only women. Writing for the minority, Justice Powell did not mention gender and instead discussed the educational value of single-sex schools.

[60] Peremptory challenges allow attorneys to dismiss potential jurors without providing a reason.

Sometimes when male justices did not construct gender in their opinions, they voted to extend the same legal treatment to women and men. This pattern was common in cases involving private clubs seeking to restrict membership to men. In *Board of Directors of Rotary International v. Rotary Club of Duarte* (1987) and *New York State Club Association v. City of New York* (1988), male justices concluded that such membership policies were unconstitutional. However, instead of discussing gender, they reasoned that private clubs' exclusionary policy did not fall under the purview of freedom of association and first amendment rights.

Gender had a panel effect on male justices' behavior in some cases but not others. In addition to determining when it did and did not have a panel effect, the second goal of this small-N analysis is to identify why the panel effect of gender occurred. In other words, I aim to identify the mechanisms by which the presence of female justices altered their male colleagues' behavior.

6.3 CASE SELECTION AND CASES UNDER STUDY

6.3.1 Panel Effect in Judicial Opinions

In order to explain when and why gender had a panel effect on judicial behavior, I examine male justices' approaches to constructing gender in their opinions and the gender distinctions they advanced when voting in gender classification cases. To identify under what conditions gender had a panel effect on opinion writing and when it did, why it did, I examine four Supreme Court cases. In two of the cases under study, most male justices furthered a sameness approach in their opinions, but in the other two, only some did. Table 6.2 displays each approach to constructing gender advanced by most male justices, some male justices, and the female justices in each Supreme Court case under study.

< insert Table 6.2 here >

I selected the following cases under study, *Mississippi University for Women v. Hogan* (1982), *Meritor Savings Bank v. Vinson* (1986), *United States v. Virginia* (1996), and *Miller v. Albright* (1998), in order to obtain variation in the expected outcome. In *Vinson* and *Virginia*, most male justices constructed women and men the same in their opinions. By contrast, only some male justices advanced a sameness approach in their opinions in *Hogan* and *Miller*. Selecting cases in which most or some male justices promoted a sameness approach enables me to identify when gender had a panel effect on male justices' behavior and then why. In other words, under what conditions did most male justices advance a sameness approach, and when they did, why did they do so?

I also selected cases in which the opinions were written by both sexes. Given that Justice O'Connor and Justice Ginsburg wrote an opinion in approximately half the cases they adjudicated, which is higher than the male justices, it is possible that female justices had the capacity to shape their male colleagues' behavior only when they wrote the opinion. As such, selecting opinions written by female and male justices enables me to assess whether the panel effect of gender is contingent upon opinion authorship.

Justice O'Connor and Justice Ginsburg promoted a sameness approach in the opinions they wrote in two of the cases under study. Four male justices joined Justice O'Connor's majority opinion in *Hogan*, a case involving a man who applied for admission to the Mississippi University for Women's School of Nursing. Joe Hogan was a registered nurse who sought to return to school and earn his baccalaureate degree, but he was denied on account of sex. A divided Court held that the school's admissions policy violated the equal protection clause of the 14th amendment.

In *Virginia*, six male justices signed Justice Ginsburg's opinion. As discussed in chapter five, Virginia Military Institute (VMI) had a male-only enrollment policy, believing that admitting women would destroy its curriculum and deny to men a unique educational opportunity. A majority of the Court rejected this argument and held that VMI's male-only enrollment policy violated the equal protection clause.

Male justices wrote the opinions in the other two Supreme Court cases. In *Meritor Savings Bank v. Vinson* (1986), a case concerning sexual harassment, Justice Rehnquist advanced a sameness approach when writing the majority opinion. In 1974, Mechelle Vinson began working at Meritor Savings Bank, under the supervision of then branch manager Sidney Taylor (*Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)). In the four years that Vinson worked at the bank, she obtained a series of promotions, from teller-trainee to assistant branch manager, all based on merit (*Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)). In November of 1978, Vinson was dismissed for excessive use of sick leave, and she subsequently filed a discrimination claim against Taylor and the bank. Vinson asserted that Taylor sexually harassed her during her four year tenure and that this constituted sex discrimination under Title VII of the Civil Rights Act, and a unanimous Court agreed.

In *Miller v. Albright* (1998), Justice Breyer and Justice Souter were the only male justices who constructed women and men as the same in their opinions. As discussed in the previous chapter, Lorelyn Penero Miller's application for American citizenship was rejected because her citizen father, Charlie Miller, did not fulfill the requirement of establishing paternity before her 18th birthday. She filed suit, claiming that a provision of the Immigration and Nationality Act (INA) that imposed more requirements for unwed fathers' as opposed to unwed mothers to transmit their citizenship violated the 14th amendment.

6.3.2 Panel Effect in Judicial Votes

To further examine when and why gender had a panel effect on judicial behavior, I examine why male justices' votes reinforced gender differences in some cases and not others. The results from chapter four demonstrated that male justices were more likely to cast votes treating women and men differently when there were more female justices on the Court, and this is an anomalous outcome. Rather, I expected male justices to be more likely to provide women and men with the same rights and opportunities when serving with female justices. In this second part of this small-N analysis, I seek to identify the factors that strengthen or dilute the panel effect of serving with a female justice.

To do so, I examine *United Automobile Workers v. Johnson Controls* (1991), *J.E.B. v. Alabama* (1994), and *Tuan Anh Nguyen v. Immigration and Naturalization Service* (2001). Using the same case selection strategy employed in the examination of male justices' approaches to constructing gender in their opinions, I selected cases containing variation in the male justices' votes. In one case under study, all male justices furthered a sameness distinction, but in the other cases, only some of them treated women and men the same. This variation enables me to identify the mechanism through which gender had a panel effect, or alternatively, the factors preventing female justices from affecting their male colleagues' votes.

All cases under study were adjudicated when there was at least one female justice on the Court, and female justices voted to treat women and men the same in each case. Table 6.3 displays the Supreme Court cases under study and the gender distinction advanced by most male justices, some male justices, and the female justices in each case.

< insert Table 6.3 here >

In *United Automobile Workers v. Johnson Controls*, a unanimous Court found Johnson Controls in violation of Title VII of the Civil Rights Act. Johnson Controls manufactures batteries, and employees working in battery manufacturing jobs are at risk of lead exposure. This carries with it a variety of health risks, one of which is possible harm to a fetus carried by a pregnant employee. Until 1982, Johnson Controls allowed women to work in battery manufacturing jobs, but it required them to sign a waiver certifying that they were informed of the risks associated with lead exposure and pregnancy. However, after eight women became pregnant and were found to have excessive lead levels, Johnson Controls began prohibiting women from working in jobs involving lead exposure. Three employees—Mary Craig who was sterilized to keep her job, Elsie Nason who transferred to a lower paying job, and Donald Penney who was denied a leave of absence because he wanted to become a father[61]—filed suit and claimed that Johnson Controls' fetal protection policy violated Title VII of the Civil Rights Act.

In *J.E.B. v. Alabama*, a case concerning peremptory challenges on the basis of sex in jury selection, four male justices—Blackmun, Souter, Stevens, Kennedy—advanced a sameness distinction in their votes, while three male justices—Scalia, Rehnquist, Thomas—forwarded a difference one. On behalf of the mother of a minor child, the state of Alabama sued petitioner J.E.B. for paternity and child support. During jury selection, the state used its peremptory strikes to remove male jurors, believing that female jurors would be more sympathetic to the plight of a single mother and young child. The resulting jury was all-female, but before it was empaneled, J.E.B. filed a challenge, claiming that using peremptory strikes to eliminate male jurors violated the equal protection clause of the 14th amendment. The district court rejected the claim and empaneled the jury, which found for the state. A majority of the Court, including Justice

[61] Penney was a plaintiff because research suggested that lead exposure was detrimental to men's reproductive health as well as women's (*United Auto Workers v. Johnson Controls*, 499 U.S. 187 (1991)).

O'Connor and Justice Ginsburg, held unconstitutional peremptory challenges on the basis of sex.

In the last gender classification case the Supreme Court considered, five male justices voted to uphold a provision of the Immigration and Naturalization Act that imposed additional requirements on unwed fathers seeking to transmit their citizenship to children born abroad in *Tuan Anh Nguyen v. Immigration and Naturalization Service*. By contrast, two male justices joined both female justices to strike it down and grant women and men the same legal treatment.

Tuan Anh Nguyen was born in Vietnam to a Vietnamese mother and American father, Joseph Boulais. The two never married, and Nguyen's mother left him after his birth. He lived with the family of Boulais's new girlfriend in Vietnam until the age of six when Nguyen joined his father in Texas and was granted permanent resident status. At the age of 22, Nguyen pled guilty to child sexual assault and was sentenced to 16 years in prison. After serving for three years, the INS initiated proceedings to deport him to Vietnam.

In an effort to prevent Nguyen's deportation, Boulais applied for citizenship for his son but was denied because he did not meet all the requirements for transmitting his citizenship. Unwed mothers transmitted their citizenship simply by virtue of giving birth, but unwed fathers had to satisfy four requirements, including establishing a blood relationship and agreeing to provide financial support. The logic was rooted in the assumption that mothers, but not fathers, were more likely to have a relationship with their child. Nguyen and Boulais challenged the INS provision, claiming that it violated the equal protection clause, but those in the majority disagreed and upheld the gender classification.

6.4 THEORY AND HYPOTHESES

To explain when and why gender had a panel effect on male justices' behavior in United States Supreme Court gender classification cases, I draw on the literatures in gender politics and judicial behavior. The conditions under which gender had a panel effect could depend upon male justices' ideologies and personal relationships, interest group pressure, or characteristics of the case. The mechanisms by which male justices alter their behavior when serving with a female justice could be due to direct or indirect influences, or strategic reasons.

6.4.1 When Gender had a Panel Effect

a) Conservative Ideologies

A substantial body of research contends that judicial behavior is a product of justices' ideological attitudes and values (Segal and Spaeth 1993), and the quantitative analysis demonstrated that there were ideological differences in how justices constructed gender in their opinions and how they voted in gender classification cases. As such, the conditions under which gender had a panel effect could depend upon the ideological leanings of the male justices. In other words, serving with a female justice may have no impact on male justices because they harbor conservative ideologies that insulate them from external influences.

H1: Gender does not have a panel effect on judicial behavior when a majority of the male justices have conservative ideologies.

b) Personal Relationships

Few scholars examine the effect of personal relationships on judicial decision making, but the influence that male justices' daughters may have on their behavior cannot be overlooked. The ways in which male justices construct gender in their opinions and vote in gender classification cases could result not from serving with a female justice but from their daughters' influence instead. Glynn and Sen (2014) examine gender cases adjudicated in the federal

appellate courts from 1996 to 2002 and find that male judges with at least one daughter are more likely to vote in a feminist direction. They theorize that having a daughter produces a "learning" effect, meaning that male judges are compelled to learn about issues they may not have otherwise considered, such as Title IX,[62] pregnancy discrimination, or reproductive rights (Glynn and Sen 2014: 15). Male judges who have daughters may acquire secondhand experience of the challenges women face, and as a result, have an incentive in liberalizing discriminatory laws (Glynn and Sen 2014: 15).

H2: The majority of male justices are not affected by their female colleagues because their gender attitudes are instead shaped by their daughters' influence.

c) Interest Group Pressure

Supreme Court justices respond to various institutional constraints in the political environment, one of which is interest group pressure (Collins 2004; Corley 2008). Male justices may seek to maintain the Court's institutional legitimacy and preempt interest groups from lobbying another branch of government if they disagree with a judicial ruling, so gender may have no panel effect on their behavior. The institutional constraints male justices confront may supersede any influence of serving with a female justice and compel them to reinforce gender differences in their opinions and votes. Oftentimes, justices use interest group support to gauge public support and how a decision may be received (Collins 2004). Justices care about the Court's reputation and public image, and they strive to avoid issuing too many unpopular decisions in order to ward off negative attention that could harm their implicit authority (Stimson, Mackuen, Erikson 1995: 555; Casillas, Enns, Wohlfarth 2010). As such, gender may have an unexpected panel effect on male justices' behavior and this could be why they still cast votes treating women and men differently even when serving with a female justice.

[62] Title IX prohibits sex discrimination in any federally funded school or activity.

H3: There is no panel effect of gender on male justices' behavior when interest groups advocate for gender differences.

d) Characteristics of the Case

Due to the content of the case, gender could have a panel effect in cases involving reproductive differences between women and men. Drawing on the informational accounts theory, male justices may believe their female colleagues acquire particular insights and information based upon their personal and professional experiences as women (Gryski, Main, Dixon 1986; Peresie 2005; Boyd, Epstein, Martin 2010). As such, they may believe that their female colleagues are better qualified to adjudicate certain types of gender classification cases and have more expertise in cases concerning reproductive differences than they do. As a result, gender may have a panel effect because male justices heed the advice of their female colleagues or follow their lead in such cases.

H4: Gender has a panel effect in cases involving reproductive differences between women and men.

6.4.2 Why Gender had a Panel Effect

a) Direct Influence

One of the reasons why gender could have a panel effect on male justices' behavior is because of a female justice's direct influence. As stated above, male justices might think that their female colleagues have more expertise in gender classification cases than they do. Due to their personal and professional experiences as women, female justices may be perceived as having unique insight and knowledge that they can then draw upon in gender classification cases (Gryski, Main, Dixon 1986; Peresie 2005; Boyd, Epstein, Martin 2010). For instance, female

justices may have experienced sex discrimination and therefore understand some of the challenges women may encounter in the workplace.

Because male justices may think female justices are more knowledgeable in cases involving gender classifications than they are, they might accept their advice or follow their lead. Believing that female justices are well versed in such cases, male justices may trust and value their judgment. As a result, the panel effect of gender could be due to female justices' direct influence on their male colleagues' behavior, inducing them to advance a sameness approach in their opinions.

H1: Gender has a panel effect on judicial behavior because the majority of male justices solicit the advice of their female colleagues or follow their lead.

b) Indirect Influence

Another possibility as to why gender has a panel effect could be due to female justices' indirect influence on their male colleagues' behavior. Due to the exposure of serving with a female justice and seeing that she is just as capable and competent as men, male justices may come to realize that one's abilities and intellectual capacities are not governed by sex, thereby developing egalitarian attitudes.

H2: Male justices acquire egalitarian attitudes and alter their behavior because they are serving with a female justice.

c) Strategic Behavior

While the previous reasons as to why gender has a panel effect presume that male justices' behavior is sincere, this one considers the possibility that it is not. Given that justices engage in strategic behavior in an effort to protect the Court's institutional legitimacy or to further their policy agenda (Epstein and Knight 1998), it is possible that male justices also

behave strategically when serving with a female justice. They may be compelled to alter their behavior in order to protect their reputations and not appear sexist.

H3: Gender has a panel effect on male justices because they engage in strategic behavior to protect their reputations.

6.5 RESULTS: THE ABSENCE OF A PANEL EFFECT

Did female justices shape the ways in which their male colleagues constructed gender in their opinions and voted in gender classification cases, and if they did, why did they? Interview data and archival research[63] reveal that female justices did not directly or indirectly alter male justices' behavior. In the following section, I evaluate my proposed hypotheses predicting when gender had a panel effect and why.

6.5.1 Did Gender have a Panel Effect?

I hypothesized that the panel effect of gender would be contingent upon a host of factors—male justices' ideologies and personal relationships, interest group pressure, and characteristics of the case. However, there is no evidence to suggest that, under any circumstance, female justices altered their male colleagues' behavior. Though a number of interviewees indicated that Justice O'Connor and Justice Ginsburg influenced their male colleagues, in terms of affecting the conference deliberations and their attitudes on gender equality (Interview 14, 46, 252, 165, 36, 44, 124, 420), when pressed, they struggled to think of specific examples. The following type of response was not uncommon: "I can't point to any examples, but...I have no doubt. I mean, can I prove it? I mean, obviously I wasn't there in the deliberations, but you know, I have no doubt" (Interview 135).

Some surmised that the ways in which female justices influenced their male colleagues was by sharing their personal experiences with sex discrimination. For instance, interviewee 70

[63] See chapter five for a discussion of the data and methods employed.

said that O'Connor "had a very understated but clear way of saying 'This has been my experience. This happened. This happens.'" Another said "...it wouldn't surprise me if people were like 'let's see what the girl has to say'" (Interview 20).

However, other interviewees were skeptical and did not think female justices had any impact on the male justices (Interview 374, 62). Some offered that if their presence had any effect, it would be by virtue of demonstrating that women were just as capable of doing the same work as men (Interview 69, 262). Even though several were certain that female justices made some sort of difference, none thought they affected how cases were decided, even ones involving gender classifications (Interview 147, 193, 135, 44). A common refrain was that female justices were influential in the decision making process, but not because they were women. As interviewee 243 stated of Justice O'Connor: "I just don't think it's fair to say she played a role because of her status as a woman or her experiences as a woman or that her male colleagues thought of issues of gender differently as a result of her or so much that she changed the balance of power."

6.5.2 Why Gender did not have a Panel Effect

There is no evidence to suggest that female justices had a direct or indirect influence on their male colleagues' behavior. They did not attempt to persuade their male colleagues' decisions *as women*, meaning by appealing to their personal and professional experiences resulting from their sex. It is unlikely that Justice O'Connor attempted to influence her male colleagues by offering advice or discussing her experiences with sex discrimination. When she arrived in 1981, she was a new justice, and new justices tend to keep a low profile during the first few years (Interview 13). Plus, by the time Ginsburg became a justice, the other male

justices were already used to serving with a woman, and the novelty, if any, had worn off (Interview 135, 193).

One proposed theory as to why gender has a panel effect is that male justices believe their female colleagues harbor unique information and insight given their personal experiences as women, thus heeding their advice or following their lead. However, it is unlikely that the male justices would have felt ill-equipped and unqualified to decide gender classification cases. Table 6.4 displays each male justice and the number of gender classification cases each one adjudicated prior to the arrival of Justice O'Connor in 1981 and Justice Ginsburg in 1993.

< insert Table 6.4 >

By the time Justice O'Connor arrived in 1981, each of her colleagues adjudicated nearly every gender classification case the Court ever considered during the years of this study. Even Justice Stevens, who did not join the Court until 1975, decided 20 cases. By 1981, all eight had given a great deal of thought to gender roles, stereotypes, and equality, and they had an established record on gender classification cases. As such, it is unlikely that any of these issues would have been new to the male justices once Justice O'Connor joined the Court (Interview 70).

Moreover, given that Supreme Court justices control their docket, it is unlikely that they would have granted certiorari to so many gender classification cases in the 1970s if they thought they were unqualified to decide them. As such, it is doubtful that they ever thought they did not have any expertise in this area. Or if they did, they would have been experts by 1981.

Similarly, by 1993 when Justice Ginsburg joined the bench, Justices Blackmun, Rehnquist, and Stevens had already adjudicated an overwhelming majority of the gender classification cases the Court had considered since 1971. Of the 50 cases under study, Blackmun

was involved in 45, Rehnquist adjudicated 44, and Stevens decided 32 of them. As such, given that Ginsburg litigated a number of gender classification cases in the 1970s, she might have already influenced the male justices because of her advocacy efforts and not as a justice (Interview 35). Three of the four remaining justices—Kennedy, Scalia, Thomas—were circuit court judges for the United States Courts of Appeals prior to their appointment to the Supreme Court and likely confronted cases involving gender issues there. They likely gave a great deal of thought to gender roles and equality, thereby establishing a record and developing an expertise.

If Justice O'Connor and/or Justice Ginsburg tried to influence their male colleagues' decision making, they likely invoked legal arguments. Male justices were unlikely to be persuaded by appeals to personal experiences, so female justices' ability to persuade them depended on their ability to make good, persuasive legal arguments using the law, the facts of the case, and precedent (Interview 37, 177, 254). As such, any influence they exerted on their male colleagues was likely due to good opinion writing.

a) Ideology

If female justices did not affect their male colleagues' decision making in gender classification cases, why did male justices advance a sameness approach in their opinions, and why did they vote to treat women and men differently? As the quantitative analysis suggested, judging is driven by a combination of justices' gender attitudes and ideologies, and the qualitative analysis reinforces these findings, demonstrating that judicial behavior is a function of justices' ideologies, personal experiences, and relationships.

There is no evidence suggesting that female justices had an indirect influence on male justices' behavior. I hypothesized that serving with a female justice would help cultivate egalitarian attitudes, but Justice O'Connor and Justice Ginsburg had little influence on their male

colleagues' thoughts about gender roles and gender equality. One reason is because many already harbored egalitarian attitudes (Interview 37, 51, 124, 70, 28, 165, 69). By the time Justice O'Connor arrived in 1981 and Justice Ginsburg in 1993, male justices' thinking about gender had evolved and they already established their views on the topic (Interview 177). For Justice Marshall, for instance, opposing sex discrimination was "part and parcel a larger philosophy of equality within society" (Interview 52). To him, there was no difference between race discrimination and sex discrimination because using immutable characteristics as a basis for discrimination was contrary to his worldview and commitment to justice and equality (Interview 37, 51, 98). As such, when confronting a gender case, it was obvious that he was going to support gender equality, something he would do even in the absence of Justice O'Connor (Interview 37, 51).

Likewise, support for gender equality was a part of Justice Brennan's commitment to equality (Interview 14, 73). As a fair-minded and empathetic person, supporting women's rights was natural and engrained (Interview 14). Justice Stevens and Justice Breyer were also similarly described as people for whom gender equality was a part of their worldviews and broader commitments to equality (Interview 177, 135, 193). Justice White was also receptive to women's rights by the time O'Connor joined the Court, and even though Justice Powell believed that there really were sex differences between women and men, he was committed to formal equality (Interview 69).

Moreover, by the time justices get to the Supreme Court, they are fully formed human beings with fully formed opinions (Interview 165, 374). When Justice O'Connor joined the Court, the average age of the other eight justices was 69 years old, and when Justice Ginsburg joined the Court in 1993, the average age of the seven male justices was 63 years old. Justices

are not impressionable people, and it is unlikely that they attained egalitarian attitudes simply by serving with female justices. It is also unlikely that either female justice would have had much of an influence even had she tried.

b) Personal Experiences

Male justices were not necessarily rigid in their gender attitudes and support for gender equality, but it is unlikely that their views changed simply from serving with Justice O'Connor or Justice Ginsburg. While some male justices' egalitarian attitudes resulted from their ideologies and worldviews, others were a product of their personal experiences. As a number of interviewees stated, justices could not help but to bring their life experiences to bear when deciding cases (Interview 262, 37, 35, 374).

Some male justices had profound personal experiences that contributed to their support for gender equality and egalitarian attitudes. For instance, because of his experience as the Deputy Attorney General under the Kennedy administration, Justice White became a strong supporter of civil rights, which translated into his support for gender equality (Interview 124, 62). He worked for Robert Kennedy in the justice department and helped implement the Kennedy administration's agenda to advance racial equality (Interview 124, 62; Hutchinson 1998). Working with Kennedy was a formative experience for White, and his commitment to racial equality carried over into gender equality. Justice Breyer had a similar experience working for Edward Kennedy, another strong supporter of civil rights and women's rights, in the 1960s during the civil rights movement (Interview 165).

For Justice Marshall, who made a career of using the law to further racial equality, opposing sex discrimination came naturally. He was opposed to all forms of discrimination, and growing up as a black man, he knew what it was like to be told he could not do something

simply because of his skin color (Interview 52, 37, 21). Marshall also grew up in a family of strong women—his mom was a teacher, and his grandmother co-owned a grocery store with his grandfather (Davis and Clark 1992: 338)—so he was always "rooting for strong women to succeed" (Interview 37). Marshall's attitudes about gender equality were also shaped by the women with whom he worked. He saw the important contributions women made to the civil rights movement, and he saw the difficulty women had in securing employment, which compelled him to persuade the NAACP to hire female lawyers (Interview 20, 21; Clark and Davis 1992: 339).

c) Personal Relationships

Aside from their ideologies and personal experiences, male justices' gender attitudes and support for gender equality were shaped by their personal relationships. Specifically, some of the male justices' thoughts about gender equality evolved because of the influence of their wives and daughters (Interview 28).

Many interviewees pointed to the importance of Rehnquist's wife and two daughters on his attitudes on gender roles and equality (Interview 28, 51, 112, 193). His wife, Nan, was strong and self-confident, and he respected her a great deal (Interview 112). Rehnquist also encouraged his daughters Nancy and Janet to attend college and have professional careers, of which he was very supportive. Given his family's influence, Rehnquist "recognized and respected the talents of women and the need for them to have opportunities" (Interview 112), and his daughters' influences continued to have an effect on Rehnquist throughout his career.

Near the end of his tenure on the Court and perhaps due to Janet's influence, Rehnquist demonstrated an understanding of how gender roles limited one's rights and opportunities. A strong proponent of states' rights, he ruled in favor of the federal government and wrote the

majority opinion in 2003 in *Nevada Department of Human Resources v. Hibbs*. Here, a majority of the Court held that an employee could recover monetary damages in the event that an employer interferes with her/his right to take an unpaid leave authorized by the Family and Medical Leave Act (FMLA). Rehnquist wrote that "the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes" (*Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003)).

Justice Ginsburg surmised that Rehnquist's shift in thinking about gender roles and employment was due to his daughter Janet, who was recently divorced at the time (Greenhouse 2003; Bazelon 2009). Witnessing Janet's difficulties securing reliable child care for her daughters, Rehnquist likely became sensitized to the issues facing women trying to juggle careers and families, issues he would not have otherwise noticed (Bazelon 2009). Oftentimes, he left the Court early to pick up his granddaughters from school (Greenhouse 2003; Bazelon 2009).

For Justice Breyer, having a strong and successful wife as well as two daughters was very influential (Interview 243). His wife, Joanna, was a doctor who maintained her practice and did not move to Washington when Breyer joined the Court (Interview 512). Both valued one another's independence and pursuit of their respective careers, and having a wife with a professional career made Breyer sympathetic to women's rights claims with respect to employment (Interview 512). Furthermore, in his confirmation hearings, when asked about equal pay, Breyer mentioned his daughters: "I guess it is fairly obvious, isn't it, that you are not going to pay a woman less for doing the same job as a man? What is very easy to me is I think of Chloe and I think of Nell, and they are going to be in the workplace. And, my goodness, I should come

back and somebody should have to tell somebody that a woman is going to make less money for doing the same thing or is going to have some other onerous condition that a man would not have? I mean, you try to explain that to Chloe or to Nell or to any other woman in the workplace. There is no explanation. And I would think in 1994 that that is rather clear to people." (Breyer 1993: 127).

For other justices, having daughters had a direct influence on their gender attitudes. Justice Blackmun, for example, had a strong minded wife and three strong minded daughters who sensitized him to issues of gender equality (Interview 42). When he drafted *Roe*, he solicited his wife and daughters for their thoughts on abortion (Greenhouse 2005: 83). Blackmun's daughters likely had an indirect influence as well. As an example, he was deeply affected by his middle daughter Sally's experience with an unplanned pregnancy in college (Greenhouse 2005: 74-75). Abortion was not an option, so Sally dropped out of college and married her boyfriend, suffered a miscarriage, and later divorced. Though Sally went on to finish college and law school, marry, and have two daughters, witnessing this experience likely demonstrated to Blackmun how important reproductive control was to women's lives and opportunities.

Having three daughters also affected Justice Powell's thoughts about women's rights. A conservative and a traditionalist, he expected his daughters to forgo careers and be homemakers (Jeffries 1994: 502). In a letter to his oldest daughter, Jo, he wrote "You should be prepared to do some job in the world because all women will work more from now on, but your ultimate career, I hope, will be making a home. I am old fashioned enough to believe still that this is woman's highest calling" (Powell in Jeffries 1994: 502). Although all three daughters graduated from college, a career was viewed as a back-up plan in case they ever divorced, not a priority (Jeffries 1994: 204, 502). Nevertheless, Powell always supported their decisions, and he could see how

much the world had changed in terms of the opportunities available to women from the time his daughters were born to the time they became young women (Interview 69, Jeffries 1994: 204). As such, he was persuaded by the idea that the law could not tell women what they could or could not do (Interview 69).

Like Powell, Justice Brennan was also a traditionalist despite writing several opinions expanding women's rights and opportunities. His daughter Nancy also attended college, but Brennan and his wife expected her to forgo a career and have a family (Stern and Wermiel 2010: 315). Nancy, however, sought to do both, and after interning at the Smithsonian during the summer of 1968, she decided she wanted to work in museums (Stern and Wermiel 2010: 315). Her internship was an influential experience for her, but also for Justice Brennan. He picked her up every day and on their way home, Nancy talked about the women's movement. Years later she said she could see "he was making a mental shift in how he saw me" (Stern and Wermiel 2010: 316). Nancy's experiences enabled Brennan to see the world through her eyes and the obstacles she overcame (Interview 13).

Similarly, Justice White was influenced by his wife, Marion, and daughter, Nancy. The daughter of the president of the University of Colorado, Mrs. White also attended college, unusual for women in the 1930s and 1940s (Interview 124). She also served in World War II as a member of WAVES, Women Accepted for Volunteer Emergency Service, while White was in the Navy (Interview 124). Being equal partners in marriage contributed to a respect for women's rights, as did Nancy's influence (Interview 70, 124). Following in her father's athletic footsteps, Nancy was a talented field hockey player who earned a spot on the 1980 Olympic team. Born in the late 1950s, Nancy grew up in the pre-Title IX era, and White wanted her to have opportunities and not be restricted by her sex (Interview 70, 124).

To summarize, female justices did not affect the ways in which male justices constructed gender in their opinions or voted in gender classification cases. Instead, male justices' attitudes regarding gender and gender equality were driven by their ideologies, personal experiences, and relationships. These were the lenses through which they analyzed the facts of a case and interpreted the law, and hence whether they provided the same or different legal treatment to women and men in their opinions and votes.

6.6 ADVANCING A SAMENESS APPROACH IN JUDICIAL OPINIONS

This study seeks to determine when and why gender had a panel effect on judicial behavior in gender classification cases. To do so, it examines cases in which some male justices constructed women and men as the same in their opinions, *Mississippi University for Women v. Hogan* (1982) and *Miller v. Albright* (1998), and cases in which most male justices furthered a sameness approach in their opinions, *Meritor Savings Bank v. Vinson* (1986) and *United States v. Virginia* (1996). However, I did not find evidence that female justices affected the ways in which their male colleagues constructed gender. Rather, as this section demonstrates, male justices' approaches to constructing gender in their opinions were driven by their personal influences—ideologies, experiences, and relationships—as well as institutional factors, such as the facts of the case and their understanding of the role justices should play in the political process.

6.6.1 Mississippi University for Women v. Hogan

Evidence reveals that male justices' decision making in *Mississippi University for Women v. Hogan* resulted from their ideologies and personal experiences and not from serving with Justice O'Connor. In this case, a narrow majority of the Court furthered a sameness approach in its opinion and held that the Mississippi University for Women's School of Nursing violated the constitution by admitting only women. Though Justice O'Connor wrote for the

majority that included Brennan, Stevens, White, and Marshall, she did not have any effect on their decision to advance a sameness approach and find for Hogan (Interview 12, 384, 488, 13). Even in her absence, the other justices would have agreed with her assessment that "this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review" (*Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)). There is no evidence suggesting that she tried to persuade one of the justices from the minority, Powell, Burger, Rehnquist, or Blackmun, to join her opinion. Even had she tried, the justices are so independent that it is unlikely that they would have been persuaded (Interview 384).

Many of the justices constructed gender in a way that was consistent with their political ideologies (Interview 488, 507). Brennan, Stevens, and Marshall were firmly in the liberal bloc, and they were all ideologically opposed to sex discrimination, which was contrary to their overall commitment to advancing equality (Interview 52, 14, 73. 135). Justice Brennan, for instance, was influenced by his attitudes toward gender equality in this case, agreeing with O'Connor that sex discrimination reinforces gender stereotypes, regardless of whether it is against a woman or a man (Interview 35). Similarly, *Hogan* was an easy decision for Justice Marshall, and there was no question that he was going to vote against the state (Interview 20). He opposed the separate-but-equal doctrine, regardless of whether it applied to race or sex, and just as it was stigmatizing to say that blacks and whites could not learn together, it was also stigmatizing to say that women and men could not learn together (Interview 20).

As for the justices in the minority, Powell, Blackmun, Burger, and Rehnquist, it is unlikely that they disagreed with the way in which Justice O'Connor constructed gender in her

opinion. That was probably not the reason they did not sign onto her opinion. Rather, there were other factors influencing their decision to dissent.

Chief Justice Burger and Justice Rehnquist cast votes consistent with their conservative ideology and their tendency to side with the state (Interview 487, 488). However, Rehnquist's decision can also be explained by his understanding of what role the Court should play in the political process. He believed that justices should not determine the types of educational opportunities available in a state. To him, political institutions should decide whether to offer opportunities for coeducation and single-sex education, and then through the political process, people are free to decide which schools to attend (Interview 28).

As I discussed in the previous chapter, Justice Blackmun and Justice Powell did not view this case as a traditional sex discrimination case. They had a difficult time grasping the notion that men, not just women, could be victims of sex discrimination (Interview 12). For Justice Powell, however, this was a deeply personal case and he was likely influenced by his personal experiences. For one, he was a former school board attorney and was therefore not expected to vote against the school (Interview 486, 488). Moreover, the Powell family had a tradition of attending single-sex schools, and his personal experience likely infiltrated his decision making in *Hogan*. Powell attended Washington and Lee, which was all-male at the time, and all four of his children attended single-sex colleges (Jeffries 1994: 204-206, 209). In conference, Powell said that "All Powells have gone to single-sex schools...Perfectly legit…" (Blackmun box 359, folder 10). Clearly, he believed that single-sex schools were educationally valuable, which was reflected in his vote.

Justice O'Connor wrote the majority opinion in *Hogan* but exerted little influence on her male colleagues' decision making. Most of the justices' actions were consistent with their

ideologies, although Rehnquist felt institutionally constrained by his role as a justice and Powell drew on his personal experiences. In short, it is likely that the outcome would have remained the same even in O'Connor's absence.

6.6.2 Meritor Savings Bank v. Vinson

A unanimous Court found for Mechelle Vinson in *Meritor Savings Bank v. Vinson* in 1986. Writing for the majority, Justice Rehnquist declared that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex" (*Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)). He and four other male justices advanced a sameness approach in their opinions. Rehnquist wrote that "sexual harassment which creates a hostile or offensive environment for members of one sex is every bit as arbitrary barrier to sexual equality at the workplace" and that "it is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as a *condition to obtain employment or to maintain employment or to obtain promotions* falls within protection of Title VII" (*Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)).

Though the male justices' approach to constructing gender was likely influenced by their thoughts about gender, it is unlikely that Justice O'Connor had an impact (Interview 62, 52). To the justices, this was an easy case and it was clear to them that sexual harassment constituted sex discrimination (Interview 46, 69, 70). The facts of the case made it easy for justices to find for Vinson. For four years, she endured Taylor's many sexual advances, fondling, and rape. Justice Powell, for example, would have viewed this harassment as very bad behavior and easily recognized that it is an issue of gender equality when women must endure this as a condition of employment (Interview 69).

Three male justices—Marshall, Blackmun, Brennan—did not sign onto Rehnquist's opinion, but it was not because of how he constructed gender. Rather, it was due to a disagreement over employer liability. Those in the majority did not issue a ruling with respect to employer liability and declined to determine when employers could be held liable. However, those in the minority disagreed and wanted to rule on the issue, believing that employers should be held liable. Justice Marshall's views on gender equality were influential here, as he wanted to strengthen Title VII so it could be used as a "powerful tool to combat gender discrimination" (Interview 52).

Like *Hogan*, male justices likely would have signed onto Rehnquist's opinion and advanced a sameness approach even without Justice O'Connor. It is possible that her presence changed the tone and heightened some male justices' sensitivity to sexual harassment, but the outcome would have been the same without her (Interview 480). Moreover, that the ruling was unanimous suggests that persuading the male justices was not necessary (Interview 482). Given the facts of the case, it was clear to the male justices that sexual harassment constituted sex discrimination.

6.6.3 United States v. Virginia

In 1996, in *United States v. Virginia*, the Supreme Court again confronted the question of whether state-supported single-sex schools violated the equal protection clause. Justice Ginsburg wrote for the majority and advanced a sameness approach in her opinion, which was joined by six other justices.[64] She wrote, for example, that "state actors controlling gates to opportunity...may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females" (*United States v. Virginia*, 518 U.S. 515 (1996)). Though she

[64] Justice Thomas recused himself because his son was a VMI cadet at the time.

had the support of most male justices, it is unlikely that Justice Ginsburg, or even Justice O'Connor, influenced how most of them thought about gender in this case (Interview 165).

Instead, male justices were influenced by their own ideologies and the facts of the case (Interview 461, 165, 507, 459). For Stevens, Souter, and Breyer, their approach to constructing gender was consistent with their liberal ideologies and egalitarian values (Interview 459). Furthermore, for all the justices, the facts of the case made it easy for them to side with the federal government. VMI vehemently denied that its admissions policy was rooted in gender stereotypes, but its internal documents demonstrated otherwise, and as such, this was an easy case for the justices to resolve (Interview 165, 177). The school could have made a valid argument for restricting its enrollment to men, but it did not, and instead, its documents were rife with sexist stereotypes that compelled the justices to vote the way they did (Interview 165). It was apparent to the justices that VMI did not have a legitimate justification for restricting admission to men.

It is unlikely that Justice Ginsburg or Justice O'Connor compelled most male justices to advance a sameness approach in this case. However, it appears that Ginsburg probably altered Chief Justice Rehnquist's decision making. At conference, Rehnquist sided with Justice Scalia, but he switched sides and signed Ginsburg's opinion. One explanation is that Ginsburg wrote such a persuasive and powerful opinion that made it difficult for Rehnquist to dissent (Interview 516). Although Ginsburg was influential in this case, it was because she advanced convincing legal arguments and not because she appealed to her personal and professional experiences based on sex.

Justice Scalia was the lone dissenter in *Virginia*. Ideologically conservative and a traditionalist, he furthered a difference approach to constructing gender in his opinion. He had

very strong views in this case, and his opinion reflected his attitudes about women's place (Interview 258, 459). In it he wrote that "the tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat" (*United States v. Virginia*, 518 U.S. 515 (1996)).

Again, male justices' approaches to constructing gender were driven by their ideologies and the facts of the case in *Virginia*. Ginsburg arguably shaped Rehnquist's behavior, but it was due to her persuasive legal arguments and not any personal appeals.

6.6.4 Miller v. Albright

In 1998 in *Miller v. Albright*, justices faced the question of whether gender differences in the ability for unwed parents to pass their citizenship to their children born abroad violated the due process clause of the 5th amendment. Although a majority of the justices upheld the gender classification, they were split in four groups. The fractured Court suggests that each justice was firm in her/his position and that there were no attempts to persuade one another (Interview 193) or that any such attempts were unsuccessful. As such, it is unlikely that Justice O'Connor or Justice Ginsburg had any impact on the ways in which male justices constructed gender in their opinions.

Justice Stevens wrote for himself and Chief Justice Rehnquist, upholding the gender classification and advancing a difference approach in the opinion. Both concluded that the federal government had a legitimate interest in ensuring that children born abroad developed a relationship with their citizen parent and the United States. Stevens wrote that a "citizen mother, unlike the citizen father, certainly knows of her child's existence and typically will have custody of the child immediately after the birth. Such a child thus has the opportunity to develop ties with its citizen mother at an early age, and may even grow up in the United States if the mother

returns." (*Miller v. Albright*, 523 U.S. 420)). He went on to note that "biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands" (*Miller v. Albright*, 523 U.S. 420)).

The ways in which Rehnquist thought about gender were consistent with his conservative ideology. However, the ways in which Justice Stevens constructed gender in his opinion seemed contrary to his liberal ideology and egalitarian attitudes. In this case, however, Stevens was deeply affected by his personal experiences as a World War II veteran and the father of adopted children.

Based upon his military experience, Stevens thought that the gender classification was justifiable because he thought men in the military engaged in sexual activity without any intention of starting families (Interview 229). He wrote that "Given the size of the American military establishment that has been stationed in various parts of the world for the past half century, it is reasonable to assume that this case is not unusual...Congress had legitimate concerns about a class of children born abroad out of wedlock to alien mothers and to American servicemen who would not necessarily know about, or be known by, their children." (*Miller v. Albright*, 523 U.S. 420)). Stevens' approach to constructing gender reflected his belief that men in the military who have sexual relations do not want to be fathers. Furthermore, he believed that if a woman chose to bear a child, then she should assume the burdens of raising the child, and he did not want to impose on men the responsibilities of fatherhood (Interview 432). In short, Stevens thought that men would not be as committed to parenthood as women would and that therefore, unwed mothers should be advantaged with respect to transmitting citizenship.

Moreover, as the father of adopted children, Justice Stevens benefitted from policies favoring unwed mothers over unwed fathers. He was able to adopt his children because laws permitted unwed mothers to put their child up for adoption without the biological father's consent (Interview 512). From Stevens' perspective, unwed fathers abandon their children (Interview 516), and therefore, gender classifications that advantage unwed mothers are permissible.

Justice Scalia wrote for himself and Justice Thomas, and they were influenced by the facts of the case and the belief that the Court should have a minimal role in the political process and leave the issue up to the other branches of government to decide. Both maintained that the Court could not grant the relief Lorelyn was seeking, citizenship, so the case should be dismissed. Justice Scalia wrote that "I agree with the outcome of the case, but for a reason more fundamental than the one relied upon by Justice Stevens...The complaint must be dismissed because the Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress" (*Miller v. Albright*, 523 U.S. 420)).

O'Connor and Kennedy were also reluctant to rule on the constitutionality of the INA provision because they believed that Loreyln did not have standing.[65] O'Connor wrote that "a plaintiff cannot rest his claim to relief on the legal rights and interest of the third party" and that "although petitioner is clearly injured by the fact that she has been denied citizenship, the *discriminatory* impact of the provision falls on petitioner's father, Charlie Miller, who is no longer a party to this suit" (*Miller v. Albright*, 523 U.S. 420)).[66]

Justice Breyer, joined by Justice Ginsburg and Justice Souter, dissented and eliminated gender differences in his opinion. Breyer asked "What sense does it make to apply these latter

[65] A party has standing if s/he has been directly harmed by a law or action.
[66] Miller was wrongly dismissed from the case by the district court, which he did not appeal (Interview 475).

two conditions only to fathers and not to mothers in today's world—where paternity can readily be proved and where women and men both are likely to earn a living in the workplace?" (*Miller v. Albright*, 523 U.S. 420 (1998)). He also went on to note that "a mother or a father, knowing of a child's birth, may nonetheless fail to care for the child or even to acknowledge the child" and that "either men or women may be caretaker" or "either men or women may be 'breadwinners'" (*Miller v. Albright*, 523 U.S. 420 (1998)). Though Breyer and Souter furthered a sameness approach, it is doubtful, however, that Ginsburg was influential. Given their political ideologies and egalitarian attitudes, they likely would have arrived at this position without her.

To summarize, the ways in which male justices constructed gender in their opinions in *Hogan*, *Vinson*, *Virginia*, and *Miller* were largely driven by their ideologies, experiences, and relationships. Yet, despite these influences, they were also bound by the facts of the case and institutionally constrained by their roles as justices. Even though Justice O'Connor and Justice Ginsburg furthered a sameness approach in their opinions, there is no evidence suggesting that they altered their male colleagues' behavior by appealing to their personal and professional experiences as women.

6.7 ADVANCING A DIFFERENCE DISTINCTION IN JUDICIAL VOTES

This study also examines when and why gender had a panel effect on male justices' votes in gender classification cases. In particularly, it seeks to explain why male justices cast votes affirming gender differences even when serving with female justices. The following cases, *United Auto Workers v. Johnson Controls* (1991), *J.E.B. v. Alabama* (1994), and *Tuan Anh Nguyen v. Immigration and Naturalization Service* (2001), were selected in an effort to identify the conditions under which a panel effect occurs and when it did, why it did. In *UAW*, all male justices voted to treat women and men the same. By contrast, in *J.E.B.*, some male justices

furthered a sameness distinction, and in *Nguyen*, most male justices advanced a difference distinction. Like the previous analysis, I do not find evidence suggesting that female justices altered their male colleagues' voting behavior. Rather, male justices were influenced by their ideologies and personal experiences, and were constrained by the law and the role of the Court.

6.7.1 United Auto Workers v. Johnson Controls

Johnson Controls was a company that manufactured batteries, and it prohibited all women from working in jobs involving lead exposure because it potentially harmed fetal development. In 1991 in *United Auto Workers v. Johnson Controls*, a unanimous Court advanced a sameness distinction and held that employers could not discriminate on the basis of sex simply because of women's capacity to become pregnant. Writing for the majority, Justice Blackmun wrote that Johnson Controls' policy "explicitly discriminates against women on the basis of their sex" (*United Auto Workers v. Johnson Controls*, 499 U.S. 187 (1991)). Not only that, but the policy violated the Pregnancy Discrimination Act's amendment to Title VII. According to the PDA, "women who are either pregnant or potentially pregnant must be treated like others "similar in their ability ... to work." In other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job" (*United Auto Workers v. Johnson Controls*, 499 U.S. 187 (1991)).

While some male justices—Blackmun, Souter, Stevens, and Marshall—were likely influenced by their ideology and egalitarian attitudes (Interview 519), other male justices—Scalia, Rehnquist, White—may have felt constrained by the law and their role as justices. Regardless of their thoughts about fetal protection policies and women's employment decisions, some justices believed they should not write their personal preferences into law (Interview 135, 28, 112, 177). Simply put, the law was very clear; the PDA prohibits employers from

discriminating on the basis of pregnancy, and Johnson Controls was clearly violating it (Interview 519, 516). As Justice Scalia wrote in his concurring opinion: "...treating women differently "on the basis of pregnancy" constitutes discrimination "on the basis of sex," because Congress has unequivocally said so" (*United Auto Workers v. Johnson Controls*, 499 U.S. 187 (1991)).

Chief Justice Rehnquist was similarly constrained by the law and his role as a justice. One of his law clerks had reservations about ruling against Johnson Controls because it would subject companies to lawsuits, but Rehnquist said that making that decision was not the Court's job (Interview 112). As he put it, "the law is what the law is" and the PDA is very clear and must be followed (Interview 112).

Although all eight male justices voted to treat women and men the same, it was not because of the presence and influence of Justice O'Connor. Given that the Court was unanimous, she did not need to play the "woman card" and assert her influence by claiming that she had more knowledge in this area because of her personal experiences (Interview 519). Instead, male justices voted the way they did because of their ideologies and institutional constraints such as precedent and the role of justices in the political process.

6.7.2 J.E.B. v. Alabama

In 1994 in *J.E.B. v. Alabama*, the Court was asked to determine if the equal protection clause prohibited peremptory challenges on the basis of sex just as it prohibited peremptory challenges on the basis of race as determined in *Batson v. Kentucky*. Justice Blackmun, writing for the majority, believed that peremptory challenges on the basis of sex were rooted in gender stereotypes and harkened back to a time when women were considered too incompetent to serve on a jury. In his majority opinion, Justice Blackmun pointed out that "all persons, when granted

the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination" (*J.E.B. v. Alabama*, 511 U.S. 127 (1994)).

Each of the male justices were likely influenced by their ideologies (Interview 507), but those in the majority felt institutionally constrained by their interpretation of the constitution. For Blackmun, Souter, Stevens, and Kennedy, this was an easy case because the equal protection clause clearly established that sex discrimination was unconstitutional (Interview 135, 147). Since it was unconstitutional to strike potential jurors on the basis of race, it was also unconstitutional to strike them on account of sex (Interview 147).

For those in the minority—Scalia, Thomas, Rehnquist—it was not that they believed women were incapable of jury service. Rather, based upon their experiences in the legal profession, these justices knew that lawyers strike certain people from juries because they want to construct a jury favorable to their side. As Justice Scalia mentioned, "The pattern here, however, displays not a systemic sex-based animus but each side's desire to get a jury favorably disposed to its case" (*J.E.B. v. Alabama*, 511 U.S. 127 (1994)). He went on to state that whereas in the past "women were categorically excluded from juries because of doubt that they were competent; (today) women are stricken from juries by peremptory challenge because of doubt that they are well disposed to the striking party's case" (*J.E.B. v. Alabama*, 511 U.S. 127 (1994)). However, Scalia's logic also rests on the belief that there are gender differences between women and men that warrant the use of sex as a proxy for support, consistent with the minority's conservative ideologies.

While some male justices maintained gender differences in their votes in *J.E.B.* and others eliminated them, it was not because there was a panel effect of gender. Their votes would

have been the same even in the absence of Justice O'Connor and Justice Ginsburg (Interview 463). Instead, male justices' voting behavior can be attributed to their ideologies, experiences, and interpretation of the constitution.

6.7.3 Tuan Anh Nguyen v. Immigration and Naturalization Service

Three years after *Miller*, the Court again adjudicated the constitutionality of the provision governing the transmission of citizenship in the Immigration and Nationality Act (INA). In 2001 in *Tuan Anh Nguyen v. Immigration and Naturalization Service*, a divided Court ruled in favor of the federal government and upheld the gender classification favoring unwed mothers over unwed fathers. Here, most male justices furthered a difference distinction in their votes, while some male justices voted to treat women and men the same.

Justice Kennedy, joined by Stevens and Rehnquist, advocated differential treatment and wrote that birth provides "an opportunity for mother and child to develop a real, meaningful relationship" in his majority opinion (*Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001)). Further, he maintained that the provision was justifiable because "without an initial point of contact with the child by a father...there is no opportunity for father and child to begin a relationship" (*Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001)). Even though Kennedy was on the record as stating that the INA provision was unconstitutional in *Miller*, he switched sides in *Nguyen*. This was surprising because some interviewees believed that he would provide the 5th vote to strike down the gender classification (Interview 432, 503). Instead, he found for the federal government, which may have been because all his law clerks that term were conservative, and they influenced his vote in this case and other cases (Interview 229). Given that he is a moderate, Kennedy's vote could be explained by his ideology, or it could be a result of his personal relationships with his conservative clerks.

As I mentioned in a previous section, voting to uphold this gender classification is consistent with Rehnquist's conservative ideology and reluctance to intervene in matters he believes the elected branches of government should decide. Again, Justice Scalia and Justice Thomas maintained their belief that conferring citizenship is not a judicial power. In his concurring opinion, Scalia reiterated that "the Court lacks power to provide relief of the sort requested in this suit-namely, conferral of citizenship on a basis other than that prescribed by Congress" (*Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001)).

Again, Justice Stevens was affected by his experiences as an adoptive father and veteran in *Nguyen*. Like the others in the majority, he did not think that the INA provision was motivated by animus, and instead, the gender classification was rooted in reality (Interview 229, 503). In addition, given his military experience, he thought there were lots of American men, but not necessarily women, abroad in the military or traveling around the world who engaged in sexual activity with no interest or desire to form families (Interview 229). Even though Justice Stevens talked about the case at length with his clerks, he remained firm in his position. Due to the biological differences between women and men and his belief that men's sexual activity did not imply a desire for fatherhood, Justice Stevens held that the INA provision could impose requirements on unwed fathers' ability to transmit their citizenship not imposed upon unwed mothers.

There is no evidence that Justice O'Connor or Justice Ginsburg attempted to persuade Stevens to change his position. However, he was uncomfortable opposing both female justices, particularly Justice O'Connor (Interview 229). Because O'Connor was not only a female justice but also a moderate with strong feelings in the opposite direction, she inadvertently compelled

Stevens to reconsider his reasoning in a way that he would not have had he been opposed by Justice Kennedy, for example (Interview 229).

Consistent with their ideologies, Justice Breyer and Justice Souter, along with Justice Ginsburg, signed onto Justice O'Connor's dissenting opinion and advanced a sameness distinction. Breyer and Souter agreed that the "idea that a mother's presence at birth supplies adequate assurance of an opportunity to develop a relationship while a father's presence at birth does not would appear to rest only on an overbroad sex-based generalization" (*Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001)). Given that women and men are "similarly situated with respect to the "opportunity" for a relationship" (*Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001)), they invalidated the provision. It is unlikely, however, that O'Connor or Ginsburg had any impact on Breyer and Souter who believed that striking down the classification was a fair application of the existing precedent (Interview 229).

In the last gender classification case the Supreme Court considered, most male justices voted to maintain gender differences while only two advocated for the same treatment between women and men. Their voting behavior can be largely attributed to their ideologies, experiences, and relationships, as well as their interpretation of the law and their roles as justices. As in the other cases under study, it cannot be said that Justice O'Connor or Justice Ginsburg altered their male colleagues' voting behavior.

6.8 CONCLUSION

This chapter examined when and why gender had a panel effect on male justices' behavior. However, Justice O'Connor and Justice Ginsburg did not have a direct influence on the ways in which their male colleagues' constructed gender in their opinions or voted in gender classification cases. This finding calls into question the idea that gender has a panel effect on

judicial behavior, though there remains the potential for an indirect effect. However, that possibility is slim as many male justices harbored egalitarian attitudes and support for gender equality by the time O'Connor joined the Court in 1981 and Ginsburg in 1993.

I find that male justices' behavior in gender classification cases resulted from their ideologies, personal experiences, and relationships. Some male justices' gender attitudes were a product of their ideological attitudes and values, and hence shaped their approaches to constructing gender in their opinions and whether they voted to treat women and men the same or differently. Other male justices had profound personal experiences that contributed to their support for gender equality, while others were influenced by their personal relationships with their wives and daughters.

Even though male justices brought various aspects of their backgrounds to bear when adjudicating gender classification cases, some were also constrained by the law and the role they believe the Court should play in the political system. Many felt constrained by precedent, both the Court's and their own (Interview 12, 42, 24, 35, 73, 37, 13, 177, 36, 69). As one interviewee stated, "the constraints of the law...do not leave a lot of room for different approaches based on who is in the room or their gender" (Interview 165). Likewise, justices were constrained by their roles as justices and were careful not to act like legislators (Interview 135, 28, 112, 177). For instance, Chief Justice Rehnquist did not think justices should impose their own interpretations of the law and their policy views in their decisions (Interview 112). In his opinion, Rehnquist believed that the Court should interpret and apply the law, not fix laws, which was Congress's responsibility (Interview 112, 28).

In some ways, it appears that the results from the qualitative and quantitative analyses contradict one another. However, as I mentioned at the beginning of the chapter, the panel effect

of gender was only a partial one, so already it was not very strong. Together, the findings from both analyses suggest that the panel effect found in the quantitative analysis was spurious. It appears that Justice O'Connor's arrival coincided with the development of male justices' egalitarian attitudes. As opportunities for women expanded in the 1970s and as male justices' wives and daughters internalized the equal rights ideology of the women's movement, they directly and indirectly shaped male justices' attitudes about gender roles and gender equality. As such, by the time Justice O'Connor, and later Justice Ginsburg, joined the Court, male justices' gender attitudes were already well established, having been influenced by their family members or their personal experiences. In short, the gender composition of the Supreme Court is correlated with male justices' behavior but does not drive it.

That I did not find evidence of a panel effect of gender is not entirely surprising. Given that Supreme Court justices are idealized as apolitical, neutral actors who mechanically interpret and apply the law (Epstein and Kobylka 1992: 11; Tiller and Cross 2006: 518), they are supposed to be immune to any extralegal influences, even though they are not. Though interviewees speculated that justices' personal experiences affected their decisions and were confident that female justices made a difference in the Court, they were unsure of the details. This is not entirely surprising as nobody wants to suggest justices are externally influenced, even the justices themselves. Such little correspondence between the justices was preserved in the justices' papers that I combed through them twice to make sure I did not overlook anything that would provide evidence of a panel effect. Either gender truly did not have a panel effect, or it did and any evidence was not saved for public knowledge.

Moreover, given that justices are independent and unaccountable to a constituency, there is no incentive for them to justify their decisions, aside from what they write in their opinions.

The nature of their job is such that they do not need to explain themselves to anyone. They are beholden only to the law, and as long as they can justify their decisions using legal arguments, they need not provide any extralegal reasons for their decisions.

The culture of the Supreme Court may not allow gender to have a panel effect, and this has implications for how we think about the Court. For one, the lack of personal interaction among the justices, likely inhibits any opportunity for female justices to attempt to influence their male colleagues. A surprising aspect of the Supreme Court, even to the law clerks, was how little justices interacted with one another outside of conference and oral argument (Interview 12, 28, 37, 51, 62, 70, 177, 20, 35, 36, 42, 44, 52, 69, 98, 124). Most communication was done on paper in opinions and memos (Interview 12, 62, 177, 98), and it was surprising to see one justice in another justice's chambers (Interview 12, 42, 124). Justices interacted so infrequently that some had substantive conservations with another justice only once or twice a year (Toobin 2007: 48). In fact, a common refrain was that the Supreme Court operated like nine law firms (Interview 36, 42, 44, 124, 274).

This lack of interaction is contrary to our conceptualization of the Supreme Court. Aside from conference, which provides a limited opportunity for deliberation, justices do not sit around talking about the law and how to decide cases (Interview 339, 44, 98). In short, Court culture does not provide much opportunity for justices to influence one another. Simply put, gender may not have had a panel effect because female justices are not supposed to and had little opportunity to attempt to influence their male colleagues.

The nature of the Supreme Court and the role justices are meant to play in the political process also makes the panel effect of gender less likely. Justice O'Connor and Justice Ginsburg did not come to the Court with a particular agenda, and both vehemently denied that they

decided cases differently because they were women (Ginsburg 1994: 5; O'Connor 2003: 191). As such, O'Connor and Ginsburg were not on the Court to advance any agenda, influence their male colleagues, or draw attention to their sex in their decision making capacities.

Table 6.1. Number of Times Male and Female Justices advanced Each Type of Approach to Constructing in Opinions and Number of Each Type of Gender Distinction advanced in Judicial Votes in United States Supreme Court Gender Classification Cases, 1981-2001.

Approach to Constructing Gender in Opinions	Gender Distinction Advanced in Male Justices' Votes		Total	Gender Distinction Advanced in Female Justices' Votes		Total
	Difference	Sameness		Difference	Sameness	
No Approaches	25	19	44	3	2	5
Difference	5	2	7	0	0	0
Sameness	2	52	54	0	11	11
Both Approaches	10	10	20	1	4	5
Total	42	83		4	17	

Table 6.2. Male and Female Justices' Approaches to Constructing Gender in Judicial Opinions in United States Supreme Court Cases under Study, 1982-2001.

Approach to Constructing Gender	Most Male Justices	Some Male Justices	Female Justices
No Approaches		Blackmun*: *MUW v. Hogan* Burger*: *MUW v. Hogan* Powell*: *MUW v. Hogan* Rehnquist: *MUW v. Hogan* Marshall*: *Meritor Savings Bank v. Vinson* Brennan: *Meritor Savings Bank v. Vinson* Blackmun: *Meritor Savings Bank v. Vinson* Kennedy: *Miller v. Albright* Scalia*: *Miller v. Albright* Thomas: *Miller v. Albright*	O'Connor*: *Miller v. Albright*
Difference		Scalia: *U.S. v. VA*	
Sameness	Rehnquist*: *Meritor Savings Bank v. Vinson* Powell: *Meritor Savings Bank v. Vinson* Burger: *Meritor Savings Bank v. Vinson* Stevens*: *Meritor Savings Bank v. Vinson* White: *Meritor Savings Bank v. Vinson* Rehnquist*: *U.S. v. VA* Souter: *U.S. v. VA* Kennedy: *U.S. v. VA* Breyer: *U.S. v. VA* Stevens: *U.S. v. VA*	Stevens: *MUW v. Hogan* Brennan: *MUW v. Hogan* White: *MUW v. Hogan* Marshall: *MUW v. Hogan* Breyer*: *Miller v. Albright* Souter: *Miller v. Albright*	O'Connor*: *MUW v. Hogan* O'Connor: *Meritor Savings Bank v. Vinson* O'Connor: *U.S. v. VA* Ginsburg*: *U.S. v. VA* Ginsburg*: *Miller v. Albright*
Both Approaches		Stevens*: *Miller v. Albright* Rehnquist: *Miller v. Albright*	

* Denotes opinion author.

Table 6.3. Male and Female Justices' Gender Distinctions advanced in Judicial Votes in United States Supreme Court Cases under Study, 1982-2001.

Gender Distinction	Most Male Justices	Some Male Justices	Female Justices
Difference	Rehnquist: *Nguyen v. INS* Kennedy*: *Nguyen v. INS* Thomas: *Nguyen v. INS* Stevens: *Nguyen v. INS* Scalia*: *Nguyen v. INS*	Scalia*: *JEB v. Alabama* Thomas: *JEB v. Alabama* Rehnquist*: *JEB v. Alabama*	
Sameness	Scalia*: *UAW v. Johnson Controls* Marshall: *UAW v. Johnson Controls* Rehnquist: *UAW v. Johnson Controls* White*: *UAW v. Johnson Controls* Souter: *UAW v. Johnson Controls* Blackmun*: *UAW v. Johnson Controls* Stevens: *UAW v. Johnson Controls* Kennedy: *UAW v. Johnson Controls*	Blackmun*: *JEB v. Alabama* Souter: *JEB v. Alabama* Stevens: *JEB v. Alabama* Kennedy*: *JEB v. Alabama* Souter: *Nguyen v. INS* Breyer: *Nguyen v. INS*	O'Connor: *UAW v. Johnson Controls* O'Connor*: *JEB v. Alabama* Ginsburg: *JEB v. Alabama* O'Connor*: *Nguyen v. INS* Ginsburg: *Nguyen v. INS*

* Denotes opinion author.

Table 6.4. Number of United States Gender Classification Cases Adjudicated by Male Justices prior to 1981 and 1993.

Supreme Court Justice (Tenure)	Number of Cases Adjudicated prior to 1981	Number of Cases Adjudicated prior to 1993
Blackmun (1970-1994)	33	45
Brennan (1956-1990)	34	n/a
Burger (1969-1986)	33	n/a
Kennedy (1988-)	n/a	2
Marshall (1967-1991)	33	n/a
Powell (1972-1987)	32	n/a
Rehnquist (1972-2005)	32	44
Scalia (1986-)	n/a	5
Souter (1990-2009)	n/a	1
Stevens (1975-2010)	20	32
Thomas (1991-)	n/a	0
White (1962-1993)	33	n/a

CHAPTER 7: CONCLUSIONS AND IMPLICATIONS

7.1. INTRODUCTION

Supreme Court decision making in cases involving gender issues potentially shapes the trajectory of gender equality in the United States. The ways in which justices discuss gender in their opinions and their voting behavior in gender classification cases can have important implications for women's status in society. By extending the same—or different—treatment to women and men, justices arguably restrict or advance gender equality.

In the first gender classification case it ever considered, *Bradwell v. Illinois*, a unanimous Court affirmed a lower court decision restricting the practice of law to men, on account that the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life" (*Bradwell v. Illinois*, 83 U.S. 130 (1873)). Here, early feminists sought equal rights on the same basis as men, but they were defeated. Instead, justices gave legal recognition to traditional gender roles and stereotypes, reinforcing differences between women and men. Two years later, the National Woman Suffrage Association's efforts to win voting rights were also unsuccessful in *Minor v. Happersett* (1875). Again, feminists sought equal rights, but a unanimous Court rejected the logic that because women were citizens, they should have the right to vote.

While the fight for gender equality stalled in the late 1800s, it was successful in the early 1900s, beginning in 1908 in *Muller v. Oregon*. The National Consumers' League successfully lobbied for protective labor laws for women but found itself defending them in the courtroom. Such laws were intended to protect women from danger and exploitation in the workplace, thereby helping them, and the Supreme Court usually agreed that given the physiological and reproductive differences between women and men, differential treatment was justifiable. Here, in

an effort to advance gender equality, feminists sought rights on a *different* basis as men—and won.

While equality feminism advocates the same, or equal, treatment of women and men (Kaminer 1990; Lorber 2000: 86), difference feminism maintains that there are circumstances under which women and men should be treated differently in order to further gender equality (Law 1983; Kay 1985; Vogel 1990). Here, for instance, women's capacity to get pregnant warrants differential treatment. Moreover, difference feminists contend that women and men are inherently different and that those differences should be embraced. Treating women and men as the same overlooks women's special and unique qualities, values, and needs (see Vogel 1990; Anleu 1992; Jacquette 2001: 122; Verloo and Lombardo 2007).

Therefore, under the rubric of difference feminism, Supreme Court decisions on gender classifications in the first half of the 20th century were viewed as benefitting women. Protective labor laws improved women's working conditions and enabled them to also successfully fulfill their roles as wives and mothers (Lipschultz 1996: 121). As such, a ten-hour work day for women helped compensate them for the burdens of motherhood and the responsibilities they assumed in the home by protecting them from long work days (*Muller v. Oregon* 1908). Similarly, laws establishing a minimum wage for women ensured that employers did not exploit women and paid them a fair wage (*West Coast Hotel v. Parrish* 1937). Prohibiting women from working in bars unless they were the wife or daughter of the male owner protected women from moral and social problems that plagued women not working under the supervision of their father or husband (*Goesaert v. Cleary* 1948).

By the 1960s, however, some feminists would come to reject protective legislation and fight for equal rights, not different treatment. In contrast to the feminists active in the early

1900s, second wave feminists believed that seeking different treatment reinforced gender stereotypes and women's inferiority to men, thereby restricting their opportunities and obstructing women's rights (Vogel 1990: 19; Jacquette 2001: 122; Rosen 2006: 75-76). Women's rights groups litigated several court cases and were mostly successful at breaking down the legal barriers preventing women's full participation in the political, legal, and economic arenas.

Beginning in 1971 in *Reed v. Reed,* Supreme Court justices began eliminating gender differences between women and men in their opinions and rulings. In a variety of issue areas, justices reasoned that gender classifications cannot rely on "archaic and overbroad generalizations" (*Schlesinger v. Ballard,* 419 U.S. 498 (1975)). For instance, they held that a statute designating that females were legal adults at the age of 18 and males at 21 was unconstitutional in *Stanton v. Stanton* in 1975. Rooted in the notion that females tend to marry early and males need an education or job training so they can provide for their family, the statute was impermissible and Justice Blackmun wrote that "no longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas" (*Stanton v. Stanton,* 421 U.S. 7 (1975)).

Similarly, in a case involving the constitutionality of a law requiring men, but not women, to pay alimony, justices maintained that "classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the "proper place" of women and their need for special protection" (*Orr v. Orr*, 440 U.S. 268 (1979)). In contrast to the views of justices in the late 1800s and early 1900s, justices in the 1970s rejected the notion that women need protection and special treatment. As Justice Brennan stated, "There can be no doubt that our nation has had a long and unfortunate history of sex

discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage" (*Frontiero v. Richardson*, 411 U.S. 677 (1973)).

However, despite eliminating gender differences in a number of decisions, justices continued reinforcing differences between women and men in a number of cases. For instance, the Court held that women could be denied employment in maximum security prisons because their "womanhood would thus directly undermine [their] capacity to provide the security that is the essence of a correctional counselor's responsibility" (*Dothard v. Rawlinson*, 433 U.S. 321 (1977)). It also reasoned that because women were ineligible for combat, the president can require only men to register for the draft (*Rostker v. Goldberg* 1981). Justices also upheld gender differences in the transmission of citizenship to children born abroad to unmarried parents because "fathers are less likely than mothers to have the *opportunity* to develop relationships" (*Miller v. Albright*, 532 U.S. 420 (1998)).

For over a century, the Supreme Court weighed in on the conditions under women and men could be treated differently before the law. Justices' approaches to constructing gender in their opinions and their voting behavior arguably influenced the trajectory of gender equality in the United States. However, as I discussed in chapter three, notions of what constituted gender equality—same or different treatment—evolved over time among feminists and in the Supreme Court. This lack of consensus over what constitutes gender equality makes it difficult to assess the Court's impact on it. Furthermore, that women are not a monolithic group and are divided by race, class, and sexuality means that Supreme Court rulings will have an uneven impact on gender equality, benefitting some women and not others.

This chapter begins with a review of this study and the factors shaping the variation in the Supreme Court's legal treatment of women and men from 1971 to 2001. I move on to discuss some implications of this research and consider the question of whether women can make a difference in the Supreme Court. Finally, I conclude with some avenues for future research.

7.2 SUPREME COURT DECISION MAKING IN GENDER CLASSIFICATION CASES

This dissertation investigated variation in the legal treatment of women and men by the United States Supreme Court. To do so, it examined justices' opinions and votes in gender classification cases from 1971 to 2001. In chapter four, I sought to explain the approaches justices took when constructing gender in their opinions and why they voted as they did with regard to the legal treatment of women and men. I found that justices' behavior was largely influenced by their personal characteristics—political ideology and gender. Compared to liberal justices, conservative justices were more likely to reinforce gender differences between women and men in their opinions and their votes. Female justices were more likely than male justices to treat women and men the same. The analysis suggested that in addition to having an individual effect on judicial behavior, gender also had a partial panel effect. When serving with female justices, male justices were more likely to eliminate gender differences in their opinions but more likely to reinforce differences in their votes. I argue that judicial decision making in gender classification cases is largely influenced by Court membership.

In chapter five, I examined gender's individual effect on female justices' behavior. I argue that personal experiences with sex discrimination had a profound effect on Justice O'Connor and Justice Ginsburg. Both experienced pervasive discrimination in law school and during their careers, instilling in them the belief that gender stereotypes and the discrimination that resulted from them were unjust and harmed women *and* men. As justices, both sought to

eliminate gender differences, stereotypes, and barriers limiting women's and men's rights and opportunities.

Chapter six examined whether gender had a panel effect on judicial behavior and found that it did not. That is, I found no evidence that female justices altered their male colleagues' decision making. Instead, I argue that male justices' personal experiences and relationships, particularly the influence of their wives and daughters, and ideologies shaped their behavior in gender classification cases.

The results from chapters four and six seem to contradict one another, but not necessarily. Given that male justices promoted a difference distinction when voting in gender classification cases even in the presence of female justices, the panel effect of gender was only a partial one and not particularly strong. Furthermore, the relationship between the gender composition of the Court and the approaches male justices took when constructing gender in their opinions seem to have resulted from correlation, not causation. Male justices' adoption of a sameness approach in their opinions coincided with Justice O'Connor's arrival to the Court in 1981 and Justice Ginsburg's in 1993. In other words, their approaches to constructing gender became more egalitarian over time, but not because they were serving with female justices. Instead, their egalitarian attitudes resulted from their ideologies, personal experiences, and relationships.

Drawing together the various aspects of the analysis, I argue that Court membership is the most important factor shaping judicial decision making in gender classification cases. That is, the characteristics of the justices—political ideology and gender—were responsible for their legal treatment of women and men in opinions and votes. Not only that, but justices were deeply affected by their personal experiences and relationships, bringing them to bear in their decision making.

My argument builds upon the attitudinal model, agreeing that judging is a subjective endeavor driven by personal influences, and refutes some facets of the legal model. The traditional legal model of judicial decision making conceptualizes Supreme Court justices as neutral and impartial actors immune to personal and external influences (Epstein and Kobylka 1992: 11; Tiller and Cross 2006: 518). As now Chief Justice Roberts maintained in his confirmation hearings, judges are like umpires, applying the rules but not making them. Indeed, this is how they are socialized in law school; judges apply and interpret the law, leaving the policymaking up to the elected branches of government (Baum 1997; Kahn 1999; George and Epstein 1992: 324; Bailey and Maltzmann 2008). However, as much as we try to depersonalize judges, the reality is that they are people who cannot shed their personal experiences, attitudes, and values when they don their black robes.

Justices bring a lifetime of experiences with them to the bench, and this was a major reason why there were gender differences in judicial behavior. However, Justice O'Connor and Justice Ginsburg were not the only ones deeply affected by their personal experiences; male justices were too. Their egalitarian attitudes and support for gender equality resulted not from serving with female justices, but from their ideology, experiences, and relationships. For instance, based upon his experience working for the Kennedy administration, Justice White developed a strong support for civil rights that carried over into his support for women's rights. As a black man, Justice Marshall had firsthand experience with discrimination, and his commitment to advance civil rights easily translated into a commitment to further gender equality. While some male justices had formative personal experiences, others were influenced by their wives and daughters. For example, Justice Breyer had a strong and independent wife with her own career and daughters whose opportunities and rights he did not want restricted.

I argue that central to Supreme Court justices' decision making is the justices themselves. Their ideologies, personal experiences, and relationships are the lenses through which they interpret the facts of the case, statutes, the constitution, and precedent. My theory violates conventional wisdom in more than one way. As I discussed, the legal model posits that judging is a mechanical exercise that consists of interpreting and applying the law, but it is not and justices instead bring a wealth of experiences with them to the bench. Although my theory most closely mirrors the attitudinal model, I disagree that justices are primarily politically motivated and simply act in ways consistent with their partisan leanings. While their background characteristics seep into their judicial behavior, justices remain bound by the law, the facts of the case, and their roles in the political system. In this way, justices are institutionally constrained, but their duty is to the law and not to other political actors—the president or Congress—or interest groups.

My argument is generalizable to other courts and judges, issue areas, and equal rights claims. First, it is applicable to independent judiciaries in which judges are unelected. If judges lack judicial independence, are easily sanctioned by other political actors, or beholden to constituents, they are unlikely to bring their ideologies, experiences, and relationships to bear in their decision making. Instead, their behavior will likely be constrained by external pressures since maintaining their judgeship could be their foremost concern.

Although political ideology will likely drive judicial behavior across a range of cases, judges' personal experiences and relationships will probably have an idiosyncratic influence. With respect to political ideology, as Segal and Spaeth (1993) contend, judges' attitudes and values affect their interpretation of the facts of the case, law, and constitution, regardless of the issue area. However, given that judges have a variety of personal experiences and relationships, the ways in which they will be brought to bear will likely depend upon the issue area, facts of the

case, and context. For instance, when faced with a case involving water rights, Justice O'Connor drew on her expertise of the topic that came from her experience of growing up in the West (Interview 384, 264, 274). Similarly, Justice Marshall was a former trial lawyer who invoked his experiences and used them to inform his decisions regarding procedural rules and deadlines (Interview 21). Even though judges are certainly affected by their personal experiences and relationships when judging, the ways in which these influences manifest themselves will vary.

Finally, my argument extends to other types of cases involving equal rights. I expect that judges who are members of a minority group, whether it is on the basis of race, sexuality, or religion, will draw on their experiences when adjudicating cases involving the rights of that group. Moreover, the experiences of judges who are in one minority group should inform their decision making in cases concerning the rights of another minority group. To some degree, they should be able to relate to the grievances brought by those in another group and be sympathetic to their claims. For example, as I mentioned, Justice Marshall's personal experiences with racial discrimination made him empathetic to sex discrimination claims.

In sum, I argue that variation in the legal treatment of women and men in the United States Supreme Court is largely a result of justices' ideologies, personal experiences, and relationships. The approaches they took when constructing gender in their opinions and voting in gender classifications were driven by their personal attributes and backgrounds. In short, judicial behavior in this important issue area was a result of *who* was on the bench.

7.3 IMPLICATIONS OF THIS RESEARCH

There are several important implications of this research. That judicial behavior is largely influenced by Court membership demonstrates that efforts to diversify the federal bench are

important, and it suggests that judges are not dissimilar to legislators. Moreover, even though gender significantly shaped judicial behavior, there are limits to the influence of female justices.

7.3.1 Diversifying the Bench

Given that Court membership is a critical factor shaping judicial behavior, *who* becomes a judge is very important. According to Erikson, Mackuen, and Stimson (2002), compared to the president and Congress, the Supreme Court is the branch most insulated from forces in the political and social environment. Even though judges are, to some degree, legally constrained, because of the lack of institutional constraints, the judicial selection and nomination process become even more imperative.

On some level, it is evident that there is an understanding that judges' personal characteristics and background are the most important factors driving their behavior. After all, battles over judicial nominees have increased in the past 30 years (Epstein and Segal 2005: 2), and presidents, senators, and the general public care deeply about who gets to be a judge. Nominees are carefully vetted, their writings or judicial opinions are combed through to glean insight into how they might rule as a judge, and they undergo intense questioning in their confirmation hearings. Senators take their "advise and consent" role seriously, and interest groups testify in support of or opposition to a nominee. These battles have intensified so much that after increasing numbers of nominations were stalled due to filibusters, the Senate abolished the use of the filibuster for district and appellate court nominees.

Given that judges bring their ideologies, personal experiences, and relationships to bear in their decision making, diversifying the courts is an important endeavor, especially for historically disadvantaged groups seeking to achieve equal rights. Since the late 1970s, more efforts have been made to diversify the federal bench. In 1976, the Democratic Party platform

stated that "All diplomats, federal judges and other major officials should be selected on a basis of qualifications. At all levels of government services, we will recruit, appoint and promote women and minorities" (Democratic Party Platform 1976). As a result, in 1977, President Carter became the first president to make it a point to diversify the federal courts, and other presidents, particularly Democratic ones, followed suit (Scherer 2011: 588). Efforts to appoint more women and minorities may have been attempts to curry political favor, but this research demonstrates that diversifying the bench is important and not just for symbolic reasons.

Having diverse political institutions can have democratic and substantive implications. For instance, institutions with a diverse membership are perceived as being more democratic because more groups are descriptively represented and have a voice in government (Tate 2003; Scherer and Curry 2010). Second, having a diverse political institution could have policy consequences, as descriptive representation may produce substantive representation (Allen and Wall 1993; Thomas 1994; Mansbridge 1999; Reingold 2000; Carroll 2002; Swers 2002; Wolbrecht 2002; Martin and Pyle 2005). In sum, because judicial behavior is largely driven by a court's membership, having judges with a diverse set of perspectives and backgrounds is critically important.

7.3.2 Judges as Legislators

Another implication of this research involves the role of judges in our political system. Supreme Court justices are nominated to the bench by the president, confirmed by the Senate, and granted lifetime tenures conditional upon good behavior. Unelected and seemingly unaccountable, they appear to recognize that even though they are co-governors in our nation's political system, they are different from legislators. They are perceived as being insulated from the political process, and for the most part, they avoid openly partisan and political activity. For

instance, in his confirmation hearings to be Chief Justice, then Judge John Roberts repeatedly maintained that judges were like umpires, applying the rules but not making them. As such, justices are idealized as impartial and neutral actors whose role is to simply interpret and apply the law.

However, this research contradicts that perception and instead suggests that judges and legislators are not dissimilar. Though the federal government was conceived as separate branches sharing power, there appears to more overlap between the members of the Supreme Court and Congress than what the framers intended. Although judges and legislators are both constrained by their institutions' institutional rules, norms, and procedures, ultimately, their behavior is deeply influenced by their own attitudes, values, and attributes. Justices and legislators alike are appointed or elected, respectively, because of their political ideologies and *who* they are, and as national policymakers, they have the opportunity to further their policy goals.

That the line between judging and legislating is blurry raises an important question of whether judges should act like legislators and what role they should play in our political system. On the one hand, weighing in on important and controversial issues could be perceived as being inherently antidemocratic (see Bickel 1962). When the Supreme Court strikes down congressional acts, it acts against the representatives of people, thereby leading to a "countermajoritarian difficulty" (Bickel 1962: 16). As such, judicial review violates democratic principles because an unelected body acts against the prevailing majority (Bickel 1962: 19). In some ways, because judicial behavior is largely driven by characteristics of the justices and their backgrounds, the Court may appear undemocratic. Institutionally unconstrained and without a constituency to hold them accountable, justices appear to be motivated by their personal preferences and free to advance them.

However, on the other hand, judicial review is not inherently undemocratic or problematic (Graber 1993). After all, by invalidating unconstitutional acts, judges are doing exactly what they are supposed to be doing, checking the other branches of government and preventing tyranny of the majority (Johnson 2004: 131). The Court's membership shaped the legal treatment of women and men, but that does not automatically render it undemocratic. Justices were still institutionally constrained by the law, so they were not free to inject their personal preferences into their decisions. Moreover, it is not that justices' backgrounds dictate their decision making; rather, it is that their backgrounds color their interpretation and application of the law.

Furthermore, a constituency does not necessarily ensure accountability. For one, legislators do not need to please all their constituents, and they do not need to please them all of the time. Also, members of Congress are influenced by more than just their constituents' preferences and reelection concerns. There may be other factors, such as pressure from party leaders or a desire to attain a leadership position, guiding their behavior. In short, judge-made law may not be inherently undemocratic simply because judges do not face election or reelection.

Consequently, the overlap between justices and legislators suggests that the political process is highly interactive and reactionary. Lawmaking is not the responsibility of one branch; rather, it is a shared endeavor among the Supreme Court, Congress, and the president (Barnes and Miller 2004; Barnes 2007). As a result, judicial decision making does not occur in a vacuum, but neither does policymaking in the other branches of government. Each branch's behavior constrains and is constrained by the others as they strive to make law. In doing so, they act

strategically, anticipating one another's actions and reactions and responding to one another in a way that helps them maximize their power and achieve their policy goals (McCann 1999: 65).

7.3.3 Women's Power and Its Limits

This research also has implications for how we think about women's power in the judiciary and more broadly. Women's descriptive representation in the judiciary and other political institutions is important for symbolic and substantive reasons. As women attain political representation, they may inspire other women to seek positions of power. Indeed, both Justice O'Connor and Justice Ginsburg recognized the symbolic importance of their appointments and embraced a "role model" role. They sought to set an example and demonstrate that women could aspire to and attain positions of power.

Women's descriptive representation could also produce their substantive representation. Changes in the legal treatment of women and men in the Supreme Court were influenced in part by female justices, and as the Court becomes increasingly conservative, their impact may become even more apparent and important. The relationship between descriptive and substantive representation is cyclical. As political leaders, women can use their power to further gender equality, resulting in more opportunities for women and more opportunities to wield power.

It is difficult to predict whether gender differences in judicial behavior will persist over time. On the one hand, given that gender differences arise due to women's professional experiences, gender differences in judging may diminish. As women experience less sex discrimination in law school and in the legal profession, they may eventually cease to bring a perspective different from men to the bench. This would be a positive development and imply that sex discrimination is decreasing, but it may not be. Instead, it may be on the decline among elite women, who are the most likely to end up on the Court, and not all women. Therefore, if

would-be female justices cease to experience sex discrimination, they may not bring a different perspective to the bench and no longer act in ways that further gender equality.

On the other hand, gender differences may persist as long as there are reproductive differences between women and men. When it comes to issues involving pregnancy, abortion, and childrearing, women and men may have different perspectives that will persist. However, given that women are not a monolithic group, they will be differently affected by these issues and react differently to them. As such, it cannot be presumed that women will bring a unified perspective to these areas and judge differently than men.

That gender did not have a strong panel effect suggests that there may be limits to the extent to which female justices shape judicial decision making in the Supreme Court. With respect to how cases are decided and the content of opinions, male justices did not seem to be swayed by their colleagues in this issue area. They were often confident in their views and knew how they were going to decide cases, and it did not appear that much could be done to change their minds.

I began this section on the implications of this research by discussing the importance of diversifying the bench. However, this research suggests that in terms of judicial decision making, diversifying courts only goes so far. In terms of shaping judicial behavior at an individual level, having judges with a wealth of different experiences and perspectives is important and can make a difference in judicial rulings, insofar as each judge exerts influence through her/his opinion and vote. However, there are limits to the impact of diversifying the bench as this research demonstrates judges are influenced first and foremost by their own ideologies and experiences, not those of their colleagues.

7.4 CAN WOMEN MAKE A DIFFERENCE IN THE SUPREME COURT?

I return to the question of whether women can make a difference in the Supreme Court. Although gender had a limited panel effect, it could manifest itself in other ways. Female justices could be influential in cases that do not involve gender classifications. They could spur male justices to hire more female law clerks, and they could also impact the atmosphere of the Supreme Court.

7.4.1 Non-Gender Classification Cases

One area in which gender could have a panel effect is procedural/administrative cases. Compared to gender classification cases, in which the gender lines drawn are distinct, the ways in which procedural and administrative cases shape gender equality are more subtle. Therefore, female justices may be more compelled to speak up about their experiences or persuade their colleagues as women, and male justices may be more inclined to listen.

For instance, in 1992 in *Planned Parenthood v. Casey*, the Court faced the question of whether the Pennsylvania Abortion Act, which contained a number of abortion restrictions, one of which required women to notify their husbands before obtaining an abortion, violated the right to abortion. Rehnquist, Scalia, Thomas, and White were prepared to uphold all of the restrictions and functionally overturn *Roe*, while Stevens and Blackmun wanted to strike them all down (Interview 259; Toobin 2007: 47). O'Connor and Souter wanted to uphold some of the restrictions but preserve *Roe* (Toobin 2007: 47). Rehnquist assigned himself the task of writing the majority opinion, intending to uphold all of Pennsylvania's provisions.

After conference, Souter approached O'Connor, seeking to find a way to uphold most of the abortion restrictions while also preserving *Roe* (Toobin 2007: 48). They decided to write an opinion together, and knowing they would have the support of Stevens and Blackmun, O'Connor successfully solicited Kennedy for the fifth vote to save *Roe* (Interview 259). O'Connor made

her mark in the resulting opinion in two ways. First, she replaced *Roe's* trimester framework, which allowed states to regulate abortion after the first trimester, with her undue burden test, which would permit abortion restrictions unless they created an undue burden on a woman's right to abortion (Toobin 2007: 50). Although the Court upheld most of Pennsylvania's provisions, it struck down the one requiring married women to inform their husbands prior to obtaining an abortion. This provision angered O'Connor, who believed it was sexist and gave husbands too much authority over their wives (Toobin 2007: 52). Some male justices, such as Justice Souter, recognized the importance of preserving *Roe*, but without Justice O'Connor's influence, they may not have realized the detrimental impact the spousal provision could have had on women's rights.

Gender could also have a panel effect in cases that do not involve gender issues. As an example, in 2009 in *Safford Unified School District v. Redding*, justices confronted the question of whether the 4th amendment prohibited schools from strip searching students suspected of possessing drugs. Operating on a tip from a student, school officials forced thirteen-year-old Savana Redding to strip down to her bra and underwear, searching for contraband ibuprofen, which they did not find. The male justices had a difficult time understanding how Redding's rights were violated, wondering how the strip search was any different from changing for gym class.

In an unusual move, Ginsburg spoke about the case to reporters while it was still pending and talked about how her male colleagues did not understand how humiliating this experience could be for a teenage girl. She said "They have never been a 13-year-old girl...it's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood" (Biskupic 2009). She went on to say that "Maybe a 13-year-old boy in a locker room doesn't

have that same feeling about his body. But a girl who's just at the age where she is developing, whether she has developed a lot...or...has not developed at all (might be) embarrassed about that" (Biskupic 2009). Although *Safford* pertained to 4th amendment rights and not gender equality, Justice Ginsburg was influential in getting her male colleagues to see how strip searches such as these were potentially traumatic for young girls and violated students' rights.

7.4.2 Environmental Impacts

Having female justices on the Supreme Court might have a substantive impact in ways that seemingly have little to do with how cases are decided. Interviewees were confident that Justice O'Connor and Justice Ginsburg had an impact on their male colleagues but were hard pressed to come up with examples or were uncertain as to how their influence manifested itself. Nonetheless, several thought of other ways in which female justices made their mark on the Supreme Court.

a) Law Clerk Hiring Practices

Due to Justice O'Connor's and Justice Ginsburg's influence, some male justices may have become more conscious of their hiring practices with respect to law clerks. Justice O'Connor was very intentional and hired two female clerks and two male clerks each year, whereas most justices hired one female clerk and three male clerks (Interview 77, 165). Over time, other justices who predominantly hired male clerks began hiring more female clerks, and part of the reason may have been because they saw that O'Connor's clerks were successful and capable (Interview 77).

Around the time Justice Ginsburg joined the Court, either she or O'Connor initiated a discussion among the justices about the representation of female law clerks (Interview 165). Justice Ginsburg was similarly conscious of her hiring practices, also hiring two female and two

male clerks, as was Justice Breyer, perhaps due to the example set by his female colleagues. Prior to joining the Court, as a circuit court judge, Breyer usually hired one female clerk and three male clerks, but once on the Court, he began hiring two of each (Interview 165). Justice Souter also became conscious of his hiring practices. For the first couple of years, he happened to hire all male clerks and he did not want this to become a habit (Interview 147).

b) A Community for Women

When Justice O'Connor joined the Court, one of the ways in which she subtly influenced the Supreme Court was by organizing an all-female aerobics class. Every day at 3 p.m., some of the male law clerks and Justice White played basketball in the Court's gym, but the female clerks did not join them. In response, Justice O'Connor organized an aerobics class for the women that met two or three times a week (Interview 62, 70, 77, 69, 98).

O'Connor's aerobics class was an attempt to develop a community for women (Interview 77, 69) and make herself available to all female law clerks (Interview 77). She was a mentor to not only her law clerks, but to all female law clerks, and the aerobics class was the way she made herself available (Interview 69, 77). It was rare for clerks to interact with justices who were not their employers, but O'Connor was an exception because of her aerobics class (Interview 77).

Even though there was no evidence that female justices altered their male colleagues' decision making, there are other ways in which they could make a difference in the Supreme Court. Female justices may help male justices' see how decisions in non-gender classification cases impact women or inadvertently compel them to reassess their law clerk hiring practices. Lastly, in a traditionally masculine profession, female justices may help foster a community for women.

7.5 AVENUES FOR FUTURE RESEARCH

This dissertation found that judicial behavior in gender classification cases is largely shaped by the Court's membership. Justices were deeply influenced by their ideology and gender, as well as their personal experiences and relationships. Future research should consider the ways in which female law clerks could make a difference in the Supreme Court and should delve further into the ways in which justices' personal experiences, backgrounds, and relationships affect judicial behavior. Finally, future research should test the applicability of my argument to other rights groups by examining and comparing the trajectories of civil rights, women's rights, and LGBT rights in the Supreme Court.

7.5.1 The Influence of Female Law Clerks

The presence and influence of women in the Supreme Court is not necessarily restricted to female justices, and future research should examine the influence of female law clerks. Law clerks work very closely with the justice for whom they clerk, and while the justice ultimately decides how to vote, clerks usually make a recommendation in their bench memos. Justices also talk to their clerks about the cases, soliciting their thoughts and ideas, and most clerks write the first drafts of opinions. As such, these potentially present opportunities for female clerks to shape judicial decision making.

Justices have more contact with their law clerks than with their fellow justices, so the presence of female law clerks may be more influential in shaping male justices' gender attitudes than the female justices (Interview 46, 131, 177, 42). For Justice White, for instance, having capable female law clerks influenced his gender attitudes (Interview 131). As another example, Justice Blackmun hired many female clerks, so he became accustomed to listening to women and taking them seriously, hence seeing them as human beings and intellects (Interview 42). As a direct influence, particularly in cases concerning gender issues, female clerks talked about the

cases with Blackmun, offered their recommendations, and discussed the ramifications on gender equality (Interview 42).

It is plausible that justices harboring progressive gender attitudes are more likely to hire female clerks, hence negating any influence. However, some justices hired only a token female clerk a term, suggesting that their hiring decisions were due to symbolic reasons and not necessarily egalitarian ones. For these justices, female clerks might shape their gender attitudes.

7.5.2 Personal Experiences and Background

Future research should also systematically examine the influence of justices' personal attributes, experiences, and relationships on their decision making. This study concentrated on one dimension of a justice's background—gender—but there are multiple facets to their identities. For instance, even though Justice O'Connor's decision making was influenced by her gender, it was also shaped by her identity as a former state legislator, a Westerner, and the swing vote (Interview 112, 62, 165, 144, 51, 77). In a similar vein, Justice Ginsburg has said that "All of our differences make the conference better. That I'm a woman, that's part of it, that I'm Jewish, that's part of it, that I grew up in Brooklyn, N.Y., and I went to summer camp in the Adirondacks, all these things are part of me" (Bazelon 2009). Furthermore, as I have discussed, other justices had influential experiences that shaped their decision making.

Much of the research on judicial behavior is quantitative, which could be why scholars overlook the influence of justices' experiences and backgrounds. As long as the attitudinal model continues to be conceptualized as political ideology, it will be impossible to ascertain how these other dimensions shape how justices decide cases. As such, future research should probe justices' backgrounds and cases to further the understanding of how the former affect how they approach and decide cases.

7.5.3 Comparing Civil Rights, Women's Rights, and LGBT Rights

Future research should also examine whether judicial behavior in other issue areas is also driven by Court membership by comparing the evolution of civil rights, women's rights, and LGBT rights in the United States Supreme Court. Since the latter half of the 20th century, various disadvantaged and marginalized groups have employed litigation tactics in their fight to advance equal rights. Beginning with civil rights groups' litigation successes in the 1950s, women's rights and LGBT rights groups have followed suit, no longer lobbying only Congress or the president for equal rights. Though these groups have had many successes, they have not been without setbacks, raising the question of what drives the Court's decision making on cases involving equal rights.

As I discussed in chapter three, women's rights groups employed the strategy of equating sex to race in an effort to persuade the Court to strike down discriminatory laws. Perhaps inspired by civil rights groups' litigation successes, they pointed out that race and sex are immutable characteristics, and that consequently, the Court should prohibit laws that discriminate on the basis of sex because in prior cases, it prohibited laws that were discriminatory on the basis of race. This strategy appears to have been successful; not only did the Court prohibit sex discrimination in most cases, justices also incorporated such arguments into their opinions. This suggests that the Court may have used civil rights cases to help it navigate women's rights cases, raising the question of whether it will draw on both as it negotiates and continues to negotiate the contours of LGBT rights.

Future research should examine and compare the duration and trajectory of civil rights, women's rights, and LGBT rights in the United States Supreme Court. In the mid-1800s, the Court restricted civil rights in many cases before ultimately reversing course in the middle of the

20th century, desegregating schools and striking down anti-miscegenation laws. This battle lasted over a century, and once the Court began granting equal rights in *Brown v. Board of Education* in 1954, it continued doing so in subsequent civil rights cases. With respect to women's rights, the Court initially advocated differential treatment of women and men in a handful of cases in the late 1800s and early 1900s, but during the 1920s, it granted women and men equal rights in two employment cases. However, equal treatment was short lived; the Court quickly reversed course in the 1930s, once again treating women and men differently and continuing to do so in subsequent cases until 1971 in *Reed v. Reed.* Though the Court granted women and men the same rights and opportunities in several cases in the 1970s and thereafter, instances in which it still granted differential treatment remain, even in the early 2000s. While the battles for civil rights and women's rights spanned over a century, the Court adjudicated fewer LGBT rights cases. Over the course of nearly thirty years, it upheld sodomy laws in the mid-1980s before overturning itself in the early 2000s. Although it protected LGBT rights in a case decided in the mid-1990s, it has yet to weigh in on an issue captivating the nation: same-sex marriage.

In this study, I argued that Court membership was the most important factor shaping the legal treatment of women and men. Future research should assess the plausibility of my theory of judicial behavior and whether it extends to other types of rights cases. Specifically, it should examine whether justices' ideologies, personal experiences, and relationships are also brought to bear in cases involving civil rights and LGBT rights. Given that arguments advanced by women's rights groups were inspired by civil rights arguments and that women's legal treatment before the Court was partially motivated by African American's legal treatment, it is important to look back in time (to race) and forward in time (to LGBT rights) to determine how Court

membership shaping its attitudes and actions vis-a-vis each group compare with its attitudes and actions vis-a-vis the others.

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Appendix 3.1. Keyword Search.

I used the following keyword search terms: woman or women, female, gender, gender discrimination or gender-based discrimination, sex, sex discrimination, gender classification or gender-based classification, equal protection clause and female or male, equal protection clause and man or men, woman and man, women and men, Title VII, Title IX, due process clause and woman or man, due process clause and women or men, due process clause and female or male, and mother and father. A search for more than one term using 'and' identifies all cases containing both terms. I input equal protection clause and due process clause with other key words (ie, sex, gender, female, male) in an attempt to immediately filter out cases concerning non-gender issues such as race, ethnicity, religion, age, and disability. For the same reason, I also search for "woman and man," "women and men," and "female and male." Searching for more than one term using 'and' and 'or' identifies all cases containing the first term and either of the following terms. For example, a search for "equal protection clause and female or male" yields all cases containing "equal protection clause and female" and all cases containing "equal protection clause and male." I used this function to search for "equal protection clause and man or men," "due process clause and woman or man," "due process clause and women or men," and "due process clause and female or male" in an effort to immediately weed out duplicate cases.

Appendix 3.2. Filtering Cases.

There are three ways to determine if the major question in a case concerns whether an action or law constitutes sex or gender discrimination. First, the major question might explicitly ask if a gender classification constitutes sex discrimination. For example, "Is restricting women from jury service discriminatory?" Or, the major question might be clearly stated in the outcome of the case summary. For example, "The Supreme Court affirms the decision that restricting the employment of females does not constitute sex discrimination." The major question could also be stated in the first paragraph of the majority opinion.

Second, the major question might ask if a law or action is discriminatory, which usually indicates that it contains a facially neutral gender classification. For example, "Does the exclusion of insurance coverage for pregnancy constitute sex discrimination?" Or "Does a preference for hiring veterans constitute sex discrimination?" The major question the court is addressing in the case could be stated in the case summary outcome. For example, "Sexual harassment creates a hostile and abusive work environment and thereby constitutes sex discrimination."

Finally, the major question might ask if a law or action violates the 5th amendment or the due process clause,[67] the 14th amendment or the equal protection clause,[68] Title VII of the Civil Rights Act,[69] or Title IX of the Education Amendments of 1973.[70] For example, "Does an

[67] The due process clause of the 5th amendment states that persons shall not "be deprived of life, liberty, or property, without due process of law." The 5th amendment was enacted in 1791.

[68] The due process clause of the 14th amendment states that "...nor shall any State deprive any person of life, liberty, or property, without due process of law," and the equal protection clause of the 14th amendment states that "...nor deny to any person within its jurisdiction the equal protection of the laws." The 14th amendment was enacted in 1868.

[69] Title VII of the Civil Rights Act, which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin, was passed in 1964. The inclusion of sex discrimination was disingenuous; Representative Howard Smith (D-VA) offered the amendment in an effort to derail passage of the Civil Rights Act (Skrentny 2002: 96).

[70] Title IX prohibits sex discrimination in any federally funded school or activity.

unmarried pregnant woman have the right to terminate her pregnancy under the 14th amendment?" Or "Does sexual harassment create a hostile or abusive work environment, thereby violating Title VII of the Civil Rights Act?" Or "Does same-sex sexual harassment violate Title VII?" This information might also be stated in the outcome of the case summary. For example, "The Supreme Court concludes that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII." These amendments and acts are useful in determining if a case contains a gender classification or concerns sex discrimination because at least one of these serves as the basis for any challenge of a law, policy, or action. In other words, when parties to a case challenge a particular practice, they always use at least one of these amendments or acts to justify why it is discriminatory or unconstitutional.

Infrequently, I was unable to determine if a case fit the criteria for inclusion in my study. In these instances, the case summary did not provide sufficient information to enable me to determine if the case involved a facial or facially neutral gender classification. This arose when: 1) the case concerned discrimination, but the case summary did not state whether it was sex or gender discrimination; 2) the case concerned a minority, but the case summary did not indicate if the definition of minorities includes women; 3) the case concerned a particular law, but identified it only by name or statute number instead of its content; 4) the case concerned a legal rule or procedural aspect (for example, cases concerning back pay or the number of days a plaintiff has to file a discrimination suit); 5) the case concerned a law involving women but not a gender classification (for example, a law prohibiting the transportation of women across state lines for the purpose of prostitution).

In these instances, I read the case syllabus, which contained a more detailed description of the facts of the case, major question, and holding than the summary did as well as the

headnotes, footnotes, and the relevant legal issues. In particular, the case syllabus provided additional information about the aforementioned reasons hindering my ability to determine whether a case fit the criteria for inclusion in my study. For instance, if the case summary stated that a case involved discrimination, the case syllabus stated the type. After reading the syllabus, I then sorted the case in or out based on that reading.

In rarer instances, I was unable to determine if a case was relevant to my study even after reading the case syllabus. This usually occurred because I was still unable to determine if a case involving a legal rule or procedural aspect constituted sex discrimination. When this occurred, I read the majority opinion, which contained a detailed description of the facts of the case, the major question, and the holding. Here, I looked closely at the grounds under which a law, policy, or action was challenged and the grounds under which the case was resolved, and then I was able to sort the cases in or out based on this reading.

Appendix 3.3. Approach to Constructing Gender in Opinions and Gender Distinctions in Votes in United States Supreme Court Gender Classification Cases, 1971-2001.

Case	Type of Opinion	Presence of Each Approach to Constructing Gender		Number of Difference Distinctions	Number of Sameness Distinctions
		Sameness	Difference		
Reed v. Reed	majority	x		0	7
Stanley v. Illinois	majority	x		2	5
	dissent		x		
Roe v. Wade	majority	x	x	2	7
	concurring	x	x		
	dissent				
Doe v. Bolton	majority		x	2	7
	concurring		x		
	concurring		x		
	dissent		x		
	dissent				
Frontiero v. Richardson	majority	x		1	8
	concurring				
	concurring	x			
	dissent	x			
Pittsburgh Press Company v. Pittsburgh Commission on Human Relations	majority	x		4	5
	dissent				
	dissent				
	dissent				
Cleveland Board of Education v. LaFleur	majority	x	x	2	7
	concurring		x		
	dissent		x		
Kahn v. Shevin	majority		x	6	3
	dissent	x			
	dissent	x	x		
Geduldig v. Aiello	majority	x	x	3	6
	dissent		x		
Schlesinger v. Ballard	majority	x	x	5	4
	dissent	x			
Taylor v. Louisiana	majority	x		1	8

	dissent	x			
Weinberger v. Wiesenfeld	majority	x	x	0	8
	concurring	x			
	concurring	x			
Stanton v. Stanton	majority	x		1	8
	dissent				
General Electric v. Gilbert	majority	x	x	3	6
	concurring	x	x		
	concurring	x	x		
	dissent	x	x		
	dissent		x		
Craig v. Boren	majority	x		2	7
	concurring		x		
	concurring		x		
	concurring	x			
	concurring	x			
	dissent		x		
	dissent		x		
Trimble v. Gordon	majority		x	4	5
	dissent				
Fiallo v. Bell	majority			6	3
	dissent	x			
Califano v. Goldfarb	majority	x		4	5
	concurring	x	x		
	dissent		x		
Califano v. Webster	majority	x	x	9	0
	concurring		x		
Dothard v. Rawlinson	majority	x	x	7	2
	concurring		x		
	dissent	x	x		
Nashville Gas Company v. Satty	majority		x	9	0
	concurring				
	concurring		x		
Quilloin v. Walcott	majority			9	0
City of Los Angeles Department of Water and Power v.	majority	x	x	2	6

Manhart	concurring	x	x		
	concurring				
	dissent	x	x		
Duren v. Missouri	majority	x	x	1	8
	dissent		x		
Orr v. Orr	majority	x	x	3	6
	concurring				
	concurring				
	dissent				
	dissent				
Caban v. Mohammed	majority	x		4	5
	dissent	x	x		
	dissent	x	x		
Parham v. Hughes	majority		x	5	4
	concurring				
	dissent	x	x		
Personnel Administrator of Massachusetts v. Feeney	majority	x		0	9
	concurring	x			
	dissent	x			
Califano v. Westcott	majority	x		4	5
	dissent				
Wengler v. Druggists Mutual Insurance Company	majority	x	x	1	8
	concurring				
	dissent				
Kirchberg v. Feenstra	majority			0	9
	concurring	x			
Michael M. v. Superior Court of Sonoma County	majority		x	5	4
	concurring				
	concurring		x		
	dissent				
	dissent	x	x		
Rostker v. Goldberg	majority	x	x	6	3
	dissent				
	dissent	x			
North Haven Board of Education v. Bell	majority	x		3	6

	dissent					
Mississippi University for Women v. Hogan	majority dissent dissent dissent	x			4	5
Lehr v. Robertson	majority dissent	x x	x x		6	3
Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris	majority dissent	x	 x		4	5
Heckler v. Mathews	majority				9	0
Roberts v. Jaycees	majority concurring	x			0	7
Meritor Savings Bank v. Vinson	majority concurring	x x			0	9
Wimberly v. Labor and Industrial Relations Commission	majority	x			0	8
Johnson v. Transportation Agency	majority concurring concurring dissent dissent		 x 		6	3
Board of Directors of Rotary International v. Rotary Club of Duarte	majority				0	7
New York State Club Association, Inc. v. City of New York	majority concurring concurring		 x 		0	9
UAW v. Johnson Controls, Inc.	majority concurring concurring	x x	x x 		0	9
J.E.B. v. Alabama ex rel. T.B.	majority concurring concurring dissent dissent	x x x x	 x x 		3	6
United States v. Virginia	majority concurring dissent	x x	 x		1	7

Oncale v. Sundowner Offshore Services, Inc.	majority	x		0	9
	concurring	x			
Miller v. Albright	majority	x	x	6	3
	concurring				
	concurring				
	dissent	x	x		
	dissent	x			
Tuan Anh Nguyen v. Immigration and Naturalization Service	majority	x	x	5	4
	concurring				
	dissent	x	x		
Total				165	273

Appendix 3.4. Approach to Constructing Gender in Opinions in United States Supreme Court Gender Classification Cases, 1971-2001.

Year	Case	Type of Opinion	Presence of Each Approach to Constructing Gender			
			Sameness	Difference		
				Gender Role Stereotypes	Reproductive	Unsubstantiated
1971	*Reed v. Reed*	majority	x			
1972	*Stanley v. Illinois*	majority	x			
		dissent		x	x	x
1973	*Roe v. Wade*	majority	x	x	x	x
		concurring	x	x		
		dissent				
1973	*Doe v. Bolton*	majority		x		
		concurring		x		
		concurring		x		x
		dissent				x
		dissent				
1973	*Frontiero v. Richardson*	majority	x			
		concurring				
		concurring	x			
		dissent	x			
1973	*Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*	majority	x			
		dissent				
		dissent				
		dissent				
1974	*Cleveland Board of Education v. LaFleur*	majority	x	x		
		concurring		x	x	
		dissent		x		
1974	*Kahn v. Shevin*	majority		x		x
		dissent	x			x
		dissent	x	x		
1974	*Geduldig v. Aiello*	majority	x		x	
		dissent			x	
1975	*Schlesinger v. Ballard*	majority	x			x
		dissent	x			

1975	*Taylor v. Louisiana*	majority	x				x
		dissent	x				
1975	*Weinberger v. Wiesenfeld*	majority	x	x			
		concurring	x				
		concurring	x				
1975	*Stanton v. Stanton*	majority	x				
		dissent					
1976	*General Electric v. Gilbert*	majority	x			x	
		concurring	x			x	
		concurring	x			x	
		dissent	x			x	
		dissent				x	
1976	*Craig v. Boren*	majority	x				
		concurring					x
		concurring					x
		concurring	x				
		concurring	x				
		dissent					x
		dissent					x
1977	*Trimble v. Gordon*	majority				x	
		dissent					
1977	*Fiallo v. Bell*	majority					
		dissent	x				
1977	*Califano v. Goldfarb*	majority	x				
		concurring	x				x
		dissent					x
1977	*Califano v. Webster*	majority	x				x
		concurring					x
1977	*Dothard v. Rawlinson*	majority	x	x			
		concurring		x			
		dissent	x	x			
1977	*Nashville Gas Company v. Satty*	majority				x	x
		concurring					
		concurring				x	
1978	*Quilloin v. Walcott*	majority					
1978	*City of Los Angeles Department of Water and Power v.*	majority	x	x			x

	Manhart	concurring	x	x		x
		concurring dissent	x			x
1979	*Duren v. Missouri*	majority	x			x
		dissent				x
1979	*Orr v. Orr*	majority	x			x
		concurring				
		concurring				
		dissent				
		dissent				
1979	*Caban v. Mohammed*	majority	x			
		dissent	x	x	x	x
		dissent	x	x	x	x
1979	*Parham v. Hughes*	majority		x	x	x
		concurring				
		dissent	x			x
1979	*Personnel Administrator of Massachusetts v. Feeney*	majority	x			
		concurring	x			
		dissent	x			
1979	*Califano v. Westcott*	majority	x			
		dissent				
1980	*Wengler v. Druggists Mutual Insurance Company*	majority	x	x		
		concurring				
		dissent				
1981	*Kirchberg v. Feenstra*	majority				
		concurring	x			
1981	*Michael M. v. Superior Court of Sonoma County*	majority		x	x	x
		concurring				
		concurring		x	x	x
		dissent				
		dissent	x		x	x
1981	*Rostker v. Goldberg*	majority	x	x		x
		dissent				
		dissent	x			
1982	*North Haven Board of Education v. Bell*	majority	x			

		dissent					
1982	*Mississippi University for Women v. Hogan*	majority	x				
		dissent					
		dissent					
		dissent					
1983	*Lehr v. Robertson*	majority	x				x
		dissent	x				x
1983	*Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*	majority	x				
		dissent					x
1984	*Heckler v. Mathews*	majority					
1984	*Roberts v. Jaycees*	majority	x				
		concurring					
1986	*Meritor Savings Bank v. Vinson*	majority	x				
		concurring	x				
1987	*Wimberly v. Labor and Industrial Relations Commission*	majority	x				
1987	*Johnson v. Transportation Agency*	majority					
		concurring					
		concurring					
		dissent					x
		dissent					
1987	*Board of Directors of Rotary International v. Rotary Club of Duarte*	majority					
1988	*New York State Club Association, Inc. v. City of New York*	majority					
		concurring					x
		concurring					
1991	*UAW v. Johnson Controls, Inc.*	majority	x			x	x
		concurring					x
		concurring	x				
1994	*J.E.B. v. Alabama ex rel. T.B.*	majority	x				
		concurring	x				x
		concurring	x				
		dissent				x	x
		dissent	x				
1996	*United States v. Virginia*	majority	x				
		concurring	x				
		dissent		x			x

1998	*Oncale v. Sundowner Offshore Services, Inc.*	majority	x			
		concurring	x			
1998	*Miller v. Albright*	majority	x	x	x	
		concurring				
		concurring				
		dissent	x	x		
		dissent	x			
2001	*Tuan Anh Nguyen v. Immigration and Naturalization Service*	majority	x	x	x	x
		concurring				
		dissent	x		x	

Appendix 4.1. Approaches to Constructing Gender in Opinions in United States Supreme Court Gender Classification Cases, by Issue Area and Opinion Author, 1971-2001.

Opinion Author	Case	Year	Issue Area	Type of Opinion	Presence of Each Approach to Constructing Gender			
					Sameness	Difference		
						Gender Role Stereotypes	Reproductive	Unsubstantiated
Douglas (1939-1975)	*Doe v. Bolton*	1973	abortion	concurring		x		x
	Pittsburgh Press Company v. Pittsburgh Commission on Human Relations	1973	employment	dissent				
	Kahn v. Shevin	1974	marriage compensation/benefits	majority		x		x
Brennan (1956-1990)	*Frontiero v. Richardson*	1973	marriage employment military compensation/benefits	majority	x			
	Kahn v. Shevin	1974	marriage compensation/benefits	dissent	x			x
	Geduldig v. Aiello	1974	employment pregnancy discrimination compensation/benefits	dissent			x	
	Schlesinger v. Ballard	1975	military	dissent	x			
	Weinberger v. Wiesenfeld	1975	marriage compensation/benefits	majority	x	x		
	General Electric v. Gilbert	1976	employment pregnancy discrimination compensation/benefits	dissent	x		x	
	Craig v. Boren	1976	sex discrimination	majority	x			
	Califano v. Goldfarb	1977	marriage compensation/benefits	majority	x			
	Orr v. Orr	1979	marriage compensation/benefits	majority	x			x
	Michael M. v. Superior Court	1981	sex discrimination	dissent				

	of Sonoma County							
	Heckler v. Mathews	1984	compensation/benefits	majority				
	Roberts v. Jaycees	1984	private clubs	majority	x			
	Johnson v. Transportation Agency	1987	employment	majority				
Stewart (1958-1981)	*Roe v. Wade*	1973	abortion	concurring	x	x		
	Frontiero v. Richardson	1973	marriage military compensation/benefits	concurring	x			
	Pittsburgh Press Company v. Pittsburgh Commission on Human Relations	1973	employment	dissent				
	Cleveland Board of Education v. LaFleur	1974	employment pregnancy discrimination	majority	x	x		
	Geduldig v. Aiello	1974	employment pregnancy discrimination compensation/benefits	majority	x		x	
	Schlesinger v. Ballard	1975	military	majority	x			x
	General Electric v. Gilbert	1976	employment pregnancy discrimination compensation/benefits	concurring	x		x	
	Craig v. Boren	1976	sex discrimination	concurring	x			
	Dothard v. Rawlinson	1977	employment	majority	x	x		
	Caban v. Mohammed	1979	family parental rights	dissent	x	x	x	x
	Parham v. Hughes	1979	family parental rights	majority		x	x	x
	Personnel Administrator of Massachusetts v. Feeney	1979	employment	majority	x			
	Michael M. v. Superior Court of Sonoma County	1981	sex discrimination	concurring		x	x	x
	Kirchberg v. Feenstra	1981	marriage	concurring	x			
White (1962-1993)	*Stanley v. Illinois*	1972	family parental rights	majority	x			
	Doe v. Bolton	1973	abortion	dissent				x
	Kahn v. Shevin	1974	marriage	dissent	x	x		

			compensation/benefits						
	Taylor v. Louisiana	1975	jury	majority	x				x
	Duren v. Missouri	1979	jury	majority	x				x
	Parham v. Hughes	1979	family parental rights	dissent	x				x
	Wengler v. Druggists Mutual Insurance Company	1980	employment compensation/benefits	majority	x	x			
	Rostker v. Goldberg	1981	military	dissent	x				
	Lehr v. Robertson	1983	family parental rights	dissent	x				x
	Johnson v. Transportation Agency	1987	sex discrimination	dissent					
	New York State Club Association, Inc. v. City of New York	1988	private clubs	majority					
	UAW v. Johnson Controls, Inc.	1991	employment	concurring					x
Marshall (1967-1991)	*Fiallo v. Bell*	1977	family parental rights	dissent	x				
	Dothard v. Rawlinson	1977	employment	dissent	x	x			
	Quilloin v. Walcott	1978	family parental rights	majority					
	City of Los Angeles Department of Water and Power v. Manhart	1978	employment compensation/benefits	concurring					
	Personnel Administrator of Massachusetts v. Feeney	1979	employment	dissent	x				
	Kirchberg v. Feenstra	1981	marriage	majority					
	Rostker v. Goldberg	1981	military	dissent					
	Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris	1983	employment compensation/benefits	majority	x				
	Meritor Savings Bank v. Vinson	1986	employment sexual harassment	concurring	x				
Burger* (1969-1986)	*Reed v. Reed*	1971	sex discrimination	majority	x				
	Stanley v. Illinois	1972	family parental rights	dissent		x	x		x
	Doe v. Bolton	1973	abortion	concurring		x			
	Pittsburgh Press Company v. Pittsburgh	1973	employment	dissent					

	Commission on Human Relations								
	Craig v. Boren	1976	sex discrimination	dissent					x
	Califano v. Webster	1977	compensation/benefits	concurring					x
	City of Los Angeles Department of Water and Power v. Manhart	1978	employment compensation/benefits	dissent	x				x
	Mississippi University for Women v. Hogan	1982	education	dissent					
Blackmun (1970-1994)	*Roe v. Wade*	1973	abortion	majority	x	x	x	x	
	Doe v. Bolton	1973	abortion	majority		x			
	Pittsburgh Press Company v. Pittsburgh Commission on Human Relations	1973	employment	dissent					
	Stanton v. Stanton	1975	family	majority	x				
	General Electric v. Gilbert	1976	employment pregnancy discrimination compensation/benefits	concurring	x		x		
	Craig v. Boren	1976	sex discrimination	concurring	x				
	City of Los Angeles Department of Water and Power v. Manhart	1978	employment compensation/benefits	concurring	x	x			x
	Orr v. Orr	1979	marriage compensation/benefits	concurring					
	Califano v. Westcott	1979	family compensation/benefits	majority	x				
	Michael M. v. Superior Court of Sonoma County	1981	sex discrimination	concurring					
	North Haven Board of Education v. Bell	1982	employment	majority	x				
	Mississippi University for Women v. Hogan	1982	education	dissent					
	UAW v. Johnson Controls, Inc.	1991	employment	majority	x			x	x
	J.E.B. v. Alabama ex rel. T.B.	1994	jury	majority	x				
Powell (1972-1987)	*Frontiero v. Richardson*	1973	marriage employment military compensation/benefits	concurring					
	Pittsburgh Press Company v. Pittsburgh Commission on	1973	sex discrimination	majority	x				

	Human Relations							
	Cleveland Board of Education v. LaFleur	1974	employment pregnancy discrimination	concurring		x	x	
	Weinberger v. Wiesenfeld	1975	marriage compensation/benefits	concurring	x			
	Craig v. Boren	1976	sex discrimination	concurring				x
	Trimble v. Gordon	1977	family parental rights	majority			x	
	Fiallo v. Bell	1977	family parental rights	majority				
	Nashville Gas Company v. Satty	1977	employment pregnancy discrimination compensation/benefits	concurring				
	Orr v. Orr	1977	marriage compensation/benefits	dissent				
	Caban v. Mohammed	1979	family parental rights	majority	x			
	Parham v. Hughes	1979	family parental rights	concurring				
	Califanov. Westcott	1979	family compensation/benefits	dissent				
	North Haven Board of Education v. Bell	1982	employment	dissent				
	Mississippi University for Women v. Hogan	1982	education	dissent				
	Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris	1983	employment compensation/benefits	dissent				x
	Board of Directors of Rotary International v. Rotary Club of Duarte	1987	private clubs	majority				
Rehnquist (1972-1986)	*Roe v. Wade*	1973	abortion	dissent				
	Doe v. Bolton	1973	abortion	dissent				
	Frontiero v. Richardson	1973	marriage employment military	dissent	x			

			compensation/benefits					
	Cleveland Board of Education v. LaFleur	1974	employment pregnancy discrimination	dissent		x		
	Taylor v. Louisiana	1975	jury	dissent	x			
	Weinberger v. Wiesenfeld	1975	marriage compensation/benefits	concurring	x			
	Stanton v. Stanton	1975	family	dissent				
	General Electric v. Gilbert	1976	employment pregnancy discrimination compensation/benefits	majority	x		x	
	Craig v. Boren	1976	sex discrimination	dissent				x
	Trimble v. Gordon	1977	family parental rights	dissent				
	Califano v. Goldfarb	1977	marriage	dissent				x
	Dothard v. Rawlinson	1977	employment	concurring		x		
	Nashville Gas Company v. Satty	1977	employment pregnancy discrimination compensation/benefits	majority			x	x
	Duren v. Missouri	1979	jury	dissent				x
	Orr v. Orr	1979	marriage compensation/benefits	dissent				
	Wengler v. Druggists Mutual Insurance Company	1980	employment compensation/benefits	dissent				
	Michael M. v. Superior Court of Sonoma County	1981	sex discrimination	majority		x	x	x
	Rostker v. Goldberg	1981	military	majority	x	x		x
Rehnquist* (1986-2005)	*Meritor Savings Bank v. Vinson*	1986	employment sexual harassment	majority	x			
	J.E.B. v. Alabama ex rel. T.B.	1994	jury	dissent			x	x
	United States v. Virginia	1996	education	concurring	x			
Stevens (1975-2010)	*General Electric v. Gilbert*	1974	employment pregnancy discrimination compensation/benefits	dissent			x	
	Craig v. Boren	1976	sex discrimination	concurring				x
	Stanton v. Stanton	1977	family	dissent				

	Califano v. Goldfarb	1977	marriage compensation/benefits	concurring	x			x
	Nashville Gas Company v. Satty	1977	employment pregnancy discrimination compensation/benefits	concurring				
	City of Los Angeles Department of Water and Power v. Manhart	1978	employment compensation/benefits	majority	x	x		x
	Orr v. Orr	1979	marriage compensation/benefits	concurring				
	Caban v. Mohammed	1979	family parental rights	dissent	x	x	x	x
	Personnel Administrator of Massachusetts v. Feeney	1979	employment	concurring	x			
	Wengler v. Druggists Mutual Insurance Company	1980	employment compensation/benefits	concurring				
	Michael M. v. Superior Court of Sonoma County	1981	sex discrimination	dissent	x		x	x
	Lehr v. Robertson	1983	family parental rights	majority	x			x
	Johnson v. Transportation Agency	1987	employment	concurring				
	Miller v. Albright	1998	family parental rights	majority	x	x	x	
O'Connor (1981-2006)	*Mississippi University for Women v. Hogan*	1982	education	majority	x			
	Roberts v. Jaycees	1984	private clubs	concurring				
	Wimberly v. Labor and Industrial Relations	1987	employment pregnancy discrimination compensation/benefits	majority	x			
	Johnson v. Transportation Agency Commission	1987	employment	concurring				
	New York State Club Association, Inc. v. City of New York	1988	private clubs	concurring				
	J.E.B. v. Alabama ex rel. T.B.	1994	jury	concurring	x			x
	Miller v. Albright	1998	family parental rights	concurring				

	Tuan Anh Nguyen v. Immigration and Naturalization Service	2001	family parental rights	dissent	x		x	
Scalia (1986-)	*Johnson v. Transportation Agency*	1987	employment	dissent				x
	New York State Club Association, Inc. v. City of New York	1988	private clubs	concurring				
	UAW v. Johnson Controls, Inc. York	1991	employment	concurring	x			
	J.E.B. v. Alabama ex rel. T.B.	1994	jury	dissent	x			
	United States v. Virginia	1996	education	dissent		x		x
	Oncale v. Sundowner Offshore Services, Inc.	1998	employment sexual harassment	majority	x			
	Miller v. Albright	1998	family parental rights	concurring				
	Tuan Anh Nguyen v. Immigration and Naturalization Service	2001	family parental rights	concurring				
Kennedy (1988-)	*J.E.B. v. Alabama ex rel. T.B.*	1994	jury	concurring	x			
	Tuan Anh Nguyen v. Immigration and Naturalization Service	2001	family parental rights	majority	x	x	x	x
Souter (1990-2009)								
Thomas (1991-)	*Oncale v. Sundowner Offshore Services, Inc.*	1998	employment sexual harassment	concurring	x			
Ginsburg (1993-)	*United States v. Virginia*	1996	education	majority	x			
	Miller v. Albright	1998	family parental rights	dissent	x	x		
Breyer (1994-)	*Miller v. Albright*	1998	family parental rights	dissent	x			

* denotes Chief Justice

Appendix 4.2. Descriptive Statistics for the Independent Variables, 1971-2001.

Category	Variable	Mean (Standard Deviation)	Minimum	Maximum
Personal Attributes	Justice's political ideology	-.04 (.43)	-.81	.69
	Percent women on the Supreme Court	.05 (.08)	0	.22
Institutional Constraints	Percent women in managerial or professional occupations	41.40 (2.93)	37.3	48.6
	Number of liberal interest groups advancing no approaches	1.03 (3.10)	0	21
	Number of liberal interest groups advancing only a difference approach	.78 (3.31)	0	24
	Number of liberal interest groups advancing only a sameness approach	4.59 (8.66)	0	47
	Number of liberal interest groups advancing both approaches	3.36 (6.42)	0	25
	Number of liberal interest groups advancing a sameness distinction	8.77 (11.83)	0	48
	Number of liberal interest groups advancing a difference distinction	.42 (1.31)	0	7
	President's ideal point	.08 (.50)	-.53	.56
	Median member of the U.S. House of Representatives	-.08 (.09)	-.17	.17
	Median member of the U.S. Senate	-.09 (.09)	-.17	.11
Case Attributes	Case concerns pregnancy discrimination or abortion	.14 (.35)	0	1

Appendix 4.3. Multinomial Regression Results Predicting Justices' Approaches to Constructing Gender in Majority, Concurring, and Dissenting Opinions in United States Supreme Court Gender Classification Cases, 1971-2001.

Variable	Justice Advances No Approaches[a]			Justice Advances Only a Difference Approach[a]			Justice Advances Both Approaches[a]		
	Court Membership	Institutional Constraints	Full Model	Court Membership	Institutional Constraints	Full Model	Court Membership	Institutional Constraints	Full Model
Conservative Justice	1.01**		1.00**	1.69**		1.70**	.27		.22
	(.34)		(.35)	(.48)		(.50)	(.33)		(.36)
Female Justice	-.35		-.50	-13.13**		-13.24**	.27		-.05
	(.42)		(.45)	(.51)		(.67)	(.35)		(.39)
Percent Women on the Supreme Court	-.03			-.09**			-.07		
	(.03)			(.04)			(.05)		
Percent Women in Managerial or Professional Occupations		-.04	-.04		-.29*	-.28		-.06	-.06
		(.12)	(.13)		(.17)	(.18)		(.14)	(.15)
Number of liberal interest groups advancing no approaches		-.09	-.09		.06**	.07**		-.11	-.11
		(.11)	(.10)		(.02)	(.03)		(.08)	(.08)
Number of liberal interest groups advancing only a difference approach		-.11	-.11		.01	.02		-.97*	-1.00*
		(.07)	(.08)		(.04)	(.05)		(.55)	(.56)
Number of liberal interest groups advancing only a sameness approach		.02	.02		02	.02		.04	.04
		(.03)	(.03)		(.05)	(.04)		(.04)	(.04)
Number of liberal interest groups advancing both approaches		.01	.01		-.04	-.04		-.13*	-.13*
		(.04)	(.04)		(.06)	(.06)		(.07)	(.07)
Case Concerns Pregnancy or Abortion	-.17	-.16	-.15	1.66	1.41	1.42	1.25	2.04	2.05
	(1.23)	(1.45)	(1.49)	(.1.15)	(1.39)	(1.45)	(1.13)	(1.70)	(1.73)
(constant)	.02	1.68	1.63	-.52	10.96	10.56	.12	2.51	2.58
	(.35)	(4.89)	(5.16)	(.41)	(6.84)	(7.18)	(.37)	(5.97)	(6.13)
Log Likelihood	-558.53	-540.48	-525.00	-558.53	-540.48	-525.00	-558.53	-540.48	-525.00
Number of Observations	445	445	445	445	445	445	445	445	445

* significant at 10%, ** significant at 5%

[a]Comparison group is a sameness approach to constructing gender.

Appendix 4.4. Multinomial Regression Results Predicting Justices' Approaches to Constructing Gender in Majority, Concurring, and Dissenting Opinions in United States Supreme Court Gender Classification Cases, 1971-2001.

Variable	Justice Advances Only a Difference Approach[a]			Justice Advances Only a Sameness Approach[a]			Justice Advances Both Approaches[a]		
	Court Membership	Institutional Constraints	Full Model	Court Membership	Institutional Constraints	Full Model	Court Membership	Institutional Constraints	Full Model
Conservative Justice	.68		.70	-1.01**		-1.00**	-.74*		-.78*
	(.54)		(.56)	(.34)		(.35)	(.41)		(.42)
Female Justice	-12.78**		-12.74**	.35		.50	.63		.45
	(.56)		(.73)	(.42)		(.45)	(.39)		(.44)
Percent Women on the Supreme Court	-.06			.03			-.03		
	(.04)			(.03)			(.04)		
Percent Women in Managerial or Professional Occupations		-.25*	-.24		.04	.04		-.01	-.02
		(.14)	(.15)		(.12)	(.13)		(.10)	(.10)
Number of liberal interest groups advancing no approaches		.14	.15		.09	.09		-.02	-.03
		(.11)	(.11)		(.11)	(.10)		(.14)	(.14)
Number of liberal interest groups advancing only a difference approach		.13*	.13*		.11	.11		-.86	-.89
		(.07)	(.07)		(.07)	(.08)		(.56)	(.57)
Number of liberal interest groups advancing only a sameness approach		-.01	-.01		-.02	-.02		.02	.02
		(.05)	(.05)		(.03)	(.03)		(.05)	(.05)
Number of liberal interest groups advancing both approaches		-.05	-.05		-.01	-.01		-.13	-.13**
		(.05)	(.05)		(.04)	(.04)		(.06)	(.06)
Case Concerns Pregnancy or Abortion	1.83**	1.57**	1.56**	.17	.16	.15	1.42*	2.20**	2.20**
	(.62)	(.63)	(.62)	(1.23)	(1.45)	(1.49)	(.79)	(.78)	(.78)
(constant)	-.53	9.27	8.93	-.01	-1.68	-1.63	.10	.82	.94
	(.38)	(5.79)	(5.96)	(.35)	(4.89)	(5.16)	(.36)	(3.89)	(3.95)
Log Likelihood	-558.53	-540.48	-525.00	-558.53	-540.48	-525.00	-558.53	-540.48	-525.00
Number of Observations	445	445	445	445	445	445	445	445	445

* significant at 10%, ** significant at 5%

[a]Comparison group is no approaches to constructing gender.

Appendix 4.5. Marginal Effects at Means for Models Predicting Justices' Approaches to Constructing Gender in Majority, Concurring, and Dissenting Opinions in United States Supreme Court Gender Classification Cases, 1971-2001.

Variable	Justice Advances No Approaches		Justice Advances Only a Difference Approach		Justice Advances Only a Sameness Approach		Justice Advances Both Approaches	
Conservative Justice	.16	.16	.10	.11	-.20	-.21	-.05	-.05
Female Justice	-.05	-.04	-.15	-.15	.14	.08	.06	.11
Percent Women on the Supreme Court		-.01		-.01		.01		-.00
Percent Women in Managerial or Professional Occupations	.00		-.02		.02		-.00	
Number of liberal interest groups advancing no approaches	-.01	-.01	.01	.01	.02	.02	-.01	-.01
Number of liberal interest groups advancing only a difference approach	.04	.04	.02	.02	.09	.09	-.15	-.15
Number of liberal interest groups advancing only a sameness approach	.00	.00	.00	.00	-.01	-.01	.00	.01
Number of liberal interest groups advancing both approaches	.01	.01	-.00	-.00	.01	.01	-.02	-.02
Case Concerns Pregnancy or Abortion	-.21	-.22	.06	.11	-.24	-.24	.38	.36
Number of Observations	445	445	445	445	445	445	445	445

Appendix 4.6. Marginal Effects at Means for Models Predicting Why Justices Advance a Sameness Distinction when Voting in United States Supreme Court Gender Classification Cases, 1971-2001.

Variable	Full Model 1	Full Model 2	Full Model 3	Full Model 4
Conservative Justice	-.41	-.42	-.42	-.42
Female Justice	.16	.17	.20	.20
Percent Women on the Supreme Court			-.02	-.01
Percent Women in Managerial or Professional Occupations	-.01	.00		
Number of Liberal Interest Groups Advancing a Sameness Vote	.01	.02	.02	.02
Number of Liberal Interest Groups Advancing a Difference Vote	-.02	-.02	-.00	-.01
Conservative President	.10	.15	.11	.13
Conservative House of Representatives	-.10		.38	
Conservative Senate		-1.00		-.54
Case Concerns Pregnancy or Abortion	.07	.04	.05	.03
Number of Observations	438	438	438	438

Appendix 5.1. Interview Invitation Phone Script.

1. Hello Justice/Dr./Professor/Mr./Ms. X. My name is Kristine Coulter. I am a Ph.D. candidate in the political science department at the University of California, Irvine. I am working on my dissertation, which examines the Supreme Court's influence on gender equality in the United States.

I am contacting because you [are a former or sitting United States Supreme Court justice/clerked for Justice X/conduct research on the United States Supreme Court/participated in cases before the Supreme Court] and you may be interested in sharing with me your experiences and expertise.

2. If you are interested in hearing more, may I continue?

3. [If yes] Great! I think your experiences and expertise can provide valuable insight into this study, titled "Gender Matters: Women, Power, and the United States Supreme Court."

4. [If not] Thank you for your time.

5. If you would like to learn more and potentially participate in this project, may we schedule a time to discuss this project? The interview should take between 30-45 minutes once we begin.

6. [If yes, schedule the interview.]

7. [If no] Thank you for your time.

Appendix 5.2. Interview Invitation Email/Letter.

Dear Justice/Dr./Professor/Mr./Ms. X. My name is Kristine Coulter. I am a Ph.D. candidate in the political science department at the University of California, Irvine. I am working on my dissertation, which examines the Supreme Court's influence on gender equality in the United States.

I am contacting you because you [are a former or sitting United States Supreme Court justice/clerked for Justice X/conduct research on the United States Supreme Court/participated in cases before the Supreme Court] and you may be interested in sharing with me your experiences and expertise.

This study, titled "Gender Matters: Women, Power, and the United States Supreme Court" will look at how justices' gender affects judicial rulings in sex discrimination cases. I believe that your experiences and expertise can provide valuable insight into this project.

If you choose to take part in this research study, we will schedule a time for an interview. This interview should last between 30-45 minutes and can be conducted at a time of your choosing, over the phone.

If you would like to participate or if you have any questions about the study, please email me at X or call me at X.

Thank you for your time.

Kristine Coulter
Ph.D. Candidate
Department of Political Science
University of California, Irvine

Appendix 5.3. Date, Time, Location, Duration, and Recording Information for Each Interview, by Interviewee Category.

Interviewee Category	Date	Time	Location	Duration	Recording
Law Clerk					
77	6/24/14	1 pm PDT	Phone	32:41	Notes and Audio Recording
36	6/24/14	11:30 am PDT	Phone	36:27	Notes and Audio Recording
124	6/23/14	1 pm PDT	Phone	30:00	Notes and Audio Recording
243	6/23/14	10 am PDT	Phone	33:55	Notes and Audio Recording
12	6/20/14	2 pm EST	D.C.	31:10	Notes and Audio Recording
52	6/20/14	12 pm EST	Phone	31:46	Notes and Audio Recording
193	6/19/14	5 pm EST	Phone	28:23	Notes and Audio Recording
14	6/10/14	1 pm EST	D.C.	1:30:00	Notes
37	6/18/14	11 am EST	D.C.	1:08:13	Notes and Audio Recording
46	6/17/14	6 pm EST	Phone	42:28	Notes and Audio Recording
165	6/17/14	10 am EST	D.C.	1:05:13	Notes and Audio Recording
177	6/16/14	10 am EST	D.C.	26:39	Notes and Audio Recording
135	6/13/14	2 pm PDT	Phone	55:15	Notes and Audio Recording
42	6/25/14	11 am PDT	Phone	49:15	Notes and Audio Recording
62	6/12/14	9 am PDT	Phone	54:19	Notes and Audio Recording
70	6/11/14	11 am PDT	Phone	42:50	Notes and Audio Recording
51	6/10/14	1 pm PDT	Phone	26:26	Notes and Audio Recording
73	6/25/14	1 pm PDT	Phone	47:49	Notes and Audio Recording
28	6/10/14	9 am PDT	Phone	59:05	Notes and Audio Recording
112	6/26/14	9:30 am PDT	Phone	54:21	Notes and Audio Recording
35	6/26/14	2:30 PDT	Phone	32:00	Notes and Audio Recording
13	6/27/14	12:30 PDT	Newport Beach, CA	1:30:00	Notes
18	6/30/14	1 pm PDT	Phone	39:22	Notes and Audio Recording
229	6/27/14	11 am PDT	Phone	23:35	Notes and Audio Recording
44	7/1/14	11:30 am PDT	Phone	24:02	Notes and Audio Recording
147	7/1/14	12 pm PDT	Phone	55:00	Notes
69	7/1/14	1:30 pm PDT	Phone	58:13	Notes and Audio Recording
20	7/2/14	10 am PDT	Phone	38:41	Notes and Audio Recording
98	7/3/14	10 am PDT	Phone	30:54	Notes and Audio Recording
131	7/14/14	12 pm PDT	Phone	40:36	Notes and Audio Recording
262	7/17/14	11:30 am PDT	Phone	28:03	Notes and Audio Recording
384	7/15/14	12 pm PDT	Phone	39:22	Notes and Audio Recording
339	7/18/14	8 am PDT	Phone	14:15	Notes and Audio Recording
420	7/23/14	9 am PDT	Phone	47:15	Notes and Audio Recording
269	7/25/14	10 am PDT	Phone	19:50	Notes and Audio Recording

274	7/25/14	1 pm PDT	Phone	23:58	Notes and Audio Recording
419	8/13/14	12 pm CST	Phone	58:27	Notes and Audio Recording
82	8/19/14	10 am CST	Phone	32:38	Notes and Audio Recording
374	8/25/14	3:30 pm CST	Phone	25:16	Notes and Audio Recording
264	8/28/14	9 am CST	Phone	9:31	Notes and Audio Recording
287	8/28/14	10 am CST	Phone	26:45	Notes and Audio Recording
21	8/28/14	12:30 pm CST	Phone	31:00	Notes and Audio Recording
338	8/28/14	3 pm CST	Phone	18:09	Notes and Audio Recording
Litigant					
488	7/10/14	2:00 PDT	Phone	25:00	Notes
486	7/17/14	2:30 PDT	Phone	15:30	Notes and Audio Recording
463	7/17/14	12:30 PDT	Phone	15:37	Notes and Audio Recording
475	7/16/14	9 am PDT	Phone	36:03	Notes and Audio Recording
461	7/14/14	9 am PDT	Phone	29:58	Notes and Audio Recording
457, 458, 459	7/18/14	10 am PDT	Phone	16:43	Notes and Audio Recording
494	7/18/14	11 am PDT	Phone	29:54	Notes and Audio Recording
489	7/21/14	10 am PDT	Phone	16:08	Notes and Audio Recording
482	7/18/14	1:30 pm PDT	Phone	39:03	Notes and Audio Recording
491	7/23/14	2:30 PDT	Phone	11:22	Notes and Audio Recording
432	7/29/14	8:30 am PDT	Phone	43:53	Notes and Audio Recording
459	7/24/14	1 pm PDT	Phone	27:45	Notes and Audio Recording
487	8/14/14	12 pm CST	Phone	21:19	Notes and Audio Recording
Amici					
480	7/15/14	11 am PDT	Phone	32:32	Notes and Audio Recording
516	7/15/14	1 pm PDT	Phone	28:03	Notes and Audio Recording
507	7/22/14	12 pm PDT	Phone	28:57	Notes and Audio Recording
512	7/25/14	1:30 PDT	Phone	51:02	Notes and Audio Recording
519	7/29/14	11 am PDT	Phone	34:01	Notes and Audio Recording
503	8/28/14	2 pm CST	Phone	15:04	Notes and Audio Recording
Legal Expert					
259	6/13/14	12 pm PDT	Phone	53:37	Notes and Audio Recording
252	6/10/14	11 am PDT	Phone	12:45	Notes and Audio Recording
258	6/19/14	11 am EST	D.C.	23:39	Notes and Audio Recording
254	7/21/14	3 pm PDT	Phone	27:06	Notes and Audio Recording
534	7/28/14	8:30 am PDT	Phone	13:46	Notes and Audio Recording

Appendix 5.4. Number of United States Supreme Court Law Clerks Contacted and Each Type of Response, by Justice and Justice's Status.

Supreme Court Justice	Justice's Status	Contacted	Accepted	Declined	No Response
Blackmun	Deceased	20	3	3	14
Brennan	Deceased	13	5	1	7
Breyer	Sitting	11	3	5	3
Burger	Deceased	6	4	0	2
Ginsburg	Sitting	28	4	11	13
Kennedy	Sitting	18	0	10	8
Marshall	Deceased	15	6	7	2
O'Connor	Retired	53	9	17	27
Powell	Deceased	11	2	2	7
Rehnquist	Deceased	19	2	8	9
Scalia	Sitting	21	0	7	14
Souter	Retired	20	1	5	14
Stevens	Retired	17	3	5	9
Thomas	Sitting	11	0	5	6
White	Deceased	15	5	5	5
Total		278	47	91	140