

**HAVE WE COME A LONG WAY, BABY?:
FEMALE ATTORNEYS BEFORE THE UNITED STATES SUPREME COURT**

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Abstract

Numerous statistics indicate the presence of gender bias in the U.S. legal profession. To this date, however, studies addressing the mechanisms of this bias have been noticeably absent. In particular, little is known as to whether attorney gender significantly affects the likelihood of litigant success in appellate courts, including the nation's highest court. In this paper, we test two alternative theories of the influence of attorney sex: gender schemas and different voice. We find that Supreme Court justices are less likely to support litigants represented by women. Our findings suggest that litigation teams that have a higher proportion of female attorneys are less likely to win before the Court. In addition, this bias appears to be highly conditional on judicial ideology. Conservative jurists are more likely than liberal jurists to vote against litigation teams with a higher proportion of women.

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In 1869, Myra Bradwell was denied admission to the Illinois bar. The United States Supreme Court affirmed that decision in 1873, stating that “The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother” (*Bradwell v. Illinois*, 83 U.S. 130 at 141 (1873)). A century later, in 1971, women comprised only 3 percent of all attorneys in the United States; in 1988, that figure had risen to 16 percent (Curran and Carson 1991). By 2005, while women accounted for 47.5 percent of first-year law school admissions, still only approximately 28 percent of those appointed to federal judgeships were women, 19 percent accounted for law school deans, and women as partners in private practice law firms comprised a weak 17 percent (ABA Commission 2005). Despite the eradication of outright discrimination through passage of Title VII of the Civil Rights Act of 1964 and a series of landmark legal decisions recognizing the equality of the sexes, women still face subtle, yet serious bias in our nation’s law schools, courthouses and in the legal profession generally.

In this paper, we specifically examine how women as litigators fare before the justices of the U.S. Supreme Court. While numerous statistics exist to document the discrimination that women face in terms of equal pay, career advancement, and other intangible perceptions (or realities) of exclusion, there exists little empirical work which assesses the influence of attorney gender on judicial decision making. In hopes of remedying this deficiency, we ask if the gender bias that pervades the legal profession as a whole has also crept its way into the decision-making calculus of the Supreme Court justices.

Gender Bias: Theoretical Explanations

With the growing number of women entering the legal profession, the discussion of the prevalence of gender bias in the legal system has become prominent. What has become known as the “no- problem, problem” describes the paradox represented by the growing entry of women into the legal profession and how such influx masks the problems and discriminatory treatment women still face (Rhode 2002, 1003). By 1990, numerous court systems and bar associations across the nation set forth to create task forces on gender bias in order to address this burgeoning problem (Abrahamson 1993). These task forces, consisting of judges, practicing attorneys and academics, conducted surveys, held public hearings, and formed numerous roundtables in order to investigate the problems and discrimination faced by female litigants and lawyers. The outcomes of these studies all showed, to some extent, that women lawyers had been victims of gender-based improper conduct by judges, male attorneys, and other court personnel (e.g., Cortina et al. 2002). This conduct oftentimes ranged from seemingly innocuous forms of improper surname usage, to the failure of male judges to acknowledge and monitor inappropriate gender-based courtroom behavior, to overt sexually inappropriate behavior by the judges themselves (Cortina et al. 2002; Swent 1996). Justice Sandra Day O’Connor, the first female justice herself, has also fallen victim to such conduct. While hearing oral arguments in 1991, Justice O’Connor had to remind a male attorney that she *too* was on the bench in response to part of his statement, “Gentlemen, I want to remind you....” (*Newsweek* 1991, 13). Outside the courtroom, the prognosis has been equally grim: women are disproportionately employed in low paying fields such as family law, poverty law, and the public sector; men experience higher income premiums for their decisions to start a family while women’s similar choices are to their

detriment; and women graduates from prestigious law schools still earn a lower salary than similarly situated men (Huang 1997).

What accounts for this gender bias in the legal profession has become the subject of important feminist discourse over the past two decades. Attempts to address how, in the absence of blatant discrimination, gender neutral policies still tend to thwart the advancement of women as lawyers have led to the development of interesting, yet oftentimes conflicting theories.

Some feminists take the position that the only way to substantially change the legal profession is through the contribution of women's "different voices" (Menkel-Meadow 1985; Colker 1990; Cahn 1991). Grounded in early work by developmental psychologist Carol Gilligan, these cultural feminists argue that not only are women physiologically different from men but emotionally different as well. Possessing what has been termed an "ethic of care," women are deemed relational and nurturing while men are seen as individualistic and guided by abstract notions of laws and justice (Gilligan 1982). Since men have dominated many of our important societal discussions, women's perspective is not only considered to be less developed and sophisticated, it is often not even taken seriously in societal discourse (Gilligan 1982). Gilligan argued for recognizing the value of the female voice in order to "arrive at a more complex rendition of human experience which sees the truth of separation and attachment in the lives of women and men and recognizes how these truths are carried by different modes of language and thought" (Gilligan 1982, 173-174).

Lawyering in a "different voice," for example, would stress alternatives to the typical adversarial forms of dispute resolution, offering a more contextual or cooperative approach and applying such methods as mediation or arbitration to a legal dispute (Menkel-Meadow 1985; 1995). Menkel-Meadow (1985) also argues that in their role as counselors, female lawyers might

be better equipped to understand their client's needs and goals because within them (as women) inheres the values of care and responsibility. Suzanna Sherry (1986) claimed to have found evidence of this gendered behavior in the opinions of Sandra Day O'Connor, citing evidence of communitarian concerns within O'Connor's Supreme Court opinions. While Sherry's findings have been questioned by other theorists (Davis 1993) and Justice O'Connor herself, the cultural feminists' approach to understanding judging is still relevant and capable of providing important insights (Karst 1984; 2003). Cultural feminists are often optimistic that women's different voices can provide the impetus to produce real and meaningful changes in the courts, the legal profession, and in American procedural and substantive laws (West 1997; Turnier, Conover and Lowery 1996). The question of whether an "ethic of care" translates into distinct substantive or stylistic expressions of the legal arguments of female lawyers has not been adequately explored in the literature. In addition, scholars have yet to address whether these presumed differences between male and female attorneys have an impact on judicial decision making.

While the "different voice" approach has been important for offering an explanation of the behavior of some women and society's reaction to women as lawyers, it has been criticized as being "essentialist" (Harris 1990) in nature; that is, it may not account for important differences among women. Likewise, it may not entirely account for the reasons why women advance at such a disproportionately slower rate than men in the legal world, nor does it explain why discrimination against women attorneys persists. "Gender Schemas," may be helpful in further explaining this gender bias. Similar to stereotypes, but more neutral in formation, schemas are cognitive structures which enable us to interpret the world (Valian 1999). As Valian (1999) describes, individuals naturally assign different attributes, physical and mental, to men and women. Men are viewed as independent, strong, and rational; women are seen as communal,

emotional, and nurturing. While these schemas correspond to the perspective offered by “different voice” theory, proponents of this approach argue that their underlying effect is the overrating of men and the underrating of women. Thus, daily events that unconsciously advantage men accumulate to elevate men in society’s eyes while women slowly yet steadily fall behind. Finally, because we tend to form our impressions about men and women from extreme cases (the ultra feminine vs. the ultra masculine), the result is that our view of the sexes in general becomes polarized, super-intensifying our schematic applications of gender attributes to the benefit of one and the detriment of the other.

Since these characteristics are so fundamentally at odds with what the law represents and expects, women face a “double-bind” in the legal profession (Radin 1990; Jamieson 1995; Nelson 2004; Rhode 2002). Women are expected to work harder yet are still rated as less competent. That is, in a society that continues to elevate men’s contribution to the public sphere, “every seemingly progressive step forward (by women) can also provoke opposing, negative consequences” (Bartow 2005, 233). In most professional institutions, including legal institutions, cultural bias toward the male stereotype is a reality. For example, male attorneys are rewarded for ruthless behavior in the courtroom, but capable female lawyers are often negatively stereotyped as overly assertive and aggressive if they behave in the same manner (ABA 2001; Pierce 1995; Rhode 2002). On the other hand, so-called “gendered” behavior is remembered and oftentimes serves as a further basis to thwart women’s advancement. People easily recall the woman who had to leave work early to tend to a sick child, yet they tend to forget her professional accomplishments. In a study of media portrayal of women lawyers, it was found that overwhelmingly women were represented as either emotionally conflicted (recall Ally McBeal) or heartless and uncaring people, leading the author to conclude that television’s reinforcement

of gender stereotypes further helps to undermine the power and authority of real-life women attorneys (Corcos 2003). Ultimately, these gender schemas or stereotypes become self-fulfilling prophecies.¹

Assessing the Influence of Attorney Gender on Supreme Court Decision Making

Scholars have begun to examine the influence of gender in the legal context, focusing largely on the question of whether a judge's gender influences his or her voting behavior (e.g., Allen and Wall 1993; Gruhl, Spohn and Welch 1981; Gryski, Main and Dixon 1986; Songer and Crews-Meyer 2000; Songer, Davis and Haire 1994; Walker and Barrow 1985). The findings of such studies are mixed, ranging from no effects in the United States Courts of Appeals (Songer, Davis and Haire 1994), to conditional effects (e.g., Allen and Wall 1993; Gryski, Main and Dixon 1986, finding that gender matters only in cases involving gender issues), to substantial effects in state courts of last resort (Songer and Crews-Meyer 2000).

Although there is a vast amount of research to suggest that attorneys play an important role in the decision-making process of American judges (McGuire 1993;1995; 2000; Johnson,

¹ A more radical theoretical approach advanced to explain the prevalence of gender bias is "dominance" or "anti-subordination theory." According to this theory, men dominate societies' institutions, laws, and private relationships, all of which are structured hierarchically according to sex. As a result, men maintain the power to manipulate what has value and meaning within society to the detriment of women. Proponents believe that the existence of sexual harassment, domestic violence, rape, pornography, and workplace inequities can be explained by men's monopoly on power. By advancing abstract principles and standards which appear to be gender neutral, men easily maintain this power advantage (MacKinnon 1987). Thus, gender differences are a fiction and cannot be used to explain away women's lack of success. The solution, according to these feminists, is a complete restructuring of our institutions and of those terms on which society is based. Regarding the legal profession, MacKinnon states: "Being a lawyer is also substantially more consistent with the content of the male role, with what men are taught to be in this society: ambitious, upwardly striving, capable of hostility; aggressive not just assertive, not particularly receptive or set off from the track of an argument by what someone else might be saying or, god forbid, feeling" (MacKinnon 1987, 74). Dominance theory raises the question of whether women can ever truly be comfortable with their role as lawyers as that role is presently constructed. While this theory is important for understanding and explaining many aspects of women's subordinate status, we would expect to find empirical evidence by studying legal doctrines and other public policy outputs, which may or may not contain dominance structures. Since this is not the focus of our paper, we instead focus on gender schemas and different voice theory.

Wahlbeck and Spriggs 2006), few studies have examined the effects of *attorney* gender on judicial decision making in the American courts. Most, if not all, of the attorney gender studies focus solely on the impact of attorney gender on jury decision-making (Cohen and Peterson 1981; Hahn and Clayton 1996; Hodgson and Pryor 1984; Johnson 1985; McGuire and Bermant 1977; Sigal et al. 1985; Villemur and Hyde 1983). All of these studies are mock juror experiments, primarily conducted by psychologists. Some studies find no relationship between attorney gender and mock juror verdicts (e.g., Cohen and Peterson 1981; Johnson 1985; Sigal et al. 1985). Others conclude that mock jurors are more likely to vote in favor of male attorneys (Hahn and Clayton 1996; Hodgson and Pryor 1984; McGuire and Bermant 1977). Finally, the mock jurors in the experiment conducted by Villemur and Hyde (1983) were more likely to acquit a hypothetical rape defendant when the defense attorney was a woman. Clearly, the results of these studies are mixed. Furthermore, since the collective knowledge on the topic is a result of a series of experiments, it is subject to questions of external validity. These studies, moreover, are limited to jury decision making, which is conceptually distinct from judicial decision making. In fact, to this date, no one has studied the impact of attorney gender in the appellate courts of the United States. More strikingly, no one has studied the impact of attorney gender in our nation's highest court, the U.S. Supreme Court.

While we have come a long way since Justice Bradley opined that a woman's place was in the home, the allegations of sexual harassment by attorney Anita Hill against Clarence Thomas and the confirmation hearings of Samuel Alito (where the now Justice was questioned repeatedly about his upholding of abortion spousal notification provisions) were not so long ago. Historically, the U.S. Supreme Court has exhibited a surprising pattern of discrimination against women attorneys beginning with its decision in *Bradwell v. Illinois* (1873). For instance, Belva

Lockwood was not admitted to practice before the Supreme Court until 1879, and she was only admitted after successfully lobbying Congress to pass legislation allowing women the statutory right to join the Supreme Court bar (Berkson 1982). Almost a century later, Americans at long last witnessed the confirmation of the nation's first female justice.

Additionally, the hiring patterns of Supreme Court clerks over time provide evidence of disparate treatment of women, if not outright discrimination. For example, it was not until 1944 that Lucille Lomen, a graduate of the University of Washington School of Law, was hired as a clerk by Justice Douglas; it would be another twenty-two years before the second woman law clerk for the Supreme Court was hired (McGurn 1980). Despite the passage of time, the rise in the number of women law clerks has not corresponded with the rise of women graduating from law school and entering the legal profession. In fact, during the 2004-2005 term, 15 of the 35 law clerks hired were women; over the 2005-2006 term, the proportion of male to female clerks had fallen – only 13 of the 37 clerks were women (Mauro 2006). Most recently, in the 2006-2007 term, the Court hired just 7 women clerks, versus 30 male clerks (Greenhouse 2006). During this period, just under half of the law school graduates were women (ABA 2005; Greenhouse 2006).

While the gender inequality in the Supreme Court law clerk selection process is by itself troubling given the role that clerks play (Lazarus 1998; Perry 1991; Wahlbeck, Spriggs, and Sigelman 2002; Ward and Weiden 2006), it may also prolong the gender and ethnic bias in the Supreme Court bar, because former law clerks are substantially more likely to participate in Supreme Court litigation (McGuire 1993; O'Connor and Hermann 1995) and are presumed by the justices to be highly competent in that role (Johnson, Wahlbeck and Spriggs 2006). Moreover, the legal entities that handle a substantial portion of the cases before the Court (e.g., the Office of the Solicitor General; large firms and boutiques with Supreme Court litigation

divisions) actively recruit and employ a significant number of these former, and most often, male clerks (Mauro 2004). In sum, the former law clerks are the pool from which a significant number of Supreme Court litigators are drawn², and so long as women make up a substantially smaller portion of that pool, they will likely continue to be underrepresented and underrated members of the Supreme Court bar.

Indeed, in terms of sheer numbers, women as legal counsel do appear to be underrepresented in litigation before the Supreme Court. Figure 1 presents the frequencies, in percentages, of the proportion of women on a litigation team participating in a Supreme Court case during the period of our analysis, the 1993-2001 terms. As seen in the figure, most teams have very few, if any, women serving as counsel. In fact, more than half of the litigation teams had four-to-one or higher male-female attorney ratios. Teams with proportionally high female representation are the exception and not the rule.

[Figure 1 about here]

Thus, just as women account for a significantly smaller proportion of those attorneys in positions of power in the legal world generally, they also hold too few important positions within the arena of the Supreme Court. Whether this underrepresentation results in gender discrimination in the form of women's lack of success in arguing Supreme Court cases is the focus of our study. That is, does the gender of the attorney engaged in Supreme Court litigation affect the justices' decision-making process?

Attorney Influence on Supreme Court Decision Making

² For example, during the period from 1993-2001, approximately ten percent of the attorneys arguing before the Court were former clerks, and they were responsible for presenting more than a quarter of the oral arguments.

Before assessing the degree to which attorney gender affects decision making on the Supreme Court, it is important to first understand how attorneys in general affect the justices. Like most political decision makers, the justices rely on other actors for information, including law clerks (Peppers 2006; Wahlbeck, Spriggs, and Sigelman 2002; Ward and Weiden 2006) and attorneys (Johnson 2001; 2004) who both play critical roles in the judicial system. According to Johnson (2004), the justices use oral arguments to gather information about the policy implications of their decisions as well as the preferences of external actors that could influence the impact of the Court's decisions. While not empirically examined in the same degree of depth, it is also possible that the party briefs contain similar information. Moreover, others contend that appellate litigators can clarify the facts and issues for the judges (Wahlbeck 1997) or even construct persuasive legal arguments (Haire, Lindquist, and Hartley 1999).

Regardless of the sources and types of information relied upon by the justices, we know that the degree to which the Court relies on the information varies across attorneys. According to McGuire (1995) and Johnson, Wahlbeck and Spriggs (2006), the justices are more reliant upon information if they believe the source is credible. While no one has directly tested the credibility hypothesis, we do know that the justices are more influenced by attorneys with prior Supreme Court litigation experience (McGuire 1995; Wahlbeck 1997; 1998). McGuire (2000) also finds some evidence of a relationship between prior Supreme Court clerkships and Court decisions. Finally, we also know that an assortment of attorney characteristics (including experience, clerkships, law school alma mater, certain types of government employment, and geographic proximity to the Court) influenced Justice Blackmun's informal assessments of the attorneys' performances during oral arguments and, in turn, those assessments partially explain the other justices' votes (Johnson, Wahlbeck and Spriggs 2006).

In sum, it is apparent that attorneys can and do influence Supreme Court decision making. Thus, it becomes all the more essential that we look more closely at the attorney specifically to see if gender also plays a critical role in the decision making of the Supreme Court justices. In this effort, we formulate a model of the justices' votes that tests whether the gender composition of legal teams is a source of significant bias among these political elites.

Hypotheses

Attorney Gender

Gender Schema

While the influence of attorneys before the Supreme Court is a partial function of certain experiential characteristics, it is also possible that their influence is a function of immutable traits like sex. Clearly, the Court has discriminated against women in the past, and there is at least de facto evidence of continued discrimination in the clerk selection process (Greenhouse 2006; Mauro 2006). Moreover, scholars have found evidence of negative gender stereotyping in the legal profession (Rhode 2002) and in related contexts. Mass perceptions of elites, for example, are influenced by gender schema. Experimental researchers have found that people are more likely to assume that men are leaders (Butler and Geis 1990; Porter and Geis 1981), and public perceptions of women political candidates are biased by gender stereotypes (Kahn 1996). Elites, like women professors, are often discriminated against by their elite colleagues as a result of the application of negative gender schema (Valian 2005). Similarly, media elites apply gender schema to their coverage of women politicians which, in turn, influences public perceptions (Kahn 1992).

Evidence of discrimination resulting from gender schemas abounds in the legal context as well. For example, gender schema perceptions among law school professors can lead to gender-

based segregation among law faculty (Kornhauser 2004). Among lawyers, women generally earn less than their male counterparts with similar experience and qualifications (ABA 2001; Epstein et al. 1995; Noonan and Corcoran 2004). Moreover, women attorneys working in law firms are less likely to receive promotions than similarly situated males (Epstein et al. 1995; Noonan and Corcoran 2004). Clients also discriminate against women lawyers. In an analysis of the language employed by attorneys and clients, Bogoch (1997) finds that clients are more deferential to men, even though the content of the language used by the attorneys did not vary across gender. Finally, Karst's (2003) anecdotal examinations of Supreme Court justice opinions identified gender stereotypes that were employed by some of the justices to rationalize weakening equal protection standards for women.

Our application of gender schema theory implicitly assumes that the justices are aware of the gender of the attorneys. Obviously, subconscious stereotypes of male and female attorneys will only affect the justices' perceptions of the attorneys' arguments if the gender of these actors is known. In the context of Supreme Court litigation, the justices are aware of the gender of the orally arguing attorney, but they are not necessarily aware of the gender of the other attorneys that play a role in the process. As such, we will test the gender schema hypothesis by examining the impact of the gender of the orally arguing attorney. Given the substantial evidence of the negative application of gender schema in the legal world and in related contexts, we expect to find that the justices apply negative gender schema when judging the credibility of the information presented by women attorneys in oral arguments. Specifically, if both sides of a given case are represented by female counsel at oral argument, the effect of gender bias on the likelihood of the petitioner's success will be mitigated. However, when a female attorney squares off against a male attorney before the Court, the female may be presumed less credible

relative to her male counterpart. Since there is reason to believe that perceptions of attorney credibility influence the votes of the justices, we hypothesize the following:

H₁: Justices are less likely to vote in favor of petitioners when the petitioner's orally arguing attorney is a female and the respondent's orally arguing attorney is a male.

Different Voice

Unlike gender schema, different voice theory could explain differential treatment of female attorneys even if the justices are unaware of the gender of the attorney. Different voice theory assumes, on average, female attorneys will construct “different” arguments (both modes of language and thought) than those constructed by male attorneys in the same context. To the extent that justices are accustomed to, or expect, more traditionally “male” arguments, they would then favor arguments made by male attorneys. Given the age of the justices, as well as the historical exclusion of women from the legal profession, as well as the relative paucity of female attorneys participating in Supreme Court litigation (see Figure 1), we expect to find the justices will favor arguments developed largely by males, over those that are more a product of female lawyers.

In Supreme Court litigation, attorney arguments take two forms: oral arguments and written briefs. Authorship of the party merits briefs is almost always attributed to multiple attorneys. Moreover, Supreme Court litigators interviewed by the authors indicated that in many contexts, the orally arguing attorneys play a relatively small role in constructing the briefs. Since the process of constructing the brief is a collaborative effort, we believe the proportion of women on the litigation team will reflect the degree to which the arguments are a product of lawyering in a different voice. This measure does not reflect the impact of gender schema because there is no reason to believe that the justices are even aware of the relative gender breakdown of the authors

of the brief, beyond that of the orally arguing attorney (which we control for). As such, we hypothesize the following:

H₁: Justices are less likely to vote in favor of petitioners that are represented by a greater proportion of women attorneys relative to those representing the respondent.

Justice Ideology

While we expect the gender of legal counsel to have a significant effect on the nature of Supreme Court decisions, we must consider the possibility that another variable might magnify or mitigate this effect for a given justice. In particular, a leading contender in this respect is judicial ideology. Scholars have long noted the important influence of judicial ideology in the decision-making processes of Supreme Court justices (e.g., Segal and Spaeth 2002). Hence, a key control variable discussed below involves the congruence between a justice's ideology and the ideological direction of the petitioner's preferred outcome. Although the influence of judicial ideology is likely to be quite pronounced in this manner, it is also possible that a justice's ideology might influence the application of gender schemas or a justice's receptivity to arguments constructed by female counsel.

There is, in fact, some anecdotal evidence that justice ideology affects the treatment of women lawyers. According to data presented by Peppers (2006, 21), four of the five conservative justices serving on the Court at some point between the 1993-2001 terms (Scalia, Thomas, Rehnquist and Kennedy) were significantly less likely to hire female law clerks than their liberal brethren. Indeed, at least 70 percent of the clerks hired by the four male conservative justices were men while four of the five liberal justices (Stevens, Ginsburg, Blackmun, and Breyer) had female clerk percentages ranging between 36 percent (Stevens and Blackmun) to over 40 percent

(Breyer and Ginsburg). Conversely, the four conservative males had female clerk percentages of 13 percent (Scalia), 16 percent (Rehnquist and Kennedy), and 30 percent (Thomas). Only O'Connor (over 40 percent of her clerks were women) and Souter (23 percent) did not scale ideologically.

While we know that there is a relationship between ideology and perceptions of women in other contexts (e.g., Koch 2000), and we also know that ideology tends to affect the justice's selection of women clerks, how could ideology modify the justice's perceptions of the information presented by female attorneys? One might hypothesize that justices who tend to support more liberal political positions might also tend to apply gender schemas in ways that are not as disadvantageous toward women. For example, those who are more committed to supporting women's rights, including equal employment rights (i.e., judicial liberals), might be more weary of applying traditional gender stereotypes or simply might be more aware of the existence of such stereotypes. Similarly, ideology might condition the degree to which justices are open to arguments presented in a woman's voice. If there is even partial overlap in the types of arguments, goals, and strategies emphasized or accepted by women and liberal jurists, the possibility for gender bias to negatively affect the likelihood of litigant success should be alleviated, at the very least. Thus, the influence of one's ideological preferences may extend beyond the substantive issue raised in the case to the gender of the attorneys presenting the legal arguments. These possibilities lead to the generation of a third set of hypotheses:

H_{3a}: Conservative justices will be less likely to vote in favor of petitioners represented by a female orally arguing attorney, whereas liberal justices will be inclined to offer further support or, at the very minimum, will not be less inclined to support such litigants.

H_{3b}: Conservative justices will be less likely to vote in favor of petitioners represented by a greater proportion of women attorneys, whereas liberal justices will be inclined to offer further support or, at the very minimum, will not be less inclined to support such litigants.

Data and Methods

The dataset for the analyses includes the orally argued cases from the U.S. Supreme Court's 1993-2001 terms.³ The cases were identified from *The Original U.S. Supreme Court Judicial Database* (Spaeth 2002).⁴ The unit of analysis is the individual justice's vote in a single case.⁵ Only the dependent variable, whether the justice voted for or against the petitioner (coded '1' if the vote supported the petitioner, '0' if it did not support the petitioner), was coded based solely on information contained in the Spaeth dataset. Because the dependent variable is dichotomous, we employed logistic regression. Finally, since a justice's vote in one case could influence his/her vote in a future case, we used robust standard errors clustered by justice to account for the possible inflation in the unclustered standard errors due to the possible interdependence of the errors across observations (see Johnson, Wahlbeck, and Spriggs (2006)).⁶

Main Independent Variables

Unless otherwise noted, the independent variables are operationalized to account for the adversarial nature of Supreme Court litigation, in which each side is represented by legal counsel. In other words, the impact of an attorney on the justices' decisions is a function not just of the attorney's characteristics, but also those of his or her opponents. Indeed, it is the

³ The "case" is the citation. Five percent of the cases were excluded due to missing data on one or more variables, including the dependent variable, ideological compatibility, party capability, attorney experience, and amicus support. We started with the 1993 term, because it was the first year that two women served on the Court. Specifically, during that term Ruth Bader Ginsburg was confirmed. We concluded with 2001 because it was the last full term available when we started collecting the data.

⁴ The Spaeth dataset can be found at the Inter-University Consortium for Political and Social Research (ICPSR) as well as the following Web site: <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm>.

⁵ The justice's vote is the appropriate unit of analysis, because we are interested in the interaction between attorney gender and the characteristics of the justices, specifically ideology.

⁶ It is possible that case-level variables have similar effects on one or more of the individual justice's votes on that case (e.g., precedent, attitudinal stimuli, case facts, and case complexity). Therefore, we also estimated the standard errors clustered by case. The choice of the cluster unit did not change the substantive results and interpretation, unless otherwise noted below.

competitive advantage (or disadvantage) that one party has in relation to its opponent that should affect the outcome. As such, most of the variables discussed below are actually the difference of the value for the petitioner and the respondent, with higher values typically indicating an advantage for the petitioner.

Attorney Gender: Our primary concern is the impact of attorney gender on the decision-making behavior of the justices. As previously discussed, we posit two alternative theories of attorney gender influence: different voice and gender schema. Therefore, we created two separate attorney gender constructs, each reflecting one of the possible causal mechanisms of gender bias. For gender schema to influence the justices' perceptions of the information presented by the attorneys, the justices must be aware of the attorney's gender. Since the orally arguing attorney is, in essence, the "face" of the litigation team, we constructed the *Arguing Attorney Gender* variable to test the impact of gender schemas. The variable is coded as '1' if the petitioner's orally arguing attorney is a woman, but the respondent's orally arguing attorney is a man; if neither or both parties are represented by women, the variable is coded '0'. Finally, if only the respondent's orally arguing attorney is a woman, it is equal to '-1'. Given the nature of the gender schema theory, we expect to find a negative coefficient for the *Arguing Attorney Gender* variable.

Unlike gender schemas, different voice theory (in this context) focuses less on the perceptions of the justices and more on the attorneys' arguments—both style and substance. As such, it does not matter whether the justices are aware that a party is represented by women, just that the party is indeed represented by women. Therefore, we constructed an indirect measure of the overall influence of women attorneys. While the orally arguing attorney does present thirty minute arguments, the content of the argument is often a function of a larger collaborative effort

among a team of attorneys. Moreover, author interviews with attorneys that have worked for large firms, the Solicitor General's office, boutiques, and public interest groups consistently revealed that Supreme Court briefs are often largely constructed by someone other than the orally arguing attorney. Therefore, a better measure of the different voice of a litigation team is not the gender of the orally arguing attorney; it is a variable that reflects the degree to which women attorneys play a role in the (typically) larger litigation team. As such, we chose the proportion of women attorneys on the litigation team (*Attorney Team Gender*).⁷ As noted above, to account for the adversarial nature of the judicial process, the *Attorney Team Gender* variable is the difference of the proportion of women attorneys on the petitioner's litigation team and the corresponding proportion for the respondent. Given our different voice hypothesis, as well as the operationalization of the dependent variable, we expect to find a negative coefficient for *Attorney Team Gender*, indicating that justices are significantly less likely to vote in favor of a litigant represented by a higher proportion of female litigators.

To collect the gender data, we first identified the relevant names from the reporters.⁸ In most instances, the gender was apparent from the name. However, in approximately three percent of the cases, the given names were gender neutral. For the gender of the orally arguing attorney, we then referred to transcripts of the oral arguments, which typically referred to the attorney by title (e.g., Mr. or Ms.), and/or contained gender-specific pronouns. For the remaining attorneys (less than two percent), we first searched the attorneys' employer's Web site

⁷ While several alternative operationalizations of this aspect of the influence of attorney gender exist, we chose the proportion of women attorneys on the litigation team for both substantive and methodological reasons. Substantively, the measure most accurately reflects the impact of the litigation team as a whole. However, we did estimate the models using two alternative operationalizations: the total number of women attorneys who signed on to the brief and whether at least one attorney signed on to the brief. Regardless of the attorney team gender measure, the results of the models did not differ substantively from the measure we chose to present.

⁸ Both the *United States Reports* and the *United States Supreme Court Reports Lawyers' Edition, 2nd* were utilized. The default was the former, though in those instances where the Spaeth dataset did not list the *United States Reports* cite, we utilized the latter source. In some instances, particularly for assistants and deputies in the Office of the Solicitor General, we went to the transcripts of the oral arguments to determine the full name.

to identify gendered references (pronouns and/or titles) and/or pictures of the attorney. In a few instances, we directly contacted the employer.

Attorney Gender*Justice Ideology Multiplicative Term: To account for the possibility that the impact of attorney gender is conditional on justice ideology, we created multiplicative terms for each of the gender constructs: *Arguing Attorney Gender*Justice Ideology* and *Attorney Team Gender*Justice Ideology*. The *Justice Ideology* variable is the Martin and Quinn (2002) Posterior Mean Ideal Point estimates for the respective justice and term.⁹ Positive values indicate that a justice was a conservative while negative values indicate the justice was a liberal. The multiplicative terms are products of the *Justice Ideology* and the two Attorney Gender variables. Because we hypothesize that conservative justices are less receptive to women attorneys and the arguments they construct, and positive values of the *Justice Ideology* variable reflect conservative attitudes, we expect to find a negative coefficient for the multiplicative term.¹⁰

Control Variables

Justice/Petitioner Ideological Compatibility: The *Justice/Petitioner Ideological Compatibility* variable controls for the influence of ideology on the justices' decision making (e.g., Segal and Spaeth 2002). The construct measures the degree to which the justice's policy preferences are congruent with the ideological direction of the petitioner's preferred outcome. The latter concept was estimated using the Spaeth (2002) database measure of the ideological direction of the lower

⁹ The Martin and Quinn (2002) scores are designed to reflect the possibility that justice ideology is dynamic. As such, they are estimated for each term. The measures were derived using Bayesian estimation techniques for fitting multivariate dynamic linear models. They have been incorporated into several subsequent studies of Supreme Court decision making (e.g., Baird 2004; Johnson, Wahlbeck and Spriggs 2006).

¹⁰ According to Brambor, Clark, and Golder (2006), models including multiplicative terms should almost always include all of the constitutive terms. As such, we included *Justice Ideology*.

court decision. Given the petitioner's desire to reverse the lower court, the preferred position of the petitioner is the opposite of the direction of the lower court's decision. In other words, if the lower court decision was conservative, then we presume the petitioner preferred a liberal outcome. The policy preferences of the justice, on the other hand, are derived from the Martin and Quinn (2002) scores, which are positive for conservative justices and negative for liberal justices. If the petitioner preferred a liberal outcome, *Justice/Petitioner Ideological Compatibility* is the negative value of the Martin and Quinn score. Conversely, if the petitioner preferred a conservative outcome, the variable is the equivalent of the Martin and Quinn score. Increases in the compatibility measure indicate a higher level of ideological congruence. Therefore, we expect to find a positive coefficient for the *Justice/Petitioner Ideological Compatibility* variable.

Amicus Curiae: We also included two variables which account for the influence of amicus curiae on the U.S. Supreme Court: *Amici Support* and *U.S. Amicus Support*. Amici provide supplemental information to the Court, typically in the form of briefs. They may provide legal arguments, as well as information regarding the preferences of external political actors (Epstein and Knight 1999). Since there is some evidence that amicus presence affects Court decision making (e.g., McGuire 1995), we included the *Amici Support* variable, which is the difference between the number of amicus briefs for and against the petitioner, as identified using Lexis, WestLaw and the United States Reports.¹¹ We also included the variable, *U.S. Amicus Support* to account for the special role of the United States as an amicus. Scholars have found that the support or opposition of the U.S. as amicus curiae has a significant impact on Supreme Court decision making on the merits (e.g., Segal and Reedy 1988; Segal 1990). *U.S. Amicus Support* was coded '1' if the U.S. supported the petitioner, '-1' if the U.S. supported the respondent, and

¹¹ In the few instances where there was a conflict between one of the sources, we used the higher number.

‘0’ if the U.S. did not submit an amicus brief. We expect to find a positive coefficient for both variables, indicating that amicus support for the petitioner increases petitioner success.

Party Capability: We also included a measure of *Party Capability* to account for the tendency of judges to favor parties with certain advantages, including superior material resources, prior litigation experience, the ability to hire quality legal representation, and the ability to favorably change the rules that govern the legal process. We employ the traditional measure of *Party Capability*, whereby litigants are categorized based on organizational characteristics; numerical values are assigned to each category based on an assumption of relative levels of resources, experience, and other advantages (e.g., Songer and Sheehan 1992; Songer, Sheehan and Haire 2003). Starting with this premise, we constructed the following typology:¹²

- | | |
|----------------------------------|--|
| 1 = Individual persons | 4 = Sub-national governments |
| 2 = Non-Fortune 500 corporations | 5 = Fortune 500 corporations ¹³ |
| 3 = Interest groups | 6 = United States |

The actual *Party Capability* variable is the difference between the highest value among the petitioners and respondents, who were identified from the party briefs published in Lexis and

¹² Like all of the prior attempts to create a party capability typology, we make several assumptions about the order of the categories, as well as the appropriate number of categories. Based on an extensive search of the literature, the only consensus is that the U.S. should have the highest value, and a category including some or all individual persons should be assigned the lowest value. The ordering of the middle categories, and the degree of specificity often vary. We do note that we tried several alternative operationalizations, based on prior research. We increased or decreased the number of categories, and we changed the order of the middle categories. While the substantive conclusions never changed, the operationalization we chose seemed to have the greatest impact on the overall explanatory model, though the difference was rarely statistically significant.

¹³ Specifically, this category includes corporations that are on the Fortune 500 list at least once from 1993-2000.

WestLaw.¹⁴ We expect to find a positive coefficient, indicating that the justice is more likely to support the advantaged party.

Attorney Experience: Since we are examining the influence of attorneys on judicial decision making, we included two variables that control for other characteristics beyond gender. The first, *Attorney Experience*, measures the prior Supreme Court litigation experience of the orally arguing attorneys. After determining the names of the orally arguing attorneys from the reporter(s) and/or the Supreme Court transcripts, we conducted Lexis and WestLaw searches¹⁵ of the attorney field in the merits brief databases to determine the total number of prior times each attorney participated in Supreme Court litigation (either just on brief or also as the orally arguing attorney) in the previous fourteen terms.¹⁶ Since the marginal utility of experience likely decreases as the prior number of Supreme Court participations increases, we performed natural logarithmic transformations of the experience values (see Johnson, Wahlbeck, and Spriggs 2006). Finally, the actual *Attorney Experience* variable is the difference between the petitioner and respondent attorney experience measures. Based on a long line of research finding a positive relationship between attorney litigation experience and judicial decision making (e.g., Johnson,

¹⁴ We use briefs because the captions at the beginning of the case often fail to list all of the litigants. Most parties were identified from the captions at the beginning of the briefs. However, for habeas corpus cases, where the listed party is a government official, the official's government employer was coded as a party.

¹⁵ We used both search engines as a quality check.

¹⁶ We excluded prior cases from the same term because it is impossible to parcel out the benefits of different aspects of the U.S. Supreme Court litigation process, and any choice of dates (oral argument or decision) is therefore arbitrary. We chose the previous 14 terms because the Lexis brief database only went back 14 terms from our earliest term (1993). Based on preliminary Lexis and WestLaw searches of the attorney field, we concluded that searches of the decision databases undercounted the total number of prior experiences because they did not always list all of the attorneys that signed the briefs. Therefore, we decided that the brief searches were still more accurate, even though they omitted experience that was 15 or more years old. (We also calculated the prior experience of a sample of our attorneys using the decision field; the correlations with our measures were above 0.90). We did, of course, run the models with several alternative operationalizations of attorney experience, changing the previous number of terms (from 5 to 10 to 14), the type of prior experience (total experience; just orally arguing experience), the use of the logarithmic transformation (with and without), and whether we looked at prior cases from the same term. The results never changed. Moreover, the various attorney measures are all correlated at 0.94 or higher.

Wahlbeck, and Spriggs 2006; McGuire 1995; Wahlbeck 1997; 1998), we expect to find a positive coefficient.

Attorney Clerkship: Studies have identified a relationship between Justice Blackmun's assessments of attorney oral arguments (Johnson, Wahlbeck, and Spriggs 2006) as well as a conditional relationship between attorney clerkship experience and Court outcomes (McGuire 2000). Thus, we also included the *Attorney Clerkship* variable, which measures prior U.S. Supreme Court clerkship experience.¹⁷ If only the petitioner's orally arguing attorney was a former clerk, the variable was coded '1'. If neither or both attorneys clerked for the Supreme Court, the variable was coded '0'. Finally, if only the respondent's orally arguing attorney clerked for the Court, it was coded '-1.' Because clerkships provide an enhanced understanding of the inner workings of the Court, we expect to find a positive coefficient.

Litigation Team Size: Finally, while previous measures of attorney characteristics focus on the quality of the attorneys participating in Supreme Court litigation, no one has examined the *quantity* of the attorneys. The size of the litigation team could provide several benefits, including increased research power, pre-hearing moot courts, and the augmented ability to anticipate all counter arguments. Taking this into account, the *Litigation Team Size* variable measures the difference between the number of attorneys representing the petitioner and the respondent. More specifically, taking into account the possible diminishing returns of larger attorney teams, this variable is the difference of the logarithmically transformed values for the petitioner and the respondent. Based on the posited advantages of larger attorney teams, we anticipate finding a positive coefficient.

¹⁷ Clerk data was provided by the Supreme Court Public Information Office.

Results

As noted above, we test two alternative theories of attorney gender influence on the Supreme Court: different voice and gender schema. Gender schema theory suggests that the justices' perceptions of the information conveyed by the attorneys are a function of the attorney gender. To test for the influence of gender schema, the *Arguing Attorney Gender* variable reflects the relative genders of the orally arguing attorneys. Similarly, different voice theory suggests that women will construct different types of arguments than male attorneys, and the male-dominated U.S. Supreme Court will be less receptive to arguments presented by women attorneys. The *Attorney Team Gender* variable measures the proportional difference in female representation between the petitioner's side and that of the respondent. Models 1 and 2 examine the different voice and gender schema hypotheses separately, while Model 3 examines both hypotheses simultaneously. All three models of justice support for the petitioner are presented in Table 1.

[Table 1 about here]

As seen in Table 1, all of the control variables for all three models are in the expected direction, and all but one of these variables reaches statistical significance across each model. The one exception in this respect is the *Litigation Team Size* variable. Although the variable is in the expected direction, it is not statistically significant at conventional levels. However, unsurprisingly, a justice is more likely to vote for the petitioner if the petitioner's favored outcome is congruent with the justice's ideological preferences. Advantaged litigants, moreover, enjoy a greater likelihood of success before the Court as do those petitioners who obtain greater

amicus support. Also, parties that hire more experienced counsel and/or prior clerks are also more successful litigants.

With respect to the attorney gender hypotheses, the results strongly support the different voice hypothesis but provide mixed support for gender schema theory. In Model 1, which does not control for the gender of the orally arguing attorney, the sign of the *Attorney Team Gender* variable coefficient is negative and statistically significant, which supports the different voice hypothesis. As the proportion of women attorneys on the petitioner's side increases relative to that of the respondent, the likelihood of a justice making a pro-petitioner decision decreases. Substantively, the larger role women attorneys play in constructing arguments, the less likely they are to convince the justices to side with their client.

Model 2 provides some support for the gender schema hypothesis. The *Arguing Attorney Gender* variable coefficient is negative and statistically significant.¹⁸ Thus, justices are less likely to support parties when their orally arguing attorneys are women. When the justices participate in oral arguments, they are overtly aware of the gender of the attorneys. This finding seems to indicate that the justices' perceptions of the arguments presented by the attorneys are subject to gender schema bias. However, Model 3 provides less support for this hypothesis. When we include both measures of attorney gender, the *Attorney Team Gender* variable coefficient is still negative and statistically significant, while the *Arguing Attorney Gender* variable, still negative, is no longer statistically significant. In other words, when you control for the overall influence of litigation team gender, the gender of the orally arguing attorneys does not influence the justices. While this type of finding could be a function of high multicollinearity, the two variables are only correlated at 0.24, and the variance inflation factor for both gender variables in Model 3 is

¹⁸ It is important to note that when the robust standard errors are estimated with clusters on the case, as opposed to the justice, the coefficient is only significant at the .121 level, one-tailed.

less than 1.4.¹⁹ As such, the change in the significance of the *Arguing Attorney Gender* coefficient is likely not a function of an artificially inflated standard error. Instead, it is an indication that the justices are no more or less likely to favor arguments presented by women attorneys when you control for the gender make-up of the larger litigation team. It is likely that the observed influence of orally arguing attorney gender in Model 2 was not a function of gender schemas. Instead, the orally arguing attorney variable merely acted as a weak surrogate for the gender make-up of the litigation team.

[Table 2 about here]

Interestingly, though, the results presented in Table 2 suggest that the influence of attorney gender is conditional on the ideology of the justice. As seen in the results for Model 4 (without orally arguing attorney gender), the coefficient of the *Attorney Team Gender* variable when the justice casting the vote is a moderate (i.e., Martin and Quinn ideology score =0) is -0.309 and is statistically significant at $p < .001$. The multiplicative term including *Attorney Team Gender* and *Justice Ideology*, however, is also negative. Since the Martin and Quinn ideology scores employed in the analysis are positive for conservative justices, this suggests that conservative justices are even less likely to support petitioners represented by relatively more women attorneys. Specifically, we find that the effect of attorney team gender is statistically significant in Model 4 across the Martin and Quinn ideology score range of -1.31 to +3.59.

¹⁹ According to Gujarati (1995, citing Kleinbaum, Kuper, and Muller 1988) a value of 10 or greater indicates high multicollinearity.

Moreover, approximately 79.5 percent of the votes examined in the study were cast by justices falling within this ideological range.²⁰

Similarly to the findings presented in Table 1, the findings regarding the gender of the orally arguing attorney vary with model specification. In Model 5, both the stand-alone Arguing Attorney Gender coefficient and the coefficient for the ideology multiplicative term are statistically significant in the posited directions (negative). However, as seen in Model 6 the significance of the conditional effect of justice ideology on the gender of the orally arguing attorney disappears when the proportion of women attorneys is included in the model.

Clearly, our results suggest the existence of attorney gender bias before the nation's highest Court, and they also suggest that this bias is conditional on a justice's ideological preferences. However, the analysis thus far is unable to convey the magnitude of these effects or those of our control variables. In order to interpret the logistic regression coefficients found in Table 1 in a more meaningful manner, we present two additional analyses.

Specifically, **given the consistent influence of the attorney team gender variable**, Table 3 reports first differences for the statistically significant control variables based on the parameter estimates of Model 1. These first differences represent the change in the probability of a pro-petitioner vote when the control variable of interest is altered from its minimum to its maximum value while holding all other continuous variables at their means and the *Attorney Clerkship* and *U.S. Amicus Support* variables to '0' (i.e., neither or both attorneys served as Supreme Court clerks; the U.S. government did not submit an amicus brief). As seen in the

²⁰ Given the conditional relationship specified in this model, one must calculate standard errors for non-zero values of the modifying variable (see Brambor, Clark, and Golder 2006; Friedrich 1982). To do this, we utilize the formulas for conditional standard errors noted in Brambor, Clark, and Golder (2006, 70). For a model including one multiplicative term, this can be found by employing the following formula:

$$\hat{\sigma}_{\frac{\partial y}{\partial x}} \equiv \sqrt{\text{var}(\hat{\beta}_1) + Z^2 \text{var}(\hat{\beta}_3) + 2Z\text{cov}(\hat{\beta}_1\hat{\beta}_3)}$$

As described by Brambor, Clark, and Golder (2006), this formula can be modified to account for multiple interaction effects as well as models including quadratic terms.

table, one of the most important factors in a petitioner's success before the Supreme Court involves judicial ideology. A change in the minimum to the maximum amount of ideological compatibility is associated with a 0.43 difference in the predicted probability of a pro-petitioner vote. Similarly, as analyzed here, amicus support is also quite important before the Court as well as specific amicus support from the U.S. Government. Finally, these results also highlight the relative importance of attorney experience. When the value of this variable is changed from its minimum to its maximum value, the resulting change in the probability of petitioner success is about 0.22.

[Table 3 about here]

Although this analysis provides important insight on the determinants of Supreme Court decisions, given our theoretical emphasis, we are more interested in examining the impact of attorney gender on the likelihood of petitioner success. Therefore, in order to best assess the substantive significance of attorney gender bias, we estimate predicted values of the probability of a pro-petitioner vote across select values of our *Attorney Gender* and *Justice Ideology* measures. For this purpose, the other continuous variables are held at their mean values while the *Attorney Clerkship* and *U.S. Amicus Support* variables are held constant at '0.' These estimated probabilities are presented in Figure 2.

[Figure 2 about here]

Figure 2 indicates, quite strikingly, the presence of attorney gender bias and, in particular, its conditional relationship with judicial ideology. Namely, as the proportion of women attorneys on the petitioner's side increases relative to the proportion of women on the respondent's side, the probability of reaching a pro-petitioner decision appears to increase at a slight rate for Court liberals (i.e., when the judicial ideology measure is held to its minimum value). However, among

Court conservatives (i.e., when the judicial ideology measure is held to its maximum value), there is a dramatic downward slope in the probability of a pro-petitioner vote. Court moderates (i.e., ideology is set equal to '0'), meanwhile, also appear to exhibit gender bias as operationalized here, but it is less pronounced than that exhibited by more conservative justices.

Our findings regarding the overall impact of attorney gender are quite robust. Indeed, many of our control variables accounted for possible alternative hypotheses. For example, it is possible that litigation teams with a higher proportion of women are less successful because they tend to have less collective prior litigation experience. One might form this hypothesis given the primacy of attorney litigation experience in the attorney capability literature, combined with the not unreasonable hypothesis that women are less likely to have prior litigation experience. However, we controlled for attorney litigation experience, and the *Attorney Gender* variable still had a significant impact on the decision making of most of the justices (those with moderate liberal or conservative ideological beliefs).²¹ Similarly, it is possible that women attorneys are less successful because they are less likely to have clerked before the Court, and are thus more likely to miss out on the obvious benefits attached to a clerkship. Again, we controlled for this by including the *Attorney Clerkship* variable in the model.

Similarly, our findings are robust regardless of the operationalization of attorney team gender. While we only presented the models employing the proportion of women attorneys, we also estimated models using the total number of women and the presence of at least one woman

²¹ Of course, our operationalization of attorney experience (the relative experience of the orally arguing attorneys for the petitioner and respondent) is actually an approximation of the overall experience of the litigation team. Indeed, except for the U.S., the orally arguing attorney is typically one of, if not the most, experienced attorneys on the litigation team. However, according to McGuire (1995), the various alternative measures of attorney litigation experience are highly correlated with one another. Therefore, we can assume that, while the orally arguing attorney experience is relatively higher, in most cases, than the mean/median experience value for the litigation team, the relative order of the experience values across litigation teams is likely approximated by the former measure. Finally, the effects of attorney gender were also not affected by the inclusion of orally arguing attorney experience when we operationalized the former concept as the gender of the orally arguing attorney.

on the litigation team. The substantive results did not change regardless of the operationalization of attorney team gender.

It is also possible that other factors beyond justice ideology could condition the impact of attorney gender. For example, attorney gender might have more influence in cases that involve gender-related issues. To account for this, we tested models with a multiplicative term constructed from the attorney gender variable and a gender-related issue measure.²² We chose not to include the term in the final models because it had a negligible impact on the relationship between attorney gender and justice decision making.²³ The null finding could be a function of the small number of women's issues.

Similarly, amicus participation theoretically could condition the impact of attorney expertise. Specifically, attorneys may have less of an effect when the justices have more alternative sources of information. To test this, we ran several models with multiplicative terms combining *Attorney Gender* with the *Amicus Support* and *U.S. Amicus Support* variables, respectively. Once again, there was no evidence of an interaction effect for either variable.

One might also expect to find an interaction effect between attorney gender and justice gender. Indeed, most of the prior works examining gender in the judicial process have focused

²² To determine whether the case involved a gender-related issue, we utilized the coding convention developed by Walker and Barrow (1985) and followed in Segal (2000). In both studies, "women's issues" were operationalized to include sexual discrimination and harassment, reproductive rights, maternity rights, and issues involving equal employment opportunity. In addition, Walker and Barrow (1985) considered affirmative action cases involving gender issues as well. Using these conceptualizations as guidelines, we identified gender-related issues coded in the Spaeth database using the "ISSUE" variable. If ISSUE equaled any of the following, the case was coded as a women's issue: 283, 284, 533, or 932. These issues include sex discrimination in and out of the employment context, abortion and contraceptive rights, and issues involving marriage, family, and property. The Supreme Court did not decide an affirmative action case involving gender during the time period of our analysis and, thus, gender-specific affirmative action decisions could not be included in this context. We also tried broadening the scope of the issues incorporated in the women's issue variable to include race-based affirmative action and privacy issues. The results did not change significantly.

²³ The gender issue/attorney gender multiplicative term did have a borderline significant coefficient in some of the models that operationalized attorney gender as the total number of women attorneys. However, in models using three other operationalizations of attorney gender, the multiplicative term coefficient p-values never approached statistical significance.

on judge gender, albeit with mixed results. To the extent that attorney credibility affects justice decision making, and the perception of credibility is a function of the attorneys' gender, intuitively we would expect to find that male justices are less likely to side with women attorneys as a result of the application of negative stereotypes (gender schema), or because they are less likely to respond to the content of arguments presented in a women's "voice". In other contexts, like voter perceptions of candidates for congressional office, women are more likely to favorably assess women candidates (Dolan 1998; 2004; Sanbonmatsu 2002), something that Dolan (2004, 92) calls the "affinity effect": women share a group identity and are therefore more likely to support other women. Moreover, Karst (2003) finds anecdotal evidence that justice gender affects the use of gender stereotypes in judicial opinions. Based on these findings, we might expect to find a significant relationship between justice and attorney gender. Indeed, we did estimate the models incorporating a justice/attorney gender interaction. The coefficient for the multiplicative term measuring the interaction of justice gender and the proportion of women attorneys was statistically significant and positive. Since women justices were coded as '1' and males '0', we can conclude that the two women justices were more likely to side with litigants represented by more women. Conversely, the multiplicative term with orally arguing attorney and justice gender was not significant. It would seem that, at least on a Court with little gender diversity, the male justices are less receptive to arguments constructed by women, though the problem does not seem to be one of gender stereotypes.

Conclusion

Why is it important to determine the impact of attorney gender? First, among students of the judicial process, it expands our understanding of the role of attorneys. Up until now, political scientists have focused more on experiential characteristics of the attorneys (e.g., Johnson, Wahlbeck, and Spriggs 2006; McGuire 1995). More importantly, however, this study contributes to the broader examination of the impact of gender in politics. In particular, most of the prior political science studies involving the impact of gender schemas have focused on the way in which the mass public perceives elites (e.g., Dolan 1998; Kahn 1996; Koch 2000). Here, however, we examine the use of gender schemas by political elites. We also examine whether female attorneys construct arguments with a different voice, and whether they are more or less influential as Supreme Court advocates.

The models presented in the previous section illustrate the impact of attorney gender on U.S. Supreme Court justice decision making. What causes this observed gender disparity? We tested two separate measures: the gender of the orally arguing attorney and the proportion of women attorneys on the litigation team. When included in separate models, both are statistically significant. In both instances, the presence of women attorneys has a negative impact on the outcome. However, when they are included in the same model, only the proportion of women attorneys is statistically significant. Therefore, we conclude that the influence of gender is less a function of gender stereotypes, and more a result of women attorneys constructing arguments with a different voice.

We also find that the impact of attorney gender is conditional on the ideology of the justice. In particular, conservative justices are significantly more likely to support litigants that

are represented by more men. Conservative justices are less receptive to arguments constructed by women.

Given the inability to make generalizations about the possible interaction of justice and attorney gender (given the small number of female justices), we strongly suggest future research examining the role of attorney gender on other courts, particularly those with more gender diversity amongst the judges. Other courts like the U.S. Courts of Appeals and state supreme courts, are more gender diverse, and are therefore ideal contexts to examine the interplay between justice and attorney gender. Similarly, the lower courts decide more cases involving women's issues, and would therefore serve as excellent subjects for studies of the possible interaction of women's issues and attorney gender.

For now, we are left with a rather grim picture of attorney gender bias in a less diverse body, making its presence perhaps all the more severe. In particular, our analysis suggests the need to reflect on the role of legal counsel in a broader fashion than previously considered. Attorneys matter and, apparently, so does the gender composition of litigation teams.

Figure 1. The Frequency (in percentages) of the Proportion of Women Attorneys on a Litigation Team Participating in a U.S. Supreme Court Case during the 1993-2001 Terms

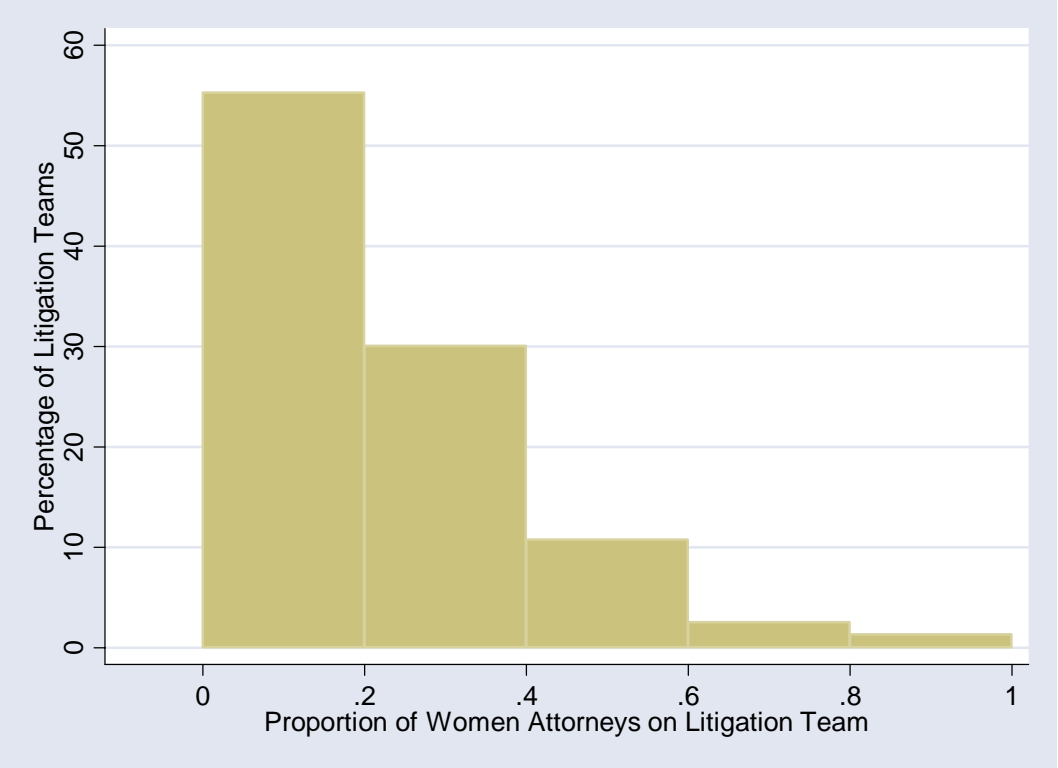


Table 1. Logistic Regression Models Estimating U.S. Supreme Court Justice Support for the Petitioner as a Function of the Attorney Gender (robust standard errors clustered by justice in parentheses)

Variable	Model 1: Proportion Women Attorneys	Model 2: Arguing Attorney Gender	Model 3: Both Gender Measures
<i>Main Independent Variables</i>			
Attorney Team Gender	-0.344*** (0.085)	-	-0.309** (0.106)
Arguing Attorney Gender	-	-0.140*** (0.031)	-0.042 (0.043)
<i>Control Variables</i>			
Justice/Petitioner Ideological Compatibility	0.265*** (0.027)	0.265*** (0.026)	0.265*** (0.027)
Amici Support	0.052*** (0.012)	0.049*** (0.011)	0.052*** (0.012)
U.S. Amicus Support	0.368*** (0.054)	0.380*** (0.053)	0.370*** (0.055)
Party Capability	0.044*** (0.014)	0.044*** (0.014)	0.044*** (0.014)
Attorney Experience	0.087*** (0.011)	0.086*** (0.010)	0.086*** (0.010)
Attorney Clerkship	0.136*** (0.035)	0.139*** (0.034)	0.138*** (0.035)
Litigation Team Size	0.009 (0.008)	0.008 (0.008)	0.009 (0.008)
Constant	0.229	0.226	0.228
Number of Observations	6264	6264	6264
Log Likelihood	-3872.06	-3875.71	-3871.87
Percent Predicted Correctly	66.0	65.6	66.0
PRE	16.6	15.5	16.6
McFadden's Pseudo R ²	0.085	0.084	0.085
AIC	1.24	1.24	1.24

p < 0.05 = *; p < 0.01 = **; p < 0.001 = *** (one-tailed tests)

Table 2. Logistic Regression Models Estimating U.S. Supreme Court Justice Support for the Petitioner as a Function of the Attorney Gender with Interaction Effects of Justice Ideology (robust standard errors clustered by justice in parentheses)

Variable	Model 4: Proportion Women Attorneys	Model 5: Arguing Attorney Gender	Model 6: Both Gender Measures
<i>Main Independent Variables</i>			
Attorney Team Gender	-0.309*** (0.054)	-	-0.270*** (0.069)
Arguing Attorney Gender	-	-0.132*** (0.031)	-0.046 (0.040)
Attorney Team Gender*Justice Ideology	-0.124*** (0.032)	-	-0.137*** (0.034)
Arguing Attorney Gender*Justice Ideology	-	-0.029** (0.012)	0.015 (0.010)
<i>Control Variables</i>			
Justice/Petitioner Ideological Compatibility	0.263*** (0.027)	0.268*** (0.027)	0.263*** (0.027)
Amici Support	0.052*** (0.012)	0.049*** (0.011)	0.052*** (0.012)
U.S. Amicus Support	0.369*** (0.054)	0.381*** (0.053)	0.371*** (0.055)
Party Capability	0.045*** (0.014)	0.045*** (0.014)	0.046*** (0.014)
Attorney Experience	0.087*** (0.011)	0.086*** (0.010)	0.086*** (0.010)
Attorney Clerkship	0.137*** (0.035)	0.139*** (0.034)	0.138*** (0.035)
Litigation Team Size	0.009 (0.008)	0.007 (0.008)	0.009 (0.008)
Justice Ideology	0.015 (0.012)	0.016 (0.011)	0.015 (0.012)
Constant	0.224	0.221	0.222
Number of Observations	6264	6264	6264
Log Likelihood	-3868.20	-3874.61	-3867.92
Percent Predicted Correctly	65.9	65.9	65.7
PRE	16.2	16.2	15.8
McFadden's Pseudo R ²	0.086	0.085	0.086
AIC	1.24	1.24	1.24

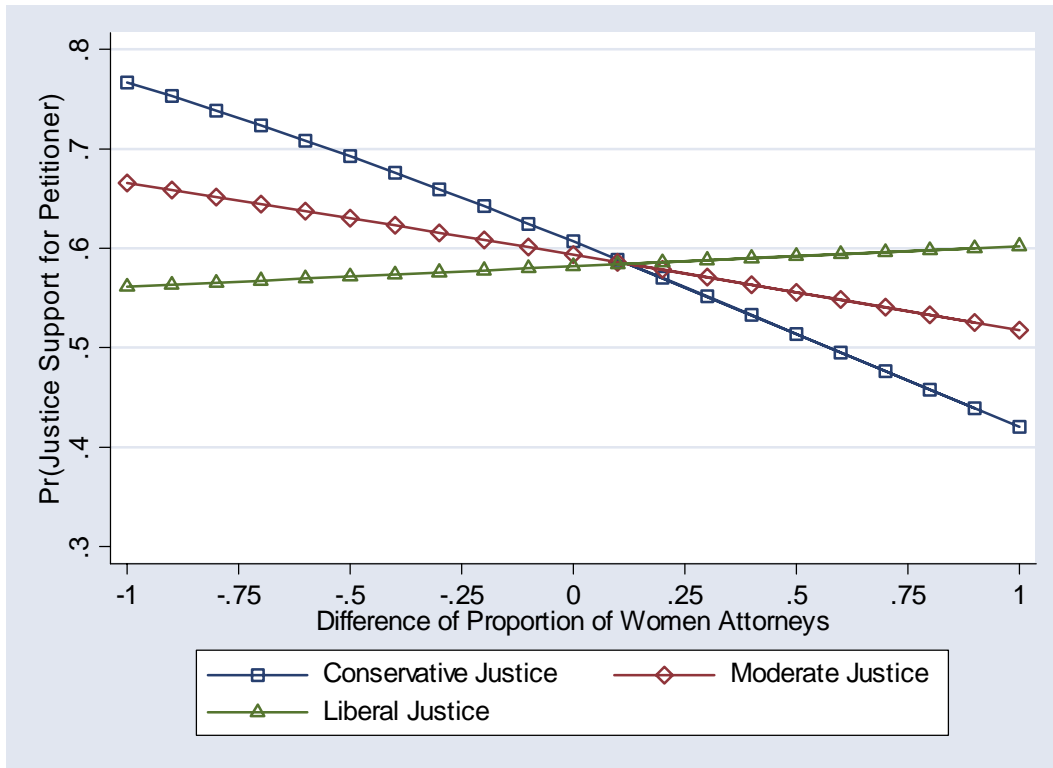
p < 0.05 = *; p < 0.01 = **; p < 0.001 = *** (one-tailed tests)

Table 3. First Differences from Model 1 – Select Control Variables

Control Variable	First Difference
Justice/Petitioner Ideological Compatibility	0.4287
Amici Support	0.4706
US Amicus Support	0.1754
Party Capability	0.1058
Attorney Experience	0.2194
Attorney Clerkship	0.0656

First differences represent the change in the predicted probability of a pro-petitioner vote when the select variable is changed from its minimum to its maximum value and all other continuous variables are held at their means while the *Attorney Clerkship* and *U.S. Amicus* variables are held at '0.'

Figure 2. Estimated Probabilities of a Pro-Petitioner Vote



These estimated probabilities are calculated for the maximum Martin and Quinn ideology score, which indicates the most conservative justice, the minimum Martin and Quinn score, which indicates the most liberal justice, and a Martin and Quinn score of '0,' which indicates a perfect moderate.

Appendix – Summary Statistics

Variable	Mean	Std. Dev.	Minimum	Maximum
<i>Dependent Variable</i>				
Justice Vote for Petitioner	0.593	0.491	0	1
<i>Main Independent Variables</i>				
Attorney Team Gender	-0.006	0.290	-1	1
Arguing Attorney Gender	-0.009	0.470	-1	1
Attorney Team Gender*Justice Ideology	0	0.592	-3.58	3.49
Arguing Attorney Gender*Justice Ideology	-.003	0.964	-3.59	3.59
<i>Control Variables</i>				
Justice/Petitioner Ideological Compatibility	-0.032	2.034	-3.59	3.59
Amici Support	0.217	3.212	-16	27
U.S. Amicus Support	0.080	.579	-1	1
Party Capability	0	3.272	-5	5
Attorney Experience	0.158	2.082	-5.037	5.576
Attorney Clerkship	0.070	0.687	-5	5
Litigation Team Size	0.213	4.539	-50	23
Justice Ideology	0.393	1.996	-3.16	3.59

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