

**ACHIEVING SUBSTANTIVE REPRESENTATION FOR WOMEN ON STATE  
SUPREME COURTS**

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# **ACHIEVING SUBSTANTIVE REPRESENTATION FOR WOMEN ON STATE**

## **SUPREME COURTS**

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My research focuses on determining what composition of a court will respond most favorably to women's issues. In order to answer this question, I examine state supreme court cases nationwide concerning sex-based discrimination in the workplace. Based on previous literature, I expect this area of the law to engender different voting patterns for men and women. I investigate what influences the different political behavior of men and women through a sociological and psychological lens. Ultimately, my research seeks to understand the impact of increasing numbers of women in the legal profession and in the highest positions of the law. Do female justices act as representatives of women in general? If this is not the case, increasing the number of women on the bench is unlikely to make courts more receptive to women's issues. I consider several possible explanations for impediments to substantive representation of women, including a lack of critical mass, and communication problems among female justices. My results help define how best to achieve equal representation for women before the law.

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## **PREFACE**

I would first like to thank my thesis advisor, Professor Chris Bonneau, for his patience, guidance, and dedication to my success. I also sincerely thank the other members of my committee, Lori Hausegger, Melanie Hughes, and Kristin Kanthak, without whose advice and expertise my thesis would have never reached this point. Finally, I would like to thank my friends and family, for their support and encouragement throughout this process.



## 1.0 OVERVIEW

The equal representation of women across domains has been an important political, social, and highly personal movement throughout the history of the United States. While women have made substantial success toward achieving equality, the journey is far from complete. Sexual harassment forces women to quit their jobs every day, and STEM fields are still dominated by men (MacKinnon, 1979; Shupe et. al, 2002; United States Department of Commerce, 2011). Although women comprise more than half of the global population, women remain significantly outnumbered by men at the highest levels of power and prestige. Less than ten percent of presidents and prime ministers are women, and even today women own less than fifteen percent of land worldwide (Lovin and Trigg, 2011; United Nations, 2009).

Equal representation of women in high profile judgeships is therefore important both in and of itself, and for instrumental purposes. In order to maintain legitimacy and justice, democratic institutions like courts should be representative of the population. Accordingly, women deserve at least equal representation with men to reflect the reality of the population and present the concerns of women (Philips, 1998). Moreover, achieving equality on the bench means giving women the opportunity to plead their case to other females, rather than to a group overwhelmingly unlike them. Unfortunately, judgeships--especially at the highest levels-- are composed of considerably more men than women. The lack of diversity on some states' highest courts is disconcerting, and potentially injurious to the pursuit of justice.

This paper seeks to explore the relationship between the number of women on a court, and that court's response to cases involving women's issues. The question at hand is how best to increase the support for women's issues at the state supreme court level. What impact do female justices have on the decision-making of a court? Will women act as representatives of other women? Will they be able to influence their male counterparts? These questions-- which are particularly relevant as the number of women in high judgeships increases-- are thornier than they may at first appear. In the following sections I will detail the intricacies of the problem, describe my own research and results, and finally use those results and theoretical constructs to propose the most effective course of action for improving the representation of women.

## **1.1 INTRODUCTION**

Creating diverse courts-- both on the federal and state level-- is an admirable and important goal, and one that presidents and governors across the country have worked to achieve for decades. The legal profession has seen substantial change in recent years as the number of women enrolling in law school and working as lawyers has steadily increased. At the same time, initiatives to increase the role of women and minorities on federal courts mean that women are far better represented today than a generation ago; according to the American Bar Association's most recent data, women make up one third of the legal profession and 27% of total judgeships (American Bar Association, 2013). Unfortunately, the problem of representation is significantly more complex than numerical presence, and the mere existence of these women is no guarantee of a court more receptive to women's issues.

My research seeks to explore the role of female justices in decision-making on issues of particular salience to women in the highest courts in the American states. Isolating the role of female justices is critical to discerning what factors make a court more receptive to women's issues, and to demystifying the representation of women. Attempts to diversify American courts do not serve their intended purpose if women do not act as representatives of other women. As the composition of our legal system shifts to better reflect the variety of this country's population, answering questions of representation become crucial to understanding and evaluating our institutions.

Furthermore, my research asks the controversial question: does gender bias exist on courts? Past research indicates a wide variety of answers to this question, and elicits powerful (and often opposite) opinions from both political scientists and Supreme Court justices themselves. Because a concrete answer to this question is so elusive, representation of women's issues becomes a considerably more difficult task. If gender differences do emerge on courts, women are bound to represent one and other better than men could represent them. On the other hand, if gender bias does not exist, gender should not influence a justice's response to women's issues. The final goal of my research is to investigate this problem. Under what circumstances are women's issues best received? Is the presence of female justices a key component or an irrelevant factor?

The answer to this question is ultimately most significant as a step toward equality. Women deserve fair representation on the bench as members of a group that comprises more than 50% of the global population. Yet even when women achieve equal representation, their presence does not necessarily translate to equal treatment for women who come before the court. Women, just like their male counterparts, are influenced by a patriarchal society, pervasive

gender stereotypes, and gender roles couched in centuries of tradition (see, for example, Shapiro et. al., 2011). Those who reach high levels of professional success are likely to work within the male dominated legal system, rarely diverging from established norms and precedents (Davis, 1993: 171). Simultaneously, judges are not as isolated from politics as the public is lead to believe: they have political ideologies and personal values that guide their decisions (Cross and Tiller, 1998). For these reasons, female justices are by no means certain to express divergent views from male justices (or, for that matter, particularly pro-female views).

In the body of this paper, I will work to explain what accounts for differences between male and female justices-- and what explains those cases in which there is no apparent difference. As with all research, it is essential to consider potential confounding variables. What type of woman reaches the pinnacle of the legal profession? How might she differ from other female politicians, lawyers, and laypersons? My research attempts to clarify and elaborate on these questions and the many complexities they entail.

## 2.0 DEFINING REPRESENTATION

To resolve the question of how best to represent the interests of women, it is first essential to consider the complexities of representation as a concept. Representation is a powerful term within the modern American notion of democracy, but its definition is rarely pinned down. Hanna Pitkin famously defines the "confused" concept of representation as "the making present in some sense of something which in nevertheless not present literally or in fact" (1967: 8). Pitkin's landmark work *The Concept of Representation* identifies four types of representation, including descriptive and substantive, both of which are critical to women on the bench.

Descriptive representation exists when a given group has a physical representative present. Pitkin defines descriptive representation in terms of "standing for." A representative shares demographic characteristics with his or her constituency. For example, because Justice Sotomayor is Hispanic, there is descriptive representation of Hispanics on the U.S. Supreme Court. Similarly, because all of the current justices are either Jewish or Catholic, both religions (and no others) are descriptively represented on the court. Descriptive representation is appealing in terms of "social legitimacy": we want institutions that accurately represent the composition of society, whether or not each subgroup obviously makes distinct decisions (Boyd et. al., 2010:390). Descriptive representation does not rely upon unique perspectives, but rather the democratic ideal of institutions that reflect the heterogeneity of society.

Substantive representation, on the other hand, asks for much more than the mere presence of a group member. Substantive representation requires members of a given group to act as representatives for that group as a whole. In Pitkin's words, substantive representatives "act for," rather than "stand for." Accordingly, women should be more receptive to issues of particular interest to women in general; blacks should be especially concerned with those issues that are most important to the black community; Jews particularly aware of Jewish priorities, and so on. Substantive representation, therefore, is considerably more difficult to attain. A single member of a group is unable to accurately relay the concerns of an entire community, not least of all because no community is entirely united on any issue. A woman tasked to substantively represent all other women simply cannot advocate for the concerns of her entire gender: there are far too many perspectives to consider.

Furthermore, attempting to represent all women with a single symbolic entity is likely to increase sexual essentialism, or the idea that women have "some essential traits that help define them and that render them unable to be represented adequately by those without such traits" (Mansbridge, 2005: 623). This stark separation by gender implies that women can only represent other women, and perhaps that any woman at all can represent the entirety of her gender (because if gender is the essential variable, the specifics do not matter). Neither of these implications are the intended outcomes of substantive representation.

Still more challenging for substantive representation are the institutional constraints of women who become those representatives. The women who represent all other women in American politics face the serious constraints of tokenism, which forces them to defer to party politics in order to gain power among male colleagues. Even women who do wish to take on the role of "representative of women" face logistical challenges when it comes to gaining and using

political capital toward an end not shared by the majority of politicians (Kanthak and Krause, 2012). The consequences of tokenism for women in politics are a major focus of this paper, and I will discuss tokenism and its implications in greater detail in a later section.

In the end, substantive representation must be the goal of diversified courts. While descriptive representation has inherent values of its own (democratic representation most prominently), only substantive representation truly gives a voice to minorities. And to complicate matters further, descriptive representation is no guarantee of substantive representation (Kanthak and Krause, 2012: 13). Past literature shows that no direct link exists between the two types of representation, a finding that is consistently supported with anecdotal evidence. For instance, studies show that the efforts of Presidents Carter and Clinton to diversify federal courts with women and blacks led to little substantive representation for either group. Instead, research reveals, "President Clinton's black and female district court appointees are no more likely to serve the policy interests of their own communities than are his white and male appointees" (Segal, 2000: 147). Consequently, increasing support for women's issues on courts is a more challenging problem than it may seem. Throughout the remainder of this paper I will expand upon the reasons that descriptive representation is not necessarily a link to substantive representation.

### 3.0 ARE MEN AND WOMEN DIFFERENT?

In order to determine the best way to represent the interests of women, it is critical first to consider whether those interests differ from the interests of men. Society tells us that men and women are fundamentally different in a myriad of ways. Women's magazines feature articles on how to decode men's behavior, while women are often portrayed in pop culture as unpredictable, and inherently different from men. Books like *Men are From Mars, Women are From Venus* become bestsellers on the premise that men and women are more different than they are the same. And it is widely accepted that in at least some respects, men and women are likely to behave in opposite ways (women prefer to talk about a breakup, for example, while men would rather engage in a distracting activity). Furthermore, we are told that this is natural-- a result of innate biological differences that make women behave one way and men another (Helgeson, 2012: 134-135).

Peer-reviewed research (while less sensational) tends to favor the idea that men and women are different as well. Research in the social sciences often emphasizes the differences: men have superior spatial skills, women communicate better, men are more likely to get heart disease, women are more likely to be depressed (Dabbs et. al, 1998; Canary and Hause, 1993; Wiedner, 2000; Nolen-Hoeksema, 2001). As the results of this research infiltrate society, they become a part of the way we interact with gender. Although every difference cited above is contentiously debated, the conclusions are widely accepted by the general public, and visibly



shape behavior. Consequently, doctors do not check women for heart disease as frequently or as rigorously as they check men; women are more likely to be referred to mental health specialists; and boys are more likely to continue to study math after high school. The consequences of gender stereotypes (even when they are not supported with robust research) can be powerful and pervasive (Helgeson, 2012).

It comes as no surprise that differences between men and women are highlighted in literature (in both academia and entertainment). Differences are simply more interesting than similarities. Reporting bias leads researchers to file away studies whose results find no gender differences; instead they choose to submit only those articles with dramatic results. As those results reach the public, important details may be omitted-- gender differences often appear only under very specific conditions, and differences may be minute. To further compound the problem, researchers and their subjects are aware of gender stereotypes and expectations, which can lead to biased studies that seek predetermined answers (Helgeson, 2012: 40-45).

These problems are important to keep in mind because of their implications for the substantive representation of women. Answering the question "do men and women behave differently?" is essential to women's representation because it determines whether or not female justices are distinct from their male counterparts. If there is no difference between men and women, increasing the number of women on a court is unlikely to make a meaningful difference in the decision-making of that court. On the other hand, if men and women are as significantly different as *Cosmopolitan* and *Men's Health* lead us to believe, women who face a court composed of only men are grossly misrepresented.

In the realm of political science, gender bias is the source of extensive research, and studies of the role of women in politics have come to nearly every possible conclusion. Walker

and Barrow's 1985 study, for example, comes to the unexpected conclusion that men are more liberal on "personal liberties and minority policy issues," although no significant differences emerged in the areas of criminal policy and women's rights issues, where perhaps one might expect gender differences to manifest themselves (Walker and Barrow, 1985: 608). According to another study, women are more liberal on employment discrimination cases (Songer et. al., 1994). A study by Allen and Wall suggests differences only emerge on "women's issues," (1987) although clarifying what exactly a "woman's issue" is can present methodological problems. A 2000 study claims that gender differences only exist among Democratic justices (Crews-Meyer and Songer, 2000). Still others suggest that no significant differences between men and women exist whatsoever (Welch, 1985). And this is only to name a few.

The results are not only mixed in scholarly circles: even the justices themselves remain divided on the salience of gender in decision-making. For example, Justice Sandra Day O'Connor has famously claimed, "a wise old man and a wise old woman will reach the same conclusion." Justice Sonia Sotomayor however, explained during her confirmation hearings (to harsh condemnation), "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life" (Totenberg, 2010). The two women, who represent the pinnacle of American judgeships, express the same discord as exists among political scientists and researchers across disciplines. How important is gender?

## 4.0 CONCEPTUALIZING GENDER

In order to conclusively determine whether gender matters in judicial decision-making, we must first consider the significance of gender as a social construct. In its most basic form, gender is an extension of biological sex. Where sex indicates the biological and physiological characteristics of men and women, gender is the societal meaning associated with those physical traits (Renzetti and Curran, 2003: 2). A true understanding of gender, however, goes beyond sex to recognize social influences over the way we operationalize gender.

Gender is an institution that orders human activity by guiding the way society thinks about men and women; it provides the assumptions we attach to people who identify as either male or female. In this way, gender acts as a stabilizing force in our lives by telling us what to expect: women who wear heels and bake cakes, men who are passionate about sports and cars. These simplistic stereotypes are a part of our collective psyche, and they influence not only interpersonal relationships, but also more abstract ideas of politics, religion, and family. According to sociologist Judith Lorber, gender "divides work in the home and in economic production, legitimates those in authority, and organizes sexuality and emotional life" (Lorber, 1994).

In a sense, gender serves as a social control, which binds men and women to behave in specific ways. Even before birth, society begins to gender babies. Women talk about male fetuses using more active words than female fetuses (Stainton, 1985: 324), little girls and boys

are encouraged to play with separate, sex-typed toys, and adult men and women are segregated at work and in family roles. Some theories propose that gender is created and re-created over time through repetitive acts, which teach men and women to carry out the roles they saw their parents enact. Over time, society may slowly change what it means to be a man or a woman (Butler, 1988; Lorber, 1994). Gender influences every aspect of society, and its ubiquity can make us blind to the ways in which it structures daily life. Consequently, gender is much more powerful than its basic definition suggests.

Gender can also be conceptualized as a process. West and Zimmerman's seminal article, "Doing Gender," describes gender as an accomplishment that requires sustained effort to achieve. The authors posit "gender is not a set of traits, nor a variable, nor a role, but the product of social doings of some sort" (West and Zimmerman, 1987: 6). West and Zimmerman emphasize the centrality of gender as a role not specific to setting in the manner of most other roles. Unlike the roles of professor or student, for example, which are specific to the classroom, gender is ubiquitous. According to West and Zimmerman, declaring one's gender to the world--for example, through the clothes one wears and the roles one embodies-- is an arduous and conscious task. Children learn to be accountable for behaving in gender concordant ways, and learn to self-regulate their behavior (West and Zimmerman, 1987: 18). Because this process begins so early, we rarely recognize the careful steps involved in presenting oneself as male or female. Consequently, each generation perpetuates the socially constructed differences between men and women by "doing gender."

West and Zimmerman's influential perspective on gender breaks from some other well-known conceptions of the same idea. For example, West and Zimmerman's account of gender directly refutes Erving Goffman's popular description of gendered human beings as actors

playing a role. Goffman proposes that men and women engage in ritualistic "gender displays," which serve as a "conventionalized portrayal" of sex (Goffman, 2007: 62). Unlike West and Zimmerman, Goffman sees gender displays as essentially optional behaviors, rather than necessary actions toward achieving a gendered presentation. According to Judith Butler, gender is something that we make through repetitive action; in this way, gender roles can change with the times (Butler, 1994). Butler's take on the process of gender allow for much more social progress than West and Zimmerman's, which creates a static presentation of gender.

In spite of differences, gender scholars are united in the belief that gender is--in one sense or another-- something active. Gender is simultaneously something we do and something that is done to us, whether through choices about what clothes to wear and what hobbies to pursue, or through the oppressive gender norms that children learn from their families, their peers, and surrounding society. Gender is not an inherent trait, nor a reflection of the biological differences between men and women, but rather a collection of behaviors that serve to create our societal norms.

Concepts of gender emphasize the way in which gender shapes the growth of men and women. The powerful social pressure to conform to well-established gender roles creates men and women with different life experiences, expectations, and ideals. By examining gender through the lens of social scientists, it is possible to consider the empirical consequences of gendering on the way men and women enact their roles in society. Male and female court justices-- just like all other men and women in western society-- are affected by cultural gender norms that structure behavior.

## 5.0 EXPLAINING THE DIFFERENCES

### 5.1 SOCIALIZATION

Theories of gender socialization investigate how the values and norms a society associates with gender are passed on from generation to generation. Theories of socialization separate themselves from biological explanations because they posit that gender differences are *learned* rather than inherent. The gender differences we observe in men and women (and even in very young girls and boys), say theories of socialization, are really only side effects of life in our society. Based on the conceptions of gender discussed earlier in this paper, gender socialization theories are the only possible way to account for the differences between men and women. If we conceptualize gender as a social construct rather than a biological fact, only society can account for the ways in which gender differences manifest themselves.

Even widely accepted biological differences of men and women can be reconsidered through the lens of the social constructionist. X- and Y-chromosomes, heralded as the most cut and dry, factual indicator of sex, are a socially constructed concept. Until the eighteenth century, scientists considered males and females to occupy the same sex category, and to have the same chromosomes, although women's were "turned in." Accordingly, one word was used to mean

both "ovaries" and "testes" (Lacquer, 1990: 4). Today's two-sex model remains controversial. Anne Fausto-Sterling proposes that at least three sexes should be recognized, and that cultural norms of what a male and female should look like are constraints unrelated to biology (2000).

Similarly, biological sex is not as binary as we often assume through the typical dichotomous categorization of sex. In other societies, third genders are not only recognized but also respected: berdaches (or individuals who adopt the behavior and social status of the opposite sex) are a part of the cultural norm among diverse societies. The muxe of Mexico, biological males who dress like women and take on stereotypically female roles, receive the highest respect and status within their society (Stephen, 2000). The hijras of India are biological men who identify as women, or with neither gender. They constitute a close community of their own, separate from the rest of society. Hijras are consistently marginalized and discriminated against, although their status as members of a third gender is widely acknowledged (Nanda, 1990). These examples put pressure on Western conceptions of gender as static and dichotomous. Popular ideas of what it is to be masculine stress that it is to not be feminine; conversely, femininity is often described as the opposite of masculinity. Cultures with third genders that embody characteristics of both masculinity and femininity call into question the certainty with which we categorize the sexes as binary and opposite.

Theories of socialization seek to explain cultural differences in the enactment of gender roles and ideals by exploring their social origin. As is the case with most powerful and broad theories, socialization can be broken down into subcategories. Theories of socialization answer the question "how do children learn what it means to be a man or a woman?" in a variety of ways. In summarizing these theories, I do not attempt to describe all of their intricacies; each

theory is worthy of its own paper. For the sake of space, I will only scratch the surface on several of the most prominent theories.

Perhaps the best-known theory of socialization is Sigmund Freud's identification theory, grounded in psychoanalysis. According to Freudian identification theory, children undergo a series of psychosexual developmental stages, culminating in the establishment of a gender identity. During the phallic stage, around three years old, children first become aware of the anatomical differences between girls and boys-- a realization which, according to Freudian thought-- leads children to view girls as inferior because of their lack of a penis. The penis envy girls first develop as small children goes on to influence their adult lives: women focus on physical appearance to attract a man, and never overcome their childhood inferiority complex (Helgeson, 2012: 146). Freud explains the vanity of women as a consequence of identification theory: women, he says, "are bound to value their charms more highly as a late compensation for their original sexual inferiority" (Freud, 1965: 136).

Freudian theory, while well known, is vulnerable to criticism. Firstly, psychoanalytic theory is inherently untestable. Because Freud suggests that identification theory takes place unconsciously, there is no way empirically to determine its accuracy. Furthermore, Freud's theory is based upon a seriously unrepresentative sample of people who sought him out for therapy, usually after sexual abuse. Methodological concerns aside, identification theory is also unapologetically anti-female. Revisions of psychoanalytic theory take more feminist approaches by placing less emphasis on penis envy as a motivating factor and instead considering the power of the womb and the breast (Chodorow, 1978; Horney, 1967; Klein, 1988).

Social learning theories are significantly different from psychoanalytic theory (and therefore sidestep some of its problems) because they rely upon observable, conscious behaviors.



According to social learning theory, children learn through an ongoing process of reinforcement, modeling, and culture. Children model the behavior of those around them, and receive either positive or negative reinforcement for those behaviors. Children continue to model behaviors for which they receive positive reinforcement, and are less likely to continue behaving in ways that elicit a negative response (Bandura, 1977). Parents in particular are critical to a child's gender socialization because they serve as both a model and the authority figure in charge of reinforcement. Parents might discourage a little boy from playing with stereotypically feminine toys, for instance, which makes him less likely to choose that same toy again (Kane, 2006). Social learning receives strong support from studies that show sex differences vary between cultures. For example, sex differences in math and science achievement are observable in many cultures, but not all (Helgeson, 2012: 148). Social learning theory accounts for this kind of variety in a way that psychoanalytic theory cannot, because it is possible for cultural norms to influence social learning. Nonetheless, social learning theory considers children to be passive recipients of gender norms, and disregards the ways in which children actively participate in their gendering.

Cognitive developmental theories, on the other hand, emphasize the active involvement of children in the socialization process. According to cognitive development, very young children learn to use sex as a basic organizing principle because it is simple for them to identify and apply. Because sex is relatively stable, and has clear indicators (dresses for women, suits for men), small children are able to categorize their otherwise disordered surroundings. Children's imperfect grasp of the complexities of gender (a person in a dress is by no means guaranteed to be a woman) can help to explain their own rigid preferences. Children are likely to prefer stereotypically sex-typed toys and activities because they do not realize that these indicators of

sex are separate from one's actual biological sex (Renzetti and Curran, 2003: 78-80). Like the other theories, however, cognitive developmental theories are not without detractors. Critics object that cognitive development does not place enough importance on the role of culture, nor consider racial intersectionality (Bem, 1993; Hill and Sprague, 1999).

The takeaway from this discussion is not which theory of socialization is superior, although that debate, too, is fascinating and worthwhile. Instead, I emphasize theories of socialization to call attention to the many ways in which human beings in society learn what it means to be male or female. Each of these theories shows the pervasiveness of our gender roles, and highlights ways in which those cultural stereotypes and beliefs actively influence our lives. We live in a world in which gender is highly salient in essentially every domain. Effectively, everything from the words parents use to describe their children, to the toys and clothes they choose, the role models they emulate, and the hobbies they pursue are gendered. Essentially everyone is gender schematic-- they use gender as an organizational tool in practically all scenarios. Therefore, it is not unusual for people to become extremely uncomfortable when another's gender is not immediately clear. From childhood we learn to use gender as a basic organizing schema, which makes people who do not conform difficult to categorize. Conversely, in knowing nothing about a person except his or her gender, one may feel that he knows something essential about that person. Other basic traits rarely afford so much guidance.

Socialization is undoubtedly different for men and women-- we are taught to excel in different areas, we model a different parent and have different ideals of beauty and success. Gender begins to separate society into two distinct groups even before birth, and the process continues throughout the life course. According to Carol Gilligan's famous account of

socialization, this is how women acquire a "different voice," or the kind of unique perspective to which women like Sonia Sotomayor allude (Gilligan, 1982).

On the other hand, the specific group my research focuses on may be-- in some senses-- immune from the power of socialization. While we are all affected by the societal norms that permeate children's lives, men and women who reach the pinnacle of the legal profession are in many respects more similar than they are different. Men and women in the highest judgeships have a great deal of socialization in common: they have similar levels of education, through high school, college, and law school, and they are likely to have worked in law firms and have experience in lower judge positions before reaching the level of a state's highest court. Some research argues that these similarities outweigh the different socialization processes that boys and girls undergo (Songer et al, 1994).

Even within the legal profession, however, men and women are likely to pursue different paths. While men frequently work in corporate law, women are more likely to become involved in family law. Women are also more likely to work part-time, and to make a greater effort toward balancing work and family than their male colleagues (Smith, 1993).

## **5.2 BIOLOGY**

Socialization theories emphasize the social construction of gender, and implicitly suggest that without societal influence, sex differences would not exist to the extent that we observe them. The role of society is difficult to overstate when it comes to gender norms, which vary between cultures and over time (pink was once a masculine color). Even so, some physical

differences between men and women do exist independent of society. Biologically and physiologically, men and women are not identical, although the differences are frequently overstated.

Socialization theories are useful to explain how culture influences gender norms and the resultant differences between the sexes. But socialization is only one of many possible explanations for the ways in which men and women express their gender identities; the social sciences attempt to account for gender differences using many frameworks. One of the best-known and oldest ways to explain gender differences is evolutionary theory, which derives from Darwin's theory that "we behave in ways to ensure the survival of our genes" (Helgeson, 2012: 143). According to evolutionary theorists, gender differences exist today due to evolutionary challenges that caused men and women to develop differently. More specifically, evolutionary theorists cite reproduction as the most important determinant in gender differences.

Evolutionary psychology often begins with hunter-gatherer societies, in which men and women were segregated as a means to ensure survival. While men employed their superior strength as hunters, women invested themselves in their children, and stayed close to home as caretakers. Hunter-gatherer societies are, therefore, construed as an outgrowth of men's and women's natural propensities. For these reasons, posit evolutionary psychologists, men and women developed different behaviors and attitudes that are a part of modern gender roles. According to evolutionary theory, men are naturally more promiscuous than women because more sexual partners are directly correlated to more offspring to carry on the male's genes. Women, on the other hand, are drawn to a single, stable partner-- someone who will support her children (Pederson, et. al, 2002). Competition among males for females may be used to explain increased aggression and dominance among men in modern society. Evolutionary trajectories

can also be used to account for some differences in sexual behavior; according to some research, men are more prone to rape than women because of its evolutionary use as a reproductive tactic (Thornhill and Palmer, 2000).

Evolutionary theory, however, is not without criticism. The theory may seem deterministic: due to the behavior of our ancient ancestors, male domination is a fact of modern life. Similarly, some critics consider evolutionary theory to be harmful to society because it allows for little social change, while emphasizing an androcentric image of evolution (Vandermassen, 1970). Furthermore, evolutionary theory tends to be empirically untestable and sometimes refuted by research. Specifically, evolutionary theory struggles to explain behaviors that do not maximize the survival of one's genes, like homosexuality and suicide (Helgeson, 2012: 145).

The final explanation for sex differences I review is biological. Biological explanations of sex differences take many forms, including the easily observable discrepancies in men's and women's physical size, and the less overt differences in brain structure and hormones. Biological models emphasize the role of genes and hormones in differences between men and women. Higher levels of testosterone in men, for instance, accounts for their greater competitiveness and aggression. Other studies investigate the different activation of sections of the brain in men and women. Evidence does show some difference in brain size and structure between the sexes, but the meaning of these differences is unclear (Helgeson, 2012).

Like theories of socialization, evolutionary and biological explanations for sex differences should not be considered in isolation. Each theory contributes to the discussion of differences in cognition, behavior, and gender roles. Taken alone, any given theory is unlikely to encompass the complexity of human life, and the important interaction between nature and

nurture that forms our personalities and perspectives. While I do not intend to choose one theory to inform my study of court decision-making, it is critical to understand the myriad influences of everything from chromosomes to television shows in constructing modern gender roles.

## **6.0 MANIFESTATIONS OF GENDER DIFFERENCES IN POLITICS**

The theories and abstract concepts of the previous sections of this paper help to account for observable differences between men and women, but as I noted earlier, there is little consensus on the role of gender bias in government. Discussion of the concepts of gender and the sources of gender differences (whether they be inherent and biological, or consequences of society), are relevant to my study only if gender differences actually exist in the judicial branch of American politics.

To determine whether female court justices are likely to make different decisions (or engage in a difference decision-making calculus) than their male counterparts, it is relevant to look at examples in legislature. Do women in Congress represent their constituents differently than men? The question here is one of substantive representation: once women achieve descriptive representation (and hold positions of power in politics) do they influence outcomes in any measurable way?

In some respects, evidence shows that women in legislature act as distinct entities from their male counterparts. For example, although both men and women consider themselves able to represent the needs of women, substantially more female legislators than male legislators consider women a specific and significant constituency (Paxton and Hughes, 2007: 200). It follows, then, that female legislators are likely to prioritize issues of special concern to women more frequently than their male colleagues. According to research by Sue Thomas, women

prioritize "legislation concerning women, children, and family issues more than men" (Thomas, 1991: 960). And not only do women prioritize women's issues more than men, but they also act on those priorities by voting in favor of legislation to benefit women. Female state legislators are 8% more likely than men to vote in favor of women's issues bills, with an even greater difference when it comes to issues of reproduction (Swers, 1998: 440). We see this phenomenon in action on the national level as well. Only because of the persistent effort of women in Congress are routine mammograms today covered by Medicare (Kanthak and Krause, 2012: 158). Finally, women who replace a male legislator from the same district are likely to sponsor more bills related to women's issues than her male predecessor (Gerrity et. al., 2007).

Women also bring a distinct perspective to politics. Research on both legislatures and the judiciary references Carol Gilligan's insight that men and women define themselves differently. While men tend to emphasize hierarchical relationships, women envision relationships as interconnected webs (Davis, 1993). Women define themselves in different terms than men, and have a greater concern for positive rights rather than only negative rights (Songer et. al., 1994). Consequently, women approach problems differently than men, and express divergent interests and outlooks. For example, female legislators view crime in terms of its context, taking into account societal influences and the criminal as human being, in a manner unusual among male legislators (Paxton and Hughes, 2007: 207).

In spite of previously cited problems with descriptive representation, this research suggests that descriptive representation of women leads to substantive representation of women. In other words, the presence of women in Congress better serves the policy interests of American women than a legislature with no female representatives. Although the link between descriptive representation and substantive representation is a tenuous one, it appears that female legislators



do make a difference for their female constituents. What explains this? How have these women converted their mere presence in legislature to political capital?

## 7.0 CRITICAL MASS AND TOKENISM

A possible explanation for the apparent substantive success of female legislators is critical mass theory. Critical mass theory posits that a minority is unable to achieve substantive success until they constitute a certain percentage of the legislative body. A United Nations recommendation that legislatures contain at least 30 percent women employs critical mass theory (Kanthak and Krause, 2007: 94). Perhaps successful female legislators have reached critical mass, or a threshold at which they are able to work together and overcome their minority status. While scholars have yet to determine the exact number at which critical mass takes hold, it is often estimated between 15 and 30 percent.

Research on the utility of critical mass theory in politics is divided (for a review, see Bratton, 2005). Collins et. al. find that "as the number of women serving at a court point increases, the difference between the decision making of male and female jurists grows" (2010). Although evidence of a critical mass of women is cited in some studies, research on Congress indicates that increasing the number of women present does not necessarily lead to positive policy changes. Kristin Kanthak and George Krause's book *The Diversity Paradox* suggests that women in the House of Representatives in fact had greater difficulty effecting change as their numbers increased (2012). At the root of their problems, say Kanthak and Krause, is the token status of female legislators.

According to Rosabeth Moss Kanter's landmark work, tokenism exists in groups with a skewed population wherein 85 percent of the group is composed of one "type" and the remaining 15 percent is composed of another "type." Skewed populations create one dominant group, and one token group, whose members are perceived as symbolic representatives rather than individuals (Kanter, 1977). Women in politics today may be considered tokens because of their minority status in a male dominated domain. Women in every branch of government are still greatly outnumbered by men: in 2014 women hold 18.5 percent of seats in the U.S. Congress, 23.3 percent of statewide elective executive offices, and comprise 24.2 percent of state legislatures (Center for American Women and Politics, 2014).

Tokenism is constraining on the substantive change that woman can engender, but it also affords certain advantages. Token women have the benefit of symbolism-- men who wish to avoid a biased reputation are wise visibly to include female colleagues. And when the token group of women is particularly small and men are not threatened by a potential shift in the status quo, women are likely to receive special attention. An illustrative example of this phenomenon is the greater value Republican Congressmen place on their female colleagues compared to Democratic Congressmen. In spite of the greater concern for women's issues generally attributed to the Democratic Party, a larger proportion of Republican women serve in party leadership than do Democratic women. This unexpected result comes from the smaller numbers of female representatives in the Republican Party. Because Republican women constitute a small, token group, their male colleagues are not threatened by the presence of women, thereby allowing them to move rapidly toward leadership positions otherwise reserved for more senior members (Kanthak and Krause, 2012).

The advantages of tokenism come at a cost. Token women have little discretion to advocate for women's issues, or to deviate from party politics. In return for political capital and leadership positions, tokens must reinforce the strength of the dominant group. Men are unlikely to support token women who do not conform to the ideals of the majority. Susan Molinari, once a token member of the Republican Party, "reports that retribution was swift when her political views strayed from those of her male colleagues" (Kanthak and Krause, 2012: 52). Nonetheless, token women receive real, substantial benefits from their position as tokens.

It is because of these benefits that, in some cases, surpassing the token level leads to more problems rather than fewer. When a token group achieves enough members to become a "non-token minority," they are no longer subject to special treatment from the majority. In the case of women in the U.S. Congress, it can be argued that surpassing tokenism eliminated the favorable treatment women once received from male colleagues, who now see a bloc of female legislators as a potential threat to the status quo. Again, think of the greater benefits Republican women receive from male legislators (more leadership positions, and campaign support, for example) as opposed to Democratic women, who constitute a more substantial, and therefore threatening, portion of the Party.

Furthermore, in a phenomenon known as asymmetric tokenism, those women devalue one and other as their numbers increase. Once women in Congress surpass the token level, men begin to devalue them because they no longer work to reinforce the status quo and the strength of the majority. At the same time, however, the women devalue each other because they are accustomed to the benefits and limitations of token status. Token women, used to receiving benefits from the dominant group, may resent one and other as competition for those benefits. Exacerbating the issue further, women accustomed to tokenism struggle to work together.

Instead of uniting around their shared causes, women often hold each other back; they have communication issues because they are unaccustomed to working together, and they are trained to act like outsiders, vying for the special attention of the dominant group. Asymmetric tokenism leads women to continue behaving as tokens without reaping the rewards of tokenism. Ironically, this means that these women still can't advocate for each other, even now that they are not constrained by tokenism (Kanthak and Krause, 2012).

The discussion of critical mass and tokenism highlights the complexities of achieving substantive representation for a minority. With my own study, I seek to determine whether women on state supreme courts can overcome tokenism by reaching critical mass, rather than keeping each other down through asymmetric tokenism.

## 8.0 METHODOLOGY

To determine which courts are most receptive to women's issues I examined 307 cases that occurred in the highest courts of 42 states.<sup>1</sup> I chose to look at the way courts rule on "women's issues" because I expect the differences between men and women to appear most clearly on issues that are of particular importance to women. Defining what a "woman's issue" really is-- and more fundamentally, deciding if such a thing even exists-- is less straightforward than most literature suggests. Nonetheless, scholars recognize that some issues disproportionately affect women; workplace sexual discrimination is one such issue (Paxton and Hughes, 2007). Discrimination is, therefore, often referred to as a "woman's issue," and I will consider it one for the purposes of this paper. I selected cases involving sex discrimination in the workplace, because those cases historically elicit differing responses from men and women. Although studies show very mixed results in regard to gender bias on courts, research consistently shows that women are more liberal than men in discrimination cases (Songer et al., 1994, Allen and Wall, 1987).

I chose cases on state courts because they provide variety: justices on states' highest courts are selected in many different ways and for different term lengths. Some justices are appointed while others face partisan or nonpartisan elections and retention elections, in some cases with an opponent and others without. By choosing to look at justices who are selected in so

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<sup>1</sup> No applicable cases took place in the remaining 8 states

many different ways, I reduce the chances that my results are influenced by justices' institutional constraints.

Simultaneously, state supreme courts face less scrutiny than the United States Supreme Court because they do not receive national attention. For this reason, it is possible for some states' highest courts to have very little diversity, or very great diversity. Fewer people are aware of the composition of their state's highest court than the composition of the U.S. Supreme Court, so state courts have more discretion when it comes to selection of justices. For example, when faced with a Supreme Court nomination after Sandra Day O'Connor's retirement in 2006, President George W. Bush perhaps felt pressure to replace her with another female justice because public opinion supported better representation of women. President Bush's nomination of Harriet Miers-- although ultimately unsuccessful-- may serve as evidence of the power of public opinion (Boyd et. al., 2010). State courts, however, are not so much in the public eye. I examined courts composed of only white men in some instances, and others with a majority of women or ethnic minorities.

The cases I examined all took place between 1990 and 2013. I chose this timeframe because (like the courts themselves) the timeframe provides the maximum amount of variety. While courts made up of only white men still exist, the first instance of a majority female state supreme court occurred in 1991. By studying cases beginning in 1990, I was able to catalogue cases with both historic maximums and minimums in terms of female representation.

I used the database LexisNexis in order to search all states' highest courts for applicable cases within my timeframe. A total of 307 cases met my requirements. I coded each case for details about the justices and the decision. Specifically, I recorded each justice's gender, race, and party affiliation, along with the manner in which the justice was selected and whether the justice

voted in favor of the plaintiff (a pro-woman vote for the purposes of my study) or in favor of the defendant. I also recorded some data on each case, including whether the plaintiff was male or female, the percent of women on the court and which justices dissented and authored the opinion.



## 9.0 HYPOTHESES

My research focused on four main hypotheses. First-- and most central to the study-- I hypothesized that female justices would take a liberal position on workplace sex discrimination more frequently than their male counterparts. This hypothesis is based in part on past studies with similar parameters, which indicate women are more likely than men to support the plaintiff in discrimination cases. Peresie's study of sexual discrimination and sexual harassment cases in federal appellate courts finds that the "presence of a female judge significantly increased the probability that the plaintiff would prevail" (2005: 1768-9). Songer et. al. found female judges on the United States Courts of Appeals were substantially more liberal than male judges in cases of employment discrimination (1994).

Additionally, the different socialization of males and females means that women are more likely than men to have firsthand experience with discrimination (McGlen et al., 2010). Supreme Court justices Sandra Day O'Connor and Ruth Bader Ginsburg have both spoken publicly about their own experiences with gender discrimination in the legal profession (Moyer and Tankersley, 2010). Those experiences are likely to influence the way female justices respond to cases of workplace sex discrimination. Consequently, I expect female justices to vote in favor of the victim of sex discrimination more often than male justices to whom the issue is of less personal significance.

Second, I hypothesized that racial minorities would make more liberal decisions than white justices. This hypothesis rests on the same basic theory as my first hypothesis: previous research and firsthand experience with discrimination indicate that non-white justices will be more sympathetic to the plaintiff in discrimination cases. While it is difficult to isolate the reasons blacks in the general public maintain such strong loyalty to the Democratic Party and liberal ideals, the black experience as marginalized group is essential to an understanding of black politics (Tate, 1994). A study of President Carter's black appointees to U.S. courts of appeals found that black males voted in favor of the victim in sex discrimination cases 65% of the time compared to white men's 57% (Gottschall, 1983: 172, but see Segal, 2000).

The third hypothesis I proposed is that Democrats will make more liberal decisions than Republicans. Because party affiliation serves as a rough indicator of ideology-- and the best indicator possible for me in this research--Democrats are generally more liberal and Republicans are generally more conservative (Moyer and Tankersley, 2012: 792). I based my hypothesis on this paradigm.

My fourth hypothesis is based on a phenomenon known as "panel effects," which states that increased numbers of women will influence the entire court to make more pro-female decisions. Not only are the women themselves more likely to make a pro-plaintiff decision, but their presence on the bench also has a measurable impact on the behavior of their male colleagues. Previous research finds that women sensitize their male colleagues to issues about which they may be particularly aware (Gryski et al., 1986: 150). A 2010 study of federal appellate courts finds that men are 14% more likely to find for the plaintiff in discrimination cases if at least one woman sits on the panel of judges (Boyd et al., 2010). Similarly, Crews-Meyer and Songer's study of state supreme courts finds that men with at least one female

colleague are "substantially more likely than their brethren on all-male courts to support the liberal position in the cases before them" (2000).

The reasons for this are manifold. According to Moyer and Tankersley, women serve as "critical actors" who shed light on issues like sexual harassment and discrimination about which men might not otherwise be aware (2011). Recent research based on the Supreme Court of Canada, suggests that female justices "provide a consciousness-raising experience for men on the bench" (Jilani et. al., 2010: 59). Jilani finds that male justices are 9 percent more likely to cast a liberal vote for each woman with whom he shares the bench, which strongly supports the idea that women influence their male colleagues. As women surpass the level of tokenism and reach a critical mass, their influence becomes far more powerful. I hypothesized the same phenomenon in my own study, since female justices may be able to provide invaluable insight on sex discrimination.

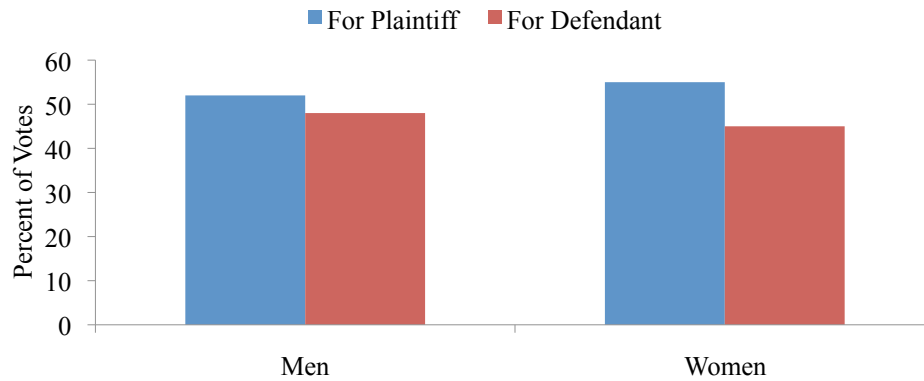
## 10.0 RESULTS

Of my four core hypotheses, only one-- that Democrats were more likely to support the plaintiff than Republicans--was supported by my results. The other three hypotheses did not achieve statistical significance. My results showed no statistically significant difference whatsoever between the decision-making of male and female justices (see Figure 1 and Table 1), including when I controlled for party affiliation.

Similarly, I saw neither a significant difference between white and non-white justices, nor the liberalizing influence of panel effects (in fact I found a small negative coefficient-- indicating that more women actually made courts less liberal). Table 1 shows these results in greater detail.

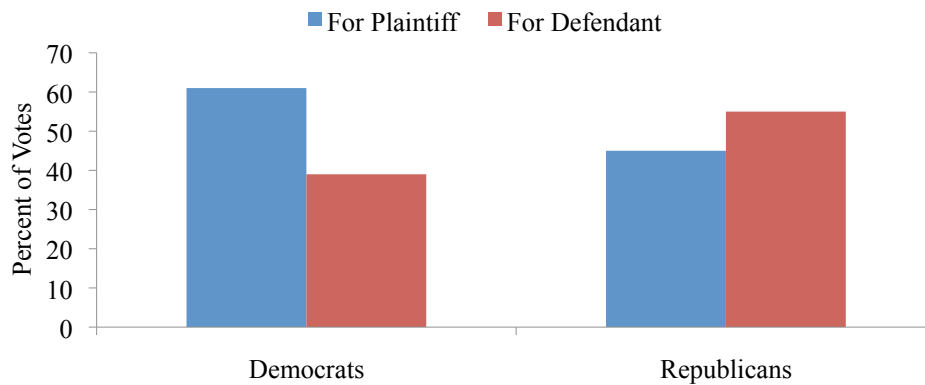
According to my results, party affiliation is the best predictor of a justice's vote on workplace sex discrimination cases (see Figure 2). Only party affiliation achieved a statistically significant p-value, and Democrats are 16 percent more likely than Republicans to vote for the plaintiff in the cases I examined (Table 2). Democrats--regardless of their sex or race, are more likely to support the plaintiff than their Republican colleagues. While my research is preliminary, these results indicate that the best way to create a court that is favorable to women is to fill it with Democratic justices, rather than to increase the number of women present. This finding is in keeping with the weak link between descriptive and substantive representation. Women are most likely to receive favorable rulings in workplace sex discrimination cases in states like New

Jersey or Washington, where a majority of justices identify with the Democratic Party, rather than states like Wisconsin or Tennessee where a majority of justices are female.



**Figure 1:** Votes by gender

I found no significant difference between the voting patterns of male and female justices.



**Figure 2:** Votes by party affiliation

Party affiliation is the only measure that reached statistical significance in my study. Democrats in my study are 16 percent more likely to cast pro-plaintiff votes than their Republican colleagues, regardless of gender.

**Table 1:** Likelihood of Pro-Plaintiff Vote in Workplace Sex Discrimination Cases

<b>Variable</b>	<b>Coefficient</b>	<b>Robust Standard Error</b>	<b>z</b>	<b>P &gt;  z </b>
Judge Race	0.0179	0.1163	0.15	0.878
Judge Gender	0.0660	0.0534	1.24	0.216
Percent Female Judges	-0.0015	0.0050	-0.29	0.769
Judge Party	0.4192	0.1049	4.00	< 0.001
Appointed/Elected	0.0678	0.1381	0.49	0.624

Number of votes: 1811

**Table 2:** Marginal Effects of Likelihood of Pro-Plaintiff Vote

<b>Variable</b>	<b>dF/dx</b>	<b>Robust Standard Error</b>	<b>z</b>	<b>P &gt;  z </b>
Judge Race	0.0071	0.0462	0.14	0.878
Judge Gender	0.0263	0.0213	1.24	0.216
Percent Female Judges	-0.0006	0.0020	-0.29	0.769
Judge Party	0.1655	0.0409	4.00	< 0.001
Appointed/Elected	0.0270	0.0549	0.49	0.624

## 11.0 DISCUSSION

The first question that my results raise is how to account for the strong statistical significance of party affiliation, at the expense of every other factor I examined (gender, race, recruitment method). Perhaps asymmetric tokenism can account for the lack of differences between male and female justices. Critical mass theory, which suggests that increased numbers of women will exacerbate the differences between men and women-- and which I endorse in this paper-- does not appear to be at work. Not only did I find no evidence of panel effects on the courts I examined, I instead found that more women on a court increased the likelihood of a conservative decision in sex discrimination cases. It is possible that asymmetric tokenism is at the root of this unexpected result. The female justices in my sample may be behaving like the Congresswomen in Kanthak and Krause's study. Like those legislators, it is possible that the women in my study do not know how to work together and are accustomed to the benefits of tokenism. Asymmetric tokenism may then cause those women to devalue one and other, and to defer to the male majority.

In the case of state supreme courts, however, I find this suggestion somewhat unlikely. In Congress, asymmetric tokenism occurs as a consequence of two important factors: first, as the number of women in the minority surpasses the "token" level, those women receive fewer benefits from the majority, which is now threatened by the growing minority. Second, the minority is unable to use their newfound strength in numbers because its members are



accustomed to the constraints of tokenism. Members of the minority resent each other for the loss of tokenism's benefits, and struggle to communicate effectively because tokenism trains them to emphasize their singularity, and to rely upon the majority's favorable treatment. Because the legislative and judicial branches of government are substantially different institutions, I do not expect asymmetric tokenism to function in an analogous manner in courts. Token court members receive fewer benefits from the majority than their peers in Congress, and because of the smaller number of members of a court than a legislature, the consequences of tokenism are less striking. Consequently, asymmetric tokenism in this study is importantly different from asymmetric tokenism in Congress. Women in the minority on courts are unlikely to suffer the same problems that minorities in Congress might.

Whereas prominent members of Congress have many favors to bestow upon their colleagues (leadership positions, preferable committee placement, campaign contributions, and formal endorsements), court justices have fewer rewards to offer well-behaved colleagues. Token court members receive fewer benefits from the dominant majority, with authorship of opinions as the one notable exception. Therefore, token members of a court do not have the same incentives to rely upon the majority that token legislators experience. For this reason, the first prong of asymmetric tokenism is far less likely to occur on a court than in a legislature. Women who surpass tokenism on a court are unlikely to resent their loss of benefits, because they have much less to lose in terms of benefits than a Congressional token minority.

The second prong of asymmetric tokenism is also difficult to apply on courts. Many of the courts I examined are composed of five justices. With numbers this small, even a single woman comprises 20 percent of the court. Unlike a token number of Congresswomen, justices do not face hundreds of colleagues in the dominant majority. Although women in high judgeships

remain significantly outnumbered by their male counterparts, the low number of judges on any given bench distinguishes the judicial branch from legislature. Furthermore, justices are forced to cooperate with one another (at least to some extent) because they must discuss cases, make decisions, and choose authorship of decisions. The female justices in my study face substantially lower barriers to communication than Congresswomen, who represent different constituencies and work within an institution sixty times the size of even the largest supreme courts.

Consequently, I believe that other accounts are better suited to explicate my results. As I briefly mentioned in the introduction to this paper, an important consideration in evaluating my results are the individual women whose decision-making I analyze. Women who serve as judges on the states' highest courts are distinct from the general population in a variety of ways. They are better educated, and likely to be wealthier and more politicized than most of the general public. Consequently, many of the potential explanations of my results speak to the ways in which judges are unlike the people for whom they adjudicate. And this issue itself is a possible problem in achieving substantive representation for women, or for any group at all. Choosing the political elite as our representatives may in itself put pressure on the already tenuous link between descriptive and substantive description. How can people with backgrounds so unlike much of the public possibly represent them in a substantive way?

One potential explanation for the strength of party ideology has to do with the increased polarization of elite level politicians, which is of course another way in which the justices in this study are distinct from most people they represent. The gridlock we observe on a daily basis in Congress, in local politics, at town halls, is constant evidence of how polarized our political process has become. While it was once easier to reach across the aisle, modern political parties have become increasingly separate from each other, and in some cases, extreme (the success of

the Tea Party illustrates this change). Members of Congress today perceive that the penalties for compromise are higher than the benefits. Judges, like members of the legislature, are constrained by party politics. Judges who are elected in partisan elections, and those who are selected by gubernatorial appointment may feel particularly strong pressure to stick to ideological boundaries. Among the justices in this study who were selected through gubernatorial appointment, nearly 100 percent identified with the same party as their appointing governor. This correlation suggests that justices are more politicized than we might generally associate with the judicial system.

A second possible explanation for the primacy of party affiliation as a predictor of judicial votes is the ideological makeup of my sample. The women in this study are more evenly split between the Democratic and Republican Parties than we usually expect with the female population. A potential problem scholars face when answering the question "are women more liberal than men?" is the uneven distribution of women as Democrats and Republicans. Because women are disproportionately associated with the Democratic Party, it can be hard to discern whether women are voting liberally on "women's issues" strictly because they themselves are women, or because they represent a liberal party and a liberal constituency (see Paxton and Hughes, 2007). My study is fortunate in that the divide of Republican and Democratic women is fairly even, at 44 percent Republican and 56 percent Democratic. This equal distribution means my results are subject to the problem I just addressed to a lesser extent than many studies. If women are voting more liberally than men, it is not a consequence of party affiliation. However, it also leads to the unlikely conclusion that women are not more liberal than men. Because they are representing the conservative party nearly as much as the liberal party, results are more

equal. We would expect more differences between men and women when Democratic women are over represented, as they are in many studies of political elites.

It is interesting to note that even studies that do find notable differences between men and women may still credit political ideology as the most powerful variable. Michele Swers's study of Congress, for example, shows that women are more likely to support women's issue bills than men even after controlling for factors like ideology and partisanship. Nonetheless, the strongest predictor of voting patterns was political ideology (1998).

Another possibility is that my results indicate no difference between male and female justices because their socialization is more similar than different. As discussed earlier in this paper, among the political elites in my sample it may be the case that the different socialization of men and women in the general public is outweighed by the similar socialization of men and women at the peak of the legal profession. The justices in my study have similar backgrounds through education and work in the legal profession. In a sense the "unique perspective" women like Sonia Sotomayor claim to bring to the table may be subservient to similar experiences those women undergo in law school and the legal practice. Whatever differences they may once have possessed have mostly been canceled out by the norms learned in law school and on the bench.

In spite of the theoretical framework and prior research in support of my hypotheses, it is also possible that institutional constraints of the judiciary will outweigh other considerations in decision-making. Justices do not have total control over the decisions that make because they are constrained by the doctrines of stare decisis and precedent. In other words, justices are encouraged to let the decision stand, and are bound by Supreme Court rulings. Supreme Court precedents are binding, and some cases leave little room for interpretation. Furthermore, justices do not like to have their decisions overturned or their reputations questioned, so they are very

unlikely to disregard precedent (Miceli and Cogel, 1994). Of course, this problem is partially alleviated by examining only states' highest courts. Lower courts are allowed even less discretion because they are beholden to the precedents set by every higher court in their jurisdiction. Before sex discrimination cases reached public attention and the Supreme Court, justices had more leeway to make decisions based on their own ideologies or specifics of the cases. McCall finds that judges dissented in sexual harassment cases significantly more before the Hill-Thomas Senate hearings called attention to the issue. Increased public scrutiny about sexual harassment makes judges more hesitant to dissent, and potentially impact their chances of retention on the court (2003). Since sex discrimination is now a well-trodden issue, which attracts a good deal of media attention, justices are not able to use as much of their own discretion as they once were.

Yet another potential constraint on the discretion of justices is the method of recruitment and retention that brings them to office. Elected and appointed justices have different institutional concerns to keep in mind. As elected justices reach the end of their terms, for example, they become less likely to dissent because they do not wish to call attention to their voting behavior shortly before an election. Keeping in mind the short attention span of most voters, however, they are more likely to make ideological decisions early in the term. Appointed justices-- particularly those with long terms-- face fewer institutional constraints (see McCall, 2003; Baum, 1995; Brace and Hall, 1993). Justices who are appointed are generally less concerned with public opinion, although those who are selected through gubernatorial appointment tend to be more highly politicized (Slotnick, 1988). I found no difference in the way elected justices and appointed justices voted in workplace sex discrimination cases, but that is not to say that retention method had no impact. Concern for public opinion can take a variety of forms, perhaps leading a justice to choose to join the majority opinion rather than to write a

dissenting opinion when she is nearing reelection and prefers not to attract attention. The side the justice takes in the case, however, may not be relevant to her goal of remaining out of the public eye.

Finally, there is no way for me to control for particulars of a case, and the idiosyncrasies of certain judges. While I do not expect that these things influenced my results in any substantial way, it is worthwhile to note the possibility. No one can completely separate himself from his ideologies and experiences, and certain cases may strike a personal note and influence a justice's decision-making in unpredictable ways.

## 12.0 A NOTE ON FEMINISM

A final consideration in evaluating my results is the role of a feminist jurisprudence in guiding decision-making.

People are often loath to label themselves feminists, largely because the word is so widely misunderstood in popular culture. In its most simplified form, the definition of feminism is the fairly benign doctrine of advocating equality for women. Nonetheless, feminism and its advocates are often stigmatized. Studies on college campuses indicate that the term feminist is repeatedly associated with aggressive, "man-hating" behavior. Terms like "defensive" and "unyielding" come up frequently, even in the comparatively liberal landscape of a college campus (Tewng and Zucker, 1999). The media largely portray feminism in reductive and inaccurate ways: as silly catfights among women or in negative stereotypes of bra-burning man haters. Other stories represent feminism as single, monolithic view, not accounting for the wide variety of feminist perspectives (Beck, 1998). Evidence shows that these pervasive stereotypes influence the way people treat the concept of feminism. In spite of overwhelming support for the goals and accomplishments of the women's movement, a 1989 *Time* article found only 33 percent of women were willing to identify themselves as feminists (Wallis, 1989).

Confusion about feminism comes from many sources, but one major reason has to do with the sheer number of sub-types of feminist thought. Feminism can take a wide variety of forms, and consequently, feminists who subscribe to different types of feminism may answer the

same question in different ways, and using a different theoretical framework. Forms of feminist thought are in some cases radical, but others are relatively conservative. Liberal feminists, for example, desire equal opportunity for all, which has limited implications for societal change. Radical feminists, on the other hand, are interested in a total reconstruction of gender in order to undermine the systemic oppression of women (Minow, 1993). A thorough discussion of feminist thought is not the purpose of this paper; an understanding of the heterogeneity of feminists and the ideals for which they stand, however, is important to conceptualize a feminist jurisprudence.

A justice's jurisprudence is essentially the basic theoretical system of analysis she uses to consider the law. Judges who reason with a feminist jurisprudence critique the law as a patriarchal institution, keeping in mind its societal implications. But the way in which justices might enact such jurisprudence is not circumscribed. For example, one justice might believe that women are benefited most by equality of opportunity: men and women should be held to the same standards in all regards. Some feminists would argue that even pregnancy related benefits actually usher in sex-based discrimination, rather than protect women. So, in a case in which a pregnant woman is fired from her job for taking time off, this justice may rule against the woman because that is how her sense of feminist jurisprudence guides her. On the other hand, a judge who believes that women deserve equal outcomes rather than just equal opportunities is more likely to rule in favor of the woman. At the crux of the debate is whether the means or the ends should be gender neutral. Is it better to recognize differences or refuse to? Feminism's many brands means that feminist judges will not necessarily make identical (or even similar) decisions. Furthermore, the same justice can be pulled in several directions by his or her sense of feminist jurisprudence.



The complexities of feminism make the analysis of my results less straightforward. Potentially, every single justice in my study believes that he or she is advocating for women. For the sake of this study, I consider a "liberal" decision, or a decision in favor of the plaintiff, to be a pro-woman decision. And in general, this is a reasonable assumption to make. Usually, deciding in favor of the plaintiff is deciding to compensate a woman who has experienced workplace sexual harassment at the expense of a male superior who is the harasser, or who permitted the harassment to continue. On a case-by-case basis, however, the "pro-woman" decision is not always obvious, especially when we acknowledge the diversity of feminist perspectives.

### 13.0 CONCLUSIONS

The most obvious conclusion of this research is that women who wish to sue for workplace sexual discrimination are most likely to get a favorable outcome in states like New Jersey or Washington, where the highest courts are composed primarily of Democrats. Women are not more likely to win their cases in Wisconsin or Tennessee, even though there is a majority of women on both of those supreme courts. When it comes to workplace sex discrimination cases, my research indicates that affiliation with the Democratic Party is a better predictor of a liberal vote than is gender.

Perhaps the more interesting result (although less immediately useful) is the support for the disconnection between descriptive and substantive representation. The number of women on the court does not predict how it will decide on women's issues. Increasing women does not necessarily improve outcomes for women. This is not to say that increasing the number of women in high judgeships is not still an important and worthy goal. Descriptive representation of women-- while it is no guarantee of substantive change-- remains a powerful step toward creating democratic institutions reflective of the populous. Nonetheless, the presence of women on state supreme courts does not have the direct impact on cases involving women's issues that I expected to find.

This leaves the question, how do we better represent women? Or, for that matter, any other underrepresented group? The relationship between descriptive and substantive

representation severely complicates any attempt to improve outcomes for American minorities. Further research across disciplines will hopefully shed light on how best to represent minorities in our legal system. Fair representation is a complex problem and even the best-intentioned attempts are not guaranteed success. The contents of this paper are only the beginning of what is certain to be a lengthy process to achieve equality.

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