

Do Women Justices Matter?

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## The Impact of Women Supreme Court Justices

Women have become a driving force in almost all aspects of politics, and the judicial system is no exception. Since 1981, when Sandra Day O'Connor was appointed to the bench by President Reagan, the court gained the potential to become a podium for women to influence the politics and laws of the nation. Women Supreme Court justices have used this influence as a chance to stand up for women's rights. For example, in 2009, as the only woman on the Supreme Court, Ruth Bader Ginsburg pointed out that in the case of *Safford Unified School District v. Redding*, a case dealing with a questionable strip search performed on a thirteen year old girl, that the other justices on the court had never been a thirteen year old girl, and therefore, had a disconnect with the issue at hand (Buskopic 2009, 2).

There is research to show the impact that women have on policy in Congress, which can be beneficial in determining the impact of women on the Supreme Court. For one thing, more women in Congress can impact the appointment of Supreme Court justices. When Clarence Thomas was appointed in 1991, many thought that had Congress's committees consisted of more women, the outcome may have been different (Swers 2002, 89). Research has shown that female legislators do in fact shed more light on women, family, and child issues than men do. The research also shows that both Republican and Democratic women both show equal interest in these issues (Swers 2002, 132). The Supreme Court has the potential to yield the same results. With four women having been appointed to date, I may be able to find whether there is a difference in the kinds of cases that the court grants writ of certiorari to, as well as a difference in the decisions made in such types of cases. When looking at cases about women, children, and families, I can study whether or not more such cases are chosen with more women on the court than only one. If this research has similar results to the impact of women in Congress, the

conclusion would be that women have a significant impact on the cases that are heard before the court, as well as an influence on the majority opinions on those cases. The best way to go about this issue is by using a case study of the last few terms of the Supreme Court. There are two completed terms in which three women justices have been involved in the decision making (Fossum 2010).

By comparing the October 2010 and October 2011 terms, which include all three women, to the two terms preceding the appointment of both Sonia Sotomayor and Elena Kagan, which only included one woman, Ruth Bader Ginsburg, I believe that a difference will be seen in the choice of cases and the decisions made. It would make sense for three women justices to be able to work together to push issues that are important in understanding the gender gap. This research will necessitate a comparison between a court with one woman, Ginsburg, on the bench and a court with all three women, while skipping the 2009 term. In order to yield the best results, I find it best to use a case study of the maximum amount of the 2010 and 2011 terms, each having three women on the bench, versus the 2007 and 2008 terms, which held only Ginsburg. If there is in fact an increase among the cases involving women, child, and family issues, I believe that this will help show that there is in fact an impact of women on the Supreme Court, and that at least a portion of cases chosen and the decisions in those cases are a direct correlation of the recent addition of women to the judicial branch of government.

### **Literature Review**

Extensive research delves into the impact of women in politics, but little of it revolves around the Supreme Court. In order to determine whether there really is a correlation between women justices and the choice and outcome of cases, it is important to understand the

importance that women have in the political system. There is substantial research on women in Congress and the general judicial system. Many studies show that female judges and Congresswomen analyze cases differently than men, and I believe that this research can be applied to women of the Supreme Court.

In the early 1980s, there were roughly 26,000 state trial and appellate court judges throughout the United States. Only 2% of those judges, however, were women. By the year 2000, the small percentage had risen to 25% (Palmer 2001, 91). Thirty years ago, Sandra Day O'Connor was the only woman to have ever held a position on the Supreme Court bench. It was more than a decade before Ruth Bader Ginsburg was appointed to be the second woman on the bench (Palmer 2001, 92). Although these numbers show great improvements, women still stand underrepresented, especially in legal professions. Women make up about 28% of those who work in such positions, which is a greater gap between men and women than the gap in the general labor force (Coontz 2000, 61). Because there is such a small number of women involved in these types of positions, those women that do hold seats on the bench or Congressional positions often offer high support for issues involving women, including education, violence against women, and maternity issues. Women that are judges find themselves acting as a liaison between the government and the women and girls in communities (Day O'Connor and Azzarelli 2011, 5). This research shows that with more women involved in politics, more attention will be paid to women's issues.

Congress is an important indicator of the impact that women could have in the Supreme Court. The bills that Congress see deal with a wide variety of topics. But in recent years, more deal with women's issues. Out of the different types of women's issue bills, the most common are those of affirmative nature, which means that they recognize the importance of women in

social, economic, and cultural situations (Gertzog 1995, 146). The higher amount of attention to these types of issues can be attributed to the high numbers of women in the legislature (Swers 2002, 10). This is not only because women vote a certain way, but also due to members of Congress working to push their policies through to other members. Legislators want to be reelected and in order to do so, they need others to agree with their views to receive more votes (Swers 2002, 10). Women have traditionally been in favor of bills that promote the role of woman as a caregiver. By supporting bills that promote social welfare, women have been granted a gateway to political participation (Swers 2002, 11). Recently, women have emphasized education and healthcare issues in order to reach out to women voters (Swers 2002, 12). If this research is true, then the same idea can most likely be applied to Supreme Court justices. The only big difference is that justices do not need to worry about reelection. When deciding on cases to grant certiorari, the research on women in Congress would imply that female Supreme Court justices are more sympathetic to cases dealing with women's issues. It is also possible that the women would try to persuade the male justices to vote with them.

In regards to women in Congress, there is a great deal of evidence showing that the party affiliation does not change the fact that women tend to swing in favor of women's rights issues. In this context, women's issues are defined as bills that relate particularly to aiming for equality for women, children and education issues, and women's health (Swers 2002, 34). Although it would seem like women who call themselves conservative would be less apt to support these issues, which actually is not the case (Swers 2002, 35). In fact, in the 103<sup>rd</sup> Congress, a larger percentage of Republican women sponsored women's issue bills than Democratic women did, with 83% versus 72%. These statistics suggest that sponsorship is less revolved around party affiliation, and perhaps about gender and issues that the individual can personally relate to

(Swers 2002, 39). It is in these issues and bills that Republican women are most likely to be seen veering from the pressures to vote with their party (Swers 2002, 48). Ultimately, women in Congress seem to advocate for themselves and use their political resources to encourage others to believe the same (Swers 2002, 55). Women on the Supreme Court bench are appointed under specific parties, but if they are anything like women in Congress, which is the assumption, the choice and decisions of cases would lean in favor of women's issues.

Approval ratings and nominations of Supreme Court justices are also important in understanding the impact of female justices. With the Senate being the final voice of whether or not an individual is affirmed for his or her Supreme Court position, Supreme Court appointments and nominations reflect the views of Congress and even the President. In a 2000-2001 survey of law and political science scholars assessed the quality of justices. The scholars were asked to rate post-1967 justices, using a four point scale, based on their overall performance. Zero was the lowest; four was the highest (Comiskey 2006, 299). The results showed that the average rating of all justices was a 2.46 (Comiskey 2006, 301). Included in this survey were two female justices, O'Connor and Ginsburg. Each received scored above the mean, 2.60 and 2.79, respectively. These results show that female justices are actually received well by scholars as compared to all the other justices which are men (Comiskey 2006, 303). This same survey also asked about public opinion at the time of the justices' nomination. The results of this question provided a mean of 2.61. Out of the ten most recent justices, only three received ratings above 3.0, one of whom was Justice Ginsburg (Comiskey 2006, 307). O'Connor's rating was a 2.41 and Ginsburg's was a 3.29. These numbers show that women justices have received high scores compared to the average (Comiskey 2006, 312).

In addition to showing that scholars and the public seem to greatly approve of female

justices, it also explains the views of the Senate and President. The approval of Ginsburg was due to the choice of President Clinton, who showed the public his progressiveness through his choice of a female justice (Comiskey 2006, 312). Senators and the President are both sure to use their power in order to strategically solicit approval for the nominee. Ultimately, each individual is acting based on their own interests, and that means needing to get others on the same side. Recent years have shown that many appointments are close to unanimous, and this can help to show that there are going to be greater approval ratings towards that justice at a later date (Sommer 2013, 5). In 2005, when Justice Sandra Day O'Connor retired from the bench, it was up to President Bush to replace her. His choice to not replace her with another female was met with animosity from the liberal community. At this time, the Senate had a large concentration of women, and chances are, a woman would have been approved. Without the nomination of a woman by Bush, his intentions were made clear (Swers and Kim 2013, 24). Nominations by the President and approval by the Senate are extremely crucial in understanding the political views of the nation and gives a good indication of public approval.

With research indicating that women solve moral problems differently than men, there is a good case to be made that women holding seats on the Supreme Court bench would impact the outcome of cases (Gilligan 1982, 5). If women really do decide policy issues in a different way from men, there is much reason to believe that those differences would also be applied to the Supreme Court (Gilligan 1982, 7). By studying the caseload that has been taken on by the justices in recent years as compared to the male dominated years, a deduction can be made about the impact of women in the most important legal structure in the nation. There is a clear influence that women have in lower courts, the judicial nomination process and Congress. With similar results in multiple aspects of high politics, the assumption is that the same will apply to

the Supreme Court. If that is indeed the case, it would be much easier to predict the outcome of cases rulings as well as predict which types of cases the court would choose to hear.

### **Methodology**

In order to effectively determine whether the appointment of female Supreme Court justices impacts the court's case choices and decisions, it is best to use a mix of both quantitative and qualitative research. There is substantial research backed up by the writings of the Justices themselves which help to explain how each justice can influence the others in their own way. By analyzing the written words of justices, inferences can be made about the impact of the women on the bench. This is as close to the source that research can get. Some justices are more vocal others about his or her influences in their written word, but those words can help in better understanding what goes on behind closed doors. No one knows exactly what conversations among justices are like, but by reading interviews and articles written by justices, there may be some insight into the impact that justices have on each other, especially the relationship between women's influence on the men. This will help prove the validity of the research, as it will all be from firsthand sources.

Another source to use in researching the impact of women Supreme Court Justices is the history and background of the women in question. Assuming that cases are chosen in part because of special interests of justices, the background of the women can be a large indicator of the future of the court. By studying that information, perhaps an implication can be made about the types of cases that will be heard, as well as if their views will help to influence the court's final ruling. Some of the women that have been appointed as a Supreme Court Justice are very active in feminist causes and family sensitive issues. The more women that are on the bench might increase the amount of influence they have on the number of women and family issue



cases that the court hears.

In addition to this qualitative research, a certain amount of quantitative research will be useful as well. Comparing the percentage of cases dealing with women and family issues during terms where three female justices are on the bench, in 2010 and 2011, to a time when there was only one, in 2007 and 2008, will help to prove whether or not there is actually a difference in the amount of those types of cases that are heard. The research will be trustworthy and valid, coming from the Supreme Court Database. Cases that revolve around women and family issues can usually be categorized as liberal. By analyzing the percentage of those women and family issue cases that were decided liberally and comparing that to the percentage of liberally decided cases from when there was only one woman on the bench, an inference can be made about whether or not women have an impact on the decision of such cases.

### **What Women Bring to the Table**

#### **Does Background Matter?**

When a Supreme Court vacancy opened up in 1981, people all over the country held their breath in anticipation of who President Ronald Reagan would choose as a replacement justice. With talks being in the works for years over whether a woman should hold a seat on the coveted bench, it was noted that it was an appropriate time for a woman to be appointed. Reagan appointed Sandra Day O'Connor whom he chose not only because she was the most qualified woman, but because she was the most qualified candidate out of all in the running (Cushman 2001, 246). O'Connor brought an interesting set of ideals to the table, as a Conservative woman justice. She considered herself conservative on several topics, but was relatively private on her concerns about abortion. She had declined to condemn the 1973 decision in *Roe v. Wade* which led to some backlash from some fellow Conservatives (Cushman 2001, 249). Even before accepting her position as a Supreme Court Justice, O'Connor seemed to be making a statement

about how regardless of her Conservative values; she still had a loyalty to the rights of women. O'Connor was also known for voting liberally to strike down a law that excluded men from attending a nursing school. She showed a drive for equal rights, extending to rights of both men and women. With a conflict between being Conservative and have a drive for women's rights, O'Connor's vote was an important one (Cushman 2001, 250). She was seen as the swing vote, and often made the ultimate decision for the court. For it being the first time that a woman was ever on the Supreme Court, her impact was incredible (Cushman 2001, 250). Her background and passion for women's rights led to the court leaning her way, which exhibits the importance of having a women on the court to stand up for one of the biggest minority groups in the nation.

The background of Ruth Bader Ginsburg and her passion for feminist issues made it apparent from the start that her legacy on the Supreme Court would revolve around women's rights. Years before being appointed to the high court, Ginsburg argued several sex discrimination cases in front of the court. She argued for full equality, even so far as to say that laws that supposedly "protected" women were actually perpetuating the stigma that women were weaker and therefore depended on the law and government to help them (Cushman 2001, 255). Ginsburg was so involved in women's rights that she founded Women's Rights Project. It was a known fact that if she was successfully appointed to the Supreme Court, her impact would be unbelievable. In the middle of her appointment, Clinton called her "the Thurgood Marshall of gender equality law" (Cushman 2001, 257). Her nomination was not one that came without concern. Conservatives were less than thrilled with her past of being a feminist crusader (Cushman 2001, 258). Congress' and the public's concern over the appointment of Ruth Bader Ginsburg was a large indication of the impact that she was bound to have. With a second woman on the court, strict Conservatives feared that the impact of such strong viewed women would be

too much (Cushman 2001, 258). After twelve years of working on the court with Justice O'Connor, there was a period where Justice Ginsburg was the lone woman on the court. In an interview conducted by District Judge Elaine Bucklo, Ginsburg expressed that this was a troubling time for her, making her feel underrepresented (Bucklo 2011, 9). Having only one woman on the court gave the public the wrong impression. Feeling lonely on the bench, Ginsburg just did not feel that it was right to have only one woman representing the public (Bucklo 2011, 9). Regardless of her disappointment in being the only woman on the court, she also optimistically envisioned a time when there would be multiple women on the court (Bucklo 2011, 10). Her optimism, combined with her passion for feminism was sure to produce a positive impact on the court, encouraging others to vote in favor of women's and family issues. Her drive to stand up for women's rights provided the court with something that had never been seen before.

Justice Sonia Sotomayor was appointed by President Obama in 2009. Her appointment was one of importance because she was the third woman to ever land a spot on the coveted Supreme Court bench. Her nomination process, however, was another that did not go without criticism. Previous comments surrounding her beliefs on how different minorities respond to issues in law created controversy during the Senate confirmation process. During a previous speech, years earlier, Sotomayor was recorded making statements that a "wise white male" would not understand the same issues that a "wise Latina woman" would (Everbach 2011, 4). These statements made it clear that she believed in her ethnic and gender background influenced how she made decisions. This led to criticism that Sonia Sotomayor let politics and ideology affect her decision making, even though the law is supposed to be void of those topics. Regardless of criticism, Sotomayor still argues for a belief that women do in fact rule on cases

differently, based on their own experience, which she claims is a result of affirmative action (Alcoff 2010, 126). Growing up as a minority, Justice Sotomayor is known for her belief that background is an important influence in decision making (Alcoff 2010, 127). As one of three women on the current court, her influence could be great, in attempting to help the others understand the plight of the minority, in this case, women. If Justice Sotomayor has the same drive to stand up for women's rights that she does when it comes to Latina rights, her impact on the court, combined with two other passionate woman, cannot go unheard.

The newest woman on the court, also the newest member in general, was also appointed by President Obama. In 2010, Elena Kagan's appointment was a very important one. In addition to being the fourth woman to ever hold a position on the bench, it was the first time that there were ever three women on the court. A journalist for the Washington Post, David Broder, made the claim that with Kagan on the bench, making the number of females an unprecedented three, the court was sure to change (Sykes 2011, 1382). Although it is still very early to tell if Kagan will have an impact on the court, her background gives an idea of her feelings on women's issues. As the first female Dean of Harvard Law School as well as the first female Solicitor General of the United States, Kagan has an appreciation for the minority status of women (Shapiro 2012, 247). Regardless of her successes as a woman, Elena Kagan stresses that she does not think that personal and political preferences should find their way into deciding judicial cases. She claims that her philosophy of judicial decision making revolves solely around the law. Aside from those views, it can safely be assumed that her impact as a woman will still be seen on the court (Shapiro 2012, 250). As Justice Ginsburg pointed out in her interview with Elaine Bucklo, although three woman on the court is not a majority, it is still a third. That percentage is higher than the representation of women in either the House or the Senate (Bucklo 2011, 10).

Judging by the documented impact that females have in Congress, which has a lower ratio of men to women, it would make sense that the appointment of Elena Kagan would do wonders for women's and family rights cases (Swers 2002, 11).

### **How the Numbers Add Up**

In 2007 and 2008, neither Justice Sotomayor nor Justice Kagan held positions on the bench. Justice Ginsburg was the only female out of the nine justices. By comparing those two terms with the 2010 and 2011 terms, a statistical conclusion can be made as to whether or not there has been a change in the types of cases the court has chosen, and how they have been decided. For the sake of the research used in this paper, "women's rights" refers to women's rights as they are treated equally to men. Types of cases that this encompasses are those that particularly affect women, for reasons that are biological as well as legal (Goldstein 1988, xii). When looking at types of women and family issues, for the purpose of this research, examples of the cases included are those dealing with sex discrimination, juveniles, abortion, marital and family issues, and child support (Supreme Court Database).

As shown in Table 1, the percentage of cases that were ruled liberally in 2007 and 2008, respectively, were 37% and 51%. Those numbers, compared to those from 2010 and 2011 are not significantly different. In 2010, the percentage of cases ruled liberally 42%, and in 2011, 43%. The numbers do not vary significantly. In 2008, although there was only one female on the court, it was higher than any of the other three years used for research (Supreme Court Database). Another type of cases that were important in this research, was cases that were generally categorized as "Civil Rights" cases. Many women's and family issues cases revolve around civil rights and civil liberties. By comparing the percentage of Civil Rights cases per term, it can help

understand whether or not the number of women on the bench could make a difference. Again looking at Table 1, the percentage of cases in each term that deal with Civil Rights does not significantly change despite the change in number of females on the court. In fact, the numbers in 2007 and 2008 were even higher than in 2010, when there were three females deciding.

After looking at the total number of cases that were ruled liberally, and those types of cases that were Civil Rights issues, it was necessary to compare the percentage of cases that dealt with the specific issues of women and family issues. The justices on the bench during the 2007 term did not hear any cases falling into this category. After this, all three subsequent terms involved in this study, 2008, 2010, and 2011, have very little change in percentage of family and women's issue cases, which can be seen in Table 2 (Supreme Court Database). The percentage of those particular cases that were decided liberally ranged from 0%-67%. 2011 was the year that 0% of the women's issues cases were ruled liberally. Regardless that the number of female justices was higher than any other terms, the numbers were lower than the 2008 term that ruled 67% of such cases liberally (Supreme Court Database).

### **What Does All of This Mean?**

As the data in Table 1 and Table 2 alarmingly show, there is not a documented impact that women have on the types of cases that the Supreme Court hears, nor is there an impact on the way these types of cases are decided. The data shows relatively consistent numbers, leading me to believe that it is too soon to make an inference on the impact of women and the court. There are only two years of data available to collect. Perhaps years down the road, there will be a noticeable difference in how women affect the choices and decisions of the court as a whole.

The backgrounds and the interests of the particular women play very important roles into their individual roles of the court. Regardless that the numbers do not show a significant change,

the mere fact that three women are currently sitting on the bench is significant and impactful enough. It is unprecedented in the near 250 years that this nation has existed. A court with more women on it is going to be able to stand up for the rights of females. As Justice Kagan pointed out in 2009, men are not able to connect to and understand the cases that deal with women sensitive issue (Biskupic 2009, 1). Three women are eventually going to be able to band together to stand up for those types of issues, and eventually there may be a time when the numbers signify such a change. All three women have liberal ideologies, and yet, the results are not skewed in a liberal favor. That being said, it is unlikely that ideology affected my research in an unfair way.

Republican and Democratic women of the House and the Senate are partial to women's rights, and in recent years the research has shown that they are more in support of women's and family issue cases than ever before (Swers 2002, 10). Remembering what Justice Ginsburg pointed out, that the percentage of women on the court is a third, which is higher than the ratio in either legislative body, it can be presumed that eventually, numbers will show that this small group of women will impact the court in ways that are unimaginable (Bucklo 2011, 10). Given more time, research is sure to show these differences.

When Justice O'Connor was appointed by Ronald Reagan in 1981, the Chief Justice was Justice Warren Burger, a Republican (Cushman 2001, 245). Justice Ginsburg took office under the direction of Chief Justice William Rehnquist, yet another Republican (Cushman 2001, 256). Justices Sotomayor and Kagan have served only under Justice Roberts, a Republican (Shapiro 2012, 330). The court has been considered Conservative since the 1950s when Justice Earl Warren held office. Regardless that there are currently three powerful and passionate women on the court, who would love nothing more than to influence their six male colleagues, a

Conservative Chief Justice is going to mean a Conservative court, making it difficult for these women to have the desired influence. Women justices generally have liberal views when it comes to women's and family issues, which is problematic for them when the court is more likely to decide a case conservatively. Even in the most recent term, with three women, the court ruled conservatively 57% of the time (Supreme Court Database). Justice Roberts has only been on the court for seven years, and at only 58 years old, he probably won't be seen retiring anytime soon (Allen and Smith 2005, 1). Until that time, the court will most likely remain Conservative, leaving little wiggle room for women to noticeably impact the court.

The main goal of the Supreme Court is to rule on cases objectively. In beginning this research, the assumption was that women were going to impact the court in a way that led to more liberal decisions in women's and family issues, as well as an increase in those specific types of cases being heard. The research, however, proved otherwise. This is actually beneficial to the reputation of the court. Personal ideologies and political beliefs are best left out of court decisions. This research shows that despite strong beliefs in women's rights, the women are not necessarily letting their personal beliefs influence the rest of the court. It provides hope that the court really is deciding cases based on law, instead of letting outside factors determine the outcome. Leaving gender out of the decision making equation is best for the court as a whole. Although the data does not show that women matter, the underlying importance of an increasing number of women on the court is bound to eventually make a difference, which we are sure to see in the future.

**Table 1**

	2007	2008	2010	2011
% All Cases Ruled Liberal	37%	51%	42%	43%
% Civil Rights Cases	21%	27%	21%	24%
% Civil Rights Cases Ruled Liberal	60%	41%	33%	45%



**Table 2**

	2007	2008	2010	2011
% Specific Family/Women Issues	0%	4%	2%	3%
% of Specific Cases Ruled Liberal	N/A	67%	50%	0%

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