



Pergamon

The Social Science Journal 40 (2003) 79–97

The
**SOCIAL
SCIENCE
JOURNAL**

Gender, judicial dissent, and issue salience: the voting behavior of state supreme court justices in sexual harassment cases, 1980–1998

Madhavi McCall*

*Department of Political Science, San Diego State University, Nasatir Hall 109,
5500 Campanile Drive, San Diego, CA 92182-4427, USA*

Abstract

The importance of women on the bench and the influence of gender on decision making has garnered much scholarly attention. Based in large part on the belief that women will act as “representatives” of their gender, much of the literature attempts to determine if women in fact do support the pro-women position in judicial cases. However, because the literature assumes women will act in a prescribed manner given the opportunity, the literature fails to question the willingness of women justices, given the political context of a case, to fulfill this responsibility. I propose that decision making by female justices on state supreme courts is dependent not only on the attitudinal predisposition women may have in support of the pro-women position in gender-sensitive judicial cases, but also upon the political and institutional context of any given case. Accordingly, I examine the voting behavior of state supreme court justices in sexual harassment cases decided between 1980 and 1998. I find that women justices do support the pro-women position in sexual harassment cases prior to 1992 and the Anita Hill–Clarence Thomas sexual harassment Senate hearings. However, after 1992, there is no significant difference in the voting behavior of male and female justices suggesting the increased salience of the sexual harassment issue influenced judicial votes.

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In recent years, several authors have questioned the influence of judges’ gender on their decision-making process. Extending the general argument that women act differently than men (Chodorow, 1978; MacKinnon, 1987) many authors believe that women judges engage in a fundamentally different decisional calculus than men (Allen & Wall, 1993; Crowe, 2000; Davis, 1993; Davis, Haire, & Songer, 1993; Gryski, Main, & Dixon, 1986; Martin, 1993;

* Tel.: +1-619-594-5050; fax: +1-619-594-7302.

E-mail address: mcall@mail.sdsu.edu (M. McCall).

Sherry, 1986). While scholars do not necessarily agree on the effects of gender on justice,¹ they would agree with Justice Sandra O'Connor's observation that "It makes a night and day difference to have women on the bench (Crowe, 2000)."

More specifically, much of the research on women on the bench makes the basic assumption that women will act to support women and women's rights. The results of this line of work are mixed. For example, Davis et al. (1993) find that women judges do act as representatives for their gender in sex discrimination cases while Davis' (1983) analysis of Carter's appointees to the U.S. Appeals Court indicates that nontraditional appointees do not act as representatives of their group. If there are only a token number of women on the court, Allen and Wall (1993) conclude that the women behave as outsiders while an analysis of Justice O'Connor's voting patterns for the United States Supreme Court does not indicate a necessarily consistent female jurisprudence (Davis, 1993). Regardless of the findings, a majority of this research proceeds on the belief female justices are *politically willing* to support women's rights.

In essence, by emphasizing the attitudinal predispositions of women judges and questioning only the justices' responses to the issues, the literature ignores the institutional and political context in which decisions are made. That is, the literature in general assumes a justice's desire to vote policy preferences without first questioning the judge's willingness to make this choice. I contend, however, that judges, male or female, are not isolated actors totally unconstrained in their ability to render decisions based purely on policy preferences.² Rather, depending upon the structure of the particular court and the context of any particular case, justices may not be able to decide decisions on policy preferences without risking personal political security.³ Accordingly, this research examines the voting behavior of male and female justices on state courts of last resort controlling for the institutional and political variables which may influence decision-making practices.

First, I question if institutional arrangements which surround the recruitment and retention of justices structure decision making. As most state court judges do not receive life tenure, do retention features restrict the implementation of personal policy preferences? Are electoral considerations manifest in voting? Does the inclusion of an intermediate court of appeals sway voting behavior? I posit institutional constraints are a vital factor in decision making and thus incorporate institutional variables in this study.

Second, the literature also often ignores the political context in which decisions are made. The salience of an issue, for example, may cause a justice to be more aware of public opinion and render decisions which are consistent with public opinion regardless of the justice's own personal policy dispositions (Canon, 1992). Are women more likely, for example, to render votes which support equal pay but less likely to support a women's right to choose? Canon suggests that the moral and religious considerations inherent in the abortion decision force more care and caution in voting than would an issue like equal pay. Moreover, does the timing of a particular case within the justice's term further structure voting calculations? Assuming a female justice's predisposition is to support the right to choice, is she more likely to voice this opinion if she has just been elected as opposed to if she is just about to face election? This research posits that the political context surrounding any case, specifically the timing of a case within the justice's term and the current salience of a given topic,⁴ are relevant factors in judicial decision making which must be incorporated in an analysis of voting behavior.

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