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How far does the gender gap extend? Decision making on state Supreme Courts in Fourth Amendment Cases, 1980–2000

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Abstract

The importance of women on the bench and the influence of gender on judicial decision making has garnered much scholarly attention. We examine the voting behavior of male and female justices in 718 Fourth Amendment search and seizure votes cast on state Supreme Courts between 1980 and 2000. We find that women justices, controlling for institutional, political, and legal constraints, are more likely to rule in favor of the criminal defendant than their male brethren in cases decided after 1991 but not before. We also find women justices serving with female colleagues are more inclined to render liberal votes. We conclude the influence of gender may be evident in a wider variety of cases than those dealing with women's lives but that this influence is dependent upon the existence of a critical mass of women on the state court benches.

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Extending the general argument that women behave differently than men (Gilligan, 1982; MacKinnon, 1987), judicial scholars suggest that the gender of judges in part structures their decisions (Allen & Wall, 1993; Martin & Pyle, 2000; Maule, 2000; McCall, 2003a, 2005; McCall & McCall, 2002; Sherry, 1986; Songer & Crews-Meyer, 2000; Songer, Davis, & Haire, 1994). Often labeled as feminist jurisprudence, scholars hold that the presence of women in significant numbers as professionals in the legal system leads to profound legal changes because women bring alternative perspectives to the law (Songer et al., 1994). In short, scholars contend that gender matters.¹

The empirical work on judicial behavior, however, fails to provide clear expectations. For instance, in women's rights cases Songer et al. (1994), Allen and Wall (1993), and McCall

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(2003a) demonstrate women state Supreme Court judges are inclined to support women's positions. However, [Martin and Pyle's \(2000\)](#) study reveals gender is insignificant in sex discrimination and sexual harassment cases. For gender-neutral issues, results are also unclear. [Songer et al. \(1994\)](#) additionally conclude gender is insignificant in obscenity and search and seizure cases. More recently,² however, [Songer and Crews-Meyer \(2000\)](#) find female state Supreme Court justices more liberal than men in obscenity and death penalty cases. Obviously, the inconsistency of findings warrants further analysis to estimate more confidently the impact of gender on judicial decisions.

The inconsistent results may reflect two methodological, not theoretical, problems. First, most earlier gender research was undertaken when there were very few women state High Court justices, potentially restricting analysis. Research on state legislatures ([Thomas, 1994](#)) indicates a "critical mass" of women policy makers is necessary before women feel most comfortable advancing personal policy preferences. Adapted from the social psychology literature (see [Yoder, 1991](#)), critical mass theory suggests that only after women constitute approximately 15–25% of an institution's membership are they able to exert much power or influence, although a smaller percentage might suffice in an elite, small group setting ([Barr, Kearns, & Palmer, 2002](#)).³ Of course and as illustrated in [Asch's \(1951\)](#) influential work, any individual espousing a minority perspective, regardless of gender, might feel pressured to conform to the majority. However, because women tend to adopt less hierarchical, more collegial leadership and relationship styles than men ([Flammang, 1985; Thomas, 1994; Yoder, 1991](#)), women especially might be likely to suppress preferences different from those of their male colleagues unless there is a sufficient number of like-minded individuals present. The literature indicates this tipping point is necessary because women, out of a desire for group harmony, generally will not act alone.⁴ Extended to the judiciary, women justices might suppress policy preferences until the tipping point is reached, suggesting "increased gender and racial diversification beyond tokenism may indeed have substantive policy ramifications" ([Smith, 1994: 200](#)). Past research may not adequately reflect gender based voting patterns because an adequate number of women did not occupy judicial positions until recently.⁵

Second, behavioral state Supreme Court research finds justices may be restricted from attitudinal voting because they do not enjoy life tenure ([Hall & Brace, 1989, 1996; McCall, 2001, 2003a,b, 2005](#)). [Hall and Brace \(1989, 1996\)](#) demonstrate that elected justices tend to suppress preferences in death penalty cases while [McCall's work \(2003a\)](#) extends the analysis to sexual harassment cases. Institutional factors may constrain voting options and therefore the impact of gender cannot be adequately evaluated without modeling these forces ([Smith, 1994](#)). Indeed, [McCall's recent analysis \(2005\)](#) of police brutality cases before state Supreme Courts demonstrates this point. The article examines police brutality cases in three separate regressions—one controlling for institutions but not gender, one controlling for gender but not institutions, and one controlling for both gender and institutions. The final model's performance is superior to the other two, indicating that gender studies should control for institutional constraints on judicial voting behavior.

We examine the influence of gender on justices' decisions using Fourth Amendment search and seizure cases decided on 47 state Supreme Courts (excluding justices from Massachusetts, New Hampshire and Rhode Island who have life tenure or tenure until age 70)⁶ between 1980 and 2000. The research design allows for a consideration of critical mass arguments because

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