

The Role of Gender Norms in Judicial Decision-Making at the U.S. Supreme Court: The Case of Male and Female Justices

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Abstract

Although still a minority, the growing number of women on both the Bench and at the Bar of the U.S. Supreme Court has important implications for judicial decision-making and successful advocacy at the Court. Research in judicial behavior generally focuses on vote direction and the presence of female attorneys in a case. We offer a more nuanced account of how gender impacts both attorney success and judicial decision-making by drawing on work in social and political psychology and utilizing quantitative textual analysis to explore the tension between masculine norms of behavior that are valued in the legal profession and feminine norms of behavior that are expected of women, but devalued in the legal profession. Based on the Court's long-standing disdain for emotional arguments, we examine how the emotional content in 601 party briefs shapes the Court's majority opinions. Our results indicate that male justices evaluate counsel based on their compliance with traditional gender norms—rewarding male counsel for

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cool, unemotional arguments and rewarding female counsel for emotionally compelling arguments. However, we find no evidence that gender norms shape the opinions of female justices. Given that the justice system is supposed to be “blind,” our results highlight the durability of gendered expectations and raise questions about the objectivity of judicial decision-making.

Keywords

judicial decision-making, gender, social psychology, emotion, quantitative textual analysis

For most of the U.S. Supreme Court’s history, the Bench and Bar were closed to women because of their supposed inability to handle the rigors of the legal profession.¹ Three women now sit on the Bench; yet at the Bar, women are significantly outnumbered by men (Sarver et al., 2007-2008) and they are less successful than men in advocating before the Court with conservative justices in some issue areas (Szmer, Sarver, & Kaheny, 2010). The tension between the feminine norms of behavior expected of women and the professional norms expected at the Court may be an important explanation for this discrepancy. The norms of adversarial argument and conflict, so embedded in the Court’s ethos, contradict the norms of behavior historically associated with women, such as empathy, agreeableness, and consensus building. Violating gender norms to conform to professional norms or vice versa carries the risk of sanction (Biernat, Tocci, & Williams, 2012; Nelson, 2015; Rudman and Glick, 1999, 2001), placing female attorneys into an unenviable double bind (Rhode, 1994; Wald, 2010).

Justice Sotomayor (2013) speaks to this tension, saying that for women to be successful as attorneys, they need to present legal arguments “just like a guy” (p. 180). Although doing so allows women to meet the professional norms of the Court, it also forces them to violate long-standing gender norms. Research in social psychology suggest that when women (but not men) violate traditional gender norms, they are subjected to social “backlash” and are evaluated more negatively by others (Rudman & Glick, 2001, 1999; Heilman, Wallen, Fuchs, & Tamkins, 2004). Indeed, as a result of her demeanor as an attorney Sotomayor earned the title “one tough bitch” from her colleagues (p. 261). Sexism in the legal profession, Justice Sotomayor concedes, is “an occupational hazard” for women (p. 203). Such dilemmas are particularly pronounced in male-dominated environments including political and corporate leadership (Eagly & Carli, 2007; Jones, 2016), the

partnership ranks of large law firms (Wald, 2010), and we contend among elite attorneys arguing before the Supreme Court.

The ways attorneys navigate gender and professional norms enable us to study whether the justices, both male and female, evaluate counsel differently depending on their conformity to traditional gender norms. We expect these evaluations will be less problematic for male attorneys than for female attorneys because professional norms of the Court are consistent with masculine norms of behavior, but inconsistent with feminine norms of behavior. However, research in judicial behavior finds, under specific conditions, female judges decide cases differently than their male peers (e.g., Boyd, 2013; Scheurer, 2014). Part of this is attributable to the sexism female jurists likely experienced as they climbed through the judicial ranks themselves (Coleman, 2001; Haire & Moyer, 2015; Kearney & Sellers, 1996; Seidenberg, 1985). Female judges, based on past experience, are likely cognizant of this tension and perhaps less likely to sanction female counsel for violating gender norms. This has important consequences for calls for diversity on the bench as well as normative concerns over the blindness of the justice system.

Drawing upon recent work which finds the structure and content of legal arguments impacts attorney success (Black, Hall, Owens, & Ringsmuth, 2016; Wedeking, 2010), we contend that male and female attorneys' conformity with gendered norms of communication impacts the evaluation of the justice writing the majority opinion. We focus specifically on the emotional content in legal briefs because the stereotype that women are more emotionally expressive than men is not only pervasive but empirically supported (Chaplin, 2015; Fischer & LaFrance, 2015; Fischer & Manstead, 2000; Mulac, Giles, Bradac, & Palomares, 2013; Yu, 2011). We thus analyze the emotional content in all 601 party briefs filed at the Supreme Court between the 2010 and 2013 terms using quantitative textual analysis, (e.g., Black et al., 2016; Pennebaker, Chung, Ireland, Gonzales, & Booth, 2007; Wedeking, 2010). In doing so, we move beyond previous work on attorney gender and judicial decision-making, which focuses on the presence of female attorneys and the direction of a judge's vote (e.g., Collins, Manning, & Carp, 2010; Szmer et al., 2010). Our findings suggest that male justices reward attorneys, both male and female, for conforming to traditional gender norms in briefs. In other words, male attorneys are rewarded for utilizing more masculine language in their briefs, whereas female attorneys are rewarded for employing more feminine language. However, we find no effect on female justices' evaluations of legal arguments for either male or female attorneys.

This research not only adds important nuance for the study of judicial decision-making and attorney success, but it also extends psychological work on gendered communication to appellate courts. Our findings suggest that the

recent diversification of the Bench brought on by the confirmations of Justices Sotomayor and Kagan may have important consequences beyond descriptive representation stretching to the effectiveness of counsel and judicial outcomes. We proceed in several parts. First, we overview the literature on gender in judicial decision-making and attorney success. We then discuss gendered norms of communication and our expectations about how such communication shapes judicial decision-making. We then describe our methods and present our results. We conclude with the implications of our findings and directions for future research.

Gender and Its Implications for Judicial Decision-Making

As women began making inroads into the legal profession, scholars speculated that female judges would reach more liberal decisions than their male peers. Gilligan (1982), for example, argues that women are less concerned with abstract rights and more concerned with caring for the needs and interests of others. Menkel-Meadow (1986) extends Gilligan's work into the legal profession, suggesting that women are more cooperative, empathetic, and inclined toward nonadversarial modes of conflict resolution than their male colleagues. Indeed in the realm of criminal justice, women express greater support for offender treatment and less support for punishment than men (Applegate, Cullen, & Fisher, 2002). Despite this, gender is not a catch-all explanation for differences in judicial decision-making (Songer & Crews-Meyer, 2000). It is more properly thought of as a "lens" through which judges evaluate cases in tandem with other factors (Johnson, Stidham, Carp, & Manning, 2008). Although there are ample reasons to suspect gender differences should translate into judicial decision-making, few differences are apparent beyond specific issue area effects. As Haire and Moyer (2015) note, this may be because female judges undergo the same professional training as their male peers which in many instances leads to similar outcomes for both men and women on the bench. In certain situations, however, there are limited gender effects on judicial decision-making and are typically dependent on either the issue area or the gendered composition of the court in question.

Examining the effect of gender on case outcomes at the federal appellate courts, Songer, Davis, and Haire (1994) find female judges are no more liberal than their male peers in both obscenity and search and seizure cases, but are significantly more liberal in employment discrimination cases. Similar findings exist at the federal district courts, where women's decisions are like those of their male colleagues in criminal procedure and women's policy cases, but are more conservative than male judges in personal liberties and

minority policy cases (Walker & Barrow, 1985). At the federal courts of appeals, increasingly gender diverse circuits lead to more liberal voting by female judges, though, much like in earlier studies, the issue area is key to observing differences (Scheurer, 2014). This is to say only once female judges reach a critical mass on a given bench do they vote differently than their male counterparts. Differences have also been noted in how female judges manage their courtrooms in the federal district courts; female district court judges have more settlements in their courtrooms (Boyd, 2013), and are more likely to grant motions from parties bringing sex discrimination claims than their male colleagues (Boyd, 2016). Such work suggests jurists are not just the product of their legal training but also their lived experiences (e.g., Glynn & Sen, 2015; Haire & Moyer, 2015).

Although mixed, these findings are consistent with work in other fields, which suggests the salience of gender is critical for determining how gender shapes attitudes and behavior (e.g., Karpowitz & Mendelberg, 2014; Shih, Pittinsky, & Ambady, 1999). The overall gendered composition of a given court affects the salience of gender, and thus, its potential to shape judicial decision-making. Indeed, the presence of different perspectives can prompt judges to view old problems in new ways either via the background of the judge herself or via a contagion effect whereby her presence changes the behavior of male judges on a panel (e.g., Boyd, Epstein, & Martin, 2010; Haire & Moyer, 2015; Johnson et al., 2008). A more diverse bench should create a more inclusive legal process for women as parties and counsel (Kenney, 2002). Still, gender on the bench is only part of the equation. To fully understand these dynamics, we must also consider the impact of attorneys for judicial decision-making.

The Role of Attorneys

Success often hinges on having a good attorney. Effective attorneys can alter the outcome of a case by swaying a judge's decision in terms of overall case disposition or majority opinion content (Corley, 2008; Johnson, Wahlbeck, & Spriggs, 2006; Ringsmuth, Bryan, & Johnson, 2013). Attorney quality is typically marked based on experience, background, or overall skill in presenting arguments. Attorneys employed in the Office of the Solicitor General, for example, are usually seen as some of the best, as are attorneys with multiple appearances before the Court (Black & Owens, 2012; Curry, 2015; McAtee & McGuire, 2007; McGuire, 1995, 1998; McGuire & Caldeira, 1993). Although skill and resume entries are strong predictors of attorney quality, recent work emphasizes attorneys' argumentative ability is pivotal in brief success. To this end, attorneys strategically frame the arguments in their

briefs to increase the probability of a favorable disposition from the Court (Wedeking, 2010). Other work finds justices sitting on the proverbial fence can be swayed by effective counsel (Ringsmuth et al., 2013).

Although almost half of recent law school graduates are women (American Bar Association [ABA], 2016), attorneys at the upper levels of the legal profession remain predominantly men (Sarver et al., 2007-2008). Prior research shows that when women are minorities in decision-making groups, gender is a salient feature that shapes behavioral expectations and evaluations (Karpowitz & Mendelberg, 2014; Shih et al., 1999). As female attorneys are distinct and visible minorities, we expect gender to be a salient feature of the Court. Although there are multiple studies on how attorney gender affects judicial decision-making at appellate courts, most focus on the effects of the mere presence of female attorneys. For instance, Szmer et al. (2010) note female attorneys are evaluated more harshly by conservative justices in some issue areas, though they are more successful in cases involving women's issues in which women are expected to be more knowledgeable. In trial courts, female attorneys are often seen as incompetent by other attorneys and judges (Blodgett, 1986; Kearney & Sellers, 1996; Seidenberg, 1985). In addition, female trial attorneys often report experiencing bias from their male counterparts and judges, though men are often not aware of the bias (Stepnick & Orcutt, 1996; Winkle & Wedeking, 2003).²

Bias toward female attorneys is less likely, however, when gender becomes a less salient feature of the courtroom. At the Supreme Court of Canada, women hold a higher proportion of the seats on the bench. Likewise, there are more female law clerks and attorneys than on the U.S. Supreme Court. There, female attorneys are more successful than their male colleagues (Kaheny, Szmer, & Sarver, 2011). At the more gender diverse federal courts of appeal, female attorneys fare as well as their male adversaries in all cases writ large and are more successful than men in women's issues cases (Szmer, Kaheny, Sarver, & DeCamillis, 2013). Although this seems to suggest that women have achieved parity at the federal courts of appeals, there is an important caveat. Female success falls when attorneys petition the court to overturn the decision of a lower court (Szmer et al., 2013). As Szmer et al. (2013) note asking for a decision to be overturned is inherently "aggressive" and out of line with feminine norms of behavior, the Courts of Appeals enforces gender norms on female attorneys. Such caveats illustrate the importance of accounting for not only the presence of female attorneys but their behavior as well.

Women who seek to ascend to the top of the legal profession, the elite Supreme Court Bar, find themselves in an environment where masculine norms of behavior are dominant. As mentioned in the introduction, while in law school Justice Sotomayor was complimented by her male colleagues for

arguing “just like a guy” (Sotomayor, 2013). This suggests that Sotomayor’s colleagues saw her as effective, either entirely or in part, because she broke with gender norms to meet the masculine norms of behavior valued in the legal profession. Gender norms stem from gender stereotypes: the traits, roles, and behaviors that underlie the appropriate and/or typical behavior of men and women (Eagly & Mladinic, 1989). Men are often characterized by and expected to express agentic traits such as competence, assertiveness, and dominance (Eagly & Carli, 2007; Eagly & Mladinic, 1989). In contrast, women are often characterized by and expected to express communal traits such as empathy, cooperation, and agreeableness (Eagly & Carli, 2007; Eagly & Mladinic, 1989). This is problematic for female attorneys because as Rhode (1994) articulates, “The aggressiveness, competitiveness, and emotional detachment traditionally presumed necessary for advancement in the most prestigious and well-paid occupations are incompatible with traits commonly viewed as attractive in women: cooperativeness, deference, sensitivity, and self-sacrifice” (p. 67). For women (but not men), compliance with gender norms negatively affects perceptions of competence yet failure to comply with gender norms negatively affects perceptions of warmth (Cuddy, Fiske, & Glick, 2008; Heilman et al., 2004). This is especially true for women in male-dominated fields such as the law (Biernat et al., 2012; Cuddy et al., 2008; Eagly & Carli, 2007; Rudman & Glick, 1999). In attempting to navigate this difficult balancing act, women across a variety of political and legal contexts tend to eschew gender norms to comply with professional norms (Bogoch, 1997; Jones, 2016; Shaw, 2000; Yu, 2014). Yet it is unclear how women navigate competing expectations at the Supreme Court and whether such behavior has any impact on judicial decision-making. With the exception of Szmer et al. (2013) and Szmer et al. (2010), few studies consider how gendered norms of behavior affect judicial decision-making at appellate courts. In addition, this work tends to focus on the presence of women in the courtroom and not on their compliance with gender norms. We seek to expand the treatment of gender beyond the presence of a female attorney in the courtroom to encompass the way in which attorneys, both male and female, perform gender to the justices via written communication in briefs.

The Role of Communication

Communication lies at the heart of an attorney’s job. Although this seems a simple proposition, subtle norms of legal communication are deeply embedded in written and verbal communication, including legal briefs filed at the Supreme Court (Corley, 2008; Corley, Howard, & Nixon, 2005), and can be framed in ways that leave the justices with a favorable impression of the

attorney's argument. To this end, attorneys strategically frame the arguments in their briefs to increase the probability of a favorable disposition from the court (Wedeking, 2010). Other work finds justices sitting on the proverbial fence can be swayed by attorneys that are particularly skilled at oral arguments (Ringsmuth et al., 2013). Although oral arguments are the most publicly visible part of advocacy, many jurists downplay the importance of oral arguments and instead emphasize the value of a well-crafted brief in attorney success (Rehnquist, 2001). Judge Michel (1998) notes that oral arguments make no difference in 80% of cases which are instead largely decided by the briefs submitted by the parties. Scholars have likewise noted the importance of briefs by both direct parties and amici (Black et al., 2016; Collins, Corley, & Hamner, 2015; Corley, 2008). Indeed, briefs are such valuable sources of information that the justices often directly borrow language from briefs for the majority opinion (Corley, 2008) and the extent to which the justices borrow language from briefs is increasingly seen as a marker of brief success (Black et al., 2016; Black & Owens, 2012; Collins et al., 2015).

Communication also serves as a powerful, albeit subtle, marker of one's gender and thus provides a valuable lens into an attorney's compliance with gender norms (Butler, 1999; Jones, 2016; Pennebaker, 2011). Psychologists and linguists have uncovered a number of reliable and consistent differences between the communication styles of men and women by leveraging computational methods to analyze oral and written communication from tens of thousands of men and women (Mulac et al., 2013; Newman, Groom, Handelman, & Pennebaker, 2008; Pennebaker, 2011; Schwartz et al., 2013). One large-scale study, for example, showed that women use significantly more pronouns (e.g., I, you, they) and fewer articles (e.g., a, an, the) than men (Newman et al., 2008). An experiment by Mulac et al. (2013) shows that when individuals are asked to write "as if" they are a man (or woman), they reliably adopt communication styles that correspond to male (or female) stereotypes. Individuals are not only cognizant of the stereotypical differences between male and female communication styles, they utilize such stereotypes to form expectations about how men and women should communicate.

Such work has enabled scholars to uncover whether stereotypes about the ways men and women communicate are empirically valid. One of the more pervasive gender stereotypes is that women are more emotional than men (Eagly & Carli, 2007; Eagly & Mladinic, 1989; Fischer & Manstead, 2000). Although there is disagreement about whether men and women experience emotion differently, a number of studies support the notion that women are more emotionally expressive in communication than men (Chaplin, 2015; Fischer & LaFrance, 2015; Fischer & Manstead, 2000; Mulac et al., 2013; Yu, 2011). Thus, emotional arguments are not only expected of women, they

are more likely to be expressed by women. Gender norms are clearly demarcated in the communication of emotion, and importantly for our purposes, so too are professional norms at the Court.

Despite the early tradition of grand orators such as Daniel Webster, the Court's rules specifically instruct counsel to avoid "facts and emotion" and instead focus on "arguing legal theory" (O'Connor, 2013, p. 91). Black et al. (2016) note that as an appellate court, the Supreme Court discourages "jury arguments" and places a premium on detached legal reasoning above emotion. Indeed, attorneys that craft less emotional briefs are more successful in their arguments (Black et al., 2016). This suggests that the Court actively enforces this normative, unemotional style of communication. However, this rule may preclude feminine styles of communication because women tend to be more emotionally expressive than men (Chaplin, 2015; Fischer & LaFrance, 2015; Fischer & Manstead, 2000; Mulac et al., 2013; Yu, 2011). This suggests female (but not male) attorneys must carefully navigate between competing expectations professional and gender norms.

Do Gender Norms Affect Judicial Decision-Making?

The growing number of women on both the Bench and at the Bar of the Supreme Court has important implications for understanding judicial decision-making and attorney success. The different ways that female attorneys navigate competing gender and professional norms enable us to study whether the justices, both male and female, evaluate counsel differently depending on their conformity to gendered norms of behavior. We expect these evaluations will be less problematic for male attorneys than for female attorneys because professional norms of the Court are consistent with masculine norms of behavior, but inconsistent with feminine norms of behavior.

However, there are also reasons to expect such evaluations are mediated by the justice's gender. As discussed above, under specific conditions, female judges decide cases differently than their male peers (e.g., Boyd, 2013; Boyd et al., 2010; Scheurer, 2014). In addition, female jurists can likely recall instances of gender discrimination as both attorneys and judges (Haire & Moyer, 2015). This includes instances where judges referred to female attorneys as "sweetie" and "honey" or mistook them for support staff (e.g., Sotomayor, 2013, 232). The sexism female jurists likely experienced as they climbed through the judicial ranks themselves (Coleman, 2001; Haire & Moyer, 2015; Kearney & Sellers, 1996; Seidenberg, 1985) suggests they are cognizant of the tension faced by female counsel and perhaps less likely to sanction female counsel for violating gender norms as a result (e.g., Boyd et al., 2010). Moreover, the increased success of women as counsel at more

gender diverse appellate courts suggests that the success of attorneys does not just depend on compliance with gender norms but also on the gender of a specific judge or the overall gender composition on the bench (Kaheny, Szmer, Hansen, & Scheurer, 2015; Szmer et al., 2013). For this reason, we expect conformity with gender norms will not play an important role in the success of either male or female attorneys before female justices.

As mentioned above, male justices almost surely did not have the same experiences as their female colleagues (Haire & Moyer, 2015) and may be less forgiving when women violate gender norms. Although there is evidence that male judges often rule in favor of parties represented by female counsel at roughly the same rate as those represented by male counsel (e.g., Kaheny et al., 2015; Szmer et al., 2013, 2010), this may be dependent on the extent to which female counsel conform with gender norms. When arguments by female counsel are consistent with gender norms, we expect she will be judged favorably by male justices. Likewise, we expect male attorneys will fare best before a male justice when they argue in a manner consistent with gender norms.

Methods

We test our expectations with all direct-party briefs filed in cases decided with oral argument and signed opinions from the 2010 to 2013 terms of the Court (Spaeth et al., 2016).³ We collect majority opinions, and party briefs from Westlaw; this results in 313 unique cases which contain 601 briefs.⁴ We use the individual brief–majority opinion dyad as our unit of analysis, which differs from previous studies which have used judge vote as a unit of analysis (Black et al., 2016; Szmer et al., 2010). By shifting our focus to the success of the brief, we gain greater leverage over how the justices evaluate the arguments presented in each individual brief when crafting the majority opinion rather than a dichotomous measure of whether the justices find the totality of the argument and the circumstances compelling enough to vote for the party.

Our dependent variable is brief success. Traditionally, success is tied to the Court's disposition in the case or the justice-vote for a given party. However, a ruling or vote in favor of the endorsed party does not always serve the goals of litigants seeking a specific legal rule or policy (Collins, 2007; Spriggs & Wahlbeck, 1997). Success is more accurately measured by the extent to which the Court incorporates arguments made in the attorney's brief into the majority opinion (Black et al., 2016; Corley, 2008). We adopt this definition of success and construct our dependent variable according to the procedure outlined by Corley (2008). We do so via automated textual analysis with the WCopyfind software to measure the percentage of the Court's opinion which is "plagiarized" from the petitioner's (respondent's) brief (Bloomfield, 2008). We

utilize the parameters outlined by Corley (2008) and adopted by a number of subsequent studies (e.g., Black et al., 2016; Collins et al., 2015; Corley, Collins, & Calvin, 2011). We set the shortest match to six words and 100 characters. We allow for a maximum of two imperfections and require at least an 80% match. We further set the software to ignore outer punctuation, numbers, letter case, and nonwords (such as case citations).⁵ Our primary independent variables focus on attorney gender, majority opinion author gender, and the gendered content of the language employed in the brief. To craft these measures, we locate each party brief and note the counsel of record. We subsequently run Internet searches for each attorney's name and use law firm websites and news accounts to ascertain his or her gender (e.g., Wedeking, 2010). We set the counsel of record gender variable to "1" if the attorney is female, and "0" if male. To establish a baseline for whether male and female attorneys counsel of record file different briefs, we compute the average affective content of briefs filed by male and female counsel of record. We find that the average standardized level of affect in briefs with male counsel of record is 0.019. However, female counsel of record have a lower level of affective content in their briefs (-0.162). A *t*-test confirms that the difference between these two means is statistically significant.⁶ We note the majority opinion author's gender with a dichotomous variable set to "1" if the majority opinion is authored by a female justice (Spaeth et al., 2016). Guided by previous use of the underlying psychological features of briefs (e.g., Black et al., 2016; Bryan & Ringsmuth, 2016; Wedeking, 2010), we employ the Linguistic Inquiry Word Count software (LIWC) to extract the level of affective, or emotional, content of each brief.⁷ We measure the underlying gendered content of the brief via the affective, or emotional, categories, which consists of 915 positive and negative emotion words that have been validated by high inter-coder reliability and Pearson correlational analysis (Pennebaker et al., 2007). Words included in the affective category include, for example, "laugh," "nice," "sweet," "love," "cried," "hate," "annoy," and "grief." As previous work in social psychology notes that men and women utilize affective language at different rates, affect is an ideal mechanism to capture compliance with gender norms in attorney communication with the Court (Newman et al., 2008).

Affective language has the advantage of being used by previous scholars studying language in briefs (Black et al., 2016; Bryan & Ringsmuth, 2016; Collins et al., 2015).⁸ Briefs with higher levels of affect are characterized as more feminine, whereas briefs with less affect are characterized as more masculine and in line with the professional norms of a "good" attorney. In keeping with standard practice, we standardize the resulting coefficient (Owens & Wedeking, 2011). Our theory predicts majority opinion authors evaluate affective content in briefs differently based on the gender of the attorney

making the argument. To test this expectation, we interact the gender of the counsel of record, the gender of the majority opinion author, and the emotional content of the brief. This three-way interaction allows us to ascertain how attorney's performance of gender affects brief success based on both attorney and majority opinion author gender.

We also employ several control variables which prior research demonstrates impact judicial decision-making. Party briefs are less successful in politically salient cases (Corley, 2008). Accordingly, we note whether a case is politically salient using the measure developed by Epstein and Segal (2000). As the opinion author has a great deal of control over the eventual shape of the opinion (Maltzman, Spriggs, & Wahlbeck, 2000), we include a measure of the majority author's ideology (Epstein, Martin, Segal, & Westerland, 2007). Of course, the extent to which the majority opinion author must accommodate colleagues is shaped by both the extent to which bargaining is necessary to preserve the majority coalition and the median ideology in that coalition. As such, we control for the difference in size between the majority and minority coalition (Hansford & Spriggs, 2006; Murphy, 1964) and the ideology of the median justice in the majority coalition (Epstein et al., 2007). We also note the percentage of women in the majority coalition, as the presence of women can affect the extent to which traditional gender norms are enforced (Haire & Moyer, 2015; Szmer et al., 2010). It is also important to note that authors are more likely to draw material from briefs which is ideologically congruent with their preferences; we thus create a measure of whether the brief fits the ideological preferences of the majority opinion author by multiplying the author's JCS score by -1 if the brief is liberal and 1 if the brief is conservative (Collins et al., 2015).

Scholars also note actors other than the justices can affect outcomes at the Court because justices rarely write the first drafts of their opinions (Peppers & Zorn, 2008; Rosenthal & Yoon, 2011), whereas others delegate much of the drafting process to their law clerks. Accordingly, we control for the percentage of the majority opinion author's clerks who are female in the term in which the brief is filed (Kromphardt, 2017). We note amici present in a case with the difference in the number of amici supporting each party (Box-Steffensmeier, Christenson, & Hitt, 2013; Collins, 2008). Given the solicitor general's high rate of success as both a direct party and as an amici, we note when a brief was filed by the solicitor general and when a brief's position was supported by the solicitor general (Wohlfarth, 2009).⁹

As the Court has a greater need for information when there is no clear record from the lower courts, we measure legal conflict in a case with a dichotomous variable set to "1" if the Court noted conflict when granting review. As the Court often accepts cases to correct errors in the lower courts,

we note whether each brief is from the petitioner with a dichotomous marker. In addition, Corley (2008) finds the Court typically draws more heavily on the brief filed for the party that wins at the merits. Accordingly, we employ a dichotomous variable noting whether a brief comes from the side that won on the merits.

Other work notes attorney-level factors shape outcomes at the Court. As more experienced counsel are typically familiar with the Court and its expectations (Curry, 2015; McGuire, 1995, 1998), we control for the previous litigation experience of the attorneys in the case with a count of the number of briefs cases each counsel of record submitted to the Court before the decision date for each case. We do so by searching for each attorney's name in the "counsel" field in Lexis before the date of each decision.¹⁰ Also, attorneys that previously served as law clerks may be more successful as they are familiar with the Court's decision-making process. As such, we include a dichotomous marker of whether the counsel was previously a law clerk at the Supreme Court (Peppers, 2006). Previous work notes that lexical complexity, typically defined by the number of words with more than six letters (see, for instance, Wedeking, 2010), can affect the strength of an argument (Petty & Cacioppo, 1984). Accordingly, we use LIWC to create a measure of each brief's linguistic complexity with a measure of the number of words greater than six letters long.¹¹ As noted by Sarver et al. (2007-2008), the participation of women in the legal team drafting the brief may have consequences for outcomes. Thus, we create a measure of the percentage of the legal team listed on each brief which is female and subsequently interact it with the affective content and the majority opinion author gender variables. As previous studies note female attorneys differ from their male colleagues in some issue areas (e.g., Boyd et al., 2010; Songer & Crews-Meyer, 2000), we include dichotomous variables for each of the issue areas in the Supreme Court Database (Spaeth et al., 2015).¹²

Because our dependent variable is continuous and bound by 0 and 1, we employ a fractional regression model. Much like standard regression models, fractional regression models have continuous dependent variables. However, fractional regression models constrain the dependent variable between 0 and 1 (Papke & Wooldridge, 1996).¹³ As our unit of analysis is the majority opinion-brief dyad and each case has at least two total briefs, we cluster standard errors on case citation.

Results

Our results provide support for our expectation that male and female justices evaluate counsel differently based on conformance with gender norms. Male

Table 1. Distribution of Briefs for Female Attorneys by Issue Area.

Issue area	Total briefs	Briefs by female attorneys
Criminal procedure	151	22 (15%)
Civil rights	100	13 (13%)
First amendment	37	4 (11%)
Due process	26	3 (12%)
Privacy	23	1 (4%)
Attorneys	10	0
Unions	14	1 (7%)
Economic activity	133	11 (8%)
Judicial power	53	9 (17%)
Federalism	43	8 (19%)
Federal taxation	12	1 (8%)
Miscellaneous	4	0
Private action	4	0

justices reward attorneys for using little traditional gender norms via the affective content found in their briefs. That is to say, male attorneys are more successful arguing before male justices when using language with low affective content. Female counsel, on the contrary, are more successful when they conform with female gender norms by using high values of affect in their briefs. Also in accord with expectations, we do not find evidence that female justices consider gendered norms of communication in evaluating legal briefs for either male or female counsel. This indicates that differences between male and female jurists extend beyond a disposition for female justices to rule more liberally in certain issue areas; it encompasses the way in which justices evaluate the arguments conditioned on attorney gender. Ultimately, our results raise questions about how effective female counsel are at the Court, based on the immutable characteristics of both counsel and the justice authoring the majority opinion. Before evaluating our model, we first examine our data descriptively.

Women are a distinct minority at the Supreme Court Bar, from 2010 to 2013 they constitute roughly 12% of all attorneys filing briefs. Table 1 shows their briefs are distributed fairly evenly across the issue areas at the Court. Most of the issue areas have a portion of women roughly in line with the overall number of female counsel at the Court. Women are, however, underrepresented in unions, economics, privacy, and federal taxation cases. In addition, they are completely absent from some smaller issue areas such as: private action, miscellaneous, and attorneys. Fortunately, our issue area dichotomous variables account for this discrepancy.

Table 2. Distribution of Attorney Briefs by Majority Opinion Author Gender.

Issue area	Total briefs	Male authors	Female authors
Criminal procedure	151 (25%)	96 (23%)	55 (28%)
Civil rights	100 (16%)	69 (17%)	31 (16%)
First amendment	37 (6%)	30 (7%)	7 (4%)
Due process	26 (4%)	16 (4%)	10 (5%)
Privacy	23 (4%)	19 (5%)	4 (2%)
Attorneys	10 (2%)	2 (0.5%)	8 (4%)
Unions	14 (2%)	14 (3%)	0
Economic activity	133 (22%)	86 (21%)	47 (24%)
Judicial power	53 (9%)	37 (9%)	16 (8%)
Federalism	43 (7%)	29 (7%)	14 (7%)
Federal taxation	12 (2%)	10 (2%)	2 (1%)
Miscellaneous	4 (1%)	4 (1%)	0
Private action	4 (1%)	4 (1%)	0

It is also important to note which issue areas female jurists write opinions in. If female jurists disproportionately write opinions in those cases where female counsel argue, then it is possible that any effect we observe is driven by the issue area. The distribution of briefs to male and female opinion authors by issue area is shown in Table 2. The distribution between male and female authors is fairly uniform, although female authors are slightly overrepresented in criminal procedure and economic activity cases. Male authors are slightly overrepresented in first amendment cases. Again, our issue area variables should account for any discrepancy.

To bring both of our previous descriptive tables together, we construct Table 3. Here, we note the issue areas where male and female justices evaluate briefs filed by male and female counsel. Overall, 25% of briefs filed by female counsel are evaluated by female majority opinion authors. At the same time, 33% of briefs filed by male counsel are evaluated by female majority opinion authors. Shifting focus to justices, 13% of male justices author opinions for cases in which female counsel participate. Although female justices write opinions in cases with female counsel 10% of the time. As female counsel make up 12% of the counsel of record and 33% of the justices are female, this indicates female counsel and opinion writers are fairly uniformly distributed. We now move to the results of our model.

The results of our model are presented in Table 4.¹⁴ The first column displays our model without any interaction terms, whereas the second column includes the interactions. Our results provide support for

Table 3. Opinion Author and Counsel of Record Gender by Issue Area.

Issue area	Counsel	Male author	Female author
Criminal procedure	Male	77	52
	Female	19	3
Civil rights	Male	57	30
	Female	12	1
First amendment	Male	26	7
	Female	4	0
Due process	Male	15	8
	Female	1	2
Privacy	Male	18	4
	Female	1	0
Attorneys	Male	2	8
	Female	0	0
Unions	Male	13	0
	Female	1	0
Economic activity	Male	78	44
	Female	8	3
Judicial power	Male	33	11
	Female	4	5
Federalism	Male	25	10
	Female	4	4
Federal taxation	Male	10	1
	Female	0	1
Miscellaneous	Male	3	0
	Female	1	0
Private action	Male	4	0
	Female	0	0

our argument that counsel are evaluated based on their conformance with gender norms. At first blush, our results seem to suggest none of our main independent variables affect brief success. However, the main thrust of our argument resides in the interaction term between counsel gender, opinion author gender, and the affective content of the brief. Interaction terms cannot be evaluated by *p* values alone (Brambor, Clark, & Golder, 2006). It is necessary to graph interaction effects to determine whether (and at what levels) they are statistically significant. We now turn to an evaluation of our interaction term.

Figure 1 graphically illustrates our main interaction term. The figure is divided into two panels where the first panel shows the effect for male majority

Table 4. Effect of Gender Norms on Judicial Decision-Making.

	(1)	(2)
Female attorney	0.026 (0.042)	0.012 (0.046)
Affective content of brief	-0.001 (0.015)	-0.015 (0.021)
Female opinion author	0.055 (0.051)	0.035 (0.059)
Female Attorney × Affective Content	—	0.112*** (0.032)
Female Attorney × Female Author	—	0.015 (0.095)
Female Author × Affective Content	—	-0.015 (0.041)
Female Attorney × Female Author × Affective Content	—	-0.146 (0.086)
Political salience	-0.203** (0.066)	-0.206** (0.065)
Coalition median ideology	0.008 (0.092)	0.001 (0.092)
Vote split	0.015** (0.005)	0.014** (0.004)
Percent women in majority	0.035 (0.178)	0.029 (0.178)
Author ideology	0.156* (0.061)	0.144* (0.061)
Ideological congruence	0.005 (0.034)	0.007 (0.034)
Percent female law clerks	0.131 (0.101)	0.122 (0.101)
Amici advantage	-0.005 (0.004)	-0.005 (0.004)
SG party	0.184*** (0.031)	0.184*** (0.031)
SG amici	0.021 (0.024)	0.018 (0.024)
Conflict	0.080* (0.033)	0.080* (0.032)
Petitioner brief	0.050** (0.018)	0.051** (0.019)
Winning party	0.082*** (0.017)	0.082*** (0.017)
Attorney experience	0.000 (0.000)	0.000 (0.000)

(continued)

Table 4. (continued)

	(1)	(2)
Law clerk experience	0.057* (0.029)	0.053 (0.029)
Lexical complexity	-0.049*** (0.014)	-0.046*** (0.014)
Percent female legal team	-0.082 (0.060)	-0.065 (0.079)
Percent Female Legal Team × Affective Content	—	-0.003 (0.060)
Percent Female Legal Team × Female Author	—	0.029 (0.125)
Percent Female Legal Team × Female Author × Affective Content	—	0.134 (0.128)
Criminal procedure	0.120* (0.060)	0.128* (0.059)
Civil rights	0.112 (0.060)	0.122* (0.060)
First amendment	0.163* (0.078)	0.176* (0.078)
Due process	0.028 (0.074)	0.031 (0.073)
Privacy	0.186* (0.083)	0.199* (0.082)
Attorneys	0.293 (0.150)	0.300* (0.142)
Unions	-0.115 (0.081)	-0.115 (0.084)
Economics	0.185** (0.058)	0.194*** (0.058)
Judicial power	0.160* (0.068)	0.168* (0.067)
Federalism	0.214** (0.067)	0.219** (0.068)
Federal taxation	0.097 (0.089)	0.095 (0.086)
Miscellaneous	0.288* (0.138)	0.300* (0.118)
Constant	-1.934*** (0.067)	-1.933*** (0.068)
AIC	343.505	359.308
BIC	484.260	535.251
Observations	601	601

Note. Standard errors in parentheses. AIC = Akaike information criterion; BIC = Bayesian information criterion.

* $p < .05$. ** $p < .01$. *** $p < .001$.

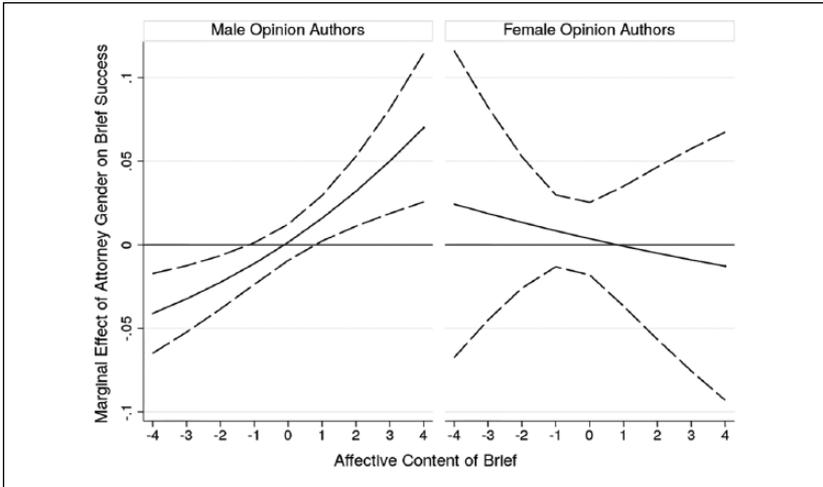


Figure 1. Interaction of counsel of record gender, affective content of brief, and majority opinion author gender.

opinion authors and the second panel shows the effect for female majority opinion authors. In each panel, the x -axis shows the standardized value of the amount of affect in the brief, whereas the y -axis depicts the marginal effect of counsel of record gender on brief success. Should the solid line at $y = 0$ fall within the dashed 95% confidence intervals, then the interaction term is insignificant at that particular value of affect. We note that for male opinion authors, female counsel are less successful when they exhibit lower levels of affect. However, once the level of affect present in their briefs increases, they become more successful. Turning to the female majority opinion author panel, we note that the 95% confidence intervals always include the reference line at $y = 0$. This indicates that the level of affect contained in the brief does not affect the success of female counsel when the majority opinion author is female. This provides support for our contention that male justices evaluate attorneys based on their conformance with gender norms in briefs, whereas female justices do not. The interaction between the percentage of the legal team that is female, opinion author gender, and affective content of the brief is not significant at any level. The graphical depiction is presented in the Appendix.

To further illustrate our findings, we also estimate a model to estimate how the use of affective language affects the success of male counsel. To do so, we rerun our analysis with a “male” variable rather than a female variable (not shown). This variable is coded as “1” if the counsel of record on the brief is a male and “0” if the counsel of record is female. Although the resulting

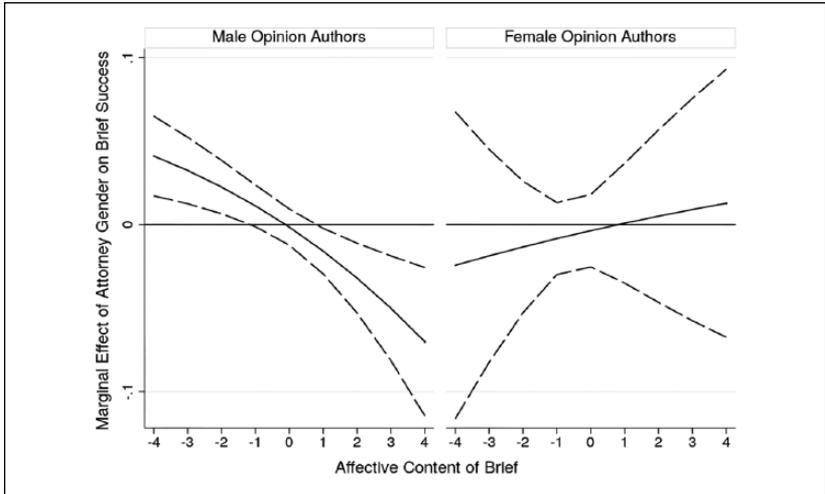


Figure 2. Interaction of counsel of record gender, affective content of brief, and majority opinion author gender (with male attorney variable in place of female attorney variable).

interaction is the mirror image of Figure 1, we display it in Figure 2 to illustrate how gender norms manifest at the Court. For male attorneys, lower levels of affective content in briefs results in more success with male majority opinion authors. However, as the level of affective content in their briefs increases, their success decreases. Conversely, female justices take no notice of affective brief content for male counsel. This provides support for our expectations that both male and female counsel are held to gender norms by male (but not female) justices.

We find support for our contention that male justices enforce traditional gender norms via their evaluation of affective language in briefs. If female attorneys break from traditional gender norms and make arguments more typical of men, which is to say they argue aggressively and forcefully, those briefs are less successful with male opinion writers. Conversely, if female attorneys conform to traditional gender norms and make arguments which are more conciliatory and interpersonally warm, their success increases with male justices.¹⁵ As shown in Figure 2, the opposite is true of male attorneys. Male attorneys are most successful with male opinion writers when they file briefs with low affective content, which is to say briefs which conform with gender norms, when a male justice writes the majority opinion. As the affective content of the brief increases, male attorneys are less successful. This indicates male justices enforce traditional gender norms.

Collectively, our results indicate that male justices evaluate counsel based on their compliance with gender norms. Should an attorney break with gender norms in his or her brief, male justices will evaluate that brief more harshly and its success will fall. This is not the case for female justices, as we find no evidence gender norms play a role in their evaluation of briefs.¹⁶ Arguably, we could also be observing an ideological split rather than a gender split because three of the four members of the Court's liberal bloc are women. To account for this possibility, we reran our analysis with Justice Breyer grouped with the female members of the Court. The results were substantively unchanged. Finally, to continue with the possibility that our results are driven by ideology, it is possible that there is an interactive effect between justice ideology and attorney gender. We ran a control model with an interaction between the majority opinion author's ideology score and the gender of the counsel of record. At no level was this interaction significant. Collectively, these results provide strong support for our expectations.

Discussion

As the bench becomes more diverse, female judges increasingly decide differently than their male counterparts across a variety of state, federal, and international courts. It is clear that gender matters in judicial decision-making. However, although work in judicial behavior has often noted gender as a dichotomy, research in psychology holds gender is not just a dichotomy, but rather it is also a performance where men and women either comply with or violate gender norms and others evaluate their performance based on their conformance with gender norms. In this particular case, gender is performed by attorneys who are then judged by the justices. Male justices enforce traditional gender norms, whereas we find no evidence that female justices do so. To reach this finding, we draw upon recent innovations in textual analysis and psychology to provide a more nuanced account of the role of gender in judicial decision-making than previous studies. We now turn to a more detailed discussion of the findings of this study and offer directions for future research.

Differences between male and female justices extend beyond vote direction in particular issue areas to the extent to which justices enforce gender norm via the evaluation of briefs filed by attorneys. Utilizing psychological measures of gender performance, we find male justices enforce traditional gender norms. We find no evidence that female justices do. Although these findings speak to the literatures on gender in judicial decision-making, they also highlight the importance of diversity on both the bench and at the bar beyond mere symbolism. President Obama's push to make the federal bench

more diverse, both in terms of gender and ethnicity, may move the Court toward a more inclusive institutional culture where female counsel are not placed at a disadvantage in their advocacy before the justices because of their gender (e.g., Kaheny et al., 2015; Kenney, 2002).

Ultimately then, this study points toward the utility of exploring the interplay of emotion in legal arguments. Although we are not the first to do so (Black et al., 2016; Bryan & Ringsmuth, 2016), we highlight the underlying gendered components of the emotion in judicial decision-making and demonstrate the utility of using quantitative measures of emotional content in legal arguments. In doing so, we uncover a discrepancy with the psychology literature. Broadly, this literature emphasizes that men and women should enforce the same gender norms (Rudman & Glick, 2001). That would imply male and female justices should both reward attorneys for complying with gender norms. However, we find that although the male justices enforce gender norms, the female justices do not. Accordingly, our findings suggest that the context in which gender norms are evaluated has consequences for outcomes. The judicial context is unique, at least insofar as briefs are concerned perhaps because of the professional background and experiences of female jurists (Haire & Moyer, 2015). Although this study offers an account of the role of gender norms in how the justices evaluate male and female counsel via party briefs, it also serves a springboard for future research.

Many scholars have explored the lack of gender diversity in the the legal profession. This is often attributed to the remnants of a legal culture in which Justice Ginsburg was famously denied a clerkship because of her gender in the 1950s (Haire & Moyer, 2015). Two decades later, much was still the case as demonstrated by Justice Sotomayor's candid account of the sexist environment she experienced in law school and her male colleagues general surprise that she argued in a masculine style (Sotomayor, 2013). However, in line with previous work which finds male and female judges employ a different decision-making calculus, we find male and female justices do not enforce the same gender norms. Male justices reward men that are aggressive and women that are conciliatory. This suggests that female counsel have the best chance of success when the majority opinion is authored by a female justice as they do not have to balance competing professional and gender norms. However, female attorneys often adopt more masculine styles of communication than their male peers in an effort to downplay the salience of their gender. At least when a male justice writes the majority opinion, this is done to their detriment.

It is unclear whether the findings above extend to other courts. Given that the overall diversity of the bench affects the extent to which female

jurists take on a distinct voice (Collins et al., 2010; Scheurer, 2014) and the success of female attorneys (Kaheny et al., 2011), our findings might translate slightly differently at other courts where women are better represented at both the bench and the bar. Frequently, scholars have focused on the more gender diverse federal courts of appeals and district courts where they find the impact of gender on judicial decision-making and attorney success differs from the Supreme Court in important ways. Particularly given that the various circuits have differing levels of gender diversity, there could be remarkable variation in terms of the role of gender norms in the evaluation of arguments. Other work notes differences between how gender affects outcomes on state supreme courts depending on the gendered composition of that particular bench (McCall & McCall, 2007). One way in which future work might draw on our findings is by examining contagion effects when male jurists serve on panels with female jurists (e.g., Boyd et al., 2010). Likewise, it is possible that male jurists can shift the way they evaluate gender norms in light of their own personal circumstance (Glynn & Sen, 2015). Although studies of American courts are certainly warranted, it is also worthwhile to take these findings and apply them cross-nationally. The Supreme Court of Canada in particular would allow scholars to assess how gender norms shape judicial decisions in a gendered context that is almost the opposite of the U.S. Supreme Court (Kaheny et al., 2011, 2015).

We suspect the way in which justices enforce gender norms manifests in slightly differently ways depending on the way in which attorneys participate before the Court. Along with many recent scholars, we focus our attention on party briefs (e.g., Black et al., 2016; Corley, 2008; Wedeking, 2010). Although there is much to be learned from the study of briefs, we note that recent research highlights the importance of oral arguments (e.g., Johnson et al., 2006; Ringsmuth et al., 2013). Particularly, as oral arguments involve interruptions and back-and-forth between the justices and counsel, we suspect the way jurists enforce gender norms manifests differently than in party briefs.¹⁷ This likewise could be expanded to oral arguments at other courts, such as high courts with a female majority and federal appellate court panels where only one of three judges is female. Such investigations will further help provide a more nuanced account of gender in judicial decision-making.

Of course, one limitation of this study is the short time frame we employ. Although our choice of 2010–2013 was guided by a desire to maximize the number of female majority opinion authors, questions linger about how female counsel would fare before a Court where there are just one or two female justices. Although we can merely speculate at this point, the

literature on state supreme courts and the lower federal courts suggests that we might observe less difference between male and female opinion writers as women typically exhibit a “different voice” when their numbers move beyond token status (Szmer, Christensen, & Kaheny, 2015). For example, Collins et al. (2010) note that female federal district court judges only vote distinctly from their male colleagues once female judges reach a critical mass on a given bench. At the Supreme Court, this may manifest differently depending on the particular gendered composition of the bench. Davis (1993) brings this into sharp-focus when she concludes that Justice O’Connor did not exhibit a distinctly feminine voice on the Court from 1981 to 1987. Davis (1993) concedes this may be a function of O’Connor’s personal judicial orientation or, as other work has suggested, it might be because she was the only woman on the Court in this time frame. Although Davis (1993) did not have access to terms in which multiple women served on the Court, scholars now have a wide range of terms with one, two, and three female justices. Examining these terms in various combinations may yield further insight to the operation of gender norms at the Court. For example, Ginsburg and O’Connor may have adopted a different voice from the later Ginsburg and Sotomayor combination. We leave further exploration of this to future scholars.

Perhaps, one of the largest contributions of this manuscript is methodological. Previous studies of gender and judicial decision-making focus on the presence of a female judge on the bench and whether she casts her vote in either a liberal direction or in favor of the female attorney. We instead examine the way in which gender norms shape how jurists evaluate the legal arguments posed by male and female attorneys via their majority opinion. Much like the work of Spriggs and Wahlbeck (1997) and Corley (2008) helped move the study of how justices evaluate briefs and attorneys beyond a dichotomous measure of success on the merits to a more nuanced percentage of the brief incorporated into the majority opinion, this manuscript moves the study of gender and judicial decision-making beyond the mere presence of female attorneys to how the performance of gender evidenced in the underlying psychological content of briefs. In doing so, we join a small but growing number of judicial scholars who bring psychology in language more fully to the fore to explain judicial decision-making (Black et al., 2016; Bryan & Ringsmuth, 2016).

Of course, our measure of success steps away from the traditional vote model where one might analyze each justice’s vote at the merits. Although this approach has a rather blunt measure of success (a given justice either votes in favor of or against a given attorney’s position), it is intuitively attractive to the point that numerous previous studies of the success of female

counsel use this approach (Szmer et al., 2010). We do not use it here for two reasons. First, by using the percentage of the brief copied into the Court's majority opinion, we obtain a more fine-grained measure of success that allows us to more fully explore the success of affective language in brief success. Second, much of the literature stresses that the voting behavior of individual judges is a function of their own background (Glynn & Sen, 2015) and the gendered composition of panels (Boyd et al., 2010) and courts overall (Collins et al., 2010; Scheurer, 2014). Given that there is little variation on the latter two on the U.S. Supreme Court, this might be a question better suited for the lower federal courts or a cross-national examination (e.g., Kaheny et al., 2011, 2015).

Finally, our results raise normative concerns over the consequences of gender in judicial decision-making. Although the Court has been quick to defend the "myth of the robe," ample research indicates that extra judicial factors influence case outcomes at the U.S. Supreme Court. Recent studies note immutable characteristics of both the judge and attorney also shape outcomes. If, as our results indicate, the male members of the Court include attorney conformance with gender norms in their evaluation of arguments, even if done subliminally, there are profound consequences for how inclusive the legal process is (Kenney, 2002). This then gives normative value beyond the purely symbolic to efforts to diversify the bench. These results, when considered in tandem with work finding African American judges are more likely to be reversed on appeal (Sen, 2015) and that women and racial minorities are rated systematically lower by the American Bar Association than their White male peers (Sen, 2014) raises the possibility that other implicit biases may be at play in judicial evaluation of attorneys and judges alike. Indeed, the role of norms, gender and otherwise, may extend beyond judicial decision-making itself. It is possible that future work on gender norms can provide a more nuanced account of judicial decision-making throughout the literature.

Conclusions and Directions

By moving beyond the dichotomous notation of gender in judicial decision-making to a more performative measure, we demonstrate male and female justices evaluate attorney compliance with gender norms differently. Although this certainly raises normative concerns, our findings serve as a call for future research on judicial decision-making on other courts. Indeed, this study suggests the two are intertwined. Female justices not only decide differently than their male counterparts, but they evaluate the way in which female counsel communicate in their briefs differently as well. As the

evaluation of arguments is conditioned by the gender of the attorney, these results raise a number of important normative questions. For male justices, gendered expectations reveal subtle biases that influence their evaluation of “good” arguments. This is problematic because enforcing traditional gender norms perpetuates the relative authority of men’s voices compared with women’s. Our results thus raise questions about how counsel are evaluated based on immutable characteristics by the justices. Although much more can surely be written on this topic, we leave it to future scholars to explore more in depth in a host of judicial contexts and courts.

Appendix

In this appendix, we present the plots for the percent female legal team \times female attorney \times female majority opinion author control variable from Table 4 As noted in text, at no level does this interaction term achieve statistical significance.

We also run a control model where we interact attorney gender with the opinion author’s ideology. This model, which is presented below, is substantively unchanged from the results we present in text. The interaction plot, also presented below, does not achieve statistical significance at any level.

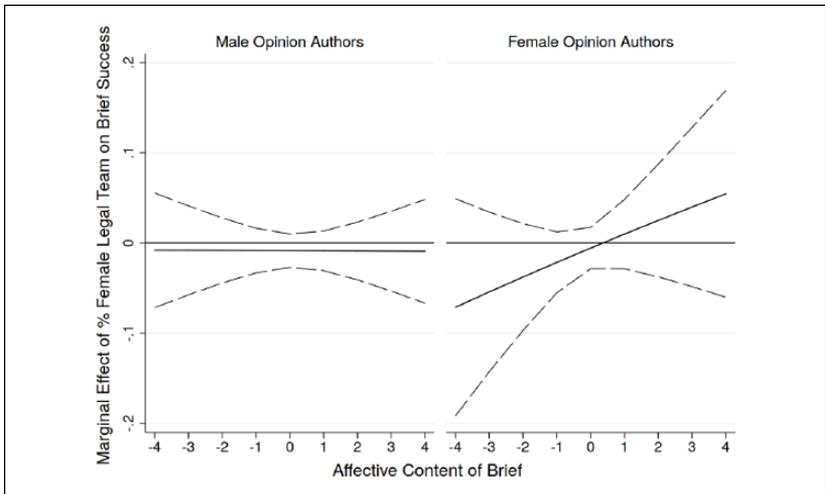


Figure AI. Interaction of percent female legal team, affective content of brief, and majority opinion author gender.

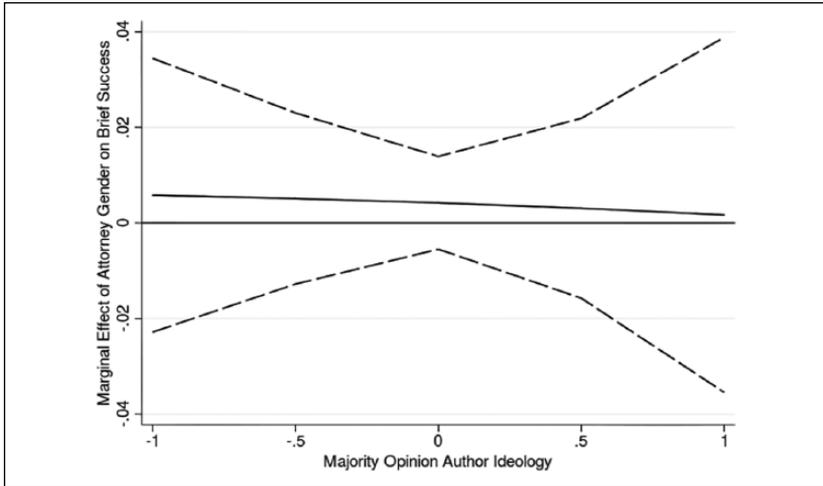


Figure A2. Interaction of attorney gender and majority author ideology.

Table A1. Effect of Gender Norms on Judicial Decision-Making (With Gender \times Ideology Control).

	Coefficient	SE
Female attorney	0.017	(0.057)
Female opinion author	0.025	(0.053)
Affective content of brief	-0.017	(0.018)
Female Attorney \times Female Author \times Affective Content of Brief	-0.137	(0.081)
Political salience	-0.204***	(0.060)
Coalition median ideology	0.097	(0.099)
Vote split	0.013***	(0.005)
Percent women in majority	0.163	(0.162)
Author ideology	0.132*	(0.063)
Female Attorney \times Author Ideology	-0.022	(0.126)
Ideological congruence	0.011	(0.034)
Percent female law clerks	0.130	(0.100)
Amici advantage	-0.004	(0.004)
SG party	0.187***	(0.032)
SG amici	0.015	(0.024)

(continued)

Table A1. (continued)

	Coefficient	SE
Conflict	0.072*	(0.032)
Petitioner brief	0.050**	(0.018)
Winning party	0.081***	(0.017)
Attorney experience	0.000	(0.000)
Law clerk experience	0.053	(0.028)
Lexical complexity	-0.044***	(0.013)
Percent female legal team	-0.063	(0.058)
Percent Female Legal Team × Female Author × Affective Content of Brief	0.117	(0.111)
Criminal procedure	0.150*	(0.061)
Civil rights	0.133*	(0.060)
First amendment	0.178*	(0.079)
Due process	0.038	(0.071)
Privacy	0.198*	(0.083)
Attorneys	0.312*	(0.142)
Unions	-0.104	(0.084)
Economics	0.207***	(0.057)
Judicial power	0.178**	(0.067)
Federalism	0.231***	(0.070)
Federal taxation	0.096	(0.079)
Miscellaneous	0.285*	(0.121)
Constant	-1.973***	(0.072)
Observations		597
AIC		354.613
BIC		521.506

Note. Standard errors in parentheses. AIC = Akaike information criterion; BIC = Bayesian information criterion.

p* < .05. *p* < .01. ****p* < .001.

Authors’ Note

Shane A Gleason is now affiliated with Texas A&M University Corpus Christi.

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Notes

1. *Bradwell v. State of Illinois*, 83 U.S. 130 (1873).
2. Evidence that female counsel are evaluated with respect to conformance with gender norms is more mixed when shifting the focus from judges to juries (see, for instance, Cohen & Peterson, 1981; Hahn & Clayton, 1996; Sigal et al., 1985; Villemur & Hyde, 1983).
3. These terms are advantageous because they coincide with the confirmation of Justice Kagan and mark the start of an era in which three of the Court's nine members are female, a historical high which allows female justices to achieve a critical mass and exhibit their own "distinct voice" (Kanter, 1977; Scheurer, 2014).
4. In some consolidated cases, multiple party briefs are filed. Black et al. (2016) restrict their analysis to only those cases with just one brief for the petitioner and respondent, respectively. We opt to incorporate the full universe of party briefs. As a robustness check, we reran our models with just those cases with a total of two briefs. The results are substantively the same. In addition, in keeping with Corley (2008), we exclude reply briefs from our analysis.
5. For a more detailed discussion of the parameters used by the software, please see Corley (2008).
6. Although briefs are often written by large legal teams and the counsel of record may not have much role in the actual drafting of the brief, we adopt the counsel of record approach for several reasons. First, from a practical perspective, this approach is the norm in the literature (Corley, 2008; McGuire, 1998; Wedeking, 2010) as the Court often looks to attorneys that it trusts (McGuire & Caldeira, 1993). This takes on added importance in exploring gender and judicial decision-making as the presence of a woman in a prominent position in highly gendered environment, such as the Supreme Court Bar, is noteworthy and will draw attention to her gender (Karpowitz & Mendelberg, 2014; Shih et al., 1999). Moreover, as the justices and their clerks review briefs they are likely guided by their initial impressions of whether the author of the brief is male or female. This expectation is supported by studies on hiring decisions which finds potential employers evaluate candidate resumes based on their perceived race and gender independent of the actual entries on the document (Moss-Racusin, Dovidio, Brescoll, Graham, & Handelsman, 2012; Smith, Tabak, Showail, Parks & Kleist, 2005). This would imply that the name on the brief shapes the justices' expectations about which set of norms the document should conform with. Second, as the justices and their clerks review briefs, it is likely the case they do not know the dynamics of who did the actual drafting of the brief, rather just the name of the counsel of record. This is likely the case even for those justices who have previously worked in large firms and are familiar with the conventions of brief authorship. However, the justice may look to the overall composition of the legal team that is listed on the brief as an imperfect proxy for who the true authors are. Thus, as a precaution, we also include a control measure for the percentage of the legal team listed on the brief that is female. Of course, it is also true that many briefs are "ghostwritten" by attorneys who are not actually the counsel of record nor are they listed on the

brief. Although the identity of these authors is of academic interest, it is not possible for the Court or scholars to identify them and whether they conform with gender norms without conducting in-depth background research. For the Court, this is impractical. We encourage future in-depth case studies to examine the gendered dynamics of brief composition and the assigning of credit. As we are interested in explaining the success of female counsel broadly across many cases, we contend that our approach is the best approach.

7. Linguistic Inquiry Word Count software (LIWC) analyzes text samples on a word-by-word basis and compares each word with a dictionary of over 2,000 words divided into 74 linguistic categories. For example, the “articles” category searches, for instances, of the words “a,” “an,” and “the.” For a more complete description of LIWC, please see Pennebaker et al. (2007).
8. Positive and negative affective words have different impacts on judgment and decision-making (Baumeister, Bratslavsky, Finkenauer, & Vohs, 2001). The norm in the judicial behavior literature is to use the combined positive and negative measure from LIWC (e.g., Black, Hall, Owens, & Ringsmuth, 2016; Bryan & Ringsmuth, 2016).
9. It is also possible that the presence of the solicitor general in a case could significantly alter the role of gendered language as the Office of the Solicitor General is overwhelmingly male. To guard against this possibility, we ran a control model where all cases involving the solicitor general as a direct party or are excluded. The results do not substantively change.
10. Lexis’ search returns only experience as counsel of record; co-counsel are excluded. However, Westlaw’s attorney search function in briefs provides a count of all instances in which attorneys are listed on briefs, not just as counsel of record. In an abundance of caution, we thus calculate the experience measure based on the Westlaw metric. The two measures are correlated at .87 and when we reran the model with this measure, the results are substantively unchanged. We are accordingly confident moving forward with our counsel of record experience measure.
11. Petty and Cacioppo (1984) also suggest that more cognitively complex arguments can negatively affect the success of an argument. In addition, studies of amicus brief success stress that attorneys are more successful when their arguments are presented in more simple, easily digestible, language (Collins, Corley, & Hamner, 2015). Accordingly, we run a control model where we replace the lexical complexity measure with the cognitive complexity measure from LIWC. The results are substantively unchanged.
12. We exclude the private action category. There were no briefs filed in interstate relations cases in our data. Therefore, that issue area is not included. As previous work suggests that female attorneys are more successful in “women’s issues” cases, we would have liked to include a dichotomous marker for that issue area following the coding rules outlined by Szmey, Sarver, and Kaheny (2010). However, a lack of observations precludes the inclusion of that variable.
13. We reran our models as an ordinary least squares regression. The results are robust. Furthermore, we opt for a fractional regression model rather than a beta regression because of the more forgiving model assumptions of fractional regression.

14. We also run a series of control models where we replace the three-way interaction with a two-way interaction between just counsel of record gender and affective content of the brief. We do this for all opinions and just cases where (fe)male justices author the majority opinion. The results are substantively unchanged from our main model, although the female justice model has so few observations that the model will not converge when issue area dummies are included. For this reason, and in the interest of parsimony, we do not report these control models.
15. Importantly, if the affective content brief score is approximately 0, there is no impact on the success of a brief filed by female counsel before a male justice.
16. In line with previous research, we also examined whether the justices looked not to the gender of the counsel of record, but the overall gendered composition of the legal team preparing the brief (Sarver et al., 2007-2008). We controlled for this in our models with the interaction between the percentage of women in the legal team and the affective content of the brief. This interaction is never significant at any level of affect.
17. In addition, we note that at oral arguments there is little concern about “ghost-written” briefs.

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