Elite Polarization and Gender Effects on Ideology: How This Shapes The Supreme Court on Women’s Rights Cases

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ABSTRACT

ELITE POLARIZATION AND GENDER EFFECTS ON IDEOLOGY: HOW THIS SHAPES THE SUPREME COURT ON WOMEN’S RIGHTS CASES

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The study of ideological polarization continues to be an important topic for scholars of behavioral research to scholars of institutional politics. Polarization has not received as much attention in the context of the Supreme Court, yet polarization has begun to play a role in how the Supreme Court is shaped through the nomination process and is likely to continue in its practice. Compared to past Courts, the justices on the Court today are through party and ideology. This paper seeks to answer the question: has the voting behavior of Supreme Court justices over time in abortion and sex discrimination cases changed as a result of polarization and the increased number of female justices? To do this, a measure of ideology employed by Andrew Martin and Kevin Quinn, known as Martin-Quinn scores is used. The scores show the relative location of where U.S. Supreme Court justices fall on the ideological continuum. To analyze what influences the justices’ ideological scores, I analyzed several variables, such as their gender, their ideology, the president’s party who nominated them, and the majority of the Senate who confirmed them. Finally, I analyzed the case outcomes and the effect ideology played in abortion and sex discrimination cases. The results show ideology prevails over time and the increase in women on the Court does as well.
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CHAPTER 1
INTRODUCTION

During Ruth Bader Ginsberg’s nomination speech to the U.S. Supreme Court in 1993, she stated, “It is essential to woman’s equality with man that she be the decision maker that her choice be controlling” and “if you impose restraints that impeded her choice, you are disadvantaging her because of her sex.” While Justice Ginsberg may not have been directly discussing the right to an abortion that came from *Roe v. Wade* (1973), what is clear is her assessment of where she stood on women’s rights.\(^1\)

The importance of a justice’s view on abortion rights might be a key determining factor for Senate confirmation. This is not surprising, as many Republican presidential campaigns are run with the promise of nominating justices to the Court who will overturn the precedent set by *Roe v. Wade*, while many Democratic presidential campaigns are run under the premise of being for women. As a result, it is not surprising for a nominated Supreme Court justice to be questioned about abortion cases or their views on abortion.

As the country shifts to a state of polarization on social issues, where a justice stands on social issues may be more heavily scrutinized during the confirmation process. Scholars such as Devins and Baum (2019; 2017; 2014) and Clark (2009) argue the Supreme Court is moving into more of a polarized direction as an institution. This is a recent phenomenon, as Devins and

\(^1\) Justice Ruth Bader Ginsberg has written about abortion rights in terms of equal protection.
Baum’s (2019; 2017) analysis of the Supreme Court prior to 1990 concluded there were no clear ideological divisions on the Court. However, based on their analysis of the Supreme Court after 1990, the Court could be mimicking the current partisan lines evident in other institutions such as the House and the Senate. Thus, this paper seeks to answer the questions: has the voting behavior of Supreme Court justices over time in abortion and sex discrimination cases changed as a result of polarization and the increased number of female justices?

This paper builds on prior research conducted by Devins and Baum (2019; 2017), reiterating that today’s Court is different from past Courts in the relationship between party and ideology. More important, it restates the explanation Devins and Baum (2019; 2017) offer for this development. Their explanation is based on the evidence for the growth in polarization among political elites, which has shaped the Court in different ways and is likely to continue. Devins and Baum’s focus was on political parties, ideology, and the relationship between the two. However, they did emphasize civil rights and civil liberties, which encompasses “issues of discrimination and equality, as well as individual rights such as freedom of expression and the procedural rights of criminal defendants” (Devins and Baum 2019, 3-4). As a result, much of their analysis concerns “civil liberties.”

The purpose of this paper is to focus on the influence of partisanship and gender on justices’ votes on the Supreme Court. Devins and Baum’s (2019) theory of polarization on the Court is directly influenced by the elites who nominate the justices. While most polarization research focuses only on the issue of abortion (Clark 2009), the Court does not only hear women’s rights issues dealing with abortion. Past research has not focused on polarization and the role of women on the Court. This analysis seeks to add to past literature by analyzing justices’ votes on women’s rights issues and if the votes were influenced by elite polarization.
This paper proceeds as follows. The first section discusses the development of polarization on the Supreme Court and its outside influences. It also discusses the influence of polarization on the votes of the women on the Supreme Court. This section also includes a discussion of the effect on votes of women on the Supreme Court and their votes on women’s rights cases, such as abortion and sex discrimination. The second section presents the methods and data, and the third section presents the results, including discussion of the contemporary Court and how the majority of the liberal justices being female may affect future decisions. The final section discusses the influence ideology and partisanship have on case outcomes. It also discusses how the increase in liberal female justices influence the direction of case outcomes to be more liberal.

Polarization on the Supreme Court

Influence of polarization on the Supreme Court continues to interest judicial scholars who study judicial decision making. Ideological, legal, and strategic considerations have all been previously discussed in literature involving judicial decision making (Segal and Spaeth 2002; Epstein and Knight 1998; Bartels 2009). All these studies have analyzed justices’ ideological voting patterns as predictors of the way justices may vote, which leads to an important point since the behavior of justices as influenced by their ideology and attitudes has been analyzed extensively. Yet the role of polarization in Supreme Court decision-making has not emerged in the study of judicial politics until recently (Devins and Baum 2019; Bartels 2015; Clark 2009). Devins and Baum (2019) argue that polarization among elected elites has begun to influence the judicial decision making of the justices. Polarization among elected elites and the American public has been studied extensively leading to a consensus that elites have polarized more
frequently in the past decades (Hetherington 2009). Yet, a debate remains about whether polarization is occurring amongst elected elites and amongst the American public (Fiorina and Abrams 2008; Abromowitz and Saunders 2008). However, examining polarization on the Supreme Court has not been as prevalent in the literature (Clark 2009; Devins and Baum 2019; 2017; 2014; Bartels 2015).

According to Devins and Baum (2019; 2017), the Court today is different from past Courts because of how party and ideology are now inextricably linked. This is because of the growth in polarization among elected political elites. Political elites are the ones who continue to influence the Supreme Court because of their influence in the nomination process. Currently, the Supreme Court ideological lines coincide with party lines. This is because every Democratic president since the succession of Elena Kagan for John Paul Stevens has nominated a Supreme Court justice who has had a more liberal voting record. The same can be said of every Republican president, as their appointees have had a more conservative voting record. However, in the 2010-2015 terms of the Court, “the Justice appointed by a Democratic president who has cast the highest proportion of conservative votes (43.5 percent) was Stephen Breyer; the Justice appointed by a Republican president who cast the lowest proportion of conservative votes (53.4 percent) was Anthony Kennedy” (Devins and Baum 2017, 309). This is also the first period in the Court’s history where the Court has been sharply divided between “substantial blocs of Justices from each of the two major political parties” (Devins and Baum 2017, 310).

To conceptualize polarization at the judicial level, Devins and Baum (2019; 2017) explicate elements of polarization. They extend Fiorina and Abrams’ (2008) idea of “partisan sorting,” which occurs when conservatives increasingly move to the Republican Party and liberals to the Democratic Party. This means individuals are moving to the party that best
represents their ideology, leading to more homogeneity among the parties (Iyengar et al. 2012; Fiorina and Abrams 2008). Among political elites, the ideological distance between Republicans and Democrats is possibly greater today than it has been at any other point in the nation’s history (Levinson and Pildes 2006). The second element of polarization they focus on is the emphasis on the ideological consciousness of the justices and those who select the justices for nomination. Since political elites have become more divided than in the past and are more likely to view opposing ideological sides as more hostile; this has led the justices and those nominating the justices to be more aware of where they are “sorted” as it relates to partisan sorting (Devins and Baum 2019; 2017). Polarization and party sorting are not the same. Devins and Baum (2019; 2017) analyze the impact of polarization on the Court in terms of elite social networks. Polarization is evident in the social networks that identify and prepare judicial appointees to the federal courts and the Supreme Court (Teles 2009). It is also evident in the social networks of which the Justices are part. Republican appointed justices interact with elites who support more conservative outcomes and Democratic appointed justices interact with elites who support more liberal outcomes (Williams and Baum 2006). “Party sorting” is when individuals move to the party that best represents their ideology; however, Devins and Baum (2019) argue polarization amongst political elites is occurring and that polarization on the Supreme Court is ideological polarization and party sorting.

Some scholars argue judicial appointments are the most important variable to explain polarization among justices on the Supreme Court (Bartels 2009). But the Supreme Court appointment process has always been political (Epstein and Segal 2005) and continues to become more political as presidents continue to nominate justices based on their ideology and party affiliation (Devins and Baum 2019). This has been argued by Dahl (1957) through an
explanation of how presidents appoint justices based on ideological compatibility or based on whether the justice is more likely to vote in accordance with the president’s policy preferences. Devins and Baum (2019) argue through the different nominations of justices by Republican presidents (such as Souter, O’Connor, and Kennedy) that this may not always be the case as justices may shift ideologically over time. But Dahl’s (1957) theory may explain how judicial appointments can lead to polarization. Presidents likely choose ideologically compatible justices with their own ideology and with the Senate’s ideology. If this is the case, when Democrats are in power, they should be able to appoint liberal justices, and when Republicans are in power, they should be able to appoint conservative justices. Yet, Bartels (2015) demonstrates important limitations to the theory in that presidents do not always choose justices based on ideological preferences. This is because selection of Supreme Court justices has a great deal of bureaucracy (Yalof 2001). The example Yalof gives is the post-New Deal era and how Presidents Truman and Eisenhower consistently chose mostly moderate to center-right justices. Yalof (2001) also identified key variables that shape who is nominated by the president and why. Some of these include when the vacancy arises on the Supreme Court, the political and ideological composition of the Senate, the president’s popularity, the pool of available candidates for nomination, and the bureaucracy used by the President between other elites to reach select a viable candidate who to be confirmed. Thus, Dahl (1957) failed to consider swing justices and when justices change their minds. It only looks at the influence of presidential appointments based on ideology of the justices.

Some scholars argue judicial polarization may also be explained by the influence of the Chief Justice on his fellow justices (Gooch 2015). Through analysis of jurisprudential regimes, Gooch (2015) analyzed different Chief Justice regimes and the jurisprudential regime of
abortion. Richards and Kritzer (2002) define a jurisprudential regime as one that “structures Supreme Court decision making by establishing which cases factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ in assessing case factors (i.e., weighting the influence of various factors)” (305). As a result, justices use previous decision-making factors in regimes in subsequent cases. The Chief Justice controls the institutional aspects of the Court. He assigns who will write the opinions, he decides the case load, and he sets the agenda for the Court. However, this is only when he votes in the majority. If he is not in the majority, the most senior justice assigns the opinion to one of their fellow justices. He is also considered an opinion leader among his fellow justices (Gooch 2015). This is important because the Chief Justice arguably has a lot of control over the direction of the Court because of his role as Chief Justice and may lead to a Court being more polarized or more activist (Devins and Baum 2017; Keck 2004). Gooch finds that across different Chief Justice regimes, polarization was on the decline from the Hughes Court through the Vinson Court. However, he then found that polarization increased from the Vinson Court to the Burger Court. Yet, he argued polarization decreased in the Rehnquist and Roberts Courts, but that the rate polarization is higher in these last two Courts. However, Devins and Baum (2019; 2017) argue that polarization on the Supreme Court did not begin until after the 1990s. Gooch’s (2015) analysis of polarization falls short because it does not consider the influence of political elites on judicial appointments (Devins and Baum 2019). While the influence of the Chief Justice over the Supreme Court and his fellow justices could help explain the effects of polarization on judicial outcomes, it is not enough to rely on this variable to explain polarization on the Court.

Justices may drift in their ideology over time (Devins and Baum 2019; Epstein, Martin, Quinn, and Segal 2007; Owens and Wedeking 2012). This is because they may be influenced by
other justices on the Court, they may be influenced by the party they were nominated by along
with the President nominating them (Nemacheck 2007), and/or they may be influenced by public
opinion (Epstein et al. 2007; Gooch 2015; Devins and Baum 2019; Jackson and Tushnet 1999).
While justices may evolve ideologically (Epstein et al. 2007), they may also be responding to
ideological shifts that occur in the Senate (Gooch 2015). If the Senate has been a majority
Republican or a majority Democrat for the justice’s confirmation hearings and/or tenure on the
Court, the ideology of the Senate may influence the appointment process and the justices once
they are on the Court (Epstein and Segal 2005; Devins and Baum 2019; Gooch 2015; Farganis
and Wedeking 2014). Increasing polarization among Congress and the Presidency or political
elites may also influence the Court (Devins and Baum 2019; Gooch 2015).

The literature also seeks to explain how the growth in Supreme Court polarization has
occurred. Keck (2014) measured polarization between the Democrats and Republicans through
four different issues areas that remained pivotal in the division among the parties. The issue areas
Keck analyzed are key issue areas in the culture wars: abortion, affirmative action, gun rights,
and same-sex marriage. Through his analysis of the votes in Congress, federal appeals courts,
and the U.S. Supreme Court, he found a party-line divide between 1993 and 2013. This is an
example of the role of ideology in judicial appointments and how one might expect the judicial
appointment process to center around the justices’ views on these issue areas. However, Devins
and Baum (2019) note the importance of the appointment process and how it may also be
polarized. When a president considers a nomination for a Supreme Court justice, they look for
much more than their knowledge of the law or their ethical behavior. In fact, Presidents look to
“advance policy priorities, reward service to the president and the president’s party, gain future
political benefits from their party, and enhance the chance of their nomination being confirmed”
(Devins and Baum 2019, 121). However, this is a recent change in the view of the President. Sometimes, presidents do not only use their Supreme Court appointments to advance their policy agenda, but they also used them to keep campaign promises (Yalof 2001), to appeal to the Senate for confirmation hearings to be conducted more smoothly (Farganis and Wedeking 2014), and for justices who will adhere to their ideological preferences (Epstein et al. 2007). Devins and Baum (2019) argue beginning in the 1980s, presidents began nominating Supreme Court justices who shared the same ideology as their party. This has led to more careful scrutiny of the nominees and more influence from the party because the presidents receive vetted lists from trusted advisors when it comes to nominating Supreme Court justices. As a result, presidents have appointed more conservative justices and democratic presidents have appointed more liberal justices. This leads to the conclusion that policy plays a major role in consideration of a judicial appointment and shows the growth in partisan polarization, which is paralleled by the selection of Justices (Devins and Baum 2019). At this point, one can see the influence polarization among the parties has on the judicial appointment process.

The nomination of Sandra Day O’Connor in 1981 was a result of President Regan honoring a campaign pledge to nominate a woman (Yalof 2001; O’Brien 2017; Devins and Baum 2017). Despite the increasing number of women appointed to the Court since Justice O’Connor in 1981, there has not been much attention given to the influence they have had in gender related cases.

The increase of female judges on the U.S. Supreme Court (Sandra Day O’Connor in 1981 to currently Elena Kagan, Ruth Bader Ginsberg, and Sonia Sotomayor in 2019), has not been as heavily studied as the increase of female judges on the U.S. Court of Appeals (Carbon, Houlden, and Berkson 1981). This led many scholars to develop different theories regarding the effects of
gender on judging. Songer, Davis, and Haire (1994) developed three theories concerning the effect women can have on the bench regarding three specific types of cases: search and seizure, obscenity, and employment discrimination cases. The first theory they posit is female judges will be more liberal in all three areas. The second theory they posit is there will be no differences between men and women regarding the three issues areas. The third theory posits that women will be more conservative than men when deciding obscenity cases. The rationale behind this theory stems from the perpetuation of oppression of women related to obscenity as it connects to pornography.

Based on their theories regarding the effect women can have on the bench regarding specific types of cases, Songer, Davis, and Haire (1994) found women judges are more likely to be more liberal than men judges are when deciding employment discrimination cases. Other research conducted in an analysis of the criminal appeals court in Alberta, Canada, found similar results. Yet, McCormick’s (1993) results suggest there is little, if any, difference in the performance of women judges and in the way they vote as compared to their male counterparts, even on specific issues that deal with women, such as sexual assault cases. However, research conducted by Boyd, Epstein, and Martin (2010) suggests something different. They state, “Women possess unique and valuable information emanating from shared professional experiences” and those effects can be seen “only on issues which female judges may possess valuable expertise, experience, and information” (391). The current research provides support for why women are more likely to be more influential when they are writing an opinion for abortion or sex discrimination cases because only women may face these issues in their lifetime. This leads to the assumption that women judges will be more polarized on such cases compared to their male counterparts, leaning more liberal than conservative.
Abortion is often regarded as one of the most divisive issues between Republicans and Democrats (O’Brien 2017, 3). Yet, little attention was paid to *Roe v. Wade* when it first appeared on the order list for the Court (O’Brien 2017, 4). According to a study done by the Pew Research Center in 2016, self-identified Republicans have become more polarized on the issue, while self-identified Democrats have maintained steady numbers of support of abortion\(^2\). Sixty-two of Republicans do not support legal abortion at all while 34 percent think it should be legal in most cases (Fingerhut 2016). Democrat men and women maintain support for legal abortion, with numbers increasing to 79 percent in 2016 (Fingerhut 2016). Only 18 percent of Democrats say abortion should be illegal in all or most cases. A driving factor is the support from Democratic women risen (Fingerhut 2016). Comparing both parties, the partisan gap in support for legal abortion is 45 percentage points (Fingerhut 2016). Since self-identified Democrats are moving more left on the issue of abortion and self-identified Republicans are moving more right on the issue of abortion, polarization is evident between the public on the issue of abortion.

Since polarization is evident among the public who identify as Republicans or Democrats, it is also evident among elites who are elected as representatives as well (Devins and Baum 2019). It is important to analyze sex discrimination to show the different effects gender may have on voting outcomes. The Civil Rights Act of 1964 included Title VII, which prohibited employers from “discriminating against employees on the basis of sex, race, color, national origin, and religion.” Title VII has been relatively successful in helping women gain access to areas of employment that were not previously available to them (Bartlett and Rhodes 2010). Title VII may have helped women in the workplace, but sex discrimination is still highly prevalent for women.

\(^2\) The survey conducted asked if they identified as Republicans, Democrats, or Independents. Independents are not included in the Republican or Democrat numbers.
Sex discrimination occurs in more areas than in employment (Butler 1991). This is where the right to privacy comes in, as abortion may be “regarded as a unique problem for women” (Butler 1991, 140), but sex discrimination, or equal protection under the law, is defined by what men need (Butler 1991).

Research has found that female judges are more likely to cast liberal votes than male judges (Boyd, Epstein, and Martin 2010), especially in sex discrimination cases. Moyer and Haire (2015) found that female judges born on or before 1945 had the highest likelihood of casting a liberal vote in sex discrimination cases as compared to those born after 1945 and male judges born after 1945. This is especially relevant to women’s issues. But what is a women’s issue? Vega and Firestone (1995) found female members of Congress have been representing women’s issues and legislation that calls for equality. These issues deal with legislation to improve women’s social, economic, and political status (Childs and Krook 2008; Bratton 2005). Women’s issues in legislation can also be those that affect women differently than men, such as abortion, welfare, education, and health (Bratton 2005). Because of the growing number of women in Congress, women’s issues have become more prevalent and will only continue to do so (Vega and Firestone 1995). Similarly, as more women gain a voice in politics, more women’s groups will seek to involve the judicial branch of government.

The increase in female members in Congress has led to women’s issues becoming more prevalent and debated in Congress and an increase in the number of women’s issue cases that have been argued in the U.S. Supreme Court of Appeals and thus the Supreme Court. This is because more laws that pertain to women’s issues can lead to more challenges in the courts. The same can be said of the Supreme Court’s decision in 1973 that led to the right to abortion. More states keep passing laws to challenge that right. As a result, women’s issues will continue to be
prevalent in the courts and the Supreme Court because of the increase in laws that benefit and protect women (Vega and Firestone 1995).

Polarization suggests we will see more votes along ideological and partisan lines on the Supreme Court on issues that feed into polarization, such as the culture war issues Keck (2014) identified. However, on issues of sex and gender discrimination/equality, we would expect the number of female judges on the Court to also matter. First, the literature tells us that polarized political elites are influencing the Supreme Court, resulting in more polarization in judicial outcomes (Devins and Baum 2019). Thus, one would expect hypotheses about ideology and partisanship:

H1: Liberal justices are more likely to vote in favor of abortion rights and sex discrimination claims in the liberal direction, while conservative justices are more likely to vote against abortion and sex discrimination claims in the conservative direction.

and

H2: Over time, Republican appointed justices are more likely to vote in the conservative direction and Democratic appointed justices in the liberal direction.

Next, the literature tells us that female judges are more likely to vote more liberally (Songer, Davis, and Haire 1994). However, the few major abortion cases that have garnered opinions from the Supreme Court have mostly been written by men, or in the case of Planned Parenthood v. Casey (1993) one woman, Justice Sandra Day O’Connor. Because of this, I do not expect there to be much difference in the influence of female justices on abortion cases, as they are primarily authored by men. However, as more female justices are nominated by democratic presidents, case outcomes should be more liberal in abortion and sex discrimination cases. Thus, the third hypothesis concerns gender:

H3: The more women appointed to the Court over time should increase the likelihood of votes for the liberal direction in abortion and sex discrimination cases.
The intent of this research is to estimate the effect of the increase of the number of female judges on the Supreme Court and how their votes influence case outcomes in abortion and sex discrimination cases. The literature has identified political elites have influenced the Supreme Court more recently, leading to ideological polarization to become more evident in the Supreme Court, with the conservative judges voting more conservative and the liberal judges voting more liberal. However, a gap exists within the literature as to gender effects affect polarization and case outcomes regarding abortion and sex discrimination cases. Furthermore, the literature primarily addresses civil liberties as one that contains everything from First Amendment cases to discrimination cases rather than separating women’s issues from the mix (Devins and Baum 2019). I address this gap in the literature through an analysis of the effects of gender on polarization on cases outcomes in abortion and sex discrimination cases.
CHAPTER 2
DATA AND METHODS

To measure the ideology of judges, the first step is to determine whether they are liberal, conservative, or something that falls in between. The assumption is judges nominated by Republican presidents tend to be more conservative, and if nominated by Democratic presidents, the judges tend to be more liberal. However, many scholars agree this is too simple to measure the ideology of justices.\(^3\) However, Epstein, Martin, Quinn, and Segal (2012) argue against the use of Segal-Cover scores because of their exogeneity or because these scores are not dependent on the ideological placement of the justices. Yet, most scholars who know the shortcomings of using endogenous measures – measures that can easily be explained by differences in the measures themselves and not outside influence – and not exogenous measures of data understand the implications this may have on their research. However, Epstein et al. (2012) explain why exogenous measures for trying to understand the ideology of justices fall short.

The Segal-Cover scores were developed by Segal and Cover in 1989. They analyzed newspaper editorials written about the justices between when the justices were nominated to the Supreme Court and when they were confirmed. They had students code each paragraph in the editorials for political ideology as is discussed as below:

Paragraphs were coded as liberal, moderate, conservative, or not applicable. Liberal statements include (but are not limited to) those ascribing support for the rights of

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\(^3\) While partisanship may seem like a decent proxy for ideology today, this has not always been the case. Thus, political scientists set out to develop distinct measures of ideology.
defendants in criminal cases, women and racial minorities in equality cases, and the individual against the government in privacy and First Amendment cases. Conservative statements are those with an opposite direction. Moderate statements include those that explicitly ascribe moderation to the nominees or those that ascribe both liberal and conservative values. (Segal and Cover 1989, 559)

Then as Epstein et al. (2012) measured the judicial ideology by “subtracting the fraction of paragraphs coded conservative from the fraction of paragraphs coded liberal and dividing by the total number of paragraphs coded liberal, conservative, and moderate” (709). The scale they came up with ranges from 0 (conservative) to .5 (moderate) to 1 (liberal). However, Epstein et al. (2012) are quick to point out, based on research done by Epstein and Mershon (1997), the scores are best suited for cases dealing with civil rights and liberties rather than areas of federalism. This is because newspaper editorials care of juicy topics such as gun rights or gay rights and not topics such as federalism. Another drawback is that the scores are static, as they do not change over the justices’ tenure, which leads to the discussion of the Martin-Quinn scores and why I used them as my only source of data to measure justice ideology. My rationale comes from Epstein et al. (2012). Endogenous measures in judicial politics measure behavior that has already occurred (Epstein and Mershon 1997). As a result, most, if not all, work on the Supreme Court concerning justice ideology uses the estimates created by Martin and Quinn. These scores are created from analyses of voting patterns on the Supreme Court each term. This means the scores acknowledge that justice voting behavior can change over time, leading to the fact that justice ideology can change over time. The scores can range from very liberal -6 (Justice Douglas) to a very conservative +4 (Justice Thomas) (Epstein et al. 2012).

Thus, the Martin-Quinn scores are more useful, as they are based on readily available and easy to replicate vote patterns. They measure what the justices give us based on their ideology and based on their votes rather than the Segal-Cover scores. The Martin-Quinn scores are
dynamic, and the measures change with the justices if their ideologies drift during their tenure on the court. Yet, they have a major drawback that Epstein et al. (2012) discuss. Using these scores is the same as using votes to predict votes. They are analyzing how the justices have already voted to predict how they will vote again, which results in an endogeneity problem. Yet, Epstein et al. (2012) argue, “Researchers should only use them for certain kinds of studies – typically studies that already assume ideology has an effect on voting” (713). Since this study is specifically looking at issues concerning women’s rights, it is safe to assume that ideology affects voting in these types of cases. Martin and Quinn (2005) write,

[A]s a practical matter using the full data Martin-Quinn scores when modeling votes in a single issue is perfectly appropriate. While circularity is a technical concern, the resultant measures from purging issues will change very little, and so it is not worth the effort to do so. When modeling votes in a single-issue area, circularity is not a practical concern. (3).

Thus, the scores are useful for this study because the scores focus on one issue area. They provide the ideological preferences for justices over time, are easily comparable from justice to justice, and are appropriate because they compare their behavior.

To analyze if polarization is occurring on the Supreme Court in line with Devins and Baum (2019), I imported all the Martin-Quinn scores for all the justices who have served on the Supreme Court from 1937 to 2019 into the statistical software R. Then I coded whether the justices were Chief Justice as a 1 and if they were not as a 0. The Chief Justices are highlighted by name. (See Figure 1). Next, I coded whether the justices were nominated by Democrats (1) or Republicans (0). The black line denotes the median justice ideal point over the course of the Court. The blue line denotes nomination by a Democratic president and the red line denotes nomination by a Republican president. (See Figure 1).
Dependent Variable

To test the hypotheses, I used a linear probability model through OLS regression. This is because the dependent variable, case outcomes, is a dichotomous variable (1 coded as liberal case outcome and 0 coded as conservative case outcome). To do this, I used the Supreme Court Database created by Spaeth (2019) and analyzed all cases that mentioned abortion or sex discrimination dealing with employment or not (cases that did not involve women were excluded). Each case in the database has a case outcome coded as either liberal or conservative. If the case outcome was liberal, it was coded as a 1; if it was conservative, it was coded as a 0. Then each sex discrimination case was coded as a 1, and each abortion case was coded as a 0.

Independent Variables

Next, to analyze the effect of gender and ideology on case outcomes regarding women’s rights, I imported all the Martin-Quinn scores for all the justices and then added additional variables derived from the literature. I coded the gender of the justice 1 for female and 0 for male. Next, if the justice was nominated by a Democratic president, they were coded a 1; if it was a Republican president, it was coded as a 0. The Senate majority at the time of the justice’s confirmation was also coded. If it was a Democratic majority a 1 and if it was Republican majority, a 0. Finally, I created an additional variable, case type. If the case type was an abortion case it was given a 0, if the case type was a sex discrimination case, a 1.
Modeling

Five models were run using OLS linear probability model, since the dependent variable is a dichotomous one. Table 1 analyzes the effect of identified independent variables on case outcomes over time, from 1937-2020. Model one analyzed the effect of gender, ideological score (MQScore), the president’s party nominating the justice, the case type (abortion=0, sex discrimination=1), and the majority of the Senate at the time of the nomination on case outcomes from 1937 to 2020. Model two analyzed the effects of the gender of the justice, the president’s party nominating the justice, whether, the majority of the senate at the time of the confirmation, the type of case (Abortion (0), Sex Discrimination (1), and the ideological score (Martin-Quinn score) of the justice prior from 1937-1981 (during which there were no women on the Court). Model three analyzed the effect of gender, ideological score (MQScore), the president’s party nominating the justice, the case type (abortion=0, sex discrimination=1), and the majority of the Senate at the time of the nomination on case outcomes from 1981 to 1993 (when Sandra Day O’Connor was nominated in 1981 to when Ruth Bader Ginsberg was nominated in 1993). The period only has one woman on the Court. Model four analyzed the effect of gender, ideological score (MQScore), the president’s party nominating the justice, the case type (abortion=0, sex discrimination=1), and the majority of the Senate at the time of the nomination on case outcomes from 1993 to 2005 (when Ruth Bader Ginsberg was nominated in 1993 to when Sandra Day O’Connor finished her tenure on the Court). The period has two women on the Court. Model five analyzed the effect of gender, ideological score (MQScore), the president’s party nominating the justice, the case type (abortion=0, sex discrimination=1), and the majority of the Senate at the
time of the nomination on case outcomes from 2005 to present (when Ruth Bader Ginsberg, Sonia Sotomayor, and Elena Kagan are on the Court). The period has three women on the Court.

Finally, to analyze how the justices’ voting preference changes over time and whether the increase in women on the court has any influence, previous analysis done by Devins and Baum will be employed through the use of the Martin-Quinn scores (See Figure 1). Devins and Baum analyzed the ideological positions of the justices over time using Martin-Quinn scores. These scores are “based on a transformation of the patterns of interagreement on votes among the Justices, without a priori labeling of their ideological direction and with a procedure that is designed to minimize the impact of random fluctuations in the Justices’ voting from term to term that results from the specific mix of cases the Court hears” (Devins and Baum, 2017 310; Martin and Quinn 2002). The Martin and Quinn scores are dynamic measures that place the justice’s ideal preference point on a common ideological continuum. This was done for each justice in each term since 1937. They were then estimated using longitudinal data in the form of per-term merit votes derived from the Supreme Court Judicial Database (Clayton and McMillan 2012).
Figure 1: Supreme Court justice ideology based on Martin-Quinn scores from 1937 to 2019 (All Case Types).
CHAPTER 3

RESULTS

The graph in Figure 1 builds on prior research done by Devins and Baum (2019; 2017) by replicating and updating a key party of their analysis depicting that justices who were nominated by a Republican president tend to be more conservative (as denoted by the red line) and justices who were nominated by a Democratic president tend to be more liberal (as denoted by the blue line). The time period is from 1937 to 2019 and the cases are all the cases in each of the terms. The more conservative justices are toward the top of the graph and the more liberal justices are toward the bottom of the graph. The median justice over the different Court terms is highlighted by a black line. The median justice has not always been consistently around the 0 mark according to the ideal pint estimates, but it has slowly begun to drift toward the 0 mark as more Republican appointed justices have been confirmed.

Figure 1 also depicts how the justices nominated to the Supreme Court are likely ideologically representative over time, with an even number of conservative and liberal justices. This influence likely comes from how public opinion can sway who the elected political elites nominate for the Court, as Yalof (2001) discusses. This could also be an indication of when the Court becomes too ideological conservative or too ideological liberal, public opinion may play more of a role. Over time, the figure also suggests the country is moving more conservative, with the appointment of more conservative justices. But, some of the Republican appointed justices,
such as Justice Brennan, Justice Warren, Justice Blackmun, and Justice Stevens, drifted more ideologically liberal over their tenure on the Court. However, according to Devins and Baum’s (2019) theory, elected elites are the ones who influence the Court and polarization. Yet, the nomination of these justices who became more ideologically liberal over time may reflect public opinion at the time, more so than the elites influence, as according to Devins and Baum’s theory (2019), the justices likely should have remained more ideologically conservative over time, since they were nominated by Republican presidents. This is also evident in other justices, but the other way around, with them becoming more ideologically liberal, but still being conservative, as is the case with Chief Justice Rehnquist’s line. Figure 1 shows that Rehnquist was very conservative when he started as associate justice, but once he became Chief Justice in 1986, he became more ideologically liberal. Figure 1 also shows Justice Thomas becoming more ideologically conservative over time, since according to his Martin-Quinn score, he has become more conservative in his voting over his tenure on the Court. According to Figure 1, he is the only justice to become more ideologically consistent with what is initial ideology was in the beginning of his tenure. The rest of the justices either become more ideologically conservative or more ideologically liberal over time, the opposite of their ideological preferences they began with on the Court. However, with the nominations of Justice Ginsberg and Justice Sotomayor, something similar is happening here, where they are becoming more ideologically liberal over time.

Figure 1 illustrates how Justice Sandra Day O’Connor’s ideological voting preference has changed over time. She was nominated in 1981 by a Republican president. As a result, she would be expected to be more conservative. However, she held the line around zero as the median justice for her entire tenure on the Court. She was also known as a swing justice. What is
interesting here is that Chief Justice Roberts appears to have taken over the median justice role on the Court, with Kavanaugh on his line as well. However, since she was nominated by a Republican, one would likely expect her to be more ideologically conservative over time. This was not the case as she would sometimes vote more liberally or more conservatively on different issues, as one can see her line (the black line from 1981 to 2005) shows her becoming more ideologically liberal over time. Which, since she was a swing justice, this makes sense.

Figure 1 also depicts where the women on the Court have voted over time. Besides Justice O’Connor who was the median justice during her tenure on the Court, the other three women on the Court were nominated by Democratic presidents and have remained fairly liberal in their ideology. They even have begun to be more liberal over time. However, they are not the most ideological liberal justices to have been on the Court, as Justice Douglas, Justice Marshall, Justice Brennan (nominated by a Republican) and Justice Stevens (nominated by a Republican) have all been likely more liberal over time in their ideology, leading to the interpretation that gender likely will not have much effect on ideology. However, as Justice Ginsberg and Justice Sotomayor remain on the Court, they are becoming more ideologically liberal over time. Yet, this still suggests that gender likely does not affect ideology as much as the justices’ preferences and attitudes.

Finally, in analyzing whether polarization is occurring on the Supreme Court and to build upon and update previous research done by Devins and Baum (2019), Figure 1 depicts the current nine justices on the Supreme Court. The justices toward the top of the figure on the right side are Justice Thomas, Justice Alito, Justice Gorsuch, Justice Kavanaugh, and Chief Justice Roberts. They are all above zero on the figure, meaning they are more conservative, and they were nominated by Republican presidents. While the justices toward the bottom of the figure on
the right side are Justice Breyer, Justice Kagan, Justice Ginsburg, and Justice Sotomayor. They are all below the zero on the figure and are thus more liberal in their ideology. They were also nominated by Democratic presidents. There is over a one-point gap between the two voting blocs: between Chief Justice Roberts and Justice Breyer. These likely highlights polarization. What this could also tell us is that Chief Justice Roberts, as the median justice, may be inclined to vote with the more liberal justices as well.

To test my three hypotheses, five models were run to test the effects of various variables on case outcomes. (See Table 1). The first model was run from 1937 to the present Court. It highlights the effects of being female, the ideological score, the president’s party nominating the justice, the majority of the Senate at the time of the nomination of the justice, and the case type. The results show that all five variables influence the justice to more likely vote liberal.

Model 2 highlights the effect of the partisanship variables (president’s party and majority of Senate) influencing the case outcomes prior to the tenure of Sandra Day O’Connor on the Supreme Court. The justices are more likely to vote liberal. However, the ideological score variable has no effect. But case type does influence case outcomes. The justices are more likely to vote liberal in both abortion and sex discrimination cases.

Model 3 highlights the effect of gender on the Court with the nomination of Sandra Day O’Connor in 1981. The model shows that one woman does not influence the case outcomes to be more liberal or conservative. The partisanship variables are still the ones influencing the case outcomes at this point, along with the case type.

Model 4 highlights the effect of gender on the Court with the nomination of Ruth Bader Ginsberg in 1993. The model shows that two women do not influence the cases outcomes to be more liberal or conservative. This model shows that the partisanship variables are still the ones
influencing the case outcomes. However, the case type does not influence the case outcomes anymore.

Model 5 highlights the effects of gender on the Court with the retirement of Sandra Day O’Connor and the nomination of two additional women the Court. The model shows that three women do influence cases outcomes to be more likely liberal. Thus, until more women are on the Court and they are ideologically liberal, gender has no influence. This could be because Justice Sandra Day O’Connor was nominated by a Republican president, or it could be because at most there have only ever been three women on the Supreme Court at the same time.
Table 1
Partisanship and Gender Influence on Case Outcomes

<table>
<thead>
<tr>
<th></th>
<th>Case Outcome (Liberal=1, Conservative=0)</th>
<th>OLS Linear Probability Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intercept</td>
<td>1.15*** (1.04, 1.27)</td>
<td>1.03*** (0.77, 1.30)</td>
</tr>
<tr>
<td>Female</td>
<td>-0.18*** (-0.30, -0.05)</td>
<td>0.12 (-0.26, 0.51)</td>
</tr>
<tr>
<td>Ideological Score (MQScore)</td>
<td>-0.21*** (-0.35, -0.08)</td>
<td>0.10 (-0.11, 0.31)</td>
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<tr>
<td>President Party Nominating Justice (1 is Democrat)</td>
<td>-0.08*** (-0.15, -0.004)</td>
<td>0.09* (-0.01, 0.18)</td>
</tr>
<tr>
<td>Case Type (Abortion=0, Sex Discrimination=1)</td>
<td>-0.16*** (-0.24, -0.07)</td>
<td>-0.15*** (-0.26, -0.04)</td>
</tr>
<tr>
<td>Majority of Senate at Time of Nomination (Democrat=1)</td>
<td>-0.35*** (-0.46, -0.24)</td>
<td>-0.32*** (-0.59, -0.06)</td>
</tr>
<tr>
<td>Observations</td>
<td>750</td>
<td>426</td>
</tr>
<tr>
<td>R²</td>
<td>0.11</td>
<td>0.04</td>
</tr>
<tr>
<td>Adjusted R²</td>
<td>0.10</td>
<td>0.03</td>
</tr>
<tr>
<td>Residual Std. Error</td>
<td>0.45 (df = 744)</td>
<td>0.47 (df = 421)</td>
</tr>
<tr>
<td>F Statistic</td>
<td>18.44*** (df = 5; 744)</td>
<td>4.30*** (df = 4; 421)</td>
</tr>
</tbody>
</table>

Note: *p < 0.05; ** p < 0.01; *** p < 0.001. Standard errors in parentheses.
CHAPTER 4
DISCUSSION/CONCLUSION

According to Devins and Baum (2019; 2017), the Court today is different from past Courts because of how party and ideology are now linked. This is because of the growth in polarization that has occurred amongst political elites. Political elites are the ones who continue to influence the Supreme Court because of their influence in the nomination process. Currently, the Supreme Court ideological lines coincide with party lines. This is because every Democratic president, since the succession of Elena Kagan for John Paul Stevens, has nominated a Supreme Court justice who has had a more liberal voting record. This can be seen in Figure 1. The same can be said of every Republican president, as their appointees have had a more conservative voting record. This can be seen in Figure 1. The results in Figure 1 are likely consistent with what Devins and Baum found in terms of polarization occurring on the Supreme Court through the influence of partisanship between elites.

I set out to assess the nature and extent to which a combination of polarization on the Supreme Court over time and the appointment of more women on the Court, if there has been an influence in the justices’ votes and resulting case outcomes – in gender and sex discrimination
cases – over time. Polarization on the Court has increased because elite influence has grown substantially in how and why justices are nominated (Devins and Baum 2019). Presidents are more likely to nominate justices who align with their ideological preferences and the Senate is now more likely to vote in favor of the justices who share their ideological preferences as well. Prior analysis done by Devins and Baum (2019) set the stage for this research, as I was interested in analyzing the effects of polarization on women’s rights cases. The results of this analysis are shown in Figure 1. The results in Figure 1 updates and confirms Devins and Baum’s (2019) theory of elite polarization amongst elected elites in the partisanship variables (President’s party and Senate majority) has grown and had effects on the Supreme Court. It shows this is more of the case in recent times, as Devins and Baum (2019) argue polarization on the Supreme Court is a relatively new phenomenon occurring after 1990. As a consequence, it is reasonable to expect that partisan and ideological polarization will have an effect on the justices’ votes in gender-related cases. But I also wanted to analyze if gender affected case outcomes and whether or not they were more ideologically conservative or ideologically liberal in their voting patterns.

As for the effect of gender, I expected female justices to vote more liberally in abortion and sex discrimination cases. However, it was not until the period in Model 5 that gender plays a role. This is because of the increase in the number of female justices on the Court. The reported results of the female variable are statistically significant. This means the variable female influences the justices’ ideology to be more liberal in Table 1, Model 5. This is likely because there are three women on the Court after 2005. (See Table 1). One would expect women justices to vote more liberal, as three out of the four women who have been nominated to the Court have been nominated by Democratic presidents. Since models 2, 3, 4, and 5 are after a woman was nominated to the Supreme Court, there has been some interesting reported results. In models 2
and 3, after the nomination of justice Sandra Day O’Connor and the nomination of justice Ruth Bader Ginsberg, gender has no effect on case outcome and whether the justices are more likely to vote conservatively or liberally. This could be because justice Sandra Day O’Connor was nominated by a Republican president and justice Ruth Bader Ginsberg was nominated by a Democratic president. Model 5 shows that once there are three women on the Court after 2005, then gender is relevant to whether the justice votes more liberally or more conservatively on case outcome. This could be because all three of the women were nominated by Democratic presidents. Which shows that gender is a force influencing case outcomes when there are more women on the Supreme Court.

The attitudinal model can also help explain the results. A degree of judicial impartiality is expected from the judges on the Court; however, judges are still human beings who have certain ideological and personal values that do not disappear when they vote on a case (Segal and Spaeth 2002). This is true for the polarized issue of abortion. All five models used the case type variable, with the court cases being either about abortion or sex discrimination. It can help explain the divide between Republican appointed justices and Democratic appointed justices, after the exit of justice O’Connor and justice Kennedy, who were both Republican appointed justices that voted in favor of abortion rights in 1992. This also explains their own attitudes and beliefs that justices hold to influence their votes on abortion. The more liberal justices currently on the Court – Ginsberg, Breyer, Kagan, and Sotomayor – are more likely to vote in favor of abortion rights; while the more conservative justices on the Court – Roberts, Gorsuch, Thomas, Kavanaugh, and Alito – are more likely to vote against abortion rights. (See Figure 1).
The multivariate analysis in Table 1 is also counterintuitive from what would expect in the partisanship variables. Democratic appointed justices would likely vote more liberally while Republican appointed justices would likely vote more conservatively. However, partisanship seems to work in the opposite way, which would suggest polarization is not the overriding force in the sex discrimination cases. The results do suggest that polarization is a force influencing the case outcomes in the abortion cases. Ideology of the justices is the prevalent factor over time driving the justices votes in different cases outcomes, especially in sex discrimination cases. This reiterates the attitudinal model and how justices are likely to vote based on their attitudes and preferences. Yet, Model 5 in Table 1 also shows that gender matters in case outcomes only when there are more women on the Court and when there is a liberal woman on the Court. A possible explanation for the partisanship variables causing the results to be the opposite of what we would expect is that the possible correlations between the independent variables, as Democrats make it less likely that justices will vote liberally. This is a limitation to my research and an issue that would have to be addressed in future research.

Another limitation of this study is the endogeneity problem that comes from using purely the Martin-Quinn score to account for a measure of ideology. A combination of the Martin-Quinn scores and the Segal-Cover scores would account for this problem. While the Martin-Quinn scores are measures taken of how the justice votes while on the Court over time, the Segal-Cover scores account for the votes prior to being on the Supreme Court, thus resulting in the elimination of the endogeneity problem, as their votes prior and after tenure on the Court are taken into consideration. Additional research would also compare specific justices by subtracting their Martin-Quinn score from .5 for additional analysis of how polarized the justices are today. It would be useful to observe how polarization between justices are on reproductive rights cases
and sex discrimination cases. Alternatively, another path that would be useful in the study of polarization would be to analyze additional data about the cert process, because it may show how a minority of the Court gets to set the agenda, which would be relevant for the discussion of polarization.

Overall, in spite of these and other limitations, this study makes an important contribution to the literature on judicial decision making and the literature on the polarization on the Supreme Court, by focusing on how the presence of having women on the Court does influence the polarization on women’s rights issue cases after there is more of them on the Court and when the women on the Court are liberal in their ideology. However, it also shows that ideology is and remains the prevalent force behind justices’ decision making and thus subsequent case outcomes. This is important to study in order to demonstrate how the Supreme Court is no longer dominated by men through an influence of more liberal female justices being appointed by Democratic presidents.
REFERENCES


APPENDIX

DESCRIPTIVE STATISTICS
### Descriptive Statistics Table

<table>
<thead>
<tr>
<th>Statistic</th>
<th>N</th>
<th>Mean</th>
<th>St. Dev.</th>
<th>Min</th>
<th>Pctl(25)</th>
<th>Pctl(75)</th>
<th>Max</th>
</tr>
</thead>
<tbody>
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<td>Female (Female=1, Male=0)</td>
<td>750</td>
<td>0.1</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
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<tr>
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<td>0.4</td>
<td>0.5</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
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<td>Majority of Senate at Time of Nomination (Democrat=1, Republican=0)</td>
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<td>0.9</td>
<td>0.3</td>
<td>0</td>
<td>1</td>
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<td>1</td>
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<tr>
<td>Case Outcome (Liberal=1, Conservative=0)</td>
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<td>0</td>
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<td>Case Type (Abortion=1, Sex Discrimination=1)</td>
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<td>0.4</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Ideological Score (MQScore: Very Liberal -6 to very conservative +4)</td>
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<td>0.1</td>
<td>0.2</td>
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<td>0.1</td>
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