

You Think; Therefore I Am: Gender Schemas and Context in Oral Arguments at the Supreme Court, 1979–2016

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Abstract

Attorneys' ability to secure justice-votes is shaped by gender schemas, subconscious expectations which hold women should use more emotion than men. This poses few problems for male attorneys since men and attorneys are both expected to avoid emotion. But, women are placed in a double-bind with competing professional and personal expectations. We argue gender schemas are not static rather they change with the context of the Court. Introducing a new dataset inclusive of all oral arguments from 1979 to 2016, we utilize quantitative textual analysis and find gender schemas predict securing justice-votes as the Bar becomes more diverse and justices become more conservative. Our results raise normative concerns about female attorneys' ability to substantively contribute to the Court's case law.

Keywords

gender schemas, oral arguments, attorneys, U.S. Supreme Court, diversity

As a first-year law student in the 1950s, Ruth Bader Ginsburg was asked by Harvard Law School Dean Erwin Griswold why she was taking a seat that would otherwise go to a man (Ginsburg 2016). Twenty-five years later Chief Justice Burger openly voiced opposition to female law clerks and justices, arguing they were unfit for the rigors of the Court (Thomas 2019; Woodward and Armstrong 1979). These blatantly sexist comments were the product of prevailing gender schemas holding the law was a male domain (e.g., Haire and Moyer 2015; Norgren 2018; Schneider and Bos 2019). Over the past several decades, the role of women, in society broadly and the legal profession specifically, has changed remarkably (Faludi 1991; Fileborn and Loney-Howes 2019; Haire and Moyer 2015; Rhode 2002); though, implicit sexism remains (Noonan and Corcoran 2004). While women now constitute approximately a quarter of all oral advocates at the Court, they are often evaluated by how well they conform with gender schemas (Gleason 2020; Szmer et al. 2010; Patton and Smith 2017), implicit expectations about how women and men should act in a host of contexts (Bem 1979; Hudak 1993; Patton and Smith 2020). This often occurs through language (Gleason 2020).

Collectively, existing studies find female attorneys more effectively secure justice-votes when conforming with gender schemas. But, existing work is restricted to

brief time periods where the Court's context is relatively static. Since gender schemas dynamically change with the broader social and political context (e.g., Sanbonmatsu 2002, 2008), the relative importance of gender schemas in attorneys securing justice-votes should likewise change over time. Thus, we must consider the Court's changing context to fully understand how gender schemas shape attorneys obtaining justice-votes.

Since the legal profession's culture is overwhelmingly male (Gorman 2005; Rhode 1994, 2002), male gendered expectations align with attorneys' professional expectations (Gleason et al. 2019). This is due to an often overtly sexist history (Norgren 2018) which has implications to the present day (Kaheny et al. 2015; Sarver et al. 2008; Epstein et al. 1995; Noonan and Corcoran 2004). Consequently, despite an increasingly gender diverse Bar, the

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Court's case law is predominantly male in source and composition (e.g., [Patton and Smith 2020](#)). The prevalence of gender schemas raises normative questions about how effectively women can advocate for their clients and, more importantly, the extent to which female attorneys and their arguments can substantively shape the Court's decision-making process in a myriad of ways (e.g., [Mansbridge 1999](#); [Pitkin 1967](#); [Scherer and Curry 2010](#)).

We explore how the Court's changing context alters the extent to which gender schemas predict attorneys securing justice-votes via quantitative textual analysis of a new dataset encompassing 39 years of oral argument transcripts. We contend the changing context alters how gender schemas shape justice-votes ([Funk et al. 2021](#); [Sanbonmatsu 2002](#); [Bauer 2015](#)). We examine two contexts suggested by the previous literature, women's presence at the Bar (e.g., [Gleason 2020](#); [Hack and Jenkins 2021](#); [Kaheny et al. 2011](#); [Kanter 1977](#); [Szmer et al. 2013](#)) and justices' ideological preferences (e.g., [Bolzendahl and Myers 2004](#); [McDermott 2016](#); [Patton and Smith 2020](#); [Sanbonmatsu 2008](#)). We find increasing diversity at the Bar and justice conservatism increase reliance on gender schemas in predicting justice-votes.

Gender Schemas and Securing Justice-Votes

Attorney's ability to garner justice-votes is ultimately measured by how persuasive the justices find their arguments ([Johnson 2001, 2004](#); [Ringsmuth et al. 2013](#)). While professional qualifications and affiliation matter ([Black et al. 2016](#); [McAtee and McGuire 2007](#); [McGuire 1995](#)), scholars increasingly note immutable characteristics predict outcomes ([Gleason 2020](#); [Patton and Smith 2017](#); [Szmer et al. 2010](#)). Attorneys are better able to acquire justice-votes when arguments are gender schematic. Thus, an argument which secures justice-votes for male attorneys does not necessarily guarantee votes for female attorneys ([Gleason et al. 2019](#)). This poses few problems for male attorneys; male schemas and professional norms stress avoiding emotion and zealous advocacy (e.g., [O'Connor 2013](#)). But female schemas encourage emotional language and conflict avoidance. This is at odds with professional expectations, ([Rhode 1994](#); [Schneider and Bos 2019](#)). This is due to gender schemas (e.g., [Bem 1979](#); [McDermott 2016](#)).

Gender schemas construct behavioral expectations in innumerable contexts ([Bem 1979](#); [Hudak 1993](#)). But, schemas are not monolithic across decision-makers or contexts ([Bartlett 1932](#); [Diekman et al. 2005](#); [Haines et al. 2016](#); [Sanbonmatsu 2002](#)). As the context changes, so too does reliance on gender schemas. We examine gender schemas at the Court via two key contextual changes: the presence of women at the Bar and justice ideology. We

argue as more women appear at the Court, gender schematic arguments increasingly predict attorneys' ability to secure justice-votes ([Bauer 2015](#); [Sanbonmatsu 2002](#)). Since conservatives draw more heavily on gender schemas than liberals ([Klein 1984](#); [McDermott 2016](#); [Patton and Smith 2020](#); [Szmer et al. 2010](#)), we expect gender schematic arguments will more effectively secure conservative justice-votes. We now turn to detailed discussions of securing justice-votes, gender schemas, and our expectations.

Securing Justice-Votes

As legal generalists, the justices rely on attorneys to provide information via briefs ([Corley 2008](#); [Feldman 2017](#)) and oral arguments ([Johnson 2001, 2004](#); [Johnson et al. 2006](#)). But the Court does not privilege all attorneys equally ([Black and Owens 2012](#); [McGuire 1995](#); [Ringsmuth et al. 2013](#)). Securing justice-votes can be predicted by immutable characteristics including sex ([Harris and Sen 2019](#); [Szmer et al. 2010](#); [Gleason et al. 2019](#); [Gleason 2020](#); [Patton and Smith 2017, 2020](#)). Importantly, work on American and comparative courts suggests sex's impact on outcomes is context dependent across time and space.

Altering the context changes how gender shapes an attorney's potential to secure justice-votes. Female attorneys are less able to secure votes in some issue areas at the U.S. Supreme Court ([Szmer et al. 2010](#)) and the High Court of Australia ([Smyth and Mishra 2014](#)). By contrast, women are better able to secure justice-votes than men at the Supreme Court of Canada in most issue areas ([Kaheny et al. 2011](#)). While all three courts share the common law tradition, their bars vary in composition. The U.S. and Australian courts' bars are approximately 20% female; Canada's is 50%. Briefly, the context in American courts is such that gender schemas are salient for decision-makers (e.g., [Bauer 2015](#); [Sanbonmatsu 2002](#); [Taylor and Fiske 1978](#)). We argue changing the context alters how attorney sex impacts judicial decision-making, if only at the subconscious level.

Gender Schemas

Schemas are cognitive structures organizing and guiding perceptions of which traits are expected based on some characteristic (e.g., [Bartlett 1932](#); [Bem 1979](#); [Hudak 1993](#); [Sanbonmatsu 2002](#)). Schemas are constructed subconsciously as early as childhood ([Cunningham 2001](#)) through socialization ([Hudak 1993](#); [Klein 1984](#)). Since sex is one of the first things noted in interactions ([Shih et al. 1999](#)), gender schemas are commonly employed in personal and professional contexts ([Sanbonmatsu 2002](#)). Thus, frequently observing women in leadership positions translates into associating women with leadership. The inverse is also true, rarely seeing women in leadership

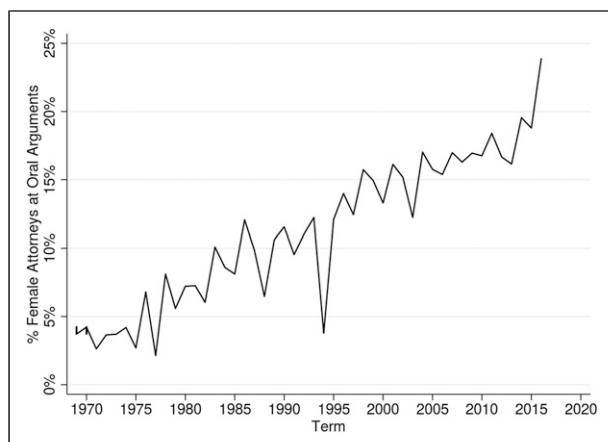


Figure 1. % Female Attorneys By Term

predicts viewing female leaders as deviant (Bolzendahl and Myers 2004; Klein 1984). Of course, reliance on schemas is not uniform across all decision-makers (Bartlett 1932; Carli 1990; Hudak 1993).

Gender schematic decision-makers frequently draw on gender schemas (Bem 1979; Frable 1989; Hershey 1977). Gender schematic decision-makers feel threatened by non-schematic behavior (e.g., Eagly and Karau 2002; Johnson et al. 2008) and sanction violators (Alexander and Andersen 1993). In the legal realm, gender schematic jurists expect female attorneys to behave in stereotypical feminine ways (e.g., Gleason 2020; Hudak 1993). Should women exhibit non-gender schematic behavior, such as appearing before an appellate court (Szmer et al. 2010), they will likely face sanction (Patton and Smith 2020).¹ Oral arguments present ample opportunities to either conform with or violate gender schemas, inclusive of body language, hair style, vocal pitch, and attire (Bauer and Carpinella 2018; Villemur and Hyde 1983). However, one of the key places gender schemas manifest is language (Carli 1990; Hudak 1993).

A sizable literature explores schemas through the use of language. Female trial court attorneys are critiqued for language praised in male attorneys (see for instance: Hahn and Clayton 1996; Hodgson and Pryor 1984). At the Supreme Court an attorney's capacity to secure justice-votes depends, in part, on the extent to which written and oral arguments comply with gender norms (Gleason et al. 2019).² Attorneys, both male and female, are more successful in securing justice-votes when the level of emotion in their oral arguments is gender normative (Gleason 2020). This is to say, female attorneys are more likely to secure justice-votes when they eschew the professional norm of avoiding emotion in favor of the gendered norm of employing emotion. The opposite is true for male attorneys; men are less likely to gain justice-votes with emotional arguments.³ But this is context dependent.

Context is pivotal to a myriad of aspects of judicial outcomes (see for instance: Murphy 1964; Collins et al. 2010). The bench's changing diversity (Haire and Moyer 2015; Szmer et al. 2015), jurists' views and experiences (Boyd et al. 2010; Glynn and Sen 2015; Patton and Smith 2020), and specific attorneys' roles (Gleason and Ivy 2021) change how gender shapes votes. Similarly, we contend context shapes how gender schemas impact attorneys' ability to secure justice-votes (Kaheny et al. 2011). While the legal profession is increasingly gender diverse (ABA 2018), the Supreme Court Bar remains predominantly male in both composition and culture (Kaheny et al. 2015; Sarver et al. 2008) Figure 1 shows the percentage of female attorneys arguing at the Court from 1979 to 2016.⁴ During the 1980s, women exceed 10% of attorneys in just three terms. Prior to 2002, women never exceed 15% of direct party attorneys at the Court. Into the 2000s, women remain rare at the Bar. An expansive literature emphasizes the size of women's presence in a given context shapes how gender predicts outcomes. Thus, the overall presence of women at the Bar shapes the extent to which compliance with gender schemas shapes justice-votes (e.g., Childs and Krook 2006; Holman and Mahoney 2018).

The extent to which sex predicts outcomes varies across institutions and roles. Greater diversity amongst judges leads to the emergence of different decision-making styles (Collins et al. 2010; Scheurer 2014; Szmer et al. 2015) and produces more legally nuanced decisions (Haire et al. 2013). However, in legislatures the presence of women operates differently; women in parliamentary parties that have reached critical mass⁵ are less likely to participate in floor debates (Bäck and Debus 2019). However, this effect is conditional on the context of the institution in question (e.g., Holman and Mahoney 2018). Moreover, the impact of increased diversity in an institution is not always uniform (Childs and Krook 2006) nor a linear progression toward more inclusion (Funk et al. 2021). Shifting our focus back to the Court, we contend gender schematic language does not predict female attorneys securing justice-votes when women occupy few places at the Bar because low numbers magnify competence for decision-makers (Abramson et al. 1977; Taylor and Fiske 1978). But, as more women come to the Bar the context changes and evaluations are increasingly rooted in gender schemas (Bauer 2015; Sanbonmatsu 2002; Wilson et al. 1985). We now turn to a detailed discussion of our expectations.

A minority group's size in an institution impacts the salience of difference for decision-makers (Kanter 1977; Karpowitz and Mendelberg 2014), if only implicitly (e.g., Harris and Sen 2019).⁶ This shapes the relative importance of that difference in predicting outcomes. When a minority is rare in a given context, observers, in this case

justices, often magnify the competence of actors with that trait (Abramson et al. 1977; Taylor and Fiske 1978). Importantly, sex is one of the first things noted in interactions (Shih et al. 1999); especially at low levels of presence (Taylor and Fiske 1978). This suggests compliance with gender schemas should not predict justice-votes when few female attorneys appear at the Bar.

Trailblazer female attorneys constituted a small part of the Bar and their presence was highly salient (Norgren 2018). Early female attorneys were generally more able to secure jurist-votes than their male counterparts (Cohen and Peterson 1981; Hodgson and Pryor 1984; Villemur and Hyde 1983). This is not to say early female attorneys did not face sexism; they endured a great deal (Epstein et al. 1995; Ginsburg 2016; Haire and Moyer 2015; Norgren 2018). However, rarity magnified competence (Hodgson and Pryor 1984) and thus helped secure jurist-votes without respect to gender schematic language.

As context changes so too does the salience of difference (Funk et al. 2021; Kanter 1977; Sanbonmatsu 2008; Scheurer 2014). As the number of women in a given context increases, observers are less likely to magnify competence.⁷ This is well illustrated by work on management and legislatures. Wilson et al. (1985) note female executives are perceived as more competent when occupying one position in a group of ten executives; but as the number of female executives increases (and thus moves beyond rarity) women's perceived competence decreases (see also: Abramson et al. 1977). Work on critical mass in legislatures indicates as the overall presence of women in the institution changes, so too does the way in which gender shapes outcomes (Thames and Williams 2013).⁸ Importantly, this does not always manifest as more participation or more favorable evaluations (Bäck and Debus 2019; Childs and Krook 2006; Holman and Mahoney 2018).

Since the way gender shapes outcomes is often institution dependent (Funk et al. 2021; Thames and Williams 2013), it is useful to examine how gender shapes outcomes on appellate courts. One line of research finds female attorneys are better able to secure jurist-votes as their presence at the Bar increases (e.g., Szmer et al. 2010, 2013; Kaheny et al. 2011). Yet these studies focus on the presence of female attorneys, not how they argue their case (see for instance: Hack and Jenkins 2021). Importantly, gender is more complex than a binary marker; rather it is better thought of as a performance (Biernat et al. 2012). To this end, another line of research notes female attorneys are more able to secure justice-votes when utilizing gender normative language (Gleason et al. 2019; Gleason 2020). Particularly as these studies only include terms where women never occupy less than 13% of the Bar,⁹ it stands to reason that once women move beyond a small number of positions at the Bar their ability

to secure justice-votes will depend on compliance with gender schemas. Thus:

Hypothesis 1 As the percentage of women at the Court increases, so too does the importance of gender schematic arguments in predicting justice-votes for the attorney.

Ideology, a powerful predictor of judicial decision-making (e.g., Segal and Spaeth 2002), also shapes views on gender (Bolzendahl and Myers 2004; Reingold and Foust 1998; Sanbonmatsu 2002; Valentino et al. 2018). Notably, this relationship became more pronounced over the past 30 years (e.g., Haines et al. 2016; McDermott 2016). Liberal ideology predicts feminist sympathy from men (Klein 1984; Reingold and Foust 1998; Rhodebeck 1996)¹⁰ and ideological conservatism is associated with gender schematic views (Diekman and Goodfriend 2006; Eagly and Steffen 1984; Johnson et al. 2008). More liberal men and women are more supportive of equal pay and affirmative action (Conover 1988) because liberals tend to attribute inequality in the distribution of rewards to external forces which need to be rectified. Conservatives tend to attribute inequality to the individual and thus rely more on gender schemas to make evaluations (e.g., Briscoe and Joshi 2016; Gurin et al. 1978). The relationship between ideology and gender schemas often manifests via language (e.g., Roberts and Utley 2020) and ideology and gender schemas are linked in judicial decision-making (e.g., Patton and Smith 2020; Szmer et al. 2010).

Conservative jurists rely more heavily on gender schemas to evaluate attorneys than their liberal counterparts (Patton and Smith 2020; Szmer et al. 2013). At federal appellate courts and the Supreme Court, female attorneys are less likely to secure the votes of conservative jurists because conservative jurists are more gender schematic and less open to women occupying non-traditional roles, such as arguing at appellate courts (Patton and Smith 2020; Szmer et al. 2010, 2013). It stands to reason:

Hypothesis 2 As a justice becomes more conservative, so too does the importance of gender schematic arguments in predicting an attorney's potential of obtaining the justice-votes.

Data and Methods

We assemble a new dataset of all orally argued U.S. Supreme Court cases resulting in a signed opinion or judgment from 1979 to 2016 (Spaeth et al. 2018).¹¹ We gather oral argument transcripts (Patton and Smith 2017) and create an individual transcript of each attorney's

utterances excluding those from justices and opposing counsel. Our unit of analysis is the justice-vote for each attorney; in a case where nine justices cast votes, we have nine observations for the petitioner's (respondent's) attorney. We analyze 1,987 unique cases and 35,222 justice-votes. Our dependent variable is a dichotomous marker of whether the justice votes for the attorney's party at the merits (Spaeth et al. 2018). We posit the impact of gender schematic arguments on attorneys' ability to garner justice-votes is context dependent. Accordingly, our two primary independent variables are interaction terms. Each contains attorney sex and gender schematic language. This is combined with the lagged percentage of female attorneys arguing at the Court that term (justice ideology). We measure gender schematic language in each transcript with the Linguistic Inquiry Word Count software (hereafter: LIWC) (Pennebaker et al. 2007). LIWC extracts over 80 different properties of speech from documents; we utilize affective, or emotional, language.¹² We choose this measure because gender schemas hold women should use more affective language than men (Biernat et al. 2012; Eagly and Carli 2007; Newman et al. 2008).

Additionally, affective language is utilized by several existing studies of attorney success. While attorneys are instructed to avoid affective language (Black et al. 2016), the Court's enforcement is gendered. Male attorneys are more apt to secure justice-votes when using low levels of affect whereas female attorneys are more apt when using higher levels of affect (Gleason 2020). We transform the affect measure to reflect how well each argument complies with gender schemas by noting whether each attorney is male or female via the honorific used in the transcript.¹³ We set this value to "1" for female attorneys, "0" for male attorneys. Since we are interested in the extent to which each attorney's argument is gender schematic, we multiply the affect value by -1 for male attorneys and $+1$ for female attorneys. Positive values are schematic and negative values are non-schematic.

To further illustrate gender schematic language, consider the following two excerpts from oral argument transcripts. The first, from Jean Kamp,¹⁴ has low affect and is gender schematic for male (but not female) attorneys. The second, from Charles Rothfield,¹⁵ has high affect and is gender schematic for female (but not male) attorneys. Affect words are in bold.

I'm not aware of any of that **kind** of evidence... which requires a minimum of 70 square feet and it says that if you have to go below that on an emergency basis for more than a week, you're going to have to assume that you're going to have increased disease and increased disciplinary **problems**. I think the court's finding of that was **true**, **certainly** not clearly erroneous, as simply—

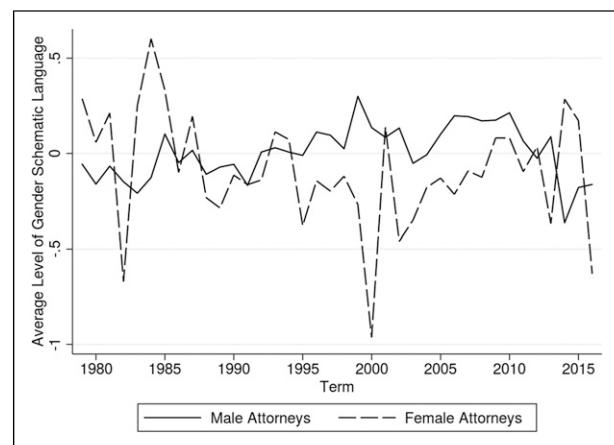


Figure 2. Level of Gender Schematic Language by Attorney Sex

With **respect**... I would suggest that's one of the government's odder **arguments**. I think that reading any significance to the use of "the" rather than "the" in this context is quite **peculiar**... **Certainly** the use of doesn't suggest some **contemplation** of multiple alternative regimes of **punishment**. So I think the government, I give them kudos for **creativity** there, but I think it's very **difficult** to read any conscious choice by Congress in the use of the different article.

In both instances, the affect words seem trivial and without linguistic value. Indeed, words, such as "argument," are standard for attorneys. However, gender operates in language at an implicit level. This is illustrated by function words (e.g., "of," "and," and "the") which predict the evaluation of men and women in several contexts (Jones 2016; Pennebaker 2011) despite conveying little independent content. Here, men and women differ in usage of gender schematic language, but the presence and size of that difference varies over time. Figure 2 shows the average levels of gender schematic language by attorney sex from 1979 to 2016. Women generally use less gender schematic language than their male counterparts since the early-1990s.¹⁶ While there is term-level variation, a *t*-test indicates women use significantly less gender schematic language than men ($p = 0.003$).

Turning to the third variables in our interaction terms, we note the lagged percentage of female attorneys each term (Hypothesis 1).¹⁷ We measure justice ideology (Hypothesis 2) via the Judicial Common Space's justice ideology measure (Epstein et al. 2007).¹⁸ Because of the nature of our hypotheses, we create two three-way interaction terms. The first is gender schematic language, attorney sex, and the lagged percentage of female attorneys. The second is gender schematic language, attorney sex, and justice conservatism.¹⁹ These constitute our primary independent variables.

We include a number of control variables suggested by the previous literature. Since the Court generally defers to its former clerks (Kromphardt 2015), we include a dichotomous measure of whether the attorney previously clerked. The Court typically defers to the solicitor general (Black and Owens 2012), so we include a binary marker of whether the attorney represents the federal government. The Court often grants review to reverse lower courts; so we include a binary measure denoting whether the attorney represents the petitioner (Spaeth et al. 2018). Because attorneys presenting more lexically complex oral arguments are better able to secure justice-votes (Gleason 2020), we include LIWC's measure of words longer than six letters.

Since more experienced attorneys are better able to secure votes (McGuire 1995; McAtee and McGuire 2007; Ringsmuth et al. 2013), we include the experience differential for each attorney. We create a running tally of all previous appearances set to "0" the first time an attorney appears²⁰ and increments by one for each subsequent appearance.²¹ To create each attorney's differential, we subtract their opponent's appearances from their appearances. Attorneys are less successful when receiving more oral argument questions than their opponents (Patton and Smith 2017; Johnson et al. 2009). We note the total number of judicial utterances during each attorney's oral argument and create a question differential for each attorney relative to their opponent in the same fashion as the experience differential.²² Since "haves" tend to come out over "have nots" (Galanter 1974), we include ordinal measures of party capability for both the attorney's party and that of their opponent (Szmer et al. 2010). Since attorney success increases with more amicus curiae briefs relative to their opponent (Collins 2008), we create an amicus brief differential. Because amicus briefs filed by the solicitor general carry special weight (Black and Owens 2012), we note whether an attorney is supported or opposed by the solicitor general's amicus brief (Nicholson and Collins 2008). This takes on a value of "-1" if the attorney is opposed by the solicitor general; "1" if supported; "0" otherwise.

Female justices may be more sympathetic to female attorneys because they experienced many of the same difficulties in their legal careers (Haire and Moyer 2015). Accordingly, we include a dichotomous marker noting justice sex interacted with attorney sex. Because the presence of female law clerks can change voting behavior under some conditions (Kromphardt 2017), we include the percentage of each justice's law clerks who are female each term interacted with attorney sex. Since justices often vote their ideological preferences (Segal and Spaeth 2002), we include a measure of ideological congruence between attorney and each justice by noting whether each attorney represents the liberal position, as defined by the

decision-direction of the lower court and interact that measure with each justice's ideology score (Epstein et al. 2007; Spaeth et al. 2018).

Because female attorneys are better able to secure justice-votes and are interrupted less frequently in women's issue cases (Patton and Smith 2017, 2020; Szmer et al. 2010), we include a dichotomous measure noting women's issue cases (Szmer et al. 2010) which we interact with attorney sex. Because our dependent variable is dichotomous, we employ a logit model with standard errors clustered on the justice.²³

Results

Since several of our variables are closely linked theoretically, we present three separate models in Table 1. At first glance, our results seemingly suggest female attorneys are less able to secure votes than male attorneys and gender schematic arguments increase the probability of securing justice-votes for all attorneys. But since we posit conditional hypotheses, we must utilize the interaction terms. Interaction terms cannot be evaluated in the same way as additive terms; all three constituent terms must simultaneously vary. This is best accomplished graphically (e.g., Brambor et al. 2006).

Figure 3 depicts the three-way interaction between gender schematic arguments, attorney sex, and the lagged percentage of women at the Bar. The left panel displays the interaction for male attorneys; the right for women. The y-axis depicts the percentage of female attorneys arguing at the Court that term while the x-axis represents the marginal effect of gender schematic arguments on attorneys' securing justice-votes. Should the reference line at $y = 0$ pass through the dashed-line 95% confidence interval, the interaction is insignificant at that particular level of lagged female attorney percentage. The first panel indicates when few women argue at the Court, gender schematic language predicts male attorneys securing justice-votes. But, as the lagged percentage of female attorneys increases the importance of gender schematic arguments in predicting male attorney success decreases.

The second panel indicates the opposite is true for female attorneys; when few women appear at the Bar, gender schematic language decreases the probability of securing votes. As the lagged percentage of female attorneys increases, the importance of gender schematic arguments in predicting female attorneys obtaining justice-votes increases. When women exceed 10% of attorneys at the Bar, gender schematic arguments begin to predict justice-votes. As the percentage of oral advocates increases, so do gender schemas' ability to predict justice-votes. Substantively, the marginal effect of gender schematic language exerts a slightly negative effect when 5% of all attorneys at the Bar are women. But when

Table 1. Securing Justice-Votes at Oral Arguments

	(1)	(2)	(3)
Female Attorney	−0.303* (0.120)	−0.294* (0.120)	−0.215 (0.123)
Gender Schematic Argument	0.080*** (0.023)	0.092*** (0.023)	0.105*** (0.023)
Lagged % Female Attorneys/Term	−0.356 (0.207)	−0.672*** (0.181)	−0.728*** (0.188)
Female Attorney X Lagged % Female Attorneys/Term	3.538*** (0.997)	4.067*** (0.973)	2.985** (1.021)
Gender Schematic Language X Lagged % Female Attorneys/Term	−0.590** (0.189)	−0.718*** (0.172)	−0.696*** (0.179)
Female Attorney X Gender Schematic Language X Lagged % Female Attorneys/Term	2.800*** (0.487)	2.885*** (0.509)	2.522*** (0.490)
Justice Ideology	1.288*** (0.056)	1.262*** (0.052)	1.277*** (0.053)
Female Attorney X Justice Ideology	−0.161* (0.067)	−0.156* (0.068)	−0.147* (0.070)
Gender Schematic Language X Justice Ideology	0.022 (0.015)	0.021 (0.016)	0.021 (0.015)
Female Attorney X Justice Ideology X Gender Schematic Language	0.077 (0.044)	0.065 (0.042)	0.075 (0.041)
Former Clerk	0.095* (0.042)	0.227*** (0.037)	0.066* (0.029)
Federal Party	—	—	0.606*** (0.079)
Petitioner	0.680*** (0.057)	0.655*** (0.051)	0.664*** (0.053)
Lexical Complexity	0.091*** (0.007)	0.115*** (0.009)	0.071*** (0.008)
Experience Differential	—	0.003** (0.001)	—
Question Differential	−0.018*** (0.001)	−0.018*** (0.001)	−0.018*** (0.001)
Own Party Capability	0.097*** (0.018)	—	—
Opposing Party Capability	−0.117*** (0.017)	—	—
Amicus Brief Differential	0.053*** (0.009)	0.030*** (0.009)	0.042*** (0.010)
SG Amicus Brief Present	0.328** (0.119)	0.371** (0.126)	0.385** (0.126)
Female Justice	−0.011 (0.008)	−0.013* (0.007)	−0.017 (0.009)
Female Attorney X Female Justice	0.076 (0.055)	0.083 (0.051)	0.069 (0.060)
% Female Clerks	0.029 (0.023)	0.028 (0.022)	0.022 (0.020)
Female Attorney X % Female Clerks	−0.216 (0.168)	−0.229 (0.171)	−0.197 (0.177)
Liberal Position	0.858*** (0.083)	0.508*** (0.055)	0.610*** (0.059)
Liberal Position X Justice Ideology	−2.534*** (continued)	−2.484*** (continued)	−2.508*** (continued)

Table 1. (continued)

	(1)	(2)	(3)
Women's Issue	(0.118)	(0.111)	(0.113)
Female Attorney X Women's Issue	-0.103 (0.058)	-0.151* (0.060)	-0.102 (0.052)
Constant	0.353 (0.266)	0.517 (0.275)	0.497 (0.271)
% Correctly Predicted	-0.704*** (0.075)	-0.575*** (0.047)	-0.733*** (0.057)
Proportional Reduction in Error	67.36%	66.05%	66.69%
Observations	35222	35222	35222

Standard errors clustered on justices in parentheses.

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$.

women constitute 30% of the Bar, gender schematic language increases the predicted probability of attorneys securing justice-votes from -0.02 to 0.09. This provides support for Hypothesis 1.

Figure 4 depicts the interaction between gender schematic arguments, attorney gender, and justice conservatism. Figure 4's layout is identical to Figure 3 above, but the y-axis depicts justice ideology with higher values indicating more conservative justices. The left panel shows gender schematic arguments do not impact male attorneys securing the votes of liberal justices. For more conservative justices, gender schematic language has a small positive effect on male attorneys securing justice-votes. The second panel shows gender schematic arguments have no bearing on female attorneys securing votes of liberal justices. But as the justices become more conservative, gender schematic arguments predict female attorneys' capacity to garner votes. Substantively, moving from a purely moderate justice (JCS = 0.00) to the most conservative justice (JCS = 0.80) increases the marginal effect of gender schematic language in predicting securing justice-votes from -0.001 to 0.03, an increase of 0.025. This provides support for Hypothesis 2.

A number of control variables reach statistical significance. Since logit coefficients are unintuitive, we discuss results in terms of predicted probabilities.²⁴ Previously, serving as a clerk increases the predicted probability of gaining justice-votes by 0.02. A one standard deviation increase in lexical complexity increases the predicted probability of securing justice-votes by 0.02. Attorneys representing petitioners have a predicted probability of securing votes 0.14 higher than respondent's counsel.

A one standard deviation increase in question differential decreases the predicted probability of justice-votes by 0.09. A one standard deviation increase in amicus brief advantage increases the predicted probability of securing votes by 0.03. Related, an attorney supported by an

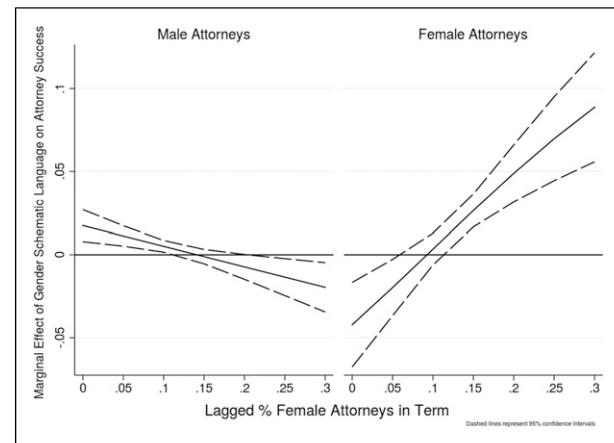


Figure 3. Interaction Between Gender Schematic Argument & Lagged % of Female Attorneys Per Term, By Attorney Sex

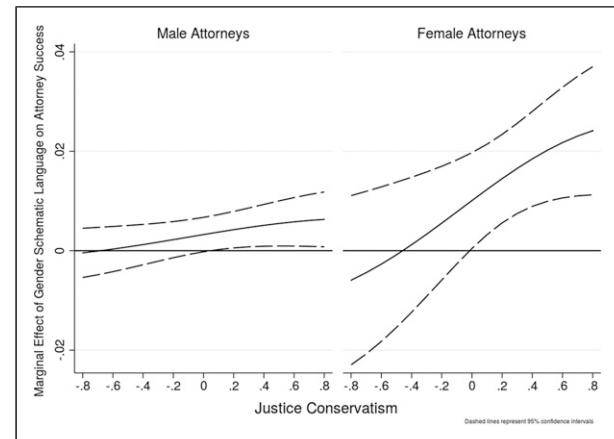


Figure 4. Interaction Between Gender Schematic Argument & Justice Ideology, By Attorney Gender

amicus brief from the solicitor general has a predicted probability of securing justice-votes 0.13 higher than an attorney opposed by the solicitor general's amicus brief.

Attorneys representing the federal government have a predicted probability of securing votes 0.13 higher than other attorneys.²⁵ A one standard deviation increase in attorney experience advantage increases the predicted probability of justice-votes by 0.01.²⁶ Attorneys are less likely to secure justice-votes as their opponent's party capability score increases. Going from the lowest category (individual) to the highest (federal government), decreases the predicted probability of securing votes by 0.13. Similarly, the probability of justice-votes increases along with party capability. Moving from representing an individual to representing the federal government increases the predicted probability of success from 0.46 to 0.56. Attorneys are more likely to secure the justice-vote when the attorney's position is ideologically congruent with the justice.²⁷

Discussion

Securing justice-votes is the product of many things, not the least of which is conformance with justices' subconscious gender schematic expectations about how attorneys should act (e.g., Gleason et al. 2019; Gleason 2020; Szmer et al. 2010). The prevalence of gender schemas is tied to the context both in terms of institutional composition and the justices' ideological preferences. When few women are at the Bar (less than 10%), gender schemas have little effect because rarity magnifies perceived competence (Taylor and Fiske 1978). But, as women's presence increases so too does the predictive power of gender schemas (e.g., Sanbonmatsu 2008). Additionally, as the justices become more conservative gender schematic arguments are more likely to secure justice-votes (Klein 1984). Our results provide new insight into how context and the performance of gender shapes outcomes at the Court. They also raise a number of new normatively troubling questions, which future scholars should more fully explore.

From a normative perspective, increasing gender diversity at the Bar is important as it allows women to provide input into the contours of case law binding on the whole country through substantively different decisions (Haire et al. 2013; Boyd et al. 2010; Pitkin 1967). But we find as more women come to the Bar, justice-votes are increasingly based on the extent to which female attorneys conform with gender schemas. This means greater presence increases the need for women to balance competing personal and professional expectations (Rhode 1994). This demonstrates the operation of schemas is complex (e.g., Funk et al. 2021) and adds a new wrinkle to an already concerning area of scholarship. Our results prompt a number of follow-up studies exploring both the normative and empirical implications at a variety of courts.

A comprehensive exploration of how gender schemas operate at the Court must wait until women achieve parity at the Bar (e.g., Kaheny et al. 2015). Since the impact of gender in institutions can be non-linear, we suspect the relationship between presence and gender schemas will be parabolic (e.g., Funk et al. 2021). Thus, we speculate gender schemas have limited effect when few women are at the Bar *and* when at parity (Kaheny et al. 2011). However, when women represent a minority (Kanter 1977), their ability to secure justice-votes is dependent on conformance with gender schemas. This is likely conditional on the rate of change (Sanbonmatsu 2008).

Questions remain about the precise point of presence where schemas are activated. We note gender schematic arguments begin to predict securing justice-votes when women constitute 10% of the Bar; but the Court's context is complex (e.g., Gleason and Ivy 2021). We suspect other conditions also play a role in activating schemas. Future work should explore diversity amongst law clerks, major firms, and on the Bench itself (e.g., Kaheny et al. 2015) in order to more fully understand how context shapes the role of gender schemas. Indeed, the composition of all of the roles in tandem likely contributes to gender schemas' predictive power in any number of outcomes at the Court. While a full exploration cannot presently be done at the U.S. Supreme Court, other courts such as the Supreme Court of Canada and state supreme courts offer fruitful avenues.

Our results and the literature on Canada seemingly suggest female attorneys are in a transitional phase where they cannot "effectively" advocate; women can only do so at low and high levels of presence. This is, however, an overly simplistic view. Even when women are evaluated based on compliance with gender schemas, there is normative value in increased diversity at the Bar. A diversifying Bar can begin to shift the Court's culture, lay groundwork for future litigation campaigns, and descriptively represent both victims and aspiring attorneys, among others. Additionally, those women who appear at the Bar gain the experience which is often prerequisite for joining elite firms and judgeship (Haire and Moyer 2015). This alters the overall culture of the legal profession beyond just the Supreme Court Bar. Indeed, it may impact society as a whole (e.g., Thames and Williams 2013). Further explorations of these topics will add greater nuance to the collective understanding of how the Court's decisions impact a myriad of aspects of American life beyond just justice-votes.

Perhaps one of our more perplexing findings is the relationship between female attorney presence and gender schemas in predicting male attorneys securing justice-votes. While gender schemas and justice ideology track similarly for male and female attorneys, presence operates differently. Gender schematic language predicts male

attorneys securing justice-votes when few women argue at the Court. However, once female attorneys constitute 10% of the Bar gender schematic language *decreases* the probability of male attorneys securing justice-votes. While we leave a full exploration to future scholars, we believe recent work exploring masculinity offers a starting point. While masculinity manifests as expectations of behavior (e.g., [Gill et al. 2017](#); [McDermott 2016](#)), it inherently contains power elements ([Carbado 2012](#)). Given the Court's masculine ethos (e.g., [Kaheny et al. 2015](#); [Sarver et al. 2008](#)), it seems likely that the overall presence of men may shape the extent to which stereotypical masculine behavior predicts justice-votes. We encourage future scholars to examine this further on courts with different institutional contexts.

Given the Court's shift to the right after the confirmations of Justices Gorsuch, Kavanaugh, and Barrett, gender schematic arguments will likely be central for securing justice-votes in the near future. But, ideology is just one element shaping justices' reliance on gender schemas (e.g., [Conover 1988](#)). Increasingly, scholars note the importance of lived experiences ([Glynn and Sen 2015](#); [Harris and Sen 2019](#)) and professional interactions ([Boyd et al. 2010](#)). Experiences from law school to the Supreme Court may shape thinking and shed light on how justices draw upon schemas. This takes on added importance given the intermediate appellate court has become increasingly conservative and male in recent years ([Solberg and Diascro 2020](#)).

One of the key contributions of this study is our data. We gather attorney information and transcript corpora for all orally argued cases from 1979 to 2016. We hope this data serves as a springboard for a number of studies exploring attorney sex specifically and attorneys more broadly. Such projects might include how gender schemas shape interactions in contexts such as briefs or oral amicus arguments ([Gleason et al. 2019](#); [Gleason and Ivy 2021](#)). Our data could be expanded to more fully examine interruptions. Female attorneys are interrupted earlier and more often than their male counterparts; this is linked to justices' gender schematic views ([Patton and Smith 2017, 2020](#)). But it remains unclear whether interruptions and schemas are related. Perhaps, the presence of female attorneys does not predict interruptions; rather non-gender schematic arguments do. In this case, female attorneys with gender schematic oral arguments may be interrupted less, and thus be more able to secure justice-votes, than a non-schematic male attorneys.

We also encourage future research to move beyond written transcripts in evaluating gender schemas. While it is nearly impossible to examine gender schemas via body language, style of dress, or other visual cues (e.g., [Bauer and Carpinella 2018](#)) at the U.S. Supreme Court over any appreciable period of time, it is possible to explore how a *lack* of visual cues impacts gender schematic language via

the conference call oral arguments the Court instituted during the COVID-19 pandemic. We speculate linguistic gender schemas are more pronounced without accompanying visual cues. Scholars may also look beyond the written word by turning to audio transcripts to explore gender schemas via vocal pitch (e.g., [Dietrich et al. 2018](#)); it seems likely not just attorneys' words are governed by gender schemas, but also how they are said.

Conclusions

We expand on existing work which notes female attorneys are less likely to capture justice-votes than male attorneys when their arguments do not conform with gender schemas. We demonstrate gender schemas' predictive power is context dependent by creating an exhaustive dataset inclusive of 39 terms along with a corpus of associated transcripts. Gender schematic arguments become more important for female attorneys securing justice-votes as their numbers increase and the Court becomes more conservative. Ironically, as the Bar reaches historic levels of diversity, gender schemas exercise the largest pull since the late 1970s. While these results are normatively troubling, this study adds to our understanding of gender schemas and justice-votes. We encourage future scholars to build on these results.

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Author's Note

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Data availability

All replication materials will be available on the first author's website (<http://shanegleason.com>) once this article appears in print.

Notes

1. Men who do not behave stereotypically masculine also face sanction (Gill et al. 2017).
2. Gender norms are specific expectations about how men and women should act (Butler 1999; Fischer and LaFrance 2015; Mulac et al. 2013); schemas are broader cognitive frameworks encompassing norms.
3. This finding extends to party briefs. However, only male justices enforce gender norms in briefs (Gleason et al. 2019).
4. This figure is constructed from the data discussed below.
5. There is no firm consensus as to the point where critical mass occurs; most scholars place it between 15% and 30% of the positions in a given institution (e.g., Collins et al. 2010).
6. Minority groups often adopt dominant groups' behavior to downplay the salience of differences (Kanter 1977); women actually use *more* masculine language than men in party briefs (Gleason et al. 2017).
7. We make no claims regarding where this shift occurs. However, our results below provide a starting point for future scholars exploring the location of the shift.
8. Adding to the complexity, this also depends on broader societal attitudes and composition of other institutions.
9. These studies encompass 2004–2016 (Gleason 2020; Gleason and Ivy 2021) and 2010–2013 (Gleason et al. 2019). The 13% value is based on Figure 1 above.
10. Klein (1984) defines feminist sympathy as a uniquely male ideological commitment to gender equality at an abstract level. The female equivalent, feminist consciousness, is rooted in lived experiences which shape ideological views.
11. Following the lead of previous studies on gender at oral arguments, we limit our analysis to cases where one petitioner faces one respondent (e.g., Szmer et al. 2010; Gleason 2020). While this requires us to eliminate some cases, it isolates the effect of each attorney on the justice-vote.
12. We standardize the resulting value (Wedeking 2010).
13. “Mr.,” “Ms.,” and “Mrs.” are the most common honorifics, but the Court sometimes uses others. For example, solicitors general are typically referred to as “General.” In those instances, we check whether the attorney used gendered honorifics in another case. In rare instances, where only non-gendered honorifics are available, we search news accounts and obituaries to determine attorney sex.
14. *Rhodes v. Chapman*, 452 U.S. 337 (1981)
15. *U.S. v. Rodriguez*, 553 U.S. 377 (2008)
16. In the 1980s, women use more schematic language than men. This underscores the importance of changing context in schema operation.
17. We also tested models with a two (three) term lag and a contemporaneous measure. The results are substantively unchanged.
18. We also tested models with the Martin and Quinn (2002) and Bailey (2013) measures. The results are substantively unchanged.
19. We also include each of the constituent terms on their own and in all possible two-way interactions to ensure proper model specification (Brambor et al. 2006).
20. Many attorneys in our data also argue prior to 1979. To prevent undercounting, we gather the names of all attorneys arguing between 1969 and 1978 to create a pre-1979 experience total. For attorneys arguing before 1979, we start their counter with the pre-1979 total.
21. This measure includes the original docket, per curiam opinions, and those with more than two attorneys.
22. Judicial utterances such as “Thank you for clarifying” or “Go on” are not interruptions per se. We run an alternate specification with the question differential replaced with the difference in total words uttered by justices; the results are substantively unchanged.
23. We also estimate a model clustered on justice-docket. The results are substantively unchanged. We explore a random effects model centered on the justice and the justice-docket; the ρ coefficient indicates random or fixed effects approaches offer no advantage over a pooled model with clustered standard errors (Woolridge 2010). We also run a model with dichotomous issue area variables (Spaeth et al. 2018). The results are substantively unchanged.
24. We calculate predicted probabilities averaged across all observed values of the independent variables (Hanmer and Kalkan 2013). Unless otherwise noted, predicted probabilities are calculated from Model 1.
25. This predicted probability is calculated from Model 3.
26. This predicted probability is calculated from Model 2.
27. This result is based on evaluation of the interaction plots (not presented in-text).

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