

Would justice be better served in the United States if more Supreme Court judges were women?

Historically, of the 116 justices appointed to the Supreme Court since the founding of the Court, only 6 have been women (*SUPREME COURT*). With the appointment of Ketanji Brown Jackson extending the diversity of the court, the number of women judges serving concurrently has reached an unprecedented high at this stage. It is thrilling to see this new mark in history because a historically male-dominated judicial profession itself symbolizes gender stereotypes and discrimination. In a famous interview, Ruth Bader Ginsburg, the Supreme Court's second female justice, was asked when there would be enough female justices. She answered, "When there are nine" (Toohill, 2015), remarking on how important she believes it is to strengthen women's court representation. However, does the number of women on the bench affect Supreme Court decisions, and would more female judges necessarily serve justice better?

Before proceeding with my arguments, the following provisions should be clarified: as the topic restricts, the discussion would primarily focus on the U.S. Supreme Court system and its nationwide influence. Fully aware of the complexity of the US judicial system and the intricacies of this question, I will argue that appointing more female judges to the US Supreme Court would not effectively better serve justice in the US. This hypothesis results from the imprudence of oversimplifying justice, prepositioning female judges, and ignoring various factors that affect a judge's decision.

Since justice is a relatively broad concept with varying interpretations in different academic contexts (Miller, 2021), it is essential to limit the scope of discussion first. For the purpose of this essay, justice is not considered a virtue comparable to "rightness in general" (Aristotle, 2000), nor the utilitarian concept of "the greatest happiness for the greatest number" (Bentham, 1996). Conversely, as derived from John Rawls (1999), justice in this article is defined as "fairness", and pursuing justice entails achieving a state in which diverse groups share equal fundamental liberties and opportunities in society.

Regarding the difficulty to quantify justice, we need to work out what "justice be better served" means here. Since the nineteenth century, the idea of social justice has been related to the "common good" (Booth, 2021), which is defined as a good achieved collectively, but shared individually by its members (Dupre, 1993). Traditionally, the ultimate goal of justice is the pursuit of the common good, which is prevalently supposed to bring benefits to society on balance, in contrast to private profits. However, the individuals' experiences stimulated by the so-called good proper vary significantly from different perspectives. Thus, those who decide whether nature is good or bad become the majority of a community or those in power, justifying the torture of a minority if applied to society (Paterson, 1993), with the common good's common nature disappearing or attenuating (Murphy, 2011). In this case, when the topic assumes that an universal justice exists with the goal of achieving the public good, it essentially

ignores the needs of individuals and the rights and interests of minority groups.

Shifting the focus onto the judges, the presupposition about female law enforcement style is itself a stereotype. As pointed out by feminist existentialism, a woman is the product of social and cultural construction (Quinan, 2016); female characteristics are imposed by the world imperceptibly, rather than being born naturally. When appointing new Supreme Court judges, the public usually has expectations for women judges to be more sensitive to discriminative issues, more empathetic with female litigants, and wishes they could bring female experiences to represent a variety of human experiences (Hunter, 2015). This is somehow what the people are looking forward to seeing by increasing the number of female judges in general, not just in the Supreme Court. Nonetheless, these expectant traits are not what women necessarily own, as Simone de Beauvoir (2010) pointed out, "eternal feminine" does not exist. Indeed, there is no evidence suggesting that gender norms shape the opinions of female justices (Gleason et al., 2018). When society adds such presuppositions for female judges, it is also unobjectively presupposed that female judges will make different choices from male judges, while female judges do rule in the same way as male judges in many cases such as the civil-rights ones (Scheurer, 2012). Hence, justice cannot be better served by purely increasing the number of female judges.

Some people might argue that female judges naturally come with a feminist perspective and are capable to bring a diverse and pluralistic understanding of justice. However, female judges will not necessarily adopt a feminist perspective that would influence their ruling. Feminists prioritize judicial nominations that "promote the legal, social, and political equality of men and women (FMF)". Additionally, the idea of feminist jurisprudence is the use of women's perspectives and experiences to comprehend female experiences, in opposition to the dominant masculine jurisprudence (Minda, 1995). Unfortunately, the correlation between a judge's gender and their pro-feminist opinions found in present judicial behavior literature is minimal (Dixon, 2009); in other words, the judge's female identity does not mean her feminist tendency. Living in a society where injustice stems from one gender's advantage over the other, only feminist jurisprudence could fundamentally alter this structure, not simply a female voice (Behuniak-Long, 1992). Consider Sandra Day O'Connor, the first female judge on the US Supreme Court. Her appointment was hailed by women's rights advocates as a major advance for women and the courts, but she is not regarded as the progressive force suggested by feminist jurisprudence due to her conservative voting habits. Hence, a conclusion that merely increasing the appointment of female judges could ensure better justice is mistakenly drawn from the confusion between feminine and feminist.

Moreover, gender may be a factor in the differential decisions made by male and female judges but is by no means the only decisive one. According to data, there is a difference in state Supreme Courts in that female judges tend to vote more liberally in death penalty cases (Songer & Crews-Meyer, 2000). Nonetheless, this does not establish a causal or even correlative relationship between their gender and their liberal stances, or

any pattern of adjudication, the way how judges deal or should deal with cases. One way to categorize theories of adjudication is to distinguish between legal formalism and legal realism. For legal formalism, the acceptable legal arguments accessible to a judge should support only one conclusion in all circumstances, including considerable and disputed cases, independent of other nonlegal considerations (Leiter, 2010). In this case, Supreme Court judges should always make the same decisions regardless of extraneous influences like gender. In contrast, the primary themes of legal realism hold that the judges' decisions are largely based on fundamental realities rather than determinate legal rules (Leiter & Sebok, 1999). When breaking away from the legal norms, there are multiple factors that will influence judges' decisions on concrete cases, as the perspectives and understandings of different judges vary due to other factors like personal experiences or political stances (Renstrom, 1991). According to a study conducted by Danziger et al.(2011), the researchers discovered that even what the judges ate had an impact on their decisions. Thus, it is justified to assume that corresponding to what legal realism promotes, many potential factors exist and would all contribute to the Supreme Court justice's decision.

In fact, a judge's decision in a certain case could be influenced by his/her political stance, professional experience, personal background, and so forth. These influences are common among judges of all genders. First, political stance is often a more decisive factor than gender, as seen in the large disparity between O'Connor's decision as a conservative justice and the other three female Supreme Court Judges. In the context of American politics, where Democrats are largely associated with liberalism and Republicans are associated with conservatism, the differences between the two parties are also reflected in the voting preferences of different justices on the Supreme Court. Based on the data drawn on four female justices, the three Democratic justices, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor, demonstrated large differences in voting tendency from O'Connor, who is regarded as a Republican. More specifically, all three Democratic judges show conspicuous leanings toward voting liberally in several aspects, including cases related to criminal procedure, civil rights, and economics. For instance, from 1946 to 2017, the liberal voting percentage for RBG, Elena Kagan, and Sotomayor in criminal procedural cases are 62.3%, 62.5%, and 66.9%, respectively, while that for O'Connor is only 26.4% (Epstein et al., 2017).

One might argue that Justice Ginsburg, although consistently voted liberally, was considered a moderate when first confirmed, seemingly to indicate that the initial political stance could not explain the whole story (*Women on the Supreme Court*, 2022.). In fact, it is very prevalent to see nominees making unexpected decisions after being formally appointed, which is called the "ideology shift" (Greenhouse, 2012). But the interplay between the Supreme Court and the judges is not totally reciprocal, as Robert Jackson (1979) mentioned that the Supreme Court influences its appointments far more than they influence it.

Despite of individual justices' little impact on the overall position of the Supreme Court, I want to argue that the judge's past working experience is indispensable in shaping one's conception and decision, which should not be overshadowed by a single narrative of gender. Specifically, the experience before a justice's appointment and after his or her time on the Supreme Court plays a large role, which could explain the difference between male and female justices' voting preferences in certain sex discrimination cases (Scheurer, 2012). Heading back to Justice O'Connor, she was one of the few female law students at that time and was often denied appeals clerk and other prestigious entry-level positions provided to males (Dixon, 2009). It is these unique experiences, rather than her gender, that makes her more sensitive to gender equality cases (Beiner, 2005). Though it is undeniable that the discrimination she suffered stemmed from her female identity, and that sexism still exists today, few female judicial candidates are likely to have experienced the same level of sexism in the 1940s and would respond to gender cases so pointedly.

The judges' personal experience changes their perspective when looking at things, and in court cases, this also leads to their different attitudes toward a certain case more so than gender. The male Supreme Court Justice Oliver Wendell Holmes himself was an enthusiastic proponent of the idea that judges' personal experience in decision-making matters (Holmes, 1909). Take Justice Amy Coney Barrett for another example, born in a Roman Catholic family, she was influenced significantly by her family's beliefs and was an unswerving Catholic. She once claimed that "your legal career is but a means to an end..., that end is building the kingdom of God (Barret, 2006)" in the diploma ceremony. Considering her fanatical religious faith and the difficulty for dogma and laws to exist together, Senator Diana Feinstein once implied that ACB might not be able to utilize law objectively enough at the Supreme Court (Hadro, 2020).

In closing, in view of the problematic behavior of assimilating individuals' expectations of justice and having stereotyped expectations of female justices, it is clear that justice would not be better served in the U.S. if more Supreme Court judges were women. Moreover, other important aspects including political stances, past working experiences, and personal backgrounds are all much more influential factors in justices' behaviors than gender. In order to achieve better justice by making changes to the composition of Supreme Court Judges, it is necessary to eliminate the prejudice of both just women and other marginalized groups when they speak for their voices. On the basis of this, there might be aspects other than gender to diversify on, such as varying appointees' backgrounds and tempting to balance the number of judges of different parties. Moreover, the rights of minorities should be recognized more during the legislation process, instead of considering them only in the judicial system.

References

- Aristotle. (2000). Book V. In R. Crisp (Ed.), *Aristotle: Nicomachean Ethics* (Cambridge Texts in the History of Philosophy, pp. 81-102). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511802058.009
- Barrett, A. C. (2006, May). Associate Professor Amy Coney Barrett, Diploma Ceremony Address. *Commencement Programs*.
- Behuniak-Long, S. (1992). Justice Sandra Day O'Connor and the Power of Maternal Legal Thinking. *The Review of Politics*, 54(3), 417–444. <http://www.jstor.org/stable/1407799>
- Bentham, J. (1996). *An Introduction to the Principles of Morals and Legislation* (Bentham, Jeremy, Works.). Oxford University Press, USA.
- Beiner, T. M. (2005). *Female Judging*. 823–829.
- Booth, P. (2021, June 21). *The meaning of the common good and social justice—Catholic Social Thought*. <https://catholicsocialthought.org.uk/the-meaning-of-the-common-good-and-social-justice/>
- de Beauvoir, S. (2010). *The Second Sex* (Original work published 1949). Vintage Books.
- Danziger, S., Levav, J., & Avnaim-Pesso, L. (2011). Extraneous factors in judicial decisions. *Proceedings of the National Academy of Sciences*, 108(17), 6889–6892. <https://doi.org/10.1073/pnas.1018033108>
- Dixon, R. (2009). Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination. *Yale Journal of Law and Feminism*, 21, 297–338. <https://doi.org/10.2139/ssrn.1520784>
- Dupré, L. (1993). The Common Good and the Open Society. *The Review of Politics*, 55(4), 687-712. doi:10.1017/S0034670500018052
- Gleason, S. A., Jones, J. J., & McBean, J. R. (2018). *The Role of Gender Norms in Judicial Decision-Making at the U.S. Supreme Court: The Case of Male and Female Justices*. 4(3). <https://doi.org/10.1177/1532673X18766466>
- Greenhouse, L. (2012). The justices. In L. Greenhouse (Ed.), *The U.S. Supreme Court: A Very Short Introduction*. Oxford University Press. <https://doi.org/10.1093/actrade/9780199754540.003.0003>
- Hadro, M. (2020, September 19). 'Dogma lives loudly in you'—What happened at Amy Coney Barrett's 2017 confirmation hearing. Catholic News Agency. <https://www.catholicnewsagency.com/news/45896/dogma-lives-loudly-in-you-amy-coney-barretts-2017-confirmation-hearing>
- Holmes, O. W. (1909). *The Common Law*. Little, Brown. <https://books.google.com/books?id=xXouAAAAIAAJ>
- Hunter, R. (2015). More than Just a Different Face? Judicial Diversity and Decision-making. *Current Legal Problems*, 68(1), 119–141. <https://doi.org/10.1093/clp/cuv001>
- Hume, David, *A Treatise of Human Nature*, edited by L.A. Selby-Bigge, revised by P.H. Nidditch, Oxford: Clarendon Press, 1978.
- Ideological leanings of United States Supreme Court justices. (2023). In *Wikipedia*. https://en.wikipedia.org/w/index.php?title=Ideological_leanings_of_United_States_Supreme_Court_justices&oldid=1159388019#cite_note-43
- Jackson, R. H. (1941). *The Struggle for Judicial Supremacy: A Study of a Crisis in American*

- Power Politics* vii. Octagon Books.
- Justices 1789 to Present. (n.d.). Retrieved June 22, 2023, from https://www.supremecourt.gov/about/members_text.aspx
- Leiter, B. (2010). LEGAL FORMALISM AND LEGAL REALISM: WHAT IS THE ISSUE? *Legal Theory*, 16(2), 111–133. <https://doi.org/10.1017/S1352325210000121>
- Leiter, B., & Sebok, A. (1999). Positivism, Formalism, Realism. *Columbia Law Review*, 99(4), 1138–1164. <https://doi.org/10.2307/1123484>
- Minda, G. (1995). Feminist Legal Theory. In *Postmodern Legal Movements*. <https://www.jstor.org/stable/j.ctt9qg2gf.12>
- Miller, D. (2021). Justice. In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2021). Metaphysics Research Lab, Stanford University. <https://plato.stanford.edu/archives/fall2021/entries/justice/>
- Murphy, T. (2011). Ethics, Politics, and Types of Justice. *Transnational Legal Theory*, 2. <https://doi.org/10.5235/tlt.v2n1.135>
- Paterson, I. (1993). *God of the Machine* (1st Edition). Routledge. <https://doi.org/10.4324/9780203790618>
- Quinan, C. L. (2016). Feminism, Existential. In *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies* (pp. 1–3). John Wiley & Sons, Ltd. <https://doi.org/10.1002/9781118663219.wbegss665>
- Rawls, J. (1999). A THEORY OF JUSTICE (Rev. ed., 5.-6. printing). Belknap Press of Harvard Univ. Press.
- Renstrom, P. G. (1991). *American Law Dictionary*. ABC-CLIO, Inc.
- Toohill, K. (2015, February 19). *Ruth Bader Ginsburg Won't Be Happy Until There are 9 Women on the Supreme Court*. ATTN. <https://archive.attn.com/stories/874/ruth-bader-ginsburg-georgetown>
- Scheurer, K. F. (2012). Gender and the U.S. Supreme Court: An Analysis of Voting Behavior in Gender-Based Claims and Civil-Rights and Economic-Activity Cases. *The Justice System Journal*, 33(3), 294–317. <http://www.jstor.org/stable/26158392>
- Songer, D. R., & Crews-Meyer, K. A. (2000). Does Judge Gender Matter? Decision Making in State Supreme Courts. *Social Science Quarterly*, 81(3), 750–762. <http://www.jstor.org/stable/42864001>
- Women on the Supreme Court*. (2022). RepresentWomen. https://www.representwomen.org/women_supreme_court