EQUAL PROTECTION UNDER THE LAW

Student Author

Katherine Jorgensen recently completed her bachelor's degree in political science from Purdue University-Calumet. She will begin her master's degree at Arizona State University in the fall of 2012, and plans to focus on American government and political theory. Her research interests include constitutional law, judicial decision making, and gender and politics.

Abstract

As women take on a continuously larger role in the legal field, it has become tremendously important to study and understand the impact women are having on the judicial system. This work explores the role of women in the judiciary. Specifically, I examine the Supreme Court of the United States to find out whether women's jurisprudence differs from that of their male colleagues. For this paper, I limit my examination to cases involving equal protection under the law. The theory I employ is that of Carol Gilligan, who argues that across many realms, women have a uniquely different voice than men (1982). Through a quantitative analysis of 49 cases dealing with issues of equal protection under the law, I show that Gilligan's theory helps us understand how cases are decided in the United States Supreme Court. Additionally, I show how the "Different Voice" model improves upon existing models of judicial decision making by Lee Epstein, Jeffrey Segal, and Harold Spaeth. This paper expands current gender and politics literature, which had previously used Gilligan's insights to examine U.S. state legislatures, by analyzing decision making in the Supreme Court. This paper thus illustrates that women, due to their unique life experiences, have a different understanding of the law in regards to equality and equal protection under the law.

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Mentor

Meg Rincker is an assistant professor of political science at Purdue University-Calumet. She joined the faculty in 2008 after receiving her Ph.D. from Washington University in St. Louis. Her research and teaching focuses on international relations, decentralization, and gender and politics. She recently completed her book manuscript, *What Women Want: Global Decentralization and Women's Empowerment*. Based on extensive fieldwork, this research employs 115 structured interviews with women's group leaders as well as local and national politicians to determine where politicians are most aware and responsive to women's policy preferences in the United Kingdom, Poland, and Pakistan.

EQUAL PROTECTION UNDER THE LAW:

Do Female Justices Have a Different Voice?

Katherine Jorgensen, Political Science

INTRODUCTION

This paper examines how female justices view and articulate individual rights and the implications of the “Feminine Voice Model” (Maveety, 1996) regarding equal protection under law in America. More women are entering the legal profession, which may be expected to lead to more female judges at all levels of the American judicial system. Women used to be 9% of law school

students, but as of 2010 comprise 47% of law school enrollment (American Bar Association, 2011). Further, the two most recent appointments to the Supreme Court of the United States have produced a 3 to 6 ratio of women to men on the court. I will show that this increase in participation by women in the legal field has resulted in a clear trend toward equality as a social norm as female law scholars tend to fight for these rights as lawyers and rule on them as judges.

I examine cases during the Rehnquist Era (1994–2004), focusing on the judgments of Justice O’Connor and Justice Ginsburg—comparing their opinions, concurring opinions, and dissenting opinions. I demonstrate how O’Connor and Ginsburg sought to defend equal protection during their tenure together. Through the examination of their judgments I illustrate that their decisions were based in part on the Feminine Voice Model (Maveety, 1996). This model suggests that “Women’s judgments are tied to feelings of empathy and compassion” based upon past experiences (Gilligan, 1982, p. 69). I argue that the Feminine Voice Model is the key identifier as to why female U.S. Supreme Court Justices, who exhibit different religious backgrounds and theoretically opposing political ideologies, still arrived at the same legal conclusions in a majority of cases regarding equal protection.

This paper presents three central findings. First, with regards to equal protection under the law, O’Connor and Ginsburg rule together in a majority of cases (65%) to uphold equal protection and expand equal rights. Second, when O’Connor and Ginsburg rule separately (35% of

Figure 1. The four women who have served on the Supreme Court of the United States. From left to right: Justice Sandra Day O’Connor (Ret.), Justice Sonia Sotomayor, Justice Ruth Bader Ginsburg, and Justice Elena Kagan in the Justices’ Conference Room, prior to Justice Kagan’s Investiture Ceremony on October 1, 2010. Photo courtesy of the Collection of the Supreme Court of the United States.

cases), they both seek to support equal protection under the law. Finally, this paper shows that in cases regarding gender equality, O'Connor and Ginsburg have the strongest opinions and are more likely than their male counterparts to rule and work together to protect the rights of women.

Feminine Voice Model

The Feminine Voice Model has become a serious contender in untangling and understanding what kind of ideology women bring to the world of politics. Since Carol Gilligan released her book *In a Different Voice* in 1982, scholars have extended her initial examination of differences between men and women in regards to morality, rights, and law to question whether the model applies to those in governmental roles.

For example, Lyn Kathlene applied Gilligan’s ideas to women who hold legislative positions. Kathlene points out that the political field is one dominated by males and masculine concepts. Thus, the influence of women in the political realm requires further research in order to fully note how women have changed or impacted law and policy (Kathlene, 2005). Kathlene highlights the key differences between men and women regarding creating new laws. By examining the differences between men and women as Kathlene outlines, I will show how this theory can be applied to women in the judiciary in their interpretation of laws.

Kathlene (2005) makes a distinction between masculine and feminine approaches to law (Table 1). The masculine approach is defined as an “ethic of justice” (p. 215). Men typically see people as being self-interested and in competition with one another. The masculine approach suggests men prioritize individual rights, but have a strong tendency to support the rights of the majority (p. 216).

Women, on the other hand, exhibit an “ethic of care”. Kathlene writes, “Women are more concerned with the interworking of society and the interconnectedness of people” (2005, p. 216). This implies that women address the needs of society by upholding the equality of individuals before individual rights. However, as a consequence of protecting equal rights, women do a greater job than men of protecting individual rights. Acting under the “ethic of care,” women’s main objective is to create a society that guarantees all people equal protection under the law.

Baines discusses the expansion of Gilligan’s ideas to the interpretation of law. She points to the work of Katharine T. Bartlett, who suggested that female justices exhibit “feminist practical reasoning” (as cited in Baines, 2009, p. 34). Unlike other forms of practical reasoning, “feminist practical reasoning takes its direction from facts, experiences, and contexts” (Baines, 2009, p. 36). Baines’ analysis is in agreement with other legal scholars such as Sherry and Sharon Rush, who hold female justices are more likely than male justices to decide cases using contextual analysis (as cited in Baines, 2009, p. 35).

Alternative Approaches

Other models for judicial decision making include the “Attitudinal Model” and the “Legal Model.” The Attitudinal Model suggests that Supreme Court Justices decide cases based on their personal moral convictions, political ideology, societal norms, and political obligations (Segal & Spaeth, 2002). The Legal Model asserts that judicial decision making is generated from a strict textual interpretation of law and legal doctrine, generated from past cases (George & Epstein, 1992). This view of judicial decision making has been labeled as “mechanical jurisprudence, because the process by which judges reach a decision is highly structured . . . it consists of

Ethic of Justice	Ethic of Care
<ul style="list-style-type: none"> View self as autonomous Human interactions are separate and competitive Distinguishes difference between subjective and objective knowledge, favors objective Main focus is on addressing individual rights 	<ul style="list-style-type: none"> Views self in connection with community/others Human interactions are part of a continuous web of relationships Integrates objective and subjective knowledge, but believes both have a bias Main focus is on addressing needs/equality

Table 1. Masculine approach (Ethic of Justice)/Feminine approach (Ethic of Care). After Kathlene, 2005.

three steps (1) observation of similarity between cases, (2) announcement of the rule of law in the first case, and (3) application of that law in the second case” (George & Epstein, 1992, p. 324).

In the examination of the jurisprudence of O’Connor and Ginsburg, bits of the Attitudinal Model and Legal Model will be evident. This is because the Feminine Voice Model encompasses many of the characteristics represented in these two models; I will demonstrate how these views are combined in the Feminine Voice Model in a way that is applicable to and apparent in Ginsburg and O’Connor.

METHODS

The remainder of the paper contains two substantive sections and conclusions. The first section is an in-depth analysis of the jurisprudence of O’Connor and Ginsburg. In this section, I compare and contrast their different ideologies, illustrating the Feminine Voice Model. I then analyze the judgments of O’Connor and Ginsburg in landmark cases concerning abortion and discrimination. This section demonstrates how they derived a ruling and whether there is evidence showing that the outcome fits within the Feminine Voice Model. This research highlights where O’Connor and Ginsburg differentiate in areas of substantive due process, judicial restraint, judicial independence, and judicial activism.

The second section of this paper consists of quantitative analysis. This data is composed of all cases regarding equal protection of rights that occurred between 1994 and 2005. For this research, equal protection of rights refers to those rights that aren’t explicitly listed in the Bill of Rights (such as discrimination, privacy, sexual harassment, and choice). These rights typically fall under the Equal Protection Clause of the Fourteenth Amendment. In examining these cases I record how often Ginsburg and O’Connor ruled similarly and differently in order to demonstrate that there is a common theme represented by both of them in upholding equal protection of law.

Jurisprudence

O’Connor has been revered as the moderate centrist of the Rehnquist Era, typically being the fifth vote in the majority of 5-4 decisions (Domino, 2010). O’Connor’s use of precedent in accordance with conservative approaches to fundamental rights (Maveety, 1996) and application of the Equal Protection Clause illuminates her role as a preserver of equal rights for all. O’Connor supports judicial activism that is both conservatively and liberally

Figure 2. Sandra Day O’Connor, U.S. Supreme Court justice. Photo courtesy of the Collection of the Supreme Court of the United States.

Figure 3. Ruth Bader Ginsburg, U.S. Supreme Court justice. Photo courtesy of the Collection of the Supreme Court of the United States.

motivated, but she tempers this activism by narrowing the decisions, refusing to issue any broad principles (Keck, 2004). This type of ruling shows that O'Connor does not fall into either of the aforementioned approaches as she is not ruling in a manner that is solely based on her personal/political beliefs or precedent. O'Connor's use of these many different judicial practices demonstrates feminine legal reasoning, a key component in the Feminine Voice Model.

O'Connor frequently writes her own opinions as a way to assert her judicial independence, assuring that her decision is fully understood as to how she interprets the Constitution (Maveety, 2008). O'Connor tries to avoid substantive due process, viewing her job as a justice as "interpreting and applying law not making it" (Nomination of S. D. O'Connor, 1981). This is a key difference between her and Ginsburg. Ginsburg believes that the development of rights had been embedded in the Supreme Court's history and it is the obligation of the Court to continue to define and protect the rights of all citizens (Nomination of R. B. Ginsburg, 1993).

Much like O'Connor, Ginsburg is known for representing centrist ideologies. Ginsburg effectively avoids labels such as conservative or liberal. Rather she is "a conservative by maintaining our oldest ideals and a liberal by beckoning us into the new world" (Merritt & Liebermann, 2004, p. 48). It is this jurisprudence that is continually displayed in her rulings to uphold all rights, thus maintaining a commitment to opportunity and equality for all (Merritt & Liebermann, 2004). It is clear that the jurisprudence represented by both O'Connor and Ginsburg corresponds to the Feminine Voice Model insofar as both justices view it as their responsibility to protect these rights. This is because female judges empathize with the situation of having been denied certain rights, based on belonging to a marginalized group in society.

Case Analysis: Abortion

Another critical indicator on how these justices view equality comes from their thoughts on abortion with respect to the Constitution. While neither Ginsburg nor O'Connor sat on the Court for *Roe v. Wade*, they both hold distinct views on what this case truly meant for abortion entitlement. Both O'Connor and Ginsburg found the finding of *Roe* to be insufficient. Ginsburg thought that *Roe* didn't fully give women the personal freedom to choose; every act of abortion according to *Roe* was a decision that couldn't be made solely by the women; rather, that choice must be made in concurrence with her

physician (Garrow, 1998). O'Connor, on the other hand, found a problem with the rationale used to determine when a pregnancy could be aborted (Garrow, 1998). She said, "The *Roe* framework is clearly on a collision course with itself . . . and there is no justification in law or logic for the trimester framework" (Garrow, 1998, p. 645).

When O'Connor ruled on abortion in *Planned Parenthood v. Casey* (1992), she followed character and decided the case based on *stare decisis*, upholding the central finding of *Roe*. However, she took this chance to move away from the medically focused decision to establish abortion as a right that favors the equality of women. In a plurality opinion, O'Connor, along with Kennedy and Souter, wrote, ". . . choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment" (*Planned Parenthood v. Casey*, 1992).

A year after *Casey*, Ginsburg was questioned about her views on abortion during her confirmation hearing. The Senate was concerned with whether she believed abortion was a matter of both equal protection and individual autonomy (Nomination of R. B. Ginsburg, 1993). She responded as follows:

The decision whether or not to bear a child is a central to a women's life, her well being, and her dignity . . . when government controls this decision for her she is being treated as less than a fully adult human responsible for her choices . . . as well if the government imposes restraints that impede a women's right to choose it is disadvantaging her, because of her sex. (Nomination of R. B. Ginsburg, 1993)

O'Connor and Ginsburg ruled together for the first time in 2000 to uphold abortions rights in *Stenberg v. Carhart* (2000). Both Ginsburg and O'Connor wrote concurring opinions on this, making almost identical claims that the Nebraska regulation was in violation of the past precedent founded in *Casey*, and it placed an undue burden on women when trying to obtain an abortion (*Stenberg v. Carhart*, 2000).

In 2007, Ginsburg was faced with revisiting abortion in *Gonzalez v. Carhart*, which challenged the 2003 Partial-Birth Abortion Ban Act. In her dissenting opinion, Ginsburg upheld the views she had openly expressed during her confirmation hearing and in writings previous to her appointment. She claimed that by allowing for the partial-birth abortion ban to stand, the Court was "chipping away at a right declared again and again by

the Court” (*Gonzalez v. Carhart*, 2007). These cases, opinions, and thoughts on abortion are all intertwined with autonomy of the individual and the equality of women, all of which exclusively relate to the concepts in the Feminine Voice Model.

Case Analysis: Discrimination

In the area of discrimination O’Connor and Ginsburg sought to defend equality of people based on gender, race, and sexual orientation. However, in these cases the differences between O’Connor and Ginsburg are illuminated. When examining their rulings in these cases, we find that they occasionally wind up on different sides. With further investigation into their rulings it is clear that they are both trying to protect equality for minorities, but their views differ.

The landmark decision of *United States v. Virginia* (1996) exemplifies this and the Feminine Voice Model. *United States v. Virginia* challenged the Virginia Military Institution’s (VMI) male-only status, as it was a public institution receiving state and federal funding. VMI argued that it must remain open exclusively to men to preserve the integrity of the university as the programs would have to be altered in order to admit women. VMI also argued that it had established a program exclusively for women that paralleled that of VMI. Ginsburg wrote the majority opinion, with which O’Connor concurred, that, “We hold that Virginia has violated the Fourteenth Amendment’s equal protection clause. Because the remedy proffered by Virginia—the Mary Baldwin VWIL—doesn’t cure the Constitutional violation i.e. it does not provide equal opportunity” (*United States v. Virginia*, 1996). She follows with a response to the claim that VMI would have to modify its program in this statement: “Equal protection as it applies to gender classification means state actors may not rely on overly broad generalizations” (*United States v. Virginia*, 1996). The language used by Ginsburg throughout this decision supports Gilligan’s model. In a recent interview Ginsburg talked about the VMI decision, stating that discrimination based on sex is completely unacceptable in today’s time and women are to be regarded as equal to men in all capacities of life (Ginsburg, 2011).

Discrimination based on one’s sexual orientation is still a challenge for today’s Court as it faces questions regarding the right to gay marriage. *Lawrence v. Texas* (2003) and *Romer v. Evans* (1996) are key cases in the establishment of precedent regarding the equality of LGBT rights. In these cases both Ginsburg and O’Connor sought to protect

the rights of homosexuals from government intrusion. However, in *Boy Scouts of America et al. v. Dale* (2000), the Court deviated from the precedent set by *Romer*. Ginsburg and O’Connor ruled differently in this case as they disagreed in how far the Constitution could be extended to protect equality. O’Connor sided with the majority, but in examining the logic within the opinion it can be argued that she was still acting in association with the Feminine Voice Model. The majority decision claimed that the Boy Scouts’ refusal for Dale to be a scout leader due to his sexual orientation did not violate the Fourteenth Amendment as the Boy Scouts is a private organization that exercises outside the governmental realm and is protected by the First Amendment’s right of association (*Boy Scouts of America et al. v. Dale*, 2000). By siding with the majority O’Connor was protecting the rights of one group that was just as fundamental as Dale’s right. Ginsburg, on the other hand, was more concerned with the rights of Dale than the rights of the Boy Scouts. Thus, both were acting within the bounds of the Feminine Voice Model.

The prior examples demonstrate that O’Connor and Ginsburg desire to expand and protect equality of rights for all. Their ideologies clearly portray Gilligan’s notion that, “Changes in women’s rights change women’s moral judgments and reasoning with justice by enabling women to make judgments that are more tolerant and less absolute” (1982, p. 149).

RESULTS

Table 2 shows that areas of sexual harassment, right to privacy/choice, disability discrimination, and governmental discrimination have the highest percent difference between the number of times O’Connor and Ginsburg decided together and the number of times they ruled separately. While Ginsburg certainly took a more predominant and emphatic view on the rights of those with disabilities, which is demonstrated in her majority opinion in *Olmstead v. L. C.* (Bagenstos, 2004), O’Connor joined her in expanding rights and the equal protection of law to the disabled. O’Connor and Ginsburg desired for people to recognize that those with disabilities should be regarded as equals (Bagenstos, 2004). They saw these cases as a way to expand equality for handicapped individuals in the workplace, schools, and other public/governmental entities. In doing this they established a role in society for people with disabilities, demonstrating that they should be regarded and viewed as ordinary citizens.

The Rehnquist Court faced a higher percentage of sexual harassment cases than previous courts as the third wave

of the feminist movement was underway. O'Connor and Ginsburg both faced the difficulty of sexual harassment in the early stages of their careers (Maveety, 1996; Ginsburg, 2011). Their strong stances on eliminating sexual harassment toward women may well be a result of the troubles they faced in their own careers. They also view sexual harassment as a way to keep women under male control. Ginsburg wrote, "The equal dignity of individuals is part of the constitutional legacy" (Merritt & Liebermann, 2004, p. 39). O'Connor and Ginsburg undoubtedly view derogatory treatment toward women as a violation of their personal dignity that needs Constitutional protection to ensure the equality of women.

The right to privacy and choice holds a variety of implications and could have been classified with governmental discrimination cases, but I found that these cases posited questions that are critical to one's being and should be viewed independently. These cases go beyond the realm of equality and tap into the arena of personal autonomy. As seen in the Feminine Voice Model, men are typically more concerned with individual autonomy (Kathlene, 2005), but as Gilligan demonstrated, as women gain more rights they begin to see themselves as individual actors in society and begin to protect rights in that degree (Gilligan, 1982). This also demonstrates that women's judgments are not tied to a moral conviction: as O'Connor stated in her confirmation hearing, she is morally opposed to abortion (Nomination of S. D. O'Connor, 1981), yet she

continually upheld a woman's right to choose. These cases also demonstrate equating women with men by putting them in control of their own bodies.

The area I found most interesting was racial discrimination and affirmative action. This is the only area where the number of times they opposed each other superseded the times they ruled similarly. However, a careful reading of the opinions they wrote in a few of these cases, such as *Grutter v. Bollinger* (2003), *Gratz v. Bollinger* (2003), and *Adarand Constructors, Inc. v. Peña* (1995), shows they were both trying to protect equality through different outlets.

As shown in Table 2, in total, O'Connor and Ginsburg ruled similarly 66% of the time in cases regarding the equal protection of law; this demonstrates that even though they come from different political and religious backgrounds, they value the equality of the individual. This is reiterated by opinions they have written as both O'Connor and Ginsburg asserted their judicial independence in numerous cases regarding equal protection under the law.

CONCLUSION

This paper shows that the Feminine Voice Model applies to female justices when hearing cases that involve equal protection under law; there are three main findings that support this claim. First, in cases regarding equal

Types of Cases	Decided Together	Decided Separately
Sexual Harassment	80%	20%
Right to Privacy/Choice	71%	29%
Racial Discrimination/Affirmative Action	38%	63%
Age Discrimination	66%	32%
Disability Discrimination	77%	22%
Gender Discrimination	57%	43%
Governmental Discrimination	71%	29%
Total	66%	34%

Table 2. O'Connor/Ginsburg voting similarities and differences in equal protection cases. Composed from 49 Supreme Court cases regarding equal protection of law from 1994–2005.

protection, O'Connor and Ginsburg ruled together the majority of the time (66%) to expand equal protection to minority groups. Second, even in instances of racial discrimination and affirmative action where O'Connor and Ginsburg part ways, they both still seek to expand equal protection. For O'Connor, equality means not establishing quotas through affirmative action as she find this ultimately leads to inequality. For Ginsburg, equality means the implementation of affirmative action as an effective way to bring about equality. Third, when looking at gender equality as a whole, Ginsburg and O'Connor rule in a manner that promotes women's rights more than 90% of the time. These results support the idea that there is a distinctly feminine voice taken by justices in terms of equal protection under the law. However, as previously mentioned, the Feminine Voice Model does not apply to all aspects of law. Thus, the Attitudinal Model and Legal Model may apply to female justices in other areas of law such as fundamental rights of speech and expression, religious freedom, or regarding questions of federalism.

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