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Mother Nature, Lady Justice: Ecofeminism and Judicial Decision-Making

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MOTHER NATURE, LADY JUSTICE: ECOFEMINISM AND
JUDICIAL DECISION-MAKING

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MOTHER NATURE, LADY JUSTICE: ECOFEMINISM AND
JUDICIAL DECISION-MAKING

by

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THESIS

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Abstract

Ecofeminism offers a feminist perspective that links gender to how humans relate to the natural world. As such, this framework explores the connections between the oppression of nature and the oppression of women, such as widespread views that both women and nature are property, are to be dominated, and are most valuable when cultivated and curated by men. I apply this philosophical and sociological framework to judicial decision-making, where women judges should view environmental issues as women's issues and thus be more likely to vote in favor of the environmental protections relative to her male peers. I evaluate this theory using a mixed method design, focusing on environmental cases before the United States Supreme Court. Previous studies on gender and judicial decision-making examine how cases pertaining to women's issues can alter a woman judge's voting behavior; however, these studies have limited empirical analyses to cases that typically are associated with women's issues (e.g. reproductive rights, sex discrimination, sexual harassment, etc.). I thus expand this definition of women's issues and examine the power dynamics between women (oppression) and the environment (extraction). I first quantitatively analyze gendered voting patterns on the U.S. Supreme Court in environmental cases. Second, I linguistically analyze a set of solo-authored dissenting opinions to evaluate whether women authors differ in their language, attitudes, and framework pertaining to environmental issues compared to their male judge peers.

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Chapter 1: Ecofeminism

Ecofeminism serves as a theory where feminist thought meets ecology through a multi-faceted emphasis on humanity's role in the environment through a feminist lens (Mies and Shiva 1993). Ecofeminism thus relies on a theme of ecological interdependence while synthesizing prominent theories of oppression found in feminist literature. Ecofeminist philosophy is grounded in the assumption that the exploitation and desire to dominate nature is equivalent to our society's exploitation of women (Mies and Shiva 1993). These parallels are highlighted by the conceptual framework of basic beliefs and assumptions about women and nature that are rooted in the patriarchy—specifically the dichotomies that maintain current power structures (such as man versus woman, nature and society, etc.).

The term “ecofeminism” is often traced back to Françoise d'Eaubonne's use of the term in 1974, though others argue that ecofeminism has its roots in peaceful activism beginning in 1970 (Mack-Canty 2004). Specifically, ecofeminism is tied to the Chipko Movement of the 1970's in which women living in villages located in Himalayan India protested the destruction of their forests (Mack-Canty 2004). These peaceful protests were comprised almost entirely of women who were protecting their natural resources by tying themselves to trees (Mack-Canty 2004). The first link between women's struggles—specifically those of indigenous women in developing countries—and the environment is formed through these protests by women whose lives are irrefutably tied to the resources that developed countries were attempting to exploit (Mack-Canty 2004).

Although ecofeminist activism was prominent in the 1970's and 1980's, ecofeminist theory gained theoretical footing in the third wave of feminism that lasted throughout the late-1980's and 1990's (Mack-Canty 2004). The third wave of feminism was primarily led by women of color and

indigenous women, who rejected the universalization of feminism promoted by leaders of the second wave of feminism (Mack-Canty 2004). Instead, the third wave of feminism acknowledged that there are many differences among women, and these differences demand that feminism move away from foundational theories and develop new theories of oppression that can account for the different socio-political barriers that contribute to the continued oppression of women of color and indigenous women (Mack-Canty 2004).

Ecofeminism began developing and incorporating theories based upon postcolonial feminism. Postcolonial feminism argues that Western colonialism and its effects play a large role in the oppression of women, racism, and environmental exploitation (Mack-Canty 2004). Specifically, postcolonial feminism critiques the global capitalist system which promotes “development” projects in developing countries and communities of color (Mack-Canty 2004). For example, the nature versus culture dichotomy is a central tenet of most Western ideologies, where “civilized” man is seen as having complete domination over “uncivilized” or primitive nature (Mack-Canty 2004; Lahar 1991). This belief directly informed the development of classical liberalism which brought about capitalism and colonialism (Mack-Canty 2004). The necessary spread of “civilization,” and thus capitalism, mandated and justified colonization and the exploitation of the environment, which holds value solely as a provider of resources for economic gain.

Environmental extraction became the key to promoting and funding western colonization, whereby extraction became a powerful form of domination and control. For instance, many developing nations have relied on agriculture to sustain their economy; however, these developing nations are subjected to pressure from the agricultural demands from developed (Western) nations such that they are incentivized (i.e. forced) to become a monoculture industry to promote exports

to provide these resources to developed (Western) nations (Lahar 1991). The transition to monoculture prompts a developing country to abandon centuries-old agricultural practices and techniques to favor the desires of the developed nations, such as being required to use genetically modified seeds to produce the “ideal” crop and abandoning sustainable practices. Furthermore, this relationship contributes to colonization where these developing nations internalize Western beliefs viewing natural resources as a commodity, valued only in terms of extractable units to be exploited (Lahar 1991).

Although humans appear to profit from the exploitation of the environment, capitalism also designates individuals as units that can be extracted for economic gain denoted which labors were valuable. This makes the value of people tied to their economic use. The demand for “viable” individuals to participate in the labor force (i.e. men) reduces the value of women, who are associated with less “civilized” and more “primitive” domestic work—which is rendered invisible, unpaid, and expected labor from women (MacGregor 2004)—through both the devaluation of the work and the people engaging in it. As a consequence, the devaluation of women causes a significant increase in violence against women (Shiva 1989), higher rates of female infanticide (Lahar 1991), and other mortality risks (Mack-Canty 2004).

Ecofeminism also highlights how the spread of western colonization further disseminated socio-political narratives that dictate political priorities and create false dichotomies between issues, where political goals and priorities are treated as trade-offs rather than complementary (Lahar 1991). For example, politicians may argue that it is more important to invest time and resources in the economy system rather than investing in environmental sustainability or “women’s issues” like education or healthcare. Care and care-related activities or careers are of lower value to a capitalist and liberal society, because they are seen as feminine (MacGregor 2004).

Furthermore, ecofeminism critiques the prioritization of militarization, development of nuclear energy and weapons, and dumping of environmental toxins as a direct result of western colonization and the spread of capitalism (Mack-Canty 2004). Women, specifically women of color, are usually the first to notice issues arising from the dumping of environmental toxins, because they are at home for longer periods of time than men; therefore, women are also disproportionately exposed to environmental toxins dumped by corporations and/or the government (Mack-Canty 2004).

Based upon these critiques addressing destructive political behavior, ecofeminism seeks to alter discourse and socio-political practices to emphasize the value of women and the environment interdependently. Specifically, ecofeminism advocates for the adoption of an ecological civic virtue that stems from women's societal standards of care—or a *politicized* ethic of care (Curtin 1991). Care ethics emphasize the notion that women, specifically in a maternal lens, are the individuals “who do the caring, nurturing, and subsistence work that sustains human life” (MacGregor 2004, 58). This “barefoot epistemology” states that women's “ways of knowing” are inherently tied to life-affirming activities; therefore, women's relation to nature, through their labor, is drastically different than men's (MacGregor 2004). Not only do women care about their children, they also care about their environments, and women are more concerned with issues of survival rather than power, unlike men (MacGregor 2004). Women have a higher epistemic awareness of survival and protection of life; therefore, women are more inclined to protect natural resources for the continued survival of their families (MacGregor 2004). Consequently, women have a stronger ethical approach to the survival of the environment as their relation to nature is fundamentally different than that of men (Salleh 1997). Through care ethics, women are also seen as instruments of social change, because they can serve as the primary medium to transmit new

social ideas to younger generations and can help develop an ethical societal standard for caring about the environment (Merchant 1996).

Chapter 2: Ecofeminism & Judicial Decision Making

This chapter seeks to apply ecofeminism to theories of judicial decision-making and evaluate the extent to which women judges diverge from their male peers in their decisions in environmental cases. I first outline existing judicial theories on gendered decision-making. I then offer a new theory of decision-making based upon ecofeminism, which I empirically examine within the United States Supreme Court.

I. Different Voice Theory

Theories of gender and judicial decision making can be traced back to Carol Gilligan's (1982) psychological analysis on gender and moral development. Gilligan (1982) argued that previous metrics for moral development were inherently masculine, because the indicators of moral development were measured utilizing notions of autonomy, separation, rights, and rules (Gilligan 1982). Instead, Gilligan (1982) found that the female subjects solved moral dilemmas by emphasizing community, obligation, and responsibility (Gilligan 1982). These differences in moral development between men and women may affect the way women perceive the law. Because the political and legal philosophies on which the United States was founded are inherently masculine—through promoting a moral frameworks based on autonomy, objectivity, and rights (Sherry 1986), thereby excluding women's moral frameworks based on community and care—women should perceive the law differently and develop their own feminine jurisprudence (Sherry 1986).

Such a feminine jurisprudence is expected to not focus solely on issues pertaining to women; instead, it encompasses all legal issues (Sherry 1986). When deciding cases, women judges are expected to incorporate a contextual analysis that emphasizes individual circumstances and allows bending of the rules (i.e. legal authorities, precedent, procedural rules, etc.) in order to

provide the “correct” moral response (Sherry 1986). By incorporating their own life experiences, women judges may also redefine liberty and reformulate rights (Binion 1991). A masculine definition of liberty sees liberty as an inverse relationship between an individual and the government’s power over that individual; however, women cannot find liberty or empowerment through a lessening of government power, because women experience powerlessness in their everyday lives and often require the state to step in on their behalf (Binion 1991).

Furthermore, feminine jurisprudence should also have no deference to ideology. Women judges should only vote liberally when a liberal vote equates to protecting the community and securing full participation in it (Sherry 1986); therefore, a judge’s vote should not be gauged on whether the vote produces a liberal or conservative outcome across all cases.

Sherry (1986) tested this theory by analyzing differing votes between Justice O’Connor and Chief Justice Rehnquist. O’Connor and Rehnquist frequently voted in similar ways, because they both aligned ideologically; therefore, a differing vote between the two justices could be indicative of a feminine jurisprudence that is independent of ideology (Sherry 1986). Sherry (1986) analyzed Establishment Clause cases and discrimination cases, because these two case issues intersect between the interests of individualists and communitarians. The results showed that O’Connor was more likely to adopt a community-oriented approach and often favored the well-being of the community over individual rights when compared to her male colleague, Chief Justice Rehnquist; however, O’Connor rarely deviated from her conservative voting pattern and usually voted in alignment with Rehnquist (Sherry 1986).

II. Representational Theory

Representational theory posits that women are representatives of their gender and are expected to advance the general interest of women when serving in an institutional role (Boyd et

al. 2010). Representation is a multi-faceted issue and often times there are dimensional components to representation (Pitkin 1967). Representational theory assumes that women judges fall under descriptive and substantive representation as categorized by Pitkin (1967). Not only are women descriptively representing women citizens (i.e. demographically similar), but they are also substantively advancing the policy interests of women (Boyd, et al. 2010). Because women have been excluded from political decision-making historically, the presence of women allows for new political agendas to identify and promote women's needs. Women representatives thus feel obligated to protect their gender class and ensure their wellbeing.

Unlike Sherry's (1986) notion of feminine jurisprudence, a representational account would only demonstrate effects in issues that directly pertain to women (e.g. reproductive rights, employment discrimination, sex discrimination, and sexual harassment), because women judges are serving as *substantive* representatives of their class; therefore, they are primarily interested in making decisions that align with the policy preferences that protect and advance women's interests (Boyd et al. 2010).

Boyd et al. (2010) find empirical support for representational theory in their study of votes from judges in the U.S Courts of Appeal. Boyd et al. (2010) analyzed votes in cases that directly pertain to women's issues (e.g. abortion, Title VII sex discrimination, and sexual harassment) as well as cases that do not directly pertain to women's issues (e.g. ADA, Contract Clause, federalism, Takings Clause, Title VII race discrimination, capital punishment, campaign finance, affirmative action, and piercing the corporate veil) (Boyd, et al. 2010). The authors test cases that do not directly pertain to women's issues in order to test the different voice theory; however, the data only empirically supported representational theory in sex discrimination cases (Boyd, et al. 2010). Since the empirical results only indicated significant differences in only one legal issue area

pertaining to women's issues, the results may be more supportive of informational theory, because representational theory posits that a woman should vote differently than men on *all* issues that pertain to women's interests.

III. Informational Theory

Women possess a unique set of experiences and knowledge regarding issues that directly pertain to women; therefore, women are expected to vote differently than their male counterparts, who lack this experience and knowledge (Boyd, et al. 2010). Unlike representational theory, women in this theory are not serving as representatives of any class; instead, they make decisions utilizing their collective knowledge on issues from shared professional experiences (Boyd, et al. 2010). Because women's decisions will be contingent on knowledge pertaining to certain first-hand experiences, individual effects may be limited to an even smaller set of cases—particularly sex discrimination in employment (Boyd, et al. 2010). Although it is possible for informational theory to apply to other women's issues, it is completely dependent on the individual experiences of each woman justice; therefore, a woman justice who has direct knowledge and personal experiences with specific reproductive policies may make decisions differently based on her unique knowledge and previous experience regarding the issue (Boyd, et al. 2010). Sex discrimination in employment remains the standard metric, because most women judges and attorneys have a professionally-shared experience of navigating as a woman in a male-dominated occupation (Boyd, et al. 2010).

Gryski, et al. (1986) analyzed individual decision-making by U.S. state supreme court justices in sex discrimination cases, and the results of their study showed that justices were more likely to vote in favor of a female petitioner in a non-criminal sex discrimination case when there was at least one woman serving on a court with a "high reputation" (Gryski, et al. 1986). A court's

reputation is measured by the amount of times that other courts cite a given state court's previous decisions in similar cases; therefore, women who serve on courts with higher reputations are seen as credible sources of information also by other justices outside of the court and not just by justices serving alongside women on a given court (Gryski, et al. 1986).

IV. Panel Effects

The collegial and deliberative nature of appellate courts foster an environment in which women are able to influence their male colleagues, because a female judge can create a new range of possible alternatives "by adding different preferences to the deliberation" (Peresie 2005). The U.S. Supreme Court is also collegial and deliberative in nature, particularly with regard to the majority opinion writing process (Wahlbeck, et al. 1999). Majority opinions are often the result of multiple collaborations and influence from many justices voting in the majority; therefore, decisions in the U.S. Supreme Court are not made in an isolated setting (Wahlbeck, et al. 1999).

Women judges are also seen as credible sources of information pertaining to women's issues (Boyd et al. 2010). Through this account, male judges tend to view women as being more credible in interpreting and analyzing issues pertaining to women; therefore, male judges value women's judgment in certain legal issues (Peresie 2005). As such, male judges learn from their women colleagues and begin to side more often with plaintiffs in issues pertaining to women (Peresie 2005). Although male judges defer to their female counterparts on certain issues, their decision to side with women judges may be strategic in nature. A male judge may side with a woman judge in a case that is important to her in order to secure a vote in a case that may later be important to the male judge (Peresie 2005).

Boyd et al. (2010) also find that in vertical cases argued before U.S. Courts of Appeal "not only do males and females bring distinct approaches to these cases, but the presence of a female

on a panel actually causes male judges to vote in a way they otherwise would not—in favor of plaintiffs” (Boyd et al. 2010, 406). Overall, Boyd, et al. (2010) concluded that the effect of gender in federal appellate courts is rare and not empirically significant in most cases; however, there were consistent findings that proved individual and panel effects were significant in decision-making pertaining to sex discrimination disputes (Boyd, et al. 2010).

V. Critical Mass

The empirical effect of women’s presence on a high court may be subject to a certain threshold that is required before a substantial effect can be detected (Haire and Moyer 2015, 45). The notion of critical mass theory is grounded in the substantive shift in policy within an institutional body once its membership crosses a threshold for a specific group (Thomas 1994). Thomas (1994) first coined the term when discussing this threshold in legislative bodies. As higher proportions of women were present in a subject legislative body, legislators were more likely to push for policies that advanced the interests of women (Thomas 1994). Empirical results in studies of legislative thresholds indicate that critical mass is reached once the legislative body is comprised of 15-30% women (Dahlerup 2014; Swiss, et al. 2012; Childs and Krook 2006a; Bratton 2005). Once that threshold is met, legislative policy pertaining to women begins to significantly increase. In applying critical mass theory to courts, results have shown that women serving on U.S. district courts are likely to decide cases more liberally when there are at least two women serving within the same judicial district (Collins, et al. 2010). Women serving on state supreme courts also vote differently based off of the number of other women serving on the bench (McCall 2003).

Maule (2000) applied Thomas’ (1994) critical mass theory to the Minnesota State Supreme Court¹ and found that the court had an increase in consensus when deciding family law cases

¹ In 1991, the Minnesota State Supreme Court became the first state supreme court in the United States with a majority of women judges.

between 1985 and 1994 with a starting threshold of two women serving on the bench and ending threshold of four women in 1994 (Maule 2000). In addition to an increase in consensus, the Minnesota State Supreme Court also saw an increase in family law petitions filed (Maule 2000). The increase in filings of family law petitions could be indicative that the presence of a majority of women was sufficiently influential to increase a sense of trust in the Minnesota State Supreme Court to make more family-oriented decisions, or the increase in filings could also be indicative of the justices' willingness to take on more family law cases (Maule 2000).

On paneled courts, a certain threshold of women must be reached before there is a significant effect on voting patterns. This theory implies that there should be no quantifiable difference between men and women's decision-making prior to reaching critical mass. It is only once critical mass is reached, that women begin to vote differently than men.

VI. Conformity

The mixed results of previous studies and often small differences between female and male judicial decision-making may be a result of organizational factors. All judges undergo a relatively uniform legal training process in order to become lawyers and judges (Guinier, et al. 1994). As such, both men and women are expected to conform to professional norms of behavior and decision-making.

Moreover, women are subjected to certain gender norms in the legal field that force them to align their behavior and roles to their male colleagues (Solimine and Wheatley 1994). The legal field is inherently masculine, and women judges and attorneys are constantly trying to “[make] it in a man's world” (Kritzer, et al. 1977). Additionally, women judges follow a relatively similar pathway to judgeship through public service usually as a prosecutor or a highly successful private practice (Kritzer, et al. 1977). Lastly, women judges and attorneys may also “overcompensate” in

order to “prove” themselves in the hyper-masculine world of the law; therefore, they regularly align themselves to the behaviors and thought processes of their male colleagues (Kritzer, et al. 1977).

Issues of selection bias may also affect the way women judges rule once they are appointed or elected to the bench. When appointing the first women to high courts, the institutional bodies ruling on their appointment may prefer judicial candidates who are most similar to male judges currently sitting on the bench (Peresie 2005). President Carter’s first judicial appointees proved this theory, because all women who were initially appointed to the bench demonstrated no significant difference in decision-making when compared to their male colleagues who were already serving on the bench (Walker and Barrow 1985). These findings are indicative of institutions’ intent to preserve the status quo while satisfying social demands of diversification.

Additionally, the institutional bodies appointing women to courts may not have any substantive intent by appointing a woman to a court; instead, the women are appointed to serve as tokens on high courts (Peresie 2005). Women judges who are viewed as tokens on the court may conform to the substantive views of their male colleagues due to pressure of legitimacy (Peresie 2005; Kanter 1977). Additionally, a token judge will attempt to align themselves as closely as possible to the majority or the center, in order to “avoid drawing attention to the salient characteristic which sets them off as a minority member and simultaneously obtain a legitimate status in the eyes of the group” (Allen, et al. 1987, 233). The role of the token is solely to occupy a descriptive role without advancing any substantive policy initiatives that deviate from the norm (i.e. male judges’ policy agenda) (Allen, et al. 1987).

Table 1 below summarizes existing theories on gendered judicial decision-making along with empirical expectations for each theory.

Table 1: Existing Theories on Gendered Judicial Decision-Making

Theory	Implications	Empirical Expectation
Different Voice	Women develop a different notion of morality and worldview than men.	Qualitative, contextual differences in decision-making across all legal issue areas
Representational	Women judges serve as representatives on the Court for women's issues	Women vote in favor of protecting and advancing women's interests. Vote differences should only occur in cases that pertain to women's issues
Informational	Women judges are credible sources of information pertaining to women's issues and make decisions based off of their own unique knowledge on specific issues.	Women should vote in favor of women's interests that they have direct knowledge or personal experiences with
Panel Effects	Male judges should view women as being more credible in interpreting and analyzing issues pertaining to women and will defer to women's judgement in certain legal issues.	Male judges should vote similarly to women judges on women's issues
Critical Mass	Panel effects require that a certain threshold of women judges serve on the bench before there is a quantifiable effect in decision-making.	After a certain number of women are appointed to a court, women begin to form to coalition and vote differently than male peers in cases pertaining to women's issues
Conformity	Both women and men are constrained and trained by the same institutions (e.g. law school, professional training, and institutional constraints of the Court); therefore, there should be no differences in voting behavior between men and women holding all other explanatory factors constant.	There should be no differences in voting behavior between men and women with all other factors held constant.

VII. Ecofeminist Legal Theory

In this section, I apply theories of care ethics from ecofeminism to existing theories of different voice and feminine jurisprudence to develop and empirically test an ecofeminist legal theory. Women exhibit higher awareness of survival and prioritize the protection of life; therefore, women have a stronger moral approach to the survival of the environment as their relation to nature is fundamentally different than that of men (Salleh 1997; MacGregor 2004). Different voice theory in judicial decision-making helps bridge ecofeminism's care ethics into judicial decision-making. A woman judge should exhibit different responses to moral dilemmas across all legal issue areas when compared to male judges, because a woman's socialization and life experiences shape her moral response to be one of community, obligation, and responsibility (Gilligan 1982; Sherry 1986). This moral connection with the environment may manifest itself in an ecofeminist legal jurisprudence as one that favors protecting the environment above all other issues; therefore, a woman's inclination towards protecting the environment should not be contingent on her own personal experiences or whether women's interests are directly at stake, but rather she should emphasize the protection of *all* life both human and non-human.

Furthermore, women have different information and experiences with the environment since they deal more directly with it compared to men. Since the environment directly affects family health, child raising, and public safety, informational theories of judicial decision-making could also be applied to an ecofeminist legal theory. Many environmental cases involve much more than just protecting the environment. Cases disputing an increase in air pollution, water pollution, or dumping of toxic materials usually have families and children as litigants who sue for health-related damages resulting from a company's dumping or excessive release of toxins and pollutants. In these types of cases, women's experiences with child raising and maintaining family

health should prompt them to make decisions that favor the protection of the environment in order to ensure the safety and health of children and families.

Women’s different moral approach to nature and the protection of life—as well as their own personal experiences with advancing the safety of families and children—should incline women judges on the United States Supreme Court to cast votes that protect the interests of the environment.

H₁: Women judges will cast more pro-environment votes than men in cases that pertain to environmental issues.

a. Data and Methods

In order to test my hypothesis on gendered decision-making effects in environmental cases, I utilize the Supreme Court Database² (“SCD”), which compiles data on cases argued before the United States Supreme Court. Although the SCD’s data ranges from the inception of the U.S. Supreme Court, I analyze environmental cases decided from 1997 to 2017. I choose this timeframe to account for the increase in legislative activity pertaining to environmental policy. During the early-1990’s, Congress and the Clinton Administration passed several amendments to existing environmental statutes (e.g. Clean Water Act, Clean Air Act, and National Environmental Policy Act) that expanded the role of the Environmental Protection Agency in regulating pollutants and other toxic materials. With the understanding that litigation is a lengthy process and cases often take years to reach the U.S. Supreme Court, I use 1997 as base year to account for environmental litigation that may have initiated at the time the environmental policy initiatives were enacted by

² Harold J. Spaeth, Lee Epstein, et al. 2019 Supreme Court Database, Version 2019 Release 1. URL: <http://Supremecourtdatabase.org>

Congress and the Clinton Administration. I analyze cases from the SCD that pertained to the following issues: national supremacy over natural resources; national supremacy over air pollution; national supremacy of water pollution; environmental protection of natural resources; federal utility regulation of gas pipelines, oil producers, gas producers, and nuclear power; Indigenous People; and the Takings Clause or other non-constitutional governmental taking of property. The dataset thus consists of 92 cases and 1,039 justice votes.

I am primarily interested in analyzing individual votes from justices as to whether they are in favor of protecting the environment, so the dependent variable is coded “1” for a pro-environment (liberal) vote and “0” for a judge vote against the environment. Since the dependent variable is dichotomous, I employ a logistic regression model.

The main independent variable of interest is the justice’s gender,³ and the variable is coded “1” for women and “0” for men. Table 1 indicates the proportion of votes casted by woman judges as compared to male judges.

Table 2: Proportion of Votes between Woman and Male Judges

Justice Gender	Total Number of Votes in Sample (n = 1,039)
Female	245
Male	794

³ There are also methodological issues with utilizing a judge’s sex as the main casual variable. Since sex is considered an inherent property of an individual, it should not be analyzed as a causal factor (Boyd, et al. 2010). Additionally, there is an inherent ordering issue, where the sex of the judge is always determined before any other covariate property, such as ideology (Boyd, et al. 2010). I would argue that this issue is reconciled by utilizing Simone de Beauvoir’s infamous quote from *The Second Sex*: “One is not born, but rather, becomes a woman” (Beauvoir 1989). The casual mechanisms argued through feminist legal theory are not intrinsic in nature; instead, they are a result of the socialization and expectations that women are succumbed to through childhood and beyond.

Control Variables

A judge's ideology matters when making decisions (Segal and Spaeth 2002). In order to account for this effect, I utilize Segal-Cover⁴ ideology scores to measure the ideology of a justice. Segal and Cover (1989) measured justices' ideology by analyzing newspaper editors' assessments of the justice before the justice was confirmed by the U.S. Senate (Segal and Cover 1989). The Segal-Cover ideology scores had a correlation of 0.80 between the ideological score and the justices' votes in civil liberties cases (Segal and Cover 1989). In this sample, the Segal-Cover ideology scores range from 0 to 0.78 with 0 being the most conservative justice in the sample and 0.78 being the most liberal justice in the sample with a mean value of 0.32.

I also control for the effects that a specific type of petitioner or respondent may have on judicial decision-making. I include environmental organizations, the U.S. Environmental Protection Agency ("EPA"), corporations that extract natural resources, Indigenous Peoples, and the United States as relevant parties that may have an effect on how justices vote in cases pertaining to the environment. Table 3 shows the frequency at which each type of party appears in the sample as either a petitioner or respondent.

Table 3: Frequency of Control Parties Appearing as Petitioner or Respondent

Party Type	Total No. of Cases as Petitioner	Total No. of Cases as Respondent
Environmental Organization	5	17
U.S. EPA	8	16
Corporation Extracting Natural Resources	19	6
Indigenous Person/Tribe	12	37
United States	14	23

⁴ Jeffrey A. Segal and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83: 557-565.

In cases involving the protection of natural resources and the environment, environmental organizations and the U.S. EPA should be the best advocates for environmental protection; therefore, the presence of an environmental organization or the U.S. EPA should incline a justice to vote in favor of protecting the environment.

Corporations that extract natural resources should be advocating for the continued extraction of natural resources in order to benefit their business. The following types of corporations are included in the analysis: coal companies, oil companies, natural gas companies, pipeline companies, lumber/logging companies, companies managing nuclear power plants, and other mining companies (excluding coal, oil, or pipeline companies). The presence of a corporation that extracts natural resources may incline a justice to vote against protecting the environment, because corporations should be the best at advocating for the continued extraction of natural resources due to their economic resources to engage in litigation and hire specialized, prestigious lawyers who often have extensive experience arguing before the Court (Galanter 1974).

Indigenous Peoples have a spiritual connection with the environment (MacGregor 2004). For example, indigenous women of the Keres of Laguna and Acoma Pueblos take the lead in ensuring the protection of the environment as a tribute to the myth of Kochinnenako (Yellow Woman), who established a contract with the non-human world through a male nature spirit in order to secure the tribe's survival (Parke-Sutherland 2018). Additionally, Indigenous Peoples are subjected to higher levels of environmental injustice and dumping of environmental toxins by the U.S. government and corporations (MacGregor 2004). For example, Hopi and Navajo women of the Black Mesa Water Coalition protested the leasing of 65,000 acres of land in the Black Mesa plateau in northern Arizona, and the Black Mesa Water Coalition successfully—through the combined efforts of Hopi and Navajo women—shutdown the Peabody Coal Company's operations

in Black Mesa following years of protests, lawsuits, and Congressional hearings (Parke-Sutherland 2018). Because of Indigenous Peoples and individual tribes' unique relationships with the environment, they should serve as efficient advocates for environmental protection and addressing environmental injustice within their tribes as stewards of the environment; therefore, the presence of Indigenous Peoples and/or Indigenous Tribes may incline a justice to vote in favor of protecting the environment.

The Solicitor General of the United States is an influential and highly-successful advocate for the United States (Segal, et al. 1988; McGuire 1998). The U.S. Solicitor General hires some of the best and most-experienced attorneys to argue and brief before the U.S. Supreme Court, and they have repeated experience with advocating for the United States before the Court (McGuire 1998). If the United States is a party, then justices may cast a vote in favor of the United States' position in the case.

I also control for economic factors that may affect the reasoning behind a justice's vote to protect the environment. I use data from the Quality of Government Basic Dataset⁵ to measure the percentage of total GDP attributed to the agricultural sector and percent unemployment. If the agricultural sector comprises a higher percentage of the country's total GDP, a justice may be voting against protecting the environment in order to secure arable land to sustain the country's economy—rather than voting to protect the environment to prevent exploitation of natural resources. Similarly, when unemployment is high, the government is pressured to create more employment opportunities—often through using natural resource extraction. As such, courts may

⁵ Dahlberg, Stefan, Sören Holmberg, Bo Rothstein, Natalia Alvarado Pachon & Sofia Axelsson. 2020. The Quality of Government Basic Dataset, version Jan20. University of Gothenburg: The Quality of Government Institute, <http://www.qog.pol.gu.se> doi:10.18157/qogbasjan20

feel pressured to balance individual livelihood with environmental protection where justices are expected to favor extraction over the environment in order to produce jobs and reduce social unrest.

b. Results

Table 4 shows the result of the logistic regression model testing the effects of gender on justice’s vote in environmental cases while controlling for other potential explanatory factors.⁶ I run two models, where Model 1 represents the full model with all cases. Model 2 excludes cases pertaining to the Takings Clause. Cases dealing with the Takings Clause tie in directly with ecofeminism’s arguments of exploitation of land for the benefit of capitalism, because Takings Clause cases usually pertain to the governmental taking of land for economic and development purposes. For this reason, I include them in my analysis. Model 2, however, acknowledges that certain legal arguments do not categorize the Takings Clause as an environmental issue and thus serves as a robustness check.

Table 4: Likelihood of Pro-environment Vote in the United States Supreme Court, 1997-2019

Variable Name	Model 1	Model 2
Justice Gender	-0.587* (0.223)	-0.359 (0.242)
Ideology	3.494** (0.613)	3.452** (0.637)
Environmental Organization as Petitioner	1.862* (0.788)	1.783* (0.832)
Environmental Organization as Respondent	-1.838** (0.474)	-1.615** (0.497)
EPA as Petitioner	1.711** (0.508)	1.486** (0.549)
EPA as Respondent	0.628* (0.394)	0.759** (0.435)
Corporation as Petitioner	-0.413 (0.472)	-0.076 (0.605)
Corporation as Respondent	0.073 (0.896)	-1.327* (1.060)

⁶ Justices’ votes are likely dependent on each case, so the errors in both models are clustered around cases and the year the case was decided, in order to account for time as well.

Indigenous People/Tribe as Petitioner	-0.368 (0.676)	-0.257 (0.684)
Indigenous People/Tribe as Respondent	-2.491** (0.412)	-2.519** (0.489)
United States as Petitioner	1.224** (0.508)	1.607** (0.591)
United States as Respondent	-0.895** (0.504)	-1.155** (0.626)
Agriculture as a % of GDP	0.656 (1.409)	-0.626 (1.836)
% Unemployment	-0.040 (0.096)	-0.152** (0.099)
Constant	-1.117 (1.714)	0.853 (2.274)
N	1,039	845
Log pseudolikelihood	-554.749	-431.158
Prob>chi²	0.000	0.000

Robust standard errors are noted. * = $p < .05$; ** = $p < .01$

In order to accurately interpret the results from the logistic regression model, I calculated the marginal effects⁷ for each independent variable, and the marginal effects are reported below in Table 5.

Table 5: Marginal Effects of Likelihood of a Pro-environment Vote in the United States Supreme Court, 1997-2019

Variable Name	Model 1	Model 2
Justice Gender	-0.138* (0.051)	-0.084 (0.055)
Ideology	0.854** (0.150)	0.825** (0.153)
Environmental Organization as Petitioner	0.405** (0.120)	0.403** (0.143)
Environmental Organization as Respondent	-0.351** (0.065)	-0.311** (0.074)
EPA as Petitioner	0.387** (0.089)	0.352** (0.112)
EPA as Respondent	0.155* (0.097)	0.186** (0.107)
Corporation as Petitioner	-0.098 (0.107)	-0.018 (0.143)

⁷ The marginal effects for the continuous variables in the model are calculated utilizing average marginal effects. The average marginal effect represents the average difference expected in probability corresponding to a single-unit increase in the continuous variable and is adjusted to the means of the other variables in the model.

Corporation as Respondent	0.018 (0.221)	-0.250** (0.137)
Indigenous People/Tribe as Petitioner	-0.087 (0.153)	-0.060 (0.154)
Indigenous People/Tribe as Respondent	-0.475** (0.053)	-0.472** (0.063)
United States as Petitioner	0.294** (0.110)	0.378** (0.119)
United States as Respondent	-0.199** (0.099)	-0.237** (0.105)
Agriculture as a % of GDP	0.160 (0.344)	-0.149 (0.439)
% Unemployment	-0.010 (0.023)	-0.036** (0.024)
N	1,039	845
Log pseudolikelihood	-554.749	-431.158
Prob>chi²	0.000	0.000

Robust standard errors are noted. * = $p < .05$; ** = $p < .01$

The results from Model 1 show that there is a statistically significant difference in voting behavior between male and female justices. A female justice is 13.8% less likely to cast a liberal vote than a male justice.

A justice's ideology is statistically significant, and the results show that the more liberal a justice is, the higher the likelihood that a justice will cast a liberal vote. In this model, for every unit increase in a justice's Segal-Cover score, there is a corresponding 85.4% greater chance a justice will cast a liberal vote.

Environmental organizations have a statistically significant effect on a justice's vote when they are present in a case as a petitioner and a respondent; however, the effect is inversed depending on whether the environmental organization is a petitioner or respondent. When an environmental organization is present in a case as a petitioner, there is a 40.5% greater chance that a justice will cast a liberal vote than if there was no environmental organization present as a petitioner. The effect is reversed when an environmental organization is present in a case as a

respondent with justices 35.1% less likely to cast a liberal vote than if there was no environmental organization present as a respondent.

The U.S. Environmental Protection Agency has a statistically significant effect when present in a case as both a petitioner and a respondent. When the U.S. EPA is present in a case as a petitioner, a justice is 38.7% more likely to cast a liberal vote than if the U.S. EPA was not present in a case as a petitioner. The effect is in the same direction—to a lesser degree—when the U.S. EPA is present in a case as a respondent. A justice is 15.5% more likely to cast a liberal vote when the U.S. EPA is present in a case as a respondent than if the U.S. EPA was not present in the case as a respondent.

Indigenous Peoples and tribes have a statistically significant effect on a justice's vote but only when they are present in a case as a respondent. A justice is 47.5% less likely to cast a liberal vote when Indigenous Peoples and tribes are present in a case as a respondent than if Indigenous Peoples and tribes were not present in a case as a respondent.

The United States has a statistically significant effect on a justice's vote when present in a case as both a petitioner and a respondent. When the United States is present in a case as a petitioner, there is a 29.4% greater chance that a justice will cast a liberal vote than if the United States was not present in a case as a petitioner. The effect is reversed when the United States is present as a respondent. A justice is 19.9% less likely to cast a liberal vote when the United States is present in a case as a respondent than if the United States was not present in a case as a respondent.

The results of Model 2 are from decisions in environmental cases that do not include any cases pertaining to the Takings Clause. A large number of cases in the dataset pertained to the

Takings Clause, so I ran a separate model to ensure that there were no significant differences with Model 1.

The results of Model 2 show that a justice's gender does not have a statistically significant effect. Model 2 also shows that when a corporation that extracts natural resources is present in a case as a respondent, a justice is 25% less likely to cast a liberal vote. Additionally, unemployment is statistically significant in Model 2 with a justice being 3.6% less likely to cast a liberal vote for every corresponding unit increase in percent unemployment.

c. Conclusion

A woman justice is less likely to cast a liberal vote than a male judge which is the opposite effect that I had originally predicted; however, I believe these results have several implications and are multi-faceted.

First, I believe these results actually indicate that cases pertaining to the environment are not entirely homogenous and not all liberal decisions equate to environmental protection. This observation is highlighted by the presence of an environmental organization and its effect on judicial decision-making. In many instances, environmental organizations may be engaging in litigation *against* the federal government and a liberal decision in a case may actually indicate a pro-government decision rather than a pro-environment decision. This may be the reason that we see an inverse relationship when an environmental organization is petitioning the U.S. Supreme Court to review a lower court decision rather than responding to a petition from an adverse party. Justices are more likely to cast liberal votes when environmental organizations are petitioners but are less likely to cast liberal votes when environmental organizations are respondents. This could very well mean that casting liberal votes does not equate to protecting the environment when cases

are between environmental organizations and the U.S. government; instead, a liberal vote is likely indicative of the U.S. government's interests.

The sample of cases also includes cases pertaining to the Takings Clause and other non-constitutional governmental taking of property. In these types of cases, a liberal decision indicates a pro-government/anti-owner vote; therefore, if women are less likely to cast a liberal vote in Takings Clause cases, then they are more likely to be advocating against governmental taking of property.

The results also indicate that the U.S. Environmental Protection Agency is a good advocate for environmental protection. In these types of cases, there are no competing interests between the government and environmental protection; therefore, liberal decisions should be indicative of pro-environmental stances from justices. Regardless of whether the U.S. EPA is involved in a case as a petitioner or a respondent, justices are likely to cast liberal votes in favor of environmental protection.

Justices are less likely to cast liberal votes in cases where Indigenous People and tribes are present as a respondent. These results indicate that U.S. Supreme Court justices are generally voting against the interests of Indigenous Peoples and tribes. Out of the 254 cases in the sample where Indigenous Peoples and tribes are present as respondents, only 18 of those cases pertain to Takings Clause; therefore, there is little chance that the negative coefficient is a result of anti-government votes in Takings Clause cases.

Overall, I believe these results provide a promising insight to the effects of gender on judicial decision-making in environmental cases. A judge's gender matters when making decisions in environmental cases, and I would argue the data shows that women judges are more likely to protect the interests of the environment than male judges. Future research on this matter should

attempt a different coding scheme to address the liberal/conservative issues that arise when identifying the direction of decisions in cases where there are conflicting interests between the U.S. government and the environment.

Chapter 3: Ecofeminist Language & Dissenting Opinions

I. Ecofeminism and Linguistics

Linguistics and concept formation can also be used to draw connections between women and nature. Ludwig Wittgenstein (1953) argues that concept formation can be analyzed by the way an individual uses language to discuss themselves and the world around them. In most cultures, language is critical in perpetuating a sexist-naturist dialogue which sees women and nonhuman nature as less than men (Mack-Canty 2004). Specifically, the English language promotes naturalizing and animalizing women by comparing them to certain animals or parts of nature already viewed to be inferior to men (Adams 1990). Women can be referred to as bitches, chicks, whales, queen bees, snakes, pets, bunnies, and social butterflies; however, men are usually referred to animals that are usually not exploited to the same degree as the animals which women are referred to (e.g. lions, wolves, tigers, eagles, etc.). The English language also feminizes nature. It is Mother Nature, not Father Nature, which has its resources extracted, controlled, exploited, and penetrated. Fertile soil, not potent soil, is the one that is farmed and utilized over and over until it is deemed useless by man (i.e. it can no longer provide resources to the man's benefit).

The way we talk about ourselves and the world around us matters. Language formation and cultural formation work *vis-à-vis* to perpetuate patriarchal domination of women and nature by incorporating language that feminizes nature and naturalizes women (Adams 1990).

II. Data and Methods

I test linguistic theories of ecofeminism by qualitatively analyzing dissenting opinions written by justices of the United States Supreme Court in six environmental cases found within the sample of cases utilized in Chapter 2. A qualitative analysis is adequate and necessary for many reasons. First, a qualitative analysis serves as a consolidatory medium to address epistemological

conflicts between ecofeminism and my quantitative analysis of justices' votes. Qualitative research grounds itself primarily on an interpretivist epistemology—rather than the positivist epistemology that quantitative research relies on (Webley 2010). Analyzing social phenomena through an interpretivist epistemology allows for a deeper understanding of social behavior and the structural relations produced as a result of that social behavior (Webley 2010).

Second, a qualitative analysis following a quantitative analysis may aid in explaining the phenomenon observed quantitatively in greater detail (Kritzer 2009). Qualitative analyses are equally capable of testing causal and descriptive inferences and producing valid results (King, Keohane, and Verba 1994). A qualitative analysis is much smaller with regard to data points than a quantitative analysis; however, the data analyzed through a qualitative analysis is considered to be more contextual and in-depth than single observations within a quantitative analysis (Webley 2010). By analyzing written court opinions, which provide legal reasoning and context beyond a singular vote, I am able to examine alternatives and other explanatory factors for the results of the quantitative analysis in Chapter 2.

Current practices for qualitative document analysis rely heavily on coding schemes and a statistical analysis of content and discourse of written documents (Webley 2010); however, coding written documents and analyzing written content statistically shifts the analysis back to a positivist epistemology, which undermines the very premise of ecofeminism's epistemology emphasizing multiple, dynamic understandings of knowledge and value. Instead, I analyze written dissents that compares writing styles between women and men in environmental cases. Interpretivist approaches to analyzing written documents emphasize the researcher's frame of reference, because "no-one is capable of being objective, all meaning being socially constructed" (Webley 2010, 5).

I analyze solo-authored dissenting opinions instead of majority opinions for two reasons. First, dissenting opinions are not binding law, so justices have more freedom to express themselves and provide critiques against the majority's decision (Wahlbeck, et al. 1999). Secondly, a majority decision is a product of negotiation and compromise, so the language cannot be easily attributed to particular majority coalition members, such as the majority opinion writer. Majority opinions are circulated and often times have several sections added or omitted by other justices that are signing on to the majority opinion (Wahlbeck, et al. 1999). A dissenting opinion should have a more centralized and isolated voice that speaks to the intentions and thoughts of the justice writing the opinion; therefore, analyzing solo-authored dissenting opinions will provide the best framework for comparing women and men's voices when discussing environmental matters.

I randomly⁸ select six dissenting opinions written in environmental cases with three opinions authored by women⁹ and three authored by men. These cases are selected from the sample of cases analyzed in the quantitative section of this paper; therefore, the dissenting opinions analyzed in this chapter were not randomly selected from all environmental cases heard by the U.S. Supreme Court. Out of the six dissenting opinions two are written by Justice Ruth Bader Ginsburg, one is written by Justice Elena Kagan, two are written by Justice John Paul Stevens, and one is written by Justice Antonin Scalia.¹⁰

⁸ When randomly selecting dissenting opinions from women justices, all cases selected at random contained a dissenting opinion written by Justice Ginsburg; therefore, I had to identify a case in the dataset that did not contain a dissenting opinion from Justice Ginsburg in order to ensure a degree of variety in authorship from the available opinions written by women.

⁹ There were no dissenting opinions from Justice Sotomayor or Justice Breyer in the dataset used to analyze dissenting opinions. Future analysis of Justice Sotomayor's written opinions will be especially beneficial to discourse regarding the impacts of intersectionality on language and perceptions of the environment. Future research can also benefit from analyzing Justice Breyer's dissenting opinions to determine if ideology is a stronger influence than gender on linguistics in written opinions, since Justice Breyer is often seen as the "most liberal" male judge on the Court.

¹⁰ The dataset analyzed in the quantitative portion of this paper contained a limited number of dissenting opinions—particularly dissenting opinions written by women. For this reason, there are two opinions written by Justice Ginsburg and two opinions written by Justice Stevens, as they were part of a limited number of dissenting opinions. Future research on dissenting opinions should analyze written opinions from *all* available environmental cases to increase diversity among authoring justices.

III. Dissenting Opinion Analysis

Donald C. Winter, Secretary of the Navy, et al. v. Natural Resources Defense Council, Inc., et al.
555 U.S. 7 (2008)

Natural Resources Defense Council filed for an injunction in the U.S. District Court for the Central District of California in response to the U.S. Navy carrying out exercises in southern California waters.

Pursuant to the National Environmental Policy Act of 1969 (“NAPA”), the U.S. Navy was required to prepare an environmental impact statement (“EIS”) in order to assess the risks and potential dangers their exercises could have on marine life in the area. The U.S. Navy emphasized its intent to carry out the EIS; however, it proceeded with its exercises prior to the completion of the EIS. Natural Resources Defense Council argued that the mid-frequency active sonar used during these exercises would cause significant harm to marine mammals in southern California waters. In order to bypass the requirements set forth by NAPA, the U.S. Navy sought relief from the Council on Environmental Quality (“CEQ”), and the CEQ, an advisory council within the Executive Branch, granted an exemption and provided alternative arrangements that allowed the U.S. Navy to continue their exercises without an EIS. The District Court granted Natural Resources Defense Council’s petition for injunction and specifically cited the “possibility of irreparable harm” to marine mammals in southern California waters as grounds for injunction. The U.S. District Court also stated that CEQ could not, under its authority, provide the U.S. Navy with “alternative arrangements” to bypass the EIS requirement.

The U.S. Navy appealed on the grounds that the U.S. District Court abused its discretion by granting an injunction that prevented exercises that the U.S. Navy saw as an “emergency circumstance” outlined by NAPA and were therefore allowed to carry out the exercises prior to completing an EIS.

The majority held in a 5-4 decision that the U.S. District Court abused its discretion by granting an injunction solely on the grounds of the “possibility” of an irreparable harm to marine mammals. The majority argued that the legal standard for an injunction cannot be a “possibility” of an irreparable harm; instead, the petitioner needs to prove that without an injunction the irreparable will be likely. Additionally, the majority held that the naval exercises were in the public’s interest and outweighed any irreparable harm to marine wildlife. Lastly, the majority held that a U.S. District Court must provide an alternative for persuading the U.S. Navy to comply with completing an EIS rather than an injunction.

Justice Ginsburg filed a dissenting opinion arguing that the U.S. District Court did not abuse its discretion in granting an injunction preventing the U.S. Navy to continue its exercises until an EIS was completed by the U.S. Navy. Justice Ginsburg argues that had the U.S. Navy completed the EIS prior to commencing their exercises, “the parties and the public could have benefited from the environmental analysis—and the Navy’s training could have proceeded without interruption” (*Winter v. Nat. Res. Def. Council, Inc.* 2008).

The U.S. Navy’s own environmental assessment predicted that there would be irreparable harm to marine mammals, specifically with their use of sonar. Justice Ginsburg’s emphasis on the significant harm to marine mammals is worth noting:

“In my view, this likely harm—170,000 behavioral disturbances, including 8,000 instances of temporary hearing loss; and 564 Level A harms, including 436 injuries to a beaked whale population numbering only 1,121—cannot be lightly dismissed, even in the face of an alleged risk to the effectiveness of the Navy’s 14 training exercises” (*Winter v. Nat. Res. Def. Council, Inc.* 2008).

Justice Ginsburg does not dispute whether the U.S. Navy’s exercises are important; however, military interests do not always take precedent, especially when high-scale damage to marine life is very likely. Justice Ginsburg ends her dissenting opinion by stating that

“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment” (*Winter v. Nat. Res. Def. Council, Inc.* 2008).

Justice Ginsburg’s assessment of environmental injury and her emphasis on the harms to marine mammals in the present case could be indicative of her perceptions of what environmental protection should consist of within the courts (*i.e.* non-human protection of life is more important than the interests of the U.S. Navy). It is also important to note that Justice Ginsburg perceived the public interest to be one of protecting the environment and marine wildlife rather than the placing the public interests in the continued military exercises carried out by the U.S. Navy.

Michigan, et al. v. Environmental Protection Agency, et al. 576 U.S. ___ (2015)

Congress passed amendments to the Clean Air Act in 1990 that created a framework for the U.S. Environmental Protection Agency (“EPA”) to regulate hazardous air pollutants, specifically mercury, from “stationary sources” that released air pollutants in high quantities. By regulating these hazardous air pollutants, the EPA was directed to also conduct cost-benefit analyses to gauge the effects and total cost on the industry to regulate air pollutants. Congress also modified the Clean Air Act to allow the EPA to regulate power plants in an effort to curb rising levels of acid rain in areas where power plants were operating. Following a public health study that concluded that power plants, specifically electric utility steam-generating units, are the “largest non-natural source of mercury emissions,” the EPA decided that it was “appropriate and necessary” to regulate the emissions from power plants. Michigan, along with 22 other states and several industries, sued the EPA on the grounds that the agency did not take into consideration the cost of regulating the power plants when the agency decided to regulate the power plants. The EPA

argued that its decision was solely the triggering event for a multi-stage regulatory process that would, at some point, include a cost-benefit analysis before implementing an emission limit.

The majority held in a 5-4 decision that the EPA did not consider costs when making its decision to regulate power plants' emissions and unreasonably interpreted the "appropriate and necessary" provision of the Clean Air Act Amendments of 1990.

Justice Elena Kagan filed a dissenting opinion arguing that the EPA had the full intent of taking costs into account when regulating power plants, and it would be unreasonable to expect the agency to conduct a thorough cost-benefit analysis at the initial stages of the regulatory process. Justice Kagan also argues that the courts cannot interfere with the agency's regulatory decisions after the agency has determined that regulation is "appropriate and necessary," because "EPA's experience and expertise in that arena—and courts' lack of those attributes—demand that judicial review proceed with caution and care" (*Michigan v. E.P.A.* 2015). Justice Kagan also emphasizes that the regulatory process, specifically with regard to setting emissions levels, can be a "lengthy and complicated process" that often times requires years-worth of studies to truly assess costs and benefits.

Justice Kagan also critiques the majority's argument regarding "interpretive gerrymander" that the EPA, according to the majority, only considered environmental effects and not costs when deciding that it was "appropriate and necessary" to regulate power plants' emissions. The majority uses a sport-car metaphor to liken the EPA to a driver who believes it is "appropriate" to buy a Ferrari but fails to account for the cost, because "he plans to think about cost later when deciding whether to upgrade the sound system" (*Michigan v. E.P.A.* 2015). Justice Kagan responds by stating that

"The comparison is witty but wholly inapt. To begin with, emissions limits are not a luxury good: They are a safety measure, designed to curtail the significant health

and environmental harms caused by power plants spewing hazardous pollutants” (*Michigan v. E.P.A.* 2015).

Justice Kagan instead provides her own car metaphor by comparing the EPA to a driver who decides that it is “appropriate and necessary” to replace her worn-out brake pads without initially considering cost; however, she is well aware that she has enough time to evaluate costs and explore different options to stay within her budget, because of her prior experience with replacing worn-out brake pads.

Justice Kagan’s critique of the majority’s car metaphor could be interpreted as a critique on the masculine themes found within the majority’s opinion, as well. Justice Kagan downplays the metaphor by categorizing it as “witty but wholly inapt,” and she reminds the majority that the issue at hand has much larger implications than buying a car (i.e. public health and the environment are directly at risk as a result of power plants’ pollutants). It is also worth noting that Justice Kagan switches the pronouns used by the majority from “he” to “she” in her own reinterpretation of the car purchase metaphor.

Justice Kagan concludes her dissenting opinion by stating that “the [majority’s decision] is a decision that deprives the American public of the pollution control measures that the responsible Agency, acting well within its delegated authority, found would save many, many lives” (*Michigan v. E.P.A.* 2015).

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, et al. 557 U.S. 261 (2009)

Coeur Alaska proposed a discharge of 210,000 gallons a day of wastewater from its gold mine into Lower Slate Lake located in Alaska’s Tongass National Forest. The wastewater would include concentrations of certain toxic metals, including aluminum, copper, lead, and mercury. An estimated 4.5 million tons of solid waste would be discharged into the lake and raise the lake’s bottom elevation by 50 feet. The Southeast Alaska Conservation Council sued Coeur Alaska, Inc.

on the grounds that the discharge would be in violation of the EPA's standards, governed by Section 306 of the Clean Water Act, of discharging waste into the waters of the United States. Coeur Alaska argued that their proposed discharge was not subject to regulation by the EPA, but instead was governed by the Army Corps of Engineers through Section 404 of the Clean Water Act.

The majority held in a 6-3 decision that the U.S. Army Corp of Engineers has the authority to regulate the discharge and grant permits to Coeur Alaska and other similar companies intending on discharging wastewater.

Justice Ginsburg issued a dissenting opinion arguing that any discharge that is subject to a performance standard through the Clean Water Act should be exclusively regulated by the EPA. Justice Ginsburg emphasizes Congress' intent behind the Clean Water Act which was primarily to "eliminate, by 1985, the discharge of all pollutants into the Nation's navigable waters" (*Coeur Alaska, Inc. v. Se. Alaska Conservation Council* 2009). There is room for Sections 306 and 404 of the Clean Water Act to operate simultaneously as long as Section 404 does not allow for permits to discharge pollutants that would otherwise be prohibited by Section 306. Justice Ginsburg warns of the effects that allowing for an override of Section 306 could have on future pollution-control standards, because the new standard would simply be that a permit could be issued if the discharged pollutant(s) contain "sufficient solid matter to raise the bottom of a water body, transformed into a waste disposal facility" (*Coeur Alaska, Inc. v. Se. Alaska Conservation Council* 2009). Justice Ginsburg goes on to state that "providing an escape hatch for polluters whose discharges contain solid matter, it bears noting, is particularly perverse; the Act specifically focuses on solids as harmful pollutants" (*Coeur Alaska, Inc. v. Se. Alaska Conservation Council* 2009).

The majority's decision, according to Ginsburg, completely undermines the purpose of the Clean Water Act and opens the door for the waters of the United States to be used as "settling ponds." In a footnote, Justice Ginsburg critiques Justice Breyer on the alleged safeguards that would help continue enforcement of performance standards.

"Given today's decision, it is optimistic to expect that EPA or the courts will act vigorously to prevent evasion of performance standards. Nor is EPA's veto power under § 404(c) of the Clean Water Act an adequate substitute for adherence to § 306. That power—exercised only a dozen times over 36 years encompassing more than one million permit applications, see Brief for American Rivers 14—hinges on a finding of "unacceptable adverse effect," 33 U.S.C. § 1344(c). Destruction of nearly all aquatic life in a pristine lake apparently does not qualify as "unacceptable" (*Coeur Alaska, Inc. v. Se. Alaska Conservation Council* 2009).

Justice Ginsburg's use of imagery in her concluding sentence cannot go unnoticed. Her use of the word "pristine" to describe the lake, that earlier in her opinion she argued would be perversely polluted, could be interpreted as a ecofeminist critique against the exploitation of a "pristine" lake to be used as a dumping site for waste pursuant to the majority's decision.

National Association of Home Builders, et al. v. Defenders of Wildlife, et al. 551 U.S. 644 (2007)

Under the Clean Water Act, the EPA is allowed to transfer authority to regulate a National Pollution Discharge Elimination System (NPDES) upon the application of a state, as long as the state meets nine criteria outlined by the Clean Water Act. In 2002, Arizona applied for a transfer of authority from the EPA, so the state could administer its own NPDES. Upon Arizona's application, the EPA consulted with the Fish and Wildlife Services ("FWS") to determine if the transfer would have any adverse effect on listed species. FWS concluded that the transfer would not have any direct effect on water quality that would adversely affect certain species; however, FWS believed that the transfer could potentially violate Section 7(a)(2) of the Endangered Species Act of 1973 ("ESA"). FWS argued that a transfer could potentially result in more discharge permits from the state which would allow for growth in land development, ultimately affecting certain

endangered species in Arizona. The EPA disagreed and granted the permit arguing that as long as the state met the nine criteria, the EPA would not be responsible for any future impacts related to projects requiring state-issued NPDES permits. The Defenders of Wildlife sued to challenge the transfer and argued that the EPA's decision would be independently subject to the requirements set forth by the ESA.

The majority held in a 5-4 decision that the EPA's transfer to Arizona was not subject to the provisions protecting endangered species, because the transfer was considered a "non-discretionary" action; therefore, the EPA is only bound by the nine criterion outlined by the Clean Water Act, and the provisions of the ESA are only applicable to discretionary actions of federal agencies.

Justice John Paul Stevens issued a dissenting opinion arguing that the ESA should apply to *all* federal agency actions—both discretionary and non-discretionary. Justice Stevens relies on precedent in *TVA v. Hill*, 437 U.S. 153 (1978) (also known as the "snail darter" case) where the Court held that the intent behind the ESA was to place endangered species above all other "primary missions" in federal agencies. In *Hill*, the Court found that the survival of the snail fish would require a \$100 million project to be permanently halted due to the strict provisions of the ESA. Justice Stevens argues that the Court's decision in *Hill* demands that the CWA and the EPA yield to the provisions outlined in the ESA.

Following the Court's decision in *Hill*, Congress amended the ESA and created the Endangered Species Committee which was granted authority to issue exemptions to the ESA and essentially "approve the extinction of an endangered species" (*Nat'l Ass'n of Home Builders v. Defs. of Wildlife* 2007). Due to the committee's authority to approve the extinction of a species, the committee is often referred to as the "God Squad" or "God Committee." Justice Stevens argues

that the creation of the committee is indicative of Congress recognizing that some conflicts with the ESA cannot be resolved without the permanent sacrifice of some endangered species.

Justice Stevens' inclusion of the "colloquial" term "God Squad" or "God Committee" when referring to the Endangered Species Committee is particularly interesting. His inclusion of the term "God Squad" can be interpreted to be a masculine justification for the committee's authority to "approve" the extinction of an endangered species. Justice Stevens upholds the ESA throughout his dissenting opinion; however, he seems to depart from the total authority that the ESA should have when discussing the "God Squad." Justice Stevens grants a "pass" when it comes to approving the extinction of an endangered species when the approval comes from a committee with a hyper-masculine terminology ascribed to its identity and duties.

Justice Stevens concludes his dissenting opinion by stating that the majority's decision completely disregards the Court's decision in *Hill* and "places a great number of endangered species in jeopardy, including the cactus ferruginous pygmy-owl and Pima pineapple cactus at issue here" (*Nat'l Ass'n of Home Builders v. Defs. of Wildlife* 2007).

Friends of the Earth, Inc., et al. v. Laidlaw Environmental Services (TOC), Inc. 528 U.S. 167 (2000)

Laidlaw Environmental Services (TOC), Inc. ("Laidlaw") obtained a wastewater treatment plant and subsequently was granted a NPDES permit that authorized Laidlaw to discharge limited pollutants into the North Tyger River in South Carolina. Laidlaw repeatedly exceeded the discharge of mercury allowed by the permit, and Friends of the Earth ultimately filed a citizen suit against Laidlaw alleging violation of the NPDES and sought an award of civil penalties against Laidlaw. Laidlaw argued that the Friends of the Earth did not have standing to sue, because Friends of the Earth could not demonstrate a concrete injury as a result of the exceeded dumping of mercury into the North Tyger River. Laidlaw also argued that the issue had become moot, because

it had complied with the terms of the NPDES following the filing of the suit from Friends of the Earth.

The majority held in a 7-2 decision that the issue in controversy cannot be dismissed as moot due to Laidlaw's compliance following the commencement of litigation. The majority went on to state that "a defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case" (*Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.* 2000). The majority also argued that Friends of the Earth had standing to bring forth a suit on behalf of its members, because they were able to prove injury in fact, causation, and redressability. Lastly, the majority argued that the civil penalties imposed by the U.S. District Court served both as a catalyst for immediate compliance and a deterrent for future violations.

While the legal question remained primarily procedural, Justice Antonin Scalia's dissenting opinion offers insights into his perception of environmental harms as remediable harms in the courts. Justice Scalia issued a dissenting opinion arguing that the Friends of the Earth were not able to demonstrate an injury in fact and therefore had no standing to bring suit against Laidlaw. Justice Scalia emphasizes the need for a connection between the harms to the environment and a direct harm to the individual bringing forth the suit.

"Ongoing 'concerns' about the environment are not enough, for '[i]t is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions'" (internal quotes pertain to *Los Angeles v. Lyons*, 461 U.S. 95 (1983)) (*Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.* 2000).

It is worth discussing that in every iteration of the terms "environmental concerns" or "environmental harms," Justice Scalia religiously places the term "concerns" or "harms" in quotation marks as to indicate that the environmental concerns or harms asserted by Friends of the Earth, or any party asserting an environmental harm or concern, are not legitimate.

Justice Scalia states his concerns regarding evidence presented in the form of affidavits in the U.S. District Court that were used to prove up the plaintiffs' damages and concerns regarding the potential effects that continued violations by Laidlaw could have on their lives. Justice Scalia continues to deny plaintiffs' standing stating that

“[b]y accepting plaintiffs' vague, contradictory, and unsubstantiated allegations of 'concern' about the environment as adequate to prove injury in fact, and accepting them even in the face of a finding that the environment was not demonstrably harmed, the Court makes the injury-in-fact requirement a sham” (*Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.* 2000).

Justice Scalia also critiques the majority's decision to allow private citizens to pursue public civil penalties paid directly to the U.S. Treasury. Particularly, the issue of redressability and individual relief is absent when civil penalties are paid to the government rather than the private citizen; therefore, Justice Scalia argues that this mechanism essentially allows for a plaintiff to act as a “self-appointed mini-EPA” to enforce environmental laws and regulations through the courts. *Monsanto Co., et al. v. Geertson Seed Farms, et al.* 561 U.S. 139 (2010)

Monsanto Co. (“Monsanto”) and Forage Genetics International (“FGI”) genetically engineered the alfalfa genome to be resistant to Roundup, an herbicide originally produced by Monsanto. Under the Plant Protection Act (“PPA”) the Animal and Plant Health Inspection Service (“APHIS”) must regulate genetically-engineered plants in order to assess their risk to other naturally-present plants in the United States; therefore, companies that genetically engineer plants, such as Monsanto, must comply with NEPA and PPA by completing an EIS to determine the environmental effects the plant may have. APHIS began deregulating Roundup Ready Alfalfa (“RRA”) without the completion of an EIS, and Geertson Seed Farms (“Geertson”), along with Trask Family Seeds (“Trask”), petitioned a U.S. District Court to issue an injunction preventing the distribution of RRA seeds until an EIS is completed. The U.S. District Court granted the

injunction on the grounds that there was sufficient evidence to prove that RRA would lead to cross-pollination with traditional alfalfa crops and ultimately eradicate the conventional alfalfa plant.

The majority held in a 7-1 decision that the U.S. District Court abused its discretion by granting the injunction without holding an evidentiary hearing to establish the requirements for an injunction, specifically citing to *Winter, et al. v. Natural Resources Defense Council, Inc., et al.* 555 U.S. 7 (2008) in which the Court held that a NEPA violation does not indicate that injunction relief is available.

Justice John Paul Stevens issued a dissenting opinion arguing that the U.S. District Court had sufficient findings of fact that supported the injunction. Justice Stevens states that the majority did not dispute the U.S. District Court's findings of fact that included the following: RRA is proven to contaminate other plants through cross-pollination, controlled planting has still led to cross-pollination, the APHIS does not have the resources available to enforce any limitations on planting, and contamination of the conventional alfalfa crop can "decimate farmers' livelihoods and the American alfalfa market for years to come" (*Monsanto Co. v. Geertson Seed Farms* 2010).

Justice Stevens places significant weight on the environmental impacts that RRA could have when a gene transfer occurs. The findings of fact also included that "gene transfer can and does occur, and that if it were to spread through open land the environmental and economic consequences would be devastating" (*Monsanto Co. v. Geertson Seed Farms* 2010). Justice Stevens also states that "limits on planting or harvesting may operate fine in a laboratory setting, but the District Court concluded that many limits will not be followed and cannot be enforced in the real world" (*Monsanto Co. v. Geertson Seed Farms* 2010).

Justice Stevens concludes his dissenting opinion standing by the U.S. District Court's decision to grant the injunction.

“Confronted with those disconcerting submissions, with APHIS’s unlawful deregulation decision, with a group of farmers who had staked their livelihoods on APHIS’s decision, and with a federal statute that prizes informed decisionmaking on matters that seriously affect the environment, the court did the best it could” (*Monsanto Co. v. Geertson Seed Farms* 2010).

When comparing Justice Stevens’ written opinion in *Monsanto* to the dissenting opinion in *National Association of Home Builders*, there is a clearer concern with environmental harm in *Monsanto* with a more neutral and ungendered approach in language. In *Monsanto*, Justice Ginsburg and Justice Sotomayor voted with the majority; therefore, Justice Stevens was the sole dissenter in this case. His concerns for the cross-contamination of crops, specifically alfalfa, and the sensitivity to the individual concerns of the farmers who sought the injunction on behalf of countless of smaller farms across the nation are worth discussing in light of Vandana Shiva’s ecofeminist arguments on preserving agricultural techniques and protecting the livelihood of natural seeds against companies like Monsanto.

Chapter 4: Conclusion

This study introduces a new theory to judicial and gendered decision-making scholarship by synthesizing an ecofeminist legal theory through existing theories of judicial decision-making and ecofeminism.

From a quantitative standpoint, women judges appear to vote differently than men in cases pertaining to the environment. Although women are less likely to cast “liberal” votes in environmental cases, I argue that this finding should not be interpreted as an anti-environment stance from women on the U.S. Supreme Court. Instead, future research should attempt to employ a different coding scheme that is exclusive to environmental cases that differentiates between a pro-government and pro-environment decision when both government and environmental interest are at odds in the same litigation. The dataset used for this study is in no way tailored to environmental cases, but it contains a sufficiently large sample to offer an initial analysis of voting patterns. Additionally, the results indicate that the U.S. Environmental Protection Agency serves as a successful advocate for the environment when arguing before the U.S. Supreme Court. Future studies may also be interested in analyzing the mechanisms behind the EPA’s successful track record on the Court.

Future studies may also control for a justice’s race and examine the effects of race and gender on environmental decision-making in U.S. courts. Because different groups with intersectional identities across gender, race, ethnicity, and class—among others—have distinct relationships with the environment, looking at a less homogenous group of justices would be beneficial. U.S. appellate courts, for example, have greater diversity than the U.S. Supreme Court, and this study could be further extended to state high court decisions as well.

Furthermore, future research should also analyze countries other than the United States. Other countries have different laws and regulations regarding the environment, as well as a different demographic of judges on their respective high courts. Cultural, economic, and religious differences define their relationship with the environment in ways that differ from American modes of conceptualization, policy priorities, and perceived needs. Similarly, the degree of environmental protections ensured through indigenous rights, such as policies pertaining to indigenous stewardship or indigenous collective property titles, vary significantly across countries. Taking a more international comparative approach would offer a better understanding of how gender relates to the environment across these contexts.

The linguistic analysis of justices' written dissenting opinions also provides promising insight to the future of gender effects on environmental litigation before the U.S. Supreme Court. Justices Ginsburg and Kagan demonstrated a clear concern with the protection of human and non-human, as well as implementing ecofeminist language within in their opinions. When compared to Justice Ginsburg and Justice Kagan, Justice Stevens and Justice Scalia demonstrated significantly different concerns when discussing the environment. Justice Stevens continued to use masculine themes and language in his dissenting opinions, even though he was generally advocating for the protection of the environment. Future studies may perform a comprehensive content analysis to statistically analyze written opinions and detect the frequency of certain ecofeminist terms or themes.

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