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## Justice System Journal

Publication details, including instructions for authors and  
subscription information:

<http://www.tandfonline.com/loi/ujsj20>

### High Court Recruitment of Female Clerks: A Comparative Analysis of the U.S. Supreme Court and the Supreme Court of Canada

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Published online: 29 Jan 2015.

To cite this article: Erin B. Kaheny, John J. Szmer, Michael A. Hansen & Katherine Felix Scheurer  
(2015): High Court Recruitment of Female Clerks: A Comparative Analysis of the U.S. Supreme Court  
and the Supreme Court of Canada, Justice System Journal, DOI: [10.1080/0098261X.2014.989791](https://doi.org/10.1080/0098261X.2014.989791)

To link to this article: <http://dx.doi.org/10.1080/0098261X.2014.989791>

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# High Court Recruitment of Female Clerks: A Comparative Analysis of the U.S. Supreme Court and the Supreme Court of Canada

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In this article, we systematically analyze the available data on SCOTUS clerk appointments to more thoroughly investigate the gender disparity in the hiring practices of its justices across the time period, 1941 to 2011, and compare this data, whenever possible, to that collected for the SCC from 1967 to 2007. In doing so, we are especially interested in exploring the impact of justice ideology and justice gender on individual decisions to hire female clerks. We maintain that the gender imbalance that has characterized the U.S. Supreme Court's composition might, at least partially, account for the discrepancy between the number of male and female clerks that have worked for this Court. It may also explain the notable relationship between a justice's ideology and his or her decision to hire female clerks.

**KEYWORDS:** clerk gender, clerk selection, U.S. Supreme Court, Supreme Court of Canada

It does not take long for an observer of Supreme Court litigation to notice some key names appearing on brief or at oral argument. As Professor Kevin McGuire uncovered in his 1993 investigation, "some Supreme Court lawyers . . . have extensive and dramatic experience before the Court" (McGuire 1993, 7). He further documented the now well-known tendency for such

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individuals to be drawn from very highly ranked law schools (McGuire 1993, 133). And, yes, since “clerks have a strong chance of being recruited by a firm or organization engaged in Supreme Court litigation” (McGuire 1993, 164), his study is now one of many to underscore the importance of the Supreme Court clerkship opportunity. Even those who do not aspire to be a member of the Supreme Court bar will find their previous Supreme Court clerkship experience to be a tremendous resource in the development of lucrative legal and professional careers (see, e.g., Benson 2007, 23; Estrich 2006). As an indication of the value of a Supreme Court clerkship, the market rate for a *bonus* to attract former clerks to prestigious law firms now stands at \$280,000—well above a justice’s salary (Mauro 2012; Posner 2013, 301). Beyond just the economic benefits of clerking, the experience opens doors to the highest levels of legal employment, from the top law firms to legal academia, prestigious government opportunities such as coveted positions in the Office of the Solicitor General, the judiciary, and even the U.S. Supreme Court bench. Indeed, six former clerks have been appointed to the U.S. Supreme Court: Justices Byron White, William Rehnquist, John Paul Stevens, Stephen Breyer, John Roberts, and Elena Kagan (Supreme Court of the United States 2014). If, in fact, women are less likely to receive clerkships, then women may be less likely to have these prestigious opportunities. In other words, this may diminish the opportunities for women to have a distinct voice in a variety of realms, which all play major roles in legal policy making.

Perhaps more importantly, clerks potentially influence high Court outputs.<sup>1</sup> For example, law clerks serving on the supreme courts of the United States and Canada play major roles in agenda setting (Flemming and Krutz 2002, 832; Perry 1991). In both institutions, the courts have discretionary jurisdiction. Parties seeking review by the Supreme Court of the United States (SCOTUS) must submit a petition requesting that the Court grant a writ of certiorari. Similarly, litigants asking the Supreme Court of Canada (SCC) to review their case submit an application requesting a leave to appeal. SCOTUS and SCC clerks are the primary actors responsible for summarizing these requests (Flemming and Krutz 2002, 832; Perry 1991). While this does not mean that the clerks set the agenda, it does mean that they have the opportunity to influence the process. Of course, there is at least some empirical evidence that law clerks, in some situations, do influence the decision to decide a case (Black and Boyd 2012, 147).

Similarly, law clerks on the SCC and the SCOTUS likely play a significant role in disposing of cases on the plenary docket. Law clerks on both Courts tend to write bench memoranda, summarizing the facts and evaluating the legal issues in cases and, in some instances, recommending particular outcomes (Songer 2008, 123; Ward and Weiden 2006, 3). In addition, while not universally true, existing evidence suggests that SCOTUS and SCC law clerks write significant parts of the opinions of the Court, including the majority opinions that reflect the logic behind the Courts’ decisions and serve as the guidelines for future judicial decisions under the doctrine of *stare decisis* (Bodwin, Rosenthal, and Yoon 2013, 159; Peppers and Zorn 2008).

Given the patterns identified by the likes of Professor McGuire (1993) and others (e.g., O’Connor and Hermann 1995), the advantages that befall those who serve as high Court clerks,

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<sup>1</sup>It is important to note that, while the clerks are in a position to influence the Court’s decisions, that does not mean that they will necessarily influence them. The clerks are selected, in part, because they tend to share the preferences of the justice. In addition, the nature of the justice–clerk relationship is akin to the principal agent, such that there are institutional mechanisms in place that may allow the justice to constrain and control the behavior of her law clerk (see Peppers 2006, 206–211).

and the potential influence of clerks on high Court decision-making, it is unsurprising that legal scholars, political scientists, and outside commentators have paid attention to the hiring practices of high Courts. Such practices, moreover, have received negative attention at times (see, e.g., Benson 2007, 23).

Indeed, one area of particular importance noted in the literature and commentary surrounds the U.S. Supreme Court's hiring of female clerks or, better put, its lack of hiring female clerks (e.g., Greenhouse 2006; Mauro 2006). It should come as no surprise that women, as a group, have lagged behind men in being selected for these positions. As Cynthia Cooper (2008, 18) describes, only three women were selected to be SCOTUS clerks prior to the 1970s. The first, Lucile Lomen, clerked for Justice William Douglas during the 1944 October term. Evidence suggests that Douglas had a strong preference for hiring men, but geographic limitations—he hired clerks only from law schools in the Ninth Circuit—and World War II dramatically narrowed the pool of male candidates (Chandra 2012, 199). As a result, he broadened the pool to include women, and Lomen was both highly qualified and highly recommended by at least two Douglas confidantes (Chandra 2012, 200–205). While Lomen was apparently “very able and very conscientious,” (Chandra 2012, 210, citing Douglas 1980, 171), twenty-two years passed before Justice Hugo Black hired the second female SCOTUS law clerk, Margaret Corcoran, for the 1966 term (Peppers 2006, 20–21). Unlike Lomen, however, Corcoran was apparently not conscientious; she was often distracted by a rich and full social life (Peppers 2006, 21). Two terms later, Martha Field Alschuler clerked for Justice Hugo Black. However, quoting Justice Ruth Bader Ginsburg, Cooper (2008, 18–19) adds, “women law clerks no longer appeared as one-at-a-time curiosities” by the mid-1970s. Nonetheless, the number of female clerks remains rather low. Writing in 1996, Professor Mark Brown analyzed SCOTUS clerk hiring practices for the 1960 to 1994 period, finding (among other things) that “a majority of current Justices still exhibit a strong, statistically significant male preference” (Brown 1996, 364).

This issue has not been lost on Court observers. Indeed, as Professors Peppers and Ward (2012, 13, note 1, citing Mauro 1998a and 1998b) point out, “in the late 1990s, journalist Tony Mauro triggered a firestorm of controversy with a series of articles discussing the lack of diversity among law clerks.”<sup>2</sup> As noted by Kaye and Gastwirth (2008, 457–458; 2009, 412), the number of women working as SCOTUS clerks re-emerged as a particularly salient issue with Linda Greenhouse's coverage of clerk selection for the 2006 term (see also Cooper 2008, 18–19). Greenhouse's (2006) article, “Women Suddenly Scarce among Justices' Clerks,” indicated that the Court hired just seven women for its 37 clerkship positions for the year. This was a sizeable departure from the standard proportion of clerkships filled by women around this time period, which was suggested to be about “one-third” (Cooper 2008, 18).

Academics and commentators responded to this news event, generating a number of articles and editorials seeking to address the low number of female clerks hired for the 2006 term (see, e.g., Cooper 2008; Estrich 2006; Kaye and Gastwirth 2008; Lazarus 2006; Lithwick 2006). Some also sought to examine the issues of women's representation as high Court clerks, more generally (Kaye and Gastwirth 2009).

Two particularly important studies in this respect were conducted by Kaye and Gastwirth (2008) and (2009). In their 2008 *Jurimetrics* article, Kaye and Gastwirth (2008, 463) addressed

<sup>2</sup>See also, e.g., Mauro 1998c and Mauro 1998d.

the U.S. Supreme Court's hiring developments for the 2006 term, finding some evidence to support the proposition that the low number of women clerks selected that year could very well have been "random variation" as asserted by Justices Souter and Breyer," who, at one point, commented on the 2006 clerkship controversy.

In a subsequent study, Kaye and Gastwirth (2009, 415) expanded their analysis to consider issues surrounding "the pool of competitive . . . applicants" for clerkship posts and the differences in aggregate versus individual selection patterns with this pool in mind. Though they were not privy to detailed information on those who applied for Supreme Court clerkships during the time period of their study, they did suggest, as many others have, that there are critical aspects of the selection process that determine who is most likely to be accorded a clerkship. For example, "viable" (Kaye and Gastwirth 2009, 436) SCOTUS clerk applicants come from the nation's top-tier law schools (Kaye and Gastwirth 2009, 414, citing Peppers 2006, 23–30 and Ward and Weiden, 2006, 72–73). While at law school, these individuals frequently serve on the law review and, often, in positions of leadership (Kaye and Gastwirth, 2009, 414–415, citing Peppers 2006, 30–31). Further, worthy SCOTUS clerk applicants often serve as clerks for select U.S. Courts of Appeals judges (Kaye and Gastwirth, 2009, 414, citing Peppers, 2006, 31–36 and Ward and Weiden, 2006, 76–77). Importantly, as Kaye and Gastwirth (2009, 418) maintain, "if the feeder system is used in defining the highly qualified applicant pool, then roughly one-third of that pool seems to consist of women." When looking at the likely percentage of women in this group of would-be SCOTUS clerks, their data did not suggest "bias at the level of the Justices as a group" in the selection of female clerks (Kaye and Gastwirth 2009, 423). This was not the case, however, in their individual-level analysis. Indeed, their model suggested that the clerk selection behavior of the individual justices was "not consistent with the simple picture of gender-neutral hiring from a common pool" (Kaye and Gastwirth 2009, 428).

While previous studies have certainly been informative, they are limited in a number of ways. First and foremost, Kaye and Gastwirth do not explicitly control for justice ideology in their statistical analyses, yet at least one study suggests the relevance of judicial ideology in an analogous context: the evaluation of female attorneys' arguments before the SCOTUS (Szmer, Sarver, and Kaheny 2010, 27). Second, their analysis of SCOTUS clerk hires does not take into account other possible influences on judicial clerk selection beyond the nature of the clerk pool, such as larger societal influences or the Court's own docket. In addition, the existing literature has not engaged in a comparative analysis of the issue of clerk recruitment in order to gain a better understanding of the causes of women's underrepresentation as Supreme Court clerks. A question that remains is whether a more gender-diverse Supreme Court would be more likely to select a more gender-diverse set of clerks. As only four women have ever served on the U.S. Supreme Court, to address this question, one must look beyond the U.S. context.

The SCC has been more gender-diverse in its membership and leadership than the U.S. Supreme Court. Eight women have been appointed to the SCC throughout its history (Supreme Court of Canada, n.d.(a)) and, until Justice Marie Deschamps's resignation in 2012, four of the SCC's nine sitting justices were women (Makin 2013). Further, a woman, Beverley McLachlin, has served as the SCC's Chief Justice since 2000 (Supreme Court of Canada, n.d.(b)). As described by McInnes, Bolton, and Derzko (1994, 66), moreover, female clerks are not a rarity in this venue (see also Sossin 1996, 285). As they note, "Since the early 1980s, the number of women at the Court has increased sharply," and they further add that "in recent years, the clerks have been predominately female" (McInnes, Bolton, and Derzko 1994, 66). Thus, in these critical

respects, the SCOTUS and the SCC are quite distinct. Considering the other ways, however, in which the SCC parallels the SCOTUS,<sup>3</sup> including the value accorded to the position of clerkships (Sossin 1996, 286),<sup>4</sup> the roles clerks are thought to play in Court operations, and the fact that individual justices of both Courts have discretion in who they hire for these positions (Sossin 1996, 285–287),<sup>5</sup> the SCC is an ideal comparative case.

Thus, in this article, we systematically analyze the available data on SCOTUS clerk appointments to more thoroughly investigate the gender disparity in the hiring practices of its justices across the time period 1941 to 2011, and we compare this data, whenever possible, to that collected for the SCC from 1967 to 2007. In doing so, we are especially interested in exploring the impact of justice ideology and justice gender on individual decisions to hire female clerks. We maintain that the gender imbalance that has characterized the U.S. Supreme Court's composition might, at least partially, account for the discrepancy between the number of male and female clerks that have worked for this Court. It may also explain the notable relationship between a justice's ideology and his or her decision to hire female clerks.

## THEORETICAL FRAMEWORK

Though we provide a largely descriptive account of clerkship trends across the high Courts of the U.S. and Canada, we do expect to find substantial differences in the hiring practices of SCOTUS and SCC justices. As noted above, the gender disparity in SCOTUS clerk hires has been repeatedly noted in the literature, and at least a few scholars have noted the growing numbers of female clerks hired by the SCC (McInnes, Bolton, and Derzko 1994, 66; Sossin 1996, 285). However, as discussed earlier, our study is unique in its comparative examination of clerkship hires across the SCOTUS and the SCC and in its assessment of the differential impact of judicial ideology and justice gender on clerkship selection across these two Courts.

### Judicial Ideology—SCOTUS

As Todd Peppers (2006, 21) describes in his book on Supreme Court clerks, there have been clear differences among Court liberals and conservatives in terms of their rates of hiring female clerks, with only two justices bucking an obvious ideological trend in his dataset. In addition, in their study of women lawyers before the SCOTUS, Szmer, Sarver and Kaheny (2010, 10) hypothesized that Court liberals should be less inclined to negatively stereotype female advocates. As they maintained,

those who are more committed to supporting women's rights, including equal employment rights (i.e., judicial liberals), might be more wary of traditional gender stereotypes. These justices might assign different traits to their characterizations of that which is typically male and female in a way that

<sup>3</sup>See, e.g., Kaheny, Szmer, and Sarver (2011, 84) describing the SCC as "a similarly situated common law high court."

<sup>4</sup>As Sossin (1996, 286) notes in his description of Canada's high Court clerks, "For law school deans and professors, placing clerks is a measure of the school's prestige."

<sup>5</sup>As detailed by Sossin (1996, 285–287), as in the U.S. case, the process of securing a SCC clerkship is highly competitive, with SCC clerks being drawn from top-tier Canadian law programs.

might neutralize any preconception that the female role does not mesh with that of a legal advocate. (Szmer, Sarver, and Kaheny 2010, 10)

Clearly, similar considerations might play a role in the selection of law clerks. Indeed, gendered conceptions of competency may play an even larger role for a judge in selecting his or her own legal assistants.

Prior research also suggests justices might use gender as an ideology heuristic. Several studies, including one by Huddy and Terkildsen (1993, 133), find that voters are more likely to attribute liberal beliefs to female political candidates than male candidates. This tendency is particularly strong in a low-information election (McDermott 1998, 904). While there are other possible heuristics in the clerk hiring context (e.g., feeder judges and membership in certain organizations, such as the Federalist Society), the amount of information regarding the applicants' ideologies is probably analogous to a low-information election. Moreover, using feeder judges as cues of either competence or ideology could also exacerbate gender disparities in clerk hiring to the extent that lower court judges are also influenced by sex stereotypes of competence or ideology when employing clerks.

Thus, we expect that, to the extent that gender stereotypes—either stereotypes of competence or ideology—operate in the hiring of clerks before the SCOTUS, they should be less influential among Court liberals. In turn, we hypothesize that Court liberals should exhibit larger ratios of female to male clerks than Court conservatives over the time period of the study.

### Justice Gender—SCOTUS

As Szmer, Sarver, and Kaheny (2010, 21) did in their study, we also consider the possibility that gender stereotypes, to the extent they do exist, might operate differently for male and female justices. Specifically, we expect that female justices will be more inclined to select female clerks than their male colleagues. This could very well be a function of negative gender stereotypes having less or no effect on female justices' evaluations of female lawyers. However, it could also be part of their attempt to recruit women to these posts, considering the tremendous career boosts afforded to former clerks and the fact that, historically, men have served as SCOTUS clerks in far greater numbers than women.<sup>6</sup>

### Justice Ideology and Sex—SCC

To be clear, however, we do not necessarily expect justice ideology and justice sex to operate the same way among SCC justices. Indeed, with more female justices serving on the SCC than the SCOTUS across the time period examined, we should expect a conditioning variable, bench diversity, to play a role here. Further, looking again to the experience of female advocates before the SCC, previous scholarship has suggested that, if anything, female lawyers find greater success before this Court than their male counterparts. Such was the result of Kaheny, Szmer, and Sarver's

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<sup>6</sup>Justice Ruth Bader Ginsburg herself was rejected for a Supreme Court clerkship with Justice Felix Frankfurter, despite the recommendation of her law professor (Cooper 2008, 18; Greenhouse 2006).

(2011, 94) investigation of women litigation teams before the SCC, where they found that teams with a relatively greater number of women on their side had a higher likelihood of persuading an individual SCC justice to support their position. In addition, justice gender did not interact with lawyer team gender in their study, and, with the exception of criminal cases, judicial ideology did not alter the apparent (and positive) relationship between lawyer team gender and SCC votes either (Kaheny, Szmer, and Sarver 2011, 95). On balance, therefore, there is little evidence to suggest that more conservative and/or male members of the SCC will be less inclined to hire female clerks. We hypothesize, accordingly, that justice gender and justice ideology will play less of a role in SCC female clerkship hires than in SCOTUS female clerkship hires.

Further, for the U.S. case, we examine the selection patterns across individual justices, taking a special look at members of the two most recent Courts—the Rehnquist Court and the Roberts Court. If the proportion of female clerks selected by the justices is truly a function of the pool of applicants, we should see similar rates of fluctuation in these proportions over time across individual justices.

Finally, we test a multivariate model of clerkship appointments by individual U.S. Supreme Court justices in a given year, and this, too, is guided by a number of theoretical considerations. These expectations emanate, in part, from previous assessments of clerkship selection, a previous study examining the influence of lawyer gender before the SCOTUS (Szmer, Sarver, and Kaheny 2010), and from other related research in the field of gender studies.

In this model, as with our larger assessments of clerkship hiring trends, we consider the role of judicial ideology and justice gender in the decision to hire female Supreme Court clerks. Thus, we hypothesize that, to the extent that gender stereotypes operate in the hiring of clerks before the SCOTUS, they should be less influential among the Court’s liberal and female members. In turn, we hypothesize that Court liberals and female justices should, on average, select a larger proportion of female clerks than their conservative/male peers per year.

There are, of course, additional factors that might influence the degree to which justices hire female clerks. For example, external environmental characteristics could affect clerk selection. Here, we look at two related concepts: the proportion of women in the pool of potential clerks and overall societal views toward women in the workplace. First, some of the justices themselves have contended that the proportion of female clerks hired by each justice is a function of the number of available female applicants with, of course, the proper credentials (see Greenhouse 2006).<sup>7</sup> Second, though justices of the Supreme Court are clearly elite decision-makers, like other political and legal actors, they are part of a larger society. Therefore, we also consider the influence of broader societal attitudes toward women in the workplace. These attitudes, of course, have evolved over the time period of this study, as has the size of the pool of potential female clerks. We hypothesize that, as the environment for hiring female law clerks becomes more favorable, the proportion of female clerks hired by the justices should tend to increase.

It is also possible that judicial assessments of “substantive expertise” (Szmer, Sarver, and Kaheny 2010, 11) might play a role in clerkship selection. Specifically, like Szmer, Sarver, and Kaheny (2010, 10) citing Dolan’s (2004, 78) discussion of “issue stereotypes,” we argue that justices might look at women lawyers as being particularly knowledgeable about “women’s issues” (Szmer, Sarver, and Kaheny 2010, 11). Here, we maintain it is reasonable to assume that

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<sup>7</sup>See Greenhouse (2006) and, specifically, her discussion of Justice Souter’s and Breyer’s reactions to the 2006 clerkship hires.

the justices might consider female clerks to possess insight with respect to these issues as well, thus linking clerk selection to docket composition. Therefore, we hypothesize that increases in the number of women's issues cases coming before the Court will be associated with increases in the proportion of female clerks hired by a given justice.

## DATA AND METHODS

To assess the comparative differences in the high Court recruitment of female law clerks across the U.S. and Canada, we utilize existing datasets of clerk appointments by the SCOTUS and the SCC. The former dataset was provided to us by the U.S. Supreme Court Public Information Office and includes SCOTUS clerk hires for the 1940–2010 terms (years 1941–2011).<sup>8</sup> Specifically, the U.S. dataset includes the name of the clerk, the justice for whom the clerk worked, the term in which the clerk worked for the Court and the law school attended by the clerk. The gender of each clerk was coded by the authors on the basis of the clerk's name. In cases in which the coder encountered a gender-neutral name, the coder performed Web-based searches to identify the clerk's sex. SCC clerk data was obtained through the Supreme Court of Canada Registrar for the time period, 1967–2007,<sup>9</sup> and includes the gendered salutation of the clerk, the Justice for whom the clerk worked, and the terms served by the clerk.<sup>10</sup>

The U.S. portion of the study includes a number of descriptive analyses, charting women's presence in these important positions over the time period covered in the dataset and investigating whether key justice characteristics (i.e., justice ideology and justice gender) are associated with higher or lower percentages of female clerk hires. For descriptive purposes, the former trait is initially assessed by reference to the party of the appointing president. In addition, we calculate the percentage of women clerks hired over time by each justice serving on the Rehnquist and Roberts Courts to examine individual patterns in the employment of female clerks. As noted above, if the percentage of female clerks is completely a function of the gender composition of "the applicant pool" (Greenhouse 2006),<sup>11</sup> we should see similar temporal fluctuations in the percentages of female clerks hired by the individual justices. The final descriptive portion of the U.S. study is an investigation of the law school backgrounds of male versus female law clerks in order to determine whether female clerks are disproportionately selected from higher-ranked

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<sup>8</sup>In the analyses that follow, we often employ "year" as opposed to "term." However, neither the SCOTUS term, which runs from the first Monday in October until the last week in June of the subsequent year, nor the SCOTUS clerk terms, which run from July to the subsequent July, overlap completely with the calendar year. For the purpose of the U.S. analyses, "year" is defined as "term+1."

<sup>9</sup>Unlike the SCOTUS, the SCC organizes its work year in accordance with the calendar year. However, like their southern counterpart, the SCC hires clerks that serve year terms that extend across two calendar years—typically from August or September to the subsequent August or September (see the Supreme Court of Canada (n.d. (c))).

<sup>10</sup>We were unsuccessful in obtaining a completely updated clerks dataset from the SCC to include the 2008–2011 period as a result of the institution of new rules to protect the privacy of clerks. Thus, our analysis of clerk recruitment by justices of the SCC ends in the 2006–2007 period, the last year of (complete) available data. The SCC analysis begins with the year 1967, which marks the beginning of the SCC's clerkship program (see Bodwin, Rosenthal, and Yoon 2013, 159).

<sup>11</sup>Again, we reference her discussion of comments by Justices Souter and Breyer.

schools. For this purpose, we turn to the law school rankings conducted by *U.S. News and World Report* (2013), assuming relative stability among the most highly ranked law schools over time.

Finally, we employ a multivariate analysis. Our dependent variable is the percentage of female clerks hired by each justice in each year between 1972 and 2007. To examine whether gender disparities are apparent in the hiring patterns of individual justices, it is essential to examine an array of explanatory factors. First, as theorized above, we anticipate that more liberal justices should be more inclined to select female clerks. To measure U.S. justice ideology, we utilize Martin-Quinn scores (Martin and Quinn 2002), whereby positive values are assigned to conservative justices (Martin and Quinn 2002, 145). Thus, we expect increases in the justice ideology measure to be negatively associated with our dependent variable—the proportion of female clerks hired by a justice in that year. Via the U.S. Supreme Court Justices Database (Epstein et al. 2013), we control for the age of the justice for each year of the analysis, hypothesizing that older justices are more likely to prefer hiring male clerks, on average, than younger justices. In addition, as noted above, we expect that female justices will be more inclined to hire female clerks than their male counterparts; thus, we include a dummy variable that measures the sex of the justice (0 = male and 1 = female).

To investigate the environment for hiring women clerks, we created an index (Legal Profession Gender Environment) consisting of three components that included two measures of the sex distribution of the pool of potential clerks and a measure of the societal view toward women in the workplace. Reflecting the larger pool—all recent law school graduates—the index includes the proportion of Juris Doctor (JD) degrees awarded to female students in the previous academic year. This data is derived from the U.S. Department of Education’s National Center for Education Statistics Website.<sup>12</sup> In addition, we include a measure of the gender distribution of the law review members at the top feeder law schools. As Ward and Weiden (2006, 55) note, working on the law review in law school is a virtual prerequisite for serving as a clerk. The measure is the average number of women on the law reviews of the top nine law schools (in the previous academic year) from which SCOTUS clerks in our study were drawn: Harvard University, Yale University, the University of Chicago, Stanford University, Columbia University, the University of Virginia, the University of Michigan, the University of Pennsylvania, and the University of California at Berkeley.<sup>13</sup> The third component of the environment index reflects societal views toward women in the workplace. To measure this, we identified a question asked on the American National

<sup>12</sup>U.S. Department of Education: National Center for Education Statistics, Table 294—“Number of degree-granting institutions conferring doctor’s degrees in dentistry, medicine, and law, and number of such degrees conferred, by sex of student: Selected years, 1949–50 through 2009–10” (2011), citing “U.S. Department of Education, National Center for Education Statistics, Earned Degrees Conferred, 1949–50 through 1964–65; Higher Education General Information Survey (HEGIS), ‘Degrees and Other Formal Awards Conferred’ surveys, 1965–66 through 1985–86; Integrated Post-secondary Education Data System (IPEDS), ‘Completions Survey’ (IPEDS-C:87–99); and IPEDS Fall 2000 through Fall 2010, Completions component,” available at [http://nces.ed.gov/programs/digest/d11/tables/dt11\\_294.asp](http://nces.ed.gov/programs/digest/d11/tables/dt11_294.asp).

<sup>13</sup>Each of these nine law schools contributed at least fifty clerks for the time period of our study. Also, more than 78 percent of the clerks that served on the U.S. Supreme Court in our dataset came from these schools, rendering this assessment fairly reflective of the clerk pool. To obtain this average, we reviewed the law review masthead of the first issue of each volume of the above schools’ law reviews and tallied the total number of students and the total number of female students on the law review. The average percentage of women on law review was then computed across the nine schools for each academic year. For the purposes of predicting the average number of female clerks hired per justice per year, this average is lagged one year. For the purposes of coding law review student gender, we relied on the name of the student. In cases where the student’s name was gender neutral, we engaged in Web-based searches in order to identify

Election Studies (ANES, n.d.) survey that appeared to capture this sentiment. Beginning in 1972, the survey included the following question:

Recently there has been a lot of talk about women's rights. Some people feel that women should have an equal role with men in running business, industry, and government. Others feel that a woman's place is in the home. Where would you place yourself on this scale (1 "Women and men should have an equal role" to 7 "A woman's place is in the home") or haven't you thought much about this (ANES, n.d.)?

For each year in which this question was included on the survey, we calculated the average response score among the respondents, removing from the analysis those who did not register an opinion. As the ANES survey is conducted only for those years in which there is a national election, for odd-numbered years in our analysis we computed the average of the mean response score for the prior and following year in which data was available.<sup>14</sup>

All three environmental indicators were transformed into an index using principal components factor analysis. The factor analysis resulted in one eigenvalue greater than one (2.91) and two that were both less than 0.07. This is extremely strong evidence that the three indicators reflect a single underlying dimension, and the resulting scale is reliable.<sup>15</sup>

Last, in addition to the environment for hiring women, we also computed the mean number of women's issue cases heard by the Supreme Court each year. As described above, we hypothesized that increases in the number of women's issue cases might be associated with a greater likelihood of hiring a larger proportion of female clerks. For the purposes of this study, we turned to the Supreme Court Judicial Database's "issues" coding (Spaeth et al. 2014, Supreme Court Database Online Codebook) and designated those cases raising a sex discrimination claim as "women's issue" cases along with those involving abortion rights, birth control, and "marital and family relationships and property" (Spaeth et al. 2014, Supreme Court Database Online Codebook).<sup>16</sup> The variable is lagged by one year.

To carry out this multivariate analysis, fractional logistic regression is employed. It is the appropriate technique to employ when one wishes to regress a proportional dependent variable

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the individual's sex. Further, when the coder was unable to locate a masthead for the first issue of a given volume, the next available issue was utilized in its place.

<sup>14</sup>The question was not asked in the 1986, 2002, and 2006 surveys. Thus, the value for this variable for the year 1986 is the average of the mean scores computed from the 1984 and 1988 surveys. For 2002, we averaged the mean scores from 2000 and 2004. Finally, we located a pilot study for the year 2006 that included a very similar question and utilized the response from that question for this particular year.

<sup>15</sup>Additionally, a summated ratings scale of the three variables (which is correlated with our scale at the 0.99 level) had a Cronbach's alpha of 0.98, an indication of a very high level of reliability. Moreover, if we were to include all three measures in a single regression model of our dependent variable, the variance inflation factors for the three variables are all above 14—an indication of very high multicollinearity, which suggests that the three measures would make a reliable scale and that they should be combined into a single index. The fact that none of the three composite measures were significant in the regression model, while the index is significant at the 0.001 level, also lends credence to our strategy.

<sup>16</sup>Note that our "women's issue" category includes the following issue codes as provided in the Supreme Court Judicial Database online codebook: 20130, 20140, 50020, and 100070. This operationalization of "women's issues" is consistent with that utilized in studies of lawyer gender before the SCOTUS (see, e.g., Sarver, Kaheny, and Szmer 2008, 242, note 40 and Szmer, Sarver, and Kaheny 2010, 14).

(in this case, the percentage of female clerks hired by each justice in each year) on a series of independent variables (see Papke and Wooldridge 1996).<sup>17</sup>

Unfortunately, due to data limitations, we were not able to conduct a similar regression analysis investigating the proportion of female clerks hired by each SCC justice per year. Further, as noted above, SCC clerk data was available to us only for the time period 1967–2007. However, we were able to compute the percentage of female SCC clerks for each year of data that was available. Second, to aid comparison in trends seen in the U.S., we compute the percentage of female clerks hired by the SCOTUS and the SCC for the following time periods: 1967–1969, 1970–1979, 1980–1989, 1990–1999, and 2000–2007. Third, to better assess whether high Court clerk appointments vary with SCC justice ideology, we track the percentage of female clerks hired by liberal and conservative appointees to the SCC for each year of the study. As a surrogate measure of SCC justice ideology, we consider the party of the appointing prime minister. Last, as in the U.S. case, we track the percentage of female clerks hired by male and female justices of the SCC in hopes of better distinguishing the effects of justice gender in a more diverse high Court.

## RESULTS

In order to provide a greater understanding of the gender disparity in the hiring practice of Supreme Court justices, we begin by examining the presence of SCOTUS and SCC female law clerks over time. To aid in comparing the SCOTUS to the SCC, the date range for Figure 1 starts in 1967. As previously noted, the first female SCOTUS clerk served during the 1944 term, followed twenty-two years later by the second female clerk. The number of female clerks did not start to steadily climb until after the Court's 1971 term. As documented in Figure 1, the percentages of female clerks hired by each court generally follow an upward trajectory, though there certainly were some steep downturns at select junctures. As previously reported, there was a nearly twenty percentage point drop in the number of SCOTUS female clerks serving from 2006 to 2007, a stark contrast from the other figures reported in this decade. This, and other short-term fluctuations, could reflect “random variations” (Kaye and Gastwirth 2008, 463) due, at least in part, to the relatively small denominator (i.e., the total number of clerks hired in the term).

After considering what may be random “noise” across years, two trends are apparent. First, both national courts of last resort tended to hire greater proportions of women law clerks over time. Second, the SCC tended to hire a greater percentage of women in comparison to its southern counterpart. This is reflected in the relative yearly comparisons—since 1990, for example, the

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<sup>17</sup>As an ancillary analysis, we estimated the model using fractional OLS regression. The results were consistent with those of the more appropriate model. Additionally, due to the time series and cross-sectional nature of the data—repeated observations of the same justice over different points in time—we were concerned with autocorrelation. To account for the correlations within justices, we estimated standard errors clustered by justice. With respect to serial autocorrelation, we did estimate a model, not presented here, with year fixed effects. The results of the hypothesis test change for the environmental index, which is not significant in this alternative model. This is not surprising, given that the index has a high variance inflation factor when we include the year fixed effects. In the end, we chose to present the model without the fixed effects. We justify this choice, in part, because the test for serial autocorrelation in panel-data models indicated that we could not reject the null hypothesis that we did not have serial autocorrelation (see Drukker 2003, which implemented the test generated by Wooldridge 2002).

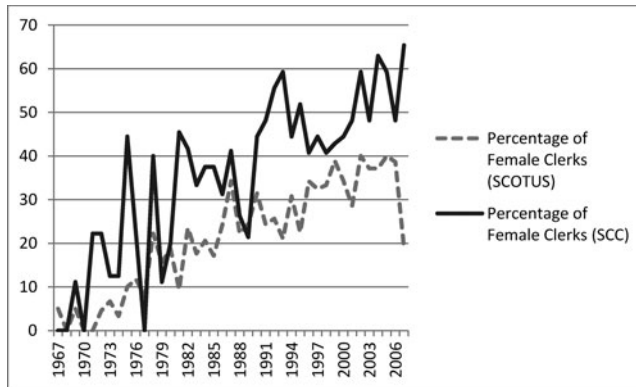


FIGURE 1 Percentage of Female Clerks, Supreme Court of the U.S. (SCOTUS) and Supreme Court of Canada (SCC), 1967–2007.

SCC has always hired a greater proportion of women. This trend is also reflected in the maximum values: the highest proportion of women law clerks hired by the SCOTUS in a term is approximately 40 percent, while the SCC in recent years often has employed a majority female clerk cohort.

Of those women that were selected to a prestigious SCOTUS clerkship, they unsurprisingly came from highly ranked law schools, the same law schools typically documented as being instrumental in serving as a stepping stone for clerkships to the high Court (see Peppers 2006, 24). As seen in Table 1, most of the Court's female clerks were graduates of Yale, Harvard, Stanford, the University of Chicago, Columbia, New York University (NYU), the University of Virginia, the University of California at Berkeley, the University of Michigan, Georgetown, and Northwestern. Eight women from the University of Pennsylvania and seven women from Duke University were also selected as high Court clerks. What is obvious, of course, is that, with the exceptions of Duke, NYU, and Georgetown,<sup>18</sup> all of the primary "feeder" schools placed significantly more male clerks. Unsurprisingly, to some extent, this is a function of low female enrollment at law schools in the U.S. that was typical for many of the early years of the study (ABA 1993) and, at least for the case of Harvard during the first nine years of the study, a function of a prohibitive admissions policy (Sarver, Kaheny, and Szmer 2008, 240, citing Mullarkey 2004, 369). As noted by Carson (2004), until the 1970s, women made up a very small portion of law students. By the end of the decade, more than a third of first-year law students were women—and by the end of the millennium, approximately half of the first-year students were women (Carson 2004). Thus, the time period of the study surely affords the opportunity for greater numbers of women to be reflected in this distribution.

Of course, caution should be taken when examining the percentages of female Supreme Court clerks in Figure 1 and in subsequent figures, as they are often aggregate statistics reported across

<sup>18</sup>We examined whether Georgetown placed a relatively higher proportion of female clerks due to Justice Ginsburg's connection to the law school where her husband taught. However, she hired only two Georgetown clerks, and the rate of hiring clerks from that school barely increased when she was appointed (from 1.68 percent to 1.8 percent). Moreover, the most prodigious employers of Georgetown alumni, Justices Brennan and White, both retired prior to Ginsburg's appointment.

TABLE 1  
Law Schools of Male and Female U.S. Supreme Court Clerks, 1941–2011

<i>Law School</i>	<i>U.S. News and World Report Ranking (2013)<sup>†</sup></i>	<i>Number of Female SCOTUS Clerks</i>	<i>Number of Male SCOTUS Clerks</i>
Yale University	1	64	266
Harvard University	2	64	400
Stanford University	2	27	89
University of Chicago	4	30	116
Columbia University	4	23	86
New York University	6	14	27
University of Pennsylvania	7	8	40
University of Virginia	7	15	76
University of California–Berkeley	9	13	39
University of Michigan	9	18	62
Duke University	11	7	8
Northwestern University	12	10	26
Cornell University	13	2	6
Georgetown University	14	14	21
University of Texas at Austin	15	4	28
Vanderbilt University	15	3	2
University of California–Los Angeles	17	3	14
University of Southern California	18	1	8
University of Minnesota	19	1	6
University of Alabama	21	0	2
George Washington University	21	4	9
Notre Dame University	23	5	10
Indiana University	25	0	12
University of Iowa	26	0	3
Washington & Lee University	26	1	4
University of Washington	28	1	7
Boston University	29	0	5
Boston College	31	0	3
University of North Carolina–Chapel Hill	31	2	5
University of Georgia	33	3	5
Ohio State University	36	1	3
University of Arizona	38	0	5
Fordham University	38	0	2
University of Utah	41	0	4
Brigham Young University	44	2	10
University of Colorado	44	0	3
University of Illinois (Urbana-Champaign)	47	1	4
Southern Methodist University	48	1	2
Pepperdine University	61	0	2
University of Denver	64	0	2
Case Western Reserve	68	0	2
Loyola Marymount University	68	0	3
University of Miami	76	0	2
University of Missouri	76	1	2
Catholic University	80	1	2
University of Kansas	86	1	4
State University of New York–Buffalo	86	2	1
University of Mississippi	102	0	3
National Law	NR	0	2

<sup>†</sup>U.S. News and World Report (2013). *Note.* For the purposes of Table 2, we include only those schools from which at least two clerks graduated.

NR = not ranked.

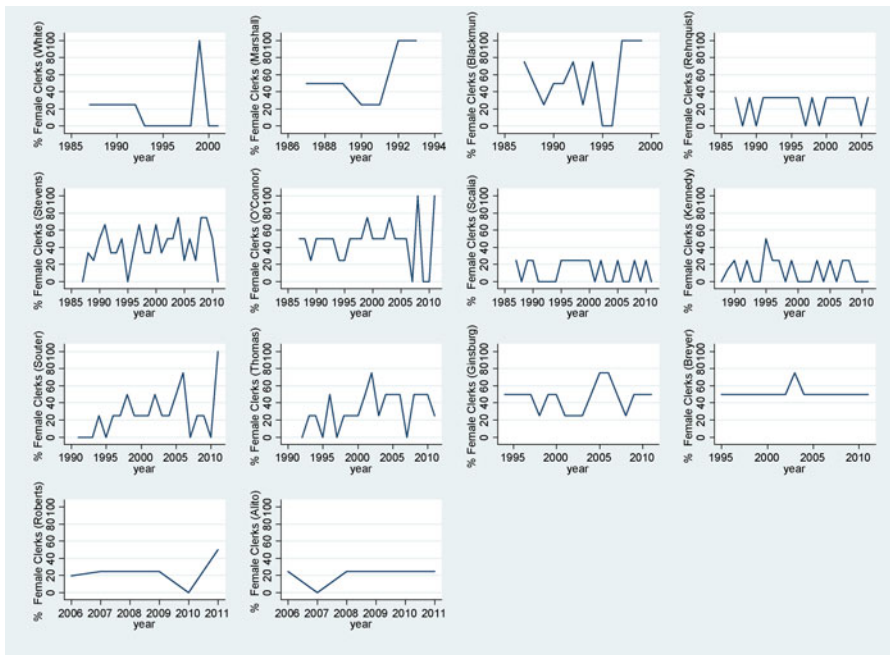


FIGURE 2 Percentage of Female Clerks Employed by Rehnquist and Roberts Court Justices.

all of the justices of the U.S. Supreme Court. Considering that the decision to hire clerks is an individual-level choice, it is essential to consider how these trends vary across individual justices and across individual-level justice traits, including ideology and sex. However, when we present figures that examine the individual justice-level or subsets of justices, we have another problem. Indeed, before interpreting the data, one should remember that the denominator is quite small (e.g., typically four in Figure 2), so significant variation will exist from one year to the next. Instead, it is more important to focus on overall trends across the entire time period.

To begin, we present the percentage of female clerks hired by justices serving on the Rehnquist and Roberts Courts in Figure 2.<sup>19</sup> The variation in the selection figures among the justices on these two Courts is remarkable and quite illuminating. First, it is clear that, for at least some justices, the gender composition of the pool of potential clerks is likely less relevant. Justice Breyer, for example, tended to hire roughly the same percentage of male and female law clerks. Justice Roberts and Justice Alito exhibited fairly stable hiring trends as well but tended to hire fewer female law clerks than Justice Breyer. Justice Scalia and Justice Kennedy's patterns, meanwhile, do seem more variable.

One obvious trait to consider when examining justice-level trends is the role of judicial ideology. As a point of departure, we present the percentage of female clerks hired by Democratic and Republican appointees to the SCOTUS bench, expecting a higher percentage of women

<sup>19</sup>Due to their relatively limited tenures during the time period under investigation, Justices Brennan, White, Powell, Sotomayor, and Kagan are omitted from this figure.

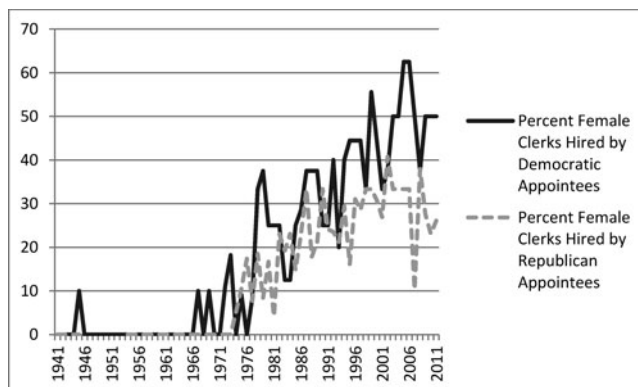


FIGURE 3 Percentage of Female Clerks Hired by Democratic and Republican Appointees to the U.S. Supreme Court, 1941–2011.

to be chosen by the former group of justices.<sup>20</sup> As seen in Figure 3, the percentages largely conform to our expectations. Indeed, from 1977 on, Democratic appointees to the SCOTUS typically retained higher percentages of female clerks than their Republican counterparts. There were some exceptions, of course. In 1983, 1984, and 1990, Republican-appointed justices hired larger proportions of female clerks than did Democratic appointees, and in 1990 and 1998, the percentages among the two partisan cohorts were essentially the same. That said, on balance, it is impossible to ignore the likely influence of political ideology on the hiring decisions of the U.S. Supreme Court justices as evident in Figure 3.

Another important individual-level trait to consider when explaining the number of women clerks hired by Supreme Court justices is justice gender. Figures 2 and 4 reveal, at least, the potential importance of a justice's gender. While the SCOTUS has had only four women appointees in its history, the trends in clerkship hires are distinct across male and female justices. Looking at the graphs in Figure 2, Justice Sandra Day O'Connor frequently maintained parity in her clerkship hires with a 50 percent male/female ratio, and in four years on the Court, she hired more women than men for these positions. Justice Ruth Bader Ginsburg also maintained parity across most terms of the study, diverging from a 50 percent female hiring rate in either the positive or negative direction in only a few years, but always hiring at least one female clerk. Though only three years of data are available for the Court's most recent female jurists, Justices Sonia Sotomayor and Elena Kagan each hired at least two female clerks (i.e., 50 percent hiring rate) for each of the terms under study. Finally, looking at Figure 4, the aggregate data presents

<sup>20</sup>We recognize that a more refined measure of ideology, which accounts for changes over time and the ability of some presidents to nominate ideologically compatible justices, is in some ways preferable. However, the simplicity of the dichotomous measure allows for graphical comparisons without having to arbitrarily select cut points. Moreover, if anything, the party of the president measure underestimates the extent of the gender disparity in clerk hiring across ideologies. Looking back at Figure 2, Stevens and Souter, two of the four Republican appointees most likely to employ female clerks, are also among the most liberal justices using Martin-Quinn scores. A third, O'Connor, is generally a moderate. Only Thomas, the most conservative justice during this period, clearly bucks the ideological tendency. Finally, while we opted to use the party measure for the graphical comparison, we do use the Martin-Quinn measures for the multivariate model.

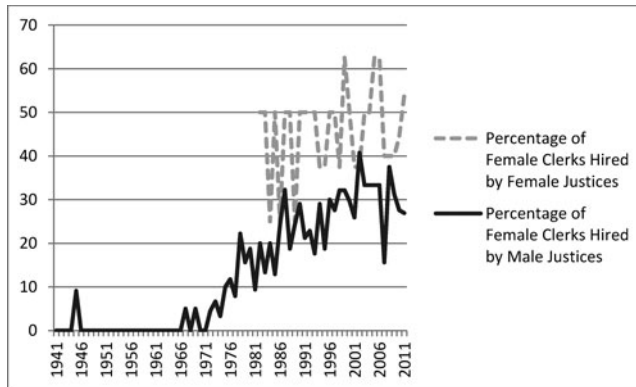


FIGURE 4 Percentage of Female Clerks over Time by Justice's Sex (U.S. Supreme Court), 1941–2011.

a similar case. Female justices almost always hire more women. The maximum percentage of female clerks hired by male justices is slightly higher than 40 while the female justices exceeded 60 percent on multiple occasions.

Of course, all but one of the female justices were appointed by a Democratic president. To disentangle the effects of justice gender and ideology on clerkship appointments, we turn to the multivariate model. Specifically, we present a fractional logit analysis regressing the proportion of female clerks hired by a justice in a given year (our dependent variable) and include justice ideology and justice sex as independent variables in the model. This method also allows us to more systematically examine other possible independent variables that might influence the proportion of female clerks hired by a given justice each year, including the environment for hiring women clerks, justice age, and the mean number of women's issues heard by the Court. The results of this multivariate analysis are displayed in Table 2.<sup>21</sup>

As the table shows, justice ideology and sex, as well as the gender environment of the legal profession, significantly affect the proportion of women clerks hired by SCOTUS justices. All three coefficients are in the expected direction: conservative justices are, on average, less likely to hire greater proportions of women clerks, while female justices tend to hire greater proportions of female clerks. Also, as one would expect, as the environment for hiring women clerks improved (there were more women in the pool of potential clerks, and society began to have greater acceptance of women in the workplace), more female clerks were hired. Conversely, neither the mean number of women's issues on the docket nor the justices' age appear to affect tendencies to hire female clerks.

We also computed the substantive significance<sup>22</sup> of the effects of ideology, justice sex, and the environment. For example, the proportion of women clerks hired, on average, is 32 percent

<sup>21</sup>Due to data limitations on select independent variables, the model only examines the proportion of women hired by each justice across the 1972–2007 time period.

<sup>22</sup>The discrete changes for the continuous ideology and environment variables are calculated as the differences in the proportions of female clerks hired when the variables are set to one standard deviation above the mean and when they are set to the mean, holding all other variables constant at their appropriate measures of central tendency (i.e., mean for continuous variables and mode for justice sex). The discrete change for the justice sex variable is the difference in the proportion of female clerks hired by a woman, compared to the average male justice.

TABLE 2  
 Fractional Logit Analysis of the Proportion of Female Clerks per SCOTUS Justice-Year, 1972–2007  
 (standard errors clustered by justice in parentheses)

<i>Independent Variable</i>	<i>Coefficient</i>	<i>Discrete Changes</i>	<i>Percent Changes</i>
Justice Ideology	−0.115(0.059)*	−0.086	−32.4%
Justice Age	0.009(0.015)	—	—
Sex of Justice	0.814(0.266)***	0.168	77.2%
Legal Profession	0.527(0.124)***	0.168	115.5%
Gender Environment			
Mean Number of Women's Issue Cases	0.245(2.973)	—	—
Constant	−1.921(0.977)		

*Note.* \* $p < .05$ , \*\*\* $p < .001$

$N = 324$ .

AIC = 0.819.

lower for a justice that is one standard deviation more conservative than the average justice. The environment is even more powerful; the proportion of female clerks is more than 115 percent greater in a year where our index is one standard deviation above the mean, compared to the average year. Finally, the proportion of female clerks hired by a female justice is 77.2 percent greater than the proportion hired by the average male.

## COMPARING THE TWO HIGH COURTS

The U.S. Supreme Court, during the time period assessed in the regression, however, had only two female justices—and has had a total of four to date. Does justice ideology play as a strong of a role in a more diverse Court? Does justice sex make less of a difference in a more diverse high Court setting? To address these important questions, we offer a comparative analysis of clerk selection in the Supreme Court of Canada.

As we discussed earlier, Figure 1 plotted the percentage of female SCC clerks hired in each year of the data available to us, which for the SCC, includes the 1967–2007 time period. As with the figures reported for the SCOTUS, relatively few women served as SCC clerks until the mid- to late 1970s, but the SCC trend line is strongly positive over time. What is distinct from the U.S. case are the percentages themselves; they are notably higher in Canada. While the percentage of SCOTUS female clerks never climbed above 40 percent for the time period under study, the percentage of female clerks hired by the SCC has frequently been over 40 percent.

To assist in making comparisons, the percentages of female clerks hired across both high Courts is provided for comparable time periods in Table 3—the late 1960s, 1970s, 1980s, 1990s, and the 2000–2007 time period. As noted in the table, the SCOTUS and SCC looked relatively similar in terms of the percentage of female clerks hired by each Court in the first time period. Thereafter, the differences in the percentage of women hired as clerks between the two Courts are substantial. In the 1970s, the SCC's percentage of female clerks was about ten points higher

TABLE 3  
 Percentage of Female Clerks Hired by the SCC and SCOTUS, 1967–2007

<i>Time Period</i>	<i>Percentage of Female Clerks (SCC)</i>	<i>Percentage of Female Clerks (SCOTUS)</i>
1967–1969	5%	3.23%
1970–1979	18.89%	8.85%
1980–1989	32.50%	21.39%
1990–1999	47.23%	29.33%
2000–2007	54.42%	34.36%

than that of the SCOTUS, and it was eleven percentage points higher than that of the SCOTUS in the 1980s. In the 1990s and 2000–2007 time period, the percentage of women hired as clerks by the SCC was nearly 19 points and 20 points higher than the SCOTUS, respectively.

Figure 5, moreover, suggests another critical distinction between the two high Courts; in the SCC, both liberal and conservative appointees to the bench hired relatively large proportions of female clerks. Unlike the figures reported earlier for the U.S., judicial conservatives (as measured via the party of the appointing prime minister) often hired relatively more women than men for these positions, thus pushing their female clerk rates above the 50 percent mark in a number of years, a trend nowhere to be seen in the aggregate figures reported for the SCOTUS. The lack of an apparent relationship between judicial ideology and female clerk hires by SCC justices is itself highly suggestive that the SCC’s own gender diversity might be playing a role in driving these figures.

Interestingly, while the female justices on the U.S. Supreme Court stood apart in the rate at which they hired women for clerk positions, there are minimal gender differences in this respect among the justices on the SCC (see Figure 6). Certainly, the differences that are manifest are not consistent over time. Both male and female SCC justices hired women at relatively high rates in comparison to the SCOTUS justices. Male SCC justices, moreover, registered higher percentages of female clerks than their female counterparts in a number of years throughout the study, though

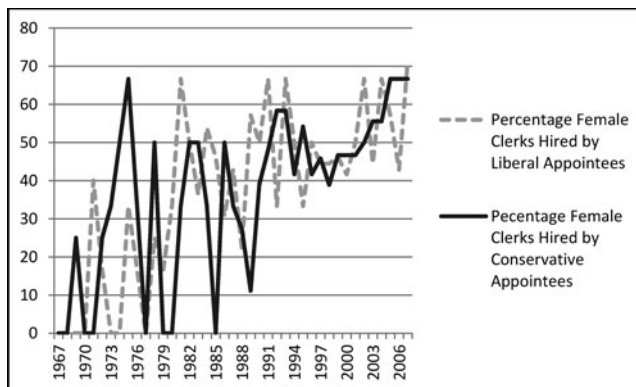


FIGURE 5 Percentage of Female Clerks Hired by Liberal and Conservative Appointees to the Supreme Court of Canada, 1967–2007.

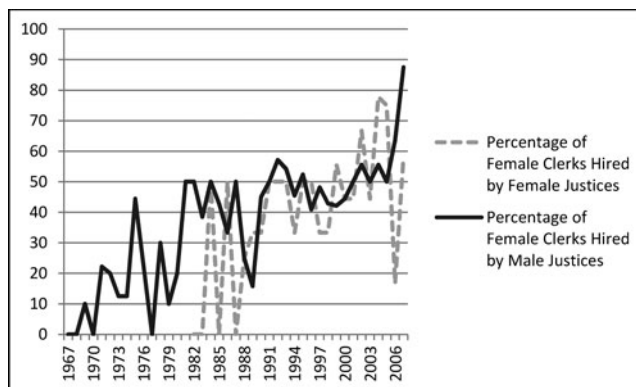


FIGURE 6 Percentage of Female Clerks over Time by Justice's Sex, Supreme Court of Canada, 1967–2007.

there were a few years in the last decade where female justices hired relatively more female clerks. On balance, though, this figure drives home what appears to be a critical institutional difference between the SCOTUS and the SCC.

## CONCLUSION

Like others before us, our analysis suggests that women are seriously underrepresented among those selected to be U.S. Supreme Court clerks. While the average percentage of women selected to clerk positions has increased since women made their debut in this forum, women still lag behind men in the rates at which they appear.

This is not news. Many commentators and a number of academics have addressed the U.S. Supreme Court's record on gender diversity in this respect. What makes the present study distinct, however, is its explicit attention to the influence of justice sex and judicial ideology on clerk selection—both individually and in a multivariate context. Further, by offering a descriptive analysis of clerk selection patterns in the Supreme Court of Canada, we add yet another issue for consideration—the impact of bench diversity.

Our findings, unsurprisingly, suggest that female justices of the U.S. Supreme Court, most notably Justices O'Connor and Ginsburg (for whom we have more data), were more inclined to select a more equitable number of female clerks than their male colleagues. In addition, a trend line suggests that SCOTUS justices appointed by Democratic presidents were more inclined to select larger proportions of female clerks than those appointed by Republican presidents. Importantly, in our multivariate model predicting the proportion of female clerks hired by a given U.S. Supreme Court justice per year, justice sex and justice ideology were both statistically and substantively significant. This was the case even in the face of controls for various aspects of the female clerk applicant pool, society's attitudes toward women, the extent to which the Court's docket focused on so-called women's issues, and justice age.

While the causal mechanisms for justice sex are more intuitive—for example, concepts such as homophily suggest we like to be surrounded by people who are like us (Ibarra 1992,

422–447)—the relationships between a clerk’s sex and justice ideology are less clear. As we noted earlier, perhaps sex is a heuristic for ideology and/or competence. Since justices do not have complete information regarding the preferences of the clerks, they may infer either or both characteristics from their sex. Alternatively, perhaps the justices use feeder judges as heuristics for ideology and/or competency—and the feeders, in turn, used sex as a heuristic for these characteristics.

It is also possible that selection effects play a role in the SCOTUS justice ideology findings, at least during earlier periods. Specifically, prospective female clerks might tend to apply to work for liberals and other women. If this is the case, it is likely time-bound, as it has become the norm to apply to all the justices (Ward and Weiden 2006, 58–59). Moreover, this recent norm combined with the persistence of the clerk gender gaps across justice sex and ideology in recent terms (see Figures 3 and 4) suggests that selection effects might play a minimal role at least at this level. It is still quite possible, however, that there is a selection effect at the lower court level. For example, women may tend to apply to liberal and female feeder judges.

While data limitations prevented us from running a comparable multivariate model for SCC justice clerk selection, the descriptive analyses provided are quite telling. First, the SCC’s aggregate figures of the percentage of female clerks hired across select time periods were consistently higher than those for the SCOTUS, especially from the 1970s to the end of the time period assessed. Further, the graphical displays of the percentages of female clerks hired by liberal and conservative appointees to the SCC do not suggest the sort of relationship between justice ideology and female clerk selection that does appear to be present in the SCOTUS. In a number of years, in fact, conservative SCC appointees hired more women than their liberal counterparts. Similarly, male SCC justices hired proportionally more women than their female colleagues in a number of years in the time period assessed.

The comparative results between the U.S. and Canada in the selection of high Court clerks are striking. What might explain the apparent differential impact of justice sex and ideology in the clerk selection process across the two contexts? Unfortunately, our dataset does not afford us the opportunity to unearth the causal mechanisms at work. However, we can suggest some possible explanations.

As noted above, one of the most apparent differences across the two institutions analyzed involves the gender diversity of the justices making the clerk selections. As more women have been appointed to the SCC and one has even led the Court, it is possible and, we argue, quite likely, that the Canadian Supreme Court’s own gender diversity has altered the use of sex as a “status characteristic” (see, e.g., Foschi and Lapointe 2002, 147) in the selection of Court clerks. It is even possible that such diversity has led to the attachment of higher evaluations of women’s competence for these positions over time.

What might be aiding this as well are larger political and cultural differences between the two countries. As Foschi and Lapointe (2002, 147, citing Carli and Eagly 1999, 203–222 and Sagatun 1981) explain, “in some societies, sex . . . is a strong determinant of beliefs about . . . overall worth and competence (typically superior if the person is a man); while other societies are more egalitarian.” While gender discrimination in the workplace is still noted in both contexts,<sup>23</sup> Canada is known as being more “egalitarian” than the United States (see, e.g., Norris and Inglehart

<sup>23</sup>For the U.S., see National Women’s Law Center (2000). For Canada, see Pay Equity Commission (2012).

2008, 12). To the extent that larger cultural acceptance of women as authority figures is at play in Canada, it may not be as surprising to see the selection of higher proportions of women clerks by both its conservative and liberal judicial appointees. Such larger societal differences could also mitigate gender-based differences in the employment of female clerks by the justices across the two Courts as well.

However, it also important to note that patterns evident in the selection process in both the U.S. and Canadian Supreme Courts are also likely a function of other institutional processes that produce “the serious contenders for these clerkships” (Kaye and Gastwirth 2009, 437). This, of course, relates to “the feeder system[s]” (Kaye and Gastwirth 2009, 418) that are discussed in the literature on high Court clerk selection. It is quite possible that the gender differential in clerk selection is exacerbated in the U.S. system and mitigated somehow in Canada. Unfortunately, due to data limitations, we were not able to test the extent to which differences in these selection systems explain the patterns we find in the present study. Thus, we must pass the torch to future researchers to investigate this possibility. Considering the important role that clerks play in both high Courts, and the fact that clerkship opportunities can set the stage for highly influential legal careers, it is one worth carrying.

### ACKNOWLEDGMENTS

We would like to thank Professors Rorie Spill Solberg and Stephen Wasby for reviewing and commenting on this article and the U.S. Supreme Court’s Public Information Office for providing us with clerkship data. Finally, we must thank Prof. Mark Hurwitz, editor of the *Justice System Journal*, for supporting publication of the article. Any errors that remain are our own.

### REFERENCES

- American Bar Association (ABA). 1993. “A Review of Legal Education in the United States—Fall 1980 (Chicago, IL: American Bar Association, Section on Legal Education and Admission to the Bar).” Reprinted in Cynthia F. Epstein, *Women in Law*. Urbana: University of Illinois Press.
- American National Election Studies (ANES). n.d. “The ANES 2008 Time Series Study [dataset].” Stanford University and the University of Michigan [producers]. [www.electionstudies.org](http://www.electionstudies.org) (accessed October 10, 2014).
- Benson, C. R. 2007. “A Renewed Call for Diversity Among Supreme Court Clerks: How a Diverse Body of Clerks Can Aid the High Court as an Institution.” *Harvard Black Letter Law Journal* 23: 23–54.
- Black, R. C., and C. L. Boyd. 2012. “The Role of Law Clerks in the U.S. Supreme Court’s Agenda-Setting Process.” *American Politics Research* 40: 147–73.
- Bodwin, K., J. Rosenthal, and A. H. Yoon. 2013. “Opinion Writing and Authorship on the Supreme Court of Canada.” *University of Toronto Law Journal* 63: 159–92.
- Brown, M. R. 1996. “Gender Discrimination in the Supreme Court’s Clerkship Selection Process.” *Oregon Law Review* 75: 359.
- Carli, L. L., and A. H. Eagly. 1999. “Gender Effects on Social Influence and Emergent Leadership.” In *Handbook of Gender and Work*, edited by G. Powell, 203–22. Thousand Oaks, CA: Sage.
- Carson, C. N. 2004. *The Lawyer Statistical Report*. Chicago, IL: American Bar Foundation.
- Chandra, J. B. 2012. “Lucile Lomen: The First Female United States Supreme Court Law Clerk.” In *In Chambers: Stories of Supreme Court Clerks and Their Justices*, edited by T. C. Peppers and A. Ward, 198–230. Charlottesville, VA: UVA Press.
- Cooper, C. L. 2008. “Women Supreme Court Clerks Striving for ‘Commonplace.’” *Perspectives* 17: 18–22.

- Dolan, K. 2004. *Voting for Women: How the Public Evaluates Women Candidates*. Boulder, CO: Westview.
- Douglas, W. O. 1980. *The Court Years, 1939–1975: The Autobiography of William O. Douglas*. New York: Random House.
- Drukker, D. M. 2003. “Testing for Serial Correlation in Linear Panel-data Models.” *Stata Journal* 3: 168–77.
- Epstein, L., T. G. Walker, N. Staudt, S. Hendrickson, and J. Roberts. 2013. *The U.S. Supreme Court Justices Database*, March 2, <http://epstein.wustl.edu/research/justicesdata.html> (accessed October 4, 2014).
- Estrich, S. 2006. “Lack of Women Supreme Court Law Clerks Shows Unconscious Discrimination.” FoxNews.com (August 30). <http://www.foxnews.com/story/0,2933,211379,00.html> (accessed October 4, 2014).
- Flemming, R. B., and G. S. Krutz. 2002. “Repeat Litigators and Agenda Setting on the Supreme Court of Canada.” *Canadian Journal of Political Science* 35: 811–33.
- Foschi, M., and V. Lapointe. 2002. “On Conditional Hypotheses and Gender as a Status Characteristic.” *Social Psychology Quarterly* 56: 146–62.
- Greenhouse, L. 2006. “Supreme Court Memo: Women Suddenly Scarce among Justices’ Clerks.” *New York Times*, August 30.
- Huddy, L., and N. Terkildsen. 1993. “Gender Stereotypes and the Perception of Male and Female Candidates.” *American Journal of Political Science* 37: 119–47.
- Ibarra, H. 1992. “Homophily and Differential Returns: Sex Differences in Network Structure and Access in an Advertising Firm.” *Administrative Science Quarterly* 37: 422–47.
- Kaheny, E. B., J. J. Szmer, and T. A. Sarver. 2011. “Women Lawyers Before the Supreme Court of Canada.” *Canadian Journal of Political Science* 44: 83–109.
- Kaye, D. H., and J. L. Gastwirth. 2008. “The Disappearance that Wasn’t? ‘Random Variation’ in the Number of Women Supreme Court Clerks.” *Jurimetrics* 48: 457–63.
- . 2009. “Where Have All the Women Gone? The Gender Gap in Supreme Court Clerkships.” *Jurimetrics* 49: 411–37.
- Lazarus, E. 2006. “This Year’s New Supreme Court Clerks: Why Are Only Twenty Percent Women? The Question, and the Unfortunate Conversation It Caused.” Findlaw.com (August 31), <http://writ.lp.findlaw.com/lazarus/20060831.html> (accessed October 4, 2014).
- Lithwick, D. 2006. “Clerked Around: Is There a Major Girl Crisis in Supreme Court Hiring?” *Slate Magazine* (Slate.com), August 30, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2006/08/clerked\\_around.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2006/08/clerked_around.html) (accessed October 4, 2014).
- Makin, K. 2013. “Supreme Court Needs More Women, Departing Judge Says.” *Globe and Mail*, February 2. <http://www.theglobeandmail.com/news/national/supreme-court-needs-more-women-departing-judge-says/article8149711/> (accessed October 4, 2014).
- Martin, A. D., and K. M. Quinn. 2002. “Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999.” *Political Analysis* 10: 134–53.
- Mauro, T. 1998a. “Corps of Clerks Lacking Diversity.” *USA Today*, March 13.
- . 1998b. “Only 1 New High Court Clerk is a Minority.” *USA Today*, September 10.
- . 1998c. “Rehnquist Blames Grad Pool for Lack of Diversity.” *USA Today*, December 8.
- . 1998d. “Activists Protest Court’s Lack of Minority Clerks.” *USA Today*, October 6.
- . 2006. “High Court Clerks, Still White, Still Male.” *Legal Times*, May 25.
- . 2012. “High Court Clerks, Big Money.” *National Legal Journal*, September 12.
- McDermott, M. L. 1998. “Race and Gender Cues in Low-Information Elections.” *Political Research Quarterly* 51: 895–918.
- McInnes, M., J. Bolton, and N. Derzko. 1994. “Clerking at the Supreme Court of Canada.” *Alberta Law Review* 33: 58–79.
- McGuire, K. T. 1993. *The Supreme Court Bar: Legal Elites in the Washington Community*. Charlottesville: University of Virginia Press.
- Mullarkey, M. J. 2004. “Two Harvard Women: 1965 to Today.” *Harvard Women’s Law Journal* 27: 367–79.
- National Women’s Law Center. 2000. “Sex Discrimination in the American Workplace: Still a Fact of Life.” <http://www.nwlc.org/resource/sex-discrimination-american-workplace-still-fact-life> (accessed April 4, 2014).
- Norris, P., and R. Inglehart. 2008. “Cracking the Marble Ceiling: Cultural Barriers Facing Women Leaders.” *Harvard University Report*. <http://www.hks.harvard.edu/fs/pnorris/Acrobat/Marble%20ceiling%20professional%20format.pdf> (accessed April 4, 2014).

- O'Connor, K., and J. R. Hermann. 1995. "The Clerk Connection: Appearances before the Supreme Court by Former Clerks." *Judicature* 78: 247–49.
- Papke, L. E., and J. M. Wooldridge. 1996. "Econometric Models for Fractional Response Variables with an Application to 401(k) Plan Participation Rates." *Journal of Applied Econometrics* 11: 619–32.
- Pay Equity Commission. 2012. "Gender Wage Gap." <http://www.payequity.gov.on.ca/en/about/pubs/genderwage/wagegap.php> (accessed May 2, 2014).
- Peppers, T. C. 2006. *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*. Stanford, CA: Stanford University Press.
- Peppers, T. C., and A. Ward. 2012. *In Chambers: Stories of Supreme Court Clerks and Their Justices*. Charlottesville, VA: UVA Press.
- Peppers, T. C., and C. Zorn. 2008. "Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment." *Depaul Law Review* 58: 51–77.
- Perry, H. W. Jr., 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press.
- Posner, R. A. 2013. "The Supreme Court and Celebrity Culture." *Chicago-Kent Law Review* 88: 299–305.
- Sagatun, I. J. 1981. "Sex Differences in Attribution: A Norwegian Study." *Scandinavian Journal of Psychology* 22: 51–7.
- Sarver, T. A., E. B. Kaheny, and J. J. Szmer. 2008. "The Attorney Gender Gap in U.S. Supreme Court Litigation." *Judicature* 91: 238–50.
- Songer, D. R. 2008. *The Transformation of the Supreme Court of Canada*. Toronto: University of Toronto Press.
- Sossin, L. 1996. "The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada." *University of British Columbia Law Review* 30: 279–308.
- Spaeth, H. J., L. Epstein, A. D. Martin, J. A. Segal, T. J. Ruger, and S. C. Benesh. 2014. "Supreme Court Database Online Codebook to the U.S. Supreme Court Judicial Database, Version 2014, Release 1." <http://scdb.wustl.edu/documentation.php?var=issue> (accessed October 7, 2014).
- Supreme Court of Canada. n.d.(a). Supreme Court of Canada Web page. <http://www.scc-csc.gc.ca/court-court/judges-juges/atoz-aaz-eng.aspx> (accessed October 4, 2014).
- Supreme Court of Canada. n.d.(b). "The Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada." *Supreme Court of Canada* Web page. <http://www.scc-csc.gc.ca/court-court/judges-juges/bio-eng.aspx?id=beverley-mclachlin> (accessed October 4, 2014).
- Supreme Court of Canada. n.d.(c). "Supreme Court of Canada: Law Clerk Program." <http://www.scc-csc.gc.ca/about-apropos/empl/lc-aj-eng.aspx> (accessed October 7, 2014).
- Supreme Court of the United States. n.d. "Frequently Asked Questions." *Supreme Court of the United States* Web Page. [http://www.supremecourt.gov/faq\\_justices.aspx#faqjustice19](http://www.supremecourt.gov/faq_justices.aspx#faqjustice19) (accessed on May 2, 2014).
- Szmer, J. J., T. A. Sarver, and E. B. Kaheny. 2010. "Have we Come a Long Way, Baby? The Influence of Attorney Gender on Supreme Court Decision Making." *Politics and Gender* 6: 1–36.
- U.S. News and World Report. 2013. "Best Law Schools: Ranked in 2013." *U.S. News and World Report*. <http://gradschools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings?int=e5db0b>.
- Ward, A., and D. L. Weiden. 2006. *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. New York: NYU Press.
- Wooldridge, J. M. 2002. *Econometric Analysis of Cross Section and Panel Data*. Cambridge, MA: MIT Press.