

## Marquette Law Review

---

Volume 98

Issue 1 *Symposium: Judicial Assistants or Junior*

*Judges: The Hiring, Utilization, and Influence of Law  
Clerks*

Article 13

---


# Taking a Dip in the Supreme Court Clerk Pool: Gender-Based Discrepancies in Clerk Selection

John J. Szmer

Erin B. Kaheny

Robert K. Christensen

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>

 Part of the [Courts Commons](#), [Judges Commons](#), [Law and Race Commons](#), [Law and Society Commons](#), and the [Legal Profession Commons](#)

---

### Repository Citation

John J. Szmer, Erin B. Kaheny, and Robert K. Christensen, *Taking a Dip in the Supreme Court Clerk Pool: Gender-Based Discrepancies in Clerk Selection*, 98 Marq. L. Rev. 261 (2014).

Available at: <http://scholarship.law.marquette.edu/mulr/vol98/iss1/13>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# TAKING A DIP IN THE SUPREME COURT CLERK POOL: GENDER-BASED DISCREPANCIES IN CLERK SELECTION

JOHN J. SZMER\*

ERIN B. KAHENY\*\*

ROBERT K. CHRISTENSEN\*\*\*

*Former U.S. Supreme Court clerks are heavily recruited by select law firms, and many eventually find their way to policy “elite” positions in the government or in the legal academy. A number of former clerks have returned to the Court as litigators, and a subset has returned to the Court as Justices. We are interested in clerk selection for two reasons. First, clerks influence key aspects of the judicial process while serving in their clerkship capacity, and second, many seem to be in a good position to influence legal policy well after their clerkships have ended. With this in mind, it is natural to ask about the selection of such individuals to these posts. There are larger questions of diversity, however, that have permeated discussions of the Court’s clerkship selection practices. In this Article, we explore one critical dimension—the relative imbalance between men and women serving as High Court clerks. We analyze the U.S. Supreme Court directly, but also supply comparison points in assessing clerkship diversity in Canada and Brazil.*

---

\* Associate Professor of Political Science, University of North Carolina at Charlotte, J.D., University of Georgia, 1995, Ph.D., University of South Carolina, 2005.

\*\* Associate Professor of Political Science, Department of Political Science, University of Wisconsin—Milwaukee, Ph.D., University of South Carolina, 2004.

\*\*\* Associate Professor of Public Administration and Policy, Department of Public Administration and Policy, University of Georgia, J.D., Brigham Young University, 2000, Ph.D., Indiana University, 2007.

I. INTRODUCTION .....	262
II. CLERK SELECTION AND DIVERSITY.....	263
III. HISTORICAL BACKGROUND.....	266
IV. ANALYSIS .....	270
A. <i>Comparing the United States &amp; Canada</i> .....	270
B. <i>Brazil as a Point of Comparison</i> .....	282
1. Relevant Background.....	282
2. Diversity of Supreme Federal Court Staff.....	284
V. CONCLUDING THOUGHTS.....	286

## I. INTRODUCTION

Every year, Justices of the Supreme Court of the United States and the Supreme Court of Canada select new groups of law clerks for their respective Courts. The law clerks on both Courts are charged with a host of important duties, from screening requests to hear cases<sup>1</sup> to drafting opinions,<sup>2</sup> and their influence continues to be discussed and contested.<sup>3</sup> While the extent of this influence has received a fair amount of attention, so has the rather significant impact the clerkship experience has on these individuals' legal careers, at least in the United States.<sup>4</sup> With impressive credentials, including the experience working

---

1. For a discussion of the draft of summaries of petitions for writ of certiorari submitted to the U.S. Supreme Court and evidence of the influence of clerks on the U.S. Supreme Court, see H. W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 58–60, 69–89 (1991). Akin to the petition for writ of certiorari, appellants submit petitions for leave to appeal to the Supreme Court of Canada. Lorne Sossin, *The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada*, 30 U. BRIT. COLUM. L. REV. 279, 289–90 (1996). Like the U.S. Supreme Court cert pool, one clerk typically writes a memo summarizing the leave to appeal for the entire court. *See id.*

2. For the U.S. Supreme Court, see Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 56 (2008). For the Supreme Court of Canada, see F.L. Morton & Rainer Knopff, *The Role of Clerks in the Supreme Court of Canada*, in *LAW, POLITICS AND THE JUDICIAL PROCESS IN CANADA* 555, 555–56 (F.L. Morton ed., 3d ed. 2002).

3. For the U.S. Supreme Court, see Peppers & Zorn, *supra* note 2, at 51–52 (citing TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 2* (2006)). For the Supreme Court of Canada, see DONALD R. SONGER, *THE TRANSFORMATION OF THE SUPREME COURT OF CANADA* 139–40 (2008), and Morton & Knopff, *supra* note 2, at 556–58.

4. *See, e.g.*, Christopher R. Benson, *A Renewed Call for Diversity Among Supreme Court Clerks: How a Diverse Body of Clerks Can Aid the High Court as an Institution*, 23 HARV. BLACKLETTER L.J. 23, 23 (2007); Susan Estrich, *Lack of Women Supreme Court Law*

for a Justice of the nation's highest Court, former U.S. Supreme Court clerks are heavily recruited by select law firms.<sup>5</sup> Many eventually find their way to positions in the government or in the legal academy.<sup>6</sup> A number of former clerks have returned to the Court as litigators,<sup>7</sup> and a subset has returned to the Court as Justices.<sup>8</sup> In short, while clerks may very well influence key aspects of the judicial process while serving in this capacity, many seem to be in a good position to influence legal policy well after their clerkships have ended.

## II. CLERK SELECTION AND DIVERSITY

With this in mind, it is natural to ask about the selection of such individuals to these posts. What key variables influence the selection of individuals for Supreme Court clerkships? It is true, of course, that those with the best odds of being selected for Supreme Court clerkships are graduates of the nation's top law schools<sup>9</sup> and are typically former members of these schools' law reviews.<sup>10</sup> The Supreme Court clerkship pool, moreover, often includes candidates from the chambers of select lower court judges, i.e., "feeder judges,"<sup>11</sup> who recommend some of their

---

*Clerks Shows Unconscious Discrimination*, FOX NEWS (Aug. 30, 2006), <http://www.foxnews.com/story/0,2933,211379,00.html>, archived at <http://perma.cc/BE9F-QCBP>.

5. See, e.g., Charles Lane, *Former Clerks' Signing Bonuses Rival Salaries on the High Court*, WASH. POST, May 15, 2006, at A15; *Law Firms' Signing Bonuses: Supreme Desire*, ECONOMIST, Aug. 17, 2013, at 56.

6. See Lane, *supra* note 5; see also Artemus Ward, Christina Dwyer & Kiranjit Gill, *Bonus Babies Escape Golden Handcuffs: How Money and Politics Has Transformed the Career Paths of Supreme Court Law Clerks*, 98 MARQ. L. REV. 227, 240–46 (2014).

7. See KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* 163–64 (1993); Karen O'Connor & John R. Hermann, *The Clerk Connection: Appearances Before the Supreme Court by Former Law Clerks*, 78 JUDICATURE 247, 247 (1995).

8. *Frequently Asked Questions: Justices*, SUP. CT. U.S., [http://www.supremecourt.gov/faq\\_justices.aspx#faqjustice19](http://www.supremecourt.gov/faq_justices.aspx#faqjustice19) (last visited Oct. 27, 2014), archived at <http://perma.cc/PG9Y-T67V>; see also PEPPERS, *supra* note 3, at 81, 126–27, 129, 163.

9. David H. Kaye & Joseph L. Gastwirth, *Where Have All the Women Gone? The Gender Gap in Supreme Court Clerkships*, 49 JURIMETRICS J. 411, 414 (2009) (citing PEPPERS, *supra* note 3, at 23–30; ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 72–73 (2006)).

10. WARD & WEIDEN, *supra* note 9, at 55; Kaye & Gastwirth, *supra* note 9, at 414–15.

11. See Lawrence Baum & Corey Ditslear, *Supreme Court Clerkships and "Feeder" Judges*, 31 JUST. SYS. J. 26 (2010).

own clerks for High Court clerkship positions. This process, therefore, shapes the nature of this group in fundamental ways.<sup>12</sup>

There are larger questions of diversity, however, that have permeated discussions of the Court's clerkship selection practices. In this Article, we explore one critical dimension—the relative imbalance between men and women serving as High Court clerks. While women have certainly claimed more Supreme Court clerkships over time, they are not claiming an equitable number of positions in most chambers and in most years.<sup>13</sup> Indeed, while at one time women's relative scarcity in this venue could be explained by their lack of presence in law school and on the law reviews of their respective programs, these explanations are far less plausible today,<sup>14</sup> and thus, the continued gender disparity in Supreme Court clerkships presents an important issue.

Legal scholars and social scientists have, in fact, studied this disparity. Though Supreme Court reporter Tony Mauro authored “a series of articles” relating to this and other issues of clerkship selection,<sup>15</sup>

---

12. For details, please see PEPPERS, *supra* note 3, at 17–37.

13. See Erin B. Kaheny, John J. Szmer, Michael A. Hansen & Katherine Felix Scheurer, High Court Recruitment of Female Clerks: A Comparative Analysis of the U.S. Supreme Court and the Supreme Court of Canada 6–7 (Apr. 11, 2014) (unpublished manuscript) (on file with authors).

14. For trends regarding the number of women graduating with law degrees, please see NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, at tbl.294 (2011), available at [http://nces.ed.gov/programs/digest/d11/tables/dt11\\_294.asp](http://nces.ed.gov/programs/digest/d11/tables/dt11_294.asp), archived at <http://perma.cc/9YXG-9E3G> [hereinafter EDUCATIONAL STATISTICS] (citing NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., EARNED DEGREES CONFERRED: 1949–1950 THROUGH 1964–1965; HIGHER EDUC. GEN. INFO. SURVEY, DEGREES AND OTHER FORMAL AWARDS CONFERRED: 1965–1966 THROUGH 1985–1986; NAT'L CTR. FOR EDUC. STATISTICS, INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM: COMPLETIONS SURVEY, at C:87-99; NAT'L CTR. FOR EDUC. STATISTICS, INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM, COMPLETIONS COMPONENT: FALL 2002 THROUGH FALL 2010). As part of their study, Kaheny et al. also conducted an analysis of the mastheads of the law reviews of nine major law schools for the time period 1965–1966 to 2011–2012. The results did show that the mean percentage of women serving as members of these law reviews climbed throughout the time period. For the 1965–1966 academic year, for example, the mean percentage of women serving on the law reviews in their sample was only about 2.8%. This average climbed to about 40.14% for the 2011–2012 academic year. See Kaheny et al., *supra* note 13 (data on file with authors); see also Julie Silverbrook, *Ms. JD–NYLS Report Shows Improvement in Women and Minority Representation on Law Reviews*, MS. JD (Apr. 1, 2014), <http://ms-jd.org/blog/article/ms.jd-nyls-report-shows-improvement-in-women-and-minority-representation-on>, archived at <http://perma.cc/W3ZA-ZKZC>.

15. See Todd C. Peppers & Artemus Ward, *Introduction to IN CHAMBERS: STORIES OF SUPREME COURT CLERKS AND THEIR JUSTICES* 1, 13 n.1 (Todd C. Peppers & Artemus Ward eds., 2012) (citing Tony Mauro, *Corps of Clerks Lacking in Diversity*, USA TODAY,

D.H. Kaye and Joseph Gastwirth's analyses of the Court's selection of female clerks was a direct response to a more recent development at the Court—namely, the controversy surrounding the Court's predominately male picks for the 2006 Term.<sup>16</sup> Kaye and Gastwirth published two articles that sought to uncover the nature of these selections. In *The Disappearance that Wasn't? "Random Variation" in the Number of Women Supreme Court Clerks*, the authors concluded that "[t]he proportion of female clerks . . . has been quite stable since 2000, and the downturn in 2006 followed by the upturn in 2007 is consistent with fluctuations about the mean."<sup>17</sup> In a follow-up analysis, their conclusions about possible gender bias seemed contingent upon whether the focus was at the Court or Justice level. As they note:

On one hand, the overall proportion of women clerks, which is estimated by the female fraction of all law clerks during the seven-year period, is consistent with the binomial model that treats the Justices as equally inclined to hire a woman as a man (and every woman as equally disposed to apply to and accept offers from each Justice).

On the other hand, the Justice-by-Justice pattern of hiring is much harder to reconcile with the binomial model. If the proportion of highly qualified women in the pool for each Justice is truly one-third, then some Justices hire significantly fewer women than expected.<sup>18</sup>

More recently, Kaheny, Szmer, Hansen, and Scheurer sought to assess the gender disparity in the Supreme Court's clerkship selection as well.<sup>19</sup> Unlike Kaye and Gastwirth, Kaheny et al. sought to more directly assess the role of Justice gender and judicial ideology in the selection of female clerks.<sup>20</sup> In doing so, they found that female Supreme Court Justices were more likely to hire women clerks than their male counterparts, and liberal Justices were more likely to hire larger proportions of women clerks than their more conservative

---

Mar. 13, 1998, at 12A; Tony Mauro, *Only 1 New High Court Clerk is a Minority*, USA TODAY, Sept. 10, 1998, at 9A).

16. See D.H. Kaye & Joseph L. Gastwirth, *The Disappearance that Wasn't? "Random Variation" in the Number of Women Supreme Court Clerks*, 48 JURIMETRICS J. 457, 457–59 (2008).

17. *Id.* at 462.

18. Kaye & Gastwirth, *supra* note 9, at 429.

19. Kaheny et al., *supra* note 13.

20. *Id.* at 7.

colleagues.<sup>21</sup> These findings emerged in the context of descriptive bivariate analyses as well in the context of a multivariate model.<sup>22</sup> Importantly, their analysis was also comparative in nature.<sup>23</sup> Specifically, in addition to examining patterns in the U.S. Supreme Court, they also assessed the proportion of women clerks hired by justices of the Supreme Court of Canada.<sup>24</sup> Graphical relationships between Justice gender/ideology and the propensity to hire female clerks found in the United States were not evident in the Canadian case,<sup>25</sup> leaving the authors to suggest multiple reasons for the disparity between these two fairly similar judicial institutions. The present analysis is an extension of Kaheny et al. We build on this work in a variety of ways, through the provision of more in-depth statistical (e.g., adding descriptive looks at Canadian clerk hiring patterns by individual justices over time along with a Supreme Court of Canada multivariate analysis) and historical analyses, and examination of the seven most recent Supreme Court of Canada and U.S. Supreme Court Terms (which include three additional female Justices—Karakatsanis in Canada, and Sotomayor and Kagan in the United States).

### III. HISTORICAL BACKGROUND

Following the lead of Justice Horace Gray, the first U.S. Supreme Court law clerks were hired in the 1880s.<sup>26</sup> However, it would take more than sixty years until Justice William Douglas hired Lucile Lomen, the first female law clerk, to serve during the 1944–1945 Term.<sup>27</sup> Even then, it took the combination of several factors to crack the glass ceiling. While he outwardly denied it, Justice Douglas's personal papers indicated he only considered female candidates because World War II decimated the pool of potential male clerks.<sup>28</sup> Lomen also was an ideal candidate. First, Justice Douglas only hired clerks from the Ninth

---

21. *Id.* at 26–27.

22. *Id.* at 14–15.

23. *Id.* at 8–9.

24. *Id.* at 7–8.

25. *Id.* at 26–28.

26. Peppers & Ward, *supra* note 15, at 4–5.

27. WARD & WEIDEN, *supra* note 9, at 89.

28. Jennie Berry Chandra, *Lucile Lomen: The First Female United States Supreme Court Law Clerk*, in *IN CHAMBERS: STORIES OF SUPREME COURT CLERKS AND THEIR JUSTICES* 198, 199 (Todd C. Peppers & Artemus Ward eds., 2012).

Circuit, and Lomen graduated from the University of Washington.<sup>29</sup> She distinguished herself as the vice president of the law review, the only Honor Graduate and member of the Order of the Coif, and the author of a well-received note on the Privileges and Immunities Clause.<sup>30</sup> Second, she impressed the right people, including her law school dean as well as two trusted acquaintances of Justice Douglas: Charles Maxey, her undergraduate thesis adviser and the Justice's fraternity brother, and Vern Countryman, a former Douglas clerk who was in his third year at Washington during Lomen's first year.<sup>31</sup>

Justice Douglas described Lomen as "very able and very conscientious,"<sup>32</sup> and he apparently considered hiring a woman to serve as a combination law clerk/legal secretary when the Justices were authorized to hire a second clerk in 1950.<sup>33</sup> However, more than two decades passed before Justice Hugo Black hired the second female clerk in 1966.<sup>34</sup> During the interim, a young Ruth Bader Ginsburg was recommended to Justice Felix Frankfurter by a former law professor.<sup>35</sup> Ginsburg had excelled at Harvard Law School, where she made law review, before transferring to Columbia Law School to accommodate her husband's legal career.<sup>36</sup> There she tied for first in her class.<sup>37</sup> Even with her sterling credentials and a recommendation from a professor known to select clerks for the Justice, Frankfurter still refused to hire Ginsburg.<sup>38</sup> Some suggest he was hesitant to hire a woman with a five-year-old child,<sup>39</sup> while others suggest he was "worried she might wear

---

29. *Id.* at 199–200.

30. *Id.* at 202–04.

31. *Id.* at 205–06.

32. WILLIAM O. DOUGLAS, *THE COURT YEARS, 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 171 (1980).

33. Justice Ruth Bader Ginsburg, *The Washington College of Law Founders Day Tribute*, 5 AM. U. J. GENDER & L. 1, 2–3 (1996) (citing Letter from William O. Douglas, Associate Justice, U.S. Supreme Court, to Stanley M. Sparrowe (Jun. 13, 1950), in *THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS* 49, 49 (Melvin I. Urofsky with Philip E. Urofsky eds., 1987)).

34. Tammy A. Sarver, Erin B. Kaheny & John J. Szmer, *The Attorney Gender Gap in U.S. Supreme Court Litigation*, 91 JUDICATURE 238, 239 (2008).

35. WARD & WEIDEN, *supra* note 9, at 87–88.

36. SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 389 (2010).

37. *Id.*

38. *See id.*

39. *See* WARD & WEIDEN, *supra* note 9, at 87–88.



pants instead of dresses.”<sup>40</sup>

Margaret Corcoran, a graduate of Harvard Law School, was the second female U.S. Supreme Court clerk and was selected by Justice Hugo Black.<sup>41</sup> She was also the daughter of a former clerk to Justice Oliver Wendell Holmes, Tommy “The Cork” Corcoran.<sup>42</sup> The elder Corcoran was a veteran of the New Deal and a powerful political fixer who even allegedly lobbied Supreme Court Justices *ex parte*.<sup>43</sup> According to Justice Black’s wife, Elizabeth, as well as the accounts of another Black clerk serving that Term, Margaret was more interested in socializing than performing her duties as a law clerk.<sup>44</sup> Stephen Susman, her co-clerk, claimed in an interview to have done all of Margaret’s work in exchange for the “wonderful” social opportunities she provided.<sup>45</sup> Tommy Corcoran was apparently aware of his daughter’s work habits and may have helped her with her brief writing.<sup>46</sup>

Two years later, Martha Alschuler (later Martha Field) clerked for Justice Abe Fortas.<sup>47</sup> Field, a prominent law professor, was followed by Barbara Underwood, a Thurgood Marshall clerk, in 1971.<sup>48</sup> Underwood later blazed another trail when she was named the Acting U.S. Solicitor General in 2001, the first woman to serve in this capacity.<sup>49</sup>

During the 1972 Term, two women worked as law clerks—the first time more than one woman served in that capacity in the same Term.<sup>50</sup> That year, Justice Douglas set another first when he hired two female clerks—Carol Bruch and Janet Meik.<sup>51</sup>

While there were several cracks in the glass ceiling by the early 1970s, not all Justices were comfortable hiring women at that point. Justice William Brennan, a powerful advocate for gender equality under the Constitution, refused to hire Alison Grey as a clerk despite

---

40. STERN & WERMIEL, *supra* note 36, at 389.

41. See DAVID MCKEAN, *TOMMY THE CORK: WASHINGTON’S ULTIMATE INSIDER FROM ROOSEVELT TO REAGAN* 294–96 (2004); PEPPERS, *supra* note 3, at 20.

42. PEPPERS, *supra* note 3, at 20.

43. Harry McPherson, *Tommy the Cork: Washington’s Ultimate Insider, From Roosevelt to Reagan*, WILSON Q., Winter 2004, at 125, 126–27 (book review).

44. PEPPERS, *supra* note 3, at 20–21.

45. *Id.*

46. *Id.* (citing MCKEAN, *supra* note 41, at 296–97).

47. PEPPERS, *supra* note 3, at 20–21; Ginsburg, *supra* note 33, at 3.

48. Ginsburg, *supra* note 33, at 3.

49. Sarver et al., *supra* note 34, at 240 n.23.

50. WARD & WEIDEN, *supra* note 9, at 90.

51. *Id.*

recommendations from two law professors—both former Brennan clerks.<sup>52</sup> Justice Brennan apparently rejected Grey, who had finished first in her class at the University of California Berkeley School of Law, solely because of her sex.<sup>53</sup> In 1973, one of the former Brennan clerks who had recommended Grey tried to convince the Justice to hire Marsha Berzon for the 1974–1975 Term.<sup>54</sup> Again, Justice Brennan categorically refused to hire a woman. This time, however, Barnett wrote an impassioned letter to Justice Brennan asking him to reconsider.<sup>55</sup> Barnett pointed out that Justice Brennan’s decision not to hire Berzon on account of her sex likely violated the Constitution—in large part due to an interpretation of the Fourteenth Amendment championed by Justice Brennan.<sup>56</sup> Barnett’s arguments persuaded the Justice to hire Berzon.<sup>57</sup> However, he would not hire another female clerk for seven Terms.<sup>58</sup>

Compared to the U.S. Supreme Court, scholars have paid scant attention to the history of Canadian Supreme Court law clerks. However, we know the first Supreme Court of Canada female clerk worked for Justice Emmett Hall during the 1969–1970 clerk term.<sup>59</sup> While this may seem late considering Lucile Lomen clerked for the U.S. Supreme Court twenty-five years prior, the Supreme Court of Canada did not institute the law clerk position until 1968.<sup>60</sup> Two Supreme Court of Canada justices, Louise-Philippe Pigeon and Douglas Abbott, hired female clerks in 1971, a year before two U.S. Supreme Court Justices hired multiple female clerks in the same term.<sup>61</sup> One of the clerks, Louise Arbour, would later become the fourth woman to serve as a

---

52. STERN & WERMIEL, *supra* note 36, at 386.

53. *Id.*

54. *Id.* at 399.

55. *Id.* at 400.

56. *See id.*

57. *Id.* at 400–01.

58. *Id.* at 406.

59. Judge and term-specific information was provided by the Supreme Court of Canada. Also, we use the phrase “clerk term” as opposed to “term” because the Supreme Court of Canada does not have an official term, but they hire clerks for a time frame that overlaps closely with the same term used by the U.S. Supreme Court (late summer–late summer). *See Law Clerk Program*, SUP. CT. CANADA, <http://www.scc-csc.gc.ca/about-apropos/empl/lc-aj-eng.aspx> (last visited Oct. 28, 2014), *archived at* <http://perma.cc/88FD-HRW5>.

60. SONGER, *supra* note 3, at 139; *see supra* note 27 and accompanying text.

61. Data regarding clerks at the Canadian Supreme Court are on file with the authors.

Canadian Supreme Court justice.<sup>62</sup> She is still the only person to have served as both a law clerk and justice on the Supreme Court of Canada.<sup>63</sup>

#### IV. ANALYSIS

##### *A. Comparing the United States & Canada*

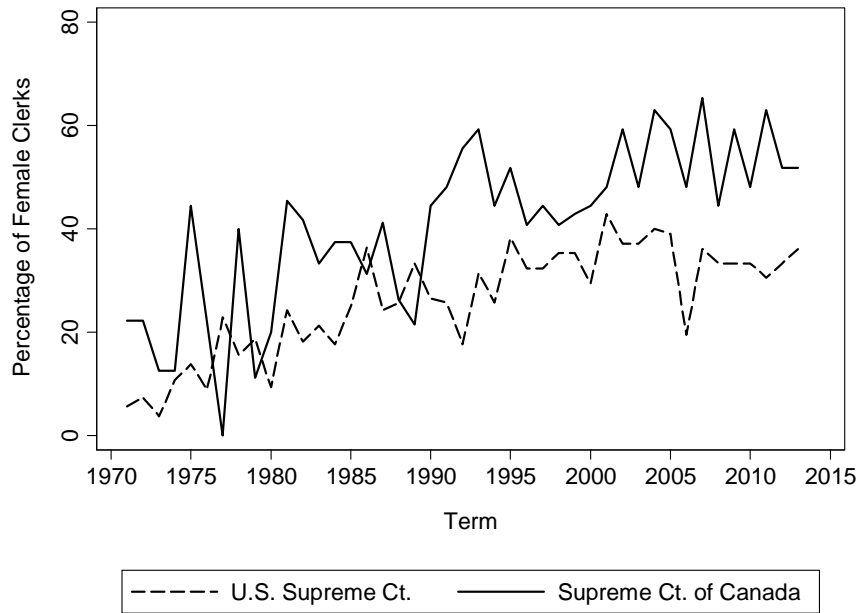
Figure 1 provides an aggregate comparison of the hiring of female clerks by the two North American common law High Courts over time. While there is some noise, the proportion of women clerks increased on both Courts over time. In the 1970s, the Supreme Court of Canada varied more from year to year. In some years, forty percent or more of the law clerks were women, while in other years the number dipped below twenty percent, and in 1977–1978, the Supreme Court of Canada did not hire a woman. Conversely, the U.S. Supreme Court varied less in the 1970s, but it also never peaked as high as the Supreme Court of Canada—the ratio of female-to-male clerks was always less than one-quarter. By the late 1980s, however, the patterns shifted. Every year, the Supreme Court of Canada hired a greater proportion of female clerks. Between 1990 and the most recent term, the Supreme Court of Canada average was close to perfect parity, though the percentage of female clerks still varied over time, from as little as forty to over sixty percent. Conversely, the U.S. Supreme Court trend line flattens, with the peak approaching the level of the minimum value for Canada—forty percent. Conversely, the minimum value for the U.S. Supreme Court dipped to below twenty percent for the 2006 Term.

---

62. ADAM DODEK, *THE CANADIAN CONSTITUTION* 152–53 (Britanie Wilson ed., 2013).

63. *Id.*

**Figure 1**  
**Percentage of Female Clerks Hired by the**  
**U.S. Supreme Court & Supreme Court of Canada, 1971–2013 Terms**



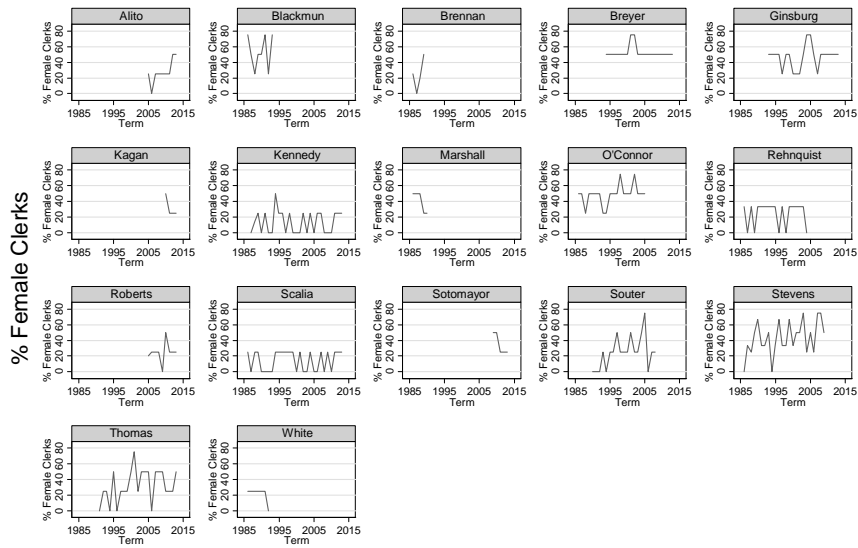
Figures 2a and 2b contain year-by-year graphs of the percentage of women clerks hired by recent U.S. and Canadian Supreme Court Justices, respectively. We note, of course, that each Justice hires relatively few total clerks each Term, and thus, even modest changes in the number of women employed will translate to rather large graphical shifts in a given year. Nonetheless, the graphical presentations afford a snapshot of the hiring patterns of a number of U.S. Supreme Court and Supreme Court of Canada Justices, and thus, we include them here with this caveat.

When critics challenged the U.S. Supreme Court Justices for selecting so few women clerks for the 2006 Term, at least two Justices suggested that the issue was a function of the number of women available to serve that year.<sup>64</sup> One manifestation of the predominance of supply-side dynamics, however, would seemingly be similar rates of fluctuation across all of the Justices in the percentage of women hired. The graphical analyses in Figure 2a suggest such dynamics may partially explain changes over time in the rate of women hired for these posts. They do not, however, seem to explain the patterns evident across all of the chambers analyzed. Some chambers, for example, report fairly consistent proportions of female clerks, thus giving rise to the impression that ensuring a minimal level of female representation is a priority of a given Justice and is also realistic given the supply of female candidates for these positions. In addition, as seen in the graphs, there is an apparent relationship between Justice gender and the percentage of female clerks hired each term as well. Interestingly, this pattern is more striking for the first two female Justices—O'Connor and Ginsburg. In their much shorter careers, the gaps between Justices Sotomayor and Kagan and their male colleagues are generally narrower.

---

64. See, e.g., Kaye & Gastwirth, *supra* note 16, at 460 (quoting Linda Greenhouse, *Women Suddenly Scarce Among Justices' Clerks*, N.Y. TIMES, Aug. 30, 2006, at A1 (providing an explanation from Justices Souter and Breyer "that the sharp drop in women among the clerkship ranks reflected a random variation in the applicant pool"))).

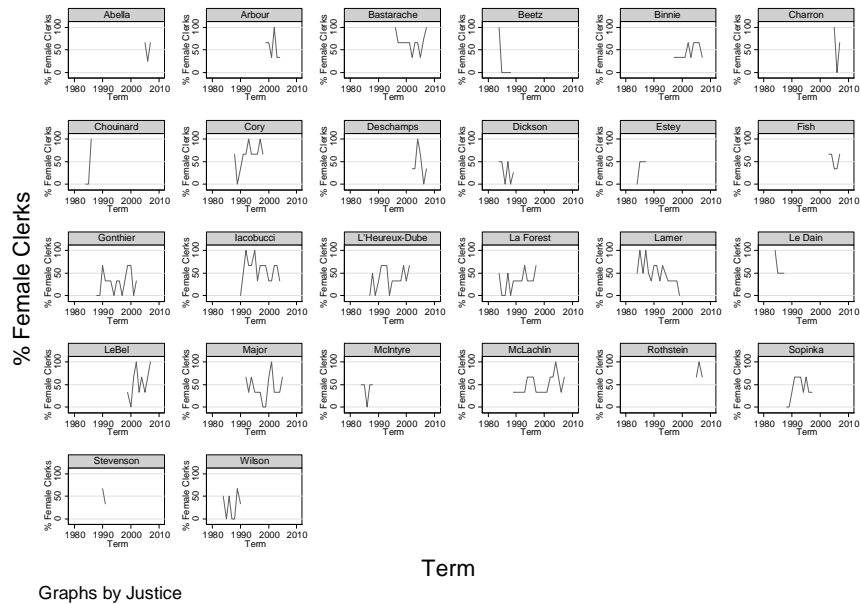
**Figure 2a**  
**Percentage of Female Clerks Employed by U.S. Supreme Court Justices**  
**Serving During the Rehnquist and Roberts Courts**



Graphs by Justice

Term

**Figure 2b**  
**Percentage of Female Clerks Employed by Supreme Court of Canada**  
**Justices Serving During the Dickson, Lamer, and McLachlin Courts**



Graphs by Justice

Again, comparison of these data with clerk hiring patterns of Supreme Court of Canada justices is informative. As with the United States, we provide comparable graphs of individual justices on the Canadian High Court, focusing on justices serving on this bench from 1984 onward.<sup>65</sup>

As seen in Figure 2b, the graphical presentations of individual Supreme Court of Canada justice patterns are not informative for what they reveal so much as for what they fail to reveal. Looking across each of the justices serving on the Supreme Court of Canada since 1984, it is hard to discern much in the way of patterns. While Chief Justice Lamer's and Justice Iacobucci's overall graphs trend downward, there were periods within this time span where a drop in the percentage of women clerks is followed by a rise for both justices. A number of other justices serving on the bench from 1984 on also exhibit this sort of fluctuation without clear upward or downward trends. There are, of course, a few justices with relatively flat lines, suggesting a possible greater incentive on their part to ensure more consistent representation of female clerks in their chambers. Particularly notable in this respect are Justices Estey and LeDain. However, the graphical results presented for these justices capture their hiring patterns for only four terms, and thus, one should be highly cautious when drawing inferences. Further, one must also interpret the results in the figure with some caution, as some of the justices served prior to 1984 and may have hired a gender-diverse set of clerks prior to this time period. Indeed, though Justice Beetz hired relatively few women in the years since 1984, prior to this period, he hired five female clerks.<sup>66</sup>

These graphs can also be useful for a quick assessment of the hiring patterns of this court's male versus female justices. Two female members, Justices McLachlin and L'Heureux-Dubé, were among those who exhibited a fair number of changes over time, though the former always employed at least one female clerk during the period analyzed. Justice Louise Arbour, moreover, always hired at least one female clerk for the years under study. In two terms, two of her three clerks were women, and in the 2002 term, all three of her clerks were women. Similar trends were apparent in the hiring patterns of Justice Marie Deschamps. She hired at least one female clerk for every term save one across the 2002 to 2007 period. Finally, three of Justice Charron's clerks

---

65. See *supra* Figure 2b.

66. Data regarding clerks at the Canadian Supreme Court are on file with the authors.



in the 2005 term were women, and two of her three clerks in 2007 were women. In the intervening term, her only two clerks were both male.

While collectively, the hiring patterns of the Supreme Court of Canada's female members suggest special attentiveness to selecting women for clerkship posts, one could point to many male justices in this dataset for similar patterns. Justice Louis LeBel hired at least one female clerk in all but nine of the terms we analyzed. In two of these terms, all three of his clerks were women. The selections of Justices Bastarache and Iacobucci are similarly representative. Women comprised the majority of their clerks in many of the terms we analyzed. A similar portrait is gleaned from the selections of Justice Peter deCarteret Cory. In nine of eleven terms, a majority of his clerks were women. Though in two terms Justice John Major's three clerks were all male, in every other term we investigated the justice employed at least one woman, and in five terms the majority of his clerks were female. We have but five years of data in which to assess the patterns of Justice Fish, but in what we are able to examine, the justice hired at least one woman in every term, and they comprised the majority in three of five terms. In short, there does not appear to be a definitive pattern in the hiring of women clerks by the Supreme Court of Canada on the basis of justice gender—at least, not one that is not readily apparent when examining these graphs. Both male and female justices of the Canadian High Court have made conscious or unconscious decisions to hire female clerks in relatively high numbers, and the larger pool has obviously supported sufficient numbers of female candidates.<sup>67</sup>

While the graphical analyses are useful, they do not allow for the possibility of spurious relationships. Moreover, one must also inquire about whether the choice to hire female clerks has an ideological basis. To do so, we conducted multivariate analyses of clerk hiring for both the Supreme Court of Canada and the U.S. Supreme Court. Specifically, for each Court we model the proportion of women clerks hired by a given Justice in a given Term as a function of Justice ideology, Justice gender, Justice age cohort (the year the Justice was born), the number of women's issues on the Court's docket in the previous year, and the supply of women lawyers. For both models, we use the same Justice gender, Justice age cohort, and average women's issues measures. Justice gender is coded one if the Justice was a woman, zero if a man. We also use the same Justice age cohort measure—the Justice's birth

---

67. See JOHN F. CONWAY, *THE CANADIAN FAMILY IN CRISIS* 127 (5th ed. 2003).

year. We assume that Justices who are born in a later year will be more likely to hire larger proportions of women clerks. Finally, for our measure of women's issues on the Supreme Court of Canada's docket, we turn to a previous study conducted by Kaheny, Szmer, and Sarver on the success of litigation teams before the Supreme Court of Canada.<sup>68</sup> They defined such issues on this court as including any case involving "rape, equality, privacy, marriage, divorce or other family related issues,"<sup>69</sup> and thus, we adopt their operationalization here as well. In both models, we calculate the proportion of cases raising a women's issue in the previous Term.<sup>70</sup>

For the supply of women lawyers and Justice ideology, we had to use different measures for the two Courts due to varying data availability. For the former, which we label, "Legal Profession Gender Environment," we used proxy measures based on the percentage of law school graduates that were women one year prior to the term. In the U.S. Supreme Court model, we had a measure from the U.S. Department of Education.<sup>71</sup> For the Supreme Court of Canada, we could not find the equivalent measure, but we did locate some data indicating "Women as a Percentage of all Lawyers" in Ontario in select years from 1971 to 2006 which, in turn, relied on Canadian census data.<sup>72</sup> While this is but one province and while the dataset did not include yearly measures throughout this entire period, the figures provided track fairly well with national figures we were able to locate for select years.<sup>73</sup> Thus, though not ideal, these measures do likely capture at least

---

68. Erin B. Kaheny, John J. Szmer & Tammy Sarver, *Women Lawyers Before the Supreme Court of Canada*, 44 CANADIAN J. POL. SCI. 83 (2011).

69. *Id.* at 91.

70. Data for the Supreme Court of Canada measure was derived from Stacia L. Haynie, Reginald S. Sheehan, Donald R. Songer & C. Neal Tate, *High Courts Judicial Database*, U.S.C. JUD. RES. INITIATIVE, <http://artsandsciences.sc.edu/poli/juri/highcts.htm> (to access, click on "Canada Supreme Court 1969–2003") (last visited Oct. 28, 2014), *archived at* <http://perma.cc/J79L-96BG>. The U.S. Supreme Court measure was generated using Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, *2014 Supreme Court Database, Version 2013 Release 01*, THE SUPREME COURT JUDICIAL DATABASE, <http://supremecourtdatabase.org> (last visited Oct. 28, 2014), *archived at* <http://perma.cc/QQ4U-YK3F>.

71. EDUCATIONAL STATISTICS, *supra* note 14.

72. MICHAEL ORNSTEIN, RACIALIZATION AND GENDER OF LAWYERS IN ONTARIO: A REPORT FOR THE LAW SOCIETY OF UPPER CANADA 18 tbl.13 (2010), *available at* [http://www.lsuc.on.ca/media/convapril10\\_ornstein.pdf](http://www.lsuc.on.ca/media/convapril10_ornstein.pdf), *archived at* <http://perma.cc/C8E9-3LBF>.

73. *See, e.g.*, CONWAY, *supra* note 67, at 127; RUTH ROACH PIERSON & MARJORIE GRIFFIN COHEN, CANADIAN WOMEN'S ISSUES VOLUME II: BOLD VISIONS 165 (1995);

one aspect, and an important one at that, of the pool of potential female Supreme Court of Canada clerks. Specifically, for years in which percentages were not provided in this data, we took the average of the previous and subsequent year that was reported. The measure, moreover, is lagged one year.

For the U.S. Supreme Court ideology variable, we used the Martin-Quinn scores, where higher values indicate increasing conservatism.<sup>74</sup> Again, since no equivalent measure existed for the Supreme Court of Canada, we relied on a measure developed by Professors Songer, Johnson, Ostberg, and Wetstein, who engaged in a content analysis of Canadian newspaper articles to discern a nominee's liberal or conservative nature.<sup>75</sup> Specifically, we use the measure they constructed for policy preferences in civil liberties issues, as this measure should more adequately capture judicial predispositions to support women in the workplace than the other ideological measure they constructed, which would be suitable for examining judicial decision making in criminal cases.

Finally, since the dependent variable (percentage of female clerks hired per year) is a proportion, ordinary least squares regression is not appropriate. Thus, we employ fractional logistic regression with robust standard errors clustered on the judge. The results of these analyses are displayed in Tables 1 and 2.

---

DAVID A.A. STAGER with HARRY W. ARTHURS, *LAWYERS IN CANADA* 149 tbl.6.5 (1990); Christopher Guly, *Apprenticeship to Academe: The History of Law Schools in Canada*, *LAW WKLY.*, Sept. 24, 2010, at 24, 24 (Can.).

74. For a description of the process for generating the Martin-Quinn scores, see Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 *POL. ANALYSIS* 134 (2002).

75. DONALD R. SONGER, SUSAN W. JOHNSON, C.L. OSTBERG & MATTHEW E. WETSTEIN, *LAW, IDEOLOGY, AND COLLEGIALLY: JUDICIAL BEHAVIOUR IN THE SUPREME COURT OF CANADA* 120–25 (2012). These scores range from -2, indicating a highly conservative justice to +2, which would indicate the upper range of judicial liberalism. *Id.* at 122.

**Table 1**  
**Fractional Logit Analysis of the Proportion of Female Clerks per**  
**Supreme Court of Canada Justice-Year, 1972–2007**  
**(standard errors clustered by justice in parentheses)**

Independent Variable	Coefficient	Discrete Changes	Percent Changes
Justice Ideology	0.120* (0.079)	0.050	12.110
Justice Birth Year	0.033** * (0.012)	0.139	37.803
Justice Gender	-0.456+ (0.187)	-0.107	-24.600
Legal Profession Gender Environment	0.011 (0.017)		
Mean Number of Women's Issue Cases	3.467* (2.319)	0.042	10.238
Constant	-65.344** (23.634)		

\*p<0.10, \*\*p<0.05, \*\*\* p<0.01 in a one-tailed test; + p<0.01 but not in the expected direction.

N=223

AIC = 1.116

**Table 2**  
**Fractional Logit Analysis of the Proportion of Female Clerks per**  
**U.S. Supreme Court Justice-Year, 1972–2011**  
**(standard errors clustered by Justice in parentheses)**

Independent Variable	Coefficient	Discrete Changes	Percent Changes
Justice Ideology	-.135* (0.062)	-0.101	-36.874
Justice Birth Year	-0.003 (0.013)		
Justice Gender	0.800*** (0.249)	0.165	75.311
Legal Profession Gender Environment	4.774*** (0.785)	0.261	484.088
Mean Number of Women's Issue Cases	1.022 (2.752)		
Constant	2.852 (25.744)		

\*p<0.05, \*\* p<0.01, \*\*\* p<0.001 in a one-tailed test

N=348

AIC = 0.822

The combined results in both models suggest that ideology plays a role in the degree to which Justices hire female clerks. In the U.S. Supreme Court model,<sup>76</sup> the coefficient for Justice ideology is negative and statistically significant. Since higher values of the variable indicate more conservatism, this suggests that conservatives are less likely to employ female law clerks. We also find some evidence of a similar relationship on the Supreme Court of Canada. The judicial ideology variable coefficient is positive (suggesting more liberal justices are more likely to hire female clerks) and borderline statistically significant, with an observed probability level of 0.06. This, of course, stands in contrast to the graphical results presented by Kaheny et al.,<sup>77</sup> however, we are utilizing a different and likely better measure of judicial ideology in the present model,<sup>78</sup> along with a multivariate model.

The relationship between the tendency to hire women clerks and Justice ideology is also more substantively significant in the United States. The probability of hiring women clerks for a typical Supreme Court of Canada justice with an ideology one standard deviation more liberal than the mean is only 12.11% greater than the probability for a similarly situated justice with an ideology one standard deviation below the mean. Conversely, the effect of ideology is three times stronger on the U.S. Supreme Court.

We also find evidence that Justice gender influences clerk hiring, though interestingly, the nature of relationship varies across the two Courts. While female U.S. Supreme Court Justices are more likely to hire a greater proportion of female clerks, female justices on the Supreme Court of Canada are *less* likely than their male counterparts to hire larger proportions of women. Of course, caution should be taken in assessing this particular result. Though the Supreme Court of Canada has had more female justices throughout this time period than the U.S. Supreme Court, they are still relatively few in number.<sup>79</sup> Moreover, like the effects of ideology, the substantive significance for judge gender effects is much weaker in the Supreme Court of Canada. Specifically, the percent change absolute values are, again, approximately one-third of the values in the U.S. Supreme Court model. In other words, the

---

76. See *infra* Table 2.

77. Kaheny et al., *supra* note 13.

78. See SONGER ET AL., *supra* note 75, at 122. With greater variance, these scores are superior to the rougher estimates of political ideology (i.e., party of the appointing prime minister), which were employed by Kaheny et al., *supra* note 13.

79. See Kaheny et al., *supra* note 68, at 87.

proportion of women clerks is roughly 75% higher for the average female Justice in the United States compared to a similarly situated male, while the proportion of female clerks hired by the average Canadian female justice is approximately 24.6% lower compared to the equivalent male justice sitting on the Supreme Court of Canada.

Among the other measures, while the legal profession gender environment variable is statistically (and highly substantively) significant in the U.S. Supreme Court model, it is not significant in the Supreme Court of Canada model. Conversely, Justice age cohort is significant in Canada but not the United States. Moreover, based on the percent change estimates, age cohort is the strongest explanatory factor in the former model. Finally, our lagged women's issue variable nearly reaches significance at the 0.05 level in the Supreme Court of Canada (but not U.S. Supreme Court) model despite the relatively small proportion of such issues in a given term throughout most years in the dataset.

### *B. Brazil as a Point of Comparison*

#### 1. Relevant Background

Moving from North to South America provides an interesting point of reference and underscores several possibilities for future research and investigation. We provide here a brief sketch of relevant features of Brazil's highest constitutional court. Brazil shares with the United States a strong federal system with trial and appellate courts at federal and state levels.<sup>80</sup> However, unlike Canada and the United States, Brazil's legal system is based on civil code rather than common law.<sup>81</sup> Courts of last resort are the objects of this paper, and Brazil has both the Supreme Federal Court for final adjudication of constitutional questions and the Superior Court of Justice for non-constitutional questions.<sup>82</sup> We focus here on the Supreme Federal Court, because it is

---

80. See GILMAR MENDES, SUPREMO TRIBUNAL FEDERAL, FRAMEWORK OF THE BRAZILIAN JUDICIARY AND JUDICIAL REVIEW, [http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfAgenda\\_pt\\_br/anexo/Framework\\_of\\_the\\_Brazilian\\_Judiciary\\_\\_Ingl\\_aterra\\_Final.10.20091.pdf](http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfAgenda_pt_br/anexo/Framework_of_the_Brazilian_Judiciary__Ingl_aterra_Final.10.20091.pdf), archived at <http://perma.cc/9S7A-CV5Q>.

81. See Maria Angela Jardim de Santa Cruz Oliveira, *Reforming the Brazilian Supreme Federal Court: A Comparative Approach*, 5 WASH. U. GLOBAL STUD. L. REV. 99, 101 (2006); *Where Our Legal System Comes From*, GOV'T CAN. DEPARTMENT JUST., <http://justice.gc.ca/eng/csj-sjc/just/03.html> (last visited Oct. 28, 2014), archived at <http://perma.cc/WD52-GBEV>.

82. See Maria Angela Jardim De Santa Cruz Oliveira, *supra* note 81, at 105.

most analogous to the U.S. Supreme Court and the Supreme Court of Canada in function.<sup>83</sup>

The power of the Supreme Federal Court is not only manifest in its final arbitration of constitutional questions, but also in that its Chief Justice is the third in line after the Vice-President to govern the country as Acting President.<sup>84</sup> Congress cannot amend the Constitution to suppress or change the judiciary.<sup>85</sup>

According to the Brazilian Constitution, the Supreme Federal Court has eleven justices,<sup>86</sup> all appointed by the president and approved by the Senate.<sup>87</sup> They must be native citizens,<sup>88</sup> between thirty-five and sixty-five years of age.<sup>89</sup> Supreme Federal Court Justices “are chosen from among citizens . . . of notable juridical learning and spotless reputation,” but lawyers are the rule rather than the exception.<sup>90</sup> The Chief Justice position rotates among justices every two years, from the oldest to the most recent.<sup>91</sup> Each justice has a staff that ranges from thirty-one to a maximum of forty-eight people.<sup>92</sup> The Chief Justice has a staff of sixty people, and some of these are employees hired by private companies that have a contract with the Supreme Federal Court to provide personnel that perform basic administrative functions like bodyguards, drivers, waiters, cleaning, document delivery, etc.<sup>93</sup>

The Supreme Federal Court needs the large staff. In the 2000s, they processed as many as 160,000 appeals in a single year.<sup>94</sup> While minimal enhancement to docket control and the creation of binding precedent (as a civil law system, they generally do not follow the norm of stare

---

83. See MENDES, *supra* note 80; *Canada's Court System*, GOV'T CAN. DEPARTMENT JUST., <http://justice.gc.ca/eng/csjs-ajc/ccs-ajc/page3.html> (last visited Oct. 29, 2014), *archived at* <http://perma.cc/DLE9-LAU2>.

84. Constituição Federal [C.F.] [CONSTITUTION] art. 80 (Braz.).

85. *See id.* art. 60.

86. *Id.* art. 101.

87. *Id.*

88. *Id.* art. 12.

89. *Id.* art. 101.

90. *Id.*

91. *See About the Court*, SUPREMO TRIBUNAL FEDERAL, [http://www2.stf.jus.br/portaISffInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte\\_en\\_us&idConteudo=123027](http://www2.stf.jus.br/portaISffInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=123027) (last visited Oct. 29, 2014) (Braz.), *archived at* <http://perma.cc/X42H-CVTL>.

92. Correspondence from Jorge Luiz de Santa Ritta, Brazilian Supreme Federal Court legal analyst.

93. *Id.*

94. *See* Maria Angela Jardim de Santa Cruz Oliveira, *supra* note 81, at 100.



decisis)<sup>95</sup> in a small subset of cases as a result of the Judicial Reform Act of 2004 appears to have significantly curtailed the size of the docket, in 2013 the court still processed almost 90,000 cases.<sup>96</sup>

## 2. Diversity of Supreme Federal Court Staff

The extent of staffing at the Supreme Federal Court allows for a more in-depth analysis of gender diversity in pools of clerks and support staff. The Supreme Federal Court does not have a single pool of clerks, so our data are based on examination of Supreme Federal Court personnel as of April 2014.<sup>97</sup> For purposes of assessing diversity, we focus on key staff positions beginning with The Chief of Staff (one position); Legal Advisors (up to five positions—three of them are not necessarily civil servants; two of them can be federal judges requested from one of the five federal circuits for a two-year term); Legal Analysts (up to ten positions); and Technical Support (varies, all with a college degree, no need for a law degree), with a Cabinet Officer (one position) who serves as the chief of technical support personnel.<sup>98</sup>

There are nine male justices and two female justices (Rosa Weber and Cármen Lúcia)<sup>99</sup> on the Supreme Federal Court, and we examine staff diversity accordingly, paying particular attention to whether justice gender influences clerk/staff selection as it does in the United States and Canada. We note that, across some types of key personnel, gender

---

95. *Id.* at 101.

96. See *Estatísticas do STF [Statistics of the Supreme Federal Court]*, SUPREMO TRIBUNAL FEDERAL, <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=decisoesgeral> (last visited Oct. 29, 2014) (Braz.), archived at <http://perma.cc/CKE3-6NTA>.

97. Data provided by Jorge Luiz de Santa Ritta using data from ANEXO IV—SERVIDORES CEDIDOS AO STF—POSIÇÃO EM 31/8/2014, available at [http://www.stf.jus.br/arquivo/cms/transparenciaCedidoSTF/anexo/Transparencia\\_Cedidos\\_ao\\_STF.pdf](http://www.stf.jus.br/arquivo/cms/transparenciaCedidoSTF/anexo/Transparencia_Cedidos_ao_STF.pdf), archived at <http://perma.cc/GC24-X8XT>.

98. See *infra* Table 3.

99. *Profile of the Justices of the Federal Supreme Court*, SUPREMO TRIBUNAL FEDERAL, [http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte\\_en\\_us&idConteudo=120056](http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=120056) (last visited Oct. 29, 2014) (Braz.), archived at <http://perma.cc/WK24-W9BF>. Justice Weber replaced Ellen Gracie, the first women justice and the first woman chief justice, in 2011. *Third Female Minister to Take Office at the Brazilian Supreme Court*, SUPREMO TRIBUNAL FEDERAL (Jan. 2, 2012), [http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfDestaque\\_en\\_us&idConteudo=197093](http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfDestaque_en_us&idConteudo=197093), archived at <http://perma.cc/QQ9S-H9LZ>; Débora Santos, *Aposentadoria de Ellen Gracie do Supremo é Oficializada*, POLÍTICA (Aug. 8, 2011, 6:57 AM), <http://g1.globo.com/politica/noticia/2011/08/aposentadoria-de-ellen-gracie-e-oficializada-pelo-governo.html> (last updated Aug. 8, 2011, 9:02 PM) (Braz.), archived at <http://perma.cc/R9XS-5A7T>.

diversity is fairly evident, with analysts and technical support staff, on average, being more likely to be women.<sup>100</sup> However, two types of key personnel are notably less likely, on average, to be women: advisors and the chiefs of staff. We also note that there are distinct differences according to justice gender. For example, female justices have not appointed any female judge advisors in 2014 and have about half (by percentage) as many female non-judge advisors. On the other hand, with the exception of advisors, the two female justices appoint a higher percentage of female staff than their male justice counterparts.

We qualify this section by pointing out a few limitations. First, we cannot perform longitudinal analyses as we can with the other two High Courts of interest. Thus, we cannot determine if Brazil exhibits similar patterns as the U.S. Supreme Court and Supreme Court of Canada regarding gender diversity among key staff. Second, we do not have at our disposal the types of variables that would allow us to determine, for example, whether justice ideology influences staff gender diversity. We leave these to future studies.

**Table 3**  
**2014 Gender Diversity in Brazil's Supreme Federal Court Staff:**  
**Percentage of Female Clerks**

<b>Justice Gender (#)</b>	<b>Judge Advisors</b>	<b>Non- judge Advisors</b>	<b>Analysts</b>	<b>Chief of Staff</b>	<b>Cabinet Officer</b>	<b>Tech Support</b>	<b>Total</b>
<b>Male (9)</b>	19%	37%	48%	38%	50%	51%	42%
<b>Female (2)</b>	0%	17%	78%	50%	50%	68%	52%
<b>Total (11)</b>	15%	34%	53%	40%	50%	54%	44%

100. See *infra* Table 3.

## V. CONCLUDING THOUGHTS

What can we conclude from our analyses? First, conservatives appear more reticent to hire female clerks on both North American Courts, though the results are much stronger for the U.S. Supreme Court.<sup>101</sup> Of course, we can only speculate on the reasons for this relationship. Perhaps female law clerks are more likely to be liberal in both countries<sup>102</sup> and, therefore, more likely to apply to liberal Justices. In recent years, a norm developed where potential clerks apply to all nine Justices<sup>103</sup>—thus, shedding some doubt on this explanation. Alternatively, given the gender gap in ideology, sex might be a cue to the Justices. Absent direct information, and given the gender gap, the Justices may rely on sex as a proxy for ideology. Similarly, the Justices could rely on lower court judges to send ideological cues—and perhaps the more conservative lower court judges are less likely to hire or recommend women than their liberal counterparts.

The second interesting conclusion: the factors that affect the proportion of women hired by the two North American Courts vary significantly. For example, the substantive effects are much stronger in the U.S. Supreme Court model.<sup>104</sup> We also find that women are more likely to hire women on Brazil's Supreme Federal Court, but women are less likely to hire women on the U.S. Supreme Court.<sup>105</sup> Perhaps, like Justice Brennan,<sup>106</sup> male Justices in the U.S., on average, are more comfortable hiring male clerks. Alternatively, perhaps female U.S. Supreme Court Justices, having perceived discrimination when the shoe was on the other foot (like when Justice Frankfurter refused to hire Ruth Bader Ginsburg as a law clerk),<sup>107</sup> are more likely to hire women.

In the future, the topic should be examined further. We focused on two countries and found interesting differences. Our cursory analysis of the Brazilian Supreme Federal Court suggests gender matters there as well—particularly when hiring in leadership positions like the chief of

---

101. See *supra* Part IV.A.

102. In general, women are more liberal in both countries. See, e.g., Ronald Inglehart & Pippa Norris, *The Development Theory of the Gender Gap: Women's and Men's Voting Behavior in Global Perspective*, 21 INT'L POL. SCI. REV. 441, 448–453 (2000).

103. Adam Liptak, *A Sign of the Court's Polarization: Choice of Clerks*, N.Y. TIMES, Sept. 7, 2010, at A1.

104. See *supra* Tables 1 & 2.

105. See *supra* Part IV.B.

106. See *supra* notes 53–58 and accompanying text.

107. See *supra* note 38 and accompanying text.

staff. By looking at more countries, we might be able to discern the effects of environmental and institutional variations more systematically.