

## **Gender Differences in the U.S. and Canadian Supreme Courts**

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## Introduction

Over the last couple of decades there has been a growing body of literature in the United States that has examined the impact female judges have had on the American judiciary. Since the number of female judges on appellate has been on the rise, it has become more feasible to examine possible gender differences on appellate courts and to develop generalizations from such research for the legal field and other political institutions. At the heart of these judicial studies lies the question: Do female judges approach the law differently than their male colleagues? Or, as the psychologist Carol Gilligan (1982) eloquently stated, do women "speak in a different voice" than men? The answer to this question is critical to examine because, if substantive differences do exist between the genders, they may have important ramifications for the development of law and policies in the future as women are elevated in greater numbers to appellate courts and other elite policy-making institutions.

Overall, this study examines the impact of female justices on two high courts through two distinct conceptual lenses: 1) at the macro-level by looking at how they impact their work group environment as measured through patterns of unanimity and, 2) at the micro-level in terms of how they influence judicial outcomes in all types of discrimination claims. Our study analyzes these questions in two high courts of advanced democracies sharing a common law heritage, namely Canada and the United States. What makes this study unique is that it utilizes two new methodological techniques, namely time series analysis and logistic regression, while simultaneously controlling for numerous factors, including specific case facts, to help examine whether gender differences occur across two different high courts in discrimination cases. We know of no study to date that has applied time series analysis to assess possible gender differences in judicial voting behavior, and only one study on the lower U.S. federal courts that

analyzed gender difference while controlling for case facts (Songer et. al. 1994). Our study builds on the prior work by Songer et. al. (1994) by analyzing the impact of gender differences in multiple types of discrimination cases among justices serving on two national high courts. We also make a new theoretical contribution to the feminist literature by advancing the notion that a strand of "mediated feminism" is currently emerging in elite institutions, such as courts, because there are numerous factors endemic to these institutions that operate to mitigate the appearance of strong feminist tendencies in the policy-making process.

We chose to study gender difference on the U.S. and Canadian Supreme Court for several reasons. First, justices on high courts, unlike those found on lower appellate court, are far more likely to vote according to their own personal values simply because they sit at the pinnacle of the judicial hierarchy. Since they are not seeking higher office, do not see themselves as primarily norm enforcers, and do not fear appellate review, they are far more likely to express gender differences in their voting behavior than judges who serve on lower appellate or State Supreme Courts (see Segal and Spaeth 1993, 2002). Second, we chose to study the impact of women on these two high courts because four female justices currently serve on the Canadian Supreme Court and Chief Justice Beverley McLachlin has occupied the helm of that court since 2000. As a result, we are able to take a quantitative snapshot of whether Chief Justice McLachlin's leadership style has produced changes at the macro-level that differ from her two male predecessors, as the feminist literature would suggest. Third, we chose to study these courts because it will allow us to examine possible similarities and differences between the gender influences found on the two elite institutions, and shed light on whether gender differences, as feminist scholars would have us believe, do indeed transcend cultural boundaries. Lastly, we chose to study feminist influences in the judicial area because we believe that some

researchers have set the bar too high in their expectation of finding wholesale feminist impact on policy-making in elite institutions.

### **Theory & Literature Review**

The groundbreaking work of Carol Gilligan (1982) provides a theoretical foundation for understanding why men and women might approach the field of law and politics from different perspectives. Gilligan's research led her to conclude that men view the world in a more linear, hierarchical, abstract and individualist manner. As such, they are much more likely to resolve moral conflicts according to abstract idealized rules that are incorporated in the language of rights and are ultimately applied in a zero-sum, all or nothing fashion (Gilligan 1982, Palmer 2001b, 92). According to Gilligan, women, in contrast, see the world in terms of a web of interconnected relationships that make up a larger interdependent community. As such, they are more likely to resolve moral conflicts in a more conciliatory fashion by utilizing the language of reconciliation and responsibility to the larger community (Gilligan 1982). Ultimately, Gilligan's research suggests that women will view the world through different lenses and will tend to speak with "a different voice" because they are biologically different and have different life and cultural experiences than their male counterparts. Needless to say, Gilligan's research has motivated political scientists to examine whether gender differences exist in the political arena, and, if so, to determine the degree to which such differences matter in the policy-making process. For example, public opinion scholarship suggests that women have consistently different attitudes than men on a wide range of policy issues, such as crime, the death penalty, rehabilitation, gun control, drug enforcement, obscenity, war and foreign policy issues (see Hurwitz and Smithey, 1998). Research on female policy-makers in Congress and state

legislatures have also shown that female legislators are more likely to support liberal and feminist positions than male colleagues on issues such as the Equal Rights Amendment, defense spending, abortion rights, social welfare issues and the death penalty (see Leader 1977; and Mandel and Dodson 1992). Moreover, female representatives tend to approach legislative problems and conduct hearings differently than their male colleagues (see Duerst-Lahti 2002; Duerst-Lahti and Kelly 1995; Kathlene 1994). Many of the studies from the legislative literature reinforce the feminist theory that females in elite leadership roles do approach their positions and policy-making responsibilities from a different vantage point than their male colleagues.

Gilligan's research, along with others, has generated a host of legal studies aimed at assessing the degree to which gender differences have emerged in the legal realm. The bulk of the research to date has primarily focused on lower federal and state courts, which is understandable given that more women have been elevated to these courts. Still, the literature in this area has yielded mixed results at best. An early study by Kritzer and Uhlman (1977) found no significant differences among male and female judges in their sentencing patterns in criminal cases (see also Gruhl, Spohn, and Welch, 1981, for similar findings in the federal court of appeal). A sweeping study by Walker and Barrow (1985) found female district judges were less supportive of minority policy claims, more supportive of governmental economic regulations, and voted no differently from men on women's rights issues, an area where the feminist literature would expect a clear differentiation between the sexes. Two other studies, by Davis (1986) and Gotschall (1983), on the U.S. Courts of Appeal revealed only slight differences in the judicial behavior of men and women on the bench (see also Songer et al. 1994, 427; Davis, 1993). Collectively, these studies seem to suggest that no cogent or cohesive generalizations can be made about the impact of women on lower appellate courts.

Even though empirical scholarship has failed to show that women approach the law in a fundamentally different way than their male counterparts across a wide spectrum of legal issues, either in terms of voting behavior or the process of decision-making, numerous studies have indicated that gender differences do emerge in particular types of legal disputes. For example, studies have shown that female justices on various courts vote more liberally than male justices on issues that are significant for women (Allen and Wall 1987; Martin and Pyle 2000; Gryske et al., 1986; Songer and Crews-Meyer 2000; Peresie 2005), and in employment discrimination cases (Songer et al. 1994; Davis et al. 1993). Martin (1993a, 128), in a *Judicature* symposium, provided the best overall assessment of the research to date when she concluded that although recent empirical scholarship fails to support Gilligan's contention that female judges "speak with a different voice," there is clear evidence that "women judges are making a distinctive contribution to our legal system...most evident(ly) in areas involving issues of gender fairness."

The few studies that have examined gender differences on the U.S. Supreme Court have yielded mixed findings as well, although two justices appointed to the U.S. and Canadian top courts have found Gilligan's argument intuitively appealing (see Martin 1993a; Wilson 1990). In one early study on Justice O'Connor, Sherry (1986) claimed Justice O'Connor's early jurisprudence reflected a contextualized feminine perspective (1986, 592-616; see also Behuniak-Long 1992; Sullivan and Goldzwig 1996). Yet, later scholarship on judicial voting patterns show little evidence that Justice O'Connor's voted differently than men because of her gender (see Davis 1993b; Aliotta 1995; Maveety 1996; Van Sickel 1998). Recent scholarship by Songer and Clark (2002), indicates that the voting behavior of both Justice O'Connor and Ginsburg is better explained by their party affiliation than gender. However, O'Connor and Segal (1990) found that Justice O'Connor did vote more liberally than her male colleagues in sex

discrimination cases, and her mere presence on the court encouraged the court as a whole to be more supportive of such claims.

There has been much less scholarship examining gender differences on the Canadian Supreme Court to date, which is surprising since four female justices currently sit on the high court, and one of them, Justice McLachlin, has served as chief justice since 2000. A recent comparative study by Songer et. al. (2003) revealed little differences in the male and female voting records among Canadian Supreme Court justices in either civil liberties or criminal cases. Indeed, their study went on to conclude that that there were no strong overall gender differences among appellate court judges, at the Supreme Court or lower appellate court level, in three common law nations they analyzed, Canada, U.S. and Australia (Songer 2003, 17). Yet, scholarship by White (1998, 87-88) suggests that the first three women on the Canadian Supreme Court were far more likely to support fundamental freedoms and equality rights claims than their male counterparts.

Given the limited research done on gender differences in the Canadian Supreme Court and the plethora of women currently serving on that bench, scholars have a unique opportunity to assess gender differences in a pivotal policy-making institution of an advanced industrial democracy. Moreover, it allows scholars to compare those findings with gender differences found in the U.S. Supreme Court over approximately the same time period. Since U.S. studies show relatively consistent gender differences in discrimination cases addressing women's issues, it seems obvious to begin our comparative analysis in that area of law. The one unique feature of this study is that it focuses on all types of discrimination claims, instead of just those addressing women's issues. At the heart of our inquiry, we ask whether female justices vote differently than their male counterparts in all types of discrimination claims. Second, we are interested to see if

these differences are cross-cultural in nature. If so, we are interested in what this possible differences might suggest for theories of judicial behavior in the United States and in other elite institutions.

Looking at the research holistically, one might question why studies on gender differences, both in the U.S. and Canada, have yielded such mixed results. The differences found in the literature can be explained by a number of factors. First, since researchers have utilized different methodological approaches and have analyzed gender differences in a variety of legal issue areas on a host of different courts that adhere to different institutional and structural norms, it is not surprising that their findings have yielded mixed results. Moreover, it is our contention that many researchers have set exceedingly high expectations in their quest to assess whether there has been a feminist impact in the judicial field. It is our belief that much of the feminist theory is correct in suggesting women will vote and write about some areas of law in a different manner, or voice, than their male colleagues. However, it is critical to realize that the feminist impact will not necessarily occur in a holistic manner. Rather, we argue that the impact of feminist theory in the judicial field will be piecemeal and fragmented at best because there are a multitude of forces that work to mitigate or dampen the impact of gender differences in the legal arena. Thus, "strong feminism" is often mediated by the context, rules, and political settings that female justices encounter in different courts. Consider for example, the impact of a female justice joining a particularly masculine bench with traditional modes of individualized opinion expression and voting behavior. In this setting, a female justice might have her distinctive feminist voice mediated by that institutionally masculinized setting (see Aliotta 2003). Other female justices might see their feminine perspective or views overshadowed by the ideological polarization evident within a court, so much so that ideological voting patterns may supersede or

trump any gender cleavages that might exist on that court. In still other instances, a female judge with "masculine" tendencies may join a court and have no problem handing down dissenting opinions on her own and advancing an aggressive style of opinion writing in an already masculine environment. In other courts, where distinctive norms of collegiality exist, the feminist voice may be more readily accepted and adopted into the mainstream of majority opinions. Overall, the theoretical argument that is being advanced here is that "strong feminism" is too frequently expected by researchers, when instead it should be acknowledged that the institutional idiosyncrasies of courts and the distinctive political dynamics of how they operate often work to mediate the impact of gender differences from emerging and a "strong feminist voice" from taking shape on different courts. Thus, we posit that researchers should expect less from their empirical results in the way of "strong feminism," and begin to appreciate the more fragmented, piecemeal, or "mediated feminism" that is emerging in the legal field and in other elite policy-making institutions as more women are elevated to key political posts. In the pages that follow, we explore the extent to which strong or mediated feminist influences have appeared in the modern U.S. and Canadian Supreme Courts.

### **Data and Methods**

The empirical portion of this study proceeds in two distinct phases, the first analyzing the U.S. and Canadian Supreme Courts at an institutional level and the second focusing on the voting patterns of individual justices at the case level. The institutional analysis is designed to test hypotheses about the impact of female justices on aggregate patterns of decision-making in each court. We first examine whether the arrival of female justices alters the rate of consensus within each court. The expectation from a "strong feminist" perspective is that rates of

consensus should increase with women on the court because they have a greater tendency to encourage collaboration and collegiality, and are less inclined to exhibit individualistic behavior than their male colleagues. This study measures consensus by analyzing the percentage of unanimous rulings in cases argued in each term or year. In the U.S., unanimity is measured from the 1973 to 2005 terms, using data for orally argued cases from the updated Spaeth (2007) database of decisions. This time frame was chosen in order to match a comparable data set compiled by the authors on Canadian decisions spanning the Laskin, Dickson, Lamer, and McLachlin Courts (1973-2005).<sup>1</sup> The time frame of analysis was also chosen because it allows one to assess the degree of unanimity both before and after the appointment of the first female justices to the U.S. and Canadian Supreme Courts (Justice Sandra Day O'Connor in 1981 and Justice Bertha Wilson in 1982). This institutional-level analysis relies on time series techniques to test whether the rate of unanimity is altered in any substantive way when female justices are elevated to the Supreme Courts, and whether that rate increases as more females are appointed to the top bench.

The second level of analysis examines the voting patterns of male and female justices in a specific set of cases where differences are most likely to appear between the sexes, namely discrimination disputes. For each court, we analyze patterns of liberal or conservative voting in a wide array of cases, including allegations of unequal treatment on the basis of age, race, religion, sex, sexual orientation, citizenship, disability, indigence, or marital status. Each justice's vote serves as the dependent variable in the equation. We use logistic regression techniques to explore the "strong feminist" hypothesis that female justices vote more liberally than their male counterparts, while simultaneously controlling for a variety of other factors that might influence judicial voting behavior. Both models include control variables that tap the

ideology of the justices (as measured in newspaper reports at the time of their appointment), and the fact patterns, legal claims and litigants appearing in each case (explained in more detail below). This research mimics earlier work on the Canadian Court by Ostberg and Wetstein (2007), but expands the discussion by comparing it to discrimination claims argued in the U.S. Supreme Court, which has yet to be analyzed using a comprehensive attitudinal model.

At the institutional level, rates of unanimity are analyzed using time series models that control for other factors that might explain higher or lower rates of agreement on the two courts. For example, since ideological differences among the justices might drive conflict on the bench, we introduce a control variable that measures the percent of partisan agreement on the courts in each year or term. Obviously, when more justices on a court are from the same political party, there is a greater likelihood that unanimity will prevail. As a result, our equations control for the percentage of justices who were appointed by presidents or prime ministers of the same political party, and we expected a positive coefficient for this indicator. A second control variable measures the workload of the courts by tabulating by the number of cases argued in a given term or year. The presumption here is that in years where caseloads are higher, justices will feel more pressure to resolve cases in a more efficient manner. As such, it is expected that justices will pen fewer concurring and dissenting opinions and greater unanimity will emerge on the court in these years. A third control variable accounts for the average panel size in each year or term. This variable was included in the analysis because, in the Canadian context, the court typically hears cases in panels of five, seven, or nine justices. In the U.S. context, controlling for panel size is important because it can account for court transition periods where the Supreme Court might be shorthanded. In years where the average panel size is lower, it is logical to expect higher rates of unanimity, simply because it is easier to get consensus in a group of seven than a group of nine.

We report the data results using ordinary least squares (OLS) regression, but readers should be aware that we initially used time series models that applied ARIMA techniques to test for autocorrelation in the data (see McDowell et al. 1980; Ostrom 1978). We chose to report OLS regression results because they are more readily understood by a wider set of readers, and the ARIMA models demonstrated that there was no significant autocorrelation among the error terms in our data sets.<sup>2</sup>

The key independent variable at the case level of analysis was the sex of a justice (female = 1, male = 0). In light of our coding scheme and feminist theory, we expected that liberal votes would be cast more frequently by female justices, all other things being equal. The statistical controls built into both models included a measure of judicial ideology drawn from the work of Segal and Cover (1989) on the U.S. Supreme Court, and replicated successfully in Canada (Ostberg and Wetstein 2007, chapter 3). These measures represent a more nuanced measure of ideology than party identification because they are drawn from journalistic commentary and editorials across a variety of newspapers at the time of a justice's nomination to the court. Although both measures of Supreme Court justices rank the nominees along a liberal conservative spectrum, the Segal-Cover scores range from a high of +1 for the most liberal justices to -1 for conservative justices while the scores for the Canadian justices range across a +2 to -2 spectrum of possible rankings. It was expected that justices with higher scores on these measures would cast a greater percentage of votes in favor of rights claimants in discrimination cases, resulting in a positive coefficient.

Several case-specific indicators were included in the statistical models to control for certain factual scenarios and case characteristics that were prominent in equality cases decided by the two courts. For example, both equations included a variable measuring whether the

appellant lost a job or was forced to retire (1 if true, 0 if not). This variable tests whether justices would be more sympathetic to the extreme economic harm suffered by litigants who lost a job. Another type of injury the courts addressed in discrimination cases pertains to the alleged denial of various benefits (see Ostberg and Wetstein 2007, 129). These were classified into a three-tiered hierarchy, with cases alleging the denial of government benefits at the top (scored as 2), followed by the denial of private benefits, such as insurance (scored as 1), and cases featuring no benefits at all (0). Given this classification scheme, it was expected that justices would be most supportive of claimants seeking equal access to governmental benefits; followed by benefit complaints against private entities; and that the justices would provide the least support where no denial of benefits occurred. The logic behind this categorization is that justices would be more tolerant in situations where benefits were denied in the private marketplace than in the governmental sphere because governmental discrimination is anathema to the fundamental values found in a democratic society. We also expected the justices would be more inclined to protect individuals from harms caused by private entities than when no direct economic harm appeared in the case.

The statistical models also control for the type of discrimination alleged in each case, and our coding scheme for each court followed constitutional doctrine set out in case law in both countries. In the U.S. model, we tested whether justices vote according to the three-tiered judicial hierarchy of strict scrutiny, intermediate scrutiny and reasonableness in different types of equal protection cases (Ducat 2004, 1251). Our expectation was that this doctrine would yield distinctive voting patterns and result in regression coefficients of differing magnitude in line with the hierarchy. Many readers familiar with U.S. case law understand that race and religion enjoy a preferred status in the hierarchy, and governments must advance a compelling interest in order

to infringe on these rights (Ducat 2004, 1251). As such, claims of racial and religious discrimination should enjoy a heightened profile and produce a larger number of liberal votes than other forms of discrimination, such as indigence, sex, age, and disabilities. Our U.S. model excluded age discrimination from the analysis for comparison purposes because it is found in the lowest rung of the hierarchy. If justices truly adhered to this legal doctrine, we expected the strongest positive coefficients for cases alleging racial or religious discrimination (found in the top tier), a smaller positive coefficient for sex discrimination (found in the intermediate scrutiny category), and no real differences for the remaining types of equality claims in the model (allegations based on disability or indigence).

In Canada, our analysis of different forms of discrimination claims followed the language of Section 15 of the *Charter of Rights and Freedoms*, recognizing that some forms of discrimination are explicitly outlawed in the text of the document, while others are not. Five key equality guarantees enjoy textual support in the *Charter*: age, sex, religion, disability, and non-citizenship. In addition to these classes, sexual orientation has been "read into" the *Charter* by the Canadian Supreme Court, elevating gay rights to a quasi-constitutional profile of protected status (see *Egan v. Canada* [1995] 2 S.C.R. 513). Each of these forms can be distinguished from the category of marital status discrimination, which does not enjoy a constitutional profile but has been a frequently litigated source of contention in Canada. Given this lower profile, we expected the Canadian justices to vote less frequently for litigants when they raised marital status claims. As such, we expected positive coefficients for the other discrimination variables in the Canadian model, and omitted marital status cases from the equation as a comparison group for analysis.

The models included controls for the number of constitutional or Charter issues raised by the litigants (2 = two or more substantive issues, 1, or 0 constitutional claims). After a detailed reading of the cases, we anticipated that when claimants brought multiple constitutional issues into their argument, they would be using a scattershot approach to the law by trying to extend Charter and Constitutional principles beyond reasonable and customary bounds (see Ostberg and Wetstein 2007, 135). As such, we expected the justices to be less likely to side with rights-based arguments when multiple constitutional issues were raised, resulting in a negative coefficient for this variable. In the U.S. model, we also controlled for the direction of the lower court ruling (1 = liberal, 0 = conservative) anticipating that the justices have discretionary control of their docket and are more likely to take cases for oral argument in order to vote against the ideological leaning of the lower court. In the Canadian model, we relied on a measure that tapped the ideological direction of a Human Right Commission (HRC) ruling, and expected the justices to vote in the opposite direction of these commissions, because the justices feel capable to reach conclusions about equality law without deferring to the rulings of these specialized tribunals (Ostberg and Wetstein 2007, 135).

Our models test for the possible ideological impact that specific parties and interveners might have on the justices in the area of equality law. In both courts, we control for the impact of government attorneys who are fighting the charges of discrimination (1 = government, 0 = for all other cases). We expected that government attorneys would be more successful in fighting discrimination complaints because of their "repeat player" status before the Supreme Court of each country (see Galanter 1974, 2003; Kritzer 2003; Flemming and Kurtz 2002a, 2002b, Femming 2004). In other words, the litigation experience of government attorneys may generate more frequent victories for their side, and thus, more conservative votes than in other cases. If

this hypothesis held true, we expected negative coefficients in each model. We also introduced controls into each model for key interveners who file large numbers of amicus curiae briefs in equality cases. In Canada, we controlled for the participation of a prominent feminist civil rights group, the Women's Legal Education and Action Fund (LEAF), one of the most successful interest group litigants in that country (see Manfredi 2004; Brodie 2002). We expected that LEAF's participation in a case would foster a higher percentage of liberal votes, all other things being equal. In the U.S., our model controlled for the presence of the NAACP, a similarly prominent interest group litigator with a long record of success in the federal courts. We also controlled for the impact of the Equal Employment Opportunity Commission (EEOC), because many of the cases featured EEOC support of a litigant, either through a "letter to sue" or other form of support (perhaps as an amicus brief filer). In such instances, we coded the case with a +1, whereas EEOC opposition was coded with a -1, while cases lacking any EEOC participation received a zero score. Our expectation was that EEOC support would spur justices to be more supportive of the rights litigant, thus generating a positive coefficient in the equation.

A final control variable included in the Canadian model assessed whether the contemporary McLachlin Court voted more liberally in equality cases than the courts led by her two male predecessors (Chief Justices Dickson and Lamer). Feminist theory would suggest that since females are more sympathetic to equality claims, once a woman is elevated to the helm of the court, it might be more prone to hand down liberal rulings in such cases. This argument is enhanced in the Canadian context because Chief Justice McLachlin can not only structure conference deliberations and influence the direction of voting by other justices, but also can wield the power of panel assignment to help foster a more liberal outcome. Thus, we anticipated a positive coefficient for the variable tapping her leadership tenure on the Canadian Court.

## Results

### *Female Justices and Aggregate Patterns of Institutional Change*

At the aggregate level, the two time series regression equations produced model results that do an impressive job of explaining the varying degrees of unanimity in the two Supreme Courts (see Table 1). Both equations produced comparable F Test scores and were statistically significant at the .001 levels. The adjusted R Square values indicate that the U.S. context and 50.8 in the Canadian setting, which means that the U.S. model was able to account for 41 percent of the variance in the dependent variable, while the Canadian model accounted for 51 percent of the variance. The Durbin-Watson statistics indicate there is no serial autocorrelation in the error terms of the two equations, although a lagged variable was introduced into the Canadian model to correct for first order autocorrelation (see Ostrom 1978).

Turning to the individual variables in the equations, the data reveal that the introduction of women to the U.S. Supreme Court did significantly increase the number of unanimous rulings handed down by the Court (see the left side of Table 1). Indeed, when the percentage of females on the U.S. Supreme Court increased by 11 percent (comparable to an increase of one justice), the rate of unanimous rulings increased by 4.6 percent, and the impact is significant at the 99 percent confidence level ( $b = .417 \times 11 = 4.6$ ). This finding lends credence to the "strong feminist" argument that when women join a court there is a greater likelihood that they are able to foster greater cooperation and cohesion on the bench. Having said this, the addition of women to the Canadian high court did not have a statistically significant impact on the degree of unanimity reached on that court, although the coefficient is in the expected direction ( $b = .049$ , see the right side of Table 1). Here we have evidence of a "mediated feminist" impact. Perhaps

one explanation for the disparity in the two equations is that since the Canadian Court, as an institution, has a much higher propensity to hand down unanimous rulings than the U.S. Court to begin with, the introduction of women to the high court does not dramatically increase the level of unanimity on an already highly cohesive court (an average of 76 and 38 percent respectively over the last three decades).<sup>3</sup> A second explanation for why women do not have a significant impact on rates of unanimity on the Canadian Court might be explained when one studies the voting behavior of the first three female justices in greater detail. Indeed, their voting behavior in discrimination cases, as well as other civil rights and liberties cases reveals that these justices had no trouble articulating their own views and writing concurring and dissenting opinions. Indeed, two studies of court authorship patterns revealed Justices L'Heureux-Dube and McLachlin were the two greatest dissenters on the Lamer Court (see Ostberg et al. 2004; McCormick 1994). These findings help refute the contention by some feminist scholars that the first women elevated to courts may be likely to conform to the dominant masculine voting patterns of a traditionally masculine institution. This is certainly not the case on the Canadian high court, where pioneering female justices were willing to speak their own mind on "so-called" women's issues. Indeed, we find it surprising that the coefficient for women justices on the Canadian Court is in the positive direction given the propensity of the initial female appointees to dissent. Overall, our data on rates of unanimity at the macro-level reflect a surprising "strong feminist" impact on the U.S. Supreme Court, but a "mediated feminist" impact on the Canadian Supreme Court.

**INSERT TABLE 1 HERE**

The estimates for average panel size indicate that this factor significantly influences rates of unanimity on both courts. As expected, in years when an average of one more justice hears cases the rate of unanimity on the Canadian Court drop by six percent, while in the U.S. setting it goes down by 15 percent (see Tables 1). These findings support the contention that the more justices who hear a case the greater the likelihood that conflict will emerge on each court. As a result, these results highlight an important institutional power that is unique to the Canadian chief justice, namely the power to create smaller panel sizes and in reduce conflict among the justices. This is a power that the U.S. chief cannot wield. Although Canadian scholars and justices are quick to point out that concerted efforts are made to evenly distribute the workload (see Greene et al. 1998, 119), the times series analysis clearly shows that panel size does influence the overall degree of consensus obtained on a yearly basis.

The two other variables that proved to be statistically significant in Table 1 are the percent of Charter cases heard and workload of the Canadian Court in a given year, although the latter was in the unexpected direction. Not surprisingly, the more Charter cases that are heard by the Court per year, the greater the likelihood that disagreement will emerge on the bench ( $b = -.30$ , significant at the 95 percent confidence level). Since Charter cases are more likely to deal with controversial disputes relating to civil rights and liberties issues, we are not surprised that they are likely to generate more disagreement on the bench. However, we did not anticipate that in years where the Canadian Court hands down more rulings there would be less likelihood that agreement would emerge ( $b = -.22$ , significant at the 99 percent confidence level). This finding suggests that workload patterns do not encourage Canadian justices to join majority opinions at a greater rate. As mentioned earlier, since high rates of unanimity already exist on the Canadian Court, there is not a substantial burden imposed on justices when they decide to author a dissent.

Even though the workload in the U.S. context does not have a statistical impact on rates of unanimity reached per year on the court, the estimate is in the expected direction ( $b = .028$ ).

The variable tabulating the percent of justices from the same party did not achieve statistical significance in either model, and it was in the incorrect direction in the Canadian context. The findings suggest that when the percentage of justices from the same party increases by 11 percent (the addition of one justice), unanimity in Canada actually declines by roughly two percentage points ( $b = -.17 \times 11 = 1.87$ , see Table 1). Yet, a similar increase in justices from the same party in the U.S. context increases consensus by two percent ( $b = .20 \times 11 = 2.2$ , see Table 1). The disparity in the signs of the two coefficients might be attributed to the fact that the appointment process is far more ideologically motivated in the U.S. than it is in Canada, and thus when more justices come from the same party, ideological agreement and proclivities matter that much more. Since the U.S. justices are more likely to be found at the ideological extremes than those appointed in Canada, the addition of one more member of the U.S. Court who is of the same political party will be more likely to increase rates of unanimity on that bench.

The most important finding to take away from the times series analysis is that while the introduction of female justices to the U.S. Court has increased the rates of unanimity on an aggregate level, surprisingly, it has not done so in the Canadian setting. First, most readers will be surprised that the appointment of seven female justices in Canada has not produced a significant positive impact on overall rates of unanimity. As mentioned earlier, the major reason for this diminished finding is the distinctive dissenting voice that several early female justices displayed, most particularly, Justice L'Heureux-Dube. Second, most readers would be surprised that the addition of Justices O'Connor and Ginsburg to the U.S. Court has fostered more collegiality and cooperation on the high court in a way that sets them apart from their male

predecessors. This finding is significant because it illustrates the "strong feminist" contention that the introduction of more women to the Supreme Court could have a profound impact on the voting behavior of the court, at least on an aggregate level. The question remains whether these feminist tendencies will hold true at the individual case level.

### ***Female Justices and Evidence of Different Voting Behavior***

The two regression equations laid out in Table 2 assess voting behavior at the individual level and both models produced statistically significant, robust results. The findings on the left side of Table 2 provide logistic regression maximum-likelihood estimates for a sample of 692 discrimination votes cast by the U.S. Supreme Court between 1981-2005, along with model-fit statistics found at the bottom of the table. The results indicate that our fourteen variable model produced a Chi Square statistic of 781.63 and a Nagelkerke R Square of .30. Since the modal frequency for the dependent variable is 52.5 percent and the model explained fully 69 percent of the votes correctly, there is a 34 percent improvement over the modal guessing strategy. On the right side of the table, the fifteen variable model in the Canadian Court produced an even more robust model-fit statistic featuring a total of 611 discrimination votes cast by the justices between 1984-2005. The Canadian model correctly predicts 71 percent of the judge votes, and was able to improve upon the modal guessing strategy by 38 percent. This equation featured a Chi Square of 694.084 and a Nagelkerke R Square of .292.

Turning to the judge level variables in Tables 2, the findings reveal intriguing, and in some sense counterintuitive findings. Not surprising to most American scholars, the most important variable in the model of U.S. discrimination cases is ideology, which is statistically significant at the highest level and is in the correct direction ( $b = 1.49$ , significant at the 99.9

percent confidence level). The findings in the second column of data suggest that liberal justices are 60 percent more likely to rule in favor of discrimination claimants than their conservative counterparts. Ironically, the key variable that drives voting behavior in the U.S. context does not appear to matter much in Canadian discrimination cases (see the right side of Table 2). Although the estimate is in the expected direction and indicates that liberal justices are fifteen percent more likely than conservatives to rule in favor of equality claims, the findings are not statistically significant ( $b = .15$ ). As mentioned earlier, one explanation for this discrepancy between the two coefficients is that the appointment process in Canada is not as ideologically driven as it is in the United States. Although the Prime Minister, like the President, has the power of appointment, the lack of meaningful parliamentary oversight has ensured that the appointment process lacks the bitter partisan wrangling that occurs in the U.S. Senate.<sup>4</sup> Consequently, modern Canadian Prime Ministers have considered a myriad of factors when making appointments to the bench aside from ideological proclivities of the nominee. As journalists have pointed out, Prime Ministers have considered a variety of traits in their selection of appointments to the court, such as bilingualism, regional balance, legal expertise, gender, and judicial experience (for examples, see LeBlanc and Clark 2003; Tibbetts 1999). Needless to say, the fact that ideology fails to be statistically significant in the Canadian model will surprise most U.S. scholars because it remains the most important factor in explaining judicial voting in virtually every area of law in the U.S. court, especially in civil rights and liberties disputes.

### **INSERT TABLE 2 HERE**

The critical variable in this paper, namely the voting behavior of women on the high court, also yields counterintuitive results. Indeed, the impact of women on the two courts is the

exact opposite of that found at the aggregate level. Contrary to expectations, Table 2 indicates that when Justice O'Connor and Ginsburg participate in discrimination cases in the U.S. Court they are 22 percent less likely to rule in favor of the equality claimant than their male counterparts, all other things being equal ( $b = -.89$ ). Although one must be cautious about reaching any definitive conclusions regarding the feminist hypothesis based on the voting behavior of only two justices, it would appear that the first two females appointed to the U.S. high court do not vote more liberally in equality cases than their male colleagues, at least when controlling for their ideology and fact patterns in the cases. This finding is important because it is at odds with the majority of scholarship on lower appellate courts, and casts doubt on the ability to assert that a strong feminist hypothesis prevails in discrimination cases at the Supreme Court level. Only time will tell the veracity of this claim as more females are appointed to the U.S. Supreme Court.

In contrast to the surprising finding in the U.S. context, female justices on the Canadian Supreme Court are 24 percent more likely to hand down a liberal ruling in discrimination cases than their male colleagues ( $b = 1.02$ , statistically significant at the 99.9 percent confidence level). The fact that the findings for the female variable are at odds in the two models is intriguing. One possible explanation for the disparity in the results may be attributed to the relative impact that ideology plays on the two Courts, as mentioned above. Since the Canadian justices are not ideologically driven when resolving discrimination claims, other variables, such as gender, have come to play a more pivotal role in structuring conflict in this area of law. In contrast, since ideology is so dominant in the U.S. context, its power may mediate the effect of gender difference and other variables in such disputes.

The Canadian Court treated four of the six types of discrimination that are protected in the language of the *Charter* in the expected manner, with each featuring a statistically significant positive coefficient (see Table 2). As anticipated, the Court treated equality arguments based on gay rights, religion, citizenship and disability more favorably than discrimination based on marital status, which is left out of Section 15 of the *Charter*. Moving from high to low, the coefficients for each of these variables is  $b = 1.47$  (gay rights),  $b = .77$  (for discrimination based on religion and citizenship), and  $b = .56$  (disability rights), and the changes in probability for these variables suggest that Canadian justices are 31 percent more likely to rule in favor of gay rights litigants, at the high end, and 14 percent more likely to side with disability assertions, at the low end, in comparison to marital claims. However, we were surprised to find that the Canadian justices treated sex and age discrimination no differently than marital status arguments, since these two forms of equality are protected under the *Charter*. In fact, both coefficients are in the unexpected direction, although the results do not allow us to reject the null hypothesis. It is only after looking more closely at the sex discrimination cases that one realizes that in almost a third of them, the justices are divided along gender lines, with the males voting conservatively and the females voting liberally.<sup>5</sup> These results, in conjunction with the unanimous cases handed down in the conservative direction, help explain why the coefficient for the sex discrimination cases is negative while the indicator for the female justice variable is positive. The negative result for the age discrimination variable makes sense given that the Canadian justices themselves face forced retirement from the top court at the age of 75. As such, it is not surprising that they would be more reticent to side with equality arguments that are based on retirement mandates. Overall, it seems that members of the Canadian high court are indeed protecting a bulk of the different types of equality rights enshrined in the *Charter* at a level that

is significantly higher than that found for marital status rights protected in federal and provincial laws.

Unlike its northern counterpart, members of the U.S. Court do not treat four of the five types of discrimination in accordance with the three-tiered hierarchical structure developed in constitutional case law. Contrary to expectations from the legal model, the justices are the least supportive of racial discrimination in relation to age cases (the omitted category), followed by disability, religious, sex, and indigent discrimination in that order ( $b = -2.07, -1.47, -1.20, -.67,$  and  $-.36$  respectively, see Table 2). These findings are almost the exact opposite of what one would expect given the three-tiered legal framework established by the Court. Ultimately, one would expect the highest level of scrutiny to be given to race and religion claims, followed by immediate scrutiny for sexual inequality, and the reasonableness standard to be applied to discrimination based on disability, age and indigency. The data reveal that only the coefficient for indigent status lines up with the hypothesis set out in the legal model. The other coefficients suggest that members of the U.S. Supreme Court, at least in the discrimination area, do not adhere to legal principles in the manner that they suggest in their written opinions. Rather, they vote following the lines of their own attitudinal predilections, which helps explain why the ideology variable is so overwhelmingly powerful in the U.S. equation. Our findings on this score reinforce the extensive scholarship by Segal and Spaeth (1993, 2002) illustrating that on the case level anyway, attitudinal behavior is writ large in the U.S. context.

The two measures tapping lower court influences, namely lower court liberalism (in the U.S.) and human rights commissions (in Canada), have coefficients in the expected direction and are statistically significant for both courts (see Table 2). As expected, both courts tended to hear cases from the lower court that they were apt to overturn. The findings indicate that while the

U.S. Court is 15 percent more likely to rule against rights claimants who won in the lower appellate court, the Canadian justices are 20 percent more likely to vote in the opposite direction of the Human Rights Commission. In short, both courts use their discretionary powers of docket control to take cases that they are most likely to overturn.

The two variables measuring Charter and constitutional issues are both in the expected direction, although only the Canadian *Charter* variable is statistically significant at the 99.9 percent confidence level (-.93, see Table 2). This variable suggests that when two or more *Charter* issues are raised in a case, the justices are 43 percent less likely to rule in favor of the rights claimant, when compared against cases with no Charter issues. Although this finding may seem counterintuitive to some readers, one must remember that an extensive reading of cases that raise multiple *Charter* claims led us to hypothesize the justices would perceive litigants as "pushing the *Charter* envelope" beyond the justices' comfort zone. As such, we are not surprised that the justices tended to reject the litigants' arguments at a higher rate in these cases (Ostberg and Wetstein 2007, 135).

In both courts, the job loss variable has a negligible impact on the justices' voting behavior, although the coefficient in the Canadian model is in the expected direction ( $b = .12$ ). On the other hand, the presence of benefits disputes in both courts has an unexpected negative impact, and in both models, the coefficient is statistically significant at the 99 percent confidence level (see Table 2). Thus, while Canadian justices are 17 percent less likely to rule in favor of rights claimants when government benefits are at issue, the U.S. justices are 24 percent less likely to do so. These figures are in contrast to cases where benefits are not in play, and the results indicate that the justices are least likely to rule in favor of rights claimants when government benefits are at issue. Although these findings are not in tune with equality principles

presumed by democratic theory, they make sense in light of Galanter's (1974) contention that repeat government players acquire a privileged status in the legal system because they develop critical expertise and enjoy resource advantages in the legal system (see also Kritzer 2003). This theme is reinforced by the negative coefficients for the government litigant variable in both models, although the result is only statistically significant in the Canadian setting ( $b = -.65$ , significant at the 95 percent confidence level in Canada,  $b = -.14$  in the U.S. model). As expected, Canadian justices are 16 percent less likely to side with individuals who allege discrimination by the government, while U.S. justices are 3 percent less likely to do so.

The three intervener variables highlighted in the two models provide coefficients that are all in the correct direction, suggesting a positive impact for rights claimants when they are supported by prominent interveners. In the U.S. model, when the NAACP or EEOC support the litigant, the justices are 25 and 29 percent more likely to side with those raising equality claims ( $b = 1.08$  for NAACP,  $b = .60$  for EEOC, see Table 2). Although Canadian justices are nine percent more likely to side with rights claimants when LEAF is involved in the case, we are unable to reject the null hypothesis for LEAF participation ( $b = .35$ ). Collectively, these findings demonstrate that interest groups do tend to encourage progressive decision making by the justices, although more so in the U.S. setting than the Canadian context.

The last variable included in the Canadian equation, namely the McLachlin Court control variable, indicates that the high Court does hand down more liberal rulings in equality cases during the first five years of Justice McLachlin's tenure than during the tenures of either of her two male predecessors ( $b = .85$ , statistically significant at the 99.9 percent confidence level). Indeed, McLachlin Court justices are 20 percent more likely to hand down a liberal ruling in the equality area than justices on the earlier courts. This finding helps reinforce the vitality of the

feminist argument in the Canadian context because it shows that when a female leads the Court, it has decisively handed down more liberal rulings in equality cases. The fact that the court control variable is statistically significant in the equality area also suggests that justice McLachlin might approach her leadership role in a different manner than her two male predecessors. However, only time and further research on the McLachlin Court will determine the strength and viability of this feminist contention.

### **Conclusion**

There are several overarching conclusions that can be drawn from this study. First, on a macro-level the addition of women to the U.S. Supreme Court has significantly increased rates of unanimity on that bench. In other words, the presence of both Justices O'Connor and Ginsburg has fostered greater cohesion and consensus in the decisions handed down since 1982. This finding lends credence to the "strong feminist" argument that women bring a greater degree of collegiality and collaboration to the court regardless of their respective party affiliations. Although the macro-level findings of feminist effect did not pan out in the Canadian high Court, the results were in the expected direction. Ultimately, we believe this variable did not significantly alter the rate of unanimity because the first three females appointed to the Canadian Court, most notably Justice L'Heureux-Dube, were prolific dissenters on the post-Charter Canadian Court. However, we believe that these initial results, exhibiting what some would label "masculine" opinion tendencies during these justices' tenure, may be transformed with the passage of time when the current cadre of female appointees have had sufficient time to make their mark on the Court. Thus, on a macro-level, it seems the findings on the U.S. Court provide

some strong support for the feminist argument from an aggregate perspective, although such conclusions may be subject to change as more women are appointed to the U.S. Supreme Court.

We believe there are two important conclusions that can be drawn at the micro-level regarding the resolution of equality disputes on these two courts. First, not surprisingly, ideology plays a paramount role in the voting behavior of U.S. Supreme Court justices in discrimination cases. Yet, a critical finding, and one that many U.S. court watchers may find shocking, is that ideology plays an insignificant role in Canadian equality cases. This stark contrast highlights the importance of doing comparative research in the judicial field, because it not only provides insight into how high courts operating in similar advanced industrial societies differ, but also points to the fact that long-held beliefs about what factors influence judicial decision making in the U.S. may not drive judicial behavioral patterns elsewhere. The weakness of the ideology variable in Canada casts doubt on the assumption that attitudinal decision-making, which is the driving force in the U.S., will play a role at all, much less a pivotal one, in other high courts of advanced industrial democracies.

A second surprising finding from our analysis is that the female variable has the opposite impact on the two high courts at the micro-level, and these findings stand in contrast to the results at the aggregate level. Put simply, although female justices in Canada have not increased rates of unanimity at an institutional level to date, at an individual level they do cast more liberal votes in equality disputes than their male counterparts. The U.S. results run in the exact opposite direction, with unanimity having increased with the arrival of Justices O'Connor and Ginsburg, but from an individual perspective, their voting behavior has actually been more conservative than male justices in the equality area. We believe the results at the individual level make sense when considering the ideologically polarized nature of the U.S. Supreme Court, and the

overwhelming power this variable wields over the other judge-level variable in the equation. In Canada, the more nuanced appointment process dampens the impact of ideological voting, and in the equality area, feminist cleavages are allowed to emerge as a salient factor influencing individual voting behavior. Thus, we reach a somewhat surprising conclusion: in the U.S. high court, judicial ideology trumps gender and mediates its impact in the equality realm, while in Canada, gender effects trump ideology. Again, these findings point to the importance of conducting comparative research on high court, not only because they can tell us something about the more nuanced ways that ideology operates in other high courts, but also because they can shed light on the idiosyncratic nature and dominance of ideological voting behavior in the U.S. high Court.

From an even broader perspective, the findings from this research illustrate the distinctive impact that females can have on two democratic high courts, and suggests that there is some validity to the contention that when women rise to elite leadership positions they will approach their working environment and the resolution of cases from a different perspective than their male colleagues. Although the scope and veracity of the feminist argument advanced by Gilligan and others does not take place in the holistic fashion on either court, the piecemeal or "mediated feminist" impact that emerges from this study is more realistic, and no less important, in settings where various institutional features will dampen the impact that females make on the bench. Although we believe that mediating factors will continue to operate in these two high courts, we believe that gender differences will become increasingly important at both the micro and macro-level as more women are appointed to the bench.

**TABLE 1 -- Predicting Annual Rates of Unanimity in the  
U.S. and Canadian Supreme Courts, 1973-2005**

<b>Variable</b>	<b>UNITED STATES SUPREME COURT</b>		<b>CANADIAN SUPREME COURT</b>	
	<b>b</b>	<b>Statistical significance</b>	<b>b</b>	<b>Statistical significance</b>
Percent Female Justices	.417	.010 **	.049	.386
Percent Justices Same Party	.198	.074	-.173	.070
Average Panel Size	-15.051	.013 *	-6.368	.000 ***
Number of Cases Argued	.028	.314	-.216	.010 **
Percent of Docket Charter			-.304	.013 *
Percent Unanimous Prior Year			.151	.130
Constant	150.802		139.609	
Number of Observations	33		32	
Adjusted R Square	.408		.508	
F Test	6.520 ***		6.330 ***	
Durbin Watson Statistic	2.138		2.316	

**TABLE 2 -- Logistic Regression Estimates of Liberal Votes in a Sample of U.S. Supreme Court Equality Cases and Canadian Equality Cases, 1981-2005**

Variable	UNITED STATES SUPREME COURT		CANADIAN SUPREME COURT	
	b	Change in Probability When X is Low & High	b	Change in Probability When X is Low & High
<b>Judge Level Variables</b>				
Ideology	1.487 ***	.599	.153	.151
Female Justice	-.889 ***	-.218	1.022 ***	.242
<b>Case Characteristics</b>				
Racial Discrimination	-2.069 ***	-.468		
Disability Discrim.	-1.472 ***	-.347	.559 *	.136
Religious Discrim.	-1.203 ***	-.289	.772 *	.182
Sex Discrim.	-.667 *	-.165	-.406	-.101
Indigent Discrim.	-.362	-.091		
Gay Rights Case			1.471 ***	.311
Citizenship Discrim.			.771 *	.180
Age Discrim.			-.511	-.127
Benefits	-.495 ***	-.243	-.343 **	-.170
Job Loss	-.119	-.030	.124	.031
Constitutional Issues	-.145	-.072	-.930 ***	-.433
Lower Court Ruling	-.617 ***	-.150		
HR Commission Ruling			-.399 *	-.195

**TABLE 2 Continued -- Logistic Regression Estimates of Liberal Votes in a Sample of U.S. Supreme Court Equality Cases and Canadian Equality Cases, 1981-2005**

Variable	UNITED STATES SUPREME COURT		CANADIAN SUPREME COURT	
	b	Change in Probability When X is Low & High	b	Change in Probability When X is Low & High
<b>Parties &amp; Interveners</b>				
Govt. is a Party	-.137	-.034	-.649 **	-.157
NAACP Intervener	1.081 ***	.245		
EEOC Participation	.595 *	.287		
LEAF Intervener			.351	.086
<b>Court Control Variable</b>				
McLachlin Court			.852 ***	.204
<b>Constant &amp; Model Fit Data</b>				
Constant	2.658		.734	
-2 LLR Chi Square	781.630 ***		694.084 ***	
Nagelkerke R Square	.300		.292	
Percent Correct	68.6%		70.7%	
Reduction in Error	33.9%		37.8%	
Number of Votes	692		611	

\* significant at  $p < .05$ ; \*\* significant at  $p < .01$ ; \*\*\* significant at  $p < .001$

Note: In the U.S. regression model, age discrimination cases are omitted for comparison purposes, while in the Canadian model, marital status claims are the excluded class of cases.

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## Notes

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<sup>1</sup> The tabulation of rates of unanimity for the U.S. Supreme Court focused on cases that were orally argued before the Supreme Court and resulted in either a per curiam opinion, a signed opinion, or a tie vote that upheld the lower court decision. The unit of analysis was the case citation (see Spaeth 2007). In Canada, rates of unanimity were tabulated from orally argued cases featuring written opinions as published in the Supreme Court Reports. Omitted from the analysis were oral judgments without any formal written opinion. One should note that Justice Laskin did not get elevated to the position of chief justice until December of 1973. Thus, the data set also captures the last year of the Fauteaux Court in Canada.

<sup>2</sup> We did find autocorrelation in the Canadian time series, but controlled for that by introducing a lagged indicator of the dependent variable in that model (see Ostrom 1978). Since we did not find autocorrelation in the U.S. setting, we did not introduce a lagged indicator in that equation.

<sup>3</sup> Epstein et al. (1996, 93) report that the rate of unanimity across all U.S. cases across 1975 and 1994 is 38 percent, while Ostberg and Wetstein (2007, 116) report a 76 percent unanimity rate on the Canadian Court between 1984 and 2003.

<sup>4</sup> It should be noted that in recent years there have been efforts to instigate an oversight function for the Canadian Parliament in the Supreme Court appointment process, although the last two appointments have provided only a token informational role for a Parliamentary committee.

<sup>5</sup> See *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571; *Symes v. Canada*, [1993] 4 S.C.R. 695; *SEPQA v. Canada* [1989] 2 S.C.R. 879; *Vancouver Society v. Minister of National Revenue*, [1999] 1 S.C.R. 10; and *Quebec (Attorney General) v. Quebec* [2001] S.C.R. (although in this last case only one of the two females vote liberally).