POLITICS, GROUPS, AND IDENTITIES
https://doi.org/10.1080/21565503.2021.1946098

Trailblazer women in the Supreme Court of Canada

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ABSTRACT

How do judges decide issues of equality? While prior scholarship demonstrates that judicial attributes such as partisan identification, gender, race, age, and career backgrounds help elucidate judicial decision-making, considerably less attention has been devoted to how judicial empathy may influence or condition judicial decision-making. Such scholarly attention is especially lacking in the study of courts outside of the United States. To bridge this critical gap, we examine how judicial empathy affects decision-making behavior by analyzing data from the Supreme Court of Canada from 1982 to 2015. We find compelling evidence that trailblazer women's unique personal experiences exert a strong influence on judicial behavior within the Canadian Supreme Court. In fact, our findings demonstrate that the effects of judicial empathy extend across a broader array of discrimination cases in Canada compared to previous findings on the American courts. We find that trailblazer women have a greater propensity to vote in favor of discrimination claimants compared to their male peers. Normatively, these effects manifest as judicial empathy in discrimination cases where trailblazers themselves likely faced upward mobility challenges.

ARTICLE HISTORY
Received 29 May 2020
Accepted 20 May 2021

KEYWORDS
Female trailblazers; judge gender; comparative courts; equality; Supreme Court; empathy

> I had a chance to be part of the evolutionary changes in the law regarding women and minorities and persons with disabilities … Did I consciously get involved with those things? Yes I did. I believe the law is related to justice.
>
> Hon. Rosalie Silberman Abella,
>
> Justice, Supreme Court of Canada
>
> (Quoted in Soloway and Constante 2015)

While women constitute half the world's population, judicial positions in every country have predominantly been occupied by men. This is especially true in courts of last resort. The Supreme Court of Canada is notable for being one of the most gender-diverse courts of last resort in the world. Outside of the United States, court observers note important developments in Canada's highest legal institution, with December 2017 marking the end of Chief Justice Beverley McLachlin's career as the first female chief justice of the Canadian Supreme Court (Tasker 2017). Alongside McLachlin, nine other women have served

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Supplemental data for this article can be accessed https://doi.org/10.1080/21565503.2021.1946098.

on Canada's top court, compared with four female justices on the US Supreme Court. Notably, though, in neither High Court have women constituted a majority at any point in time. Nevertheless, the increased diversity in courts of last resort begs the question of whether and the extent to which it affects decision-making patterns overall. Shared experiences and backgrounds may shape a person's outlook and perceptions of the world, and this notion forms the basis of studies examining socialization in judicial behavior (Tate and Handberg 1991; Baum 1997).

A recent development elucidating our understanding of socialization's effects on decision-making in the American courts is a scholarship that finds that female trailblazer judges in the intermediate appellate courts vary from their male counterparts in support of sex discrimination claimants (Moyer and Haire 2015). This important study also finds that the behavior of female and male judges within these cases converges in eras of greater gender parity within the American federal appellate courts (Moyer and Haire 2015). These important findings raise critical questions about female trailblazer effects more broadly, especially the potential of their impact beyond the United States. First, are such findings idiosyncratic to American courts or are similar effects present within courts outside of the United States? Second, are trailblazer effects limited to intermediate appellate courts or do such tendencies manifest in courts of last resort? Finally, would greater levels of gender diversity elicit heightened, similar, or lower levels of potential female trailblazer effects?

Systematic examination of the influence of female trailblazers within comparative legal settings, such as the Canadian courts, has eluded empirical attention, despite a multitude of studies showing gender effects on the Canadian Supreme Court (Ostberg and Wetstein 2007; Songer and Johnson 2007). Female trailblazers in the Canadian courts, as in the United States, faced direct and significant personal challenges in their educational and professional journeys (Backhouse 2008; Kay and Gorman 2008). On the other hand, women educated and professionally socialized in eras of gender parity were less likely to face as much direct and overt discrimination (Backhouse 2008; Moyer and Haire 2015). In addition, as more women enter the legal profession, the views of their male peers are arguably more likely to be shaped, at least in part, by the women they are educated with and work alongside, unlike prior eras with more gender disparity. Given the reality of either explicit or implicit discrimination faced by women, it is conceivable that female trailblazers may view discrimination claims with more empathy than their male colleagues. However, over time, the impact of socialization may potentially mute gendered differences in judicial decision-making behavior.

This study expands on recent advancements in judicial scholarship by exploring the impact of socialization and judicial empathy on decision-making in the Canadian judiciary. Due to a small number of women appointed to the US Supreme Court, scholars have been unable to test the efficacy of trailblazer effects on a court of last resort. Given its comparatively larger number of female appointments, the Supreme Court of Canada (SCC) provides a fruitful opportunity to explore trailblazer theory in a court of last resort and, critically, in a context outside the United States. We explore female trailblazers' behavior utilizing data from equality cases in the Supreme Court of Canada between 1982 and 2015. Our study offers several key contributions to the literature. First, we contribute to judicial decision-making and trailblazer studies by investigating the transportability of female trailblazer effects outside the American courts.

Second, we extend the scope of existing female trailblazer studies from intermediate courts to a court of last resort by examining the Supreme Court of Canada, one of the most gender-diverse courts in the world. Third, we add to the literature by exploring female trailblazer effects in a wider array of issue areas compared to existing work.

Our analyses provide strong support for female trailblazer effects in the Supreme Court of Canada. The findings suggest that female trailblazers in the Canadian High Court bring unique personal experiences and empathy to bear on their decisions in discrimination cases. Notably, our findings demonstrate wider-ranging trailblazer effects in Canada compared to the US courts. Normatively, this means that female trailblazers vote more often in favor of claimants in a variety of discrimination cases compared to their male peers. We also find that such gender differences dissipate with greater levels of gender diversification on the Court. Overall, our analyses reveal that judicial empathy for litigants and professional socialization impacts the justices' behavior in profoundly meaningful ways.

The Supreme Court of Canada

The Supreme Court of Canada shares many similarities with the US Supreme Court. Both courts have a common law heritage and the power of judicial review, considerable control of their dockets, and are courts of last resort (Ostberg and Wetstein 2007; Songer, Johnson, and Bowie 2013). The *Charter of Rights and Freedoms*, passed in 1982, expanded the Court's jurisdiction over civil rights and liberties claims bringing similar civil liberties issues to the Court that the US Supreme Court decides under the Fourteenth Amendment. Yet, despite these similarities, other factors mitigate attitudinal influence in Canada including political, historical, and cultural traditions, norms of institutional collegiality, the justices' perceptions about their roles, and criticism of activist rulings (Ostberg and Wetstein 2007; Macfarlane 2012; Songer et al. 2012).

Scholarship indicates that the Supreme Court of Canada's justices are less polarized than their American counterparts and far more collegial (Ostberg and Wetstein 2007; Hausegger, Hennigar, and Riddell 2009; Macfarlane 2012; Songer et al. 2012).[1] As such, instances where the justices disagree or vote as a bloc tend to represent extreme policy disagreements among them. Prior work demonstrates that equality cases are one area where justices tend to vote frequently along ideological lines (Wetstein and Ostberg 2017). However, scholarship has not fully delved into the theoretical explanations for policy differences in equality cases (but see Wetstein and Ostberg 2017). We theorize that differences in socialization affect the justices in Canada in a similar fashion to the influences on discrimination cases in the US Courts of Appeals (Haire and Moyer 2015; Moyer and Haire 2015) where female trailblazers express higher amounts of empathy for equality claimants.

Women in the Canadian appellate courts

Studies of the Supreme Court of Canada and Canada's appellate courts provide several insights to inform our trailblazer analysis, specifically in providing evidence of differences in decision-making patterns between men and women. Previous scholarship shows women on Canada's appellate courts are consistently more liberal than men in

civil liberties cases but more conservative in criminal appeals (Ostberg and Wetstein 2007; Songer and Johnson 2007; Stribopoulos and Yahya 2007; Songer et al. 2012; Hausegger, Riddell, and Hennigar 2013; Hausegger, Hennigar, and Riddell 2015; Songer, Radieva, and Reid 2016; but see McCormick and Job 1993). Scholars point to an "ethic of care" dimension where female justices support community and societal safety over criminal defendants (Ostberg et al. 2009),[2] along with the emergence of gender as a more significant cleavage on the Supreme Court than region, religion, or political party (Songer and Johnson 2007).

Beyond criminal and civil liberties cases generally, analysis of discrimination cases in the post-Charter era shows a 14% higher probability of favoring claimants by female justices than their male peers (Wetstein and Ostberg 2017) with justice sex being the strongest predictor of claimant support beyond other justice characteristics or case facts. Women are also more likely to dissent with Wetstein and Ostberg's (2017) finding that five of the six top dissenting justices in discrimination cases are women.[3] In fact, trailblazer justice L'Heureux-Dubé lauds dissent as a means to continue dialogue with justices in future eras (L'Heureux-Dubé 2000). This body of work on gender effects in the Supreme Court of Canada indicates that decision-making theories applied in the US context are largely transferrable to Canada and can be examined in a more gender-diverse court than the US Supreme Court. Scholarship also indicates that gender effects may be more pronounced in Canada than in the US (Ostberg et al. 2009).

Trailblazers in law school and the legal profession

Though the scholarship described above mirrors early gender-based theories of decision-making in US courts, scholars in the US have begun to move away from purely sex-based theories of behavior to examine more nuanced explanations of how gender affects judging. The analyses described previously are based on theoretical expectations that women judges bring unique experiences to the law and may rely on their own experiences when deciding cases (Songer, Davis, and Haire 1994; Ostberg and Wetstein 2007). For women, this means that their decisions may reflect unique perspectives from men in cases where their direct personal experiences differ (Boyd, Epstein, and Martin 2010).

One theoretical contribution from US judicial scholarship provides evidence that female trailblazers differ both from men and other women in their decision-making in sex discrimination cases. Trailblazers, who represent the first wave of women to achieve success in the legal profession, share unique experiences that set them apart from both men and their younger women colleagues. When women were fewer in number in law schools and the legal profession, these trailblazers overcame systematic educational and professional discrimination while women who attended law schools in later periods were able to enjoy the successes of equality achieved by the women who came before them (Backhouse 2008). For instance, Lori Duffy, a partner at the Toronto-based law firm WeirFoulds, says:

> It worries me that the next generation of young women seems to think there is no going back, that these opportunities will always be there and the choices they make are personal to them and will not have any greater impact at all. Women have the opportunities we have because we really fought hard for them, and if we stop ensuring that those opportunities

> continue and stop reminding everyone that they have to continue, they will be gone in a nanosecond. (Zahorsky and Filisko 2013, 36)

Trailblazer theory suggests that these different experiences lead to differences in legal interpretation, especially in discrimination cases. Further, the experiences of men may differ from one era to the next as educational and professional environments achieve or approximate gender parity. For example, in their study of US Courts of Appeals judges, Moyer and Haire (2015) find support for trailblazer theory's application in sex discrimination claimants for women judges who faced similar treatment earlier in their careers. Specifically, professional women are likely more aware of and to have personally experienced discrimination (Moyer and Haire 2015).

Like the US, in Canada women faced obstacles in obtaining a legal education. Though all Canadian provinces removed the legal barriers that prevented women from practicing law in 1942 (Lopez 2011), by the 1970s, women still comprised less than 10% of law school students (Krakauer and Chen 2003). More recent statistics indicate that women account for over one-third of the attorney labor force (Lopez 2011; L'Heureux-Dubé 1998). Concerted efforts to diversify the bench have largely been successful with women making up roughly 40% of Canada's judges (Government of Canada 2019). Thus, patterns of women in law school and the legal profession largely parallel the US pattern of enrollment and professional entry. Yearly statistics from the American Bar Association (Moyer and Haire 2015) shows a precipitous climb in female enrollment in US law schools after 1970.[4] Scholars describe similar patterns of education and professional entry in Canada (Krakauer and Chen 2003; Backhouse 2008; Lopez 2011).[5]

Oral histories and biographies also illustrate experiences of the first women in law schools and appointed to the bench (Kirk-Montgomery 2012), many echoing the experiences of trailblazers in US courts (Moyer and Haire 2015; L'Heureux-Dubé 1998). For instance, when Bertha Wilson applied to Dalhousie University's law school in 1954, the Dean reportedly asked her, "Why don't you just go home and take up crocheting?" (Backhouse 2008; Soloway and Constante 2015). This seemingly singular account of a discrete event is part of a broader cultural and societal view toward the first waves of women entering the legal field in Canada. Women's experiences, especially as trailblazers, differ remarkably from their male peers and their more recently trained women colleagues. A continuous thread of judicial scholarship concludes that such personal experiences influence decisions, especially in cases that highlight or recall these experiences (Songer, Davis, and Haire 1994; Boyd, Epstein, and Martin 2010; Moyer and Tankersley 2012; Gleason, Jones, and McBean 2019; Gleason 2020).

Judicial empathy and socialization effects

Trailblazers' unique experiences with discrimination are closely connected to the notion of judicial empathy. Judicial empathy suggests judges' own background experiences may shape how they view the litigants appearing before them and their claims of inequality. For instance, Glynn and Sen (2015) demonstrate that US appellate court judges who have daughters are more sympathetic to sex discrimination claims than judges who do not, even after controlling for partisan affiliation. Other studies, however, distinguish

between sympathy and its companion, judicial empathy – a deeper interest that stems from direct, personal experiences.

Judicial empathy studies suggest the diversity of personal experiences alters individual judges' perceptions of judging in certain types of cases, particularly discrimination claims. Weinberg and Nielsen (2012) argue that empathy especially matters in discrimination cases because "illegal discrimination can operate through implicit bias rather than overt harassment" (2012, 322). Judicial perception matters in such instances because in such cases the "facts and evidence … are often ambiguous and open to interpretation" (Weinberg and Nielsen 2012, 323). When such instances of open interpretation are present, judges then may rely on their own personal experiences and perspectives. Further, " … judges who hail from different social or cultural backgrounds may provide a more nuanced understanding of facts, evidence and credibility determinations than judges who lack such experience" (Weinberg and Nielsen 2012, 324). Judicial empathy, therefore, is most likely to manifest in cases where individual judges may uniquely perceive harm due to their own interactions in society. This is especially relevant for trailblazer women whose experiences equip them not only to sympathize with discrimination claimants but empathize because they are " … aware and actually sensitive to the state of condition of another" (Weinberg and Nielsen 2012, 325).

Judicial empathy, thus, elicits responses in judges who may draw from their unique backgrounds and experiences, which may vary between men and women due to differences in socialization (Kaheny, Szmer, and Christensen 2020; Kalkhoff and Thye 2006). Studies show that professional socialization affects equality perceptions (Eddy and Burke 2004) and elicits more collaboration and participation from women compared to more authoritative tendencies from men (Burke and Collins 2001; Boyd 2013). Similarly, socialization in educational settings to women's views might alter one's own perceptions of issues of equality (Boyd, Epstein, and Martin 2010; Jilani, Songer, and Johnson 2010; Johnson, Songer, and Jilani 2011; Songer, Radieva, and Reid 2016). Thus, men trained alongside greater numbers of women likely view claims of discrimination differently than men trained during periods of less gender diversity when trailblazer women experienced higher levels of overt discrimination. Similarly, women in later periods are more likely to influence their male peers if there are greater numbers of women to "normalize" the group's expressed viewpoint (Backhouse 2008). Thus, approaching gender parity in educational and professional environments may alter perceptions and behavior, lessening the differences in perspectives between men and women on issues of discrimination, which manifests as greater empathy from trailblazer women.

The scholarship supports socialization effects found in collegial settings when women are present on the panel or a member of the court (Boyd, Epstein, and Martin 2010; Collins, Manning, and Carp 2010; Haire, Moyer, and Treier 2013; Moyer 2013). Men professionally socialized alongside roughly equal numbers of women, or even in periods when women made up a sizeable minority of the law school class, are more likely to perceive equality in the same manner as their women cohorts (Moyer and Haire 2015). In addition, as more women enter legal careers, the professional environment shifts. Increased exposure to students from diverse backgrounds alters empathy and perception, especially in instances where personal experiences of those groups deviate from traditional perceptions of discrimination.[6] Trailblazer women, therefore, are more likely to differ in their perceptions of equality claims than men they trained

alongside and compared with women and men in later eras. This suggests that differences between men and women in collegial courts and the legal profession may lessen over time as more men train and serve alongside greater numbers of women.[7]

Discrimination claims in Canada

Beyond differences in perceptions of sex discrimination claims, we theorize that female trailblazers will be more pro-claimant in equality cases than other justices due to their unique experiences with direct discrimination, building on theories of judicial empathy. While Moyer and Haire (2015) focus their analysis on sex discrimination cases, we expect trailblazer women to be more pro-claimant across various discrimination claims. This is due to judicial empathy toward similar discrimination claims along with differences in equality jurisprudence in Canada compared to those in the US.

Female judges who have direct experiences with discrimination are as likely to advance the rights of other groups, as well, because sex discrimination might mask discriminatory treatment of women as members of other minority groups. In other words, where perceptions of discrimination might seem ambiguous for individuals who have not faced direct, personal discrimination, trailblazers may be more apt to identify more subtle forms of discrimination. As Weinberg and Nielsen (2012) note, "In the context of discrimination claims, anecdotal and empirical accounts show that those who experienced prejudice or bias are more likely to develop empathy resulting from that experience" (2012, 348).

An example of judicial empathy can be seen in *Egan v.* Canada (1995), a gay rights case involving the *Old Age Security Act*, which had limited spousal benefits to heterosexual couples (Grabham 2002; Wetstein and Ostberg 2017, 242). In this case, the justices found the law to infringe on the *Charter of Rights* by discriminating against gay persons. However, the justices split in their language with two notable concurrences written by trailblazer justices, Claire L'Heureux-Dubé and Beverley McLachlin, their opinions illustrating subtle nuances of judicial empathy (McCarthy, Martha, and Radbord 1999).

Unlike the majority, L'Heureux-Dubé emphasized that the Court should "focus on the discriminatory effects of the law" and whether the law perpetuates the view that individuals are "less capable or less worthy of recognition or value as a human being" rather than focusing simply on the ground of discrimination and whether it is analogous to other grounds of discrimination explicitly listed in the *Charter of Rights* (Wetstein and Ostberg 2017, 243). Similarly, McLachlin emphasized the Court should "assess not only the reason for the distinction … but whether it was grounded in stereotypical beliefs about the group or its personal characteristics" (Wetstein and Ostberg 2017, 243).[8] These subtle distinctions in language hint at how empathy gained from past personal experiences might shape a judge's perspective in a case with L'Heureux-Dubé and McLachin both demonstrating how discriminatory treatment by law personally impacts individuals, compared with the group descriptors used by the majority opinion (McCarthy, Martha, and Radbord 1999; Grabham 2002).

We argue that empathy may affect perceptions of cases where judges approach claims of inequality that recall personal, direct experiences in their own educational and professional lives. In other words, trailblazers may differ in their perceptions of equality

cases where discriminatory conduct against individuals recalls discriminatory treatment personally experienced by trailblazers themselves.[9] We expect that trailblazer women with personal, shared experiences of discrimination will cultivate distinct stimulus responses to the discrimination cases before them. Trailblazers' educational and professional experiences especially differ from men and later eras of women. Thus, trailblazer women's direct personal experiences may affect their decisions not only in sex discrimination cases but also in other categories of discrimination. Roughly two-thirds of equality cases decided by the Supreme Court of Canada present *Charter of Rights* constitutional issues. The other one-third of cases included in our data present the Court with issues pertaining to equality legislation such as the *Canadian Human Rights Act* (1977) as well as human rights acts at the provincial level (Lepofsky 1992; Chun and Gallagher-Louisy 2018). Many equality claims in the post-Charter period concern Section 15 of the document. Section 15 states,

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (*Charter of Rights and Freedoms* 1982)

Section 15 also applies to sexual orientation as "analogous to other forms of discrimination" enumerated under the clause (Lepofsky 1992; McCarthy, Martha, and Radbord 1999; M. V. H. 1999 ; Grabham 2002; Smith 2005). The Charter's language differs from the Fourteenth Amendment in the US, and SCC justices sometimes rely on substantive legal tests (or equal outcome) rather than formal equality (or equal opportunity) approaches used by the US. Supreme Court to address equal protection claims (McCarthy, Martha, and Radbord 1999; Grabham 2002; Wetstein and Ostberg 2017). For instance, in Canada, the justices interpret the *Charter of Rights* to account for the discriminatory impact, unlike US Fourteenth Amendment jurisprudence. However, as is the case in the US, Section 15 jurisprudence allows a great deal of judicial discretion and SCC justices have often split in determining the proper test applicable in discrimination cases.[10]

Most equality cases decided by the Supreme Court, both Charter and non-Charter, concern age discrimination, sexual orientation, sex discrimination, and religious discrimination (Wetstein and Ostberg 2017). Over time, the number of equality cases heard by the Court has diminished, with the highest numbers of discrimination cases decided in the 1980s and the 1990s. Wetstein and Ostberg (2017) point to *Charter* maturation (McCormick 2015) and the fact that "many of the key principles in discrimination law had been settled and could be situated in a comprehensive framework by the close of the 1990s" (2017, 202).[11]

Since judicial empathy theory suggests trailblazer women will exhibit empathy toward similar claims of discrimination to actions they personally experienced, we extend trailblazer theory beyond sex discrimination cases to other claims of equality.[12] Thus, our expectation is that SCC trailblazer women, who are much more sensitive and likely to exhibit judicial empathy to claims of discrimination, draw on their own experiences of inequality when gender parity did not exist in law school education or the legal profession. Since female trailblazer experiences in law school and the legal profession are unique, we expect the following:

Trailblazer Hypothesis: Female judges educated and professionally socialized in "trailblazer" eras are more likely to support equality claimants compared to male judges in "trailblazer" eras and female and male judges trained in later eras.

Data and methods

To test our prediction, we rely on the High Court Judicial Database[13] and include all non-unanimous equality cases decided by the Supreme Court of Canada from 1982 to 2015.[14] The period of analysis begins with the date of the first female appointment to the Supreme Court in 1982.[15] In extending these data, we relied on the cases as reported by the Supreme Court of Canada.[16]

We evaluate trailblazer theory along with alternative explanations over a series of models to assess the robustness of linkages.[17] The dependent variable within each model is each justice's vote in a case, coded as "1" if the vote favored the claimant in an equality case; it is coded "0" otherwise. As is common with decision-making analyses, cases without a clear directional outcome were omitted from the analysis.[18] Given that the dependent variables are dichotomous, we estimate logistic regression models and cluster the errors by the justice.

Our first independent variable captures the gender of the justice called *Female Justice*, coded "1" for females and "0" for males. We include a variable for *Law School Graduation Date* as a proxy for socialization, coded as a continuous variable by year, utilizing the official Supreme Court of Canada website biographical information.[19] Our key expectations are that the votes of female trailblazers and males within their cohort will deviate most from each other in equality cases, while men and women who graduated in times of greater gender parity will decide equality cases more similar to one another. Therefore, our key variable of interest is the multiplicative term *Female Justice* × *Law School Graduation Date* to assess differences between trailblazer women and other justices within equality cases.[20] Like Moyer and Haire (2015), we recognize women's experiences will vary depending upon their unique circumstances. Thus, we view trailblazer status, not as a dichotomous concept, where a person is decisively classified as either a trailblazer or not. Rather, we conceptualize trailblazers as individuals whose experiences differ remarkably from others because they faced direct, personal discrimination. For instance, the first woman to attend a particular law school may experience greater degrees of discrimination personally than even the second or third woman to attend because those who first shatter the glass ceiling in many ways pave the way for others to be viewed as "belonging" or worthy of their educational or professional position. Though our comparison is between trailblazers and non-trailblazers, we conceptualize trailblazers as a continuous phenomenon, like Moyer and Haire (2015), where personal experiences of discrimination against women lessen over time and where variation may exist even within certain timeframes. Thus, for Supreme Court of Canada women, trailblazer effects may appear slightly earlier or slightly later than they did in the US Courts of Appeals. Further, we expect to observe a dampening effect in voting patterns in discrimination cases continuously over time rather than a sharp break in support levels at a discrete moment in time.

We include several control variables to account for additional confounding effects. To control for other ideological cleavages, we include ideological career scores for each

justice. These are the proportion of cases in which the justice cast a pro-claimant vote in a civil liberties case during their tenure on the Supreme Court prior to the year of the present decision.[21] We include control variables for the types of discrimination cases to account for whether one type of discrimination, such as sex discrimination, is driving the results. Therefore, we include dummy variables for *Sex Discrimination*, *Religious Discrimination*, and *Age Discrimination*. *Sexual Orientation Discrimination* is the excluded category. Since previous studies show regional cleavages on the Canadian Supreme Court, we include control variables for justices from *Quebec*, *Ontario*, and the *Western Provinces*. A variable for the *Eastern Provinces* is the excluded reference category. We also include constitutional issues as a separate control to assess differences in cases that raised a *Charter of Rights* issue versus some other claim (such as provincial legislation). Finally, we conduct several statistical analyses to determine whether there are alternate explanations of gendered behavior in equality cases. In these alternative analyses, we control for chief justice leadership, number of women on the panel, number of women on the Court, and date of appointment. We also test for *Charter* maturation effects where constitutional claims that come to the Court in early years may have been easier to decide in favor of claimants as they were much more straightforward than later *Charter* cases. As a robustness check for law school graduation date – and since the two are highly correlated in our data – we also run equivalent models with the justice's date of birth rather than law school graduation date.[22] Finally, though our data only cover the period through 2015, we include a separate analysis of equality cases through 2020 in order to more fully compare the behavior of women appointed more recently to the Court to that of their predecessors.[23]

Empirical results

The estimates from our model are presented in Table 1.[24] This model captures the likelihood of a pro-claimant vote in equality cases.[25] Our key prediction is that trailblazer women are more likely to support equality claimants than their male peers and both

Table 1. Logistic Regression Model on Likelihood of a Pro-claimant Vote in Equality Cases.

Variable	Coefficient	Std Error	*p*-Value
Female Justice	281.3206	67.501	0.000
Law School Graduation Date	0.001	0.023	0.779
Female × Law School Graduation Date	−0.143	0.034	0.000
Justice Ideology	1.385	0.870	0.111
Sex Discrimination	−1.320	0.506	0.009
Religious Discrimination	1.295	0.665	0.051
Age Discrimination	−0.122	0.521	0.815
Quebec	−0.461	0.410	0.262
Ontario	0.531	0.378	0.160
Western Provinces	−0.003	0.399	0.994
Charter of Rights	−1.349	0.384	0.000
Constant	−13.070	46.154	0.777
Observations	167.000		
χ^2	249.940		
Prob > χ^2	0.000		

Note: The dependent variable is the likelihood of a justice vote for the claimant. Sexual Orientation Discrimination is the excluded category for the discrimination controls. Eastern provinces is the excluded category for the regional controls. The standard errors are clustered on each Supreme Court justice.

men and women who were educated in later periods. The multiplicative term is statistically significant and negatively signed. To determine the magnitude of the trailblazer effect, we estimated the marginal effects for all observed values and averaged them (Hanmer and Ozan Kalkan 2013) while holding continuous variables constant at their medians and dichotomous variables constant at their modal values.

The substantive results suggest broad support for trailblazer effects within the Supreme Court of Canada in equality cases. Figure 1 illustrates this effect. Women who graduated from law school in periods prior to gender diversity in law schools are significantly more likely to cast a pro-claimant vote in equality cases. However, in post trailblazer years, this effect diminishes as expected. Women who graduated in periods of greater gender diversity are less different from their male peers in their votes in equality cases. Figure 1 illustrates the probability of a liberal vote, respectively, with a steep downward slope in support for equality claimants and no difference in men and women who graduate from law school after the mid-1970s. This further corroborates trailblazer effects for equality cases. Our findings also support the expectation that female trailblazers favor equality claimants beyond just sex discrimination cases.[26] This finding is new to the literature. That is, female trailblazers exhibit judicial empathy for claimants in equality cases distinct from other male and female justices.

To better elucidate the classification of trailblazers on the Supreme Court of Canada, we calculated the cumulative percentages for pro-claimant decisions in non-unanimous cases at different points using equality case data updated through 2020.[27] Table A2 displays these results. Women overall are 58% pro-claimant in equality cases across the entire period, compared with the male average of 49.7% pro-claimant.[28] Of most interest, however, is determining the point at which male and female preferences diverge the most and where they lessen.

Table A2 indicates that together, Wilson and L'Heureux-Dubé, the two women to attend law school in the 1950s decide cases in a pro-claimant direction about 69% of

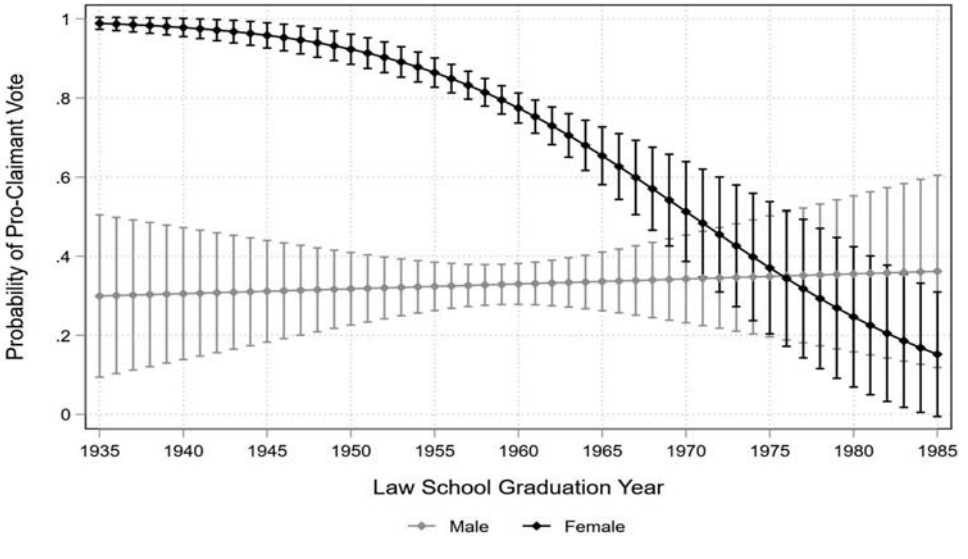

Figure 1. Impact of Trailblazer Effects in Equality Cases.

the time. When including McLachlin, who graduated from law school in 1968, the combined pro-claimant support score is 61%, still 4 percentage points above the mean of all women. When we include Arbour and Abella, both 1970 law school graduates, the pro-claimant score increases slightly to about 63%. The support score dips to 59% when Deschamps, a recognized conservative justice, is added to the "trailblazer" category. Thereafter, with the appointment of Charron, known to be more liberal than Deschamps, the support score for claimants by women justices remains just below 60%. Thus, it appears that Wilson and L'Heureux-Dubé can be definitively classified as trailblazers. But even when adding McLachlin as a trailblazer, who is well-known as a centrist especially after her ascent to Chief Justice (Ostberg and Wetstein 2018), these first three justices' pro-claimant support percentage exceeds overall pro-claimant support by all women combined and continues after 1970 female graduates are added to the trailblazer category. Only after adding the 1974–1975 graduates (Deschamps and Charron) does the trailblazer support score trend about the same as the female average. Thus, the raw percentages indicate that the earliest law school female graduates decide equality cases differently than females who graduated after the mid-1970s. In particular, Wilson and L'Heureux-Dubé fit the trailblazer profile with effects converging in later years around the mid-1970s.

We observe the effects of our control variables in Table 1. Female justices are significantly more liberal than their male counterparts beyond trailblazer effects. Law school graduation date is also positively signed, though not statistically significant. The measure for ideology is positive, as predicted, and approaches statistical significance.[29] The constitutional case variable is negative and statistically significant, indicating that justices treat constitutional claims more conservatively than equality claims brought to the Court on other grounds. The negative direction on the coefficient is not surprising given that similar effects are documented in *Charter of Rights* claims whereby scholars have found that SCC justices were more pro-claimant in the early years of the Charter in deciding landmark cases, but subsequently decided progeny cases more conservatively in later years under the *Charter* (Morton, Russell, and Withey 1992; Wetstein and Ostberg 2017).

Two of the discrimination control variables reach conventional levels of statistical significance. The variable for *Sex Discrimination* is significant and negatively signed. On the other hand, the variable for *Religious Discrimination* is significant in a positive direction. Additionally, the variable for *Age Discrimination* is not significant relative to the reference category. This suggests that there are differences in how the justices consider the various types of discrimination claims that come before them. Overall, sex discrimination claims are treated more negatively by the justices overall, despite pro-claimant voting behavior exhibited by female justices and trailblazer women, especially. This finding comports with Johnson and Reid (2020), who find equality cases to be an area where female justices dissent the most. The regional variables do not reach statistical significance[30], but the negative sign for Quebec justices indicates they vote more conservatively in equality cases than justices from Ontario or Atlantic provinces consistent with previous studies (Songer and Johnson 2007; Hausegger, Hennigar, and Riddell 2009).[31]

The interesting results from the empirical model provide strong and overwhelming evidence of trailblazer effects within one of the most gender-diverse courts of last resort in the world. These findings elucidate the reality that trailblazer effects are not

idiosyncratic to the US courts nor are they a unique function of comparatively low levels of gender diversity within a judicial system. These results demonstrate that trailblazer findings are not only prevalent across judiciaries but may be amplified under certain institutional and social conditions. In fact, female trailblazer effects are wider-ranging than the effects found in the US Courts of Appeals extending beyond sex discrimination cases to discrimination claims more generally. Notably, we find that female trailblazers exhibit judicial empathy for claimants in equality cases distinct from other male and female justices. Overall, these results provide robust and substantively meaningful support for trailblazer effects within a comparative legal system outside of the US.

Discussion and conclusion

Novel and insightful work by Moyer and Haire (2015) sheds light on the important linkage between female trailblazers and judicial behavior in the American courts. Our work demonstrates that such effects also manifest in courts outside the United States. Notably, we find that female trailblazer effects extend beyond sex discrimination cases. That is, female judicial trailblazers in Canada – the first women to train as lawyers and serve as justices – exhibited a greater propensity to vote in favor of discrimination claimants than their male peers. Compared to assessments of the US courts, we find that female trailblazer effects in the Canadian Supreme Court were wider-ranging and more pervasive than trailblazer effects in the US. Seemingly, female trailblazers in the Supreme Court of Canada drew on their educational and professional experiences of discrimination when deciding equality claims. Interestingly, like Moyer and Haire (2015), we also find that female trailblazer effects diminish over time and as more women join the bench.

While feminist legal theory has largely focused on the jurisprudential treatment of equality claims as discrete categories, our findings reveal that within a strict legal framework, female justices make a difference by deciding claims that affect women in a similar way regardless of the type of equality claim. The empathy of trailblazers appears to extend to case categories where the justices deciding the case have likely experienced direct personal discrimination in their educational and professional lives. This view of judging suggests that in evaluating the effects of gender diversification on judiciaries in the US and comparatively, scholars should focus on individual, nuanced theories of behavior.

For instance, prior studies on the Canadian Supreme Court demonstrate generational effects among the justices (Wetstein and Ostberg 2017). However, scholars have not found previously generational effects in equality cases.[32] Our theory supplements post-materialist value change theory, embodied in part by the *Charter of Rights* itself. Value change theory suggests mobilization of interest groups to push particular types of cases and legal arguments (Hein 2001; Morton and Allen 2001; Brodie 2002; Smith 2002; Manfredi 2004; Vanhala 2009; Alarie and Green 2010; Radmilovic 2013), and overall societal change (Morton and Allen 2001; Blais et al. 2004) are reflected in the behavior of political elites. However, within equality cases, we find that educational and professional socialization profoundly impact the justices' voting behavior. If age-based generational value change were driving equality results, we would not observe substantial differences between men and women in earlier periods. Instead, one would likely observe uniform behavior across the genders within particular generations.

Our study has important implications for judicial behavior literature. Ostberg and Wetstein (2007, 226) note that in Canada judicial decision-making fueled by ideology "weaves a more complex tapestry" because of differences in institutional arrangements from the US.[33] Other comparative courts might also manifest differences as judicial empathy, especially courts that are more racially and ethnically diverse, religiously diverse, or diverse in other ways. Within Canada, female trailblazer effects are discernably broader ranging than the American appellate courts (Moyer and Haire 2015) with justices empathizing with other categories of discrimination when adjudicating proximal cases. Future scholarship might work toward better engaging empathetic responses to explore other ways judges from diverse backgrounds behave differently – perhaps even strategically – regardless of the legal standard *stare decisis* demands. Such work would greatly enhance our understanding of both gender-based differences and the puzzle of judicial behavior (Baum 1997).

Notes

1. The Court is comprised of nine justices appointed by the Prime Minister who serve until a mandatory retirement age of 75. Three justices must be from Quebec by law, and by custom three are appointed from Ontario. Two of the remaining three justices are commonly from the western provinces with the remaining one from the Atlantic provinces (Hausegger, Hennigar, and Riddell 2009). At least one female justice has served on the Court since 1982 with Bertha Wilson's appointment as the first female justice.
2. However, see Manfredi and Lemieux (1999) for a discussion of sexual assault cases which split justices along a criminal defendant and victims' rights dimension.
3. Other work shows women's presence on the panel affects decision-making in Canada (Jilani, Songer, and Johnson 2010) with increased numbers of women on the panel leading to more liberal decisions overall.
4. The Canadian Bar Association was unable to provide yearly statistics for women's law school enrollment over time.
5. Though reformists continue to call for efforts to further diversify the legal profession overall, especially in private practice where women remain underrepresented (Lopez 2011).
6. Legal education and recruitment in Canada are similar to the US. Canadian law firms recruit students in their second year of law school with the expectation that the position will lead to an articling position with the same firm and then a permanent associate position after the call to the bar. Competition among elite law firms for students from prestigious law schools result in higher employment prospects overall (Krakauer and Chen 2003). As such, elite law schools traditionally dominated by men results in men dominating the legal profession. However, as more women enter law school, the gender gap narrows.
7. We explicitly test for competing explanations of equality decision-making, such as panel effects, in the Appendix.
8. The dissenters in the case argued that the law was justified because "parliament had taken an incremental and flexible approach that slowly extended social benefits to different minority groups in society" (2017, 244).
9. Further, as the law focuses on one category at a time in Canada (similar to the treatment of equality claims as discrete characteristics in the US), it then requires judges to choose which grounds of discrimination most likely contributed to the unequal treatment without regard to multiple discriminatory factors. While legal scholars have made great strides in calling attention to this paradoxical treatment of discrimination in equality law (discriminating by comparison) (Grabham 2002; McCarthy and Radbord 1999), judicial scholars have not yet fully addressed how individual judges respond with empathy to the discrimination cases appearing before them.

10. For Charter claims generally the Court determines "whether the law creates a distinction based on an enumerated or analogous ground" and then separately determines whether the distinction is discriminatory (Government of Canada 2018). The burden of proof rests with the claimant in demonstrating that the law has an "adverse effect" or "adverse impact" on the protected group (Government of Canada 2018). If the claim reaches the final stage, the burden then shifts to the government under Section 1 of the Charter, and applying the test developed in R. v. Oakes (1986), the Court determines whether the government's goal nevertheless constitutes "reasonable limits demonstrably justified in a free and democratic society" (Government of Canada 2018; Wetstein and Ostberg 2017; Lepofsky 1992; McCarthy and Radbord 1999; Grabham 2002).
11. Wetstein and Ostberg (2017) describe an evolution of sex discrimination law across the Dickson (1984–1990), Lamer (1990–2000), and McLachlin (2000–17) Courts. Some early sex discrimination claims heard by the Dickson Court focused on issues of pregnancy discrimination, overt sex discrimination in employment, and sex harassment. The Lamer Court, however, limited findings of sex discrimination to public, not private fraternal organizations, with the women justices on the Court arguing in dissent that "adverse effect discrimination" was as detrimental to women's advancement as "direct discrimination" (Wetstein and Ostberg 2017, 262). By the time McLachlin ascends to the chief justiceship in 2000, sex discrimination claims arriving at the Court largely involved the "jurisdictional authority and the power of labour arbitration boards and human rights commissions" (Wetstein and Ostberg 2017, 264).
12. Differential treatment of individuals because of language falls under Section 16 of the Charter, which protects equally English and French-speakers, while many government policies related to First Nations' indigenous peoples fall under Section 25. Since jurisprudence largely differs in these two categories from Section 15 analysis, we exclude them from our analysis, noting however, that these cases often raise questions of equality. Wetstein and Ostberg (2017) control for non-Section 15 equality cases in their model, noting distinctions between legal interpretations in these separate sections of the *Charter*.
13. The High Courts Judicial Database (HCJD) is a public access database supported by the National Science Foundation (NSF). The data and its documentation are available at http://www.songerproject.com/national-high-courts.html. The HCJD data cover the period 1970–2002 for the SCC with an extension of that data through 2008 funded by the Canadian Embassy in the US, Canadian Studies Grant Program. Using the same coding scheme, the authors extended the data through 2015.
14. We separately analyze civil liberties cases as a baseline (available in the Appendix) and equality cases as our main case category of interest.
15. The Canadian Bill of Rights of 1960, a statutory document, contained equality provisions applicable only to the federal government (Lepofsky 1992). The Charter of Rights was adopted in 1982 but its Section 15 protections did not come into effect until 1985. We include the entire period women served on the Court since our analysis includes both Charter and non-Charter discrimination claims. Including the pre-Charter years also increases our number of observations for the earliest trailblazer justices. However, we provide results in the Appendix testing Charter interpretation over time to ensure that Charter maturation effects are not driving the results.
16. Accessible at https://scc-csc.lexum.com/scc-csc/en/nav.do
17. Alternate specifications are presented in the Appendix.
18. Only one case was excluded from the analysis where a clear direction could not be discerned.
19. Available at https://scc-csc.ca/judges-juges/cfpju-jupp-eng.aspx
20. To demonstrate the robustness of the results, we estimate the impact of female trailblazers on all civil liberties cases in addition to equality cases. Estimating the effects of separate models allows us to isolate the key hypothesized effects from potential confounding effects. There are also significantly more observations with the broader set of civil liberties cases. The results are highly consistent with the results reported in Table 1 and Figure 1. This analysis is provided within the Appendix.

21. We also conduct our analyses using the political party of the appointing Prime Minister as a robustness check. Other ideology measures similar to Segal-Cover scores (Ostberg and Wetstein 2007) and Martin-Quinn scores (Alarie and Green 2009) exist for some Supreme Court justices. However, for our longer period of study, we utilize career scores and party as the best available measures of political ideology across all justices in the data.
22. We also include birthdate as a potential generational explanation since Wetstein and Ostberg (2017) find generational differences between Supreme Court of Canada justices in equality cases. We note here that they do not include conditional relationships between gender and generation in their models. In our data, birthdate and law school graduation date have a correlation of 0.982.
23. Since the expanded data through 2020 only include equality cases, we substitute party of the appointing PM as the ideology measure in our analyses for later years since data are unavailable to calculate civil liberties career scores beyond 2015. We provide this analysis in Appendix B. The expanded data through 2020 increase the observations in non-unanimous equality cases to $n = 9$ each for Côté and Karakatsanis and $n = 3$ for Martin.
24. We also estimated models with decade dummies and year fixed effects to capture temporal changes. The results are nearly identical to the main analysis. Therefore, following convention, we default to reporting the results from the more parsimonious model. We report the multilevel model with year fixed effects in the Appendix.
25. Within our data, justices voted in favor of claimants overall 45 percent of the time. During the Dickson Court (1984–1990), justices favored equality claimants overall at a rate of 46 percent. This support level dropped to 44 percent in the Lamer Court (1990–2000) and 45 percent in the McLachlin Court (2000–2015).
26. Unfortunately, we do not have a sufficient number of observations within sex discrimination claims to analyze these cases separately. In our data, sex discrimination cases comprise 20% of cases, age discrimination comprises 28%, 9% are religious discrimination cases, and 19% are LGBTQ discrimination issues. The cases are distributed across Courts as follows: sex discrimination (Dickson Court = 24%; Lamer Court = 54%; McLachlin Court = 22%); religious discrimination (Dickson Court = 36%; Lamer Court = 19%; McLachlin Court = 44%); age discrimination (Dickson Court = 49%; Lamer Court = 36%; McLachlin Court = 16%); LGBTQ discrimination (Lamer Court = 50%; McLachlin Court = 50%).
27. The number of non-unanimous equality cases women decided are as follows: L'Heureux-Dubé ($n = 35$), Wilson ($n = 16$), McLachlin ($n = 52$), Arbour ($n = 9$), Abella ($n = 22$), Deschamps ($n = 18$), Charron ($n = 11$), Côté ($n = 9$), Martin ($n = 3$), and Karakatsanis ($n = 9$).
28. This finding is consistent with that of Johnson and Reid (2020) who find about a 10-percentage point difference in men's and women's voting patterns from 1984 to 2015 in equality cases, mostly due to dissenting behavior by women justices in this category of cases.
29. Using political party of the appointing Prime Minister (Songer and Johnson 2007) as an alternative ideology measure yielded similar results.
30. See Cochrane and Perrella (2012) for a discussion of why regional differences in Canada may not explain cleavages across various issues.
31. Altering the reference category for the regional variables produces nearly identical results.
32. Importantly, Wetstein and Ostberg (2017) did not interact justice sex and birth year because in testing Ronald Inglehart's (1997) theory of post-materialist value change, they predicted generational differences based on birth year among the justices overall rather than gendered effects due to differences in educational and professional socialization. When we interact year of birth and justice sex, our findings are similar to the findings presented for law school graduation date and date of appointment.
33. See also Hausegger, Riddell, and Hennigar (2013) and Lawlor and Crandell (2015) for discussions of how selection impacts ideology on Canadian appellate courts.

Acknowledgement

An earlier iteration of this paper was presented at the annual meeting of the Southern Political Science Association. We are grateful to Susan Haire and Laura Moyer for the inspiration on trail-blazer effects in their article on the U.S. Courts of Appeals. We thank Shane Gleason, Benjamin Kassow, and the anonymous reviewers for their helpful comments and suggestions. We dedicate this article to the memory of Donald Songer, who was an early pioneer and consistent advocate for greater scholarly engagement on the Canadian courts.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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