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The Greenhouse Effect: What is the Relationship between Media Attention and Supreme Court Law Clerk Diversity?

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The Greenhouse Effect

What is the Relationship between Media Attention and Supreme Court Law Clerk Diversity?

Introduction

As the first female Harvard Law Review president in the late 1970's, Susan Estrich believed her chances of obtaining a law clerk position under Supreme Court Associate Justice William Brennan were high. Brennan had hired every Harvard Law Review president that applied to his chambers. Despite these odds, Estrich's application was denied. Justice Brennan never publically commented on his rejection, and journalists can only speculate about why he denied her the position. If you ask Estrich or reporters who cover the courts, however, she was denied because of her gender.

When the Supreme Court first opened its doors in 1789, justices and clerks were all white males. Recently, diversity on the Supreme Court has increased. This study will examine whether the increase in diversity on the Supreme Court has led to an increase in the diversity of the law clerks they choose. More specifically, this paper will attempt to determine if the dynamic between justices and clerks is driven by the theory symbolic representation.

As nontraditional students began entering law school classrooms and obtaining prominent law clerk positions, this once homogenous group began to diversify. In recent years, this shift of justices hiring more diverse clerks has attracted elite media attention. This study will explore the power of media attention in relation to diversity of the clerk cohort to understand the factors that impact Supreme Court law clerk diversity.

Court Clerk Diversity

In her *New York Times* article, "Women Suddenly Scarce Among Justices' Clerks," Greenhouse describes the lack of female law clerks on the Supreme Court. Greenhouse writes

that women accounted for about 50 percent of new law school graduates in 2005, yet only 7 of the 37 law clerks hired to serve on the Supreme Court were women.¹ Along with the recent decrease in females from the position, Greenhouse argues that attention must be focused on the lack of ethnic and racial diversity among the clerks. Without a diverse clerk cohort, the clerk influence on justices will be too similar and homogeneous. The body of Supreme Court clerks should be more diverse so their different backgrounds and experiences may offer justices alternative interpretations of a case. By providing justices with alternative ways of viewing a case, clerks can help justices flesh out the details of their decisions. This process will ultimately lead to the creation of a Supreme Court opinion that encompasses multiple interpretations.

In her *Slate* article “Is There a Major Girl Crisis in Supreme Court Hiring?” Dahlia Lithwick provides commentary on Greenhouse’s *New York Times* article. Lithwick writes that what Greenhouse’s article lacks is an answer to why Justice Scalia has only hired two women out of 28 clerks in six years.² When justices are asked questions regarding the lack of diversity among the clerk cohort, they justify their selections by stating that they chose the most qualified individuals to fill the available positions. Lithwick is critical of this answer, scrutinizing the extensive criteria used in the selection process of clerks. Lithwick argues that the reason why there are so few females in clerk positions is because there is a lack of women at the top of elite law school classes, and a shortage of women clerking for feeder judges. This gender discrepancy is a problem. Gender inequalities arise in the judiciary when judges and Supreme Court justices refuse to consider the applications of individuals outside of the homogeneous pool of male candidates. Greenhouse and Lithwick’s perspectives are very specific in that they examine the

¹ Greenhouse, Linda. "Women Suddenly Scarce Among Justices' Clerks." *Nytimes.com*. The New York Times, 29 Aug. 2006. Web. 12 Mar. 2014.

² Lithwick, Dahlia. "Is There a Major Girl Crisis in Supreme Court Hiring?" *Slate.com*. Slate Magazine, 30 Aug. 2006. Web. 12 Mar. 2014.

level of clerk diversity in 2005. Given the increased number of female justices from one in 2005, to three in 2010, one may question whether this change has also led to an increase in gender diversity of clerks.

The journalistic accounts of law clerk diversity is further explored by scholarly research on the importance of symbolic representation within politics. In “Politics or Presence? Congresswomen and Symbolic Representation,” Jennifer L. Lawless discusses whether the presence of female officeholders affects constituents’ evaluations of their members of Congress, levels of political efficacy, and propensity to participate politically. Lawless argues that “male dominated government suggests to women citizens that the political system is not fully open to them.”³ Lawless’ argument is applicable to the phenomenon of justices as agents of the people. The fact that women are high ranking members of the Supreme Court demonstrates that the judiciary is more “open to” females. People may begin to envision themselves in roles of judicial power because they have seen others of a similar race or gender excel in those positions.

More specifically, Lawless writes, “Women in public office stand as symbols for other women, both enhancing their identification with the system and their ability to have influence within it.”⁴ When minorities see others similar to themselves “succeeding in the political system – a cynical, arduous, male-dominated arena – then...they will believe that they can enter other realms of society in which [they] have previously felt intimidated.”⁵ The presence of successful women in politics may instill more confidence in other women and “inspire [them] to overcome patterns of traditional socialization.”⁶ The theory of symbolic representation holds true in

³ Lawless, Jennifer L. "Politics of Presence? Congresswomen and Symbolic Representation." *Political Research Quarterly* 57.1 (2004): 81-99. *JSTOR*. Sage Publications, Mar. 2004. Web. 18 Sept. 2014.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

politics, specifically when applied to the judiciary. Justice O'Connor legitimized the opportunity for women to envision themselves on the Supreme Court by serving as an agent of change. Due to this, her work on the Supreme Court could have inspired women to seek out clerkship positions.

Similarly to Lawless, Petra Meier and Emanuela Lombardo analyze the impact of discursive politics on the development of a theoretical framework of symbolic representation in their scholarly article "Towards a New Theory on the Symbolic Representation of Women." Meier and Lombardo argue that the function of symbolic representation is to "constitute identity to create or foster legitimacy."⁷ Meier and Lombardo are correct in that when minority agents of judicial power excel in their positions on the court, other minorities may view their work as legitimate. This fostering of legitimacy on the Supreme Court may encourage minorities to seek out positions as clerks, because they can identify with members of their racial or gender group who are excelling on the court. The perspective offered by Lawless, Meier and Lombardo may lead one to question if the theory of symbolic representation is exemplified in the relationship between diversity on the bench and diversity in the clerk cohort.

Ward and Weiden examine the clerk cohort more closely in their text, *Sorcerer's Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. The authors argue that while justices wield formal power to decide important legal and political issues, clerks are also influential in the decision-making process of cases. Serving alongside the nation's highest leaders, modern clerks are "trusted decision makers" deciding political and legal matters which

⁷ Meier, Petra, and Emanuela Lombardo. "Towards a New Theory on the Symbolic Representation of Women." *www.papers.ssrn.com*. Social Science Research Network, 2010. Web. 18 Sept. 2014.

stand as “precedence for the rest of history.”⁸ Ward and Weiden’s textbook is essential to the study of the clerkship because it was the first to systematically examine factors in clerk selection through quantitative research. Specifically, the authors find that when selecting clerks, justices may contemplate controversial factors such as “sex, and race.”⁹ They gathered data by surveying past Supreme Court law clerks. In regard to gender, the authors found that between 1944 and 1976, only 18 female law clerks were hired to the Supreme Court.¹⁰ When describing the influence diverse clerks have on justices, Ward and Weiden note that Ninth Circuit Court of Appeals Judge, Alex Kozinski, prefers hiring clerks with diverse backgrounds and experiences. These clerks challenge his views, and help him to develop a more well-rounded opinion. Diversity within the clerk cohort is imperative to decision-making that considers multiple points of view. A lack of clerk diversity is troubling because it may prevent a justice from considering other interpretations on a case. Insofar as gender goes, however, it is possible that the diversity of the Supreme Court impacts clerk diversity. The perspective offered by Ward and Weiden’s textbook has led to the development of the hypothesis as justice diversity increases, so too does clerk diversity, in regards to an individual’s gender.

In contrast to this hypothesis, other scholars have theorized that justices’ hiring practices are influenced by elite media attention. Outside of elite media members, the majority of news reporters have little access to the Supreme Court. Video recordings are not allowed during court hearings, and the media is not permitted access when justices deliberate their decisions in conference. Given the public’s minimal access, people are at a distance from court proceedings. Since the public depends on the elite media for coverage, there is a link between the way in

⁸ Ward, Artemus, and David L. Weiden. *Sorcerers’ Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. New York: New York UP, 2006. Print.

⁹ *Ibid.*

¹⁰ *Ibid.*

which the court is portrayed in the media and the public's opinion of the institution. If news coverage is negative in nature, for instance, the public may be more critical of the court because they are basing their opinion of that report.

Media contributions made by Greenhouse, Lithwick and other elite news reporters are so persuasive that commentators have theorized that their reports may influence the decision making process of Supreme Court justices. D.C. Appeals Court Judge Laurence Silberman popularized this theory, called "The Greenhouse Effect," which refers to the phenomenon of federal judges whose rulings are guided partly by their desire for adulation from elite legal reporters, such as Greenhouse. In a speech to the Federalist Society, Silberman said "It seems that the primary objective of the *New York Times*' legal reporters is to put activist heat on recently appointed Supreme Court Justices."¹¹ This statement suggests that while hearing cases, justices become interested in public support and positive news coverage. This interest may lead justices to slightly alter their views to that which would be favorable to the media. In regards to the judicial appointment process, legal scholar Robert Bork recently said "it's hard to pick the right people in the sense of those who won't change, because there aren't that many of them...you tend to get people who are wishy-washy...and those people tend to drift to the left in response to elite opinion."¹² The fact that justices' behavior could be impacted by media coverage, as Silberman and Bork argue, suggests that the court is not insulated from public opinion. Rather, these arguments suggest that the court follows elite media coverage and that the Greenhouse effect is a salient phenomenon to justices' decisions making process. The view

¹¹ Tolchin, Martin. "Press Is Condemned By a Federal Judge For Court Coverage." *The New York Times*. The New York Times, 14 June 1992. Web. 04 Apr. 2015.

¹² Lithwick, Dahlia. "The Souter Factor." *www.Slate.com*. Slate, n.d. Web. 04 Apr. 2015.

offered by these sources lead to the hypothesis that as media attention on clerk diversity increases, the level of diversity within the clerk cohort will also increase.

Another influential text to this study is *Congress as Public Enemy*, by John R. Hibbing and Elizabeth Theiss-Morse. Hibbing et al. find that the “public traditionally has substantially more confidence in the Supreme Court.”¹³ Specifically, their research shows that the mean percentage of confidence in the Supreme Court is 30, with a range from 22 to 50. Conversely, the mean percentage of confidence in Congress is just 17, with a range from 8 to 42. These results support the notion that there is “extra confidence placed in the Supreme Court.”¹⁴ The high level of confidence in the court suggests justices should not be concerned with negative media coverage when making decisions because they can be confident that the public will continue to support their decision. This confidence suggests that justices are insulated from media influences. The perspective from Hibbing et al. led to the hypothesis that there is no relationship between elite media coverage and justices’ decision making process, such that increased elite media coverage does not alter the level of diversification of the clerk cohort.

Hypotheses

The following research aims to determine if there is a relationship between the diversity of the Supreme Court and the diversity of the clerk cohort. The level of diversity of the Supreme Court law clerk cohort each term is the dependent variable of this study. This research will examine the impact of diversification of the Supreme Court on the diversity of the law clerk cohort. More specifically, the first hypothesis is that a positive relationship exists between the

¹³ Hibbing, John R., and Elizabeth Theiss-Morse. *Congress as Public Enemy: Public Attitudes toward American Political Institutions*. Cambridge: Cambridge UP, 1995. Print.

¹⁴ *Ibid.*

level of diversity within the clerk cohort and the Supreme Court, such that a more diversity Supreme Court will hire more diverse law clerks. This hypothesis is based off the theory of symbolic representation.

Political scientists theorize that minority political elites contribute symbolic benefits to society. The theory of symbolic representation, developed by political scientist Hanna Pitkin, is “representation of the principle (the one who is represented) through an agent (the one who is representing), to which a certain representative meaning is attributed.”¹⁵ The significance of symbolic representation resides in the ability of the agent to “evoke or suggest...belief, feeling and value related and appropriate to the principle.”¹⁶ The representative power of the agent is in “what [he or she] is able to evoke” in society.¹⁷ The appointment of Sandra Day O’Connor, the first female Justice elevated to the Supreme Court, for example, may have encouraged other women to envision themselves in clerkship positions. In addition to elevating the status of others, the presence of women in positions of power may impact the behaviors of their colleagues by encouraging them to hire more diverse clerks. An increase in diverse clerks over time would indicate the existence of symbolic representation.

The appointment of diverse justices like O’Connor, and others, to the judicial sphere has attracted media attention. However, there are two competing theories on whether this media attention impacts the behavior of justices. The Greenhouse phenomenon of justices being attentive to media coverage predicts that their behavior may be influenced by their desire for favorable press coverage. Conversely, Hibbing et al. argue that the court is insulated from

¹⁵ Meier, Petra, and Emanuela Lombardo. "Towards a New Theory on the Symbolic Representation of Women." *www.papers.ssrn.com*. Social Science Research Network, 2010. Web. 18 Sept. 2014.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

pressures by the media, and thus their behavior is not altered by increased attention. Therefore, two competing hypotheses are derived from the literature. First, if the Greenhouse phenomenon exists, there will be a positive relationship between media coverage and clerk diversity, such that increased media attention to diversity of Supreme Court law clerks will lead to more diverse clerks hired. If, however, Hibbing et al. have correctly described the relation between justices and the media then the Supreme Court is insulated from elite media attention and their decision making is not influenced by pressures from the media.

Data and Methodology

Diversity was originally conceptualized as differences in race and gender. Due to data availability, justices and clerks are only diverse if they are not male. Traditional justices and clerks are males, meaning that nontraditional individuals are those who are female. Media attention is conceptualized as references in different types of newspapers including the following: magazines, journals, law reviews and law journals, web-based publications, news transcripts and newsletters. A greater number of clerk references in one year, compared to the previous year, signifies an increase in media attention.

The unit of analysis in this study is the same for all hypotheses. The study will utilize a group level of analysis in order to test the level of clerk cohort diversity each term. Using this level will allow for better understanding of how the level of justice diversity and media attention affect the level of diversity within the clerk cohort. Thus, the unit of analysis is the clerk cohort.

The following research aims to determine if there is a relationship between the level of diversity of the Supreme Court bench and the clerk cohort hired. The level of diversity of the Supreme Court law clerk cohort for a specific year is the dependent variable. Abovethelaw.com was used to identify the percentage of female clerks from 1978 to 2014. The identity of every

clerk was confirmed by searching Google for news articles, legal resumes and law firm websites that provided detailed information about that specific individual.

A Google search was completed to identify various independent variables, all of which consist of data from the 1979 to 2014 term. The first independent variable is the percentage of female Supreme Court justices. The gender identify of these justices were confirmed by additional Google searches. The diversity of justices was coded, meaning that the level of diversity for each individual is represented by a numerical value. A score of “0” indicates a court of all men and no diversity for a specific year. A “9” is given to a year if the court has no men and is completely diverse or nontraditional. For example, 2008 would be given the score of a “1” because the bench consisted of all men, except for Justice Ruth Bader Ginsburg. The second independent variable notes the percentage of justices who hired at least one female law clerk each term. The third independent variable is the median ideology of the Supreme Court each year. The fourth independent variable of this study is the percentage of women enrolled in law school from 1979 to 2014.

In regards to the hypothesis on media attention, a LexisNexis search was completed. LexisNexis is an electronic database for legal and journalistic documents. The first phrase entered into the search engine was Supreme Court clerks. This search was made in order to identify when law clerks began receiving attention by the media, and how the amount of media coverage has changed over time. One out of every ten articles was checked in order to verify the reliability of the LexisNexis search. The next search made narrowed the focus to only articles on Supreme Court clerk diversity. This search was verified in the same manner detailed above. The last search focused on media attention to the gender diversity of Supreme Court clerks. The LexisNexis search was necessary in order to chart the progression of media attention on clerk

diversity. The fifth independent variable is the media attention to clerks regarding gender diversity. This attention was lagged two years in order to represent the residual impact that increased media attention may have on justices' hiring practices. This lagging is necessary in order to have a practical representation of the media's influence on justices. Justices, for example, hire their clerks the summer prior to the next term in October. If numerous articles were published on the lack of female clerk diversity by elite media sources months after a justice has already hired his clerk cohort, he or she has no way of altering the diversity level of that group. If the justice was impacted by the media attention, he or she may not be able to demonstrate that in their hiring practices until the following term. Thus, it was necessary to lag the variable in order to demonstrate this reality. A strong, statistically significant relationship between media attention and clerk diversity would support the Greenhouse hypothesis. Conversely, a weak relationship that is not statistically significant would support the Hibbing et al. hypothesis.

The level of measurement for all variables, both dependent and independent, is ratio. Ratio level data assumes that the variables have a numerical value. Ratio level data also possesses a meaningful, or non-arbitrary, zero value. The level of media attention, for example, is a ratio value because the number of articles published can vary greatly each year. Line graphs were created to represent the relationship between justice and clerk diversity, and the trend of elite media attention on clerks from 1979 to 2014.

The appropriate analysis for ratio level data includes bivariate correlation measures of association and linear regressions, both of which were computed in SPSS. Bivariate correlations were computed to determine the strength and direction of correlation. A correlation level of -1 indicates a strong, perfectly inverse correlation between two variables, while a 1 conveys a

strong, perfectly positive correlation. This measure of association was conducted to see the correlation between the dependent variable and the independent variables. Linear regressions were also examined to isolate the effect of one independent variable on the dependent variable, while controlling for the effects of other independent variables. In regards to this study, linear regression will be used to predict how each independent variable effects the percentage of female clerks hired each term, while controlling for other independent variables. The significance level of the bivariate correlation and linear regression measures will be analyzed to see the statistical significance of the relationship. P-value levels less than 0.05 reveal statistical significance for the directional hypotheses tested in this investigation. When the significance level reveals a p-value greater than 0.05, there is no statistical significance between the two variables. The results of these tests are discussed in the following section.

Results

The percentage of female clerks hired from 1979 to 2014 was examined first, and is represented in figure 1 of the appendix.

(“Figure 1 about Here”)

This figure depicts the upward trend of clerk diversity since 1979, when only 44% of the Supreme Court hired at least one female law clerk. In 1986, the number of justices who hired at least one female clerk increased to 77%. This upward trend culminates at its highest point in 2011, when 100% of the court hired at least one female clerk. This figure is important because it shows the growth of women in the clerk cohort. The media’s attention to clerk diversity was studied next. The trend of this variable, from 1979 to 2014, is represented in figure 2 of the appendix.

(“Figure 2 about Here”)

This figure shows the upward trend of media attention on clerks since the first article on clerks was published in 1980. The amount of media attention on clerks during this time was very limited. Only two news articles were published on the topic of clerks and clerk diversity. As reporters began to understand the importance of clerks, and the influence they have on justices' decision-making process, the number of articles published on the cohort increased. This increase reaches its peak in 2014, when 160 articles were published on clerks.

The bivariate correlations revealed two strong relationships, out of the four hypotheses measured.

(“Table 1 about Here”)

The correlation between the percentage of women enrolled in law school and the percentage of women in the clerk cohort yielded a strong, positive correlation of 0.729, and was statistically significant. Thus, there is a relationship between the number of women enrolling in law schools, and the percentage of women hired. The second statistically significant relationship was between the percentage of female justices and the percentage of female law clerks hired. When measured, the bivariate correlation revealed a measure of 0.67, suggesting that there is a relationship between justice diversity and clerk diversity, such that as the Supreme Court becomes more diverse, so too will the clerk cohort. The relationship between media attention and clerk diversity was statistically significant, but yielded a value of 0.473. This suggests that while the relationship is positive and significant, it is weaker than the relationships detailed above. Thus, there is a moderate relationship between increased media attention on the gender diversity of clerks, and the percentage of female clerks hired. Finally, the measure between median court ideology and the percentage of female clerks hired revealed a value of -0.153. This value suggests a very weak, inverse relationship. Regardless of its limited strength and inverse

direction, the relationship was not statistically significant. Thus, there is no relationship between the court's median ideology and the percentage of female clerks hired.

After evaluating the relationships through bivariate correlations, linear regressions were completed to reveal the impact of each independent variable on the dependent variable.

(“Table 2 about Here”)

Knowing the independent variables account for 49.6 percent of the differences in clerk diversity. Thus, the independent variables account for approximately half of the factors impacting clerk diversity. In addition, the F test reveals that the linear regression model is statistically significant.

The diversity of the court was evaluated first to understand its impact on clerk diversity. The linear regression is statistically significant and reveals that with every additional woman appointed to the court, we should expect to see two additional female clerks hired. These results support the first hypothesis that an increase in justice diversity leads to an increase in clerk diversity.

The next regression tested the Greenhouse hypothesis against the Hibbing et al. hypothesis. The results show that there is no statistically significant relationship between the number of articles written about female clerk diversity and the actual diversity of the clerk cohort. The Hibbing et al. hypothesis was supported, and as such, there is no relationship between media attention to clerk gender diversity and the number of diverse clerks hired.

The third independent variable evaluated was the percentage of females enrolled in law school. This regression was statistically significant and reveals that when female enrollment increases by 3 percent, we should expect one additional female law clerk hired. The final independent variable evaluated was the median ideology of the Supreme Court each term. The

regression shows that there is no statistically significant relationship between the median ideology of the court and clerk diversity.

Conclusion

Given the results, we can conclude that the first hypothesis between justice and clerk diversity was statistically significant and the relationship was strong and positive. Thus, we can infer that justice diversity impacts clerk diversity, such that an increase in the number of female justices on the court will lead to an increase in the number of female clerks hired. The theory of symbolic representation may play a role in this relationship. When female justices were appointed to the Supreme Court, they legitimized the opportunity for women to envision themselves in positions of judicial power. The work of female justices may have inspired other women to seek out clerk positions on the Supreme Court. The addition of female justices may also impact the hiring processes of other justices, such that they may be more inclined to hire a female clerk because of the existence of their female colleague.

In addition, the results from this study revealed that media attention does not impact clerk diversity. The Greenhouse hypothesis was only moderately correlated and was not statistically significant. Thus, there is no relationship between media attention and clerk selection, such that an increase in media attention on clerk diversity does not affect the level of diversity within the clerk cohort. In regards to the media's influence on clerk hiring practices, the results support the Hibbing et al. hypothesis. When discussing the hiring of female clerks, justices do not take elite media attention into account when making their decisions. The results of this study support the claim that Supreme Court justices are insulated from increasing levels of media attention when it comes to the clerk hiring processes. The public can be confident that justices are making decisions based on their own views and beliefs, rather than that of the media and public opinion.

This study supports the idea that Supreme Court justices do not base their decisions off a desire for favorable press coverage. Thus, so far as the clerk hiring processes goes, Supreme Court justices are more insulated from public opinion and elite media pressure than Judge Silberman, and other proponents of the Greenhouse Effect, would like to argue.

Due to data limitations, this study evaluated diversity in regards to gender. Further study on the diversification of the clerk cohort could reconceptualize diversity to include racial minorities. This more comprehensive measure on clerks captures a holistic view of diversity. Given the importance of women enrolled in law school, future study could also refine the female law school enrollment variable to include the graduation rates of women from elite and Ivy League law schools. This is especially important in the study of clerks because the vast majority of Supreme Court law clerks graduate from elite law schools. Finally, a measure of media attention could be developed to include specific content analyses of LexisNexis news articles. This step would serve as a check on the validity of the news sources. Thus, given these potential avenues of research, the study of clerk diversity may be expanded in the future.

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Appendix

Figure 1:
Percent of Court that Hired At Least One Female Law Clerk by Term, 1979-2014

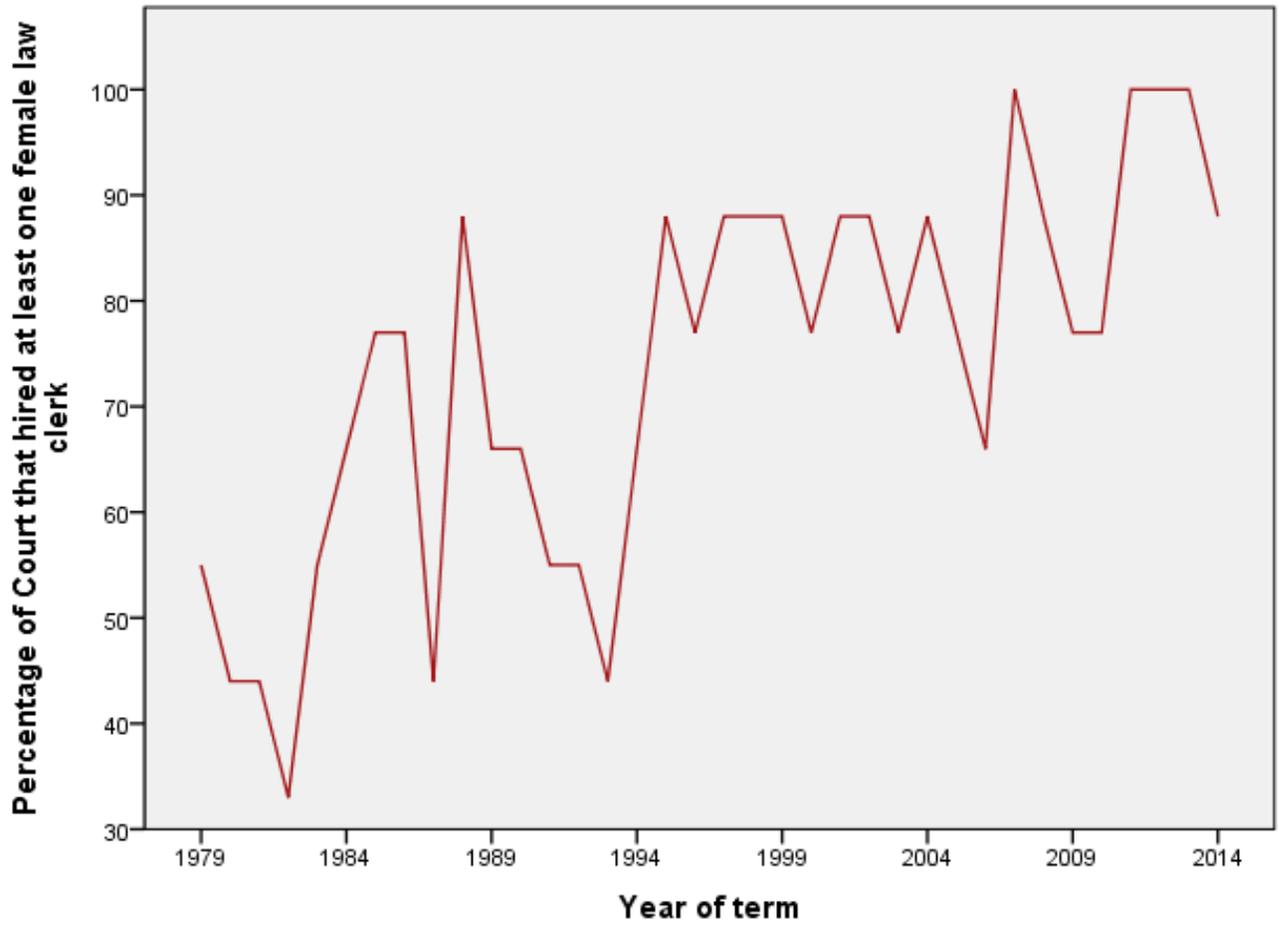


Figure 2:

Percentage of Media Attention to Clerks by Term, 1979-2014

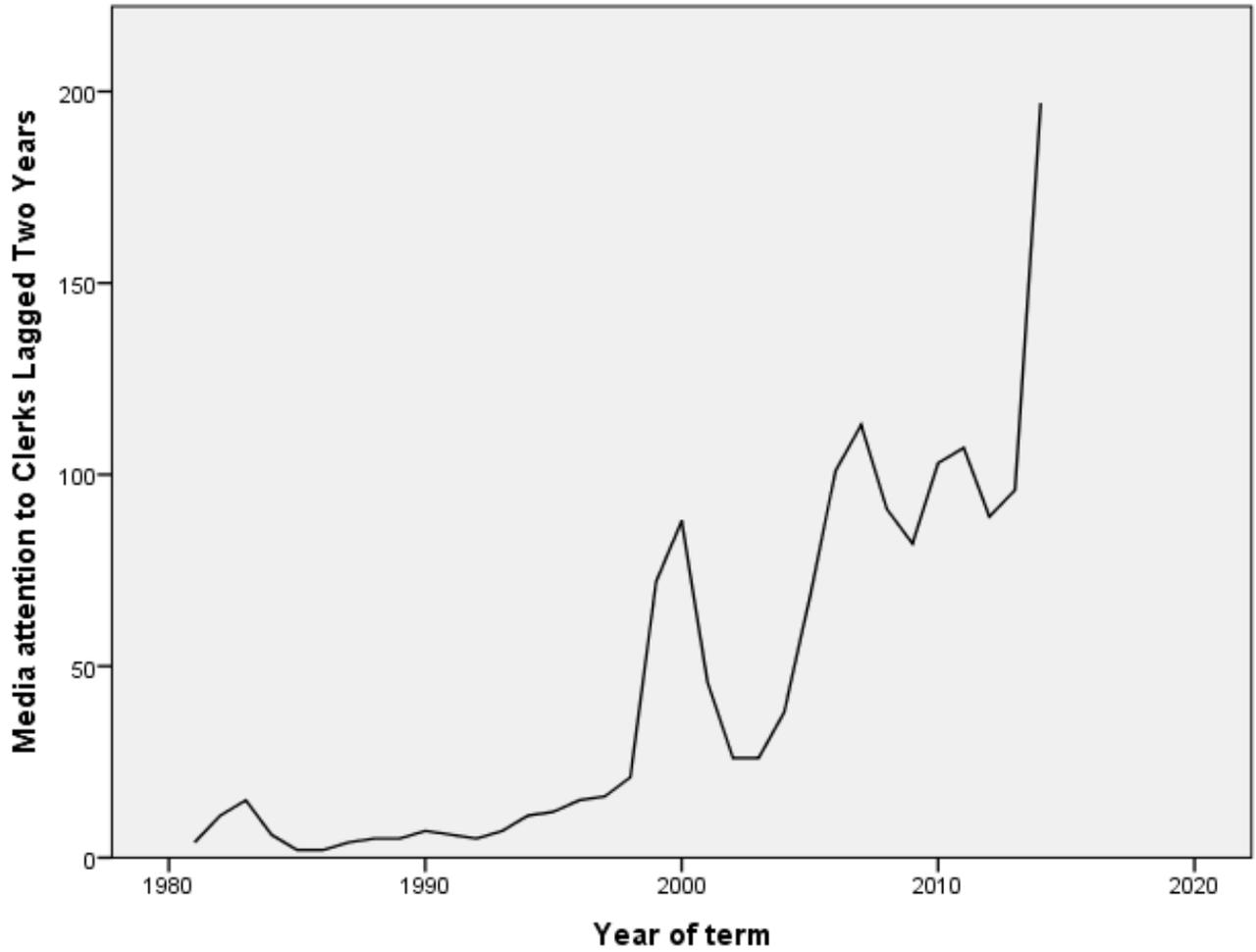


Table 1:

Bivariate Correlations between United States Supreme Court Law Clerk Diversity and Key Indicators by Term, 1979-2014

	Percent of women enrolled in law school	Percent of female justices	Media attention to clerk, gender diversity	Median ideology of the court
Percent of female clerks	0.729**	0.669**	0.473**	-0.153

**p < 0.01; (one-tail test)

Table 2:

Determinants of United States Supreme Court Law Clerk Diversity by Term, 1979-2014

Variable	Clerk diversity (Standard error)
Percent of women enrolled in law school	0.847* (0.419)
Percent of female justices	0.449* (0.188)
Media attention to clerk gender diversity	0.195 (1.457)
Median ideology of the court	-8.760 (4.384)
Adjusted R ²	0.496
F	7.291
Significance of F	0.000

*p < 0.05; (one-tail test)