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Who Runs the World: The Impact of the Gender of Clerks on the Legal Profession

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Who Runs the World: The Impact of the Gender of Clerks on the Legal Profession

By

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Table of Contents:

List of Figures.....	4
Abstract.....	5
Introduction.....	6
Literature Review.....	11
Methodology.....	29
Results.....	40
Conclusion.....	56
References.....	59
Appendices.....	62

List of Figures:

Figure 1.....	40-41
Figure 2.....	49

Abstract

This paper investigates the role of gender on law clerks from the federal appellate clerks. There has been significant scholarship on the importance of the gender of judges and on the role and influence of law clerks; however, to this date there has been no analysis of how the gender of law clerks may or may not influence the clerkship experience. This honors thesis seeks to address that question and shed light on important aspects of the federal judiciary and the legal profession. I have approached this inquiry through descriptive and qualitative analysis, focusing on law clerks from this millennium. I analyze the gender distribution of term clerks and career clerks since 2000 to determine how well women are represented in these positions, and how that representation may have changed. In addition, I have also conducted interviews with former clerks to hear about their experiences and probe their perception about the clerkship. These clerks represent a number of circuits and clerked for judges who were appointed both by Republican and Democratic presidents. In addition, the interview subjects were evenly split between men and women. Thus, they are, for the most part, representative of appellate clerks in recent years. I discovered important insight both from explicit and implicit questions about gender. Women and men term clerks have very similar experiences because of the nature of the job. However, career clerks, who are overwhelmingly women, have a more “feminine” role.

Introduction:

Women in government are no longer unusual in the American political system. Women walk the halls of almost all levels and areas of government, including city councils, mayorships, governors' mansions, state legislatures, the United States Congress, various cabinet departments, and all levels of federal, state, and local courts. Women are ambassadors, soldiers, economic advisors, strategists, and candidates. The increase of women in these positions raises questions about their career trajectories and the impact they will have on the career trajectories of young women who are just entering the professional sphere. Moreover, it is also important to consider the policy implications of more women in positions of power. Finally, it is also important to ask how the new generation of men and women in the professional legal field are treated and the extent and form that institutionalized sexism may still play a role. Significant literature has been dedicated to women in legislative positions in the United States, focusing on the decision to run for office, sexism in campaigns, women's strategies as legislators, and the effects on policy. Moreover, there has also been intense debate on the barriers to women as executives, particularly in the aftermath of the 2016 presidential election, which revealed how deeply ingrained misogyny is in American culture; with multiple women competing for the Democratic nomination in 2020, there will certainly be more debate in the media about sexist bias, "women's issues," and gender dynamics more broadly. Gender analysis, both in the academic and non-academic worlds, focuses on these two branches of government, executive and legislative, because people believe, or pretend to believe, in

the myth of the independent judiciary. However, it is important to examine gender issues in the judiciary as carefully as in the other two branches. While nominally acting as impartial vehicles of the law, emulating the biblical Solomon, judges are human beings and are thus influenced by personal experience, internal motivators, and ingrained biases. Given the importance of the judiciary in not just interpreting but creating American public policy, it is vital that scholars study and analyze how gender affects the judges and the courts. Thus, this paper will investigate how gender affects the clerkship experience at the federal appellate level, the implication of a gendered clerkship experience on the legal profession, and the importance of gender among career clerks.

This paper will draw on scholarship on many levels of state and federal judiciaries; however, my analysis will pertain first and foremost to the federal appellate courts. There are several reasons for this focus: firstly, there is a significant corpus of scholarship on gender and the United States Supreme Court and on Supreme Court clerks. While there is currently little literature on the impact of gender on Supreme Court clerks, scholars have focused heavily on the role and responsibilities of those clerks. Thus, my research on appellate court clerks will strengthen a smaller body of research. Furthermore, while the Supreme Court receives much more media attention, it only weighs in on a tiny fraction of federal cases. The vast majority of federal issues are resolved at the appellate level. Therefore, in order to elucidate dynamics that are significant to the vast majority of federal case law, it is imperative to understand the unique mechanisms of the circuit courts. In addition to ramifications for judicial politics

and public policy, scholarship on federal appellate clerks also helps to frame important issues in the legal profession and the career paths of young, elite lawyers. In a given year, there are only a few dozen Supreme Court law clerks, with each of the nine Justices employing three to four clerks. In contrast, there are hundreds of appellate clerks a year, working for more than 200 federal appellate judges. Thus, these clerks offer a more varied sample, allowing for a more in depth analysis. Furthermore, understanding the role of gender for appellate clerks also offers more understanding of the legal profession, as there are simply more former appellate clerks than former Supreme Court clerks in the legal profession. Taken together, an analysis of gender among federal appellate clerks reveals important new insight both about the process of jurisprudence in America and the status of women in the legal profession.

The study of law clerks is important to understanding both the judiciary and the elite levels of the legal profession. In order to fully understand the judicial process, it is imperative to understand the role and influence of law clerks. Law clerks are an essential part of the American court system: given the magnitude and complexity of litigation before the courts, it would be impossible for any judge to devote the necessary legal research or writing to each and every case. Because of this, most judges employ young law school graduates to perform the time consuming and often tedious preparation work that must occur at all stages of a case. Law clerks are the staff behind the scenes, enabling the courts to function efficiently. Moreover, while their influence over judicial outcomes is disputed, law clerks nevertheless fill a unique role within the court system, acting at

times as the scribes, librarians, ghostwriters, and editors behind a judge: they summarize cases, offer questions for the judge to ask advocates, draft opinions, and suggest outcomes. It is impossible to understand the federal judiciary, particularly the appellate courts, without understanding the enormous responsibility that falls on clerks. Moreover, it is also important to understand clerks' position as new members of the field of law. By studying the how gender affects the clerkship experience, which is often one of the first professional legal experiences for high achieving young lawyers, it is possible to understand to a greater degree the roles of women in the law.

While this research will examine the experiences of men and women as clerks for federal appellate judges, it is imperative to briefly consider two important factors in any study of identity: essentialism and intersectionality. Essentialism is an ideology that holds that women and men are biologically programmed to behave in certain ways and are naturally predisposed to certain roles and professions. I reject this belief absolutely. Similarities between the actions, beliefs, and reflections of women are not a product of a genetic or biological inclination, but are rather the result of a shared experience in the culture of American patriarchy. Commonalities arise because of the ubiquitous ways institutional and cultural misogyny are enforced. Furthermore, I recognize that the very designation "woman" defines the group both too broadly and too narrowly. The theory of intersectionality teaches that identity vectors are inherently linked, inextricable, and mutually influential. Thus, it is impossible to experience one's gender identity without also experiencing race, sexual orientation, ability, religion, and socioeconomic status.

While I will study “women” and “men” in this paper, it is imperative to recognize that interview subjects experience the world through the confluence of their identities.

Literature Review:

Clerks:

As the men and women behind the curtains of the judiciary, clerks have been the subject of scholarly scrutiny. While the responsibilities and influence of clerks vary across chambers and have changed over the years, these young lawyers are nevertheless a crucial part of American jurisprudence. A significant amount of this research has focused on the United States Supreme Court. As the most visible court in the country, this is not surprising. Understanding the characteristics Supreme Court clerks and their relationships with justices, however, is illuminating. Both Supreme Court justices and their clerks often work at the appellate level before reaching the high court. Moreover, while legal issues may vary between federal and state courts, it is also important to evaluate literature concerning the role of clerks at both federal and state appellate and supreme courts.

However, it is critical to note a few key differences between Supreme Court clerks and appellate clerks. Firstly, because Supreme Court clerks in recent years are almost exclusively former appellate clerks, Supreme Clerks tend to be more older and more experienced (Wasby 2006). Furthermore, because the Supreme Court is held in one building, the clerks of all the justices are better able to develop an informal network of clerks among themselves. Finally, and most importantly, appellate courts are not empowered to set their own dockets as freely as the Supreme Court may. As a result, appeals court clerks do not have to prepare memoranda with recommendations on

whether or not to hear a case. Conversely, however, appellate clerks are responsible for more cases, as each judge hears more cases than the Supreme Court. Nevertheless, it is important to understand data concerning law clerks at all levels of jurisdiction.

Furthermore, it is also important to understand the difference between term clerks and career clerks. The majority of judicial clerks are recent law school graduates and typically serve one year terms. In contrast, a few judges also maintain career clerks. Most judges with career clerks employ only one, who leads the term clerks. However, some judges' chambers are composed exclusively of career clerks, with no term clerks at all. As the name implies, career clerks stay on in a judge's chambers for many years, taking on a somewhat managerial role, and tend to be somewhat older than the young term clerks. For the purposes of this paper, unless otherwise noted, the term "clerk" will apply to both career and term clerks.

Scholarly focus on clerks begins before they have even been hired. In "The New Market for Federal Judicial Clerks," Avery, Jolls, Posner, and Roth explore the processes by which judges choose clerks (2007). The clerkship hiring system was reworked in 2002 and 2003 to be more fair to both applicants and judges. New guidelines created start dates for judges to begin interviewing candidates and then to begin making offers. Moreover, the new guidelines encouraged hiring third year law students rather than second year law students. The authors found that, while judges tended to like these new guidelines, the rate of compliance was still fairly low. In particular, hiring third year law students gives the judges an additional year of academics by which to evaluate applicants. However,

judges continued to interview and make soft offers before official start dates. The authors express concern that noncompliance from some may make it necessary for all judges to ignore the guidelines, fearing that the best candidates will no longer be available if they comply with the non-binding rules. Furthermore, while it is possible to have sustained equilibrium despite levels of nonadherence, there are concerns that it could lead to market segmentation. It is possible that early start chambers and normal start chambers might segment along some type of line, such as, as the authors suggest, political ideology or, as I suggest, gender. In addition, candidates were expected to accept or decline offers very quickly, in one case within 35 minutes. This may pressure candidates to accept whichever offer they receive first, leading to reduced compatibility between judges and clerks.

The importance of good judge-clerk matches is itself well documented. While each judge has his or her own preferences, there are some commonalities that most appellate judges look for. Jonathan Michael Cohen identifies the three most important qualities of a good clerk are generally the pedigree of the law school the clerk attended, the grades the student received at that law school, and whether the candidate was on law review (2002). Ward and Weiden argue that among Supreme Court clerks, candidates must have excellent grades, law review experience, and have attended an elite law school to even have a chance at being hired (2006). Crucially, candidates apply to Supreme Court clerk positions before even graduating law school. In many cases, they argues, future Supreme Court clerks will apply to the Supreme Court after their appellate clerkship (2006). As a result, the overwhelming majority of Supreme Court clerks are

former appellate clerks. Given this, the timing of such the applications indicates that similar criteria are necessary for both. Ward and Weiden argue, in fact, that “court of appeals judges, therefore, have come to provide an important screening function,” by selecting the best and brightest applicants, whom the Supreme Court justices can winnow even further (2006, 68). While each components is crucial, personal biography alone is not together sufficient to explain clerk hiring decisions.

Personal connections are hugely important: some judges rely heavily on recommendations of current clerks or law professors in their selection process. The recommendation of a lower court judge or prestigious law professor can be imperative to distinguish an applicant from the crowd. Moreover, judges are often looking for the nebulous “fit” of a clerk, a level of compatibility that the judge believes will suit their chambers. Compatibility is particular importance given the nature of the relationship between judge and clerk. Judge Patricia M. Walds describes “[t]he judge-clerk relationship is the most intense and mutually dependent one [she] know[s] of outside of marriage, parenthood, or a love affair,” (Peppers, Giles, Tainer-Parkins 2014). Given this intensity, it is paramount for judges to recruit and hire clerks with whom they can work productively. Critically, both networking and vague criteria such as personality fit can be influenced by gender. Furthermore, many judges prefer candidates with a certain political or judicial philosophy, often aligning with their own. In their investigation of state supreme courts, Swanson and Wasby affirmed this process, finding that judges themselves tended to seek candidates who aligned with their judicial ideology, reducing

disagreement between the judge and his or her clerks (2008). Judges often seek out clerks whose philosophies align with theirs because they rely so heavily on their work to manage their dockets.

Clerks perform vital services to aid judges. Cohen identifies four main duties of clerks: 1) research cases and prepare bench memoranda 2) prepare case material 3) serve as a “sounding board” and 4) assist in writing opinions (2002). While every judge uses his or her clerks differently, these four main tasks are all critical across appellate courts. Because a clerk has fewer cases than a judge, he or she can get to know them better and talk through the various issues and sides with the judge. In addition, clerks are often the only people with a legal background judges with whom judges are legally or ethically allowed to discuss cases. However, clerks generally help the judge hone their argument rather than change it. While most judges want their clerks to argue with them, clerks tend to choose their battles, saving political capital to argue with the judge in only a few cases. Moreover, in most chambers, clerks wrote the first drafts, with varying levels of guidance for the judge him/herself. However, regardless of the primary author of drafts, almost all judges felt that their opinions reflected their style as well as substance. Despite perceptions to the contrary, Swanson and Wasby use principal-agent theory to argue that clerks have little incentive to sabotage or shirk their judge’s directives (2008). Instead they find that clerks have relatively little influence on the substance of an opinion but somewhat more influence in the language used. The authors used surveys sent to judges themselves to determine how often they agreed with their clerks and how often their

clerks influenced them. They found a moderate influence over the substance of the opinion but somewhat more influence over the language. Clerks had the greatest influence in the research stage of the judicial process. A significant mitigator, they found, was that judges themselves tended to screen their clerk applicants and hire those with similar judicial ideologies, reducing disagreement. This analysis is in line with other scholarship on Supreme Court clerks, which found that while clerks could influence language, they rarely affected the decision of winning litigant. This suggests congruence between state and federal court. Nevertheless, there is not consensus among scholars as to the extent to which clerks can influence the proceedings of the courts.

Particularly in the U.S Court of Appeals, clerks have taken on more responsibility as the workload for judges has increased. Cohen argues that the appellate courts have become more bureaucratized, in the sense that judges are more beholden to managerial and administrative concerns than the actual execution of jurisprudence (2002). This has occurred because not only have the number of cases before appellate judges increased, the complexity and diversity of those cases has also multiplied. Thus a judge's staff has increased to two secretaries and three or four clerks, and the judge him or herself is less involved in any individual case. As a result, clerks are highly empowered to affect the judicial process as judges may delegate the minutiae and justifications of a case. Cohen argues that because of this, clerk-written drafts are less clearly written and articulated and opinions carry less weight. These changes in bureaucracy have magnified the tendencies of appellate courts to function as what Justice

Powell called “small independent law firms” (Cohen 2002, 27). Cohen’s criticism of the reliance on clerks is not unprecedented. In a 1983 article, attorney John G. Kester decries the “invasion” of the judicial system. Condemning everything from judicial torpor to word processors, Kester expresses concern that, as the ranks of clerks grow, judges will delegate to them more power, undermining the strength and credibility of the judiciary. Kester also argues that more clerks results in longer, more complex opinions and dissents, which then themselves spawn more judicial writing in response (1983). Kester and later Cohen argue that the bureaucratization of the courts undermines the judiciary, because it seems that clerks rather than judges are driving the judicial process. The question of the extent of clerk influence, and the value of their input, is hotly contested. While few deny the importance of the clerks in preparing memos and drafts, scholars debate whether clerks actually influence judicial decision making, and, if they do, whether that influence is good.

Even after their tenure, former clerks continue to reap long term benefits in their careers. While few clerks maintain a relationship with their judge after they leave, nearly all former clerks cite the importance of the position. A study of former appellate clerks by Stephen Wasby indicates that the majority of former clerks credit the position with improving their legal skills, particularly their ability to undertake legal writing (2006). Still others refer to their intimate knowledge of court proceedings as integral to their legal practice. Finally, clerking offers opportunities for career advancement after the commencement of the position, both from the resume line as well as letters of

recommendation from their judges. Thus, clerkships are enormously beneficial to the long term careers of ambitious young lawyers. Of particular importance to this project is the issue of diversity among clerks.

In 2014, Tony Mauro revisited his own scholarship concerning diversity among Supreme Court clerks. While this article is primarily about the Supreme Court, it has interesting implications for my work. In 1998, when he published his first study, racial and gender diversity was not good. By 2014, things were better but not perfect. He found that about $\frac{1}{3}$ of SCOTUS clerks were women in the Roberts court, up from about $\frac{1}{4}$ in 1998. However, this hides the fact that, among women justices (Kagan, Sotomayor, Ginsburg), clerks were roughly evenly divided, men and women. In contrast, among dude justices, about $\frac{3}{4}$ of clerks were still men. The numbers are even worse in terms of racial diversity, especially for non Asian American minorities. Of particular interest is Mauro's description of why clerk diversity matters. Paraphrasing his colleague, he talks about how a case might seem insignificant to a white man clerk from New England, but could be really important to a woman of color in California. Clerks are now more likely to be hired after firm or executive branch experience are appellate clerking. Justices he talked to said off the record that it was the fault of the law school pipeline that Supreme Court clerks were not more diverse, but Mauro clearly argues that the systemic biases at all levels of legal training disadvantage women and minority lawyers. This analysis is bolstered by Artemus Ward's 2006 book on Supreme Court clerks, where he found that the most recent term in which no justice had a female clerk was only 1970. Moreover, he

too finds the increase of women among Supreme Court law clerks can be attributed primarily to the activism of certain justices themselves, with Justices Breyer, Day O'Connor, and Ginsburg boasting the highest percentages of women clerks (Ward 2006). Notably, all three are known for their support of women's equality in the workplace. It is not clear if this trend holds at the appellate level.

Judicial Behavior:

Much has been made of the seemingly opaque maneuvering of judges in the American judiciary. Scholars have sought to understand the social, political, and philosophical factors that cause judges to behave as they do. Because judges tend to deliberate in private, speaking only through opinion, political scientists have had to rely on both traditional empirical methods as well as theoretical frameworks. Because of this, there are several competing schools of thought that describe judicial behavior.

The first of these frameworks, judicial formalism, erases the role of the individual judge and positions the judge as mouthpieces for the court. Classical legal formalism, at its most fundamental, argues that legal decisions should be based solely on legal sources, without influence from "sources external to the law" (Cox 2002). Epstein, Landes, and Posner describe formalism as a mechanized method of jurisprudence, rather than a means of "social engineering" (2013). Formalists supposedly do not operate with a political agenda or legal goal, instead purporting to act neutrally in the application of law. Crucially, in his defense of legal formalism Cox argues that this judicial philosophy does not enable ambition in practitioners, a dubious assertion at best. Moreover even defenders

of legal formalism acknowledge that evil can be permitted by formalist judges. However, they argue that the fault of legal injustice rests on lawmakers rather than judges. If one is a strict formalist, believing that judges should rule based solely on the letter of the law, the gender of judicial clerk or judge ought not matter. However, not all scholars support this position.

Reacting to the purported apolitical philosophy of judicial formalists, academic opponents developed the theory of judicial realism. Judicial realism, and its extension to critical legal studies, seeks to view judicial behavior for what it is rather than what it perhaps ought to be (Epstein et al 2007). Max Radin, an early scholar of legal realism, argues that realist judges are those who simultaneously recognize that the cases before them are comprised of unique individuals but that those individuals' circumstances are determined in large part by recurring sequences or forces (1931). Realist judges are those that recognize "that the business of judgment is to decide between a better and a worse readjustment of the human relations disturbed by an event, and that the terms better or worse imply a valuation and a standard" (Radin 1931, 825). Thus, realists do not view themselves as neutral actors enforcing the unbiased law, but rather are self-consciously aware of the nuances and constructions evoked in legal cases.

Critical legal studies, commonly referred to as CLS or cls, developed as a left wing reaction to judicial formalism. Indeed, CLS is, according to Allan Hutchinson, an attempt to extend realism to allow room for liberal politics (1989). CLS adherents hold that law is a tool that is used to confer legitimacy and power to social structures and

hierarchies. CLS seeks to show how judges themselves, whether they admit it or not, are affected by politics in the most broad sense of the word. Hutchinson argues that “beneath the patina of legalistic jargon, law and judicial decisionmaking are neither separate nor separable from disputes about the kind of world we want to live in” (5). Thus, each and every act of jurisprudence is inescapably political and exists as a part of historical context. That judges are always political actors allows room for a political analysis of the judiciary itself; for it judges act politically, surely the clerks who research cases, argue over findings, and draft opinions also have political intentions. A crucial paradigm of American feminism is that the personal is political. Given that, the daily tasks and interactions among clerks and between clerks and judges are performances of dominant cultural norms. This project seeks to understand how the political workspace of judicial chambers is affected by gender.

While formalists, realists, and CLS adherents discuss how judges *should* act, political scientists have also developed related frameworks which help explain how judges *do* act. Segal and Spaeth, in their 1993 book *The Supreme Court and the Attitudinal Model*, develop a model for understanding how Supreme Court justices behave by studying how they have behaved. The authors contrast their model, the attitudinal model, with the so-called legal model. Critically, it is possible to see the influence of legal theorists in the development of both models. The first model, the legal model, is derived in part from formalism. According to Segal and Spaeth, the legal model claims that justices settle disputes based on one of the following justifications: plain

meaning, intent of the framers or legislators, precedent, and balancing. Citing court cases, statements by former Justices and lawmakers, and statutory content and history, Spaeth and Segal demonstrate that these methods do not accurately predict or explain judicial behavior. Instead, they argue that an attitudinal model provides a more accurate prediction and explanation for judicial behavior.

The attitudinal model holds that justices make decisions by measuring the facts of a case against their own ideology and values. Essentially “[then Chief Justice] Rehnquist [voted] the way he does because he is extremely conservative. Marshall voted the way he did because he is extremely liberal” (65). Fundamental to this is the assumption that policy-making is the primary goal of Supreme Court justices. Segal and Spaeth speak at length about the lack of accountability and the absence of a desire for higher offices among Supreme Court justices. For the purpose of this research, it is important to note that appellate judges may indeed try to position themselves for promotion to the Supreme Court and are, by virtue of Supreme Court review, somewhat more accountable for their decisions. Nevertheless, the security of their jobs and the paucity of the Supreme Court docket allow appellate judges to have similar goals as Supreme Court justices. Thus it is reasonable to expect that, appellate court judges will also settle disputes based largely on their own ideological attitudes and values.

While similar to the Supreme Court in many ways, appellate courts’ different responsibilities leads to key differences in the ways those courts function. Perhaps the greatest difference between appellate courts and the Supreme Court is in their respective

abilities to set their own dockets. Whereas the Supreme Court has total control over the cases it hears, appellate courts do not have the same control over their dockets. Moreover, appellate judges tend to hear cases in groups of three judges or, occasionally en banc. The three judge panels represent a middle ground between the single judge in federal trials and the nine justices on the Supreme Court. Some scholars argue that small-group analysis must be used to analyze judicial behavior on the appellate courts by viewing interactions between judges as occurring between individual actors with their own agendas (Cohen 2002). Nevertheless, these approaches identify the ways in which judge-judge interaction may shape the judicial political process and the emergence of ideologically grounded “voting cliques.” These studies emphasize the need for balance between autonomy and interdependence between chambers: judges must maintain some degree of independence from other chambers in order to provide their uninfluenced opinion on legal issues. However, too much independence undermines the inherently collegial nature of judicial decision making (Cohen 2002). Ultimately, despite differences in judicial philosophy, it is necessary for judicial credibility that the courts speak with one voice while still cultivating space for judicial independence. While these studies provide a crucial theoretical framework for judicial interaction, it is also important to consider the ways in which these theories are made manifest by actual judges.

Despite hearing cases together, appellate judges typically discuss cases only through limited and highly structured channels. This direct communication comes primarily in conference discussions and the circulation of proposed opinions. When they

do communicate outside of these fora, judges primarily rely on written communication, such as email. Written communications provide a documented account of the interaction, are easy to pass along to clerks, and are a convenient means of including all three judges. Outside of written communications, judges may converse by telephone or in person (Cohen 2002). In addition to the means of communication, the timing of communications is also crucial to appellate judge behavior.

Before hearing arguments, judges primarily communicate over administrative and housekeeping issues in order to develop their opinions independently. Much like at the Supreme Court, oral arguments themselves are also a means for judges to converse with each other about the issues at hand. Whether speaking directly to each other or through a lawyer, judges occasionally probe or question their colleagues' opinions. The bulk of communications between judges occurs in the conferences following oral arguments. This is the primary venue for judges to engage, question and bargain with each other. Post-conference memoranda, issued by the presiding judge immediately after the conference summarize the preliminary conclusion reached; these memoranda serve as instructions for both the writing and non-writing judges. At this point, judges work fairly independently from each other to draft the appropriate judgements (Cohen, 2002).

Gender:

In her 2001 article, Palmer discusses the history and status of women in the legal profession. One theory about the rate at which women becomes clerks is the eligibility pool theory, which suggests that there will be a delay between when women started

attending law school at higher rates and when they were professionally qualified to become judges or, in this case, clerks. However, she notes that, while (in 2001) about 40% of law school classes were women, the legal profession was only made up of about 27% women. This indicates that women are more likely to leave the legal profession, perhaps the result of a motherhood penalty. Furthermore, women are also more likely to enter government service after law school rather than private practice. In spite of this, women still make up a small number of federal judges.

Since the Carter administration's initiative to increase the diversity of federal judges, scholars have sought to understand how these "non-traditional" judges function when compared to white male judges. The results of these studies, however, have led to varying conclusions. Thomas Walker and Deborah Barrow's 1985 study of federal trial judges yielded somewhat unexpected results. Nontraditional judges tended to have followed non traditional career paths, eschewing the traditional private practice, local community, political contributions route. Their behavior once on the bench, however, offered a complicated story. Walker and Barrow found that women who were judges were less sympathetic than men to personal liberty and libertarian cases, ruling for the government more often than the individual in cases involving regulatory policy and economic issues. Furthermore, the women who were judges were also somewhat less sympathetic to issues affecting minorities than white male judges. Finally, there was no significant difference between men and women judges in areas of criminal rights or women's rights. In addition to substance, Walker and Barrow found little difference in

the quality of decisions produced by men and women, as measured by the rates of appeal and reversal. While dated, this study indicates that differences in behavior between men and women judges may not be as predictable as early commentators had thought.

Donald R. Songer, Sue Davis, and Susan Haire reach different conclusions in their 1994 study of gender in the courts of appeals. The authors sought to clarify several contradictory theories on the effects of women judges: firstly, that women would be more liberal judges than men; secondly that there would be no gender difference; and thirdly, a middle-ground opinion that women would not be uniformly liberal or conservative across issues, instead favoring whichever position promised greater equality. They tested these claims by looking at decisions on three issues: obscenity, search and seizure, and employment discrimination. The authors found no significant difference between men and women judge's likelihood to vote a certain way in either of the first two scenarios. However, in the case of employment discrimination, particularly though not exclusively gender discrimination, they found evidence that judges who were women were much more liberal than judges who were men. Controlling for other variables, they found that women had a 75% probability of casting a liberal vote while men judges only had a 38% chance. These results would seem to contradict Walker and Barrow's findings that there was little difference between men and women judges on issues of gender discrimination. Furthermore, it also suggests that the differences between men and women judges are small.

While early studies focused primarily on federal judges, those positions were initially held primarily by Carter appointees, who presumably had similar ideologies. In contrast, David W. Allen and Diane E. Wall studied state supreme court justices from across parties (1987). The authors contrast two archetypes of minorities in a group setting: that of token and that of outsider. Tokens, they argue, are likely to conform to institutional norms in order to avoid drawing attention to themselves. Judges acting as tokens would thus either adopt centrist views or mirror the ideological makeup of the men on the court. In contrast, those functioning in the outsider role are more likely to exhibit strong personalities and reject institutional norms; as a result, outsiders are expected to occupy ideological extremes. Allen and Wall find evidence that women on state supreme courts function more as outsiders than as tokens. On women's issues, they find that the women judges tend to be more decidedly pro-woman than the rest of the court on which they sit. Importantly however, women also function as outsiders on both criminal and economic issues. Prior research identified a continuum in political ideology that suggested that Democratic women would be the most liberal, followed by Democratic men, followed by Republican women, and lastly with Republican men occupying the most ideologically right wing position. Given this, it would make sense for liberal women judges to be the farthest left and conservative women judges to be more centrist. However, they found that while liberal women judges tended to be the most liberal members of a court, conservative women tended to be the most conservative on

economic and criminal justice issues. This supports the claim that women judges will hold extreme policy positions, acting as outsiders.

As more women have joined the federal bench, scholars have had access to more robust data regarding the role of women judges. Peresie studies the behavior of judges on the courts of appeals between 1999 and 2001 in cases related to Title VII sexual harassment and sex discrimination cases or the Civil Rights Act of 1964 (Peresie 2005). She found that the intersection of gender and judicial ideology, as measured by the appointing president, is particularly stark. In Title VII sexual harassment and discrimination cases, the presence of a female judge on a panel greatly increased the likelihood of the court holding for the plaintiff. She also found that in these cases Republican-appointed women and Democrat-appointed men supported plaintiffs at approximately the same rates. Moreover, the presence of a woman judge on the panel greatly increased the likelihood that a male judge would favor the plaintiff in sexual harassment and discrimination cases. While tailored to a specific and explicitly gendered issue, this research indicates that the mere presence of women in the courts, regardless of political or judicial ideology, impacts the interpretation of the law.

This project will seek to find the intersection of the literature on gender and the literature on clerkships. It will demonstrate the ways in which clerks' genders affect the experience of their clerkship. This work provides the foundation for future studies on the intersection of judicial behavior, gender, and clerkships.

Methodology:

The data for this paper was collected using several methods. My conclusions are derived from two sources: interviews with clerks and a descriptive study of federal appellate clerk composition. These two procedures offer both quantitative and qualitative insight into the clerkship experience for men and women as well as the demographic characteristics of clerks over time. Both my descriptive data and interview results began in the same place, the *Judicial Yellow Books*. Published by the *Leadership Directory* series, the *Judicial Yellow Books* are a fairly comprehensive compilation of identifying information for every judge at the federal and state level, from the United States Supreme Court down to state trial courts and specialized courts. They are updated semi-annually in both print and online form. For the purposes of this project, it was essential that I use the physical copies of the books; the online database does not allow viewers to access the editions of specific years, but rather one must search by judge or circuit, invariably leading to omissions, and making it difficult to discern one cohort of clerks from another. While the physical copies did not have complete information for every single judge, and included a few minor errors, they provided a useful snapshot into clerk names and identities over the course of several years. I took data from the fall editions from 2010 through 2012. From 2013 to 2017, I collected data from the summer editions due to difficulty obtaining the fall copies. I chose to use the fall and summer editions primarily because of the calendar of a clerkship. While federal appellate courts, unlike the Supreme Court, hear cases and render opinions all throughout the year, most clerkships operate not

on a calendar year but a summer to summer schedule, where each class of clerks arrives sometime between June and August and departs in that same season the following year.

For federal appellate judges, the *Judicial Yellow Books* name each judge in a given circuit, and lists the year they were appointed, the president who appointed them, their status on the court, and various other information, including birthdate, education, and a photograph among others. Importantly, the book also identifies the clerks for most chambers by name and, occasionally, education history and term dates. The books also distinguish career clerks from term clerks. Because not every judge's information was complete in the fall or summer edition, particularly for judges who had joined the bench that year, I supplemented information from the winter or spring edition of the corresponding term to gain a clearer picture of the circuits. However, the information for most judges in the *Judicial Yellow Books* was fairly complete, as demonstrated by consistency between editions within the same term and confirmation from clerks whom I interviewed.

While the data on appellate clerks has been compiled in the *Judicial Yellow Book*, the information has not been analyzed in a meaningful way in regards to gender or any other factor. Thus, a part of this research has involved studying trends and patterns of who appellate clerks are as a whole as well as the gender identities of career clerks, as compared to term clerks. For the most part, the first names of the clerks listed in the *Judicial Yellow Books* have definitely indicated the gender, man or woman, of the clerk. However, for those clerks whose first names are used by men and women, I have

confirmed gender by searching professional networking sites, such as LinkedIn, employer websites, and other publications, including law school websites and alumni magazines, which often celebrate the personal and professional accomplishments of graduates.

In addition to descriptive analysis, I also used the lists I compiled from the *Judicial Yellow Books* to randomly select potential interview candidates. While I collected clerk data from 2000 on, I randomly selected interview subjects from 2008 through 2017. I did not include clerks from the fall of 2018, because they would still be employed by their judge and thus would both be unlikely to consent to interviews and would not have the the experience of the whole year. Conversely, I focused on clerks who served after 2008 or so in order to increase the likelihood that the interviewees would still have detailed memories of their time. In addition, more recent clerks would be able to provide more insight into the current dynamics of the clerk experience and thus would be more relevant to understanding gender and clerkships today.

I organized each year's data by chamber, such that each judge was listed in order of circuit and seniority and was numbered from one to around two hundred forty, depending on the year. I then used a random number generator to select nine judges from each year between 2008 and 2017. I contacted the clerks from those chambers that were selected for that year. I found the former clerks by searching for "[their name] attorney" on Google; I was able to confirm that the people I found were indeed the people for whom I was searching because, given the prestige of appellate clerkships, they all had their clerkship listed somewhere in their company biography. I was able to identify most,

but not all, of the randomly selected clerks using this method. Among those I found, I was also able to find email addresses for most as well. I contacted each of the prospective interview subjects with the same email text, in which I described the project, the goals for the interview, and offered more information on privacy upon request.¹ While I only received a few responses from people who declined to participate, I also did not hear back from many of the attorneys I contacted. For those that did agree to participate, I scheduled phone interviews and sent an informed consent form, which I asked them to sign and return to me before we conducted our interviews.² I found all of my interview subjects but one using this method. However, one interview subject was a personal friend. That said, even though I was aware that this person was an attorney, I learned of this person's appellate clerkship from the *Judicial Yellow Pages*; that interview was also the only one which I was able to conduct in person. However, I followed the same general protocol for every interview, which was developed in accordance with the Bucknell Institutional Review Board and scholarship in the field.

The response rate for interview requests was adequate. Approximately 10% of contracted subjects agreed to be interviewed; I conducted a total of ten interviews. Of these ten interview subjects, 50% (five) were women and 50% (five) were men. They clerked between the 2005-2006 term and the 2015-2016 term. Furthermore, they represent a range of judges and circuits. Subjects had clerked on the First, Second, Third, Fifth, Sixth, Eighth, and Ninth Circuits. These circuits together make up the East Coast

¹ Appendix A

² Appendix B

from Maine to Delaware, the West Coast, including Alaska and Hawaii from California to Montana and Arizona, portions of the Midwest, and the Gulf Coast states.³ Furthermore, the sample also includes clerks for judges across the political spectrum. Six were appointed by Democratic presidents (60%) and five were appointed by Republicans (40%).⁴ While this distribution is less balanced than the gender distribution of the sample, it is nevertheless a relatively reasonably balanced sample, with two appointing Democratic presidents and two Republicans. Moreover, in this political climate, it is not surprising that clerks for Democratic appointees are more willing to talk openly about gender issues; the confirmation process for Justice Brett Kavanaugh likely played a role in depressing response rates for former Republican clerks, who may have been reluctant to even inadvertently open their judge up to criticisms of gender inequity. Finally, I was only able to interview term clerks. Career clerks, likely because they are still working for their judge, did not respond to my requests for interviews. In spite of these obstacles, my sample is representative of clerks in the past ten to twelve years in terms of geography, gender, and political affiliation.

Because of the robust canon on judicial clerks, leaders in the field have developed a set of guidelines for conducting research. Ward and Wasby provide a comprehensive meta-analysis of best practices for interviewing current and former clerks (2010). The

³ The states covered by the circuits for which my interviewees clerked are Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, and Washington.

⁴ Appointing presidents include Carter, Reagan, Clinton, and W. Bush

article provides practical tips for contacting potential subjects, conducting the interview, and analyzing data. The authors note the importance of both mail/email contact introducing the researcher and then a follow up phone call to reduce the rate of non-responses. They also caution that often times clerks will need to seek the approval of their judge before consenting to an interview. The authors strongly recommend in person interviews and believe that the interviewer should suggest audio recording the interview but be flexible should the respondent not be comfortable. To maintain confidentiality, they recommend using judge name and decade rather than names of the clerk (e.g a clerk for Justice Ginsburg in the 2000s). Among many other suggestions, they also discuss the need for opening with a “softball” question to make the clerk more comfortable and then moving into a mix of open and closed ended questions. Ward and Wasby’s manual for conducting interviews with former judicial clerks is a vital tool for researchers in the field.

The interviews I conducted followed a very similar structure. I began each interview by thanking the participant for talking with me and asked if they had any questions before we began. Then I used a standard set of questions to guide each interview, but allowed the conversation to flow naturally and followed-up as needed. The standard questions asked about a broad range of issues, including typical responsibilities, the division of labor, and agreement or disagreement with the judge.⁵ While the research participants were aware I was studying gender, I did not ask any explicit questions about

⁵ See Appendix C for full list

sexism or gender equality. This omission was intentional. Firstly, Ward and Wasby explained that clerks are often very loyal to their judges. As a result, it is unlikely that any clerk would explicitly criticize their judge's behavior. Furthermore, in the #metoo era, again, particularly after the controversy surrounding the confirmation of Justice Kavanaugh, it is likely that former clerks would be hypersensitive about releasing information that might implicate their judge in unfair practices. Finally, I am interested in the ways that gender differences may subtly affect the clerkship experience. By asking indirect questions, I was able to ascertain the subtle ways in which gender affected the clerkship experience.

In addition to the standard questions I asked every interview subject, I also allowed the conversation to flow relatively freely and followed-up on interesting points or remaining questions I had. Finally, I wrapped up each interview by asking if there was anything about the clerkship that we had not touched on that the subject would like to say. I also asked if they had any questions for me about the project and offered to share my results when I had completed the project. Interviews ranged in time but were generally between thirty minutes and an hour. Depending on the preference of the interview subject, I either recorded and then transcribed the interviews or took notes and wrote down quotes as we went.

In addition to Ward and Wasby's guidelines, I also tailored my research to the recommendations of Bucknell's Institutional Review Board, in order to protect the confidentiality of my subjects and comply with best practices for research involving

human subjects. I made clear to all subjects that their participation was strictly voluntary and that they were allowed to decline to answer a question or conclude the interview at any time for any reason without penalty. The project involved no more than minimal risk to participants, and the benefit to participants was a space to reflect meaningfully on their clerkship experience, an important and, as I would learn, positive experience for most participants. In addition to protecting the participants from harm during the interview process, I also took steps to ensure anonymity and confidentiality for all involved.

The data from this project has been collected and is expressed with the explicit goal of protecting the confidentiality of interview participants. To do this, I have employed a multistep secure procedure: each participant is assigned a number based on the order of their interview. I created a password protected spreadsheet, to which only I have access, which contains identifying information on participants. This document links each participant's number with their name, the judge for whom they clerked, and the year of their clerkship. These identifying factors cannot be linked to the participant's number in any way outside of the spreadsheet key. It is important to not only conceal names, but also judge and term, because those factors too can reveal a subject's identity. Because each judge has only a few clerks in a term, usually between one and five, identifying participants by their judge and/or term could potentially reveal their identity. I have maintained these confidentiality procedures both in the final product of this research and in the data collection and analysis process. Recordings are labeled by participant number and are only available to me in a secure location. Furthermore, the notes or transcriptions

from each interview also omit identifying factors, including clerk or judge name, dates, and explicit references to the participant's educational or career history. However, some anecdotes provided in the interviews are incredibly specific and could potentially reveal the identity of a judge or clerk. Those stories remain as they were told by the interviewee in my notes but will be generalized or otherwise anonymized in this paper. Throughout this paper, participants will be referred to exclusively by either their assigned number or their circuit.⁶ Finally, all recordings and notes will be destroyed upon the submission of this thesis. By following these protocols, I have maximized participants' comfort and safety, thus ensuring that I received honest feedback while respecting the wellbeing of my subjects.

The initial goal of this paper was to examine several hypotheses: I hypothesized that chambers with more women as clerks would produce more limited rulings, that is, rulings which were tailored more closely to the unique facts of the case, and adhered more closely to established precedent, as determined by third party empirical measures. Furthermore, I also planned to determine if those chambers implement different procedures to handle the case; I predicted that distribution of work and types of assignments women and men were given would be more equitable in chambers with gender balance among the clerks. Finally, I anticipated that the level of collaboration among clerks and between the clerks and the judge would be positively correlated with the percentage of women in the chamber. These hypotheses were derived from literature

⁶ E.g, subject four, or a clerk from the Third Circuit

on women in the workplace and my own expectations of how women are treated in the workforce. While these are important hypotheses to test, my research goals shifted over the course of this project, largely in response to the data I collected and the questions it raised. While I have pursued answers to several of these hypotheses, those findings have elucidated different things than I had anticipated initially.

My research has come to focus more on clerk experience and perception and on the demographics of who serves in the various clerk roles than on clerks' potentially gendered impact on their judge. This shift in interest has come in part from the content of interviews, which I will explore further in the next chapter. Furthermore, the *Judicial Yellow Books* have also provided a rich source of raw data for descriptive and quantitative analysis that I could not have anticipated before I began compiling the lists of current and former term and career clerks. Thus, this project has become as much about the legal field itself as it has court proceedings. It is important to study the interaction of clerk status and gender for several reasons. The first, as demonstrated in the literature review, is that clerks are hugely important to the judicial process. Thus, understanding how gender affects clerkship experiences is important to understanding the judiciary. Secondly, understanding how gender influences clerkships, is also important to understanding the role of women in the legal profession. Federal appellate clerkships are highly prestigious positions and are overwhelmingly filled by recent graduates in the top of their class from the best law schools in the country, including Harvard, Yale, Stanford, Columbia, the University of Pennsylvania, the University of Chicago, and the University

of Virginia, among a few others. These are the men and women who go on to be leaders in the legal field as litigators at big firms, professors at other law schools, and high level government lawyers. The appellate clerkship is not only a sign of status, but a springboard into a successful career in the legal profession. It is important to understand how gender may or may not play a role in appellate clerkships, which are often a young lawyer's first or second job out of school, in order to begin to understand the status of women in the elite echelons of the legal profession today. Conversely, it is important to understand how term clerks and career clerks may differ, and to understand any gendered implications of those differences.

Results:

Clerkships are incredibly important to the career trajectory of energetic young lawyers. Term clerks for the courts of appeals are the best and the brightest from the highest ranked law schools in the country. They get excellent grades in law school, are on law review, and graduate at or near the tops of their classes. As subject four described it, a clerkship is “like graduate school for lawyers.” Moreover, court of appeals clerks increasingly have already completed a district court clerkship and a few will go on to be Supreme Court clerks. Furthermore, given the importance of clerkships in attaining other prestigious jobs in the field, it is not only important to understand what it is like to clerk, but also to understand who these clerks are in the first place. They go on to become leaders in the legal profession, including law professors, partners at firms, prestigious government attorneys, and even future judges themselves. Thus, the experiences of young court of appeals clerks are vital to defining the future of the legal profession.

Since the year 2000, women have made up slightly less than half of court of appeals clerks. This evidence is derived from several sources, including my own data set and studies by the National Association on Lawyer Placement (NALP). An analysis of a random circuit, in this case the Fifth, reveals that the proportion of women clerking varies dramatically from year to year: women made up between 38 and 59% of Fifth Circuit clerks between 2000 and 2017, as shown in figure one. Thus, while there is significant variation in the gender distribution of the Fifth Circuit from term to term, there is no clear trend that indicates the presence of a systemic bias against women. The Fifth Circuit is

largely similar to the other circuits, with similar proportions of judges appointed by Republicans and Democrats and similar gender distribution among judges. Therefore, it is reasonable to generalize the statistics for the Fifth Circuit to the appeals courts as a group. The gender distribution of clerks appears to be fair because women have made up around half of law school graduates for many years. In fact, by 2016 and 2017, women made up over half of law school enrollees. Critically, though, this trend was bolstered by the disproportionate share of women at lower ranked law schools. However, even among the top twenty law schools, from which appellate clerks are overwhelmingly drawn, women make up between 40 and 60% of students, with Duke at the lowest end of the top twenty with just 41.3% and the University of California, Berkeley at the top with 60% women (Zaretsky 2018). Thus, women have consistently been fairly equitably represented as court of appeals clerks since 2000 because they have been fairly well represented at top law schools since the same time. This indicates that, at least in hiring practices, clerkships are fair to men and women.

Year	Percent men	Percent women
2000	54%	46%
2001	44%	66%
2002	54%	46%
2003	56%	44%
2004	65%	35%
2005	48%	52%
2006	64%	36%

2007	64%	36%
2008	62%	38%
2009	67%	33%
2010	41%	59%
2011	62%	38%
2012	56%	44%
2014	53%	47%
2017	60%	40%

Figure 1-percent of women and men clerks on the Fifth Circuit between 2000 and 2017

Just as hiring practices and results for term clerks appear equitable, if somewhat erratic, the experiences of term clerks in their chambers are also fairly similar regardless of gender. The responsibilities of term clerks for judges on the courts of appeals are similar across chambers. As each and every clerk I interviewed said, the major responsibilities for term clerks are legal research and writing. While there is some variation in how cases are assigned and how judges approach the writing process, every clerk spent the majority of their time preparing bench memoranda and drafting opinions. The bench memoranda, or bench memos, were comprehensive summaries of the cases before the court, including relevant arguments, lower courts' findings, analyses of precedential cases, and, in some cases, a recommendation by the clerk. These memos help prepare the judge for oral arguments. After oral arguments, every clerk interviewed also discussed drafting opinions. Because only judges, and not their staff, are allowed in post argument conferences, the judges would report back to their chamber the court's

findings on each case and if their chamber was assigned the opinion. In general, though not always, the clerk who had written the bench memo for a case would be responsible for the opinion; a few clerks reported that occasionally a different clerk could write an opinion if the clerk who wrote the memo already had too many opinions. For the most part, however, the process of writing bench memos and beginning to draft opinions was standard for clerks of all genders and across chambers. Given that these duties make up the overwhelming responsibility of a clerk's responsibilities, it indicates a greater amount of parity between men and women in the clerkship role.

Even in areas that were not standard between chambers, there was little indication of any degree of gendered difference in the experiences of men and women clerks. There was, for instances, significant variation in how clerks were assigned to cases. In some cases, such as with subjects one and nine, the judge would assign cases, sometimes randomly, or based on strengths and interests, as well as a fair distribution of labor; for instance, the judge would not assign two long and complex cases to one clerk and give the others only a short case. In most of the other chambers, however, clerks had significant discretion in divvying up cases among themselves. Most settled on some version of a draft. In most cases, sit down together and go around, taking turns picking. They generally would rotate who got to choose first from month to month. Most indicated that there was some room for bartering if someone really wanted a particular case. In addition, subject eight suggested that there was some flexibility month to month, so that if someone got a long and dull case one month, they would be allowed more

privilege in choosing the next. Moreover, in some circuits the circuit administration would give cases a numerical assignation that indicated the expected complexity of the case. In circuits where this occurred, clerks would strive to ensure that everyone had roughly the same number of points, indicating a fairer workload. While it is harder to determine the motives of judges in assigning cases, it is clear that the clerk cohorts themselves tried to ensure fairness in dividing their caseload. Thus, by developing a system which was both structured and, at times, flexible, the clerks largely skirted gender issues in case assignments.

Given that case distribution was fair between clerks, it is fitting that the rest of the work of the clerkship was similar between men and women. Women in the workplace are often tasked with administrative or office duties, even if they fall outside their job description. However, that does not seem to be the case among judicial clerks. Most judges, though not all, have at least one secretary who handles the judge's schedule.⁷ Several former clerks described the few administrative, or non-legal, work they performed: subject one and their co-clerk would answer the phone and occasionally take a message if the judge was out. Similarly, the clerk who sat closest to the door would get the mail in clerk five's chambers, and the clerks took turns answering the phones. In addition, clerk five described a monthly rotation, where each month one clerk was responsible for certain administrative duties, such as printing the judge's emails. Finally, subject ten's chambers had the most regimented administrative duties. Each clerk in

⁷ It should come as no surprise that the overwhelming majority of secretaries for judges on the courts of appeals were and are women.

subject ten's chamber was assigned to one of three roles for their entire term, related to scheduling, future clerks, and past clerks. The clerks were able to decide among themselves who served in which role. Thus, most clerks did not have administrative duties. Among those who did, the work was neither laborious nor particularly gendered. Crucially, the clerks had some degree of control over their administrative tasks, which largely ensured that those duties did not fall disproportionately to the women clerks in the chamber.

Indeed, the greatest variation in clerk experience seems to result from the ways judges ran their chambers. While speculative, I asked each clerk if they thought their co-clerks had similar experiences. For the most part, the subjects said yes, regardless of the gender of the interviewee or his or her co-clerks. Subjects two and nine both indicated that they had co-clerks who struggled: one was not a particularly strong writer and the other had an unusually difficult caseload. Both subjects two and nine indicated that they think their other co-clerk had a similar experience with themselves. Moreover, judges are clearly careful about ensuring that they are equally accessible to their clerks. Most judges who had to travel for oral arguments took all of their clerks with them for every sitting. While subject three's judge was not able to bring everyone, the clerks would rotate who stayed and who traveled with the judge. These trips provided valuable face-time for clerks to develop personal relationships with their judge. Many judges would travel and dine with their clerks while at sittings; one judge even appointed themselves as an unofficial tour guide for their clerks. This personal interaction was augmented by

cultivated non-work time in the office: many judges would eat lunch or have coffee with their clerks a few times a week, where they would discuss cases, politics, sports, and their families. Given the importance of a clerkship in a young lawyer's career, many former clerks stayed in touch with their judge after their clerkship, relying on them as an unofficial mentor. This equity in treatment from and access to the judge was paramount in ensuring that women and men had equal opportunities for success in their clerkship.

While the men and women clerks mostly had similar clerkship experiences, two respondents, both of whom are women, reported anecdotes that suggested a possible gender bias, either from the court or resulting from internalized misogyny. However, in both of these examples, it is important to note that the generational difference between judge and clerk are also very important and that, given the paucity of this sample, it is difficult to draw generalizable conclusions.⁸ In the first instance, clerk six articulated a regret for not taking advantage of her judge's accessibility, bluntly telling me that "I'm not very good at networking." Moreover, she said that "looking back, maybe it would have been better to do it after being a lawyer for a few years...I would have taken more advantage of working with the judge and the people I met." Taken together, these quotes suggest a degree of timidity from the young lawyer. Given women's reluctance to capitalize on mentorships and doubt their own abilities, these quotes indicate that internalized sexism may still hinder women's abilities to take full advantage of the opportunities presented in a clerkship. The second anecdote is indicative of external bias

⁸ One clerk related a story of having to define a particular sexual act to their judge, who had not heard of it.

against working mothers. This clerk is the only interview subject who had children during her clerkship. She expressed difficulties of balancing childcare and her clerkship, saying that her judge didn't understand why she sometimes had to work more irregular hours if her son was sick or had a day off from daycare. This is a plight often felt by working parents of both genders, but especially women. While this participant's judge always allowed her to do what she needed to do to take care of her child, the judge's resistance is representative of a culture that penalizes women for being expected to take on the brunt of responsibilities in the home. Nevertheless, the relative equality of women and men in court of appeals clerkships reveals important insight into the sexism women face in other parts of the legal profession

The nature of the clerkship lends itself to the equal treatment that the former clerks reported. Firstly, nearly every interview subject brought up the solitary nature of the work; one former clerk, subject nine, went so far as to twice call their experience "monastic," underlining that the legal research and writing was, primarily, not collaborative. Another clerk, subject eight, called it "isolating." As a result, clerks largely circumvented some of the more glaring situations where workplace sexism exists, such as mansplaining and credit wsw. As subject six explained, "as a clerk, you are supporting a judge and some of the problem women have as lawyers is that women tend to be given supporting roles rather than leadership. Being a clerk lends you to that supporting role for men and women. There is no leadership role for clerks. Being there for a year, everyone having a similar role, not really competing for promotion, lends itself to being treated

more fairly.” This insight is key: many barriers against women in the workplace relate to leadership and promotion, where women are criticized for their leadership skills and held back from career advancement. However, there is little place in a term clerkship for leadership, as the clerk exists solely to help the judge. Furthermore, there are no degrees of seniority and power among term clerks. Each term clerk, regardless of gender, serves for one year, and every clerk performs the same type of duties. The combination of solitude, lack of advancement opportunities, finity, and commitment to serving a judge leads to women and men term clerks being treated roughly as equals. Understanding the role of gender in term clerkships is important because they constitute vast majority of clerks on the federal appellate courts. However, career clerks offer a different lens to the role of gender in a judge’s support staff.

Career Clerks:

While I was unable to interview any career clerks directly, both interviews with other term clerks and quantitative analysis of career clerk data reveal important insights into the ways gender affects that position. An important caveat is the fact that I did not interview any clerks from chambers with male career clerks. However, as my analysis will reveal, that fact is not surprising. The gendered differences for term clerks may be subtle; however, there are more stark implications in the role of career clerk. As shown in figure two, the number of career clerks has increased dramatically since 2000. In the early years of the 2000s, there were typically around 22 to 29 career clerks among all of the judges on the federal appellate circuits. In 2007, however, that number shot up to 47.

Over the next ten years, that number continued to grow, so that by the end of the 2010s, there were between 75 and 85 career clerks working at the appellate level. This increase is the result of several factors. Firstly, several new judges were appointed to the bench who employed only career clerks, sometimes as many as five or six. More importantly, however, the size of the circuit courts themselves increased significantly over the years studied; in 2000 there were 223 judges on the first through eleventh and D.C circuits, excluding judges on bankruptcy courts. By 2018, however, there were an additional eighteen judges, for a total of 241. Each of these judges, of course employed more clerks and many also hired career clerks. The percentage of career clerks who are women has declined somewhat as the number of career clerks overall increased. However, women have made up at least two thirds of career clerks every year since 2000. Even through this increase in the number of career clerks, however, women still continued to make up the majority of that position. At the peak of women clerks in 2003, women made up 80% of career judicial clerks. Even at the low point, women still represented a full 66% of career clerks. The percentage increased again over the next ten years and has stabilized so that in any given year, 68-71% of career clerks are women. The preponderance of women in this particular position reveals interesting and important insight into the role of gender in judicial clerkships.

Year	Men	Women	Percent split (M-W)	Change in men
2000	6	18	25-75	---

2001	7	19	27-73	+2
2002	7	16	30-70	+3
2002	5	20	20-80	-10
2004	7	16	30-70	+10
2005	5	13	28-72	-2
2006	9	19	32-68	+4
2007	14	33	23-77	-9
2008	22	42	34-66	+12
2009	23	46	33-67	-1
2010	26	54	32-68	-1
2011	26	61	31-69	-1
2012	25	57	30-70	-1
2014	25	58	30-70	N/A
2017	25	54	32-68	+2

Figure 2-the number and percentage of career clerks by gender, and change in percentage between 2000 and 2001

If term clerkships are a prestigious entree into the legal world for the highest achieving students at the best law schools, the career clerkship carries more nuanced significance. Career clerks tend to stay in their position with their judge for many years. This is demonstrated by the consistency of certain career clerk names across many years in the *Judicial Yellow Pages*. Subject two described how the career clerk in their chamber had been with that judge for a few years and before that had served as a career clerk for twenty years with a different judge before that judge's retirement. It is, clearly, a long term, high loyalty opportunity. Furthermore, the job has obvious benefits. Due to a

judge's lifetime appointments on the federal bench, career clerks have a high level of job security and, as employees of the federal government, access to generous benefits. Furthermore, the job is fairly predictable, both on a daily basis and across the year. The job of career clerk, like for term clerks, is one of judicial research and writing. While some travel may be involved to go to sittings, it is highly predictable and set well in advance. Furthermore, as several term clerks described, most, though not all, chambers keep fairly regular business hours with time for lunch. Finally, and perhaps most importantly, while a career clerk's duties are predictable the work is nevertheless diverse and engaging. As discussed in a previous chapter, appellate judges hear cases on a wide range of judicial subjects and issues. Thus the work for career clerks is constantly changing as they prepare their judge to hear new cases. Thus, a career as a judicial clerk has many benefits for women and men. However, there are other aspects of the career clerkship that implicate gendered expectations about the roles of women, which help explain the disproportionate number of women in these roles.

Some of the very factors which make the career clerkship such an appealing position are themselves gendered. The stability and predictability of career clerkships allow women to have a greater degree of work-life balance while still maintaining an interesting career; this is in particularly stark contrast to the hours of practicing attorneys at big firms, which can be grueling. As subject two describes of her chamber's career clerk, "all while her kids were little, she worked for a judge... who gave her a ton of flexibility. And if you're a practicing attorney, I'm sure she would have been a litigator if

she'd gone in that direction, sometimes you have to stay all night, sometimes you have to get out in the morning or you have a trial or whatever... We didn't stay late... Working for judge, we had a lot of predictability of our hours." While flexibility is incredibly important for working parents, particularly mothers, it is not the standard in all chambers. The flexibility that this career clerk had with her first judge—subject two's judge was this clerk's second—is highly dependent upon the judge's personal preferences; some judges, such as subject two's, demand specific "in office" times while others, such as subject ten's, are more flexible. However, the predictability and consistency of clerk work does exist across most chambers. This predictability and consistency is augmented by the schedule itself, which, for most chambers, was a typical business day. The pace of career clerk life aligns well with the demands of working mothers, who generally bear a disproportionately large proportion of responsibility for childcare and organizing a household. As subject two indicated, the hours and pace of a career clerkship is particularly appealing because it is much more compatible than the unpredictable but invariably long hours at a law firm. For intellectually curious women who either need or desire to maintain a balance between workplace responsibilities and home responsibilities, a career clerkship provides an enticing combination of challenge and stability. Even beyond the career incentives of a long term clerkship, the nature of the job is itself gendered.

Career clerks in chambers with term clerks tend to have two roles. The first responsibility, common among both term and career clerks, is to do legal research and

writing to help prepare the judge for oral arguments and crafting opinions. As I have discussed, clerkships are inherently jobs of support, wherein the clerk is not a leader, but rather an aide to the legal needs of the judge. While this position can even the gender playing field for term clerks, it has different implications for career clerks. Career clerks stay in that service role over a period of years, with no opportunity to advance in the chamber. Given the leadership differential between men and women, the preponderance of women in career clerk roles is significant.

Moreover, while the second responsibility is more supervisory, it does not allow for leadership or advancement, but is rather a caretaker role. The term clerks I interviewed who had worked with career clerks all described a part of the career clerk's job as acting as a liaison between the young lawyers and the judge. Career clerks aid term clerks both in substantive matters and in personal or professional areas. Several clerks commented that, especially in the first few months of their clerkship, the career clerk would help revise their drafts before they went to the judge. In addition, the career clerks also were able to help the term clerks with complicated legal issues, as career clerks had been practicing much longer. As subject two said of her career clerk "[she] could edit things to make things go more smoothly through his review....I'm sure my clerkship experience would have been much less positive and much less rich if [she] hadn't been there." In this regard, the career clerks act as a deputy to the judge in aiding the revision process. However, subject two's phrasing here is important: the career clerk's revisions were intended to ease the clerk's revisions with the judge. In this way, the career clerk

was intervening on substantive matters to ensure harmony between the judge and the younger clerks. In addition to substantive support, career clerks also act as a buffer between the judge and clerks in defining the culture of the chambers. Many clerks, both from chambers with and without career clerks, describe a certain degree of formality and stiffness in their judges. Career clerks, some described, often softened the office culture by bringing in snacks, scheduling coffee breaks, and justifying personal time to the judge. In this way, career clerks take on the responsibility for maintaining a fair and satisfying office environment. It is difficult to ignore the similarities to outdated attitudes about roles in the nuclear family: the judge as the strong but distant father, the career clerk as the mother who cares for her “children” and eases the relationship with the father, and the term clerks as the children. It is not unusual that professions that entail maintaining harmonious relationships are held largely by women.

Taken together, this analysis of term clerks and career clerks suggests emphasizes the importance of institutions and structure in understanding gender in the workplace. Interviews with former term clerks could suggest that the federal court system does not fall victim to gender barriers for women in the workplace. However, this deduction would be incorrect. That career clerks are overwhelmingly women indicates that the courts are not themselves more or less equal to women or men; instead, the structures of a job can either promote or discourage equality when viewed in concert with the other patriarchal expectations. The position of term clerk enables equality precisely because it

is finite and is generally held by young, unattached lawyers. In contrast, the career clerkship position falls victim to many common pitfalls for women in the workforce.

Conclusion:

The federal judiciary is a complex and seemingly opaque institution. However, while it is framed in the popular imagination as an unbiased and independent institution, the courts are like every other branch of government: composed of human beings with unique experiences and motivations. While judges are the most visible and ultimately the most consequential members of the judiciary, they do not act alone. Judicial clerks support judges at every stage of a case. Clerks are important in part to manage the volume of the workload in front of federal appellate judges. While judges are asked to hear more cases, and the legal issues are becoming increasingly complex, the judiciary has not expanded enough to accommodate the workload. As a result, it is necessary to have law clerks act to summarize arguments, research cited prior cases, and draft opinions; it would be impossible for any one judge to take on all that work alone. Moreover, the role of the clerk is also more than simply utilitarian; clerks are also legal counsellors, helping to contextualize cases for their judge. In doing legal research and writing, clerks help to determine the validity of a claim, the framing of an argument, and even specific language in an opinion. Moreover, they help judges prepare for oral arguments, suggest outcomes, and advocate for certain positions or arguments in an opinion. While it is unclear how much clerks actually influence how a judge decides to rule on a particular case, it is nevertheless incontrovertible that their legal research and draftings are important.

Because clerks are not only practically necessary but also substantively important it is vital to study them with as much vigor as judges. Gender is a fundamental identity vector in this society, which influences not only how we interact with the world, but also how the world interacts with us. Scholars have studied some of the ways in which gender is at play among judges. However, as I have demonstrated, it is also important to understand how gender does or does not affect judicial clerks themselves. My research indicates that term clerks have fairly similar experiences, regardless of gender. This is because the nature of the job treats all clerks the same, placing them in service roles. Moreover, term clerkships are finite and offer no opportunity for advancement within the chamber, negating gender issues related to women and leadership roles. The career clerk position, however, suggests more disparity. Career clerks are overwhelmingly women. Furthermore, the career clerk's responsibilities for officially and unofficially helping to train term clerks to work with the judge, reviewing term clerk work before it went to judge, acting as a buffer between the term clerks and judge, and moderating the tone and atmosphere of the office suggest that the preponderance of women in those positions is likely related to gender roles. My research thus shows that gender is an important factor for the experience of clerks and that the job title and responsibilities, rather than an overtly sexist or non-sexist culture are responsible for differences and similarities in how gender affects the clerkship experience.

In addition to implications for the role of clerkship and the judiciary themselves, clerkship experiences are also important for understanding the legal profession. As more

and more women attend law school, enrolling at equal or sometimes higher rates than men, more women will be entering the legal profession. Clerkships at the federal appellate level are highly sought after and tend to go to students at the tops of their classes at the most elite law schools. Former appellate clerks then go on to hold prestigious positions in the legal field, working at big firms, government agencies, law schools, and even becoming judges themselves. Thus, as their first jobs out of law school, clerkships are important springboards for ambitious and high achieving young advocates. In order to understand how women reach high profile and prestigious positions later in their careers, it is vital to understand how that first job was similar or different to the rest of the legal world.

This research project has begun to investigate the important relationships between gender and appellate court clerkships. However, this area still remains underexplored and my own research only begins to ask the necessary questions about the manifold ways gender may influence the experiences of clerks and their implications on judicial behavior, the legal profession, and beyond. Firstly, future research is necessary to discern what, if any, role clerk gender may have on the outcomes on cases. Moreover, additional research may explore may operate for clerks on different courts. Finally, it is imperative that future research explores intersectionality further, particularly clerkships are affected by race as well as gender. These avenues and others will elucidate the influence of clerks to a greater extent and will thereby offer further insight into the role of gender on judicial behavior and on the legal profession.

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Appendices:

Appendix A:

Dear [name]

My name is Taylor Bernstein and I am a senior political science major at Bucknell University. I am currently conducting my senior thesis project on the influence of judicial clerk gender on court behavior at the federal appellate level. I am interested in hearing about your experience as a former clerk. I am seeking former clerks for interviews on the process through which opinions are drafted and tasks are assigned, the relevance of the clerk's own ideology to the proceedings of the chamber, the qualities a judge may have looked for in clerks, and the nature of the relationships among clerks and between clerk and judge. In addition to informing my research, it is my hope that this interview will provide participants with an avenue in which to reflect on their experience as a clerk. These interviews will be relatively brief and can be conducted by phone or over video conferencing software (e.g Skype). In addition, I will diligently preserve the anonymity of respondents and their judges.

Given this information, would you be willing to discuss your clerkship experience with me? I am also happy to send along a more detailed account of my methodology and the procedures I will use to safeguard participants' identifying information.

Thank you for your consideration and please let me know if there are any questions I can answer for you about the project.

Sincerely,

Taylor Bernstein

Bucknell University '19

Appendix B:

Who Runs the World: The Impact of the Gender of Clerks on Judicial Rulings Informed
Consent

Bucknell University

You are invited to participate in a research project on the impact of clerk gender on judicial behavior. The results of this study will be used as evidence in the researcher's honors thesis at Bucknell University. The research team hopes to recruit ten to fifteen interview participants.

Participation will include an interview of roughly one hour, to be conducted by phone or video conference software (e.g skype). The interview will include open ended questions on the process through which opinions are drafted and tasks are assigned, the relevance of the clerk's own ideology to the proceedings of the chamber, the qualities a clerk believes their judge looks or looked for in clerks, and the nature of the relationships among clerks and between clerk and judge. In addition to informing my research, it is my hope that this interview will provide you, the participant, with an avenue in which to reflect on your experience as a clerk. Participation is fully voluntary and you may at any time end the interview or skip questions for any reason with no penalty. I will protect

your confidentiality strictly over the course of the project. I will assign each participant a numerical identifier and will not otherwise record your name, employer, or any other identifier in connection with your responses. Information on participants and records of consent will be maintained in a separate and secure location and cannot be linked to your responses. In addition, any audio recordings used during the interview itself will be destroyed immediately after they have been transcribed.

Any questions about the purpose of the research project can be directed to Taylor Bernstein by either phone (215-510-7832) or email (tpb007@bucknell.edu). Furthermore, any general questions about the rights of human subjects in research can be directed to the chair of Bucknell University's Institutional Review Board, Matthew Slater, at either (570)577-2767 or mhso16@bucknell.edu.

By signing below, you affirm that you have read the material above, agree to participate, and are over 18 years old.

Signature of

Participant: _____

Date: _____

Signature of

Researcher: _____

Date: _____

Appendix C

Standard questions:

For whom did you clerk and when?

What was a typical day like during your clerkship?

What tasks and responsibilities were assigned to you as a clerk?

Did you and your fellow clerk(s) work together often?

How were tasks assigned among clerks in your judge's chambers?

Can you tell me about the process (rather than the substance) of writing opinions?

What was it like if you disagreed with your judge's ruling?

Did you find that you and your judge generally agreed?

What qualities do you think are important in a good clerk?

What did you find challenging about working as a clerk?

What did you find rewarding about working as a clerk?