

A RENEWED CALL FOR DIVERSITY AMONG SUPREME COURT CLERKS: HOW A DIVERSE BODY OF CLERKS CAN AID THE HIGH COURT AS AN INSTITUTION

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INTRODUCTION

Recently, public criticism has focused on the lack of diversity among Supreme Court clerks. Various explanations have been given for the relatively homogenous status of clerks, and proposals have been raised to remedy the situation. However, while scholars and critics have focused on the disadvantages to women and minorities who are shut out from the coveted role of Supreme Court clerk, little attention has been given to the potential benefit a diverse body of clerks could confer upon the institution itself. In this Note, I submit that a more balanced group of clerks would provide a great benefit—beyond the minorities themselves who would be granted the honor and professional network of serving our nation’s Highest Court, a valuable counterweight would be established against the Court’s largely majoritarian tendencies.

Part I will examine the current and historical homogeneity of Supreme Court clerks as well as explanations for and criticism of this trend. Perhaps not surprisingly, the composition of clerks has, to a large extent, mirrored the composition of the Court itself. The predominance of white male clerks has led to wide criticism in both popular and scholarly media. Attempts to explain the trend have followed, along with potential remedial options. While often varying in approach, the scholarship in this area focuses largely on the disservice to women and minorities who are not given the opportunity to serve the Court. Former clerks advance to preeminent positions in government, at scholarly institutions, and in private practice, and the relative lack of women and minority clerks necessarily prevents them from receiving equal access to such lofty legal spoils.

In order to set the stage for an examination of the advantages that a diverse body of clerks can confer upon the Court, Part II discusses the

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Supreme Court's interaction with public opinion, demonstrating the Court's general unwillingness to act as a countermajoritarian body. With very few exceptions, the Court is unwilling, in the absence of a clear constitutional or statutory mandate, to circumvent well entrenched public opinion. To the extent that one believes the Constitution should serve to protect minority citizens from encroachments by the majority, this presents a problem with the Court as an institution.

Part III seeks to extend the current debate by discussing the ways in which a diverse body of clerks could act as a counterweight to the Court's majoritarian tendencies. Two main avenues of clerk influence are posited. First, the potential for a more diverse body of clerks to influence their Justices directly, through the Court's formal processes, will be explored. Specifically, clerks' role in the certiorari pool, opinion drafting, and ultimate decision-making will be discussed. As modern Courts have ceded greater responsibility and authority to clerks, the potential influence they may exert on the Court expands. Second, the potential for clerks to influence Justices through their interpersonal relationships, both in and out of Chambers, will be explored. The potential for a diverse body of clerks to positively influence the Court results from the intense and often lifelong relationships that clerks develop with their Justice. It is highly possible that a more representative body of clerks would make the Justices more aware of and more sensitive to the concerns and needs of minorities and women. This claim is buttressed by social psychological scholarship, and its application to concrete areas in which minority and female clerks may impact their Justices.

While this Note recognizes the limitations of the influence that clerks have on the Court, the potential to counteract the Court's typically majoritarian stance provides a strong incentive for increasing diversity among Supreme Court clerks. By providing a normative claim based on the potential benefits to the Court itself, the goal of this Note is to extend the current debate and force a more nuanced look into the consequences of a demographically homogeneous body of clerks.

I. HOMOGENEITY OF SUPREME COURT CLERKS

Something is terribly wrong if the standard-bearer of justice is discriminating against our people, all the people.
—Representative Gregory Meeks D-N.Y.¹

A. Background

The opening day of the Supreme Court's 1998 term was highlighted by a vigorous protest. Nearly 1000 civil rights activists, including Congressman Meeks, converged on the High Court to voice their outrage at

1. Tony Mauro, *Activists Protest Court's Lack of Minority Clerks*, USA TODAY, Oct. 6, 1998, at 10A.

the homogeneity of its clerks.² Nineteen of the protestors, including Meeks and NAACP president Kweisi Mfume, were arrested while peaceably crossing police lines in an attempt to deliver résumés to the Court.³

Four days later, Congressman Meeks, along with Representatives Conyers and Jackson, submitted a resolution to the House of Representatives expressing Congress's disapproval of the Supreme Court's "shameful record in hiring minority and women law clerks."⁴ The resolution noted that the hiring rates for women and minorities were well below the representation of those groups in law schools, and called for the Court to improve its recruiting and hiring practices.⁵ Although the resolution contained no provisions for enforcing its statements, it signaled a new height in public scrutiny of the Court's hiring practices.

The controversy was spurred, in large part, by a *USA Today* article that examined the racial and gender breakdown of the present and past clerks of the then-current Justices.⁶ The findings were startling. A total of 394 clerks had been hired across the collective tenures of the nine Justices.⁷ Of those clerks, a mere seven were African American, eighteen were Asian American, and four were Hispanic.⁸ Four of the Justices—Rehnquist, Kennedy, Scalia and Souter—had never hired an African American clerk.⁹ Women accounted for only one-fourth of the total.¹⁰ Civil liberties groups and large segments of the general public were shocked by what seemed to be overt hypocrisy on behalf of the Nation's most venerated tribunal.¹¹

Although the furor in October 1998 was the most visible display of dissatisfaction with the Court's hiring patterns, it had been no secret that there was a homogeneous pool of "old boys" working for the Supreme Court. Justice Douglas hired a woman in 1944, Lucile Lomen, but his decision was largely motivated by the reduced availability of male clerks due to the War.¹² Four years later, in 1948, Justice Frankfurter hired William T. Coleman, the first African American to obtain a clerkship on the

2. *Id.*; Erin Teixeira, *High Court is Target of Protest Over Law Clerks*, BALTIMORE SUN, Oct. 6, 1998, at 4A; Gaylord Shaw, *Critics: High Court's Out of Order/ Calls for Diversity as Term Opens*, N.Y. NEWSDAY, October 6, 1998, at A29.

3. See Shaw, *supra* note 2; see also ARTEMUS WARD & DAVID L. WEIDEN, *SORCERER APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 95 (New York University Press 2006). It should be noted that the delivery of résumés was disingenuous at best. Two of the candidates had not even attended law school, and nine of them were second- or first-year students. Only one of the twenty-one résumés indicated that the applicant had obtained lower court clerkship.

4. H.R. Res. 591, 105th Cong. (1998).

5. *Id.*

6. Tony Mauro, *Corps of Clerks Lacking in Diversity*, USA TODAY, Mar. 13, 1998, at 12A; see also Tony Mauro, *The Hidden Power Behind the Supreme Court*, USA TODAY, Mar. 13, 1998, at 1A.

7. See *Corps of Clerks Lacking in Diversity*, *supra* note 6.

8. *Id.*

9. *Id.* It should be noted that Justices Scalia, Kennedy and Souter have each hired at least one African American clerk between 1998 and the present. The Chief Justice, however, never hired an African American clerk during his time on the bench.

10. *Id.*

11. See Teixeira, *supra* note 2, (quoting NAACP President Kweisi Mfume as stating "we are here to protest the hypocrisy of the highest court in the land.").

12. TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 20 (2006).

High Court.¹³ The second female and African American clerks would not make it to the Court until nearly two decades after Coleman clerked for Justice Frankfurter.¹⁴ In between the clerkships of Lomen and Margaret Corcoran, the second female clerk, Justice Frankfurter famously decided not to “take a chance” on hiring Ruth Bader Ginsburg.¹⁵

The most comprehensive study of the gender and racial composition of the Court throughout its history found that, between 1882 and 2004, eighty-five percent of clerks were male, and ninety-four percent of clerks were Caucasian.¹⁶ In recent years, the Justices have hired more women and minorities than in the past, although there are variations between chambers. The number of female clerks has steadily increased since the seventies, with women making up thirty percent of the clerks in the nineties.¹⁷ Minority composition has increased since the 1998 protests, with a high of nine minority clerks in the 2002 pool of thirty-five.¹⁸

Despite these advances, critics maintain that clerks remain a largely homogenous group, and call for increased action to ensure that a better representation of the population as a whole is achieved.¹⁹ Interestingly, the representation of female clerks, which had drawn less criticism than minority representation in the last decade due to a greater female presence among clerks,²⁰ has come under fire again. The pool of clerks in 2006 contained the lowest number of female clerks in a dozen years: seven out of thirty-seven.²¹ Combined with the recent retirement of Justice O’Connor, the low number of female clerks has sparked increased criticism of the Court’s gender composition.²² However, this criticism may be allayed in part by the composition of the upcoming 2007 class of clerks, which will contain thirteen women.²³

Several proposals have been introduced by legislators and scholars to address the gender and racial composition of Supreme Court clerks. The Court, however, has been resistant to any broad change in its hiring procedure and to the suggestion of independent oversight by Congress.

13. WARD & WEIDEN, *supra* note 3, at 94.

14. PEPPERS, *supra* note 12, at 20–22 (discussing the clerkships of Margeret Corcoran for Justice Black in 1966 and Tyrone Brown for Chief Justice Warren in 1967).

15. Tony Mauro, *Supreme Court Renovations Set to Start*, AMERICAN LAWYER MEDIA, Apr. 21, 2003, available at <http://www.law.com/jsp/article.jsp?id=1050369439502>.

16. PEPPERS, *supra* note 12, at 20, 22; see also WARD & WEIDEN, *supra* note 3, at 95–98 (discussing similar statistics).

17. PEPPERS, *supra* note 12, at 21.

18. WARD & WEIDEN, *supra* note 3, at 96.

19. See, e.g., Tony Mauro, *High Court Hires More Minorities*, USA TODAY, Sept. 9, 1999, at 1A (quoting Jesse Jackson, “The overall picture of equal opportunity at the Court is still woefully out of focus.”); Tony Mauro, *Burnish Supreme Court’s Minority-Hiring Image*, USA TODAY, Mar. 14, 2000, at 19A; *Expand Diversity of Hiring Practices*, SUN-SENTINEL (S. Fla.), Sept. 13, 199, at 20A.

20. PEPPERS, *supra* note 12, at 22–23.

21. Linda Greenhouse, *Supreme Court Memo: Women Suddenly Scarce Among Justices’ Clerks*, N.Y. TIMES, Aug. 30, 2006, at A1.

22. *Id.*

23. See David Lat, *October Term 2007 Clerk Hiring: Filling in the Blanks*, Above the Law, at http://www.abovethelaw.com/2007/03/october_term_2007_clerk_hiring_1.php (Mar. 23, 2007) (listing the upcoming class of Supreme Court clerks, which, including the clerk for retired Justice O’Connor, will contain thirteen women).

B. *Proposals for Change*

In order to examine the various proposals for creating a more diverse group of clerks, a word must be said about the selection process. The process has changed drastically since Justice Gray hired the first law clerk in 1882.²⁴ Selection during earlier years was comparatively informal, and Justices often based their decisions on idiosyncrasies such as geography.²⁵ Today, Justices continue to utilize their own methods in both the procedure they use to screen applications, and the factors they weigh most heavily when making their final decisions. However, the dramatic increase in competition for clerkships since the Warren Court has created a much more structured process. The absolute number of applicants has risen dramatically, and applicants now typically apply to all nine Justices as opposed to tailoring their search to an individual member of the Court. Half a century ago, Chief Justice Warren received a mere forty-three applications for three positions.²⁶ Presently, each Justice receives several hundred applications a year for four positions.²⁷

The increased number of clerkship applications has standardized the process by leading the Justices to rely more heavily on certain indicators of merit when making their decisions. Today it is virtually impossible to gain a clerkship if the applicant did not attend a top law school, serve on its law review, and obtain a federal clerkship immediately following graduation. Indeed, over the Court's history, eighty percent of clerks have come from ten elite schools.²⁸ Perhaps even more importantly, ninety-eight percent of clerks that served on the Rehnquist Court had prior clerkship ex-

24. WARD & WEIDEN, *supra* note 3, at 24. The authors argue that the inception of clerks on the High Court was spurred by the legal apprentice model, which had been adopted in America from Great Britain. This is in contrast to the more mainstream theory that the impetus was the rapidly rising caseload of the Court in the 1880s and 90s. The author of this Note would submit that this more novel theory misses its mark. While an examination of the apprentice model serves as a useful tool for understanding the role of early clerks and their relationship with the Justices, it suffers from a fatal flaw. If, as Ward and Weiden would suggest, the impetus for Supreme Court clerkships came from the apprentice model, it is difficult to see why clerks did not make it to the Court until nearly a century after the creation of the Court. Indeed, as Wald and Weiden point out, the legal apprentice model began to give way to the Law School tradition in the late nineteenth century, just as the clerkship model took hold in the Court. See WARD & WEIDEN, *supra* note 3, at 28–29. This factor makes the issue of timing even more difficult to explain.

25. WARD & WEIDEN, *supra* note 3, at 56 (noting that the regular receipt of late applications by Justices signals that the early process was more “haphazard and idiosyncratic”).

26. *Id.* at 57.

27. See Karoun Demirjian, ‘Struck by Lightning’ 3 Times Over: Northwestern Places 3 Grads at One Time in Prestigious Supreme Court Clerkships for Only Second Time Ever, CHI. TRIB. (Feb. 27, 2007); see also Joan Biskupic, Clerks Gain Status, Clout In the ‘Temple’ of Justice, WASH. POST, Jan. 2, 1994, at A1.

28. PEPPERS, *supra* note 12, at 24 (noting the predominance of degrees from Harvard (29%), Yale (16%), University of Chicago (8%), Columbia (7%), Stanford (6%), University of Virginia (4%), University of Michigan (4%), University of Pennsylvania (3%), Georgetown (2%) and NYU (2%), amongst Supreme Court clerks).

perience, and ninety-two percent had clerked for a Federal Court of Appeals.²⁹

The prerequisites of success at an elite law school and a clerkship with an influential federal justice significantly limit the available “pool” of applicants. The Court has often raised the limited minority representation in this elite “pool” as a defense to its hiring record. For example, in response to the 1998 NAACP protest, Chief Justice Rehnquist focused on this line of reasoning, stating, “As the demographic makeup of this pool changes, it seems entirely likely that the under representation of minorities... will also change.”³⁰ Justices Souter and Thomas mirrored this logic the following year while making the Court’s annual budget presentation before a House Appropriations subcommittee.³¹

1. *Expanding the “Pool”*

In response to the argument that the limited demographics of the “pool” results in the homogenous composition of clerks on the Court, many critics have proposed methods of expanding the applicant pool. The most prominent of these suggestions is to broaden the body of law schools that Justices typically choose from. Other suggestions include alleviating the financial disincentives involved in forgoing a lucrative private sector career to serve the Court, and focusing on various aspects of law schools themselves.

a. *Looking Beyond the Top Ten Schools*³²

To expose the Justices to a wider range of academic institutions, Thomas Brennan, a former Chief Justice of the Michigan Supreme Court, has suggested that a national “Deans’ List” be created.³³ Under Brennan’s proposal, all 175 accredited law schools would nominate a single student each year to serve the High Court.³⁴ Although selection from the list would not be mandatory, Brennan believes that it may broaden hiring patterns by exposing the Justices to a wider range of applicants.

This proposal has been criticized on the grounds that it may actually narrow the pool of applicants that Justices consider because only one student per school is recommended.³⁵ Further, there is no guarantee that the Justices would choose from the list, or that the Deans would nominate women and minorities in large numbers. While a more balanced repre-

29. WARD & WEIDEN, *supra* note 3, at 77, table 2.7.

30. See Tony Mauro, *Rehnquist Blames Grad Pool for Lack of Diversity*, USA TODAY, Dec. 8, 1998, at 3A.

31. See Joan Biskupic, *In Testimony, Justices Defend Court’s Hiring Practices*, WASH. POST, Mar. 11, 1999, at A7; see also Greenhouse, *supra* note 21, at A1 (noting that Justices Souter and Breyer posited that the downturn in female clerks for the 2006 term was the result of an anomaly in the applicant pool).

32. The top ten schools from which eighty percent of clerks serving on the Supreme Court graduate. *Supra* note 28.

33. See Clarence Page, *Defining Merit at the Supreme Court*, CHI. TRIB., Dec. 9, 1998, at 25.

34. *Id.*

35. Robert M. Agostisi & Brian P. Corrigan, *Do as we Say Or Do as we Do?: How the Supreme Court Law Clerk Controversy Reveals a Lack of Accountability at the High Court*, 18 HOFSTRA LAB. & EMP. L.J. 625, 654 (2001).

sentation of law schools may be valuable in its own right, it does not necessarily translate into gender and racial diversity.

The hiring practices of past Justices interested in academic diversity buttress this claim. Chief Justice Warren made a point of not hiring more than one clerk from the same school during the same term, and also actively sought out clerks from Western schools.³⁶ However, during his tenure, he never hired a female law clerk.³⁷ Chief Justice Rehnquist, who hired clerks from thirty-four different schools, selecting at least two clerks from twenty different institutions,³⁸ never hired an African American clerk.

b. Alleviating Financial Disincentives

Financial disincentives have also been discussed as a limitation on the pool of applicants. Minority students are, on average, more likely to have fewer financial resources and therefore incur a substantial amount of debt during their college and law school studies. Upon graduation, top-tier students are presented with highly lucrative offers to practice in the private sector, which far outpace clerkship salaries. When faced with the choice of taking a six-figure pay cut to clerk for a Justice, many qualified minorities may feel pressured to forego the clerkship.

Justices Kennedy and Thomas have recognized this issue, and Justice Thomas specifically referenced a potential clerk who could not work for him due to academic debt.³⁹ Similarly, former Judge Luttig, who sat on the 4th Circuit and was extraordinarily successful at placing his clerks with the conservative Justices on the Supreme Court, recounted an African American graduate from Harvard Law School who turned down a clerkship in order to accept a more lucrative offer to practice in the private sector.⁴⁰

In response to the significant financial disincentives, it has been proposed that the Court initiate a loan forgiveness program or alternative financial compensation scheme.⁴¹ Although this would seem an easy program to initiate, the Court has yet to adopt such a plan. In some instances, students may be able to secure a private scholarship through their academic institution or through other sources, but financial disincentives remain an important factor for some applicants.⁴²

36. See WARD & WEIDEN, *supra* note 3, at 71.

37. See PEPPERS, *supra* note 12, at 21.

38. *Id.* at 27.

39. See Tony Mauro, *Sentencing, Clerkships Discussed at High Court Budget Hearing*, AMERICAN LAWYER MEDIA, Apr. 10, 2003, available at <http://www.law.com/jsp/article.jsp?id=1048518272085>.

40. See WARD & WEIDEN, *supra* note 3, at 96–97.

41. See Mauro, *supra* note 39 (discussing proposal by Frank Wolf to apply debt forgiveness to Supreme Court clerkships in an effort to improve diversity).

42. See Lynn K. Rhinehart, *Is there Gender Bias in the Judicial Clerkship Selection Process?*, 83 GEO. L. REV. 575, 581 (1994). It is worth noting that Supreme Court clerks now routinely receive bonuses approaching \$ 200,000 upon joining private practice, which cuts against this argument. See, e.g., Emma Schwartz, *D.C. Circuit Keeps Clerks Confidential*, LEGAL TIMES, Apr. 9, 2007, at 3. However, to the extent that those with significant financial debt enter law school intending to join the highly compensated private sector and unaware of lucrative post-clerkship bonuses, this may have less of an impact than one might expect.

c. Improving Diversity in Law Reviews and Faculty Mentors

Changes in law schools have also been examined as a potential avenue for increasing demographic diversity on the High Court. Two aspects are particularly important to the present discussion: law review membership and faculty mentors.

Writing for a prestigious law review has always been a welcome résumé addition. However, as discussed above, increased competition for clerkships on the High Court has made membership on a law review essentially a prerequisite. Minority membership, therefore, is an important indicator of the eligible pool of applicants for Supreme Court clerkships.

Recognizing the lack of diversity among their ranks, several top-tier law reviews instituted affirmative action plans in the 1980s.⁴³ These plans drew considerable criticism, and landed national headlines.⁴⁴ While it is beyond the scope of this Note to engage in a full discussion of affirmative action, it should be pointed out that critics of law review affirmative action programs worry that they hurt qualified minority members, as well as the publications themselves by requiring them to lower their standards in some instances.⁴⁵ In response, some law reviews have sought to tailor their programs to avoid identifying which, if any, minority students were selected under affirmative action,⁴⁶ and to avoid displacing non-minority students who would have otherwise gained a position on the publication.⁴⁷

The present Note takes no stance on the affirmative action debate. However, minority membership on prestigious law reviews—no matter how it is achieved—is an important prerequisite to broadening the pool of minority applicants and therefore increasing minority membership among Supreme Court clerks.

It has also been suggested that a lack of diverse faculty members may play a role in decreasing the diversity among applicants for High Court clerkships.⁴⁸ Due to the importance of recommendations to clerkship applications, if women and minorities are less likely to have prominent mentors, they are at a disadvantage. No study has been published to show this

43. See Lisa Anderson, *Law Review Masks Diversity in a New Admissions System*, N.Y. TIMES, July 7, 1995, at A17 (noting that nine of the top twenty law schools had instituted an affirmative action plan for their law review); see also *Harvard Law Review Selects Minority Editors*, N.Y. TIMES Oct. 10, 1982, § 1, at 30; Ruth Markus, *Law Review About Face: U-Va Journal Tries to Attract First Black*, WASH. POST, Feb. 11, 1987, at B1; Stephen Labaton, *Law Review at Columbia in a Dispute on Bias Plan*, N.Y. TIMES, May 3, 1989, at B1.

44. See, e.g., William Raspberry, *Affirmative Action that Hurts Blacks*, WASH. POST., Feb. 23, 1987, at A11.

45. *Id.*

46. See Anderson, *supra* note 43 (discussing changes to the UPENN affirmative action program designed to prevent ascertainment of which students were chosen through the program); see also *Harvard Law Review Selects Minority Editors*, *supra* note 43 (quoting the President of the Harvard Law Review as stating, "If there were any minorities selected as a result of the plan, wouldn't it be terrible if we publicized their names?").

47. See Anderson, *supra* note 43 (noting that the Managing Board of the UPENN Review first selects all of the editors it believes necessary to run the Journal and then adds additional members under its affirmative action policy as necessary to mirror the composition of the student body as a whole).

48. Rhinehart, *supra* note 42, at 593.

effect, but it is intuitive that the lack of significant diversity among faculty members at many top-tier schools limits the availability of mentors to minority law students.

Harvard Law School, which has by far the best track record among law schools in producing Supreme Court clerks,⁴⁹ provides a salient example in this regard. The gender and racial composition of the faculty has been the source of heated debate since the appointment of its first African American professor in 1969 in response to pressure from the student body.⁵⁰ Although steps have been taken to ensure a more diverse faculty, a report released in June 2006 found that women are underrepresented on the faculty of the University as a whole and that only eleven percent of the tenured faculty at the Law School are minorities.⁵¹ While the faculty composition is in no way determinative of the opportunities presented to female and minority students to obtain top-notch mentors, it may have an effect.

There are several potential causal factors that may play a role. First, students' own preferences and ability to identify with mentors of the same gender, heritage, or ethnicity, may make students less likely to approach and develop a relationship with some professors. The same may also be true for certain professors with regard to their students, on a conscious or unconscious level. Further, and perhaps most importantly, under-representation of women and minorities in elite teaching positions may serve as a deterrent for some students to set their sights on similarly lofty goals, such as a Supreme Court clerkships. Although no empirical study has been conducted in this regard, the logical plausibility of such an effect merits further study.

2. *Application of Federal Employment Law to the Judiciary*

Five months after joining Representatives Meeks and Conyers in submitting House Resolution 591, which expressed disdain for the Supreme Court's hiring record regarding clerks,⁵² Congressman Jackson submitted House Bill 1048.⁵³ The resolution, joined by forty members of Congress, proposed the "Judicial Branch Employment Nondiscrimination Act of 1999." Under the proposed Act, Title VII of the 1964 Civil Rights Act would be amended to remove the existing exception for the Judicial Branch, thereby exposing the Judiciary to its equal employment provisions.⁵⁴

This was not the first Congressional inquiry into the application of employment law to the Judiciary. In 1995, the Congressional Accountability Act was passed,⁵⁵ which applied Title VII and ten other Federal laws to

49. Twenty-nine percent of all clerks have graduated from Harvard.

50. See Fox Butterfield, *Harvard Law Professor Quits Until Black Woman Is Named*, N.Y. TIMES, Apr. 24, 1990, at A17; see also *Harvard Students Call for Affirmative Action*, N.Y. TIMES, Nov. 26, 1982, at A16; Fox Butterfield, *Parody Puts Harvard Law Faculty in Sexism Battle*, N.Y. TIMES, Apr. 27, 1992, at A10.

51. See Alan Finder, *Women on Faculty Still Lag at Harvard, Report Finds*, N.Y. TIMES, June 14, 2006, at A18.

52. *Supra* note 4.

53. Judicial Branch Employment Nondiscrimination Act of 1999, H.R. 1048, 106th Cong. (1999).

54. See *id.* at § 2.

55. Congressional Accountability Act of 1995, Pub L. No. 104-1, 109 Stat. 3.

the Federal Government. Under the Act, the Judicial Conference was required to conduct a study and submit a report to Congress on the applicability of the same employment laws to the Judiciary.⁵⁶

The Conference's forty-two page report recommended against applying Federal employment law to the Judiciary.⁵⁷ The rationale focused largely on the importance of judicial autonomy, but also noted that such protections were practically unnecessary as the Judiciary's internal procedures afford the same protections as the employment laws. Commentators have noted that application of employment law to the Judiciary would create serious conflicts of interest due to the anomalous situation of Judges deciding cases involving their peers in the event that a claim was brought against Judicial employment practices.⁵⁸

II. A MAJORITARIAN BODY

It is too much to expect the Court to go against the established and crystallized customs.

—Charles Houston, NAACP lawyer⁵⁹

Arguing for a life-tenured, independent Judiciary, Alexander Hamilton reasoned that, without such bulwarks, "it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community."⁶⁰ Thus, the judicial branch was insulated to ensure adequate protection of the Constitution and minority classes of citizens from the overbearing caprices of the majority.⁶¹ History, however, has not vindicated Mr. Hamilton's logic.

This Note makes no attempt to enter the scholarly fray addressing the apparent dissonance between a politically insulated Judiciary interpreting the Constitution, and the Democratic principle of majority rule—the "counter majoritarian problem." Rather, this section will serve to illustrate, by way of example, the historical tendency of the Court to endorse majority opinion to the detriment of minorities.⁶²

56. See 2 U.S.C. § 1434 (1995).

57. Unpublished report, on file with the Judicial Conference.

58. See, e.g., Agostisi & Brian, *supra* note 35, at 652.

59. GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 145 (1983).

60. Alexander Hamilton, *THE FEDERALIST PAPERS*, 78 (May 28, 1788).

61. See *id.* ("But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws."). It is important to note that there is serious debate over the extent of Judicial Review that the Founders had in mind when drafting the Constitution.

62. It should be noted that the value of a diverse body of clerks is not lost if one disagrees with the argument that the Court is a majoritarian body. Even if one believes that the Court does often protect minorities from the majority, additional protection through Supreme Court clerk influence may still represent a positive development.

History demonstrates, with few exceptions,⁶³ that the Court is unwilling to controvert a substantial majority of the populace in the absence of a clear Constitutional mandate.⁶⁴ The examples of this phenomenon are legion, and the scope of this Note does not permit an in-depth discussion. For present purposes, it is enough to demonstrate that the law is often indeterminate enough to allow the Court to follow public opinion.

Perhaps the most infamous example of this phenomenon is *Korematsu v. United States*, where the Court upheld military orders internment Japanese American Citizens during World War II.⁶⁵ The case presented a perfect opportunity to protect a minority group against the general populace, but the Supreme Court deferred to majority sentiment. This was not due to a lack of constitutional authority; in fact, the Court announced the “strict scrutiny” equal protection test in *Korematsu*.⁶⁶ Instead, the Court was unable to break through the national security hysteria and deep-rooted racial prejudice that gripped the general public.⁶⁷

School segregation provides another ready example. In 1927 the Supreme Court heard *Gong Lum*, a case involving segregation of Chinese Americans by assigning them to schools designated for African Americans.⁶⁸ The Chinese American plaintiffs claimed that the *Plessy* “separate but equal” doctrine was being violated because they were forced to attend school with African Americans, while whites were not.⁶⁹ Citing a long list of precedent, a unanimous Court affirmed the constitutionality of racial segregation, but did not address the specific claim.⁷⁰ Indeed, the Court noted that railroad segregation in *Plessy* presented a “more difficult question.”⁷¹

In the nearly three decades between *Gong Lum* and *Brown*, much changed in the United States, however, the Fourteenth Amendment did not. *Gong Lum* unanimously upheld school segregation, and *Brown* struck it down by the same count. Again, this demonstrates the Court’s unwillingness to contravene “established and crystallized customs.” Until pub-

63. See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990) (upholding flag burning under the First Amendment’s guarantee of free speech); *Engle v. Vitale*, 370 U.S. 421 (1962) (striking down school prayer).

64. See generally MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004) (providing a comprehensive and insightful analysis of the Supreme Court’s actions in relation to the political, social, and economic context of broader society.). The introduction notes that judicial interpretation reflects not just public opinion generally, but the elite subculture to which judges belong, and quotes Justice Holmes, “The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.” KLARMAN, at 5–6.

65. See *Korematsu v. United States*, 323 U.S. 214 (1944).

66. *Id.* at 215 (“It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”).

67. See *id.* at 233–42 (Murphy, J., dissenting) (elucidating this point).

68. See *Gong Lum v. Rice*, 275 U.S. 78 (1927).

69. *Id.* at 81.

70. See *Gong Lum v. Rice*, 275 U.S. 78 (1927).

71. *Id.* at 86.

lic opinion and social pressures shifted, the Court would not vindicate integrated education under the Equal Protection Clause.⁷²

To the extent that one believes the Court should serve to protect minorities from the overreach of majoritarian influence, the preceding discussion presents a serious problem with the Court as an institution. Indeed, “[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”⁷³ This Note provides additional justification for a more diverse body of Supreme Court clerks by arguing that such an arrangement has the potential to mitigate the Court’s majoritarian tendencies. While there are important limitations on the influence clerks may exert on the Court, the fundamental implications of the Court’s traditionally majoritarian tendencies counsel that the potential for a more diverse group of clerks to have a countermajoritarian impact not be overlooked.

III. CLERKS AS A COUNTERWEIGHT

Since 1957, when William Rehnquist criticized the “liberal” bias of Supreme Court clerks in making certiorari recommendations,⁷⁴ their role on the nation’s highest bench has been the subject of heated debate.⁷⁵ Three main avenues of clerk influence have been discussed at length—certiorari decisions, opinion writing, and influencing the Justice’s ultimate decision—with varying accounts of both the actual and proper role of clerks.⁷⁶ The potential for a more diverse body of clerks to positively influence the Court through these three routes will be discussed in turn. Finally, a fourth

72. KLARMAN, *supra* note 64, at 147–48 (“NAACP policy in the interwar period was to contest the spread of school segregation in the North, but not to challenge it where it was ‘so firmly entrenched by law that a frontal attack cannot be made.’ . . . If NAACP leaders doubted the wisdom of challenging southern school segregation in light of public opinion, the justices were not about to interfere with it.”)

73. *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943).

74. William H. Rehnquist, *Who Writes Decisions of the Supreme Court*, U.S. NEWS & WORLD REPORT 74–75 (Dec. 13, 1957) (“Looking back, I must admit that I was not guiltless on this score, and I greatly doubt if many of my fellow clerks were much less guiltless than I. And, where such bias did have any effect, because of the political outlook of the group of clerks that I knew, its direction would be to the political “left.”).

75. Two early contributors to this debate are BOB WOODWARD, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979) (creating a national furor by describing the Burger Court as riddled with interpersonal conflict and lacking solid leadership. Although focused squarely on the Justices, this best-selling book discussed the important roles played by clerks, and relied heavily on clerks as sources.); and EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998) (setting off a tirade of criticism for openly violating the Court’s internal code of confidentiality, and billed as the first book to relate an eyewitness account of the Court’s activities, Lazarus describes in great detail the strong influence of ideologically driven clerks). Just this year, two of the most comprehensive accounts to date were released, surveying the role of clerks since their inception in 1882—WARD AND WEIDEN, *supra* note 3 and PEPPERS, *supra* note 12.

76. See, e.g., PEPPERS, *supra* note 12; LAZARUS, *supra* note 75; see also Biskupic, *supra* note 27 (discussing criticism of clerks’ role in the certiorari process); Rehnquist *supra* note 74.

avenue, which has received little scholarly attention, will be addressed: due to the close and oftentimes life-long relationships Supreme Court clerks share with their Justice, increased diversity among clerks could provide a strong counterweight to the Court's historically majoritarian tendencies by influencing the personal sentiments and opinions of the Justices.

A. *Certiorari Decisions*

The advent of the "dead list" in 1935 led most Justices to rely more heavily on their clerks in making certiorari decisions.⁷⁷ Exploding dockets during the Warren Court strained the clerks' efforts and led Justice Powell to propose the creation of a system that would avoid the redundancy of having each petition reviewed nine times. Although Justice Stevens has never joined, the resulting "cert pool" quickly became a staple of the Court. Incoming petitions are divided evenly across the eight chambers and then distributed among clerks within chambers. Clerks prepare brief memoranda on their assigned petitions and distribute their work to the other eight chambers. Upon receipt, clerks in each chamber typically provide a mark-up of the pool memoranda to aid their Justice's decision-making.

Due to the large role that clerks have in the certiorari process, they are often referred to as the "Junior Court." Commentators have focused on this aspect of the clerks' role, arguing that such an important part of the Court's duties cannot be abdicated to recent law school graduates.⁷⁸ This argument finds support from past Justices. Justice Frankfurter stated that certiorari decisions are "so dependent on a seasoned and disciplined professional judgment that I do not believe that lads—most of them fresh out of law school and with their present tendentiousness—should have any routine share in the process."⁷⁹ Despite its criticisms, it is difficult to envision the modern Court, which receives over seventy-five hundred petitions a year,⁸⁰ operating in the absence of a "cert pool."⁸¹

Although clerks exercise substantial power in drafting "cert pool" memoranda, it is difficult to discern how increased diversity among clerks would mollify the Court's majoritarian leanings through the certiorari process. Two points make this clear. First, even if clerks do exert strong influence over which cases are brought before the Court, that influence is not likely

77. WARD & WEIDEN, *supra* note 3, at 112–15. Before the "dead-list," the Chief Justice would provide a brief summary of each case on the Court's docket at Conference. *Id.* at 112. Justice Hughes pioneered the practice of creating a list of cases that he deemed not certworthy, and which would not be discussed at conference unless another Justice requested discussion. *Id.* at 113. Presently, the "dead list" is no longer circulated. Cases deemed unworthy of certiorari by the Chief Justice are merely left off the conference agenda, but can be added at the request of any Justice. *Id.* at 115.

78. *See, e.g., id.* at 147 (quoting Kenneth Starr as stating, "Selecting 100 or so cases from the pool of 6,000 petitions is just too important to invest in very smart but brand-new lawyers.").

79. *Id.* at 115; *see also* 119–20 (discussing Justice Douglas's arguments against reliance on clerks for screening petitions).

80. *The Supreme Court, 2004 Term*, 119 HARV. L. REV. 415, 425 (2005).

81. *See* Joan Biskupic, *supra* note 27 (quoting former Rehnquist clerk Maureen Mahoney as stating, "The Justices have to delegate. It is completely appropriate that they spend less time on the [certiorari] process, when they can spend time reading briefs and writing opinions.").

to impact the Court's disposition of accepted cases. A corollary to this point is the fact that a grant or refusal of a petition cannot be readily classified as majoritarian or countermajoritarian. For instance, granting certiorari over a case where the lower court reached a countermajoritarian result could be deemed majoritarian if the Court then overrules. However, if the Court then affirms the decision, the grant of certiorari cannot be considered majoritarian. In the same token, refusal to grant a petition where the lower court reached a majoritarian result can be seen as expressing a preference for the majority, but any prediction into how the Court would have decided the case if certiorari were granted is uncertain at best. Thus, while the Court may benefit from a diversity of clerks administering the "cert pool," this diverse representation may not have an impact on the Court's majoritarian tendencies—at least, there is no definitive way to measure the effect.

B. *Opinion Writing*

While the "cert pool" may receive more public criticism,⁸² the role of clerks in drafting opinions remains exceedingly contentious. The disparity in public attention results in part from the mystique surrounding opinion writing. The "cert pool" has been widely recognized for decades, while clerks' role in penning decisions for the Court has remained a closely guarded secret. Justices who rely heavily on their clerks have an incentive to avoid public disclosure of the practice. Justice Brandeis once stated that "The reason why the public thinks so much of the Justices is that they are almost the only people in Washington who do their own work."⁸³ The public may forgive Justices for farming out certiorari review to their clerks in light of the monumental number of petitions received each year. However, opinion writing remains the distinct province of Article III Justices. Indeed, as the number of cases decided by the Court each year has dropped,⁸⁴ there seems little excuse for delegating their duties to clerks who, while among the nation's brightest scholars, remain novices in the legal world.⁸⁵

Justices vary widely in their reliance on clerks in this regard, but there is general agreement that more recent clerks have assumed a greater role than those serving in the past.⁸⁶ A clerk for Justice Brandeis described his

82. See *id.* (stating that "The clerks' appeals 'pool' draws the most complaints.").

83. See CHARLES E. WYZANSKI, *WHEREAS—A JUDGE'S PREMISES* 61 (1965).

84. See WARD & WEIDEN, *supra* note 3, at 142–43, figure 3.2 (discussing the sharp decline in cases decided by the Court during the Rehnquist Court in conjunction with the rise of the cert pool).

85. See Stuart Taylor Jr. & Benjamin Wittes, *Of Clerks and Perks: Why Supreme Court Justices have More Time than Ever and Why it should be Taken Away*, *ATLANTIC MONTHLY*, July/Aug. 2006, at 50 ("There are few jobs as powerful as Supreme Court Justice—and few jobs as cushy."); *but see* Courtiers of the Marble Palace at 192 ("Moreover, the illusion that the Justices 'do their own work' has been dashed, and the public has—with only an occasional murmur of protest—accepted these new institutional norms.").

86. See WARD & WEIDEN, *supra* note 3, at 201–04 (suggesting that clerks have assumed a greater role in opinion writing over time); PEPPERS, *supra* note 12, at 191 (stating that "one can safely conclude that no other set of sitting Supreme Court justices have

role as follows: “When I finished my work on a draft which had been assigned to me or got as far as I could, I gave it to him. He tore it to pieces, sometimes using a little, sometimes none.”⁸⁷ A clerk for Justice McReynolds recalled a meeting with the Justice to discuss a draft opinion which he had labored on through the weekend.⁸⁸ As they were talking, “he [Justice McReynolds] quietly reached across the desk and silently, almost gently let my opinion glide down into the wastebasket.”⁸⁹

Modern clerks tell a different story. A Warren clerk opined: “The Chief is not a good writer. His first drafts are commonly very bad. Happily, however, he is quite willing to accept criticism or, indeed, to have his clerks reject the thing in toto. As a result, the preparation of his opinions is left in great measure to his clerks.”⁹⁰ Justice Brennan is quoted as attributing his opinions to the “Brennan chambers”: “I say from ‘the Brennan chambers’ because, as Bentham said, the ‘Law is not the work of judge alone but of judge and company.’ The company in this case consisted of the sixty-five law clerks who have been associated with me on the Court.”⁹¹

It is important to note that while the norm of the Court has been to cede increasing responsibility to clerks, there are distinct differences between chambers. Justice Stevens continues to write the first draft of all assigned opinions. Beyond his belief that doing so is necessary to fully comprehend the case at hand, Stevens has stated: “I’m the one hired to do the job.”⁹²

Regardless of whether clerks’ influence over the content of opinions translates into influence over their Justice’s ultimate decision—which available scholarship seems to refute⁹³—their role in crafting the Court’s opinions has important implications. The legal reasoning and dicta contained in opinions have broad ranging repercussions as precedent from the nation’s Highest Court. In certain cases, practitioners and scholars will examine and rely on details as unassuming as a footnote for generations.⁹⁴ Because clerks influence myriad details of opinions which are heavily relied upon throughout the legal community, there is reason to believe that increased diversity in the body of clerks could have a mitigating effect on

delegated as much responsibility to their law clerks as those on the Rehnquist Court.”).

87. HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 238 (3d ed. 1975) (quoting Dean Acheson).

88. See Barry Cushman, *Clerking for Scrooge: The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Clerk in FDR’s Washington*, 70 U. CHI. L. REV. 721, 737 (2003).

89. *Id.*

90. PEPPERS, *supra* note 12, at 149 (quoting the Diary of Dallin Oaks, clerk for Chief Justice Warren during the 1957 term.). It should be noted, however, as Peppers points out, that this is not the equivalent of directing the justice’s ultimate decision, and Warren was not swayed by his clerks in this regard. See *id.* at 149–50).

91. WARD & WEIDEN, *supra* note 3, at 202 (quoting Justice Powell as stating, “Apparently the Chief Justice does not like my clerks, as again it seems to me that we have been ‘short-changed’ on cases to write.”) (citations omitted).

92. PEPPERS, *supra* note 12, at 195.

93. See WARD & WEIDEN, *supra* note 3, at 191, Table 4.2 (noting that only 5 of 133 respondents indicated that they were able to influence the outcome of a case).

94. See, e.g., Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

the Court's majoritarian stance, even if the outcome of cases remains unaltered. Two examples make this point clear.

1. *Korematsu v. United States*⁹⁵

In *Korematsu*, although the Court as a whole reached a shameful outcome, Eugene Gressman, clerking for Justice Murphy, penned a stirring dissent.⁹⁶ It is impossible to determine just how much of Gressman's first draft reached the record unedited, but there is evidence to suggest that Murphy often ceded considerable authority to his clerks.⁹⁷

The logic and language of Murphy's dissent has since been cited repeatedly, including cases involving affirmative action,⁹⁸ Fourth Amendment protection from unreasonable search and seizure,⁹⁹ and First Amendment rights.¹⁰⁰ Most recently, it was cited in *Hamdi v. Rumsfeld*¹⁰¹ for the proposition that, while military judgment is granted wide discretion, when constitutional rights are violated, the Court must be allowed to determine whether the military actions are reasonable.¹⁰²

Despite the majority's capitulation to the intense social and political pressures of the time, Murphy's dissent serves as an eloquent reminder that the Constitution is no less applicable in times of strife. "All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at *all times* as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution."¹⁰³ Indeed, times of hysteria and national emergency place minority citizens at the greatest risk of having their constitutional rights trampled by the caprices of the majority.

2. *Carolene Products*¹⁰⁴

Footnote four of *Carolene Products* has become perhaps the most famous, and certainly the most analyzed, footnote in the Court's history.¹⁰⁵ Scholars and practitioners alike have continually probed the contours and

95. 323 U.S. 214 (1944).

96. See WARD & WEIDEN, *supra* note 3, at 204.

97. See *id.* (noting that Court insiders referred to Gressman as "Mr. Justice Gressman," and quoting Justice Douglas writing to Justice Black, "Frank [Murphy] sa[id] Sat[urday] that he did not write the dissent in *Macbee* but was impressed when he saw it.").

98. See, e.g., *Adarand v. Peña*, 515 U.S. 200, 214–15 (1995); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603–04 (1990) (O'Connor, J., dissenting); *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 501 (1989).

99. *United States v. Taylor* 956 F.2d 572, 592 (6th Cir. 1992) (Jones, J., dissenting) (arguing that the urgency of the war on drugs does not trump the protections afforded to basic civil liberties by the Constitution).

100. *ACLU of Ill. v. United States GSA*, 235 F.Supp.2d 816, 817 (N.D. Ill. 2002) (citing Murphy's dissent for the proposition that civil liberties cannot be abrogated by claims of national security unless those claims withstand a reasonableness analysis).

101. 542 U.S. 507 (2004).

102. *Id.* at 535 (2004).

103. *Korematsu*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting) (emphasis added).

104. *United States v. Carolene Products*, 304 U.S. 144 (1938).

105. *Id.* at 153 n.4. A simple search of U.S. Law Reviews and Journals for references of "footnote 4" yields 1838 results on Lexis.

implications of the “political process” theory Justice Stone espoused in a mere three paragraphs nearly seventy years ago. Although the instant case dealt with the contours of the Federal Government’s power under the Commerce Clause, footnote four set the groundwork for a more strict form of scrutiny when legislation directly interferes with the political process, or has a similar effect by focusing on “discrete and insular minorities.”¹⁰⁶

Carolene Products supplies a paradigmatic example of the potential influence of clerks through dicta. Even before clerks began routinely drafting entire opinions, they were often assigned the duty of completing footnotes.¹⁰⁷ This was the case in 1938 when Louis Lusky clerked for Justice Stone and reportedly drafted, in large part, the famed fourth footnote in *Carolene Products*.¹⁰⁸ Presently, with clerks routinely producing entire drafts of opinions, there is a much greater chance of their logic reaching the published record.

C. Influencing Decision-making

Little is known about the extent of influence clerks exert over their Justice’s votes. Lazarus, in his scandalous book *Closed Chambers*,¹⁰⁹ opined that Justice Kennedy was occasionally swayed by his clerks, but this claim was rebuked by a former clerk as “simply false and slanderous.”¹¹⁰ The most comprehensive study of this line of influence found that very few clerks believed they were able to influence their Chamber’s vote.¹¹¹ This makes perfect sense in light of the disparity of legal experience between Justices and their clerks, who are typically only one or two years removed from law school. One might argue, however, that clerks would be especially tight-lipped regarding any such influence because it would weaken the Court’s credibility.

In spite of the limited evidence indicating that clerks are unlikely to exert influence over the outcome of cases, in rare instances it may happen. It is possible that the beliefs of female and minority clerks—especially those based on personal experiences, which are likely to be more adamantly defended—hold enhanced credibility in cases affecting minorities and women. In the event that a Justice is open to the input of clerks on a particular case, female and minority clerks may be in a position to exert a persuasive influence over the outcome. Further, to the extent that diverse clerks would introduce a broad array of past experiences and viewpoints, even if they do not change the opinion of their Justice, they may help to ensure that it is more comprehensive.

106. See Lusky, *supra* note 94. Lusky, in fact, wrote most of footnote four. See WARD & WEIDEN, *supra* note 3, at 203.

107. See WARD & WEIDEN, *supra* note 3, at 202–03.

108. See *id.* at 203; see also *id.* at 202–03 (suggesting that Chief Justice Warren’s clerk, Richard Flynn, completed footnote eleven in *Brown* by adding several sociological studies).

109. LAZARUS, *supra* note 75.

110. See WARD & WEIDEN, *supra* note 3, at 153 (citation omitted).

111. See *id.* at 191, Table 4.2 (noting that only 5 of 133 respondents indicated that they were able to influence the outcome of a case).

D. *Interpersonal Relationships*

Relationships between clerks and Justices and among clerks themselves vary widely between Chambers. However, regardless of the exact contours of the relationship, Justices spend a large portion of their time working with clerks. One former clerk recalled Justice Powell telling her: "I will see you more than I see my wife."¹¹² Although changed in substance, the relationship between clerks and their Justice often extends well beyond the clerk's term of service. These relationships have the potential to influence Justices' personal views on subjects that may hold important jurisprudential implications.

This Section will first examine the contours of relationships, both on and off the Court, between clerks and Justices. Mindful of important caveats, it will discuss the ways in which a more diverse body of clerks could influence the views of the Court. Specific areas where such influence may have an impact will be discussed. I submit that, while perhaps a gradual process, the exposure of Justices to minority viewpoints has important implications that should be taken into account when debating the lack of diversity among Supreme Court clerks. To the extent that one believes the Court should serve as a bulwark against majoritarian encroachments upon minority rights, a diverse body of clerks is a goal worth striving for.

1. *Relationships Between Clerks and Justices*

Many analogies have been posited to encapsulate the relationship between Justice and clerk. To name just a few: Partner and Associate,¹¹³ Junior Justices, Sorcerers' Apprentices, parent and sibling, and mentor and student. With important caveats, the author believes that the relationship most closely approximates the latter—mentor and student. However, mere labels provide little insight into the link between Justice and clerk, without concrete examples. In following, examples of relationships both during and after clerkships will be discussed, which I refer to as "in chambers" and "out of chambers," respectively. Due to the normative stance of this Note, the focus will be largely directed toward more recent Justices with the intent of providing an accurate foundation for discussing the ways in which increased diversity among clerks could aid the present and future Court.

a. *In Chambers*

As the preceding sections demonstrate, clerks play an important role in certiorari screening, as well as formulating opinions for the Court. Regardless of how much influence is ceded to these young lawyers, none would deny that they work very hard. In discussing her selection process for clerks, Justice O'Connor said, "maturity, stability, and congeniality are important to me because we work long hours and every weekend and

112. Interview with Anne Coughlin, O.M. Vicars Professor of Law, University of Virginia School of Law (Nov. 17, 2006) (on file with author).

113. See PEPPERS, *supra* note 12, at ch. 5.

holidays, other than Christmas Day and New Year's Day."¹¹⁴ It would be a mistake to believe that clerks for the late Justice Rehnquist, who is known for being well-rounded and insisting on maintaining time for his family and non-legal pursuits,¹¹⁵ did not spend the majority of their time laboring at the behest of the Chief.

The demanding work schedule of the Court leads to countless interactions between clerks and Justices, both formal and informal. From drafting and discussing certiorari and bench memoranda, to debating the merits of cases, to calling Justices late into the evening to discuss death penalty petitions, working as a clerk on the nation's highest bench entails a professional relationship most legal scholars only dream of. While there are differences between Chambers, recent Justices have come to rely more heavily on their clerks,¹¹⁶ creating a more intense working relationship than past clerks may have experienced.¹¹⁷

Justice Powell discussed this relationship in a letter to former clerk, John Jeffries, Jr.:

An especially gratifying aspect of serving here has been the personal and professional association with law clerks—especially mine. The clerks do not make the decisions but they contribute more to the quality of opinions than is generally recognized. For me, the personal relationship and yes—inspiration—of working closely with the “brightest and best” from the great law schools, has illuminated this decade for me in a very special way.¹¹⁸

Justice Thomas is known for engaging his clerks in “uninhibited and wide-ranging” conferences discussing bench memoranda, where clerks are encouraged to take their own stance and challenge his views.¹¹⁹ A former

114. *Id.* at 197.

115. See Brian Morris, *Symposium: Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O'Connor: In Memory of Chief Justice Rehnquist: For the Chief*, 58 STAN. L. REV. 1683 (2006) (noting that “The Chief was always jealous with his time.”); James E. Ryan, *Symposium: Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O'Connor: In Memory of William H. Rehnquist: The Chief as Teacher*, 58 STAN. L. REV. 1687 (2006) (noting that “[w]hat struck me most about working with the Chief was just this sense of perspective and balance. Despite the nature and obvious importance of his position, he never lost sight of the fact that his job was just one part of his life. He clearly relished his work, but he also cherished his life outside of his job, including, most importantly, his family, to whom he was deeply devoted.”).

116. See generally WARD & WEIDEN, *supra* note 3; PEPPERS, *supra* note 12. See also Biskupic, *supra* note 27 (“The influence of a clerk on a justice varies by chambers. Rehnquist has a reputation for rarely seeking advice, while Sandra Day O'Connor and some of the newest justices regularly turn to clerks for debate on an issue.”).

117. See PEPPERS, *supra* note 12, at 167 (quoting a former clerk to Justice White as saying, “in many ways he really could have operated without any clerks at all.”); Patricia M. Wald, *Selecting Law Clerks*, 89 MICH L. REV. 152, 153 (1990) (“The judge-clerk relationship is the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair. Unlike lawyers in law firms or government bureaucracies, the federal judge (I speak now primarily of an appellate judge) works in small, isolated chambers with a minimum of work contacts outside.”).

118. PEPPERS, *supra* note 12, at 190 (quoting Powell Papers, Box 129B).

119. See *id.* at 200–01 (confirmed in interview with current clerk, John Adams) (Nov. 14, 2006).

clerk to Justice Stevens commented that she could “imagine few bosses so interested in the views of their employees, so prepared to engage in free-flowing debate, and so enthusiastic to be proven wrong.”¹²⁰

Perhaps as a reward for their dedication, Justice O’Connor regularly cooked for her clerks while they worked on Saturdays.¹²¹ A former Rehnquist clerk recalled passing trivia questions to the Chief during oral argument, to the enjoyment of his boss, and debating cases while walking the sidewalks surrounding the Court.¹²² A former Powell clerk remembered calling the Justice, then seventy-nine years of age, in the middle of the night and having Mrs. Powell politely transfer the call to her husband.¹²³[CB5]

As evidenced by the above examples, professional contacts between Justices and their clerks vary widely. However, a common thread is the devotion of clerks to their Justice, and in most cases, a reciprocal devotion of Justices to their clerks.¹²⁴ This is perhaps best demonstrated by the non-legal interactions of Justices and clerks during their term, as well as the continuing relationships between clerks and their Justice after their time on the Court, which will be discussed in the following section.

Beyond their professional relationship, many Justices enjoy the company of their clerks outside of the Supreme Court. A clerk to Justice Breyer fondly recalls spending Valentine’s Day evening at dinner with a group of fellow clerks and the Justice, whose wife was in Boston at the time.¹²⁵ One of Justice Brennan’s clerks remembers traveling to Philadelphia where the Justice was scheduled to give a speech. While in line to purchase tickets at Union Station “a student came up, dropped his suitcase on the Justice’s feet, and asked, ‘Hey, buddy, can you hold my place in line while I make a phone call?’”¹²⁶ Justice Brennan retained his composure, and politely promised that he would do so.

Justice O’Connor is reported to have invited her clerks to attend yoga and aerobics with her,¹²⁷ and Justice Ginsburg has taken her clerks to the Opera.¹²⁸ In addition, her husband, Martin Ginsburg, cooks a meal for her clerks once per term.¹²⁹ One of Justice Powell’s clerks, who was living apart from her husband at the time, recalls being invited to dinner with his family and feeling that the Justice was very protective of her.¹³⁰ This is no surprise given the fact that Justice Powell stated explicitly that he and

120. PEPPERS, *supra* note 12, at 196 (quoting Debra Pearlstein, National Council of Jewish Women).

121. See Biskupic, *supra* note 27 (quoting a former clerk: “on Saturdays she would whip up some quesadillas for the clerks.”); PEPPERS, *supra* note 12, at 198.

122. See Morris, *supra* note 115, at 1684.

123. Interview with Anne Coughlin, *supra* note 112.

124. *But see* PEPPERS, *supra* note 12, at 171 (noting that some Justices, such as Douglas, Fortas, and McKinley, did not develop such devoted relationships to their clerks).

125. E-mail from Risa Goluboff, Associate Professor of Law, University of Virginia School of Law (Nov. 13, 2006) (on file with author).

126. E-mail from Robert M. O’Neil, Professor of Law, Dir. of Thomas Jefferson Center for the Protection of Free Expression (Nov. 17, 2007) (on file with author).

127. PEPPERS, *supra* note 12, at 198.

128. *Id.*

129. *Id.*

130. Interview with Professor Anne Coughlin, *supra* note 112.

his wife regarded his clerks “as their own sons and daughters.”¹³¹ A Justice Warren clerk recalls the Chief insisting that he bring his wife and son to the Court to meet him, and still treasures a picture taken of the Chief holding his one-year-old son.¹³²

Justice Rehnquist was known to foster particularly strong non-legal relationships with his clerks. One clerk recalls that Justice Rehnquist delighted in beating his clerks at trivia.¹³³ Another recalls spending the day doing yard work at the Chief’s West Virginia vacation home, and selecting wedding music for her upcoming ceremony during a respite.¹³⁴ The late Chief would also recruit his clerks to join him for weekly tennis matches.¹³⁵ During a trip to a match, a former clerk recalls discussing a wide range of topics with the Justice, including his father’s service during World War II.¹³⁶ Unbeknownst to the clerk, Justice Rehnquist later corresponded with his father regarding the War.¹³⁷

Sports form a recurrent theme in extra-court activities between clerks and Justices. Before he remarried, Justice Black was reported as inviting his clerks to play tennis with him.¹³⁸ Justice White was notorious for his aggressive play on the basketball court with his clerks, and often took his clerks to watch professional sporting events.¹³⁹ A former Warren Court clerk recalls watching college football with the Chief after regular Saturday lunches with his co-clerks.¹⁴⁰

These personal relationships allow clerks a unique vantage into the lives and personalities of their Justices, and grant Justices the same in regard to their clerks. Further, they serve to solidify in-chambers relationships, and often serve as a welcome respite from the taxing work of the Court. In conjunction with the strong professional relationships discussed above, personal relationships between clerk and Justice often lead to a rapport that extends well beyond the single term of service.

b. Out of Chambers

With the intensity of the relationship between clerk and Justice and the devotion clerks feel to their Chambers, it is no surprise that relationships typically extend well beyond the term of service, and often last a lifetime. Perhaps the most poignant demonstration of the continuing dedica-

131. PEPPERS, *supra* note 12, at 189 (quoting former clerk David Westin).

132. E-mail from Earl Dudley, Professor of Law, University of Virginia School of Law (Nov. 15, 2007) (on file with author) (noting also that “All working sessions with him [Chief Justice Warren] began with him inquiring about your life and family . . .”).

133. See Ryan, *supra* note 115, at 1688.

134. Craig E. Bradley, et al., *Hail to the Chief: Former Law Clerks for William Rehnquist Recall What They Learned and How He Touched Their Lives*, 91 A.B.A.J. 42, 48 (2005) (recording observations of Celestine McConville, former clerk).

135. *Id.* at 46–48 (recording observations of John Englander and Celestine McConville, former clerks).

136. *Id.* at 46.

137. *Id.*

138. Interview with Professor A. E. Dick Howard, White Burkett Miller Professor of Law and Public Affairs, University of Virginia School of Law (Nov. 10, 2006) (on file with author).

139. PEPPERS, *supra* note 12, at 166–67.

140. E-mail from Professor Earl Dudley, *supra* note 132.

tion of clerks to their Justice is that of Justice Harlan's grief-stricken clerks watching over him during his last days in the hospital in 1971.¹⁴¹ Indeed, former clerks have a long tradition of attending and speaking at Justices' funerals, as demonstrated most recently when former clerks of the late Chief Justice Rehnquist bore his coffin from the Cathedral.¹⁴²

The continued contacts between Justice and clerk vary. Most Supreme Court clerks move on to distinguished legal careers and often keep in touch with their Justice to apprise them of their career, pass along their scholarship, comment on the Court's work, or merely to continue strong personal ties formed on the Court. Indeed, Justices themselves often contact their former clerks for the same reasons or to seek assistance in selecting new clerks, and most Chambers hold annual reunion dinners for their past clerks.

A former Rehnquist clerk recalled the Chief taking a particular interest in his career, and providing an influential recommendation for his appointment to the Montana Supreme Court.¹⁴³ Clerks that move into academia often keep their Justice apprised of their scholarly publications, particularly when their work touches upon the Justice's jurisprudence.¹⁴⁴ Upon receiving correspondence from a former clerk regarding his opinion in *INS v. Delgado*, Justice Powell responded: "I . . . am glad to know you approve of my *Delgado* views—even though none of the other Justices perceived their merit."¹⁴⁵ Epitomizing the enduring personal ties between clerk and Justice, former clerk to Justice Powell, John Jeffries, Jr., met the Justice for lunch four times a year, every year, for over twenty years between his clerkship and Powell's passing.¹⁴⁶

2. Potential Influence on the Court

When thinking about influence cultivated during Judicial clerkships, scholars have typically focused solely on the clerks. This follows from the traditional foundations of clerkships in the apprenticeship model and the widely espoused view of Justice as mentor and clerk as student.¹⁴⁷ Indeed, many former clerks view their Justices as mentors¹⁴⁸ and ascribe them

141. See PEPPERS, *supra* note 12, at 155.

142. See Todd S. Purdum, *Eulogies for Rehnquist Recall a Man of Many Interests*, N.Y. TIMES, Sept. 8, 2005, at A1.

143. See Morris, *supra* note 115, at 1685.

144. See, e.g., interview with Professor A. E. Dick Howard, *supra* note 138 (noting that he sent Justice Black a Law Review Article he wrote discussing the Sit-In Cases); e-mail from Professor Risa Goluboff, *supra* note 125.

145. WARD & WEIDEN, *supra* note 3, at 194 (quoting Powell Paper box 129A).

146. E-mail from John Jeffries, Jr., Dean, University of Virginia Law School (Nov. 13, 2006) (on file with author).

147. See generally Scott Messinger, *The Judge as Mentor: Oliver Wendell Holmes, Jr., and His Law Clerks*, 11 YALE L.J. & HUMAN. 119 (1999) (describing how Justice Holmes established the model of judicial clerking that focused on mentorship); Ryan, *supra* note 115 (describing the author's student-mentor relationship with Justice Rehnquist).

148. E-mail from Professor Robert M. O'Neil, *supra* note 126 (describing Chief Justice Brennan as a "clear ideological mentor"); interview with Professor A. E. Dick Howard, *supra* note 138; e-mail from Professor Risa Goluboff, *supra* note 125.

with immeasurable influence on their lives after the Court.¹⁴⁹ It is difficult to disagree with this characterization in light of the laundry list of impressive careers former clerks have subsequently enjoyed¹⁵⁰ as a result of their clerkship on the High Court.

To be clear, this Note makes no attempt to ascribe influence of the same magnitude to clerks. However, it does submit that, in light of the intense professional and often close personal relationships Justices share with their clerks, they do exert a certain level of influence on their Justices' world views. In many instances the influence may be subconscious, and in most cases the impact only manifests itself over time. These caveats, however, should not be equated with insignificance. To the extent that one believes a fundamental mandate of the Supreme Court is to protect minority rights against majority encroachments, the influence a diverse body of clerks can have on the Court—even if indirect and subject to limitations—is of considerable importance. Indeed, though the Court's clerks have historically been a homogeneous group, the makeup of the Court itself has been far more uniform. Placing women and racial minorities as clerks on the Court may be a far second to placing diverse Justices on the bench, but it is a welcome step in the right direction.

This Section will begin by outlining the limitations on clerks' influence in an attempt to elucidate its parameters. Once the parameters have been adduced, a discussion of the potential influence of a more diverse body of clerks will be presented both from a more general, theoretical vantage, and in the context of a concrete example. The discussion of the potential positive influence on the Court as an institution leads to the normative claim that diversity among clerks is a goal worth striving for, a claim discussed in the final section of this Note.

a. Limitations

There are several important limitations on the potential influence clerks can have on the views of Justices. These fall into three broad categories: characteristics of Justices, characteristics of clerks, and the nature of the relationship between clerk and Justice. Each will be considered in turn.

Supreme Court Justices have been almost entirely older white men. They often enter the Court as preeminent jurists, but even those Justices who ascend the bench with little to no judicial experience quickly become experts. These factors seem to cut against clerk influence. On the one hand, they tend to make it less likely that a minority or female clerk only recently out of law school will feel comfortable interjecting his or her personal experiences or viewpoints. On the other, they tend to make it more

149. See Messinger, *supra* note 147, at 120 (quoting Alger Hiss as describing his clerkship as “probably the greatest emotional [and] intellectual experience any of us ever had . . . I think Holmes was the single greatest influence on me.”); Ryan, *supra* note 115, at 1690 (“Although I ultimately came to understand and appreciate the Chief’s misgivings about my own academic career, I’ve often thought it ironic because, after my parents, the Chief was the most influential teacher I’ve ever had.”). See also Kent D. Syverud, *Lessons from Working for Sandra Day O’Connor*, 58 STAN. L. REV. 1731 (2006); Morris, *supra* note 115.

150. See PEPPERS, *supra* note 12, at 1.

likely that the Justice will have crystallized beliefs that may be less susceptible to change through interactions with clerks.

When thinking about the benefits of a diversity of viewpoints, social and cultural experience plays a large role. That is to say, beyond race and gender, the environmental exposure of clerks is important. If clerks have not been exposed to situations typical of minorities, it is less likely that their race or gender alone will temper the majoritarian tendencies of the Court. For instance, many minorities have different views on law enforcement and Fourth Amendment rights than the population as a whole.¹⁵¹ However, minorities from affluent communities are unlikely to have shared the same experiences, and therefore may espouse a more majoritarian set of beliefs. Similarly, the percentage of African Americans and Hispanics on welfare is proportionately much higher than Caucasians.¹⁵² However, if a minority clerk has never encountered anyone on welfare, he or she is less likely to counter the majoritarian belief that the welfare system is replete with lazy and ungrateful recipients. With regard to gender, some women may have had less exposure to certain hardships or prejudice. For instance, a woman from a well-off family may have had a vastly different experience with regard to reproductive rights—including abortion—than a poor woman.¹⁵³

With these examples in mind, the actual experiences of minority and female clerks may limit the countermajoritarian influence they exert on the Justices. As discussed below, a certain level of influence can be expected from increased minority and female clerks, regardless of experience, but experience does serve as a definite limitation which must be taken into account.¹⁵⁴

151. See Richard W. R. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, (2000) (discussing survey data from minority communities designed to assess minority views of law enforcement, and examining the “urban frustration” hypothesis). See generally DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999).

152. In 2001, African Americans made up 39% and Hispanics accounted for 23.6% of TANF (i.e., cash welfare) recipients. 32.2% of recipients were Caucasian. HOUSE WAYS AND MEANS COMM., 108th Cong., GREEN BOOK, Table 7-30 § 7 (2004). These are remarkable figures when compared to the percentage of the overall population these races comprise. Following the most recent national census (2000), 12.3% of the American population is African American and 12.5% is Hispanic, as compared to 75% Caucasians. Thus, even though there are six times more Caucasians than African Americans in the United States, African Americans account for 6.8% more welfare cases than Caucasians. The Hispanic figures demonstrate a similarly egregious distribution. U.S. CENSUS BUREAU, *PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS* (2000).

153. For that matter, many women may never have been exposed to abortion issues first hand.

154. One might take this line of reasoning to its conclusion and argue that diversity of clerks, by itself, is not worth striving for. Instead, it may be argued, diversity of viewpoints and minority sympathy should be the end goal. While it is true that a diversity of viewpoints would present a positive advancement under the normative theory espoused in this Note, it suffers from several flaws. First, it negates the advantages focused on by most commentators: those to the female and minority clerks themselves. Beyond the fact that nearly all former clerks advance to prestigious legal careers, there is reason to believe that their success may provide inspiration to other

Another limitation stems from the openness of clerks to discussing personal experiences. In the event that such experiences are socially or politically unpopular, clerks may be unwilling to allude to them in their interactions with their Justice. This is likely compounded by the dynamic of the Court itself. Many clerks, just one or two years out of law school, are overawed by their Justice. As a result, some clerks may be more likely to mirror the views of their Justice rather than interject with their own.

These limitations present definite obstacles to clerk influence. They vary, however, depending on characteristics of particular Justices and clerks. Certain Justices may be more susceptible to influence from their clerks, and some clerks may be in a better position to influence their Justices. This does not negate the potential impact of a diverse body of clerks. Indeed, bearing in mind the above qualifications, a more representative body of clerks presents important implications for the Court as an institution.

Additionally, an argument can be made that increased minority representation on the Court has the potential to mitigate these limitations. Greater numbers of minorities and women in Chambers will likely foster an atmosphere where clerks are more comfortable expressing personal ideas and experiences. Further, such progress will increase the probability that minority and female clerks have experiences typical of the demographic section they are thought to represent.

b. Potential Influence

I've never known a homosexual in my life.
—Justice Lewis Powell to Justice Harry Blackmun¹⁵⁵

Justice Powell provided the fifth vote to uphold the Georgia sodomy statute at issue in *Bowers v. Hardwick*.¹⁵⁶ He vacillated on the case, and initially voted to strike down the law in conference before casting his eventual vote in favor of the statute.¹⁵⁷ The irony of his statement to Justice Blackmun is that, at the time, one of Powell's clerks was gay,¹⁵⁸ and it has

minorities and women and perhaps afford networking opportunities that would otherwise remain unavailable. Second, it negates the inherent advantages of a diverse body of clerks on the Court, irrespective of viewpoint and experience, which will be discussed below. Third, and perhaps most importantly, clerks who are sympathetic to minority rights but have not themselves experienced the plight of minorities do not hold as much sway as those who have. Not only are the values of those who have experienced difficulties of welfare or disparate police enforcement likely to be much more strongly held, they are inherently more credible.

Thus, although the author agrees that an experience-oriented approach which focused on factors such as poverty or hardship would be an improvement, it would not confer the same benefits as a focus on race and gender. In addition to the reasons stated above, it should be noted that an experienced-based approach would also fail to repair the Court's tarnished image in regard to its hiring practices. To the extent that the public perception of the Court as an "old boys club" is seen as detrimental, this factor should be considered.

155. See JOHN C. JEFFRIES JR., JUSTICE LEWIS F. POWELL: A BIOGRAPHY 528 (1994).

156. 478 U.S. 186 (1986).

157. See JEFFRIES, *supra* note 155, at 511–30.

158. *Id.* at 521.

been reported that he unconsciously hired at least one gay clerk for six consecutive terms during the 1980s.¹⁵⁹

Justice Powell later regretted his vote in *Bowers*. After a lecture at New York University Law School, Justice Powell responded to a student's question regarding the consistency between *Roe v. Wade* and *Bowers* by stating: "I think I probably made a mistake in that one."¹⁶⁰ The logical corollary of Justice Powell's statement that he had never met a homosexual is that, had he been knowingly exposed to gay acquaintances, he may have come down the other way in *Bowers*.¹⁶¹ This example highlights both the potential and the limitations of clerk influence.

While either past exposure to homosexuals through his clerks, or formal discussion during *Bowers* could have changed the outcome of the case, Justice Powell's gay clerks did not make their sexual orientation known to him. This was likely due to a concatenation of factors, which cannot be fully discovered in retrospect. However, several likely factors come to mind. First, Justice Powell was a conservative "Southern Gentleman," who was nearly eighty years old at the time. Particularly in light of the fact that Justice Blackmun was aware of gay clerks in Powell's chambers,¹⁶² it seems likely that Justice Powell was oblivious, perhaps purposefully, to certain cues that could have made him aware of the sexual orientation of some of his gay clerks.¹⁶³ Second, and perhaps equally important, clerks may have felt uncomfortable expressly sharing the fact with Justice Powell because of his conservatism.¹⁶⁴ Further, they may have been worried that outing themselves while on the Court would close some of the many doors that a Supreme Court clerkship opens in the legal world.

These restraints, which arguably held Justice Powell's vote in the balance, demonstrate limitations on clerk influence, even where it has great potential. They do not nullify that potential, nor do they preclude its impact on the Court. Indeed, one may credibly argue that, as diversity becomes more commonplace on the High Court, clerks and Justices will feel more comfortable discussing personal experiences and sentiments which may not be accepted by the majority of Americans.

In the following Section, the potential impact of a diverse body of clerks will be discussed from a theoretical vantage, focusing on two main areas of influence. First, clerks have the opportunity to interject their personal experiences and beliefs directly during the preparation and discussion of cases with their Justices. Second, through the countless professional and personal interactions between clerks and Justices, minority and female

159. WARD & WEIDEN, *supra* note 3, at 98.

160. See JEFFRIES, *supra* note 155, at 530 (noting that Powell confirmed this statement in a later conversation with a reporter stating: "I do think it was inconsistent in a general way with *Roe*. When I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments.").

161. Note that it was not until 2003, in *Lawrence v. Texas*, that the Court would reconsider the issue, overruling *Bowers* and striking down the Texas statute. 539 U.S. 558 (2003).

162. JEFFRIES, *supra* note 155, at 528.

163. See *id.* at 529 ("Powell had never known a homosexual because he did not want to. In his world of accomplishment and merit, homosexuality did not fit, and Powell therefore did not see it.").

164. See *id.* at 518 (quoting a former clerk as stating: "At a very deep level, he found homosexuality abhorrent.").

clerks may indirectly or subconsciously impact the perceptions and beliefs of their Justices. The latter presents a more gradual prospect for change, but with perhaps more wide-ranging effects. Following this discussion, these two avenues of influence will be applied to a concrete example: the constitutionality of welfare reform.

i. Influence Generally

Clerks holding diverse viewpoints have the potential to directly influence Justices through their professional relationships in Chambers. Throughout the process of deciding cases, from “cert pool” and bench memos, to discussing the outcome of cases, to opinion writing, clerks are presented with a unique opportunity to weigh in with their personal experiences. While it may be the rare instance that a clerk is able to change a Justice’s vote, influence may be revealed in other ways.

Even if the vote remains stable, a Justice may be persuaded to change the language and tenor of his or her opinion, or write separately to express particular concerns with the ruling. Beyond changes in the case before the Court, Judges may look at later cases with different fact patterns in a new light. There are three main reasons to expect that recantation of personal experiences by minority and female clerks could exert such influence.

First, to the extent that a case deals with an area in which a clerk has had personal experience, it is more likely that he or she will have stronger feelings and values regarding the issues it presents. This not only makes it more likely that a clerk will speak up, but also suggests that a clerk would be more adamant when doing so. Second, when a clerk does present views based on personal experience, those views tend to carry more weight than an abstract preference for a certain outcome. A third, related rationale is that expression of personal experiences takes the case out of the abstract. A clerk who has experienced or is familiar with certain issues presented to the Court reminds the Justice of the real world impact of cases in a manner that legal briefs cannot reproduce. To the extent that Justices are fond of their clerks—as suggested by the above discussion of personal relationships between clerks and Justices—this may be a powerful incentive to think seriously about the consequences of ruling in a certain manner.

Beyond the overt influence of female and minority clerks on the Justices, this Note submits that there is the potential for significant indirect and subconscious impact. Although less apparent to the outside observer, the indirect influence of female and minority clerks on the Justices may play a more important role in mitigating the Court’s majoritarian tendencies than clerks’ direct professional influence. This theory finds both logical and social psychological support.

The above discussion highlights the intense personal and professional relationships clerks and Justices share during their term of service, which often remain strong even after the clerk has moved on with his or her career. These relationships can best be described as a mentorship in which the clerk is privileged to apprentice a jurist preeminent in the legal world. While clerks are the primary beneficiary of imparted knowledge, it would

seem disingenuous to suggest that the Justices are not indirectly influenced by their clerks.

An examination of the relationship between Justice and clerk makes this clear. Most modern Justices rely heavily on their clerks. Regardless of their selection methods, Justices seek to obtain top-notch jurists who will work hard and get along well with both the Justice and his or her other clerks. Once selected, clerks become a part of a “team” or “corporation,”¹⁶⁵ which represents the Justice’s Chambers and insures that it runs smoothly. Thus, there is a particular level of investment in each clerk when inviting them to join the Court. This is evidenced in the many examples of Justice’s hospitality toward and concern for their clerks’ well-being.

Beyond the fact that Justices pick their own clerks—which tends to make them more invested than the average mentor—the intensity of the working relationship, and the devotion of most clerks to their Justice tends to ensure a special bond within Chambers. Many psychological studies have demonstrated the bonding effects of common goals and teamwork.¹⁶⁶ In the case of Supreme Court Chambers, this seems especially true. Not only do clerks and Justices spend a significant amount of time together, they also share an extremely unique situation at the nation’s Highest Court. Their work is of the utmost importance, and much of it is kept confidential. This necessitates vesting a considerable amount of trust in each clerk. Justices must trust their clerks to provide them with first-rate legal services, and to remain silent in the face of ever-increasing media pressure.

The unique relationship between Justice and clerk necessitates a certain level of respect, if not devotion. This is not to suggest that Justices view their clerks as peers or equals, but it does suggest that Justices care strongly about their clerks and value their insights and experiences. Whether or not they agree with their clerks, Justices respect their opinions as colleagues. It follows that exposure to clerks with different experiences and viewpoints, while not necessarily molding those of the Justice, will at least be considered by the Justice, granting a more nuanced outlook.

Importantly, most Supreme Court clerks go on to distinguished legal careers in academia, private practice, or government service. As former clerks develop professionally, their views may carry increased weight with their Justice. In addition to the fact that established former clerks more closely approximate peers of the Justices, longstanding post-Court relationships may create an even greater bond of trust and empathy between Justice and clerk.

165. Interview with John Adams, current clerk to Justice Thomas (Nov. 14, 2006) (noting that Justice Thomas views his clerks as a small “corporation”).

166. MUZAFER SHERIF, ET AL., *INTERGROUP CONFLICT AND COOPERATION: THE ROBBER’S CAVE EXPERIMENT* (1954) (demonstrating the positive impact of cooperation on intergroup relations). See also PHILLIP BANYARD & ANDREW GRAYSON, *INTRODUCING PSYCHOLOGICAL RESEARCH: SIXTY STUDIES THAT SHAPE PSYCHOLOGY* (1996) (listing the “Robber’s Cave Experiment” as one of the most influential psychological studies); Andrew Tyerman & Christopher Spencer, *A Critical Test of the Sherifs’ Robber’s Cave Experiments: Intergroup Competition and Cooperation Between Groups of Well-Acquainted Individuals*, in 14(4) *SMALL GROUP BEHAVIOR*, 515–31 (1983) (testing and upholding Sherif’s original hypotheses).

Even in the absence of discussion of past experiences or viewpoints,¹⁶⁷ the mere presence of increased minority and female clerks on the Court may have a subconscious effect. Many psychological studies have chronicled ingrained, subconscious stereotypes.¹⁶⁸ That is to say, most people harbor some level of unconscious stereotypes, even though they are not aware of them and would denounce the suggestion that they possess any racial or gender prejudice. There is no reason to think that Supreme Court Justices, despite their high levels of education and intellectual sophistication, would be any different from the general public in this regard.

To the extent that such subconscious stereotypes are present in the Justices, exposure to women and minorities in the context of a very intense and trusting relationship is likely to have ameliorative effects. At the very least, this exposure will serve to foster increased empathy for both women and minorities. To some this may appear a trivial point. However, if clerks accurately represented the general law school population, Justices would be continually exposed to, and work with, women and minorities, year after year. Continuing relationships after clerks leave the Court would further reinforce this trend.

ii. Welfare Reform

In order to more fully envision the potential influence of a diverse body of clerks, it is helpful to discuss a concrete example. The constitutionality of welfare reform provides a ready template for such purposes.¹⁶⁹ Welfare remains a divisive issue among legal scholars, and presents an area in which minorities and women may have unique experiences and viewpoints.

The provision of welfare in America has always been contentious. Initially envisioned as a holistic system encompassing old age pensions and health care, the term “welfare” has come to connote solely assistance to the poor, primarily cash transfers and food stamps. With this shift, public opinion towards welfare has soured.¹⁷⁰ Importantly, as larger categories of assistance were removed from the conception of welfare, the number of people contained within the ambit of welfare shrank significantly.¹⁷¹ These two factors leave the welfare population particularly vulnerable to majoritarian encroachments. Further complicating the issue, African Ameri-

167. This may result from either a lack of such experiences, as discussed in the proceeding section, or from a lack of disclosure to the Justice.

168. See Anthony Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Task*, 74 J. PERSONALITY & SOC. PSYCHOL., 1464 (Jun. 1998) (discussing the Implicit Association Test, which examines unconscious stereotypes by measuring reaction times to certain visual stimuli. Results have consistently shown a tendency of Caucasians to more readily associate African Americans with negative stimuli and White Americans with positive stimuli); Mahzarin Banajai & Anthony Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181 (Feb. 1995) (discussing studies showing that participants more readily associate men with positions of fame than women); See also Mark Chen & John Bargh, *Nonconscious Behavioral Confirmation Process: The Self-Fulfilling Consequences of Automatic Stereotype Activation*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541 (Sep. 1997).

169. Other salient areas are Fourth Amendment rights, gay marriage, capital punishment, and abortion, to name a few.

170. MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP* 1–17 (2001).

171. See *id.*

cans and Hispanics are much more likely to receive welfare than whites, and benefits are primarily granted to single mothers.

In an effort to reform the unpopular system, in 1996 Congress passed the Personal Responsibility and Work Opportunity Reorganization Act (PRWORA).¹⁷² This act sought to remove any entitlement to welfare support and focused on moving recipients off of welfare and into the workforce. Importantly, it conditioned receipt of benefits on efforts to obtain work, and set an absolute cap on federal benefits at five years. Additionally, the Act was designed to promote marriage, and discourage the birth of children to single mothers. In 2005, Congress tightened the restrictions on benefits by redrafting the definition of “work” and setting a more stringent baseline from which state reductions in the number of welfare recipients are calculated.¹⁷³

These changes reflect the popular sentiment that all citizens should endeavor to pull their own weight, and a strong aversion to any “free riding” or “handouts” from tax dollars. However, they also place minorities, predominately single parent families, at risk of losing their primary means of support. The recent reform, like past efforts, will likely lead to a host of legal challenges, some of which may reach the Highest Court.¹⁷⁴ The scope of this Note does not permit an examination of these issues, however, it is enough to note that there is sufficient indeterminacy in the law.

Welfare reform presents a current area of law in which a minority of citizens, largely African American and Hispanic, essentially depend on the sentiment of the majority for their most basic needs. Not only are welfare recipients politically outnumbered, they are a group with little political clout of their own. Politicians stand to gain politically by reducing welfare expenditures, and the recipients have little say in the process.¹⁷⁵

172. Personal Responsibility and Work Opportunity Reorganization Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

173. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4. (2005).

174. See *Saenz v. Roe*, 526 U.S. 489 (1999) (challenging California’s limitation on the amount of welfare available to newly arrived residents as violating the “right to travel”); *Turner v. Glickman*, 207 F.3d 419 (7th Cir. 2000) (challenging 21 U.S.C. § 862a, which makes certain convicted drug offenders permanently ineligible for federal aid in the form of food stamps and Temporary Aid for Needy Families (TANF), as violating due process, the Equal Protection Clause, and the Fifth Amendment Double Jeopardy Clause); *Bowen v. Gilliard*, 483 U.S. 587 (1987) (challenging federal requirements of child support attribution as violating due process and equal protection, and as constituting an unconstitutional taking of property); *Jefferson v. Hackney*, 406 U.S. 535 (1972) (challenging Texas’s different level of funding for welfare as opposed to other support programs as violating the Equal Protection Clause); *Wyman v. James*, 400 U.S. 309 (1971) (challenging the requirement of federal welfare benefits upon recipient allowing official to perform home visits as violating the Fourth Amendment); *King v. Smith*, 392 U.S. 309 (1968) (challenging Alabama’s “substitute father rule” under the Fourteenth Amendment Equal Protection Clause). See also Rebecca M. Blank, *Was Welfare Reform Successful?*, THE ECONOMISTS VOICE, Vol. 3(4) (Mar. 2006); Christopher Jencks, *Do Poor Women Have a Right to Bear Children?*, AMERICAN PROSPECT, Vol. 6(20) (Dec. 1, 1995), available at <http://www.prospect.org/web/page.wv?section=root&name=ViewPrint&articleId=5042>.

175. Although the “political process” theory espoused in footnote four of *Carolene Products* has never been adopted by the Court, welfare reform represents a paradigmatic example of where it would apply.

This suggests that further reform, likely in the form of restrictions, may be proposed in future Congresses.

Briefs and oral advocacy may seek to portray the plight of welfare recipients, but there is a limit to their effect. This is not to suggest that Justices are callous, but rather that, as with the general population, they are detached from the reality of the poorest Americans. Just as many Americans walking through the parks in our Nation's Capitol disdain the presence of the homeless on benches and huddled on the grass, believing that they could be somewhere else—mainly working—it is likely that at least some Justices feel the same way.¹⁷⁶ After all, Congress explicitly conveyed this message to welfare recipients when it passed PWRORA.¹⁷⁷

As discussed above, there is reason to believe that a minority clerk with first-hand experience regarding welfare would be in a position to have particular influence on his or her Justice in the event that a case regarding welfare benefits came before the Court.¹⁷⁸ This could be through personal interactions prior to the case, or direct interactions regarding the case at hand. While the clerk's view may not change the Justice's mind, it would at least provide an opinion from a trusted confidant and highly regarded legal scholar. Given the political powerlessness of our Nation's indigent population, this may be more than they could otherwise hope for.

V. CONCLUSION

Welfare reform presents one area that has the potential to be favorably impacted by increased diversity among clerks. Several other constitutional areas bear note: Title IX, female military combat, affirmative action, Fourth Amendment concerns, Eighth Amendment concerns relating to prison conditions and capitol punishment, and gay marriage come quickly to mind. In each of these areas, minority or female clerks can present the Court with unique experiences and viewpoints that may mitigate the tribunal's historically majoritarian stance.

Most commentators calling for increased diversity among clerks have focused on the benefits clerks obtain through the unique relationships they share with their Justices. Minorities and women, they argue, should not be denied the prestige, influential legal connections, and career benefits bestowed upon clerks of the nation's highest tribunal. In addition, they opine that a homogeneous hiring pattern burnishes the credibility of the

176. Further, there is evidence to suggest that many people have become so accustomed to the problem of homelessness in the District that they hardly notice it anymore. *See, e.g.,* William Raspery, *The Homeless Crisis is Over! Somebody Tell the Homeless*, WASH. POST, Oct. 9, 1998, at A27.

177. PRWORA requires welfare recipients to fulfill work requirements within two years and cuts off federal assistance after five years. Thus, Congress in a very real sense has told our nation's indigent population to "get a job."

178. To the critics that would suggest that such a clerk is a figment, the author would submit the following statistics: 2004 figures indicate that 24.7% of African Americans and 21.9% of Hispanics are living in poverty as opposed to 8.6% of Caucasians. U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES REP. pt. 60, at 52–57 (2004). Even if a minority clerk has not experienced welfare first hand, it is not implausible to think that they may have been exposed to the plight of our nation's poor through family or friends.

Court as a bastion of equality. While these arguments have merit, this Note seeks to extend the argument. Beyond benefiting the clerks themselves and the reputation of the Court, a more diverse body of clerks has the potential to positively influence the Court as an institution. Female and minority clerks are in a unique position to counteract the majoritarian impulses of the Court, which often validate practices to the detriment of our nation's most vulnerable citizens.

This Note acknowledges the limitations on the influence clerks can exert on the Justices, however, few would deny the fact that Supreme Court clerks are in a very unique and influential position. Most directly, clerks play an integral role in the function of the Court. They screen petitions for certiorari, draft opinions, and often debate the merits of cases with the Justices. In this manner, clerks are given an unparalleled role in the creation of Supreme Court precedent. Further, the relationships between Justices and clerks have the potential to influence the Court both directly and indirectly. Clerks share intense professional and personal relationships with the highest Justices in the land, and their relationships often extend well beyond their service to the Court. Justices' viewpoints on a particular issue may be influenced by these relationships as a result of exposure to the beliefs and experiences of their clerks. Even in the absence of discussion of past experiences or viewpoints, the mere presence of a substantial number of minority and female clerks on the Court may have an impact through a subconscious transformation of the Justices' beliefs.

In light of the potential impact a diverse body of clerks may have on the Court as an institution, such representation is a goal worth striving for. This normative claim is buttressed by the independent rationales put forth by past commentators. Although several methods of attaining a more diverse body of clerks are discussed above, this Note takes no stance as to the most desirable avenue. That inquiry remains the subject for another paper. Regardless of the chosen method, the theory set forth herein presents a renewed call for such efforts. Increasing the number of female and minority clerks may be a far second to attaining a diverse set of Justices, but this more lofty goal does not negate the normative force of the potential benefits that a diverse body of clerks can confer upon the Court. Indeed, as the ranks of minority and female clerks grow, it is increasingly more likely that females and minorities will ascend to the top of the legal world, perhaps to the Highest Court.