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## The Collapse of the House that Ruth Built: The Impact of the Feeder System on Female Judges and the Federal Judiciary, 1970-2014

Alexandra G. Hess

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# THE COLLAPSE OF THE HOUSE THAT RUTH BUILT: THE IMPACT OF THE FEEDER SYSTEM ON FEMALE JUDGES AND THE FEDERAL JUDICIARY, 1970-2014

ALEXANDRA G. HESS\*

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The current [clerkship] system is not a pure or efficient market. In fact, the closest market analogy would be a once-a-year shopping spree in which hundreds of shoppers, each with different amounts of money, enter the corner grocery at different times and buy goods that are only partially visible, that are each unique, and whose prices and brand names may not reflect their true value.<sup>1</sup>

### I. INTRODUCTION

The process of applying to judicial clerkships is a well-known rite of passage for many law students. It brings equal measures of excitement and dread for students as they vie for prestigious clerkships and results in professors sending endless numbers of recommendation letters. Although there are 874 sitting federal judges<sup>2</sup> with clerkships up for grabs each year, one clerkship seems to rule them all: the Supreme Court clerkship. Many aspects of the Supreme Court clerkship process have been carefully studied, including: the race, sex, and political ideology of the clerk pool<sup>3</sup> and the efficiency (or lack thereof) of the clerkship selection process.<sup>4</sup> But only recently has the conversation turned to the study of “feeder judges,” those Court of Appeals judges who send their clerks on to clerk for the Supreme Court.

I examined one aspect of the feeder phenomenon that has not received any attention: the underrepresentation of female appellate judges as feeder judges. To date, scholars have discussed the history of the clerkship process and empirical studies have focused on proving the feeder phenomenon exists and analyzing whether the particular judges from whom

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1. Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 CALIF. L. REV. 765, 783 (1993).

2. See Fed. Judicial Ctr., *History of the Federal Judiciary: Biographical Directory of Federal Judges, 1789-Present*, FEDERAL JUDICIARY CENTER, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Aug. 31, 2015) [hereinafter *Biographical Directory of Federal Judges*] (listing all sitting Article III judges, both active and senior status).

3. See Christopher R. Benson, *A Renewed Call for Diversity Among Supreme Court Clerks: How a Diverse Body of Clerks Can Aid the High Court as an Institution*, 23 HARV. BLACKLETTER L.J. 23, 25-26 (2007).

4. See Richard A. Posner et al., *The Market for Federal Judicial Law Clerks*, 68 U. CHI. L. REV. 793, 799-800 (2001).

justices take clerks reflect ideological polarization.<sup>5</sup> This paper builds upon those previous works and contributes extensive new empirical data to the study of feeder judges. While some may argue that this concern over Supreme Court clerks and feeder judges is an act of legal navel-gazing, Ditslear and Baum give a compelling justification for the study of the feeder system specifically:

It could be argued that there is no need for a more extensive analysis of the feeder phenomenon: it is a curiosity and nothing more. We think otherwise. The selection of law clerks, including the use of a feeder system, provides a window on the justices' behavior. By learning what matters to the justices when they select clerks, we also learn about their goals as decision makers and the ways they make choices. The extent to which a feeder system exists and the attributes of that system also tell us about the linkages between justices and the judges who serve one level below them in the federal judiciary.<sup>6</sup>

Therefore, in order to examine this system, my analysis begins in 1970, the first year that a female judge sent a clerk to the Supreme Court,<sup>7</sup> and continues through 2014, the last year of complete clerk data. I first examined whether female judges were underrepresented as feeders compared to their proportion of the federal appellate bench - the data revealed that until 1994 women had roughly demographically proportionate representation. But in 1994 there was a sudden sharp decline in female feeders, and their numbers have never recovered. Ironically, Ruth Bader Ginsburg caused this decline in female feeders – her elevation to the Supreme Court meant that the federal appellate bench lost its biggest female feeder ever.<sup>8</sup>

I then investigated why female judges were unable to fill the void left by Justice Ginsburg's elevation. For this period, I collected demographic data on over one thousand Supreme Court clerks, the twenty-three Supreme Court justices and nearly two hundred appellate judges they clerked for, and the more than five hundred judges who sat on the federal appellate bench during this period. I then ran regression analyses to determine what measurable factors of an appellate court judge – including age, race, tenure on the bench, party of the nominating President, sex, circuit, having been a

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5. See *infra* Part II(d).

6. Lawrence Baum & Corey Ditslear, *Supreme Court Clerkships and "Feeder" Judges*, 31 JUST. SYS. J. 26, 28 (2013).

7. Alexandra G. Hess, *Analysis of Supreme Court Feeder System, 1970-2014* (unpublished data, on file with author). Judge Shirley Hufstедler of the U.S. Court of Appeals for the Ninth Circuit sent a clerk to Chief Justice Burger.

8. See *infra* Part III-IV.

former Supreme Court clerk, and having previously sent a clerk to the Supreme Court – affected their chance of sending a clerk to the Supreme Court. I also examined whether the time between a judge’s confirmation to the appellate bench and first feeding a clerk to the Supreme Court could explain the gender gap. (It does not.)<sup>9</sup> The regression results revealed, in part, that for all judges, having been a Supreme Court clerk and previously sending a clerk to the Court had the largest positive effect on sending a future clerk to the Supreme Court. However, for female appellate judges, sending a clerk to the Court had a large *negative* impact on sending a second clerk.<sup>10</sup>

To examine this striking result, I created a breakdown of all feeder judges by the number of clerks they sent to the Court in a given five-year period. This revealed that since 1970, a small number of judges have sent an increasingly large percentage of Supreme Court clerks. For example, in the last five years, eleven judges supplied over 70% of Supreme Court clerks and 90% of all Supreme Court clerks were fed by a total of twenty judges. I then looked at the gender of these “super-feeder” judges. Of the eleven judges that sent 70% of the clerks, none were women. Of the twenty that sent 90% of the clerks, two were women. This evidence provides an important part of the explanation for why women have been unable to reestablish themselves as consistent feeders to the Supreme Court – women are essentially marginalized by the “super-feeders,” a small pool of judges that sends the vast majority of clerks to the Supreme Court.<sup>11</sup>

Thus, the data shows that two factors have contributed to the gender gap: first, the elevation of Justice Ruth Bader Ginsburg to the Supreme Court left a void in the female feeder pool; and second, the ever increasing importance of “super-feeders” has prevented female judges from filling that void. The data demonstrates that increasingly the justices value clerks from the same small set of overwhelmingly white, male judges. This is driven, in part, by ideological needs and the need to find a method of winnowing the vast applicant pool. But this underrepresentation of women as feeder judges is also part of a larger narrative of women’s absence or marginalization in other elite areas, such as law firm partnership,<sup>12</sup>

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9. See *infra* Part VIII.

10. See *infra* Parts V-VII.

11. See *infra* Part IX.

12. See Jennifer Smith, *Female Lawyers Still Battle Gender Bias*, WALL ST. J., (May 4, 2014), <http://www.wsj.com/articles/SB10001424052702303948104579537814028747376>; Deborah L. Rhode, *Law is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That*, WASH. POST, (May 27, 2015), <http://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least->

Supreme Court clerks,<sup>13</sup> Supreme Court litigators,<sup>14</sup> federal judges,<sup>15</sup> et cetera. Women are being shut out of what are considered positions of status, and this paper highlights one more such area. However, it is not only women who are affected by these findings. Rather, the entire legal profession is affected when such a narrow class of people controls so many facets of legal life.

## II. TERMINOLOGY

It is important to note that the term ‘feeder judge’ does not have a single definition. Some sources use it to describe any judge that has ever sent a clerk to the Supreme Court,<sup>16</sup> while others limit the term to those who regularly send clerks.<sup>17</sup> In one study, the authors note that although they “cannot define a feeder system with precision, we can say that such a system exists if the distribution of Supreme Court law clerks across Court of Appeals judges is far more concentrated than it would be if there were a random distribution of clerks from judges to justices.”<sup>18</sup> In this paper, I use the term ‘feeder judge’ to refer to any judge who has ever sent a clerk to the Supreme Court and the term ‘super-feeder’ to refer to judges who send an average of at least one clerk per term in a five-year period.<sup>19</sup> Two

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diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/ (noting that “women account for only 17 percent of equity partners, and only seven of the nation’s 100 largest firms have a woman as chairman or managing partner”).

13. See Erin B. Kaheny et al., *High Court Recruitment of Female Clerks: A Comparative Analysis of the U.S. Supreme Court and the Supreme Court of Canada*, 00 JUST. SYS. J. 1 (2015). In fact, one could argue that the feeder system is partly responsible for the underrepresentation of female clerks on the Supreme Court. See *infra* Conclusion.

14. See Joan Biskupic, Janet Roberts & John Shiffman, *At America’s Court of Last Resort, a Handful of Lawyers Now Dominates the Docket*, REUTERS (Dec. 8, 2014), <http://www.reuters.com/investigates/special-report/scotus/>.

15. See Lynn Hecht Schafran, *Women of the Courts Symposium: Not from Central Casting: The Amazing Rise of Women in the American Judiciary*, 36 U. TOL. L. REV. 953, 956 (2005).

16. See Christopher D. Kromphardt, *Fielding an Excellent Team: Law Clerk Selection and Chambers Structure of the U.S. Supreme Court*, 98 MARQ. L. REV. 289, 297 (2014). Most newspaper sources also use this definition.

17. See David H. Kaye & Joseph L. Gastwrith, *Where Have All the Women Gone? The Gender Gap in Supreme Court Clerkships*, 49 JURIMETRICS J. 411, 418 (2009) (defining major feeder judges “as those who have supplied the Justices with at least ten law clerks” over a ten year span).

18. Baum and Ditslear, *supra* note 6, at 29.

19. Other sources have used the term “major feeder” to refer to judges who send an average of one clerk per term. I use this term interchangeably with “super-feeder” or “elite feeder.”

further terms merit definition: “feeding” refers to a judge sending a clerk to the Supreme Court, and “self-feeding,” a term that I have coined here, refers to when a former appellate court judge, elevated to the Supreme Court, hires his or her former appellate clerks as Supreme Court clerks.

### III. THE CREATION OF THE ‘FEEDER’ CLERKSHIP

Understanding the historical causes of the feeder clerkship helps explain why the current Supreme Court clerkship system is based on an ever-shrinking pool of repeat players. The feeder phenomenon seems to have arisen from a confluence of circumstances in the 1950s and 1960s: the increasing Supreme Court applicant pool,<sup>20</sup> the increasing prestige of a Supreme Court clerkship,<sup>21</sup> and Chief Justice Burger’s stated preference for clerks with prior clerkship experience.<sup>22</sup> Some social scientists claim that an increasing politicization of the Supreme Court has also been a factor.<sup>23</sup> In one sense, the increase in the prestige of Supreme Court clerkship has created a competitive environment in which Court of Appeals judges and clerks are both looking to maximize the likelihood that the Court will hire the clerk. But the increase in the applicant pool has also created top-down pressure on the justices to develop a method for winnowing candidates without evaluating each one individually. As some have described the current clerkship process, there is now a “general musical chairs” quality in which there are “too many accomplished and attractive backsides for too few desirable seats.”<sup>24</sup> Thus, while the feeder judges increase their own status by sending clerks to the Supreme Court, they also serve a practical function to the justices.<sup>25</sup>

#### A. Increasing Applicant Pool

The first reason for the emergence of the feeder phenomenon is the expansion of the Supreme Court clerk applicant pool. Although Justice O’Connor is quoted as remarking, “[w]e have a luxury of riches when it comes to applicants,”<sup>26</sup> this is a relatively recent phenomenon. Rather, until

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20. See *infra* Part II(a).

21. See *infra* Part II(b).

22. See *infra* Part II(c).

23. See *infra* Part II(d).

24. Ross E. Davies, *Feeding the Right Stuff: Would You Clerk for Learned Hand?*, 3 J.L. ECON. & POL’Y 187, 189 (2013).

25. If this is true, however, that then leads to a whole new series of fairness questions about how that pool of trusted judges is created and who they are. This will be further explored in Part IX.

26. ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 55 (2007) [hereinafter WARD

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the 1950s,

[t]he number of applications the justices received from prospective clerks and their recommenders was generally manageable from the institution's inception through the Warren Court. . . . Often it was the justice who actively sought a clerk through contacts with friends, colleagues, law professors, and judges. . . . What is perhaps most surprising, however, is that each justice received very few applications and had very few applicants recommended to them during this period.<sup>27</sup>

In fact, some clerks were selected solely on these recommendations and never sent a formal application. The application pool was so manageable that Justice Black corresponded personally with each applicant, “[b]ut as the number of applications doubled, and tripled, he could not meet the demand.”<sup>28</sup> In 1968, he wrote, “so many applications have come to me this year that I have reluctantly been driven to writing a form letter in reply . . . the job of selecting clerks is probably my most difficult one, simply because I have to turn down so many well qualified people.”<sup>29</sup> Justice Powell agreed with the sentiment; in 1977 he wrote, “[t]he selection process becomes both more difficult and ‘chancy’ each year, as the number of applicants increases.”<sup>30</sup> The applicant pool expanded continuously through the Burger and Rehnquist courts and, as of 2009, “more than one thousand applicants apply each year for less than a handful of spots per chamber.”<sup>31</sup>

Furthermore, prospective clerks used to apply only to the justices for whom they actually wanted to work.<sup>32</sup> However, custom has evolved and it is now considered polite to apply to all nine active justices and all three retired justices, regardless of interest level. As one clerk commented, “I was selective – I applied to only nine justices.”<sup>33</sup> With this proliferation of applicants, clerk selection has become an unwieldy process. In an

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& WEIDEN].

27. *Id.* at 56.

28. *Id.* at 57.

29. *Id.*

30. *Id.*

31. Adam Liptak, *A Sign of the Court's Polarization: Choice of Clerks*, N.Y. TIMES (Sept. 6, 2010), <http://www.nytimes.com/2010/09/07/us/politics/07clerks.html>. The Supreme Court does not release data on its applicants so the exact number is unknown.

32. John J. Szmer, Erin B. Kaheny, & Robert K. Christensen, *Taking a Dip in the Supreme Court Clerk Pool: Gender-Based Discrimination in Clerk Selection*, 98 MARQ. L. REV. 261, 286 (2014).

33. WARD & WEIDEN, *supra* note 26, at 58.



interview, Justice O'Connor commented, "[i]t takes considerable time to look [the applications] over with extreme care. I look at the courses they have taken, their grades, their honors achieved."<sup>34</sup> Yet she might, and likely does, spend this time on applicants who are not actively interested in clerking for her. Even with a diminishing caseload,<sup>35</sup> this is not necessarily an activity on which the justices want to spend an extensive amount of time. This increased workload in regard to selecting clerks explains the desire to rely on the recommendations of trusted colleagues, therefore turning to 'super-feeders' to fill their ranks reliably.

### *B. Increasing Prestige of the Supreme Court Clerkship*

This feeder system is a dramatic change from 1882 when Justice Horace Gray hired the Court's very first clerk. The modern conception of a clerkship developed in the 1920s when the justices' workload expanded and clerks "acted less as personal secretaries and takers of dictation and started being asked to do more legal research."<sup>36</sup> Beginning in 1924, each justice could hire one clerk. The number expanded to two clerks per year in 1940, three in 1970, and then the current four in 1974.<sup>37</sup>

In recent times, a Supreme Court clerkship has become a prestigious and valuable credential for students and a status symbol for judges. Even from the earliest days, Supreme Court clerks tended to come from elite law schools – in fact, 45% of all Supreme Court clerks from 1882 to 2002 came from Yale Law School and Harvard Law School<sup>38</sup>; in addition, almost 90% of clerks over the last four decades have come from sixteen law schools.<sup>39</sup> But, before the 1950s, the justices still had to actively reach out to find applicants; now, they are inundated with them. In fact, before Chief Justice Burger joined the court, it was considered "excessive" to do more than one clerkship.<sup>40</sup> As Judge Wald explains, "there were fewer judges, and fewer clerkships; judges had one, later two clerks; judges' caseloads were lighter, their dependence on clerks less critical. Because of the small numbers, a clerkship, though always a valuable career asset, was not considered as crucial to certain careers in the law, like teaching, as it apparently is

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34. *Id.* at 55.

35. See Liptak, *supra*, note 31.

36. Clare Cushman, *Foreword* to IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES, ix (Todd C. Peppers & Artemus Ward eds., Univ. of Virginia Press 2012).

37. David J. Garrow, *Acolytes in Arms*, 9 GREEN BAG 2D 401, 412 (2006).

38. WARD & WEIDEN, *supra* note 26, at 72.

39. Mark R. Brown, *Gender Discrimination in the Supreme Court's Clerkship Selection Process*, 75 OR. L. REV. 359, 365 (1996).

40. WARD & WEIDEN, *supra* note 26, at 78.

now.”<sup>41</sup> But, as Ward and Weiden note:

As clerkships grew in prestige as stepping-stones to promising careers in prestigious law firms, government agencies, and the legal academy, applicants sought ways of improving their chances of landing a position on the Court. Graduating at the top of one’s class from an elite law school no longer guaranteed a spot on the High Court. By gaining experience on a lower court, and securing a favorable recommendation from their judge, applicants became more attractive to the justices.<sup>42</sup>

Thus, one of the primary reasons driving this increase in applications is the ever-increasing value placed on a Supreme Court clerkship. Law firms offer recent Supreme Court clerks bonuses of upwards of \$300,000<sup>43</sup> and many members of elite law school faculty are former clerks.<sup>44</sup> Furthermore, the Supreme Court bar tends to be composed of Supreme Court clerks. A 2014 study found that from 2004 to 2012, “[sixty-six lawyers,] far less than one percent of lawyers who filed appeals to the Supreme Court . . . were involved in forty-three percent of the cases the high court chose to decide.”<sup>45</sup> Significantly, of those sixty-six, thirty-one were former Supreme Court clerks.<sup>46</sup> It has become more necessary or helpful for certain legal positions – for example, the U.S. Chamber of Commerce recently hired five former Supreme Court clerks.<sup>47</sup> Hopeful students have needed ways to best position themselves to get the job. This has created a marketplace for judges to establish and advertise themselves as the person most capable of placing a clerk.

Although some compare students’ search for feeder clerkships to “sheiks looking for luxury cars,” this increasing sense of prestige has not only caused a rat race among students, but judges as well.<sup>48</sup> In 2011, there were

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41. Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 155 (1990).

42. WARD & WEIDEN, *supra* note 26, at 78.

43. *Law Firm Signing Bonuses: Supreme Desire*, THE ECONOMIST (Aug. 17, 2013), <http://www.economist.com/news/business/21583667-curiously-strong-market-supreme-court-clerks-supreme-desire>.

44. See Beverly B. Cook, *Women Judges: A Preface to Their History*, 14 GOLDEN GATE U. L. REV. 573, 593-94 (1984).

45. Biskupic, Roberts & Shiffman, *supra* note 14.

46. *Id.*

47. John Shiffman, *Chamber of Commerce Forms its Own Elite Law Team*, REUTERS (Dec. 8, 2014), <http://www.reuters.com/article/2014/12/08/us-scotus-firms-chamber-idUSKBN0JM10Q20141208>.

48. David Margolick, *Annual Race for Clerks Becomes a Mad Dash, with Judicial Decorum Left in the Dust*, N.Y. TIMES (Mar. 17, 1989), <http://www.nytimes.com/1989/03/17/us/law-bar-annual-race-for-clerks-becomes-mad->

382,828 electronic applications filed to fill clerk positions for the 874 presidentially appointed federal judges.<sup>49</sup> For some, such as the retired Judge Wald, the stakes for finding good clerks are high, “[t]he judge – clerk relationship is the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair. . . . [A]n excellent versus a mediocre team of clerks makes a huge difference in the judge’s daily life and in her work product.”<sup>50</sup> Other judges “want to attract applicants who will go on to clerk at the Supreme Court, not only because of the intrinsic value of these clerks as a result of their high ability, but also because such applicants have instrumental value to the hiring judge in that they make the judge more attractive to future candidates.”<sup>51</sup> In an infamous law review article, Judge Alex Kozinski explained the relationship between judge and clerk:

Judge and law clerk are in fact tethered together by an invisible cord for the rest of their mutual careers. The judge will forever appear on the clerk’s resume as his first permanent professional employer; she will receive many inquiries about the clerk’s performance and character. The law clerk is the judge’s emissary to the world; although sworn to secrecy about the court’s substantive work, clerks often comment, expressly or by knit of the brow, about the character, work habits, fairness and generosity of the judges they clerked for.<sup>52</sup>

This conception of clerk as “emissary” is why some judges, such as Judge Kozinski, battle for the clerks that they believe they can send to the Supreme Court. It can be a battle for prestige, as “the myth of the superstar clerk lives on, and like the pied piper continues to lure pursuing judges.”<sup>53</sup> Judge Kozinski himself has joked that he starts recruiting “at birth” and believes that, for him, “It’s a constant job of selling yourself. . . . You may be the greatest judge since Learned Hand, but the person I’m interviewing wouldn’t necessarily know Learned Hand from Learned Foot.”<sup>54</sup> In fact, a 1989 New York Times article described Judge Kozinski’s varying recruitment methods, from “beating [prospective clerks] at poker, losing to

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dash-with-judicial-decorum-left-dust.html.

49. Catherine Rampell, *Judges Compete for Law Clerks on a Lawless Terrain*, N.Y. TIMES (Sept. 23, 2011), <http://www.nytimes.com/2011/09/24/business/judges-compete-for-law-clerks-on-a-lawless-terrain.html>.

50. Kromphardt, *supra* note 16, at 295.

51. Posner et al., *supra* note 4, at 875.

52. Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1709 (1991).

53. Wald, *supra* note 41, at 155.

54. Margolick, *supra* note 48.

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them at chess, calling them during ski vacations, introducing [them] to current clerks, wining and dining, bageling and loxing.”<sup>55</sup> And while Judge Kozinski’s tactics may be unique – especially considering he has sent the highest number of clerks to the Supreme Court<sup>56</sup> – they illustrate that it is not only the clerks who are striving to get to the High Court, but some judges as well. As one faculty clerkship adviser, Joan Larsen, at the University of Michigan described it, “I have had a feeder judge say to me, ‘Yes, Joan, I’m sure he would be a great clerk, but I can’t send him upstairs.’”<sup>57</sup>

Like the Supreme Court clerkship itself, this “frenzied mating ritual”<sup>58</sup> of feeder clerks and clerkships is driven, in part, by prestige:

A judge’s reputation among his own colleagues may in part reflect his ability to garner the most highly-credentialed clerks under his banner so that he can maintain a reputation as a “feeder” of clerks to the Supreme Court. Correlatively, the stronger an appellate (or a district) judge’s reputation for channeling clerks to the high court, the more attractive he will be to many understandably ambitious, qualified clerk applicants. Some judges have long friendships with justices so that their clerks have an edge simply by virtue of that relationship. Others become feeders because they consistently are able to recruit the law review editors and top students from prestigious schools; not surprisingly, they want to keep it that way.<sup>59</sup>

While I will later discuss how and why certain judges become feeder judges, it is clear that status is a driving factor. With the ever earlier hiring of clerks, some students are being selected for feeder clerkships before they even have a full year’s worth of grades.<sup>60</sup> And rather than an applicant’s performance as a clerk determining a recommendation for a Supreme Court clerkship, “the letter has been replaced by the clerkship itself. . . . [S]imply securing a clerkship with one of the top feeder judges on the courts of appeals virtually guarantees the applicant a Supreme Court clerkship.”<sup>61</sup>

But some judges opt out, choosing clerks through non-traditional criteria

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55. *Id.*

56. *See infra* **Table 2** (noting that although Judge Kozinski has sent the greatest number of clerks in absolute numbers, he does not have the highest feeding average per Term).

57. Rampell, *supra* note 49.

58. Norris, *supra* note 1, at 776.

59. Davies, *supra* note 24, at 188.

60. Posner et al., *supra* note 4, at 802-03.

61. WARD & WEIDEN, *supra* note 26, at 77.

or hiring clerks who lack certain Supreme Court benchmarks, such as not being on a school's flagship journal. And others, such as Judge Richard Posner of the Seventh Circuit, seem to deride the competition for clerks – although he himself has sent twenty-nine clerks to the Supreme Court as of 2014.<sup>62</sup> Judge Posner has noted, “It’s a little humiliating that judges are so desperate for these young people, who you would think would play only a peripheral role in a system. But ambitious judges realize that law clerks help them attain their ambitions. People want the best ghostwriters.”<sup>63</sup> This apparent symbiosis between clerk and judge helps explain why tracing the conduits through which clerks reach the Supreme Court, as well as the power implicit in these relationships, is something worth exploring.

### C. *The Impact of Chief Justice Burger*

Considering the application process through this lens, it might make sense that as the applicant pool is ever increasing, the justices are essentially outsourcing the winnowing process to lower court judges and the lower court judges are competing to send the greatest number of clerks possible. But the growth in feeders has also been shaped by the changing needs of the justices themselves. In the 1940s and 1950s, rarely did a Supreme Court law clerk have previous clerkship experience.<sup>64</sup> From 1945 to 1949, only 23% of clerks had a lower court clerkship; from 1950 to 1960, that percentage dropped to 17.6%.<sup>65</sup> And unlike the contemporary feeder clerkship, potential clerks frequently worked for district court judges rather than appellate judges. From 1979 to 1994, Judge Louis Pollak of the Eastern District of Pennsylvania sent eleven clerks straight to the Supreme Court without an intermediate appellate court clerkship. Between 1984 and 1997, Judge Louis F. Oberdorfer of the District of Columbia sent eight clerks in the same fashion. According to Ward and Weiden, “in the 1976-1985 terms, among the Supreme Court clerks who had served in lower courts, forty-five percent came from the district courts or (much less often) from state courts. In the 1995-2009 terms that proportion dropped to two percent.”<sup>66</sup> By the Rehnquist Court, this dropped further to less than one percent.<sup>67</sup>

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62. Hess, *supra* note 7.

63. Margolick, *supra* note 48.

64. TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 31 (Stan. Univ. Press 2006).

65. Alexandra G. Hess, *Supreme Court Clerk Data, 1944-2015* (unpublished data, on file with author). However, the number of clerks also increased during these two periods.

66. Baum and Ditslear, *supra* note 6, at 26.

67. WARD & WEIDEN, *supra* note 26, at 79.

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While the number of applications may have increased starting in the 1950s, appellate clerkships were not yet clearly mandatory, as only a little more than half of Supreme Court clerks had a prior clerkship. However, when Chief Justice Warren Burger came to the bench in 1969, the rate of appellate clerkships among Supreme Court clerks began to rise dramatically. As Ward and Weiden note, “Chief Justice Burger wanted law clerks who had previously clerked in the federal judiciary, and the other Burger Court justices quickly took notice. During the first five years of the Burger Court, sixty-eight percent of law clerks surveyed had clerked for a federal or state court judge. From 1980 to 1985 that percentage had swelled to ninety-five percent of clerks surveyed.”<sup>68</sup> By the Rehnquist Court, ninety-eight percent of clerks had prior clerkship experience, and ninety-two percent had clerked for a Federal Court of Appeals judge.<sup>69</sup>

**Table 1** shows the overall rise in federal appellate clerkships for the period from 1965 to 2014.<sup>70</sup> I first determined the number of clerks with prior appellate court clerkships during a five-year period and then divided that by the total number of Supreme Court clerks in the given period to calculate the percentage of clerks with prior appellate clerkships.

**Table 1: Supreme Court Clerks and Prior Clerkship Experience, 1965-2014**

| Period  | Total Number of Supreme Court Clerks with a Prior Appellate Clerkship | Total Number of Supreme Court Clerks | Percentage of Supreme Court Clerks with Prior Appellate Clerkships |
|---------|---|--------------------------------------|--|
| 1965-69 | 19  | 73                                   | 26%  |
| 1970-74 | 61  | 128                                  | 48%  |
| 1975-79 | 100   | 135                                  | 74%  |
| 1980-84 | 123   | 149                                  | 83%  |
| 1985-89 | 141   | 166                                  | 85%  |
| 1990-94 | 165   | 189                                  | 87%  |
| 1995-99 | 168   | 176                                  | 95%  |
| 2000-04 | 174   | 175                                  | 99%  |
| 2005-09 | 194   | 194                                  | 100%   |
| 2010-14 | 195   | 195                                  | 100%   |

68. PEPPERS, *supra* note 64, at 31.

69. *Id.*

70. Hess, *supra* note 65. However, the number of clerks also increased during these two periods. I included the period from 1965 to 1969 to show the impact of Chief Justice Burger joining the Court.

Chief Justice Burger joined the Court in 1969 and this table demonstrates the clear increase in appellate court clerkships since his tenure on the bench. In the five years prior to Chief Justice Burger's commission, only twenty-six percent of Supreme Court clerks had a prior appellate clerkship. This percentage nearly doubled in the first five years of the Chief Justice's tenure and that number has consistently reached one hundred percent since 2005. In fact, not only has a feeder clerkship become a requirement, but some students also seem to be clerking for multiple Court of Appeals judges in the hopes of better positioning themselves to receive a Supreme Court clerkship. In the period from 2010 to 2014, there were 195 Supreme Court clerks but they clerked for 207 appellate court judges; from 2005 to 2009, there were 194 Supreme Court clerks who clerked for 200 appellate judges.<sup>71</sup> In some instances, the students are clerking for two known feeder judges, while in others, students are clerking for a lesser-known appellate judge and then a more established feeder judge.<sup>72</sup>

#### *D. Politicization of the Supreme Court*

Whether the politicization of the Supreme Court is a factor in the rise of the feeder judge is a relatively new question, but most legal professionals and social scientists seem to agree that ideology is crucially important. While the regression results indicate that the nominating party of a judge does not have a statistically significant effect on their chance of sending a clerk to the Court, the extremely high rates of same-party feeding shown in Part VII are telling.<sup>73</sup> With the super-majority of clerks coming from judges of the same party, the justices are relying on a small subset of politically-aligned judges for their clerks. This has contributed to the rise of super feeder judges, a group that almost entirely excludes female judges.<sup>74</sup>

Recent studies have exclusively focused on this question of polarization. While it is not entirely clear why the polarization of the Court has occurred, one study found that because of the increasing applicant pool and the fact that it is customary for a prospective clerk to apply to all nine justices, "justices cannot tell anything about applicants' ideological leanings from the fact that they applied. Lacking other information on that score, the justices seem to look to the ideology of the feeder judge."<sup>75</sup> This is demonstrated by the fact that, for example, one study found that between

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71. *Id.*

72. *See id.* (referring to the author's source on file cited in FN 71).

73. *See infra* Part VI-VII.

74. *See infra* Part IV (analyzing the exclusion of female feeder judges).

75. *See* Liptak, *supra* note 31 (discussing the Baum and Ditslear study).

1975 and 1980, the “relationship between the justices’ ideological positions and those of the judges from whom they drew their clerks was relatively weak.” However, by 1993–1998, “the picture was fundamentally different” and the ideological relationships had become “very strong.”<sup>76</sup>

This increasing division along ideological position has continued to the present day. A New York Times article from 2010 noted that from 1969 to 1986, Chief Justice Burger “hired roughly even numbers of clerks who had worked for judges appointed by Democrats and Republicans.”<sup>77</sup> However, today, “the more conservative justices are much more likely than were their predecessors to hire clerks who worked for judges appointed by Republicans. And the more liberal justices are more likely than in the past to hire from judges appointed by Democrats.”<sup>78</sup> For example, in the 1986 to 1994 terms, “Justice Kennedy took 15 percent of all his clerks from Democrats, Justice Scalia 13 percent, and Chief Justice Rehnquist 22 percent. In the 1995-2004 terms, each took 3 percent of his clerks from Democrats.”<sup>79</sup> Former judge J. Michael Luttig of the Fourth Circuit, who has the highest feeder rate of clerks per term—and of his forty-two clerks to the Supreme Court, thirty-three of them were fed to Justices Thomas and Scalia—says that this shift toward a more politicized clerkship pool is unsurprising and “the justices’ overall hiring practices reflected a fundamental shift.”<sup>80</sup> He elaborated:

As law has moved closer to mere politics, political affiliations have naturally and predictably become proxies for the different political agendas that have been pressed in and through the courts. Given this politicization, it should come as no surprise to learn that the more liberal judges tend both to hire clerks who would self-describe themselves as Democrats and to hire clerks from other judges who would likewise self-describe themselves as Democrats, and vice versa for the more conservative judges.<sup>81</sup>

Fifteen years ago, Justice Thomas echoed a similar sentiment in more blunt terms, “[choosing clerks is like] selecting mates in a foxhole. I won’t hire clerks who have profound disagreements with me. It’s like trying to train a pig. It wastes your time, and it aggravates the pig.”<sup>82</sup>

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76. Garrow, *supra* note 37, at 408.

77. Liptak, *supra* note 31.

78. *Id.*

79. Baum and Ditslear, *supra* note 6, at 43.

80. Liptak, *supra* note 31.

81. *Id.*

82. *Id.*



Various studies seem to affirm that ideology plays “a role in both feeder and non-feeder matches; applicants and judges alike, through conscious and unconscious selection, show a tendency to make ideological matches.”<sup>83</sup> In fact, Peppers and Ward posited that failing to consider ideology prevents people from understanding the fundamental nature of the feeder system and what has caused its proliferation:

[M]ost discussions and numerical rankings of “feeder judges” fail to adequately emphasize the most important and consequential element of the phenomenon, namely how in recent decades virtually every such jurist has been either exceptionally liberal or highly conservative. . . . For instance, the D.C. Circuit has long enjoyed an overall numerical advantage, but why is it that judges [Laurence] Silberman, [David] Sentelle, and [Stephen] Williams, just like judges [David] Bazelon, [J. Skelly] Wright and [Abner] Mikva in earlier years, score far above equally well-respected but ideologically moderate jurists like Judith W. Rogers? Similarly, in a national context, why have judges Luttig and Kozinski topped the charts rather than say judges Michael Boudin, Pierre Leval, and the late Edward Becker? The explanation is not that the Fourth and Ninth Circuits have decidedly stronger reputations than the First, Second, or Third, nor that clerks to judges like Silberman are decidedly more able than clerks to a Boudin or Leval. If instead the real answer is simply that multiple justices have closer personal ties to judges like Luttig, Silberman and Kozinski than Rogers, Boudin, and Becker, then the justices have only themselves to blame for a “clerk force” whose political loyalties are far more partisan than was the case in earlier decades when clerks did not undergo the ideological socialization that they now receive during their appellate clerkships.<sup>84</sup>

And while some judges claim to have exempted themselves from the ideological divide, such as Judge J. Harvie Wilkinson of the Fourth Circuit (who say that he tries “not to put an ideological litmus test” on his candidates), there is a serious concern that the rise of the feeder system is intimately tied to politics and politicking.<sup>85</sup> And while I will not address whether considering ideology in choosing clerks is a net positive or negative for the Court, it is clearly connected to the feeder system. For the justices, the ideology of appellate court judges acts as an easy filter.<sup>86</sup> And among those judges of the same political party as a justice, there appears to be a tendency to take many clerks from the same judges, the “exceptionally

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83. Kromphardt, *supra* note 16, at 296.

84. Garrow, *supra* note 37, at 418.

85. Liptak, *supra* note 31.

86. Baum and Ditslear, *supra* note 6, at 27.

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liberal or highly conservative.”<sup>87</sup>

#### IV. MEASURING UNDERREPRESENTATION

While there are many factors that have led to the creation of the feeder judge system, there has not yet been an exploration of the gender imbalance in this market. On the most basic level, I wanted to examine whether female Court of Appeals judges were actually underrepresented as feeder judges to the Supreme Court. As mentioned, I limited my analysis to the years 1970 to 2014 because 1970 was the first year a female judge sent a clerk to the Supreme Court and 2014 was the most recent term for which full data on the clerks and their prior clerkships are available.<sup>88</sup> The list of clerks came from the Oyez Project and the Supreme Court, each of which publishes a list of clerks for each justice by year.<sup>89</sup> To determine what prior clerkships each clerk had, I ran a simple Boolean search.<sup>90</sup> Using this information, I determined that there were 1,378 Supreme Court clerks<sup>91</sup> who clerked for a Court of Appeals judge in the period from 1970-2014.<sup>92</sup> Using the Biographical Directory of Judges, I then determined the sex of each judge and then calculated what percentage of the feeder judges were female in a given year.<sup>93</sup>

I then compared the percentage of female feeder judges to the percentage of women on the federal appellate bench as a whole. This was much more difficult because there is no list of judges on the bench in a given year. Therefore, again using the Biographical Directory of Judges, I made a list of each judge on each of the twelve circuits<sup>94</sup> for each year by sex from 1970 to 2014. I included judges in my table from their year of commission to their termination year. This yielded 9,061 observations for the period in

87. Garrow, *supra* note 37, at 418.

88. See Alexandra G. Hess, Court of Appeals Feeder Judge Data, 1944-2015 (Apr. 13, 2015) (unpublished data, on file with author) (limiting analysis to 2014 because the Supreme Court has not yet completed hiring for October Term 2015).

89. See Alexandra G. Hess, Supreme Court Clerk Data, 1944-2015 (unpublished data, on file with author).

90. Alexandra G. Hess, Court of Appeals Feeder Judge Data, 1944-2015 (April 13, 2015) (unpublished data, on file with author) (limiting analysis to 2014 because the Supreme Court has not yet completed hiring for October Term 2015). For example, I consulted social media sites, newspapers, legal blogs, company websites, and a variety of other online sources in compiling the data. While this means there is some margin of error, it is one of the most comprehensive lists to date.

91. *See id.*

92. However, there were about 200 unique feeder judges once I excluded repeats: 31 female feeders and 167 male feeders.

93. Biographical Directory of Federal Judges, *supra* note 2.

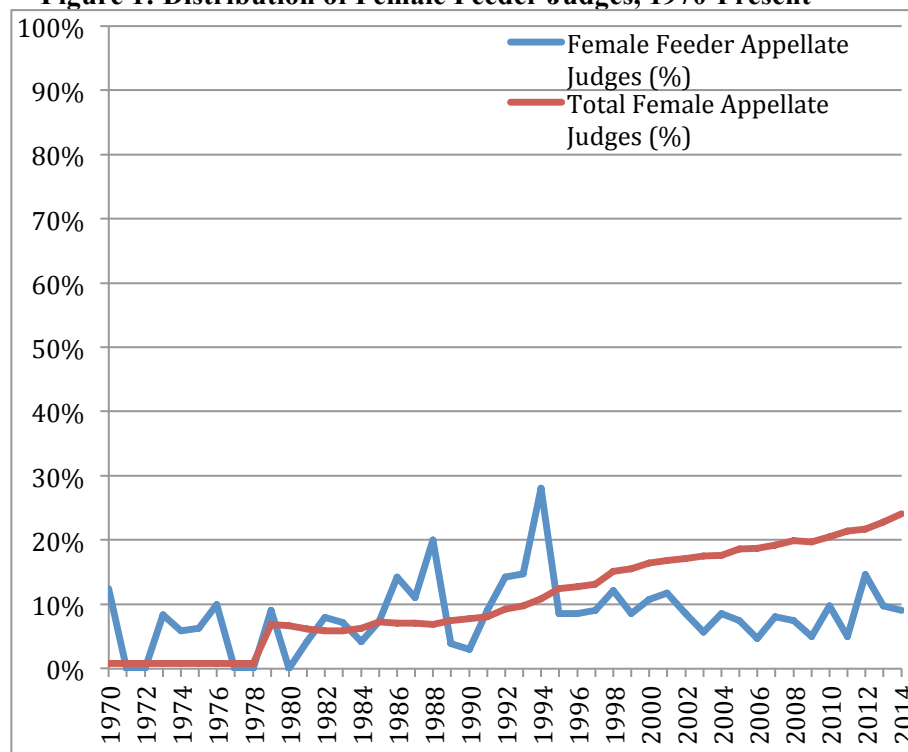
94. *Id.* (excluding the Court of Appeals for the Federal Circuit).

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question. I then calculated the total percentage of women on the federal appellate bench for each year.

**Figure 1** below compares the percentage of women who are feeder judges (blue line) as compared to the overall representation of women on the federal appellate bench (red line).

**Figure 1: Distribution of Female Feeder Judges, 1970-Present<sup>95</sup>**



This graph shows that from 1970 to 1994, women were actually *overrepresented* as feeder judges for sixteen of those first twenty-five years. In 1970, they were overrepresented by over 1200%, as women were 0.8% of all federal appellate judges but 12.5% of feeders.<sup>96</sup> The sharp rise in female judges in the late 1970s was attributable in part to President Carter’s establishment of “commissions within each circuit to identify

95. See Alexandra G. Hess, Supreme Court Clerk Data, 1944-2015 (unpublished data, on file with author).

96. This is due, in large part, to the small sample size because only eight clerks previously clerked at the appellate level. By 1972, more than half of all Supreme Court clerks had a prior appellate clerkship. See Alexandra G. Hess, Supreme Court Clerk Data, 1944-2015 (unpublished data, on file with author).

potential nominees for vacancies on the U.S. Court of Appeals” in an effort to expand the presence of women and minorities on the appellate bench.<sup>97</sup> By 1994, women comprised 28.1% of all feeder judges and were 10.9% of all federal appellate judges. Yet, after 1994, even though the percentage of women on the federal appellate bench continued to rise steadily, the percentage of women as feeder judges dropped dramatically from 28.1% in 1994 to 8.6% in 1995 and has not recovered since. In 2009, the percentage of women as feeder judges dipped as low as 4.7% but bounced back to 9.1% in 2014. This means that, as of 2014, though 75.9% of federal appellate judges are male,<sup>98</sup> they represent over 90% of feeder judges to the Supreme Court.

Even if one just looks at a list of top feeders, one suspects that there might be a gender gap. As I noted in Part II, the rise of the feeder clerkship is relatively recent, but the number of clerks that some judges have managed to feed to the Supreme Court is staggering. **Table 2** lists the top ten feeder judges to the Supreme Court from the period in question. However, since there was no real feeder culture before this period, the list also represents the biggest feeders of all-time, listed in descending order of number of clerks.

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97. DONALD R. SONGER, REGINALD S. SHEEHAN & SUSAN B. HAIRE, CONTINUITY AND CHANGE ON THE U.S. COURT OF APPEALS 27 (UNIV. OF MICH. 2000).

98. This high percentage of male appellate court judges is also a source of controversy, but not one that I will be addressing in this paper. See Lynn Hecht Schafran, *Women of the Courts Symposium: Not from Central Casting: The Amazing Rise of Women in the American Judiciary*, 36 U. TOL. L. REV. 953, 956 (2005) (“As of July 2005, there are fifty female appellate court judges and 171 female district court judges, comprising 17.4% of the Article III bench.”).

**Table 2: Top Feeder Judges to the Supreme Court, 1970-2014**

| Judge               | Tenure       | Total Clerks | Clerks Per Term |
|---------------------|--------------|--------------|-----------------|
| Alex Kozinski       | 1985-Present | 58           | 2.00            |
| J. Harvie Wilkinson | 1984-Present | 55           | 1.83            |
| Merrick Garland     | 1997-Present | 43           | 2.53            |
| J. Michael Luttig   | 1991-2006    | 42           | 2.80            |
| David Tatel         | 1994-Present | 35           | 1.75            |
| Harry Edwards       | 1980-Present | 33           | 0.97            |
| Guido Calabresi     | 1994-Present | 32           | 1.07            |
| Laurence Silberman  | 1985-Present | 32           | 1.10            |
| J. Skelly Wright    | 1962-1988    | 32           | 1.23            |
| Michael Boudin      | 1992-Present | 31           | 1.41            |

While I will put these super-feeders in perspective in a later section of this paper, one can already see the huge impact these ten judges have had on the Supreme Court clerk pool. First, all of these judges are men and nine of the ten are white.<sup>99</sup> Second, if one looks at the ratio of clerks per Supreme Court term, this table shows that these judges, with the exception of Judge Edwards, are sending, on average, at least one clerk to the Supreme Court per term. And if one added up the overall clerk per term ratio for all of the judges currently sitting – thus excluding J. Skelly Wright and J. Michael Luttig – the eight remaining judges account for an average of *12.49 clerks per term*. If one assumes there is the same number of clerks that there were in 2014, thirty-nine, then just these eight judges would singlehandedly be responsible for over 32% of Supreme Court clerks. The *New York Times* also reported on this trend in 2009, when it noted that although there were 164 active judges on the federal appeals court, “just four of those judges produced about 60 Supreme Court clerks over the last six years, more than a quarter of the total.”<sup>100</sup> As Part VIII makes clear,

99. The exception is Judge Harry Edwards, who is African American. See Biographical Directory of Federal Judges, *supra* note 2; see also Alexandra G. Hess, Court of Appeals Feeder Judge Data, 1944-2015 (April 13, 2015) (unpublished data, on file with author).

100. Adam Liptak, *On the Bench and Off, the Eminently Quotable Justice Scalia*, N.Y. TIMES (May 11, 2009), <http://www.nytimes.com/2009/05/12/us/12bar.html>.

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however, this crude measure in fact grossly underestimates the huge impact of super-feeders.

By contrast to **Table 2**, **Table 3** represents just the top female feeder judges.

**Table 3: Top Female Feeder Judges to the Supreme Court, 1970-Present**

| Judge               | Tenure       | Total Clerks | Clerks/Term |
|---------------------|--------------|--------------|-------------|
| Ruth Bader Ginsburg | 1980-1993    | 17           | 1.31        |
| Patricia Wald       | 1979-1999    | 16           | 0.80        |
| Edith Jones         | 1985-Present | 11           | 0.38        |
| Amalya Kearse       | 1979-Present | 11           | 0.31        |
| Shirley Hufstedler  | 1968-1979    | 8            | 0.73        |
| Janice R. Brown     | 2005-Present | 7            | 0.78        |
| Dorothy Nelson      | 1979-Present | 6            | 0.17        |
| Judith Rogers       | 1994-Present | 5            | 0.20        |
| Pamela Rymer        | 1989-2011    | 5            | 0.42        |
| Deanell Tacha       | 1985-2011    | 5            | 0.19        |

The top female feeder judges have sent 91 clerks, less than one-fourth of the 392 sent by the top overall feeder judges. Ruth Bader Ginsburg is the top female feeder ever; however, the absolute number of clerks she fed to the Court is only slightly more than half of those fed by the tenth-ranked male feeder. She is also the only female appellate judge whose average feeding rate exceeds one clerk per term. Nine of the top ten male feeders beat that ratio. Furthermore, only 50% of the judges on the female top feeder list are still sitting, in contrast to 80% of the male judges, meaning that the female judges who are still feeding are doing so in even smaller numbers. While I will expand on the place of female feeders, both empirically and qualitatively, these comparisons give a glimpse into some of the disparities in the presence of women as feeder judges.

These data may seem counterintuitive to some; there are three women on the Supreme Court and the percentage of women on the federal bench

continues to rise.<sup>101</sup> But as I will discuss, two factors have contributed to the decline of women as feeder judges: first, ironically, the confirmation of Ruth Bader Ginsburg to the Supreme Court and second, the Supreme Court's increased reliance on a small number of appellate judges for clerks.

#### V. THE COLLAPSE OF THE HOUSE THAT RUTH BUILT

On August 10, 1993, Ruth Bader Ginsburg was sworn in as the second female Supreme Court justice.<sup>102</sup> Over the following year, the percentage of female feeder judges almost doubled from 14.71% to 28.13% in 1994. However, as noted, between 1994 and 1995, that percentage plummeted to 8.57%. Examining the clerk pool for those three years, it is evident that Justice Ginsburg's confirmation to the Supreme Court was responsible for the decline of female feeders. Why? Because she herself was a key female feeder judge. As discussed in **Table 3**, from 1980 to 1993, while she was on the D.C. Circuit, then-Judge Ginsburg fed seventeen clerks to the Supreme Court.<sup>103</sup> Her runner-up, Judge Patricia Wald, fed sixteen clerks during her tenure from 1979 to 1999, an average of 0.80 clerks per year.<sup>104</sup> After 1994, when Justice Ginsburg no longer hired her own former clerks, the only other major female feeder judge was Judge Wald, who then retired in 1999.<sup>105</sup> **Figure 2** illustrates the effect of Justice Ginsburg's elevation and its singular impact: when Judge Ginsburg became Justice Ginsburg, no other woman took her place as a 'super-feeder' and the proportion of women as feeders has not recovered. One can see, for example, that even though Justice Sotomayor was also a circuit court judge before she was confirmed to the High Court, her confirmation did not have an impact on the feeder pool because she had only sent one clerk to the court (in fact, to Justice Ginsburg in 2004).<sup>106</sup>

101. See generally Schafran, *supra* note 15 (analyzing the increasing number of female judges).

102. Biographical Directory of Federal Judges, *supra* note 2.

103. Even though she was confirmed in 1993, she still fed two of her former Court of Appeals clerks to the Supreme Court, one to herself and one to Justice O'Connor. See Alexandra G. Hess, Court of Appeals Feeder Judge Data, 1944-2015 (April 13, 2015) (unpublished data, on file with author).

104. If one includes all of the clerks she fed to the Court, Justice Ginsburg is the most prolific female feeder ever; however, if one excludes her self-feeds, then that distinction belongs to Judge Patricia Wald of the D.C. Circuit. See *id.*

105. Justice Ginsburg fed three of her former appellate clerks in her first year on the Supreme Court, which explains why there was a spike in female feeders in her first year and then a rapid decline. *Id.*

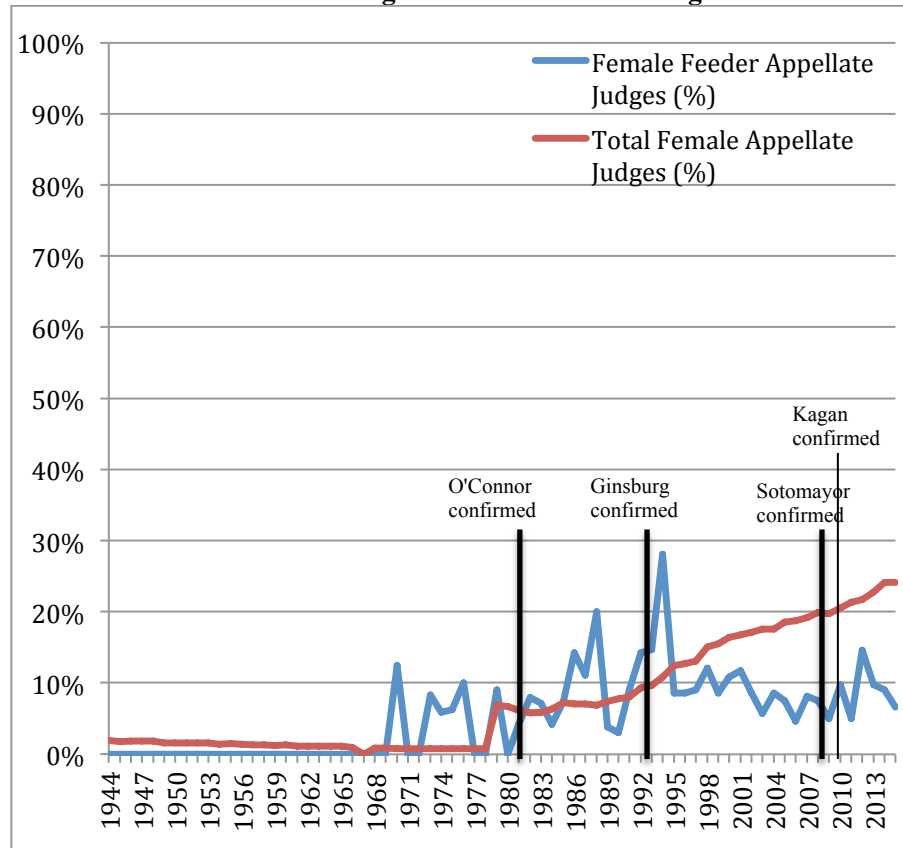
106. By contrast, Justices Kagan and O'Connor were not judges before they joined the Supreme Court. *Id.* Thus, while the impact of Justice Ginsburg's elevation is real and has had a profound impact on female judges as feeders to the Supreme Court, the

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**Figure 2: Impact of Women Being Confirmed to the Supreme Court on the Percentage of Female Feeder Judges**



In fact, Justice Ginsburg is not only one of the biggest female feeders, but as **Table 4** demonstrates, she is also (by a slim margin) the biggest feeder currently sitting on the Supreme Court, if one excludes self-feeds.<sup>107</sup> She has not only sent the most clerks in terms of absolute numbers, but also as measured by the average number of clerks sent per term.

sample size is extremely small.

107. See *infra* **Table 4**; see also *supra* **Table 3**. As noted in **Table 3**, Justice Ginsburg's average is 1.31 clerks per term if one includes self-feeds. She is also likely the biggest feeder-turned-Supreme Court justice ever, but that is primarily due to the fact that previous justices were lower court judges before a feeder clerkship became essentially required during the Burger Court.



**Table 4: Current Supreme Court Justices as Feeder Judges**

| Justice Name         | Years on Court of Appeals | Total Clerks (excluding self-feeds) | Clerks/Term |
|----------------------|---------------------------|-------------------------------------|-------------|
| Alito, Samuel A.     | 16                        | 3                                   | 0.19        |
| Breyer, Stephen G.   | 14                        | 10                                  | 0.71        |
| Ginsburg, Ruth Bader | 13                        | 14                                  | 1.10        |
| Kagan, Elena         | N/A                       | N/A                                 | N/A         |
| Kennedy, Anthony M.  | 13                        | 4                                   | 0.31        |
| Roberts, John G.     | 2                         | 1                                   | 0.50        |
| Scalia, Antonin      | 4                         | 4                                   | 1.00        |
| Sotomayor, Sonia     | 11                        | 1                                   | 0.09        |
| Thomas, Clarence     | 1                         | 1                                   | 1.00        |

If one compares this table to **Tables 2** and **3**, one can see that while Justice Ginsburg is the biggest female feeder of all-time, the other justices do not appear on the list at all.

#### VI. IS IT PURELY A QUESTION OF GENDER?

To investigate what factors other than Justice Ginsburg's elevation are causing the low levels of feeding by female judges, I used a regression to determine if certain measurable factors might be affecting women's representation. This would hopefully shed light on the question of whether the issue is purely gender or the interplay of other factors. The results revealed that for female judges, tenure had a positive effect on the chances of sending a clerk to the Court; but, in sharp contrast to male judges, having sent one clerk to the Court sharply *decreased* the chances of a female judge sending a second clerk. As I will discuss, this notable result can be explained by the rise of super-feeders, who are almost exclusively men and feed the super-majority of Supreme Court clerks. Thus, female judges have the opportunity to send one clerk but are shut out from sending multiple clerks because of the super-feeder monopoly.

##### *A. Factors to Consider*

In order to have an adequate standard of comparison, I compared the pool of feeder judges to the entire federal appellate bench from 1970 to 2014. Using the Biographical Directory of Judges, I controlled for: year, a judge's circuit, gender, race, age, and tenure on the bench,<sup>108</sup> the party of the President that nominated the judge; whether or not the judge him or herself was a prior Supreme Court clerk; and whether, relative to a given

108. See Biographical Directory of Federal Judges, *supra* note 2. (adjusting the age and tenure of the judge each year).

year, a judge had previously sent a clerk to the Supreme Court. By controlling for these other factors, I was able to see the impact of gender on the likelihood of an appellate judge sending a clerk to the Supreme Court.

Age, race, and gender were included as baseline demographic characteristics. In addition, since existing literature on feeder judges focuses primarily on the issues of political affiliation<sup>109</sup> and circuit favoritism,<sup>110</sup> it was important to include those factors in the data. Tenure on the bench goes to a similar issue of lag effects<sup>111</sup>: it looks at how the amount of time a judge is on the bench affects their chance of sending a clerk to the Supreme Court. I included the question of whether a judge was a prior Supreme Court clerk as a measurable proxy for networking effects. Essentially, while there may be many external connections between justices and individual judges, such as prior work connections or friendships that result in a judge becoming a feeder, they are not measurable on a macro-level. However, if a judge was a former clerk on the Court, that is a measurable connection and may relate to a judge's becoming a feeder. Finally, the question of whether a judge had previously sent a clerk to the Court allowed me to explore whether there is a barrier to entry to becoming a feeder judge.

### *B. Methodology*

The unit of observation is the “judge-year;” the dataset includes 504 judges who served on the bench for a combined 9,818 judge-years from 1970 to 2014.<sup>112</sup>

I examined three variations: the first, a “baseline,” was a logit regression using all 9,818 judge-years of data available. Judges appointed before 1970 who remained on the bench in that year, the beginning of the dataset, are included.

A second analysis excludes all judges who were appointed prior to 1970. For example, a judge appointed in 1969 who retired in 1975 is excluded from the data. I did this because clerk-hiring preferences – namely, the rise of the feeder clerkship – changed around the beginning of the dataset.

The third variation excludes instances of a Supreme Court justice self-feeding, which is, hiring his or her former appellate court clerk. Several recently-confirmed justices have hired many or all their most recent clerks

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109. *See supra* Part II(d).

110. *See infra* Part VI.

111. *See infra* Part VIII.

112. Alexandra G. Hess, Supreme Court Clerk Data, 1944-2015 (unpublished data, on file with author).

when assuming the high bench.<sup>113</sup> The regression estimates are very similar, indicating that the estimates in the baseline analysis are not driven by qualitatively different and highly unusual observations.

As mentioned, the model estimates the effects of judge characteristics, such as gender, tenure, age, race, circuit, whether the judge was nominated by a Republican or Democratic president, and whether the judge had previously sent a clerk to the Supreme Court, on the probability that a judge  $i$  sends a clerk to the Supreme Court in year  $t$ . The dependent variable takes the value 1 if the judge sent a clerk to the Supreme Court in that year, and 0 otherwise. I ran logit regressions of the following model, with judge characteristics grouped in a matrix to allow for cleaner notation:

$$clerk_{i,t} = \alpha_1 + \beta(Judge\ Characteristics)_{i,t} + year_t + \varepsilon \quad (1)$$

The regression estimates should be interpreted as the effect, in terms of percentage, of the characteristic on the probability a feeder judge sends a clerk to the Supreme Court.

I also considered the following model with an interaction term between circuit and gender:

$$clerk_{i,t} = \alpha_1 + \sum \beta(Judge\ Characteristics)_{i,t} + \delta(Circuit \times Female)_{i,t} + year_t + \varepsilon \quad (2)$$

### C. Results

**Table 5: Regression Results for all Court of Appeals Judges, 1970-2014**

| Characteristics of Judge                | Model 1: Baseline (all judges and clerks) | Model 2: Excludes Judges Appointed Prior to 1970 | Model 3: Excludes Self-Feeds |
|---|---|--|------------------------------|
| Age                                     | -0.0493***                                | -0.0426***                                       | -0.0482***                   |
| Tenure                                  | -0.00817                                  | -0.00747   | -0.00891                     |
| Female                                  | -0.116                                    | -0.142   | -0.115                       |
| Racial Minority                         | 0.400**                                   | 0.363**  | 0.400**                      |
| Republican                              | 0.115                                     | 0.119  | 0.103                        |
| Judge was a SCOTUS clerk                | 1.204***                                  | 1.306***   | 1.206***                     |
| Judge previously sent a clerk to SCOTUS | 2.282***                                  | 2.323***   | 2.285***                     |

\*\*\*Significant of  $p < 0.01$ , \*\*  $p < 0.05$ , \* $p < 0.1$

113. Alexandra G. Hess, Supreme Court Clerk Data, 1944-2015 (unpublished data, on file with author).

**Table 5** suggests that four characteristics have a statistically significant effect on the probability of a Court of Appeals judge becoming a Supreme Court feeder: age, racial minority status, the judge being a former Supreme Court clerk, and the judge having previously sent a Supreme Court clerk. Being a racial minority has a modest effect on sending a clerk to the Court –ranging from 36.3% to 40.0% across the three models. Since 1970, approximately 6.5% of appellate-turned-Supreme Court clerks have come from a feeder judge of color, although there is no current literature as to explain the effect.<sup>114</sup> While the latter three characteristics have a positive effect on becoming a feeder judge, age has a negative effect of approximately 4.7%. There is no literature on why this negative relationship might exist, although one could posit that once a judge takes senior status and consequently, a potentially reduced workload, they are then less likely to send a clerk to the Court because they have a smaller clerk pool.<sup>115</sup> In fact, the negative age effect and statistically insignificant effect of tenure go against common wisdom. Judge Kozinski once claimed, “[s]eniority matters. Judges with many years on the bench naturally have an advantage over upstarts like me who have to work hard at achieving a national reputation.”<sup>116</sup> But, as **Table 6** will show, tenure on the bench only has a positive effect for female appellate judges.

However, far and away the factor that has the strongest effect – ranging from 228.2% to 232.3% across the three models – is having previously sent a clerk to the Supreme Court, followed in a distant second by the judge him or herself being a former Supreme Court clerk (with an average positive effect ranging from 120.4% to 130.6%). In many ways, it makes sense that both of those factors are closely related to feeding a clerk. A judge who was a former clerk might be able to send their clerks to the same justice.<sup>117</sup> And, even if their justice is deceased, there may still be un-measurable benefits: first, networking effects; second, a signaling function of having previously clerked on the Court or; third, a perception that a former

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114. They account for 90 of 1,379 feeder judge spots since 1970. Like women, racial minority judges are underrepresented as feeder judges, accounting for an average of 6.5% of feeder judges despite making up an average of 10.1% of the federal appellate bench. See Alexandra G. Hess, Court of Appeals Feeder Judge Data, 1944-2015 (April 13, 2015) (unpublished data, on file with author).

115. See Honorable Frederic Block, *Senior Status: An “Active” Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533, 540 (2014).

116. Kozinski, *supra* note 52, at 1719.

117. A roundabout example of this is Judge Alex Kozinski. Although he clerked for Chief Justice Burger, he also clerked for then-judge Kennedy. He has subsequently fed most of his Supreme Court clerks to Justice Kennedy (28 of 58 clerks). See Alexandra G. Hess, Court of Appeals Feeder Judge Data, 1944-2015 (April 13, 2015) (unpublished data, on file with author).

Supreme Court clerk may be uniquely positioned to identify clerks who can handle the workload.<sup>118</sup> However, in theory, it seems even clearer why there is such a high impact with having previously sent a clerk to the Court. If a judge sends a clerk that performs well, then a justice might be inclined to take another clerk from that judge.<sup>119</sup>

I then examined whether these effects were consistent for just the female judges. **Table 6** indicates they were not:

**Table 6: Regression Results for Female Court of Appeals Judges, 1970-2014**

| Characteristics of Female Judge                            | Model 1: Baseline (all judges and clerks) | Model 2: Excludes Judges Appointed Prior to 1970 | Model 3: Excludes Self-Feeds |
|--|---|--|------------------------------|
| Age  | -0.00293                                  | -0.00528   | -0.00306                     |
| Tenure   | 0.0585**                                  | 0.0648**   | 0.0582**                     |
| Racial Minority  | -0.262                                    | 0.377  | -0.278                       |
| Republican   | 0.198                                     | 0.357  | 0.224                        |
| Judge was a SCOTUS clerk                                   | -1.031                                    | -1.102*  | -1.031                       |
| Judge previously sent a clerk to SCOTUS                    | -0.757***                                 | -0.932***  | -0.777***                    |
| ***Significant of $p < 0.01$ , ** $p < 0.05$ , * $p < 0.1$ |   |  |                              |

Measured against the same metrics, the result for female judges in **Table 6** is essentially the inverse of those for the entire federal appellate bench in **Table 5**. While most characteristics were not statistically significant, **Table 6** reveals that a female judge's tenure on the bench and whether she previously sent a clerk to the Supreme Court are statistically significant in interesting ways. Tenure has a positive effect – ranging from 5.82% to 6.48% – with sending a clerk to the Supreme Court whereas, in the overall appellate pool, age negatively affected the chance of sending a clerk and tenure was not statistically significant. This might support the idea of lag effects,<sup>120</sup> but could also suggest that it takes female judges longer to build networks either with schools, so that professors recommend Supreme Court

118. See Baum and Ditslear, *supra* note 6, at 27 (“Judges interact with current and future justices and develop relationships with them. A justice may seek out law clerks from a particular judge because acquaintanceship with the judge gives the justice greater confidence in the judge’s clerks. Further, acquaintanceship facilitates the exchange of information, making it easier for a justice to learn whether a specific clerk has the traits that the justice seeks. On a different level, friendship in itself may be a basis for choosing clerks from a particular judge.”).

119. See Kozinski, *supra* note 52, at 1718.

120. See *infra* Part VIII.

caliber clerks to them, or with the justices, so that they will consider the judge's clerks. There is no definitive literature on the subject, however, and might provide an avenue for further research.

The second statistically significant characteristic, whether the female judge previously sent a clerk to the Court, is more troubling. **Table 6** demonstrates that there is a large *negative* effect for female judges, a range of negative 75.7% to 93.2%, who sent a clerk to the Supreme Court to send another. This provides a sharp contrast to the sharply *positive* effect shown in **Table 5** for the entire federal appellate bench. While I will discuss the likely causes of this in Part IX – in particular, the rise of the ‘super-feeders’ – this effect, combined with the statistically insignificant result for women in **Table 6**, suggests that female appellate judges are able to send a clerk to the Supreme Court but then face barriers to further entry. The positive correlation of tenure, suggesting a longer time period needed to form networks, combined with the negative effect of having fed a clerk to the Supreme Court once, creates the picture of a system in which female judges are prevented from forming a strong feeding network by the means that male judges do.

#### VII. IMPACT OF CIRCUIT EFFECTS

One factor to consider is whether circuit effects, rather than gender, can explain the regression results; specifically, whether the issue is simply that most feeder judges come from a particular circuit. Existing literature and common lore describe the D.C. Circuit as the most prestigious, followed by the Ninth and Second Circuits. As Ward and Weiden note:

Even among clerks who come from the courts of appeals, there is considerable variation. Of the twelve circuits that comprise the appeals courts, the D.C. Circuit is by far the most prevalent stepping stone for High Court clerks. [From 1969-2002], more than one-third of all Supreme Court clerks come from the Court of Appeals for the D.C. Circuit. This is not surprising given that the D.C. Circuit is widely considered the most prestigious appellate court.<sup>121</sup>

Its prestige, they explain, is due in part to the natural access that D.C. Circuit judges have to the justices and therefore, the greater ease with which to forge connections for clerks: “Indeed, as with clerks, a disproportionate number of the current justices – Scalia, Thomas, Ginsburg, and Roberts – have come to the Court following their service on the D.C. Circuit.”<sup>122</sup> Another factor in determining the prestige of a circuit

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121. WARD & WEIDEN, *supra* note 26, at 80.

122. *Id.* at 80, 83.

is, “the disparity in the number of judges, and therefore the number of clerks, in each circuit” as well as geographical preferences.<sup>123</sup> This size differential helps explain why “excluding the D.C. Circuit, more Supreme Court clerks, currently one in five, come from the Ninth Circuit than from any other.”<sup>124</sup> However,

not all the variation can be explained by size alone. For example, what accounts for the dramatic rise in clerks ascending to the Supreme Court from the Fourth Circuit. . . . Unlike the Ninth Circuit, the Fourth Circuit did not have a dramatic increase in the number of judges and clerks during the period under study. . . . The data suggests that the increase has been caused by the general conservative shift that the Supreme Court has undergone in recent years and the higher number of conservative clerks now working there.<sup>125</sup>

As discussed in Part II, the conservative shift in the Court and its relationship to the clerk pool has become a major area of study. For the purposes of this study, the reason for the circuit effects is still important, but less so than measuring their existence. Thus, **Table 7** and **Table 8** look at circuits in their entirety to determine their effect on a judge from a particular circuit feeding a clerk to the Supreme Court.

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123. *Id.* at 83. However, this is partially misleading causation. *See supra* **Table 4** (noting that Justice Thomas and Chief Justice Roberts served on the D.C. Circuit for an extremely short period of time, one year and two years, respectively, while Justice Scalia served for four years and Justice Ginsburg for seventeen years). Thus, it is equally plausible, in the cases of Justices Thomas and Roberts, that they were put on the D.C. Circuit as a way station before being put on the Court, rather than being put on the D.C. Circuit and then being elevated to the Supreme Court by virtue of their service to the circuit.

124. *Id.* at 81.

125. *Id.*

**Table 7: Circuit Effects for All Court of Appeals Judges, 1970-2014**

| Circuit (all judges)     | Model 1: Baseline<br>(all judges and<br>clerks) | Model 2: Excludes<br>Judges Appointed<br>Prior to 1970 | Model 3: Excludes<br>Self-Feeds |
|--------------------------|---|--|---------------------------------|
| 1 <sup>st</sup> Circuit  | -0.115  | -1.532***  | -0.363                          |
| 2 <sup>nd</sup> Circuit  | 0.395   | -0.925*  | 0.196                           |
| 3 <sup>rd</sup> Circuit  | -0.949*   | -2.181***  | -1.217**                        |
| 4 <sup>th</sup> Circuit  | 0.0127  | -1.265**   | -0.182                          |
| 5 <sup>th</sup> Circuit  | -0.403  | -2.010***  | -0.596                          |
| 6 <sup>th</sup> Circuit  | -1.350**  | -2.652***  | -1.544**                        |
| 7 <sup>th</sup> Circuit  | -0.498  | -1.760***  | -0.712                          |
| 8 <sup>th</sup> Circuit  | -1.677***                                       | -3.006***  | -1.946***                       |
| 9 <sup>th</sup> Circuit  | -0.207  | -1.407***  | -0.411                          |
| 10 <sup>th</sup> Circuit | -1.537**  | -2.782***  | -1.727***                       |
| 11 <sup>th</sup> Circuit | -1.398**  | -2.629***  | -1.597***                       |
| D.C. Circuit             | 1.238**   | -0.0739  | 1.026*                          |

\*\*\*Significant of  $p < 0.01$ , \*\*  $p < 0.05$ , \* $p < 0.1$

**Table 7** suggests that circuit effects might indeed be a factor, though not exactly in the way that Ward and Weiden predicted. The D.C. Circuit, with the exception of the second model, is the only circuit with an extremely high and statistically significant positive effect. This suggests that there is indeed a circuit that is closely tied to feeding to the Supreme Court. By contrast, across the three models, it appears that the 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> Circuits have a consistently negative effect on sending a clerk to the Supreme Court. Interestingly, for model two, which considers only judges appointed after 1970, all circuits had a negative effect on sending a clerk to the Court with the exception of the D.C. Circuit, which also had a negative but not statistically significant relationship. Thus, these models suggest that for appellate judges overall, being a judge on the D.C. Circuit is a huge boon to their chances of becoming a feeder judge. However, while these results represent the entire federal appellate bench, the statistical significance disappears when one considers just female judges.



**Table 8: Circuit Effects for Female Court of Appeals Judges, 1970-2014**

| Circuit (female judges)  | Model 1: Baseline (all judges and clerks) | Model 2: Excludes Judges Appointed Prior to 1970 | Model 3: Excludes Self-Feeds |
|--------------------------|---|--|------------------------------|
| 1 <sup>st</sup> Circuit  | -0.975                                    | -0.853   | -0.908                       |
| 2 <sup>nd</sup> Circuit  | -0.365                                    | -0.37  | -0.335                       |
| 3 <sup>rd</sup> Circuit  | -0.00604                                  | -0.0839  | 0.0851                       |
| 4 <sup>th</sup> Circuit  | -1.863*                                   | -1.894*  | -1.842*                      |
| 5 <sup>th</sup> Circuit  | 0.665                                     | 1.183**  | 0.688                        |
| 6 <sup>th</sup> Circuit  | -1.38                                     | -1.405   | -1.36                        |
| 7 <sup>th</sup> Circuit  | -1.226                                    | -1.292   | -1.191                       |
| 8 <sup>th</sup> Circuit  | 0   | 0  | 0                            |
| 9 <sup>th</sup> Circuit  | -0.122                                    | -0.483   | -0.0947                      |
| 10 <sup>th</sup> Circuit | 0.745                                     | 0.728  | 0.77                         |
| 11 <sup>th</sup> Circuit | -0.569                                    | -0.73  | -0.561                       |
| D.C. Circuit             | 0   | 0  | 0                            |

\*\*\*Significant of  $p < 0.01$ , \*\*  $p < 0.05$ , \* $p < 0.1$

**Table 8** demonstrates that the circuit effects of **Table 7** do not exist for the female appellate judges. There were almost no statistically significant results – only that the Fourth Circuit has a large negative effect and that, for model two, the Fifth Circuit has a large positive effect on sending a clerk to the Supreme Court. However, some of the results may be explained by the lack of women sitting on a particular circuit. For example, there was only one woman ever appointed to the Eighth Circuit until 2013, when a second was appointed.<sup>126</sup> In fact, as of 2013, it was the least racially and gender diverse circuit, whereas the Fifth Circuit was the most.<sup>127</sup> In addition, the Fourth and Seventh Circuits did not have a non-white male judge until after 1985. It was not until 1999 that every circuit had at least one female judge.<sup>128</sup> Thus, these results would suggest that while the D.C. Circuit might have an extremely large effect on sending a clerk to the Supreme Court, that impact is limited to male appellate judges, further suggesting that being female prevents judges from receiving benefits of a prestigious circuit.

126. Sally Kenney at TEDxTU, *Why We Have Too Few Women Judges*, YOUTUBE, <https://www.youtube.com/watch?v=pvqkabPnZDA> (last visited on Dec. 2, 2013).

127. See *id.* (discussing the discrepancy between the 5<sup>th</sup> and 8<sup>th</sup> Circuit Courts of Appeals at 04:25).

128. Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84, 88-91 (2001-2002).

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## VIII. THE IMPACT OF POLITICAL AFFILIATION

Although the regression models do not show any statistically significant effects of party affiliation, I wanted to build on the studies discussed in Part II(d) and examine whether the political party of the nominating President can help explain some of the feeding patterns. The pattern for all feeder judges from 1970 to 2014 shows an extremely high degree of same-party feeding. And while the data show the same for female feeder judges specifically, the small sample size makes it more difficult to draw conclusions. The party of the nominating President is used as a proxy to determine the ideology of a judge or justice. While this might not be a perfect indicator since a judge or justice's actual voting patterns might deviate, it is a useful metric since there are no "direct, independent measures of the ideology of hundreds of appeals court judges, nor is it feasible to obtain them. We can, however, use several indicators to create an inferential measure of ideology."<sup>129</sup>

When one looks at the top feeder judges, they are evenly split between judges nominated by Republican and Democratic presidents. **Table 9** shows the party of the judge's nominating President and the party of the nominating President of the justices to whom they have fed.

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129. Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 679-80 (1994).

**Table 9: Top Feeder Judges and the Political Party of the Justices, 1970-2014**

| Judge<br>(Party of<br>Nominating<br>President) | Total<br>Clerks | Clerks to Justices<br>Appointed By a<br>Republican President | Clerks to Justices<br>Appointed By a<br>Democratic President |
|--|-----------------|--|--|
| Alex Kozinski<br>(Republican)                  | 58              | 52   | 6  |
| J. Harvie Wilkinson<br>(Republican)            | 53              | 46   | 7  |
| Merrick Garland<br>(Democrat)                  | 43              | 22   | 21   |
| J. Michael Luttig<br>(Republican)              | 42              | 42   | 0  |
| David Tatel<br>(Democrat)                      | 35              | 19   | 16   |
| Harry Edwards<br>(Democrat)                    | 33              | 21   | 12   |
| Guido Calabresi<br>(Democrat)                  | 32              | 14   | 18   |
| Laurence Silberman<br>(Republican)             | 32              | 29   | 3  |
| J. Skelly Wright<br>(Democrat)                 | 32              | 22   | 10   |
| Michael Boudin<br>(Republican)                 | 31              | 17   | 14   |
| <b>Total</b>                                   | 391             | 284  | 107  |

While this is a subset of the overall data, it shows that at least for Republicans, there is an overwhelming tendency for these super-feeder judges to feed clerks to justices of the same Presidential nominating party. By contrast, four of five of the top Democratic feeders feed more clerks to Republican justices than fellow Democrats. Furthermore, increasing partisanship is evident for both parties when one looks at the overall feeder pool for the period in question.<sup>130</sup> **Figure 3** shows the percentage of clerks

130. Overall, from 1970 to 2014, Democratic feeder judges sent 208 clerks to Democratic justices and 361 to Republican justices, a total of 569 clerks. Republican feeder judges sent 116 clerks to Democratic justices and 647 to Republican justices, a total of 763 clerks from Republican judges. During the period in question, there were thirteen Republican justices (Justices Alito, Scalia, Thomas, Roberts, Kennedy, Souter, O'Connor, Stevens, Rehnquist, Blackmun, Burger, Stewart, and Harlan) and ten Democratic justices (Justices Ginsburg, Sotomayor, Breyer, Kagan, Powell, Marshall, White, Brennan, Douglas, and Black). If one considers the number of years each justice served and assumes that each justice hired their maximum of four clerks, there were a total of 1,044 clerkship positions available with a Republican-nominated justice and 544 clerkships positions with a Democrat-nominated justice, a ratio of approximately two to one. See Alexandra G. Hess, *Supreme Court Justices by Political*

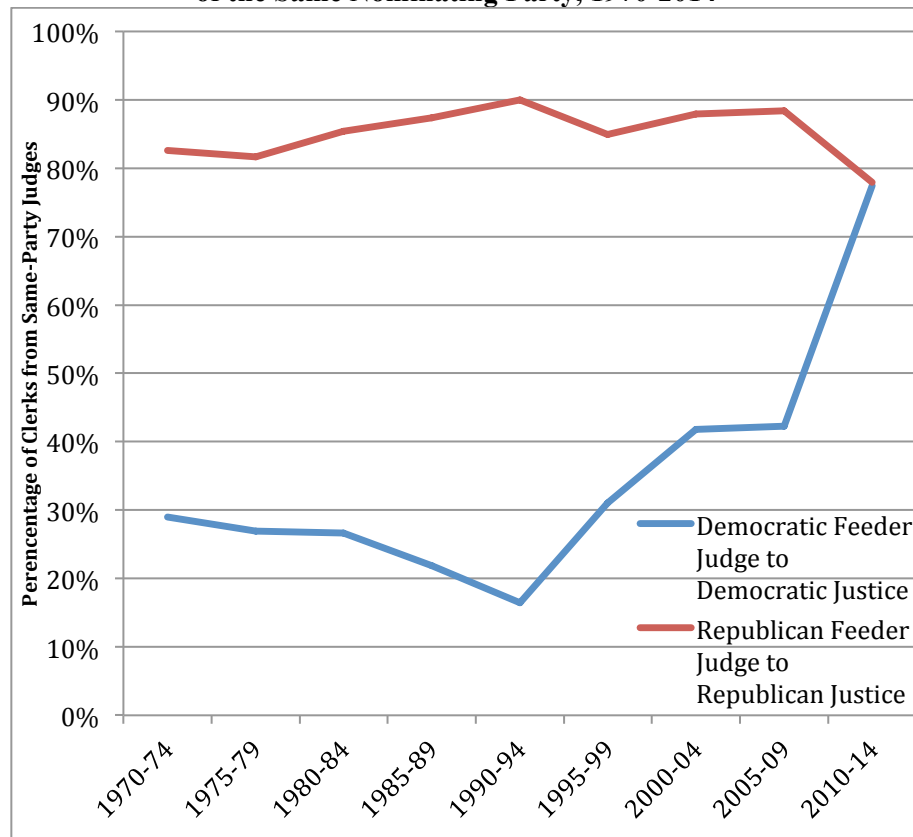
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sent from a feeder judge to a Supreme Court justice of the same nominating party. **Figure 4** illustrates the same phenomenon but only for the female feeder judges.

**Figure 3: Feeding Relationship Between Feeder Judges and Justices of the Same Nominating Party, 1970-2014**



**Figure 3** shows that there is currently an extremely high rate – over 75% – of justices hiring clerks from feeder judges of the same Presidential nominating party. For Democrat-appointed justices, this has increased dramatically over the last ten years from a low of 16% in 1990 to 1994, to its current rate of 77%. For Republican-appointed justices, however, their rate of same-party hiring has actually decreased, averaging 86% from 1970 to 2009 to 78% in the most recent period, but still remains extremely high.<sup>131</sup> **Figure 3** provides evidence, consistent with prior studies,<sup>132</sup> of

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Party Affiliation, 1970-2015 (unpublished data) (on file with author).

131. *Id.*

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increasing political polarization for Democratic nominees and the continuation of a high level of same-party feeding for Republican nominees.

**Figure 4: Feeding Between Female Feeder Judges and Justices of the Same Nominating Party, 1970-2014**



**Figure 4** shows similarly high rates of same-party feeding for the female feeder judges to the Supreme Court in recent years. From 2010 to 2014, Democrat-appointed female feeders sent 83% of their clerks to Democrat-appointed justices and Republican-appointed female feeders sent 86% of their clerks to Republican-appointed justices. However, the value of the data is somewhat limited in this case due to the small sample size. There was no female Republican feeder until 1992 and she was the only Republican woman to send a clerk, so the shift looks extremely dramatic as a result, from 0% to 100%. The Democratic female feeders have a larger

132. See *supra* Part II(d).

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overall sample size, 82 clerks versus 37 female Republican clerks, but it is still small. However, for the Democrat-appointed judges, the change over time is consistent with the change in the overall same-party feeding practices.

#### IX. THE IMPACT OF LAG EFFECTS

As I explored what statistical factors might contribute to the underrepresentation of women as feeder judges, the question arose about whether lag effects might also contribute. Lag effects are the gap between when a judge came to the bench and when they began to feed clerk(s) to the Supreme Court. Under this theory, the underrepresentation could be explained by the fact that although women are being confirmed to the Court of Appeals at a steadily increasing rate, it has taken time for that additional representation to have an impact on from whom the justices hire. This could make sense in, for example, a framework in which a judge might have to prove him or herself as having quality clerks before a justice hires from them.<sup>133</sup>

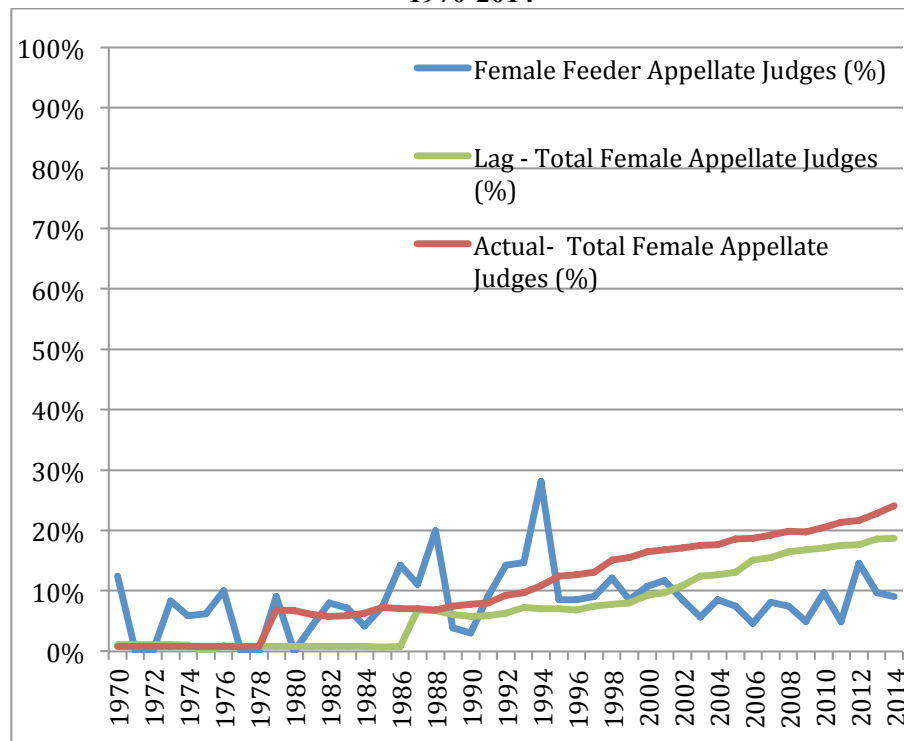
In order to explore the lag question, I first determined the lag for each feeder judge from 1970 to 2014 by subtracting the year of their first feed from the year of their confirmation. I then determined the average lag by gender for the 31 female feeders and 167 male feeders. For male judges, the average length was 7.6 years from being confirmed to the bench to feeding their first clerk. For women, the average was over a year and half longer (9.3 years).<sup>134</sup> But one judge, Carolyn Dineen King of the Fifth Circuit, was an outlier among the women – it took thirty-three years for her to send her first clerk to the Court – and, if excluded from the sample, the average dropped to 8.87 years.

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133. Although the regression results controlling for tenure on the bench call this assumption into question. *See supra* **Table 4**.

134. This gap might be explained by the relatively small sample sizes, but this disparity could also be another avenue for research. *See* Alexandra G. Hess, Supreme Court Justices by Political Party Affiliation, 1970-2015 (unpublished data, on file with author).

**Figure 5: Lag Effects for Female Court of Appeals Judges, 1970-2014**



In **Figure 5**, one can see that lag effects are not a sufficient explanation. While the percentage of women on the federal appellate bench has been shifted forward nine years to accommodate the calculated lag time, a gap in female feeder representation still exists; rather, the inflection point of slight overrepresentation to underrepresentation simply shifted from 1994 to 2003. However, as one can also see, the gap (as shown by the difference between the blue line representing the proportion of women on the federal appellate bench and green line representing the lag feeder rate) is smaller than the actual gap (as represented by the difference between the blue line and red line). Thus, **Figure 5** demonstrates that even if one believes that lag effects are at play in determining the feeding of clerks to the Supreme Court, it is not a sufficient explanation.

#### X. THE RISE OF THE 'SUPER-FEEDER'

The regression results in Part V showed that being female does not have a statistically significant effect on a female judge's chance of feeding one clerk to the Supreme Court. However, there are large, statistically significant negative effects on a female judge sending another clerk to the

Court after she has already sent one. These results would imply that although women are able to send clerks to the Court, and thus there may not be a barrier to entry to the feeder pool, there is some factor that is preventing them from becoming regular feeders or super-feeders. As we saw in Part IV, after Justice Ginsburg was elevated to the Supreme Court and Judge Wald retired in the 1990s, individual women have never been such large feeders and female judges have never regained proportionate representation. Thus, in this section, I explore what might be causing this scarcity of women as super-feeders and whether it can help explain the overall underrepresentation of women as feeder judges compared to their proportion of the federal appellate bench.

As shown in **Table 1**, all recent Supreme Court clerks have clerked for appellate judges, to the point that some have worked for more than one appellate court judge in hopes of positioning themselves to get a Supreme Court clerkship. While this might seem like it would increase the chances of a female appellate judge feeding a clerk to the Supreme Court, the opposite has proven true. As I have discovered, although prospective clerks are now essentially required to work for the Court of Appeals before having a chance at the Court, the judge pool from which the justices are choosing from is ever narrowing. As noted in Part II, this paper is not the first statistical examination into the feeder phenomenon; however, it is the first to examine it through the lens of gender. In 2013, a study found that from 1976 to 1985 and 1995 to 2004, compared to a random distribution of appellate judges feeding clerks to the Supreme Court, “the standard deviation was more than three times as high for the actual distribution as it was for the random distribution.”<sup>135</sup> The study also found a “modest” strengthening of the feeder system over the time period in question.<sup>136</sup>

To evaluate this phenomenon, I broke up the Supreme Court clerk pool into five-year increments. Within those increments, I looked to see how many appellate judges sent one clerk, two to three clerks, four to five clerks, and more than six clerks in a given period. I then calculated what percentage of the total clerk pool each of those categories made up.

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135. See Baum and Ditslear, *supra* note 6, at 29, 31 (noting, however, that their analysis “is restricted to the Supreme Court law clerks who had prior experience in the courts of appeals. [They] exclude two subsets of that group, those who served with retired justices and those who had served with the hiring justice in a court of appeals.”).

136. *Id.* at 32-33.



**Table 10: Breakdown of Feeder Judges by Number of Clerks and Percentage of the Clerk Pool, 1970-2014**

|                                 | 1970-1974        | 1975-1979        | 1980-1984        | 1985-1989        | 1990-1994        | 1995-1999        | 2000-2004        | 2005-2009        | 2010-2014        |
|---------------------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|
| <b>Sent 1 Clerk</b>             | <b>18 Judges</b> | <b>12 Judges</b> | <b>25 Judges</b> | <b>19 Judges</b> | <b>27 Judges</b> | <b>30 Judges</b> | <b>25 Judges</b> | <b>17 Judges</b> | <b>18 Judges</b> |
| <i>Percentage of Clerk Pool</i> | 14%              | 8.9%             | 16.8%            | 11.4%            | 14.3%            | 17.0%            | 14.3%            | 8.8%             | 9.2%             |
| <b>Sent 2-3 Clerks</b>          | <b>10</b>        | <b>15</b>        | <b>11</b>        | <b>17</b>        | <b>12</b>        | <b>14</b>        | <b>14</b>        | <b>15</b>        | <b>10</b>        |
| <i>Percentage of Clerk Pool</i> | 18.6%            | 25.9%            | 17.4%            | 24.7%            | 13.2%            | 19.9%            | 18.3%            | 17.0%            | 12.3%            |
| <b>Sent 4-5 Clerks</b>          | <b>3</b>         | <b>9</b>         | <b>8</b>         | <b>8</b>         | <b>4</b>         | <b>6</b>         | <b>5</b>         | <b>5</b>         | <b>9</b>         |
| <i>Percentage of Clerk Pool</i> | 10.9%            | 28.1%            | 23.5%            | 21.1%            | 9.5%             | 15.3%            | 12.6%            | 11.3%            | 20.5%            |
| <b>Sent 6+ Clerks</b>           | <b>1</b>         | <b>2</b>         | <b>4</b>         | <b>6</b>         | <b>11</b>        | <b>9</b>         | <b>11</b>        | <b>14</b>        | <b>11</b>        |
| <i>Percentage of Clerk Pool</i> | 5%               | 11.9%            | 24.8%            | 27.7%            | 51.3%            | 44.9%            | 54.9%            | 66.0%            | 69.2%            |

**Table 10** provides clear evidence that although the absolute number of judges that Supreme Court clerks come from has increased since 1970, repeat players make up the vast majority of feeder judges. From 1970 to 1974, 5% of Supreme Court clerks (six clerks) came from one judge, David Bazelon of the D.C. Circuit. However, as **Table 10** makes clear, this monopolization of the Supreme Court clerk pool has only increased over the last forty-five years. From 2010 to 2014, almost seventy percent of the entire Supreme Court pool (135 of 195 clerks) came from eleven judges.<sup>137</sup> And if one expands the definition of a super-feeder to the four-to-five clerk category, which means a judge is sending nearly one clerk per term to the High Court, then almost *ninety percent* of clerks come from twenty judges. Whether this near monopolization of the Court by a small number of judges

137. Michael Boudin (First Circuit, six clerks), Merrick Garland (D.C. Circuit, seventeen clerks), Neil Gorsuch (Tenth Circuit, seven clerks), Thomas Griffith (D.C. Circuit, nine clerks), Robert Katzmann (Second Circuit, eleven clerks), Brett Kavanaugh (D.C. Circuit, nineteen clerks), Alex Kozinski (Ninth Circuit, eleven clerks), Stephen Reinhardt (Ninth Circuit, nine clerks), Jeffrey Sutton (Sixth Circuit, ten clerks), David Tatel (D.C. Circuit, thirteen clerks), and J. Harvie Wilkinson (Fourth Circuit, thirteen clerks). See Alexandra G. Hess, Court of Appeals Feeder Judge Data, 1944-2015 (April 13, 2015) (unpublished data, on file with author).

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is a positive development is a matter for debate, its overwhelming presence is undeniable.

This table also shows that, in absolute numbers, more judges are getting the opportunity to send a clerk to the Supreme Court. However, these minor feeder judges are making up an ever-shrinking percentage of the total clerk pool. In the period from 1970 to 1974 to the most recent period, the percentage of the clerk pool made up of a judge sending a single clerk has gone down from 14% to 9.2%. And if one counts minor feeder judges as a judge that has sent three or fewer clerks in a given five-year period, then the percentage of the clerk pool has gone down from 32.6% to 21.5% in the same period. **Table 10**, therefore, tells us that the clerk pool is becoming increasingly concentrated in the hands of a few judges, but how does that play out along gender lines?

**Table 11: Breakdown of Feeder Judges by Number of Clerks and Gender of the Judge, 1970-2014**

|                        | 1970-1974        | 1975-1979        | 1980-1984        | 1985-1989        | 1990-1994        | 1995-1999        | 2000-2004        | 2005-2009        | 2010-2014        |
|------------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|
| <b>Sent 1 Clerk</b>    | <b>18 Judges</b> | <b>12 Judges</b> | <b>25 Judges</b> | <b>19 Judges</b> | <b>27 Judges</b> | <b>30 Judges</b> | <b>25 Judges</b> | <b>17 Judges</b> | <b>18 Judges</b> |
| <i>Female Judges</i>   | 0<br>(0%)        | 0<br>(0%)        | 0<br>(0%)        | 0<br>(0%)        | 7<br>(25.9%)     | 5<br>(16.7%)     | 6<br>(24%)       | 5<br>(29.4%)     | 7<br>(38.9%)     |
| <i>Male Judges</i>     | 18<br>(100%)     | 12<br>(100%)     | 25<br>(100%)     | 19<br>(100%)     | 20<br>(74.1%)    | 25<br>(83.3%)    | 19<br>(76%)      | 12<br>(70.6%)    | 11<br>(61.1%)    |
| <b>Sent 2-3 Clerks</b> | <b>10</b>        | <b>15</b>        | <b>11</b>        | <b>17</b>        | <b>12</b>        | <b>14</b>        | <b>14</b>        | <b>15</b>        | <b>10</b>        |
| <i>Female Judges</i>   | 1<br>(10%)       | 0<br>(0%)        | 1<br>(9.1%)      | 2<br>(11.7%)     | 0<br>(0%)        | 4<br>(28.6%)     | 5<br>(35.7%)     | 4<br>(26.7%)     | 2<br>(20%)       |
| <i>Male Judges</i>     | 9<br>(90%)       | 15<br>(100%)     | 10<br>(90.9%)    | 15<br>(88.3%)    | 12<br>(100%)     | 10<br>(71.4%)    | 9<br>(64.3%)     | 11<br>(73.3%)    | 8<br>(80%)       |
| <b>Sent 4-5 Clerks</b> | <b>3</b>         | <b>9</b>         | <b>8</b>         | <b>8</b>         | <b>4</b>         | <b>6</b>         | <b>5</b>         | <b>5</b>         | <b>9</b>         |
| <i>Female Judges</i>   | 0<br>(0%)        | 1<br>(11.1%)     | 1<br>(14.3%)     | 1<br>(14.3%)     | 0<br>(0%)        | 0<br>(0%)        | 0<br>(0%)        | 0<br>(0%)        | 2<br>(22.2%)     |
| <i>Male Judges</i>     | 3<br>(100%)      | 8<br>(88.9%)     | 7<br>(85.7%)     | 7<br>(85.7%)     | 4<br>(100%)      | 6<br>(100%)      | 5<br>(100%)      | 5<br>(100%)      | 7<br>(77.8%)     |
| <b>Sent 6+ Clerks</b>  | <b>1</b>         | <b>2</b>         | <b>4</b>         | <b>6</b>         | <b>11</b>        | <b>9</b>         | <b>11</b>        | <b>14</b>        | <b>11</b>        |
| <i>Female Judges</i>   | 0<br>(0%)        | 0<br>(0%)        | 0<br>(0%)        | 1<br>(16.7%)     | 2<br>(18.2%)     | 0<br>(0%)        | 0<br>(0%)        | 0<br>(0%)        | 0<br>(0%)        |
| <i>Male Judges</i>     | 1<br>(100%)      | 2<br>(100%)      | 4<br>(100%)      | 5<br>(83.3%)     | 9<br>(81.8%)     | 9<br>(100%)      | 11<br>(100%)     | 14<br>(100%)     | 11<br>(100%)     |

**Table 11** shows the gender breakdown of judges who have sent clerks to the Court in a given five-year period. While women were 3.1% of feeder

judges in the period from 1970-1974, their presence has increased to 22.9% of feeder judges from 2010 to 2014. But this is only in terms of absolute numbers, not in terms of the percentage of Supreme Court clerks that come from female judges. In fact, this table shows that, currently, women are essentially shut out of the elite feeder pool: they are excluded entirely from the six-plus clerk category, which makes up almost 70% of the clerk pool. Additionally, of the twenty judges that sent almost 90% of the Supreme Court clerk pool in the last five years, there are only two female judges.<sup>138</sup> And this is an improvement from the previous two five-year periods when female judges made up zero percent of the four-to-five and six-plus categories, which sent 77.3% and 67.5% of the clerk pool, respectively. In fact, female judges have only been three of the sixty-nine judges who have sent six or more clerks to the Court in any of the measured five-year periods: Judge Wald (D.C. Circuit, six clerks) in 1985 to 1989 and then she was joined by then-Judge Ginsburg (D.C. Circuit, ten clerks)<sup>139</sup> in 1990 to 1994.

As **Tables 10** and **11** point out, women are sending clerks to the Supreme Court, but they are being shut out of the elite-level of feeding. While I will address the reputational and other intangible consequences of this exclusion, it also seems likely to contribute to women's underrepresentation as feeder judges.<sup>140</sup> To examine this, I took my existing list of feeder judges and deleted any judge that sent an average of one clerk per term in a given five-year period, who I originally defined as a super-feeder. Although the previous tables designated a judge who sent six or more clerks in a different category from those that sent four to five, I used the one clerk per term average for this purpose to be consistent with other studies on feeder judges.<sup>141</sup> I then plotted the resulting list of judges on a graph of the actual percentage of female feeders and the percentage of women on the federal appellate bench.

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138. The women are Edith Jones (Fifth Circuit, five clerks) and Janice Rogers Brown (D.C. Circuit, five clerks). *See id.*

139. In fact, these are the most clerks a female judge has ever sent in a five-year period. This further contributes to my point in Part V that once Justice Ginsburg was elevated and Judge Wald retired, no woman has been able to reach their level of feeding.

140. *See infra* Conclusion.

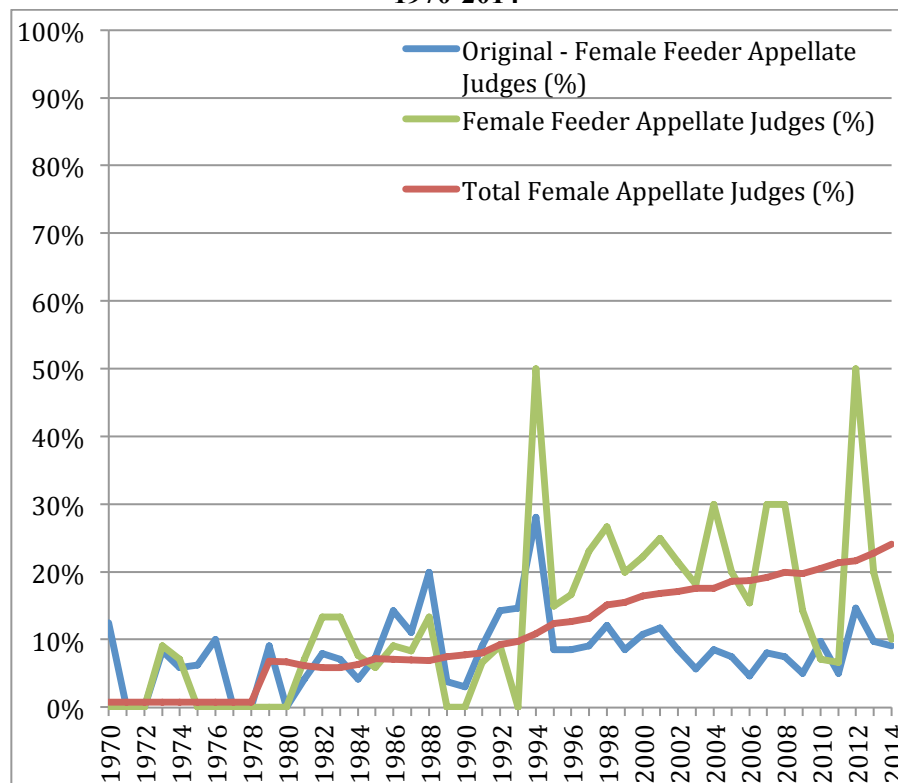
141. *See* Baum and Ditslear, *supra* note 6, at 42.

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**Figure 6: Female Judges as Feeders with Super-Feeders Removed, 1970-2014**



**Figure 6** provides clear evidence that by removing the ‘super-feeders,’ female judges’ representation increases dramatically. In fact, they are represented equal to or greater than their proportion of the federal bench in twenty-five of the forty-five years covered. This graph reflects the increasing number of women as one-off feeders. And whereas women never made up more than 30% of feeder judges in the original graph, in both 1994 and 2012 women are 50% of feeder judges. Yet, while women are now represented to a much higher degree, it took removing the feeder judges for almost 90% of the clerk pool to achieve this level of parity. This graph demonstrates that women can be equitably represented as feeder judges, but are only allowed to be so for 10% of the clerk pool. In this system, individual male judges are rewarded for consistency and quality, while female judges are treated like interchangeable anomalies.

## XI. CONCLUSION

This paper makes it clear that the rise of the super-feeder system has been a key contributor to the exclusion of women as feeder judges to the

Supreme Court. Initially, when Chief Justice Burger began requiring prospective clerks to have appellate court experience, female judges had equal or greater representation as feeders compared to their proportion on the appellate bench. However, as time went on, and especially when Judge Ginsburg became Justice Ginsburg, women were gradually shut out of the elite feeder pool. As a result, despite making up more than 24% of the Court of Appeals, women currently account for only 8% of feeder judges.

This underrepresentation of women as feeder judges is part of a pattern of women's absence or marginalization in other elite areas of the law, such as law firm partnership, Supreme Court clerks, Supreme Court litigators, federal judges, among others.<sup>142</sup> In fact, one could argue that the feeder system is partly responsible for the underrepresentation of female clerks on the Supreme Court. As mentioned, whereas women currently represent half of all law student graduates, they are only one-third of the Supreme Court clerk pool. One study found:

Suppose that we define the major feeder judges as those who have supplied the Justices with at least ten law clerks during this period. Among these judges, the 2006 proportion of female clerks from the nine major feeder schools was only 32%. If we use a more lenient criterion for identifying the feeder judges, namely those who have supplied the Justices with at least five law clerks during the 1989-2005 period, the proportion becomes 35%. In sum, if the feeder system is used in defining the highly qualified applicant pool, then roughly one-third of that pool seems to consist of women.<sup>143</sup>

The data show that a similar pattern still exists. Using these two definitions of feeder judges, about one-third of the clerks they feed are women.<sup>144</sup> This means that although the percentage of women clerking for the Supreme Court has increased, the feeder judges have not increased, and have potentially decreased, their proportion of female clerks since 1989. This is worrisome because these feeder judges are feeding an ever-larger percentage of the clerk pool, and if they are not able to hire more women or convince the justices to take a greater number of female clerks, it is unclear how this gap will ever be closed. In fact, Justice Souter seems to place the onus for increasing the representation of women and minorities as clerks on the feeder judges, "We are creatures of our feeder system. They are going to push minority high achievers in a way they have not before. We are

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142. See Smith, *supra* note 12.

143. Kaye, *supra* note 17, at 418-19.

144. *Id.*

going to see the fruits of some pushing.”<sup>145</sup> Yet, at least for women, it does not appear that this pushing has occurred among the ranks of elite feeders. Thus, certain voices are kept out of the Supreme Court<sup>146</sup> and certain groups are not reaping the benefits associated with a Supreme Court clerkship.

But there are also intangible factors driving the feeder pool. Some have argued that the feeder judges are simply “well known and well respected in their professions” and that “[m]any of the feeder judges are among the most outstanding and well-known judges of their generation.”<sup>147</sup> And while that may be true, there is no evidence supporting the fact that feeder judges, and super-feeders in particular, are better judges or produce better quality clerks. Rather, the consensus of academics seems to be that the main drivers are personal relationships:

Acquaintanceship [or friendship] undoubtedly helps to create feeder relationships, and different justices are acquainted with different judges. In turn, geography—the circuit of a justice’s prior service as a judge or current service as circuit justice—can affect acquaintanceship. Inevitably, justices differ in their assessments of particular judges and, thus, in their willingness to hire clerks who have worked for those judges. Further, feeder relationships are probably path dependent to a degree: if a justice employs a few clerks who have served a particular judge and is impressed with their work, the justice may be inclined to choose additional clerks from the same judge.<sup>148</sup>

For the most part, these qualities are vague and immeasurable, especially the networking effects. But some of these factors seem to inherently favor male judges. For example, a judge being a prior Supreme Court clerk has a huge positive effect on feeding. But for women, who currently represent

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145. WARD & WEIDEN, *supra* note 26, at 98.

146. Whether or not Supreme Court clerks actually have an influence is hotly contested. Compare H.W. Perry, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 1, 69 (President & Fellows of Harv. Coll. 1991) (interviewing past Supreme Court law clerks to show that clerks’ influence varies from Justice to Justice), with Timothy R. Johnson, David R. Stras & Ryan C. Black, *Advice from the Bench (Memo): Clerk Influence on Supreme Court Oral Arguments*, 98 MARQ. L. REV. 21, 25 (2014) (analyzing empirical and anecdotal evidence to conclude that clerks do have influence over both substantive decisions made by justices and over the opinion drafting process), with Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: an Empirical Assessment*, 58 DEPAUL L. REV. 51, 53 (2008-09) (“[c]lerks ideological predilections exert an additional, and not insubstantial, influence on the Justices’ decisions on the merits.”).

147. Kaye, *supra* note 17, at 418 n.40.

148. Baum and Ditslear, *supra* note 6, at 27.

only 33% of the clerk pool and even less in earlier periods, there were more limited opportunities to get these jobs and forge these bonds with the justices. Thus, there is no Supreme Court clerk network that they can rely on for their clerks. This may explain why there is no positive effect for women between being a former Supreme Court clerk and sending a clerk of one's own – there were limited opportunities for the current female judges to have been clerks. This same problem applies to geography: certain circuits might provide an advantage, but women may not have a substantial presence on the circuit and, therefore, are further excluded from becoming feeders. For example, the D.C. Circuit, which is the only circuit with a positive effect on sending a clerk to the Supreme Court,<sup>149</sup> has eighteen sitting judges, only five of whom are women. This small presence is further exacerbated by the fact that so far, being on the DC Circuit has not had a statistically significant positive effect on any of their *female* member's feeding, although it is possible recent female appointments could change this pattern.

Finally, based on my regression results in Part V, this notion of “path dependence” clearly seems to favor men. For female judges, sending a previous clerk to the Supreme Court has a large and statistically significant negative effect with sending another clerk. For the feeder pool overall, however, it is the single largest effect on sending a future clerk. Is the reason that when women send a clerk to the Court, the clerks are just of lower quality? This seems like an unlikely explanation. Rather, the extremely small pool of super-feeders leaves room for female judges to send one clerk, maybe two, but excludes them from this competition for the prestige that comes with being an elite feeder judge. Whether it is good that prestige flows from feeding to the Court is an issue best left for another study. But the fact is, women are being shut out of what is considered to be a position of status. It seems that even though the federal appellate bench is becoming more diverse, the pool of power players is getting increasingly narrow and continuing to replicate traditional hierarchies of privilege. And it is creating a vicious cycle in which “feeder” faculty members<sup>150</sup> are trying to send their best students to a group of almost exclusively white, male feeder judges<sup>151</sup> who then hope to send their clerks to a majority white, male Supreme Court.

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149. See *supra* Part VI.

150. See Kozinski, *supra* note 52, at 1717-18 (“Professors are not above the fray. . . . Professors, too, have reputations to safeguard. An unreliable recommendation or other kind of perfidy will weaken the force of a professor’s recommendation in future clerkship seasons.”); Kaye, *supra* note 17, at 415 n.18.

151. See Hurwitz & Lanier, *supra* note 128, at 88-91.