APPENDIX: CASES INCLUDED IN THE ANALYSIS

Case	*Year*	*Vote*	*Author*	*O'Connor Vote*	*Ginsburg Vote*
JEB v. *Alabama*	1993	6–3	Blackmun	Majority	Majority
Harris v. *Forklift Systems*	1995	9–0	O'Connor	Majority	Majority
U.S. v. *Virginia*	1996	7–1	Ginsburg	Majority	Majority
Burlington v. *Ellerth*	1998	7–2	Kennedy	Majority	Majority
Faragher v. *City of Boca Raton*	1998	7–2	Souter	Majority	Majority
Gebser v. *Lago Vista*	1998	5–4	O'Connor	Majority	Dissent
Miller v. *Albright*	1998	6–3	Stevens	Dissent	Majority
Oncale v. *Sundowner Offshore*	1998	9–0	Scalia	Majority	Majority
NCAA v. *Smith*	1999	9–0	Ginsburg	Majority	Majority
Davis v. *Monroe County*	1999	5–4	O'Connor	Majority	Majority
Nguyen v. *INS*	2001	5–4	Kennedy	Dissent	Dissent
Caesars v. *Costa*	2002	9–0	Thomas	Majority	Majority
Jackson v. *Birmingham*	2003	5–4	O'Connor	Majority	Majority
State Police v. *Suders*	2004	8–1	Ginsburg	Majority	Majority
Arbaugh v. *Y&H Corporation*	2006	8–0	Ginsburg		Majority
Burlington Northern v. *White*	2006	9–0	Breyer		Majority
Ledbetter v. *Goodyear*	2006	5–4	Alito		Dissent
AT&T v. *Hulteen*	2009	7–2	Souter		Dissent
Crawford v. *Nashville*	2009	9–0	Souter		Majority
Fitzgerald v. *Barnstable School*	2009	9–0	Alito		Majority

Note: U.S. v. *Morrison*, the 2000 Violence Against Women Act case, is not included in this list because it is coded in the Spaeth Dataset and considered by many Court watchers to be a federalism case.

Difference in Judicial Discourse

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Sally Kenney's essay reminds us of the range and the limitations of our scholarship on gender and judging. At one point in her discussion, after reviewing the views of Justices Ruth Bader Ginsburg and Sandra Day

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O'Connor discounting the role of gender in their own decision making, Kenney says this:

> [F]eminist and nonfeminist women judges' hostility to th[e] essential difference frame of reference should give us pause, as should the repeated failure to unearth the essential dichotomous difference across jurisdiction, issue, and time. But perhaps more importantly, such questions do not exhaust the relevance of gender as a category of analysis to thinking about gender and judging (pp. 436–437 of this issue).

I elaborate on the two themes Kenney addresses in this excerpt: existing frameworks of gender and judging and their utility or lack thereof, and new ways of using gender as an analytic category to study law and courts. Specifically, I want to use the 2009 confirmation hearings for Justice Sonia Sotomayor to highlight the continued suppression of difference in contemporary judicial discourse and use the positions of Sotomayor and former Justice O'Connor to reflect on the continuing relevance of difference that is neither essentialist nor simplistic.

Gender and Judging, and the Gender of Judges

The recent confirmation hearings for Justice Sotomayor were a dispiriting exercise in the paucity of sensible public discussion on viewpoint diversity on the high bench. I refer, of course, to the now-infamous "wise Latina" exchanges between the nominee and the members of the Senate Judiciary Committee. In a 2001 address to a Latino law student association meeting at the University of California-Berkeley, then-Judge Sotomayor had remarked on the ways that gender and ethnic background might inform one's judging. Reacting specifically to comments made by other women judges, Sotomayor concluded:

> Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging. Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. . . . I am also not so sure that I agree with the statement. First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, *I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life* [emphasis added].

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A substantial portion of Sotomayor's colloquy with the senators, particularly those from the GOP minority, was devoted to clarifying this final statement. In the process, what became clear was the contemporary political difficulty in having a serious discussion about women judges and their contributions to legal decision making. In the end, and for the purposes of the political theater that was the confirmation process, Sotomayor retreated quite a distance from her stated position in 2001 that "we who judge must not deny the differences resulting from experience and heritage" and that "by ignoring our differences as women or men of color we do a disservice both to the law and society."

Though the "wise Latina" episode had little material effect on Sotomayor's ultimate confirmation and appointment to the U.S. Supreme Court (given the Democrats 60-seat majority in the Senate), the exchanges on the topic of gender and judging still resonate — and did a disservice to our social conversation about gender, difference, and equality. This failure was due to the hearings' endorsement — sometimes tacit, sometimes more explicit, sometimes with the nominee's complicity — of a falsely neutral notion of objectivity in judgment, a human-featureless subject position in judging.

Framing so much of the back-and-forth during the Sotomayor hearings was Justice O'Connor's original statement. She reprised it in May 2009 for the *National Law Journal* in the context of an interview that addressed the High Court's Souter vacancy, among other matters (Rubinstein 2009). Her position on diversity and its importance was both direct and cryptic. She reiterated that she and Justice Ginsburg had repeatedly said that "A wise old woman and a wise old man, at the end of the day, can reach the same conclusion." Yet when the interviewer responded, "that said, you believe there is importance to diversity," O'Connor replied in this way:

> There is. I think we have to remember that slightly over 50 percent of the population has two X chromosomes, and it doesn't hurt to be able to look at the positions filled in our government and to see in fact that women are represented in more than token numbers.

Surely there is a point to and a purpose in diversity on the courts beyond mere descriptive representation — "people that look like the genotypic me." Yet Justice O'Connor's terse reply does little to indicate any more than that about women on the bench.

Senators asked Judge Sotomayor to characterize O'Connor's view and reconcile it with her own. Senator Patrick Leahy, the chair of the

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Judiciary Committee who opened the rounds of questioning of the nominee, gave her the first opportunity to do so. She offered this:

> I want to state up front, unequivocally and without doubt, I do not believe that any ethnic, racial or gender group has an advantage in sound judging. I do believe that every person has an equal opportunity to be a good and wise judge regardless of their background or life experiences. . . .
>
> What — the words that I use, I used agreeing with the sentiment that Justice Sandra Day O'Connor was attempting to convey. I understood that sentiment to be what I just spoke about, which is that both men and women were equally capable of being wise and fair judges.

That has to be what she meant, because judges disagree about legal outcomes all of the time — or I should not say all of the time; at least in close cases they do. Justices on the Supreme Court come to different conclusions. It cannot mean that one of them is unwise, despite the fact that some people think that. So her literal words could not have meant what they said. She had to have meant that she was talking about the equal value of the capacity to be fair and impartial.

As the hearings progressed — or at least continued — Sotomayor would further distance herself from her own remarks in 2001, finally repudiating the "wise Latina" wording as a "rhetorical flourish" that was "a bad idea" and "fell flat." She did not try to argue in favor of diverse and different experiences of individual judges enriching and informing their collective deliberations — to argue that, as syndicated columnist Ellen Goodman commented, "a wise old woman and a wise old man may only get to the same decision if they are in the same room discussing the same case."[1] Somewhat disappointingly — but not surprisingly, given the stakes of the occasion — Sotomayor chose to downplay and defang the "gendered-ness" of her remarks. Neither experiences nor President Barack Obama's much-lauded empathy, for that matter, can trump the law, Obama's nominee would explain. "We apply law to facts. We don't apply feelings to facts," Judge Sotomayor responded to Senator Jon Kyl's query as to whether empathy or "heart" had ever influenced her decisions as a judge.

It is interesting, and by way of contrast, that O'Connor has in recent years seemed to soften the language that became the touchstone for Judge Sotomayor before the Senate Republicans. As Hannah Hayes noted in 2005 for *Perspectives*, "Justice O'Connor has admitted it is 'helpful to the Court to have nine members of different backgrounds and experiences

1. Elleh Goodman, "A Wise Person for the Court," *The Boston Globe*, 29 May 2009.

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and, yes, even gender. We bring different life experiences to the task, and that's a good thing.'" Of course, such "tempering" of her wise-old-woman, wise-old-man viewpoint — if that is what it is — comes from a woman jurist in the comparatively luxurious and unconstrained position of a *retired* Supreme Court justice. This position, and its opportunities for candor and frank reflection, is rather different from that of a Supreme Court *nominee* negotiating the minefield of sound bites and slipups.

Ultimately, the views of Justices O'Connor and Sotomayor on gender and judging are more nuanced than certain of their on-record statements. But if I had to characterize and contrast them, based on those statements, I would say that they represent the distance between "a Court that looks like America" and judicial "empathy" — to evoke two phrases used by candidate and then President Obama to describe his goal for his Supreme Court appointments. Some would argue that there is no distance at all between these objectives, but there is a rhetorical difference between them. Empathy bears a family resemblance to President Bill Clinton's original agenda of appointing "big hearts" to the high bench and choosing such candidates from the ranks of the people's elected representatives — candidates with both public policy and "real people" experience. Names such as former governors Bruce Babbitt and Mario Cuomo were circulated — before Clinton's agenda foundered on the shoals of confirmable qualifications, or judicial experience. Obama, too, found that judicial experience was a useful currency, but it did not prevent his qualified nominee from being examined for the bias that her empathetic position purportedly displayed.

Perhaps because of her "a *better* decision" [emphasis added] turn of phrase, and its insinuation of an inescapably engendered-ness as a woman of color, her empathy was a threatening difference, not an inclusive one. But "a court that looks like America" seems another matter. It incorporates diversity without articulating exactly how, eliding the issue of what it is that judicial "diversity" changes about the judicial viewpoint. It is the court with more X chromosomes on it, a court with a John Roberts but in a dress — both allusions paraphrasing Justice O'Connor, who is reported as commenting about the Roberts appointment, "he's okay, except that he's not a woman." What fills the space of "except that"? O'Connor does not say. Her court that looks like America does not pointedly examine what different life experiences occur between men and women — or between Anglos and Latinas, for that matter — nor does it interrogate the impact of those life experiences on a judge's legal thinking.

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The difference between O'Connor's and Sotomayor's stated views on gender and judging, then, is in the degree of overt, self-aware acknowledgment that gender is a perspective from which rules and their impact are seen. O'Connor's "unduly burdens" standard for adjudging abortion restrictions is neutrally phrased — pointedly so — but it surely allows the wielder of the standard to identify an undue burden from *her* perspective. And it has, with respect to spousal consent restrictions, for example. But the standard has also permitted restrictions with a class-specific impact (such as waiting periods, which necessitate overnight stays, or return visits to distant clinics, beyond the means of many working-poor women) that someone "who hasn't lived that life" might not appreciate. Sotomayor's explicit and at times thoughtful recognition of a gendered perspective in her off-the-bench speeches and remarks supplied a candor than O'Connor never has, but their positions on gender and the law are not all that dissimilar. Both, I think, support the notion that women judges provide a kind of back-checking of whether neutrally formulated rules of law fairly and neutrally affect differently situated people — that is, men and women. Both seemingly accept the notion that a court-that-looks-like-some-more-of-us is more likely to embody the points of view of all of us. Sotomayor's testimonial repudiation of empathy in a judge was a blunt repackaging strategy that many found disingenuous or distressing, depending on their political persuasion. But her effort to disentangle herself from "empathetic" judging marked the spot at which gender difference dare not speak its name — though it may proceed with informing judicial decision making, albeit wordlessly.

What the Sotomayor confirmation hearings and the dissection of two women judges' musings about their particular perspectives suggest is that the validity, let alone the value, of viewpoint diversity on the bench remains a difficult precept for both a conceptualization of the role of judges and an argument for gender equality. Difficult because the idea seems to challenge the neutrality-as-sameness that underlies both. Judges are fair and legitimate when they are neutral in the sense of interchangeable; gender equality is justified/mandated because of the same essence (of wisdom, of dignity, of human rights) that men and women share. Taken as whole, the hearings promoted these constrained ideas of judges and gender — ideas that do not and should not exhaust our discussions of diversity and difference, nor our explorations of "wise" and sensitive judging.

Of course, viewpoint diversity is about a multitude of life experiences, including gender, race, and class, but also including professional and

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political background and sensibility. In one sense, then, Justice Sotomayor joins a very homogeneous bench of career-federal judges, all from the U.S. Courts of Appeals. Scholars continue to debate the implications of this uniformity in professional viewpoint for the output of the High Court (George 2008). But diversity — or the lack thereof — of other kinds has studied consequences. Homogeneity of an ideological kind is associated in the group decision-making literature with more effective and "consequential" group decisions. A recent law review piece applies this thesis to Supreme Court constitutional decisions, arguing that majority coalitions with unified ideological preferences produce more significant rulings with greater legal policy impact. Majority coalitions of ideologically dispersed justices, on the other hand, "result in a muddied explanation or a fragmented majority, either of which will limit the consequentiality of the decision" (Staudt, Friedman, and Epstein 2008, 368–69, 371, and accompanying notes).

It is important to remember that "consequential" decisions are not normatively better ones, but simply more efficacious as idea-driven policy pronouncements. Such decisions may do more, and thus rouse more controversy (Staudt, Friedman, and Epstein 2008, 385). So whether the aforementioned findings extend/apply to the heterogeneous coalition of wise old women and wise old men depends, of course, on whether gender diversity and ideological diversity generate the same significant divergence in policy preferences. Existing research suggests that they do not, except perhaps for policy issues concerning gender discrimination. But even if they do, bench diversity that leads to compromise, incremental changes, and flexible standards is a defensible objective for judicial policymaking.[2] Surely, this sort of discussion of gender and judging, and the gender(s) of judges, has a place in our scholarly and public dialogue about woman on the courts.

Gender as an Analytic Category: A Research Direction

The Sotomayor experience and the O'Connor judgeship offer another insight into the use of gender and the relevance of difference as an analytic category in the study of law and courts. Articles such as Barbara

2. Compromise, incremental change, and flexible standards were of course associated with Justice O'Connor's jurisprudence — and held up as a "model" for future Supreme Court appointments, by several senators during Samuel Alito's confirmation hearings. See Maveety (2008).

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Palmer's "Women in the American Judiciary" for *Women and Politics* in 2001 have conceptualized women judges' influence and impact in part as their performance as role models for other women legal professionals. More recent work by Margaret Williams (2008) and Jennifer Jensen and Wendy Martinek (2009) address more directly how gender affects judicial career ambitions. Sotomayor's nomination and confirmation period and O'Connor's postcourt reflections on her status as the first woman justice highlight the role of women as mentors in the American judiciary. Most particularly, their long careers in the federal judiciary prompt an examination of the mentoring relationship between women clerks and women judges, and the way that gender affects both groups of women's mentoring experience.

An obvious starting point — and an area in which some work has already been done (see Kenney 2000b, 191) — is the record of women judges on selecting women clerks. Mary Clark's essay on the history of the first women federal court judges reports that Burnita Matthews, the first woman district court judge, appointed *only* women law clerks (2004, 510). More recent women judges and more recent figures suggest a less dramatic pattern. While one study found that Justice O'Connor had a sustained high percentage of female law clerks, relative to her male colleagues (Brown 1996), with the exception being Justice Harry Blackmun (Peppers 2006), Justice Ginsburg did not until somewhat later in her term of service. She, too, was eclipsed by Justice Stephen Breyer (Ward and Weiden 2006, 92). Still, Justice Ginsburg has been quite outspoken about the need for more women on the bench, and the importance of the gender perspective of women judges to cases involving workplace discrimination and family issues (Bazelon 2009). She was equally explicit in observing that the court's gender composition for *Safford School* v. *Redding* (2009) impinged its appreciation that strip searches of public school students were especially traumatic for adolescent girls, because of the special sensitivities about body image that affect girls at this age. "Many of the [male justices]," she observed in a 2009 interview for *The New York Times Magazine*, "thought first of their own reaction" as school*boys* to the humiliation of being seen undressed (Bazelon 2009). Clearly, the propensity to appoint women clerks is not the only indicator of a woman judge's impact, nor is it the exclusive revealer of her feminist stance. But such studies do address whether more women on the bench have improved the underrepresentation of women as clerks at all court levels (Rhinehart 1994).

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Scholars might well tease out an impact of women on the bench by studying their influence as mentors of their clerks — in Sotomayor's,[3] Ginsburg's, and O'Connor's cases, women clerks who are now judges themselves. Anecdotal evidence suggests the utility of such work for insights into the difference that gender difference makes. For instance, after the announcement of Judge Sotomayor's nomination by President Obama, attention shifted to those with personal knowledge about the nominee as a judge. Among those who made statements in support of her appointment were Sotomayor's former clerks on the federal bench. (Of her 49 former clerks, 45 signed a June 1, 2009, letter to the leadership of the U.S. Senate praising and supporting her nomination.) The assumption was that clerks learn about the judicial craft from their judges, who impart to their clerks a standard of professional behavior, as well as a picture of the process of judging. Even Jeffrey Rosen's more controversial picture of clerks' remembrances for the May 4, 2009, issue of *The New Republic* accepted as given that the judge–clerk work relationship shed interesting light on the legal and nonlegal factors that influence a judge's approach to decision making. Political scientists' research on law clerks affirms this supposition(Peppers 2006; Ward and Weiden 2006), but to date, no scholarly inquiry has focused on the impact of women judges on their clerks.

Justice O'Connor's clerks famously recall her morning aerobics sessions (originated as an alternative to Justice Byron White's more male-oriented pickup basketball games) and her solicitous attention to her "grand clerks" (Bikuspic 2005), while Judge Sotomayor's clerks reported that (as she is divorced and without children) "her clerks become like her extended family — working late with her, visiting her apartment once a month for card games (where she remembers their favorite drinks), and taking a field trip together to the premier of a Harry Potter movie" (Rosen 2009). Both sets of tributes suggest a kind of personal connection that may or may not be reflective of the mentoring provided by male colleagues. Or, such reminiscences may reflect the extent to which the existence of women jurists has trained more of an eye on judges as people with a family or a gender identity beneath the robe — a phenomenon that ultimately affects society's view and assessment of all judges. Too, federal law clerks have become a more diverse lot, and women clerks have visible role models that allow them to see themselves as truly future peers of male judges for and with whom they work. As

3. Former clerks who are law professors and federal prosecutors — not yet judges.

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peers, and as women, their gender, with all its prosaic realities, is part of the judicial package.

I recall an informal conversation with Justice O'Connor at a recent luncheon with legal colleagues at Tulane Law School. One law professor asked about the clerk to whom she is entitled as a retired justice. O'Connor remarked that in addition to assisting her with her judicial duties as still-active senior judge, she assigns her clerk to one of her former colleagues' chambers, to serve as a kind of shadow or satellite Supreme Court clerk. She mentioned their past service for her colleagues Justices Ginsburg and Breyer and for one of her closest friends on the court, Justice Anthony Kennedy. "I want them to have a *good experience*," she stressed, the said and the unsaid, when asked why she undertook this assignment and this specific rotation of chambers for her postretirement clerks.

At the time, I wondered whether this kind of behavior — this concern for her clerks' continuing Supreme Court apprenticeship into and after her own retirement as a justice — was a hallmark of O'Connor's take on her judicial mentoring responsibilities, or whether any of the justices would see the judicial mentoring relationship in this way. Only secondarily did I think about the gender factor. It would certainly be passing strange — offensively essentialist and straining empirical credibility — to assert that women judges care more about and are better nurturers of their clerks. But when law and courts scholars undertake a systematic study of gender and judicial mentoring, what exactly are we asking — if only subliminally — if not the question of whether women judges *are* better nurturers of their women clerks? That gender difference of judges matters because of the difference gender makes to the mentoring dynamic, particularly for women clerks? Whatever our assumptions (up-front or unexamined), one way to assess the difference that difference makes is to track the career choices of women clerks in the legal profession who have clerked for women judges. Karen O'Connor and John Hermann's (1995) study found that women clerks were more likely to enter academia than other high-status legal career options such as elite law firms. Has clerking for women made women clerks more likely to choose the judiciary (or positions that are a track to it, such as the solicitor general's office) as a career option for themselves?

Perhaps the answer to this question — and to the question of how to use gender as an analytic category in new ways, in studying women, law, and courts — lies in the untapped resources of the past. Kenney notes in her essay that Beverly Blair Cook was the first woman political scientist to

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study women judges and that "her work merits rereading today for the depth of her feminist sensibility, as well as her methodological creativity" (p. 437). Noting Cook's contributions to the attitudinal approach to the study of judicial behavior, in the law and courts subfield, Lee Epstein and Lynn Mather (2003, 176) remarked that Cook led the law and courts field's examination of the effect of the socialization of judges on judicial behavior. In this, Cook was addressing not only formal, professional socialization experiences but also the impact of local political culture and the organizational strength of membership groups among lawyers — such as the National Association of Women Judges, which Cook herself helped cofound, as a result of her national project of interviewing women state judges in the late 1970s pp. 178, 184–85. Cook's research on women judges taught the value of case studies, personal interview data, and examination of "systematic intellectual and material processes" (Whittington 2000, 621–62) in uncovering both judicial attitudes and the causes or construction of those attitudes.

The relevance of Cook's work to contemporary inquiry into women judges and women clerks is simple and direct: Her studies found that the number of "gatekeepers" — those who select or sponsor judicial candidates — who give serious consideration to women determine whether women become more than mere tokens in the courts (Epstein and Mather 2003, 181). "Mere tokens" can refer to numbers, but it can also refer to perspective — whether women judges are descriptively *but not substantively* different from their male peers. Women judges who are more than mere tokens in the courts *are* those who embody and reflect their different experiences and socialization as women in the law. Part of this "nontoken-ness" is the opportunity, now, to have been clerks and to have had women mentors, to the same extent that men in the judicial profession have always had. Cook's creative or "eclectic" methodologies suggest new and interesting ways of investigating clerks and gender and the changing identities of judicial "gatekeepers." I am thinking here of the innovative use of contemporary personal narratives, combined with the comparative assessment of some of Cook's now-archived interview data from the late 1970s and early 1980s. (The Beverly Blair Cook Papers consist of some several dozen boxes of documents currently being catalogued at the Nadine Vorhoff Library and Newcomb Archives of the Newcomb College Center for Research on Women, at Tulane University.)

Such a research design might yield the following question for investigation: What is the difference in socialization — and therefore in judicial behavior, and professional mentoring — between a woman

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judge like Justice Sonia Sotomayor, who had and has a strong organizational link to a Latina lawyers' association, and a woman judge from the generation of Justice Sandra Day O'Connor, who rose in the judicial profession without the benefit of such networks? Do we see a difference in their respective behaviors as gatekeepers themselves?

How women judges use their women clerks, and how — or whether — those women clerks influence their judges on women's issues before the courts is another research direction that merits further attention, and would sharpen the analytic tool of gender difference in the study of judicial decision making. Kenney's interview-based study of the women clerks of the European Court of Justice revealed that they contributed to the ECJ's favorable treatment of the pregnancy discrimination issue (Kenney 2000a). The greater number of current and former women law clerks for the U.S. Supreme Court — numbers of more than mere token — suggest that the time is ripe to conduct Kenney's investigation in the context of American courts. While ECJ *referendaires*' greater longevity and substantive legal expertise (coupled with their judges' sometimes lack of experience) may give them a greater role than U.S. Supreme Court clerks in decision making, a similar point applies to clerks and judges. Women law clerks — particularly the gender conscious ones — bring wider perspectives to judicial deliberations that enhance the quality of outcomes. Whether these women lawyers now constitute a critical mass whose gendered-ness is part of the socialization they bring to their work in the judicial system remains an open question. Clerk influence in chambers is a sensitive subject in general, and the challenge for scholars lies in finding incisive ways for tapping into clerks' gender difference and its difference for the judicial process. As I observed at the start of my essay, the challenge for scholars of gender and judging is to make gender difference methodologically relevant in ways that are neither essentialist, simplistic, nor — in this specific instance — threatening to clerk confidentiality and therefore counterproductive, analytically speaking.

As Kenney concludes her essay for this issue, the centrality of a gender analysis to an understanding of judging is a widely accepted paradigm by law and courts scholars. There are various approaches to enacting this paradigm, as the essays in this issue display. There is really no controversy to asserting that "gender matters" in and for the courts, but what remains contested is the judicial role itself. Judges are neither umpires nor empaths — political rhetoric about recent federal judicial appointees notwithstanding. But they are more demographically diverse than they

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once were, and the effect of that diversity as background for both collegial and individual judging behaviors is sublimated at the risk of misunderstanding judges and misjudging judicial candidates.

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Women Candidates and Judicial Elections: Telling an Untold Story

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Although most states select their judges via merit selection or an appointive process, a number of states choose their trial and appellate judges on the basis of contested elections. Currently, approximately one-half of all state judges reach their state court benches by winning partisan or nonpartisan races. In the 21 states that elect their judges, women with judicial aspirations must be as competitive as men in these elections.[1] Specifically, they must finance increasingly expensive judicial campaigns, garner widespread support from influential political elites, and, most importantly, convince voters that they are as capable as men. Do aspiring women judges experience similar barriers or challenges as women running for legislative or executive office?

The story of the women who compete in judicial elections remains largely untold in the scholarly literature. Gender politics and judicial politics are the two subfields of political science that one would expect to take the lead in exploring the impact of gender in judicial campaigns and elections. Yet neither has addressed this issue extensively. Although numerous empirical studies have examined the intricacies of judicial campaigns and judicial elections (Bonneau 2005a, 2005b, 2006, 2007; Bonneau and Hall 2003; Champagne and Cheek 1996; Dubois 1980; Hall 1992, 2001; Hall and Bonneau 2006), few have asked whether men and women compete on an equal basis in their pursuit of elective state judgeships (Reid 2004). Even important efforts to examine judicial diversity have focused on women who already sit on state courts, rather than on women who compete in state court races (Aloize 1996; Bratton and Spill 2002; Hurwitz and Lanier 2003; Williams 2007). Similarly,

1. State court selection information cited in this essay can be found at the American Judicature Society Website: http://www.ajs.org/js/JudicialSelectionCharts.pdf.

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