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Law clerks' involvement in the work of the U. S. Supreme Court has changed significantly over the past forty years. Clerks to Justice Frank Murphy and Chief Justice Fred M. Vinson initiated the practice of young aides writing their boss's opinions, sometimes with meaningful oversight and sometimes without, during the 1940s,[1] but the subsequent increase in clerk-drafted opinions from the 1950s onward is only one part of a larger transformation that has occurred primarily since the advent of the Burger Court. This metamorphosis has until now attracted surprisingly little scholarly attention, but the simultaneous publication of these two instructive books provides a crucial opportunity for a well-informed debate over what roles clerks should and should not play.

Over the past half-century public discussion of clerks' roles has been largely episodic. In 1957 and 1958 a spate of articles, including a provocative essay in *U.S. News & World Report* titled *Who Writes Decisions of the Supreme Court?*, by a former clerk named William H. Rehnquist, caught Congress's attention, but the issue quickly faded.[2] Two decades later, in 1979, publication of *The Brethren: Inside the Supreme Court*, by Bob Woodward and Scott Armstrong, captured greater public attention than any other study of the Court before or after. *The Brethren*

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1 See David J. Garrow, "The Lowest Form of Animal Life"?: Supreme Court Clerks and Supreme Court History, 84 Cornell L. Rev. 855, 865–66 n72 (1999).

2 See William H. Rehnquist, Who Writes Decisions of the Supreme Court?, U.S. News & World Rep., Dec. 13, 1957, at 74, and Garrow, note 1 supra, at 869–71.

relied heavily on interviews with unnamed former clerks, and on documents they had retained from the time of their clerkships. Contemporary discussion acknowledged Woodward's and Armstrong's reliance on former clerks, but was largely ignorant of the extent to which some sitting justices also had assisted the authors.[3]

In 1998, publication of former October Term 1988 clerk Edward Lazarus's *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*, provoked a firestorm of criticism, much of it historically ill-informed.[4] But the public controversy over Lazarus's book sent both former and future clerks a powerful and unprecedented message that much of what they saw and heard during their time at the Court was never to be revealed to anyone outside the clerical fraternity.[5] That message was further reinforced six years later when David Margolick published an account of Bush v. Gore that relied upon interviews with unnamed clerks from October Term 2000.[6] More than eighty former high court clerks signed a public statement denouncing their colleagues who had spoken to Margolick,[7] and their denunciation received prominent press coverage.[8]

The Lazarus and Margolick controversies reinforced a message that clerks should never tell tales while also thrusting them into the public eye. But while the cumulative impact of *The Brethren*, *Closed Chambers*, and Margolick's article portrayed clerks as intriguing figures to the wider public, the three most significant changes to take place in the clerkship institution since 1969 have remained almost completely undiscussed and unexamined.

Those three developments are easy to identify: first, the increase in the number of clerks in each chambers from two to three in 1970 and then to four in 1974, second, the creation of the "cert pool" in 1972, and lastly the emergence of a prior circuit court clerkship as an all-but-universal job requirement. The increase in the number of clerks significantly reduced the personal intimacy of the clerk-justice relationship and doubled the overall clerkship population as well as each justice's staff. The establishment of the cert pool, and its growth to encompass eight of the nine chambers, drastically lessened the amount of time clerks had to devote to petitions for certiorari, thus freeing them up for other tasks. And most importantly of all, the establishment of prior clerkship experience, most oftentimes with ideologically identified circuit court "feeder" judges, as a virtual prerequisite for high court hiring, all but preordained the emergence of a clerk population already socialized into politically-informed appellate decision-making.

Courtiers of the Marble Palace chronologically surveys what is known about the clerkship practices of every justice who has served from the late 19th century to the present. The amount of available detail is greatest from the 1940s through the 1960s, mostly

3 See David J. Garrow, The Supreme Court and *The Brethren*, 18 Con. Comm. 303 (2001).

4 See Garrow, note 1 supra, at 892–94.

5 See Richard W. Painter, A Law Clerk Betrays the Supreme Court, Wall St. J., Apr. 13, 1998, at A23, Gretchen Craft Rubin, Betraying a Trust, Wash. Post, June 17, 1998, at A27, and Alex Kozinski, Conduct Unbecoming, 108 Yale L. J. 835 (1999). See also Tony Mauro, Supreme Court Tightens Secrecy Rules for Clerks, USA Today, Nov. 9, 1998, at A1.

6 David Margolick et al., The Path to Florida, Vanity Fair, Oct. 2004, at 310.

7 See Response to Bush v. Gore Magazine Article, Legal Times, Sept. 27, 2004, at 61.

8 See Tony Mauro, High Court Clerks Bemoan Bush v. Gore Revelations, Legal Times, Sept. 27, 2004, at 11, Charles Lane, In Court Clerks Breach, A Provocative Precedent, Wash. Post., Oct. 17, 2004, at D1.

because of the differing responsiveness of surviving former clerks when contacted by author Todd Peppers, an assistant professor of political science at Roanoke College in Virginia. Peppers initially mailed a one-page questionnaire to roughly 1,000 former clerks and about 40 percent responded. He then wrote to approximately 100 respondents to request personal interviews, and ultimately he succeeded in speaking with 54 former clerks.

That may sound like a sizeable number, but only 5 of Peppers's 54 interviewees clerked during the past twenty years. He was unable to interview even a single clerk to Justices Thurgood Marshall, Antonin Scalia, Anthony M. Kennedy, David H. Souter, Clarence Thomas, and Stephen G. Breyer, and only one apiece for Chief Justice William H. Rehnquist and Justices Potter Stewart, Byron R. White, John Paul Stevens, and Sandra Day O'Connor. Peppers interviewed two former clerks to Justice Harry A. Blackmun, and three for both Justices William J. Brennan, Jr., and Ruth Bader Ginsburg.[9]

This is not to suggest any lack of diligence on Peppers's part whatsoever, for he notes that "as law clerks aged and their justices retired, the former clerks were more willing to talk about their clerkship experiences." He adds that "former clerks evidenced a greater willingness to discuss their clerkship if their former employer was deceased." Thus his total of 54 includes six clerks to Justice Stanley F. Reed and four to Chief Justice Harlan Stone. In contrast, clerks from the 1980s and 1990s evidenced "a general unwillingness to be interviewed," and alumni/ae of some chambers were particularly unresponsive. Peppers reports that his "highest rejection rates for interviews with clerks of a *former* Supreme Court justice came from the Marshall clerks."[10]

Moving forward from the 1940s, Peppers enlarges upon the previous evidence concerning Murphy's and Vinson's clerkship practices. He also highlights what he calls a "startling" document from the papers of Justice Felix Frankfurter, instructing clerks that for every case in which the justice will be writing an opinion, a memo must be prepared which "should be in the form of an opinion, and in the form in which you would be willing to see it go down."[11] This is a valuable discovery, but it has long been well known that some of Frankfurter's most notable opinions, at least from the latter years of his career, were almost entirely the handiwork of one or another law clerk.[12]

Peppers likewise heralds his discovery of a 1957 diary entry by Dallin Oaks, a new clerk to Chief Justice Earl Warren. Recounting instructions from Warren's outgoing clerks about the handling of *in forma pauperis* (IFP) petitions, Oaks noted that only about 3 percent of IFPs should be circulated to all the justices, and that "*The law clerk makes the decision*." Peppers finds this "rather extraordinary,"[13] but his reaction again

9 See Courtiers at 215–16.

10 Id. at xiv, 20, 163, 172.

11 Id. at 106. In an endnote, Peppers adds that October Term 1960 clerk John D. French confirmed that writing initial drafts "was a major responsibility. I did a number of first drafts of opinions." Id. at 258 n150.

12 See Bernard Schwartz, Super Chief: Earl Warren and His Supreme Court 413 (New York: New York University Press, 1983), and David J. Garrow, Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade 186, 190 (Berkeley: University of California Press, 1998). See also Roger Newman, The Warren Court and American Politics: An Impressionistic Appreciation, 18 Con. Comm. 661, 682 n122 (2001).

13 Courtiers at 149.

overlooks previous reports of how Warren's clerks played significant roles in his judicial decision-making.[14]

Peppers rightly concludes that most Warren Court justices – indeed all members of the Court between 1957 and 1969 with the exceptions of Hugo Black, William O. Douglas, and perhaps the oft-forgotten Charles E. Whittaker – "routinely assigned their law clerks responsibility for drafting opinions."[15] This is not revelatory, but it is valuable confirmation of prior conclusions, particularly regarding those justices – Brennan, Frankfurter, John Marshall Harlan – whose reputations are especially exalted.

Peppers recounts similar information concerning opinion-writing practices on the Burger Court, but sometimes he buries his most significant nuggets in endnotes. He reports that Chief Justice Burger's law clerks "routinely prepared majority opinions," but only in an endnote is David Campbell, an October Term 1981 clerk to then-Justice William H. Rehnquist, paraphrased as telling Peppers that "he was surprised that he did not receive more detailed instructions from Rehnquist when he was assigned to draft an opinion." Similarly relegated to an endnote is Peppers's summary of comments made to him by Kathryn Webb Bradley, who clerked for Justice Byron R. White during October Term 1990. "Bradley stated that sometimes Justice White wouldn't even tell the clerks the grounds for the assigned opinion, blithely commenting that the correct legal basis would `come out in the writing.' Bradley would be forced to collect intelligence from clerks in other chambers as to the grounds of the conference vote so she could prepare an opinion that would hold the majority together."[16]

Peppers's narrative becomes less informative when it reaches the recent era of more close-mouthed former clerks. Yet just when Peppers's book weakens, *Sorcerers' Apprentices* delivers its strongest material, thanks to its co-authors, extremely thorough use of the case files of former Justices Lewis F. Powell, Jr., and Harry A. Blackmun.[17]

Much like *Courtiers of the Marble Palace*, Artemus Ward and David Weiden – also both assistant professors of political science, Ward at Northern Illinois University and Weiden at Illinois State – recount the growing involvement of clerks in the Court's substantive work from the 1940s through the 1960s.[18] Ward and Weiden further contend that "the shift toward clerk-written opinions was largely due to Chief Justice Warren's opinion-assignment prac-

14 See Garrow, note 12 supra, at 236, and Newman, note 12 supra, at 683. Peppers reports that during some terms, "law clerks prepared the first draft of every opinion" for Warren, sometimes – quoting an interview with October Term 1960 clerk Jesse H. Choper – "with very little instruction." Courtiers at 149.

15 Courtiers at 151–52. Citing information from October Term 1973 clerk Andrew Hurwitz, Peppers says that in Justice Potter Stewart's chambers, "by the early 1970s the law clerks were preparing first drafts of all majority, concurring, and dissenting opinions."

16 Id. at 177, 283 n236, 276 n105. See also Alex Kozinski & Fred Bernstein, Clerkship Politics, 2 Green Bag 2d 57, 58 (Autumn 1998), describing Judge Kozinski's October Term 1976 clerkship with Chief Justice Burger. "I saw my job as trying to figure out what his philosophy was, based on his earlier opinions, and to draft current opinions accordingly. More than once, he gave me an instruction to come out one way, and I went back and read his earlier opinions and decided he'd be more consistent if he came out the other way … . Sometimes he would switch, and sometimes he wouldn't."

17 Courtiers features over a dozen endnote citations to the Powell Papers, but only four to Blackmun's. Three of the four Blackmun citations are to correspondence with departing or former clerks, and one is to a generic chambers document. See Courtiers at 280–83, esp. 281 nn181, 188, and 201–02.

18 See Sorcerers' Apprentices at 117, 203.

tice of equally dividing the cases among his colleagues."[19] This is a notable assertion, but they do not marshal any detailed evidence in support of it.

Sorcerers' Apprentices' treatment of the Burger and Rehnquist Court eras benefits from the authors' blanket offer of anonymity to the former clerks whom they contacted. Somewhat like Peppers, Ward and Weiden mailed a written questionnaire to about 600 clerks and received 160 full or partial responses. Their mailing invited recipients to "add comments or expand upon any answer," and fortunately some did.[20]

One which they quote at some length was submitted by "a Blackmun clerk from the 1970s": "In my Term, he did most of his drafting himself. My understanding is that that was unusual and it became unusual for him. My understanding is that within a year or so of the year I clerked he was using his clerks more the way other justices historically used them and that involved a lot of drafting. … When I would talk to clerks a few years later they were doing all kinds of opinion drafting, which we hadn't done. So it changed dramatically."[21]

In a similar vein, if not quite so striking, Ward and Weiden report that a Brennan clerk from the 1980s said that the justice did "little revision" of the clerk's draft opinions. Likewise, a Rehnquist clerk from the 1990s stated that of opinions he drafted, "none were substantially revised" by the Chief Justice. Even more decisively, they write that "an O'Connor clerk from the 1990s told us that the justice `never' revised his draft opinions." All told, they recount, 30 percent of the clerks who replied acknowledged having "their drafts issued without modification, as opinions by their justice, at least some of the time." On the Rehnquist Court, Ward and Weiden conclude, "opinion writing was virtually the exclusive province of clerks."[22]

But the single most valuable contribution made by *Sorcerers' Apprentices* is Ward and Weiden's discussion of the origins and impact of the "cert pool." The creation of the pool in 1972 occurred just two years after most justices had increased their number of clerks from two to three, and two years before a further increase to four. That rapid expansion in the number of clerks has never been the subject of any thorough scholarly attention, but Ward and Weiden write that "the addition of a third and fourth clerk per chamber had a chilling effect on the extent to which clerks felt they could introduce new ideas and generally express a different position to their justice."[23] This is an intriguing assertion, but not one that the authors support with any specific evidence.

Yet their suggestion that the doubling of the clerk work force significantly altered the relationship between clerks and their justice is an important one which merits further study. Ward and Weiden indicate that moving beyond two clerks created an office culture in which any single clerk feels inhibited from openly disagreeing with the justice. Is a four-clerk chambers measurably more likely to generate "peer pressure" that dampens

19 Id. at 203–04.

20 Id. at 10–11, 282 n31, 275. Ward and Weiden appear to say that only twelve of their respondents clerked subsequent to October Term 1988. Id. at 282 n32.

21 Id. at 206–07. Ward and Weiden add that "often justices drafted their own opinions earlier in their tenures and relied more heavily on their clerks for drafts in later years." Id. at 206. This conclusion contradicts Peppers's comment that "it is unusual for a justice" to change his clerks' duties over time. Courtiers at 133.

22 Sorcerers' Apprentices at 218, 223, 224, 226, 228.

23 Id. at 52.

the range and frankness of discussion than a two clerk chambers? Is a larger staff also more vulnerable to favor-currying behavior produced by competitive jockeying for the justice's approval? These questions deserve further inquiry informed by other research into similar group dynamics.

The doubling of the number of clerks took place at much the same time as the establishment of the cert pool. Thanks to Ward and Weiden's assiduous work in the Powell Papers, they provide a richly documented account of the pool's creation and the reasons behind it. Within months of Justice Powell's arrival at the Court in early 1972, he suggested "pooling" the clerks so that each petition for certiorari would be summarized and evaluated by one clerk rather than nine. Four of his colleagues – Burger, White, Blackmun, and Rehnquist – joined Powell's endeavor, while four others – Douglas, Brennan, Stewart, and Marshall – declined.

The pool began functioning at the beginning of October Term 1972. Powell quickly pronounced it a success, telling his colleagues that it was "accomplishing its principal purpose: conserving, for other vital work, a significant part of the time of the Law Clerks who participate." He reiterated that message at the end of the term, reporting that "the Pool has reduced by at least 50% the time devoted by my clerks to certs, freeing them for other important work." Justices Blackmun and Rehnquist concurred. Echoing Powell, Blackmun wrote that the pool "tends to conserve time for the clerks and to free them for other important work." Rehnquist put it similarly, remarking that his clerks now had "more time to devote to other work which is more important to me and more interesting to them."[24]

Ward and Weiden have no doubt what that "other important work" entailed. "After the cert pool was created and expanded, the number of separate concurring and dissenting opinions issued by the justices exploded." They do not present any data in direct support of that claim, but their more basic conclusion that the pool "drastically reduced the amount of time clerks devoted to reviewing cert petitions and writing cert memos" is unchallengeable.[25] Indeed, there can be little doubt that establishment of the pool, coupled with the doubling of the number of clerks, allowed for clerks to become even more extensively involved in opinion-writing than they had been previously. Ward and Weiden go so far as to say that "the radical transformation in clerk workload" brought about by the pool "dramatically changed the role of the law clerk."[26] That may be rhetorical overstatement, but Ward and Weiden have rightly highlighted a pair of changes to which other scholars have devoted insufficient attention.

Sorcerers' Apprentices should also draw increased attention to the issue of whether ideological loyalties and partisan political

24 Id. at 122, 123. Rehnquist's understanding of the pool's purpose changed over time. In a February 1989 memo, the Chief Justice informed clerks that "The theory behind the cert pool is that the pool memos will save the time of the Justices." Id. at 126.

25 Id. at 46, 110. After 1973, every new justice except John Paul Stevens joined the pool, thus gradually expanding it to eight. On the interaction between the Stevens chambers and the pool, see Deborah Pearlstein's account of her October Term 1999 clerkship with Stevens, The Power to Persuade: A Year in the Life of a Supreme Court Clerk, NCJW [National Council of Jewish Women] Journal, Oct. 31, 2000 ("because the Stevens clerk on a case was invariably one of just two clerks in the building to have looked at the petition in detail, we regularly talked with the pool clerk on the more interesting cases; they called us or we them, hoping to compare notes or, more or less subtly, to lobby for or against cert in the case at hand").

26 Sorcerers' Apprentices at 141, 148.

identification have become far more pronounced among clerks over the past twenty years. Ward and Weiden observe that "there is a remarkable ideological congruence between justices and clerks," and Peppers concurs, remarking that "the ideological distance between clerks and their justices has diminished."[27] Yet the more dispositive element here may well be the transition from what was once a completely "rookie" set of high court law clerks, all immediately fresh from law school and recommended to or chosen for particular justices by various deans and faculty members, to a clerk workforce where nowadays almost every clerk arrives at the court only after a federal court of appeals clerkship.

In the abstract, perhaps everyone would agree that a year's experience clerking for a circuit court judge makes for decidedly more knowledgeable and up-to-speed Supreme Court clerks than would a system that instead still featured "rookies." But this significant gain in relevant legal experience comes at a cost that both justices and commentators often fail to appreciate, namely the increasingly predominant ideological loyalties that clerks bring with them to the high court from their previous clerkships.

The concept of "feeder judges," federal appellate jurists whose clerks are hired by Supreme Court justices in unusually high numbers, has been a familiar category for over a decade now.[28] Both Peppers and Ward and Weiden address the topic, but neither *Courtiers* nor *Sorcerers' Apprentices* emphasizes how virtually every top "feeder judge" of the past twenty years has been either extremely liberal or extremely conservative. Ward and Weiden rightly state that "ideology largely determines which judges place their clerks with particular justices," and Peppers presents cumulative numbers for members of the Rehnquist Court that powerfully demonstrate the extent of this pattern. Justice William J. Brennan, Jr., for example, over time hired twelve clerks who had worked for Judge David L. Bazelon, and eleven who had worked for Judge J. Skelly Wright, both well-known liberal jurists on the U. S. Court of Appeals for the District of Columbia Circuit. Justice Thurgood Marshall likewise hired nine clerks from Judge Wright, and Justice Harry A. Blackmun selected six who had worked for Judge Abner Mikva, another prominent liberal on the D. C. Circuit. In more recent years, from 1994 through 2004, Justice Stephen G. Breyer hired eight clerks from Second Circuit Judge Guido Calabresi, an outspoken liberal.[29]

At the other end of the ideological spectrum, the numbers are even more striking. Between 1986 and 2004, Justice Antonin Scalia hired thirteen clerks from Fourth Circuit Judge J. Michael Luttig – who joined the federal bench only in 1991 – and eight from Judge Laurence H. Silberman of the D.C. Circuit, both zealous conservatives. Likewise, Justice Clarence Thomas appointed fourteen Luttig clerks and nine Silberman clerks between 1991 and 2004. Similarly, Justice Anthony M. Kennedy selected fifteen clerks from Ninth Circuit Judge Alex Kozinski, an outspoken conservative, up through 2004, and Justice Sandra Day O'Connor hired ten clerks from Kozinski.

These are conspicuous totals, but they are only part of a larger pattern that also has included numerous additional clerks moving to the Supreme Court from other decid-

27 Id. at 55; Courtiers at 211.

28 The first published usages of the label appear to be Patricia Wald, Selecting Law Clerks, 89 Mich. L. Rev. 152, 154 (1990), and Alex Kozinski, Confessions of a Bad Apple, 100 Yale L. J. 1707, 1728–29 (1991).

29 Sorcerers' Apprentices at 83, Courtiers at 32–33.

edly conservative appellate judges such as David B. Sentelle and Stephen F. Williams of the D.C. Circuit and J. Clifford Wallace and Diarmuid O'Scannlain of the Ninth Circuit. Yet most 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 and almost none have been politically difficult to pigeonhole.

For instance, the D.C. Circuit has long enjoyed an overall numerical advantage, but why is it that judges Silberman, Sentelle, and Williams, just like judges Bazelon, Wright and 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.[30]

Neither Peppers nor Ward and Weiden consider this phenomenon and its implications as fully as they might, but both books cite a significant scholarly study published in 2001 whose important findings have been overlooked almost entirely by legal academics. Analyzing all Supreme Court clerk hiring between 1975 and 1998, political scientists Corey Ditslear and Lawrence Baum examined "whether the justices increasingly draw their clerks from ideological allies in the lower courts." They report that "in the 1975–1980 period, 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." For instance, Justice Thomas never once had hired a clerk from a lower court judge appointed by a Democratic president, and Justice Scalia and Chief Justice Rehnquist both drew 95 percent of their clerks from Republican appointees. Ditslear and Baum conclude that "in terms of clerk selection, this was a far more polarized Court" during the 1990s than at any previous time.[31]

Law clerks who come to the Supreme Court already socialized into a highly political and ideologically oriented view of appellate decision-making may not best serve either their justice or the Court. Instead they may be predisposed toward what Judge Posner rightly calls the "disreputably partisan" behavior so richly documented in case files from Justice Blackmun's latter years on the Court.[32] Ward and Weiden devote almost a dozen pages to summarizing some of the evidence concerning Blackmun's clerks,

30 Cf. Kozinski & Bernstein, note 16 supra, at 58 (Judge Kozinski remarking that "I feel an obligation to train conservative and libertarian lawyers").

31 Corey Ditslear and Lawrence Baum, Selection of Law Clerks and Polarization in the U.S. Supreme Court, 63 J. of Politics 869, 870, 876–77, 878 (2001).

32 Richard A. Posner, The Courthouse Mice, The New Republic, June 5–12, 2006, at 32, 35. Cf. David J. Garrow, The Brains Behind Blackmun, Legal Affairs, May/June 2005, at 26.

and they reprint two of the most egregious clerk memos in their appendices.[33] Ward and Weiden forthrightly conclude that the justices have been "ceding greater responsibility to clerks in recent years," with "certain justices ceding greater authority to clerks than others." They warn of "a real danger if justices delegate too much authority to clerks with little, if any, direction and oversight," and they accurately observe that such a state of affairs comes "perilously close" to "an unconstitutional abdication of the justices' duties."[34] With a "clerk force" whose ideological predispositions and political loyalties oftentimes may be more extreme and pronounced than their justices', judicial abdication risks seriously magnifying at least the appearances of internal discord while also amplifying their public expressions.

Apologists and defenders claim that even the delegation of opinion-writing to the clerks is no cause for complaint or concern, since the clerks are simply "filling in the boss's blueprint" and are just "carrying out the Justices' visions."[35] Ward and Weiden beg to differ. They underscore their findings that clerks "have considerable discretion over the word choice, structure, and sometimes even the substance of the opinions they write." They also reiterate how "drafts written entirely by clerks are often released as opinions with little or no changes made by justices," thus puncturing the widespread claim that even purely "editorial justices" can insure that opinions are indeed their own work. As Judge Posner correctly warns, "judges fool themselves when they think that by careful editing they can make a judicial opinion their own."[36]

Unlike Ward and Weiden, Peppers betrays some sympathy for defenders of the present regime. That attitude stems largely from Peppers's application of "principal-agent theory" to the justice-clerk relationship, for it avows that "the more an agent embraces his fiduciary duty to a principal, the less likely the agent is to act in ways counter to the principal's goals." This invocation of "goals" is extremely reductionist and highly problematic, for it leads Peppers into dubiously claiming that "[t]o affect judicial decision making, law clerks must … possess preferences or goals that *differ* from those of their justices; if law clerks and justices share the same *policy preferences* or *ideological positions*, then any influence over decision making is not troubling because the clerks are pursuing the same *policy goals* as the justices." In other words, if case decisions indeed amount to nothing more than ideology and policy, who cares who the opinions are written by and precisely what they do or do not say? At one point Peppers seems to say just that: "there is no evidence that any justices have abdicated their authority to make decisions regarding *the winners and losers* of a case. Justices, not law clerks, vote."[37] If winning and losing is indeed all that counts, and if appellate decision-making is only ideological policy combat, then perhaps intensely-committed political partisans are the ideal law clerks. But is this really what Americans want, and what constitutional litigants deserve? I don't think so, and the more public

33 Sorcerers' Apprentices at 173–84, 269–74. Cf. Garrow, note 32 supra, at 32, 33 (quoting from both memos).

34 Sorcerers' Apprentices at 201, 246.

35 Edward Lazarus, Assessing the Supreme Court at the Close of Its Current Term: New Justices, Public Critiques, and the Law Clerk Issue, Findlaw, July 6, 2006 (http://writ.news.findlaw.com/lazarus/20060706.html).

36 Sorcerers' Apprentices at 230, 9; Posner, note 32 supra, at 34.

37 Courtiers at 123, 206, 209 (emphasis added).

debate there is about the documented reality of what clerks do and how they do it, the greater the uproar will become.

Politically partisan and ideologically committed clerks may also represent a further challenge to inquisitive and fair-minded scholars, one that has not been explicitly discussed to date. Yet both Peppers and Ward and Weiden touch upon it in suggestive ways. Peppers observes at one point that Justice Thurgood Marshall's "clerkship practices are the most difficult to determine accurately" of all, for "[h]is former law clerks have built a formidable wall of silence around the late justice." Peppers adds that he is "a bit leery of secondary materials written by former Marshall clerks" who may be "overcompensating" for widespread doubts about Marshall's judicial attentiveness by promulgating what he terms "questionable data."[38]

Yet the furthest that Peppers goes is to wonder out loud whether some former clerks are "unduly modest" about the extent of the work that they did. Ward and Weiden voice a similar thought, commenting that "we were surprised that our data showed that the clerks largely downplayed their importance," a stark contrast to the oft-repeated shibboleth that clerks are wont to endlessly exaggerate their influence. But Ward and Weiden also make a further observation, one they fail to pursue but one so important that all students of the modern Court should make special note of: "Interestingly, the Court's internal memoranda paint a more activist picture than the survey and interview responses suggest." In other words, the Marshall, Powell, and Blackmun Papers, among others, all document the extent and intensity of clerks' involvement in the Court's substantive decision-making more powerfully and in more persuasive detail than do any and all information coming from the former clerks themselves. But if clerks from recent decades are indeed oftentimes primarily ideological acolytes in arms, isn't that exactly the sort of misleading, obfuscatory behavior we should expect from bottom-line partisans irrespective of whether they clerked for a Marshall or a Scalia?[39]

Both *Courtiers of the Marble Palace* and *Sorcerers' Apprentices* are valuable and informative books, but even together they do not begin to exhaust worthwhile scholarly inquiry into the work and impact of Supreme Court law clerks. For example, neither book devotes any significant attention to the handling of capital cases. In a revealing but little-known account of her October Term 1999 clerkship with Justice Stevens, Deborah Pearlstein wrote about how death cases were "by far the most taxing of our duties." She went on to volunteer that "it is in these last-minute capital appeals that the clerks' ability to influence is, perversely, at its height." That comment will ring true to many close students of the Court, but perhaps the most serious and widespread shortcoming among present-day commentators is the failure to appreciate just how important a role the virtually non-stop succession of death filings play in the year-after-year weekly lives of both the justices and other Court personnel.[40]

38 Id. at 171, 172–73. Peppers adds that "the best example" of such former Marshall clerks is Professor Mark Tushnet. Id. at 279 n152. Notwithstanding these professions of skepticism, Peppers acknowledges that those who reviewed portions of his manuscript and "offered valuable feedback" included two children of Justice Black and Justice Blackmun's longtime personal secretary, Wanda Martinson. Id. at xv-xvi.

39 Id. at 101; Sorcerers' Apprentices at 20, 199.

40 Pearlstein, note 25 supra. See also Phil McCombs, The Clerk of Last Appeals, Wash. Post, Feb. 24, 1996, at D1, one of the most original stories ever written about the Court.

Presently there are the beginnings of a valuable public debate about whether today's justices really require the professional assistance of four law clerks apiece, especially given the present Court's extremely modest case-load.[41] Speaking in defense of four clerks per justice, Professor Markel has replied that "opinions probably benefit from having a few people think about a case together before reaching resolution."[42] That's precisely the belief that underlies our structure of collegial, multi-judge appellate courts, but most Americans might be forgiven for thinking that the people who are supposed to "think about a case together before reaching resolution" are the actual *justices*, not their four-person staffs of law clerks!

Almost fifty years ago, at the very onset of the mass civil rights movement in the Deep South, E.E. Schattschneider explained how democracy's self-interest always lies in increasing the scope of any struggle or debate, for "the number of people involved in any conflict determines what happens."[43] That maxim should apply here too, both with regard to the number of law clerks each justice should employ and also how politically partisan and ideologically committed such young assistants should be. Would the American people, or at least their representatives in Congress, favor a significant reduction in the number of clerks that would compel the justices to do far more of their own writing than is presently the case? Would the legislative branch likewise be interested in some discussion, if not action, that might encourage the justices to draw fewer of their clerks from the most extreme ideological hot-houses of the circuit courts? Given the partisan tenor of Congress, perhaps the answer is "not a chance," but don't both of these questions involve issues where the debate indeed should be expanded beyond a narrow professional elite in which many participants have a vested interest reaching back to their own clerkship experience? The broader these debates become, the more likely it is that the real interests of both the American people and their Supreme Court will truly be served. GB

41 See Stuart Taylor, Jr., and Benjamin Wittes, Of Clerks and Perks, Atlantic Monthly, July/August 2005, at 50–51 (recommending a reduction in the number of clerks to no more than one per justice). See also David J. Garrow, When Court Clerks Rule, Los Angeles Times, May 29, 2005, at M5 (voicing the first call for a return to only one clerk per justice).

42 Dan Markel, First Thing We'll Do: Fire All the Clerks!, Prawfsblawg, June 7, 2006 (available at http://prawfsblawg.blogs.com/prawfsblawg/2006/06/ first_thing_wel.html).

43 E.E. Schattschneider, The Semisovereign People: A Realist's View of Democracy in America 6 (New York: Holt Rinehart & Winston, 1960).