

Clerks

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Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court,
Artemus Ward and David L. Weiden. NYU, 2006. Pp xiv, 337.

Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk,
Todd C. Peppers. Stanford, 2006. Pp xv, 301.

Scholars studying the United States Supreme Court confront a difficult task. The proceedings and the operation of the institution are, in many respects, entirely confidential—and remain so long after a particular case has been decided or a particular justice has left the Court. Even after a justice has left, there is no guarantee that the justice's private papers will be available for scholarly review (in case the justice destroys his papers or fails to make them available for public scrutiny). Consequently, Court scholars confront a basic dilemma. They can confine their study to publicly available sources, which may enable some profound hypotheses about the institution's operations but always leave one with lingering doubts about the hypotheses' validity. Alternatively, scholars can poke and prod nonpublic sources, most notably by attempting to interview the Court's present and past personnel. This approach may provide a fuller look at the institution's underbelly but may not yield generalizable conclusions, dependent as the method is on the willingness of the justices and Court personnel to speak.

Of course, scholars can surmount this dilemma by employing both methods, for they are not mutually exclusive. Then the challenge becomes a temporal one, requiring the scholar to spend years develop-

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ing protocols to test propositions and ferret out the inside information from the Court personnel. Once the scholar has generated a statistically significant data set, she must undertake the painstaking process of sorting that data to test the various hypotheses. Few scholars have the patience or, with the pressure to publish, the luxury of time to attempt this challenge.¹

If these challenges complicate study of the Court generally, they make study of its law clerks especially difficult. Until very recently, little was known about the clerks and their role, apart from the most basic data.² What do they do on a daily basis? How has their work evolved? How does their work influence—if at all—the Court's operations? Answers are elusive because, as with the rest of the Court, so little of what clerks do is ever made public. Even publicly available information trickles out during disclosure of a particular justice's papers rather than through the more systematic disclosure of the clerks' work from a particular term or a particular generation. Further complicating systematic study, clerks are an incredibly mum group. Strong bonds of loyalty run from the clerk to the justice, making clerks extremely reluctant to discuss even the most ordinary details of their work in chambers.³ A recently instituted practice requires incoming clerks to sign an oath in which they broadly declare their intention not to disclose confidential information about their work at the Court

¹ For a classic example of a scholarly work on the Court that successfully employs both methodologies, see H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court 2–3* (Harvard 1991) (explaining that the Court is both a legal and political institution and consequently that its students should not lose sight of either approach). In addition to Perry, some of the best political science on the Court generally has come through the scholarship of Lee Epstein. See generally, for example, Lee Epstein and Jack Knight, *The Choices Justices Make* (CQ 1998) (modeling justices as rational policy seekers constrained by institutional structures); Lee Epstein, et al, *The Supreme Court Compendium: Data, Decisions and Developments* (CQ 1994) (containing data on many aspects of the Court's functioning).

² For earlier efforts to develop a systematic understanding of the law clerk, see generally Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 Vand L Rev 1125 (1973) (sketching the history of the clerkship institution); Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 Or L Rev 299 (1961) (examining changes in the ways justices have used law clerks).

³ See, for example, Ken Foskett, *Judging Thomas: The Life and Times of Clarence Thomas* 275–76 (Harper Collins 2004) (disclosing anecdotes that show a close bond between Justice Thomas and his clerks). Witness, for example, the reaction to the publication of Edward Lazarus's *Closed Chambers: The First Eyewitness Account of the Epic Struggles inside the Supreme Court* (Times 1998). See David J. Garrow, *The Lowest Form of Animal Life? Supreme Court Clerks and Supreme Court History*, 84 Cornell L Rev 855, 856 (1999) (gauging reactions to the publication of *Closed Chambers*).

(Ward and Weiden, pp 16–17).⁴ Due to these limitations in the record, books about law clerks tend to come in one of two forms. Some are highly personalized biographical or autobiographical accounts of a clerk's time at the Court, which tend to be rich in detail but ultimately anecdotal.⁵ Others are better described as somewhere between popular nonfiction and journalism, entertaining but ultimately lacking much scholarly value.⁶

The two books under review, coincidentally released in the same year, attempt to fill this lacuna in the scholarship. As shorthand, I refer to the Ward and Weiden book as *Apprentices* and the Peppers book as *Courtiers*. Both apply the tools of the political scientist to the study of a particular institution at the Court.⁷ Both rely on many of the same primary sources in their historical account of the institution. While the books address the same general topic and apply some of the same methodological tools, they differ in terms of their organization, their focus, and their prescriptions. Both have been well received and have sparked a renewed interest in both the Court's operation generally and the clerk's role specifically.⁸ Their near-simultaneous publication provides an unusually good opportunity to assess the curious institution of the law clerk and to chart a direction for future research into the subject.

Before embarking on the review, it is important to address a critical and nonfrivolous question—who cares? Why does such an obscure institution as the Supreme Court law clerk, which Justice Douglas

⁴ Quoting the Code of Conduct for Law Clerks of the Supreme Court of the United States, Canons 2, 3(C) (1989).

⁵ See, for example, J. Harvie Wilkinson, III, *Serving Justice: A Supreme Court Clerk's View* (Charterhouse 1974) (recounting his clerkship with Justice Powell); Dennis J. Hutchinson and David J. Garrow, eds, *The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Clerk in FDR's Washington* (Chicago 2002) (recounting the personal experiences of a clerk for Justice James Clark McReynolds during the FDR "courtpacking" era); William H. Rehnquist, *The Supreme Court 3–20* (Knopf 2002) (recounting Chief Justice Rehnquist's time as a clerk for Justice Jackson).

⁶ See for example Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (Simon and Schuster 1979) (describing the first six years of the Burger Court); Lazarus, *Closed Chambers* (cited in note 3) (chronicling the author's year as a Supreme Court clerk by relying on personal experience and confidential interviews).

⁷ By tools of the political scientist, I mean methods such as modeling, statistical sampling, empirical testing of propositions, and rational choice theory, among others. They also draw heavily on the theoretical literature in political science on matters such as the importance of institutions in explaining political outcomes.

⁸ See, for example, Stuart Taylor, Jr., and Benjamin Wittes, *Of Clerks and Perks*, *Atlantic Monthly* 50, 50 (July/Aug 2006) (arguing that the clerkship position should be eliminated); Richard A. Posner, *The Courthouse Mice*, *New Republic* 32, 32–35 (June 12, 2006) (reviewing Ward and Weiden's *Courtiers* and Peppers's *Courtiers*).

once allegedly described as the “lowest form of animal life,”⁹ deserve (two!) full-length book treatments and further commentary in one of the country’s premier law journals? The answer is not immediately obvious. Officially, clerks have absolutely no power. They do not vote on whether to grant petitions for certiorari. They do not vote on how to resolve merits cases. They do not issue or sign opinions. Unlike the justices whom they serve, they do not have life tenure but typically only work for a single term, at most two. So why bother?

To this challenging question, several answers are possible. An obvious one is that clerks serve as the justices’ information gatekeepers. At present, the Court receives nearly nine thousand certiorari petitions each year, over one thousand applications, and thousands of motions and other miscellaneous filings.¹⁰ Under these circumstances, no one person can read every single piece of paper filed at the Court. Consequently, the justices look to the clerks—individually and as an institution—to identify those pieces of paper most worthy of their attention. Additionally, at present, each term the Court resolves eighty to ninety cases on the merits on a wide array of questions, ranging from obscure questions of admiralty law to grand constitutional debates.¹¹ For these cases, the clerks serve as the justices’ miners, probing all the possible sources of law to help the justice develop a position and, sometimes, articulate that position in an opinion. Here, it bears emphasis that the clerks are the only people with whom the justices can openly discuss the merits of the cases (apart from the other justices). A third answer, and one critical to both books’ theses, is the symbiotic relationship between a law clerk and the operation of the Supreme Court as an institution. As the Court has changed, clerks have changed with it. These changes in the clerks’ activities have wrought additional changes at the Court. For these and other reasons, a thor-

⁹ See Garrow, 84 Cornell L Rev at 855 n 1 (cited in note 3) (quoting Justice Douglas).

¹⁰ In terms of the applications, the Journal of the Supreme Court of the United States has references to specific applications but does not offer a cumulative statistic. However, one can estimate the number from reviewing the docket during the last few weeks of a term and the first few weeks of the new term (for example, the Supreme Court received approximately 1300 applications in October Term 2005). The number of motions is a hard statistic to compile accurately. For instance, the Court receives a couple of hundred miscellaneous motions, plus a few thousand motions to be admitted to the bar, as well as numerous motions in cases on the docket. For historic caseload trends at the Court, see Epstein, et al, *Supreme Court Compendium* at 70–80 (cited in note 1).

¹¹ The Court issued eighty-two opinions in the 2005 term, eighty-five in 2004, and eighty-nine in 2003. See Journal of the Supreme Court of the United States at II (Oct Terms 2003, 2004, 2005) (cited in note 10).

ough understanding of clerks is necessary both for the political scientist who studies the institution and for the lawyer who practices before it.

This review examines both books' contributions along several dimensions. It begins with the books' theoretical underpinnings, written in the "new institutionalism" school of political science. It then turns to methodology, where the books diverge sharply—*Courtiers* takes a more historical approach and *Apprentices* employs statistical sampling (based primarily on surveys of former clerks). After considering methodology, the review moves to law clerk recruitment and retention, trends that have undergone significant shifts in recent decades and, with respect to matters of diversity, have been the subject of recent controversy.¹² The review then considers the role of clerks in reviewing certiorari petitions and the changing rules governing the operation of certiorari review. After analyzing certiorari, the review addresses the clerks' role in the disposition of cases on the Court's merits docket, identifying and analyzing some of the original contributions made by both books to a study of the Court. Finally, the review considers the books in the broader policy debate over the future of the Court and the role of clerks. Both books' failure to engage this debate is one of their few real disappointments. Nonetheless, the impressive array of historical and statistical material that they have amassed is bound to influence that debate in the future.

I. THEORY

While they write about a legal institution, the authors do not approach their projects from a lawyer's perspective (though Peppers attended law school and clerked for a federal judge). Instead, they view the Court and its clerks through a political scientist's lens. This perspective presents both opportunities and challenges for the authors.

The opportunities lie in the fact that the political scientist, as opposed to the lawyer, has more specialized training in the theories about the operation of political institutions and thus is better positioned to identify patterns and trends that a lawyer might miss.

Both authors analyze the relationship between the Court and its law clerks in terms of the "new institutionalism."¹³ According to this

¹² See Margaret Raymond, *The Importance of Being Important*, 84 Iowa L Rev 147, 160–61 (1998) (noting that "the clamor to increase the gender and racial diversity of Supreme Court clerks continues").

¹³ For a prior effort to analyze the Court, though not its clerks, in this school, see generally the essays in Cornell W. Clayton and Howard Gillman, eds, *Supreme Court Decision-Making: New Institutional Approaches* (Chicago 1999).

theory, institutions are “rules of the game in a society or, more formally . . . the humanly devised constraints that shape interaction” (Peppers, p 11).¹⁴ These “rules” shape the way in which “players” in the “game” behave. If it stopped here, the account would be interesting but not especially profound. But the new institutionalism takes the analysis one important step further. It posits, as Peppers explains, that the players “can sometimes change the rules of the game to better achieve their goals. Hence institutions (the rules) affect the players, and the players reshape and amend the rules” (Peppers, p 11) (emphasis added).

While both books begin from a common theoretical starting point, they diverge in their elaboration. *Apprentices* uses the new institutionalism to demonstrate both how specific changes in the Court’s institutions have altered the duties of the clerk and how these alterations in the clerks’ duties have had further influence on the institution. For example, growth in the certiorari docket led to several important changes, including authorization to hire more clerks, creation of the cert pool, and use of a “dead list” containing cases not discussed at conferences (Ward and Weiden, pp 147–48).¹⁵ These changes freed up clerks to participate in other tasks, most notably playing an increased role in the preparation for and disposition of cases on the Court’s merits docket. Greater clerk participation in the merits cases (by a larger number of clerks) allowed the justices to produce more opinions, arguably spawning the proliferation of separate opinions in recent years and a decline in consensus among the justices.¹⁶ This represents a classic example of the new institutionalism—one set of institutions influences the roles of actors within those institutions, and through this shift those actors thereby exert further influence on the institution’s behavior.

¹⁴ Quoting Douglass C. North, *Institutions, Institutional Change and Economic Performance* 3 (Cambridge 1990).

¹⁵ For more on the cert pool, see Part IV.

¹⁶ The books do not represent the first example of linking these sorts of changes to behavior at the Court. Others have complained about how the increases in staff and Court personnel have undermined interaction at the Court and hurt its operation. See Joseph Vining, Comment, *Justice, Bureaucracy, and Legal Method*, 80 Mich L Rev 248, 251–52 (1981). The rise of the certiorari pool and increase in the number of clerks also correlates with a decline in the number of certiorari petitions that the Court annually grants. See Epstein, et al, *Supreme Court Compendium* at 66–70 (cited in note 1). On the correlation between the increase in the number of clerks and the decline in consensual norms at the Court, see Bradley J. Best, *Law Clerks, Support Personnel, and the Decline of Consensual Norms on the Supreme Court of the United States, 1935–1995* at 123–42 (LFB Scholarly 2002). For a recent attempt to formalize this correlation, see David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process* 19–44 (Minnesota Legal Studies Research Paper No 06-61), online at <http://ssrn.com/abstract=938566> (visited Jan 22, 2007).

Courtiers uses the theory to provide an explanatory typology by which to describe three historical eras in which clerks worked. The first, spanning approximately from the tenure of Chief Justice Waite until that of Chief Justice White (1874–1921) involved most justices using clerks as “stenographers.” During this era, most justices (except for Gray, Harlan, Holmes, and Brandeis) used their clerks as secretaries: typing opinions, delivering mail, and completing office work (Peppers, p 70).¹⁷ The second era, spanning from the time of Chief Justice Taft to that of Chief Justice Warren (1921–1969), involved most justices using law clerks as “legal assistants.” During this era, most justices (again with some exceptions) used their clerks to write memos on the certiorari petitions and to edit opinions that the justices themselves drafted (Peppers, p 143).¹⁸ Pointedly, most clerks did not write first drafts of the opinions during this era (Peppers, p 143).¹⁹ The third era, beginning with Chief Justice Burger and continuing to the present day, involves justices using their law clerks as “law firm associates” (Peppers, pp 145–205). During this current era, most justices participate in the cert pool, require bench memos from their clerks, and have their clerks write first drafts of opinions. This typology is the unique contribution made by *Courtiers*.

Whereas *Apprentices* offers a more sophisticated empirical account of institutional change at the Court, *Courtiers* offers a more theoretically nuanced account of *why* particular institutional changes (such as the cert pool) represented a rational response. Here, *Courtiers* relies on principal-agent theory. According to that theory, principals (here the justices) employ agents (here the law clerks) “in the expectation that the agent will subsequently choose actions that produce outcomes desired by the principal.”²⁰ In doing so, however, the principal faces at least two challenges. First, asymmetric information may mean that the principal knows less about the agent than the agent knows about the principal (that is, a potential clerk is likely to know more about Justice Kennedy, from opinions, media reports, etc.,

¹⁷ Justices Gray, Harlan, Holmes, and Brandeis, by contrast, were the first justices, according to Peppers’s historical research, to involve their clerks in legal research and the deliberations on the merits of the cases (Peppers, pp 43–44; 54–70). See also Leonard Baker, *Brandeis and Frankfurter: A Dual Biography* 131 (Harper 1984) (describing law clerks as stenographers).

¹⁸ Justice Frankfurter stood alone and generally did not involve his clerks in certiorari review, apparently reflecting his belief that personal review of the certiorari petitions was his most important job (Peppers, p 105).

¹⁹ Some justices (Clark, Frankfurter, Minton, Murphy, and Vinson) regularly used their clerks to draft opinions, and a few (Black, Jackson, and Reed) did so occasionally (Peppers, p 143).

²⁰ Terry M. Moe, *The New Economics of Organization*, 28 Am J Polit Sci 739, 756 (1984).

than Justice Kennedy will know about the applicant, who has a far less extensive public record). This forces the principal to rely on decision cues to compensate for the asymmetry (in this context—“feeder schools” and, more recently, “feeder judges” discussed in Part III). Second, as the principal delegates more responsibility to the agent, risks of moral hazard for the agent increase. This forces the principal to implement monitoring and sanctioning mechanisms to ensure that the agent does not defect or shirk his duties but, instead, continues to promote the principal’s interest.

Viewed in this light, several institutional changes at the Court can be explained. For example, whereas the cert pool is often explained as a labor-saving tool by which clerks share the burden of reviewing petitions, *Courtiers* sees it instead as a monitoring mechanism whereby the justices, who have delegated to their clerks more responsibility for reviewing a rapidly rising number of certiorari petitions, rely on clerks from other chambers to review the poolwriter’s memo (Peppers, pp 210). This ensures, so goes the argument, that clerks who might “defect” (by, for example, injecting their own personal preferences into the analysis of a petition) are checked by clerks from other chambers who review the pool memo for bias.

Though the political scientist brings a more powerful set of tools to the study of the Court (as these books demonstrate), he also confronts a challenge. Unlike the lawyer, the political scientist is less likely to be sensitive to the exogenous factors that shape the institution. While both books offer a compelling account of how the clerkship institution fundamentally transformed during the Burger era (the convergence described in *Apprentices*; the law firm associate model described in *Courtiers*) (Ward and Weiden, p 147; Peppers, p 145), neither book adequately addresses a number of exogenous factors contributing to this change. For example, neither book describes the major changes in the Court’s exercise of its jurisdiction—from the tradition of writs of error or appeal (under which the Court’s exercise of jurisdiction was mandatory) to a greater preference for the writ of certiorari (under which the Court could exercise the discretion whether to decide a case).²¹ Nor do the books adequately examine

²¹ For scholarship concerned with this issue, see Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging versus Error Correction in the Supreme Court*, 63 Wash & Lee L Rev 271, 275–78 (2006) (chronicling the rise of discretionary certiorari jurisdiction); Richard H. Fallon, Daniel J. Meltzer, David L. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System 1609–18* (West 5th ed 2003) (describing the Supreme Court’s use of certiorari); Perry, *Deciding to Decide* at 293–308 (cited in note 1) (describing the nature and history of the writ of certiorari); Robert L. Stern, et al, *Supreme Court Practice: For Practice in the Supreme*

doctrinal developments essential to their account—such as the demise of the *Lochner* era and the concomitant expansion of the federal administrative state, the incorporation doctrine and its effects on federal review of state criminal convictions, and an expansion of the habeas corpus remedy. Each of these doctrinal developments added to the Court's workload and, thus, compelled institutional changes to accommodate these pressures.

A second challenge for the political scientist is to be sufficiently sensitive to legal nuances in the account. For example, both books fail to discuss adequately the importance of death penalty cases to the Court generally and law clerks specifically. Since the Supreme Court held in *Gregg v Georgia*²² that capital punishment could comport with the Constitution,²³ capital cases have been a regular part of the Court's docket. In October Term 2005, for example, the Court received fifty-six applications in capital cases, most of which were accompanied by certiorari petitions.²⁴ While both books at least capture the certiorari filings in their general statistics on the Court's growing certiorari caseload, the books fail to break out these cases and afford them distinct treatment.²⁵ The Court has a full-time employee in the Clerk's Office whose responsibility includes handling all filings in capital cases as they come in the door.²⁶ Both books fail to offer any account of how the presence of this person in the institution shapes the treatment of capital cases at the Court.

Closer study might have buttressed both books' use of the new institutionalism. Many capital cases, unlike most certiorari petitions, often must be acted upon under relatively taxing time conditions—with multiple filings on the night of a scheduled execution not un-

Court of the United States 584–91 (Bureau of National Affairs 8th ed 2002) (discussing the history and use of certiorari); Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 287–88, 299–300 (Macmillan 1928) (“A still wider use of certiorari has been suggested.”).

²² 428 US 153 (1976).

²³ See *id.* at 187.

²⁴ According to the Death Penalty Information Center's Execution Database, online at <http://www.deathpenaltyinfo.org/executions.php> (visited Jan 22, 2007), there were sixty-two executions from October 2005 through October 2006. A review of the Court's docket shows that six of those individuals did not appeal their sentence to the Court. See <http://www.supremecourtus.gov/docket/docket.html> (visited Jan 22, 2007).

²⁵ For example, Douglas Berman has shown how the certiorari pool influences the number of capital cases on the Court's docket. See generally Douglas A. Berman, *Finding Bickel Gold in a Hill of Beans*, 2006 Cato S Ct Rev 311.

²⁶ See Stern, et al, *Supreme Court Practice* 25–28 (cited in note 21) (detailing the role of the Clerk's Office).

usual. This increases pressure for clerks to rely on an information-sharing network to decide the disposition to recommend to their respective justices, a network that *Apprentices* identifies but fails to apply in this context (Ward and Weiden, pp 159–70). Likewise, *Courtiers* overlooks entirely how the Court’s treatment of the typical execution-night filing—a memo written by the Circuit Justice to the entire conference and reviewed by all the other chambers—exemplifies, much like the cert pool, what Peppers describes as a “monitoring” mechanism to prevent defections in the principal-agent relationship.

This Part has considered the theoretical tradition in which both books were written. Through application of the new institutionalism theory, both *Apprentices* and *Courtiers* offer a lens through which to view the Court, one that both books might have used more fully. The next Part compares the differing methodologies used by both books to fortify their arguments.

II. METHODOLOGY

While both books are written in the same basic theoretical tradition and rely on many of the same primary sources, they employ partly different methodologies to support their theses. Both books utilize the same basic corpus of historical material such as biographies, the justices’ internal correspondence, and essays by former clerks recounting their work at the Court. In both books the authors also directly obtained information from former clerks—by means of surveys, correspondence, and personal interviews.

Beyond this common ground, their methods diverge. *Courtiers* reads more like a history, aggregating the evidence in the available record and searching for patterns. With the exception of its treatment of law clerk recruitment, discussed further below, *Courtiers* makes little effort to “crunch the numbers” or engage in any type of sophisticated statistical analysis of the available data. By contrast, *Apprentices* adopts a much bolder approach. It is replete with time-series analyses on matters ranging from the mundane (such as the number of justices with whom applicants interviewed) to the controversial (such as a time-series analysis of the frequency with which clerks allegedly changed their justice’s mind on cases or issues). To buttress these arguments, the authors relied primarily on detailed surveys of clerks in which they probed, among other things, the clerks’ perception of their role. This difference in methodology affects the nature of the books’ conclusions. Whereas the conclusions in *Courtiers* are narrow but cautious, the conclusions in *Apprentices* are both more profound and more unstable.

Law clerk hiring criteria provide a good example where the more sophisticated methodology in *Apprentices* enables a more profound conclusion than in *Courtiers*. There is much speculation about the precise hiring criteria used by the different justices. Academic performance? “Feeder” judges? Law school recommendations? Ideological litmus tests? Both books tackle this problem but arrive at different conclusions that in turn are traceable to their different methods. *Courtiers* argues that law clerk selection has become *more* ideologically driven. In theoretical terms, Peppers explains this argument in terms of principal-agent theory: as justices have delegated a greater degree of responsibility to their clerks, ideological litmus tests provide one mechanism by which justices can decrease the likelihood that a clerk will defect by not behaving in a manner that advances the justice’s interest (Peppers, p 209). The problem with this argument is that Peppers does not add much to the supporting evidence. Apart from citing data contained in a 2001 political science article,²⁷ Peppers relies primarily on anecdotal information contained in a handful of secondary sources such as biographies of justices or confirmation hearings of former clerks who were nominated to the federal bench (Peppers, pp 200–02).²⁸ The problem is in the proof—while each of these anecdotal bits may be interesting, they do not amount to a very compelling set of evidence to prove a controversial proposition about the supposed increased importance of ideology in law clerk selection.

Apprentices arrives at a more sophisticated conclusion and, due to the evidence the authors marshal, demonstrates it in a more convincing fashion. Ward and Weiden argue that ideology is a factor—but not the dominant factor—in law clerk selection. Initially, they utilize a survey in which they asked former law clerks to rank-order seven criteria in terms of importance to their justice’s hiring selection (Ward and Weiden, p 276).²⁹ Among the seven listed criteria, political ideol-

²⁷ See Corey Ditslear and Lawrence Baum, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J Polit 869, 869–83 (2001) (arguing that the justices have, since the 1990s, increasingly hired ideologically polarized clerks).

²⁸ Citing Foskett, *Judging Thomas* at 279–80 (cited in note 3) and Andrew Peyton Thomas, *Clarence Thomas: A Biography* 465 (Encounter 2002). Peppers does gather some original data on the ideology of law clerks (Republican versus Democrat) (Peppers, pp 35–37). Those data merely demonstrate a slight uptick since the tenure of Chief Justice Burger in the number of law clerks who self-identify as Republican (a shift that could easily be offset by the large number of former clerks who did not answer the question). Regardless of the shift (or the defensibility of equating legal philosophy with political party affiliation), Peppers does not rely on these data about clerks’ ideology to support his argument about justices’ use of ideology in their hiring practices.

²⁹ The seven criteria included: (1) prior clerkship experience, (2) law school academic performance, (3) quality of the law school, (4) similar political views as justice, (5) recommenda-

ogy ranked dead last, garnering only two votes for “most important” and three additional votes as “third most important” among 182 clerks (Ward and Weiden, p 69). This would suggest that Peppers’s conclusion, rooted in anecdote, is utterly wrong. Ward and Weiden then take the analysis one step further. They combine existing data on the justices’ ideology with their own survey results on law clerks’ ideology and document a growing convergence over time between law clerks’ ideologies and justices’ ideologies (Ward and Weiden, p 105). This suggests that, clerks’ own impressions notwithstanding, ideological convergence between clerk and justice has been fairly consistent at least since the tenure of Chief Justice Burger.

This is not to suggest that Ward and Weiden’s analysis is airtight or flawless. For one thing, one can legitimately question whether their categories of “political ideology” (liberal versus conservative) are appropriate for measuring a law clerk’s legal philosophy. Other categories such as “textualist,” “originalist,” “processualist,” etc., may have been more appropriate measures of ideology in this context. For another thing, the mere coincidence of ideological convergence between justice and clerk does not necessarily prove that ideology itself *caused* the selection of a particular law clerk. It may be that lawyers who attend the same school or come from a similar background *happen* to have the same ideology, and that those commonalities (rather than the ideology itself) cause the convergence. Finally, the low response rate to the Weiden and Ward survey (28 percent) makes their conclusions vulnerable (p 10). Had they been able to obtain more complete survey results, the data might look very different. Regardless of its ultimate validity, Weiden and Ward’s thesis on the recruitment issue is *more persuasive* than Peppers’s due to their great amount of evidence and their use of it.

In other areas, Weiden and Ward’s method makes *Apprentices* more likely than *Courtiers* to overstate its conclusions. This is particularly true where Weiden and Ward attempt a time-series analysis. Using this analysis, the authors argue that, among other things, clerks were more likely to change the views of their justices during the Rehnquist Court than during any of the tenures of the three preceding chief justices (Ward and Weiden, p 189). They base this argument on survey responses of former clerks who were asked to rate this factor. The problem with this approach, though, is that the authors are not entirely clear about how many clerks they surveyed in each era at the

tion of professors or judges, (6) rapport with the justice during a initial interview, and (7) other factors (Ward and Weiden, p 276).

Court; nor do they adequately control for other variables that might explain these results.³⁰ This difficulty in method, which is not entirely the authors' fault, leaves one not fully confident in their conclusions.

This Part compared the methodology employed in the two books. While they both start from a common set of sources, *Apprentices* has amassed a more impressive array of original data and employed more sophisticated statistical analyses to support its more powerful conclusions. These data make some of the arguments in *Apprentices* more persuasive than in *Courtiers*. Due to the lower response rate and the use of time-series analysis, however, they also are more vulnerable. The next three Parts of this review consider specific applications of the authors' methods—recruitment and retention, the certiorari pool, and merits cases.

III. RECRUITMENT AND RETENTION

Both books particularly shine in their discussion of recruitment and retention norms at the Supreme Court. With respect to recruitment, both books systematically lay out the historical trends. When they served as stenographers (in Peppers's terms), the clerks came from several schools (mainly Harvard)³¹ and applied directly to the justices (Peppers, p 25). As their role evolved into something more akin to legal assistants (again Peppers's term), the justices tended to hire clerks directly out of law school and looked to faculty members at certain law schools (centrally Harvard) for assistance with their hiring decisions, whether as "cues" for a justice's decision or, in some cases, making the hiring decision for the justice (Peppers, pp 83–144). Finally, as they assumed their current role as "law firm associate," starting with the tenure of Chief Justice Burger, certain lower court judges ("feeder judges") played a more important role in the ultimate selection of the justices' clerks (Peppers, p 33; Ward and Weiden, p 84).

While this story is a familiar one, both books take the analysis one step further and link the shifts in recruitment behavior to changes in the law clerk's role. Prior to the tenure of Chief Justice Burger, less than 50 percent of clerks had prior clerking experience (Peppers, p 31; Ward and Weiden, p 77). Both books explain this in terms of the fact

³⁰ Moreover, relying on clerks' self-assessment of matters such as their influence on justices' decisionmaking process is precarious at best. Such self-assessments are fraught with biases, risks of inflated self-importance, and serious dissonance from the justices' actual views. While Ward and Weiden explicitly acknowledge this risk, they do not control for it (Ward and Weiden, p 20). In most cases, the sitting justices were unwilling to speak with the authors.

³¹ See also Newland, 40 Or L Rev at 308 (cited in note 2).

that most justices during this era hired clerks as “legal assistants,” researching points of law and reviewing certiorari petitions but not assisting with opinion drafting. With the possible exception of petition review, a clerkship with a federal appellate court did not provide the clerks any new skills that they would particularly need at the Court. Interestingly, the justice *most* likely to hire experienced clerks during this era was Justice Frankfurter who, according to the authors, was one of the few justices whose clerks drafted opinions during this time (Peppers, p 143). By contrast, during the tenure of Chief Justice Burger, and certainly by Chief Justice Rehnquist’s tenure, clerks with lower court experience became the norm. Indeed, during the Rehnquist Court, virtually every clerk had some prior clerking experience (Peppers, p 31; Ward and Weiden, pp 77–78). In both books’ views, this shift makes sense in light of the clerks’ changing responsibilities. Beginning with Chief Justice Burger’s tenure, the clerks played a greater role in opinion drafting. With this change in responsibility, lower federal court experience grew in importance: it provided an invaluable training ground for that type of work (Peppers, p 175; Ward and Weiden, p 78).

While both books document this interesting correlation between clerk responsibilities and recruitment trends, they overlook an important feature of the recruitment process: the incentives of the other institutions, such as law schools and feeder judges, that serve as cues in the justices’ hiring decisions.³² If we assume, as Pepper does explicitly and Weiden and Ward do implicitly, that law clerks and justices are self-interested actors, then under this model law schools and feeder judges should behave similarly. Certain law schools and federal court judges will seek to dominate placements of Supreme Court clerks. With respect to schools, placing students at the Court brings several potential benefits, including marketing to prospective students, promoting alumni giving, and enhanced reputation among other schools and the professional community. Thus, it is hardly surprising to find schools engage in a concerted effort to persuade justices to hire their top students. While both books contain examples of schools displaying such behavior (Peppers, p 88; Ward and Weiden, pp 70–71), they fail to recognize that their own rational choice model can account for this behavior.

³² See Christopher Avery, et al, *The Market for Federal Judicial Law Clerks*, 68 U Chi L Rev 793, 875 (2001); Edward S. Adams, *A Market-Based Solution to the Judicial Clerkship Selection Process*, 59 Md L Rev 129, 137 (2000) (discussing the role that feeder judges, grades, and letters of recommendation play in the hiring process).

With respect to lower court judges, placing clerks at the Court reaps at least two benefits. First, it enhances the judge's prestige. Logically, this enhanced prestige increases the likelihood that the best law students will apply to that judge for an appellate clerkship. Second, placing clerks at the Court may help some lower court judges in their efforts to join the Court as justices themselves one day. This is true both because the judge develops a reputation for producing first-rate work and because the judge's clerks, after clerking for the Court, may go on to assume high-level positions in the government, during which they may promote their former boss's candidacy. Here too, both books fail to analyze recruitment patterns in terms of the rational interest calculus of the lower court judges themselves.

In addition to their explanation of recruitment, both books also address issues of retention. In particular, both books explore trends in law clerk tenure (though *Apprentices* merely notes the trends, whereas *Courtiers*, as detailed below, seeks to explain them). One would expect that, as the clerks assumed greater responsibility and consequently in some sense held increasingly interesting jobs, they would have stayed around longer.³³ Yet the data contained in both books convincingly demonstrate precisely the opposite result. During the era where they had relatively little responsibility, law clerks served justices for several years (Peppers, pp 49–70; Ward and Weiden, pp 30–34). As clerks assumed greater responsibility, such as reviewing certiorari petitions or assisting justices with their opinions, they typically served for two years, but not longer (Ward and Weiden, pp 36–45). As the clerks assumed yet more responsibility starting with the Burger Era (drafting opinions, etc.), they almost never stayed for more than a year (Ward and Weiden, pp 46–47) (one exception being when a justice retired, and his or her successor hired experienced clerks to facilitate the transition). Ironically then, as the job arguably became more interesting, clerks stayed for a shorter period of time.

Not only is the result ironic from the perspective of the clerks' interests, it is at first glance also ironic from the perspective of the justices' interests. In general, when a job requires relatively few skills, the learning curve is slight, and employees are easily replaced. By contrast, when a job entails heavy responsibility, the learning curve is steep, and it is in the employer's interest to retain qualified employees once they are trained. Applied in this context, then, one would expect

³³ For a description of the learning curve faced by new clerks, see Perry, *Deciding to Decide* at 77–85 (cited in note 1).

the justices to be less concerned about retaining clerks during the “stenographer” era and more keen to retain them for longer tenures during the “law firm associate” era. Yet again, both books convincingly demonstrate that precisely the opposite pattern occurred.

What then explains the demise of the career law clerk and the ascendance of the single-term-clerk model? Several conventional explanations are possible. One is financial—that clerks earn far less as clerks than they could in the private sector; lured by the prospect of large signing bonuses, high salaries, and prestigious government jobs, the modern-day clerks rationally move into other, higher-paying jobs after a year.³⁴ Another explanation is burnout—the modern-day clerkship is, by many accounts, an extremely demanding year, requiring clerks to work around the clock. After a year, they are prepared to move to another job promising either a superior quality of life or, at least, superior compensation for the demanding hours. Yet another explanation would be a social one—that we live in an increasingly transient society in which individuals change jobs more frequently. A final conventional explanation is topping out the learning curve. According to this explanation, clerks move on because, by the end of a year, they have learned all the key aspects of the job—how to draft a pool memo, a bench memo, and an opinion. While the legal issues may change from year to year, the skill set does not, so the clerk seeks other challenges. All of these explanations might be ones that one would expect from lawyers who focus primarily on the practical considerations.

While *Apprentices* does not really engage this debate, *Courtiers* does so, and its explanation exemplifies the scholarly benefits that come from applying the political scientist’s tools to a legal institution. *Courtiers* explains the emergence of the single-term clerk in terms of principal-agent theory as a type of control mechanism for the justice. In other words, according to Peppers (who himself cites a former clerk cum judge for this point), keeping the clerks around for a single year represents a means by which the justices can “prevent[] law clerks from fully mastering the job and consolidating power” (Peppers, p 207).

This hypothesis certainly deserves further testing. While the evolution of tenure in the Supreme Court law clerk lends some credence to it, countervailing trends in the federal appellate courts arguably undercut it. As with the Supreme Court, federal appellate courts have

³⁴ See, for example, Amy Joyce, *Latham & Watkins Lands 6 Coveted Clerks*, Wash Post D2 (Oct 30, 2006) (describing current signing bonus and salary information for clerks).

confronted an increasing workload in recent years.³⁵ Under the logic of Peppers's thesis, this increased workload should require justices to delegate a greater share of responsibility, including opinion drafting, to their clerks. To minimize the risks of defection, federal appellate clerks should serve only one year. Yet several federal appellate judges have shifted in the opposite direction, opting for at least one and sometimes more permanent clerks.³⁶ This issue presents an opportunity for further research to determine whether trends in the lower federal courts undercut Peppers's thesis or can be squared with it based on the differences in preferences between Supreme Court justices and federal appellate judges.

IV. THE CERTIORARI POOL

On the ground floor of the Supreme Court, beneath the great hall, a small video room plays a brief video about the Court. In the video, then-Justice O'Connor delivered a memorable line that "each petition receives the same individualized consideration." That statement, however noble, is at best irrelevant and at worst wrong; it masks a much more complex situation involving the certiorari pool where the clerks, as an institution, are most important.

In October Term 2005, the Supreme Court received approximately nine thousand petitions.³⁷ If Justice O'Connor's statement were true, this means that if the justices never slept, never met, and never did anything else except review certiorari petitions around the clock, they could dedicate approximately one hour per certiorari petition. Factor in a healthy eight hours of sleep per night, and that raises the ratio to forty minute per petition, again assuming that they did nothing else. If we add in the justices' other basic time commitments (oral argument, weekly conferences during the term, and, say, four hours

³⁵ See, for example, William L. Reynolds and William M. Richman, *Studying Deck Chairs on the Titanic*, 81 Cornell L Rev 1290, 1290 (1996) (explaining that appellate judges are increasingly delegating responsibilities to clerks in order "to cope with a rapidly growing caseload").

³⁶ Some state and federal judges exclusively employ permanent (or "career") law clerks, and others employ a mixture of permanent and one-, two-, or four-year, law clerks. See Online System for Clerkship Review, online at <http://oscar.dcd.uscourts.gov/> (visited Jan 22, 2007). See also Federal Law Clerk Information System, online at <https://lawclerks.ao.uscourts.gov> (visited Jan 22, 2007); Sally J. Kenney, *Puppeteers or Agents? What Lazarus's Closed Chambers Adds to Our Understanding of Law Clerks at the U.S. Supreme Court*, 25 L & Soc Inquiry 185, 190 (2000) (noting that despite experiments in some federal and state courts, most appellate clerks serve two years at most).

³⁷ The Court had 9608 certiorari petitions on its docket during the 2005 term. The Court received 8521 new petitions, and 1087 were carried over from the 2004 term. See *Journal of the Supreme Court of the United States at II* (Oct Term 2005) (cited in note 10).

per day on merits cases when the Court is sitting), that reduces the available time to less than a half hour per petition. In this time, the justice must theoretically read the petition, brief in opposition, reply brief, any amicus briefs, and appendix (including the lower court opinion), plus research the relevant case law and formulate a view on whether a petition is certworthy. Individualized consideration?

The dirty little “secret,” as both books capably document, is that the justices inevitably must rely at least to some extent on their clerks to assist with review of the massive number of petitions for writs of certiorari, not to mention the stay applications and miscellaneous motions filed with the Court throughout the term.³⁸ All justices except Justice Stevens currently participate in the cert pool, in which a clerk from one of the eight participating chambers drafts a memorandum to the entire Conference (Ward and Weiden, pp 125–26). The memorandum summarizes the facts of the case, the lower court’s opinion, and the parties’ arguments. It also analyzes the “certworthiness” of the issues presented by the case and makes a recommendation about how the Court should dispose of the petition. For pending cases, the recommendation is generally “grant,” “deny,” or “hold,” though technically other recommendations are possible. While Justice Stevens does not participate in the pool, he does rely on his clerks to screen the petitions and identify those that, in their view, he might find certworthy (Peppers, p 196; Ward and Weiden, p 126).

On this topic, the analysis in *Courtiers* is deeper, grounded as it is in principal-agent theory.³⁹ While most accounts of the cert pool describe it largely in terms of being a labor-saving device (with the justices spreading responsibility for reviewing the petitions across more clerks),⁴⁰ Peppers sees the pool as a means by which the justices can monitor the clerks’ behavior. Specifically, before the justices decide how to dispose of the petition, clerks in other chambers review the poolwriter’s work (especially when a justice has placed the petition on

³⁸ For a more dated description of the process, see Doris Marie Provine, *Case Selection in the United States Supreme Court 22–26* (Chicago 1980).

³⁹ For a prior effort to use principal-agent theory to explain the clerks’ role in the justices’ certiorari votes, see generally Jan Palmer and Saul Brenner, *The Law Clerks’ Recommendations and the Conference Vote On-the-Merits on the U.S. Supreme Court*, 18 *Just Sys J* 185 (1995–1996).

⁴⁰ For a discussion of the cert pool’s operation, see generally Barbara Palmer, *The “Bermuda Triangle?” The Cert Pool and Its Influence over the Supreme Court’s Agenda*, 18 *Const Comm* 105 (2001) (explaining the cert pool’s organization and assessing its validity). For an account of the cert pool’s creation in the biography of its likely architect, see John C. Jeffries, *Justice Lewis F. Powell, Jr. and the Era of Judicial Balance 270–72* (McMillian 1994) (noting Justice Powell’s inclination to add staff and make various other innovations—such as the cert pool—to increase efficiency in chambers).

the discuss list). The scrutiny given by the other chambers, the account goes, reduces the risks that the author of the pool memo will defect; review by eight⁴¹ other chambers enhances the likelihood that someone will detect the defection. In other words, review of the pool memo by clerks in other chambers keeps the original author “honest.” It is, according to Peppers, just one of many means by which justices (as principals) control defection by the clerks (as agents).⁴²

Both books attempt to show how the creation of the pool has affected the relationship between the justice and the clerk, but sometimes the authors commit errors that are arguably attributable to their reliance on political science methodology and inattentiveness to legal detail. For example, *Apprentices* explains how pool memos are more likely to be encyclopedic, “attempting to incorporate every possible argument in an objective fashion” (Ward and Weiden, p 130). By contrast, in-chambers memos, which are prepared by a clerk for his or her individual justice, tend to be more terse and direct. In the authors’ view, this demonstrates that the cert pool actually increases the justices’ workload instead of reducing it. This is for two reasons. First, the justices may now have to read multipage, sometimes encyclopedic, memos, whereas in earlier generations (where the law clerks acted as “legal assistants”) the clerks often only wrote a single-page pool memo (also known as a “flimsy”). Second, the justices also may have to mark up memos prepared by clerks in other chambers.⁴³

Later on, Ward and Weiden cite another pool memo where the author (a Scalia clerk) recommended that the Court deny the petition, yet Justice Scalia subsequently voted to grant it (Ward and Weiden, p 191). This anecdote, in their view, indicates the limits on clerk influence over the certiorari decisions of their justices.

Both anecdotes suffer from a common misconception that all the clerk’s work is geared toward advancing the interests of his or her individual justice. Sociological research tracing back to Weber illuminates how employees in a single job may operate in several different capacities. When their work requires them to serve the entire institution, they tend to behave in a more bureaucratic fashion, applying standardized criteria to a particular problem. By contrast, when they

⁴¹ Though they do not participate in the certiorari pool, Justice Stevens’s clerks have access to the pool memos.

⁴² Other monitoring mechanisms include the Law Clerk Code of Conduct (which imposes a sanction for unauthorized disclosure) and the creation of the “lead clerk” in certain chambers (who has the responsibility for managing the other clerks) (Peppers, p 201).

⁴³ Perry, *Deciding to Decide* at 51 (cited in note 1).

are working on behalf of a single individual, the employee can behave more flexibly, aligning his work style or product with the particular needs of his principal.⁴⁴ That literature has applications in this context. When writing a pool memo, the clerk is effectively writing for the entire Court, not only for his or her particular justice. Different justices participating in the pool may have different preferences about which issues or arguments are especially compelling (or not). These preferences may not be immediately apparent to the clerk drafting the pool memo. This uncertainty forces the poolwriter to draft the memo taking into account all those justices' interests, not simply those of his or her boss. Thus, greater prolixity almost becomes unavoidable in the pool writing process.

It is also entirely coherent for a justice to vote contrary to the disposition recommended by his own clerk acting as a poolwriter (or, for that matter, for a clerk to recommend personally to his justice a different disposition than he recommended to the Conference). That divergence simply reflects the different capacities in which the clerk is operating. When evaluating the certworthiness of the petition for the entire Court (or at least the justices participating in the pool), the clerk is simply applying those standards set forth in Supreme Court Rule 10.⁴⁵ When evaluating the certworthiness of the petition for his or

⁴⁴ See generally Bryan D. Jones, *Bounded Rationality and Public Policy: Herbert A. Simon and the Decisional Foundation of Collective Choice*, 35 *Policy Sci* 269 (2002) (describing the fundamentals of bounded rationality theory and advancing several avenues for future research). Lee Epstein and Jack Knight provide further examples of how clerks make recommendations to their individual justices based on beliefs about the outcomes that their respective justices would desire. See Epstein and Knight, *The Choices Justices Make* at 80–81 (cited in note 1).

⁴⁵ US S Ct Rule 10 is entitled “Considerations Governing Review on Certiorari.” The rule in its entirety states:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

her own justice, the clerk—as principal-agent theory would predict—should seek to promote the interests of his justice. Those interests may be different from the interests of the Court as an institution and, thus, may justify a different disposition of the petition.

There may, admittedly, be an argument here that the growing role of clerks in the certiorari review process influences how the Court as an institution applies Rule 10. Rule 10 articulates three basic grounds for granting certiorari—a conflict among certain lower courts, an important unresolved question, or an egregious error. The first ground involves minimal value judgment and can be applied rather mechanically. The latter two involve more subjective judgments about “importance” or “egregiousness.” To the extent clerks may be chary about engaging in subjective judgments—whether for reasons of blame avoidance, bureaucratic comfort, or otherwise—this might cause a disproportionate share of the Court’s docket to consist of cases implicating splits and only a few cases involving the other criteria under Rule 10.⁴⁶

In focusing on the extent to which clerks influence their justices’ decisions, the authors overlook an arguably more interesting feature of the certiorari pool—its effect on the clerk’s own recommendation. A stream of political science literature on the behavior of civil servants (who easily can be understood as agents in a principal-agent relationship) suggests that, assuming they are rational actors, they are prone to engage in behavior that minimizes the risk that they will be blamed for something and to reduce their responsibility for the behavior of the institution in which they work.⁴⁷ This school of thought suggests that clerks’ recommendations in the cert pool will reflect these incentives. Specifically, the clerk should be expected to make recommendations that minimize the risk of an embarrassing result (or, more precisely, the risk that the clerk will be *blamed* for such a result).⁴⁸

A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

⁴⁶ See Stras, *The Supreme Court’s Gatekeepers* at 37–44 (cited in note 16) (documenting increased reliance on “objective measures” such as intercircuit conflicts to support grant recommendations); Shapiro, 63 Wash & Lee L Rev at 284–87 (cited in note 21) (describing the cert pool’s structure as contributing to an increase in the percentage of cases granted cert because of a circuit split).

⁴⁷ See, for example, Alan K. Campbell, *The Institution and its Problems*, 42 Pub Admin Rev 305, 307 (1982) (detailing a tendency of civil servants to rely heavily on the trappings of job protection to the detriment of risk taking and innovation).

⁴⁸ One embarrassing result might be that the Court has to dismiss a writ as improvidently granted. See generally Michael E. Solimine and Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 Wis L Rev 1421. See also Shapiro, 63 Wash & Lee L Rev at 285 (cited in note 21):

These results might include: (1) the Court grants certiorari to resolve a question yet, upon closer examination, the case does not present an opportunity to resolve the question, (2) the Court grants certiorari and, upon closer examination, the case presents jurisdictional or other obstacles that preclude its resolution, (3) the Court grants certiorari, yet, upon closer examination, the question is not particularly important (say, an intervening law has rendered the question moot or the agency has rescinded the regulation in question).

To avoid these results, a self-interested clerk might do two things. First, she might recommend that the Court deny the petition.⁴⁹ The Supreme Court has repeatedly made clear that its decision to deny certiorari has no precedential effect and should not be understood as an implicit approval of the decision below.⁵⁰ With this doctrinal understanding, a clerk can safely recommend “deny,” and, if that recommendation is erroneous, the worst consequence for the Court as an institution is that it must await another petition presenting precisely the same question. Even if the Court overrode that recommendation and granted the petition, the clerk suffers less embarrassment, for then the decision to invest resources lies with the Court, not the clerk; at most, the justices might in the future be more skeptical of future “deny” recommendations by this clerk in close cases.

It is worth noting that the avenue of denial was not always available to the clerk. In earlier decades, a greater portion of the docket consisted of writs of error and appeal, where the Court *had* to dispose of the case on the merits (even if it was dismissing the petition for want of a substantial federal question).⁵¹ In that state of affairs, an erroneous disposition (for example, summarily affirming a case as opposed to denying a certiorari petition) could sow great confusion. Litigants would then seize on the summary affirmance as an approval of the merits of the decision below, which could spawn substantial litiga-

Law clerks are generally very stingy with their grant recommendations, in part out of a desire to preserve their credibility and political capital with the Justices and other law clerks. Most law clerks review petitions for certiorari with a presumption against granting coupled with a kind of checklist of reasons *not* to grant.

⁴⁹ On the frequency of clerk denial recommendations during four terms, see Stras, *The Supreme Court's Gatekeepers* at 50–51 (cited in note 16).

⁵⁰ See, for example, *Teague v Lane*, 489 US 288, 296 (1989) (“As we have often stated, the ‘denial of a writ of certiorari imports no expression of opinion upon the merits of the case.’”), quoting *United States v Carver*, 260 US 482, 490 (1923).

⁵¹ See Stern, et al, *Supreme Court Practice* at 135–36, n 15–16 (cited in note 21) (discussing the history of writs of error).

tion over the meaning of the Supreme Court's cryptic action.⁵² The combined upshot of the certiorari docket and the behavior of the blame-avoiding clerk, therefore, would be a high number of recommendations to deny the petition, and clerks would rarely recommend that the Court grant the petition for fear of the institutional embarrassment to the Court (and personal embarrassment to the clerk) of an erroneous recommendation.

The second strategy available to the clerk is to recommend that the Court hold the petition. A "hold" means, at bottom, that the Court should not act on the petition until some future event. The lion's share of hold recommendations come when a petition is filed that presents the same question (or a similar question) as another case that the Court has already set for argument.⁵³ A hold is an easy recommendation for the clerk. For one thing, it may defer action on the petition until after the clerk's departure. Even if it does not, it often will transfer responsibility for acting on the petition to someone else. When a petition is held for a case pending on the merits docket, the Clerk's Office will only release the petition for consideration after the Court decides the pending case. At this point, though, the petition is not returned to the clerk who originally wrote the pool memo. Instead, it is transferred to the chambers of the justice who authored the majority (or plurality) opinion. That chamber, rather than the poolwriter, must then draft a memo to the Conference recommending how to dispose of the petitions that have been held for the pending case. Thus, if the blame-avoidance theory is valid, one would expect to see a rise in the number of hold recommendations.

Unfortunately, neither book attempts to test these propositions, even though both hypotheses, if valid, would fit quite nicely into the "new institutionalism" school. To an extent, one cannot fault the authors, for the Court does not release pool memos as a matter of public

⁵² International civil litigation provides an example. In *Hilton v Guyot*, 159 US 113, 163–65 (1895), the Supreme Court announced certain standards for the enforcement of foreign judgments. Following *Hilton*, questions lingered over whether federal common law or state law determined those standards. Approximately twenty years later, the Supreme Court dismissed for want of a substantial federal question a state court case involving the enforcement of a foreign judgment. See *Aetna Life Insurance Co v Tremblay*, 223 US 185, 190 (1912). Many inferred from this dismissal that the Court believed the enforcement of foreign judgments was primarily a matter of state law. Had *Tremblay* come to the Court on a writ of certiorari—rather than on a mandatory writ—no one would have drawn the same inference from the Court's simple denial of the certiorari petition.

⁵³ In far smaller numbers, hold recommendations are possible in other circumstances. For example, a clerk might recommend a hold so that the Court could await another petition presenting similar issues, enabling it to consider the two petitions simultaneously.

record (Ward and Weiden, p 247). Nonetheless, at least with respect to the question of holds, the data are available. Usually one to two weeks following the release of an opinion, the Court disposes of the petitions that had been held pending the opinion's release. In some instances, it would be instantly evident which petitions had been held—they typically are ones “granted, vacated, and remanded in light of [the decision].” But this will not fully capture the universe of held petitions—sometimes the petitions are denied, either because the lower court's opinion was correct based on the Court's disposition of the case on the merits docket or because the Court's disposition does not affect the premises underpinning the lower court's opinion in the other case. Occasionally a petition that has been held may be granted, typically because it presents an independently certworthy issue that the Court's opinion does not resolve. Despite the difficulties, all of the data are traceable through the public record and, depending on the results, could provide further evidence about the symbiotic effect of clerks and the certiorari pool on the operation of the Court as an institution. Further research is needed here.

A second set of interesting questions overlooked by the authors concerns the implications of the cert pool model for other activities at the Court. By the “cert pool model,” I mean the assignment of an initial filing to a particular chamber, followed by a memorandum to the Conference prepared by the chamber (and presumably reviewed by the other eight chambers before the Conference at which the matter is discussed). Neither book attempts to investigate the institutional interplay between the role of clerks and different activities of the Court. Capital cases provide a good example. In those cases, the Court often receives the filings days, and sometimes even hours, before the execution is scheduled to take place. The justices do not enjoy the luxury of considered reflection before they act on the application. Consequently, the need to rely on clerk recommendations is at its height, and the “checking” function performed by clerks in other chambers is dramatically limited by the urgency of the situation. Thus, applications in death penalty cases present a prime opportunity for the “clerk network” (Ward and Weiden, pp 159–70) to influence the information flow and the ultimate decision by the institution.⁵⁴

⁵⁴ For one anecdote illustrating the clerks' influence in a death penalty case, see Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* 166–67 (Times Books 2005) (describing the path to the stay of the execution of Willie Darden, which involved a sixteen-page memorandum from a Blackmun clerk).

Capital cases also provide an interesting case study in the process of assigning certiorari petitions and other filings. Most death penalty appeals include both a certiorari petition and a stay application. Whereas certiorari petitions generally are allocated randomly across chambers, stay applications are not. By rule, stay applications are directed to the justice who is responsible for the particular circuit from which the case originates.⁵⁵ Given the differences among justices' ideologies, this rule—in theory—could have a significant effect on how the application is handled. With respect to the clerks, if one accepts the authors' premises that certain factors (whether ideological convergence or relationship with feeder judges) influence each justice's clerk recruitment behavior, then clerks likewise could have a powerful effect on how a stay application is resolved. Neither book adequately explores these issues.

Nor do the books adequately account for why the justices are willing to pool the clerks in some matters but not others. In principle, the notion of pooling resources need not be limited to review of certiorari memos or applications. Theoretically, they could also pool their clerks for the preparation of bench memos, but they decline to do so. This may be attributable to the fact that justices have different preferences about how they like to prepare for cases (as *Courtiers* demonstrates, preferences run the gamut from justices who generally do not require the preparation of bench memos to those who require their clerks to prepare encyclopedic memos considering the case from every angle (Peppers, pp 190–200)). Yet, even here, the Court might utilize its resources more efficiently. For example, a single clerk might prepare a memo to the entire Court summarizing the facts, the decisions below, and the parties' and amici's primary arguments. Theoretically, this information should be the same across chambers and cases. To take the matter one step further, a bench memo to the Conference might also provide a synopsis of the existing doctrine on the subject.

Given the theoretical possibility of such collaboration, why then do the justices appear to draw the line at the merits docket in terms of formal interchambers collaboration? Perhaps it is because it would simply be too difficult to prepare a single memo adequately addressing each justice's preferences for facts and doctrinal emphasis (for

⁵⁵ See US S Ct Rule 22.3. See also Stern, et al, *Supreme Court Practice* at 748–50 (cited in note 21) (discussing applications to individual justices); 28 USC § 42 (2000) (“The Chief Justice of the United States and the associate justices of the Supreme Court shall from time to time be allotted as circuit justices among the circuits by order of the Supreme Court.”). An interesting question warranting further research is the decision about how “circuit justice” assignments are made.

example, some justices might want to know legislative history, while textualists might not care about it). If that is the explanation, both books fail to provide it (much less prove it), leaving the reader wondering why collaboration occurs in some areas and not others.

V. WORK ON THE MERITS DOCKET

Apart from their work in the cert pool, the law clerks' other primary role is to help the justices resolve cases on the Court's argument docket. *Courtiers* explains how the nature of this assistance has evolved over time. At the beginning of the twentieth century (during the "stenographer" era), clerks played a limited role (with a few exceptions, such as those who clerked for Justice Brandeis). Clerks informally discussed cases with the justices and citechecked their opinions (Ward and Weiden, pp 35–36). During the middle of the century (the "legal assistant" era), the average clerk's responsibilities on merits cases grew. Most clerks would edit their justice's first drafts of opinions, and a few would prepare bench memos or even draft an occasional opinion (Ward and Weiden, pp 36–45). Beginning with the Warren Court and certainly by the Burger Court (the "law firm associate" era), all clerks were editing their justice's opinions, and most were drafting bench memos and opinions, too (Ward and Weiden, p 45–48). To Court observers, this is familiar terrain, which *Courtiers* simply systematizes.

Both books plow new ground, however, and three observations on the role of clerks in the merits docket bear closer consideration here: (1) their discussion about how the growth in clerk responsibilities has affected the Court's output, (2) their discussion about how the evolution in the clerk's role has affected the Court's decisionmaking process, and (3) their suggestion that the clerk's role evolves over the course of a justice's tenure.

Both books offer a rather compelling account of how the growth in clerks' responsibilities has affected the Court's output. Prior research documented how, in recent decades, the number of separate opinions (that is, concurrences and dissents) produced by the Court had risen (Ward and Weiden, p 233).⁵⁶ Both books explain how the new institutionalism can account for this phenomenon. The creation of the cert pool, the use of the dead list, and the growth in the number of clerks relieved individual clerks of the crushing burden of reviewing certiorari petitions. This freed up clerks to dedicate more time to as-

⁵⁶ See also Best, *Law Clerks* at 127 (cited in note 16) (providing a table showing the average number of opinions per case disposed of from 1935–1995).

sisting their justices with the preparation of opinions. As clerks had more time to work on opinions, the justices could produce more of them. This arguably hampered the Court's ability to achieve a consensus in cases.⁵⁷ Whereas justices previously might have had to join an opinion simply because they lacked the human resources to produce separate writings, now the reduction in their clerks' certiorari burdens enabled the justices to write more frequently.

While compelling, this conclusion is incomplete in two respects. One gap is that neither book accounts for why the justices chose to take fewer cases.⁵⁸ The expanded use of the writ of certiorari certainly *enabled* this outcome but did not *necessitate* it. Even after a greater number of appeals shifted to the Court's certiorari docket, the Court could have continued to take 150–250 cases simply by granting more writs of certiorari.⁵⁹ Had it done so, there might not have been the rise in separate opinions.⁶⁰ While Court observers have articulated various theories to explain the decline in the number of merits cases, the books do not engage this debate. Their failure to acknowledge—much less explain—this contributing cause is a weakness in their account.

The other gap is that neither book adequately accounts for the behavior of Justice Stevens's chambers. As noted above, Justice Stevens does not participate in the cert pool. Under the logic of the books' arguments, one would expect, therefore, that his clerks would bear a greater responsibility for reviewing certiorari petitions relative to clerks in other chambers—an expectation that Peppers's research verifies (Peppers, p 196). These relatively greater demands, so the theory goes, should be expected to cut into the time available for clerks in the Stevens chambers to assist in the preparation of opinions. Accordingly, under the new institutionalism account, one would expect the Stevens chambers to produce fewer separate opinions than other chambers (Peppers, p 195).

Yet ironically, the data point in precisely the opposite direction. In recent years, Justice Stevens has been among the most productive,

⁵⁷ See *id.* at 13–14.

⁵⁸ Both the decline in the number of cases on the Court's argument calendar and the difficulties in achieving consensus were explored during the recent confirmation hearings of Chief Justice Roberts. See Peter B. Rutledge, *Looking Ahead: October Term 2006*, 2006 *Cato S Ct Rev* 361, 362–63.

⁵⁹ For a recent discussion of the contraction in the Court's docket, its causes, and its effects, see generally Shapiro, 63 *Wash & Lee L Rev* 271 (cited in note 21).

⁶⁰ See Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 *S Ct Rev* 403, 432–38 (implying that the drop in number of cases disposed of led to the increase in separate opinions).

both in terms of the number of separate opinions and in terms of the number of pages authored.⁶¹ Neither book offers a clear account for this counterintuitive outcome, though they contain some findings (made in other contexts) that suggest a few explanations. *Apprentices* notes that Justice Stevens's clerks do not review all the petitions (Ward and Weiden, p 126). Among those that they do review, they may not review them in the same depth as pool clerks; generally, they do not prepare written memoranda (Ward and Weiden, p 126). A second explanation, suggested by *Courtiers*, is that Justice Stevens relieves his clerks of other responsibilities—not requiring bench memos and sometimes writing his own first drafts of opinions (Peppers, p 196). A third explanation, not adequately explored by either book, is that the Stevens clerks could essentially free ride on the cert pool. The Stevens clerks have access to the pool memos. Due to the lag between the pool memo deadline and the Conference, the Stevens clerks could use those memos as a type of cue to determine which petitions warrant closest scrutiny. Whether some combination of these explanations or others accounts for the productivity of the Stevens chambers, the books' accounts about the influence of clerks' responsibilities on institutional outcomes do not adequately explain this phenomenon.

Apart from their analysis of the clerk's impact on the Court's output, both books also posit that the change in clerk responsibilities has influenced the nature of the decisionmaking process. Here, Peppers's use of principal-agent theory is especially insightful. Several judges have attested to the occasional phenomenon where an opinion “just won't write.”⁶² When this happens, the judge may reconsider his initial vote, thereby potentially changing the result in the case. The act of personally writing the opinion forces the judge to think through the implications of the decision in a very profound way.

Contrast that model of writing with one where the clerk is taking the primary responsibility for the first draft of the opinion. Peppers's principal-agent theory suggests that the clerk, unlike the judge, might be less willing to come to the conclusion that an opinion will not write. To do so would be to admit failure and, effectively, an inability to discharge the clerk's duties as agent committed to advancing the princi-

⁶¹ See Christopher E. Smith, *The Roles of Justice John Paul Stevens in Criminal Justice Cases*, 39 Suffolk U L Rev 719, 725 n 54 (2006) (quoting a source claiming that Stevens “wrote a large number of concurring and dissenting opinions, authoring more of these than any of colleagues [sic] in each of the Court's last six terms”).

⁶² See J. Daniel Mahoney, *Law Clerks: For Better Or For Worse?*, 54 Brooklyn L Rev 321, 339 (1988) (asserting that the initial drafter of a document has a significant effect on its final character), citing Richard A. Posner, *The Federal Courts: Crisis and Reform* 106–07 (Harvard 1985).

pal's interest. Thus, the clerk will slog through the case, despite the potentially incorrect result or incoherent reasoning, rather than admit defeat to his boss. The effect of this is to give the justice greater confidence that an opinion can successfully be written in a hard case or, more controversially, to relieve the justice of the responsibility to write out his view in order to persuade himself of its correctness.

Whether this is an acceptable outcome depends, at bottom, on a normative question: what is the essence of the justice's role? Though neither book systematically explores the answer to that question, both offer anecdotes from different justices that provide two different answers. One, appearing in *Apprentices*, comes from Chief Justice Rehnquist:

[T]he clerks do the first draft of almost all cases to which I have been assigned to write the Court's opinion. When the caseload is heavy, [I] help by doing the first draft of a case myself. [This] practice . . . may undoubtedly . . . cause raised eyebrows. I think the practice is entirely proper: The Justice must retain for himself control not merely of the outcome of the case, but of the explanation of the outcome, *and I do not believe this practice sacrifices either* (Ward and Weiden, p 224) (emphasis added).⁶³

The other, appearing in *Courtiers*, concerns Justice Stevens:

Stevens always prepares the first draft of an opinion. When asked why he does not delegate this duty, Stevens initially replied that "I'm the one hired to do the job." When pressed to explain further, Stevens stated that the process of becoming educated about the factual and legal issues involved in a case does not end in oral argument—Stevens continues to learn about the case as he drafts his opinions, honing his interpretation of the applicable legal theories and *even reevaluating his ultimate position on a case* (Peppers, p 195) (emphasis added).⁶⁴

⁶³ Quoting Bernard Schwartz, *Decision: How the Supreme Court Decides Cases* 52 (Oxford 1996).

⁶⁴ Interestingly, the justice for whom Stevens clerked, Wiley Rutledge, embraced a similar philosophy. See John M. Ferren, *Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge* 341 (North Carolina 2004) ("He was seen as a 'scholar' exploring every angle, remaining undecided until he worked the problem through in writing *and could convince himself finally, by reading the analysis, what the best result was*. . . . [I]f a 'hunch' controlled the tough decision, the written elaboration *had to convince*.") (emphasis added). Justice Stevens was not the only clerk-turned-justice who emulated his former boss's management style. Justice White (a Vinson clerk) adopted Justice Vinson's approach to opinion drafting (Peppers, p 164) ("From the start, White's law clerks assisted in the opinion-writing process—as did White himself when clerking for Chief Justice Vinson."). Chief Justice Rehnquist (a Jackson clerk) adopted his jus-

The two passages illustrate very different conceptions of judging. Chief Justice Rehnquist believed that judging consisted primarily of decision and the articulation of the supporting reasoning—the act of writing was not essential. Justice Stevens draws the line differently, including within the essence of the act the articulation of the views in written form, implicitly disagreeing with Chief Justice Rehnquist’s notion that this portion of the act is not especially essential to discharge of the judicial duty.

This review does not attempt to resolve the question which of these two approaches is preferable (arguably the Rehnquist model is more efficient, whereas the Stevens model preserves a larger role for the justice).⁶⁵ Rather, it merely seeks to show that the choice of approach by a particular justice has implications both for the consequent role played by the clerks and, critically, for the content of the ultimate decision.

Finally, in addition to their analyses about the Court’s output and decisionmaking process, both books suggest that, even with respect to a particular justice, the clerk’s role is not static but can evolve over the course of the justice’s tenure on the Court. Some justices, such as Chief Justice Vinson, fully involved their clerks in the opinion drafting process from the outset, “delegating” (in Ward and Weiden’s terms) full responsibility for opinion drafting (Ward and Weiden, p 214).⁶⁶ By contrast, other justices initially retain much of the opinion writing responsibility but then delegate it as circumstances change, such their health status. For example, *Courtiers* describes the evolution of the role played by Justice Harlan’s clerks. During his first term on the Court, Justice Harlan drafted many of his own opinions, involving his clerks in opinion drafting only later in the term (Peppers, p 153). As his health, particularly his eyesight, worsened, Justice Harlan increasingly relied on his clerks to review cases prior to oral argument, read relevant precedent to him, and review his tough-to-decipher changes to his draft opinions (Peppers, p 154). Both *Courtiers* and *Apprentices* describe a similar evolution in Justice Black’s chambers. Early in his

tice’s approach to clerk recruitment (casting a broad net) and preparation for cases (generally no bench memos) (Peppers, pp 27, 125–29, 192–95). Neither book successfully obtained much information about Justice Breyer and, consequently, could not judge whether he followed the approach of his former boss, Justice Goldberg.

⁶⁵ For one critique of a model under which judges depend on their staffs, see generally Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U Pa L Rev 777 (1981) (arguing that the quality of the judicial process depends on the quality of the individuals administering it).

⁶⁶ See also Ferren, *Salt of the Earth* at 326 (cited in note 64) (“Vinson, like Murphy, relied on his clerks to write the opinions, subject only to occasional revisions at his request.”).

tenure, Justice Black drafted many of his own opinions but, by the 1960s, had delegated an increasing share of the responsibility for writing first drafts to his clerks (Peppers, p 121; Ward and Weiden, p 212).

Whereas these anecdotes suggest that the justices increasingly rely on their clerks over time, other examples suggest the opposite trend. According to one former clerk of Justice Douglas:

As the years passed, argument with him on fundamental legal issues became more difficult. When a judge has been on a court long enough to cite himself and—as in Douglas' case—to see many of his dissents become majority opinions, the likelihood that a law clerk will persuade him to alter any of his basic views is remote.⁶⁷

Such anecdotes suggest that the longer a justice has served on the Court, the more settled his or her views may be.

These examples hint at certain trends in the collaboration between justice and clerk (Ward and Weiden, pp 212–14). Under one model, the new justice (such as Chief Justice Vinson) arrives and instantly delegates substantial responsibility to the new clerk. Under a second model, the new justice (such as Justice Harlan) arrives, handles much of the work himself but, as his health declines, delegates an increasing share to the clerk.⁶⁸ Under a third model, a new justice (such as Justice Douglas) arrives, cements his views on a variety of matters and then has less need to rely on clerks to complete his work.

While *Apprentices* articulates a typology for thinking about these different relationships between clerks and justices, *Courtiers* probes more deeply into the details of particular justices' relationships with their clerks and tracks them over time. *Courtiers* hints, but does not quite claim, that the evolution is attributable to the justice's age and

⁶⁷ David Ginsburg, *Reflections of Justice Douglas' First Law Clerk*, 93 Harv L Rev 1403, 1405 (1980).

⁶⁸ This model, if valid, would have implications for a current debate over the possibility of appointing additional justices when current ones reach a certain age. See Paul D. Carrington and Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, in Roger C. Cramton and Paul D. Carrington, eds, *Reforming the Court: Term Limits for Supreme Court Justices* 467, 469–70 (Carolina Academic 2006) (arguing for a departure from life tenure for federal judges because, among other reasons, judges' support staffs enable them to work into senility); James E. DiTullio and John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 Va L Rev 1093, 1096–97 (2004) (suggesting the implementation of eighteen-year terms through constitutional amendment); Sanford Levinson, *Contempt of Court: The Most Important "Contemporary Challenge to Judging,"* 49 Wash & Lee L Rev 339, 341 (1992) (proposing a single eighteen-year term).

health—younger justices have the energy to complete the tasks themselves, whereas older ones increasingly require the assistance of their clerks. While age and health may be two determinants, the anecdotes in *Courtiers* suggest another possible determinant for the clerk's role: the justice's professional experience and stage in his or her career. Thus, for example, justices with extensive experience in government or prior experience judging may already have well-formed views on many of the issues before the Court (Peppers, p 115). By contrast, new justices with less experience in the government or the federal judiciary may rely more heavily on their clerks' input as to questions of law with which they are unfamiliar. For example, *Courtiers* gives the example of a memorandum from Justice Powell to the Chief Justice shortly after assuming office (Peppers, p 185). In it, Justice Powell requests the assistance of an additional clerk and bases this request partly on the fact that he needs their assistance on matters of criminal and constitutional law. The implication is that Justice Powell, despite a thirty-year distinguished career as a commercial lawyer, had little experience in these areas that formed an important part of the Court's docket.

Having addressed many of the books' arguments in terms of clerk recruitment and responsibilities, the review now turns to the policy debates over the future of the Court and, specifically, clerks—debates that the books inform but, with little exception, do not really engage.

VI. PRESCRIPTIONS

Despite their extensive research and analysis, both books dedicate remarkably little space to the question of what policy prescriptions flow from their analyses. This gap is curious: both books extensively review the history of some of the proposals for reforming the clerkship institution at the Court. In 1958, amid fears that a liberal cadre of clerks was effectively "running" the Court, Senator John Stennis of Mississippi took to the Senate floor and argued that the Senate should consider subjecting clerks to Senate confirmation (a proposal that went nowhere).⁶⁹ In the 1970s, the government considered (but ultimately rejected) a National Court of Appeals. Such a court could have reduced the Supreme Court's workload (and, consequently, the need for clerks at least at the Court) by relieving it of the

⁶⁹ 85th Cong, 2d Sess, 104 Cong Rec S 8107–08 (May 6, 1958) (Sen Stennis) (suggesting an inquiry into the activities of Supreme Court clerks).

need to resolve splits among the lower courts.⁷⁰ Quite recently, Stuart Taylor and Benjamin Wittes proposed eliminating law clerks (a proposal that Justice Douglas once suggested his colleagues try as an experiment for a year; like Senator Stennis's proposal, it went nowhere).⁷¹

Both books contribute little to this ongoing debate. Peppers's book is bereft of any recommendations. Ward and Weiden make one "modest proposal": the Court should increase disclosure about its internal operations. One way of doing so would be to disclose pool memos after it denies certiorari (Ward and Weiden, p 247).⁷² While their modest proposal is intriguing, the authors elsewhere confess that such incremental reforms would not result in comprehensive change at the Court. At one point, the authors lament that "[a]bsent any fundamental reform on the part of the justices, the only way the Court will be able to deal with continually rising dockets will be to do as they have done in the past: add more clerks and expand the cert pool" (Ward and Weiden, p 149).

If one accepts that the institution of clerks at the Court is in need of reform (and one walks away from both books not quite convinced that it is), then the options are not limited to a bifurcated choice between "modest proposals" and "fundamental reform." A menu of intermediate policy options is available. One obvious option would be to create a team of permanent clerks at the Court who do not turn over annually. These permanent clerks would perform some functions currently allocated to the term clerks (who used to be referred to as "elbow clerks"). One responsibility might be drafting pool memos. Another might be reviewing simple applications such as applications for extensions of time. Perhaps, more controversially, they might draft memoranda to the conference in applications to stay executions. Two

⁷⁰ See Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change* 16–19 (GPO 1975) ("The need for additional appellate capacity to maintain the national law is most starkly manifested by the existence of unresolved conflicts between different courts of appeals."). But see William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U Chi L Rev 473, 474 (1973) (arguing that the National Court of Appeals proposal is "fundamentally unnecessary and ill-advised").

⁷¹ Taylor and Wittes, *Atlantic Monthly* at 50 (cited in note 8) ("We have a modest proposal: let's fire [the justices'] clerks."). See also Dahlia Lithwick, *Once is Enough*, *The American Lawyer* on the Web (2006), online at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?hubtype=Inside&id=1159434325368> (visited Jan 22, 2007) (arguing that clerks should be limited to one clerkship for one judge for one year); William O. Douglas, *The Court Years, 1939–1975: The Autobiography of William O. Douglas* 172 (Random House 1980) ("'For one year,' I pleaded, 'why don't we experiment with doing our own work? You all might like it for a change.'").

⁷² At one point, they also suggest that the justices consider prohibiting "case swapping" by clerks but do not defend this proposal in any depth (Ward and Weiden, p 248).

features unify these functions: (1) in each case the clerk is serving the institution as opposed to a particular justice; and (2) they are all ones where the Court might benefit from the institutional expertise that comes with professional bureaucracies.⁷³

Another option would be to require counsel to certify, on penalty of sanction, that the petition satisfies the standards set forth in Rule 10, particularly that the petition does not merely seek error correction of the lower court's decision. Many appellate courts require such a certification before counsel may file an en banc rehearing petition. The standards for such a petition, in some respects, resemble those of Rule 10.⁷⁴

While the permanent clerks would assume some of these duties, the justices would retain a reduced number of term clerks. Depending on the individual justice's work habits, the term clerks' tasks might include annotating the pool memos drafted by the permanent clerks, drafting bench memos in merits cases, and assisting the justice with the drafting of opinions. Two features unify these functions: (1) they all are designed to serve the particular justice, as opposed to the Court as an institution; and (2) they are ones where the benefits of professional bureaucracies are less salient (though certainly present).

Such a proposal flows naturally from some of the principles developed in *Apprentices* and *Courtiers*. For one thing, it addresses some of the supposed recruitment issues identified in both books—justices could continue to recruit from “feeder judges” and “feeder schools” for their own clerks, but they would serve more limited functions at the Court. Additionally, it would reduce (though not eliminate) the risks of bias in the certiorari pool identified in both books. It would reduce the risk of bias because there could be no claim that a clerk in a particular chambers was shaping the pool memo to advance his or her own personal agenda.⁷⁵ It might also affect the allocation of responsibilities within individual chambers. If a reduction in the number

⁷³ See generally Max Weber, *Economy and Society: An Outline of Interpretive Sociology* 973–74, 993–94 (California 1978) (Guenther Roth and Claus Wittich, eds, and Ephraim Fischhoff, et al, trans).

⁷⁴ See, for example, FRAP 35(b) (setting forth the procedure for petitioning for a rehearing en banc); Local Rules of the Court of Appeals for the Federal Circuit 35(b)(2) (requiring that a petition for a rehearing en banc state that the petitioner believes either that the panel decision was contrary to a Supreme Court decision or that the issue is exceptionally important). I am grateful to Barney Ford for this insight.

⁷⁵ It might not eliminate the risk of bias entirely, though, because the cadre of permanent clerks might have their own agendas that they could perpetuate through their certiorari recommendations. The Court could counteract this risk of defection by having the term clerks annotate the permanent clerks' memos to the Conference on certiorari petitions.

of “private clerks” accompanied the creation of a cadre of permanent clerks, the justices might play a greater role in opinion drafting. There might also be greater harmony in the Court’s opinions if a reduction in the number of clerks led to a reduction in the number of separate opinions, a result suggested by some political science research in this area.⁷⁶

The infrastructure is already partly in place for such a reform. Both books basically overlook the fact that the Court already has a mature and well-functioning Clerk’s Office under the able administration of Major General William K. Suter, former head of the Army’s Judge Advocate General Corps.⁷⁷ At present, the Clerk’s Office performs some initial review of the petitions when they are filed. It also employs several deputy clerks. In addition to the deputy clerks responsible for the death penalty docket discussed above, others are responsible for the paid petitions and the *in forma pauperis* petitions. Thus, the infrastructure at the Court is already fairly well developed to expand the operations of this office to support the above-described cadre of permanent clerks.

Moreover, the actions of other courts have created ample precedent for such reforms.⁷⁸ Many of the lower federal courts of appeal have large clerks’ offices. Lawyers in these offices serve extended terms and perform a variety of substantive tasks not unlike those that permanent clerks could perform at the Supreme Court. These tasks include screening cases to determine which ones warrant the circuit court’s close attention. Not unlike a poolwriter, these clerks then draft recommended dispositions to a panel of appellate judges. The recommendation may be that the case should be put down for oral argument (where the case presents an unresolved question of circuit law). Alternatively, the recommendation may consist of an actual draft unpublished *per curiam* opinion resolving the case on the basis of existing circuit precedent.

Other courts suggest alternative models. The Court of Appeals for the Armed Forces (CAAF) provides a good example. CAAF is the highest appellate court in the military justice system and, like the Supreme Court, generally provides for discretionary review of most (but

⁷⁶ See Best, *Law Clerks* at 123–41 (cited in note 16) (discussing the relationship between opinion production, the number of clerks, and the court personnel).

⁷⁷ For a good overview of the history and structure of the Clerk’s Office, see Kermit L. Hall, James W. Ely, Jr., and Joel B. Grossman, eds, *The Oxford Companion to the Supreme Court of the United States*, 184–85 (2d ed 2005).

⁷⁸ See, for example, Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 SC L Rev 235, 242 (1998).

not all) cases. A central legal staff, consisting of a mix of experienced and new attorneys, reviews the petitions and the underlying record in the case. The attorney on the central legal staff drafts a memorandum to the entire Court recommending whether to grant or deny the petition, or, alternatively, to dispose of it summarily. The Chief Deputy Clerk who oversees the legal staff reviews this recommendation and can require additional work by the staff attorney or forward the memorandum with his own recommendation. All of the judges on the Court then review the staff attorney's and the Chief Deputy Clerk's recommendation. The judges may perform this review themselves or delegate the task to their clerks. The judge's own clerks consist of a mix of permanent clerks (with substantial experience) and term clerks (immediately or recently out of law school).⁷⁹ The CAAF model suggests several innovations for the Supreme Court's own management style. First, the CAAF model relies on a central staff, decoupled from an individual judge's chambers, to review the petition. Second, the CAAF model relies on a mix of new attorneys who bring a fresh perspective and experienced attorneys (the Deputy Clerk) who bring the years of experience to analyzing a given legal problem. Third, the individual CAAF judges themselves rely on a mix of new attorneys and experienced attorneys in their own work, thereby also harnessing the benefits of both types of personnel.

To be sure, the proposal is not without problems. Most centrally, the proposal displaces, rather than solves, the principal-agent problem identified by Peppers. Risks of defection by permanent clerks would replace the risks of defection by term clerks. Additionally, the creation of a permanent class of clerks would arguably worsen the "capture" problem identified above in the discussion of retention and the rise of the single-year clerk. Furthermore, quality might suffer. As both books explain, one of the allures of a clerkship at the Court is the promise of downstream financial benefits or professional opportunities. The promise of deferred gratification enables the Court to recruit some highly qualified law school graduates who otherwise might immediately pursue more lucrative careers in the private sector. A permanent

⁷⁹ Letter from the Clerk's Office of the Court of Appeals of the Armed Forces to Peter Rutledge (on file with author). For discussions of other judicial management models, involving for example the use of central staff and permanent clerks, see John Bilyeu Oakley and Robert S. Thompson, *Law Clerks and the Judicial Process: Perceptions of the Qualities and Functions of Law Clerks in American Courts* (California 1980); John Bilyeu Oakley and Robert S. Thompson, *Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges*, 67 Cal L Rev 1286, 1291-95 (1979) (describing the use of a "central staff" in combination with law students serving as "quasi-clerks").

clerkship, focused on the more long-term institutional aspects of the job, might not have the same professional promise, consequently discouraging the most highly qualified applicants.

My point is not that this proposal is a cure-all. Rather, it is simply to demonstrate that both books' analyses naturally lead to a consideration of such prescriptions, yet neither does an adequate job of addressing them (or proposing an alternative solution). Despite this failing, both clearly provide policymakers with a rich source of data and analysis to guide the ongoing debate over the role of the clerk and the need for reform.

VII. CONCLUSION

Both *Courtiers* and *Apprentices* make a significant contribution to an understanding of the Court, for the political scientist and the lawyer alike. For the political scientist, the authors have amassed an impressive array of historical material and, through their surveys (particularly in *Apprentices*), supplied some original data. While the low response rates require one to treat the data cautiously, the authors' preliminary findings suggest some important new directions for research on the Court. Their treatment of the issues through new institutionalism and principal-agent theory (particularly in *Courtiers*) sheds important light on how changes at the Court, such as the creation of the cert pool and the dead list, have influenced both the recruitment of clerks and their responsibilities. The books demonstrate persuasively how those changes in the clerks' role subsequently and reciprocally influence the Court's operations.

For the lawyer, the books' primary value comes in how they shape the broader prescriptive debate over the proper role of law clerks at the Court. Both books do a reasonably good job of debunking the myth, propagated in books like *The Brethren*⁸⁰ and *Closed Chambers*,⁸¹ that the Court is secretly run by some unaccountable "clerkocracy," sworn like members of some secret society never to reveal the power they wield (Ward and Weiden, pp 196–97).⁸² At the same time,

⁸⁰ See generally Woodward and Armstrong, *The Brethren* (cited in note 6).

⁸¹ See generally Lazarus, *Closed Chambers* (cited in note 3).

⁸² At times, Ward and Weiden almost seem to resist these findings. At one point they allege that "[c]lerks do have influence at the Court and [] their influence is increasing" (Ward and Weiden, p 199). In the same paragraph, though, they also concede that "the data show that most of the time, clerks are *not* able to change their justices' minds about cases or issues" (emphasis added).

Admittedly, the authors have unearthed some documents, primarily consisting of correspondence between Justice Blackmun and his clerks, that paint a rather unflattering portrait of how some of those clerks treated the other justices quite disrespectfully (Ward and Weiden, pp 182–

they do fortify claims that clerks play a greater role in the institution's operations than at the beginning of the twentieth century. Perhaps this shift was likely in light of the Court's growing docket and unchanged number of justices over the last century. Yet, as the experiences in lower courts demonstrate, it was neither inevitable nor permanent. A variety of reforms, ranging from resuscitation of the National Court of Appeals debate to creation of a cadre of permanent clerks within the Office of the Clerk supply alternative models.

As a closing note, it is worth considering how the books also can inform the debate over the role of clerks at other courts. Like the Supreme Court, lower courts—both at the federal and state level—have confronted rising caseloads that have not necessarily been met by increases in the judicial ranks. These pressures have led to their own institutional reforms such as the above-described creation of large clerks' offices and the increasing frequency of unsigned per curiam dispositions of appeals without the opportunity for oral argument. The new institutionalism and principal-agent theories that inform *Apprentices* and *Courtiers* can inform these debates as well. One hopes to see future scholarship building on this commendable research and extending it to these other applications.

83). While the contents of those documents cannot be denied, they do not reflect the practices of the vast majority of clerks whom I know or the experiences of clerks from other eras with whom I have spoken in the course of preparing this review.