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Benjamin C. Mizer

Wilmer Cutler Pickering Hale and Dorr LLP

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THE BUREAUCRATIC COURT

*Benjamin C. Mizer**

COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK. By *Todd C. Peppers*. Stanford: Stanford University Press. 2006. Pp. xvi, 310. Cloth, \$55; paper, \$21.95.

SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT. By *Artemus Ward* and *David L. Weiden*. New York and London: New York University Press. 2006. Pp. xiv, 337. \$39.

INTRODUCTION

In August 2006, the *New York Times* caused a stir by reporting that the number of female law clerks at the United States Supreme Court has fallen sharply in the first full Term in which Justice Sandra Day O'Connor is no longer on the bench.¹ In an era in which nearly fifty percent of all law school graduates are women, the *Times* reported, less than twenty percent of the clerks in the Court's 2006 Term—seven of thirty-seven—are women.² In interviews, Justices Souter and Breyer viewed the sharp drop in the number of female clerks as an aberration from most years, when women typically comprise one-third of all clerks.³

What is perhaps most notable about the *Times* article is that it assumes the newsworthiness of the demographics of an anonymous group of temporary judicial aides. The article was not the first time the Court's hiring practices have come under fire in recent years, nor is the fascination with Supreme Court clerks anything new. In the 1970s, Bob Woodward and Scott Armstrong rattled the cloistered Court with their best-selling *Brethren*,⁴ and twenty years later former Blackmun clerk Edward Lazarus broke the clerks' code of silence and published a tell-all insider's account in *Closed Chambers*.⁵

* Associate, Wilmer Cutler Pickering Hale and Dorr LLP; law clerk to Justice John Paul Stevens, U.S. Supreme Court, 2003–2004. I am grateful to Eve Brensike, Leondra Kruger, and Julian Davis Mortenson for feedback on prior drafts of this Review. All of the views expressed in the Review are, of course, mine and mine alone.

1. See Linda Greenhouse, *Supreme Court Memo; Women Suddenly Scarce Among Justices' Clerks*, N.Y. TIMES, Aug. 30, 2006, at A1.

2. *Id.*

3. *Id.*

4. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979).

5. EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998).

Now those gossipy texts have been supplemented by two more dispassionate and scholarly works that tell a fuller tale of the history and role of Supreme Court clerks. Rather than focusing on the personalities of the justices and inter-clerk politics, these new texts set out to answer, as Todd C. Peppers⁶ puts it in *Courtiers of the Marble Palace*,⁷ “the more important and interesting questions” left open by the prior literature: “[W]hat are the institutional roles and norms surrounding the hiring and utilization of law clerks . . . how have these rules evolved over time, and do these institutional structures allow law clerks to leave their own fingerprints on constitutional doctrine?” (Peppers, p. xiv). Artemus Ward⁸ and David L. Weiden⁹—who, like Peppers, are political scientists rather than practicing lawyers—undertake a similar project in *Sorcerers’ Apprentices*.¹⁰ Their ultimate purpose is to probe the Court’s bureaucracy to discern, to the extent possible, exactly how much influence the clerks exert over their bosses and over the shape of American law (Ward & Weiden, pp. 9–10).

Before discussing the books in any detail, it’s fair to ask why we should care. What is it about this anonymous collection of recent law graduates that has sparked so much attention over the years? Is the subject really so interesting or so important as to warrant not one but two books in the same year?

Part of the answer may simply be the natural curiosity that elite institutions so often pique. Peppers opens his book by reciting the litany of powerful positions that former clerks have occupied, from cabinet posts to the helms of industry to seats on the Supreme Court. “No other internship program in the history of the United States,” he says, “has produced as impressive and diverse a collection of individuals as the U.S. Supreme Court law clerk corps” (Peppers, p. 1).

The more basic answer, though, is likely our fascination with power. As Peppers observes, “[t]he American public loves a good conspiracy story, and tales of deception, manipulation, and the wielding of power among a secretive group hidden away in the Marble Palace have fired the imagination” (Peppers, p. 206). At bottom, then, that is what both of these books are about—trying to reach a fuller understanding of a notable source of influence on the nine most powerful judges in the country. If we can’t get inside the justices’ heads to find out what shapes their decision-making, maybe we can at least come close by talking to the people who do their bidding.

The clerks’ unwritten agreement of secrecy only adds to the mystique. It certainly made things harder for the authors, who encountered resistance

6. Assistant Professor, Department of Public Affairs, Roanoke College. Peppers attended the University of Virginia School of Law and held two federal clerkships.

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

8. Assistant Professor of Political Science, Northern Illinois University.

9. Assistant Professor of Politics and Government and Director of Legal Studies Program, Illinois State University.

10. ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006).

from former clerks unwilling to talk about their experiences or even to return the authors' surveys. Only two justices—Justice Stevens on the record and Justice Scalia off—were willing to discuss the subject of clerks (both with Peppers).

Despite the obstacle of confidentiality, both books manage to paint a reasonably complete picture of the clerk's role. Peppers adopts a workmanlike style: he painstakingly takes the reader through the years and examines how virtually every justice since the late nineteenth century used his or her clerks. Throughout the book he uses principal-agent theory to test his hypothesis that "justices create rules and informal norms designed to constrain law clerks from pursuing their own self-interests" (Peppers, p. 16). Ward and Weiden's structure is less temporal and more functional: each chapter focuses on a different stage in the process in which clerks might exert influence—in hiring, in granting certiorari, in drafting opinions, and in deciding cases.

Not surprisingly, the image that emerges is of a Court that, through the years, has become increasingly bureaucratic. The question is whether, as the bureaucracy has burgeoned, the clerks' influence on the justices has outpaced the justices' ability to check that influence.

I. FROM STENOGRAPHERS TO JUNIOR PARTNERS

The first Supreme Court clerk was hired when Justice Horace Gray was appointed to the Court in 1882. Gray was simply continuing the practice he had initiated as chief judge of the Massachusetts Supreme Judicial Court of hiring recent Harvard Law School graduates to serve as his legal secretaries.¹¹ Ward and Weiden posit that Gray's clerkship practice, and that of other judges of his era, was rooted in the English apprenticeship model of legal education. Because most of the nineteenth-century jurists were trained in the law as apprentices rather than at modern law schools,¹² it was natural for them to adopt apprentices or students once they were on the bench.¹³ Ward and Weiden's theory, then, is that the clerkship as we know it today "is a manifestation of the last vestiges of the apprentice model in American law" (Ward & Weiden, p. 29).

Justice Gray's clerks were selected by the Justice's brother, Harvard law professor John Chipman Gray (Peppers, p. 44). For some time the practice of having law school faculty members select the clerks—usually sight unseen by the justice—was the norm, at least for some justices. John Chipman Gray

11. Peppers, p. 44. Both books are filled with the names of former clerks who went on to have illustrious legal careers of their own. Among the names that jump out from the list of former Gray clerks is Samuel Williston, who is most notable for his still-authoritative treatise on contracts. Peppers, p. 47.

12. Justice Gray actually received double the customary legal training: he graduated from Harvard Law School in 1849 before apprenticing for a judge and at a law firm. Ward & Weiden, p. 29.

13. Ward & Weiden, pp. 26–27. The law school model of education would become de rigeur after Dean Langdell revived it at Harvard in the 1870s. Ward & Weiden, p. 27.

also selected clerks for Justice Holmes, and after Gray's death the responsibility of choosing Holmes's clerks at Harvard shifted to then-Professor Felix Frankfurter (Peppers, p. 56). Frankfurter would do the same for Justice Brandeis (also a former Gray clerk) and others until joining the Court himself (Peppers, pp. 45, 62).

A. Clerk Demographics

The justices' hiring practices have come a long way from the days of blind reliance on Professor Frankfurter. Both *Courtiers* and *Apprentices* devote considerable time to examining that evolution and the demographics of the clerk pool. Beginning with Justice Gray's first clerk, Harvard enjoyed a virtual lock on clerkship positions, and it took some years for that stranglehold to ease. The bias toward Harvard graduates gradually gave way to favoritism for a handful of elite schools, including Harvard, that remains firmly in place today. Twenty-eight percent of all clerks between 1882 and 2002 attended Harvard; seventeen percent went to Yale (Ward & Weiden, p. 72). When the five other top clerk-producing schools—Chicago, Columbia, Stanford, Virginia, and Michigan—are included, a mere seven schools have supplied seventy-three percent of the Court's clerks over the years (Ward & Weiden, p. 73).

Other factors illustrate the relative homogeneity of the clerkship classes. Ever since the Warren Court made prior clerkship experience a virtual prerequisite, certain appeals court judges have emerged as "feeders" who regularly send their clerks on to the Supreme Court.¹⁴ The clear winner on this score is former Fourth Circuit Judge J. Michael Luttig, who regularly sent all of his clerks on to the Court. With Luttig's recent retirement, Judge Guido Calabresi stands atop the list of feeders: on average, he places more than two of his clerks at the High Court each year.¹⁵

In addition to the clerks' relative academic and ideological homogeneity, it is no secret that the clerkship ranks have historically been lacking in women and racial minorities. The first woman to clerk at the Court was Lucille Lomen, whom Justice Douglas hired in 1944, apparently more because of the shortage of male clerks during wartime than because of any concerns about diversity (Peppers, p. 20). More than twenty years would pass before another woman entered the clerkship ranks, and her service was less than exemplary: when Justice Black hired Margaret Corcoran in 1966, it was because of political connections, and Corcoran spent her days sleeping

14. Ward & Weiden, p. 82. Sometimes clerking for a feeder judge can backfire if the judge has unfavorable things to say about the clerk. Ward and Weiden quote a recommendation letter to Justice Black in which Judge Jerome Frank explained that a candidate who looked excellent on paper was actually "a first-rate neurotic" and a "very unpleasant fellow" likely on the verge of a "nervous breakdown." Ward & Weiden, p. 77.

15. Ward & Weiden, p. 82. There also tends to be a congruence between the ideology of the feeder and the justices who routinely take that judge's clerks. In his fifteen years on the Fourth Circuit, for instance, Judge Luttig never sent a clerk to the chambers of Justices Stevens, Souter, Ginsburg, or Breyer. Ward & Weiden, p. 84. Judge Calabresi sends most of his former clerks on to the more liberal justices. Peppers, p. 33.

in Black's upstairs chamber (Peppers, pp. 20–21). But gradually the number of female clerks began to grow. In the 1970s, ten percent of the clerks were women; that number increased to twenty-three percent in the 1980s and to thirty percent in the 1990s (Peppers, p. 21).

A few years after Lucille Lomen broke the gender barrier, Justice Frankfurter hired the Court's first African-American law clerk, William T. Coleman, Jr., in 1948 (Peppers, p. 103). The hiring of Coleman, who had been a standout at Harvard, was an occasion momentous enough to garner notice in the *New York Times* and the *Washington Post* (Peppers, p. 22). Although Frankfurter saw the hiring decision as purely a matter of merit, it took some mettle: just the prior year, one of Frankfurter's colleagues—Justice Stanley Reed—had vetoed the effort of a group of law clerks to throw a Christmas party for the Court's entire staff because the party would have been racially integrated (Ward & Weiden, pp. 93–94). It would be nearly twenty years before Chief Justice Warren hired the Court's second African-American clerk in 1967 (Ward & Weiden, p. 94).

A 1998 study found that of the sitting justices' cadre of clerks during their tenures, fewer than 2% were African American, 5% were Asian American, and 25% were women (Ward & Weiden, p. 96). The study spawned considerable controversy—the NAACP went so far as to supply the Court with the resumes of African-American candidates for clerkships (Ward & Weiden, pp. 94–95)—and seemed to get through to the justices. Peppers reports that “[f]rom 1999 to 2004, the Rehnquist Court made some modest changes in the diversity of its law clerk corps” (Peppers, p. 23). But as the kerfuffle caused by the recent *New York Times* article illustrates, the clerkship ranks remain largely white and male.¹⁶

B. Clerk Responsibilities

Justice Gray—the first to begin the clerkship tradition—initially paid his clerks' salaries out of his own pocket (Ward & Weiden, p. 24). But that practice didn't last long. In 1886, Congress provided a salary of 1,600 dollars for a “stenographic clerk” for each chambers, which prompted many of the justices to follow Gray's lead and hire their own clerks (Ward & Weiden, p. 24). Over time, as the justices' workload grew, the number of clerks grew with it, as did the nature of the clerks' work (Ward & Weiden, p. 25).

The justices' clerks were initially called “secretaries,” and their duties for the most part matched their title (Ward & Weiden, p. 30–31). Justice Gray was not only the first to hire clerks, but he was also the first to use them for more than purely clerical responsibilities, including opinion drafting (Ward & Weiden, pp. 33–34). A major shift occurred in 1919, when Congress authorized a “law clerk” position in addition to the “stenographic clerk,” allowing the justices to hire two assistants, and the clerk's role as legal researcher became firmly established (Ward & Weiden, p. 34). Justices Holmes and Brandeis had already relied heavily on their clerks to check

16. See Greenhouse, *supra* note 1.

citations, conduct legal research, and suggest changes in opinions (Ward & Weiden, p. 35). Now, during the tenure of Chief Justice Taft, more justices began to follow that model (Peppers, pp. 83–84).

Chief among the clerks' new responsibilities was drafting memoranda on the petitions for certiorari—usually called “cert petitions” or simply “certs”—in which parties asked the Court to hear their case (Ward & Weiden, p. 35). The cert memos became more important when Chief Justice Hughes ended the practice of discussing every cert petition at the justices' conference. He began circulating a “dead list” of petitions that would not be discussed at conference unless another justice requested it (Ward & Weiden, p. 37). Ward and Weiden explain that the clerks “now constituted a Court-within-a-Court as justices relied on them more and more” for the evaluation of cert petitions (Ward & Weiden, p. 39). Eventually the crush of cert petitions caused the practice of the dead list to give way to the “discuss list.” Now, for a cert petition to get mentioned at conference, it must be placed on the discuss list by either the chief justice or one of the other justices; otherwise it is denied automatically on the clerk's orders list (Ward & Weiden, p. 126).

Two other events in the mid-twentieth century affected the role of the clerks. The first was the move into the Court's new building in 1935. For the first time, the Court had its own space, and justices began working in their new chambers rather than at home, as had previously been the norm (Peppers, p. 99). The close quarters allowed the justices to begin more regularly lobbying their colleagues and—to the chagrin of some—their colleagues' clerks (as was the wont of Frankfurter in particular) (Peppers, pp. 101–02). It also facilitated what Ward and Weiden call a “clerk network,” in which the interaction among clerks provided “an important resource to their justices in obtaining information about the positions of their colleagues” (Ward & Weiden, p. 43).

The second significant event was the appointment of Chief Justice Warren in 1953. Peppers observes that Warren's heavy substantive reliance on his clerks ushered in an era in which the justices shifted from treating their clerks as “legal assistants” to using them more as “law firm associates” (Peppers, pp. 151–52). Two new duties in particular became commonplace during Warren's tenure: (1) writing bench memoranda to prepare the justices for oral argument and assist their decision-making in merits cases, and (2) drafting opinions (Peppers, p. 151).

Warren also instituted an important administrative change that affected the clerks' role. Prior to Warren's tenure, the justices received opinion assignments based on how much was currently on their plate. This practice meant that the justices who churned out opinions more quickly also received more assignments. Warren determined, as Justice Douglas put it, “that every member of the Court should pull the same size oar and row as hard as any-

body else.”¹⁷ Warren’s efforts to even out the workload translated into even greater opinion-drafting responsibilities for the clerks as the more methodical justices struggled to keep [Doesn’t this footnote belong at the end of the paragraph?] pace with their faster colleagues (Ward & Weiden, pp. 42–43). One of those more methodical justices was Frankfurter, who, like many of his colleagues, began to think of his clerks as “junior partners—junior only in years.”¹⁸

One last significant development led to the clerkship institution as we now know it. Beginning around 1950, cert petitions began to inundate the Court; by 1970, the justices were receiving 4,000 petitions a year. Justice Powell was shocked by the cert workload when he first arrived at the Court, grumbling to his clerks that the “ubiquitous things will be with us always.”¹⁹ Powell suggested the creation of a “cert pool” to eliminate the duplication of effort that occurred with nine clerks writing nine memos on the same petition. He proposed that one clerk in the pool write a single memo for each petition that would then circulate to each justice in the pool (Ward & Weiden, p. 118). Five justices agreed to participate in the pool during its trial term in 1972, and the experiment was such a success that today every justice but one—Justice Stevens—is in the pool (Ward & Weiden, p. 125).

In practice the existence of the cert pool means that each petition is read by two law clerks: the pool clerk and a Stevens clerk. A pool memo is written for every petition, while the Stevens clerks write memos for the Justice in only a fraction of the cases (Ward & Weiden, p. 127). The justices rely on the clerks as “gatekeepers,” generally reading the papers themselves only when the question of whether to grant cert appears to be close or when the case is especially controversial (Ward & Weiden, p. 128). Ward and Weiden speculate that the pool has made the cert memos less candid and more cautious than they had been when the clerk was writing only for his or her individual justice, and that the memo writers increasingly focus on objectively “cert-worthy” factors such as the existence of a split among the circuit courts (Ward & Weiden, pp. 129–32). Indeed, they report that the existence of a circuit split has now emerged as the single most important factor in reviewing cert petitions (Ward & Weiden, p. 133).

The creation of the cert pool—and in particular its expansion to include all but Justice Stevens’s clerks—has actually had the effect of *reducing* the pool clerks’ cert workload. “In essence,” Ward and Weiden find, “the pool clerk’s workload has been cut in half—an astonishing feat given that the Court’s docket has almost doubled at the same time” (Ward & Weiden, p. 142). The *Apprentices* authors speculate that this means “that pool clerks are

17. Ward & Weiden, p. 42 (quoting conversation between Justice William O. Douglas and Professor Walter F. Murphy, Cassette 14 (Apr. 5, 1963) (transcript available in the Princeton University Library)).

18. Ward & Weiden, p. 41 (quoting LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY 415 (1984)).

19. Ward & Weiden, p. 118 (quoting Letter from Lewis F. Powell, Jr. to Hamilton Fox, Lawrence A. Hamilton, Covert Parnell & J. Harvie Wilkinson (Mar. 20, 1972) (on file with the Washington and Lee University School of Law)).

able to delve more deeply into each case than clerks from the previous era” and suggest that “most of the additional time modern clerks gained by the creation of the cert pool has been spent on opinion writing and is probably a contributing factor in the explosion in the number of separate concurring and dissenting opinions now issued by the Court.”²⁰

The upshot is that the justices’ chambers have now largely become what Chief Justice Rehnquist called “opinion writing bureaus” (Ward & Weiden, p. 224). The authors of both books found that the current justices for the most part delegate responsibility for first drafts of their opinions to their clerks (Peppers, pp. 195–205; Ward & Weiden, pp. 225–26). The justices provide guidance as to what the opinion should say and how it should be structured, and they often then edit the draft heavily. But the clerks remain deeply involved in the writing process (Ward & Weiden, pp. 224–26). The exception to this general delegation rule is, again, Justice Stevens, who famously writes the first draft of all of his opinions (Peppers, pp. 195–96). Because he writes his own first drafts and remains outside of the cert pool, Peppers says Justice Stevens is “the only sitting Supreme Court justice who has not fully adopted the rules and norms of the modern clerkship model” (Peppers, p. 195).

II. “THE STUDENTS OF MICHELANGELO”²¹

It is hard to quibble with the descriptive work in *Courtiers* and *Apprentices*. The authors of both books base their characterizations of the clerks’ functions on exhaustive archival research and interviews with former clerks, among other sources. It is safe for the reader to assume that the authors have painted an accurate picture of the law clerks’ responsibilities, both in the past and today. But what conclusions do they draw from all this research? What do they have to tell us about the influence that clerks have on their justices?

Peppers assesses the concept of influence as a political scientist. “To affect judicial decision making,” he says,

[L]aw clerks must have more than simply the opportunity to exercise discretionary authority to determine the winners and losers. They must also possess preferences or goals that differ from those of their justices; if law clerks and justices share the same policy preferences or ideological positions, then any influence over decision making is not troubling because the clerks are pursuing the same policy goals as the justices. (Peppers, p. 206)

20. Ward & Weiden p. 142. Although this observation correlates with the authors’ statistics, it is not fully consistent with the fact that Justice Stevens, who does not participate in the pool, also tends to write the most separate opinions each term. See Bradley C. Canon, *Justice John Paul Stevens: The Lone Ranger in a Black Robe*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* 344 (Charles M. Lamb & Stephen C. Halpern eds., 1991).

21. Yale Law School Dean Harold Koh, a former Blackmun clerk, has said that the clerks “are like the students of Michelangelo. They may put the ink on paper, but it is according to the justices’ design.” Ward & Weiden, p. 201.

For a variety of reasons, he concludes that “[t]he necessary conditions for the exercise of influence by law clerks have rarely, if ever, existed on the Supreme Court” (Peppers, p. 206).

Apprentices and *Courtiers* identify a number of ways in which the justices curb the amount of influence their clerks have on the justices’ decision-making. One of the most obvious is term limits: virtually all clerks serve for only one term, meaning that they spend more time learning the ropes and less time cultivating a close relationship that would enable them to influence the justices (Peppers, p. 207; Ward & Weiden, p. 36). The increasing number of clerks in each chamber, Ward and Weiden suggest, has also chilled the extent to which clerks feel they can introduce new ideas or express views different from those of their bosses (Ward & Weiden, p. 52). And, as a practical matter, the clerks’ influence is necessarily limited as long as they are not permitted on the bench during oral argument or in the conference room during decision-making.²²

Two other, less tangible factors may be the most important checks on clerk influence. By way of a variety of proxies—including the candidates’ organizational affiliations, the judges for whom they first clerked, and other signals on their résumés—the justices manage to ensure considerable ideological congruence with their clerks (Peppers, pp. 31–37, 209–10). That alignment means that the clerks are less likely to have an “agenda” apart from their bosses or to seek to alter the justices’ views. It also tends to create a strong sense of loyalty on behalf of the clerks toward their justices. Peppers frames this loyalty as a classic mode of principal-agent control: “[T]he more an agent embraces his fiduciary duty to a principal, the less likely the agent is to act in ways counter to the principal’s goals.”²³

In light of these checks, Peppers concludes that the opportunities for clerks to influence the justices are rare:

It is improbable to conclude that law clerks systematically influence how their justices vote, either in deciding cases or granting cert. petitions. While the history of the clerkship institution is sprinkled with examples of law clerks who changed a justice’s vote, such examples are the exception and not the rule.²⁴

22. Ward & Weiden, p. 155. Then again, as Ward and Weiden point out, the clerks’ memos can accompany the justices onto the bench and into the conference room. Ward & Weiden, p. 155.

23. Peppers, p. 123. But, as Peppers acknowledges, that bond of loyalty may break if the agent feels betrayed by the principal. Peppers, pp. 204–05. In the October 2004 issue of *Vanity Fair* magazine, an anonymous group of clerks from the Court’s 2000 Term spilled the beans about some of the behind-the-scenes maneuvering in *Bush v. Gore*, 531 U.S. 98 (2000), explaining that they felt the Court’s abuse of power in that case justified their breach of confidentiality. David Margolick et al., *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310, 320. The *Vanity Fair* article begs the question unaddressed by Peppers: Who exactly is the principal? Is it the Court as a whole—as the clerks who felt justified in talking to the magazine seem to suggest—or the individual justice?

24. Peppers, p. 165. One of the few specific instances of substantive influence that both books cite is former Stone clerk Louis Lusky’s claim that he was responsible for drafting the famous *Carolene Products* footnote 4. Peppers, p. 91; Ward & Weiden, p. 203; see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the op-

Peppers deems any influence to be confined to “the process of analyzing highly complex factual records and legal claims and pulling out a dispositive fact or compelling legal argument that would not have been otherwise considered by the justice” (Peppers, p. 165). Peppers’s final assessment, then, is that “law clerks do not wield an inordinate amount of influence.” (Peppers, p. 211). “Clerks arguably wield some influence in how judicial opinions are drafted and which doctrinal tests are used, but even the cleverest law clerk must still hold together a majority of the justices” (Peppers, p. 211).

Ward and Weiden reach a similar bottom line. They begin their book by observing that “clerks do make decisions about cases that are often unseen by those outside of their justice’s chambers” and that “there exists a very real danger of clerks using their positions to influence judicial decision making” (Ward & Weiden, p. 53). But their statistical evidence shows that this danger is rarely realized. Of the 123 former clerks who responded to the authors’ queries, 24% said they never changed their justice’s mind on cases or issues; 50% said they “seldom” had such an effect, and 24% reported that they “sometimes” influenced their boss’s decision. Only one person claimed to have “frequently” made a difference (Ward & Weiden, p. 187). Based on this data, Ward and Weiden conclude that “the influence of the clerk is neither negligible nor total”—that “clerks are not merely surrogates or agents, but they are also not the behind-the-scenes manipulators portrayed by some observers” (Ward & Weiden, p. 246).

Despite their evidence and apparent conclusions about clerk influence, Ward and Weiden go on to assert that “some aspects of the role of the modern law clerk tread perilously close to what many critics see as an unconstitutional abdication of the justices’ duties” (Ward & Weiden, p. 246). Accordingly, even as they acknowledge “that it is highly unlikely that any significant reforms will take place in the near future, given institutional and bureaucratic inertia,” the authors propose that the Court reduce the opportunities for clerk influence by increasing disclosure of its “internal operations and, at the same time, of the role that clerks play.”²⁵ Their most eye-popping recommendation in this regard is a call for the publication of the pool memos. “Releasing the pool memo,” they suggest, “could help ensure that pool writers are providing the kind of objective analysis that they are supposed to provide” (p. 247).

Ward and Weiden’s provocative proposal has garnered some attention, including an endorsement by Judge Richard Posner.²⁶ But the authors myopically toss out their suggestion as a rein on clerk influence without

eration of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”)

25. Ward & Weiden, p. 247. Ward and Weiden also recommend that the Court “prohibit ‘case swapping’ at each stage of the process,” Ward & Weiden p. 248, that is, that clerks be prohibited from trading the cases for which they are responsible within chambers. This suggestion seems gratuitous: the authors aren’t really able to explain how often such swapping occurs or why. Nor is it clear how their proposal—which would plainly meddle in the chambers’ internal operations—would curb any undue influence that might result from such swapping.

26. Richard A. Posner, *The Courthouse Mice*, THE NEW REPUBLIC, June 12, 2006, at 32, 32.

considering the effect it would have on the legal community writ large. All too often, lawyers and court observers take cert denials as binding law, or at least as an indication of the Court's views on the question presented. Imagine, then, if the cert pool memos were published. The temptation to read the memos as having some legal effect would be overwhelming. Indeed, responsible judges and lower court judges would have little option but to take their cues (and sometimes too their lumps) from the memos. Given that the memos express the views of exactly *none* of the justices, that would be an undesirable result, to say the least. Not to mention that such a result would run directly contrary to Ward and Weiden's purpose: rather than diminishing the importance of clerks, it would actually *aggrandize* clerks' ability to affect the law.

Even on its own terms—as a measure to curb the influence of law clerks—Ward and Weiden's proposal seems unwise at best. Laura Ingraham, a former Thomas clerk, has explained that a “fear factor” keeps the pool memos “reliable” because the conscientious clerks are afraid of making a mistake in a memo that will be seen by seven justices other than their own (Ward & Weiden, p. 128–29). The prospect of widespread publication would only heighten the fear factor and would likely turn the memos into veritable opinions. At the very least the memos would naturally become less frank, less concise, and less pithy. Ward and Weiden seem to assume that such a change would be for the good, but it's not clear that they're right. The vernacular of the pool memo is valuable to justices who see many of the same legal issues day in and day out; longer memos would only increase the workload of the already-taxed justices and clerks.

Ward and Weiden's proposal is also premised on a conception of the Supreme Court as black box. But that premise is demonstrably false. True, the Court's processes for granting cert are opaque, and its deliberations are secretive. But much of the justices' debate occurs publicly, in the courtroom, where they engage lawyers for both sides before a gallery of observers.²⁷ And unlike its coordinate branches, the Supreme Court—indeed, the whole of the federal judiciary—explains in detail the reasons for all of its decisions and issues written justifications for all of its actions.

Apprentices and *Courtiers* have spawned a broader debate about the role of Supreme Court clerks, and at least one other radical proposal. In *The Atlantic*, Stuart Taylor, Jr. and Benjamin Wittes offer “a modest proposal” for reining in the justices' “high-handedness” and “strutting pomposity”: “[F]ire their clerks.”²⁸ “Eliminating the law clerks,” they say, “would force the justices to focus more on legal analysis,” and, “[p]erhaps best of all, it would effectively shorten their tenure by forcing them to do their own work, making their

27. Oral argument is now even more publicly accessible: Since October 2006, the Court has made full transcripts available on its website on the same day as argument. See Press Release, United States Supreme Court (Sept. 14, 2006), <http://www.supremecourt.gov> (follow “Public Information” hyperlink; then follow “Press Releases” hyperlink; then follow “Press Releases Regarding Oral Transcripts” hyperlink) (last visited Nov. 12, 2006).

28. Stuart Taylor, Jr. & Benjamin Wittes, *Of Clerks and Perks*, *THE ATLANTIC*, July/Aug. 2006, at 50, 50.

jobs harder and inducing them to retire before power corrupts absolutely or decrepitude sets in.”²⁹

Taylor and Wittes’s essay seems less a response to *Apprentices* and *Courtiers* than it is a tirade about the unelected justices.³⁰ To the extent their proposal is aimed at limiting the justices’ lengthy tenures, other, more thoughtful commentaries have offered more direct solutions.³¹ And to the extent the essay is, in fact, sparked by a concern over the justices’ work being done by “smart but unseasoned underlings,”³² then it’s not clear why they stopped with the Supreme Court. Taken to its logical conclusion, their indictment includes in its sweep other federal judges, all of Capitol Hill, and most of the Executive Branch—all of those public servants who routinely rely on aides to complete their work.³³

Taylor and Wittes may be getting at a larger concern—one shared by Judge Posner and the authors of *Apprentices* and *Courtiers*. As Ward and Weiden put it:

The most damaging aspect . . . of having judicial opinions written by clerks is the potential loss of authority that these opinions carry. Indeed, it is only respect for the Court’s legitimacy that gives its judgments weight with both the public and lower court judges who are expected to follow its mandates. (Ward & Weiden, p. 236)

The authors are unquestionably correct that the Court’s authority derives in large part from respect for its decisions.³⁴ But neither the authors nor their fellow critics offer any evidence that awareness that clerks have a hand in drafting the justices’ opinions diminishes respect for the Court. Indeed, if anything, *Apprentices* and *Courtiers* show that the justices have been relying on their clerks for substantive assistance for more than a century, and that their authority has been none diminished for it.

The fact is that Americans are perfectly comfortable with the notion that public figures don’t craft all of their own words. We attribute President Kennedy’s most memorable lines to the President himself, not to Arthur

29. *Id.* Taylor and Wittes allow that the justices might be entitled to *one* clerk. *Id.*

30. To be fair, the Swiftian echo in Taylor and Wittes’ “modest proposal” suggests their essay is at least partially satirical. See JONATHAN SWIFT, *A Modest Proposal, in A MODEST PROPOSAL AND OTHER SATIRICAL WORKS* 52–58 (Dover Publications 1996) (1729).

31. See, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769 (2006).

32. Taylor & Wittes, *supra* note 28.

33. See Emily Bazelon & Dahlia Lithwick, *Endangered Elitist Species*, SLATE, June 13, 2006, <http://www.slate.com/id/2143628> (offering a similar response to Taylor and Wittes).

34. See *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting) (“It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (“The Court’s power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands. The underlying substance of this legitimacy . . . is expressed in the Court’s opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all.”).

Schlesinger. What matters is that the ideas belong to the person of authority—that the master provides the design and the student merely implements it. *Sorcerers' Apprentices* and *Courtiers of the Marble Palace* suggest that the relationship between Supreme Court justice and clerk falls squarely within that model. No wonder, then, that there has been little public outcry over the arrangement, and little movement to alter it.

CONCLUSION

In a way it's unfortunate that *Apprentices* and *Courtiers* were published within months of each other, because the overlap is considerable; to read one is, for the most part, to read both. There are differences, to be sure: Peppers's book is more scholarly and more painstakingly researched and footnoted; Ward and Weiden's text is better structured, more engagingly written, and, on the whole, the better read. Taken together, the two books offer as complete and accurate a picture of the role of Supreme Court clerks as one can get from outside the courthouse.

Unfortunately, Ward and Weiden slouch toward sensationalism when in their title they invoke Goethe's poem about the sorcerer's apprentice who gave into the temptation to don his absent master's robes and try his hand at sorcery.³⁵ It would be a nice metaphor if it worked, but it doesn't. Because for all their efforts in their final chapter to raise the specter of undue influence, Ward and Weiden's own evidence doesn't support that conclusion. Both *Apprentices* and *Courtiers* leave the reader with the distinct impression that there's little to worry about. Do the clerks influence the justices? Yes, naturally. But their influence appears to be neither very pervasive nor very strong. In fact, it may even be a good thing insofar as the justices regularly surround themselves with smart, young sounding boards with fresh ideas. And rarely do the clerks change the outcome of a case. So the somewhat sinister allusion of the sorcerer's apprentice is inapt, not to mention unfair. It would seem that a more benign title—something more along the lines of "Santa's Little Helpers"—would have been more fitting.

35. Ward & Weiden, p. 249. For some readers—including this one—the title may conjure to mind first the Disney version of the Goethe parable featuring Mickey Mouse in *Fantasia*. *FANTASIA* (Disney 1940). Which arguably makes the authors' point even more vividly.

