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The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court

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Recommended Citation

Carolyn Shapiro, *The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court*, 37 Fla. St. U. L. Rev. 101 (2009).

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THE LAW CLERK PROXY WARS: SECRECY, ACCOUNTABILITY, AND IDEOLOGY IN THE SUPREME COURT

CAROLYN SHAPIRO*

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Former Supreme Court law clerks are familiar with the moment that someone learns of their experience clerking on the Court. “Really? What did you do in that job? What are the Justices like? Is it true that . . . ?” And so it goes—a litany of fascinated questions about the Justices and the working of the Court. Interestingly, the questions from lawyers and non-lawyers are surprisingly similar and all bespeak an intense curiosity about the Court and the Justices. By talking to someone who was “there,” people hope they can come to better understand the institution.

It is little wonder, then, that scholars who study the Supreme Court have lately focused on law clerks. In particular, two recent books—*Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (*Courtiers*) by Todd C. Peppers,¹ and *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (*Sorcerers*) by Artemus Ward and David L. Weiden²—describe and analyze the history and development of Supreme Court law clerks as an institution. Each book offers a treasure trove of information, much of it new or newly-compiled. The authors rely on archival material, such as the recently public papers of Justices Powell and Blackmun, as well as their own surveys of and interviews with former law clerks.

Ultimately, however, despite the authors' diligence, even taken together, the books fail to adequately address what most readers really want to know: *Do law clerks have inappropriate influence on the*

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

2. ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006) [hereinafter *SORCERERS*].

*Justices' decisions and opinions?*³ Although Peppers does not claim to fully answer this question,⁴ he nonetheless concludes that the conditions for undue influence “have rarely, if ever, existed on the Supreme Court.”⁵ But this conclusion, however tenable, is unpersuasive; *Courtiers'* analysis is superficial, especially in contrast to its extraordinarily thorough historical presentation. In contrast, Ward and Weiden are more skeptical and raise concerns that the Justices have delegated their duties to an unconstitutional extent.⁶ But *Sorcerers'* evidence does not lead inexorably to the concerns that they raise, as the authors themselves admit.⁷ So even after these two detailed investigations into the clerkship institution, the key question remains largely unresolved.

The joint appearance of these new books, however, provides an opportunity to consider a more fundamental question: *Why is the question of law clerk influence so compelling in the first place?* After all, members of Congress often do not read the bills, or even the committee reports for the bills, on which they vote. They rely instead on briefings by their (often young and inexperienced) staff or on direction from their party leadership.⁸ Yet this reality, for the most part, goes unremarked. Likewise, lower court judges, like Supreme Court Justices, have law clerks and those law clerks do many of the same kinds of things—notably opinion writing—as Supreme Court law clerks. While there are occasional critiques of such judges' reli-

3. This question of whether Supreme Court law clerks have inappropriate influence is not new. See, e.g., William H. Rehnquist, *Who Writes Decisions of the Supreme Court?* U.S. NEWS & WORLD REP., Dec. 13, 1957, available at <http://www.usnews.com/articles/opinion/2008/12/09/william-rehnquist-writes-in-1957-on-supreme-court-law-clerks-influence>; Henry S. Cohn, *Book Review*, 53-OCT FED. LAW. 51 (2006) (reviewing TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE COURT LAW CLERK* (2006)) (noting that the dispute over the extent to which Supreme Court law clerks “unduly influence the [J]ustices in the decision-making process” has “rag[ed] since the 1950s”); David J. Garrow, *Acolytes in Arms*, 9 GREEN BAG 2d 411, 420 (2006) (noting the potential for law clerks to exert ideological influence on opinion writing and in capital cases); *The Abrams Report* (MSNBC television broadcast Sept. 28, 2004) (interview by Dan Abrams with David Margolick, Journalist, Vanity Fair) (“[T]here’s long been a suspicion that Justice Kennedy is susceptible to the influence of his law clerks.”); Tony Mauro, *Blackmun Article Triggers Backlash*, LEGAL TIMES, Apr. 25, 2005, (discussing accusations that Blackmun’s papers “show an outsized influence and assertive tone by [his] clerks”). But see *id.* (“The real issue is . . . whether furnishing the [J]ustices with four clerks creates powerful incentives to the [J]ustices to do less of their work than if they had only one.”) (quoting David Garrow).

4. COURTIERS, *supra* note 1, at 2 (claiming instead to address “fundamental questions about the institutional rules and norms surrounding the hiring and use of law clerks”).

5. *Id.* at 206.

6. SORCERERS, *supra* note 2, at 246, 248-49.

7. *Id.* at 246.

8. See, e.g., *id.* at 232-33.

ance on their clerks,⁹ there is not widespread cynicism about who are the real decisionmakers. Nor is there much curiosity about what these law clerks do. So what is different about the Supreme Court?

In this Article, I argue that the particular interest in Supreme Court law clerks highlights concerns that have the potential to weaken the Court's legitimacy and authority and perhaps have already done so, at least to some extent. These concerns create a kind of fault line, presenting a destabilizing threat. The Court's importance as a political institution, the significant discretion Justices exercise over which cases they hear and how they decide them, and the shroud of intense secrecy surrounding the Court all contribute to the fault line. More specifically, I argue that the fascination with and condemnation of the Justices' use of law clerks are really proxy wars for two more important concerns. The first concern is about how the Court decides what cases to hear, and it arises from the black box nature of the Court's certiorari (cert) process. The second concern, which is both more important and more difficult, stems from an unresolved tension between judicial independence and democratic accountability, and from ambivalence about the role of ideology in judging. This Article examines the generally unstated link between these concerns and the oft-posed questions about law clerk influence.

Part I of this Article describes and evaluates the two books with a special focus on the light they shed on whether law clerks exercise undue influence. Part II explores the two proxy wars: how the Court decides what cases to hear and how it decides them on the merits. The Article also includes suggestions for changes—and less secrecy—in the Court's operations, notably with respect to the cert process. It concludes with a plea for more candid public discussion of the role of ideology in Supreme Court judging.

I. THE BOOKS

Although previous books about the Supreme Court have relied on law clerks for perspective and information about the workings of the Court,¹⁰ those works have not focused on the clerkship institution itself. This new focus is the primary contribution of both *Courtiers* and *Sorcerers*.

The books share some striking similarities. Notably, they parallel each other in charting the history and development of the institution

9. See, e.g., RICHARD A. POSNER, HOW JUDGES THINK 221, 285-86 (2008); Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 PENN. L. REV. 777, 785-87 (1981).

10. See, e.g., EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998); H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

of law clerks at the Supreme Court. There were no law clerks for the first hundred or so years of the Court.¹¹ The first Justice to have law clerks, Horace Gray, imported the institution from his chambers on the Massachusetts Supreme Court when appointed to the United States Supreme Court in 1882,¹² and he paid them out of his own pocket.¹³ Yet within a few years, Congress appropriated money for each Justice to hire a “stenographic clerk,” and by the end of the 1880s, all of the Justices had done so.¹⁴

As the name of the position suggests, the duties of the early law clerks were primarily clerical,¹⁵ although Justice Gray himself, as well as some other early Justices, had his law clerks help him with his opinions.¹⁶ Moreover, although Gray’s law clerks were all Harvard Law School graduates,¹⁷ many other early clerks were neither lawyers nor law students.¹⁸ For some clerks, the position may have functioned as an apprenticeship, whether formal or informal. In other words, the clerkships may have been seen as an educational opportunity for the clerks rather than (or as well as) a source of assistance to the Justices.¹⁹

Both books describe the development of the law clerk’s role after this initial “apprenticeship” phase largely as a linear progression—through a series of stages—from a clerical position to today’s much more substantive job description.²⁰ At the same time, however, they both document that from the beginning some Justices used their law clerks much as the Justices do today.²¹ In addition, both books claim that some of the most important changes in the clerkship institution over time stem not from consistently increasing workloads, which is

11. COURTIER, *supra* note 1, at 38-43; SORCERERS, *supra* note 2, at 24.

12. COURTIER, *supra* note 1, at 44-45; SORCERERS, *supra* note 2, at 26.

13. COURTIER, *supra* note 1, at 45; SORCERERS, *supra* note 2, at 24.

14. SORCERERS, *supra* note 2, at 24.

15. COURTIER, *supra* note 1, at 54-55.

16. SORCERERS, *supra* note 2, at 34-35.

17. COURTIER, *supra* note 1, at 47, 241-42 n.22.

18. *Id.* at 24, 50.

19. SORCERERS, *supra* note 2, at 109, 111.

20. *Courtiers* divides the history into three periods: (1) “law clerk as stenographer” (1880s through about 1919, when Congress appropriated funds for each Justice to have both a stenographic clerk and a law clerk), COURTIER, *supra* note 1, at 38; (2) “law clerk as legal assistant” (1920s through the 1940s), *id.* at 83; and, (3) “law clerk as law firm associate” (1950s through the present, initiated by Chief Justice Earl Warren), *id.* at 145. *Sorcerers* identifies similar timeframes for the first phase of the institution, SORCERERS, *supra* note 2, at 34, and for the beginning of the second. But Ward and Weiden then argue that one great transformation came in 1942—more than a decade before Peppers—when the number of law clerks per Justice increased from one to two. *Id.* at 36. Also unlike *Courtiers*, *Sorcerers* divides this modern period again, dating the advent of the modern law clerk to the early 1970s when Congress authorized three and then four law clerks per Justice and when the cert pool was introduced. *Id.* at 45.

21. SORCERERS, *supra* note 2, at 34-35; COURTIER, *supra* note 1, at 206-12.

the standard account, but from more subtle changes in the operations and personnel of the Court itself.²²

Although the books chart similar histories, in some ways they are quite different. *Courtiers* is a deliberate and cautious history. Peppers reviews the historical material with respect to each Justice who had a law clerk, Justice by Justice, and makes few generalizations. In contrast, *Sorcerers* is more analytical and quicker to generalize. The books' relative strengths and weaknesses reflect these differences between them.

A. *Courtiers of the Marble Palace*

Courtiers offers two main arguments about the development of the clerkship institution. The first is that the clerkship institution can best be understood through the lens of principal-agent (P-A) theory.²³ Peppers explains that principals—in this case, the Justices—create selection and monitoring strategies to prevent (or detect) shirking or defection by their agents, the law clerks.²⁴ The more the Justices delegate substantive duties, the more extensive we should expect these strategies to be.²⁵ In other words, as the clerkship institution has changed, so too might the Justices' use of direct and indirect mechanisms of control over their law clerks.²⁶

This perspective provides a refreshing defense of the Justices' use of law clerks. The Justices are rational actors, and as such they have not simply turned over authority to their young assistants simply because they have delegated responsibility. Instead, even as they delegate, they find ways to ensure the loyalty and dedication of their clerks. Modern Justices use hiring committees, current law clerk interviews, or feeder judges to help them hire law clerks with compatible ideological goals.²⁷ Once hired, law clerks train each oth-

22. See *infra* text accompanying notes 38-42 (discussing *COURTIERS*); *infra* text accompanying notes 56-76 (discussing *SORCERERS*).

23. *COURTIERS*, *supra* note 1, at 10-11.

24. *Id.* at 12.

25. *Id.* at 14.

26. Peppers may overstate the relevance of principal-agent theory on occasion. Setting forth the theory at the very beginning of the book, he explains that one of the problems a principal has when hiring an agent is that the agent knows more about his own skills and abilities than does the principal. *Id.* at 11. In the context of the hiring of law clerks, I am not at all certain that this is true. Law clerks may well know whether, for example, they are good writers, but the Justices, through experience, know much more about what sort of people they work well with, what sort of law clerks they want to have, and what the actual job entails.

27. *Id.* at 31-36. *Sorcerers* echoes this view, arguing that "ideology largely determines which [appellate court] judges place their clerks with particular [J]ustices." *SORCERERS*, *supra* note 2, at 83. Moreover, *Sorcerers* concludes that in general the Justices do not overtly discuss ideology or politics with clerk applicants, so the use of feeder judges may be one of their better sources of information about clerk ideology. *Id.* at 102-03. See also Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making*:

er,²⁸ monitor each other,²⁹ and review each other's work.³⁰ The Justices also rely on their personal relationships with their law clerks. Many Justices cultivate intense bonds of affection and loyalty.³¹ And the law clerks rarely work on such significant matters as opinions without detailed instructions from their bosses.³² In the end, Peppers concludes that, in large part as a result of these mechanisms, there is no evidence that law clerks wield inappropriate influence over the decisionmaking and workings of the Court.³³

Most of the book, however, is not so analytical. As a result, it does not deliver the necessary support for Peppers' conclusions. The early chapter on the beginning of the clerkship institution, for example, chronicles a wide range of Justice-law clerk relationships—from the substantive delegation of Justices Gray, Holmes, and Brandeis to more purely stenographic assignments.³⁴ Yet the chapter says virtually nothing explicit about either P-A theory or about the development of the clerkship institution more generally.³⁵ Likewise, many of the stories Peppers tells are entertaining or interesting, but they do not add to our understanding of what law clerks do, how Justices use them, or why and how the institution changed over time.³⁶ Rather, *Courtiers* is largely descriptive, a comprehensive compendium of in-

An Empirical Assessment, 58 DEPAUL L. REV. 51, 65 (2008) (finding through statistical analysis that “the ideological profile of the Justice” is the most significant predictor of the ideological make-up of the Justice's law clerks).

28. COURTIER, *supra* note 1, at 66.

29. *Id.* at 210.

30. *Id.*

31. See, e.g., *id.* at 98 (explaining that Cardozo's law clerks provided “ever-available companionship and reverential friendship” and often described him as saintly) (quoting Joseph L. Rauh, Jr. et al., *A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks*, 1 CARDOZO L. REV. 5, 6 nn. 1, 7, 11 (1979)).

32. COURTIER, *supra* note 1, at 140-42, 158-65.

33. *Id.* at 206.

34. *Id.* at 43-70.

35. *Id.* at 38-70.

36. Early in the book, for example, Peppers tells the story of three young men, often called “The Inseparables,” who all came from Vineland, New Jersey, and worked in Washington in the early twentieth century. Clarence Melville York clerked for a Supreme Court Justice; Benjamin F. Barnes served as assistant secretary to President Theodore Roosevelt. The third, John W. Crawford, was secretary to an admiral. The three men were profiled in the *Washington Post*, which described the “deep admiration and wonder” with which they were regarded by the “simple folk of the quiet New Jersey hamlet” of Vineland. *Id.* at 49. Two of the young men died within two years after this article appeared. Crawford committed suicide, and York either jumped or fell to his death from a second-story hospital window. *Id.* at 49-50. This story is fascinating for its own sake, and it adds texture and human interest. But Peppers makes no attempt to link it to his promised narrative or analysis—or to explain why he does not.

formation about the Justices in relation to their law clerks; it is impressive in its detail, but hard to digest.³⁷

Peppers' second major argument is that the significant changes in ways that the Justices use their law clerks should be attributed not to increasing workloads, but rather to changes in institutional norms.³⁸ For example, he pegs the last significant shift in the law clerk role—to its current incarnation as “law firm associate,” in which law clerks take on such substantive duties as drafting opinions—to the appointment of Chief Justice Warren.³⁹ Warren, who as former governor of California was used to working on substantive matters with a large staff, delegated increasingly substantive work to his law clerks.⁴⁰ As a result, Peppers argues, institutional norms shifted and Justices appointed after Warren followed suit.⁴¹ In fact, he argues that increasing workload *cannot* explain the change in the law clerk's role; if workload alone were to blame, he says, then those Justices already serving on the Court would have made the same change, and they did not.⁴²

This analysis is oversimplified. Although Earl Warren's leadership and example undoubtedly played an important role in the development of the law clerk institution, Peppers' analysis leaves unanswered the questions of what caused Warren to precipitate this shift in norms, and why other Justices followed suit. Explanations consistent with the workload hypothesis are possible. Those Justices already on the Court might have been comfortable enough in their jobs that they were able to handle a heavy and increasing workload more easily and efficiently than were those Justices lower down on the learning curve. Or the quality of their work (or life) might have suffered with the increased workload, but they were unwilling to make significant changes in the way they did their jobs.

In fact, this question of why at various times in the institution there were changes in the Court-wide norms regarding uses of law clerks repeatedly goes unanswered in *Courtiers*, especially because the institutional history that Peppers describes, with the role of the law clerk moving from stenographer to legal assistant to law firm associate, is to some degree belied by the history he reports. His analysis leaves open the question of why certain uses of law clerks became the institutional norm rather than remaining exceptions and why

37. A few editorial changes would have helped. For example, each chapter is subdivided by Chief Justice. Subheadings by Justice, with dates of service, would have made it much more readable.

38. *COURTIERS*, *supra* note 1, at 145.

39. *Id.* at 151-52.

40. *Id.*

41. *Id.* at 152.

42. *Id.*

those shifts happened when they did. More concretely, for example, Justice Gray, the first to have law clerks, used them much as today's Justices do. And Gray was not the only Justice of the early eras to use law clerks in a relatively modern way. Justices Harlan,⁴³ Holmes,⁴⁴ Brandeis,⁴⁵ Reed,⁴⁶ Frankfurter,⁴⁷ and Cardozo⁴⁸ did as well. These Justices were unafraid to delegate quite substantive work—including opinion drafting—to their law clerks. Yet *Courtiers* does not explain why the example of these impressive men did not influence their colleagues to use their clerks similarly.

Likewise, a more nuanced analysis of the institutional norms surrounding law clerks might compare these early Justices to later ones, taking into account changes in the Court's workload and challenges to the Justices' abilities to control their clerks. The early Justices who delegated significant work to their clerks are, in general, among the most admired and most influential in the Court's history. Certainly no one worries that the great Justice Holmes was unduly influenced by his law clerks. Even Justice Gray, while not as well known today as Oliver Wendell Holmes, was seen by those who knew him as "a classic demi-god walking on the earth."⁴⁹ And the accounts of these early Justices' interactions with their law clerks suggest that they never lost control of the substance of their work. Justice Gray, for example, would go over his law clerks' opinion drafts line by line, questioning everything about them.⁵⁰ The interesting question, then, is whether other Justices, with perhaps less intellectual prowess and self-confidence and—over time—with perhaps more work to do, have been (or will be) able to exert sufficient control.⁵¹

Peppers' reliance on P-A theory does not answer that question. In his telling, *everything* devolves to P-A theory, from Douglas's reported terrorizing of many of his law clerks to Warren's treatment of his law clerks as if they were beloved members of his family.⁵² If everything about the Justice-law clerk relationship can be described as the effort of a principal to control his agent, then the P-A theory ex-

43. *Id.* at 54.

44. *Id.* at 57-58.

45. *Id.*, at 62-66.

46. *Id.* at 98-102.

47. *Id.* at 104, 108.

48. *Id.* at 95-98.

49. *Id.* at 43.

50. *Id.* at 45.

51. In fact, workloads have not consistently increased over time. At the beginning of the 1890 Term, there were over 1800 cases pending and it took three years for a case to be heard. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 60, 257 (1928). On the other hand, such a high caseload at exactly the time that Congress provided funds for each Justice to hire a clerk suggests that the workload hypothesis has at least some explanatory power.

52. *COURTIERS*, *supra* note 1, at 116-18, 151.

plains very little. Peppers does not even explicitly address whether the Justices' control and monitoring strategies have changed along with the law clerk institution (although he says at the beginning that we should expect them to),⁵³ nor does he evaluate the *effectiveness* of those strategies. Peppers' conclusion that "[t]he necessary conditions for the exercise of influence by law clerks have rarely, if ever, existed on the Supreme Court"⁵⁴ does not, therefore, fully persuade.

Courtiers collects a wealth of information that historians, political scientists, and legal academics will be mining for years to come. In this respect, its contribution is significant. But Peppers' evident research prowess and persistence eclipses both his analysis and his book's description of the Court as an institution—much less law clerks as an institution.⁵⁵

B. *Sorcerers' Apprentices*

In contrast to Peppers, Ward and Weiden take a much more analytical and conceptual approach in *Sorcerers*. *Sorcerers* is organized not historically, but functionally, with chapters on selecting law clerks, the cert process, deciding cases, and opinion writing.⁵⁶ The book generally focuses more on the workings of the Court as an institution than does *Courtiers*. Indeed, *Sorcerers*' most valuable contribution is its identification and analysis of a series of institutional changes that transformed the role of law clerks. Ward and Weiden argue, for example, that law clerks' increased involvement in reviewing cert petitions stems not from the creation of the cert pool in the early 1970s, but rather from Chief Justice Hughes' decision in 1935 to end the practice of discussing every petition in the Justices' weekly conference.⁵⁷ Hughes created a "dead list" of petitions that would not be discussed absent another Justice's request.⁵⁸ The other Justices therefore began to review the petitions on the dead list to ensure that they agreed with Hughes' assessment.⁵⁹ And they often turned to

53. *Id.* at 16.

54. *Id.* at 206.

55. This criticism may seem somewhat unfair. After all, Peppers has done us a service by compiling a vast array of information about law clerks in one place. One reader, for example, praised *Courtiers*' textured and nuanced view of the variety of relationships that different Justices have with their law clerks. See OrinKerr.com, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*, <http://www.orinkerr.com> (May 30, 2006, 11:20 EST). The problem is not so much that Peppers has gathered disparate information from numerous sources, and that those sources, not surprisingly, do not all neatly fit together, but rather that he promises an analytical thread and a narrative arc that he does not quite deliver.

56. *SORCERERS*, *supra* note 2, at 52-53.

57. *Id.* at 37, 113.

58. *Id.* at 37.

59. *Id.*

their law clerks for help in this process.⁶⁰ As a result, the “dead list had the practical effect of elevating the importance of clerks in screening petitions for possible conference discussion.”⁶¹

Sorcerers likewise argues that law clerks became increasingly involved with writing opinions due to two institutional changes, neither of which is obviously related to law clerk opinion writing at all. First, Chief Justices Vinson and Warren began assigning an equal number of opinions to each Justice.⁶² Before that, opinions were distributed on the basis of how many opinions each Justice had yet to issue.⁶³ Under this old system, Justices who wrote quickly ended up writing more majority opinions than did those who wrote more slowly.⁶⁴ Under the new policy, however, slower writers like Justices Reed and Frankfurter had to write more opinions than they had before.⁶⁵ They turned to their law clerks for help.⁶⁶

The second change was the creation of the cert pool in 1972.⁶⁷ The cert pool, which was proposed by Justice Powell and continues today, divides cert petitions equally between the chambers of participating Justices.⁶⁸ Within those chambers, each petition is assigned to one law clerk who writes a memo evaluating the petition.⁶⁹ The memo is circulated to all of the Justices who participate in the cert pool.⁷⁰ The pool—and the contemporaneous increase in the number of law clerks per Justice to three and then to four—freed up law clerks’ time previously spent reviewing cert petitions and allowed them to spend more time on opinions.⁷¹

A third important institutional change that *Sorcerers* identifies—although it does not tie the change directly to opinion writing—is the opening of the Supreme Court building in 1935.⁷² Before that, the Justices heard arguments in a room in the Capitol and did the rest of their work in their own homes, which is also where their law clerks worked (and sometimes lived).⁷³ Moving into the building precipi-

60. *Id.*

61. *Id.* at 37, 115.

62. *Id.* at 42, 204.

63. *Id.*

64. *Id.*

65. *Id.* at 42-43.

66. *Id.* at 42-43, 204.

67. *Id.* at 45.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 45-46; *see also id.* at 142 (noting that in “an astonishing feat given that the Court’s docket has almost doubled . . . [c]lerks are spending far less time now on cert petitions than they did thirty years ago before the pool started”).

72. *Id.* at 33, 160.

73. *Id.*

tated the rise of what *Sorcerers* calls the “clerk network.”⁷⁴ The clerk network gives the Justices a back channel for communicating with or gathering intelligence about each other, and many Justices take full advantage of this opportunity.⁷⁵ During one key abortion case, for example, Justice Blackmun’s law clerk reported to him how Justice Stevens’ thinking and likely separate opinion were evolving based on information the law clerk obtained from Justice Stevens’ clerk.⁷⁶ And although *Sorcerers* does not quite spell out the implications of the clerk network, to do this work effectively the law clerks must be thoroughly familiar with their own Justices’ thinking about the cases on which they are working. The clerk network, then, requires that the law clerks have a substantive role.

Whether because of or in spite of their emphasis on institutional factors rather than on the contours and details of the relationships between individual Justices and their law clerks, Ward and Weiden are less sanguine than Peppers about the level of influence held by the law clerks. With the explosion of cert petitions and the advent of bench memos in 1942, they say, “the clerk was transformed from being primarily a research assistant to being an active decision maker.”⁷⁷ And that was *before* most Justices delegated responsibility for writing opinions to their law clerks. At the end of their book, Ward and Weiden express a concern (although not quite a conclusion) that law clerks have too much influence, that Justices are not doing enough of their own work, “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 [J]ustices’ duties,” and that as a result, the authority of the court is likely to suffer.⁷⁸

Ward and Weiden may have articulated a concern rather than reached a strong conclusion of inappropriate influence in part because their book documents a fair amount of evidence pointing in the other direction. As law clerks began to take on more responsibility, the days of career clerks—clerks who serve for an extended period of time—ended. The last clerks to serve five or more terms were in the 1940s.⁷⁹ There are undoubtedly a number of explanations for this phenomenon, but one of its *effects* is to diminish both the institutional power of law clerks in general and the influence of the individual law clerks—as does the modern practice of hiring recent law school graduates instead of more experienced attorneys.⁸⁰ Ward and

74. *Id.*

75. *Id.* at 160-70.

76. *Id.* at 173-74.

77. *Id.* at 23.

78. *Id.* at 246.

79. *Id.* at 32.

80. *Id.* at 36.

Weiden's own survey responses indicate that only three percent of their respondents believed that they had *ever* changed their Justices' minds with respect to the outcome of a case.⁸¹ And *Sorcerers* goes on to document that law clerks believe that their influence is of very minor value when compared to other factors such as the Justices' jurisprudential philosophy, the facts of the case, and relevant precedent.⁸² In fact, the only thing that the law clerks thought was less important to the Justices than their own views was the Justices' awareness of public sentiment.⁸³

More problematic for Ward and Weiden's concerns, however, is that they conflate a variety of forms of influence.⁸⁴ They do not make normative or qualitative distinctions between some Justices' desire on the one hand to have their law clerks speak their minds, to challenge their thinking, and to ensure that the Justice considers all relevant facts and legal arguments with, on the other hand, the occasional law clerk's efforts to be a "mission-inspired crusader"⁸⁵ who successfully manipulates her Justice to reach results or write opinions that the Justice would not reach on his own. Not all forms of influence are bad or inappropriate, but Ward and Weiden do not acknowledge or address that reality.

Sorcerers' failure to make such distinctions also renders problematic its discussion of law clerks' ideological influence. Ward and Weiden note that historically there was "remarkable ideological congruence" between clerks and their Justices.⁸⁶ They also conclude that there is less today than previously because today's clerkship applicants apply to all Justices, not just to those with whom they agree.⁸⁷ As a result, they conclude, the clerks who are "more closely aligned ideologically with their [J]ustice, hav[e] more influence than others."⁸⁸ This argument exposes the slipperiness of the idea of "influence," and more particularly inappropriate influence. If a law clerk generally sees eye-to-eye with a Justice, how would one even assess

81. *Id.* at 192.

82. *Id.* at 194.

83. *Id.* at 195.

84. This is a mistake that Peppers explicitly avoids. *COURTIER*, *supra* note 1, at 12-14; *see also* Peppers & Zorn, *supra* note 27, at 74 (2008) (finding through statistical analysis "a clear correlation between clerk partisanship and the Justices' voting" but noting that law clerks might exercise influence using "appropriate methods, such as engaging in candid and open policy debates, as well as inappropriate methods, such as deception in memoranda writing"); *id.* at 57-58 (discussing different forms of influence, including some that are "benign").

85. *SORCERERS*, *supra* note 2, at 189.

86. *Id.* at 55.

87. *Id.* at 57-59.

88. *Id.* at 107. On this subject, Peppers shows more subtlety, arguing that hiring law clerks with compatible ideological views is one way for Justices to solve their P-A problem. *COURTIER*, *supra* note 1, at 207.

whether the law clerk influenced the Justice in any particular case?⁸⁹ Perhaps they agreed with each other from the start.⁹⁰ That Ward and Weiden rely on former law clerks' self-reports of the amount of influence they had on their Justices only exacerbates the problem. Law clerks who agree with the opinions they worked on are more likely to believe they influenced them than are the less well-aligned law clerks, even if the actual level of influence between the two groups is the same. Moreover, Ward and Weiden offer plenty of examples of Justices disregarding their law clerks' advice.⁹¹

As the example of ideological influence shows, *Sorcerers* is at its weakest when it reaches broad conclusions from rather limited data. Ward and Weiden again overstate their case when they say "it is not uncommon for some clerks to continue to aid their Justice in deciding cases even after they leave their clerkship."⁹² Their evidence for this assertion is that some former law clerks give their Justices feedback about opinions that have already issued⁹³—which is, of course, not the same thing as helping to decide cases. Their closest example is when former law clerks—or in one case a future law clerk who had not yet started—send law review articles that may be relevant to pending cases.⁹⁴ In the case of the future law clerk, however, despite Justice Powell's gracious reply, there is no evidence that he read or relied on the note or that it affected his analysis in any way.⁹⁵ Moreover, their primary examples of such communications come from the papers of a single Justice—Justice Powell—making any Court-wide generalizations suspect.⁹⁶

Not only do Ward and Weiden over-generalize from the papers of a handful of Justices, relying most heavily on Justice Powell and Justice Blackmun's papers, but they also present a study of a single significant case as a way to illustrate "the growing influence of clerks,

89. Peppers and his co-author Christopher Zorn make an attempt to measure law clerk influence generally using regression analysis. Peppers & Zorn, *supra* note 27, at 70-75.

90. Cf. PERRY, *supra* note 10, at 73 (suggesting that perhaps the Justice influences the law clerk).

91. SORCERERS, *supra* note 2, at 191. None of this is to suggest that a Justice can never be inappropriately manipulated. But *Sorcerers* offers no evidence that this happens on any kind of regular basis. Both *Sorcerers* and *Courtiers* mention one possible example of a Justice delegating inappropriate amounts of authority when they report the widespread view that Justice Murphy delegated too much authority to his law clerks, in particular to Eugene Gressman. SORCERERS, *supra* note 2, at 204; COURTIER, *supra* note 1, at 110-12. But Gressman was with Murphy for five terms—unlike today's clerks—and the story of their relationship is notable for its rarity and its age.

92. SORCERERS, *supra* note 2, at 193.

93. *Id.* at 193-94.

94. *Id.* at 194.

95. *Id.*

96. *See id.* at 194.

particularly in important cases.”⁹⁷ The case that *Sorcerers* focuses on is *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁹⁸ the landmark case that many predicted would overrule *Roe v. Wade*,⁹⁹ but due to the unprecedented joint opinion of Justices Souter, Kennedy, and O’Connor, stopped short of doing so. The story that *Sorcerers* tells here is fascinating. Relying on Justice Blackmun’s papers, the authors meticulously document how Blackmun’s clerks “constantly lobbied their [J]ustice, provided strategic and political analysis as well as legal analysis, worked tirelessly behind the scenes with clerks from other chambers to gain information about what was happening with the other [J]ustices, and drafted Blackmun’s opinion in the case.”¹⁰⁰

Casey was particularly ideologically fraught and of enormous personal concern to Justice Blackmun.¹⁰¹ Reviled by some and embraced by others, as the author of *Roe*, he was personally identified with the Court’s holding that a woman’s right to control her body is a fundamental right of constitutional magnitude. Blackmun understood this to be a serious responsibility. He read all of the hate mail, but he also wanted to defend his work.¹⁰² The barrage of memos from Justice Blackmun’s law clerks shows their dedication, their loyalty to him, and their outrage at some of the other Justices; one law clerk even goes so far as to refer to Justice Scalia as “the evil nino.”¹⁰³ But despite Ward and Weiden’s assertion that “as . . . the case study on

97. *Id.* at 173.

98. 505 U.S. 833 (1992).

99. 410 U.S. 113 (1973).

100. *SORCERERS*, *supra* note 2, at 173.

101. *Id.*

102. See David G. Savage, *The Nation; Papers of Roe-Wade Author to be Released*, L.A. TIMES, Feb. 29, 2004 at A34, available at <http://hnn.us/roundup/entries/3826.html>.

103. *SORCERERS*, *supra* note 2, at 179. This particular incident has been singled out as an example of a law clerk gone wild. David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFFAIRS, May/June 2005, available at http://www.legalaffairs.org/issues/May-June-2005/feature_garrow_mayjun05.msp (criticizing “partisan politics” and “harshly sarcastic references to other [J]ustices”). A more plausible explanation, it seems to me, is that the tone of this memo was consistent with conversations that Justice Blackmun tolerated or even enjoyed. One possible function of law clerks, only hinted at by *Sorcerers*’ discussion of the clerk network, is to give the Justices an outlet for feelings of anger, frustration, or disappointment with each other. *Cf.*, e.g., *SORCERERS*, *supra* note 2, at 166 (quoting Justice Brennan); Tony Mauro, *Blackmun Clerks Had Too Much Power, Says Historian*, LEGAL TIMES, Apr. 18, 2005, available at <http://www.law.com/jsp/article.jsp?id=1113555914558> (noting Justice Blackmun’s desire to turn up the rhetorical heat after Justices Brennan and Marshall retired, but also noting that Justice Blackmun apparently tolerated his law clerks’ disrespectful comments about his colleagues). Given their lifetime appointments and the regularity with which they handle controversial and emotional issues, the Justices may well prefer to handle any negative feelings about their colleagues indirectly—in this case, by wry and disrespectful humor in chambers. I do not claim that this explanation is in fact what happened in Justice Blackmun’s chambers. My claim is only that it is an entirely plausible explanation and one that challenges the image of the law clerk as ideological zealot.

abortion demonstrates, there is no doubt that particular clerks have played important decision-making roles at particular times and in particular cases,”¹⁰⁴ nothing in the story suggests that these law clerks acted as anything other than faithful surrogates, nor that they were delegated inappropriate authority. Blackmun might not have written the first draft of his opinion, but he was in constant communication with the law clerk who did.¹⁰⁵ And even if there were inappropriate delegation or usurpation in *Casey*, generalizing from *Casey* to other cases—even other landmark cases—is at best unreliable, as is generalizing from Justice Blackmun’s relationships with his law clerks to the institution as a whole.¹⁰⁶

The major flaw of *Sorcerers* is, thus, precisely the opposite of *Courtiers*. At times, the authors draw grand inferences from rather flimsy evidence, and they sometimes elide the differences in the institution over time or between Justices.¹⁰⁷ On the other hand, *Sorcerers* is ambitious in its analysis. It provides a much more convincing explanation for the overall development of the institution than does *Courtiers*, and it is both readable and entertaining. The *Casey* case study alone is worth the price of admission for court-watchers, but the book’s conclusions and recommendations must be read with a critical eye.

II. THE PROXY WARS

The twin appearance of *Sorcerers* and *Courtiers* offers more than the information and analysis that the books explicitly present: it raises a question so obvious it is rarely asked. Why is there so much interest in Supreme Court law clerks anyway, particularly when

104. *SORCERERS*, *supra* note 2, at 199.

105. *See generally id.* at 173-84 (discussing the involvement of Justice Blackmun’s clerks in *Casey*).

106. Additionally, these memos reflect only a portion of Justice Blackmun’s communication with his law clerks even in *Casey* itself: “Justice Blackmun directed his clerks orally through myriad conversations each day. The clerks responded in writing . . .” Mauro, *supra* note 3 (quoting former Blackmun clerk Harold Koh). Famously, Justice Blackmun ate breakfast with them every morning. *COURTIERS*, *supra* note 1, at 183. And, as is clear from some of the memos themselves, those breakfasts were an opportunity for substantive legal discussion and (intra-Court) political strategizing. *Id.*

107. On one occasion they make a mistake that allows them to reach a certain conclusion. The authors argue that the Justices’ penchant for hiring law clerks from a few law schools may in part stem from the fact that all of the Justices on the Rehnquist Court attended those very law schools. *SORCERERS*, *supra* note 2, at 75. But the authors are wrong in their premise: although they list Justice Stevens as having attended University of Chicago Law School, in fact he attended Northwestern University School of Law. *See* The Supreme Court of the United States, The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Oct. 27, 2009). And although Northwestern does occasionally send law clerks to the Supreme Court, it is not one of the schools identified as one of the Rehnquist Court’s favorites. *SORCERERS*, *supra* note 2, at 72-75.

compared to the level of interest in other influential aides to powerful governmental figures or even to the law clerks of other federal judges? The two books, as well as the rest of the literature on Supreme Court law clerks, focus heavily on the issues of whether law clerks have too much power both through their involvement with the cert process and through their ideological influence. As I have already discussed, these questions are not new.¹⁰⁸ I will argue in this section that these debates are largely proxy wars for what people really care about—how the Court decides what cases to hear and what role ideology plays in the Supreme Court’s work. Although talking about law clerks is not the best way to address those concerns, the Court’s intense secrecy displaces legitimate questions about the Court’s operations onto the slightly more accessible concerns about law clerks.¹⁰⁹

A. *The First Proxy War: The Cert Review Process*

In recent years, the number of cases decided on the merits in the Supreme Court has declined to historically low levels. In October Term 2007, for example, the Court issued only sixty-seven merits opinions after argument and decided only four additional cases—two affirmed by an equally divided court and two summary affirmances.¹¹⁰ In contrast, from 1971 to 1988, the Court handled approximately 150 merits cases a year.¹¹¹ This dramatic decline has prompted criticism by litigators,¹¹² academics,¹¹³ and appellate judges.¹¹⁴ The cert pool is often blamed for this caseload decline,¹¹⁵ including by the authors of *Sorcerers* and, according to them, by Justice Stevens.¹¹⁶

One of the key features of the cert pool and the focus of much of the criticism of it is that it delegates much of the cert process to law

108. See *SORCERERS*, *supra* note 2, at 246, 248-49 (discussing concerns about law clerk influence).

109. PERRY, *supra* note 10, at 16-17 (noting how much more information academics and the public have about other government institutions).

110. SCOTUSWiki, The Court’s Workload in OT07 (2008), available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/06/workload07.pdf>.

111. Arthur Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 403 (noting that during those years the Court handled an average of 147 cases).

112. See, e.g., Kenneth Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363 (2006).

113. See, e.g., Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271 (2006).

114. See, e.g., POSNER, *supra* note 9, at 269-70 (noting that the caseload decline is even more precipitous when calculated as a percentage of total cases decided in the federal appeals courts).

115. Shapiro, *supra* note 113, at 275; Starr, *supra* note 112, at 1377; David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 972 (2007).

116. *SORCERERS*, *supra* note 2, at 142-44.

clerks. But, as both *Courtiers* and *Sorcerers* demonstrate, law clerks have long played an integral role in reviewing cert petitions and recommending their disposition.¹¹⁷ Law clerk involvement in the cert process, therefore, cannot alone explain the caseload decline.

Charting the history of the Court's certiorari jurisdiction and law clerks' role in the cert process is clarifying. Until 1925, most cases came to the Supreme Court as of right,¹¹⁸ so there was no need for the Court to review large numbers of cert petitions. The Judges' Bill of 1925 dramatically increased the Court's control over its docket by significantly expanding its certiorari jurisdiction and reducing its mandatory jurisdiction.¹¹⁹ In the years following passage of the Judges' Bill, cert review was largely centralized in the Chief Justice's chambers, but nonetheless involved law clerks.¹²⁰ Chief Justice Hughes, who began serving in 1930, had his law clerks review the petitions and draft memos with their recommendations.¹²¹ Although these memos were not circulated to the other Justices, the Chief Justice used them to summarize the cert petitions at the Justices' weekly conference.¹²² All of the Justices, therefore, were to some degree reliant on the work of the Chief Justice's law clerks.

Over time, different Chief Justices made adjustments to this practice that, whether intentionally or not, increased law clerk involvement in reviewing those cert petitions. In 1935, Chief Justice Hughes ended the practice of discussing every petition in conference.¹²³ As described above, he began to circulate a "dead list" of the cases that would not be discussed unless some other Justice requested it.¹²⁴ As a result, the other Justices, often relying on their law clerks, reviewed the petitions on the dead list to ensure that they agreed with Hughes' assessment.¹²⁵

In addition, beginning with Chief Justice Hughes and lasting until 1971, the unpaid *in forma pauperis* (IFP) petitions—generally filed by criminal defendants and prisoners and viewed as less likely to be meritorious¹²⁶—were handled exclusively by the Chief Justice's law

117. *Id.* at 109-10, 110-11 (describing Justice Gray's reliance on law clerks in reviewing cert petitions); *id.* at 137 (describing Justice McReynolds' delegation in 1936); *id.* at 137-38 (describing the more than 600 petitions a year that each law clerk reviewed in the last Term before the cert pool began, with the Chief Justice's clerks reviewing even more).

118. Shapiro, *supra* note 113, at 275-76.

119. *Id.* at 276.

120. SORCERERS, *supra* note 2, at 112.

121. *Id.* at 111-12.

122. *Id.* at 112.

123. *Id.* at 113.

124. *Id.* at 37, 113.

125. *Id.* at 37.

126. *Id.* at 38; PERRY, *supra* note 10, at 103-04.

clerks, who would draft a memo for each such petition.¹²⁷ Although during Hughes' tenure only the Chief Justice reviewed these memos, "subsequent Chief Justices circulated [them] to all the chambers for review,"¹²⁸ where they were often reviewed by other Justices' law clerks.¹²⁹ As *Sorcerers* puts it, "[w]hen viewed through the lens of the IFP process, the creation of the cert pool was not too difficult a leap for the [J]ustices who joined."¹³⁰

As cert caseloads grew still larger over time, the Court's practice changed again. Today—and beginning with Chief Justice Vinson in 1950—the Chief Justice circulates a "discuss list" rather than a "dead list."¹³¹ Only those cases on the list are discussed at conference, and any Justice may add a case to the list.¹³² The vast majority of cert petitions, of course, are not listed and are automatically denied.¹³³ *Sorcerers* explains, "[a]s dockets grew, and a greater number of cases failed to make the discuss list, the [J]ustices were forced to rely more heavily on their clerks," often asking their law clerks to write memos on at least some of the cert petitions.¹³⁴

Finally, in 1972, following complaints by several Justices about the amount of time they or their law clerks spent reviewing cert petitions, the cert pool was born.¹³⁵ Despite the long history of law clerk involvement in the cert process, much criticism of the cert pool accuses the Justices of having abdicated their role of reviewing the cert petitions themselves.¹³⁶ Ward and Weiden themselves argue that as an institutional matter, law clerks have largely supplanted Justices in making the certiorari decisions:

It has become increasingly difficult for the [J]ustices to be a check against clerk-written memos. Indeed, the clerks themselves have a

127. *SORCERERS*, *supra* note 2, at 38-39 (noting that IFP cases were not generally discussed at Conference).

128. *Id.* at 38, 113-14.

129. *Id.* at 124.

130. *Id.* at 141.

131. *Id.* at 115.

132. *Id.* at 115, 126.

133. *Id.* at 115.

134. *Id.* at 115.

135. *Id.* at 117. The cert pool still operates much as originally implemented, although during the last twelve years of the Rehnquist Court, all of the Justices except Justice Stevens participated. *Id.* at 118-19, 125. Although Chief Justice Roberts and Justice Alito both joined the pool when they began at the Court, Justice Alito recently announced that he was leaving the cert pool as well. Adam Liptak, *A Second Justice Opts Out of a Longtime Custom: The 'Cert. Pool'*, N.Y. TIMES, Sept. 25, 2008, at A21, available at <http://www.nytimes.com/2008/09/26/washington/26memo.html>. Justice Sotomayor also joined the cert pool when she joined the Court. Tony Mauro, *The Cert Pool: Sotomayor Joins It, Lawyers Attack It*, available at <http://legaltimes.typepad.com/blt/2009/09/sotomayor-joins-the-cert-pool.html> (Sept. 21, 2009). As a result, there are now seven Justices in the pool. Justices Stevens and Alito do not participate.

136. Starr, *supra* note 112, at 1376-77.

difficult enough time checking the pool memos they receive from other chambers, relying on cues and shortcuts in an attempt to filter out shoddy work and biases. The cert pool has blurred the dividing line between [J]ustice and clerk in the long-standing battle against rising dockets.¹³⁷

This argument, however, casts the blame in the wrong place. The cert pool itself does not discourage the Justices from doing more of the cert work themselves. Rather, it is the sheer number of petitions. In OT 2006, more than 8800 cases were filed with the Court, almost all in the form of cert petitions.¹³⁸ In OT 2007, the number dropped slightly to 8241 cases.¹³⁹ Even Justice Stevens, who is not in the pool, relies on his own law clerks' review, without reviewing the underlying papers himself, in about seventy-five percent of the cases.¹⁴⁰ Justice Brennan, who famously reviewed cert petitions himself, retired when the Court acted on approximately 5400 petitions a year¹⁴¹—substantially less than the current cert petition caseload—and even Brennan delegated cert review to his law clerks during the summers.¹⁴² While it may be possible, it is neither realistic nor desirable for each Justice to personally review 8500 petitions a year, at least not without severely impairing his or her ability to engage fully in the other work of the Court. Assuming fifty weeks of work per year and a five-day workweek, 8500 petitions a year comes to 170 petitions a week, or thirty-four a day.¹⁴³ As the history described above demonstrates, even when cert caseloads were substantially lower, the Justices have *never* done all of the cert work themselves.

Nor can the mere existence of the cert pool (as opposed to aspects of the pool's culture or the cert criteria themselves) be blamed for the increasingly small numbers of cases heard by the Court, as suggested by Ward and Weiden.¹⁴⁴ As a matter of sheer numbers, this argument does not hold up. The shrinking of the Court's merits docket did not

137. SORCERERS, *supra* note 2, at 148.

138. Supreme Court of the United States, 2008 Year-End Report on the Federal Judiciary, at 10, available at <http://www.supremecourtus.gov/publicinfo/year-end/2008year-endreport.pdf>.

139. *Id.* While the Justices could review all cert petitions themselves, this would not be the best use of their time. Most petitions are disposed of easily. Either they raise a question only of state law, they have "vehicle problems" such as waivers or jurisdictional defects that might keep the Court from reaching the merits, they are "fact-bound" arguments for a second bite at the apple, or they are frivolous on their face. There is no reason why law clerks, applying a straightforward set of criteria, cannot winnow out these petitions.

140. SORCERERS, *supra* note 2, at 126. We do not know how Justice Alito has handled the cert petitions since his decision to leave the pool.

141. 2009 U.S. CENSUS BUREAU Stat. Abstract U.S. 201 (Table 321).

142. PERRY, *supra* note 10, at 67-68.

143. The key question about the cert pool as well as all other aspects of the law clerk institution is not whether the institution has problems (which, as a human endeavor, it undoubtedly does), but whether the Court would be better off without it.

144. *Sorcerers*, *supra* note 2, at 142-44.

occur until more than fifteen years after the cert pool was created—not until after Congress eliminated most of the Supreme Court’s remaining mandatory jurisdiction in 1988.¹⁴⁵ Even in 1990, two years after this congressional action, the Court heard argument in 125 cases.¹⁴⁶

The critics, including the authors of *Sorcerers*, also seem to assume that there are cases that should be granted, based on some set of objective criteria, but that are not. At one point, for example, *Sorcerers* concludes that Blackmun’s request for background information about the different pool authors “would not be necessary if each pool clerk provided *objective* analyses.”¹⁴⁷ Yet, there is no right to certiorari review. Even if the law clerks make bad recommendations, which the Justices then follow, no party would improperly be denied their day in court because no one is entitled to review. In that sense, therefore, there is no such thing as “objective analysis,” and there are no cases that *should* be granted.¹⁴⁸ All cert decisions are entirely discretionary. The better question, therefore, is whether the law clerks recommend denials of certiorari, *and whether those recommendations are followed* in cases in which the Justices would vote differently if they had reviewed the petitions themselves.¹⁴⁹

145. See Shapiro, *supra* note 113, at 277.

146. 2009 U.S. CENSUS BUREAU, *supra* note 141, at Table 321.

147. SORCERERS, *supra* note 2, at 137 (emphasis added). In fact, if anything, the evidence suggests that the cert pool and the risk aversion that it breeds causes law clerks to rely too heavily on objective criteria like circuit splits. Stras, *supra* note 115, at 975-76.

148. See PERRY, *supra* note 10, at 221 (noting that calling a case certworthy is tautological, as it simply means that four Justices voted to grant cert); see also *id.* at 264 (criticizing the proposal for a National Court of Appeals as failing to take into account the subjective evaluations the Justices make in determining whether to grant cert). There are, of course, criteria for the granting of cert. Those criteria, listed in Supreme Court Rule 10, include the presence of a circuit split and an issue of national importance. A law clerk can often provide relatively neutral or objective analysis of some of those criteria—the presence of a clean circuit split, for example. But the relative importance of the issue or the seriousness of the circuit split are not matters that have an objective answer.

149. This is a different question from whether the criteria used by the law clerks and the Justices are the right criteria. I have argued elsewhere that those criteria are too narrow. Shapiro, *supra* note 113, at 284-86. An interesting proposal recently floated by a group of academics would largely remove the power to grant or deny cert from the Justices altogether. The proposed Judiciary Act of 2009 would create a Certiorari Division of all senior circuit judges and federal appellate judges who have sat for at least eight years but are not currently serving as chief judge of their circuits. The Certiorari Division would sit in randomly assigned, rotating panels of five, and would grant or deny petitions for certiorari. The Supreme Court could overrule their decisions, choosing to grant a denied petition or choosing—but only by majority vote and with a written explanation—to deny a granted petition. Among the more interesting features of this proposal, it would require the Certiorari Division to grant a minimum of eighty and a maximum of one hundred petitions per year, and it would allow the Supreme Court, by rule, to increase the maximum. See Posting of David Stras to Balkanization, More on Reforming the Supreme Court, <http://balkin.blogspot.com/2009/02/more-on-reforming-supreme-court.html> (Feb. 14, 2009, 10:17 PM); see also Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 630-35

It is of course impossible to determine the answer to such a counterfactual inquiry. But by breaking down the different types of plausibly certworthy cases that the Court considers and by examining the available empirical evidence, we can make some educated guesses. Some cases are heard by the Supreme Court—or (arguably) should be—because of their importance or the national significance of the issues they present. In general, these are cases, like *Clinton v. Jones*,¹⁵⁰ *Hamdan v. Rumsfeld*,¹⁵¹ the right-to-die cases,¹⁵² or the Michigan affirmative action cases (*Grutter v. Bollinger*¹⁵³ and *Gratz v. Bollinger*¹⁵⁴), that everyone sees coming. They are *sui generis*, and they are famous before the cert petition is ever filed.¹⁵⁵ Because of the special nature of these cases, a pool author's recommendation and analysis is likely of relatively little importance. Analysis in the pool memo that the Court should deny a nationally significant case for technical reasons, such as a lack of jurisdiction or waiver, is likely to be carefully vetted in most if not all chambers. Suggestions that the Court should deny for political or prudential reasons will be considered but by their very nature are the sorts of suggestions receiving the least deference from the Justices.¹⁵⁶

Moreover, recent empirical evidence suggests that in general the Justices behave differently with respect to their cert votes on high-profile, politically salient cases than they do with respect to lower-profile cases and likewise suggests that the differences in behavior vary with the ideological orientation of the Justice.¹⁵⁷ Different behavior with respect to these different cases and different behavior between Justices suggest that the Justices know that there is some-

(2009). Interestingly, similar proposals were made during the period when the Court was hearing 150 cases a year. Then, the idea was that a National Court of Appeals could alleviate some of the Justices' workload, not add to it. *Id.* at 634, n. 264.

150. 520 U.S. 681 (1997).

151. 548 U.S. 557 (2006).

152. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

153. 539 U.S. 306 (2003).

154. 539 U.S. 244 (2003).

155. See PERRY, *supra* note 10, at 253-54 (noting that there are some cases of legal importance, if not social importance, that might also fall into this category).

156. See SORCERERS, *supra* note 2, at 128 ("In landmark or controversial cases, the [J]ustices are unlikely to rely upon the clerk's recommendation much, if at all.").

157. Margaret Meriwether Cordray & Richard Cordray, *Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court*, 57 U. KAN. L. REV. 313, 329-42 (2009); see also PERRY, *supra* note 10, at 271-82 (following in-depth interviews and qualitative empirical analysis, explaining the Justices' decisionmaking processes, not the law clerks); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 391 (2004) (finding that "[a]lthough the Justices consider the very same cases and materials, in light of the same criteria set out in the Court's rule, they come to quite different conclusions about which cases merit plenary review [and that e]ven Justices closely aligned in decisions on the merits often have dramatically different voting records on certiorari").

thing special about these cases and therefore give them particular attention, belying concerns about undue reliance on the pool memo. There may of course be important, *sui generis* cases that have been denied by the Court and that arguably should have been heard (although neither book identifies any), but given the likelihood that such cases are carefully considered, blaming such denials on the existence of the cert pool or on undue law clerk influence is, in my view, mistaken.

A second category of cases that might fall through the cracks of the pool are those dealing with subjects of particular interest to particular Justices, since they cannot direct other Justices' law clerks to look out for them. For example, Justice Powell took special care when reviewing capital cases.¹⁵⁸ Justice Marshall wanted heightened review of cert petitions involving civil rights.¹⁵⁹ Other Justices might seek out cases implicating, for example, federalism issues. But it is not difficult for a Justice to instruct his own clerks to pull such pool memos or petitions for particular scrutiny or to select those memos himself. In fact, this is just what Justice Powell did.¹⁶⁰ Because the Justices can identify those areas of law or legal issues to which they want particular attention paid, they and their law clerks can counteract any short shrift that a pool author from another chamber might give.

A third and related danger discussed in both books is partisanship in the pool memos. Justice Blackmun complained that some law clerks failed to include a mention of a dissent or information about the judges on the appellate court panel in their pool memos,¹⁶¹ from which Ward and Weiden seem to infer that he believed that some law clerks purposely omitted this information to make a grant less likely. Similarly, one of Justice Kennedy's former clerks recalled that a liberal clerk shaded the facts in a pool memo to make his desired result more likely.¹⁶² Obviously, shading or omitting key information or

158. *SORCERERS*, *supra* note 2, at 126-27, 192-93.

159. *PERRY*, *supra* note 10, at 261-63 (listing subjects that were of particular interest to each Justice).

160. *SORCERERS*, *supra* note 2, at 126-27. Justice Douglas, who was not a member of the cert pool, nonetheless relied on his law clerks to review the cert petitions and instructed them to identify petitions on subjects of interest. *Id.* at 119-21. *See also* *PERRY*, *supra* note 10, at 61 (noting that when clerks review pool memos for their Justices, they often identify and flag subjects about which they know their Justices are interested).

161. *SORCERERS*, *supra* note 2, at 133-34.

162. *COURTIERS*, *supra* note 1, at 202-203. In an even more disturbing story, Eduardo Penalver, a former Stevens clerk describes "one death row petition [] for which a clerk for a conservative Justice recommended 'deny' without any explanation at all." Posting of Eduardo Penalver to Think Progress, <http://thinkprogress.org> (Aug. 2, 2005) (Think Progress set up a short term Supreme Court site during the nominations of Chief Justice Roberts and Justice Alito, but the site has been disabled and the posts deleted; hard copy is on file with author.). But the fact that Penalver mentioned this breach means that it did not go unnoticed. Moreover, the norms and culture of the cert pool work against this kind of be-

facts in a pool memo to reach the law clerk's desired result impedes the Justices from exercising their own judgment. And clerks may sometimes recommend "defensive" denials when they are fearful that the result on the merits would not be to their liking.¹⁶³

But the bureaucratic nature of the cert pool means that there are safeguards.¹⁶⁴ There are standards for pool memos—such as including the information Justice Blackmun identified.¹⁶⁵ In addition, the memos are not anonymous,¹⁶⁶ and most Justices have their law clerks review at least some of the cert memos written by law clerks from other chambers.¹⁶⁷ A law clerk can develop a reputation for reliability or lack thereof (whether because she is ideologically driven or because she is simply sloppy) among her peers in other chambers or even among the Justices themselves.¹⁶⁸ Doing shoddy or unreliable work is deeply embarrassing to one's Justice as well as to the law clerk herself.¹⁶⁹ As a result, there is a culture in which law clerks take their cert pool responsibilities very seriously.¹⁷⁰ If anything, pool memos are longer and more comprehensive than the memos law clerks used to write for their individual Justices.¹⁷¹ And of course both Justices and law clerks alike can identify certain "hot button" issues that are likely to lead a clerk to allow bias—conscious or unconscious—to affect her analysis. Areas of law like capital punishment, voting rights, abortion rights, and the Establishment Clause, for example, are their own red flags to Justices and clerks who review the pool memos.¹⁷²

havior. Former Ginsburg clerk David Franklin, responding to Penalver's post, noted that, "when I was clerking, if any clerk had ever given short shrift to a pool memo in a death case because he was 'swamped with other work at the time,' it would have been considered a serious lapse of professionalism at the very least." *See id.*

163. *SORCERERS*, *supra* note 2, at 133 n.96 (quoting JOYCE MURDOCH & DEB PRICE, *COURTINING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 17(2001)).

164. In Peppers' terms, these safeguards replace the more intimate control of the law clerk available when the clerk is writing only for her own Justice. *COURTIERS*, *supra* note 1, at 210. Less intimate does not necessarily mean less effective, however. Pool memo authors today know that at least six other people (some law clerks, some Justices) will be reviewing their work—and they do not generally even know which six people it will be. Writing a deliberately manipulative or misleading pool memo is undoubtedly more difficult (and hence much riskier) for six unknown readers than for one known principal. *Id.*

165. *PERRY*, *supra* note 10, at 42.

166. *Id.* at 57.

167. *Id.* at 54-55, 60-64.

168. *See, e.g., SORCERERS*, *supra* note 2, at 136.

169. *Id.* at 128 ("[P]roducing written work that brings disrepute upon themselves and their chambers is little less than a heart-stopping prospect.") (quoting former Blackmun clerk Dan Coenen); *see also PERRY*, *supra* note 10, at 56-57, 64.

170. *SORCERERS*, *supra* note 2, at 128-29.

171. *Id.* at 129-31; *see also PERRY*, *supra* note 10, at 52-53, 55.

172. *See, e.g., Penalver*, *supra* note 162 (arguing that "it mattered a great deal which case wound up with which clerk," in part because different subjects were likely to appeal to liberals or to conservatives).

Despite their concern for too much clerk influence, Ward and Weiden also highlight an interesting counterdanger—a *lack* of partisanship. As they put it, the pool removes candor from cert review.¹⁷³ Comparing memos drafted for particular Justices with pool memos, they conclude that “clerks who wrote only for their own [J]ustice were more candid in the past, particularly with recommendations and political analyses, than are current clerks who write one memo for eight [now seven] [J]ustices who occupy different positions on the ideological spectrum.”¹⁷⁴ And they offer a fascinating example: by chance, one of Justice Blackmun’s clerks was assigned the pool memo for *Webster v. Reproductive Health Services*, an important abortion case. In the memo, the law clerk wrote: “The seventh question presented is whether the Court should reconsider *Roe v. Wade*. It is not necessary to reconsider *Roe* in order to decide the other issues presented. However, should the Court wish to revisit that opinion this case is an adequate vehicle for doing so.”¹⁷⁵ For Justice Blackmun himself, however, the law clerk was much more candid. In a handwritten note, he added: “(not that I think my recommendation counts for very much in this case.) I hope I have not taken objectivity too far.”¹⁷⁶

As this example illustrates, there is a safeguard against bland and bureaucratic pool memos: “The decline of candid analyses in pool memos is no doubt one reason why [J]ustices ask their own clerks to mark up the pool memo and do further research if a pool memo piques their interest.”¹⁷⁷ And indeed, *Sorcerers* cites numerous examples of law clerks adding their own candid and even irreverent comments to the pool memos they reviewed.¹⁷⁸ The result of the cert pool coupled with individual law clerk markups of pool memos may therefore be the best of both worlds—a relatively neutral (bland) evaluation of whether a case meets the Court’s criteria for granting cert and an individualized review by the Justices’ own clerks.

Although most of the concerns about whether law clerks are unduly influential or unduly partisan in carrying out their cert duties cannot withstand critical scrutiny, the persistence and widespread acceptance of these concerns is damaging to the Court’s institutional credibility and stature. The question, then, is whether and how the

173. *SORCERERS*, *supra* note 2, at 128-31.

174. *Id.* at 129; *see also id.* at 127 (“When a clerk writes for an individual justice, he or she can be more candid.”) (quoting Justice Stevens); PERRY, *supra* note 10, at 59 (noting that pool memos do not allow much opportunity for ideological discussion).

175. *SORCERERS*, *supra* note 2, at 130.

176. *Id.*

177. *Id.* at 131; *see also* PERRY, *supra* note 10, at 56 (noting that the markup, “not the pool memo, was seen as the place to communicate with one’s boss—particularly for more strategic considerations”).

178. *SORCERERS*, *supra* note 2, at 10-32, 130.

Court can address them. I believe that almost all of these concerns about the cert pool could be alleviated were the Supreme Court to (1) publicly share more information about the reasons it does or does not grant cert in particular cases and (2) reevaluate—and likely change—its cert criteria and the culture of the cert pool.

Except in the rarest of cases, there is no explanation for why the Court denies cert in a particular case. Lawyers and court observers generally have no way to know if a case has even been seriously considered by being placed on the discuss list.¹⁷⁹ And although the Court sometimes provides an explanation of its cert grant in merits opinions, those explanations are generally so minimal that they provide little or no useful guidance for the future.¹⁸⁰

Yet consider the advantages of more transparency in the cert process. Lawyers might gain more information about some of the reasons the Court chooses not to grant cases. This in turn is likely to lead to better-written cert petitions and even possibly fewer cert petitions¹⁸¹—saving resources for litigants and the Court alike.¹⁸² At the same time, an understanding that, in general, the role of the cert pool is relatively bureaucratic, not partisan or ideological, might decrease the concerns about who is really making the decisions. In addition, the process of deciding what information to reveal and how to reveal it might lead the Justices to reevaluate the cert criteria and the culture of the cert pool, both of which tilt against grant recommendations. In other words, more transparency about cert decisions would encourage both public and internal discussion to focus more on the cert criteria themselves—which I have argued elsewhere are too narrow¹⁸³—rather than on the less important question of how the cert pool works.¹⁸⁴

179. An exception is when a case is relisted. Occasionally, the Court does not resolve a particular cert petition during its weekly conference. This can happen for a variety of reasons, including a Justice wanting to review the petition or pool memo again. See PERRY, *supra* note 10, at 49-51 (discussing reasons for relisting a case). Because cases that do not make the discuss list are rarely relisted (at least absent some other action of the Court, such as ordering a response to the original petition), even if a relisted case is eventually denied without explanation, knowledgeable court-watchers can infer that the case was of interest to at least one Justice.

180. See *id.* at 34 (quoting Stern and Gressman).

181. But see *id.* at 224-25 (noting that there are often litigation advantages to filing cert petitions that have no hope of being granted).

182. I am not the first to intimate that the Court itself might benefit from less secrecy in the cert process. In *Deciding to Decide*, Perry points out the irony that the Justices often complain about the large number of clearly (to them) non-certworthy petitions that are filed, yet fail to provide the public and the bar with sufficient information to allow lawyers to make well-informed judgments about whether it is worthwhile to file a petition. PERRY, *supra* note 10, at 34-35.

183. Shapiro, *supra* note 113, at 275.

184. The Court's reluctance to reveal information about the cert process and criteria has another, somewhat less visible effect that should, I believe, give rise to some concerns

As always, of course, the devil is in the details. There are good reasons why the deliberations of the Justices do not become public, and my proposal is definitely reminiscent of revealing deliberations. Likewise, making public aspects of the Court's workings might well cause substantive changes to them. If, for example, as Ward and Weiden propose, cert petitions were made public, law clerks would write them with that broader audience in mind, eliminating what candor the cert pool allows.¹⁸⁵ If instead the discuss list were made public, Justices might become very strategic about what they put on the list. But of course there is no reason why the Court must release information in the form it creates internally. For example, the Court could identify cases that present issues that are possibly certworthy but that were denied due to jurisdictional or other vehicle problems. *Texas v. Hopwood*¹⁸⁶ provides one possible model. In *Hopwood*, the Fifth Circuit held unconstitutional the University of Texas' race-based affirmative action program.¹⁸⁷ The case, although extraordinarily important and closely watched, was moot by the time it got to the Supreme Court, which denied cert.¹⁸⁸ Justice Ginsburg, joined by Justice Souter, wrote an opinion respecting the denial of cert that ex-

about the Court's democratic accountability. The secrecy—when combined with the strict rules about law clerk confidentiality—creates a two-tiered system where litigants who have access to former Supreme Court law clerks are at a significant advantage in seeking (or opposing) cert. I come to this view in part through my personal experience working with and advising practitioners about seeking or opposing certiorari. In my experience, many excellent lawyers with many years of litigation experience know little about how best to present their cases to the Court. They are likely to overemphasize the facts of their case because they often assume that the Court is looking for unique or unusual cases, or they think that if they can demonstrate injustice to their client, cert is more likely to be granted. These assumptions are wrong. Lawyers opposing certiorari assume that they should file a brief in opposition—often spending significant time and money on it—rather than simply waiving their response and waiting to see if the Court orders one. Supreme Court Rule 10 contains cert criteria, but they are highly discretionary and too general to provide much guidance. See Shapiro, *supra* note 113, at 284 n.50; Cordray & Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, *supra* note 157, at 400-01. There are of course resources, most notably Gressman's Supreme Court Practice, that provide advice and information on all of these points. But these are not adequate substitutes for personal knowledge and experience.

Moreover, the rigid views on law clerk confidentiality mean that a former Supreme Court law clerk may not, for example, publicly share information about what cases were placed on the Discuss List but not granted, about the reasons the law clerk believes that particular cases were not granted, or about the types of issues that the law clerk knows are of interest to particular justices. On the other hand, that same former law clerk might well make use of this information on behalf of a client, even if only *sub silentio*. As a result, litigants who have access to former Supreme Court law clerks are at a significant advantage over other litigants. Thus an additional benefit of increased transparency would be a more equitable distribution of information among litigants.

185. For this reason, I do not support this suggestion.

186. 518 U.S. 1033 (1996).

187. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

188. *Hopwood*, 518 U.S. at 2581-82.

plained why the mootness of the case rendered cert inappropriate.¹⁸⁹ There is no reason not to have more such explanations. In fact, providing them more often and in less hot-button cases is likely to make them more widely accepted at face value instead of being seen as a signal about how the Court ultimately will rule.¹⁹⁰ Another possibility is an annual “cert report,” in which the Court could provide information about different cases or categories of denied cases that it considered potentially certworthy and those that it did not.

To find the best way to share more information with the public, the Court should be willing to experiment. It could try one approach for a single Term and then assess whether or not it worked—which is what the Court did when it created the cert pool. Other efforts to increase transparency have been successful. Until recently, the Court did not release audio of its oral arguments. Until even more recently, its oral argument transcripts did not identify which Justices asked which questions. Even the names of law clerks were not, at one time, routinely made public.¹⁹¹ Providing this information to the public does not seem to have affected the workings of the Court one way or another. The Court should not fear relatively minimal transparency about how it does its work.¹⁹²

None of this discussion is intended to suggest that the cert pool is without its flaws. But those flaws are more subtle than the common critiques of partisanship and undue law clerk influence suggest, and they have at least as much to do with the cert criteria as with the practice of relying on law clerks to review the petitions. A first concern is that, just as law clerk recommendations are of minimal use in the hot-button cases, that “influence is likely to be greatest where the [J]ustice does not have a strong preference.”¹⁹³ As a result, it is cases that involve important but unsexy issues that are most likely to be given short shrift. Some argue that commercial law cases are underrepresented among the Court’s merits decisions for this very reason.¹⁹⁴ In general, however, the concern about law clerk influence is

189. *Id.*

190. Some saw Justice Ginsburg’s *Hopwood* opinion as a signal that she and Justice Souter believed the Fifth Circuit was wrong. Linda Greenhouse, *Justices Decline Affirmative-Action Case*, N.Y. TIMES, July 2, 1996, at A12 (stating that “Justice Ginsburg appeared to be using her separate opinion as a way of advising the public not to interpret the Court’s refusal to hear the case as an endorsement of the Fifth Circuit’s analysis”); Rogers Worthington & Sabrina Miller, *Cloudy Day for Affirmative Action in Colleges; Courts Won’t Hear Case; Issue Still in Limbo*, CHI. TRIB., July 2, 1996, at 3 (stating that Justice Ginsburg’s brief opinion “[left] the door open for considering another case that would test the issues.”).

191. SORCERERS, *supra* note 2, at 18.

192. See PERRY, *supra* note 10, at 46 (arguing that revealing the voting order at the Justices’ Conference is entirely innocuous).

193. SORCERERS, *supra* note 2, at 128.

194. *Id.* at 144 (citing Kenneth Starr and Judge Richard Posner).

tied to undue *partisanship*, and such partisanship is less likely to be an issue for these less politically salient cases. Instead, if the Justices agree that commercial law is underrepresented on their docket, they can adjust the cert criteria accordingly.

Second, the cert pool has the effect of ossifying its own criteria. Law clerks prefer to recommend grants only when they know that their recommendations are readily defensible. They seek objectively verifiable criteria like circuit splits and are unlikely to recommend a grant based on a belief, for example, that the lower court was simply wrong.¹⁹⁵ Certain issues may be institutionally disfavored. For example, at the onset of the cert pool, one of Justice Blackmun's clerks wrote a memo entitled "Recurring Issues in Cert Petitions," listing a series of issues, such as constitutional challenges to "California indeterminate sentencing" and the scope or interstices of *Miranda*, that the Court was "not eager to review."¹⁹⁶ Law clerks receiving such a memo are unlikely to recommend a grant in a case presenting such an issue, even if they believe that there are good reasons for the Court to change course.

A third and related point, supported by recent empirical evidence, is that the bureaucracy and culture of the cert pool lead law clerks to be unduly stingy with their certiorari grant recommendations.¹⁹⁷ As I have detailed elsewhere, law clerks tend to review cert petitions with a checklist of reasons to deny, not with the goal of finding cases to recommend granting.¹⁹⁸ It is considered very embarrassing for a law clerk if the Court acts on her grant recommendation but the case later needs to be dismissed or is otherwise problematic for reasons that the law clerk should have foreseen. On the other hand, there is rarely any downside, from the law clerk's perspective, to recommending a denial.¹⁹⁹ Again, this is an issue of the cert pool culture and underlying cert criteria.

Finally, the cert pool combined with stingy and ossified cert criteria has the effect of insulating the Justices from what is happening in the lower courts. When the Justices read few if any cert petitions, or when they fail to read at least a representative sample, they are much less likely to notice recurring issues or themes, to pick up on areas of law that appear to be chaotic or unpredictable, or to consider whether the Court's decisions about particular issues or the general

195. *Id.* at 133; *see also* Stras, *supra* note 115, at 972-76.

196. SORCERERS, *supra* note 2, at 119.

197. PERRY, *supra* note 10, at 64; Stras, *supra* note 115, at 989.

198. Shapiro, *supra* note 113, at 285; *see also* PERRY, *supra* note 10, at 218-20.

199. PERRY, *supra* note 10, at 220-21 (quoting Justices and clerks talking about the likelihood that a "case [issue] will come back" if it is important); SORCERERS, *supra* note 2, at 144 (quoting Justice Stevens).

cert criteria themselves should be revisited.²⁰⁰ They are even more insulated if they do not even read most pool memos themselves. As I have argued elsewhere, this distance from the nitty-gritty of law as experienced and practiced in the courts on a regular basis can lead the Justices to ignore areas of law that may be in desperate need of guidance and clarity, particularly areas of law involving the application of general standards in fact-intensive contexts.²⁰¹ If such areas of law do not fit neatly into a preexisting certiorari category such as a clean circuit split, they are relatively unlikely to ever pierce a Justice's consciousness.²⁰² Again, however, this problem can be addressed in a variety of ways, from loosening cert criteria to more communication with lower court judges to the Justices reviewing more cert memos themselves.

At bottom, then, while the cert pool and cert criteria may indeed merit reform—and while such reforms might well lead to a higher grant rate—nothing about the cert pool itself is either particularly new or intrinsically dangerous or irresponsible. Law clerks have long been involved in reviewing cert petitions. Concerns that law clerks have too much power or influence in the cert process do not, for the most part, withstand critical examination. To a large extent, the Court could resolve the concerns about the cert pool both by providing more transparency in the cert process and by revisiting its cert criteria and instructions to the law clerks.²⁰³

200. This may be one reason why the cert pool might need to be restructured if future Justices, including Justice Stevens' eventual replacement, choose to join it (especially if Justice Alito rejoins). Having two parallel pools or having each petition assigned to two chambers rather than one would provide some safeguard against having law clerks miss something. See *SORCERERS*, *supra* note 2, at 148-49 (describing concerns and suggestions raised by the Justices regarding the operation of the cert pool).

201. Shapiro, *supra* note 113, at 286.

202. *Id.*

203. One additional criticism leveled by Ward and Weiden, Judge Posner, and others is that the Justices should not delegate the drafting of opinions to their law clerks. See, e.g., Garrow, *supra* note 3, at 419-20. And indeed, there may be instances in which law clerks have written opinions with inappropriately little guidance or oversight, *id.* at 414, or have been able to "introduce language or develop legal reasoning that is not entirely consistent with the [J]ustices' positions." Paul J. Wahlbeck et al., *Ghostwriters on the Court?: A Stylistic Analysis of U.S. Supreme Court Opinion Drafts*, 30 AM. POL. RES. 166, 173 (2002). There is no question that a Justice should maintain tight control over the final product. I do not believe, however, that for every judge or Justice, this control requires drafting the opinion herself. Different cognitive styles lend themselves to different control mechanisms. See, e.g., Kermit Lipez, *Judges and Their Law Clerks: Some Reflections*, 22 MAINE BAR J. 112 (Spring 2007) (describing Judge Lipez's interactive opinion-writing process). And just as with pool memos, there are many other people monitoring the content of the opinions. Perhaps most interesting, however, this criticism about opinion writing is often couched in terms of *ideology*. Garrow, *supra* note 3, at 419. See *infra*, Section II.B.

B. The Second Proxy War: The Role of Ideology on the Supreme Court

The cert process is not the only aspect of the Supreme Court that operates in secrecy. To the contrary, except for the release of its final work product—the opinions—and the questions that the Justices ask at oral argument, the Court operates in total secrecy. The Court's deliberations are strictly confidential not only while cases are pending, but also long after they have been released. In fact, some Justices were reportedly quite displeased about the posthumous release of Justices Blackmun's and Marshall's papers, as those papers included information about relatively recent cases and about Justices still serving on the Court.²⁰⁴

Supreme Court law clerks are charged with helping to maintain this confidentiality. They are supposed to place confidential papers in burn bags instead of in the regular trash or recycling.²⁰⁵ They are strictly prohibited from talking to the press.²⁰⁶ The ethical canons that have applied to Supreme Court law clerks since 1998 are explicit; clerks owe a duty of confidentiality both to their own Justices and to the Court as an institution, and those obligations continue even after they leave their clerkships.²⁰⁷

Despite these strict admonitions of confidentiality, former law clerks do periodically reveal information about the workings of the Court—often to loud condemnation. But the nature of that condemnation is revealing. The howls of outrage are loudest when the disclosures describe the Court as politically and ideologically driven and divided. After publication of *The Brethren* in 1979, for example:

204. The National Law Journal, *Are Justices Right to be Miffed About Papers?* 15 NAT'L L.J. 5 (col. 1), June 7, 1993. Of course, the Justices themselves occasionally share confidential information with journalists or other court observers, but when they do, it is usually off the record, as five Justices did with the authors of *The Brethren*. David J. Garrow, *The Supreme Court and the Brethren*, 18 CONST. COMMENT. 303, 303-05 (2001). Justice O'Connor apparently did likewise with Jeffrey Toobin for his 2007 book, *The Nine*. David Margolick, *Meet the Supremes*, N.Y. TIMES, Sept. 23, 2007 (reviewing JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2007)) available at <http://www.nytimes.com/2007/09/23/books/review/Margolick-t.html>. For *Deciding to Decide*, Perry's book-length analysis of the cert process, the author interviewed five Justices. PERRY, *supra* note 10, at 9.

205. SORCERERS, *supra* note 2, at 11.

206. Tony Mauro, *Summer Subpoenas Lead to Fall Chill*, 28 NEWS MEDIA & THE LAW 8 (2004) (describing the rumored 90-second rule under Chief Justice Warren Burger: "any law clerk seen talking to a journalist for more than 90 seconds would be fired").

207. See David Lane, *Bush v. Gore, Vanity Fair, and a Supreme Court Law Clerk's Duty of Confidentiality*, 18 GEO. J. LEGAL ETHICS 863, 872, 877-79 (2005). The earlier version of the canons, effective in 1989, was somewhat less clear but arguably imposed on-going duties on former law clerks. *Id.* at 871. In part because of these ethical obligations, as the authors of both *Courtiers* and *Sorcerers* complain, doing research on law clerks is not easy. See COURTIERS, *supra* note 1, at 18-20; SORCERERS, *supra* note 2, at 10. Many former law clerks simply refuse to participate in any research project. See, e.g., PERRY, *supra* note 10, at 10.

[t]he fallout over the book was immediate and fierce. It was evident that former clerks had talked to Woodward and Armstrong, and Court insiders bemoaned the breach of the duty of confidentiality owed by clerk to [J]ustice and *the casting of the Supreme Court as a politically polarized body*. The [J]ustices themselves were shocked at the amount of confidential information leaked in the book, and incoming law clerks were warned of the dire consequences of any future leaks.²⁰⁸

A similar reaction followed the 1998 publication of *Closed Chambers* by Edward Lazarus, who described an ideologically divided Court in which the swing Justices were manipulated by a “cabal” of conservative law clerk ideologues.²⁰⁹ Lazarus, a former Blackmun clerk, was viciously condemned in print in numerous law reviews, perhaps most notably by Judge Kozinski of the Ninth Circuit.²¹⁰ And similar, often vitriolic, condemnations were made when a group of law clerks for the four dissenting Justices in *Bush v. Gore* shared information about what happened during that case with a *Vanity Fair* reporter.²¹¹ In contrast, however, I can find no evidence of dismay about violations of confidentiality following publication of *Deciding to Decide*—a serious scholarly work that focused on how the cert process worked as a practical and largely nonideological matter and relied in part on interviews with sixty-four former Supreme Court law clerks²¹²—or, for that matter, of *Sorcerers* and *Courtiers* themselves, in which, by and large, former law clerks disavow any political or ideological influence and report virtually no outcome-oriented ideological voting by the Justices.

The outrage over law clerk disclosures primarily when they describe ideological behavior by the Justices or undue ideological influence by the law clerks is a significant tell. It suggests that the concern is not about confidentiality *per se*. Rather, there is particular anxiety about revelations that (accurately or otherwise) depict the Court as a highly political and ideological institution. Condemnations of these kinds of revelations are sometimes coupled with condemna-

208. COURTIER, *supra* note 1, at 8 (emphasis added).

209. LAZARUS, *supra* note 10, at 265.

210. Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835 (1999) (reviewing EDWARD P. LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (N.Y. Times Books 1998)); *see also* Richard W. Painter, *A Law Clerk Betrays the Supreme Court*, WALL ST. J., Apr. 13, 1998, at A23; Gretchen Craft Rubin, *Betraying a Trust*, WASH. POST, June 17, 1998, at A2.

211. David Margolick, Evgenia Peretz, & Michael Shnayerson, *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310. Other law clerks condemned the disclosures. Charles Lane, *In Court Clerks' Breach, a Provocative Precedent*, WASH. POST, Oct. 17, 2004, at D1; *Response to Bush v. Gore Magazine Article*, LEGAL TIMES, Sept. 27, 2004, available at <http://www.law.com/jsp/article.jsp?id=1095434485367>; Tony Mauro, *High Court Clerks Bemoan Bush v. Gore Revelations*, LEGAL TIMES, Sept. 27, 2004, available at <http://www.law.com/jsp/article.jsp?id=1095434485225>.

212. PERRY, *supra* note 10, at 9.

tions of other disclosures that paint the Court or particular Justices in unflattering light. In his attack on *Closed Chambers*, for example, Judge Kozinski complains at length about Lazarus's depiction of the Court as driven by ideology and the law clerks as willing and able to "exercise 'sometimes inappropriate influence over the law.'"²¹³ He also excoriates Lazarus for violating:

the bond of loyalty to his Justice, the other Justices, and his fellow clerks. . . . [I]t was clearly understood that, under normal circumstances, whatever one learned inside the Court—whether or not it was covered by the duty of confidentiality—would not be repeated on the outside, *especially if it tended to demean the Court, the Justices, or fellow clerks.*²¹⁴

The inference is irresistible: the depiction of an ideological and divided Court is demeaning or, at a minimum, discomforting. If true, it is better left unsaid.

It is also significant that concern about law clerks influence is not equally distributed. No one is especially concerned that, say, Justice Scalia or Justice Ginsburg are unduly influenced by their clerks. To the contrary, these Justices have strong views and distinctive voices. While observers may disagree—even vehemently—with one or the other of them, that disagreement is primarily attributed to the Justices themselves. It is the swing Justices—notably Kennedy and O'Connor—about whom there is the most concern that they have been unduly influenced by the people who work for them.²¹⁵

This unevenly distributed outrage and concern are not, therefore, about apparent violations of the law clerks' Code of Ethics. Rather, the anxiety arises largely in response to an acknowledgment of the often political, sometimes ideological, nature of the Court. In particular, this acknowledgment flies in the face of a frequently articulated view that the work of the Court is not, or should not be, ideological;

213. Kozinski, *supra* note 210, at 866 (quoting LAZARUS, *supra* note 10, at 516).

214. *Id.* at 846 (emphasis added). By way of example, Kozinski quotes Lazarus's unflattering descriptions of and stories about several Justices. *Id.* at 846-48.

215. As Peppers puts it, Lazarus claimed that that the "siren song of clerk power was the most irresistible in the chambers of Justices Anthony Kennedy and Sandra Day O'Connor, where the law clerks were intoxicated by the enormous power of the swing vote." COURTIER, *supra* note 1, at 10 (citing LAZARUS, *supra* note 10, at 274). Lazarus wrote that both Justices were "susceptible to clerks' arguments and delegate to them almost all the opinion drafting and doctrine crunching . . ." LAZARUS, *supra* note 10, at 274. Conservatives unhappy with and liberals hailing Justice Kennedy's vote in *Casey* or *Lawrence v. Texas*, 539 U.S. 558 (2003) are tempted to attribute them, at least in part, to his law clerks. See, e.g., Michael Dorf, *Scott McLellan* (Blog Post), http://michaeldorf.org/2008_06_01_archive.html (June 2, 2008) (reiterating denial that, as Justice Kennedy's law clerk, Dorf "brainwashed" him against overturning *Roe v. Wade*); see also Margolick, *supra* note 211, at 320 (claiming that because of conservative dismay that Kennedy had "strayed on abortion under the pernicious influence of a liberal law clerk . . . [a]pplicants for Kennedy clerkships were now screened by a panel of right-wing stalwarts").

that it can and should be limited to the neutral application of neutral sources and principles. In his confirmation hearings, for example, Chief Justice Roberts famously described the role of a Supreme Court Justice as one of an umpire who neutrally “call[s] balls and strikes,”²¹⁶ and more recently Justice Sotomayor, in her own confirmation hearings, insisted that all of a Justice’s decisions should be dictated by only the law and the facts of the case.²¹⁷ This view is also reflected, or at least nourished, by politicians’ and commentators’ complaints about “activist judges” and by periodic expressions of dismay about the contentiousness of confirmation hearings and their focus on nominees’ ideology rather than exclusively on their qualifications, intelligence, and competence.²¹⁸ In fact, there is an emerging norm that nominees to the Supreme Court are not asked—and certainly do not answer—questions about their views on any issue of public importance that might come before, or might already have come before, the Court, helping to maintain the public fiction of neutrality.²¹⁹

Yet the Supreme Court is a highly political institution.²²⁰ Whether or not consistent with the Framers’ intent, today, for better or for worse, the Supreme Court addresses many of the country’s most contentious issues, such as abortion, affirmative action, and the death penalty. It decided a case allowing Presidents to be sued while in office²²¹ and, in perhaps its most famous and most political decision ever, it determined the outcome of the 2000 presidential election.²²² And not only is the Court engaged in these high profile issues and cases, but such cases rarely have straightforward, neutral answers. In other words, as Judge Posner puts it, Supreme Court cases, by their nature, give the Justices a lot of room for discretion and political judgment.²²³

216. Nomination of Judge John G. Roberts, Jr. to be Chief Justice of the Supreme Court: Panel One of a Hearing of the S. JUDICIARY COMM., 104th Cong. (Sept. 12, 2005) (statement of Judge John Roberts); PERRY, *supra* note 10, at 140-42 (noting the unrealistic view that the work of the Court is or should be neutral and objective).

217. Nomination of Sonia Sotomayor to be Associate Justice of the Supreme Court of the United States: Panel I of a Hearing Before the S. JUDICIARY COMM., 106th Cong. (2009) (statement of Judge Sonia Sotomayor).

218. Jeffrey Toobin, *Advice and Dissent: The Fight Over the President’s Judicial Nominations*, THE NEW YORKER, May 26, 2003.

219. Ronald D. Rotunda, *The Role of Ideology in Confirming Federal Court Judges*, 15 GEO. J. LEGAL ETHICS 127, 129-31 (2002).

220. In his recent book, Judge Posner calls it a “political court.” POSNER, *supra* note 9, at 8. An influential body of work in political science posits that the Justices’ votes can best be explained simply by their desire to implement their policy preferences. See, e.g., HAROLD SPAETH & JEFFREY A. SEGAL, *THE ATTITUDINAL MODEL REVISITED* (2002). For a more detailed analysis of the role of ideology in the work of the Supreme Court, see generally Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MISSOURI L. REV. (forthcoming, 2010).

221. *Clinton v. Jones*, 520 U.S. 681 (1997).

222. *Bush v. Gore*, 531 U.S. 98 (2000).

223. POSNER, *supra* note 9, at 8, 28.

Obviously, the inherently political nature of the Supreme Court is at odds with the image of the neutral umpire. Hence, when the Justices decide cases in ways that appear ideologically driven, there is a disconnect between what many in the public expect and what they observe. Even more problematic is that people tend (or claim) to believe that the Justices they agree with are engaging in neutral judging, while those they disagree with are being ideological. Thus, when conservatives hail “strict constructionist” judges and condemn “activist judges,” they imply that the strict constructionists (conservatives) are simply applying the words of the Constitution or statutes, while the activists (liberals) are imposing their own personal views on the country. Yet, if a measure of judicial activism is a willingness to strike down federal statutes as unconstitutional, the Rehnquist Court’s conservatives were much more “activist” than were its liberals.²²⁴ And although liberals complain bitterly about the Roberts Court’s disregard of the “neutral” principle of *stare decisis*,²²⁵ they cheered when the Court overruled *Bowers v. Hardwick*.²²⁶

So what we have is a highly political institution making important decisions about important and highly salient issues. Yet it is an institution shrouded in secrecy and about which there is this fiction of neutrality—a fiction that everyone can see is inaccurate. It is, therefore, natural for people to want to understand how the Court operates and how the Justices reach their decisions. It is in this context that the fascination with law clerks begins to make more sense: the fascination is less with law clerks themselves, but rather with the workings of the Court. Law clerks are the thin edge of the wedge; if we know what they do and how much influence they wield, then maybe we can understand what is really going on at One First Avenue.²²⁷

But just as obsession with law clerks’ role in the cert process obscures more substantive questions about the Court’s criteria for granting cert, focusing our concern about law clerks’ ideological influence masks other important questions. Specifically, there are difficult questions about the appropriate balance between judicial independence and democratic accountability in our constitutional Court,

224. Lori Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 48 (2007).

225. Ronald Dworkin, *The Supreme Court Phalanx*, 54 N.Y. REV. BOOKS 14, Sept. 27, 2007; Charles Lane, *Narrow Victories Move Roberts Court to the Right; Decisions Ignore Precedent, Liberal Justices Contend*, WASH. POST, June 29, 2007, at A4; Editorial, *Justice Denied*, N.Y. TIMES, July 5, 2007, available at <http://www.nytimes.com/2007/07/05/opinion/05thu1.html>.

226. 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003); see Evan Thomas, *The War Over Gay Marriage: In a Landmark Decision, the Supreme Court Affirms Gay Privacy and Opens the Way to a Revolution in Family Life*, NEWSWEEK, July 7, 2003; Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare not Speak its Name*, 117 HARV. L. REV. 1893, 1898-1900 (2004).

227. See *supra* note 203 and accompanying text.

about the proper role of ideology in the work of the Court, and even about the appropriate levels of secrecy and candor for such an important political institution in a democracy. I will call these questions, and the ambivalence and apprehension with which they are often addressed, “democratic anxiety.”

Democratic anxiety is not usually addressed forthrightly, and compared to the concerns about the cert process, the issues here are both less technical and more complex. Working through these issues completely is beyond the scope of this Article, and I do not pretend to know what the right answers are. I believe, however, that more forthrightness by and about the Justices, while not likely to eliminate this democratic anxiety completely, might at least alleviate it. In particular, we should be more honest about what Supreme Court Justices do—that the Court is to a large degree a political body and the Justices’ decisions and opinions are often, although not always, colored by their ideological and other perspectives.²²⁸ Of course, there are public acknowledgments of these realities already, but they are often (usually) couched in terms that suggest that political decision-making by the Court is improper.

Increased candor of course has significant implications. In particular, it raises the partisan stakes in already contentious confirmation hearings. Indeed, if we admit that Supreme Court Justices are engaged in political activity, then that single democratic moment—Senate confirmation—will and should become that much more crucial for their legitimacy. Likewise, acknowledging the political nature of the Court may ultimately make more attractive proposals to limit service by Supreme Court Justices to eighteen years with rotating appointments every two years.²²⁹

As I have said, determining the best way to acknowledge, understand, and address the role of ideology in Supreme Court judging is beyond the scope of this Article. The point here, rather, is that the

228. Justice Breyer’s book, *Active Liberty*, in fact engages in this project. He describes what he calls the “attitude” with which he approaches judicial decisionmaking. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (Vintage Books 2007) (explaining his goal is to support and encourage democratic accountability and popular engagement with government, and showing, in a long series of examples, how this attitude affects his decisions).

229. See, e.g., PAUL D. CARRINGTON & ROGER C. CRAMTON, *THE SUPREME COURT RENEWAL ACT: A RETURN TO BASIC PRINCIPLES*, in *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES* 467 (Paul D. Carrington & Roger C. Cramton, eds. 2006); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 136 (2008); Sanford Levinson, *Supreme Court Prognosis: Ruth Bader Ginsburg’s Surgery for Pancreatic Cancer Highlights Why US Supreme Court Justices Shouldn’t Serve Life Terms*, *THE GUARDIAN*, Feb. 9, 2009, available at <http://www.guardian.co.uk/commentisfree/cifamerica/2009/feb/09/supreme-court-ruth-bader-ginsburg> (proposing eighteen year terms with rotating appointments every two years).

concern lavished on inappropriate and ideological law clerk influence masks this deeper democratic anxiety and threatens the long term legitimacy of the Court. It is this anxiety that must be addressed.

III. CONCLUSION

Sorcerers and *Courtiers* add fascinating and previously unknown information to our knowledge of the Supreme Court. While *Courtiers* is at times overwhelming in its detail, its precision and thoroughness will serve scholars well for many years to come. *Sorcerers'* insights into the sometimes unforeseen or unintended consequences of changes in the Court's internal operations likewise shed needed light behind the red curtain.

Despite these books' contributions, it would be a mistake to overlook the reasons for the authors—and our—interest in the subject. It is not that law clerks are intrinsically so fascinating; it is that the Court, in its current operations, is too secretive, leading to legitimate but unwarranted concerns about the cert process and to democratic anxiety about the political nature of Supreme Court judging. The Justices should take these concerns seriously. Where there are easy fixes, as in the cert process, they should take them; where experimentation might be warranted, they should embrace it. And where the nature of a constitutional court in our democracy is at issue, they should be willing to engage in a real dialogue with practitioners, academics, and the people.