



2008

Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment

Todd C. Peppers

Washington and Lee University School of Law, pepperst@wlu.edu

Christopher Zorn

The Pennsylvania State University

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlufac>



Part of the [Courts Commons](#), [Judges Commons](#), [Jurisprudence Commons](#), [Legal Education Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Todd C. Peppers & Christopher Zorn, Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment, 58 DePaul L. Rev. 51 (2008).

This Article is brought to you for free and open access by the Faculty Scholarship at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Scholarly Articles by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

LAW CLERK INFLUENCE ON SUPREME COURT DECISION MAKING: AN EMPIRICAL ASSESSMENT

Todd C. Peppers* and Christopher Zorn**

INTRODUCTION

In the past ten years, U.S. Supreme Court law clerks have achieved a visibility unmatched in Supreme Court history. A former Blackmun clerk wrote a tell-all tale of law clerk mischief at the Supreme Court,¹ a series of articles in *USA Today* addressing the lack of law clerk diversity sparked protests and the grilling of Supreme Court Justices by congressional subcommittees,² former clerks offered insight into the turmoil gripping the Court during the 2000 presidential election,³ and two new television series focused on the behind-the-scenes machinations of Supreme Court clerks.⁴ The decade of the law clerk culminated in the publication of two major academic works on Supreme Court law clerks.⁵ Both books sought to provide a thorough

* Associate Professor of Political Science, Roanoke College; Lecturer in Law, Washington and Lee School of Law.

** Professor of Political Science, Pennsylvania State University. A previous version of this paper was presented at the 2006 Annual Meeting of the American Political Science Association, August 31 to September 3, 2006, Philadelphia, Pennsylvania. Our thanks to Greg Caldeira, Scott Comparato, William Henderson, and seminar participants at the Indiana University Law School, the University of Georgia, and the Ohio State University for helpful comments and suggestions. All remaining errors are our own.

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

2. See Tony Mauro, *Corps of Clerks Lacking in Diversity*, *USA TODAY*, Mar. 13, 1998, at 12A.

3. See David Margolick et al., *The Path to Florida*, *VANITY FAIR*, Oct. 2004, at 310–20.

4. The television shows—both of which were quickly cancelled—were “First Monday,” starring James Garner and Joe Mantegna, and “The Court,” starring Sally Field, Pat Hingle, and Diahann Carroll.

5. See TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006); ARTEMUS WARD & DAVID L. WEIDEN, *SORCERER’S APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006). The two books immediately spawned discussion in the media, law reviews, and scholarly journals. See, e.g., Emily Bazelon & Dahlia Lithwick, *Endangered Species: In Defense of the Supreme Court Law Clerks*, *SLATE*, June 13, 2006, available at <http://www.slate.com/id/2143628> (book review); Jeff Bleich, Book Review, *CAL. LAWYER*, Jan. 2007, at 34; Deborah Challenger, Book Review, 16 *LAW & POL. BOOK REV.* 693 (2006); Paul M. Collins, Jr., Book Review, 29 *JUST. SYS. J.* 117 (2008); David J. Garrow, *Acolytes in Arms*, 9 *GREEN BAG 2D* 411 (2006) (book review); Harvey Gee, Book Review, 100 *W. VA. L. REV.* 781 (2008); Charles Lane, *The Varying*

analysis of the rules and norms surrounding the hiring and utilization of law clerks and to address the one question deemed most salient by Court scholars: whether law clerks wielded inappropriate influence over judicial decision making.⁶

Ironically, the late Chief Justice William Rehnquist first suggested that law clerks might be unduly influencing their Justices.⁷ In 1957, the young Rehnquist suggested that both shoddy legal research as well as the “unconscious slanting” of certiorari (cert) memoranda by law clerks might affect how the Justices voted on cert petitions.⁸ Given Rehnquist’s assertion that the majority of law clerks were liberal and the Justices conservative, his basic concern was that the cert memoranda were causing the Justices to vote in a manner more consistent with the law clerks’ liberal political agenda.⁹

Rehnquist’s article sent tremors throughout the small community of former law clerks, and several rushed to refute his claims.¹⁰ The proverbial genie, however, was out of the bottle, and that initial article has spawned scores of books and articles discussing and debating the question of law clerk influence.¹¹ While some former law clerks modestly claim that their Justice really didn’t need his or her law clerks and simply humored the clerks by soliciting their advice and counsel,

Influence of Clerks, WASH. POST, Mar. 6, 2006, at A13 (book review); Wendy L. Martinek, Book Review, 16 LAW & POL. BOOK REV. 769 (2006); David C. Mizer, 2007 *Survey of Books Related to the Law: Supreme Court Clerks: The Bureaucratic Court*, 105 MICH. L. REV. 1301 (2007); Richard A. Posner, *The Courthouse Mice*, NEW REPUBLIC, June 12, 2006, at 32 (book review); Peter B. Rutledge, *Clerks*, 74 U. CHI. L. REV. 369 (2007) (book review); Dan Slater, *The Clerk Conundrum*, WALL ST. J., June 9, 2006, available at <http://online.wsj.com/article/SB114899525276566278.html> (book review); D. Grier Stephenson, Jr., *The Judicial Bookshelf*, 32 J. SUP. CT. HIST. 190 (2007) (book review); David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947 (2007) (book review); Rick A. Swanson, *How Much Influence?*, JUDICATURE, Nov.–Dec. 2006, at 137 (book review); Artemus Ward, Book Review, 48 AM. J. LEGAL HIST. 340 (2008).

6. See PEPPERS, *supra* note 5, at 2 (“Enduring intrigue and interest about Supreme Court law clerks has stemmed primarily from one central debate—do law clerks wield an inappropriate amount of influence over their justices?”).

7. See William H. Rehnquist, *Who Writes Decisions of the Supreme Court*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74.

8. See *id.*

9. See *id.*; see also William H. Rehnquist, *Another View: Clerks Might “Influence” Some Actions*, U.S. NEWS & WORLD REP., Feb. 21, 1958, at 116.

10. See Alexander M. Bickel, *The Court: An Indictment Analyzed*, N.Y. TIMES, Apr. 17, 1958, at M16; William D. Rogers, *Clerks’ Work is “Not Decisive of Ultimate Result,”* U.S. NEWS & WORLD REP., Feb. 21, 1958, at 114.

11. See generally LAZARUS, *supra* note 1; BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979); David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFF., May–June 2005, at 26.

other former clerks and Court insiders recount stories of ambitious clerks manipulating their malleable employers.¹²

Admittedly, these latter stories make for compelling reading. To date, however, the question of law clerk influence has not been examined empirically. While social scientists have carefully tested myriad models of Supreme Court decision making,¹³ they have yet to consider the influence of law clerks' policy preferences on Court decisions. The origins of this failure are twofold: first, researchers have not fully appreciated law clerks' extensive job responsibilities, and, therefore, the potential for them to influence the Justices; second, researchers have simply not collected data on law clerks in general—and on their policy preferences in particular.

Here, we undertake the first effort at assessing the existence and extent of law clerk influence in the U.S. Supreme Court. Drawing upon original survey data on the political ideology of 532 former law clerks, we evaluate the extent to which both the Justice's personal policy preferences and those of his or her law clerks exert an independent influence on the Justice's votes. While our results are preliminary, they nonetheless support the contention that—over and above “selection effects” due to Justices choosing like-minded clerks—clerks' ideological predilections exert an additional, and not insubstantial, influence on the Justices' decisions on the merits. In Part II, we first present a short overview of the evolution of the rules and norms surrounding the hiring and utilization of law clerks at the United States Supreme Court, paying special attention to the job duties of clerks on the current Supreme Court.¹⁴ Drawing upon principal-agent theory, in Section II.B, we then discuss the dynamics between law clerks and Justices and the conditions that must be present before law clerks can wield influence.¹⁵ Finally, in Parts III, IV, and V, we propose and empirically test a model of Supreme Court decision making that includes the preferences of law clerks as a separate independent variable.¹⁶

12. LAZARUS, *supra* note 1, at 262–75, 314–22, 391–94.

13. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (outlining the “attitudinal” model of Supreme Court decision making); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998) (discussing the “strategic” model).

14. See *infra* notes 17–44 and accompanying text.

15. See *infra* notes 45–54 and accompanying text.

16. See *infra* notes 55–95 and accompanying text.

II. THE SUPREME COURT LAW CLERK: A BRIEF HISTORY¹⁷

The history of the Supreme Court law clerk begins in 1882, when Justice Horace Gray selected Harvard Law School graduate Thomas Russell to work as his legal secretary.¹⁸ Initially, Gray personally paid his secretaries.¹⁹ In return, Gray called upon his young charges to help with legal research and opinion writing.²⁰ Justice Gray's motivation for hiring a legal assistant was likely a product of his work habits; one of Gray's former legal secretaries wrote that he "liked historical research, and, until he knew everything that history could tell him, he was unwilling to decide a case. He had both the thoroughness and the accuracy of the scholar."²¹

In 1886, Congress authorized funds for each Justice to hire a stenographic clerk.²² While most Justices subsequently hired assistants—either older attorneys or professional stenographers—to take dictation and assist in mundane duties, over the next two decades Justice John Marshall Harlan I and Justice Oliver Wendell Holmes, Jr. followed Gray's lead and hired newly graduated law students to assist with more substantive tasks.²³ Each clerk's tenure varied by Justice and usually turned on how the Justice used the clerk. Justices who hired newly graduated law students for substantive legal work tended to rotate their clerks on a yearly basis, while those Justices who employed older attorneys or non-attorneys for clerical assistance retained their clerks for longer periods.²⁴

A critical development in the evolution of the clerkship institution came in 1919, when Congress authorized the Justices to hire both a law clerk and a stenographer.²⁵ While not all Justices immediately took advantage of this new authorization by hiring a second assistant, the Justices now had the resources to hire one staff member for purely

17. Much of the following relies on PEPPERS, *supra* note 5. For further discussion of the early years of law clerks at the Supreme Court, see generally WARD & WEIDEN, *supra* note 5; Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299 (1961).

18. Newland, *supra* note 17, at 301. For more information about Justice Gray, see generally Elbridge B. Davis & Harold A. Davis, *Mr. Justice Horace Gray: Some Aspects of His Judicial Career*, 41 A.B.A. J. 421 (1955).

19. Samuel Williston, *Horace Gray*, in GREAT AMERICAN LAWYERS: A HISTORY OF THE LEGAL PROFESSION IN AMERICA 157-58 (William Draper Lewis ed., 1909).

20. *See id.* at 158-60.

21. Francis C. Lowell, *Horace Gray*, 39 PROC. AM. ACAD. ARTS & SCI. 630 (1904).

22. Act of Aug. 4, 1886, ch. 902, 24 Stat. 222, 254.

23. PEPPERS, *supra* note 5, at 53-54, 56-60.

24. *See generally id.* at 38-82.

25. Act of May 29, 1920, ch. 214, 41 Stat. 631, 686-87.

secretarial support and a second for more substantive legal duties.²⁶ As with most Washington bureaucracies, the clerkship institution continued to grow: by the middle of the twentieth century, the Justices could hire two law clerks, a secretary, and a messenger.²⁷ Today, each Justice may hire up to four law clerks, while the Chief Justice may employ five law clerks, plus two administrative assistants.²⁸ As established practice, law clerks work for a single term of Court, although some Justices prefer to have a senior clerk who serves a second term and brings continuity to the chambers.²⁹ Almost all modern law clerks are recent law school graduates.³⁰

A clerkship on the Supreme Court has become a highly sought prize for graduating law students. This ultimate brass ring, however, is available to only a select few. A comprehensive picture of the law clerk corps reveals that almost all law clerks are white, graduates of elite colleges and law schools, former members of law reviews, and former clerks for federal appeals court “feeder” judges.³¹ While Justice William O. Douglas hired the first female law clerk, Lucile Lomen, in 1944, the Justices did not begin to hire significant numbers of female clerks until the 1980s.³² Today, following a highly prized Supreme Court clerkship, law clerks can virtually dictate their own career path. For instance, clerks can work at the Department of Justice, teach at top law schools, or reap signing bonuses of up to \$200,000 by joining prestigious law firms in New York, Washington, D.C., and Los Angeles.³³

A. *Law Clerk Responsibilities and the Question of Influence*

Any discussion of law clerk influence must necessarily begin with a thorough understanding of the duties assigned to clerks. The functions of Supreme Court clerks have varied widely over the history of the clerkship institution.³⁴ In the early decades of the twentieth century, Justices such as Pierce Butler, Benjamin Cardozo, Charles Evans

26. PEPPERS, *supra* note 5, at 83.

27. WARD & WEIDEN, *supra* note 5, at 22–23, 36–37.

28. DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 132 (7th ed. 2003); PEPPERS, *supra* note 5, at 176; WARD & WEIDEN, *supra* note 5, at 22–23, 45.

29. WARD & WEIDEN, *supra* note 5, at 46–48.

30. *Id.* at 54–68.

31. PEPPERS, *supra* note 5, at 20–36.

32. *Id.* at 21.

33. See Charles Lane, *Former Clerks' Signing Bonuses Rival Salaries on the High Court*, WASH. POST, May 15, 2006, at A15; David Lat, *The Supreme Court's Bonus Babies*, N.Y. TIMES, June 18, 2007, at A19. See generally PEPPERS, *supra* note 5.

34. See generally PEPPERS, *supra* note 5, at 38–205 (describing the evolving role of the Supreme Court law clerk).

Hughes, Oliver Wendell Holmes, Jr., and William Howard Taft routinely assigned their law clerks the task of reviewing petitions for certiorari.³⁵ The limited historical evidence suggests, however, that no Justice relinquished the role of opinion writer during this time period.³⁶ By the 1940s and 1950s, Justices Sherman Minton, Frank Murphy, and Fred Vinson began to break with historical practice and require their law clerks to both review cert petitions and draft opinions.³⁷ Still, other Justices, such as Harlan Fiske Stone, Harold Burton, and Robert Jackson, maintained the practice of drafting their own opinions.³⁸

In the last thirty years, nearly all the Justices have broadened the clerks' duties. The clerks now review cert petitions, write memoranda summarizing the petitions, and recommend whether to grant or deny review; write bench memoranda that prepare the Justices for oral argument; and prepare the first drafts of majority, concurring, and dissenting opinions.³⁹ With these responsibilities, clerks have multiple opportunities to exercise influence over how the Justice votes in a given case.

A summary of law clerk duties for modern Justices (excluding those Justices who sat on the Rehnquist Court on or after 2004) is presented in Table 1. All modern Justices seek verbal or written input and guidance from their clerks in reviewing cert petitions and preparing for oral argument.⁴⁰ At the same time, those Justices vary widely in the degree of additional responsibility they delegate to their law clerks; moreover, minor variations exist across chambers in the details of how cert and bench memoranda are prepared.⁴¹

The extent and nature of Supreme Court clerks' formal responsibilities is directly relevant to the question of their possible influence. If a clerk's duties are limited to taking dictation or proofreading opinions for grammatical errors, then substantive influence is effectively impossible. Such a clerk may, at most, influence the style of the opinion, but

35. *Id.* at 57–58, 67–68, 85–86, 93–96.

36. *See generally id.* at 38–144.

37. *Id.* at 109–12, 134–39, 141–42.

38. *Id.* at 88–93, 125–29, 131–33.

39. Of all the Justices on the Rehnquist Court, only Justice John Paul Stevens prepared his own opinion drafts. To date, there is no evidence suggesting that either Chief Justice John Roberts or Associate Justice Samuel Alito have deviated from the now-standard practice of having clerks prepare first drafts of opinions.

40. *See generally* PEPPERS, *supra* note 5, at 145–205.

41. *See generally id.*

TABLE 1: LAW CLERKS AND JOB DUTIES⁴²

	Prepare Cert Memos	Draft Bench Memos	Prepare Opinion Drafts	Edit Opinion Drafts
Hugo Black	Yes	No	Infrequently	Yes
Harry Blackmun	Yes	Yes	Yes	Yes
William Brennan	Infrequently	No	Yes	Yes
Warren Burger	Yes	Yes	Yes	Yes
Harold Burton	Yes	Yes	No	Yes
William O. Douglas	Yes	No	No	No
Abe Fortas	Yes	Infrequently	Yes	Yes
Felix Frankfurter	Infrequently	Infrequently	Yes	Yes
Arthur Goldberg	Yes	Unknown	Unknown	Yes
John Harlan II	Yes	Infrequently	Yes	Yes
Robert Jackson	Yes	No	Infrequently	Yes
Thurgood Marshall	Yes	Yes	Yes	Yes
Sherman Minton	Yes	Infrequently	Yes	Yes
Lewis Powell	Yes	Yes	Yes	Yes
Stanley Reed	Yes	Infrequently	Infrequently	Yes
Potter Stewart	Yes	No	Yes	Yes
Earl Warren	Yes	Yes	Yes	Yes
Byron White	Yes	Yes	Yes	Yes
Charles Whittaker	Yes	Yes	Unknown	Yes

not its content; thus, the clerk's own preferences will be immaterial to the Justice's decision. At the other extreme is a Justice who allows his or her clerks wide latitude in authoring opinion drafts, such that the clerk effectively determines the winners and losers in cases pending before the Court. In this scenario, the Justice has effectively abdicated the role of decisionmaker, and the influence of the clerk's own preferences and goals on the Justice's actions is at its apex.⁴³

Influence, however, can also be more benign. For example, a Justice may change his or her vote because a clerk has discovered a dispositive fact in the record or convincingly argued that a controlling precedent is distinguishable. In both situations, the Justice has changed his or her vote while retaining the role of decisionmaker. Alternatively, a law clerk's policy arguments might sway a Justice. During the initial review of the cert petition, in a bench memorandum, during informal conversation, or as the opinion is drafted, the clerk could convince the Justice that a specific holding represents the ideal political outcome. Finally, a Justice may determine who prevails in a

42. *Id.* at 143, 190.

43. The authors know of no evidence of such a remarkable abdication of power ever occurring in the Court's history, although the late-career infirmity and illness of such Justices as Charles Whittaker, John Harlan II, William O. Douglas, and Thurgood Marshall have raised concerns about whether the institutional conditions existed for law clerk misadventure. See generally DAVID N. ATKINSON, *LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END* (1999).

case while relying upon the clerk to find a legal doctrine or precedent to support the Justice's preferred outcome.⁴⁴

B. *The Principal-Agent Theory of Supreme Court Clerks*

Recently, scholars have turned to principal-agent theory as a tool for understanding the dynamics of law clerks and Justices.⁴⁵ Paul Wahlbeck and others characterize the relationship between Justices and their clerks as "a classic principal-agent relationship," noting that:

Justices, as principals, hire agents, their clerks, to perform particular tasks, such as writing first drafts of opinions. The clerks, however, often gain informational advantages over the justices regarding various aspects of cases What is more, as clerks research the facts and law relevant for a case, they can develop private information that would allow them to steer decisions in a particular direction. Consequently, it is possible that they can introduce language or develop legal reasoning that is not entirely consistent with the justices' positions, and the justice may be uncertain about whether the clerks are making choices that will produce outcomes desirable to them.⁴⁶

As in all principal-agent relationships, the Justices, as principals, must solve two different dilemmas in employing law clerks as agents: adverse selection and moral hazard.⁴⁷ The law clerk, not the Justice,

44. Of course, the potential for law clerk influence extends well beyond voting on the merits of the case and opinion writing. All law clerks prepare cert memoranda, and a clerk who seeks a specific outcome might misrepresent facts in the record, minimize the appearance of a split among the circuits, or make a compelling policy argument as to why a case should not be heard. Moreover, at least in recent years, the Justices are clearly aware of the potential for clerks to influence the Court's agenda-setting process. For example, Linda Greenhouse noted a 1996 memo to the clerks from Chief Justice Rehnquist, in which he expressed

his displeasure at learning that law clerks were not honoring the supposedly random assignment of cert petitions to the so-called "cert pool" The practice of randomness was supposed to avoid having ideologically charged cases fall regularly into the hands of law clerks or chambers with an ideological stake in the outcome.

Linda Greenhouse, *How Not To Be Chief Justice: The Apprenticeship of William H. Rehnquist*, 154 U. PA. L. REV. 1365, 1369-70 (2006).

45. See generally PEPPERS, *supra* note 5; Corey Ditslear & Lawrence Baum, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J. POL. 869 (2001); Sally Kenney, *Beyond Principals and Agents: Seeing Courts as Organizations by Comparing Referendaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court*, 33 COMP. POL. STUD. 593 (2000).

46. 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).

47. See, e.g., Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CAL. L. REV. 1345 (1982); Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315 (1991); Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203 (2005); Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739 (1984); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984).

possesses the most complete information regarding the clerk's skill set, and it is not in the clerk's best interests to present anything but an exaggerated picture of his or her abilities. More important, even the most qualified candidates will bring to the position their own set of policy goals and preferences. As Moe notes, "[T]here is no guarantee that the agent . . . will in fact choose to pursue the principal's best interests or to do so efficiently. The agent has his own interests at heart."⁴⁸ Thus the Justice must be vigilant in monitoring the law clerk for both incompetence and subterfuge while simultaneously adopting institutional rules and incentives—both positive and punitive—that will encourage clerks to carry out their duties in a manner consistent with the Justices' wishes.⁴⁹

As noted above, in the early decades of the clerkship institution, the duties assigned to law clerks were mundane, and the risk that a law clerk would defect was correspondingly minimal.⁵⁰ Modern Supreme Court Justices, however, grant significant job responsibilities to their clerks; thus, the defection of a law clerk could have far-reaching consequences. In light of these responsibilities, it is in the Justices' best interest to fashion rules and norms "that, in mitigating the informational asymmetries and structuring rewards, prompt[] the agent to behave as the principal himself would under whatever conditions might prevail."⁵¹

Contemporary Supreme Court Justices use a variety of tools by which they can reduce the possibility of defection. The most powerful of these is selection: the Justices typically choose new clerks each term and almost always personally interview finalists for the positions.⁵² Moreover, consistent with the greater levels of delegation in the modern Court era, Ditslear and Baum find clear evidence that, particularly in the past two decades, Justices endeavor to select clerks that share the Justices' ideological preferences.⁵³

The principal-agent perspective thus suggests a number of implications about the possibility of clerk influence. First, the substantial degree of delegation of responsibility to clerks in the modern Court era

48. Moe, *supra* note 47, at 756.

49. See John E. Chubb, *The Political Economy of Federalism*, 79 AM. POL. SCI. REV. 994, 994–1014 (1985); David E. M. Sappington, *Incentives in Principal-Agent Relationships*, 5 J. ECON. PERSP. 45, 45–66 (1991).

50. See *supra* notes 18–38 and accompanying text.

51. Moe, *supra* note 47, at 756–57.

52. Beyond selection, recent Justices have fashioned monitoring devices and increased the penalties for defection with the adoption of a formal law clerk code of conduct. See PEPPERS, *supra* note 5, at 203–05.

53. See Ditslear & Baum, *supra* note 45, at 870–75.

suggests that, minimally, the necessary preconditions for influence are met. We, therefore, have at least some reason to believe that, at the margin, clerks may be capable of shaping the Court's decisions. The advent of mechanisms to deal with the possibility of clerk defection, however, tempers this expectation somewhat. In particular, following Ditslear and Baum,⁵⁴ we expect that Justices will seek out ideologically compatible clerks, and, as a result, mitigate clerk influence.

III. MEASURING LAW CLERK POLICY PREFERENCES

Assessing whether clerks' policy preferences influence the Court's decision making requires first that we develop a measure of those preferences. Between 1882 and 2004, approximately 1800 men and women clerked on the United States Supreme Court.⁵⁵ We obtained the names of those clerks from the Supreme Court Public Information Office and used a range of sources to code personal and demographic data on them. We also collected mailing addresses for approximately 1000 of the 1600 clerks who served in the Supreme Court between 1940 and 2004. These former clerks were then mailed a one-page survey, which included questions concerning the clerk's law school activities, lower court clerkship, and subsequent professional activities. The survey also contained the following closed-end question: "During your clerkship on the United States Supreme Court, which political party more closely mirrored your own personal political ideology?" Respondents were limited to checking a box next to "Democratic Party" or "Republican Party."

This last question was designed to gather data on the respondents' political preferences at the time of their clerkship. While recognizing that political party is an imperfect proxy measure of political ideology, alternative words like "liberal" or "conservative" could be open to multiple interpretations and would also be likely to suppress survey response rates.⁵⁶ Of the 639 former clerks who responded to our survey, 135 answered that the Republican Party more closely mirrored their political ideology at the time of their clerkship, and 397 answered that the Democratic Party more closely mirrored their political ideology.⁵⁷

54. *See id.*

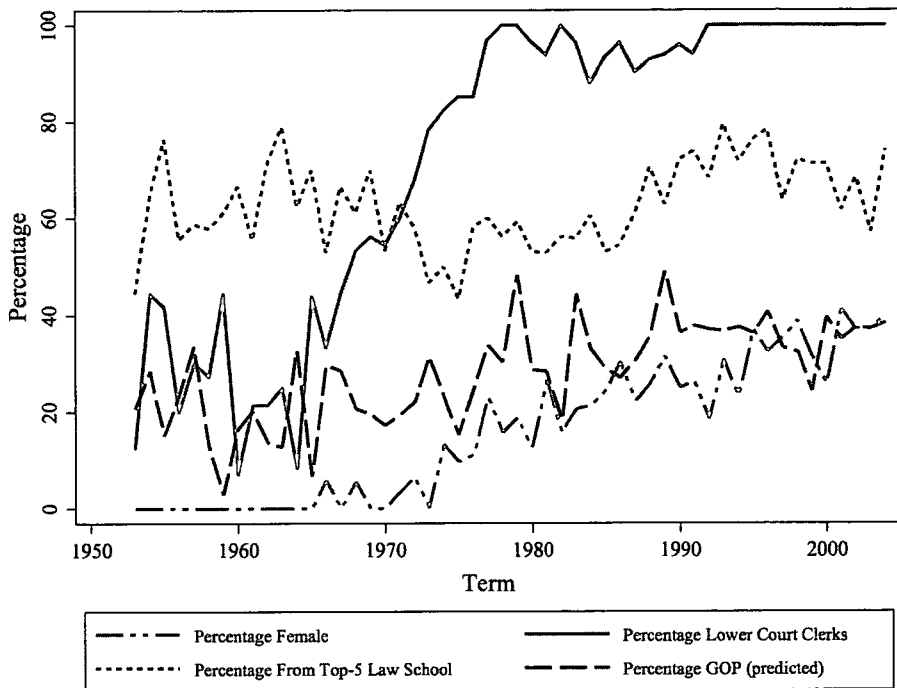
55. PEPPERS, *supra* note 5, at 20.

56. For similar reasons, we did not provide respondents the third choice of "independent" out of concern that former clerks would select that alternative to avoid revealing their true partisanship.

57. An additional ninety-nine respondents did not answer the question, and eight respondents wrote in "Independent" despite not being given that choice.

Our data paint a rich portrait of changes in the clerkship institution. Figure 1 presents an overview of these data, plotting the percentage of clerks serving in each term that (1) were female, (2) had served previously as a clerk in a lower federal court, (3) were drawn from the “top-five” law schools from which clerks have historically graduated (Harvard University, Yale University, Columbia University, the University of Chicago, and Stanford University), and (4) indicated that they were closer, ideologically, to the Republican Party.⁵⁸

FIGURE 1: TRENDS IN SUPREME COURT CLERK CHARACTERISTICS, 1953–2004 TERMS⁵⁹



The two most striking trends in Figure 1 are those for gender and for the use of “feeder” judges. While women held essentially none of the clerkships in the 1950s and early 1960s, their numbers have risen steadily since that time, to a high of more than forty-one percent in 2001. Even more substantial is the increase in the numbers of clerks with prior clerkship experience in the lower federal courts, which went from being the exception during the 1950s to a de facto requirement

58. Note that this last variable is a combination of survey responses and predicted values; see *infra* note 60 and accompanying text for more details on the construction of this measure.

59. Figure 1 plots percentages of clerks in four categories by Court term.

for a Supreme Court clerkship in the last twenty years. In contrast to these trends, the percentages for both “top-five” law school graduates and self-identified Republicans among Supreme Court clerks have been relatively stable over the past five decades.

We draw on these data to develop our measure of the political preferences of the men and women who served as clerks on the U.S. Supreme Court. As noted above, we begin with data on 532 former clerks who indicated their partisan affiliation on our survey.

A. *Measuring Non-Responsive Clerks*

While these data are a valuable resource, it is important to also note that a substantial number of respondents refused to answer the question about political preferences, and an even larger number did not respond to the survey at all. Ideally, we could use the information contained in the survey responses to infer the partisan affiliations of those clerks who did not respond. To do so, however, requires that we assess the extent to which survey respondents and non-respondents differ: if those clerks responding to our survey were systematically different from those that did not, then using the respondents’ data to predict the partisanship of non-respondents would yield biased predictions.

Accordingly, we adopt a two-pronged strategy. First, we estimate a combined model of survey response and clerk partisanship in which we account for the possibility of selection effects due to survey non-response. Doing so allows us to assess whether survey non-response might bias our estimates of partisanship, as well as to examine empirically one of the central implications of our principal-agent perspective: the extent to which Justices choose ideologically like-minded clerks. Second, we draw on our findings from that model to create aggregate measures of clerk partisanship for each Justice’s chambers in each term, and use that measure to assess the question of clerk influence in a model of Supreme Court decision making.

For our initial analysis, the variables of interest are the *survey response*, coded one for those clerks responding to our survey and zero for those that did not, and *clerk partisanship*, in which the response of interest is coded one if the clerk identified as Republican and zero for Democratic identifiers. Note that the latter model can be estimated only for those clerks for whom partisanship data are available. To address the possibility of selection bias due to survey non-response, we estimate a bivariate probit model with sample selection.⁶⁰ This ap-

60. WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* 849–55 (4th ed. 2000).

proach allows us to test for the presence of sample selection bias formally via a test of $\hat{\rho} = 0$ (where ρ is the implicit correlation between the errors in the selection and partisanship equations) and thus to assess the extent to which survey non-response biases our predictions of non-responding clerks' political partisanship.

B. *Judicial Ideology of Entering Supreme Court Clerks*

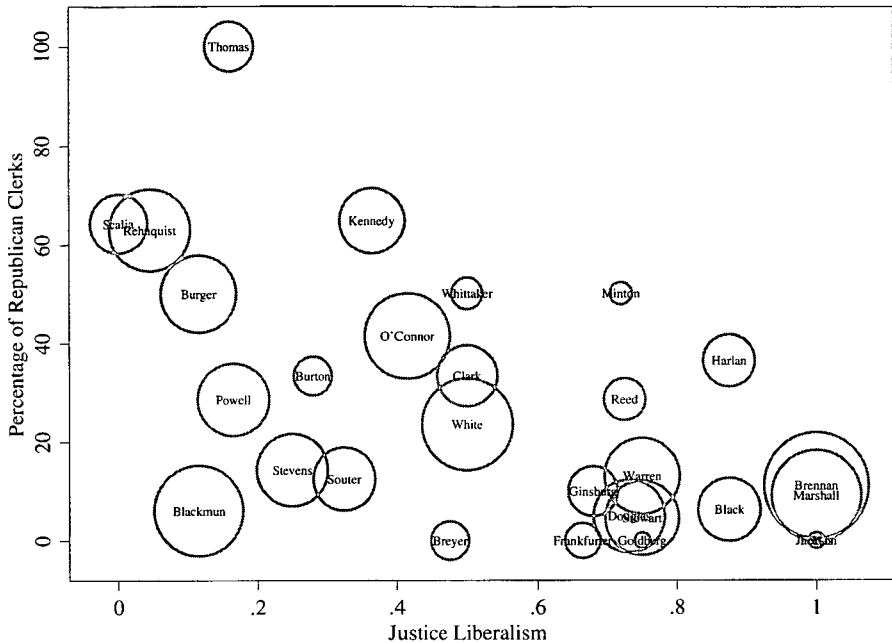
What factors determine the ideology of those chosen to serve as Supreme Court clerks? From our perspective rooted in principal-agent theory, the Justices should possess strong incentives to ensure that clerks share their overall legal and policy perspectives.⁶¹ Moreover, Ditslear and Baum's analysis is strongly consistent with this perspective, although their evidence on this point is indirect.⁶² Accordingly, we expect that, when all else is equal, more ideologically liberal Justices will be more likely to select clerks whose political party affiliation is Democratic, while more conservative Justices will be more likely to choose Republican clerks.

We measure *Justice Liberalism* using the familiar Segal-Cover scores,⁶³ rescaled to range from zero (most conservative) to one (most liberal). Figure 2 plots the percentage of each Justice's clerks in our data who indicate that they identify with the Republican Party. Symbol sizes are proportional to the number of clerks on which the percentage is based and range from a low of one clerk (for Justices Fortas, Goldberg, and Jackson) to a high of forty-five (for Justice Brennan). As Figure 2 makes clear, there is a strong relationship between the ideological predisposition of the Justices and the average partisanship of their clerks; the Pearson's correlation between *GOP Percentage* and *Justice Liberalism* is -0.59 ($p < .001$, $N = 29$).

61. See PEPPERS, *supra* note 5; Kenney, *supra* note 45.

62. See Distlear & Baum, *supra* note 45, at 870-75.

63. See, e.g., Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 557-65 (1989); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 812-23 (1995) [hereinafter *Ideological Values Revisited*].

FIGURE 2: CLERK PARTISANSHIP, BY JUSTICE LIBERALISM⁶⁴

Beyond judicial ideology, a number of other factors might influence clerk partisanship. In the general population, partisanship is correlated with both race and gender; nonwhites and women are more likely, all else equal, to identify as Democrats than are white males.⁶⁵ Therefore, we include naturally-coded indicator variables for *Female* and *White* clerks. In addition, we include indicators for whether each clerk in our data attended a *Top-Five Law School*,⁶⁶ and whether or not the clerk served on a *Lower Court* before coming to the Supreme Court. Finally, we include a variable for the *Term* in which each clerk served—coded as (*Year of Service* – 1900)—as a rudimentary control for temporal changes in partisan affiliations over time.

We also include our partisanship variables in our model of survey response, although we have no strong expectations for the influence of

64. Figure 2 plots the percentage of clerks identifying with the Republican Party, by Justices' liberalism (Segal-Cover) scores. Symbol sizes are proportional to the numbers of clerks in the data for that Justice.

65. The same could be said for a number of other demographic characteristics, including education and occupation. With the exceptions of race and gender, however, Supreme Court clerks constitute a relatively homogenous group on these other variables.

66. As in Figure 1, we operationalize "Top-Five" strictly in terms of the five schools that have historically provided the Court with the greatest number of clerks; those schools are Harvard, Yale, Stanford, the University of Chicago, and Columbia.

Justice Liberalism on response rates. Further, we do not expect that race, gender, or legal education will influence response rates of former clerks. To the extent that clerks with lower court clerkships may have a greater investment in the clerkship institution, we harbor a slight expectation that those clerks might be more likely to respond than those with no lower court clerking experience. Our main expectation vis-à-vis the surveys, however, is largely temporal. On the one hand, we expect that clerks who served very recently will be less likely to respond to our questionnaire, due to both their ongoing duty of confidentiality to sitting Justices and decorum. On the other hand, we also observed declining response rates as the term during which those clerks served recedes into the past and the pool of possible respondents is reduced through illness and death. Accordingly, we include both linear and quadratic functions of our *Term* variable, with the expectation that our highest response rates will be from middle-aged clerks.

Table 2 presents the results of our analysis of both survey response and clerk partisanship. Columns two and three present simple probit models of survey responses and partisanship, respectively, while columns four and five present the results from the integrated (sample selection) model. While several results are noteworthy, none is more striking than this: the single most important influence on law clerk partisanship is the ideological profile of the Justice for whom they work. To a far greater extent than the other variables in the model, the effect of *Judicial Liberalism* is to decrease the odds of a Justice choosing a clerk from the Republican Party. This effect is seen most starkly in Figure 3, which plots the predicted probabilities, along with their ninety-five percent confidence intervals of a “median” clerk⁶⁷ identifying with the Republican Party, as a function of the *Liberalism* score of the Justice for whom he clerks. Those predicted probabilities decline from a high of 0.51 for a Justice with a *Liberalism* score of zero (e.g., Justice Antonin Scalia) to a low of 0.12 for a Justice whose *Liberalism* equals one (e.g., Justice Thurgood Marshall).⁶⁸

Supreme Court Justices’ policy preferences, then, play a key role—arguably, the key role—in the ideological makeup of the clerks in their chambers. While ideological compatibility has long been specu-

67. That is, a white, male lower court clerk with a “top-five” law degree serving during the Court’s 1982 Term.

68. Interestingly, we find no evidence of a change in the degree of Justice-clerk ideological convergence over time; the estimated effect of an interaction term for *Justice Liberalism* × *Court Term* fails to achieve statistical or substantive significance in any of the models in Table 2. *Contra* Distlear & Baum, *supra* note 45, at 875.

lated to play a role in the clerk selection process, our findings are the first direct evidence of such a relationship. Moreover, in light of the fact that modern law clerks apply for positions in the chambers of all nine Justices at once (thus ruling out possible self-selection effects), these findings undercut the Justices' claims that they do not use ideology as a selection criterion.⁶⁹

TABLE 2: DETERMINANTS OF SURVEY RESPONSE AND CLERK PARTISANSHIP, 1940–2004

Variable	Survey		Selection Model	
	Response	Partisanship	Response	Partisanship
(Constant)	0.19 (1.44)	-0.13 (0.73)	0.26 (1.45)	-0.14 (0.72)
Justice Liberalism	0.31* (0.12)	-1.22* (0.45)	0.25 (0.17)	-1.22* (0.52)
Female Clerk	-0.13 (0.10)	-0.41* (0.23)	-0.07 (0.12)	-0.41 (0.29)
White Clerk	0.06 (0.16)	-0.31 (0.34)	0.21 (0.17)	-0.32 (0.42)
Top-Five Law School	-0.16* (0.07)	0.07 (0.14)	-0.17* (0.09)	0.08 (0.26)
Lower Court Clerk	0.16 (0.14)	-0.15 (0.18)	0.30* (0.17)	-0.16 (0.32)
Court Term	0.02 (0.04)	0.007 (0.008)	0.006 (0.038)	0.007 (0.024)
Court Term Squared	-0.0003 (0.0002)	—	-0.0002 (0.0002)	—
ρ	—	—		-0.03 (1.55)
Valid <i>N</i> (clerks)	1,026	391		1,026

In Table 2, survey response is coded one for clerks who indicated their political party on the survey and zero for those for which no information is available. Clerk partisanship is coded one for Republican clerks and zero for Democrats. Cell entries are estimated probit coefficients; robust standard errors, grouped by Justice, are in parentheses. Asterisks indicate $p < .05$ (one-tailed).

Beyond the influence of ideology, the results in Table 2 reveal a number of interesting dynamics about the partisan identification of Supreme Court clerks. For example, as expected, female clerks on

69. In part, these statements have been made to the author in off-the-record interviews with two Supreme Court Justices and their law clerks. Moreover, the Justices themselves have occasionally spoken publicly about the selection process and denied the use of ideological litmus tests, although the Justices have conceded that they will not hire law clerks with wildly differing viewpoints. PEPPERS, *supra* note 5, at 31–36, 197, 200; see also WARD & WEIDEN, *supra* note 5, at 99–107.

average are less likely to identify with the GOP than are males. We cannot ascertain, however, whether this is due to general demographic differences in party identification across gender or due to selection effects. At the same time, we find no evidence of differences in partisanship across our categories for race, legal education, or lower court service, nor do our results point to any broad trends over time in the party identification of clerks.

FIGURE 3: PREDICTED PROBABILITIES OF A REPUBLICAN CLERK BY JUSTICE LIBERALISM

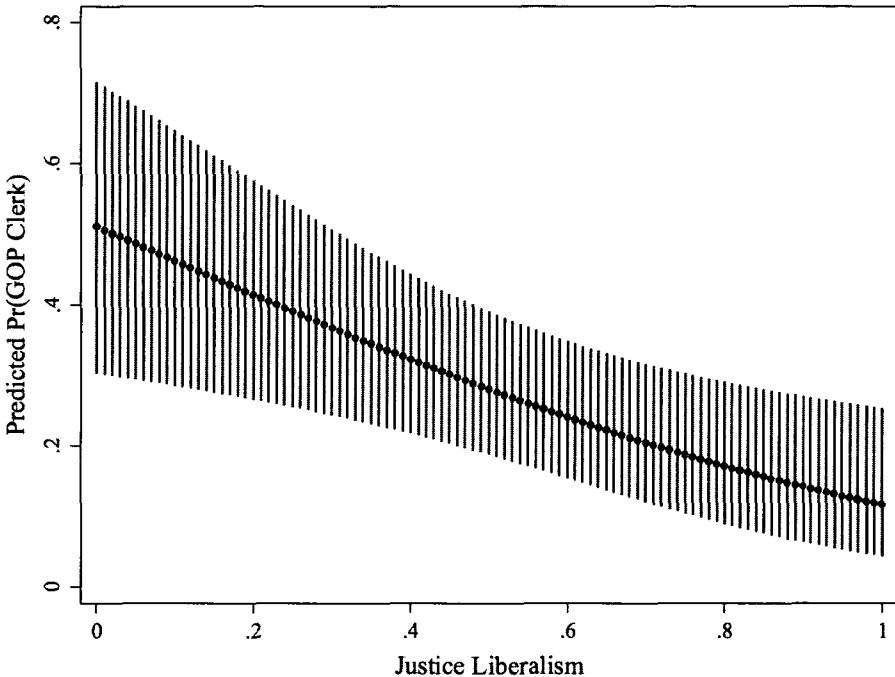


Figure 3 plots the predicted probability of a clerk identifying with the Republican party as a function of Justice liberalism, holding other variables constant at their means/medians. Bars are ninety-five percent pointwise confidence intervals.

With respect to the survey response, we uncover significant negative effects for graduation from a *Top-Five Law School* and significant positive effects for *Lower Court* clerkships in the selection model. In addition, we uncover the expected curvilinear effects of *Term*: both

very recent clerks and elderly former clerks are less likely to respond to our survey instrument than clerks from the intervening years.⁷⁰

Beyond their intrinsic interest, the results from our analyses of survey response and clerk partisanship offer a number of valuable insights about our clerk-level ideology data. For purposes of our research, the most valuable of these is the fact that the model in columns four and five of Table 2 suggests that there is little or no sample selection bias introduced by non-response to our clerkship survey. The estimate for ρ is both small and statistically insignificant, and a Wald test⁷¹ conclusively fails to reject the null hypothesis that the errors in the two equations are uncorrelated ($\chi^2(1) < 0.01$, $p = 0.98$). That fact, combined with the relative similarity of the results across the two partisanship equations,⁷² is strong evidence that our sample of respondents is in fact representative of all clerks in the data. This, in turn, suggests that we can use the results from our model of partisanship to accurately infer the ideological leanings of those clerks for whom we lack survey data.

C. Measures of Clerk Partisanship

With these results in hand, we consider three aggregate measures of clerk partisanship. The first, which we label *Reported Partisanship*, is based only on data for those individuals who responded in our survey. That is, we aggregate the partisanship (coded one for Republicans and zero for Democrats) of the clerks on whom we have data within terms for each Justice, and use the mean of that aggregate as our indicator of clerk ideology for that Justice's chambers in that year. While this measure has the advantage of being the most direct indicator of clerk partisanship, it also suffers from the greatest quantity of missing data. Moreover, to the extent that the *Reported Partnership* measure is based upon fewer clerks than the others, it also likely possesses the greatest amount of measurement error.

For our second alternative indicator of clerk ideology, we use instead the *Predicted Values* from the probit model of partisanship presented in Table 2. We use the model in Table 2 to predict the parti-

70. Note that while the estimates themselves are not statistically significant, their joint effects are substantial; for example, a test of whether *Term* and *Term Squared* are jointly equal to zero conclusively rejects that hypothesis ($\chi^2(2) = 38.6$ and 38.3 , both $p < 0.001$, for the models in columns two and four, respectively).

71. See generally Abraham Wald, *Tests of Statistical Hypotheses Concerning Several Parameters When the Number of Observations is Large*, 54 TRANSACTIONS AM. MATHEMATICAL SOC'Y 426 (1943).

72. For example, the predicted values of $\text{Pr}(GOP)$ from the probit model in column three and those from the selection model (column five) correlate at 0.99.

sanship—formally, the predicted probability that a given clerk is a Republican—of each clerk, and then aggregate these predicted probabilities. This approach allows us to generate out-of-sample predictions for clerks on whom we do not have survey data, which we then aggregate to form our Justice-term specific measure of clerk ideology. To the extent that, as the results in Table 2 demonstrate, those clerks responding to our survey are not substantially different from those who do not, this approach will yield predictions which accurately reflect the partisan makeup of each Justice's clerks in each term, while minimizing data loss due to missing information on clerk partisanship.

Our final—and preferred—measure of clerk partisanship is a *Combined Measure* that utilizes both observed and predicted values in our aggregation. For this measure, we use actual partisanship for those clerks on whom we have those data, and predicted values (again based on the results in Table 2) for those on whom we do not. This approach thus maximizes the information available by using actual data where they are available and predictions where they are not.

TABLE 3: HYPOTHETICAL ILLUSTRATION OF CLERK PARTISANSHIP MEASURES

Clerk	Respond?	GOP	Predicted Pr(GOP)	Reported Partisanship Score	Predicted Values Score	Combined Measure Score
1	Yes	1	0.70			
2	No	?	0.40	0.50	0.525	0.5375
3	Yes	0	0.25			
4	No	?	0.75			

Using each of the means of calculating the measure, Table 3 illustrates the aggregate (Justice-term) measures of clerk partisanship for the hypothetical example data.

To illustrate the differences among these three measures, we present data on a hypothetical Justice's clerks in Table 3. In our example, two of the Justice's four clerks in that term (clerks 1 and 3) responded to our survey; clerk one indicated she was a Republican, while clerk three indicated he was a Democrat. The *Reported Partisanship* measure takes the simple average of these two responses and assigns a value of $(1 + 0)/2 = 0.50$ for clerk partisanship in that term. Column four of Table 3 reports the predicted $\text{Pr}(GOP)$ for each of the four clerks; note that these predictions are available both for the two clerks that responded to the survey, as well as for those that did not. The

Predicted Values measure calculates partisanship as the mean of these scores, assigning a value of $(0.70 + 0.40 + 0.25 + 0.75)/4 = 0.525$ for clerk partisanship in that term. Finally, the *Combined Measure* uses information from both columns three and four of Table 3 and calculates partisanship as $(1.00 + 0.40 + 0.00 + 0.75)/4 = 0.5375$. While we believe the last of these measures provides the best balance of data coverage and information use, we report our findings using all three measures in the discussion below.⁷³

IV. LAW CLERK INFLUENCE ON SUPREME COURT VOTING

Our central goal is to assess the degree of influence, if any, of law clerks' ideological predispositions on the behavior of Supreme Court Justices. We focus on the most extreme type of substantive influence: how the Justices vote in cases before the Supreme Court. Arguably, the Justices' votes are the aspect of decision making most insulated from clerk influence; Justices have clearly defined preferences over both law and policy, and scholars have documented that those preferences exert substantial influence over their votes on the merits.⁷⁴ Moreover, voting on the merits of particular cases remains the one area in which commentators have not raised concerns of influence.⁷⁵ By limiting the scope of our analysis to those votes, we effectively "stack the deck" against finding evidence of clerk influence. If our analyses demonstrate that law clerks exert even marginal influence on how the Justices vote in cases before the Court, then such a finding suggests that the independent power wielded by clerks pervades all aspects of the Justices' judicial responsibilities.

Our analysis draws on data from the United States Supreme Court Judicial Database.⁷⁶ Specifically, we consider the votes of the Justices

73. Ditslear & Baum, *supra* note 45, adopt a similar multi-measure approach in their assessment of the ideological positions of "feeder" court judges. Note that we employ the *Combined Measure* as our indicator of clerk partisanship in Figure 1.

74. See, e.g., Segal & Cover, *supra* note 63, at 557-65; *Ideological Values Revisited*, *supra* note 63, at 812-23.

75. Conversely, many Court observers have pointed to the review of certiorari petitions as the one area where law clerks most influence judicial behavior. See, e.g., WOODWARD & ARMSTRONG, *supra* note 11. However, Lazarus suggests that "[t]he danger of clerk bias and the potential for real mischief was much more intense and dramatic in the emergency death penalty stays." LAZARUS, *supra* note 1, at 268. We hope to next examine the impact of law clerk ideology on the review of cert petitions.

76. See HAROLD J. SPAETH, THE UNITED STATES SUPREME COURT JUDICIAL DATABASE, 1953-2005 TERMS (2006), available at <http://facweb.knowlton.ohio-state.edu/pvixon/support/codebook-c.html>.

in all cases decided during the 1953–2005 terms of the Court,⁷⁷ coded one for votes in favor of an ideologically liberal outcome and zero for a vote in favor of a conservative outcome.⁷⁸ Our model of Supreme Court voting is a relatively simple one:

$$\Pr(\text{Liberal Vote}) = f[\beta_0 + \beta_1(\text{Justice Liberalism}) + \beta_2(\text{Clerk Partisanship}) + X\beta + u] \quad (1)$$

where *Clerk Partisanship* takes on one of the three forms described above, and $X\beta$ is a set of control variables. In the analyses below, $X\beta$ consists of a set of indicator variables for the issue area addressed in the case to control for the propensity of Justices to rule more liberally in some issue areas than others.⁷⁹

In this context, the measurement of *Justice Liberalism* poses a particular challenge. The Segal-Cover scores provide a static measure of each Justice's liberalism, measured at the beginning of their Court tenure.⁸⁰ If, as some scholars have noted,⁸¹ Justices' ideological preferences change over their careers—and if, as we have established, those preferences influence their choice of clerks—then such a measure runs the risk of confounding our ability to uncover clerk influence.⁸² At the same time, widely used dynamic measures of the Justice's policy preferences, such as those of Martin and Quinn,⁸³ are based on the Justices' votes, and therefore raise the specter of endogeneity.⁸⁴

77. Our unit of analysis is the docket number ($\text{ana1u} < 2$); we treat nonparticipations, judgments of the court, dissents from denial of cert, and jurisdictional dissents as missing. Moreover, we consider only formally decided cases ($\text{dec_type} = 1$ or 6). Our results are substantively unchanged if we broaden the analysis to include cases decided per curiam and memorandum cases.

78. Our coding corresponds to Spaeth's *dir* variable; for details, see SPAETH, *supra* note 76.

79. Formally, we include fixed effects for each of the twelve broad issue areas described by Spaeth's *value* variable. See SPAETH, *supra* note 76. Our conclusions are substantively identical if we estimate either fixed- or random-effects models with separate unit effects for each case; those results are available from the authors upon request.

80. See Segal & Cover, *supra* note 63.

81. See Lee Epstein, Valerie Hoekstra, Jeffrey A. Segal & Harold J. Spaeth, *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. POL. 801, 801–18 (1998); Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 Nw. U. L. REV. 1483 (2007).

82. For example, if a Justice becomes more liberal over time, then he or she would likely both vote more liberally and select more liberal clerks later in his or her career. A static measure of Justice Liberalism would then fail to “pick up” the change in the Justice's ideology, while the measure of clerk partisanship would do so, potentially leading the analyst to uncover apparent clerk influence even if none was present.

83. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 134–53 (2002).

84. This potential for endogeneity is why, in the models of clerk selection above, we use only the Segal-Cover measures of Justice Liberalism.

Because each measurement approach has strengths and weaknesses, we consider both sets of measures. We estimate one set of models in which *Justice Liberalism* is measured using the (static, exogenous) Segal-Cover scores, and a second set using the (dynamic, endogenous) Martin-Quinn measure. In addition, as a check on the robustness of our results, we also estimate an alternative set of models in which we include Justice-specific fixed effects. This approach allows us to independently estimate each Justice's propensity to vote liberally and so offers the maximum possible assurance that the model correctly controls for the influence of the Justices' policy preferences on the vote. Given the operationalization of *Clerk Partisanship*, a finding of $\hat{\beta}_2 < 0$ is evidence that, over and above the influence of judicial ideology, the political partisanship of a Justice's clerks exerts an independent influence on his or her decisions.

Table 4 reports the results of nine logit models of the influence of Justice and clerk ideology on Supreme Court voting.⁸⁵ For the six models that include a measure of *Justice Liberalism*, all support the general proposition that, *ceteris paribus*, more liberal Justices are more likely to vote for liberal outcomes than their conservative counterparts. More striking is the consistent influence of *Clerk Partisanship*; in all nine models, the sign of the estimated effect is in the expected direction, and in seven of the nine, that estimate is statistically differentiable from zero at the $p = 0.05$ level or greater (one-tailed).⁸⁶ The strongest and most consistent effects are for our *Combined Measure* of *Clerk Partisanship*. In the model including the Segal-Cover measure of *Justice Liberalism*, the expected effect of a one-unit change in this variable—from homogenously Democratic clerks to homogenously Republican ones—is to decrease the odds of a liberal vote by forty percent. While somewhat more attenuated, law clerk partisanship retains its explanatory power in the models using the Martin-Quinn measure of *Justice Liberalism*, and those containing

85. In Table 4, columns denote variables, while rows denote the combination of *Justice Liberalism* and *Clerk Partisanship* measures used in each analysis. Including the multiplicative interaction of *Justice Liberalism* and *Clerk Partisanship* in the models yields results substantively identical to those presented here, indicating that it is neither liberal nor conservative Justices that demonstrate greater effects of clerk ideology on their voting. Likewise, inclusion of an interaction term between *Clerk Partisanship* and a counter for the term of the Court (with OT1953=1) yielded estimates that were not statistically differentiable from zero; this suggests that, at least against the alternative of monotonically increasing or decreasing clerk influence, the effect of clerk ideology has remained relatively stable over the past fifty years.

86. Moreover, in the fixed-effects model using the *Predicted Values* operationalization of clerk partisanship, the estimate is significant at $p = 0.06$ (one-tailed).

Justice-specific fixed effects, as well, which indicates that clerk influence is robust to varying specifications of judicial ideology.⁸⁷

TABLE 4: CLERK PARTISANSHIP AND JUSTICES' VOTES

	(Constant)	<i>Justice Liberalism</i>	<i>Clerk Partisanship</i>	Valid N
Segal-Cover Measure				
<i>Reported Partisanship</i>	-0.65 (0.21)	1.32* (0.24)	-0.41* (0.12)	39,711
<i>Predicted Values</i>	-0.30 (0.66)	1.01* (0.56)	-0.99 (1.24)	43,800
<i>Combined Measure</i>	-0.53 (0.24)	1.19* (0.26)	-0.51* (0.17)	53,246
Martin-Quinn Measure				
<i>Reported Partisanship</i>	-0.09 (0.11)	0.30* (0.03)	-0.14* (0.05)	39,708
<i>Predicted Values</i>	0.27 (0.16)	0.27* (0.03)	-1.26* (0.31)	43,798
<i>Combined Measure</i>	-0.03 (0.11)	0.29* (0.03)	-0.29* (0.09)	53,243
Fixed Effects				
<i>Reported Partisanship</i>	n/a	n/a	-0.18* (0.05)	39,711
<i>Predicted Values</i>	n/a	n/a	-1.46 (0.91)	43,800
<i>Combined Measure</i>	n/a	n/a	-0.25* (0.08)	53,246

In Table 4, the response variable is the ideological direction of the Justices' votes, coded one for liberal votes and zero for conservative. Cell entries are estimated logit coefficients; robust standard errors, grouped by Justice, are in parentheses. Asterisks indicate $p < .05$ (one-tailed). All models include fixed effects for issue areas (not reported), and "fixed-effects" models also include twenty-nine fixed effects for Justices.

Figure 4 presents a clearer picture of the relative magnitude of the effect of clerk partisanship, plotting predicted probabilities of a liberal vote as a function of the two main covariates of interest: *Justice Liberalism* (measured using the Segal-Cover indicator) and *Clerk Partisanship*. Note that both variables' values range from a low of zero to a high of one; for purposes of comparability, we rescale the *Clerk Partisanship* variable so that higher values denote greater liberalism—that

87. In addition, to the extent that *Clerk Partisanship* is itself a function of *Justice Liberalism*, the inclusion of both in the model of votes should work to attenuate the impact of the former. Thus, our results are, if anything, somewhat more conservative than they might otherwise be, absent this variable's inclusion.

is, higher levels of adherence to the Democratic party.⁸⁸ Points (circles and triangles) denote point predictions, while bars indicate ninety-five percent pointwise confidence intervals around those predictions.

FIGURE 4: PREDICTED PROBABILITIES OF A LIBERAL VOTE BY JUSTICE/CLERK IDEOLOGY

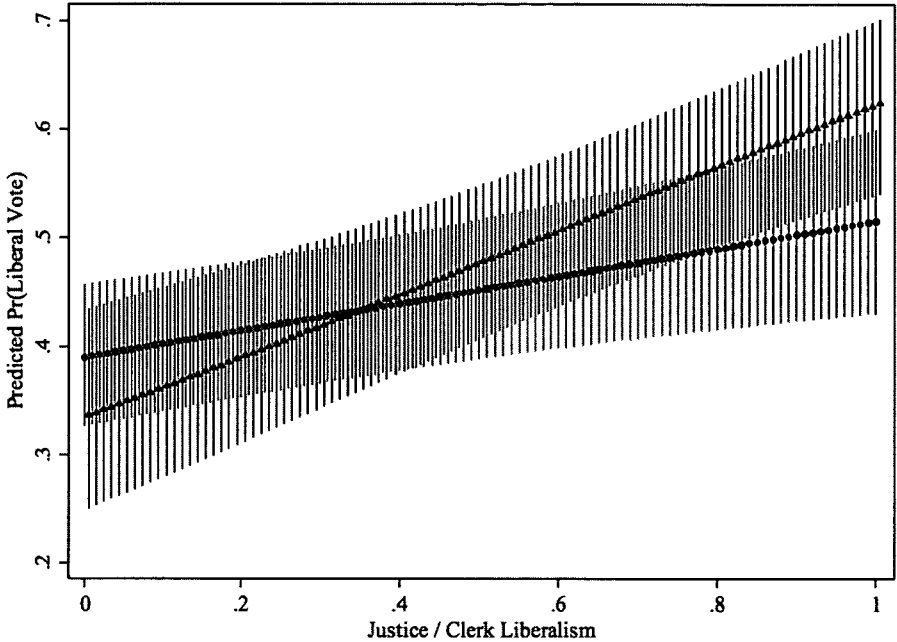


Figure 4 plots the predicted probability of a liberal vote, as a function of clerk (circles) and Justice (triangles) liberalism, holding other variables constant at their means. Bars are ninety-five percent pointwise confidence intervals.

The predictions in Figure 4 illustrate that the marginal impact of *Clerk Ideology* is between one-third and one-half that of *Justice Liberalism*. While a change across the full range of *Clerk Partisanship* from an all-Republican cadre of clerks to one composed entirely of Demo-

88. Predictions are from the model in row three of Table 4; that is, they use the *Combined Measure* of *Clerk Partisanship*. In both instances, the values of the other variables in the model are held at their mean or median values. Thus, the predictions for *Clerk Partisanship* are for a Justice with a *Liberalism* score of 0.50, while the predictions for *Justice Liberalism* are for a Justice with a *Clerk Partisanship* score of 0.29 (that is, with roughly thirty percent of his or her clerks identifying with the Republican Party). We also set all issue-specific dummy variables to zero; predictions are thus for the "baseline" category of cases involving questions of criminal procedure.

crats increases the predicted probability of a liberal vote by 0.13 (from 0.39 to 0.52), the same shift in *Justice Liberalism* yields a corresponding probability increase of 0.28 (from 0.34 to 0.62). Moreover, the confidence intervals indicate that the magnitude of this shift is sufficient to preclude the possibility of its being a statistical artifact at a high degree of confidence. The evidence, then, supports the proposition that, over and above the influence of the Justices' own policy preferences, their clerks' policy preferences have an independent effect on their votes.

V. DISCUSSION OF FINDINGS

While our findings with respect to clerk influence are compelling, it is important to highlight a number of limitations on those findings. First, our model of judicial decision making is relatively simple. While our analyses control in a straightforward and flexible way for differences across both cases and Justices, a more thorough analysis might explicitly include the influence of factors such as case facts,⁸⁹ changes in legal regimes,⁹⁰ and other mediating influences on the Justices' votes. To do so, however, would necessarily limit the analysis to a particular area of the law and require that we sacrifice generalizability for improved specification. We leave such an analysis for future work, while recognizing the potential value of such an approach.

Second, the implications of our results are somewhat limited by our methodological approach. While we demonstrate a clear correlation between clerk partisanship and the Justices' voting—one that persists in the face of even strong controls for the ideology of the Justice—it is important to underscore that our findings offer no support for any particular causal model of that influence. As discussed above, the mechanisms by which clerks might influence their Justices' behavior are many and varied; cert memoranda, bench memoranda, and informal conversations are all possible avenues through which law clerks can express their policy preferences. Moreover, to shape their Justices' perception of a case, law clerks might wield both appropriate methods, such as engaging in candid and open policy debates, as well as inappropriate methods, such as deception in memoranda writing. Therefore, unpacking the precise means by which law clerks exert influence over judicial decision making remains a task for future research.

89. See Jeffrey A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962–1981*, 78 AM. POL. SCI. REV. 891 (1984); SEGAL & SPAETH, *supra* note 13.

90. See Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305–20 (2002).

Third, our discussion is necessarily limited to the clerks' influence on how Justices vote on cases before the Court for final disposition. As we stated at the outset, voting and case outcomes are less likely loci of clerk influence on the Justices. Both existing scholarly research and journalistic accounts of the Court's internal operations suggest that other phenomena—including the certiorari process, discretionary opinion writing, and opinion content—are likely more susceptible to the influence of law clerks than voting on the merits of a case.⁹¹

Despite these caveats, we believe our findings are remarkable in a number of respects. For example, we provide the first direct evidence of "selection effects" in clerk hiring. Our robust finding that Justices choose clerks with an eye to their ideological convictions confirms both widespread popular speculation and findings from previous, indirect empirical studies. In addition to bolstering the argument for clerk influence, that finding also holds implications for questions of clerk selection and identity. For example, an ongoing question in the popular press has been the level of diversity among Supreme Court clerks.⁹² An important corollary of this concern is whether and to what extent law clerk diversity alters the way the Justices view the issues before them. As noted above, the number of female clerks has increased precipitously during the past three decades, while the number of African American law clerks has both grown more slowly and has varied dramatically by Justice. Whether such representation affects, at the margin, Justices' decisions in cases involving racial discrimination, gender discrimination, or both is a question we plan to address in future work.

Similarly, while scholars and commentators have persistently claimed that law clerks wield excessive influence over Supreme Court operations, those allegations have not yet been subjected to empirical verification.⁹³ These charges have given rise to a number of proposals by Court outsiders to limit what they characterize as undue influence by the clerks on the Supreme Court's decision making,⁹⁴ but their proponents' inability to offer an empirical assessment of the nature,

91. Accordingly, we plan to investigate these alternatives in future work, paying special attention to the differences in the manner in which the Justices utilized their clerks, both across chambers and over time.

92. See Joan Biskupic, *Two Justices Defend Lack of Minority Court Clerks*, WASH. POST, Mar. 16, 2000, at A23; Michael A. Fletcher, *As Term Opens, Lack Of Diversity is Decried*, WASH. POST, Oct. 6, 1998, at A3; Mauro, *supra* note 2.

93. See *supra* notes 6–13 and accompanying text.

94. For example, then-Senator John Stennis once suggested that Congress should establish minimum competency standards for Supreme Court clerks and approve the clerks selected by the Justices.

scope, and seriousness of law clerk influence has lessened the effectiveness of those calls.⁹⁵

Our findings strongly suggest that the partisan composition of a Justice's clerks can and does influence that Justice's decision making. Those findings are robust to the approach we use to operationalize clerk and Justice ideology, and are relatively consistent both across Justices of different ideological views and over time. Substantively, while the size of our "clerk effect" is relatively modest, we nonetheless conclude that law clerks' ideology exercises a separate and independent influence over how the Justices vote on the merits of cases.

VI. CONCLUSION

Our findings suggest that social scientists and other scholars should no longer quickly dismiss the role of law clerks in judicial decision making. However, this result signifies a beginning, rather than an end, of inquiry into the topic. To date, the widespread public discussion of law clerk influence has lacked a careful analysis of the different types of influence and the multiple paths through which that influence can be exercised. Simultaneously, that dialogue has suffered from Court observers' failure to appreciate that law clerks are not autonomous political actors. From the first day of the clerkship, the law clerk is bound by formal and informal institutional rules and norms imposed by the Supreme Court, as well as the individual Justices. Observers must clearly understand the interplay of those rules, norms, and preferences before reaching a final verdict on the extent or desirability of clerk influence.

95. However, there is evidence that the Justices themselves have taken the allegations of law clerk influence seriously and have implemented some institutional changes designed to minimize such influence. See *supra* notes 52–53 and accompanying text.