

## Book Review Essay

### The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process

COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK. By Todd C. Peppers.<sup>†</sup> Stanford: Stanford University Press, 2006. Pp. 310. \$21.95.

SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT. By Artemus Ward<sup>‡</sup> & David L. Weiden.<sup>‡‡</sup> New York: New York University Press, 2006. Pp. 336. \$39.00.

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Despite the shroud of secrecy surrounding the Supreme Court, it has become common knowledge that, to varying degrees, the Justices no longer tackle their work alone. Chief Justice Rehnquist, for instance, discussed the role of law clerks publicly, including describing the “cert pool,” in which many of the Justices combine their law clerks to draft memoranda analyzing each of the petitions for review under the Court’s discretionary jurisdiction.<sup>1</sup> Other accounts, such as Bob Woodward and Scott Armstrong’s book *The Brethren* and Ed Lazarus’s book *Closed Chambers*, go a step further by suggesting that law clerks inappropriately influence their Justices and occasionally impose their policy preferences on them.<sup>2</sup>

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1. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 232–35 (First Vintage Books 2002) (1987).

2. *See, e.g.*, EDWARD LAZARUS, *CLOSED CHAMBERS* 267–70 (1998) (discussing the “black arts” of clerking and specifically the efforts of conservative clerks to rush and pressure Justice Kennedy into denying stay applications in capital punishment cases); BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* 197–98 (1979) (highlighting an instance in which Justice Marshall denied making a statement and attributed a portion of his written opinion in a case to a prior clerk); *see also* David J. Garrow, *The Brains Behind Blackmun*, *LEGAL AFF.*, May–June 2005, at 27, 28

While interesting, the anecdotal accounts of the clerkship institution are substantially incomplete. Lazarus's book focuses on a limited time period,<sup>3</sup> and scholars have pointed out numerous inaccuracies in it.<sup>4</sup> Anecdotal accounts also lack empirical rigor, as it is nearly impossible to form normative or systematic conclusions from stories alone.

Two recent books written by political scientists, *Sorcerers' Apprentices* by Artemus Ward and David Weiden<sup>5</sup> and *Courtiers of the Marble Palace* by Todd Peppers,<sup>6</sup> fill the gap and provide a scholarly account of Supreme Court law clerks through the eyes of the clerks themselves. The authors supplement their surveys and interviews of former clerks with a number of other sources, including the scholarly literature and Justices' papers.<sup>7</sup> The results are two of the most interesting and complete accounts of one of the Court's most important and misunderstood institutions: the Supreme Court law clerk.

Both books are without doubt an improvement over the sensationalized contributions of earlier authors. Somewhat predictably, *Sorcerers' Apprentices* and *Courtiers* are remarkably similar in their aims, themes, and anecdotes, which perhaps lends some assurance as to their individual accuracy. The books identify parallel partitions in the evolution of law clerks, tracking their development from stenographers to active participants in the judicial process. Taken together, the books are a substantial contribution to the growing literature on the Supreme Court.

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(describing the influence of law clerks on the opinions of Justice Blackmun, from the substantial role played by his law clerks as far back as *Roe v. Wade* to their nearly total control of his dissent in a capital punishment case during his final term).

3. See LAZARUS, *supra* note 2, at 13 (stating that the late 1980s and early 1990s "make[] up the heart of the book"). While more comprehensive, Woodward and Armstrong's account was limited to about seven years of the Burger Court era, from 1969 to 1976. WOODWARD & ARMSTRONG, *supra* note 2, at 2.

4. See, e.g., Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835, 851–55 (1999) (book review) (pointing out that Lazarus was incorrect in his assertion that Justice O'Connor refused to join any of Justice Brennan's majority opinions and that Lazarus was further mistaken in suggesting that Chief Justice Rehnquist delayed his vote on certiorari in *Casey* with the purpose of influencing the presidential election); David M. O'Brien, *A Disturbing Portrait*, 81 JUDICATURE 214, 216 (1998) (book review) (claiming that Lazarus inaccurately described Justice Souter as dissenting in a case that was decided before Justice Souter joined the Court and in asserting that Justice Brennan completed all of his certiorari work without assistance from his clerks); David J. Garrow, *Dissenting Opinion: A Witness from Inside the Supreme Court Is Not Impressed*, N.Y. TIMES BOOK REVIEW, Apr. 19, 1998, at 26 (noting the inaccuracy of Lazarus's claims regarding Chief Justice Rehnquist's delays regarding *Casey* and Justice O'Connor's unwillingness to join any of Justice Brennan's majority opinions); Richard A. Glenn, Book Review, 9 LAW & POL. BOOK REV. 109, 111–12 (1999), available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/lazarus.html> (pointing out errors in Lazarus's case descriptions).

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

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

7. *Id.* at 19–20; WARD & WEIDEN, *supra* note 5, at 10.

As detailed more fully below, however, each book also has its individual strengths and weaknesses. *Sorcerers' Apprentices* is clearly the more ambitious work, but that is both an asset and a shortcoming. Much more than *Courtiers*, *Sorcerers' Apprentices* attempts to be a comprehensive work on law clerks, examining issues ranging from the influence of the clerk network to the ideological diversity of law clerks over time. While statistical in nature, the book's generalizations have a tendency to oversimplify the relatively complex relationship between Justices and their law clerks, particularly over different eras and among various chambers. In several areas, therefore, the authors make conclusions in the absence of compelling data.

In contrast, *Courtiers* is a historical compilation of rich stories from many eras. The data collected by Professor Peppers are vivid, engrossing, and compellingly presented, but his unwillingness to make conclusions about that data weakens the power of the book. Much more than *Sorcerers' Apprentices*, however, *Courtiers* provides rich fodder for scholars studying the Supreme Court.

The goal of this Review Essay is to use some of the valuable material in both books to examine a question raised frequently but inadequately explored in either: the influence of law clerks on the Court's changing workload.<sup>8</sup> Both books trace the influence of the Court's workload on the proliferation of law clerks and the expansion of their duties, but little attention is given to the converse question of how law clerks shape the Supreme Court's workload.

Part I tracks the development of the Supreme Court clerk from its infancy to its modern incarnation, highlighting the changing duties of law clerks as the position has evolved. Consistent with the goal of this Review Essay, particular attention will be paid to the role of law clerks in the certiorari process. With a few notable exceptions, I will leave for another day the question of law clerks' influence on opinion drafting.<sup>9</sup>

Part II critically analyzes the strengths and weaknesses of *Sorcerers' Apprentices* and *Courtiers*. While both books are important scholarly works, they only begin the important dialogue on the proper role of law clerks within the judicial branch. In this Part, therefore, I will suggest some

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8. I should state at the outset that I clerked for Justice Clarence Thomas, and in that capacity, I learned about the internal functioning of the Court and the role of law clerks in particular. As a former law clerk, I am still bound by certain rules of confidentiality, and although the precise contours of those rules are not entirely clear, I am not comfortable relaying my personal observations or opinions from my time with the Court in this or any other work. Accordingly, even if not otherwise stated, the basis for all of the observations and conclusions in this Review Essay can be found in publicly available sources, such as the scholarly literature or the two books reviewed for this piece. Indeed, the largest data source for this Review Essay, the papers of Justice Harry Blackmun, are open to any researcher at the Library of Congress Manuscripts Division.

9. For a discussion of this topic, see Todd C. Peppers & Christopher Zorn, Law Clerk Influence on Supreme Court Decision Making (Aug. 17, 2006) (unpublished manuscript), available at <http://ssrn.com/abstract=925705>.

avenues of future research and inquiry, particularly with respect to the institutional implications of delegating increased responsibility to law clerks.

After setting the stage in Parts I and II, Part III turns to the issue of Supreme Court workload. I first demonstrate that the Supreme Court's plenary docket has plunged over the last two decades,<sup>10</sup> from 153 signed opinions in 1986 to a comparably paltry seventy-four signed opinions in 2002 and 2003.<sup>11</sup> Then, using novel data obtained from Justice Blackmun's papers, I examine for the first time more than 20,000 pool memos from four different Supreme Court Terms in order to determine the impact of the cert pool on the Court's declining docket. The study uncovers three important attributes of the cert pool: first, that it is stingy in making grant recommendations; second, that it looks to objective criteria of certworthiness in making its recommendations; and third, there is considerable evidence that the recommendations of the cert pool are strongly correlated to the eventual decisions made by the Court on petitions for certiorari. Based on this evidence, I conclude that earlier studies too quickly dismissed the potential impact of law clerks and the cert pool on the size of the Court's plenary docket.<sup>12</sup>

### I. The Evolution of the Supreme Court Clerk

Although the Supreme Court has been assisted by support staff throughout its history,<sup>13</sup> the origins of the law clerk may best be described as a historical accident. Scholars have opined that the impetus for the creation of the law clerk position was the Court's expanding docket following the Civil War.<sup>14</sup> Both books, however, present a far simpler explanation: Justice Horace Gray, upon his appointment to the Supreme Court, brought with him a clerkship model that he had fashioned as Chief Justice of the Supreme

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10. In this Review Essay, "plenary docket" refers to those cases to which the Court gives full, plenary consideration, often including a grant of oral argument. In contrast, "certiorari docket" refers to cases in which the parties seek to invoke the Court's discretionary authority to review a case, most often by filing a petition for certiorari or a jurisdictional statement.

11. LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 232–36 tbl.3-3 (4th ed. 2007).

12. In a future article, I will examine more fully the reasons for the Supreme Court's declining workload, including the impact of the decreasing number of cases involving federal, state, and local governments; Congress's elimination of the Court's mandatory appellate jurisdiction in 1988 for nearly all categories of cases; changes in personnel on the Supreme Court over the past twenty years; and the reduced number of plenary cases from state courts.

13. See PEPPERS, *supra* note 6, at 38 (describing various employees of the Court, including the clerk, the official Court reporter, and the marshal of the Supreme Court).

14. See, e.g., Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1132–33 (1973) (arguing that the drastic increase in the Supreme Court's caseload at the end of the nineteenth century was a result of new industrial growth stemming from the country's expansion and significant increases in population and commerce levels); see also FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 59–61 (1928) (describing the crushing workload of the Supreme Court following the Civil War).

Judicial Court of Massachusetts.<sup>15</sup> Other Justices surely found the idea of a law clerk appealing as the Court issued an all-time high of 298 signed opinions in 1886, about four times the output of the current Court.<sup>16</sup> Indeed, just four years following Justice Gray's appointment to the Court, Congress authorized funds for the hiring of a "stenographic clerk" for each Justice at a salary not to exceed "one thousand six hundred dollars each."<sup>17</sup> The early law clerks often served a Justice for a number of years, and their duties consisted of a range of legal and secretarial work, including paying the Justices' bills and cutting their hair.<sup>18</sup>

Both books track the evolution of the law clerk over time, and changes in the Court's workload help explain some of these changes.<sup>19</sup> Although Justice Gray had used his stenographic clerks to perform legal research and review case files,<sup>20</sup> other Justices used their clerks for only menial tasks, such as running errands.<sup>21</sup> In 1919, the clerkship institution was indelibly changed when Congress added a "law clerk" for each Justice at a salary "not exceeding \$3,600 each."<sup>22</sup> Although not every Justice elected to hire a second clerk, most clerks (both legal and stenographic) began to perform a greater number of legal duties following the passage of the 1919 Act, including writing summaries of incoming petitions for certiorari.<sup>23</sup>

The clerkship institution was again changed in 1935 when Chief Justice Hughes introduced the "dead list," which categorized cases that would not be discussed by the Justices in conference.<sup>24</sup> Prior to the introduction of the dead list, all petitions for certiorari were discussed at conference, with the Chief Justice providing summaries of the facts and issues in each case.<sup>25</sup> Justices came to "rely more heavily on their clerks for certiorari memos" as the docket expanded and not all petitions were discussed at conference.<sup>26</sup> By the end of the Hughes Court in 1941, "law clerk participation in cert. review

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15. PEPPERS, *supra* note 6, at 44–45; WARD & WEIDEN, *supra* note 5, at 24–25.

16. EPSTEIN ET AL., *supra* note 11, at 232–36 tbl.3-3; WARD & WEIDEN, *supra* note 5, at 25. In contrast, following the conclusion of the Civil War in 1866, the Court issued just 128 signed opinions. EPSTEIN ET AL., *supra* note 11, at 232–36 tbl.3-3.

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

18. WARD & WEIDEN, *supra* note 5, at 31–34.

19. *Id.* at 26.

20. PEPPERS, *supra* note 6, at 51, 52.

21. *Id.* at 83.

22. Act of July 19, 1919, ch. 24, 41 Stat. 163, 209.

23. See PEPPERS, *supra* note 6, at 85, 90 (describing clerkships with Chief Justice Taft and Justice Stone); WARD & WEIDEN, *supra* note 5, at 34 (describing clerkships with Justice Gray).

24. WARD & WEIDEN, *supra* note 5, at 113.

25. *Id.* at 37. In 1950, Chief Justice Vinson stopped circulating the dead list. *Id.* at 115. Since then, the Court has only distributed a "discuss list," which inventories the cases to be discussed at the Court's conference. *Id.*

26. *Id.* at 37.

had become institutionalized—save for Justice Brandeis.”<sup>27</sup> Unlike current practices, however, most Justices of the period still independently reviewed the petitions for certiorari prior to conference.<sup>28</sup>

Greater delegation to clerks in other areas also became more common during the tenures of Chief Justices Hughes, Stone, and Vinson. Justice Murphy, in particular, was the first Justice to “completely delegate” opinion-drafting duties to his law clerks.<sup>29</sup> Justices Burton, Rutledge, and Cardozo and Chief Justice Vinson required their law clerks to prepare bench memos in advance of oral argument on merits cases.<sup>30</sup> In fact, as Professors Ward and Weiden richly describe, Chief Justice Vinson’s abdication of some of his judicial responsibilities coupled with his large staff of three clerks led Judge Learned Hand to describe Vinson’s chambers as “Vinson Incorporated.”<sup>31</sup>

The role of law clerks expanded considerably with the appointment of Chief Justice Warren in 1953. First, Warren standardized the practice of assigning opinion drafts equally among members of the Court, forcing slower writers to rely more heavily on their law clerks.<sup>32</sup> Second, he continued Vinson’s practice of delegating many judicial functions to his clerks, including drafting memoranda on certiorari petitions, writing bench memos for merits cases, and even drafting the initial versions of majority, concurring, and dissenting opinions.<sup>33</sup> Professor Peppers, in particular, concludes in *Courtiers* that Chief Justice Warren changed the norm as to the relationship between clerk and Justice by making the delegation of judicial functions to clerks perfectly acceptable, and even commonplace.<sup>34</sup> The new appointees to the Warren Court—Justices Harlan, Brennan, Whittaker, Stewart, White, Goldberg, Fortas, and Marshall—adopted substantially similar models with respect to the duties of law clerks.<sup>35</sup>

Two important developments in the early 1970s forever changed the relationship between Justices and their law clerks. First, Congress expanded the maximum number of law clerks to three in 1970 and then to the current number of four in 1974.<sup>36</sup> Although neither author investigates the reasons for the increase in the number of clerks, a reasonable explanation for the change was the increased delegation to law clerks under the stewardship of Chief Justice Warren. Workload pressure as well, especially from the

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27. PEPPERS, *supra* note 6, at 94. Another prominent change during Hughes’s tenure as Chief Justice was the elimination of the “career secretary” model of clerkships. *See id.* at 93.

28. *Id.* at 143.

29. *Id.* at 109.

30. *Id.* at 143 tbl.4.1; WARD & WEIDEN, *supra* note 5, at 40.

31. WARD & WEIDEN, *supra* note 5, at 37.

32. *Id.* at 46, 203–04.

33. PEPPERS, *supra* note 6, at 148–50.

34. *Id.* at 152.

35. *Id.*

36. WARD & WEIDEN, *supra* note 5, at 45.

explosion in the in forma pauperis<sup>37</sup> (IFP) portion of the certiorari docket in the late 1960s, surely added to the need for additional law clerks.<sup>38</sup> A rule change in 1971 placed all petitions, including IFP petitions, on the same docket for review by all Justices, further requiring Justices to rely on their clerks for certiorari work.<sup>39</sup>

The rapidly expanding certiorari docket led to the second major change in the duties of law clerks: creation of the “cert pool.”<sup>40</sup> Rather than have each chambers review every incoming petition for certiorari, Justice Powell suggested in 1972 that the Justices pool their clerks so that only one clerk would be required to write a memorandum on each case.<sup>41</sup> Despite the approval of a majority of the Court for creation of a cert pool, Justices Douglas, Brennan, Stewart, and Marshall declined to participate.<sup>42</sup> Although initially law clerks were not allowed to make recommendations in their pool memos, that changed as the pool evolved, and eventually recommendations were required as a result of a 1984 policy change.<sup>43</sup> Today, eight of the nine Justices (all but Justice Stevens) participate in the cert pool.<sup>44</sup>

By the time of the Burger Court and certainly during the Rehnquist Court, an institutional norm developed of delegating opinion drafting to law clerks in most, and in some instances all, cases.<sup>45</sup> Professor Peppers states in *Courtiers* that “one can safely conclude that no other set of sitting Supreme Court justices have delegated as much responsibility to their law clerks as those on the Rehnquist Court.”<sup>46</sup> Law clerks, therefore, have become an indispensable and perhaps fixed component of the Court's operations.<sup>47</sup>

37. In forma pauperis, or “in the manner of a pauper,” petitions are filed by litigants who lack the monetary resources to pay the filing fee. BLACK'S LAW DICTIONARY 794 (8th ed. 2004). A petitioner who succeeds on her motion to proceed in forma pauperis does not have to pay the Supreme Court's filing fee. SUP. CT. R. 39.

38. See WARD & WEIDEN, *supra* note 5, at 117 (explaining that the Court's docket increased dramatically in the 1950s forcing a heavy burden on the Justices and clerks to keep pace).

39. See *id.* at 138 (observing that prior to the rule change, only law clerks for the Chief Justice were responsible for reviewing the IFP petitions).

40. *Id.* at 117.

41. PEPPERS, *supra* note 6, at 187; WARD & WEIDEN, *supra* note 5, at 118.

42. WARD & WEIDEN, *supra* note 5, at 119.

43. *Id.* at 124.

44. *Id.* at 125. Both Chief Justice Roberts and Justice Alito have decided to remain in the cert pool for October Term 2006. Tony Mauro, *Courtside*, LEGAL TIMES, Sept. 18, 2006, at 10. Both have raised the possibility, however, of leaving the cert pool at some point in the future. *Id.*

45. See PEPPERS, *supra* note 6, at 190; WARD & WEIDEN, *supra* note 5, at 45–46; see also Paul J. Wahlbeck et al., *Ghostwriters on the Court?: A Stylistic Analysis of U.S. Supreme Court Opinion Drafts*, 30 AM. POL. RES. 166, 182, 183 (2002) (finding “stylistic traces of the drafting clerks” in the 1985 opinions of Justices Powell and Marshall and noting that their “findings bolster the view of Marshall as one who delegated the writing of opinions”).

46. PEPPERS, *supra* note 6, at 191.

47. For this reason, there is little chance that the Court will voluntarily eliminate law clerks, and there does not seem to be much momentum or reason for Congress to act in this area. Accordingly, to the extent that Stuart Taylor and Benjamin Wittes were serious in their recent piece suggesting

## II. Courtiers and Apprentices

*Courtiers* and *Sorcerers' Apprentices* tell strikingly similar tales about the evolution of the Supreme Court clerk. They also aim to provide a historical and institutional account of the Supreme Court clerkship.<sup>48</sup> Each tracks the evolution of law clerks from stenographers to junior partners or law firm associates, dividing the periods of change along roughly similar lines and dates.<sup>49</sup> The books even repeat a number of the same stories about Supreme Court history.<sup>50</sup> In fact, the congruence between the two books gives readers some confidence as to the individual accuracy of each.

Nevertheless, the approaches of the two books to the ostensibly focal question of law clerk influence diverge from one another. In this Part, I will first discuss the differences between the two books, delineating the strengths and weaknesses of each, and end by providing suggestions for future research.

### A. Sorcerers' Apprentices

*Sorcerers' Apprentices* is an ambitious work, perhaps even a little too ambitious in some of its conclusions. The book examines nearly every aspect of Supreme Court clerks, from their role in the opinion-drafting process to the clerk network that has been discussed prominently in previous works on the Court.

Unlike *Courtiers*, *Sorcerers' Apprentices* dedicates substantial attention to the clerk's role as an informal ambassador to other Justices and clerks in other chambers.<sup>51</sup> Interestingly, the clerk network was encouraged by the Justices, particularly Justice Powell, through the creation of a "Law Clerk Dining Room" in the Supreme Court cafeteria.<sup>52</sup> Ward and Weiden suggest several reasons why Justices have encouraged the formation of a law clerk network, including the educational value of seeking out another clerk with expertise in a particular area, to assist them in gaining information about the position of their colleagues, and to facilitate the creation of coalitions.<sup>53</sup>

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the elimination of law clerks, their proposal is bound to fail. See Stuart Taylor, Jr. & Benjamin Wittes, *Of Clerks and Perks*, ATLANTIC MONTHLY, July 2006, at 50. Moreover, the shock produced by such a dramatic change, despite assertions to the contrary by Taylor and Wittes, would not improve the functioning of the Court. To the contrary, I would predict that it would drastically reduce the quality of the Court's work product, at least in the short term.

48. See PEPPERS, *supra* note 6, at xiv, 10; WARD & WEIDEN, *supra* note 5, at 21.

49. See PEPPERS, *supra* note 6, at 38, 84, 145; WARD & WEIDEN, *supra* note 5, at 30–48.

50. Compare WARD & WEIDEN, *supra* note 5, at 93 (recounting the hiring of the first African American clerk, William Coleman), with PEPPERS, *supra* note 6, at 22 (mentioning the same event).

51. WARD & WEIDEN, *supra* note 5, at 159–70; cf. LAZARUS, *supra* note 2, at 264–71 (describing the conservative "cabal" that allegedly attempted to steer the decisions of the Court, particularly in death penalty stays).

52. WARD & WEIDEN, *supra* note 5, at 162–63.

53. *Id.* at 167–68.

The authors examine the influence of law clerks and the clerk network on decisionmaking through a case study of *Planned Parenthood v. Casey*,<sup>54</sup> though the sources they use do not necessarily support their conclusion. Aside from profiling Justice Blackmun, who has been criticized for the extraordinary level of influence he ceded to his clerks,<sup>55</sup> the memoranda Ward and Weiden discuss demonstrate only that one of his clerks, Stephanie Dangel, was more intimately involved than Blackmun with the day-to-day activity of *Casey*.<sup>56</sup> While it is true that Blackmun apparently followed much of his clerks' advice, there is no suggestion that they were able to change his mind on any issues of significance.<sup>57</sup> Perhaps, as Peppers might suggest if he were to analyze the case study, Blackmun's clerks were just acting as his agents on the case, pushing Blackmun's own interests even if he was not personally involved in the minutiae of the case.<sup>58</sup> Accordingly, I am not sure that the *Casey* case study explains much with respect to the issue of clerk influence, particularly regarding the practices of the Court as a whole.

Another contribution of *Sorcerers' Apprentices* is its analysis of the influence of law clerks on the opinion-drafting process. As Ward and Weiden point out, even when clerks were relegated to crafting footnotes, their influence was substantial, as both the controversial social science footnote eleven of *Brown v. Board of Education*<sup>59</sup> and the famous footnote four of *United States v. Carolene Products*<sup>60</sup> were largely a product of law clerks.<sup>61</sup> While some Justices give clerks outlines or highly detailed instructions before the clerks begin writing, clerks maintain "considerable discretion over the word choice, structure, and sometimes even the substance of the opinions they write."<sup>62</sup> Of course, as both books point out, the level of delegation to law clerks during the opinion-drafting process has only increased over time.<sup>63</sup>

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54. 505 U.S. 833 (1992).

55. *E.g.*, Garrow, *supra* note 2.

56. *See* WARD & WEIDEN, *supra* note 5, at 173–84.

57. Perhaps part of the confusion is due to the fact that Ward and Weiden never clearly define what they mean by the term "influence." For instance, if a clerk changes her Justice's mind on certain issues, whether stylistic or substantive, is that really influence? It could just as easily be described as exposing the Justice to alternative viewpoints.

58. *Cf.* PEPPERS, *supra* note 6, at 10–16 (describing the principal–agent theory and its application to the clerkship institution and hypothesizing that "justices create rules and informal norms designed to constrain law clerks from pursuing their own self-interests").

59. 347 U.S. 483, 494 n.11 (1954).

60. 304 U.S. 144, 152 n.4 (1938).

61. WARD & WEIDEN, *supra* note 5, at 202–03.

62. *Id.* at 230.

63. PEPPERS, *supra* note 6, at 192, 205; WARD & WEIDEN, *supra* note 5, at 202; *see also* Richard A. Posner, *The Courthouse Mice*, NEW REPUBLIC, June 5 & 12, 2006, at 32, 33 (book review) ("Except for Justice John Paul Stevens, who writes his own first drafts of opinions, law clerks write the first drafts of their justices' opinions.").

Ward and Weiden use three categories to describe law clerk participation in the opinion-drafting process: delegation, retention, and collaboration.<sup>64</sup> According to the book, Justice Stevens is the only current member of the Court to practice the retention model regularly, in which a Justice writes the opinion and then a clerk edits the draft and adds citations and footnotes.<sup>65</sup> Others who occasionally draft their own opinions include Justices Scalia and Souter.<sup>66</sup> In contrast, all of the other current, long-serving Justices tend to practice the delegation model, in which the Justice assigns the opinion to the clerk, sometimes accompanied by extensive instructions or an outline, and then revises the clerk's draft.<sup>67</sup> The final model is collaboration, in which the Justice and the clerk work together, often swapping drafts back and forth.<sup>68</sup> The authors further describe how Justices might use different models, depending on whether they are writing individually or for the Court, and whether the opinion is a landmark one.<sup>69</sup> Through Ward and Weiden's application and extensive discussion of the three models, the reader is able to understand the dramatic change that has taken place, even since the Warren Court—Justices Black, Minton, Clark, and Whittaker all drafted their own opinions most of the time.<sup>70</sup>

Despite its strong presentation of the influence of law clerks on the opinion-drafting process, *Sorcerers' Apprentices* sometimes draws unsubstantiated conclusions based upon meager evidence. Unlike *Courtiers*, *Sorcerers' Apprentices* uses nearly twenty charts and graphs<sup>71</sup> to make generalizations about both the tasks and influence of law clerks.<sup>72</sup> While this method provides a clearer picture of the clerkship institution, it underemphasizes the variability among different Justices and even different clerkship years with the same Justice. As a result, it is tempting to be lulled into undue reliance on their conclusions and generalizations.

Moreover, some of the conclusions in *Sorcerers' Apprentices* are stated in the absence of compelling data. One example is that Ward and Weiden

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64. WARD & WEIDEN, *supra* note 5, at 213 tbl.5.1.

65. *Id.* at 222–23.

66. *Id.* at 223.

67. *Id.* at 213 tbl.5.1. Because of the timing of the publication of both *Courtiers* and *Sorcerers' Apprentices*, neither book analyzes the law clerks for Chief Justice Roberts and Justice Alito. Any such analysis would probably be premature anyway, at least as to opinion drafting, because many Justices alter their system after several years on the Court. *Id.* at 222 (citing a “learning curve wherein new justices are more likely to participate in opinion writing and other functions than their more experienced colleagues”).

68. *Id.* at 218. Justices Reed and Burton, for example, regularly practiced the collaborative approach. *Id.* at 219.

69. *Id.* at 218.

70. *Id.* at 212–13.

71. See, for example, the charts and graphs addressing clerk influence. *Id.* at 184–97; *see also id.* at ix–xi (identifying all of the illustrations used throughout the book).

72. *See id.* at 128, 151, 159.

conclude that differences in clerk influence among various eras can be explained by changes in the application process—for example, Justices today more often hire ideologically divergent clerks who have less influence within chambers.<sup>73</sup> In other words, “this phenomenon has . . . led to certain clerks, presumably those more closely aligned ideologically with their justice, having more influence than others.”<sup>74</sup> First, this conclusion is in some tension with the rise of influential feeder judges during the Rehnquist Court, such as D.C. Circuit Judge Laurence Silberman and former Fourth Circuit Judge J. Michael Luttig,<sup>75</sup> who tended to hire more conservative clerks and send them to conservative Justices.<sup>76</sup> Second, they do not discuss other, more plausible explanations for the temporal changes in the clerks’ perceptions of their own influence, such as the fact that the increased number of clerks during the Burger and Rehnquist eras likely has minimized their perceptions of their own influence and maximized their views of the level of ideological diversity within many chambers.

The weaknesses of *Sorcerers’ Apprentices* become particularly apparent upon consideration of the flaws in the authors’ data collection. Although Ward and Weiden note in the preface “that there is always a danger with survey research that the respondents will fail to be sincere”<sup>77</sup> and “recognize that law clerks . . . may overstate their influence,”<sup>78</sup> the authors do not sufficiently address the most serious failing in their data collection. Because *Sorcerers’ Apprentices* attempts to be a snapshot of the modern clerkship institution far more than *Courtiers* does, it is troubling that its authors base their conclusions on just nineteen responses from Rehnquist Court clerks.<sup>79</sup> That is only slightly more than half of the total number of clerks working for the Court during a single Term, hardly enough to draw more than tentative conclusions about the clerkship practices of the modern Court.<sup>80</sup> Thus, while

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73. *Id.* at 106.

74. *Id.* at 107.

75. For the sake of full disclosure, I note that I clerked for Judge Luttig.

76. See WARD & WEIDEN, *supra* note 5, at 81–82; see also Corey Ditslear & Lawrence Baum, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J. POL. 869, 882–83 (2001) (finding a strong relationship between Justice and feeder judge ideology, especially during the 1990s).

77. WARD & WEIDEN, *supra* note 5, at 20.

78. *Id.*

79. See *id.* at 147. Of the more than 1,500 living former Supreme Court clerks, Ward and Weiden sent surveys to a random sample of about six hundred. *Id.* at 10, 282. They did not disclose how many of the six hundred surveys were sent to former clerks of the Rehnquist Court.

80. See Posting of Todd C. Peppers to Empirical Legal Studies Blog, [http://www.elsblog.org/the\\_empirical\\_legal\\_studi/2006/03/studying\\_the\\_el.html](http://www.elsblog.org/the_empirical_legal_studi/2006/03/studying_the_el.html) (Mar. 5, 2006, 05:36 PM) (“Simply put, law clerks of deceased justices were more willing to provide detailed information as to their former employer’s hiring and utilization practices than law clerks whose justices still sit on the bench. . . . [T]he few [Rehnquist Court clerks] who did speak with me often placed substantial limits on both the scope and use of the interview.”). Peppers, in *Courtiers*, did a far better job of recognizing the weaknesses of his data collection efforts and hedging his conclusions accordingly.

interesting, Ward and Weiden's commentary about the Rehnquist Court should not be considered conclusive or indisputable.

### B. Courtiers of the Marble Palace

*Courtiers* ends in anticlimactic fashion because of the problems with data collection, particularly among clerks serving during the Rehnquist Court. Peppers describes the modern clerkship institution as well as possible, but his account falls far short of the engrossing descriptions that he provided for clerkships in the chambers of earlier Justices, particularly those that served during the middle of the twentieth century. Indeed, Peppers devotes only about fifteen pages to the clerks of the Rehnquist Court,<sup>81</sup> which contrasts sharply with the twenty-eight pages he allocates to Warren Court clerks.<sup>82</sup> Much more than *Sorcerers' Apprentices*, therefore, *Courtiers'* approach is primarily historical, dividing the analysis into separate eras and then examining the clerkships with each Justice during every era separately.

In taking a historical approach, however, Peppers by no means ignores the question of clerk influence. Indeed, his entire project began from the premise that law clerks, like Justices, might try to maximize their own preferences in carrying out their responsibilities.<sup>83</sup> His goal, therefore, is to understand the institutional norms restricting Supreme Court clerks and the conditions under which they are able to exert influence.<sup>84</sup> To structure the inquiry more concretely, he examines law clerks within the framework of the principal-agent theory (P-A theory).<sup>85</sup>

With this framework in place, the book steps carefully and deliberately through the clerkship practices of each Justice. Though little is known about more than a handful of the earliest clerks, Peppers interprets the lack of information as confirmation that the early Justices used their assistants primarily as stenographers.<sup>86</sup> Even after Congress appropriated funds for an additional law clerk in 1919, the job duties of clerks were still limited to editing, researching, cite checking, and occasionally drafting cert memos.<sup>87</sup>

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81. See PEPPERS, *supra* note 6, at 190–205.

82. See *id.* at 146–74.

83. *Id.* at xii.

84. See *id.* at xiv.

85. *Id.* at 10. The author defines the P-A theory as follows: “[A]n analytic expression of the agency relationship, in which one party, the principal, considers entering into a contractual agreement with another, the agent, in the expectation that the agent will subsequently choose actions that produce outcomes desired by the principal.” *Id.* at 11 (quoting Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 756 (1984)).

86. In other words, Peppers presumes that we do not know much about most clerks from the Waite, Fuller, and White Courts because they performed primarily, if not solely, menial duties. Meanwhile, the clerks for Justices Gray, Holmes, and Brandeis are more well known because they were top law school graduates who were expected to perform important legal duties for their Justices. See PEPPERS, *supra* note 6, at 70.

87. *Id.* at 83–84.

Given the small risk of influence, Peppers notes, it was unsurprising that Justices during this early era had no formal procedures to minimize clerk shirking or defection.<sup>88</sup>

Consistent with P–A theory, as the Justices continued to expand the job responsibilities of clerks, they instituted formal rules to minimize shirking and defection. Justice Murphy, for example, who delegated to his clerks as much or more than modern Justices, considered ideology in selecting clerks, used a confidant to review clerk work product, and retained those clerks he trusted the most.<sup>89</sup> Chief Justice Vinson also paid careful attention to clerk ideology and created a hierarchical office staff,<sup>90</sup> although the author suggests that Vinson's formal procedures were not sufficiently robust to counter the influence he delegated to them in the opinion-drafting process and in the selection of cases for plenary review.<sup>91</sup>

Other Justices controlled their clerks in a much less formal manner. Justice Black, for instance, maintained such a close relationship with his clerks that the bond of loyalty prevented clerk defection.<sup>92</sup> Justice Brennan's morning coffee with his clerks served a similar function and provided him with a regular opportunity to monitor his clerks.<sup>93</sup> The author even suggests that the fear and terror that Justice Douglas evoked in his clerks may have been an effective method of ensuring the loyalty of and control over his clerks.<sup>94</sup>

With the advent of four clerks per chambers, informal mechanisms have, according to Peppers, become less effective in controlling clerks.<sup>95</sup> To adequately monitor clerks today, the Justices have established formal confidentiality rules, instituted intrachambers peer monitoring and review, and used feeder judges and law school activities as a proxy for determining clerk ideology.<sup>96</sup> Based on the diminishing ideological distance between clerks and Justices, as well as the expansion of formal monitoring devices, Peppers ultimately concludes that "law clerks do not wield an inordinate amount of influence."<sup>97</sup>

In contrast to *Sorcerers' Apprentices*, which likely overestimates clerk influence in the opinion-drafting process, *Courtiers* perhaps underestimates the power of law clerks. Indeed, Peppers admits that clerks often have great

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88. *Id.* at 92–93, 143–44.

89. *Id.* at 112.

90. *See id.* at 134 (describing how Chief Justice Vinson even reviewed the FBI files of prospective clerks).

91. *Id.* at 138.

92. *Id.* at 123.

93. *Id.* at 159.

94. *Id.* at 118.

95. *Id.* at 210–11.

96. *Id.* at 209–10.

97. *Id.* at 211.

influence over the doctrinal and stylistic aspects of opinions<sup>98</sup> but still claims that clerks do not wield an inordinate amount of influence. Yet based on the consistent findings of both books, it is difficult to discount the power of law clerks when they are the ones writing the first draft of most opinions. To be sure, Peppers does identify some limits on their discretion. For instance, some Justices provide detailed instructions to law clerks before the drafting process begins, and a law clerk's draft majority opinion still has to hold together a Court.<sup>99</sup> Plus, the Justices are still making the decisions about the winners and losers in each case. Perhaps it is impossible to have a firm grasp on the influence of law clerks, and the level of influence likely varies greatly by Justice. But in the final analysis, the truth about law clerk influence likely lies somewhere in between the positions advocated by *Sorcerers' Apprentices* and *Courtiers*.

*Courtiers* also assiduously avoids making any normative suggestions or broad conclusions about the Court, which means that *Courtiers's* main contribution to the literature is its methodical description of the clerkship institution. In the final chapter, for example, rather than regurgitating his observations about law clerks and the Court, Peppers could have at least provided some suggestions on how the Court could use its clerks more efficaciously. While it is true that Peppers appears to take his data collection problems much more seriously than Ward and Weiden<sup>100</sup>—which may explain his hesitancy to make recommendations—I do not get the impression that Peppers is wholly satisfied with the Court's use of law clerks. Thus, the reader is regrettably left asking a critical question after *Courtiers*: Where do we go from here?

### C. *Where Do We Go from Here?*

In addition to sharing several strengths, the two books also share many of the same shortcomings. A glaring weakness of both is the absence of analysis on the overall institutional impact of law clerks. The authors are so myopically focused on the question of clerk influence that the implications of that influence on the decisionmaking of the Justices are largely ignored.

Many political scientists press models of judicial decisionmaking that are based on the policy preferences of judges.<sup>101</sup> The attitudinal model, for instance, posits that Justices will decide cases according to their "ideological

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98. *Id.* at 209.

99. *Id.* Peppers's observation that law clerk influence is limited by the requirement of holding together a Court is not particularly comforting if Justices "go along" with opinions with which they might disagree, at least in part. See David R. Stras, *The Incentives Approach to Judicial Retirement*, 90 MINN. L. REV. 1417, 1431 (2006) (describing "go-along" voting behavior (citing Richard Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 2 (1993))).

100. See *supra* note 80.

101. Stras, *supra* note 99, at 1421–29.

attitudes and values,”<sup>102</sup> regardless of “other constraints such as precedent, text, or legislative intent.”<sup>103</sup> The rational choice model also views Justices as seekers of legal policy but further recognizes that they are “strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act.”<sup>104</sup> These two models have gained great currency among political scientists and some legal scholars and are among the leading accounts of judicial behavior.<sup>105</sup>

Neither book, however, so much as mentions these models, much less analyzes the impact of law clerk behavior on them. Both books suggest that law clerks engage in strategic behavior<sup>106</sup> and attempt to fulfill their policy preferences through the certiorari and opinion-drafting processes.<sup>107</sup> Law clerk behavior, therefore, appears to be substantially similar to the behavior exhibited by Justices in deciding cases, as predicted by the rational choice and attitudinal models, but neither book takes the additional step of analyzing the impact of law clerk influence on the decisionmaking of Justices. It is possible that what political scientists view as strong empirical evidence in support of the rational choice and attitudinal models may be partially explained by the influence of law clerks’ strategic behavior.<sup>108</sup>

An example may illustrate the point more clearly. I have written previously that delegation of the opinion-drafting function to law clerks may

102. JEFFREY A. SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002); *see also id.* (stating that “Rehnquist vote[d] the way he d[id] because he [wa]s extremely conservative [and] Marshall voted the way he did because he [wa]s extremely liberal”).

103. Stras, *supra* note 99, at 1422; *see also* HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL* 287 (1999) (concluding that “precedent rarely influences United States Supreme Court justices”).

104. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE*, at xiii (1998). Epstein and Knight are among the most prominent rational choice theorists today, but the model has its origin in a 1964 book by Walter Murphy and a 1958 article by Glendon Schubert. *See* WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 198–210 (1964); Glendon A. Schubert, *The Study of Judicial Decisionmaking as an Aspect of Political Behavior*, 52 *AM. POL. SCI. REV.* 1007, 1022–25 (1958).

105. For a more thorough discussion of these two models of judicial behavior, see Stras, *supra* note 99, at 1421–29.

106. *See* PEPPERS, *supra* note 6, at 207 (depicting law clerks as “rational actors”); WARD & WEIDEN, *supra* note 5, at 177–84 (describing strategic recommendations made by Justice Blackmun’s law clerks during consideration of *Casey v. Planned Parenthood*, 505 U.S. 833 (1992)); *id.* at 133 (“Despite the incentives for pool clerks to write objectively, there is some evidence that they behave in partisan and strategic ways.”).

107. *See* PEPPERS, *supra* note 6, at 210 (describing intrachamber rules for law clerks to monitor other clerks, especially during the opinion-drafting process); WARD & WEIDEN, *supra* note 5, at 146 (stating that clerks can have a “substantial effect on [the] certiorari decisions” of their Justices); *id.* at 151 (suggesting that clerks occasionally “change their justices’ minds about particular cases or issues before the Court” and that “clerks are most persuasive with their justices in the certiorari process”).

108. *See* Peppers & Zorn, *supra* note 9, at 24–25 (finding that the policy preferences of law clerks have an independent impact on the votes of Justices on the merits of a case).

increase the propensity of Justices to decide cases based solely on their policy preferences.<sup>109</sup> As Justice Stevens stated in an interview with Professor Peppers, preparation of the first draft of an opinion hones his interpretation of the relevant legal theories and causes him, on occasion, to even reevaluate his ultimate position on a case.<sup>110</sup> A Justice who delegates the drafting of opinions to law clerks, by contrast, does not have the opportunity to learn first-hand when an opinion will not “write” or to “become as familiar with the nuances of each case, including the difficulties of aligning a new case with prevailing doctrine and other lines of decisions.”<sup>111</sup> Thus, as greater responsibility is delegated to law clerks, the possibility that a case will be decided based on policy preferences alone may also increase.

In his review of *Courtiers* and *Sorcerers’ Apprentices*, Judge Posner raises a related and equally important question: whether the quality of the Court’s output has declined as a result of the assignment of opinion drafting to law clerks.<sup>112</sup> Posner suggests that “there is . . . a loss when opinions are ghostwritten,” and that Justices are fooling themselves “when they think that by careful editing they can make a judicial opinion their own.”<sup>113</sup> The impact of law clerks is even more sobering when one considers that the deliberations among the Justices “are by all reports stilted and brief,”<sup>114</sup> although that may be changing under the stewardship of Chief Justice Roberts.<sup>115</sup> If the Justices are truly disengaged from the essential work product of the Court—the opinions—as the authors of the two books and Posner arguably suggest, then what is the effect on the Court’s output? Ultimately, the answers to these questions are beyond the scope of this Review Essay, but the careful examination of law clerks undertaken in *Courtiers* and *Sorcerers’ Apprentices* only increases the need for further research on these subjects.

The other failing of the books, and the focus of the rest of this Review Essay, is the authors’ treatment of judicial workload. In their discussion of growing clerk responsibility, for example, both books fall into the alluring trap of assuming that increased workload is responsible for the rising amount of delegation to clerks. While it is likely that workload is at least partially responsible for the growth in the *number* of law clerks,<sup>116</sup> it is far more

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109. Stras, *supra* note 99, at 1423 n.32.

110. PEPPERS, *supra* note 6, at 195.

111. Stras, *supra* note 99, at 1423 n.32.

112. Posner, *supra* note 63, at 34.

113. *Id.*

114. *Id.* at 35.

115. See Hope Yen, *Chief Justice Seeks Greater Consensus on Supreme Court*, ST. LOUIS POST-DISPATCH, May 22, 2006, at A2 (reporting increased discussion in closed-door conferences among the Justices).

116. See PEPPERS, *supra* note 6, at 185 (discussing correspondence between Justice Powell and Chief Justice Burger on the addition of a fourth law clerk); see also WARD & WEIDEN, *supra* note 5, at 26 (“There is no question that the workload thesis helps to explain the *growth* of the institution of

speculative to assert a causal relationship between workload and greater delegation to law clerks.

To be fair, both books try to avoid this pitfall and in some places attempt to provide a judicious examination of the effect of workload on law clerks. Ward and Weiden, for example, challenge the traditional assumption that the clerkship institution was first created in response to workload pressures.<sup>117</sup> Peppers also compares the growing delegation by some modern Justices with the more traditional practices of their colleagues, who faced similar caseload pressures.<sup>118</sup> He further proposes an alternative, and likely accurate, explanation for growing delegation: the creation of new norms by influential members of the Court, particularly Chief Justices Vinson and Warren.<sup>119</sup>

On other occasions, however, both books simply assume that rising workload is ultimately, and even solely, responsible for the growth of the clerkship institution.<sup>120</sup> Indeed, the background assumption about workload is so prevalent that it is unexpectedly interjected into other discussions, sometimes in a speculative fashion.<sup>121</sup> The result, unfortunately, is that workload is given an exalted role in the authors' explanation for the growth of law clerks, precluding objective examination into other factors that may have contributed to the rising influence of law clerks over the Court's work.

Other factors, including the persistence of institutional norms regarding the treatment and usage of clerks, must be relevant to the question of clerk influence because the sizeable decrease in the Court's workload has apparently not reduced the amount or type of work delegated to clerks. To the contrary, the cert pool has grown in the past fifteen years to encompass eight of nine Justices, and only Justice Stevens regularly drafts his own opinions.<sup>122</sup> Yet in their almost dogmatic adherence to the workload account, the authors do not offer an explanation for either the shrinking workload or the Justices' continued reliance on law clerks. In fact, the books pay only modest attention to the massive reduction in the Court's plenary docket in

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the clerk."); *id.* at 139 (explaining Chief Justice Warren's plan to hire law clerks for retired Justices but then actually use the clerks for completion of his own work).

117. WARD & WEIDEN, *supra* note 5, at 22.

118. See PEPPERS, *supra* note 6, at 136, 152, 192.

119. See *id.* at 134, 140–41 (Chief Justice Vinson); *id.* at 152 (Chief Justice Warren).

120. See, e.g., *id.* at 119 ("Undoubtedly, Justice Black needed law clerks because of workload pressures."); WARD & WEIDEN, *supra* note 5, at 115 ("As dockets grew, and a greater number of cases failed to make the discuss list, the justices were forced to rely more heavily on their clerks.").

121. See, e.g., PEPPERS, *supra* note 6, at 120 ("Black stated that he changed his mind [about hiring only one law clerk] because he felt that a clerkship was a valuable experience for a young person, but one wonders if workload considerations also played a role in the change of heart."); WARD & WEIDEN, *supra* note 5, at 117 ("In response to the growing caseload, the cert pool was created in 1972 to expedite the processing of petitions for certiorari.").

122. See *supra* notes 44, 65–70 and accompanying text.

recent years and fail to take any position on whether it is a positive development. It is to these issues that I will now turn my attention.

### III. Law Clerks and the Supreme Court's Plenary Docket

The Supreme Court's "plenary docket" (composed of signed opinions and per curiam opinions following oral argument) has been dwindling over the past two decades, "amaz[ing]" some Justices and baffling scholars.<sup>123</sup> Scholars have proposed a variety of theories to explain the contraction of the docket, but only a few have explanatory value, and others fail to account for any of the decrease.<sup>124</sup> In this Part, I will briefly examine the scope of the reduction in the Court's plenary docket and then turn to the role, if any, that law clerks have played in the decline.

#### A. *The Declining Plenary Docket*

The recent decline in the Court's plenary docket is extraordinary. From a contemporary high of 155 signed opinions in October Terms 1982 and 1983, the Court has retreated to about half of that number in recent Terms.<sup>125</sup> As extraordinary as the size of the reduction is its breadth, touching upon nearly all facets of the Court's docket.<sup>126</sup> Even more startling is that the reduction in the plenary docket comes at a time when Justices are, more than ever, relying on their law clerks for screening cases and drafting opinions, as *Courtiers* and *Sorcerers' Apprentices* richly describe.

The Supreme Court's workload can be measured in a variety of ways, but one reliable and well-accepted technique is the number of cases that the Court disposes of by signed opinion.<sup>127</sup> That statistic is valuable because it measures the number of cases over which the Court gives full, plenary consideration, including oral argument.<sup>128</sup> Starting with the 1800 Term and

123. David M. O'Brien, *The Rehnquist Court's Shrinking Plenary Docket*, 81 JUDICATURE 58, 58 (1997).

124. See, e.g., Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737 (2001); Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403; David M. O'Brien, *Join-3 Votes, The Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779 (1997); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363 (2006).

125. In October Term 1999, for example, the Court issued just seventy-four signed opinions, which is only 48% of the total number produced during October Terms 1982 and 1983. See EPSTEIN ET AL., *supra* note 11, at 232–36 tbl.3-3.

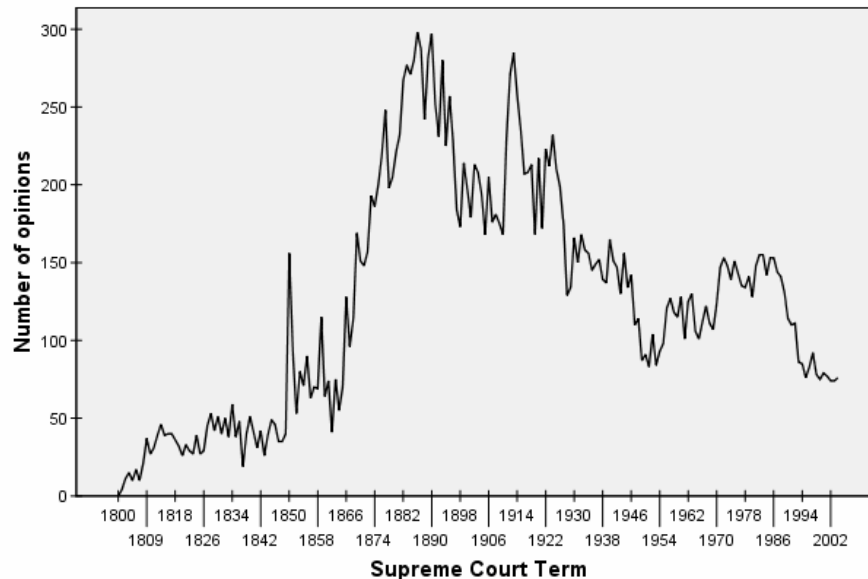
126. See Hellman, *supra* note 124, at 416 tbl.3 (comparing the number of cases on the docket in a number of categories during the 1983–1985 Terms and the 1993–1995 Terms).

127. Starr, *supra* note 124, at 1368.

128. *The Supreme Court Compendium*, which forms the basis for Figure 1, counts only signed opinions of the Court prior to October Term 1953. EPSTEIN ET AL., *supra* note 11, at 236 n.b. For subsequent Terms, both signed opinions and orally argued per curiam opinions are included. *Id.* Because this Review Essay focuses primarily on the change in the Court's caseload since 1982, the post-1953 methodological change makes little difference.

ending with the 2004 Term, Figure 1 graphically displays the number of signed opinions issued by the Court.

**Figure 1**  
**Total number of signed opinions per Term**



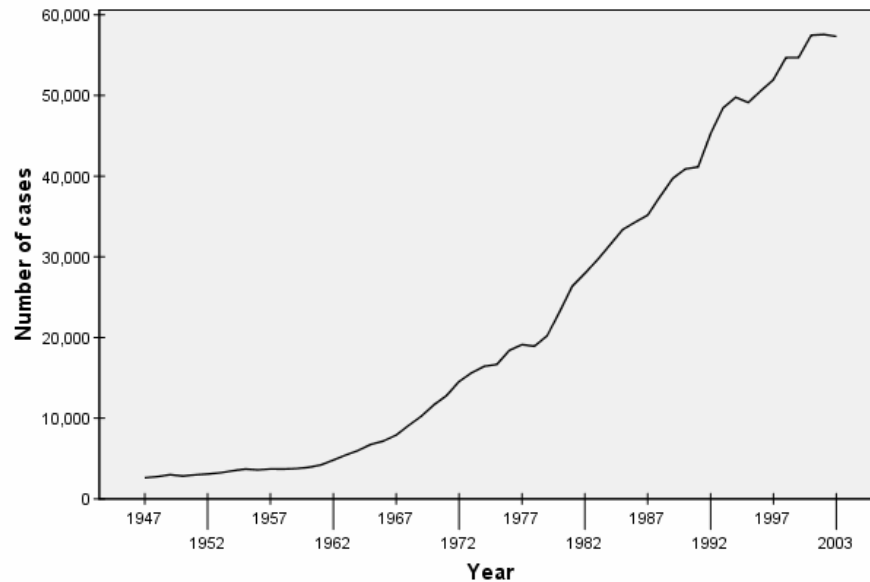
As Figure 1 demonstrates, the reduction in the Court's plenary docket began in 1986, when William Rehnquist became Chief Justice and Antonin Scalia was appointed to the Court. In October Term 1986, the Court issued 153 signed and orally argued per curiam opinions, but by October Term 1989, that number had declined to 131. The decline then accelerated, with only eighty-six such opinions released during October Term 1993. Since then, the Court's plenary docket has oscillated between seventy-four and ninety-two signed and orally argued per curiam opinions, with most of the recent Terms on the low side of that range.<sup>129</sup>

One of the most striking aspects of the declining plenary docket is that it coincides with an unprecedented expansion in the dockets of the lower courts, particularly the United States Courts of Appeals. While the Supreme Court's plenary docket is approximately half as large in 2004 as it was in 1986, the dockets of the federal circuit courts have increased by 82.4%

129. During the 2004 Term, for example, the Court issued only seventy-six signed opinions, while it produced seventy-four such opinions for both the 2002 and 2003 Terms. EPSTEIN ET AL., *supra* note 11, at 236 tbl.3-3.

during that same period.<sup>130</sup> Figure 2 graphically represents this unprecedented expansion in the number of cases before the United States Courts of Appeals.

**Figure 2**  
Total number of cases filed in  
the United States Courts of Appeals



While Judge Posner has claimed that the federal courts are not anywhere near a caseload “crisis,”<sup>131</sup> there is also no doubt that a greater number of appeals are being decided today without the benefit of oral argument before an appellate panel.<sup>132</sup> Some of the increased efficiency of

130. For 1947 to 1990, I obtained data from the annual FEDERAL JUDICIAL WORKLOAD STATISTICS, which the Administrative Office of the U.S. Courts prepared. Cf. RICHARD A. POSNER, *THE FEDERAL COURTS* 54 n.1 (2d ed. 1996) (obtaining data from the same source). For 1990 to 1997, data was obtained from two reports, which compiled statistics from multiple years. See ADMIN. OFFICE OF THE U.S. COURTS, *FEDERAL JUDICIAL WORKLOAD STATISTICS* (1997); ADMIN. OFFICE OF THE U.S. COURTS, *FEDERAL JUDICIAL WORKLOAD STATISTICS* (1993). Finally, the data for 1997 to 2004 was obtained from the annual JUDICIAL BUSINESS OF THE UNITED STATES COURTS, which are available at <http://www.uscourts.gov/judbususc/judbus.html>.

131. POSNER, *supra* note 130, at 84–85; see also Arthur Hellman, *The View from the Trenches: A Report on the Breakout Sessions at the 2005 Conference on Appellate Justice*, 8 J. APP. PRAC. & PROCESS 141, 180 (2006) (reporting Judge Posner as explaining that “the increased caseload per judge has been accommodated with relatively little difficulty by a number of changes that enhance judicial productivity”).

132. See Charles E. Carpenter, Jr., *The No-Citation Rule For Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy*, 50 S.C. L. REV. 235, 243 (1998) (listing the endangerment of oral arguments as a judicial response to the overload on the federal appellate courts). An evaluation of the merits of greater delegation to law clerks and

federal courts can be traced to improved technology, as Judge Posner suggests,<sup>133</sup> but other efficiencies result from increased use of staff attorneys (and law clerks) and unpublished opinions.<sup>134</sup> At a time when the lower courts are confronting unprecedented numbers of cases and disposing of more cases summarily, the Supreme Court is deciding, on a relative basis, nearly four times fewer federal cases than it did in 1986, which is a staggering change in less than twenty years.<sup>135</sup>

Perhaps it is unfair to judge the workload of the Supreme Court and its commitment to the supervision of the lower federal courts in light of the total number of cases terminated in the Courts of Appeals, because many lower court cases are meritless and fewer than 15% result in petitions for certiorari.<sup>136</sup> But even measuring the Court's production in terms of the total number of petitions for certiorari and jurisdictional statements demonstrates that there has been a fundamental change over the past twenty years. Since October Term 1999, the Court has granted plenary review in less than 1% of the cases in which a petition for certiorari or jurisdictional statement has been filed, which is in stark contrast to the more than 3% of cases that were granted plenary review from October Terms 1981 to 1985.<sup>137</sup> Figure 3 visually presents the Supreme Court's increasing selectivity<sup>138</sup> in recent years.<sup>139</sup>

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staff attorneys in the United States Courts of Appeals is beyond the scope of this Review Essay. I mention it only because, as the Court grants review in fewer cases, the lower courts are also spending less time on each case, even though an enlarging caseload may prevent a corresponding reduction in overall workload for the lower courts.

133. See POSNER, *supra* note 130, at 85 (linking increased judicial productivity to technology such as "advanced word processing, computerized legal research, and teleconferencing").

134. See Carpenter, *supra* note 132, at 237–38 (examining the effects of the use of parajudicial staff and unpublished opinions to handle increased case volume); Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 688, 707 (2000) (observing the increased decisionmaking influence of staff attorneys and reduced opportunity for oral arguments due to a growing caseload).

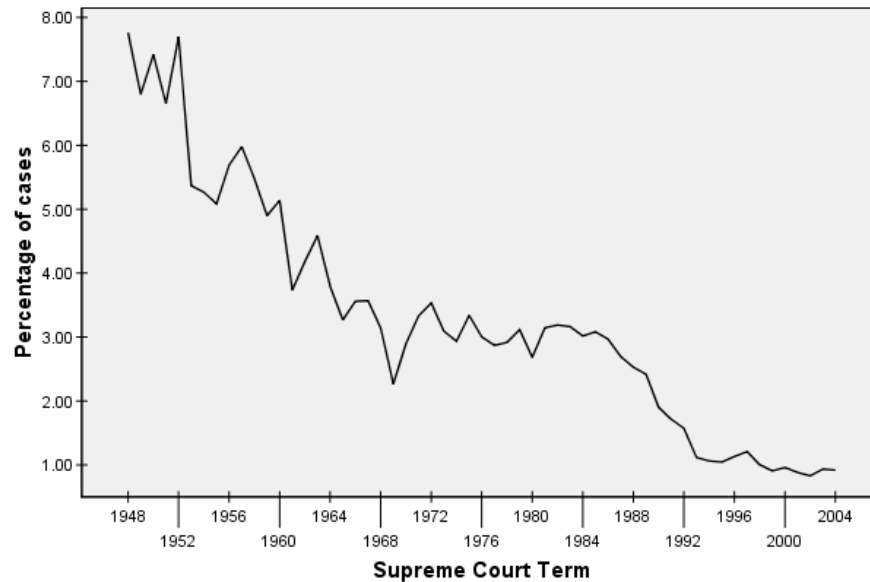
135. In 1986, the Court issued Opinions of the Court in .48% of the cases terminated in the Courts of Appeals, while that ratio had dropped to .14% by October Term 2004. While it is true that many of the more than 8,000 petitions filed each year are meritless and many other cases do not even result in certiorari petitions, it is notable that the Court has exercised its supervisory authority far more sparingly in recent years.

136. In reporting these statistics, I have made a conscious decision to focus primarily on filings from the federal courts because, during October Terms 2003 through 2005, less than 15% of the Court's plenary docket consisted of cases originally filed in state court. See *The Supreme Court, 2005 Term—The Statistics*, 120 HARV. L. REV. 372, 381 tbl.II.E. (2006); *The Supreme Court, 2004 Term—The Statistics*, 119 HARV. L. REV. 415, 427 tbl.II.E. (2005); *The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 506 tbl.II.E. (2004) [hereinafter *2003 Term—Statistics*]. I have not completely ignored, however, the impact of state cases on the Court's plenary docket. Figure 3 includes data for all petitions for certiorari filed with the Supreme Court, including those seeking review of a state court decision.

137. In calculating the percentage of cases granted certiorari review by the Court, I used *Harvard Law Review's* annual report of Supreme Court statistics.

138. Figure 3 arguably measures more than just increasing selectivity by the Court. The steepness of the downward slope can be attributed to two recent trends in the data: (1) an increase in

**Figure 3**  
**Percentage of cases granted by the Supreme Court**



*B. The Impact of Law Clerks on the Plenary Docket*

Both *Sorcerers' Apprentices* and *Courtiers* express only a passing interest in the Supreme Court's declining plenary docket. In the case of *Sorcerers' Apprentices*, for example, what little attention is given to that issue is dedicated to superficial analysis of the contribution of law clerks to the recent drop. Indeed, with little analysis, Ward and Weiden declare in *Sorcerers' Apprentices* that "[a]nother implication of the increased use of clerks in the cert process is that the Court has granted certiorari in, and

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the denominator or the total number of petitions for certiorari filed; and (2) a decrease in the numerator or the total number of cases in which the Court grants certiorari. Accordingly, even if the Court were still issuing approximately 160 opinions per year, the slope of the curve would still be downward, although it would not be so steep.

139. The number of paid petitions (i.e., those where the litigants paid the filing fee) on the Court's certiorari docket has decreased in recent years. See *Nine Justices, Ten Years: A Statistical Retrospective*, 118 HARV. L. REV. 510, 514 tbl.I.A. (2004) (reporting that the Supreme Court disposed of 2,106 paid cases during October Term 1997 but only 1,749 during October Term 2003). Paid cases have historically comprised a very large portion of the Court's plenary docket. Despite the reduced number of paid cases on the certiorari docket, however, a similar chart showing the number of paid cases granted as a percentage of the total number of paid cases on the certiorari docket actually shows a steeper decline since 1984 (with a slight surge but no consistent trend since 2000) than Figure 3, which displays the same statistic for the entire certiorari docket.

subsequently decided, fewer cases.”<sup>140</sup> Their support for that ostensible relationship, however, is based on the fact that the “most dramatic decreases [in the plenary docket], during the Rehnquist Court (1986–2002), coincide with the increasing number of justices and clerks joining the cert pool.”<sup>141</sup> Yet, as a number of other scholars have argued, the expansion of the cert pool is only one of many changes that have affected the Supreme Court since 1986.<sup>142</sup> As a result, the rising influence of the cert pool may only have a coincidental relationship with the drop in the plenary docket. *Sorcerers’ Apprentices* does not explore other potential explanations for the contraction of the plenary docket, much less evaluate them.

Ward and Weiden are not alone in asserting the influence of the cert pool in the absence of empirical support. For instance, Kenneth Starr recently wrote that law clerks serve as “mighty ‘barriers to entry’ to the [plenary] docket.”<sup>143</sup> Even Justice Stevens, the lone current holdout from the cert pool, believes that “[w]ith more justices sharing the clerks’ pool memos, . . . the clerks have become increasingly cautious in recommending that the court take up a particular case.”<sup>144</sup>

Other scholars and commentators view the matter differently, discounting the link between the plenary docket and the cert pool. For instance, in an anecdotal account of his experiences as a law clerk for Justice Blackmun, Edward Lazarus wrote in *Closed Chambers* that he “doubt[ed] the Court granted any cert. petitions because of something clerks did and, if

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140. WARD & WEIDEN, *supra* note 5, at 142. The use of the word “implication” in this passage suggests a consequential relationship between the cert pool and the declining docket. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 624 (11th ed. 2003) (defining “implicate” as “to involve as a consequence, corollary, or natural inference”).

141. WARD & WEIDEN, *supra* note 5, at 143.

142. Other possible explanations for the Supreme Court’s declining docket include: (1) Congress’s repeal of the Court’s mandatory jurisdiction over certain types of cases in 1988; (2) the reduction in the number of plenary cases involving the government, particularly the United States; (3) changes in the personnel of the Supreme Court over the past two decades; (4) greater homogeneity in the United States Courts of Appeals; and (5) a decline in the number of paid petitions filed with the Supreme Court. See Cordray & Cordray, *supra* note 124, at 750–90 (discussing a number of possible explanations for the recent decline in the Supreme Court’s plenary docket); Hellman, *supra* note 124, at 405 (testing five possible hypotheses that observers and judges have cited as explanations for the decline). An evaluation of these alternative explanations for the Court’s declining docket is beyond the scope of this Review Essay, but I plan to address them in a future article.

143. Starr, *supra* note 124, at 1376.

144. Tony Mauro, *The Hidden Power Behind the Supreme Court: Justices Give Pivotal Role to Novice Lawyers*, USA TODAY, Mar. 13, 1998, at 1A. To be fair, Ward and Weiden do mention Justice Stevens’s views when they discuss the relationship between the cert pool and the declining plenary docket. See WARD & WEIDEN, *supra* note 5, at 143–44. While moderately persuasive, Justice Stevens’s thoughts are likely based only on anecdotal experience, not on any systematic assessment of pool memos or the cert pool itself.

some clerks did manage to bury a few cases along the way, the same issues, assuming they were worth the Court's time, were sure to resurface."<sup>145</sup>

Similarly, in the most exhaustive study of the Court's plenary docket to date, Margaret and Richard Cordray find it unlikely "that the cert pool has had much systematic influence on the votes cast by individual Justices to grant or deny plenary review, at least when compared to the dominant factor of the Justices' own predispositions."<sup>146</sup> They based that conclusion on their review of the mechanics of the cert pool and the voting behavior of the Justices.

First, the Cordrays recognized that the Justices who belong to the pool do not rely solely on the pool memo recommendations in casting their votes. To the contrary, most Justices continue to employ individualized screening mechanisms for petitions for certiorari, including the annotation of pool memos and the drafting of supplementary memoranda by their law clerks.<sup>147</sup>

Second, the Cordrays point to the varying voting behavior by Justices within the pool as evidence of the pool's meager influence. In particular, Justices White and Blackmun voted to grant certiorari in far more cases than their other colleagues in the pool, most notably Justices Kennedy and Scalia.<sup>148</sup> In contrast, Justice Stevens, who has never joined the pool, has voted to grant certiorari at a rate lower than all other Justices except Kennedy and Scalia, at least during the 1989 and 1990 Terms.<sup>149</sup>

Third, the Cordrays attempt to refute the argument that an increase in the membership of the pool, from six Justices to eight Justices, has contributed to the shrunken plenary docket. They essentially conclude that the declining docket and the rising influence of the cert pool are nothing more than historical coincidences, linked in time but lacking any causal nexus.<sup>150</sup> For support, they point out that the decline only accelerated after the retirements of Justices Blackmun and White, both of whom were members of the

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145. LAZARUS, *supra* note 2, at 268. Of course, Lazarus's comments were directed primarily at denying the influence of law clerks on grants of certiorari by the Court. His comments about the relationship between the recommendations of law clerks and denials of certiorari are more equivocal. *See id.* at 31 (stating that "the disappearance of Justices outside the pool has, quite rightly . . . generated concern both inside and outside the Court" and that although the Justices do not "slavishly" follow clerks' recommendations, "in practice they carry great weight").

146. Cordray & Cordray, *supra* note 124, at 791.

147. *See* PEPPERS, *supra* note 6, at 210 (describing the annotation process); Cordray & Cordray, *supra* note 124, at 791 (explaining that the Justices continued to use individualized screening mechanisms even after the pool's implementation); O'Brien, *supra* note 124, at 801 (stating that most Justices require one or more of their law clerks to review and occasionally draft supplementary memoranda to those from the cert pool).

148. Cordray & Cordray, *supra* note 124, at 785, 791–92. In fact, the Cordrays state that Justices Scalia and Kennedy have largely settled into "abnegating roles in the discretionary review process, voting to grant review less often than any other Justice, including Justices Brennan, Marshall, and Stevens." *Id.* at 785.

149. *Id.* at 785 n.242.

150. *Id.* at 793.

cert pool.<sup>151</sup> Even more decisive, according to the Cordrays, is the fact that three Justices who did not participate in the cert pool, Justices Stevens, Marshall, and Brennan, voted to grant certiorari at a rate well below the average of their colleagues.<sup>152</sup> Accordingly, the Cordrays are “virtually certain that the number of Justices in the cert pool has had little or nothing to do with the Court’s declining docket.”<sup>153</sup>

While the Cordrays have mounted the most comprehensive attack against the influence of the cert pool on the declining plenary docket, their study still suffers from a lack of completeness. Like others who have studied the influence of the cert pool, they draw conclusions that are not based on any type of review or assessment of the pool memoranda produced by law clerks. While the diverse voting behavior of the Justices within (and outside) the pool is informative, it does not *directly* account for the influence of the pool on either the Justices themselves or the Court as a whole. It is possible, in other words, that some members of the pool (White and Blackmun) were just more magnanimous with their votes to grant certiorari than others (Scalia and Kennedy), but that does not mean that the cert pool had no influence on their votes. Likewise, the miserly voting behavior of Justices Brennan and Marshall, who voted to grant certiorari less often than most of their other colleagues on the Rehnquist Court, may be unrelated to their nonparticipation in the cert pool. Instead, it may just be a reflection of their philosophies about the proper supervisory role of the Court. In sum, the Cordrays’ study does little to separate the influence of the cert pool from the possible predispositions of the Justices.

It should be apparent by now that it is difficult to know precisely how much impact the pool memoranda have on the decisions of the Justices, because the Court does not usually tell us why a particular petition for certiorari was granted or denied.<sup>154</sup> It is possible that the pool just serves as an initial screening device for the Justices, without much substantive impact on their votes, but it is also possible that the Justices take the recommendations of the law clerks in the pool seriously. The starting point, therefore, of a study of the impact of the cert pool is an assessment of the pool memoranda, the instruments that the law clerks use to communicate with the Justices. To my knowledge, however, no scholar has engaged in a systematic study of

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151. *Id.*

152. *Id.* A review of the docket sheets for October Terms 1991, 1992, and 1993 demonstrates that after the departures of Justices Marshall and Brennan, Justice Stevens became more willing to grant certiorari than any other member of the Court except Justice White. During October Term 1993, for example, Justice Stevens voted to grant certiorari in 124 cases, nearly twice that of any other Justice.

153. *Id.*

154. Sometimes the Court will say in an opinion that it granted a petition for certiorari because of a lower court conflict on an issue of law. On other occasions, Court watchers are left to guess why the Court decided to review a case. In contrast, reasons are rarely, if ever, given by the Court to explain denials of certiorari, even when one or more Justices dissents in writing from the denial.

every petition for certiorari from even a single Term of the Supreme Court, and thus there is an analytical hole in the study of the influence of the cert pool.<sup>155</sup>

In this section, I will begin with an analysis of the mechanics of the cert pool, including a critical examination of the theoretical underpinnings for the argument that the pool has influenced the declining docket. Most scholars who have examined the impact of the cert pool on the decisions of the Justices have failed to lay out a compelling, theoretical framework for their analysis. I will then turn to the results of my examination of every pool memorandum from several Terms of the Court. My pilot study reveals at a high level of confidence that the cert pool is considerably more stingy in making grant recommendations than is the Court in its decisions to grant plenary review. Although it is difficult to say exactly how much influence the pool recommendations have on the ultimate decision of whether to grant certiorari, it is safe to say after this study that the pool is not a factor in encouraging the Court to expand its plenary docket and may well be contributing to the decline.

1. *The Institutional Predisposition Against Granting Certiorari.*— As *Sorcerers' Apprentices* describes, the cert pool was suggested by Justice Powell in 1972 as an administrative device to reduce the collective amount of time that law clerks spend on petitions for certiorari.<sup>156</sup> Instead of having nine clerks, one from every chambers, each write a memorandum on a petition for certiorari, one clerk prepares a memorandum that is then circulated to all of the Justices participating in the pool.<sup>157</sup> Initially, only five Justices participated, leaving Justices Douglas, Brennan, Stewart, and Marshall to rely on their own law clerks to review each petition for certiorari.<sup>158</sup> Over time, however, the cert pool has become firmly entrenched, and membership in the pool has become the norm for incoming Justices, leaving Justice Stevens as the lone holdout on the current Court.<sup>159</sup>

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155. In her article in *Constitutional Commentary*, Barbara Palmer analyzed the recommendations of the cert pool for October Terms 1972–1974 and 1984–1985, but only for those cases that were eventually granted review by the Court. Barbara Palmer, *The "Bermuda Triangle?": The Cert Pool and Its Influence over the Supreme Court's Agenda*, 18 CONST. COMMENT. 105, 111–12 (2001). Her study was limited to the papers of Justice Powell, who discarded the pool memos from cases that were eventually denied plenary review by the Court. *Id.* at 109.

156. WARD & WEIDEN, *supra* note 5, at 118. Some evidence suggests that the cert pool does not in fact fulfill its time-saving mission. See H.W. PERRY, JR., DECIDING TO DECIDE 51–53 (1991) (noting that the cert pool process does not save time when law clerks have to write memos on cases that are obviously not certworthy).

157. WARD & WEIDEN, *supra* note 5, at 118.

158. *Id.* at 119.

159. Justice Stevens is the oldest member of the Court at age 86; the next oldest member of the Court, Ruth Bader Ginsburg, is almost thirteen years younger than Justice Stevens. When Justice Stevens leaves the Court, it is possible that all nine Justices on the Court will belong to the cert

The mechanics of the cert pool have led to a homogenization of the process by which petitions for certiorari are reviewed. Before the creation of the pool, each Justice had his own procedure for screening cases, from Justice Brennan's individual review of each petition (except during summer recess) to the more common delegatory model of Justices such as Stewart and Marshall, who required their law clerks to draft memoranda on the petitions.<sup>160</sup> The process within each chambers was highly individualized, with each Justice using his law clerks in any manner that he wished. A benefit of these divergent approaches was that law clerks who worked on screening cases could tailor their memoranda and recommendations, resulting in greater candor about the cases that would interest their Justice the most.<sup>161</sup> For example, Justice Stevens requires his law clerks to focus on the petitions that would be of most interest to him or that have particular merit.<sup>162</sup>

In contrast, the cert pool requires the law clerks to follow a standardized format in drafting their memoranda.<sup>163</sup> For instance, a review of pool memoranda in the papers of Justice Blackmun reveals that, at least from 1984 to 1993, each memo contains the following five standardized sections: Summary, Facts and Decisions Below, Contentions (of the parties), Discussion, and Recommendation. More importantly, although law clerks could spend more time on each petition they were assigned, they were no longer able to tailor the pool memoranda for their individual Justices, writing instead for an audience of anywhere from five to eight Justices. The cert pool has thus led to a greater homogenization of the memoranda produced by law clerks.

Recall, however, that the Cordrays argued that the cert pool did not eliminate the Justices' individualized screening mechanisms.<sup>164</sup> Professor David O'Brien takes the Cordrays' argument one step further by contending that the Justices "in the cert pool might actually give more attention to case selection" based on the ongoing individualized screening mechanisms of each Justice.<sup>165</sup> Professor H.W. Perry cites additional evidence that law clerks for most Justices provide an important check on the cert pool by

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pool. My hope is that this Review Essay, as well as the other scholarly literature on the subject, will encourage the Court to reevaluate its reliance on the cert pool and examine other procedures for reviewing petitions for certiorari.

160. PEPPERS, *supra* note 6, at 157–58 (Justice Brennan); *id.* at 162 (Justice Stewart); *id.* at 173 (Justice Marshall).

161. *See* WARD & WEIDEN, *supra* note 5, at 129 ("There is some evidence that clerks who wrote only for their own justice were more candid in the past, particularly with political analyses and recommendations, than are current clerks who write one memo for eight justices who occupy different positions on the ideological spectrum."); *id.* at 127 (quoting Justice Stevens as stating that "[w]hen a clerk writes for an individual justice, he or she can be more candid").

162. *Id.* at 126.

163. *See id.* at 118, 124 (describing the standard format of pool memos).

164. Cordray & Cordray, *supra* note 124, at 791.

165. O'Brien, *supra* note 123, at 63.

reviewing and annotating pool memos and highlighting areas of particular interest for their Justices.<sup>166</sup> But his interviews with former law clerks also suggest that, because recommendations to deny a case are the norm, law clerks pay far less attention to those recommendations than to recommendations to grant during the annotation process, increasing the likelihood that an issue of importance will be overlooked.<sup>167</sup> Indeed, Justice Brennan did not join the cert pool in part because “[h]e said that he would find three to four cases a year that the clerks had missed.”<sup>168</sup> Therefore, the annotation process is potentially more effective for the less than 1% of cases that earn a grant recommendation from a law clerk in the pool<sup>169</sup> than it is for the far more common deny recommendation.

Moreover, the current incarnation of the cert pool—with eight of the nine Justices participating—has led to further homogenization. As stated above, when the cert pool was created, four Justices declined to participate.<sup>170</sup> In addition to the check provided by the clerks for the Justices participating in the pool, the four nonparticipating Justices independently reviewed the petitions for certiorari, increasing the likelihood that an important issue warranting the Court’s attention would not be overlooked. Justice Stevens has staunchly resisted membership in the pool because he has recognized that having all nine Justices in the pool could result in a greater number of “potential mistakes.”<sup>171</sup> Now, instead of four separate chambers providing a balance against the cert pool, the process has become more homogenized, with only Justice Stevens’s chambers in a position to independently ensure that certworthy cases are not overlooked. The obvious implication is that, with fewer checks on the cert pool, more certworthy cases could be falling through the cracks.<sup>172</sup>

In addition to homogenization, norms have developed within the cert pool that its creators, the Justices of the 1972 Court, might find surprising. Justice Blackmun initially thought that participation in the cert pool would make law clerks more likely to recommend granting certiorari in the cases that they reviewed.<sup>173</sup> But according to *Sorcerers’ Apprentices*, the pressure

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166. See PERRY, *supra* note 156, at 60–64 (detailing the markup process where clerks check the pool memos and often annotate them for their Justice).

167. See *id.* at 63 (quoting former law clerks as stating that they would pay far less attention to the recommended denials than grants).

168. WARD & WEIDEN, *supra* note 5, at 121.

169. See *infra* section III(B)(2).

170. See *supra* text accompanying note 158.

171. WARD & WEIDEN, *supra* note 5, at 126.

172. See Tony Mauro, *Roberts May Look to Stay Out of the Pool*, LEGAL TIMES, Aug. 15, 2005, at 8 (reporting Chief Justice Roberts’s opinion that the cert pool’s scope raises concerns because it places so much power in the hands of the clerks at the certiorari stage and noting that the advantage to having a number of Justices outside the pool is to catch cases that cert pool clerks erroneously evaluate).

173. WARD & WEIDEN, *supra* note 5, at 143.

of writing for five or more Justices has made law clerks more cautious in their recommendations,<sup>174</sup> creating what has become a “hydraulic pressure to say no.”<sup>175</sup> As Kenneth Starr has explained, when a clerk is unsure about a recommendation the “prevailing ethos is that no harm can flow from ‘just saying no.’”<sup>176</sup> First, it is less risky to recommend a denial because, as stated above, that recommendation tends to be subject to far less scrutiny than a recommendation to grant a case.<sup>177</sup> Second, a recommendation of deny permits pool authors to avoid the dreaded dismissal of a case as improvidently granted, otherwise referred to as a DIG.<sup>178</sup> The desire to maintain credibility within the pool by avoiding a DIG weighs in favor of recommending a denial when there is the possibility of a vehicle problem or the case just presents a close call. Third, the behavior of law clerks is partly a product of the prevailing norms of the institution to which they belong, and the Court’s declining docket surely sends a signal that the fewer grants the better.<sup>179</sup> Borrowing Professor Peppers’s framework, the law clerks are an unlikely “agent” of institutional change, especially in light of the short one-year tenure that they currently enjoy with the Court.<sup>180</sup>

A related reason for the hesitancy of law clerks to recommend granting a case may be due to relative inexperience. Incoming law clerks, often fresh off of a clerkship with a judge on the United States Courts of Appeals, have little training and even less experience screening petitions for certiorari. While it is true that outgoing clerks attempt to stagger their departures to serve as sounding boards for the new crop of clerks, much of the screening work is done during the summer months, when the Justices are not regularly inside the building. Fourth Circuit Judge J. Harvie Wilkinson, himself a former law clerk to Justice Powell, has referred to the certiorari review process as a “baptism by fire” for new law clerks.<sup>181</sup>

In the absence of objective factors such as a conflict among the lower courts, the decision about whether to recommend a grant or a denial of certiorari is largely based on subjective factors that law clerks, at least early

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174. *Id.*

175. Starr, *supra* note 124, at 1377.

176. *Id.* at 1376.

177. PERRY, *supra* note 156, at 63, 220.

178. Starr, *supra* note 124, at 1377. A dismissal of a case as improvidently granted occurs when the Court grants a case and either “the merits are . . . not all they were cracked up to be” or there is some defect in the case, often jurisdictional, that keeps the Court from reaching the question on which it granted certiorari. *Id.*

179. PERRY, *supra* note 156, at 218.

180. See PEPPERS, *supra* note 6, at 10–11 (explaining the principal–agent theory and its application to the relationship between Justices and their law clerks).

181. *Id.* at 187.

in their clerkships, may be ill-equipped to evaluate.<sup>182</sup> The natural consequence is that law clerks will focus on objective factors to guide their inquiry, most notably the presence or absence of a split among the lower courts on an issue of federal law.<sup>183</sup> Other possible certworthy cases lacking objectively identifiable characteristics, therefore, might slip through the cracks, potentially resulting in fewer cases on the Court's plenary docket.

2. *The Empirical Evidence on the Cert Pool.*—Now that the theoretical framework for the cert pool's potential contribution to the Supreme Court's declining docket has been thoroughly explored, it is time to test those theories against the empirical evidence. In this section, I begin with a readily falsifiable hypothesis about the cert pool advanced by several scholars: that the cert pool is stingy with its recommendations to grant petitions for certiorari as compared to the certiorari decisions of the Court as a whole.<sup>184</sup> I then turn to a related matter: whether the cert pool and the Justices unduly focus on the presence of conflict among the lower courts in making decisions about whether to grant certiorari in a case. Finally, instead of examining the level of influence of the cert pool, an inquiry fraught with difficulty due to the absence of compelling data, I look at the correlation and level of agreement between the recommendations of the cert pool and the decisions of the Court, which may provide some clue as to the role and importance of the cert pool in the screening process.

a. *The Stingy Cert Pool.*—A number of scholars and commentators have noted that the presumption in the cert pool is to recommend the denial of certiorari.<sup>185</sup> The anecdotal evidence is plentiful and ranges from qualitative studies on the certiorari process by scholars to posts on blogs.<sup>186</sup> But no

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182. See DAVID M. O'BRIEN, *STORM CENTER* 193 (7th ed. 2005) (quoting Justice Harlan as stating that "[f]requently the question whether a case is 'certworthy' is more a matter of 'feel' than of precisely ascertainable rules").

183. See WARD & WEIDEN, *supra* note 5, at 132 (stating that "clerks, lacking institutional memory and a broad outline of the Court's trends, focused on the observable features of the cases that could be justified as being 'cert-worthy'" and noting a former clerk's conclusion that a circuit conflict was the first thing clerks would look for in a petition for review). Several political science scholars have noted that the Justices search for readily identifiable cues when examining petitions for certiorari. See, e.g., Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in *JUDICIAL DECISIONMAKING* 111, 118–19 (Glendon Schubert ed., 1963); Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 *AM. POL. SCI. REV.* 1109, 1120 (1988). As I explain in subsection III(B)(2)(b), it appears that the law clerks follow some of those same cues in deciding which of the petitions are worthy of plenary review.

184. See, e.g., Starr, *supra* note 124, at 1377.

185. See *supra* notes 174–80 and accompanying text.

186. Compare PERRY, *supra* note 156, at 218 (quoting law clerks as stating that there is a presumption against recommending a grant in the cert pool), with Posting of Lyle Denniston to SCOTUSBlog, [http://www.scotusblog.com/movabletype/archives/2005/10/commentary\\_the\\_2.html](http://www.scotusblog.com/movabletype/archives/2005/10/commentary_the_2.html)

researcher has tested the conventional wisdom that the cert pool is stingy, which is a view that seems to be shared by many former Supreme Court law clerks and Court watchers.

In order to evaluate the characteristics of the cert pool, every pool memorandum from October Terms 1984, 1985, 1991, and 1992 was examined to determine whether the pool writer recommended that the Court grant, deny, or take some other action with respect to a petition for certiorari or a jurisdictional statement. The recommendation was then coded, and the total numbers per Term were tallied for each category.<sup>187</sup> The examination demonstrates that, compared to the certiorari decisions of the Court as a whole, the cert pool is stingy in dispensing grant recommendations, and the clerks as a group are remarkably consistent in their stinginess from Term to Term.<sup>188</sup>

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(Oct. 21, 2005, 05:13 PM) (stating that “a culture” has developed in which “a grant of review is recommended only if it is practically an obvious grant”).

187. In conducting this study, I adhered strictly to the filing system in Justice Blackmun's papers, which separated pool memoranda and case files by Term. See Harry A. Blackmun: A Register of His Papers in the Library of Congress, available at <http://lcweb2.loc.gov/service/mss/eadxmlmss/eadpdfmss/2003/ms003030.pdf>. Pool memoranda in denied cases were grouped together in his papers. In contrast, pool memoranda in granted cases were put in the full case file, which includes correspondence, opinions, and other papers gathered during the plenary review of the case.

A small number of pool memoranda in cases in which certiorari was granted in an earlier Term may have appeared in the full case file for the following Term. Rather than recategorize all these cases for the proper Term in which certiorari was granted, which would have been difficult in light of the possibility of re-lists and holds, I strictly adhered to Justice Blackmun's filing system. Aside from being simple, it also maintained consistency because pool memoranda for every Term were treated in the same manner in his papers, which ensures the integrity of the results.

188. This project required a review of every pool memo contained in the papers of Justice Harry Blackmun, which are housed in the Library of Congress Manuscripts Division, for October Terms 1984, 1985, 1991, and 1992. Although the vast majority of memoranda were standardized and the recommendations were clear, I still had to develop some guidelines to ensure consistency in the review.

First, if more than one recommendation was contained in a pool memo, the recommendation to grant or deny always prevailed over competing recommendations. If anything, this first guideline resulted in inflating the total number of grant recommendations because those memos most often contained multiple recommendations. Examples of memoranda containing multiple recommendations included “grant or CVSG [call for the views of the Solicitor General]” or “grant or hold for [insert case name].”

Second, any pool memoranda calling for a “close deny,” “close grant,” “possible grant,” or some other variation thereof, were treated as grants or denials, as the case may be. I struggled with the decision of whether to treat a “close deny” recommendation differently, as one reviewer suggested, by putting it in its own category. On the one hand, a close deny often represents a close call for the law clerk and could even be interpreted as a signal for members of the Court to take a close look at the case. In my review of pool memos, however, I did not necessarily see a consistent use of the close deny recommendation by the cert pool, and the willingness of law clerks to use that recommendation varied by Term. Moreover, in the early 1980s and 1990s, there were not many pool memos that made qualified recommendations, so counting them separately did not seem warranted. Finally, my treatment of qualified recommendations is consistent with Barbara Palmer's more limited study of the cert pool. See Palmer, *supra* note 155, at 110 n.15.

Table 1 compares the number of grant recommendations by the cert pool with the number of Opinions of the Court and oral argument sessions for each of the four Terms studied. Both statistics—the number of Opinions of the Court and number of oral argument sessions—serve as proxies for the number of cases over which the Court grants full, plenary review. The results are consistent with the hypothesis that the cert pool is operating under a strong presumption that each petition for certiorari be denied. The data from the 1991 Term, for example, show that the Court decided 116 cases, while the pool recommended that certiorari be granted in only eighty-six cases. Likewise, for the 1984 Term, the Court decided 151 cases, but the pool recommended that the Court grant plenary review in only 107 cases. For every Term that was studied, the cert pool dispensed grant recommendations considerably less often than the Court granted certiorari.<sup>189</sup>

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Third, the recommendation in any supplemental memoranda produced by the pool clerk, if available, always controlled over the recommendation contained in the original pool memo. The reason is that the supplemental memo always contained the final communication and recommendation from the pool clerk, which was often informed by the filing of one or more additional briefs from the Solicitor General or the parties.

Fourth, in the event that multiple petitions originated from the same lower court decision (or were curve-lined), a recommendation to grant the case is counted only once. The rationale for this guideline is that, even if more than one petition is granted, the cases are ordinarily consolidated and decided by the Court in a single opinion. *See, e.g.,* *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

Fifth, like Palmer, if a pool memo recommended grant on a limited subset of the questions contained in the petition for certiorari, I counted it as a grant for purposes of this study. *See* Palmer, *supra* note 155, at 110 n.15. Also included within the “grant” category were pool memos containing a recommendation to note probable jurisdiction, which is the equivalent of a grant recommendation for cases falling within the Court’s mandatory appellate jurisdiction.

Sixth, if a recommendation was unclear and could not be determined from the discussion or recommendation sections of the pool memo, it was counted as containing “no recommendation,” a category that I tallied separately. Likewise, pool memos containing no recommendation at all were also placed in this category.

Seventh, I created a category called “take some other action,” which counted separately the number of pool memoranda that made a recommendation other than to grant or deny. The most common variations of this category included CVSG (call for the views of the Solicitor General), Summary Reverse, Summary Affirm, CFR (call for a response), CFRRecord (call for the record), Hold, and GVR (grant, vacate, and remand).

189. In a future study, I hope to compare cert pool recommendations with the votes of each of the Justices on the Court to see whether there are any statistical differences between the certiorari votes of Justices participating in the pool and those electing to review the petitions on their own. The issue is likely of greater importance for the earlier Terms included in this pilot study because, for October Terms 1984 and 1985, three Justices (Brennan, Marshall, and Stevens) did not participate in the pool, while only one (Stevens) remained outside the pool during October Terms 1991 and 1992.

In Professor Palmer’s limited study of the cert pool, she found that in “the vast majority of cases, Justices in the cert pool and out of the cert pool were voting together to determine which cases were selected,” but she looked only at the cases that were granted plenary review by the Court. Palmer, *supra* note 155, at 119. A more comprehensive study using the Blackmun papers may yield a different result.

Table 1

Comparison of the number of grant recommendations by the cert pool with the total number of opinions of the Court and oral argument sessions, October Terms 1984, 1985, 1991, and 1992<sup>190</sup>

	Supreme Court Term			
	1984	1985	1991	1992
Number of grants suggested by the cert pool	107	111	86	83
Number of opinions of the Court	151	159	116	114
Number of oral argument sessions	175	171	127	116
Total number of cert petitions	4,269	4,289	5,825	6,336

Table 2 compares the data over time by displaying the ratio or percentage of grant recommendations by the cert pool to the total number of Opinions of the Court and oral argument sessions. Despite the presence of nearly 100% law clerk turnover on an annual basis and figures from two separate decades,<sup>191</sup> the data show a surprisingly consistent grant-to-plenary decision ratio of between 70% and 75%.<sup>192</sup> The data also permit the rejection, at a .001 confidence level or greater, of the null hypothesis that the Court and the cert pool are equally parsimonious in their views on whether to grant certiorari.<sup>193</sup> In other words, there is less than a 1 in 1,000 chance that the Court itself is as stingy as the cert pool based on the data collected for the

190. The data for the number of opinions and petitions for certiorari were taken from the annual *Harvard Law Review* statistics, while the number of oral argument sessions per Term was obtained by reference to information provided by the Supreme Court Public Information Office. Meanwhile, the number of recommended grants from the cert pool was calculated from a review of every pool memo in the papers of Justice Blackmun for October Terms 1984, 1985, 1991, and 1992.

191. According to *Sorcerers' Apprentices*, only twenty-one law clerks served for more than one Term during the Rehnquist Court. WARD & WEIDEN, *supra* note 5, at 47 tbl.1.4.

192. The ratio between the number of grant recommendations by the cert pool and the number of oral argument sessions is slightly more dispersed but still demonstrates remarkable consistency from Term to Term.

193. Indeed, the null hypothesis can also be rejected based on the ratio of grant recommendations to oral argument sessions, at the .001 confidence level, which demonstrates the robustness of the result.

four Terms examined in Tables 1 and 2. Moreover, based on a 95% confidence interval, the Court can be expected to grant between 25% and 31% more cases on an annual basis than the cert pool recommends. Accordingly, the data are strongly supportive of the hypothesis advanced by scholars that the cert pool is stingy in its screening of cases for the Court.

Table 2  
Number of grant recommendations made by the cert pool as a percentage of the number of opinions of the Court and oral arguments, October Terms 1984, 1985, 1991, and 1992

	Supreme Court Term			
	1984	1985	1991	1992
Grant recommendations as a percentage of opinions of the Court	70.86	69.81	74.14	72.81
Grant recommendations as a percentage of oral argument sessions	61.14	64.91	67.72	71.55

*b. Objective Criteria in Certiorari Review.*—Recall that one possible reason for the stingy cert pool is the relative inexperience of the clerks, who may search for objectively identifiable grounds to justify a recommendation that the Court grant certiorari in a particular case.<sup>194</sup> The most objective indicia of certworthiness, at least as far as the Rules of the Supreme Court are concerned, are whether “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter” and whether “a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.”<sup>195</sup> Ascertaining the presence of a lower court conflict requires less subjectivity from law clerks than determining, for example, whether “a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court.”<sup>196</sup>

194. See *supra* notes 181–83 and accompanying text.

195. SUP. CT. R. 10(a), (b).

196. SUP. CT. R. 10(c). Of course, the other criterion of Rule 10(c), whether the lower court has “decided an important federal question in a way that conflicts with relevant decisions of” the

Dating at least as far back as the passage of the Judge's Bill in 1925,<sup>197</sup> the Court has placed particular emphasis on the presence of lower court conflict in making the decision about whether to grant certiorari or hear an appeal. For example, Chief Justice Taft stated during the 1922 House Hearings on the Judge's Bill that "[w]henever a petition for certiorari presents a question on which one circuit court of appeals differs from another, then we let the case come into our court as a matter of course."<sup>198</sup> The emphasis on lower court conflict has been echoed by a number of other Justices throughout the years.<sup>199</sup>

In recent years, lower court conflict has become an increasingly important factor guiding the certiorari decisions of the Court. Table 3 displays the results from a study of all cases decided by the Supreme Court during the last three Terms, which includes Chief Justice Rehnquist's last two years and the first year for Chief Justice Roberts on the Court. Evaluating petitions for certiorari, lower court opinions, and the Court's opinion to determine whether a case involved a lower court conflict, the study determined that nearly 70% of the cases reviewed by the Court involved a split among the lower courts.<sup>200</sup> The percentage of plenary cases involving a conflict ranged from 58.4% in 2003 to 78.9% in 2004.

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Supreme Court, is also objectively identifiable, but fewer of these types of cases arise on the Court's certiorari docket.

197. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (amending the Judicial Code and defining the jurisdiction of the circuit courts of appeals and Supreme Court).

198. *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the H. Comm. on the Judiciary*, 67th Cong. 2 (1922) (statement of William Howard Taft, Chief Justice of the United States).

199. *See, e.g.*, *Michaels v. McGrath*, 531 U.S. 1118, 1119 (2001) (Thomas, J., dissenting from the denial of certiorari) ("[E]ven if I did not have serious doubt as to the correctness of the decision below, I would grant certiorari to resolve the conflict among the Courts of Appeals on this important issue."); *McDowell v. United States*, 484 U.S. 980, 981 (1987) (White, J., dissenting from the denial of certiorari) (stating that he would grant certiorari in the case because of "a conflict among the lower courts"); REHNQUIST, *supra* note 1, at 234–35 ("One factor that plays a large part with every member of the Court is whether the case sought to be reviewed has been decided differently from a very similar case coming from another lower court: If it has, its chances for being reviewed are much greater than if it hasn't."); *see also* Caldeira & Wright, *supra* note 183, at 1120 (finding that one of the most important variables in the certiorari decision is whether an actual conflict exists).

200. Excluded from the study are cases that were dismissed as improvidently granted, cases involving three-judge panels, and cases arising under the Court's original jurisdiction. All other cases, including those originating from a state court of last resort, are included.

Table 3  
 Supreme Court cases involving a conflict among the lower courts,  
 2003–2005 Terms

	Supreme Court Term		
	2003	2004	2005
Cases involving a conflict	58.4% (45)	78.9% (60)	70.6% (60)
Cases without a conflict	41.6% (32)	21.1% (16)	29.4% (25)
Total cases	77	76	85

Those numbers contrast starkly with the composition of the Court's plenary docket in the early 1980s. In his important 1996 article in the *Supreme Court Review*, Professor Arthur Hellman presented data on the number of cases involving a circuit conflict on the Court's plenary docket during the 1983–1985 and 1993–1995 Terms.<sup>201</sup> He used the following criteria in determining whether a case involved a “conflict grant”:

The Supreme Court stated that it granted review to resolve an intercircuit conflict.

The Court's opinion, although not specifying conflict as the reason for granting review, pointed clearly to the existence of an intercircuit disagreement.

The conflict was explicitly acknowledged by one or more courts of appeals in a case that was brought to the Court's attention before review was granted.<sup>202</sup>

Table 4 reproduces Hellman's figures on United States Courts of Appeals cases that received plenary review by the Supreme Court during the 1983–1985 and 1993–1995 Terms, and further updates the data to include the three most recent Terms of the Supreme Court. The composition of the docket changed considerably from the 1983–1985 period to the 1993–1995 period, with the number of cases involving a conflict rising from 45% during the earlier period to approximately 69% by a decade later.<sup>203</sup> The number of

201. Hellman, *supra* note 124, at 415–16.

202. *Id.* at 415.

203. One possible explanation for the increased percentage of conflict grants during the early 1990s, aside from changes in personnel on the Court or the influence of the cert pool, could be the elimination by Congress of most of the Court's mandatory jurisdiction in 1988. Supreme Court

conflict grants has since dropped to 60% during the most recent period, 2003–2005, but the recent decline is not nearly as sizeable as the remarkable increase in conflict cases as a percentage of the total plenary docket in the early 1990s.<sup>204</sup>

Table 4  
United States Courts of Appeals cases on the plenary docket, 1983–1985,  
1993–1995, and 2003–2005 Terms

	Supreme Court Terms		
	1983–1985	1993–1995	2003–2005
Conflict	44.5% (151)	68.7% (132)	59.8% (122)
No conflict	55.5% (188)	31.3% (60)	30.2% (82)
Total Court of Appeals cases	339	192	204

Tables 3 and 4 provide interesting information about the composition of the Court's docket, to be sure, but they provide only a baseline by which to evaluate the recommendations of the cert pool. Table 5, in contrast, considers directly the question of whether law clerks rely on the presence of conflict among the lower courts in making their recommendations on petitions for certiorari. In conducting the analysis, every plenary case from

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Selection Act of 1988, Pub. L. No. 100-352, 102 Stat. 662. As all nine Justices had stated in a letter written several years before the Act was passed, the mandatory portion of the docket placed a strain on the resources of the Court, causing cases of nominal importance to require full, plenary review. Letter from all nine Justices of the United States Supreme Court to Congressman Robert Kastenmeier (June 17, 1982), in H.R. REP. NO. 100-660, app., at 27–28 (1988).

Several scholars have rejected the hypothesis that elimination of the Court's mandatory jurisdiction has led to the decline in the number of cases on the Court's plenary docket. See, e.g., Cordray & Cordray, *supra* note 124, at 755–58 (arguing that it is implausible that the decrease in plenary cases resulted from the elimination of the Court's mandatory jurisdiction in 1988); Hellman, *supra* note 124, at 412 (concluding that the elimination of the Court's mandatory jurisdiction played only a minimal role in the decrease of the plenary docket). It is less clear, however, what impact the 1988 Act has had on the *composition* of the plenary docket over the past two decades. That issue is ripe for further study.

204. The figures for the 2003–2005 Terms in Table 3 are different than those presented in Table 4 for two reasons. First, Table 4 contains only cases that were decided by a United States Courts of Appeals, while the data in Table 3 considers *all* cases appearing on the Court's plenary docket. Second, in contrast to Table 4, Table 3 includes any cases in which a conflict can be determined by reference only to the petition for certiorari and a comparison of lower court opinions, even if the split was not explicitly acknowledged by the Court or any of the courts below.

October Terms 1984 and 1985 reviewing a decision of a United States Court of Appeals was analyzed. Each case, after being categorized as a conflict or nonconflict case in accordance with Table 4, was then cross-referenced against the corresponding pool memo for that case. The pool memo was then classified as belonging to one of five categories: grant, deny, take some other action, no recommendation, or missing a pool memo.<sup>205</sup> The results of the study are compiled and displayed in Table 5.

Table 5  
Cert pool treatment of conflict and nonconflict United States Courts of Appeals cases on the plenary docket, October Terms 1984 and 1985

	Supreme Court Term			
	1984		1985	
	Conflict	No conflict	Conflict	No conflict
Cert pool recommended grant	35	25	25	23
Cert pool recommended deny	6	17	11	18
Cert pool recommended some other action	8	16	11	14
No recommendation	0	2	0	3
Missing pool memo	1	3	1	1
Total number of cert petitions	50	63	48	59

During the 1984 and 1985 Terms, the number of nonconflict grants outnumbered conflict grants by twenty-four cases. Despite the larger universe of nonconflict grants during those two Terms, the cert pool still recommended that the Court grant certiorari in twelve more conflict cases (60) than nonconflict cases (48).

Because the study examines cases that were eventually granted plenary review by the Court, it is not surprising that the Court agreed more often with

205. See *supra* note 188.

the recommendation of the cert pool in cases involving a circuit split. In 61.22% of conflict grants, the cert pool agreed that the Court should grant certiorari. Meanwhile, the Court disagreed with the cert pool more frequently in nonconflict cases, with only 39.34% of the pool memoranda within that category recommending a grant. As a consequence, therefore, both in absolute numbers and percentage terms, the cert pool appears to be less comfortable recommending that the Court grant certiorari in a case lacking in objective indicia of certworthiness than it does in a case presenting a square conflict on an issue of law.

Table 6

Cert pool treatment of conflict and nonconflict United States Courts of Appeals cases on the plenary docket (by percentage), October Terms 1984 and 1985<sup>206</sup>

	1984–1985 Terms	
	Conflict	No conflict
Cert pool recommended grant	61.22%	39.34%
Cert pool recommended deny	17.35%	28.69%
Cert pool recommended some other action	19.39%	24.59%
No recommendation	0%	4.10%
Missing pool memo	2.04%	3.28%

*c. Correlation and Agreement Between the Cert Pool and the Court.*—As Professor Robert O’Neil stated in the foreword to *Courtiers*, “remarkably little is reliably known” about the role of Supreme Court law clerks in the judicial process.<sup>207</sup> Although that statement is less true today with the publication of *Courtiers* and *Sorcerers’ Apprentices*, the shroud of secrecy surrounding the Court has made it difficult to ascertain, with any reliability or precision, exactly what role law clerks play in setting the agenda of the Court. Another barrier to quantitative study of the cert pool was the unavailability of information. As Professor Barbara Palmer has noted,

206. The percentages in this table are based on the data in Table 5.

207. Robert O’Neil, *Foreword to PEPPERS*, *supra* note 6, at ix.

Justice Powell's papers contain only the pool memos in granted cases;<sup>208</sup> yet until recently that was the best source of data about the cert pool. However, with the 2004 public release of the papers of Justice Blackmun—who meticulously retained all of his records and correspondence in every case—a quantitative study of the impact of the cert pool is now possible.

The rest of this Review Essay will be dedicated to assessing empirically what role the cert pool recommendations have on the Justices and the Court. As before, in conducting this pilot study, every pool memo from October Terms 1984, 1985, 1991, and 1992 was examined and the recommendation recorded. The study required an examination of more than 20,000 pool memos and then a review of the United States Reports to determine in which cases the Court ultimately granted review. The total raw numbers for the study are reported in Table 7.

Table 7  
Recommendations of pool memos, by Term  
October Terms 1984, 1985, 1991, and 1992<sup>209</sup>

	Supreme Court Term			
	1984	1985	1991	1992
Number of grant recommendations	107	111	86	83
Approximate number of deny recommendations	3,864	3,815	5,412	5,882
Number of "some other action" recommendations	298	363	327	371
Total approximate number of pool memos	4,269	4,289	5,825	6,336
Number of opinions of the Court	151	159	116	114

208. Palmer, *supra* note 155, at 109.

209. The category labeled "Approximate Number of Deny Recommendations" is an approximation based on the total number of disposed petitions reported each year in the *Harvard Law Review*. This category includes all cases where the cert pool recommended that the Court deny the petition, the cert pool made no recommendation, or the pool memo was missing from the Blackmun papers.

The data reveal a surprisingly strong relationship between the number of plenary decisions by the Court, as expressed by the number of opinions of the Court, and the number of grant recommendations made by the cert pool. The Pearson correlation coefficient between those two variables is a remarkably high .998 at a statistical significance level greater than .01. Although the robustness of this statistic is weakened somewhat by the small sample size (four Terms) and the nonrandomness of the Terms selected,<sup>210</sup> the high correlation coefficient and statistical significance demonstrate, to a reasonable degree of confidence, that there is a relationship between the two variables.<sup>211</sup> As further evidence in support of the relationship, the Pearson correlation coefficient between the number of grant recommendations of the cert pool and the number of oral argument sessions is a similarly high .984 at a statistical significance level of approximately .01.

The question raised by the high correlation coefficient is whether the law clerks are driving the size of the plenary docket, or whether other factors account for the strong relationship. One possible explanation is that the decrease in the number of cases on the plenary docket and the number of grant recommendations made by the cert pool both reflect a declining number of certworthy petitions on the Court's docket.

That explanation, while plausible, seems unlikely. Although it is true that the number of paid petitions—or those in which the petitioner is able to pay the filing fee—has actually decreased by about 450 cases since 1984,<sup>212</sup> the total number of petitions has nearly doubled since then.<sup>213</sup> And even ignoring the fact that the in forma pauperis portion of the docket has almost tripled since 1984,<sup>214</sup> the 50% drop in the plenary docket far exceeds the approximately 20% decline in paid cases on the certiorari docket. Moreover, at the time of greatest decline in the plenary docket, between 1986 and 1993,

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210. Although the Terms were not selected randomly, they also were not selected in order to yield a particular result or relationship. Instead, other interesting data were available for those Terms, such as the circuit conflict data found in the Hellman study for October Terms 1984 and 1985, which made their selection particularly useful for analysis. See Hellman, *supra* note 124.

211. A preliminary linear regression analysis, which is not sufficiently robust for full discussion in this Review Essay in light of the small sample size, shows a linear relationship between grant recommendations made by the cert pool and the number of cases decided by the Court. The  $r^2$  of the linear regression is .997, and it is statistically significant at the .002 level. Further study is required to determine whether the linear relationship will survive as data from additional Terms are added.

212. Compare *The Supreme Court, 1984 Term—The Statistics*, 99 HARV. L. REV. 322, 326 (1985) [hereinafter *1984 Term—Statistics*] (disposing of 2,179 paid petitions from the certiorari docket), with *2003 Term—Statistics*, *supra* note 136, at 514 (2004) (disposing of 1,749 paid petitions from the certiorari docket).

213. Compare *1984 Term—Statistics*, *supra* note 212, at 326 (reporting the disposition of 4,269 petitions for review), with *2003 Term—Statistics*, *supra* note 136, at 486 (reporting the disposition of 7,781 petitions for review).

214. Compare *1984 Term—Statistics*, *supra* note 212, at 326 (reporting 2,082 in forma pauperis petitions on the Court's certiorari docket), with *2003 Term—Statistics*, *supra* note 136, at 486 (reporting 6,030 in forma pauperis petitions on the Court's certiorari docket).

there was very little change in the number of paid petitions on the certiorari docket.

It is also possible that the quality of petitions has declined substantially since 1984. Even aside from the fact that that is an exceedingly difficult issue to judge, it is hard to believe that a doubling of the number of petitions for certiorari could produce half as many certworthy cases.<sup>215</sup> In fact, although conflict grants already comprise a sizeable portion of the Court's plenary docket, as discussed above, the Court may be failing to review 200 or more circuit splits each year, meaning that it is unlikely that a fundamental decline in the quality of petitions is the driving force behind the massive drop in the plenary docket.<sup>216</sup>

Another possibility is that changes in personnel on the Court are driving the reduction in the plenary docket. At least three other scholars have found merit to this explanation,<sup>217</sup> and it has substantial empirical support. But it fails to explain the strong correlation between the number of plenary decisions by the Court and grant recommendations by the cert pool each Term, unless the Justices are instructing law clerks to limit the number of grant recommendations each Term or to otherwise be cautious in dispensing grant recommendations. Neither *Sorcerers' Apprentices* nor *Courtiers* finds any evidence of such a declaration from the Chief Justice or the Court, and, of course, any such declaration would suffer from nearly insurmountable

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215. To the extent that litigants are being advised by sophisticated counsel, a far more likely scenario is that the drop in paid petitions can be attributed, at least in part, to the declining number of cases on the plenary docket and not the other way around. The decline in paid petitions began in October Term 1994, one Term after a twenty-seven case drop in the decisional output of the Court. A recent article estimated that filing a petition for certiorari can cost up to \$75,000—not a nominal expense. Tony Mauro, *Supreme Advocates*, AM. LAW., Oct. 2000, at 90, 94. Accordingly, as the probability of achieving a favorable result from the Court on a petition for certiorari has decreased over time, a rational economic actor would be less willing to pay such a large expense for an exceedingly small chance of obtaining plenary review by the Court. The most likely petitions to be sacrificed under this theory would be the marginal ones, assuming that the attorneys for the petitioners are knowledgeable about the factors driving plenary review by the Court.

216. See Cordray & Cordray, *supra* note 124, at 772 (noting that, according to the *United States Law Week's* "Circuit Split Roundup," there are more than 400 circuit splits that arise each year); Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81, 117 (2001) (estimating that the Court "might be denying review in more than 200 conflict cases a year"). To be sure, some of the decisional conflicts may arise in poor vehicles for Supreme Court review or may be about the proper interpretation of the Sentencing Guidelines or the Federal Rules, areas in which the conflicts may be cured by simple rule changes. See, e.g., *Braxton v. United States*, 500 U.S. 344, 348 (1991) (stating that Congress "necessarily contemplated" that the United States Sentencing Commission would periodically review and revise the Sentencing Guidelines). On the other hand, however, neither Hellman nor the Circuit Split Roundup (which was discontinued in 2004) include decisional conflicts involving state courts of last resort, which is an important category of cases specifically mentioned among the criteria for certiorari review in SUP. CT. R. 10.

217. See Cordray & Cordray, *supra* note 124, at 790; Hellman, *supra* note 124, at 424; O'Brien, *supra* note 124, at 799.

collective action problems.<sup>218</sup> It would require the clerks from each of the chambers participating in the cert pool to work together, either explicitly or implicitly, to reach a target number of grant recommendations.

A more subtle variation of this explanation is that the culture of “just saying no” has become more pronounced in recent years, which is perhaps just a reflection of the philosophies of the members of the Court. Ward and Weiden suggest as much when they state that “[a]s the number of justices and clerks joining the pool and reviewing pool memos increased, clerks became more cautious.”<sup>219</sup> The data in this study provide some support for that explanation. Despite the strong correlation between the number of grant recommendations by the cert pool and the number of plenary decisions by the Court, the Justices and cert pool still disagree on the disposition of a considerable number of cases each Term, ranging from just forty-seven cases in 1992 to seventy-five cases in 1985.<sup>220</sup> It is possible, therefore, that the Justices are exercising independent judgment during the certiorari process and that the law clerks are simply following the leadership and cues of the Justices,<sup>221</sup> who in recent years have granted certiorari in fewer cases than ever before.<sup>222</sup> Although this explanation cannot be discounted, without collective action by all the clerks in the pool, it still fails to explain the remarkably high correlation between the number of grant recommendations by the cert pool and number of plenary decisions by the Court.

A third explanation is that the recommendations of the cert pool are driving the number of cases heard on the merits each year by the Court. This explanation has considerable facial plausibility as some Justices, including the late Chief Justice Rehnquist, have admitted that they do not look at every petition for certiorari that is filed with the Court.<sup>223</sup> Moreover, during the 1984 and 1985 Terms, the cert pool recommended that the Court grant certiorari in slightly more than 2.5% of the cases on the certiorari docket. By the 1991 and 1992 Terms, that ratio had dropped to slightly less than 1.4%. Accordingly, the pool is not only stingy compared to the total number of cases in which the Court granted certiorari, but its stinginess has increased over time.<sup>224</sup>

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218. See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 53–57 (1971) (observing that the larger the group size, the more difficult it is to have successful collective action).

219. WARD & WEIDEN, *supra* note 5, at 143.

220. See *infra* Table 8.

221. See *supra* subpart III(A).

222. See *supra* section III(B)(1).

223. PEPPERS, *supra* note 6, at 194.

224. The stinginess of the cert pool is observable even when the certiorari docket is separated into its paid and in forma pauperis components. For example, during October Terms 1984 and 1985, the cert pool recommended that the Court grant 4.7% of the paid petitions filed with the Court, while that statistic had dropped to 3.6% by October Terms 1991 and 1992.

On the other hand, the wholesale delegation of screening cases to newly-minted law clerks would be a remarkable abdication of judicial responsibility. Neither *Sorcerers' Apprentices* nor *Courtiers* suggests that law clerks possess that much power. To the contrary, the Justices still discuss the potentially meritorious petitions for certiorari in conference.<sup>225</sup> Moreover, although there is a strong correlation between grant recommendations and plenary decisions, the law clerks and the Justices do not always agree on the appropriate disposition of petitions for certiorari. Accordingly, further study is necessary to determine the robustness of the correlation coefficient as well as to determine which of the foregoing explanations, if any, account for it.

One potential weakness of the correlation coefficient calculated above is that it does not directly measure the agreement between the cert pool and the Court. Instead, it aggregates all the grant recommendations of the cert pool, in both granted and denied cases, and compares that figure to the total number of cases decided by the Court. The Blackmun papers, because they include pool memos from all cases that were granted and denied during Justice Blackmun's tenure, permit researchers to calculate and analyze for the first time the level of agreement between the cert pool and the Court both within and across Terms.

In conducting the analysis, I separated the cases into five categories: (1) cases in which the pool memo and the Court both agreed on a grant; (2) cases in which the pool memo and the Court both agreed on a denial;<sup>226</sup> (3) cases in which the pool memo suggested a grant, but the Court denied; (4) cases in which the pool memo suggested a denial, but the Court granted; and (5) cases in which the cert pool recommended that some other action be taken by the Court.<sup>227</sup> Table 8 displays the number (and percentage) of cases falling into each of these categories for October Terms 1984, 1985, 1991, and 1992.

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225. Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. PA. L. REV. 1665, 1671 (2006); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 643 (2003). The frivolous petitions, by contrast, do not get put on the discuss list and are automatically denied following Conference. See Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 LAW & SOC'Y REV. 807, 813 (1990) (explaining that the discuss list serves as a "neutral, administrative measure" and is "a result of the widespread agreement on the frivolousness of 60 to 70 percent of the caseload").

226. This category was estimated by taking the total number of cases falling into any of the other categories and subtracting that number from the total number of petitions disposed of during that particular Term, as reported by the *Harvard Law Review*. It may also include a small number of cases where a pool memo was missing or contained no recommendation at all.

227. As before, this category counts separately the pool memoranda that made a recommendation other than grant or deny. The most common variations of this category included CVSG (call for the views of the Solicitor General), Summary Reverse, Summary Affirm, CFR (call for a response), CFRRecord (call for the record), Hold, and GVR (grant, vacate, and remand). See *supra* note 188.

Table 8  
 Agreement between pool memo and the Court on disposition of  
 petitions for certiorari, October Terms 1984, 1985, 1991, and 1992

	Supreme Court Term			
	1984	1985	1991	1992
Pool memo suggests grant, and Court grants	1.83% (78)	1.70% (73)	0.93% (54)	1.03% (65)
Pool memo suggests deny, and Court denies	89.88% (3,837)	88.09% (3,778)	92.46% (5,386)	92.38% (5,853)
Pool memo suggests grant, but Court denies	0.68% (29)	0.89% (38)	0.55% (32)	0.28% (18)
Pool memo suggests deny, but Court grants	0.63% (27)	0.86% (37)	0.45% (26)	0.46% (29)
Some other action suggested by pool memo <sup>228</sup>	6.98% (298)	8.46% (363)	5.61% (327)	5.86% (371)
Total number of cert petitions	4,269	4,289	5,825	6,336

The numbers and percentages are relatively consistent from Term to Term, aside from the noticeable drop in the number of grant recommendations by the cert pool during the 1991 and 1992 Terms. Moreover, pool memos suggesting some other action, such as calling for a response or the views of the Solicitor General, among others, also declined from 7.7% of the certiorari docket during October Terms 1984 and 1985 to 5.7% for October Terms 1991 and 1992. Using the number of grant recommendations and recommendations to take some other action as proxies for cases that the cert pool found worthy of further consideration by the Court, the percentage of those cases dropped from 10.3% of the certiorari docket in 1984 and 1985 to

228. It bears noting that this category includes a number of cases in which the cert pool recommended that some other action be taken, but the Court decided to grant certiorari anyway. The separate categorization of these cases accounts for most of the disparity between the number of cases listed as grants of certiorari by the Court in Table 8 and the total number of opinions of the Court in Tables 1 and 7. *See also infra* note 235 (explaining the rationale for treating cases in which the cert pool recommended that some other action be taken separately from other categories of cases).

7.1% in 1991 and 1992. These figures provide further support for the hypothesis that the cert pool has become increasingly stingy over time.

The level of agreement between the cert pool and the Court has also increased over time, at least as a percentage of the total number of cases on the certiorari docket. For October Terms 1984 and 1985, the total number of cases involving a disagreement between the cert pool and the Court was 1.46%, while that same statistic was just .86% for October Terms 1991 and 1992.

These statistics lend support to the hypothesis that greater homogenization of the cert pool—from six Justices during 1984 and 1985 to eight Justices in 1991 and 1992—has had an impact on the level of agreement between the cert pool and the Court. Recall that the second homogenization argument is that, as the number of Justices in the pool has increased, the number of “checks” on the pool has decreased, potentially permitting more cases to fall through the cracks.<sup>229</sup> During October Terms 1984 and 1985, six Justices participated in the pool, while three other Justices provided an independent “check” on it.<sup>230</sup> By the 1991 and 1992 Terms, in contrast, only Justice Stevens’s chambers independently reviewed petitions for certiorari.<sup>231</sup> As the number of Justices participating in the pool increases, the homogenization theory would predict that the level of agreement between the Court and the pool would also increase. While the ratio of grant recommendations to cases decided by the Court has remained remarkably consistent over time,<sup>232</sup> the level of agreement between the Court and the cert pool has predictably *increased* as more Justices have joined the cert pool.<sup>233</sup>

While the numbers suggest greater consensus between the cert pool and the Court in more recent Terms, Table 8 does suffer from at least one prominent flaw. Many of the cases on the certiorari docket are frivolous, including a large percentage of those cases in which the cert pool and the Court both agree that a petition should be denied.<sup>234</sup> Thus, it can be argued that Table 8

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229. See *supra* notes 170–72 and accompanying text.

230. The six Justices who participated in the cert pool were Chief Justice Burger and Justices White, Blackmun, Rehnquist, Powell, and O’Connor. WARD & WEIDEN, *supra* note 5, at 119, 125; Palmer, *supra* note 155, at 109. Meanwhile, Justices Brennan, Marshall, and Stevens remained outside the pool. WARD & WEIDEN, *supra* note 5, at 119, 126; Palmer, *supra* note 155, at 109.

231. WARD & WEIDEN, *supra* note 5, at 125.

232. See *supra* Table 2.

233. In the two categories of agreement between the cert pool and the Court (grant/grant and deny/deny), an independent samples t-test reveals, to a confidence level greater than .02, that there are statistically significant differences between the percentages from the 1980s and 1990s. The other categories are suggestive of differences, but it is impossible to confirm without additional data.

234. In particular, many of the cases appearing on the *in forma pauperis* portion of the Court’s certiorari docket are patently frivolous. See Palmer, *supra* note 155, at 109 (stating that the “vast majority of cases that come to the Court are ‘frivolous,’ particularly those filed *in forma pauperis* by prisoners”).

grossly overestimates the level of agreement between the cert pool and the Court by including all petitions without separately accounting for the level of consensus in cases in which the Court granted certiorari. After removing all cases in which the cert pool recommended that some other action be taken,<sup>235</sup> Table 9 responds to that criticism by bifurcating the data into two groups. First, the Table displays the level of agreement between the cert pool and the Court in all cases in which the Court *either* granted or denied certiorari. It then separately presents the level of agreement in only those cases in which the Court eventually granted certiorari.

Table 9  
Agreement between pool memo and the Court on  
disposition of petitions for certiorari (by percentage),  
October Terms 1984, 1985, 1991, and 1992

	Supreme Court Term			
	1984	1985	1991	1992
Agreement (all cases)	98.59% (3,915)	98.09% (3,851)	98.95% (5,440)	99.21% (5,918)
Disagreement (all cases)	1.41% (56)	1.91% (75)	1.05% (58)	0.79% (47)
Agreement (grants only)	74.29% (78)	66.36% (73)	67.50% (54)	69.15% (65)
Disagreement (grants only)	25.71% (27)	33.64% (37)	32.50% (26)	30.85% (29)

The trend of greater agreement between the cert pool and the Court begins to break down only when the closer and more difficult granted cases are examined. During October Terms 1984 and 1985, the Court and the cert

235. In her limited study of the pool memos in cases in which certiorari was granted, it appears that Professor Palmer counted the cases in which the cert pool recommended that some other action be taken as instances in which the cert pool and the Court disagreed. *See* Palmer, *supra* note 155, at 111–14, 119. However, just because the Court eventually denied a petition in which other action was recommended does *not* mean that that other action was never ordered. To the contrary, the Court frequently denies petitions after it calls for a response, the views of the Solicitor General, or the record. Moreover, instances in which petitions are held pending the review of another case, by far the largest category in which other action is recommended by the cert pool for the four Terms studied, would not appear directly on the publicly available records on the Court's docket. Thus, it is virtually impossible to ascertain the level of agreement between the cert pool and the Court on the petitions in which some other action was recommended by the cert pool. I, therefore, exclude those cases from Table 9.

pool agreed on the disposition of 70.2% of the cases in which certiorari was granted, while that same statistic for 1991 and 1992 was a slightly lower 68.4%. The data suggest that the level of agreement between the Court and the cert pool has not been impacted by a change in the number of Justices participating in the pool, casting some doubt on the viability of the homogeneity theory. However, unlike the data for both granted and denied cases, the data for only the granted cases originate from a much smaller sample size. Instead of the 3,700 or more cases on the certiorari docket every Term, the number of observations in the granted cases category ranges from eighty to 110 cases per Term. While the percentage differences from Term to Term look comparably large when only granted cases are considered, the differential amounts to only about three to five cases per Term in one direction or another, hardly enough to make any sweeping conclusions about the cert pool. Further testing of the validity of the homogeneity theory should include data from additional Terms.

It is unsurprising that the level of disagreement between the cert pool and the Court is higher with respect to the granted cases. In contrast to the denied petitions, many of which are frivolous, the cases in which the Court grants certiorari are often very close and are “more a matter of ‘feel’ than of precisely ascertainable rules.”<sup>236</sup> Agreement between the cert pool and the Court about 70% of the time in granted cases does not show that the cert pool lacks influence over the Court’s selection of plenary cases, as Professor Palmer claimed in her 2001 study.<sup>237</sup> To be sure, a 30% disagreement rate in that category does demonstrate that the Justices exercise some independent judgment in making their decisions about whether to grant certiorari.<sup>238</sup> However, the approximately 99% agreement in all cases and the nearly 70% agreement in granted cases also reveal that the recommendations of the cert pool are indeed related to the final decisions of the Justices on petitions for

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236. O’BIEN, *supra* note 182, at 193 (quoting Justice Harlan).

237. See Palmer, *supra* note 155, at 120 (calling the cert pool “primarily . . . a time-saver and not an initial case-screener”). Palmer concluded in her study that 51% agreement between the cert pool and the Court on granted cases was insufficient to support an inference of influence by the cert pool. Palmer, *supra* note 155, at 113–14, 120. However, her study suffers from two flaws that draw her conclusions into doubt. First, she did not exclude cases in which the cert pool recommended that some other action be taken, which skewed her results because, as stated above, a pool memorandum that suggests other action does not necessarily conflict with a grant of certiorari by the Court. See *supra* note 235. Second, as she recognized, she did not have the benefit of the pool memos in cases in which the cert pool recommended a grant of certiorari but the Court disagreed. See Palmer, *supra* note 155, at 109 (stating that, without the pool memos in denied cases, her study gave “an incomplete picture of the influence of the cert pool”). This pilot study resolves both of the flaws in Professor Palmer’s approach.

238. Another possibility, of course, is that the annotation process within each chambers rescues a number of cases from the cert pool’s initial recommendation to deny. See *supra* note 147 and accompanying text.

certiorari. Without further study, the extent of that relationship is unclear,<sup>239</sup> but it is a question of particular importance in light of the Court's shrinking docket and the miserly predispositions of the cert pool discussed in subsection III(B)(2)(a).

A new study by Professors Todd Peppers (the author of *Courtiers*) and Christopher Zorn provides indirect support for the influence of law clerks on the certiorari process.<sup>240</sup> In their study, Peppers and Zorn measure the influence of law clerk ideology (based in part on the law clerks' responses to a survey designed to elicit their membership in the Republican or Democratic parties) on the ultimate decision on the merits of a case.<sup>241</sup> The other independent variable in their study is the ideology of the Justice, which is measured by reference to the Segal–Cover scores of judicial ideology.<sup>242</sup> Running six logit models measuring the influence of Justice and clerk ideology on Supreme Court voting, four of the six models were statistically significant at the .05 level.<sup>243</sup> Based on the predictions of their multivariate regression, Peppers and Zorn estimate that the marginal impact of law clerk ideology on the decision on the merits is between one-third and one-half as great as the Justice's ideology.<sup>244</sup> They ultimately conclude, therefore, that “over and above the influence of the justices' own policy preferences, those of their clerks have an independent effect on their votes.”<sup>245</sup>

The study indirectly supports the influence of law clerks on the certiorari process because, as Ward and Weiden find in their interviews of former law clerks in *Sorcerers' Apprentices*, the influence of law clerks is “most potent” in the area of decisions on petitions for certiorari.<sup>246</sup> As Justice Stevens and the late Chief Justice Rehnquist have stated, the review of certiorari petitions is the one area of judicial decisionmaking in which the

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239. The extent of the influence of the cert pool will have to await a multivariate regression analysis examining all of the variables that are relevant to whether a petition for certiorari is granted. In their 1988 article, Professors Caldeira and Wright identified a number of such variables, including the presence of the Solicitor General as the petitioning party, the filing of one or more *amicus curiae* briefs, a conflict among the lower courts, and the ideological direction of the lower court decision, among others. Caldeira & Wright, *supra* note 183, at 1117. In a multivariate regression model, those factors in addition to the recommendation of the cert pool would serve as the independent variables with the Court's ultimate vote on a petition for certiorari serving as the dependent variable. I hope to collect further data on one or more of the Terms in this study in order to perform such a regression analysis in the future.

240. Peppers & Zorn, *supra* note 9.

241. *Id.* at 13–14.

242. *Id.* at 16.

243. *Id.* at 24.

244. *Id.* at 25.

245. *Id.* at 26.

246. See WARD & WEIDEN, *supra* note 5, at 144 (indicating that 38% of clerks responded that they were most likely to “change the minds of the justices for whom they worked” in the certiorari process).

Justices do not even attempt to review all of the filings in a case.<sup>247</sup> Thus, the Court must place substantial reliance on the summaries contained in the pool memos.<sup>248</sup>

Meanwhile, the Justices' votes on the merits are the aspect of judicial decisionmaking "most insulated from clerk influence."<sup>249</sup> As Peppers and Zorn explain, "[t]he justices have clearly defined policy preferences, and how to vote in a particular case is typically the one area in which concerns of influence have not been raised."<sup>250</sup> Moreover, the Justices presumably have read most of the briefs in the cases, discussed the cases with the other Justices during conference, and attended the oral argument sessions, so the likelihood of clerk influence is greatly reduced in the votes of the Justices on plenary cases. Nonetheless, by finding clerk influence on those decisions, an area where the deck is stacked "against finding evidence of clerk influence,"<sup>251</sup> the study conducted by Peppers and Zorn suggests a finding of clerk influence in the certiorari process as well.<sup>252</sup>

#### IV. Conclusion

*Courtiers and Sorcerers' Apprentices*, through intensive research and interviews with former law clerks, reveal that law clerks play an increasingly important role in the work of the Supreme Court. Law clerks are involved in virtually every aspect of the Court's business, from drafting opinions to screening petitions for certiorari. As the books suggest, the Justices no longer perform their work alone.

Moreover, the establishment of the cert pool has greatly increased the role of law clerks in the certiorari process. An examination of the pool memoranda from four Terms empirically uncovers three characteristics of the cert pool for the first time: (1) it is stingy with respect to making grant recommendations; (2) it emphasizes objective criteria of certworthiness in

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247. See REHNQUIST, *supra* note 1, at 233–34 (stating that "with a large majority of the petitions [for certiorari] it is not necessary to go any further than the pool memo"); MAURO, *supra* note 144 ("[Stevens] said his clerks dispose of about three-fourth of the cases without sending him any memorandum at all.").

248. As Peppers and Zorn further observe, law clerk malfeasance has some chance of succeeding in the screening of petitions for certiorari. Although pool memos are annotated and checked by law clerks from other chambers, "a clerk who seeks a specific outcome might try to 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." Peppers & Zorn, *supra* note 9, at 12.

249. *Id.*

250. *Id.* at 12–13.

251. *Id.* at 13.

252. See *id.* at 27–28 ("The 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 more susceptible to the influence of law clerks than voting on the merits of a case.").

making its recommendations, such as the presence of lower court conflict; and (3) there is mounting evidence that the recommendations of the cert pool are correlated with the eventual decisions of the Court on petitions for certiorari. Although this Review Essay reports only the results of a pilot study, the empirical evidence further demonstrates that many scholars have too quickly dismissed the impact of the cert pool on the Court's declining plenary docket.

Both books, as well as this Review Essay, raise a host of possibilities for further research. One area for additional study is an examination of the role of law clerks, if any, within the attitudinal and rational choice models advanced by political scientists. On the issue of workload, many questions abound. For instance, how do law clerks fit with the traditional explanations for the Court's declining docket, such as changes in personnel on the Court and the elimination by Congress of the Court's mandatory appellate jurisdiction? Is there a better approach to screening petitions for certiorari, such as hiring more experienced clerks or a group of staff attorneys to perform the work? How strong is the influence of the cert pool when additional factors are considered, such as the role of amicus briefs at the certiorari stage and the ideological composition of the lower court panel? I hope to answer some of these questions another day, but my goal in this Review Essay is simply to encourage scholars to take another look at the role of law clerks as gatekeepers in the certiorari process.