

# The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?

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*This Article presents the first comprehensive empirical study of the post-clerkship employment of law clerks at the Supreme Court from 1882 to the present, and it uses that data to flesh out a historical and institutional interpretation of the clerkship and the recent political polarization of the Court more generally. The liberal tradition of the clerkship arose out of Louis Brandeis's vision of former law clerks serving a progressive legal agenda, a tradition that Felix Frankfurter helped institutionalize while striving to remove ideological bias. With the advent of a conservative bloc on the Court, this tradition has waned, due to the emergence of markedly partisan patterns in the Justices' hiring of clerks and post-clerkship careers in academia, private practice, and government. After documenting these trends, the Article suggests institutional reforms both for those seeking to perpetuate this polarization and for those seeking to erase it.*

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*William E. Nelson, Harvey Rishikof, I. Scott Messinger, and Michael Jo\**

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## INTRODUCTION

What impact will the election of Barack Obama as President and the return of large Democratic majorities to Congress have on the

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Supreme Court? It seems likely that President Obama will be able to make enough appointments to ensure the presence of a significant bloc of liberal Justices on the Court for decades to come; he has already appointed Justice Sonia Sotomayor in the wake of Justice David Souter's retirement. It also seems likely that he will get to replace few, if any, of the identifiably conservative Justices who are now sitting.<sup>1</sup> The question then becomes how the newly appointed liberals will interact with the holdover conservatives. Will they put aside what President Obama has called "the stale political arguments that have consumed" the Court and the country "for so long,"<sup>2</sup> and move together toward reinstating something akin to a rule of what most Americans might recognize as law? Or will the two blocs go to battle with each other and further reify the political polarization of the Court that has become increasingly familiar in recent years?<sup>3</sup>

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1. See, e.g., Jerry Markon, *Obama's Appointments Are Expected to Reshape the U.S. Legal Landscape*, WASH. POST, Dec. 8, 2008, at A1 (explaining that despite the Court's conservative nature, Obama can assert his influence through lower-court appointments); Tony Mauro, *Despite Victory, Court May Hold Steady*, LEGAL TIMES, Nov. 10, 2008, at 8 (discussing when the Court's four liberal justices might retire); David G. Savage, *Supreme Chance to Alter the Court; Who Would Obama Nominate if Given an Opportunity? Liberals Have High Hopes, but a Moderate is More Likely*, L.A. TIMES, Nov. 17, 2008, at A12.

This Article was largely completed in the spring of 2009, before Justice Sotomayor's appointment, and it analyzes data through 2006. Therefore, it does not attempt to discuss the jurisprudence of Justice Sotomayor, Chief Justice John Roberts, or Justice Samuel Alito. It is enough to note that Justice Sotomayor is likely to serve on the court for decades to come, and that as a presumptively liberal justice, she replaced another member of the Court's liberal wing.

2. President Barack Obama, Inaugural Address (Jan. 20, 2009), in WASH. POST, Jan. 21, 2009, at A34.

3. Legal scholars, political scientists, and economists have developed a sizable literature on the empirical measurement of ideological polarization in the Supreme Court and the federal appellate courts. Most of these studies correlate judicial voting patterns with the political party of the President appointing each judge. See, e.g., CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 19 (2006) ("Democratic appointees are far more likely to vote in the stereotypically liberal direction than are Republican appointees."); Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805, 807-08 (1999) (finding that Republican-appointed judges were more likely than Democrat-appointed judges to reverse EPA decisions challenged by industry). Other studies examine the voting records of judges to determine their ideological orientations. See, e.g., William M. Landes & Richard A. Posner, *Rational Judicial Behavior: An Empirical Study* 1-9 (Univ. of Chi. John M. Olin Law & Econ., Working Paper No. 404, 2008), available at <http://ssrn.com/abstract=1126403>. Most scholars working in this area draw upon the databases assembled by Harold Spaeth and Donald Songer. See, e.g., ASHLYN K. KUERSTEN & DONALD R. SONGER, DECISIONS ON THE U.S. COURTS OF APPEALS 241-64 (2001); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL xvii (1993). All these studies conclude that ideology plays a role in judicial decisionmaking, conditioned by likelihood of appellate review, existence and broad acceptance of precedent, or the ideological consistency of court or appellate panel. Most find evidence of increasing polarization in recent decades.

No one, least of all the present authors, can answer these questions. Our main goal in this article is to present what we believe to be our key insight—that the future direction of the Court will be determined not only by the wishes of the President, Congress, the Justices themselves, opinion leaders, or even the American people, but also by the institutional structures that have grown up around the Court in support of its work.<sup>4</sup> Those institutional structures have become increasingly polarized over the past two decades, strengthening partisan approaches to the law.

The particular institution on which we focus is the Supreme Court clerkship. The institution is important for at least two reasons. The first is spelled out in a recent empirical analysis examining “the extent to which both [each] Justice’s personal policy preferences and those of his or her law clerks exert an independent influence on the Justice’s votes.”<sup>5</sup> The analysis found that “clerks’ ideological predilections exert an additional, and not insubstantial, influence on the Justices’ decisions on the merits”<sup>6</sup> above and beyond the ideological orientation of each Justice.

A second reason to pay attention to Supreme Court clerks is that they exert considerable influence on the legal profession and the law following the conclusion of their clerkships.<sup>7</sup> Upon leaving the Court,

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Journalists have also conducted investigations of ideological polarization in the federal courts. See, e.g., R. Jeffrey Smith, *The Politics of the Federal Bench; GOP-Appointed Majorities Winning Ideological Battles at Appellate Level*, WASH. POST, Dec. 8, 2008, at A1 (finding significant polarization in *en banc* rulings of Federal Court of Appeals for Sixth Circuit from 1998–2008, which is correlated with the party of the President appointing each judge).

4. In examining the Supreme Court clerkship as an institutional practice, this Article draws upon insights from New Institutionalism, specifically the Historical Institutionalism of political science. Historical Institutionalists argue that institutions have “have powerful channeling and delimiting effects” upon individuals, rather than merely functioning as neutral sites for political conflict, but they also examine institutions as “the developing products of struggle among unequal actors,” rather than as wholly structural forces outside the control of political actors. In so doing, they focus upon historical and multi-institutional context in shaping institutions and their subsequent structuring of collective behavior. Paul Pierson & Theda Skocpol, *Historical Institutionalism in Contemporary Political Science*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE* 693, 706–07 (Ira Katznelson & Helen V. Milner, eds., 2002).

Historical Institutionalism is distinct from Rational Choice Institutionalism and New Institutional (or Organizational) Economics, which employ the tools of economic theory to analyze political and economic institutions. Peter Hall & Rosemary Taylor, *Political Science and the Three New Institutionalisms*, 44 *POL. STUD.* 936–50 (1996).

5. Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 *DEPAUL L. REV.* 51, 53 (2008).

6. *Id.*

7. Nearly all commentators on the Supreme Court clerkship, academic and otherwise, note that many of its former members assume leadership positions in private practice, all levels of government, and the academy. A small minority take prominent positions in business, public

former clerks typically find themselves in positions of power in government, private practice, or the academy and use those positions to transmit to others what they learned at the Court. The legal profession and, to a lesser extent, the general public thereby share vicariously in the law clerks' experiences. Above all, law students acquire their formative knowledge of the Court from professors who previously served as clerks or from other professors who have read the scholarship of those clerks. Through processes such as these, the clerks play a key role in communicating how the Supreme Court and, indeed, the judiciary as a whole work.<sup>8</sup>

Given this importance, legal scholars, political scientists, and journalists have lavished abundant attention upon the Supreme Court clerkship. Recent studies have detailed the history of the clerkship, clerk demographics and backgrounds, the selection process, the changing duties of the clerks while on the Court, and the ongoing debate over their influence upon the Court's written opinions.<sup>9</sup>

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interest law, and the nonprofit sector. A leading scholar of the institution states that "no other internship program in the history of the United States has produced as impressive and diverse a collection of individuals as the U.S. Supreme Court law clerk corps." TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 1* (2006).

8. Many have argued that the Court plays an "educative" role in American democracy. See Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 964 (1992) ("[T]he Supreme Court cannot be fully understood except as an institution with educative responsibilities . . . ."); Mark Tushnet, *Style and the Supreme Court's Educational Role in Government*, 11 CONST. COMMENT. 215, 223 (1994) (arguing in part that "[t]he Court educates the public by acting through opinion leaders"); see also ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 26 (1962) ("[T]he courts . . . are also a great and highly effective educational institution."); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) (calling Justices "teachers in a vital national seminar"). But see Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 175-79 (1998) (arguing that controversial Supreme Court decisions "were more successful at mobilizing opposition than at rallying support through educating the citizenry" and that "we should be glad that the Supreme Court's pronouncements do not have much educational effect . . . [because] the educational lessons conveyed by the Court are as likely to be bad as good"). Whether this role is effective or normatively desirable, the prominence of former clerks in the academy, private practice, and government suggest that they function as important agents in disseminating the doctrines of the Court throughout the nation's political and legal institutions.

9. Two recent book-length studies exhaustively document the clerkship institution: PEPPERS, *supra* note 7, and ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006). See also BRADLEY J. BEST, *LAW CLERKS, SUPPORT PERSONNEL, AND THE DECLINE OF CONSENSUAL NORMS ON THE UNITED STATES SUPREME COURT, 1935-1995* (2002); JOHN BILYEU OAKLEY & ROBERT S. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS* (1980); Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125 (1973); Norman Dorsen, *Law Clerks in Appellate Courts in the United States*, 26 MOD. L. REV. 265 (1963); Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299 (1961). Other first-hand accounts include JOHN KNOX, *THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR'S WASHINGTON* (David J. Garrow &

This Article adds to that scholarship by presenting the first comprehensive empirical study of the post-clerkship employment of Supreme Court clerks, and then using that data to flesh out a historical and institutional interpretation of how the clerkship is changing and why that change may matter. Using a list of former clerks provided by the Supreme Court, and searching through public records including archival sources; biographical information published by law firms, government agencies, and law schools; directories of law professors and practitioners; and secondary sources on the Justices and their clerks, this study has assembled data on the careers of over 90 percent of the clerks who served between October Term (“O.T.”) 1882 and 2006.<sup>10</sup>

The data on the careers of former clerks show striking trends of political polarization in the recent history of the clerkship with regard to the legal academy, government service, and private practice. However, it cannot support any simple interpretations of the agents or processes driving this development. The data do not disclose whether Justices actively steer clerks toward certain careers or employers; whether clerks self-select for such careers without input from the Justices; whether other networks, such as former clerks or the Federalist Society, help shape clerks’ careers; or whether patterns of polarization are unintentional by-products of the selection process. Moreover, these aggregate trends inevitably overlook exceptions to the general pattern of

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Dennis J. Hutchinson eds., 2002); J. HARVIE WILKINSON, III., *SERVING JUSTICE: A SUPREME COURT CLERK’S VIEW* (1974).

10. According to records provided by the Supreme Court, 1,888 clerks have served through O.T. 2006. Research has unearthed eight additional names of possible clerks, most of whom served before 1920. Of these 1,896, this study [hereinafter Supreme Court Clerks Data Set] has unearthed data for 1,723, or 90.9 percent of the total. For the majority of the 1,723 clerks with career data, research has identified their major career positions, undergraduate and law schools attended with dates of graduation, prior clerkship (if any), and post-baccalaureate degrees other than the J.D.

Primary sources include lawyer biographies and resumes published by law firms and law schools; the *Martindale-Hubbell Law Directory*; the Association of American Law Schools’ annual directory of law professors; Aspen Publishers’ *Directory of Corporate Counsel*; government biographies and press releases from the Federal Judicial Center, the Department of Justice, and other agencies; corporate annual reports and press releases listing in-house counsel; and biographical directories such as *Who’s Who in America*. Secondary sources include published reminiscences by former clerks, archived oral histories, and biographies of the Justices.

Each clerk has been assigned a primary and secondary career category out of the following: private legal practice, academia, government service, the judiciary, non-profit legal employment, elected office, and non-legal employment. Generally, the primary career represents the last position held by the clerk. Where a clerk’s career has been dominated by a particular position that he or she no longer holds or did not hold at the time of his or her death, this position has been substituted for the clerk’s last position of employment. Those few clerks who served for multiple terms or served multiple Justices during a single term are counted once, under the Justice who first appointed them. Data is current as of August 2008.

For tables summarizing the complete data set, see app. tbls.I, II.

polarization, such as Justice Antonin Scalia's purported practice of hiring one ostensibly liberal clerk per term.<sup>11</sup> Nevertheless, the trends emerging from the data are pronounced enough to constitute strong evidence that a process of polarization, creating new institutional structures surrounding the Court, is at work.

We are especially interested in the triangular relationship between the Court, the clerks, and the legal academy. Former clerks train new clerks for the Court, which then completes the clerks' training and sends them out to train the next generation of clerks and lawyers more generally, whether in the academy, private practice, or government. Our concern is with the message that emerges from this triangular process. Does the Court teach clerks, and do they then proclaim to the profession, that law is profoundly different from politics? In a world where politicians are distrusted, do former clerks thereby enhance the judicial branch's independence and stature? Or do they teach that the Court is merely one more site of Washington political intrigue?<sup>12</sup>

Although the office of law clerk for individual Justices has its roots in the nineteenth century, our foundational claim is that the Supreme Court clerkship, as it was understood until recently, arose out of a vision of Justice Louis Brandeis about how former law clerks should remain involved in the work of the Court after their clerkships had ended. The vision of Justice Brandeis was a highly political one. It was related coherently to his preferences in choosing his clerks and how they should serve him while at the Court, as well as to a larger, progressive, proto-New Deal understanding of American law, society, and politics.

In the past two decades, however, a new conservative counter-vision has begun to emerge. It is equally political. It is associated coherently with a rejection of the New Deal revolution in constitutional jurisprudence—indeed, with a rejection of much of the New Deal itself.

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11. For a typical assertion of this practice, see Margaret Talbot, *Supreme Confidence: The Jurisprudence of Antonin Scalia*, *NEW YORKER*, Mar. 28, 2005, at 40.

12. Most discussions of the Supreme Court clerkship outside legal academic and professional circles adopt the latter view of the institution. See, e.g., EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* 6 (1998) (describing the Court as an "institution broken into unyielding factions" where justices "discard judicial philosophy and consistent interpretation in favor of bottom-line results" and where "ideologically driven clerks" use their power to "manipulate their bosses and the institution they ostensibly serve"); JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 339 (2007) (arguing that constitutional cases before the Court "can be decided only on the basis of a political judgment," which is directly related to the identities of the Justices and the outcomes of presidential elections); BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT 18-19* (1979) (describing President Nixon's use of the F.B.I. to investigate Justice Fortas, with the goal of "discredit[ing] his student liberalism").



This article will examine these competing visions in five sections. Part I will analyze Brandeis's reasons for conceiving of Supreme Court clerkships as he did, show how he put his new conception into place, and suggest how his former clerks proselytized on behalf of his views after leaving the Court.

Part II will show how Justice Felix Frankfurter and his fellow New Deal appointees institutionalized Brandeis's novel approach. Since Democrats and moderate Republicans controlled the Presidency between 1937 and 1968 and accepted the tenets of the New Deal,<sup>13</sup> few conservatives were appointed to the Supreme Court during this period,<sup>14</sup> and liberals and moderates dominated the bench. Justice Brandeis's conception of the clerkship became a routinely accepted one, and what had been created as a liberal institution functioned from the 1940s into the 1980s in a seemingly non-partisan fashion, absent serious conservative challenge. What had served at its outset as a means of propagating Justice Brandeis's views became a vehicle for educating the profession and the public about the work of the Court as a whole. In the mid-twentieth century, the institution of the Supreme Court clerkship functioned in a fashion that proclaimed the superiority of law over politics.

Part III will then turn to the competing conception of the clerkship developed by Chief Justice William Rehnquist and several of the Court's current conservative Justices. This Part also will examine steps taken recently toward institutionalizing the new conservative conception. Lastly, it will suggest that the presence of competing visions of the Supreme Court clerkship tends to reify the political divisions on the Court. It will show how clerks who arrive at the Supreme Court

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13. Democrats won seven of the nine presidential elections between 1932 and 1964, and the moderate Republican Dwight Eisenhower won in 1952 and 1956. For Eisenhower's attempt to forge a moderate "Modern Republicanism" that incorporated and extended New Deal programs such as Social Security, see JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974* 272 (2006) (noting that Eisenhower "in no way threatened the welfare state begun in the New Deal years"); STEVEN WAGNER, *EISENHOWER REPUBLICANISM: PURSUING THE MIDDLE WAY* 4 (2006) ("[Eisenhower] supported the continuation and, in some cases, the expansion of popular New Deal programs."). For the limits of this accommodation of liberalism, see Robert Griffith, *Dwight D. Eisenhower and the Corporate Commonwealth*, 87 *AM. HIST. REV.* 87, 91-92 (1982) (stating that Eisenhower's "middle way" initially "entailed arresting the momentum of New Deal liberalism" while acknowledging that "some forms of state action were not only expedient but necessary").

14. Of the four men appointed by President Eisenhower who served for any extended period of time, two—Earl Warren and William Brennan—became paradigms of liberalism. Two others—John Marshall Harlan and Potter Stewart—were no more conservative than a number of Democratic appointees, such as Stanley Reed, Tom Clark, and Byron White, or, arguably, Justice Frankfurter himself. Together these men, along with mostly more liberal Justices, made the Court a centrist to left-leaning entity between 1937 and 1968.

already divided among conservative and liberal chambers go on to deeply polarized career tracks in the government, law firms, and law schools. These career tracks entrench their divergent ideologies, further dividing their students, their associates, and the public at large—thereby reinforcing ideological dissonance and stridency.

Two final parts, IV and V, will focus on the significance for the Supreme Court's work of the institutions surrounding the clerkship that support the political visions of liberals and conservatives. More specifically, Part IV will suggest how those who are comfortable with politicized judging might want to further develop and extend existing institutional structures. Part V, in contrast, will suggest that citizens seeking to encourage a replacement of today's politicized judging with an approach more akin to a neutral rule of law ultimately might need to consider altering the institution of the judicial clerkship as well as other institutional structures related to the Court, perhaps by legislation. Finally, Part V will suggest that, if other means of lessening the Court's polarization fail, new approaches to legal education and legal scholarship—approaches which build on Justice Brandeis's and modern conservatives' understanding of the triangular relationship between the Court and the academy—might become necessary.

### I. BRANDEIS'S NEW IDEA

Brandeis's vision for his clerks' careers was a product of his vision of law and the legal process. Law, for Brandeis, was not a derivative of eternal principles, but instead a pragmatic response to societal needs. Because society was always changing, law was also in constant flux. Just as anyone seeking to understand what law was at any point in time first had to understand society, so too, Brandeis thought, a lawyer seeking to argue what law ought to be first needed to grasp what society was becoming.<sup>15</sup> Lawyers also had the function of educating the public and thereby creating enlightened public opinion;<sup>16</sup> Brandeis believed that law reviews and legal scholarship had a major role to play in performing that duty.<sup>17</sup>

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15. See PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 95–96, 122–24, 309–13 (1984) (describing the role of the “Brandeis brief” in bringing data about the current state of society before the Court and how Brandeis “found the key to jurisprudence in facts”).

16. Letter from Louis D. Brandeis to Felix Frankfurter (Jan. 24, 1926), in 5 *LETTERS OF LOUIS D. BRANDEIS* 204 (Melvin I. Urofsky & David Levy eds., 1978).

17. STRUM, *supra* note 15, at 363–64.

Brandeis first put this conception of the legal process into operation in his famous “Brandeis brief”<sup>18</sup> in *Muller v. Oregon*, which consisted almost entirely of sociological data with only two pages of legal argument.<sup>19</sup> After his appointment to the Court, he continued to employ it when he wrote opinions that emphasized social facts as the foundation for law.<sup>20</sup> Such emphasis on facts, however, was difficult: a great deal of work was typically necessary to acquire, synthesize, and interpret the facts. He often assigned the task of acquiring facts to his law clerks, but his single clerk could perform the arduous task in at most a few cases each year.<sup>21</sup>

Brandeis realized that he and other judges needed outside help. He sought that help by encouraging former clerks to become professors and assisting them in obtaining jobs.<sup>22</sup> Those former clerks could then devote their scholarship to elaborating the junctions of law and society—as two of those clerks, Willard Hurst and David Riesman, most notably did.<sup>23</sup> The scholarship of other former clerks—particularly Paul Freund, Henry Hart, and Louis Jaffe—focused on the other work Brandeis deemed important: analyzing the work of the judiciary and thereby educating the profession and the public.<sup>24</sup>

Brandeis also sought out applicants for the clerkship who had an interest in academia. He directed Felix Frankfurter, who selected his clerks for him, that, “other things being equal, it [was] always preferable

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18. See *id.* at 114–31 (describing Brandeis’ use of statistics).

19. 208 U.S. 412 (1908).

20. See PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* 63–71 (1993) (describing Brandeis’ use of facts in several cases); MELVIN I. UROFSKY, *A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM* 133–39 (1971) (describing how Brandeis would search out “all of the relevant materials of any sort” and then see “how the law meshed with the facts”).

21. See STRUM, *supra* note 15, at 356–57 (describing how one Brandeis clerk spent six months researching background material for a patent case and how another clerk “prepared endless pages of research”).

22. See *id.* at 359 (describing Brandeis’s goal of creating a new pool of law professors composed of former clerks).

23. For an example of historical scholarship supportive of Brandeis’s views about government’s power to stimulate and regulate the economy, see JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956). Not all of Brandeis’s clerks, however, saw their subsequent careers or their experience in the clerkship in quite the same manner that Brandeis did. Riesman, for example, expressed contempt for his experience in the clerkship and for the duties he had had to perform. David Riesman, *Becoming an Academic Man*, in *AUTHORS OF THEIR OWN LIVES: INTELLECTUAL BIOGRAPHIES BY TWENTY AMERICAN SOCIOLOGISTS* 22, 38–40 (Bennett M. Berger ed., 1990). Nonetheless, it is noteworthy that Riesman had an extraordinary career doing the sort of scholarship that Brandeis anticipated would be helpful to a liberal-oriented Supreme Court.

24. The most important book of a former Brandeis clerk examining the work of the judiciary probably was HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. and Philip P. Frickey eds., 1994).

to take someone whom there is reason to believe will become a law teacher.”<sup>25</sup> It was acceptable to Brandeis for his former clerks to enter government service in lieu of teaching, but he did not want them “to waste [their talents] on a New York or other law office[.]”<sup>26</sup>

Brandeis’s understanding of law and his goals for both incumbent and former clerks tied him to the sociological jurisprudence and subsequent legal realist movements, both of which had strong liberal slants at, and for some time after, their origin.<sup>27</sup> His jurisprudence thereby reflected what one newspaper called “the eminent mantle of liberalism.”<sup>28</sup>

Brandeis’s goals for his clerks were also liberal in another important sense: Brandeis wanted to use his clerkship to promote the upward mobility of underclass, primarily Jewish, youths into prestigious academic posts. Thus, he appointed a number of clerks who had attended college at non-Ivy League institutions,<sup>29</sup> and he told Frankfurter that “[w]ealth [or] ancestry” should create a presumption against his choosing a young man to be a clerk.<sup>30</sup> He became especially indignant about one clerk who had difficulty arriving at work on time when he learned that the young man had been “accustomed at home to be awakened *by a servant*”; he blamed the clerk’s “bad habits” on the life of luxury in which he had been raised.<sup>31</sup> In contrast to those who had grown up with wealth, Brandeis found in the poor and especially in Jews “a certain potential spirituality and sense of public service which can be more easily aroused and directed, than at present is discernible in American non-Jews.” For that reason he believed “that a great service

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25. Letter from Louis D. Brandeis to Felix Frankfurter (Jan. 28, 1928), in 5 LETTERS OF LOUIS D. BRANDEIS, *supra* note 16, at 320.

26. Letter from Louis D. Brandeis to Felix Frankfurter (Oct. 13, 1929), in 5 LETTERS OF LOUIS D. BRANDEIS, *supra* note 16, at 404. As a general matter, Brandeis encouraged his clerks to leave Eastern metropolises and “[g]o home and be . . . leader[s] in . . . [their] own communit[ies].” Nathaniel L. Nathanson, *Mr. Justice Brandeis: A Law Clerk’s Recollections of the October Term, 1934*, 15 AM. JEWISH ARCHIVES 6, 13 (1963).

27. See STRUM, *supra* note 15, at 413–14 (commenting on Brandeis’s approach to sociological jurisprudence).

28. Fred H. Young, *A Victor Over Prejudice*, PROVIDENCE J. BULL., Oct. 7, 1941, reprinted in MR. JUSTICE BRANDEIS, GREAT AMERICAN: PRESS OPINION AND PUBLIC APPROVAL 32–33 (Irving Dillard ed., Modern View Press 1941).

29. Such institutions include the University of Florida (William Sutherland), St. John’s University (Calvert Magruder), New York University (Thomas Austern), and Washington University (Paul Freund).

30. Letter from Louis D. Brandeis to Felix Frankfurter (Oct. 23, 1922), in 5 LETTERS OF LOUIS D. BRANDEIS, *supra* note 16, at 74.

31. Letter from Louis D. Brandeis to Felix Frankfurter (Oct. 7, 1928), in 5 LETTERS OF LOUIS D. BRANDEIS, *supra* note 16, at 358–59 (emphasis added).

could be done generally to American law and to the Jews by placing desirable ones in the law school faculties.”<sup>32</sup>

Brandeis enjoyed remarkable success in attaining his goals for his former clerks. Of his twenty-one clerks, eleven, or 52.4 percent, obtained academic appointments, although one of them, Calvert Magruder, eventually left Harvard Law School to assume a place on the bench of the U.S. Court of Appeals for the First Circuit. Three became government servants, including Dean Acheson, who ultimately served as Secretary of State in the Truman Administration. Only seven went into private practice or the business world, but one of those, Henry Friendly, spent nearly the last three decades of his career as a judge on the U.S. Court of Appeals for the Second Circuit.<sup>33</sup> In sum, 71.4 percent of Brandeis’s clerks became either law professors or public servants.<sup>34</sup>

Brandeis’s achievement is even more striking when compared to prior patterns of post-clerkship employment. The office of the Supreme Court law clerk was born in 1882 on the appointment of Justice Horace Gray, who brought to Washington his practice of hiring a law clerk while on the bench of the Massachusetts Supreme Judicial Court.<sup>35</sup> When Brandeis took his seat on the Court in 1916, eighty-six individuals had served or were serving other Justices as their personal clerks. Of those, only five, all from the chambers of Justice Gray and Justice Oliver Wendell Holmes, had long-term careers in legal academia.<sup>36</sup> A major reason why so few clerks became academics was that the clerkship was not originally designed exclusively to employ young lawyers.<sup>37</sup> Most Justices during the clerkship’s early decades employed stenographic

32. Letter from Louis D. Brandeis to Felix Frankfurter (Oct. 13, 1929), in 5 LETTERS OF LOUIS D. BRANDEIS, *supra* note 16, at 404.

33. For a list of Brandeis’s clerks and information about their careers as of the mid-1940s, see ALPHEUS T. MASON, *BRANDEIS: A FREE MAN’S LIFE* 690 (1946).

34. Supreme Court Clerks Data Set, *supra* note 10.

35. Robert M. Spector, *Legal Historian on the United States Supreme Court: Justice Horace Gray, Jr., and the Historical Method*, 12 AM. J. LEGAL HIST. 181, 186 n.19 (1968).

36. These were Samuel Williston (O.T. 1888, Gray); Ezra Ripley Thayer (O.T. 1891, Gray); Jeremiah Smith, Jr. (O.T. 1895, Gray); Joseph Warren (O.T. 1900, Gray); and Augustin Derby (O.T. 1906, Holmes). A few other clerks, such as Blewett Harrison Lee (O.T. 1889, Gray) and Roland Gray (O.T. 1898, Gray), taught in law schools briefly before entering private practice. William Schofield (O.T. 1883, Gray), served as an instructor of torts at Harvard Law School while maintaining his private practice; he later served as a member of the Massachusetts House of Representatives, the Supreme Judicial Court of Massachusetts, and the United States Court of Appeals for the First Circuit. Supreme Court Clerks Data Set, *supra* note 10.

37. The original act of Congress creating clerkship positions for each Justice called them “stenographic clerks.” Act of Aug. 4, 1886, ch. 902, 24 Stat. 254. It was not until 1920 that Justices were authorized to appoint both a law clerk and a secretary. Act of May 29, 1920, ch. 214, 41 Stat. 631, 686–87.

assistants as their clerks, only some of whom had legal training.<sup>38</sup> These Justices generally used their clerks as stenographers, not legal assistants, and retained them on a long-term basis over multiple terms.<sup>39</sup>

While some distinguished nineteenth-century jurists—such as Justice Gray himself—started their legal careers in clerical and reporter positions,<sup>40</sup> most of the clerk-stenographers had neither the inclination nor the capacity to become law professors. At that time, the Justices lacked any coherent program for what their assistants should do in their post-clerkship careers. Thus, most of the clerks accordingly did what most lawyers do: they practiced law. Of the fifty-two clerks serving before O.T. 1916 for whom post-clerkship career data is available, twenty-five (48.1 percent) went on to private practice; five (9.6 percent), as noted above, became academics; five (9.6 percent) had long-term careers in government; three (5.8 percent) became businessmen; one (1.9 percent) served in the judiciary; one died during his clerkship; one held elected office; and eleven (21.2 percent) were or became stenographers.<sup>41</sup>

Justice Brandeis, in short, had a plan—an uncommonly inventive plan designed to serve a liberal political agenda. Brandeis

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38. Of the eighty-five clerks who served before O.T. 1916, fifty (58.8 percent) have left no record of attending law school. While some of these clerks may have read law in a practitioner's law office and later practiced law themselves, others worked as stenographers both before and after their time at the Supreme Court, suggesting that they had little or no legal education. Justices Samuel Blatchford, Joseph P. Bradley, David Josiah Brewer, Henry Billings Brown, William Rufus Day, Samuel Miller, William Henry Moody, Willis Van Devanter, and Edward Douglass White appear never to have hired a law school graduate as a clerk. The elder Justice John Marshall Harlan did, however, hire clerks with and without law degrees. Supreme Court Clerks Data Set, *supra* note 10.

Justices Gray and Holmes did employ recent law school graduates on a short-term basis, and they used their clerks mainly as legal rather than stenographic assistants. See PEPPERS, *supra* note 7, at 51–53, 56–61. Justices Gray and Holmes, it might be noted, accounted for all but one of the twenty-nine Harvard Law School graduates who served as clerks before O.T. 1916. Supreme Court Clerks Data Set, *supra* note 10.

Justice Harlan Fiske Stone, who was appointed to the Court nearly a decade after Brandeis, became the fourth Justice to select only law school graduates as clerks. Stone, who had been dean of Columbia Law School, chose all his clerks except his first from Columbia, selecting from a list drawn up by Dean Young B. Smith and Professor Noel T. Dowling. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 646–47 (1956).

39. For the duties of clerks hired by Justices other than Gray, Holmes, and Brandeis during this period, see PEPPERS, *supra* note 7, at 56–62, 66–70 (noting that a law clerk's duties could include taking dictation, answering telephones and correspondence, balancing checkbooks, and acting as a traveling companion).

40. Horace Gray began his legal career in 1854 as Reporter of Decisions for the Massachusetts Supreme Judicial Court; his exemplary performance of those duties earned him a spot on that bench ten years later. Spector, *supra* note 35, at 185. He became Chief Justice of the state supreme court in 1873, and hired law clerks including Louis Brandeis before joining the United States Supreme Court in 1882. *Id.*; Supreme Court Clerks Data Set, *supra* note 10.

41. Supreme Court Clerks Data Set, *supra* note 10.

sought to use law clerks, both while they were at the Court and after their terms of service had ended, to provide non-legal factual data to support judgments about how the law needed to change to progressively advance societal needs and goals. He also sought to use the clerkship and the academic professorships to which clerking could lead to promote upward social mobility of Jews, in particular, and of immigrants and underclasses more generally. His liberalism lay in his belief that courts should permit law to change in response to social change, as well as his further understanding that it is possible to use law, which is sufficiently independent of society to be able to influence the course of social change, to build a more egalitarian, more inclusive, and more pluralist culture. He applied his liberalism to the office of the Supreme Court clerk by transforming young men into acolytes who would assist him, while at the Court and later, even after his own death, in achieving these liberal ends.

## II. INSTITUTIONALIZING THE BRANDEIS PROGRAM

Would Brandeis's liberal program of mentoring professors survive after his retirement? Would his use of law clerks become a blip in the history of the clerkship, or would it become institutionalized? The answer lay in the presidential appointment process and especially in President Franklin Roosevelt's appointment of Felix Frankfurter as a Supreme Court Justice. Roosevelt was unable to make any appointments to the Court during his first term,<sup>42</sup> but by the end of his second term, in January 1941, he had made five.<sup>43</sup> And when the Court began its October 1941 Term ten months later, with Harlan Fiske Stone replacing Charles Evans Hughes in the Court's center chair, eight of the nine members of the Court owed their seats to Franklin Roosevelt.<sup>44</sup>

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42. WILLIAM E. LEUCHTENBERG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 108 (1995).

43. The five were Hugo Black in 1937, Stanley Reed in 1938, Felix Frankfurter and William O. Douglas in 1939, and Frank Murphy in 1940. *Id.* at 220; Supreme Court Clerks Data Set, *supra* note 10.

44. The total of eight includes Harlan Fiske Stone: although he had first been appointed as an Associate Justice by Calvin Coolidge in 1924, he owed his appointment as Chief Justice to Roosevelt. The two additional Roosevelt appointees were James Francis Byrnes and Robert Jackson, both chosen in 1941. Byrnes left the Court to head the Office of Economic Stabilization in October 1942 and was succeeded by Wiley Rutledge. WILLIAM M. WIECEK, *THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953*, at 1, 51, 106, 110 (2006).

These appointments came less than five years after Roosevelt's failed attempt to reorganize the Court. The vigorous scholarly debate on the "court-packing" controversy asks whether the Justices transformed constitutional jurisprudence in response to the President. *See, e.g.*, BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION*

All of Roosevelt's appointees adopted Brandeis's practice of appointing young law school graduates as their clerks and replacing them after one or two years of service.<sup>45</sup> The old pattern of clerk stenographers died out, and a significant number of the young men and women who served as clerks over the next three decades went into teaching for their careers. Out of a total of 257 who served as law clerks between 1940 and 1959, career information exists for 219, of whom sixty, or 27.4 percent, became academics. An additional seven, or 2.7 percent, spent a significant part of their careers in government service, while eighteen, or 7.0 percent, ultimately ascended the bench. While these percentages were not as high as those of Brandeis's clerks, they were much higher than the pre-Brandeis numbers and suggest that the pattern Brandeis had created became institutionalized following his death.<sup>46</sup>

The key Justice in this process of institutionalization was Felix Frankfurter. According to Karl Llewellyn, Frankfurter's "greatest contribution to our law" was his effort to turn the judicial clerkship "into what shows high possibility of becoming a pervasive American legal institution."<sup>47</sup> Remember that, as a professor at Harvard Law School, Frankfurter had selected Brandeis's clerks.<sup>48</sup> In fact, his role in pointing the clerks toward academia had gone far beyond merely selecting them. During the 1920s, Frankfurter worked closely at Harvard with a

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11 (1998) ("Because each of the decisions comprising the revolution was handed down after Roosevelt's February 5, 1937 announcement of the plan, commentators quite naturally posited a causal link."); LEUCHTENBERG, *supra* note 42, at 162 ("[N]o event has had more momentous consequences than Franklin Roosevelt's message of February 1937."); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 14 (2000) ("[T]he 'Court-packing' plan . . . is treated . . . as chastening the Court and facilitating its accommodation to New Deal legislation."); Laura Kalman, *The Constitution, The Supreme Court, and the New Deal*, 110 *AM. HIST. REV.* 1052, 1053 (2005) (noting that the shift on the Court occurred "weeks after the president had announced his plan to add one justice to the Supreme Court for each one over the age of seventy who did not retire, up to fifteen justices"). Regardless of the answer to that question, the controversy and its aftermath helped establish a more stable balance of power between the Court and Congress. The Twenty-Second Amendment, for example, constrains the President's ability to control the Court by reducing the number of appointments he can potentially make.

45. The last Justices who consistently appointed clerks without law degrees were two of the "Four Horsemen" opposed to the New Deal, Willis Van Devanter and Pierce Butler. The other two, James Clark McReynolds and George Sutherland, appointed clerks both with and without law degrees. After McReynolds's retirement from the Court in 1941, every incoming clerk has had a law degree, and only one or two clerks in any given year have clerked at the Court in a previous term. Supreme Court Clerks Data Set, *supra* note 10; *see also* Newland, *supra* note 9, at 306 (Although the "system of employing recent law-school graduates for one-year terms is now the rule, it was not generally adopted until the advent of the Roosevelt court.").

46. Supreme Court Clerks Data Set, *supra* note 10.

47. KARL L. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 321 (1960).

48. STRUM, *supra* note 15, at 354.



number of S.J.D. students who assisted him in his scholarship; the best of them went on to become Justice Brandeis's clerks.<sup>49</sup> No wonder many of those clerks later went on to become professors: Frankfurter had launched them on that track upon graduation and had sent them on to Brandeis only after they had achieved some initial success as academic researchers. In short, Professor Frankfurter in the 1920s had made himself into a mentor who used Justice Brandeis as much as Justice Brandeis used him, creating a cadre of future leading legal academics to propagate his legal vision.

Needless to say, Felix Frankfurter did not alter his agenda when he ascended the bench. He continued to mentor law clerks to become professors who would advance his jurisprudential views just as he had mentored his best students in the past. In all, eighteen of Justice Frankfurter's thirty-seven law clerks for whom information exists became academics—that is, 48.6 percent—while fourteen, or 37.8 percent, spent some part of their working careers in government service. Four, or 10.8 percent, made their careers there.<sup>50</sup> One former Frankfurter clerk went to the bench.<sup>51</sup> In total, the percentage of Frankfurter's clerks in teaching and public service was comparable to that of Justice Brandeis.

The high percentage of Frankfurter clerks entering the academy and the government likely had an impact on the Court in general. First, Frankfurter's numbers for post-clerkship positions in legal academia raised the Court's average as a whole. When Frankfurter's clerks are subtracted from all of those serving at the Court between 1939 and 1962 (i.e., Frankfurter's time on the Court), only 19.5 percent of those remaining became professors.<sup>52</sup> Second, Frankfurter was a great proselytizer who undoubtedly tried to persuade other Justices to follow his model and mentor their law clerks as academics. While his colleagues, in large part, probably ignored him,<sup>53</sup> it is possible that at

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49. LEONARD BAKER, *BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY* 227–28 (1984); LIVA BAKER, *FELIX FRANKFURTER* 103 (1969); MICHAEL E. PARRISH, *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 160–61* (1982). The S.J.D. (*Scientiae Juridicae Doctor*) is Harvard Law School's designation of its most advanced degree, Doctor of Juridical Science; most other law schools designate this degree the J.S.D. (*Juris Scientiae Doctor*).

50. Supreme Court Clerks Data Set, *supra* note 10.

51. This was Vincent L. McKusick, Chief Justice of the Maine Supreme Judicial Court from 1977 to 1992. Supreme Court Clerks Data Set, *supra* note 10.

52. Out of 313 clerks who served during this period, seventy-nine became academics, and eighteen out of those seventy-nine clerked for Justice Frankfurter. Supreme Court Clerks Data Set, *supra* note 10.

53. See H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 6, 155–76 (1981) ("Frankfurter could not lead the Court and, much to his surprise, found himself faced with an opposing 'bloc.' "); ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 297–98, 322 (1994) (discussing Frankfurter's

least on a few occasions he might have been persuasive. Third, Frankfurter spread his message not only to his own clerks but also to the clerks of other Justices; he undoubtedly influenced some of them to enter the academy and provided placement assistance to them when they sought to do so.<sup>54</sup> Fourth, Frankfurter provided a model. At least at Harvard Law School, he was a magnet for students seeking to become academics: they understood that the path to a professorship, especially at Harvard, passed through Frankfurter's chambers.<sup>55</sup> But what if one did not receive an appointment with Justice Frankfurter? The next best option was to seek a clerkship with a different Justice. A number of highly prominent legal academics—among them Guido Calabresi (Yale; O.T. 1958, Justice Hugo Black), Norman Dorsen (N.Y.U.; O.T. 1957, Justice John Marshall Harlan II), and Frank Michelman (Harvard; O.T. 1961, Justice William Brennan)—did just that.

By the time that Justice Frankfurter retired in 1962, the pattern that he and Justice Brandeis had established had become sufficiently institutionalized that it remained in place. Of the 827 clerks who served at the Court during the three decades from 1960 to 1989, information is available on 786; of these, 244, or 31.1 percent, became professors. Many clerks during this period—155, or 19.7 percent—entered government service; of these, thirty, or 3.8 percent, spent most of their careers in government.<sup>56</sup>

No ideological pattern is discernable with regard to the tendency of different Justices between 1940 and 1990 to send their former clerks

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divisiveness and his failed expectation of being the Court's leader); JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* 127 (1989) (noting that within four years of his appointment Frankfurter had "lost his liberal majority and leadership").

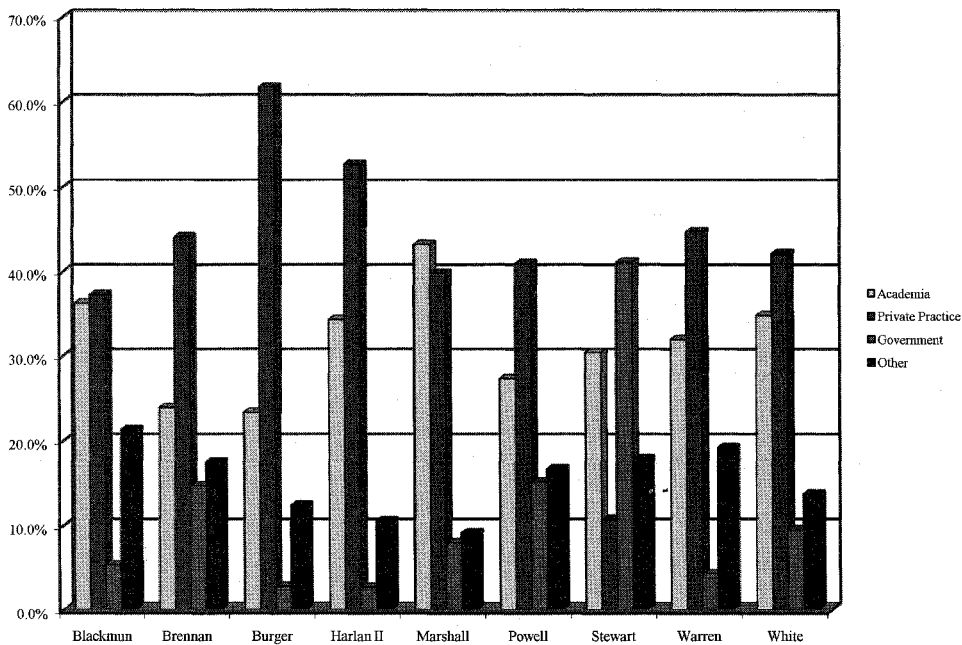
54. Interview with Jerome A. Cohen, Professor, New York Univ. Sch. of Law, in New York, N.Y. (Nov. 10, 2008); Interview with Norman Dorsen, Professor, New York Univ. Sch. of Law, in New York, N.Y. (Oct. 15, 2008).

55. See Erwin N. Griswold, *Felix Frankfurter—Teacher of the Law*, 76 HARV. L. REV. 7, 10–11 (1962) ("Through his succession of law clerks from the Harvard Law School he kept well informed about conditions at the School, and through his acquaintance with his own law clerks, and clerks to other Justices, too, he has been of great help in evaluating persons in whom we had an interest for possible membership on our Faculty."); see also Norman Dorsen, *Earl Warren, II*, in 2008 GREEN BAG ALMANAC & READER 93, 94 (Ross E. Davies ed.) ("[M]y professors . . . viewed Frankfurter's jurisprudence as close to gospel."); Norman Dorsen, *The Enigma of Felix Frankfurter*, 95 HARV. L. REV. 367, 385 n.101 (1981) (reviewing H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981) and discussing Frankfurter's influence on constitutional law teaching and scholarship at Harvard and elsewhere).

56. In total, over half (that is, 50.8 percent) of the 786 clerks in this time period became academics or served in government. It is perhaps noteworthy that in addition to the 155 practitioners who served in government, 160 of the 244 clerks who became professors also served in government. Government service, in short, seems to have been a rite of passage for many clerks, regardless of their ultimate destination. Supreme Court Clerks Data Set, *supra* note 10.

into teaching. As already noted, Justice Felix Frankfurter, regarded as a conservative by the time of his retirement, mentored a high percentage of academics—48.6 percent of his clerks. But a recognized liberal, Justice Thurgood Marshall, came in slightly behind him: out of his eighty-eight clerks, thirty-eight, or 43.2 percent, entered the ranks of law teachers, while another seven, or 8.0 percent, became government officials, judges, or public interest lawyers. In third place was Chief Justice Fred Vinson, a conservative: seven of his eighteen clerks, or 38.9 percent, became professors. Five Justices, ranging from conservative to liberal, had percentages in the thirties: Justice Harry Blackmun, who began as a conservative and became a liberal, with 36.2 percent; Justice Byron White, 34.7 percent; Justice Harlan II, 34.2 percent; Chief Justice Earl Warren, 31.9 percent; and Justice Potter Stewart, 30.4 percent.<sup>57</sup>

FIGURE I. CLERK CAREERS BY JUSTICE: WARREN AND BURGER COURTS



57. Thirty-four out of Justice Blackmun's ninety-four clerks became academics; Justice Harlan, thirteen out of thirty-eight; Justice White, thirty-three out of ninety-five; Chief Justice Warren, fifteen out of forty-seven; and Justice Stewart, seventeen out of fifty-six. Supreme Court Clerks Data Set, *supra* note 10.

FIGURE II. CLERK CAREERS BY JUSTICE: WARREN AND BURGER COURTS

	Academic	Private Practice	Government	Other
Blackmun (N=94)	36.2%	37.2%	5.3%	21.3%
Brennan (N=109)	23.9%	44.0%	14.7%	17.4%
Burger (N=73)	23.3%	61.6%	2.7%	12.3%
Harlan II (N=38)	34.2%	52.6%	2.6%	10.5%
Marshall (N=88)	43.2%	39.8%	8.0%	9.1%
Powell (N=66)	27.3%	40.9%	15.2%	16.7%
Stewart (N=56)	30.4%	10.7%	41.1%	17.9%
Warren (N=47)	31.9%	44.7%	4.3%	19.1%
White (N=95)	34.7%	42.1%	9.5%	13.7%

*Government service here includes members of the judiciary.*

In other respects as well, the Supreme Court clerkship appeared to be a nonpartisan institution from the 1940s into the 1980s. Unlike the pattern that would emerge after approximately 1990, there was no sign that conservative Justices favored clerkship applicants who had worked for lower court judges appointed by Republican Presidents, or that liberal Justices favored applicants from Democratic-appointed chambers.<sup>58</sup> On the Warren and Burger Courts, for instance, Justices

58. Several scholars have examined the hiring of Supreme Court clerks, and all have found increasing partisan polarization of the process since the 1980s. The first such study, by Corey Ditslear and Lawrence Baum, measured partisan polarization by comparing the party affiliations of Supreme Court Justices with those of federal circuit and district court judges, with whom clerks almost invariably serve before coming to the Supreme Court. They measured the affiliations of federal judges with a complex metric combining voting records, party of the appointing President, and other criteria. Corey Ditslear & Lawrence Baum, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J. POL. 869, 872–74 (2001). Most other scholars have in part followed a simplified version of the Ditslear and Baum method, focusing solely on the party of the appointing President. PEPPERS, *supra* note 7, at 31–37; WARD & WEIDEN, *supra* note 9, at 76–85. In a similar vein, scholars studying other branches of the federal judiciary have also controlled for judges' political affiliation by referring to the party of the appointing President. SUNSTEIN ET AL., *supra* note 3, at 6–7.

This metric has obvious imperfections. It assumes a strong correlation between party affiliation and ideological orientation; it ignores the possibility that judges might transform their political and doctrinal approaches while in office; and it ignores the role of the Senate in constraining the President's choice of nominees, particularly when opposing parties control the two political branches of government. Given these problems, both Peppers and Ward and Weiden supplement their analysis with data from surveys of clerks. Peppers & Zorn, *supra* note 5, at 53; PEPPERS, *supra* note 7, at 34–37; WARD & WEIDEN, *supra* note 9, at 99–107. However, these surveys have imperfections of their own: limited coverage (never amounting to a bare majority of the clerks) and problems in objectively evaluating self-professions of political ideology.

appointed by Republican Presidents showed an eagerness to hire clerks from Democratic-appointed federal judges. Fully 51.9 percent of Chief Justice Warren Burger's clerks with prior federal clerkship experience came from Democrats, along with 58.3 percent of Justice Powell's, and 81.8 percent of Justice Stewart's.<sup>59</sup> Similarly Justice White, appointed by President Kennedy, chose 45.8 percent of his clerks with prior federal clerkships from Republican-appointed lower court judges.<sup>60</sup> Although liberal Justices on the Warren and Burger Courts showed some tendency to favor clerks from Democratic-appointed judges—72.0 percent out of all clerks with federal clerkship experience for Justice Blackmun, 77.0 percent for Justice Brennan, 71.4 percent for Justice Marshall, and 70.0 percent for Chief Justice Warren himself,<sup>61</sup> these percentages do not match the partisan consistency of more recent conservative Justices.<sup>62</sup> (See Figure III, *infra*.) In the Stone and Vinson Courts, the practice of hiring law clerks with prior circuit or district court experience had not yet taken hold. Only four of Justice Black's clerks, for example, had such experience, although sixteen of Justice Frankfurter's clerks did, and they were selected 50 percent each from Democratic and Republican-appointed lower court judges.<sup>63</sup>

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Therefore, this Article focuses upon the party affiliation of the President appointing lower court judges. To existing studies, it adds data since 2001 and notes that Justices O'Connor, Souter, and Stevens cannot be readily characterized along straight party lines. Moreover, the studies cited largely break down the data by circuits and federal lower court judges, whereas the analysis here correlates the data with each Justice.

59. Of Chief Justice Burger's clerks with federal clerkship experience, twenty-eight out of fifty-four came from Democratic-appointed judges; Powell's, twenty-eight out of forty-eight; and Stewart's, twenty-seven out of thirty-three. Totals for these and all other Justices below, *see infra* notes 60–61 and accompanying text, do not include all the clerks for each Justice, since some clerks did not have lower federal court experience prior to joining the Supreme Court. For a very few clerks, information on a presumed lower court clerkship is not available. Supreme Court Clerks Data Set, *supra* note 10.

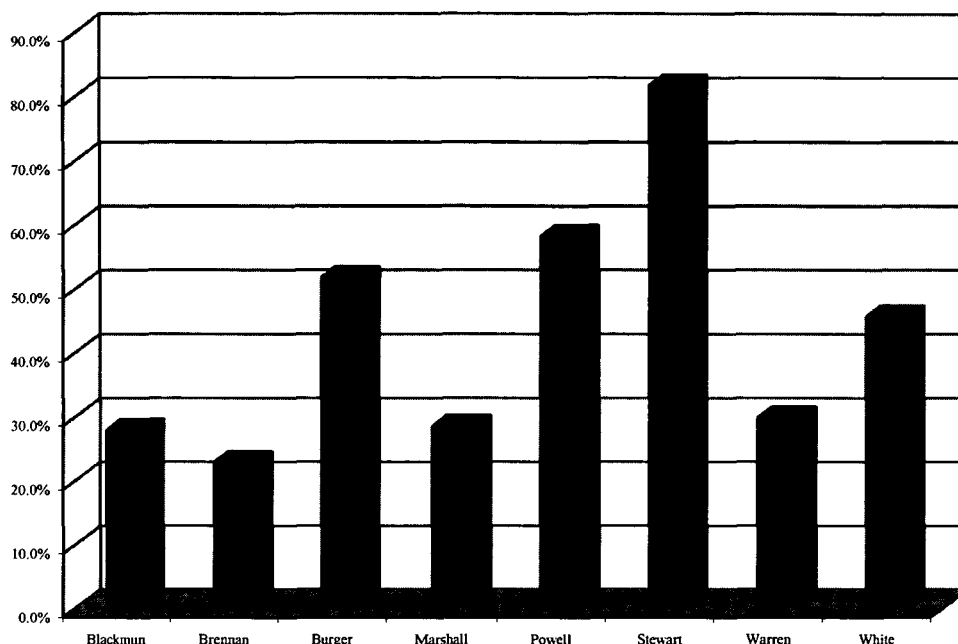
60. Of Justice Byron White's clerks, twenty-seven out of the fifty-nine with federal clerkship experience came from Republican-appointed federal judges. Supreme Court Clerks Data Set, *supra* note 10.

61. Of Justice Blackmun's clerks with federal clerkship experience, fifty-four out of seventy-five came from Democratic-appointed judges; Brennan's, fifty-seven out of seventy-four; Marshall's, fifty out of seventy; and Warren's, seven out of ten. Supreme Court Clerks Data Set, *supra* note 10.

62. *See infra* notes 94–96 and accompanying text.

63. Of Justice Frankfurter's clerks with federal clerkship experience, eight came from Democratic-appointed and eight from Republican-appointed judges. Supreme Court Clerks Data Set, *supra* note 10.

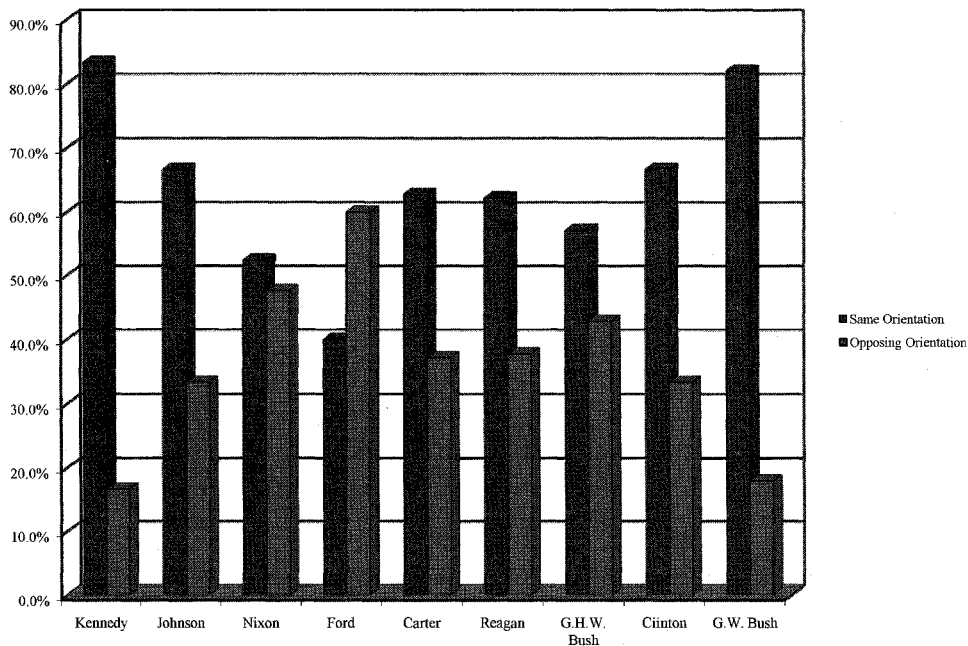
FIGURE III. PERCENTAGE OF CLERKS WITH LOWER COURT CLERKSHIPS FROM JUDGES APPOINTED BY PRESIDENTS FROM THE OPPOSING POLITICAL PARTY, BY JUSTICE: WARREN AND BURGER COURTS



Likewise, different presidential administrations prior to the 1990s hired clerks from chambers across the political spectrum. For example, the Nixon Administration took eleven out of its twenty-one (52.4 percent) former law clerks from chambers of conservative Justices; the Ford Administration, six out of fifteen (40.0 percent) from conservatives; the Carter Administration, twenty-seven out of forty-three (62.8 percent) from liberal chambers; the Reagan Administration, twenty-eight out of forty-five (62.2 percent) from conservatives; and the George H.W. Bush Administration, seventeen out of twenty-eight (60.7 percent). All told, in Republican administrations, slightly more than half of former law clerks came from conservative chambers, while in the Carter Administration the figure from liberal chambers was slightly over 60 percent.<sup>64</sup>

64. There is no centralized record of former Supreme Court clerks employed by the Executive Branch; statistics must be compiled from the biographical data of individual clerks. Therefore, it is likely that these figures are incomplete. Supreme Court Clerks Data Set, *supra* note 10.

FIGURE IV. HIRING OF FORMER CLERKS BY PRESIDENTIAL ADMINISTRATIONS: JOHN F. KENNEDY TO GEORGE W. BUSH



*Former clerks are categorized according to the political orientation of the Justice who hired them, as determined by the political party of the appointing President with the following exceptions: Justices Blackmun, Souter, Stevens, and Warren are counted with Democratic appointees.*

Finally, the clerkship that an individual held at that time was not a good predictor of that person's subsequent politics. Consider, for example, that Judge Richard Posner, appointed to the Seventh Circuit by President Ronald Reagan, clerked for the liberal Justice Brennan; Norman Dorsen, who became president of the American Civil Liberties Union, clerked for the more conservative Justice Harlan II; and the conservative Chief Justice Rehnquist clerked for the moderate Justice Robert Jackson.

In sum, Justice Brandeis's vision of former Supreme Court law clerks entering the legal academy had long-lasting effects. Large numbers of former clerks engaged in scholarly projects such as critiquing, explaining, and justifying the work of the Court, or generating historical and social science information for the Justices. This vision endured for some three-quarters of a century after Brandeis's ascension to the bench and became a norm for Justices and former clerks of all political persuasions.

From 1940 to 1990, former Supreme Court clerks developed into scholars of every political stripe. From Herbert Wechsler's "Toward Neutral Principles of Constitutional Law,"<sup>65</sup> through John Hart Ely's *Democracy and Distrust: A Theory of Judicial Review*,<sup>66</sup> to the book of one of the present co-authors, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine*,<sup>67</sup> former clerks continued to address matters of concern to the Justices. Scholarship on the part of former clerks ranges from the conservative work of Charles Fried<sup>68</sup> to the critical legal studies work of Mark Tushnet,<sup>69</sup> and the influential work of other figures including Alexander Bickel,<sup>70</sup> Frank Michelman,<sup>71</sup> Cass Sunstein,<sup>72</sup> and Martha Minow.<sup>73</sup> Collectively, most of their work—excepting critical legal studies—spread a message that law is distinct from politics and that the Supreme Court's decisionmaking transcends politics.

At least in the eyes of the emerging conservative movement, however, the institution of the Supreme Court clerkship was not non-partisan. As early as 1957, a conservative Phoenix lawyer and former

65. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

66. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

67. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

68. See, e.g., Charles Fried, *Privacy*, 77 YALE L.J. 475 (1967); Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1962).

69. See, e.g., Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1983); Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1980); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125; Mark Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261.

70. See, e.g., ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); ALEXANDER M. BICKEL, *POLITICS AND THE WARREN COURT* (1955); BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 8.

71. See, e.g., Frank I. Michelman, *Property As a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659; Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

72. See, e.g., *THE BILL OF RIGHTS IN THE MODERN STATE* (Cass R. Sunstein et al. eds., 1992); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127.

73. See, e.g., Martha Minow, *The Constitution and the Subgroup Question*, 71 IND. L.J. 1 (1995); Martha Minow, *The Supreme Court 1986 Term, Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1986); Martha Minow, "Forming Underneath Everything that Grows:" *Toward A New History of Family Law*, 1985 WIS. L. REV. 819.



clerk named William Rehnquist wrote an article in *U.S. News and World Report* charging that “the political cast of the clerks as a group was to the ‘left’ of either the nation or the Court.”<sup>74</sup> By the 1970s, conservatives thought that Justices Brandeis and Frankfurter had “developed a cohesive and pragmatic ideological program with support from legal academia” through which their acolytes dominated the output of the Supreme Court for half a century.<sup>75</sup> They “concluded . . . that the Left had very powerful networks of Harvard and Yale Law School, or past Supreme Court clerks who tended to be liberal, and those networks on the left tended to be very effective . . . at influencing legal developments in a liberal direction.”<sup>76</sup> Accordingly, as conservative legal activists gained organizational strength during the 1970s and 1980s, they set about “to replicate the function that major universities serve on the left of creating a community of people with similar views on similar issues.”<sup>77</sup>

### III. THE CONSERVATIVE COUNTERREACTION

No one doubts that Americans live today in a time of pervasive technological, economic, and hence social change. The presence of such change places enormous pressure on judges to accommodate legal doctrine to that change. Since the New Deal, liberals have argued that the judiciary has some capacity, however limited or robust, either to impede social change or to facilitate it and influence its direction. They have accordingly developed agendas entailing the development of new state capacities to formulate social policy, protect individual rights, and

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74. William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 54. Rehnquist, who clerked for Justice Robert H. Jackson during O.T. 1952, rejected the notion that clerks influenced the Justices' opinions, but concluded that their political views exerted an inappropriate influence over review of *certiorari* petitions. *Id.* In response to criticism, he subsequently published a reply: William H. Rehnquist, *Another View: Clerks Might “Influence” Some Actions*, U.S. NEWS & WORLD REP., Feb. 21, 1958, at 116.

75. Interview by Steven Teles with William H. “Chip” Mellor, President and Gen. Counsel, Inst. for Justice, *quoted in* STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 82 (2008) [hereinafter *TELES, CONSERVATIVE LEGAL MOVEMENT*]. The Institute for Justice is a libertarian public interest law firm, co-founded by Mellor.

76. Interview by Steven Teles with Steven G. Calabresi, George C. Dix Professor of Constitutional Law, Nw. Univ., *quoted in* *TELES, CONSERVATIVE LEGAL MOVEMENT*, *supra* note 75, at 165. Calabresi is a co-founder of the Federalist Society and currently serves on its Board of Directors. *See also* *TELES, CONSERVATIVE LEGAL MOVEMENT*, *supra* note 75, at 11–12 (“[P]artisan entrenchment occurs not only in courts, but also in the social institutions that feed the courts with ideas, personnel, and cases.”).

77. Interview by Steven Teles with Steven G. Calabresi, George C. Dix Professor of Constitutional Law, Nw. Univ., *quoted in* *TELES, CONSERVATIVE LEGAL MOVEMENT*, *supra* note 75, at 164.

facilitate economic regulation, as well as establishing a role for the courts as “managers of programs of social transformation.”<sup>78</sup>

The activists of the conservative legal movement are troubled by the judiciary’s capacity to promote this liberal model of social change.<sup>79</sup> They begin with a fear, which can be traced back over two centuries to the men who led the American Revolution,<sup>80</sup> that government is a dangerous entity that will oppress its subjects if left unrestrained. They assert that America’s founding generation shared their fear of

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78. Mark Tushnet, *Public Law Litigation and the Ambiguities of Brown*, 61 *FORDHAM L. REV.* 23, 28 (1992). For the agenda of progressive social change advanced by liberal legal scholars from the New Deal to recent years, see LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 49 (1996) (“Mostly united in favor of the social change the Warren Court sought to make, law professors disagreed over the means it used.”). For twentieth-century American liberalism more generally, see, for example, JAMES T. KLOPPENBERG, *THE VIRTUES OF LIBERALISM* (1998) and *THE RISE AND FALL OF THE NEW DEAL ORDER* (Steve Fraser & Gary Gerstle eds., 1989).

79. It is unclear what holds the broader conservative movement together—a matter of considerable scholarly investigation and debate. Modern American conservatism contains many disparate strands—Protestant evangelicals, libertarians, business lobbyists, conservative Catholics, anti-feminists, and foreign-policy-oriented neo-conservatives among them—making it difficult to isolate an ideological core of the movement as a whole. Hence the movement’s coherence comes from strategy, networks, and organization-building, as much as any ideological affinities. See, e.g., JACOB S. HACKER & PAUL PIERSON, *OFF CENTER: THE REPUBLICAN REVOLUTION & THE EROSION OF AMERICAN DEMOCRACY* 140 (2005) (describing how “effective coordination” of Republican “power brokers” ameliorates “real fissures” in Republican coalition); JEROME L. HIMMELSTEIN, *TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM* (1990) (analyzing the existence of specific social conditions and how the right positioned itself to take advantage of these opportunities). This coherence is constantly renegotiated and may dissolve even at critical points, such as President George W. Bush’s failed nomination of Harriet Miers to the Supreme Court in 2005. See Anthony Paik, Ann Southworth & John P. Heinz, *Lawyers of the Right: Networks and Organization*, 32 *L. & SOC. INQUIRY* 883, 886 (2007) (“[T]he varying constituencies on the conservative side of the political spectrum may fail to present a united front, even when the stakes are high.”).

However, the conservative legal movement is a comparatively well-organized and coherent branch of modern American conservatism, dominated by a “new class” of lawyers and legal academics distinct from the twin pillars of the conservative movement as a whole: business interests and social conservatives. The Federalist Society for Law and Public Policy Studies crucially strengthens the movement’s coherence by providing it with a forum for policy discussions, recruiting, and networking, even though it does not take official policy positions or endorse candidates. See TELES, *CONSERVATIVE LEGAL MOVEMENT*, *supra* note 75, at 3, 135–37, 274–77 (noting that there was “a shift of power within the conservative legal movement, from grassroots activists, Republican politicians, and business to a ‘new class’ of legal professionals and academics.”); Paik, Southworth & Heinz, *supra*, at 910–12 (concluding that “a set of notables successfully occupied the space between religious conservatives and business interests.”).

80. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 47 (1967) (arguing that thinkers of American Revolution, strongly influenced by opposition writers in England, saw government as “by its very nature . . . hostile to human liberty and happiness”). Modern American conservatives repeatedly assert that the Founders believed in the necessity of limiting government; for an influential example of this argument, see RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO SANTAYANA* 6 (1953) (identifying John Adams as a major conservative thinker, and arguing that “the American Revolution, substantially, had been a conservative reaction, in the English political tradition, against royal innovation”).

government and therefore created constitutional structures, such as federalism, separation of powers, judicial review, and the rule of law, to restrain the formation of state capacities that would impede the exercise of property rights, weaken personal or religious liberty, or endanger the traditional social order.

Legal conservatives accordingly object to giving judges a role in accommodating the law to social change. They reject the view of Justice Brandeis and his acolytes that judges, with the assistance of academics, should sculpt legal and constitutional doctrine to meet society's needs and promulgate rules designed to nudge society in progressive directions. The job of judges, in the view of such conservatives, is to put the brakes on government actors seeking to promote social change, not themselves to become agents of change. The duty of judges is "to interpret the law, not write it,"<sup>81</sup> not to behave as "a super-legislature" responsive to a liberal "advocacy movement with a well-defined legal and social agenda."<sup>82</sup> Judges who act as legislators get their role precisely backwards: their proper role is to slow change down, not to facilitate it.

Of course, members of the conservative legal movement disagree vehemently with each other about the specifics of what the law, especially the law of the Constitution, is.<sup>83</sup> Some are strict originalists who believe that the democratic mandate of the Constitution demands that judges apply its provisions according to their original meaning.<sup>84</sup>

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81. 149 CONG. REC. S120-3 (daily ed. Jan. 9, 2003) (statement of Sen. Hatch), *quoted in* TELES, CONSERVATIVE LEGAL MOVEMENT, *supra* note 75, at 152.

82. TELES, CONSERVATIVE LEGAL MOVEMENT, *supra* note 75, at 80 (quoting planning documents authored by William H. Mellor and Clint Bolick during the creation of the Center for Constitutional Litigation, a conservative public interest law firm).

83. The Federalist Society, arguably the most representative entity of the conservative legal movement, has adopted a conscious policy of fostering debate among its members rather than formulating organizational positions. *See* TELES, CONSERVATIVE LEGAL MOVEMENT, *supra* note 75, at 142–45, 152–53, 163–64 ("[T]he society sought to make its ideas attractive to those not affiliated to conservatism.").

84. Justice Clarence Thomas has staked out the most consistently originalist position on the Rehnquist and Roberts Courts, though it is unclear whether he adheres to a jurisprudence of the original intent of the framers, or the original public meaning of the Constitution. *See, e.g.,* *Kelo v. City of New London*, 545 U.S. 469, 523 (2005) (Thomas, J., dissenting) ("When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning."); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) ("I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause."); *see also* SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 104 (1999) (arguing that Thomas' originalism was "rather a 'liberal' originalism grounded in the natural rights political philosophy of the Declaration of Independence").

Others are natural lawyers—some of a religious<sup>85</sup> and some of a secular variety.<sup>86</sup> Others recognize that judges have changed and thereby made law in the past and are willing to accept those past changes, such as *Brown v. Board of Education*,<sup>87</sup> as legitimate on a theory that long acceptance confers legitimacy.<sup>88</sup> A few activist libertarians are even prepared to use courts proactively to reinvigorate old rights, but not, they would claim, to change or make law in response to progressive, egalitarian agendas.<sup>89</sup>

For our purposes, what matters most is this: virtually all legal conservatives reject the liberal vision of *Roe v. Wade*<sup>90</sup> and like cases where judge-made law has responded to and facilitated a progressive model of social change. As a result, few conservatives are inclined to write scholarship in the Brandeisian mold of Paul Freund, Henry Hart, Willard Hurst, Louis Jaffe, or David Riesman.<sup>91</sup> Thus, what they are inclined to write, other than in the well-established field of law and economics, is not likely to be highly respected in the largely liberal legal academy of today.<sup>92</sup> As a result, conservatives may find it more difficult

85. One of the most prominent religious theorists of natural law in the United States is John T. Noonan, a former professor of law who was appointed to the United States Court of Appeals for the Ninth Circuit by President Reagan. See, e.g., JOHN T. NOONAN, JR., *POWER TO DISSOLVE* (1972); JOHN T. NOONAN, JR., *THE SCHOLASTIC ANALYSIS OF USURY* (1956).

86. See, e.g., CHARLES FRIED, *MODERN LIBERTY AND THE LIMITS OF GOVERNMENT* 180–83 (2006) (examining notions of individual liberty in the modern welfare state, and asserting that it is the duty of lawyers, judges, legislators, and economists to protect and maintain a “spirit of liberty”); CHARLES FRIED, *RIGHT AND WRONG* 138 (1978) (“[I]n law it is a legal and a moral question how to interpret and when to abrogate a grant of right.”).

87. 347 U.S. 483 (1954).

88. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866 (1992) (opinion of O’Connor, Kennedy & Souter, JJ.) (“There is a limit to the amount of error that can plausibly be imputed to prior Courts. . . . The legitimacy of the Court would fade with the frequency of its vacillation.”); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 139–40 (1997) (“[S]tare decisis is not part of my originalist philosophy; it is a pragmatic exception to it.”).

89. See TELES, *CONSERVATIVE LEGAL MOVEMENT*, *supra* note 75, at 80, 221 (“[Conservative public interest law firms] had learned that conservative interests could only be protected by actively using courts to establish new or reinvigorate old rights.”).

90. 410 U.S. 113 (1973).

91. See, e.g., PAUL FREUND, *ON LAW AND JUSTICE* 22 (1968) (comparing the Constitution to “a work of art in its capacity to respond through interpretation to changing needs, concerns, and aspirations.”); HART & SACKS, *supra* note 24, at 3 (“[A]s people gain in experience and social conditions change, existing understandings will prove from time to time inadequate . . . .”); LOUIS L. JAFFE, *ENGLISH AND AMERICAN JUDGES AS LAWMAKERS* 85 (1969) (“[E]ven in a parliamentary democracy a vigorous, independent judiciary can make important contributions to the solution of problems demanding lawmaking . . . . The judiciary can enforce the Constitution and rework it to meet new challenges.”).

92. For an illustration of liberal criticism of conservative scholarship and conservative rejection of the critique, compare Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 525–26 (1995) (criticizing conservative legal scholars

than liberals to obtain the academic posts they desire, may not have the same incentives as liberals to join the legal academy, and tend to pursue other post-clerkship jobs.

Around 1990, the conservative ascendancy began to produce transformations in the institutional practices surrounding the office of the Supreme Court law clerk, especially in the hiring process and in patterns of post-clerkship employment. These transformations reflect the two major strategic avenues pursued by the conservative legal movement: entering and establishing legitimacy within institutions heretofore dominated by legal liberals, and creating alternative institutions.<sup>93</sup>

### A. *The Hiring Process*

The hiring of Supreme Court clerks has developed a marked pattern of political polarization in recent decades. Thus, the four most conservative Justices serving for a significant length of time on the Rehnquist and Roberts Courts—Justice Anthony Kennedy, Chief Justice Rehnquist, Justice Scalia, and Justice Clarence Thomas—have shown remarkable partisan consistency in selecting their clerks. 92.4 percent of Justice Kennedy’s clerks with prior federal clerkship experience, 79.4 percent of Chief Justice Rehnquist’s, 92.7 percent of Justice Scalia’s, and 100 percent of Justice Thomas’s served with federal district or circuit court judges appointed by Republican Presidents.<sup>94</sup> In contrast, 58.0

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for making “poorly supported” historical generalizations to support constitutional arguments, which “are at best deeply problematic and at worst, howlers”), with Richard A. Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 COLUM. L. REV. 591, 592 (1995) (arguing that “history offers us *too much* information, without the means of sorting it out,” and the Constitution can often be understood simply through “ordinary words as understood in the popular discourse of the time”). For an earlier liberal critique of conservative scholarship, see Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL. HIST. 275, 276 (1973) (asserting that the tradition of legal history “contain[s] fundamentally conservative political preferences dressed up in the neutral garb of expert and objective legal history”). Cass Sunstein suggests that differences between liberal and conservative scholars of constitutional history stem from the fact “that the political or moral commitments of the constitutional lawyer are an omnipresent part of the constitutional lawyer’s constitutional history.” Cass R. Sunstein, *The Idea of a Usable Past*, 95 COLUM. L. REV. 601, 602 (1995) (citing G. Edward White, *Reflections on the “Republican Revival”: Interdisciplinary Scholarship in the Legal Academy*, 6 YALE J.L. & HUMAN. 1 (1994)).

93. For a discussion of these two strategies in the growth of the law and economics movement, see TELES, CONSERVATIVE LEGAL MOVEMENT, *supra* note 75, at 216–19.

94. Of Justice Kennedy’s clerks with federal clerkship experience, seventy-three out of seventy-nine came from Republican federal circuit or district court judges; Rehnquist, seventy-seven out of ninety-seven; Scalia, seventy-six out of eighty-two; and Thomas, all sixty-four clerks. Totals for these and all other Justices below, see *infra* notes 95–96 and accompanying text, do not include all the clerks for each Justice, since some clerks did not have lower federal court experience prior to joining

percent of Justice Stephen Breyer's clerks with prior federal clerkship experience, 65.4 percent of Justice Ruth Bader Ginsburg's, 64.1 percent of Justice Souter's, and 70.6 percent of Justice John Paul Stevens's came from Democratic-appointed judges.<sup>95</sup> Such polarization is unprecedented in the history of the Court. Only Justice Sandra Day O'Connor split her clerks evenly: 50.0 percent came from Republican-appointed and 50.0 percent from Democratic-appointed lower court judges.<sup>96</sup>

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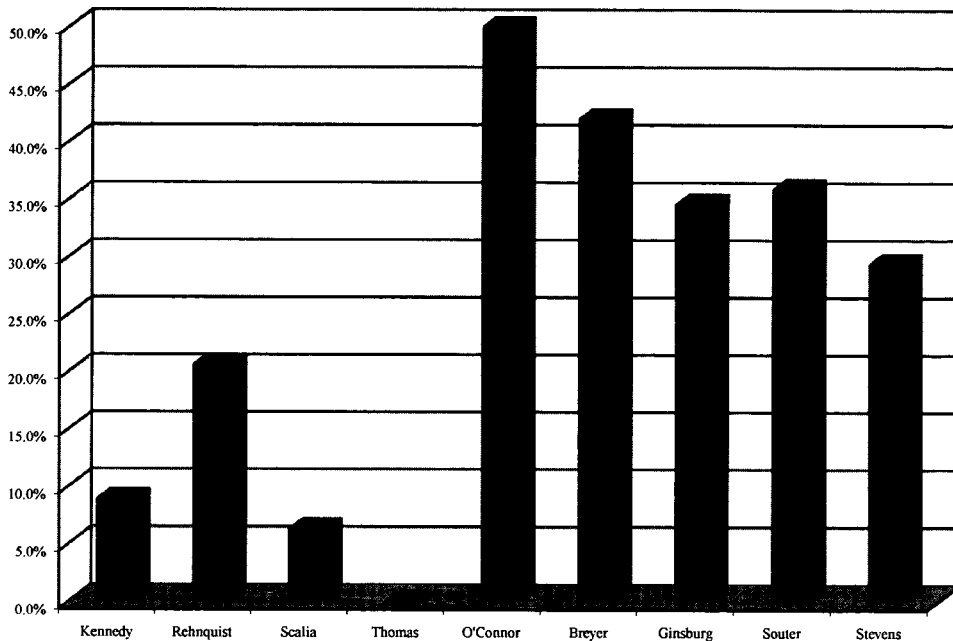
the Supreme Court. For a very few number of clerks, information on a presumed lower court clerkship is not available. Not enough data yet exists for Chief Justice John Roberts and Justice Samuel Alito; as of O.T. 2006, both Justices have maintained a spotless record of hiring from Republican-appointed judges. Supreme Court Clerks Data Set, *supra* note 10.

For the methodological issues involved in measuring partisan polarization of clerk hiring through the party affiliation of lower court judges, see *supra* note 58.

95. Of Justice Breyer's clerks with federal clerkship experience, twenty-nine out of fifty came from Democratic-appointed circuit and district court judges: Ginsburg, thirty-four out of fifty-two; Souter, forty-one out of sixty-four; and Stevens sixty out of eighty-five. It is not surprising that Justices Breyer, Ginsburg, Souter, and Stevens appoint a lower percentage of clerks from Democratic-appointed lower court judges than do Justices Kennedy, Rehnquist, Scalia, and Thomas from Republican judges since there are significantly fewer Democratic appointees serving on the lower courts. For example, there are currently sixty-three Democrats sitting on the federal circuit courts of appeals, compared with 101 Republicans. The numbers were very briefly even at the close of the Clinton administration—seventy-six and seventy-six, but given Republican domination of the White House since 1968, Republican-appointed judges typically have constituted a majority of federal circuit court judges in recent decades. Supreme Court Clerks Data Set, *supra* note 10; see also WARD & WEIDEN, *supra* note 9, at 99–107 (“There is considerable evidence to suggest that some clerks limit their applications to particular justices for partisan reasons.”); *Appeals Courts Pushed to Right by Bush Choices*, N.Y. TIMES, Oct. 29, 2008, at A1 (asserting that President Bush transformed the federal appellate courts by appointing younger and more conservative judges).

96. Of Justice O'Connor's clerks with federal clerkship experience, forty-nine out of ninety-eight came from Democratic-appointed judges and forty-nine from Republican-appointed judges. Supreme Court Clerks Data Set, *supra* note 10.

FIGURE V. PERCENTAGE OF CLERKS WITH LOWER COURT CLERKSHIPS FROM JUDGES APPOINTED BY PRESIDENTS FROM THE OPPOSING POLITICAL PARTY, BY JUSTICE: REHNQUIST COURT



A similar pattern of polarization exists for at least some of the conservative Justices when we turn to analysis of the law schools from which they have selected their clerks. The ranks of Supreme Court law clerks have always been dominated by graduates of elite law schools, where faculty typically have tended to possess a liberal bias.<sup>97</sup> From

97. Throughout this article, elite schools are defined as those that have reached the top ten in the law school rankings published annually by *U.S. News & World Report*, including those tied for tenth place, at any time since the rankings began in 1987: Columbia, Cornell, Duke, Georgetown, Harvard, New York University, Northwestern, Stanford, the University of California at Berkeley, the University of Chicago, the University of Michigan, the University of Pennsylvania, the University of Virginia, and Yale. *Best Law Schools*, in *America's Best Grad Schools 2010*, U.S. NEWS & WORLD REP., MAY 2009, at 74 (ranking Yale, Harvard, Stanford, Columbia, New York University, Berkeley, Chicago, University of Pennsylvania, University of Michigan, Duke, Northwestern, and University of Virginia in the top ten); *Schools of Law*, in *Best Graduate Schools*, U.S. NEWS & WORLD REP., Mar. 29, 1999, at 94 (ranking Cornell at number ten); *Law*, in *America's Best Graduate Schools*, U.S. NEWS & WORLD REP., Mar. 22, 1993, at 62 (ranking Georgetown at number ten). While not all of these schools enjoyed their current prestige in earlier decades, all the leading schools of those earlier decades are included in this list. Patterns of hiring from particular schools are examined more fully in PEPPERS, *supra* note 7, at 23–31; WARD & WEIDEN, *supra* note 9, at 69–76.

1940 through 1969, 83.9 percent of all clerks earned law degrees from elite schools;<sup>98</sup> in the next two decades, the percentage remained nearly constant at 83.4 percent. From 1990 to 2006, the percentage edged up slightly, to 89.6 percent of all clerks.<sup>99</sup>

This consistency, however, masks a divergence between the liberal Justices of the Rehnquist Court and some of the conservatives. The liberal Justices have shown extreme partiality toward the elite schools. Fully 96 percent of Justice Breyer's clerks, 94.6 percent of Justice Ginsburg's, 98.5 percent of Justice Souter's, and 90 percent of Justice Stevens's clerks have come from these rarefied institutions. Justice O'Connor chose 87 percent of her clerks from the same schools. The pattern for Justice Kennedy is likewise consistent with that of the liberals—at 92.3 percent. There is one notable difference in Justice Scalia's choices: although 96.3 percent of his clerks have come from elite schools, there is no randomness in the non-elite institutions from which he has selected clerks—the entire 3.7 percent come from a single religiously oriented school, Notre Dame.<sup>100</sup> It may be that Justices Scalia and Kennedy are following a strategy of bolstering a conservative presence within established institutions formerly dominated by liberals, and that the clerks they select from elite schools are more conservative from those chosen by liberal Justices. While our data cannot verify these hypotheses, they do establish that Justice Thomas diverges toward a distinctive pattern, with only 81.5 percent of his clerks coming from top-ranked schools and fully 24.6 percent of his clerks from a single such school—the University of Chicago, which had a somewhat conservative cast during much of the time in question. Chief Justice Rehnquist was the greatest outlier, choosing only 66.3 percent of his clerks from elite schools.<sup>101</sup>

As other scholars have noted, individual Justices have made their own particularized arrangements for the clerk selection process. Most Justices have so-called “feeder judges” in the federal appellate

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For discussions of the allegedly liberal bias of elite law school professors, see, for example, John O. McGennis, Matthew A. Schwartz, & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167 (2005); Adam Liptak, *If the Law is an Ass, the Law Professor is a Donkey*, N.Y. TIMES, Aug. 28, 2005, at 4.4.

98. Information on legal education is lacking for a sizeable number of clerks who served between 1882 and 1939. Given the information available, it can be stated that 55.8 percent of all clerks during this period (including those without law degrees and for whom there is no information) came from elite schools, including 38.1 percent from Harvard. Supreme Court Clerks Data Set, *supra* note 10.

99. Supreme Court Clerks Data Set, *supra* note 10.

100. *Id.*

101. *Id.*



courts who supply a significant share of their clerks.<sup>102</sup> Generally, feeder judges have been appointed by Presidents of the same party who appointed the Justices hiring from them. Some Justices enlist current clerks to help them select new clerks for the following year, and Justice Kennedy reportedly uses a committee composed partly of former clerks to screen applications.<sup>103</sup> Both these measures may reinforce the polarization of clerk hiring, assuming that the judges and former clerks filtering applications share the political orientation of the hiring Justice, as seems likely.

Recent changes in the hiring process may encourage an even higher degree of polarization. Increasing numbers of clerks are spending time in practice before their Supreme Court clerkship, departing from the standard route of a federal appellate clerkship directly after law school.<sup>104</sup> These clerks generally practice for a year before their clerkships, ordinarily with a major law firm with a Supreme Court practice or with the federal government. Others serve multiple clerkships, with federal district courts in addition to federal circuit courts, before heading to the Supreme Court.<sup>105</sup> While hiring clerks with work experience may increase clerk diversity and yield clerks with stronger qualifications, the practice also provides more evidence of the

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102. Looking at the circuit judge who supplied the most clerks for each Justice as of O.T. 2006, Justice Scalia had chosen 18 percent of all his clerks (fifteen out of eighty-three), and Justice Thomas 26.6 percent (seventeen out of sixty-four), from the chambers of Judge J. Michael Luttig of the Fourth Circuit—a former clerk of Justice Scalia when he was on the D.C. Circuit. Justice Kennedy had chosen 21.5 percent of his clerks (seventeen out of seventy-nine), and Justice O'Connor 11.0 percent (eleven out of one hundred), from Judge Alex Kozinski of the Ninth Circuit. Chief Justice Rehnquist never chose more than four of his clerks from any particular circuit judge. As for the liberals, Justice Ginsburg has taken 11.1 percent of her clerks (six out of fifty-four), and Justice Stevens 6.5 percent (six out of ninety-two), from the chambers of Judge David S. Tatel of the D.C. Circuit. Justice Breyer has taken 18.0 percent of his clerks (nine out of fifty) from Judge Guido Calabresi of the Second Circuit, while Justice Souter has taken 12.3 percent of his clerks (eight out of sixty-five) from Judge Michael Boudin of the First Circuit. *Id.*

The practice of hiring from “feeder judges” appears to have originated with Justice Brennan, who took twelve of his 109 clerks from Judge J. Skelly Wright of the D.C. Circuit and another twelve from Judge David Bazelon, also of the D.C. Circuit. Justice Marshall also took ten of his eighty-eight clerks from Judge Wright. *Id.* For further discussion of “feeder” judges, see PEPPERS, *supra* note 7, at 31–34; WARD & WEIDEN, *supra* note 9, at 76–85.

103. See PEPPERS, *supra* note 7, at 200–03 (describing Justice Thomas’s practice of having current clerks meet with applicants and Justice Kennedy’s clerk selection committee); WARD & WEIDEN, *supra* note 9, at 61–63 (describing involvement of clerks in selection process, and Justice Kennedy’s clerk selection committee comprised of his son Gregory, a New York attorney, and a number of former clerks).

104. Tony Mauro, *Clerks Follow New Path to High Court: In Break with Past, Majority Have Had Work Experience*, LEGAL TIMES, Oct. 21, 2002, at 1.

105. *Id.* (noting that the “time-honored path” for law clerks is a lower court clerkship, immediately followed by a position at the Supreme Court.”).

clerks' political connections and orientations, and may reinforce the polarization of their post-clerkship careers within the federal government and private practice, as discussed below.

In short, statistical evidence supports the claim that the recent hiring of clerks by conservative Justices has taken on an increasingly partisan character. Whatever impact these hiring practices may have upon the decisionmaking process, they correlate strongly with significant new trends in the careers of law clerks once they leave the Court. It is on these trends that we must focus, since they suggest that the traditional triangular relationship between the Court, the clerks, and the academy is changing.

### *B. Post-Clerkship Employment*

#### 1. The Academy

An examination of the post-Supreme Court careers of law clerks to the four conservative Justices indicates that those clerks—who, as suggested above, have less interest in producing Brandeisian sorts of scholarship—have tended not to follow established patterns into law teaching. Of the four, only Justice Scalia's clerks have entered teaching at a percentage approaching the Court's earlier average of 30.2 percent during the 1940-1989 period<sup>106</sup>—26.5 percent, or twenty-two out of eighty-three clerks. The percentage of Justice Thomas's clerks entering academia is lower—18.8 percent, or twelve out of sixty-four—while those of Justice Kennedy's and Chief Justice Rehnquist's clerks are lower still, with Kennedy at 17.7 percent, or fourteen out of seventy-nine, and Rehnquist at 15.4 percent, or sixteen out of 104. In all, only 19.4 percent, sixty-four out of a total of 330 law clerks from the four conservative chambers, have become professors.

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106. From 1940 through 1989, 304 out of the 1,005 clerks for whom information is available served in academia. A total of 1,084 clerks served during these decades. Supreme Court Clerks Data Set, *supra* note 10.

FIGURE VI. CLERK CAREERS BY JUSTICE: REHNQUIST COURT

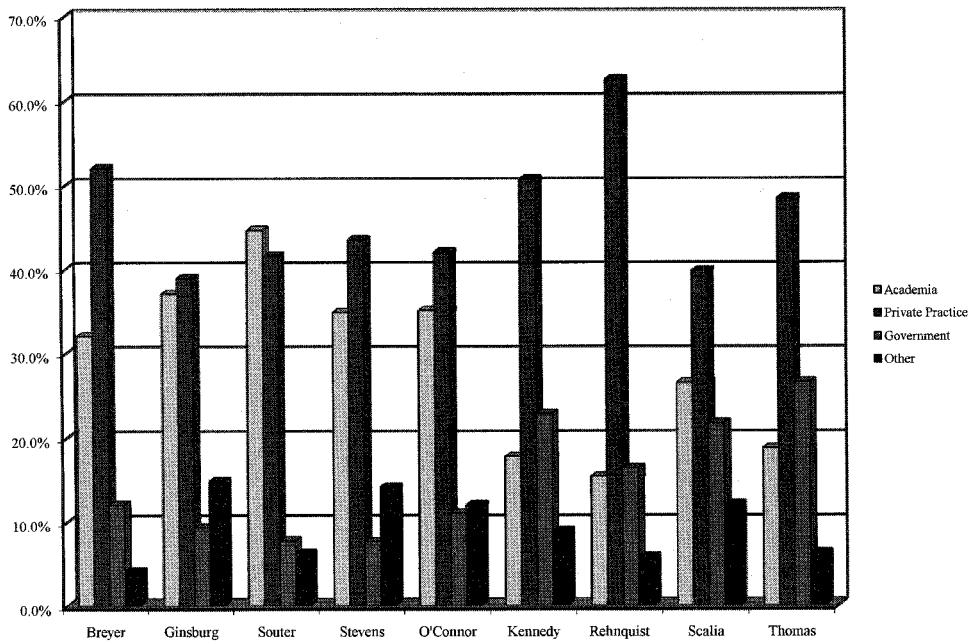


FIGURE VII. CLERK CAREERS BY JUSTICE: REHNQUIST COURT

	Academic	Private Practice	Government	Other
Breyer (N=50)	32.0%	52.0%	12.0%	4.0%
Ginsburg (N=54)	37.0%	38.9%	9.3%	14.8%
Souter (N=65)	44.6%	41.5%	7.7%	6.2%
Stevens (N=92)	34.8%	43.5%	7.6%	14.1%
O'Connor (N=100)	35.0%	42.0%	11.0%	12.0%
Kennedy (N=79)	17.7%	50.6%	22.8%	8.9%
Rehnquist (N=104)	15.4%	62.5%	16.3%	5.8%
Scalia (N=83)	26.5%	39.8%	21.7%	12.0%
Thomas (N=64)	18.8%	48.4%	26.6%	6.3%

*Government service here includes members of the judiciary.*

Even this number overstates the percentage following the traditional liberal path. Out of the total sixty-four clerks of the conservative Justices who have joined the academy, nine have gone to religiously oriented<sup>107</sup> or otherwise conservative-leaning<sup>108</sup> faculties that hired few or no former law clerks prior to recent decades. Only twenty-two out of 330, or 6.7 percent of the former law clerks from conservative chambers have gone into teaching in the elite, highly ranked law schools to which clerks had customarily gone, compared with Brandeis and Frankfurter averages of 33.0 percent and 45.9 percent<sup>109</sup> and the average for the Court as a whole between 1940 and 1989 of 18.0 percent.<sup>110</sup>

Clerks from the chambers of Justice O'Connor and the four liberal Justices, on the other hand, have remained tied to the traditional pattern. Out of Justice O'Connor's 100 clerks, thirty-five, or 35.0 percent, became academics; for Justice Stevens, the figure is thirty-two out of ninety-two, or 34.8 percent; for Justice Breyer, sixteen out of fifty, or 32.0 percent; for Justice Ginsburg, twenty out of fifty-four, or 37.0 percent; and for Justice Souter, twenty-nine out of sixty-five, or 44.6 percent. The total is 132 out of 361 former clerks—36.6 percent. Of the total, sixty—or 16.6 percent—have gone to teach at elite schools.<sup>111</sup>

## 2. Private Practice

The trend of conservative clerks away from teaching has not, however, produced a decline in their efforts to influence the Court. Since the early 1980s a new phenomenon—the creation of Supreme Court practice groups in large national law firms—has emerged.<sup>112</sup> With

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107. Notre Dame Law School (Roman Catholic) (4), J. Reuben Clark Law School at Brigham Young University (Church of Jesus Christ of Latter Day Saints) (2), and Pepperdine University School of Law (Churches of Christ) (1). *Id.*

108. George Mason University School of Law (2). *Id.* On the conservative character of George Mason, see TELES, CONSERVATIVE LEGAL MOVEMENT, *supra* note 75, at 207–16.

109. Five of Brandeis's twenty-one clerks spent the majority of their careers at Harvard, one at Yale, and one at Northwestern. Brandeis did not encourage his clerks to teach only at elite schools, and a number of them, such as Willard Hurst, spent their careers at nonelite schools such as Wisconsin, while others, such as Louis Jaffee, began their careers at nonelite schools such as Buffalo. Of Frankfurter's thirty-seven clerks, seven taught at Harvard, two at Columbia, two at New York University, two at the University of Chicago, two at Yale, and one each at Georgetown and the University of Pennsylvania. Supreme Court Clerks Data Set, *supra* note 10.

110. For these purposes, elite schools are defined in the same fashion as above. *See supra* note 97. Of the total of 1,005 clerks from this period for whom information is available, 181 spent the majority of their careers teaching at one or more elite schools. *Id.*

111. *Id.*

112. This phenomenon was noted by one of its foremost exponents, Chief Justice John Roberts, while he was a judge on the U.S. Court of Appeals for the D.C. Circuit. John G. Roberts, Jr., *Oral*

signing bonuses as high as \$200,000, which have attracted national press attention and a rebuke from Justice Kennedy,<sup>113</sup> most of these firms staff their practice groups with former clerks who now dominate advocacy before the Court and who, it has been suggested, have disproportionate influence on the Justices.<sup>114</sup> As a result, private firm employment of former clerks has changed drastically, with the earlier mix of regional, Washington, D.C., and New York corporate firms giving way to domination by specialized appellate practices centered in Washington.<sup>115</sup> Moreover, the majority of those firms that consistently

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*Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 77 (2005); see also KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* 22–25 (1993) (“[A]s the ranks of professional representatives began to swell in the nation’s capital, so too did the reliance of litigants upon Washington-based Supreme Court counsel.”); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1497–1501 (2008) (examining the development of Supreme Court practice groups); Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and its Effect on Certiorari*, 9 J. APP. PRAC. & PROCESS 175, 176–78 (2007) (examining the rise of Supreme Court practice groups and how they exemplify “the degree to which Supreme Court practice has become dominated by a handful of repeat players”); Posting of Tom Goldstein to SCOTUSblog, *The Expansion of the “Supreme Court Bar,”* <http://www.scotusblog.com/wp/the-expansion-of-the-supreme-court-bar/> (Mar. 2, 2006, 11:32 EST).

113. Charles Lane, *Former Clerks’ Signing Bonuses Rival Salaries on the High Court*, WASH. POST, May 15, 2006, at A15; Tony Mauro, *Big Bucks Used to Woo Clerks at High Court*, LEGAL TIMES, June 21, 2004, at 1. For Justice Kennedy’s comments, see *Fiscal Year 2007 Appropriations for the Supreme Court: Hearing Before the Subcomm. on Transp., Treasury, Hous. and Urban Dev., the Judiciary, D.C. of the H. Comm. on Appropriations*, 109th Cong. 217 (2006) (testimony of Anthony M. Kennedy, Associate Justice of the United States Supreme Court) (asserting that the fact that Supreme Court clerks’ sign-up bonuses and salaries are equal to the salaries of Supreme Court justices “devalues the position of the judiciary”) and *Judicial Security and Independence: Hearing before the Senate Comm. on the Judiciary*, 110th Cong. 8 (2007) (testimony of Anthony M. Kennedy, Associate Justice of the United States Supreme Court) (“Something is wrong when a judge’s law clerk, just one or two years out of law school, has a salary greater than that of the judge or justice he or she served the year before.”).

114. Karen O’Connor & John R. Hermann, *The clerk connection: appearances before the Supreme Court by former law clerks*, 78 JUDICATURE 247, 249 (1995) (finding that former clerks are more active before the Supreme Court than non-clerks); Tony Mauro, *New Study Suggests Veteran Advocates Sway Supreme Court*, LEGAL TIMES, Oct. 22, 2007, at 1 (“[M]ore and more of the Court’s cases are brought and argued by the seasoned veterans who have honed Supreme Court practice into a fine, and exclusive, art form.”); Emma Schwartz & Tony Mauro, *Firms Buying their Way into an Exclusive Club*, LEGAL TIMES, Mar. 20, 2006, at 1 (noting a trend among top law firms to bulk up their Supreme Court and appellate practices); Tony Mauro, *Arguing on High: An Appealing Practice*, LEGAL TIMES, Oct. 9, 2000, at 14 (examining emerging Supreme Court practice groups, “most of them populated by former Court law clerks and alumni of the [Solicitor General’s] office”).

115. As late as the 1980s, New York corporate practices and specialized appellate practices (mostly centered in Washington, D.C.) achieved rough parity in hiring former clerks, and few (if any) firms hired more than five clerks in any particular decade. Both the D.C. firm Covington & Burling and the New York firm Cravath, Swaine, & Moore hired five clerks who served on the Court between 1980 and 1989, while New York corporate firms Skadden, Arps, Slate, Meagher & Flom and Debevoise & Plimpton joined the appellate practices of Kirkland & Ellis and Morrison & Foerster in hiring four. This parity disappeared in the 1990s; the appellate practices of Sidley

hire clerks show a pronounced preference for hiring from chambers on just one side of the political spectrum.<sup>116</sup> (See Appendix Table III, *infra*.)

Kirkland & Ellis—notable for the number of clerks it hires, its ideological consistency, and its partisan connections—provides the paradigm for how conservative Supreme Court practice groups have been created and function. Founded in 1908, the firm hired former Supreme Court clerks only sporadically before 1980. But in the 1980s the firm hired four, and the total hired in the 1990s shot up to thirteen. Since 2000, Kirkland & Ellis has hired nine more former clerks. Of those hired since 1990, nine came from Justice Scalia's chambers, six from the chambers of Justice Thomas, four from Justice Kennedy, and three from Chief Justice Rehnquist. The firm did not hire a single clerk from any other Justice. Most of these former clerks joined the firm after Kenneth Starr (O.T. 1975, Burger) joined as a partner in 1993 in order to build an appellate practice group staffed by lawyers groomed in conservative circles.<sup>117</sup> Starr returned to the firm in 1999 after serving as Independent Counsel in the Whitewater investigation, and he remains of counsel.<sup>118</sup>

Along with Kirkland & Ellis, Sidley Austin and Jones Day were among the pioneers in establishing Supreme Court practice groups, and

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Austin, Kellogg Huber, WilmerHale, Jones Day, Kirkland & Ellis, and Williams & Connolly each hired more than ten clerks who had served on the Court in the 1990s, while the New York corporate firm Sullivan & Cromwell hired eight, Davis Polk & Wardwell seven, and Debevoise and Skadden four each. Since 2000, the New York firms have almost entirely left the market, with Sullivan & Cromwell hiring four clerks and Wachtell, Lipton, Rosen & Katz hiring three who served between 2000 and 2007. Supreme Court Clerks Data Set, *supra* note 10.

116. Richard Lazarus names nineteen firms as members of the private Supreme Court bar: Sidley Austin, Mayer Brown & Platt, Jenner & Block, Kirkland & Ellis, Hogan & Hartson, Covington & Burling, WilmerHale, Jones Day, Gibson, Dunn & Crutcher, Morrison & Foerster, O'Melveny & Myers, Latham & Watkins, Quinn Emmanuel, Baker Botts, Akin Gump Strauss Hauer & Feld, Fulbright & Jaworski, the two-person firm Farr & Taranto, and two spin-offs of Mayer Brown: Kellogg, Huber, Hansen, Todd & Evans, and Robbins, Russell, Englert, Orseck, Untereiner & Sauber. Lazarus, *supra* note 112, at 1499–1502. Of these, Quinn Emmanuel, Fulbright & Jaworski, Farr & Taranto, Akin Gump, and Robbins, Russell do not hire large numbers of clerks. Of the fourteen firms remaining, ten show polarized patterns in their hiring of former clerks, as discussed below; only Mayer Brown, Covington & Burling, Latham & Watkins, and Kellogg Huber do not show such patterns.

117. Supreme Court Clerks Data Set, *supra* note 10. Starr, who had previously served as Solicitor General and as a federal appellate judge, brought two clerks from conservative chambers—Christopher Landau (O.T. 1991–92, Scalia and Thomas) and Paul T. Cappuccio (O.T. 1998, Kennedy)—to start Kirkland's practice group. Al Kamen, *In Dining Room, At Least Symbolism's Free*, WASH. POST, Feb. 5, 1993, at A23.

118. Since assuming the deanship of Pepperdine University Law School in 2004, Starr has continued to solidify his ties with the conservative chambers. See, e.g., Tony Mauro, *Starr's Law School to Employ Alito, Scalia*, LEGAL TIMES, Apr. 2, 2007, at 7 (describing Starr's dual role as litigator in the Supreme Court and summer employer of Justices Alito and Scalia at Pepperdine).

both tend to hire clerks from the conservative chambers of the Court. Sidley Austin's practice has hired eighteen former clerks from the chambers of Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas since 1990 and only seven from the remainder of the Court, while Jones Day—where Justice Scalia worked from 1961 to 1967—has hired fifteen from the same four chambers and only five from the rest of the Court.<sup>119</sup> Two other firms with leading Supreme Court practices have strong connections with the conservative legal movement but have not hired large numbers of former clerks. Hogan & Hartson's appellate practice was until recently led by Chief Justice John Roberts (O.T. 1980, Rehnquist), who argued thirty-nine cases before the Court. Gibson, Dunn & Crutcher's practice group is led by Theodore Olson, former Solicitor General for President George W. Bush and head of the Office of Legal Counsel under President Ronald Reagan.<sup>120</sup>

Since 2000, a new generation of firms has sought to establish a foothold in the Supreme Court bar. Bartlit Beck Herman Palenchar & Scott, a firm retained by President George W. Bush in the disputed presidential election of 2000,<sup>121</sup> provides one example. Founded in 1993 by Fred Bartlit, a former litigation partner at Kirkland & Ellis, the firm has hired ten clerks to date. Eight of the ten come from chambers of the five Justices who voted in President Bush's favor in *Bush v. Gore*.<sup>122</sup> During the 2000 election controversy, President Bush also retained the Houston firm Baker Botts, with senior partner and former Secretary of State James A. Baker III serving as his chief legal advisor.<sup>123</sup> Shortly thereafter, the firm moved aggressively to create a Supreme Court practice group, headed by Jeffrey A. Lamken (O.T. 1992, O'Connor), a former assistant to the Solicitor General.<sup>124</sup> Baker Botts has hired twice as many clerks since 2000 as it had hired in the previous thirty years. Of

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119. Supreme Court Clerks Data Set, *supra* note 10.

120. Neil A. Lewis, *Contesting the Vote: The Lawyers: Trusted Litigator For Republicans*, N.Y. TIMES, Dec. 1, 2000, at A31.

121. Jeffrey Leib, *Denver Lawyer Working as Point Man for Bush: Friends and Co-Workers Describe Fred Bartlit as a Legal 'Swat Team'*, DENVER POST, Nov. 25, 2000, at B-01; James Warren, *Chicagoan Shows 'Killer' Instincts as Bush Lawyer*, CHI. TRIB., Dec. 10, 2000, PERSP., at 2.

122. 531 U.S. 98 (2000); Supreme Court Clerks Data Set, *supra* note 10.

123. Mary Flood, *Election 2000: Bush Legal Team Adds Two Local Litigators*, HOUSTON CHRON., Nov. 29, 2000, at A21; Julie Mason, *Election 2000: Cavalry Rides to Bush's Rescue: Old Guard Baker Mends Fences, Could Save Election*, HOUSTON CHRON., Dec. 5, 2000, at A1.

124. Tony Mauro, *Clerks Jump-Start a High Court Practice*, LEGAL TIMES, Oct. 11, 2004, at 1; Schwartz & Mauro, *supra* note 114, at 1.

these eight recent hires, seven have come from chambers that voted in President Bush's favor.<sup>125</sup>

Other firms seeking to build Supreme Court practices have targeted the liberal chambers of the Court. Under the leadership of Seth P. Waxman—former Solicitor General during the Clinton Administration<sup>126</sup>—Wilmer, Cutler, Pickering, Hale & Dorr has built an analogous left-oriented practice, hiring a total of thirty-five clerks since 1990 from the chambers of Justices Breyer, Ginsburg, O'Connor, Souter, and Stevens, while hiring only five from the remainder of the Court.<sup>127</sup> O'Melveny & Myers has a Supreme Court practice headed by Walter E. Dellinger III (O.T. 1968, Black), former head of the Office of Legal Counsel and Solicitor General during the Clinton Administration.<sup>128</sup> Of the eleven clerks it has hired since 1990, only one came from a conservative chamber.<sup>129</sup> Jenner & Block's appellate practice is led by Paul M. Smith (O.T. 1980, Powell) and Donald B. Verrilli, Jr. (O.T. 1984, Brennan), among others. Since 1990, the firm has hired eleven clerks, all from the liberal chambers, with five from Justice Stevens alone.<sup>130</sup>

Conservative firms with established Supreme Court or appellate practice groups currently lead the market in hiring former Supreme Court clerks.<sup>131</sup> However, available statistics—though incomplete<sup>132</sup>—suggest that the conservative and liberal firms have achieved rough parity since 1990 in the number of cases argued before the Court. After

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125. Three clerks served with Chief Justice Rehnquist and one each with Justice Scalia and Chief Justice Roberts. One clerk served with Justice Breyer and two with Justice O'Connor. Supreme Court Clerks Data Set, *supra* note 10.

126. Tony Mauro, *Wilmer, Cutler Signs Top Free Agent*, LEGAL TIMES, July 9, 2001, at 3.

127. Supreme Court Clerks Data Set, *supra* note 10.

128. Susan Beck, *How O'Melveny & Myers Built a Litigation Powerhouse*, LEGAL TIMES, Jan. 12, 2004, at 1.

129. That one clerk served with Justice Scalia. Four of O'Melveny's hirees served with Justice Ginsburg, three with Justice Souter, two with Justice Breyer, and one each with Justices O'Connor and Stevens. Supreme Court Clerks Data Set, *supra* note 10.

130. *Id.*

131. From 2000 to 2007, the five conservative firms named above—Kirkland & Ellis, Bartlit Beck, Baker Botts, Jones Day, and Sidley Austin—hired a total of forty-three former clerks, while the three named liberal firms hired thirty-four, twenty-eight of whom were hired by WilmerHale. *Id.*

132. No centralized source lists each firm's totals of Supreme Court oral arguments. Many of the firms do not keep such statistics, at least for public release; others have begun maintaining them only in recent years. Moreover, official reporters of Supreme Court decisions do not consistently list the firm affiliations of counsel arguing before the Court. Therefore, statistics acquired through databases like Westlaw or Lexis will be incomplete. Here, we have listed statistics received from the firms whenever possible. If we have not been able to acquire such statistics, we have relied upon totals from Westlaw searches, with the caveat that these numbers only represent a minimum number of cases argued by the firm during the time period listed and may significantly underestimate the actual total.



all, each case requires counsel on each side. Thus, Sidley Austin argued fifty-four cases from O.T. 1990 through O.T. 2006,<sup>133</sup> while Jones Day argued twenty-five cases between O.T. 1998 and O.T. 2006.<sup>134</sup> WilmerHale argued at least thirty-two cases between O.T. 1990 and O.T. 2006; Jenner & Block, at least seventeen; O'Melveny & Myers, at least fourteen; and Kirkland & Ellis, at least nine.<sup>135</sup> Of the leading conservative firms that do not hire large numbers of former clerks, Hogan & Hartson argued thirty-four cases between O.T. 1993 and O.T. 2006,<sup>136</sup> while Gibson, Dunn & Crutcher argued at least sixteen cases between O.T. 1990 and O.T. 2006.<sup>137</sup>

Of other major firms in the Supreme Court bar, Mayer Brown has argued fifty-four cases between 1990 and 2006.<sup>138</sup>

These figures suggest that a partisan divide is developing among many major firms of the Supreme Court bar, reflecting and reinforcing the larger divide within the legal community and the nation at large. This tendency is tempered, though, by the core work of these firms: providing representation to corporate clients for profit.

The firms dominating the contemporary Supreme Court bar have increasingly focused their practice on commercial cases, just as the Court has increased its consideration of such cases. As early as 1993, Kenneth Starr accused the Court of “abdicating its responsibility to

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133. Sidley Austin LLP, *Supreme Court Cases in Which the Firm has Filed Merits Briefs, 1985–2006*, <http://www.sidley.com/en-US/appellatemeritscases/linkedContent.aspx> (last visited Oct. 8, 2009).

134. E-mail from Anu Vermani, Bus. Dev. & Comm’n Manager, Jones Day, to Michael Jo, J.D. Candidate, N.Y. Univ. Sch. of Law (Jan. 16, 2009, 10:43:59 EST) (on file with authors).

135. These figures were obtained by searching for each law firm in Westlaw’s “All U.S. Supreme Court Cases” database with the date restrictions described above.

136. Hogan & Hartson LLP, *Supreme Court Cases Argued by Hogan & Hartson Attorneys, October 1993–October 2006 Terms*, <http://www.hhlaw.com/files/upload/U.S.%20Supreme%20Court%20arguments-1993-2005%20Terms.pdf> (last visited Oct. 8, 2009).

137. This figure was obtained by searching for the firm in Westlaw’s “All U.S. Supreme Court Cases” database with the date restrictions described above. Eleven of those cases were argued by Theodore B. Olson. Gibson Dunn & Crutcher LLP, *Theodore B. Olson, Selected Appellate Litigation*, [http://www.gibsondunn.com/publications/Documents/OlsonT\\_Selected\\_AppLitigation2007.pdf](http://www.gibsondunn.com/publications/Documents/OlsonT_Selected_AppLitigation2007.pdf) (last visited Oct. 8, 2009).

138. For a complete list of cases argued by Mayer Brown attorneys, see Mayer Brown LLP, *Cases Argued in The Supreme Court by Mayer Brown Attorneys*, <http://www.appellate.net> (last visited Oct. 8, 2009). Reliable statistics are not available for other firms with leading Supreme Court practices such as Latham & Watkins, Williams & Connolly, Covington & Burling, Akin Gump Strauss Hauer & Feld, and Farr & Taranto, or the conservative newcomers Bartlit Beck and Baker Botts. Totals derived from searches on Westlaw are suspiciously low for these firms, suggesting incomplete reporting. Baker Botts notes that its lawyers have argued twenty-five cases before the Supreme Court, but does not give dates. Baker Botts LLP, *Litigation: Appellate and Supreme Court Practice*, [http://www.bakerbotts.com/departments/practice\\_detail.aspx?id=b1396b4c-3177-4087-97af-28016f01b754](http://www.bakerbotts.com/departments/practice_detail.aspx?id=b1396b4c-3177-4087-97af-28016f01b754) (last visited Oct. 8, 2009).

select complex cases . . . often cases of immense importance to business.”<sup>139</sup> He attributed this failure to the predilections of clerks who in reviewing certiorari petitions “chok[ed] off much of the important but unglamorous business-related issues from the contemporary court’s docket.”<sup>140</sup> A few years later, Judge Richard Posner discerned “a bias in favor of non-commercial cases.”<sup>141</sup> But after the appointments of Chief Justice John Roberts and Justice Samuel Alito, “a pro-business shift in the Court’s docket” occurred, partly in response to elite firms’ efforts “to persuade the Court to enter into areas of law of interest to the regulated community to correct what business perceives as problematic legal doctrine.”<sup>142</sup> Where such cases pit business interests against strengthened governmental regulation or consumer protection, the Court has largely sided with business.<sup>143</sup> Even though this outcome generally accords with a conservative agenda of economic deregulation, both the conservative and liberal firms have vigorously advocated for business interests.

The firms show no such unity in approaching the core issues and controversies of constitutional law. On the whole, firms hiring clerks from conservative chambers have not focused their energies upon such matters.<sup>144</sup> Thus, their lawyers did not appear as lead counsel in most of the pivotal cases of the past decade, such as *Lawrence v. Texas*,<sup>145</sup> *Hamdan v. Rumsfeld*,<sup>146</sup> *Gonzales v. Carhart*,<sup>147</sup> *Parents Involved in*

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139. Kenneth W. Starr, *Rule of Law: Supreme Court Needs a Management Revolt*, WALL ST. J., Oct. 13, 1993, at A23.

140. *Id.*

141. Richard Posner, *quoted in* Tony Mauro, *The Hidden Power Behind the Supreme Court: Justices Give Pivotal Role to Novice Lawyers*, U.S.A. TODAY, Mar. 13, 1998, at 1A.

142. Lazarus, *supra* note 112, at 1531–32. According to Michael Greve of the American Enterprise Institute, O.T. 2005 featured twenty business-related cases out of seventy-two signed opinions, and O.T. 2006, twenty-five out of sixty-seven. Michael S. Greve, *Does the Court Mean Business?*, FEDERALIST OUTLOOK, Sept. 19, 2007, available at <http://www.aei.org/outlook/26834>.

143. Adam H. Charnes & James J. Hefferan, Jr., *Last Term’s High Court Rulings Mostly Pro-Corporation*, NAT’L L.J., Aug. 6, 2008, at 9; Tony Mauro, *High Court Reveals a Mind for Business*, LEGAL TIMES, July 2, 2007, at 8; Jeffrey Rosen, *Supreme Court, Inc.*, N.Y. TIMES, Mar. 16, 2008, Magazine, at 38, 40; David G. Savage, *High Court is Good for Business*, L.A. TIMES, June 21, 2007, at A-1. *But see* Melissa Maleske, *Pro-Business Myth*, INSIDE COUNSEL, Sept. 2008, at 16 (criticizing Rosen’s characterization of the Roberts Court as pro-business and ascribing seeming pro-business bias to *stare decisis* and strict approach to statutory interpretation).

144. One explanation is that during the administration of President George W. Bush, the Office of the Solicitor General—perennially the leading advocate before the Court—generally advocated for conservative policy positions. With a new Democratic administration, firms hiring conservative clerks may take up more cases in constitutional law, thereby further encouraging the political polarization of the Supreme Court bar.

145. 539 U.S. 558 (2003).

146. 548 U.S. 557 (2006).

147. 550 U.S. 124 (2007).

*Community Schools v. Seattle School District No. 1*,<sup>148</sup> and *Boumediene v. Bush*.<sup>149</sup> On the other hand, firms hiring liberal clerks have shown more interest in arguing these cases. Jenner & Block headed a team of lawyers and legal scholars in arguing *Lawrence*, while WilmerHale represented the plaintiffs in *Boumediene*.<sup>150</sup> When practice groups hiring conservative clerks work on such cases, they generally file *amicus curiae* briefs.<sup>151</sup> To name two examples, Kirkland & Ellis filed a brief opposing a challenge to the constitutionality of the Pledge of Allegiance in *Elk Grove Unified School District v. Newdow*,<sup>152</sup> while Sidley Austin represented retired military officers supporting affirmative action in *Grutter v. Bollinger*.<sup>153</sup>

Sidley Austin's brief, advancing a position hardly congenial to most social conservatives, demonstrates that no firm maintains an ideologically pure practice, either in staff or advocacy.<sup>154</sup> Moreover, not all the firms with partisan clerk hiring show equally partisan orientations in their practices. Nevertheless, evidence suggests the existence of partisan connections for at least two of the firms mentioned: Jones Day and Kirkland & Ellis. In the field of election law, Jones Day

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148. 55 U.S. 71 (2007).

149. 128 S.Ct. 2229 (2008).

150. *Id.*; *Lawrence*, 539 U.S. 558.

151. For increasing *amicus curiae* filings by the larger firms of the Supreme Court bar, see Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 826–27 (2000) and Lazarus, *supra* note 112, at 1512–14.

152. Brief for Sandra L. Banning as Amicus Curiae Supporting Petitioners, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (No. 02-1624). Petitioner Michael Newdow filed suit on behalf of his daughter; Kirkland & Ellis successfully challenged his standing on behalf of her mother, Sandra Banning, a born-again Christian locked in a custody dispute with Newdow. *Newdow*, 542 U.S. at 8–10; see Tony Mauro, *The Case and the Controversy: How a Bitter Family Drama Threatens to Ensnarl a Major Constitutional Challenge Over the Pledge of Allegiance*, LEGAL TIMES, Nov. 10, 2003, at 1 (discussing the family history and dynamic involved in *Elk Grove*).

153. Consolidated Brief for Lt. Gen. Julius W. Becton et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516). Sidley's *amicus* brief in *Grutter* accorded with the position of many large corporations. Jack M. Balkin, Plessy, Brown, and *Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689 at 1719–20 (2005). In this respect, the firm's seemingly anomalous advocacy actually suited the preferences of the firm's client base.

154. To name two recent examples involving Jones Day: First, lawyers from the firm filed an *amicus curiae* brief in 2005 for Human Rights First, formerly the Lawyers Committee for Human Rights, in litigation surrounding the case of Jose Padilla. Brief for Human Rights First as Amicus Curiae Supporting Petitioner, *Padilla v. Hanft*, 547 U.S. 1062 (2006) (No. 05-533). Second, a Jones Day partner represented the National Security Archive in its suit to force the Bush administration to recover email records of the Executive Office of the President. *Citizens for Responsibilities & Ethics in Washington v. Executive Office of the President*, 587 F. Supp. 2d 48 (2008) (consolidated case which included the action of *National Security Archive v. Executive Office of the President*); Press Release, National Security Archive, Court Rejects White House on Missing E-mails (Nov. 10, 2008), <http://www.gwu.edu/~nsarchiv/news/20081110/index.htm>.

joined Bartlit Beck and Baker Botts, among other firms, in representing President George W. Bush in 2000.<sup>155</sup> Jones Day also represented Republican voters in important redistricting cases in Colorado<sup>156</sup> and Texas,<sup>157</sup> and joined Kirkland & Ellis in arguing *McConnell v. Federal Election Commission*,<sup>158</sup> challenging the constitutionality of the Bipartisan Campaign Reform Act of 2002 (the McCain-Feingold bill).<sup>159</sup> These firms also have the usual connections between presidential administrations and like-minded law firms, both conservative and liberal. President Bush appointed Jones Day partner Deborah Platt Majoras as Chairman of the Federal Trade Commission in 2004<sup>160</sup> and partner Charles A. James as Assistant Attorney General in charge of the Antitrust Division in 2001.<sup>161</sup>

It remains to be seen how the polarization of clerk hiring will impact the advocacy of the large firms dominating the contemporary Supreme Court bar. These data do not establish whether clerks are actively seeking out practices with a congenial political profile, whether the connections between particular Justices and particular firms play a role in clerk hiring, or whether clerks perceive a connection between particular firms and the prospect of future government service. Whatever the cause of this polarization, what seems significant—and arguably troubling—about the putative emergence of politically oriented practice groups is a tendency to reify the role of the Court as a super-legislature responding to ideological arguments rather than a legal institution responding to concerns grounded in the rule of law. Lawyers advancing political programs will tend to push the Court's agenda in political directions, away from legal questions that arise randomly in the

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155. Jones Day partner Michael Carvin represented the Republican Party in *Bush v. Gore*. Brief of Petitioner, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949). He has also successfully defended California's Proposition 209 limiting affirmative action, and supported Ohio's 2003 constitutional amendment prohibiting same-sex marriage and homosexual civil unions. Vivian Chen, *Rise of the Right: Pro Bono Isn't Just for the Bleeding Hearts Anymore. Very Quietly, Big Firms are Taking on Conservative Causes as Well*, AM. LAWYER, July 2007, at 114, 117.

156. *Lance v. Coffman*, 549 U.S. 437 (2007). The case was brought by Colorado Republican voters, represented by Jones Day, objecting to a redistricting plan that would have benefited Democrats. Karen E. Crummy, *Redistrict Challenge Flops in High Court: D.C. Justices Rebuff a GOP Appeal of a Denver Court's '02 Remapping of Colorado Congressional Districts*, DENVER POST, Mar. 6, 2007, at B-04.

157. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006). Jones Day represented officials of the Republican Party of Texas. Linda Greenhouse, *Justices Uphold Most Remapping in Texas by G.O.P.*, N.Y. TIMES, June 29, 2006, at A1.

158. 540 U.S. 93 (2003).

159. Bipartisan Campaign Reform Act of 2002, 2 U.S.C.S. § 431 (LexisNexis 2009).

160. Stephen Labaton, *Chief of F.T.C. to Resign; Bush Selects a Successor*, N.Y. TIMES, May 12, 2004, at C2.

161. Jube Shiver, Jr., *All Eyes on a New Antitrust Chief*, L.A. TIMES, July 2, 2001, at C3.

broad national litigation process. This approach may enhance the political salience of the Court—perhaps dangerously so.

Remember that, in Alexander Bickel's view, the Supreme Court is the least dangerous branch of government in part because it lacks the capacity of the legislative and executive branches to set its own agenda; it can exercise its "power to construe and enforce the Constitution . . . only in a case" that the fortuities of litigation bring before it.<sup>162</sup> Conservative thinkers are well aware of this fact and have therefore striven consciously to create institutions in public interest law that can bring the cases that they suspect the conservative Justices want them to bring, thereby setting the Supreme Court's agenda. Organizations such as the Institute for Justice, the Center for Individual Rights, and the Washington Legal Foundation promote a conservative legal agenda before the Court, and they have met with considerable success.<sup>163</sup> Some have actively cultivated relationships with major national law firms.<sup>164</sup> The development of politically oriented Supreme Court practices in those firms has the potential to reinforce this tendency, ultimately helping to reify the Court's role as an essentially political rather than legal body.

### 3. Government Service

A divide similar to that in the appellate bar has emerged in the federal government's hiring of former Supreme Court clerks. Since mid-century, government service has become a rite of passage for a significant proportion of clerks leaving the Court. Between 20 and 30 percent of clerks in any given decade have worked for the federal government at some point in their careers, although the vast majority of

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162. BICKEL, *supra* note 8, at 115.

163. See TELES, CONSERVATIVE LEGAL MOVEMENT, *supra* note 75, at 78–79, 88–89, 221, 226 (discussing the evolution of conservative public interest law and its increasing influence on legal change through agenda control). For scholarly analysis of agenda-setting on the Supreme Court, see, for example, H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991); Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995); Gregory A. Caldeira, John R. Wright & Christopher J.W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 (1999); Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988).

164. Chen, *supra* note 155, at 114, 117 (showing that "big firms now regularly champion libertarian causes" with the support of "influential groups like the Federalist Society, religious organizations, and pro bono advocates" and that conservative public interest law organizations "are making a determined play for a piece of the legal establishment's pro bono pie").

them leave for private practice or the academy after less than ten years of service.

Until the 1990s, as we have seen,<sup>165</sup> successive presidential administrations exhibited little political preference in hiring Supreme Court clerks and rarely favored particular chambers. (See Figure IV, *supra*.<sup>166</sup>) Only the Kennedy Administration, which hired eight of Justice Frankfurter's clerks, showed any particular partiality. The Carter Administration chose not only nine clerks from Justice Brennan but also seven clerks from Justice Stewart. Even the Reagan Administration followed this pattern, hiring the same number of clerks from Justice Blackmun as from Chief Justice Burger, and more clerks from Justice Marshall than from Justice O'Connor. The administration of the elder President Bush hired more clerks from Justice Marshall than from Chief Justice Rehnquist.

With the Clinton presidency, federal government hiring of Supreme Court clerks jumped dramatically and began a significant partisan shift. The two-term administration hired ninety-six former clerks, more than twice as many as Reagan, but only fifteen, or 15.6 percent, from the chambers of four conservatives—Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas.<sup>167</sup> The administration of George W. Bush, on the other hand, has employed eighty-nine former clerks, of whom sixty-one, or 68.5 percent, had worked in one of the four chambers. The only other Justice who provided five or more clerks in the Bush Administration was the Justice who cast the fifth vote in favor of President Bush in *Bush v. Gore*—Justice O'Connor, who provided eight clerks. Thus, 77.5 percent of all former clerks in the Bush Administration came from one of the five chambers that had helped put him into office. Only ten clerks, or 11.2 percent of all who were hired, came from the chambers of dissenting Justices Breyer, Ginsburg, Souter, and Stevens.

In particular, the senior management offices of the Department of Justice during the administration of George W. Bush have shown a pronounced preference for clerks bearing strong legal conservative credentials: for example, clerks of Justices Scalia, Thomas, and

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165. As noted in footnote 64, there is no centralized record of former Supreme Court clerks employed by the Executive Branch, and it is therefore likely that these figures are incomplete.

166. Statistics quoted in the following paragraphs differ from those in Figure IV due to the fact that some former clerks entered government service in the Bush and Clinton administrations long after their Justices left the bench, and accordingly do not count toward the percentages listed in the text for current or recently serving Justices.

167. The Clinton administration hired ten clerks from Justice O'Connor's chambers, for a total of twenty-five out of ninety-six clerks (26.0 percent) from Republican appointees excepting Justice Souter. Supreme Court Clerks Data Set, *supra* note 10.

Kennedy; clerks of federal appellate judges J. Michael Luttig and Laurence Silberman; alumni of Kirkland & Ellis; and members of the Federalist Society.<sup>168</sup> While recent scandals over the firing of eight U.S. Attorneys<sup>169</sup> and the hiring practices of the Department's Honors Program<sup>170</sup> and the Civil Rights Division<sup>171</sup> sparked widespread criticism and several investigations, the Department's senior management offices—including the Office of Legal Counsel and the Office of Legal Policy—remain open to partisan hiring practices for political attorneys.<sup>172</sup> Moreover, government positions often provide a stepping-stone between the chambers of particular Justices and the practice groups of particular firms. Nearly all the practice groups of the contemporary Supreme Court bar were formed and initially staffed by alumni of the Office of the Solicitor General.<sup>173</sup>

In all, the patterns of post-clerkship employment that have emerged in the past two decades are striking. They are important for our purposes for two reasons.

First, the emergence of what looks like partisan hiring suggests that Supreme Court clerkships no longer constitute a single, coherent career track as they arguably did from the 1940s into the 1980s. While obtaining a clerkship with Justice Frankfurter was advantageous for a young law school graduate seeking to become a law professor in the middle of the twentieth century—especially one seeking a job at

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168. Vanessa Blum, *How to Get a Job at Justice*, LEGAL TIMES, Apr. 25, 2005, at 1.

169. For an account of the controversy, see Bruce A. Green & Fred C. Zacharias, "The U.S. Attorney Scandal" and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 204–07 (2008).

170. For criticism of hiring in the Honors Program, see OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING IN THE DEPARTMENT OF JUSTICE HONORS PROGRAM AND THE SUMMER LAW INTERN PROGRAM (2008), available at <http://www.usdoj.gov/oig/special/s0806/final.pdf>.

171. For criticism of hiring in the Civil Rights Division, see OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION (2008), available at <http://www.usdoj.gov/oig/special/s0901/final.pdf>.

172. Attorneys in the above-listed offices are classified by the Office of Personnel Management as Schedule C positions, which "are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials." 5 C.F.R. § 213.3301(a) (2009). Other attorneys hold Schedule A positions, "which are not of a confidential or policy-determining character." *Id.* § 213.3101. Schedule C attorneys are commonly called "political" attorneys, while Schedule A attorneys are known as "career" attorneys. The Office of Inspector General declares that Department of Justice policy prohibits "using political affiliations and may also prohibit using certain ideological affiliations in assessing candidates for career attorney positions," but notes no such restrictions for assessing political attorneys. OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 15 (2008), available at <http://www.usdoj.gov/oig/special/s0807/final.pdf>.

173. Lazarus, *supra* note 112, at 1497–1501; Schwartz & Mauro, *supra* note 114, at 22.

Harvard—obtaining one instead with Justice Black, Justice Brennan, Justice Harlan, or indeed some other member of the Court did not seriously alter one's career path. At the outset of the twenty-first century, in contrast, it increasingly mattered. Those who clerked for Justices Breyer, Ginsburg, O'Connor, Souter, and Stevens were about as likely as ever to become academics at the usual highly ranked, elite law schools that had long been hiring Supreme Court clerks, whereas those who clerked for Chief Justice Rehnquist or Justices Kennedy, Scalia, or Thomas were less than half as likely to become academics. Of those who did, a significant portion ended up in a religiously oriented or other conservatively identified institution.

The same process of politicization has occurred in connection with government service and with much of private practice. Prior to the presidency of Bill Clinton, former clerks who so wished could move readily from a clerkship into government service: the Justice for whom one had clerked was largely irrelevant to whether one obtained a government job in any given administration. Former clerks were hired for their legal skills and legal experience, not for their partisan affinity. This pattern changed during the Clinton Administration. Only one-sixth of the former clerks in his administration came from conservative chambers, while only one-tenth of those in the younger Bush's administration had worked for liberals.<sup>174</sup> The same was true for private law firms with significant Supreme Court practices: since the 1990s, many of the major firms have overwhelmingly hired only conservative or liberal clerks, whereas during the 1980s and before they had hired indiscriminately from across the Court's political spectrum.

Emerging patterns of post-clerkship employment are important for a second reason: the growth of specialized appellate practices allows clerks in private practice to continue the work of the Court long after they have left One First Street. A former law clerk's decision to join a private law firm with a politically oriented Supreme Court practice represents a very different life commitment from that of a clerk who joins a New York firm that engages mainly in international transactional work. A decision to join a Washington-based, Supreme Court-oriented office is analogous to the decision that Brandeis and Frankfurter clerks such as Henry Hart and Alexander Bickel made to enter the academy: it is a decision to continue doing work of the same sort one has been doing in chambers in order to continue assisting the Court in general and one's own Justice in particular. It is not a commitment to develop an entirely different legal skill set and become a

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174. Supreme Court Clerks Data Set, *supra* note 10.



very different sort of attorney from what one has so far been or from what most Justices have ever been.

Thus, if one looks broadly—including both the academy and these appellate practices—at how many former clerks have chosen careers aimed at continuing to assist and influence the Justices for whom they clerked, the percentages today are as high, perhaps even higher, than they ever were in the past. This is true for those who have clerked for both the liberal and conservative Justices on the Court. The difference is in the form that such assistance and influence take. Brandeis's conception of law as properly responding to and influencing the course of social change facilitated his mentoring of one of the great sociologists, David Riesman, and one of the great historians, Willard Hurst, of the twentieth century. Today's liberal Justices, who still adhere to Brandeis's conception, can continue to send their former clerks to highly ranked, elite law schools where their future work will likely fit in comfortably with the interdisciplinary writing that dominates those schools' scholarly agendas. Those schools, however, tend not to offer a comfortable home for conservative acolytes of conservative Justices, and hence the former clerks of Chief Justice Rehnquist and Justices Kennedy and Thomas have not frequently gone there. Responding to a need to develop alternative institutions to the liberal academy,<sup>175</sup> conservative clerks have sought other places, like practice and government, from which they might continue not only to influence the Court but also to help a group of the Court's Justices set its agenda.

#### IV. PERPETUATING THE PRESENT DIVIDE

Perhaps both legal liberals and legal conservatives are pleased with the Supreme Court's current level of political polarization. Each side may simply hope to win a sufficiently long streak of elections so as to dominate both the political process and the judiciary and thereby drive the other into oblivion. Conservatives may see the Obama Administration as a short-term aberration—as a last gasp of old-fashioned New Deal liberalism that will prove unable to cope with the post-modern world. Liberals, in contrast, may think that the perceived

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175. See TELES, CONSERVATIVE LEGAL MOVEMENT, *supra* note 75, at 70 (discussing the need for conservatives to foster links in law schools in order to compete with liberals in the public interest law arena). From an early date, conservative thinkers recognized the need for practitioners “to produce law review articles, to sponsor and provide speakers for law-related seminars, to work in concert with other legal scholars, and to coordinate with think tanks within the movement,” which are tasks commonly performed by liberal academics. *Id.* at 81.

incompetence of the George W. Bush Administration will consign Reaganism to the dustbin of history.

We doubt that either will occur and therefore expect that the partisan polarization of the Supreme Court will endure. But that is not our point. Nor do we argue that this polarization is normatively undesirable; partisanship may play a vital role in mobilizing political participation in a deliberative democracy.<sup>176</sup> Rather, our goal in this Part is to suggest how both liberals and conservatives seeking to preserve their judicial footholds can continue to use existing clerkship institutions to promote their ends, and how conservatives, in particular, can enhance their position by slightly modifying existing institutional structures.

### *A. Government Service and Private Practice*

The Obama Administration must make a choice: Does it want to bring some law clerks from conservative Supreme Court chambers into responsible positions in the government, listen to their advice, and—at least at times—craft policies and present legal arguments that take that advice into account? Will its goal be to work with the entire Court and not merely its friends on the left? Or does it want to reward liberal lawyers who have been exiled from the executive branch for the past eight years by giving them politically sensitive legal jobs and free rein to formulate policy? Will the new Administration's aim be to establish on the left the pattern that has existed for the last eight years on the right, where the conservative Justices almost invariably accepted the Bush Administration's legal positions in part, perhaps, because those positions had been crafted by recent clerks who were part of the same intellectual milieu as their Justices? Will President Obama thereby contribute to perpetuation of the present political divide on the Court by perpetuating it in his administration?

A similar choice exists in connection with the increasingly partisan appellate practice groups that have sprung up in recent years. Will groups such as these—that speak largely to one wing of the Court—remain in place? Or will former clerks who enter private practice turn again, as they frequently did in the past, to more generalized, often transactional practices related only tangentially to the work of the Court? Of course, the Obama Administration cannot determine the choice of practice that clerks make when they leave the Court.

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176. See NANCY L. ROSENBLUM, *ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP* 7 (2008) (“[P]artisanship fuels collective discussion of men and measures; partisans are the agents of ‘trial by discussion.’”).

Nonetheless, we need to discuss clerks' choices because they seem likely over time to influence how the profession and the public conceive of the Court's role.

We start from a premise that appellate litigators and transactional lawyers possess different mindsets. Appellate litigators must make arguments in support of binary choices of right and wrong, and, if they argue consistently for the same side in multiple cases, they need to develop a coherent, binary view of justice in support of consistent results. Transactional lawyers, in contrast, are not especially concerned with ultimate issues of justice. Their goal is to achieve the degree of consensus among the parties required to get a deal done; arguments about law and justice matter only insofar as they help attain consensus. The mindset of transactional lawyers, in short, is to identify the interests of potential parties and to craft compromises they all can accept; appellate litigators have an opposite mindset of seeking to articulate coherent visions of justice acceptable to their own clientele and persuasive to the swing vote on a court.<sup>177</sup>

To the extent that the tendency of clerks to enter appellate practice groups reflects a mindset about the Court, we note only that it is a mindset that tends to perpetuate the Court's divisions. A transactional mindset, on the other hand, might tend to promote consensus building and a return to a rule of broadly acceptable law. And, here, the Obama Administration can play a role. It can strive to promote a transactional mindset on the Court by carefully crafting its arguments in the briefs it files and particularly by appointing Justices from transactional backgrounds.<sup>178</sup> Or it can further reify the Court's polarization by appointing Justices with clear ideological viewpoints and by seeking narrow victories through appeals to swing Justices to obtain a fifth vote.<sup>179</sup>

Finally, it is necessary to address the recent tendency of the Justices to select as their law clerks recent graduates who have served lower court judges with a political bent similar to that of the Justice choosing the clerk. This tendency, when joined to those discussed above, creates the consummate engine for young lawyers to develop ideological skills, perfect ideological credentials, and build ideological networks. A

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177. See Evan Caminker, *A Glimpse Behind and Beyond Grutter*, 48 ST. LOUIS U. L.J. 889, 894–95 (2004) (describing focus of litigators in *Grutter v. Bollinger* on Justice Sandra Day O'Connor).

178. The assumption underlying the last sentence in the text is that a transactional lawyer would be more likely to be a consensus builder, all other things being equal, than a litigator who has spent a career advancing a partisan agenda.

179. For an example of a strategy of narrowly appealing for a fifth vote, see Caminker, *supra* note 177, at 894–95.

law student who self-identifies as a conservative by, for example, joining the Federalist Society can take the next step forward by clerking for a conservative federal circuit judge, moving on to a conservative Supreme Court clerkship, next serving in a conservative Justice Department, and finally becoming a litigator in a conservative practice group. After two decades in such a career, a smart lawyer will be fully prepared to be appointed to the bench as a reliably conservative judge or Justice. Although the path to a career as a liberal law professor is not quite as clear, it is not vastly different.

Thus, it appears that recent patterns in selecting Supreme Court law clerks and in their post-clerkship employment, which have been produced by the liberal-conservative divide on the Court, may, in turn, contribute to the reproduction of that divide over time. Those who think the nation is served well by the Court's political polarization have reason to be pleased.

### *B. The Legal Academy and Legal Scholarship*

Liberals, in large part, still remain in control of the institutions and processes of legal education. That control goes back to the deal that Felix Frankfurter, first as the man who selected Justice Brandeis's clerks and later as a Justice himself, brokered between several of the Court's Justices and Harvard, then the nation's preeminent law school.

Harvard Law School sent its best graduates to the Court, thereby insuring the Justices ongoing access to the nation's top legal talent, and the Court reciprocated by sending some of the strongest clerks back to Harvard, thereby revitalizing and strengthening its faculty. Once at Harvard, former clerks engaged in an ongoing scholarly conversation with the Court. Perhaps the conversation assisted the Justices in their work, while extension of the conversation to the classroom made the professors' students feel that they were, at the very least, close observers of the making of the nation's constitutional law. In combination with the reputations of its alumni and faculty, involvement with the Court and the clerkships it produced helped Harvard to continue attracting the best students, which, in turn, kept the Harvard / Supreme Court cycle that Felix Frankfurter had created in motion.

Harvard's influence at the Court and its supremacy within the legal academy began to erode with the retirement of Justice Frankfurter in 1962.<sup>180</sup> Justice Frankfurter's retirement transformed Chief Justice

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180. By the time *U.S. News & World Report* began its rankings of law schools in 1987, Yale had displaced Harvard from the top spot and would continue to remain there; in 1990, Harvard also was

Warren and Justice Brennan into the leaders at the Court and set the Court on an eight-year path of reform<sup>181</sup> that was manifested in controversial cases such as *Reynolds v. Sims*,<sup>182</sup> *Engel v. Vitale*,<sup>183</sup> *Green v. County School Board of New Kent County*,<sup>184</sup> *Jones v. Alfred H. Mayer Co.*,<sup>185</sup> *Heart of Atlanta Motel, Inc. v. United States*,<sup>186</sup> *Gideon v. Wainwright*,<sup>187</sup> and *Miranda v. Arizona*.<sup>188</sup> These cases were met with an outpouring of scholarly praise<sup>189</sup> and scholarly criticism,<sup>190</sup> although it is unclear whether the Court's majority was listening to either.

Meanwhile, the nation's political process was fracturing. Conservatives bent on challenging the New Deal regulatory state won

outranked by Stanford, Columbia, and the University of Chicago. Since then it has mostly remained in the second spot, occasionally displaced by Stanford.

Before 1987, the only widely published rankings of law schools were assembled by Jack Gourman, a retired professor of political science. Gourman published his first rankings of undergraduate institutions in 1967, but did not assemble a separate volume for graduate and professional schools until 1980. Between 1980 and 1985 his top ten list of law schools included Harvard, the University of Michigan, Yale, the University of Chicago, the University of California at Berkeley, Stanford, Columbia, Cornell, Duke, and the University of Pennsylvania; only the last four schools changed positions in any given year. Gourman's rankings were met with considerable controversy because of his refusal to publicize his methodology. JACK GOURMAN, *THE GOURMAN REPORT: A RATING OF GRADUATE AND PROFESSIONAL PROGRAMS IN AMERICAN AND INTERNATIONAL UNIVERSITIES* 75 (Nat'l Educ. Standards, 3d rev. ed. 1985).

181. See MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 84 (1998) (noting that Justice Frankfurter's retirement created a liberal majority and a shift away from the judicial restraint he espoused); BERNARD SCHWARTZ, *INSIDE THE WARREN COURT* 199–200, 206–09 (1983) (discussing Chief Justice Warren's role in the Court's growing activism following Justice Frankfurter's resignation).

182. 377 U.S. 533 (1964).

183. 370 U.S. 421 (1962).

184. 391 U.S. 430 (1968).

185. 392 U.S. 409 (1968).

186. 379 U.S. 241 (1964).

187. 372 U.S. 335 (1963).

188. 384 U.S. 436 (1966).

189. See, e.g., ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 88 (1968) (praising the Warren Court for “enabl[ing] our civilization to give a vastly better account of itself”); ANTHONY LEWIS, *CLARENCE EARL GIDEON AND THE SUPREME COURT* 155 (1972) (explaining that Gideon's victory in *Gideon v. Wainwright* “shows that the poorest and weakest of men . . . can take his cause to the highest court in the land and bring about a great change in the law”); Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the “New” Fifth Amendment and the Old “Voluntariness” Test*, 65 MICH. L. REV. 59, 63 (1966) (answering the *Miranda* dissents by arguing that it may be a departure from recent precedents, but that it is faithful to old principles and is not “a thunderbolt from the blue”).

190. See, e.g., BICKEL, *POLITICS AND THE WARREN COURT*, *supra* note 70, at 206–07 (criticizing *Engel v. Vitale*, a school prayer case, because it means that “just about anything with the word ‘God’ in it would also be [unconstitutional]”); PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 80–82 (1970) (arguing that *Miranda* is a “highly overrated opinion” from the perspective of both supporters and critics, because it merely required state criminal processes to adhere to the same standards as the federal criminal forum).

control of the Republican Party in 1964,<sup>191</sup> while radicals, concerned that President Lyndon Johnson's Great Society reforms did not go far enough, took to the streets in protest and, on occasion, turned to violence.<sup>192</sup> In 1968, Richard Nixon, campaigning against the protesters, the Great Society, and what he called the Warren Court's "judicial activism," won the presidency.<sup>193</sup> While the Brennan majority on the Court had been able to ignore scholarly criticism, it could not ignore the political process when President Nixon appointed Warren Burger to replace Earl Warren as Chief Justice and later appointed a brilliant young conservative, William Rehnquist, as an Associate Justice.<sup>194</sup> With the Republican Party in control of the presidency for all but four of the next twenty-four years, the Court took a decided turn to the right.

The Court's gyrations, first to the left and then to the right, undermined the old triangular relationship that Justices Brandeis and Frankfurter had established among the Court, the clerks, and the legal academy. In particular, the conservative Justices appointed by Republican Presidents understood that they had been placed on the Court not because of their attentiveness to scholarly commentary but because the Presidents who had appointed them—particularly Richard Nixon and Ronald Reagan—had won elections in part through their opposition to "judicial activism." Consequently, a backlash occurred against the Warren Court's program of sculpting constitutional doctrine to meet society's changing needs and of using the Court to nudge society in progressive directions. These new conservative appointees had no reason to listen to scholarly commentary based on liberal premises.

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191. See MARY C. BRENNAN, *TURNING RIGHT IN THE SIXTIES: THE CONSERVATIVE CAPTURE OF THE GOP* 81 (1995) (noting that conservatives in 1964 "had already won the war for control" of the Republican Party); RICK PERLSTEIN, *BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS* xi–xv (2002) (chronicling Goldwater's loss to Lyndon Johnson in the 1964 election, despite the fact that conservatives dominated Congress at the time, and describing the 1960s as "[the] decade when the polarization began").

192. See ALLEN J. MATUSOW, *THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960S* 310, 340–42 (1984) (noting those who participated in the protests were attempting to achieve a more moral society through direct action); JAMES MILLER, *DEMOCRACY IS IN THE STREETS: FROM PORT HURON TO THE SIEGE OF CHICAGO* 172–74 (2d ed. 1994) (discussing how student radicals distinguished themselves from "corporate" and "establishment" liberalism).

193. For discussions of how President Nixon's 1968 campaign linked criminal justice and the Warrant Court, see, for example, DONALD GRIER STEPHENSON, JR., *CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS* 180–82 (1999) and Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 *Geo. L.J.* 1385, 1399–1400 (2006).

194. See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 236–38, 250–52 (5th ed. 2007) (discussing political context of Nixon appointments).

Legal scholars at highly ranked, elite institutions, who once upon a time had engaged in a conversation with the Court, accordingly had to find a new audience to replace the Justices. They did. Legal scholarship today is generally addressed not to judges<sup>195</sup> but to academics in other disciplines, to a vastly enlarged international community of fellow legal scholars, and on occasion to a highly educated lay public. We doubt that very many professors at elite law schools will in the foreseeable future voluntarily change their mode of scholarship or alter the audiences to which it is addressed.

One reason why such change is unlikely is that many law professors today, especially younger ones, hold advanced degrees in other disciplines as well as law and continue to adhere to the scholarly standards of those disciplines. It is noteworthy, for example, that even law and economics—which first came to the University of Chicago Law School in a conservative guise and was initially promoted at Harvard Law School by the Olin Foundation as a conservative counterweight to critical legal studies—has developed into a largely apolitical discipline with close ties to scholarship in economics departments.<sup>196</sup> We think it unlikely that interdisciplinary law professors, once they have tenure, will want to write scholarship different from what they have been writing and were trained to write.

Nor can we discount the importance of the international stage to American legal academics. The reduction of barriers to global trade and communication has created a need to train lawyers who are able to practice in several countries and who see “themselves as part of a global elite in a worldwide market for talent.”<sup>197</sup> Several law schools have already established programs for such training,<sup>198</sup> and the trend seems likely to continue. American academics will therefore need to remain attentive to global concerns—an attentiveness at odds with legal conservatism.

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195. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992) (arguing that “too few law professors are producing articles or treatises that have direct utility for judges, administrators, legislators, and practitioners”).

196. TELES, CONSERVATIVE LEGAL MOVEMENT, *supra* note 75, at 91–101, 192–99, 204–07.

197. Simon Chesterman, *The Globalisation of Legal Education*, 2008 SING. J. LEGAL STUD. 58, 63; see also Mary C. Daly, *The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization*, 52 J. LEGAL EDUC. 480, 488–89 (2002) (proposing curricular reforms in light of globalization); John E. Sexton, “*Out of the Box*” *Thinking About the Training of Lawyers in the Next Millennium*, 33 U. TOL. L. REV. 189, 191, 198–99 (2001) (discussing the importance of globalization to law schools and means by which it can be integrated into curriculum).

198. See Chesterman, *supra* note 197, at 63–64 (providing examples of law schools which offer international double-degree programs).

Few lawyers and law students from the rest of the world share the anxiety of American conservatives that judges should not engage in judicial activism when such activism is needed to bring the law into accord with societal needs.<sup>199</sup> Foreigners do not even understand that worry, which grows out of two peculiarities of American law. The first is the practice, begun by Chief Justice John Marshall and others of his era, of using discursive majority opinions to announce new and fundamental principles of law.<sup>200</sup> The second peculiarity is the rule, enshrined in the Constitution by eighteenth-century framers, that judges possess life tenure.<sup>201</sup> Judges from most of the world do not typically write discursive opinions or have life tenure.<sup>202</sup> Therefore activism on the part of most non-American judges, who tend to sit for much shorter terms than American federal judges and have far fewer opportunities to alter the direction of legal change, poses little threat to democracy. Meanwhile, passivity on their part would threaten economic development by leaving societies bound by outmoded, traditional rules. For most of the world, the American conservative anxiety about judicial activism is an odd curiosity.

In sum, we do not expect the administrations and tenured faculties of current leading law schools to turn over control to conservative forces. While liberal academics seem willing to tolerate a conservative minority in their midst,<sup>203</sup> they are unlikely to surrender power: their moral convictions, their relationships with liberal arts colleagues and overseas professionals, and their loyalty to donors who share their values all counsel in favor of their retention of command. Thus, we predict that liberals will continue to set the agenda and

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199. See Richard H. Pildes, *Conflicts Between American and European Views of the Law: The Dark Side of Legalism*, 44 VA. J. INT'L L. 145, 147 (2003) (noting the growing pressure from some within the legal and political professions to reduce the role of courts in the United States).

200. For discussions of Marshall's abolition of seriatim opinions in favor of a single opinion issued as the opinion of all, see 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15*, at 105 (1981); and William E. Nelson, *The Province of the Judiciary*, 37 J. MARSHALL L. REV. 325, 345 (2004).

201. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.").

202. See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 821 (2006) (noting members of the highest court in every other major democratic nation do not have life tenure); John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1672, 1676-77 (2004) (discussing the fixed terms justices of European constitutional courts serve and their ability to avoid the politicization of judging typical of American courts).

203. See TELES, *CONSERVATIVE LEGAL MOVEMENT*, *supra* note 75, at 175-78, 273 (arguing that despite movements to increase the number of conservatives in law school faculties, conservatives in the legal academy remain a small minority).



dominate the teaching and scholarship of the American legal academy.<sup>204</sup>

Conservatives have sought, with some success, to modify this pattern by strengthening existing religiously affiliated and conservatively identified law schools and creating a few new ones. Henry Manne's success in transforming George Mason into a quality law school offers a startup model: Manne showed how a conservative entrepreneur, backed robustly by conservative patrons, can take over and upgrade an underperforming law school.<sup>205</sup> Many such underperforming law schools exist, and all that is needed to transform a few of them is money, energy, and imagination. Once a sufficient number of quality conservative institutions have been established, conservatives might turn to the old Harvard model of Brandeis and Frankfurter in an effort to convince conservative Justices to hire their graduates as law clerks and encourage the most successful clerks to return to their faculties. Law schools that employ this model may over time gain in stature and influence. Although we cannot foresee the time when they will replace Harvard, Stanford, Yale, and the like as America's leading law schools—the current top schools have too much money and tradition, as well as prime locations and affiliations with major research universities on their side—we can imagine one or two joining the elite.<sup>206</sup>

In conclusion, if the Obama Administration, the legal profession, and the American public are prepared to accept the persistence of the present political divide on the Supreme Court, institutions currently in place surrounding the office of law clerk will facilitate their doing so. President Obama will likely appoint enough new Justices to the Court, as well as judges on the lower courts, to preserve a liberal voice on the judiciary, although not enough to overwhelm the conservative voice. At the same time, conservatives may increase their voice in the legal academy, although, again, not enough to overcome the dominant liberal voice. Other institutional structures that contribute to the work of the Supreme Court also will likely prove resistant to change. Absent a forceful effort to undo it, the Court's polarized mode of doing business will likely remain in place.

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204. See *id.* at 268, 273 (noting that after numerous attempts conservatives have yet to succeed in displacing the liberal legal network).

205. See *id.* at 207–16 (describing how Manne took a unique approach to gaining conservative presence in higher education by “building an alternative institution from the bottom up rather than influencing the legal academy from the top down”).

206. It is possible that conservatives, who often have made their greatest societal gains while out of power in government, *id.* at 148–49, will try more effectively than they have in recent years to infiltrate the academy.

## V. ERASING THE PRESENT DIVIDE

But what if the new Administration, a group of centrist Justices on the Court, or forces outside government want to end the Supreme Court's political polarization out of a concern that unbridgeable disagreement about the sources and substance of law will erode respect for the law? What if they are concerned that respect for the Court will be eroded by a growing public perception that the Court makes law on the basis of whether a liberal or a conservative Justice possesses the fifth vote—which, in turn, depends on whether a liberal or conservative President, following a narrow electoral victory, had the opportunity to appoint the swing Justice?

Many thinkers have argued that the Supreme Court's power ultimately depends on the persuasiveness of its reasoning.<sup>207</sup> Can the Court be persuasive, however, if the Justices, and their acolytes in the academy, government, and private practice who support and explicate their opinions, offer reasons only to those who are already persuaded by a result? Or is it necessary for a majority of Justices who control the Court to reach out to others, both on and off the Court, who see the world differently than they do?

Opponents of judicial polarization argue that judicial discretion, however necessary, must be neither open-ended nor reduced to competition between policy preferences. Instead, it must be bound by an agreed upon discourse of interpretation. To paraphrase Aharon Barak, a form of "purposive interpretation" is required so that the text can be interpreted along a spectrum of agreed upon semantic meanings.<sup>208</sup> Naturally, disagreements may flow from the different tools or schools of interpretation, but critics of judicial polarization assert that this jurisprudential conversation must be bounded by a legal logic, not by partisan policy preferences masquerading as law.<sup>209</sup> They argue that approaching legal interpretation as "merely the

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207. See, e.g., BICKEL, *supra* note 8, at 235–43 (arguing that the Justices should "immerse themselves in the tradition of our society" and then "seize and demonstrate" the "fundamental presuppositions" that they identify).

208. AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 92 (2005) ("Purposive interpretation pinpoints, along the range of semantic meanings of the legal text, a legal meaning that realizes the purpose of the norm.").

209. See, e.g., LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 210–11 (2008) ("[T]he enormous difficulties attending any effort to reach consensus [on the implicit norms of constitutional interpretation] . . . must not be permitted to deflect or deflate our efforts to engage one another in the attempt.").

continuation of politics by other means”<sup>210</sup> will in the long run delegitimize the power of law.

Perhaps the protagonists of today’s competing constitutional norms are about to reach out to each other and engage in conversation and compromise. But conversation and compromise will be extremely difficult. The commitment of conservatives to use law to slow progressive social change and the commitment of liberals to use law to promote it both have deep, irreconcilable roots in America’s constitutional past.

A century and a half ago, law and other disciplines were grounded in divinely inspired, immutable principles. It made sense for a professor at Princeton University to write that it was “an ample refutation of any system to show clearly that it was atheistic in its essential character.”<sup>211</sup> Within decades, however, concepts of jurisprudence grounded in such fixed moral precepts had largely been banished from the upper reaches of the legal academy and the legal profession.<sup>212</sup> Especially during the era of Justices Frankfurter and Brennan, the issue was not whether judges should sculpt law to

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210. This phrase was coined in a different context in CARL VON CLAUSEWITZ, *VOM KRIEGE* bk. 1, ch. 1, § 24 (Berlin, Dümmlers Verlag 1832), available at <http://www.clausewitz.com/readings/VomKriege1832/Book1Ch01VK.htm> (“Der Krieg ist eine bloße Fortsetzung der Politik mit anderen Mitteln.”).

211. *Vestiges of the Natural History of Creation*, in 17 *THE BIBLICAL REPERTORY AND PRINCETON REVIEW* 505, 534 (Philadelphia, Princeton 1845), quoted in THOMAS JEFFERSON WERTENBACHER, *PRINCETON, 1746–1896*, at 233 (1946) (identifying Albert B. Dod as the author of the original work). The “Princeton Theology,” a combination of Scottish common sense empiricism and Calvinist orthodoxy, arguably helped to shape the worldview of the Justices of the late nineteenth-century Supreme Court. See MARK WARREN BAILEY, *GUARDIANS OF THE MORAL ORDER: THE LEGAL PHILOSOPHY OF THE SUPREME COURT, 1860–1910*, at 211 (2004) (explaining that the Justices “understand[] the law as a branch of moral science” and hence “approach social, political, and economic issues” with “antebellum moral philosophy” to ensure “adherence to the principles of truth and justice revealed by moral science”); *THE PRINCETON THEOLOGY: SCRIPTURE, SCIENCE, AND THEOLOGICAL METHOD FROM ARCHIBALD ALEXANDER TO BENJAMIN BRECKINRIDGE WARFIELD, 1812–1921*, at 25 (Mark A. Noll ed., 2001) (explaining the elements of Princeton Theology generally).

212. After the trial of John T. Scopes in 1925, both Protestant fundamentalism and its broader worldview lost intellectual and popular legitimacy outside the social sphere of conservative evangelicalism. See GEORGE M. MARSDEN, *FUNDAMENTALISM AND AMERICAN CULTURE: THE SHAPING OF TWENTIETH-CENTURY EVANGELICALISM, 1870–1925*, at 184–88 (1980) (noting that following the trial of Scopes the strength of the fundamentalist movement in urban centers rapidly diminished); see also JOEL CARPENTER, *REVIVE US AGAIN: THE REAWAKENING OF AMERICAN FUNDAMENTALISM 13–14* (1997) (noting the fundamentalist movement was dying throughout the country and especially among intellectuals by 1930).

In legal thought, the move away from fundamentalist conceptions of formalism was begun by the pragmatism of Oliver Wendell Holmes, Jr. and continued by the Legal Realists. See, e.g., LOUIS MENAND, *THE METAPHYSICAL CLUB* 61–67 (2001) (discussing the disinterested manner in which Holmes made judicial decisions); G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 219–22 (1993) (noting Holmes’s belief that judges should consider and articulate the policy implications of their decisions).

accommodate societal forces, but how rapidly they should do so and how much change the public would accept. The Justices were participants in a common project of conforming law to society's needs and could engage each other about issues of fact and judgment. Scholars, in turn, could engage in dialogue with the Justices, all with a hope of affecting results on a case-by-case basis.

Now, however, views of law grounded in fixed principle have returned, and they exist in tension with a vision of law as a facilitator of social change. The liberals and conservatives on the Court are no longer participating in a shared venture. Engagement between a Justice who seeks to derive law from immutable, eternal principles and a Justice who, like Justice Brandeis, is prepared to accommodate law to societal needs is well nigh impossible. The first sort of Justice, and lawyers like him, can only condemn his opponents for subverting the Constitution's mandate to use law to slow the processes of change; the second can only observe that those who disagree with her, somewhat like Rip Van Winkle, have slept through the legalist reformation of the past century by which law has become the primary instrument for enabling people "of all colors, skins, faiths and tongues to live together in community."<sup>213</sup>

Awareness of the difficulty of compromise brings us back, in turn, to the central insight underlying this article—that politically based approaches to law gain their greatest strength when they become institutionalized. Institutions give ideas traction and maintain that traction even if the ideas themselves lose some force. The triangular relationship between the Court, the clerks, and the academy is of particular importance. Justices Brandeis and Frankfurter appreciated this insight, as do current conservative intellectuals. If the insight is correct, it may be that those seeking to put an end to political polarization on the Supreme Court and to return the Court to the task of enforcing a rule of generally accepted law need to proceed by altering the institutional structures that support polarization.

We do not now recommend such a course. Given our understanding of historical-institutional analysis,<sup>214</sup> it would be unwise and premature to tamper lightly with institutional structures surrounding core elements of government, such as the Supreme Court. The rule of law is premised on stability, not radical revolution. We hope

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213. WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920–1980*, at 1 (2001) (quoting THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT*, 1968, at 214 (1969)).

214. By historical-institutional analysis the authors mean the process by which reform of institutions have future unintended consequences that can affect the delicate balance of incentives and disincentives for institutional effectiveness.

that leaders—among them the Justices of the Supreme Court—who want conversation and compromise will engage each other in it.

At the same time, we understand that the prospect of institutional redesign, even if it is distant, might push some actors toward compromise. Hence we urge readers interested in ending polarization to begin thinking about the sorts of institutional redesign that might be enacted by a majority of the Court or by other institutions.

There might, for example, be a rule prohibiting practice before the Supreme Court by former clerks for a longer period than the present two-year prohibition.<sup>215</sup> Another approach would be to require the Justices to hire law clerks directly out of law school, thereby reducing the information a Justice might have about a prospective clerk's ideological convictions. A more fundamental change would be for the Court collectively to select the clerks and place them in a pool from which they would be assigned to work randomly for all the Justices.<sup>216</sup> Recent reforms in the selection process for federal circuit and district

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215. The Supreme Court forbids former clerks, or any other former employees of the Court, from participating “in any professional capacity in any case pending before this Court or in any case being considered for filing in this Court” for two years after separation. SUP. CT. R. 7.

The American Bar Association's Model Rules of Professional Conduct offer a narrower bar; they only bar lawyers who have formerly served with the government from representing clients in matters where the lawyer participated personally as a government employee or officer unless the relevant agency gives its consent to the representation; and forbids firms employing such lawyers from representing such clients unless the disqualified lawyer is screened from participation and remuneration, and the relevant government agency is notified. MODEL RULES OF PROF'L CONDUCT R. 1.11(a)–(b) (2002). The rationale for such a limited conflict-of-interest provision is that overly broad prohibitions on practice before government agencies would adversely affect attorneys' careers in private practice and deny them the ability to use the skills and knowledge gained in government service.

216. The Supreme Court of Canada follows a somewhat similar procedure. Applications are submitted directly to the Court rather than to individual Justices, who consider all applications. Justices request the Chief Justice's Office to arrange interviews, and in final selection the Chief Justice selects his or clerks first, then followed by each Justice selecting one clerk at a time in descending order of seniority. Mitchell McInnes, Janet Bolton & Natalie Derzko, *Clerking at the Supreme Court of Canada*, 33 ALTA. L. REV. 58, 63–64 (1994).

Clerk selection procedures at the state level vary widely, even among judicial districts within states. The highest courts of Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, North Dakota, Oregon, Puerto Rico, and South Dakota require clerks to apply to the court rather than particular Justices; those applying to the Supreme Judicial Court of Massachusetts may express a preference for a particular Justice. On the New York Court of Appeals, Central Legal Research Staff clerks apply directly to the court, whereas personal law clerks apply to each judge, who sets his or her own procedures; New Jersey uses a similarly bifurcated system. Courts in some states, such as California, employ staff attorneys rather than law clerks, while in other states, such as Oklahoma, state judicial clerkships are career positions. See generally VT. LAW SCH., VT. PUB. INTEREST ACTION PROJECT, THE 2009 GUIDE TO STATE JUDICIAL CLERKSHIP PROCEDURES, available at <http://www.law.virginia.edu/pdf/judclerkguide2009.pdf> (an annual guide to application procedures for state court judicial clerkships).

court clerks provide a precedent for recasting these offices,<sup>217</sup> but the proposals here go far beyond the stabilization of competition through a uniform timetable; they attempt to fundamentally transform the Supreme Court clerkship.

Perhaps larger changes in the structure and procedures of the Court are needed. One possibility would be to increase the number of votes needed to grant certiorari,<sup>218</sup> so that the Court might hear fewer politically charged cases. Another would be an alteration in the processes for appointing and confirming federal judicial appointees so as to focus attention on professional achievement rather than political opinion.<sup>219</sup> One might even want to see a constitutional amendment fixing judicial tenure at some term of years, with no eligibility for reappointment, rather than for life.<sup>220</sup>

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217. For attempts at reforming the selection process for federal judicial clerks, see Edward R. Becker, Stephen G. Breyer & Guido Calabresi, *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 YALE L.J. 207, 225 (1994) (arguing that pushing back interviews for clerkship positions to a later date would improve the system); Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply to the Bad Apple*, 101 YALE L.J. 1097, 1108 (1992) (advocating a matching system similar to that used in filling medical residency positions should be adopted); Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 160–163 (1990) (also advocating a matching system). *But see* Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1730 (1991) (arguing the current system of selecting clerks functions well and should not be discarded). For an empirical analysis of this market before and after the 2002 moratorium on hiring law students in their second year, see Christopher Avery, Christine Jolls, Richard A. Posner & Alvin E. Roth, *The Market for Federal Judicial Law Clerks*, 68 U. CHI. L. REV. 793, 805–45 (2001) and Christopher Avery, Christine Jolls, Richard A. Posner & Alvin E. Roth, *The New Market for Federal Judicial Law Clerks 2–4* (Yale Law Sch. Pub. Law & Legal Theory Research Paper No. 122, 2007), available at <http://ssrn.com/abstract=959696>.

218. Perhaps to six. For similar proposals, see Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 1011 (2003) (proposing a two-thirds rule in which the Supreme Court could only strike down a federal law by a six-three vote); Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 77 (2003) (analyzing both a supermajority rule and rule requiring individual Justices to presume a law's constitutionality as solutions to the Court's current trend of invalidating federal statutes).

219. Since 1977, a "merit selection" process has governed appointments to the New York Court of Appeals, the state's highest court. The governor must select his or her candidate from nominations by the statewide Commission on Judicial Nomination, charged with making merit-based recommendations. *See* N.Y. CONST. art. VI, § 2; N.Y. JUD. LAW §§ 61–68 (McKinney 1983 & Supp. 1996) (establishing the commission as required under the state constitution). *See generally* Luke Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 ALB. L. REV. 339 (1996) (examining the merit-based system used by New York in appointing judges to the highest court).

220. Such is the practice on a number of foreign constitutional courts. For example, members of Germany's Federal Constitutional Court (the *Bundesverfassungsgericht*) are appointed for non-renewable terms of twelve years and have a mandatory retirement age of sixty-eight; judges on the Constitutional Court of South Africa also serve for twelve years and must retire at seventy. Members of the Supreme Court of Canada must retire at age seventy-five, whereas those of the Australian High Court must do so at seventy. VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE*

The greatest need for institutional redesign, however, is in the legal academy, which—as this article has frequently noted—has played a unique role in the triangular relationship with the Court and the clerks. The Justices of the Supreme Court by themselves are unlikely to invent new forms of constitutional dialogue through which to engage each other in conversation. They need help from the academy. They will not get it from academics who write for audiences other than judges.<sup>221</sup> Nor will new constitutional dialogue emerge if academics at liberal law schools write only for liberal Justices and academics at conservative schools write only for conservative Justices. If the Court is to come together around some new understanding of the rule of law, it needs support from collegial academic institutions in which liberals and conservatives reflect together about what that rule of law should be. It needs intellectuals to reintegrate the vision of conservatives—that law should serve as a mechanism for slowing government and thereby preventing it from trampling on religious and economic rights—with the vision of liberals—that law should be a vehicle for promoting social justice.

The institutions of legal education and legal scholarship are simultaneously the easiest and the most difficult to alter. *Grutter v. Bollinger*, for instance, raises the possibility that law schools, at least those that are publicly supported, might be subject to judicial or administrative<sup>222</sup> oversight to ensure politically balanced faculty hiring. Might law reviews similarly be subject to oversight, akin to the fairness doctrine in broadcasting,<sup>223</sup> to ensure greater balance in the scholarship

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CONSTITUTIONAL LAW 489–91 (1999). Moreover, only one state, Rhode Island, has life tenure for the Justices of its highest court. Calabresi & Lindgren, *supra* note 202, at 772 n.9 (citing R.I. CONST., art. X, § 5).

For proposals to eliminate life tenure on the United States Supreme Court, see, for example, Roger C. Cramton, *Reforming the Supreme Court*, 95 CAL. L. REV. 1313, 1323–34 (2007) (arguing that terms on the Supreme Court should be limited by statute or constitutional amendment); REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006) (a collection of essays from various authors on limiting life tenure). *But see, e.g.*, David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute”*, 83 WASH. U. L.Q. 1397, 1467 (2005) (arguing that life tenure should be retained but incentives ought to be created to entice Justices to retire voluntarily).

221. *See, e.g.*, Edwards, *supra* note 195, at 36 (explaining that too many legal scholars are “ivory tower dilettantes” whose work serves no social purpose, and arguing that law schools should fill their ranks with more interdisciplinary scholars).

222. 539 U.S. 306, 336–38 (2003) (approving a law school’s admissions policy that considered the race of applicants, because considering race as just one factor in a “highly individualized, holistic view” of each candidate was sufficiently narrowly tailored). An administrative body, of course, would need to be created by enactment of federal or state legislation.

223. The Fairness Doctrine required broadcasters to present programming on controversial issues and allow a reasonable opportunity for the presentation of conflicting viewpoints. It was

they publish?<sup>224</sup> Might such oversight induce the legal academy to place less emphasis on articles advancing smart, but often one-dimensional policy initiatives, whether they be of a conservative sort striving to maximize the efficiency of capitalist markets or a liberal sort seeking equalization of wealth and power? Might such oversight induce scholars instead to analyze systematically how law that everyone agrees had dispositive force in the past should be applied under changed conditions in the present?<sup>225</sup>

This Article is not the place to weigh the value of these or other possible institutional reforms. We are quite uncertain whether proposals such as those listed above are good ideas, whether they would ever be enacted, or whether they would achieve their objective. As noted above, we also think that institutional change is not yet timely: judicial,

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established by the FCC in 1949, *Editorializing by Broad. Licensees*, 13 F.C.C. 1246, 1257–58 (1949), *aff'd*, *Red Lion Broad. Co. v. Federal Comm'n Comm'n*, 395 U.S. 367, 400–01 (1969), *rev'd*, *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5052 (1987). See Jerome A. Barron, *What Does the Fairness Doctrine Controversy Really Mean?*, 12 HASTINGS COMM. & ENT. L.J. 205, 244 (1989) (defending the doctrine by arguing that the principal form for exchanging ideas in the nation should not be wholly privatized). *But see* Adrian Cronauer, *The Fairness Doctrine: A Solution in Search of a Problem*, 47 FED. COMM. L.J. 51, 75–77 (1994) (criticizing the doctrine for regulating the free market exchange of ideas). For background on the purpose and rationale of the doctrine, see FORD ROWAN, *BROADCAST FAIRNESS: DOCTRINE, PRACTICE, PROSPECTS: A REAPPRAISAL OF THE FAIRNESS DOCTRINE AND EQUAL TIME RULE 1–21* (1984).

224. Litigation could potentially assist in such oversight and the construction of new scholarly standards. However, there are compelling reasons for judges and legislators not to interfere with academic decisionmaking about what scholarship should be published. Judges would most likely decline to take on the burden of such cases, instead deferring to those who currently administer law reviews. Of course, judicial or legislative efforts to review what should be published in law reviews would raise profound issues of free speech and academic freedom; perhaps the First Amendment requires that distributed decisionmakers have freedom to determine what each of them should publish.

On the other hand, the First Amendment could be found to be in tension with the mandate of the Fourteenth that competing political views receive equal protection if it turns out to be the case that nearly all publishers refuse to print materials reflecting a particular political viewpoint. Traditional First Amendment law is clear that government may not engage in viewpoint discrimination, and can decide to grant access to competing groups seeking to use a public forum only on some neutral ground. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983) (holding that in a public forum the state cannot restrict access to speakers with a single viewpoint); cf. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189–90 (1983) (distinguishing content-neutral from content-based communication restrictions). It should be noted that academic freedom is easier to defend if law is understood to be separate from politics and subject to objective, quasi-scientific analysis with which non-experts should not interfere. But, if law is nothing other than politics and policy choice, it is difficult to argue that academics, especially if they are paid by the public, should be permitted to engage collectively in arguing essentially one point of view, whether liberal or conservative.

225. See RONALD DWORKIN, *LAW'S EMPIRE* 45–86 (1986) (explaining that judges arrive at the “right” solution through various interpretive theories which ensure that the community treats all its members consistently, rather than by simply applying precedent).



academic, and political actors should first be given the opportunity to come together voluntarily on their own.

It is, however, time for readers seeking to end political polarization on the Supreme Court to understand that currently emerging institutional practices, including the Supreme Court clerkship, are encouraging and reifying it. Those who believe that judicial polarization is bad for the Court and bad for the nation should look first to the Justices themselves, to the legal academy, and then to the larger legal profession for self-imposed remedies. However, they may need eventually to employ lawmaking by statute or judicial decision in order to bring polarization to an end.

## APPENDIX

TABLE I. CAREER CATEGORIES OF CLERKS, O.T. 1882 THROUGH O.T. 2006

	1882- 1915	1916- 1939	1940-1959	1960-1989	1990-2006
Academia	5 (9.6%)	20 (22.5%)	60 (27.4%)	244 (31.0%)	175 (30.3%)
Private practice	25 (48.1%)	42 (47.2%)	117 (53.4%)	395 (50.3%)	268 (46.4%)
Government	5 (9.6%)	13 (14.6%)	7 (3.2%)	30 (3.8%)	88 (15.3%)
Judiciary	1 (1.9%)	4 (4.5%)	18 (8.2%)	50 (6.4%)	7 (1.2%)
Public interest	0	0	2 (0.9%)	15 (1.9%)	6 (1.0%)
Business	3 (5.8%)	5 (5.6%)	11 (5.0%)	47 (6.0%)	18 (3.1%)
Stenographer	11 (21.2%)	4 (4.5%)	0	0	0
Other	2 (3.8%)	1 (1.1%)	4 (1.8%)	5 (0.6%)	5 (0.9%)
Unknown	34	25	38	41	35
Total with career information	52	89	219	786	577

*Percentages are expressed in terms of the total number of clerks for which career information is available.*

TABLE II. CAREER CATEGORIES OF CLERKS, O.T. 1882 THROUGH O.T. 2006

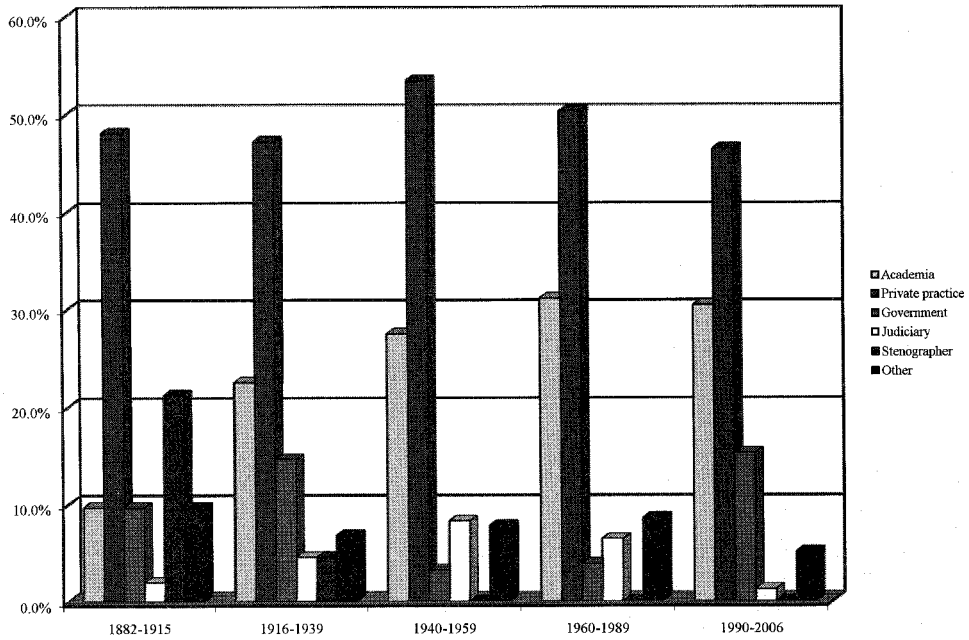


TABLE III. CLERKS HIRED BY MAJOR FIRMS OF THE SUPREME COURT BAR 1990-2006, BY JUSTICE

Firm	Breyer	Ginsburg	Souter	Stevens	Kennedy	O'Connor	Rehnquist	Scalia	Thomas	Total
Baker Botts	1	0	0	0	0	3	3	1	0	8
Bartlit Beck	0	0	1	1	1	2	1	1	3	10
Covington & Burling	0	1	3	0	1	2	3	0	1	11
Gibson Dunn & Crutcher	0	0	0	1	0	3	0	2	2	8
Hogan & Hartson	0	1	0	0	1	1	2	1	0	6
Jenner & Block	1	3	2	5	0	0	0	0	0	11
Jones Day	0	0	2	0	4	3	2	5	4	20
Kellogg Huber	4	0	2	0	5	2	3	2	0	18
Kirkland & Ellis	0	0	0	0	4	0	3	9	6	22
Latham & Watkins	1	2	1	2	1	2	1	2	0	12
Mayer Brown	1	0	4	0	0	1	2	0	2	10
O'Melveny & Myers	2	4	3	1	0	1	0	1	0	12
Sidley Austin	2	2	0	2	8	1	3	4	3	25
Williams & Connolly	3	1	3	0	1	1	0	1	2	12
WilmerHale	5	5	10	9	0	6	3	1	1	40

*Justices Alito, Blackmun, Brennan, Burger, Marshall, Roberts, and White omitted.*