

Law Clerks and the Institutional Design of the Federal Judiciary

Albert Yoon

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LAW CLERKS AND THE INSTITUTIONAL DESIGN OF THE FEDERAL JUDICIARY

ALBERT YOON*

This Essay highlights the evolving institutional changes in the federal judiciary—a protracted confirmation process, higher caseload demands, and declining real salaries—in concurrence with evidence suggesting greater reliance by judges on their law clerks when writing opinions. These dynamic forces arguably undermine the integrity of the judicial process and counsel for legislative action to address judicial working conditions or for changes by judges in the hiring of law clerks.

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I. INTRODUCTION

As with other branches of the federal government, the judiciary represents a balance between the institution and the individual. The judiciary is comprised of district courts and courts of appeals. As a formal matter, judges within each jurisdiction (i.e., courts of appeals or district courts) stand equal to one another, irrespective of experience, age, or other criteria. Cases are randomly assigned to the judges, and

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decisions from any individual judge or panel establish precedent that other judges within the jurisdiction follow.¹

At the same time, the individual judges that comprise the federal judiciary are highly independent. While decisions are subject to appeal, judges enjoy largely unfettered autonomy in how they go about their jobs on a daily basis, including the process by which they write opinions. A few judges are reputed to write their own opinions,² but recent evidence suggests that judges—including Justices—increasingly rely on their clerks when writing opinions.³

Several possible explanations account for judges' greater reliance on clerks. One explanation is workload: district and circuit judges have markedly higher caseloads than their predecessors.⁴ Another is incentives and selection: judicial salaries have declined in real dollars since 1969 and have lagged even more so relative to elite legal practice and even academia.⁵

The reliance on law clerks for substantive parts of judging is arguably exacerbated by the relatively homogenous demographic profile of the typical law clerk: young, inexperienced, and newly graduated from law school. Other branches have designed a more heterogeneous composition of staffers and aides; given their reliance on clerks, this Essay argues that judges might benefit from a similar approach, absent other institutional change.

This Essay proceeds as follows. Part II looks at the judiciary from the economic perspective as a production function, where judges work closely with their law clerks to produce judicial decisions. Part III discusses a typical judicial chambers, based on the known demographic characteristics of judges and law clerks, creating a work environment that juxtaposes older, experienced judges with younger, largely

1. See, e.g., Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1161–62 (2005) (describing how individual federal courts follow their own precedents).

2. See Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 CORNELL L. REV. 1307, 1325 (2011) (showing low writing variability for Richard Posner and Frank Easterbrook); see also Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (And Should We Care)?*, 32 FLA. ST. U. L. REV. 1077, 1119 (2005) (reaching the same conclusion relying on case citation patterns).

3. See Rosenthal & Yoon, *supra* note 2, at 1318–25 (showing increasing variability in writing of Supreme Court Justices over time).

4. See *infra* Figure 1.

5. See Albert Yoon, *Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: 1945–2000*, 91 CALIF. L. REV. 1029, 1038 fig.3 (2003) (showing comparison of annual judicial salaries with other legal and non-legal jobs).

inexperienced clerks. Part IV discusses implications of this bimodal composition, particularly given evidence suggesting that judges are increasingly relying on their clerks in the drafting of opinions. Part V discusses two approaches to improving the federal judiciary's institutional design. Part VI concludes.

II. THE JUDICIARY AS A PRODUCTION FUNCTION

One way to think about the federal judiciary is as a production function. The federal courts produce judicial decisions, which can vary in length from an order to an opinion. While litigants, witnesses, and legal counsel play important roles in any judicial system, judges are the primary input, and their judicial decisions are the output. Technological advances may facilitate judges' work, as it does with lawyers generally, but judges remain responsible for determining which parties prevail and, in the case of opinion writing, the reasons justifying their decisions.

To say that judges are responsible for judicial decisions, however, is not the same as saying that they alone produce their decisions. They have the help of judicial clerks, the vast majority of whom at the federal level work full time for an individual judge. Clerks' scope of work has evolved over the years, from a primarily administrative function in the early twentieth century to writing bench memoranda, preparing for trial or oral argument, and in many cases drafting published opinions today.⁶

Under this framework, the federal judiciary faces a big challenge. Over time, its docket has steadily increased. Figure 1 reports the aggregate federal judicial caseload for district courts and courts of appeals, based on cases terminated annually from 1900 through 2013. Over the past century, the number of terminated district court cases increased over eleven-fold, from just under 30,000 in 1900 to nearly 325,000 in 2013; at the appellate level, this increase was over *sixty-four* times greater in 2013 (58,393) than in 1900 (917).⁷ To place these

6. For an excellent discussion of the evolution of Supreme Court law clerks, see TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 38–205 (2006) (discussing how law clerks transitioned from stenographer to legal assistant to law firm associate); ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 200–36 (2006) (discussing law clerks transitioning from research assistants to junior justices); *see also* IN CHAMBERS: *STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES* (Todd C. Peppers & Artemus Ward, eds.) (2012).

7. The Federal Judicial Center publishes caseload statistics. *Historical Caseloads in the Federal Courts*, FED. JUD. CTR., http://www.fjc.gov/history/caseload.nsf/page/caseloads_main_page (last visited Oct. 26, 2014), *archived at* <http://perma.cc/J8VL-HG93>.

increases in context, the population in the United States grew only by a factor of four, from 76 million in 1900 to 317 million in 2013.⁸

The increased caseload demands are all the more daunting given that the number of authorized judgeships grew only modestly during this period. Figure 2 shows that the number of authorized district judges grew by roughly a factor of ten, from 67 in 1900 to 663 in 2013. Authorized circuit judges, by comparison, increased only by a factor of six, from 28 in 1900 to 167 in 2013.⁹ For the courts of appeals, which focus on writing opinions, the growth in caseload far outpaced the increase in authorized judgeships.

Determining the exact caseload demands for judges is elusive. Senior judges—judges who have vacated their seat after vesting in their pension¹⁰—assist active judges by continuing to hear cases, albeit often on a part-time basis. Moreover, the federal judiciary has increased its administrative support, expanding the number of non-Article III judges in the areas of bankruptcy, tax, and pre-trial matters (i.e., magistrate judges).¹¹ The Administrative Office of the U.S. Courts does not publish individual judge statistics, but recent scholarship suggests that senior judges hear on average 60% of the caseload of an active judge.¹² While senior judges help alleviate some of the caseload demands, active

8. The U.S. Census Bureau provides historical data on the U.S. population. *Population Estimates: Historical Data*, U.S. CENSUS BUREAU, <https://www.census.gov/popest/data/historical/> (last visited Oct. 26, 2014), archived at <http://perma.cc/67A3-DL9W>.

9. The Administrative Office of the U.S. Courts publishes statistics on the number of authorized judgeships. Admin. Office of the U.S. Courts, *Authorized Judgeships*, U.S. CTS., <http://www.uscourts.gov/uscourts/JudgesJudgeships/docs/all-judgeships.pdf> (last visited Oct. 26, 2014), archived at <http://perma.cc/ZVB7-KPF6>.

10. For a discussion of senior judges and the factors that influence their tenure decisions, see Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 J. EMPIRICAL LEGAL STUD. 495 (2005); Albert Yoon, *Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869–2002*, 8 AM. L. & ECON. REV. 143, 146–47 (2006). For an argument against the constitutionality of senior judges, see David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007).

11. Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 674 (2005).

12. See Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Law and Policy of Judicial Retirement: An Empirical Study*, 42 J. LEGAL STUD. 111, 141 (2013).

Figure 1
Article III Judicial Caseload
Terminated by Year-End (1900–2013)

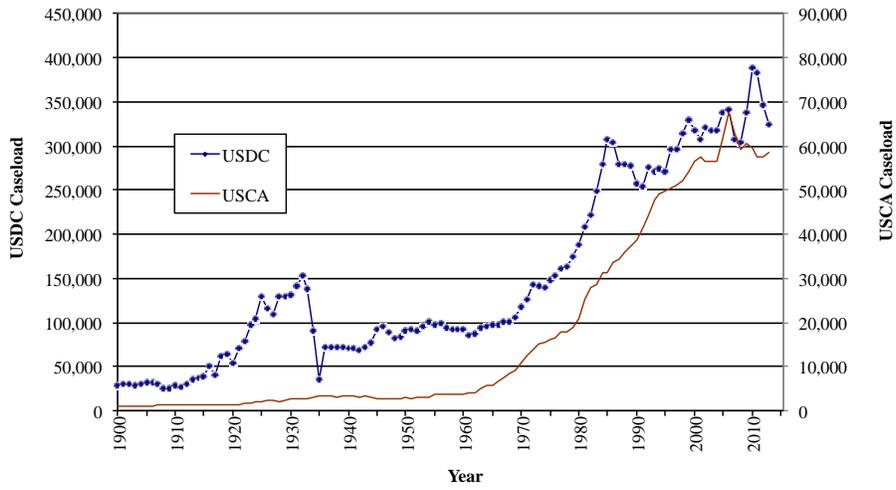
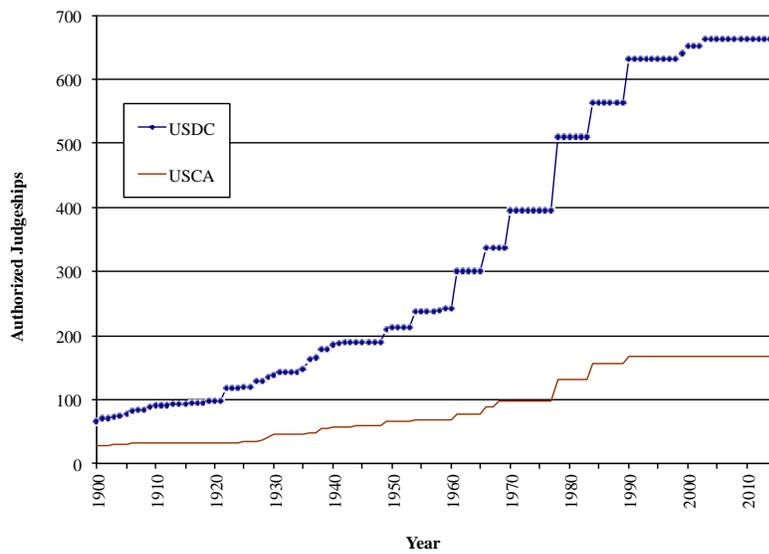


Figure 2
Article III Authorized Judgeships
(1900–2013)



judges—particularly at the appellate level—nevertheless are responsible for a higher caseload than their predecessors.

Given these increased caseload demands, federal clerks serve a much-needed role in helping judges prepare for and decide cases. While the significance of Supreme Court clerks is well-documented,¹³ clerks at the district courts and courts of appeals remain largely unexplored. A comprehensive inquiry is beyond the scope of this Essay, but it is worth examining more closely the role of clerks generally within the institutional judicial structure.

III. CHARACTERISTICS OF JUDGES AND CLERKS

A judicial chambers is like a small law firm.¹⁴ The judge is the senior partner, and the clerks are akin to the junior associates.¹⁵ The judge is also the proverbial name partner, and all work product (i.e., orders, opinions) that comes from the chambers bears only the judge's name.¹⁶ The means by which the chambers produce this work product, however, often reflects effort by the clerks.¹⁷

Continuing with the idea of judicial chambers as a small law firm, we can think of the federal judiciary as a labor market consisting of a small number of clerks and an even smaller number of judges. This analogy to the judiciary as operating within a broader labor market also reflects the thinking of Chief Justice Roberts and his predecessor, Chief Justice Rehnquist. Both jurists have expressed their concerns that the institutional challenges facing the courts could impede the ability of the judiciary to attract high-ability members of the bar and to retain them once they are appointed.¹⁸

13. See PEPPERS, *supra* note 6; WARD & WEIDEN, *supra* note 6. For a seminal earlier account, see BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979).

14. See PEPPERS, *supra* note 6, 145–205.

15. *Id.* at 145.

16. *Id.*

17. *Id.*

18. See John G. Roberts, Jr., *2006 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts, Wash., D.C.), Jan. 2007, at 1, 1–4; William H. Rehnquist, *2002 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts, Wash., D.C.), Jan. 2003, at 1, 1–3.

Table 1
Profile of Current Article III Judges

Court	Number of Appoint-ments	Age at Comm-ission	Current Age	Female	Non-White	Job Prior to Joining Bench			
						Attended Yale, Harvard, or Stanford law school	Judge	Private Practice	Prose-cutor
USDC	1,067	50	67	0.24	0.20	0.13	0.34	0.30	0.16
USCA	279	48	69	0.24	0.18	0.27	0.29	0.28	0.15
USSC	12	45	72	0.33	0.17	0.83	0.17	0.08	0.17

The current demographic profile of a typical federal judge, illustrated in Table 1,¹⁹ is a white male roughly fifty years old. Federal judges are often selected from other courts. Nearly a third of federal judges, prior to joining the federal bench, were state judges. Another 30% were in private practice, and roughly 15% were prosecutors at the federal or state level. Law graduates of Yale, Harvard, and Stanford are disproportionately represented on the federal judiciary, increasingly so as one elevates from the district courts to the courts of appeals to the Supreme Court. Earlier studies contend that the federal judiciary, notwithstanding the changing economic and legal climate, has remained relatively stable with respect to entering characteristics.²⁰

Statistics for judicial clerks, by contrast, are hard to find. The Administrative Office of the U.S. Courts does not publish statistics on clerks. The information that does exist is primarily at the level of the Supreme Court; information about court of appeals and district court clerks is primarily descriptive and typically provided in the forum of law review tributes.²¹ A back of the envelope calculation for 2014 suggests somewhere in the neighborhood of 2,500 law clerks, given the current

19. All statistics regarding federal judges, unless otherwise stated, come from the Federal Judicial Center. For the raw data, see *Biographical Directory of Federal Judges, 1789–Present*, FED. JUD. CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Oct. 26, 2014), archived at <http://perma.cc/ZN3J-KYYT> [hereinafter *Biographical Directory*]. This data includes both active and senior Article III judges. (One can export the full dataset of the biographical directory by clicking on the link on this page entitled, “Download an export of all data in the Biographical Directory of Federal Judges.”)

20. On observable characteristics, it appears that selection into the judiciary has remained stable, as has judicial tenure. See Yoon, *supra* note 5, at 1032.

21. Todd C. Peppers, Micheal W. Giles & Bridget Tainer-Parkins, *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 ALB. L. REV. 623, 623–24 (2008).

composition of active and senior judges at both levels.²² Thus, there are approximately two clerks for every federal judge (active and senior).

A judicial clerkship is, in most instances, short term. A recent survey of federal judges found that roughly half the judges (49%) hired clerks for one to two years, and a comparable percentage (48%) hired clerks for two years.²³ A majority of judges surveyed also included a permanent clerk as part of this group.²⁴ A 2000 study reported that women comprised 46% of the law clerks,²⁵ and 12% were non-white.²⁶ Clerks in the cohort category 26 to 30 represented 71% of respondents.²⁷ The prevalence of this age category suggests that the vast majority of law clerks have just graduated from law school. Judges' apparent fascination with new law graduates has created a hiring frenzy amongst law students, which neither law schools nor the judiciary appears able to remedy.²⁸

22. As of July 28, 2014, the Federal Judicial Center reported having 616 district and 158 court of appeals judges on active status. See *Biographical Directory*, *supra* note 19. District judges have on average 2 law clerks and circuit judges 3–4 clerks (depending on whether the judge elects to have 1 or 2 secretaries). There are approximately 550 senior judges, *id.*, and their number of clerks is typically 1–2 but depends on the caseload. In 2007, the Administrative Office reported 2,075 full-time law clerks at the district level. See Peppers et al., *supra* note 21, at 628 (citing Telephone Interview with Staff Member, Admin. Office of the U.S. Courts (Oct. 12, 2007)).

23. See Peppers et al., *supra* note 21, at 632–33.

24. See Peppers et al., *supra* note 21, at 633.

25. See *Clerkship Study Tables 46–66*, NALP, http://www.nalp.org/clrktb46_66#46 (last visited Oct. 26, 2014), archived at <http://perma.cc/444V-HHJA>. The National Association for Law Placement (NALP) in 2000 surveyed recent law graduates doing a post-graduate judicial clerkship. *Courting Clerkships: The NALP Judicial Clerkship Study*, NALP (Oct. 2000), <http://www.nalp.org/courtingclerkships>, archived at <http://perma.cc/N8CN-ZT75> [hereinafter *Courting Clerkships*]. For the results of this survey, see *Clerkship Study Tables 46–66, supra*. NALP distributed this study in January 2000 to 14,000 third-year law students and 4,000 law school graduates. *Courting Clerkships, supra*. The response rate was 11% for law students and 24% for law graduates. *Id.* One limitation of this study is that it does not report the breakdown of most statistics between federal versus other (state, local, and international) clerkships. Federal clerkships comprise approximately 55% of the respondents in this survey. *Clerkship Study Tables 46–66, supra*.

26. *Clerkship Study Tables 46–66, supra* note 25.

27. *Id.*

28. For a discussion of the problems of the judicial clerkship hiring practice, a hiring timeline constructed by law schools, and the defection of federal judges from this policy, see Christopher Avery, Christine Jolls, Richard A. Posner & Alvin E. Roth, *The Market for Federal Judicial Law Clerks*, 68 U. CHI. L. REV. 793, 838 (2001) [hereinafter Avery et al., *The Market*]; Christopher Avery, Christine Jolls, Richard A. Posner & Alvin E. Roth, *The New Market for Federal Judicial Law Clerks*, 74 U. CHI. L. REV. 447 (2007) [hereinafter Avery et al., *The New Market*]; Edward R. Becker, Stephen G. Breyer & Guido Calabresi, *The Federal*

Compared with their counterparts in the Executive and Legislative Branches, law clerks represent a younger and more concentrated demographic, at least with respect to age and tenure. Matching 2013 Executive employees to those approximating judicial clerks—based on educational attainment—the executive branch similarly is 56% male.²⁹ The age demographics in the Executive Branch reflect an older modal group (30 to 34 years old) but with a broad range of ages: 15% were below age 25, 46% were between ages 25 and 39, 35% were between ages 40 and 60, and 4% were above age 60.³⁰ The average length of service was 14 years, with the top quarter serving more than 23 years, and the bottom quintile serving five years or fewer.³¹

A 2001 study of Senate legislative staffers suggested a labor pool situated between law clerks and executive employees.³² Finding a precise comparable cohort to law clerks is difficult. Legislative correspondents are comprised primarily by those with an undergraduate degree as their highest educational attainment, with an average age of 25.³³ Legislative counsel is reserved for those with law degrees, with an average age of 35, predominantly male (65%), white (88%), single (65%), and without children (82%).³⁴

These demographic differences across the branches of government reflect a demographically narrower labor market for law clerks than for their counterparts in the Executive or Congress. Judicial clerks typically take the job immediately or shortly after graduating from law school and work for one or two years, whereas Executive and Legislative employees are typically older and have worked longer. This difference is likely motivated in part by design. Judges are free to hire whatever type of law graduate they like, but they clearly express a collective

Judicial Law Clerk Hiring Problem and the Modest March 1 Solution, 104 YALE L.J. 207 (1994).

29. The Office of Personnel Management (OPM) provides statistics on employees in the Executive Branch. U.S. Office of Pers. Mgmt., *Data, Analysis & Documentation: Raw Datasets*, OPM.GOV, <http://www.opm.gov/data> (last visited Oct. 26, 2014), archived at <http://perma.cc/U59H-CQCK>. All information discussed in this Essay is drawn from OPM's raw employment data for June 2013.

30. *Id.*

31. *Id.*

32. See CONGRESSIONAL MANAGEMENT FOUNDATION, 2001 SENATE STAFF EMPLOYMENT STUDY 33–36 (2001), http://www.congressfoundation.org/storage/documents/CMF_Pubs/cmfsenatesalarystudy2001.pdf, archived at <http://perma.cc/3ZDR-BYDC>.

33. *Id.* at 34. Nearly 90% of legislative correspondents have a bachelor's degree as their highest educational attainment. See *id.*

34. See *id.* at 36.

preference for hiring recent law graduates, and disproportionately from Yale, Harvard, or Stanford law schools.³⁵ It is also worth noting that a sizable fraction of former Article III clerks (12%) become Article III judges later in their careers,³⁶ in some instances in relatively short order.³⁷

IV. IMPLICATIONS OF THIS STRUCTURE

The institutional structure of judicial chambers presents clear benefits and potential drawbacks. The benefits are numerous: a small, intimate working environment in which the judge can work closely with her clerks. By predominantly hiring recent law graduates, the judge may find it easier to create a work environment to her liking, since clerks will be less likely to hold fixed views on legal practice based on their own experience in other work environments. Hiring recent law graduates also affords judges the opportunity to learn recent developments in the common law indirectly from the legal academy, which offers a more theoretical perspective on the law than typically presented by the practicing bar. Lastly, hiring young clerks provides the beginning of what may become an enriching, career-long relationship with the judge, as clerks subsequently embark on their own careers.

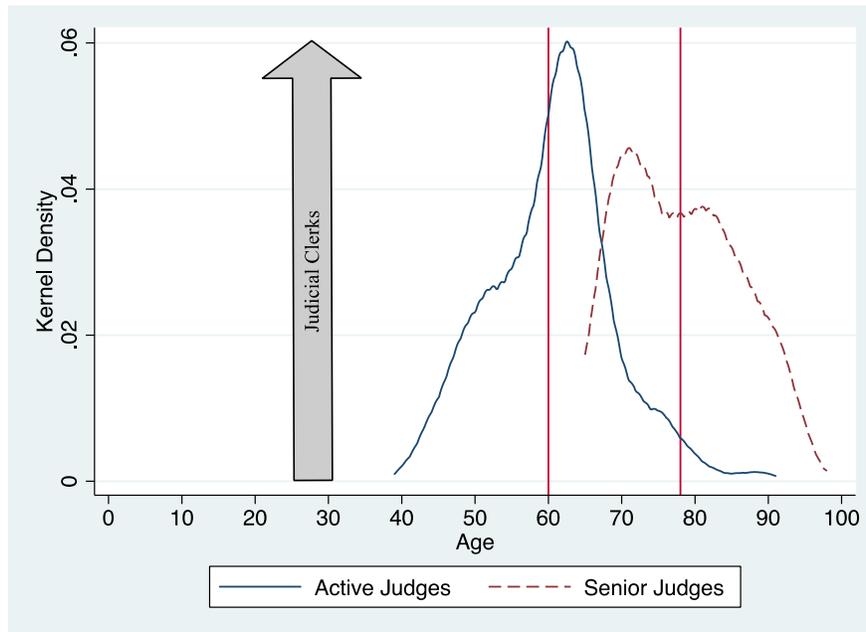
The limitations represent the flip side of the benefits to youth. What young clerks offer in the way of raw intelligence and energy, they lack in experience, and in some cases restraint. The issue is not one of youth in itself, but rather the relative homogeneity in the age composition of clerks. Figure 3 shows the distribution of active judges and senior judges as of 2014. Active judges range in age from 39 to 91, with an average age of 61 (denoted by a vertical line); senior judges range in age from 65 to 98, with an average age of 78 (denoted by a vertical line). The

35. Based on employment data from Martindale Hubbell in 2012, a national directory of practicing lawyers, 3.3% of all Yale, Harvard, or Stanford graduates clerked on the federal courts, compared with 0.7% of all law graduates from all other schools. (Data on file with author.)

36. This finding is based on biographical information provided by the Federal Judicial Center on its 3,503 commissioned judges, of whom 411 were former clerks. This data is based as of July 15, 2014. To access the raw data, see *Biographical Directory*, *supra* note 19.

37. For example, on March 31, 2014 the Senate confirmed John B. Owens, age 42, to the U.S. Court of Appeals for the Ninth Circuit. *Biographical Directory of Federal Judges: John Byron Owens*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=3520&cid=999&ctyp e=na&instate=na> (last visited Oct. 26, 2014), *archived at* <http://perma.cc/GWQ6-TRKL>.

Figure 3
Distribution of Judges and Clerks



current age distribution of clerks is unknown, but based on prior statistics, clerks range between 2,000 and 2,500 in number and largely fall between the ages of 26 and 30.³⁸

Taken together, judicial chambers on average reflect a stark bimodal distribution of older, experienced judges and younger, inexperienced clerks. There is effectively no middle cohort. The judiciary stands in contrast to other branches of government, where staffers range in age and are more likely to remain on the job for more than one or two years. This gap in experience and age, by itself, need not present grounds for concern. Rather, it becomes relevant only when looking at the allocation of labor within each chamber.

With few exceptions,³⁹ former clerks treat the operation of judicial chambers as confidential.⁴⁰ Recent work by scholars, however, suggests

38. See *supra* note 22 and accompanying text.

that law clerks are playing an increasingly larger role in the opinion-writing process. Interviews with former clerks support this claim.⁴¹ Other scholars reaching similar conclusions have used judges' case citation patterns in written opinions as a proxy for the judges' own writing (as opposed to that of their clerks), or compared draft opinions to the final version.⁴² Others compare the ideology of justices and their clerks to gauge clerks' influence on substantive decision making.⁴³

More recent efforts have used textual analysis to use writing variability as a proxy for clerks' influence.⁴⁴ Analyzing the frequency of common function words—such as “some,” “their,” “have”—that vary across writers, recent scholarship has found that over time the writing variability of judges has increased.⁴⁵ Figure 4 shows the year-to-year writing variability scores of select Justices.⁴⁶ A general pattern emerges: Justices from earlier periods have a lower writing variability, both within and across years, than more recent Justices. For example, Justices Holmes, Cardozo, and Douglas have the lowest writing variability of the Justices shown. By contrast, Justices O'Connor and Kennedy, the most recent Justices in the sample, have the highest variability.

The intuition behind the significance of writing variability is that each Justice, like any author, has a distinct writing style. This style—based on function words—stands independent of the area of the law or the length of opinion. The lower the score, the more likely the Justice is writing her own opinions. Correspondingly, the higher the score, the more likely the Justice is relying on her law clerks in the opinion-writing

39. See, e.g., EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT* (Penguin Books 1999) (1998) (describing the experience clerking on the Supreme Court).

40. PEPPERS, *supra* note 6, at 18.

41. See *supra* note 6 and accompanying text.

42. See Choi & Gulati, *supra* note 2, at 1111–16; Paul J. Wahlbeck, James F. Spriggs II & Lee Sigelman, *Ghostwriters on the Court? A Stylistic Analysis of U.S. Supreme Court Opinion Drafts*, 30 AM. POL. RES. 166, 172 (2002).

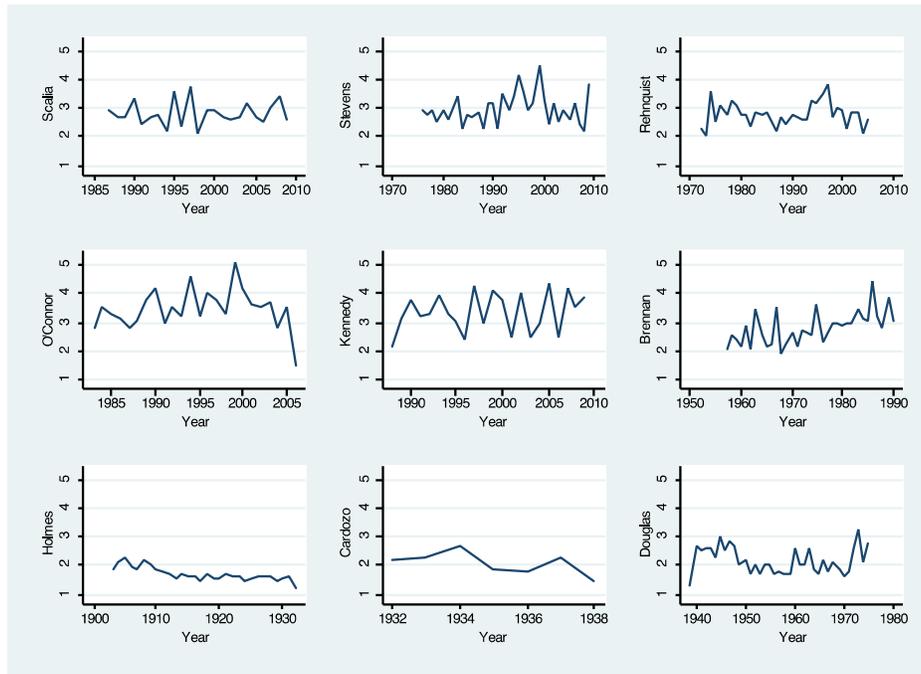
43. See Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 60 (2008).

44. See Rosenthal & Yoon, *supra* note 2.

45. *Id.* at 1314 tbl.1, 1337. For an explanation of the methodology used to construct a writing variability measure, see *id.* at 1313–17.

46. Figure 4 is taken from Rosenthal & Yoon, *supra* note 2, at 1324 fig.2.

Figure 4
Year-to-Year Writing Variability Scores
(Select Justices)



process, with the idea that the more writers participating in the drafting of the opinion the higher the variability in the writing.

One must take caution against interpreting these results too strongly, as it may be the case that some judges possess a writing style that is highly variable. Two current examples suggest that these writing scores correlate with reliance on clerks. Judges Posner and Easterbrook on the U.S. Court of Appeals for the Seventh Circuit are both reputed to write their own opinions.⁴⁷ Their scores are consistent within and across years and appear similar to Justices Holmes and Cardozo.⁴⁸

If judges increasingly rely on their clerks, beyond performing research and writing bench memos to include writing the opinions themselves, then clerks in effect play an increasing role in the

47. *Id.* at 1325.

48. *See id.* at 1326 fig.3.

development of the common law. While judges themselves are ultimately responsible for the opinions they write, sharing this responsibility and authority—even if only in part—with young, inexperienced lawyers may run counter to the optimal development of the common law.

V. IMPROVING THE FEDERAL JUDICIARY'S INSTITUTIONAL DESIGN

If federal judges are indeed relying more on their clerks when writing opinions, there are two possible responses. The bolder response is to ameliorate or reverse this reliance. The second, more modest, response is to accept this reliance as given but propose steps to mitigate any adverse effects.

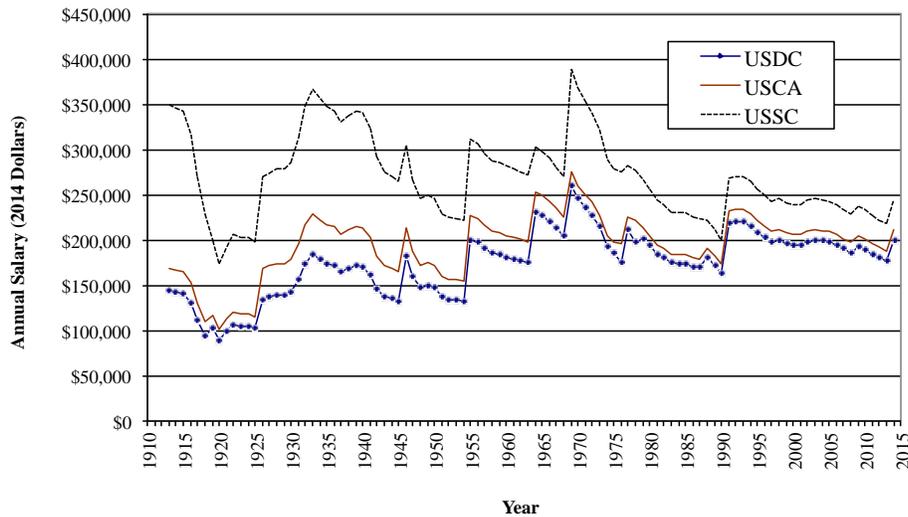
If the goal is to reduce judges' reliance on clerks, one solution is to promote a culture where judges collectively take a more active role in writing opinions. Using writing variability as a proxy, some modern-day jurists exhibit this quality: recently retired Justice Stevens and Judges Posner and Easterbrook, to name a few. Changing this culture, however, may prove difficult, if not impossible. The Constitution does not mandate how judges perform their role (or even the existence of clerks). Not surprisingly, judges do not report or disclose the process by which they write their opinions. Congress or the Chief Justice could provide guidelines for the proper reliance on clerks, but they would merely be advisory. Given their response to proposed changes regarding clerkship hiring,⁴⁹ judges may be reluctant to follow recommendations on their use of clerks.⁵⁰

Another solution that may reduce reliance on clerks is to increase what federal judges earn. Figure 5 reports judicial salaries in constant dollars since 1913. Judicial salaries are not pegged to cost-of-living adjustments but subject to increases enacted by Congress. The graph illustrates two trends. The first is that any given nominal salary decreases in real dollars until Congress provides a raise. The second is a

49. The hiring process for judicial clerks is one such example where judges could not collectively comply with hiring timelines for judicial clerks. See Becker et al., *supra* note 28; Avery et al., *The Market*, *supra* note 28; Avery et al., *The New Market*, *supra* note 28. Judge Alex Kozinski is unabashed in his rejection of any reforms to the judicial hiring process. See Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1730 (1991).

50. See Carl Tobias, Commentary, *Salvaging the 2013 Federal Law Clerk Hiring Season*, 91 WASH. U. L. REV. 243, 246 (2013) (describing the defection amongst a subset of judges that compromised the integrity of the judicial clerkship hiring model).

Figure 5
Article III Judicial Salaries
1913–2014 (2014 Dollars)



secular downward trend in real salaries since 1969, reflecting modest upward adjustments.

The recent trend in judicial salaries actually understates the broader gap between judges and other elite areas of the law. Judicial salaries were once comparable to those of partners at most elite law firms. Over time, the disparity has grown.⁵¹ In 2013, partners at the top 100 law firms—based on *The American Lawyer*—on average earned profits of nearly \$1.5 million.⁵² The relative decline in judicial salaries is exacerbated by an even greater decline relative to the elite private bar, prompting alarm from the corporate bar, the American Bar Association, and legal academics.⁵³ Some scholars, however, are skeptical that

51. Thomas J. Forr, Comment, *Want Less Ideology on the Federal Bench? Pay Judges More*, 158 U. PA. L. REV. 859, 860 (2010).

52. Aric Press, *The Super Rich Get Richer*, AM. LAW., May 2014, at 130 (reporting profits per partner as \$1.47 million).

53. Scott Baker, *Should We Pay Federal Circuit Judges More?*, 88 B.U. L. REV. 63, 65 nn.2–5 (2008).

judicial pay bears any relation to the quality of judicial decision making.⁵⁴

A third alternative solution to reduce reliance on clerks, one that assumes that judges respond to external factors, is to reduce their caseload demands. The sheer number of cases has compelled the federal judiciary to adopt ways of triaging the docket by relegating more work to court clerks, non-Article III judges, mediation, telephonic hearings, etc.⁵⁵ Scholars have characterized this trend as a bureaucratization of the judiciary,⁵⁶ which “weaken[s] the judge’s individual sense of responsibility.”⁵⁷ A smaller caseload would allow judges more time for each case, which in turn would allow more time for deliberation and, more importantly, opinion writing.

As a remedial response, the President and Congress could work together to reduce the number of judicial vacancies. As of October 2014, there were 53 vacancies on the district courts and 7 vacancies on the courts of appeals.⁵⁸ This current number of vacancies, however troubling, is certainly a well-established phenomenon and actually represents an improvement over prior years, when the number of vacancies in a given year exceeded 100.⁵⁹

Thinking more prospectively, Congress could increase the number of authorized Article III judges, which have lagged behind the growth in federal cases. It may be that identifying judicial understaffing based on case filings understates the problem to the extent that the growing docket discourages prospective litigants from filing suit. The Senate recently considered the Federal Judgeship Act of 2013, which would have created seventy new judgeships (sixty-five district; five circuit)

54. *See id.* at 112.

55. *See* David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1669, 1673 (2005) (discussing judicial delegation).

56. *See* Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 766 (1989).

57. Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456 (1983).

58. Admin. Office of the U.S. Courts, *Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx> (last visited Oct. 26, 2014), archived at <http://perma.cc/4Z4M-LW26>.

59. *See* DENIS STEVEN RUTKUS & MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., JUDICIAL NOMINATION STATISTICS: U.S. DISTRICT AND CIRCUIT COURTS 10 tbl.1 (2004) (reporting, for example, that in 1979 the district courts had 119 vacancies and the courts of appeals had 38 vacancies, representing a total vacancy rate of 24%).

recommended by the Judicial Council, but the legislation stalled in the Senate Judiciary Committee without a vote.⁶⁰

Based on recent history, the chances of an increase in judgeships are unlikely. The number of district court judgeships has held constant since 2003 and the number of court of appeals judgeships constant since 1990.⁶¹ Moreover, some members of Congress are in favor of *reducing* rather than expanding the federal judiciary. In 2013, Senator Grassley renewed calls to again reduce the number of judges on the D.C. Circuit,⁶² following recent legislation in 2008 that reduced the number of authorized judgeships from twelve to eleven.⁶³

If it is not possible to change how judges rely on clerks, either through changing judicial culture or by easing the judges' workload demands, then an alternative is to encourage judges to adopt a more diverse hiring approach. Rather than rely predominantly on the most recent cohort of law graduates, they could hire clerks who have practiced for a few years, or longer, in government, public interest, or the private sector. Older law clerks bring a potentially broader perspective to chambers, informed by their own legal experiences. They may also bring more maturity to chambers, both professionally and personally.

One advantage of hiring older clerks, at least in part, is that it enables judges to make more informed selections. Hiring clerks right out of law school means that judges make this decision based almost solely on the clerks' performance during law school, in some instances

60. Federal Judgeship Act of 2013, S. 1385, 113th Cong. §§ 2–3 (2013), <https://www.congress.gov/113/bills/s1385/BILLS-113s1385is.pdf>, archived at <http://perma.cc/5J6B-L4NB>. For the text of the Federal Judgeship Act of 2013 and its legislative history, see *All Bill Information (Except Text) for S. 1385—Federal Judgeship Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/1385/all-info> (last visited Oct. 26, 2014), archived at <http://perma.cc/U7RR-SAJW>; *S. 1385: Federal Judgeship Act of 2013*, GOVTRACK.US <https://www.govtrack.us/congress/bills/113/s1385#> (last visited Oct. 26, 2014), archived at <http://perma.cc/LG3J-7JC8>.

61. See *supra* Figure 2.

62. See Glenn Kessler, *Is the D.C. Circuit Last in 'Almost Every Category'?*, WASH. POST (June 6, 2013, 6:00 AM), http://www.washingtonpost.com/blogs/fact-checker/post/is-the-dc-circuit-last-in-almost-every-category/2013/06/05/a589b186-ce22-11e2-8f6b-67f40e176f03_blog.html, archived at <http://perma.cc/U9M4-VQXK>.

63. Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534, 2543 (2008); see also *U.S. Court of Appeals for the District of Columbia Circuit*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_dc.html (last visited Oct. 26, 2014), archived at <http://perma.cc/D6V8-68DX> (describing the history in the number of authorized judgeships).

their performance during only their first year.⁶⁴ The performance during school is undoubtedly correlated with how one would perform during a clerkship, but it may lead in some instances to false positives (i.e., a clerk who performed well at school but not at her clerkship). More significantly, the current emphasis on recent law graduates does not allow much for the false negative: the student whose performance during law school belies her ability as a lawyer and, correspondingly, a clerk.

A possible rejoinder against hiring older law clerks is that judges are not looking for junior colleagues, but rather faithful—albeit highly intelligent—agents to the judges. Clerks hired right out of law school, both because of youth and inexperience, may better perform this role. But the tradeoff for youth and fealty is added knowledge and maturity, which the other branches of government implicitly value when hiring staff. There is no *ex ante* reason to believe that the agency concerns of judges should differ from those of a member of Congress or the President.

VI. CONCLUSION

This Essay explores the institutional structure of the federal judiciary and the considerable demands it imposes on both judges and clerks. Over the past fifty years, as the ratio of case filings to authorized judges has steadily grown, judges increasingly rely on their clerks when preparing for cases and writing opinions. While the allure of clerking is perhaps heightened by this greater responsibility, the market for federal judges is arguably less attractive: an excoriating confirmation process and, for those confirmed, greater work demands coupled with lower compensation.

The current system of older judges hiring young, typically inexperienced clerks stands in contrast to other branches of government and arguably impedes rather than promotes judges' ability to perform their role. This juxtaposition poses a problem for which there is no easy solution. One approach is a Congressional response: Congress can increase the number of authorized judges to address the greater workload or increase judicial compensation with the hope of attracting individuals capable of writing their own opinions—e.g., Judges Richard

64. See Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 156 (1990) (describing how the clerkship process has over time shifted from law students' third year to their second year).

Posner, Frank Easterbrook—notwithstanding the caseload. The other approach is for judges to take it upon themselves to hire more experienced clerks.

Neither response appears likely, given the current political and judicial landscape. The cost of maintaining the current system, however, represents a lost opportunity to strengthen the judiciary and, in so doing, potentially weakens the judicial process and the development of the common law.