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Fielding an Excellent Team: Law Clerk Selection and Chambers Structure at the U.S. Supreme Court

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FIELDING AN EXCELLENT TEAM: LAW CLERK SELECTION AND CHAMBERS STRUCTURE AT THE U.S. SUPREME COURT

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Supreme Court Justices exercise wide discretion when hiring law clerks. The Justices are constrained only by the pool of qualified applicants and by norms of the institution, such as that beginning with Chief Justice Burger's tenure in 1969 90% of clerks have previously served a clerkship with a federal judge. Previous work finds that ideology structures hiring decisions at the individual clerk level; however, these analyses fail to account for the fact that a Justice hires several clerks each Term—he seeks a winning team, not just a single all-star. Hiring decisions are structuring decisions in which one of a Justice's goals is to assemble a team of clerks that provides him with information to aid in decision making. I analyze ideological characteristics of the teams the Justices assembled from 1969–2007 and find that they frequently hire clerks with different preferences than their own. This analysis has implications for the information clerks convey to their Justice and suggests that existing principal–agent models used to explain the Justice–clerk relationship may be incomplete.

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I. INTRODUCTION

All judges rely on information to help them make decisions. Information helps them to understand the facts and the law and to decide which strategy to pursue. While unobservable psychological processes are what lead a judge to choose a particular strategy, scholars have sought to learn about the inputs to these processes. These inputs include information from numerous sources, including that contained in litigant and amicus curiae briefs,¹ debated during oral argument,² articulated by the solicitor general,³ and conveyed by law clerks in in-chambers discussions.⁴ By studying these sources, scholars hope to learn how judges make decisions and, perhaps, to explain their behavior.

There are unique challenges to studying the role of clerks as information sources. First, these conversations take place in secret and are usually unrecorded, except in memo form. It is also difficult to know what information clerks possess that their judge does not. Finally, there is the challenge of disentangling the mechanism by which this information can influence the judge's decision making.

The relationship between the Justices of the United States Supreme Court and their law clerks provides leverage over some of these challenges. Scholars have availed themselves of full lists of every law clerk to serve, and because these clerks often go on to be public figures, it is possible to collect their biographical information.⁵ When her biography differs from that of her Justice, a clerk has the advantage of an information asymmetry and can convey information a Justice does not already have. Additionally, because we know the identity of all the clerks a Justice has hired, we can analyze how the information environment of a Justice's chambers affects his decision making.

1. PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 75–114 (2008).

2. Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs, II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99 (2006).

3. RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS (2012); Michael A. Bailey, Brian Kamoie & Forrest Maltzman, *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72 (2005).

4. Christopher D. Kromphardt, U.S. Supreme Court Law Clerks as Information Sources and Justice Decision Making (Aug. 3, 2014) (unpublished manuscript) (on file with author).

5. TODD C. PEPPERS, COURTIERIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 219–35 (2006).

Research has shown that when a team of clerks holds unified preferences, some teams have successfully pulled the Justice's vote in their direction.⁶

While we can neither sit in on meetings between a Justice and his clerks nor probe his brain as he considers his strategies, we can analyze how he assembles the team of clerks on which he relies. The makeup of these teams reveals clues about what information he seeks to aid his decision making. Some Justices desire information from disparate and competing sources, pursuing the logic that the fruits of many minds often produce the best answer.⁷ Other Justices seek information of a particular ideological nature;⁸ this information helps justify voting in their preferred ideological direction and may provide ammunition for persuading other Justices and defusing attacks. Studying the team a Justice assembles provides scholars with a rare glimpse into how he does his work.

This is not the first study on clerk selection, but to my knowledge it is the first to treat selection as the assembly of a team rather than the hiring of individuals. My subject of interest is the team a Justice assembles. Specifically, I will analyze patterns in the ideological characteristics of the Justices' teams from 1969–2007. I discuss two theoretical perspectives on clerk hiring—one in which clerks are agents to the Justice as principal and one in which clerks are tapped as sources of information—and derive implications from each perspective that will facilitate interpretation of data on Justice and clerk ideological preferences. These patterns reveal a great deal about the teams of clerks the Justices assemble to accomplish their goals. In general, the analysis uncovers variance across the Justices and over the Justices' tenures.⁹ In particular, the results undermine the notions that a Justice's ideology completely determines the information he seeks and that clerks' ideologies always match those of their Justices.

This study should be of interest beyond the narrow question of how clerks influence their Justices. As I mention above, the teams a Justice assembles provide clues about how he does his work. Information about

6. Kromphardt, *supra* note 4, at 25–29.

7. Cf. Rick A. Swanson & Stephen L. Wasby, *Good Stewards: Law Clerk Influence in State High Courts*, 29 JUST. SYS. J. 24, 37 (2008) (reporting that “several [state high court] judges stated that they appreciated clerks because they sometimes provide perspectives unavailable to the judge”).

8. Cf. *id.* at 36.

9. See *infra* Figures 1 & 2.

their clerks should join the Justices' comments and released papers as important sources for learning about the day-to-day job of being a Supreme Court Justice. The study treats Justices as performing an additional role. Scholars are used to looking at Justices as role-players, such as members of a collegial group,¹⁰ yet are unaccustomed to treating them in the role of personnel managers. Finally, the study also serves to illuminate a case of how elites engage in personnel management.

II. SELECTION OF LAW CLERKS

Clerk selection at the Supreme Court has been the subject of much scholarly scrutiny. In particular, scholars have described the young lawyers who fill the pool from which Justices select their clerks, as well as the individual characteristics or criteria on which the Justices base hiring decisions.¹¹ This literature contains clues about the people whom the Justices hire and the information those clerks have to provide.

Insight into the motivations of students applying for federal clerkships is limited.¹² Wasby looks at a federal appellate chambers to see why clerks chose that judge.¹³ While the results of Wasby's survey of a single chambers are of limited generalizability,¹⁴ the study does provide valuable insight into the application process. In particular, the results are suggestive of treating lower court clerks as belonging in two pools: those who are interested in applying to Supreme Court clerkships and those who are not.¹⁵ For this latter group, to which Judge

10. FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000).

11. See, e.g., ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 68–108 (2006).

12. Very few Supreme Court clerks have only federal district court or state court experience. Only 7% of Rehnquist clerks with clerkship experience had served only for a federal district court judge (i.e., did not also serve with a federal appellate judge) and 0.3% only for a state supreme court justice. *Id.* at 77. For work on other clerks, see generally 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 (2008) (district court clerks); Swanson & Wasby, *supra* note 7 (state supreme court clerks).

13. Stephen L. Wasby, "Why Clerk? What Did I Get Out of It?," 56 J. LEGAL EDUC. 411, 417–20 (2006).

14. This is even more so for explaining the experience of students who go on to be Supreme Court clerks, given that Judge Goodwin fed just two clerks. *Id.* at 418. Indeed, Wasby concludes that "[t]here is one reason [for applying to clerk with Judge Goodwin] that definitely did *not* apply — as a step toward a clerkship in the U.S. Supreme Court," and even then, "the judge was not one of those *seen* as providing that connection." *Id.*

15. See *id.*

Goodwin's clerks generally belong, factors like the judge's personality, the Ninth Circuit—both its prestige and the issues and cases its judges deal with—and the Northwest geography played the biggest roles in why respondents applied.¹⁶

Several scholars have used surveys to investigate what types of students apply for clerkships. In studies by Rhinehart and by Avery and his coauthors, the authors survey students at top schools to learn about their attitudes and experiences with regard to clerking.¹⁷ Rhinehart identifies gender gaps in why students do not seek clerkships; in particular, she finds that women are less likely in general to be interested in clerking.¹⁸ While Rhinehart's sample size is too small to determine whether this difference is statistically significant, and she is unable to draw any firm conclusions about the experiences of racial minorities, this finding implies that otherwise qualified students are not interested in applying for clerkships and that the overall pool is not representative of all otherwise highly qualified young lawyers.¹⁹ If true, this finding has implications for the perspectives the Justices hear from their clerks.

The Avery team conducts surveys in order to gain student- and judge-level perspectives on the application process and to determine how this controversial process affects students' attitudes toward the judiciary.²⁰ The authors describe how the clerk hiring market faces a timing problem, where more earnest participants will inevitably circumvent deadlines looking to get a jump on the competition.²¹ Survey responses show that students and judges alike are unsatisfied

16. *See id.* at 416–18.

17. Christopher Avery, Christine Jolls, Richard A. Posner & Alvin E. Roth, *The Market for Federal Judicial Law Clerks*, 68 U. CHI. L. REV. 793, 808–12 (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, 484–86 (2007) [hereinafter Avery et al., *The New Market*]; Lynn K. Rhinehart, *Is There Gender Bias in the Judicial Law Clerk Selection Process?*, 83 GEO. L.J. 575, 577–78 (1994). Rhinehart only surveys students at eleven top schools who serve on the law review, Rhinehart, *supra*, at 578 n.12, while Avery and his coauthors use a sampling frame that they argue is more representative of who receives clerkships, including fewer schools but all of these schools' students, Avery et al., *The Market*, *supra*, at 808–09; Avery et al., *The New Market*, *supra*, at 485. No one to my knowledge has conducted a survey that reaches a broader sample of applicants.

18. Rhinehart, *supra* note 17, at 580.

19. *See id.*

20. Avery et al., *The Market*, *supra* note 17, at 795–96.

21. *Id.* at 795.

with the process because many participants are left having made suboptimal matches.²² The hectic process understandably also has the effect of driving students away from applying at all: 58% of respondents who did not apply for federal clerkships said they opted out because of either the nature or timing (often fall semester of their 2L year) of the market's activity.²³ As one student commented, "[The market] certainly seems like a hellish experience and that definitely contributed to my decision not to apply."²⁴ Meanwhile, the authors report that 42% of judges in their survey responded to a closed-ended question that a recommendation from professors with whom they were familiar was either the most or second-most important factor.²⁵ Comments from student and judge respondents alike strongly suggest that faculty recommendations play a substantial role in the hiring process.²⁶ These factors shape the body of information the Justices can glean from conversations with their clerks.

22. *Id.* at 884. Numerous remedies to this longstanding problem have been advanced, from creating a common deadline, 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, 207–08 (1994), to implementing a system modeled off the process used to match medical graduates with residencies, Avery et al., *The Market*, *supra* note 17, at 868–84; Avery et al., *The New Market*, *supra* note 17, at 452 n.25; Ernan Haruvy, Alvin E. Roth & M. Utku Ünver, *The Dynamics of Law Clerk Matching: An Experimental and Computational Investigation of Proposals for Reform of the Market*, 30 J. ECON. DYNAMICS & CONTROL 457 (2006); Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply to the Bad Apple*, 101 YALE L.J. 1097 (1992); Patricia M. Wald, *Selecting Law Clerks*, 3 LONG TERM VIEW 37 (1995), to more market based solutions, *see* George L. Priest, *Reexamining the Market for Judicial Clerks and Other Assortative Matching Markets*, 22 YALE J. ON REG. 123, 124 (2005); *see also* Ruggero J. Aldisert, Ryan C. Kirkpatrick & James R. Stevens III, *Rat Race: Insider Advice on Landing Judicial Clerkships*, 110 PENN ST. L. REV. 835 (2006).

23. Avery et al., *The Market*, *supra* note 17, at 829.

24. *Id.* at 894 (alteration in original). While Avery and his coauthors largely paint a picture of a process whose flaws run deep, their results also show that students are strategic in how they manage the market. Because many students feel obligated to accept their first offer, or are faced with an “exploding” offer with an expiration date, 42% in one survey and 55% in another reported that they narrowed the pool to whom they applied *ex ante* to include only their most-preferred judges. *Id.* at 829. Students who strongly desire a particular experience, be it a certain form of mentorship or to work for a feeder judge, will narrow their pools to include only those judges that fit the bill. Furthermore, applicants are strategic when scheduling interviews to avoid receiving an exploding offer from a less desired judge. *See* Daniel M. Katz & Derek K. Stafford, *Hustle and Flow: A Social Network Analysis of the American Federal Judiciary*, 71 OHIO ST. L.J. 457, 481 (2010). Ample evidence supports the conclusion that students are purposeful in selecting to whom they apply.

25. Avery et al., *The Market*, *supra* note 17, at 899 tbl.A11.

26. *See id.* at 900 tbl.A12.

Multiple judges have written odes to what they consider the ideal clerk. Chief Judge of the D.C. Circuit Patricia M. Wald establishes what prominent feeder judges such as herself view as the stakes: “The judge–clerk relationship is the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair. . . . [A]n excellent versus a mediocre team of clerks makes a huge difference in the judge’s daily life and in her work product.”²⁷ As a consequence,

many judges are not looking just for qualified clerks; they yearn for neophytes who can write like Learned Hand, hold their own in a discussion with great scholars, possess a preternatural maturity in judgment and instinct, are ferrets in research, will consistently outperform their peers in other chambers and who all the while will maintain a respectful, stoic, and cheerful demeanor.²⁸

On top of making the job easier and more pleasant, Wald points to the prestige that comes with being considered a feeder judge.²⁹ Chief Judge of the Ninth Circuit Alex Kozinski, who like Wald is a feeder judge and a former court of appeals—and Supreme Court—clerk agrees that “judges have a very substantial stake in selecting clerks who are not merely competent, but brilliant; not merely articulate, but lightning fast and prolific; not merely thoughtful, but persuasive and tactful”;³⁰ to identify such clerks, he attributes “the type of drive and determination—as well as imperviousness to pain—[that] many judges look for in a clerk” to being successful in the classroom, publishing a note, doing research, or showing proficiency as a successful moot court advocate.³¹

The foregoing studies reveal a great deal about the pool from which Justices hire their clerks. They show that clerks in their application and acceptance and Justices in their offering decisions act purposefully; the pool is not filled at random, so to speak. These processes contribute to two bifurcations: feeder and non-feeder judges,³² and feeder and non-

27. Wald, *supra* note 22, at 37–38.

28. *Id.* at 38–39.

29. *Id.* at 39.

30. Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1708 (1991).

31. *Id.* at 1710 & n.8.

32. See Avery et al., *The Market*, *supra* note 17, at 875–77. Feeder judges compete for the top law students, and among the reasons these students choose to clerk with feeder judges are their prestige and their track record in placing clerks at the Supreme Court. *Id.*

feeder clerks.³³ Ideology plays a role in both feeder and non-feeder matches; applicants and judges alike, through conscious and unconscious selection, show a tendency to make ideological matches.³⁴ And while the mechanism driving the disparity is uncertain, female and minority law students are underrepresented in all appellate clerkships.³⁵

Characterizing the pool of individuals with appellate clerkship experience is essential because, in recent years, having this experience has become a norm and virtual requirement to be selected for a Supreme Court clerkship. The genesis of this practice is attributed to a preference by Chief Justice Warren Burger that soon caught on with the rest of the Justices.³⁶ During the years of the Burger Court, the percentage of clerks with prior clerkship experience increased from 68% to 95%,³⁷ and 85% of these clerks with experience had acquired it with a federal appellate judge.³⁸ This trend grew even more pronounced in the Rehnquist Court, with 98% of all clerks having experience and 92% of that subset gaining it with federal appellate judges.³⁹ The norm has become near law in the Roberts Court: through the 2013 Term, only two clerks did not first gain experience in one of the twelve regional circuits

33. See Wasby, *supra* note 13, at 418. Nelson and his coauthors discuss how an increasing number of law students appear to be following an ideological track that continues after their clerking days are over. William E. Nelson, Harvey Rishikof, I. Scott Messinger & Michael Jo, *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 VAND. L. REV. 1749, 1797–98 (2009) (“A 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.”).

34. See Corey Ditslear & Lawrence Baum, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J. POL. 869, 871 (2001). Cf. Panel Discussion, *Judges’ Perspectives on Law Clerk Hiring, Utilization, and Influence*, 98 MARQ. L. REV. 441, 463 (2014) (Judge Diane Sykes speculating about ideological self-selection by clerkship applicants). A published conversation between Chief Judge Kozinski and one of his former clerks discusses the phenomenon of judges hiring non-matches. Alex Kozinski & Fred Bernstein, *Clerkship Politics*, 2 GREEN BAG 2D 57 (1998). The dynamic between a conservative jurist and liberal clerk will provide fodder for dramatization in a play called *The Originalist* about Justice Antonin Scalia. Peter Mark, *Arena Stage Finds Material Nearby: Scalia*, WASH. POST, Feb. 27, 2014, at C1.

35. See PEPPERS, *supra* note 5, at 20–23.

36. *Id.* at 31.

37. *Id.*

38. WARD & WEIDEN, *supra* note 11, at 77.

39. *Id.*; see also PEPPERS, *supra* note 5, at 31.

of the federal courts of appeals, although both had served clerkships in the federal judiciary—one in the Federal Circuit and one in the D.C. District Court.

The use of feeder judges structures ideological hiring of clerks by the Justices.⁴⁰ Baum and Ditslear find that, “[c]ompared with the random distributions, many more judges actually provided no clerks to the justices, and some judges provided more clerks to the justices than any judge would have sent under a random distribution”;⁴¹ in other words, hiring is disproportionately concentrated among a handful of feeder judges. They further observe that “it appears that liberal and conservative justices were drawing clerks largely from different sets of feeders, sets structured by the ideological positions of the feeder judges.”⁴²

The evidence that many recent clerk hires were ideological matches is strong. Baum and Ditslear report robust and statistically significant correlations between multiple measures of the ideologies of Justices and judges for the period 1995–2004.⁴³ However, their results reveal considerable variance across correlations, making it difficult to assert with confidence precisely how strong the relationship is.⁴⁴ This difficulty is corroborated by the often substantial gaps between clerk and Justice ideologies that I report later.⁴⁵

There are three possible explanations for this phenomenon. The first is measurement error. At least some measurement error should be

40. Lawrence Baum & Corey Ditslear, *Supreme Court Clerkships and “Feeder” Judges*, 31 JUST. SYS. J. 26, 37–38 (2010). Other factors that appear to affect clerk hiring are the overrepresentation of elite schools, PEPPERS, *supra* note 5, at 23; WARD & WEIDEN, *supra* note 11, at 69, and, as suggested by the underrepresentation of female and minority clerks discussed earlier, gender and race, PEPPERS, *supra* note 5, at 20–23; WARD & WEIDEN, *supra* note 11, at 87–98; Mark R. Brown, *Gender Discrimination in the Supreme Court’s Clerkship Selection Process*, 75 OR. L. REV. 359 (1996).

41. Baum & Ditslear, *supra* note 40, at 31.

42. *Id.* at 38. In an earlier paper where the authors introduce the idea that lower court judge ideology signals information to the Justices, they find that ideological polarization, as measured by the tendency of conservative (liberal) Justices to hire clerks from judges appointed by Republican (Democrat) presidents, has increased in modern times: “In choosing clerks, the justices now give much more weight to an ideological signal than they did in the 1970s and the 1980s.” Ditslear & Baum, *supra* note 34, at 882–83.

43. Baum & Ditslear, *supra* note 40, at 38 tbl.4.

44. *Id.*

45. See *infra* text accompanying notes 74–76 and Figures 1 & 2.

expected, as ideology is a notoriously tricky concept to measure.⁴⁶ Another explanation is that when a Justice hires an ideological non-match it is the result of a mistake. The existence of selection committees, feeder judges, and a large number of qualified applicants across the ideological spectrum makes this explanation less plausible. Certainly there are enough qualified clerks with judges of known ideology that if Justices were only interested in hiring ideological matches, they would be capable of doing so.⁴⁷ The third explanation is that Justices sometimes hire ideological non-matches on purpose.⁴⁸ Substantial anecdotal evidence suggests that this third possibility—that Justices may purposefully hire clerks whose ideological preferences are different from their own—does indeed take place,⁴⁹ although systematic work has made only fleeting reference to it⁵⁰ and has never explicitly tested how it affects decision making.⁵¹

In the next section, I link these observations about the role of clerk ideology in hiring to two perspectives on clerk selection. These perspectives consider the roles clerks play and how the team of clerks a Justice hires suggests which role he prioritizes.

III. TWO PERSPECTIVES ON CHAMBERS STRUCTURE

This study is the first to describe empirically how Supreme Court

46. See Joshua B. Fischman & David S. Law, *What is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 135–36 (2009).

47. For a discussion of the benefits of having clerks who disagree with you, see Kozinski & Bernstein, *supra* note 34, at 62–63.

48. The placement records of feeder judges Douglas Ginsburg and J. Harvie Wilkinson may support this third explanation, although the possibility remains that liberal Justices hire from Judge Ginsburg for non-ideological reasons, such as reputation for hiring hard workers. Judge Ginsburg is very conservative and Judge Wilkinson less so, but both have placed clerks across the ideological range of Justices. See Baum & Ditslear, *supra* note 40, at 39 tbl.5.

49. Kromphardt, *supra* note 4, at 12.

50. See Sally J. Kenney, *Puppeteers or Agents? What Lazarus's Closed Chambers Adds to Our Understanding of Law Clerks at the U.S. Supreme Court*, 25 LAW & SOC. INQUIRY 185, 194 (2000) (citing WILLIAM O. DOUGLAS, *THE COURT YEARS, 1939–1975*, at 175 (1980)); Ryan C. Black & Christina L. Boyd, *The Role of Law Clerks in the U.S. Supreme Court's Agenda-Setting Process*, 40 AM. POL. RES. 147, 169 n.3 (2012).

51. An important exception is a study by Peppers and Zorn, who test the effect of chambers structure—how many Democrats a Justice employs, for example—on the direction of a Justice's vote. Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 74–75 (2008). The authors identify several mechanisms through which clerk ideology can influence a Justice's vote, but cannot draw any conclusions about the mechanism driving their findings. *Id.* at 75.

Justices take clerks' ideological positions into account when assembling teams.

There are two perspectives that deal with the concept that I use to characterize these teams, which I call "chambers structure," or the particular arrangement of clerks' preferences with respect to each other and their Justice. I discuss these perspectives in this section, including implications that I will rely on in the following section to identify and make sense of patterns in a set of data.

Structural decisions are closely related to clerk selection.⁵² Selection is both interesting and important, but the literature tends to treat the individual hiring decisions as if they are independent of one another, a choice a Justice makes a few times each Term.⁵³ However, a Justice does not hire his clerks in isolation of each other; rather, he hires a team of clerks in order to create a particular fit. The quality of this fit is determined by how his clerks help him pursue his goals.

These selection studies have shown that it is not controversial to assert that ideology has an important function in the decision to hire a clerk.⁵⁴ Typically, the interpretation of the results has been that the Justices at least attempt to make ideological matches.⁵⁵ However, anecdotal evidence suggests that for at least ten recent Justices, hiring decisions were *purposefully* also a function of the ideological positions of the *other* clerks who were hired.⁵⁶ These Justices profess to have the whole chambers structure in mind, not just individual clerks' characteristics.⁵⁷ These anecdotes point to hiring decisions also being structural decisions.

The first perspective on structural decisions treats the Justice-clerk relationship as an example of a principal-agent dynamic. The principal-agent perspective is very common in clerk studies.⁵⁸ These

52. See generally PEPPERS, *supra* note 5; WARD & WEIDEN, *supra* note 11; Baum & Ditslear, *supra* note 40, at 31; Ditslear & Baum, *supra* note 34, at 882; Peppers & Zorn, *supra* note 51, at 75–76.

53. See PEPPERS, *supra* note 5, at 10; WARD & WEIDEN, *supra* note 11, at 68–107; Baum & Ditslear, *supra* note 40, at 33; Ditslear & Baum, *supra* note 34, at 882; Peppers & Zorn, *supra* note 51, at 75–76.

54. Baum & Ditslear, *supra* note 40, at 38; Ditslear & Baum, *supra* note 34, at 871.

55. E.g., PEPPERS, *supra* note 5, at 32; Ditslear & Baum, *supra* note 34, at 882–83.

56. See Kromphardt, *supra* note 4, at 12.

57. See *id.*

58. PEPPERS, *supra* note 5, at 10; Black & Boyd, *supra* note 50, at 150; Ditslear & Baum, *supra* note 34, at 870; Sally J. Kenney, *Beyond Principals and Agents: Seeing Courts as Organizations by Comparing Référéndaires at the European Court of Justice and Law Clerks*

studies assume that the Justice–clerk relationship is a classic example of a principal–agent relationship.⁵⁹ This theory predicts that the principal can reduce the costs of monitoring and the risk of shirking by hiring agents he believes share his goals.⁶⁰ According to this perspective, we should expect that clerk viewpoints do not diverge greatly from the Justice’s, because the Justice seeks clerks whose preferences closely match his own.⁶¹

We can also learn what kind of information a Justice receives from a chambers structure in which clerks’ ideal points are unified and lie close to the Justice’s. In this environment, it is unlikely that the Justice will receive information that supports a position dramatically different from his own. Because of this, a Justice who creates this sort of structure probably wishes to reinforce the views he already holds.

This discussion suggests the following implications: If we observe little divergence between clerk and Justice ideological positions

- the Justice’s hiring behavior is consistent with principal–agent theory; and
- the information asymmetry held by clerks is likely small, and any learning that takes place will serve primarily to reinforce the Justice’s current ideological position.

The second perspective treats clerks as advisors. At least ten Justices in the past forty-five years have discussed using their clerks as advisors, tapping them for information about the case at hand.⁶² This perspective reasons that clerks are well-trained young lawyers who are incentivized to be good confidants to their Justice. As a result, clerks both possess useful information and are encouraged to share that information forthrightly.

Clerks have had different life experiences than their Justice, such as those acquired perceiving the world through an ideological frame or as

at the U.S. Supreme Court, 33 COMP. POL. STUD. 593 (2000); Peppers & Zorn, *supra* note 51, at 58; Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 CORNELL L. REV. 1307, 1310 (2011); 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, 173 (2002).

59. Ditslear & Baum, *supra* note 34, at 870; *see also* Wahlbeck et al., *supra* note 58, at 173.

60. Ditslear & Baum, *supra* note 34, at 870–71.

61. *Id.* at 871.

62. Kromphardt, *supra* note 4, at 9–13.

member of a minority group. Information based on those distinct experiences creates an information asymmetry between clerk and Justice and thus the opportunity for learning by the Justice. The Justice learns in two ways. The first is that by tapping his clerks as sounding-boards he increases his overall supply of information, which he can draw upon when reasoning about voting strategies.⁶³ The second way a Justice can learn is by filtering ideological arguments through his clerks, gleaned information about a strategy's utility by comparing a clerk's attitude toward it with her known biases.⁶⁴

Depending on the information he seeks, the advisory role can create reasons for a Justice to make structural decisions with a greater eye toward viewpoint diversity. In the next section, I discuss how structure affects information transmission.⁶⁵ Meanwhile, the present discussion suggests the following implications: If we observe divergence between clerk and Justice ideological positions

- the Justice faces a greater need to implement monitoring in order to prevent shirking;
- the information asymmetry held by clerks may be large, and the Justice can learn a great deal by discussing cases with his clerks (learning from his clerks may cause an observable change in the Justice's behavior); and
- factors that impede the transmission of information from clerks to their Justice will affect the Justice's ability to learn.

While the implications suggested by the agent and advisor perspectives are not the same, it is imperative to note that the agent and advisor roles are not mutually exclusive; in all likelihood, every Justice will seek the benefits of both roles and, to some degree, hire clerks intending to use them as both agents and advisors. One reason to conduct the empirical inquiry I discuss below is to evaluate the applicability of each perspective, both in general and in the context of individual Justices' structuring practices. This is an important exercise because it reveals the environment each Justice creates in which to interact with his clerks. By characterizing how Justices go about the delicate task of turning to

63. *Id.* at 3–4; *cf.* Panel Discussion, *supra* note 34, at 464 (comment by Justice David Stras expressing his desire for clerks with diverse backgrounds).

64. See Randall L. Calvert, *The Value of Biased Information: A Rational Choice Model of Political Advice*, 47 J. POL. 530, 542–43 (1985).

65. See *infra* Part III.A.

their clerks for aid with their work, we learn about how each individual approaches the job of being a Supreme Court Justice.

A. Structure Types and Information Transmission

Chambers structure—the particular arrangement of clerks’ preferences with respect to each other and their Justice—is important because it affects the impact clerks have on the Justice’s work. From the principal–agent perspective, a structure in which clerks’ preferences diverge from the Justice’s means that, unless the Justice engages in monitoring, which can be costly, clerks can shirk from their assigned tasks and pursue their own preferences.⁶⁶

Structure is also one of the factors that can impede the transmission of information alluded to in the third implication of the advisor perspective. This is because structure determines the type of information and affects how it is transmitted from clerks to Justice. For example, clerks with broadly similar ideological preferences can convey information consistent with those preferences without interference; in other words, they can transmit a clear signal to their Justice. The process is different when clerk preferences are dissimilar and multiple signals are sent. These signals can conflict with each other ideologically, and the resulting mixed signals make it difficult to predict what the Justice learns. The content of these signals comes from any information asymmetry between the Justice and his clerks. Such information can come from several places, whether through experience perceiving the world through an ideological frame or as a member of a minority group, through research, or through *amicus curiae* briefs.

This transmission of signals can be made clearer with a theoretical model in which a Justice’s chambers consists of two blocs: one composed of all clerks who are to the Justice’s ideological left and one with all those clerks to his right. A model of chambers structure such as this can be used to specify the conditions under which signals can influence Justice behavior when they trigger Justice learning about the case at hand. When clerks are in the same bloc, a single signal is sent, and the Justice can easily learn about the bloc’s position. However, when clerks are in both blocs and they send multiple, ideologically conflicting signals, the learning process becomes more complicated.

This bloc model is a useful tool for categorizing each Justice’s

66. PEPPERS, *supra* note 5, at 11–12.

chambers based upon its information environment. Some Justices, including Lewis Powell, desired a sort of information free-for-all in which multiple perspectives competed.⁶⁷ This sort of environment would lead to the accumulation of lots of information. A Justice would also be able to learn by using his clerks as ideological filters in the manner described earlier. I refer to this sort of chambers as a “crosswinds,” and it occurs when clerks are in both blocs. Other Justices, for example Clarence Thomas, seem to seek a narrower flow of information that is consistent with a uniform set of preferences.⁶⁸ The learning that results from acquiring this information reinforces a particular ideological leaning by strengthening the evidentiary base. These chambers I call “foxholes,” and they occur when clerks are in only one bloc. For example, a conservative foxhole is one in which no clerks lie to the Justice’s ideological left.

We suspect that these chambers structures exist because the Justices and their clerks say they do. By analyzing empirical data we can describe the extent to which these chambers actually occur.

The agent and advisor perspectives outlined above will help to make sense of these patterns. While the bullet-pointed generalizations do not rise to the level of causal hypotheses, they will help to guide my interpretation of the data and to evaluate the validity of the agent and advisor perspectives on clerk selection.

IV. DATA AND ANALYSIS

Figures 1 and 2 plot each Justice’s Judicial Common Space (JCS) scores for the period 1969–2007.⁶⁹ These scores are derived from the Justices’ votes on the merits and are calculated for each Term.⁷⁰ This dynamic feature allows for an approximate visualization of a Justice’s trending ideology over time.

I also plot clerks’ ideological positions with a proxy measure derived from their lower court clerkship experience.⁷¹ To do this I position each

67. *See id.* at 186.

68. *See id.* at 200.

69. *See infra* Figures 1 & 2. *See generally* Lee Epstein, Andrew D. Martin, Jeffrey A. Segal & Chad Westerland, *The Judicial Common Space*, 23 J. L. ECON. & ORG. 303 (2007).

70. *See* Epstein et al., *supra* note 69, at 306–09.

71. I assign each clerk the JCS score of the court of appeals judge for whom she previously clerked. This measure performs well under convergent and construct validation and is theoretically valid because applicants and judges select on ideology. Kromphardt, *supra* note 4, at 20–21.

clerk in the correct bloc based on whether her JCS score is higher or lower than the Justice's and plot the average JCS score for all clerks in each bloc. This measurement strategy allows bloc and Justice ideologies to be situated ordinally and gives a sense of how they relate to each other.

The solid black line running through the middle of each pane connects a Justice's JCS scores across Terms.⁷² The points in red above this solid line depict the average ideology score of all clerks in the right bloc for that Term. The points in blue below the line depict the same for clerks in the left bloc. The physical size of these points varies based on the proportion of clerks in the bloc: larger points are reflective of more clerks. Blocs with no clerks are omitted from the figure.⁷³

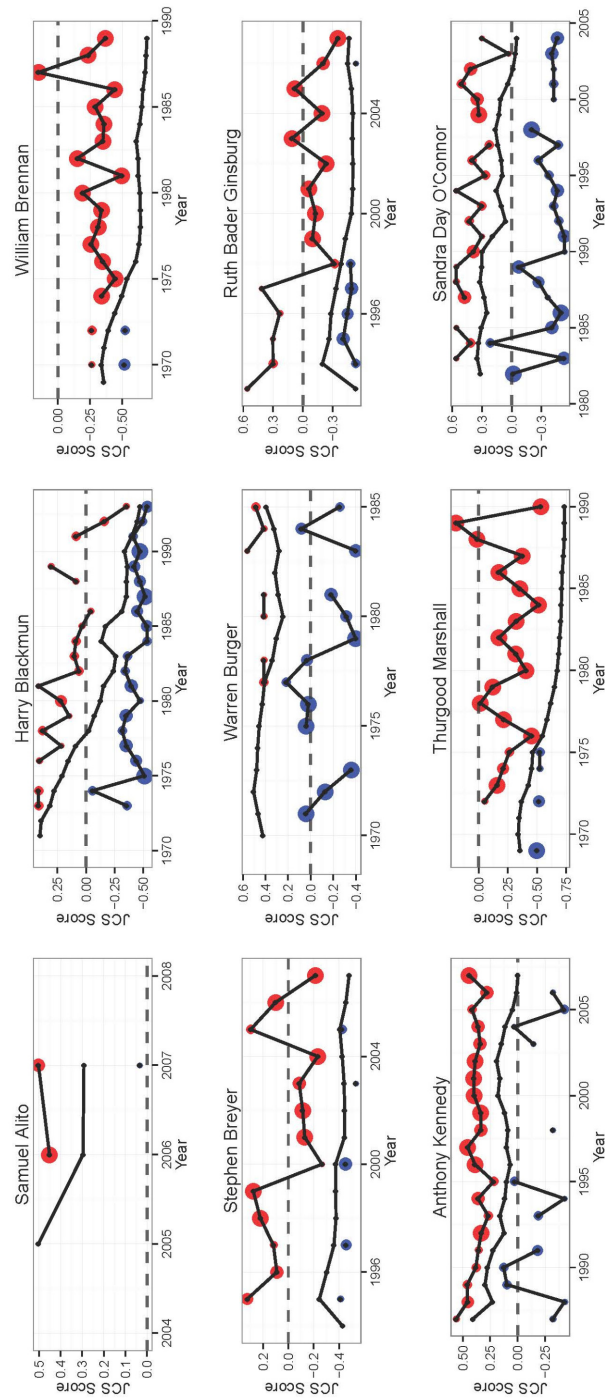
The figures enable identification of the different types of chambers discussed in the previous section. A crosswinds chambers is identifiable when there is a red point directly above and a blue point directly below a Justice's point (in other words, when a straight line can be drawn through a red dot, a Justice's black dot, and a blue dot for a single Term). As the figure shows, in 2007, Justice Samuel Alito had a crosswinds chambers. A foxhole chambers is identifiable when there is only a red or blue dot but not both, as Justice Alito had in 2006.

To my knowledge, no study has attempted to describe the structural decisions the Justices make. I will draw some general conclusions from these data that constitute the first findings about the important structural decisions the Justices make.

72. Scores are lagged by one year and capture a Justice's ideological position during the period when he hired his clerks. See Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, Research Note, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 630 (2001). Because this strategy eliminates freshman Terms, I plot a Justice's JCS score from his previous position when applicable. For example, Chief Justice John Roberts's ideology score for 2005, his first Term on the Court, is his JCS score from his tenure on the D.C. Circuit.

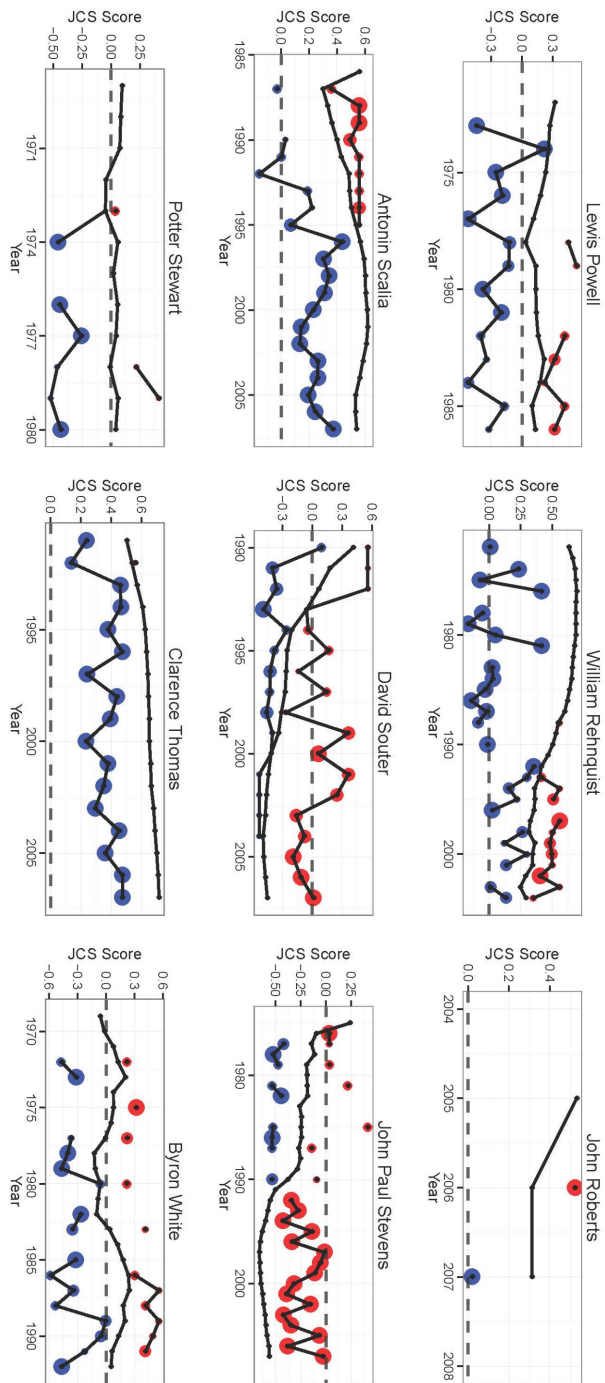
73. I omit Justices Hugo Black and William Douglas, who never met the coding criteria of having had at least two clerks with court of appeals experience, from the figures and Justice John Harlan II, who met it only once.

Figure 1
Justice and Bloc Ideological Scores from 1969–2007



Bloc scores are the average of all clerks in that bloc. Left Bloc scores are depicted in the blue and fall below the solid black line, and Right Bloc clerks are in red and above it. The size of a point increases as the proportion of the chambers' clerks in that bloc increases.

Figure 2
Justice and Bloc Ideological Scores from 1969–2007



Bloc scores are the average of all clerks in that bloc. Left Bloc scores are depicted in the blue and fall below the solid black line, and Right Bloc clerks are in red and above it. The size of a point increases as the proportion of the chambers' clerks in that bloc increases.

One of the most striking things about the figures is the presence of gaps between the ideologies of Justices and blocs. In other words, the distance between Justice and bloc ideologies is often quite great. While the nature of the data—JCS scores, while continuous, are ordinal—do not permit completely precise descriptions of this distance, it is clear that at times the blocs and the Justice are not ideological matches.⁷⁴ This goes against the prediction of principal-agent theory that the principal will hire agents that hold preferences similar to his own.⁷⁵ These gaps are surprising because divergence between a Justice and his clerks creates an opportunity for clerks to affect the output of a Justice's chambers. Yet we can clearly see in the data that there are often substantial gaps between Justice and bloc ideologies.⁷⁶

It is important to note that some of these Justice–bloc distances are a function of ideological extremeness. According to the data, it would be impossible for a Justice whose JCS score approaches the poles to hire ideological matches, much less clerks that have a more extreme ideological rank. This is due to the sample of ideology scores for the pool of courts of appeals judges. The most liberal and conservative JCS scores of courts of appeals judges who fed at least one clerk in the period 1969–2007 are -0.65 and 0.56, respectively. In the same time period, Justices Brennan, Douglas, Marshall, and Stevens had more liberal JCS scores than -0.65, and Chief Justice Rehnquist and Justices Scalia and Thomas had conservative scores surpassing 0.56.

For less extreme Justices who do not face this problem, why might they not be concerned with hiring ideological matches? One explanation is that the Justices who do so seek to obtain information from their clerks that aids in learning about which strategy to pursue. These data cannot tell us for certain why Justices make these hires, but future work should try to explain this curious pattern.

Also noteworthy is how bloc scores spike, or vary, over time. For example, over the period 1982–1985, Justice O'Connor's own score remained fairly constant while the average scores of her left bloc clerks

74. I do not measure any actual distance between the points. Rather, I use the words “distance” and “gap” here to represent what are essentially different ranks. See Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CALIF. L. REV. 813, 831 (2010).

75. See *supra* notes 58–61 and accompanying text.

76. See *supra* Figures 1 & 2. It is also worth noting that because the bloc scores are averages they understate the distance some individual clerks lie from a Justice.

were -0.014, -0.53, 0.217, and -0.41.⁷⁷ Other Justices, including Powell, Souter, Stevens, and White, at times show more attenuated spikes in bloc scores while maintaining constant, moderate scores of their own.⁷⁸ According to the theory, these spikes would lead to the Justice's receiving different types of information from Term to Term. Any effect of such spikes may be amplified by some of these Justices' status as frequent swing-vote casters.⁷⁹ This behavior can be contrasted with that of another swing-vote Justice, Anthony Kennedy.⁸⁰ After some initial fluctuation, Justice Kennedy shows remarkable consistency in his right bloc scores.⁸¹ From 1996–2005, his right bloc scores fell within the narrow range 0.33–0.46.⁸² Furthermore, in nearly all of these Terms Justice Kennedy had assembled a foxhole chambers, which meant there was not a liberal signal being sent to balance what may have been an extremely conservative signal.

Table 1 lists the number of times individual Justices elected to assemble a foxhole chambers when their JCS scores fell within a moderate range of scores. I limit the table to a moderate range— $-.35 < j < .35$ —due to the problem of ascribing purpose to structural decisions made by the sample of ideologically extreme Justices. Some Justices on this list are surprising—two of Justice Scalia's earlier Terms qualified him as moderate, while Justice Rehnquist had seven such Terms toward the end of his career.⁸³ I am less concerned with the validity of whether these Justices really were “moderate” than with distinguishing those Justices and Terms for which we might properly say their structural decisions were purposeful. This subset of ideological values is well within the sample of feeder judge scores and suits this purpose.

77. See *supra* Figure 1.

78. See *supra* Figure 2.

79. In 5–4 decisions, Justice O'Connor cast the swing vote 23.7% of the time. Peter K. Enns & Patrick C. Wohlfarth, *The Swing Justice*, 75 J. POL. 1089, 1095 fig.1 (2013). Justice Powell cast such votes 23.3% of the time, Justice Souter 4.7%, Justice Stevens 10.9%, and Justice White 23.8%. *Id.*

80. See *id.*

81. See *supra* Figure 1.

82. I find that this streak has consequences: the probability a moderate Justice with clerks who are all more conservative than he is casts a liberal vote decreases as the average score of those clerks moves further away from the Justice's score. Kromphardt, *supra* note 4, at 27–29. Justice Kennedy assembled more of these chambers than any of his colleagues from 1985–2001. He also cast the swing vote in 28.3% of 5–4 decisions. Enns & Wohlfarth, *supra* note 79, at 1095 fig.1.

83. See *supra* Table 1.

Not surprisingly, the vast majority of chambers in general are crosswinds. When making structural decisions, the Justices seem to desire more information in the form of more signals from their clerks. If we wish to consider when structural decisions were arguably the most purposeful, it is helpful to look at those Justices who made these decisions several times. It may take several tries before a Justice settles on what sort of structure he prefers. Of the Justices in this sample who faced the decision at least five times, Justice Stewart assembled foxholes the highest percentage of times at 57%, followed by Justices Powell, Stevens, and White.⁸⁴ Interestingly, all but two of the foxholes assembled by these four Justices were composed of clerks who were more liberal than they were. The Justices seem more comfortable making the decision to hire all more liberal clerks than all more conservative ones. That all-conservative chambers have been demonstrated to pull their Justice's votes on the merits in a conservative direction⁸⁵ may not be a coincidence: the Justices may be aware (or learn) of such a risk and avoid it.

Table 1

| Justice | # of Foxholes |
|-----------|---------------|
| Alito | 1 of 2 |
| Blackmun | 2 of 15 |
| Brennan | 0 of 1 |
| Breyer | 1 of 2 |
| Burger | 1 of 6 |
| Ginsburg | 0 of 4 |
| Harlan II | 1 of 1 |
| Kennedy | 8 of 20 |
| O'Connor | 4 of 24 |
| Powell | 8 of 15 |
| Rehnquist | 2 of 7 |
| Roberts | 2 of 2 |
| Scalia | 1 of 2 |
| Souter | 1 of 9 |
| Stevens | 4 of 9 |
| Stewart | 4 of 7 |
| White | 7 of 17 |

The number of foxhole chambers assembled by a Justice out of the total Terms in which he or she had a moderate JCS score and at least two clerks with court of appeals experience.

84. The Justice who assembled the lowest percentage of foxholes (and therefore the highest percentage of crosswinds) was Justice Souter at a mere 11%, followed by Justices Blackmun, Burger, and O'Connor.

85. Kromphardt, *supra* note 4, at 27.

V. DISCUSSION

What does the foregoing analysis tell us about what constitutes an excellent team for most Supreme Court Justices? For more moderate Justices, the answer is clear: a team of clerks that sends more signals is to be preferred. The learning that takes place after receiving these signals is difficult to predict, and there are exceptions to this trend, but a Justice is unlikely to assemble repeatedly a team of all conservative clerks.

The results also raise questions about the assumption that the Justice-clerk relationship can be completely explained using principal-agent theory. The data reveal divergence between Justice and clerk ideologies, which, coupled with the extent to which the Justices defer to their clerks, suggests at least one of two things is at work. The Justices who hire divergent clerks may implement monitoring to prevent shirking on delegated tasks. These Justices may also find the risk of defiance tolerable in the face of the information benefits these clerks provide. To the extent that the latter is true, scholars need to draw from a broader theoretical toolbox to explain the role of law clerks at the Supreme Court. The advisor theory I present in this paper can be a useful complement to principal-agent theory.

While this study is hopefully a stimulus for future work delving into the determinants and effects of the various roles clerks play, there are important limitations to the data and research design. Because the data are ordinal and of a proxy nature, they are not appropriate for making precise distinctions about the distance between a Justice and his clerks. Ideology, while a vitally important concept, is notoriously difficult to measure. Future work to refine these measures and the research design needs to take seriously the worthwhile challenge of capturing how clerk and Justice ideologies relate to each other. Also, the research design I employ is purely descriptive: I have not accounted for other factors besides ideology that explain the decision to hire a particular clerk. This decision is undoubtedly multivariate; race, gender, alma mater, feeder judge, and other personal factors undoubtedly play a role. Going forward, research designs should seek to eliminate any systematic factor associated with the error term.

Their limitations and tentative nature aside, the results I report here pose a number of exciting puzzles. Are conservative clerks really more effective at influencing the Justices, and if so, what are the consequences and how have the Justices reacted? When is a Justice willing to accept fewer signals, and therefore less information that could prove useful,

from his clerks? Is information obtained from these signals privileged compared to other forms, such as that obtained through oral arguments and amicus curiae briefs? Why do some moderate Justices, like Anthony Kennedy, who arguably have less of an ideological dimension to their voting behavior, nonetheless appear to follow an ideological dimension in their clerk hiring?

When we see a Justice as a manager and his clerks as a team (or teams), the range of behavior to be explained broadens. Better data collection and research designs guided by clear theoretical predictions will help improve our understanding of the effect law clerks have on the work of the Supreme Court.