

# Hiring Supreme Court Law Clerks: Probing the Ideological Linkage Between Judges and Justices

Lawrence Baum

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# **HIRING SUPREME COURT LAW CLERKS: PROBING THE IDEOLOGICAL LINKAGE BETWEEN JUDGES AND JUSTICES**

LAWRENCE BAUM\*

*Since the 1970s, the overwhelming majority of Supreme Court law clerks have had prior experience clerking in lower courts, primarily the federal courts of appeals. Throughout that period, there has been a tendency for Justices to take clerks from lower court judges who share the Justices' ideological tendencies, in what can be called an ideological linkage between judges and Justices in the selection of law clerks. However, that tendency became considerably stronger between the 1970s and 1990s, and it has remained very strong since the 1990s.*

*This Article probes the sources of that alteration in the Justices' selection of law clerks. Although no definitive conclusions are possible, two developments seem to be responsible for the change. The first is growing ideological polarization among political elites, which has given Justices stronger incentives to seek out law clerks whose policy preferences are similar to those of the Justices. The second is a pair of changes in applications for Supreme Court clerkships: a massive increase in the numbers of applicants and the development of a practice in which applicants apply to all nine Justices. These changes give the Justices more reason to use the identity of the judge with whom an applicant has clerked as a source of information about the applicant's policy preferences. Thus, it appears that a major change in the character of American politics has combined with changes in clerkship applications to bring about a strengthening of the ideological linkage between judges and Justices in clerk selection.*

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## I. INTRODUCTION

Since the mid-1970s, nearly all law clerks who serve in the Supreme Court have had prior experience clerking for judges on other courts.<sup>1</sup> Since the mid-1990s, these prior clerkships have been heavily concentrated in the federal courts of appeals.<sup>2</sup> Throughout the period

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1. See Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 61–62 (2008).

2. Lawrence Baum & Corey Ditslear, *Supreme Court Clerkships and “Feeder” Judges*, 31 JUST. SYS. J. 26, 26 (2010). In the 1975–1984 Terms, 86% of the Supreme Court law clerks with lower court experience had worked most recently in the federal courts of appeals. The comparable proportions for later decades were 88% in the 1985–1994 Terms, 98% in the 1995–2004 Terms, and 96% in the 2005–2014 Terms. These figures are from analysis of a dataset on the backgrounds of Supreme Court law clerks who served in the 1975–2014 Terms [hereinafter Dataset on Clerks’ Backgrounds], one that Corey Ditslear and I compiled from two sets of documents on the backgrounds of law clerks provided by the Supreme Court, the “Law Clerk Report by Justices” (used for the 1975–1991 Terms) and “Law Clerks—October Term [xxxx]: Law Schools and Prior Clerkships” (used for the 1992–2014 Terms). The “Law Clerk Report by Justices” does not include information on some prior clerkships, and other sources were checked to identify lower court clerkships for Supreme Court clerks who had no such clerkships listed.

When law clerks worked with more than one lower court judge, the Supreme Court’s datasheets in recent years (including the 2010–2014 Terms) have listed only one judge, ordinarily the one with the most recent clerkship, and that clerkship was used in the Dataset on Clerks’ Backgrounds and treated as the most recent one for clerks with multiple lower-court clerkships. It is possible that in some instances the clerkship listed in the Court’s datasheets and, thus included in the Dataset, is not the most recent one for a Supreme Court clerk. In some earlier years the Court’s datasheets listed multiple judges with whom a clerk worked; in those instances, the most recent clerkship was included in the Dataset. Law clerks who worked with multiple Justices were counted only for the first Justice with whom they served. Clerks who worked with a court of appeals judge and then with the same person as a Supreme Court Justice were not counted. Nor were clerks who worked with retired Justices. It should be noted that because only a single judge is included in the Dataset for each clerk, and because not all missing data could be filled in from other sources, the numbers of Supreme Court clerks that are given for specific lower-court judges later in the Article might be slight undercounts. See *infra* notes 35–37, 42. Although it appears that there were few

from the mid-1970s to the present, there has been a tendency for liberal Justices to hire clerks whose lower court service was with liberal judges and a corresponding tendency for conservative Justices.<sup>3</sup> This tendency, which I will call an ideological linkage between judges and Justices in the selection of law clerks, grew considerably stronger over time, with the largest increase coming in the early 1990s.<sup>4</sup> It has remained very strong since that time.<sup>5</sup>

This Article explores the reasons for this strengthening. Why have Justices become more inclined to draw law clerks from ideologically similar judges? This change in the Justices' approach to the selection of law clerks provides a window on the Court as an institution and the way it has evolved.

The Article does not reach a firm conclusion about the sources of this change because the implications of the available evidence are uncertain. But I suggest that two intertwined factors are responsible for the change. One factor is the growing ideological polarization of elite groups in American society, polarization that affects the thinking of Supreme Court Justices, lower court judges, and aspirants to clerkships.<sup>6</sup> The other factor is growth in the numbers of applications for clerkships that each Justice receives and one specific source of that growth: the development of a practice in which prospective clerks apply to all nine Justices.<sup>7</sup>

In Part II, I describe the existence and strengthening of the ideological linkage between judges and Justices in the selection of law clerks. In Part III, I discuss reasons why an ideological linkage might exist. In Part IV, I examine the evidence on explanations for the strengthening of this ideological linkage and offer a tentative judgment on the sources of that development. In Part V, I briefly discuss the implications of the strengthening of the ideological linkage.

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errors in the listings of prior clerkships in the two sets of Supreme Court documents, any errors that do exist could affect the numbers of clerks for specific judges as well as the data in Table 1 *infra*.

3. *See infra* Part II.

4. *See infra* Part II.

5. *See infra* notes 18–23 and accompanying text.

6. *See infra* Part IV.A.

7. *See infra* Part IV.B.

## II. PATTERNS OF IDEOLOGICAL LINKAGE

In 2001, Corey Ditslear and I reported a study of the relationship between the ideological positions of Supreme Court Justices and the positions of the judges from whom they drew their clerks in the 1975–1998 Terms.<sup>8</sup> Using two measures of the Justices’ ideological positions and two measures of the judges’ positions, and controlling for the partisan composition of the courts of appeals, we found a strong and statistically significant relationship between judges and Justices.<sup>9</sup> In other words, the more liberal the Justice, the more liberal the lower court judges whose clerks the Justice chose.

This finding was not surprising. But it was striking that by all our measures of ideology, the ideological linkage between judges and Justices became much stronger over time, with the last part of our study period (the 1993–1998 Terms) standing out from earlier parts.<sup>10</sup> When we analyzed clerk selection by individual Justices over time, we found that the strengthening of the ideological linkage reflected both differences between the selection practices of Justices who came on to the Court in the late 1980s and early 1990s and those of their predecessors, and changes in the practices of Justices who had joined the Court prior to the late 1980s.<sup>11</sup>

In a second study, reported in 2010, we focused on the Justices’ relationships with “feeder” judges who supplied substantial numbers of law clerks (for most purposes, ten clerks in a decade) to the Supreme Court.<sup>12</sup> Our analytic approach was designed for periods of stable membership on the Court, so our primary comparison was between the 1976–1985 Terms (when eight Justices served throughout the period)

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8. Corey Ditslear & Lawrence Baum, Research Note, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J. POL. 869 (2001).

9. *Id.* at 873–75. This study and a follow-up study that focused on “feeder” judges analyzed the hiring of individual clerks by Justices. See Baum & Ditslear, *supra* note 2. A useful alternative approach is to consider the attributes of the sets of clerks that a Justice hires in a given Term. See Christopher D. Kromphardt, *Fielding an Excellent Team: Law Clerk Selection and Chambers Structure at the U.S. Supreme Court*, 98 MARQ. L. REV. 289, 298–301 (2014).

10. Ditslear & Baum, *supra* note 8, at 875–77. When the ideological positions of court of appeals judges were measured by the party of the appointing president, “there was a fairly sharp break: beginning with the 1992 term, the relationship between judges’ and justices’ ideological positions was consistently at a level of strength that was matched by few prior terms.” *Id.* at 882.

11. *Id.* at 880–82.

12. Baum & Ditslear, *supra* note 2.

and the 1995–2004 Terms (when nine Justices served throughout the period).<sup>13</sup> We used four measures of judges’ ideological positions and four measures of Justices’ positions.<sup>14</sup> When we examined only those clerks whom the Justices drew from feeder judges, the ideological linkage between judges and Justices was only moderately strong in the 1976–1985 Terms.<sup>15</sup> In the 1995–2004 Terms, in contrast, the relationships were very strong.<sup>16</sup> Compared with the earlier period, feeder judges were sending clerks to smaller subsets of Justices, and those subsets overwhelmingly were composed of Justices who shared the judges’ ideological tendencies.<sup>17</sup>

The ideological linkage in the selection of law clerks has remained strong since those studies were carried out.<sup>18</sup> Table 1 shows the proportion of each Justice’s law clerks in the 2010–2014 Terms who had worked most recently with a judge appointed by a Democratic president, an imperfect but quite meaningful measure of judges’ ideological positions.<sup>19</sup> The gap between the four liberal Justices appointed by Democratic presidents and the five conservative Justices appointed by Republicans is striking. So are the very low percentages for all five conservative Justices, who were distinctly less likely to choose clerks who had worked with lower court judges from the opposite party than were their liberal colleagues. In the 2010–2014 Terms, 32.1% of the clerks for the four liberal Justices came from Republican judges, while 8.0% of the clerks for the five conservative Justices came from

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13. *Id.* at 28. We did not include the first Term in these two periods of stable membership because Justices’ approach to clerk selection in the first Term often differs from their approach in later Terms. *Id.* at 28 n.1.

14. *Id.* at 36–37.

15. *Id.* at 37.

16. *Id.* at 37–38.

17. *Id.* at 38–40.

18. See 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, 1766–68, 1775–80 (2009); Adam Liptak, *A Sign of Court’s Polarization: Choice of Clerks*, N.Y. TIMES, Sept. 7, 2010, at A1; Geoffrey R. Stone, *The Difference Between Conservative and Liberal Justices*, HUFFINGTON POST (Nov. 2, 2013, 7:07 PM), [http://www.huffingtonpost.com/geoffrey-r-stone/the-difference-between-co\\_b\\_4205674.html](http://www.huffingtonpost.com/geoffrey-r-stone/the-difference-between-co_b_4205674.html) (last updated Jan. 23, 2014, 10:52 AM), archived at <http://perma.cc/TRU4-BZRS>.

19. However, because of partisan “sorting,” which has made each party more ideologically homogeneous, some caution is needed in interpreting changes in the relationship between judges’ party affiliations and the ideological positions of the Justices to whom they supply clerks. See *infra* note 33 and accompanying text.

Democratic judges.<sup>20</sup> Indeed, prior to the 2013 Term, Clarence Thomas as a Supreme Court Justice apparently had never hired a clerk who had worked with a Democratic-appointed judge.<sup>21</sup> When Justice Thomas broke that perfect record, it was with a clerk who had been president of the Yale Federalist Society.<sup>22</sup>

**Table 1**  
**Percentages of Justices' Law Clerks with Lower Court Clerkships**  
**Who Had Worked with Democratic-Appointed Judges,**  
**2010–2014 Terms<sup>23</sup>**

Justice	Percent
Sotomayor	70.0
Kagan	70.0
Ginsburg	68.4

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20. Dataset on Clerks' Backgrounds, *supra* note 2. To a limited degree, the fact that the conservative Republican Justices hired substantially higher percentages of clerks from fellow partisans in these five Terms than did their liberal Democratic counterparts might be ascribed to the higher numbers of Republican appointees in the courts of appeals early in that period. Maxwell Palmer, *Presidential Legacies and Partisan Balance on the Federal Courts* 19 tbl.3, 27 fig.7, 29 fig.8 (Nov. 6, 2013) (unpublished manuscript), available at <http://maxwellpalmer.com/research.html>, archived at <http://perma.cc/4VGY-ZQUE>. However, this difference between conservative and liberal Justices was essentially unchanged after appointments by President Obama moved the courts of appeals toward a more even party balance. *Id.* In the 2013 and 2014 Terms, 32.3% of the clerks for the four liberal Justices came from Republican judges, while 10.0% of the clerks for the five conservative Justices came from Democratic judges. Dataset on Clerks' Backgrounds, *supra* note 2. In January 2009, about 60% of the active court of appeals judges had been appointed by Republican presidents; in January 2013, the percentage had declined to 51%. Palmer, *supra* at 29 fig.8.

21. Dataset on Clerks' Backgrounds, *supra* note 2; see also Adam Liptak, *The Polarized Court*, N.Y. TIMES, May 11, 2014, at SR1. Because the Supreme Court's information sheets on law clerks list only a single prior clerkship, usually the most recent, it is possible that one or more of Justice Thomas's clerks prior to the 2013 Term had served with a Democratic-appointed judge at some point. See *supra* note 2.

22. David Lat, *Supreme Court Clerk Hiring Watch: The Official List for October Term 2013*, ABOVE THE LAW (July 25, 2013, 5:54 PM), <http://abovethelaw.com/2013/07/supreme-court-clerk-hiring-watch-the-official-list-for-october-term-2013/#more-256382>, archived at <http://perma.cc/NV9Q-HD7A>.

23. Dataset on Clerks' Backgrounds, *supra* note 2. One clerk for Justice Breyer and one clerk for Justice Ginsburg who had served in a state supreme court are not included in the percentages for them. On possible minor errors in the source documents on which the Dataset is based, see *supra* note 2.

Breyer	63.2
Kennedy	20.0
Roberts	15.0
Thomas	5.0
Alito	0.0
Scalia	0.0

As a first step in explaining the strengthening of the ideological linkage between Justices and judges in the selection of law clerks, it is necessary to consider why any ideological linkage might exist. Why do Justices draw clerks disproportionately from ideological compatriots in the lower courts?

### III. BASES FOR IDEOLOGICAL LINKAGE

The most straightforward reason why Supreme Court Justices might draw law clerks disproportionately from like-minded lower court judges is an interest on the part of prospective clerks, judges, and Justices in working with people who share their conceptions of good legal policy.<sup>24</sup> Law students with strong policy preferences might focus their search for their first clerkships on judges who stand on the same side of the ideological spectrum. Indeed, there is evidence that at least some applicants for lower court clerkships take judges' ideological positions into account when they apply for clerkships and accept them.<sup>25</sup> When lower court clerks seek promotion to the Supreme Court, they could use the same criterion to choose where to send their applications.<sup>26</sup> The result would be to create an ideological linkage between the judges and Justices with whom clerks worked.

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24. See Liptak, *supra* note 18.

25. See Rex Bossert, *Clerks' Route to Top Court*, NAT'L L. J., Oct. 20, 1997, at A1. *But see* Alex Kozinski & Fred Bernstein, *Clerkship Politics*, 2 GREEN BAG 2D 57, 57–58 (1998) (Judge Kozinski noting that many prospective clerks do not take judges' ideological positions into account).

26. As I will discuss later, applicants for Supreme Court clerkships no longer apply selectively to the Justices, and that change in practice helps to explain the strengthened ideological linkage between judges and Justices in the selection of law clerks. *See infra* notes 103–08 and accompanying text.

Similarly, it is easy to understand why judges and Justices might prefer to work with law clerks who share their policy preferences. The role of law clerks in the Supreme Court became increasingly important over time, especially in the selection of cases to hear and in opinion writing.<sup>27</sup> A Justice wants clerks to act in ways that are consistent with the Justice's preferences, and a clerk whose own preferences mirror those of the Justice is the safest bet from that perspective.<sup>28</sup> Caseload growth in the federal courts of appeals enhanced the role of law clerks in those courts, and court of appeals judges also have reason to choose clerks who share their preferences.<sup>29</sup> Further, judges and Justices might want to give the valuable experience and career enhancement of a clerkship primarily to young lawyers who stand on their own side of the ideological spectrum.<sup>30</sup> Thus, although judges undoubtedly vary in this respect,<sup>31</sup> almost surely there is a tendency for judges and Justices to choose law clerks whose policy preferences seem fairly close to their own.<sup>32</sup>

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27. See Liptak, *supra* note 18.

28. *Id.*

29. See WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS 3 (2013); Liptak, *supra* note 18; Orin Kerr, *Are Feeder Judges Unusually Ideological? If So, Why?*, U. CHI. FAC. BLOG (Sept. 28, 2006), [http://uchicagolaw.typepad.com/faculty/2006/09/are\\_feeder\\_judg.html](http://uchicagolaw.typepad.com/faculty/2006/09/are_feeder_judg.html), archived at <http://perma.cc/M5CY-3BNW>.

30. Kozinski & Bernstein, *supra* note 25, at 58 (Judge Kozinski describing his own desire "to train conservative and libertarian lawyers" and his colleague Stephen Reinhardt's corresponding motivation to train "committed liberals"). Orin Kerr has suggested another incentive: judges might choose clerks from their own side of the ideological spectrum as part of a strategy to place those clerks with Justices who are also on that side. Personal Communication with Orin Kerr, Fred C. Stevenson Research Professor of Law, George Washington Univ. (May 5, 2014); see also Kerr, *supra* note 29.

31. JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 303 (2007) (describing differences in hiring practices between Justice Samuel Alito and J. Michael Luttig as courts of appeals judges).

32. See Kerr, *supra* note 29. In a 2013 survey of courts of appeals judges, the respondents ranked the political ideology of applicants as the least important of several possible criteria for the selection of law clerks. Todd C. Peppers, Micheal W. Giles & Bridget Tainer-Parkins, *Surgeons or Scribes? The Role of United States Court of Appeals Law Clerks in "Appellate Triage,"* 98 MARQ. L. REV. 313, 325 tbl.1 (2014). But this finding led the authors who conducted the survey "to speculate about the level of judicial candor reflected in [their] completed surveys. Simply put, [they] believe that there is too much ideological matching between courts of appeals judges and their law clerks to be the result of chance or applicants applying to like-minded jurists." *Id.* at 319.

To the extent that both judges and Justices use ideology as a criterion in the selection of clerks, there will be an indirect ideological linkage between judges and Justices in the selection process. If liberal judges and Justices both seek liberal clerks, then liberal Justices will take clerks disproportionately from liberal judges. And this will occur even if Justices pay no attention to the identity of the judge with whom a clerk works.<sup>33</sup>

In practice, Justices undoubtedly do take the identities of lower court judges into account. For one thing, if judges and prospective clerks seek each other out partly on the basis of shared policy preferences, a Justice might use the ideological position of a judge as one clue to the ideological position of the judge's clerks. Further, if a clerk has already completed the lower court clerkship or a substantial portion of the clerkship when a Justice makes hiring decisions, a lower court judge who shares a Justice's ideological views can offer concrete evidence on the clerk's own views and the clerk's willingness to follow the judge's lead.

Justices might choose clerks who have worked with judges who are ideologically similar to the Justices for reasons that relate to those judges themselves rather than to their clerks. It is natural for Justices to draw clerks from judges with whom they are acquainted, even more if they have a friendship with each other. One benefit of going to those judges is that it is easier for Justices to inquire about a clerk's qualities with a judge they know well. Further, judges' success in placing clerks with the Supreme Court has intangible benefits in pride and prestige as well as the tangible benefit of enhancing judges' ability to attract the most sought-after clerks,<sup>34</sup> so Justices may be inclined to give those benefits to people they know and like.

The feeder relationships between judges and specific Justices provide ample evidence of the effect of acquaintanceship. Justices draw clerks from former court of appeals colleagues,<sup>35</sup> former colleagues in

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33. The same is true if prospective clerks seek out both judges and Justices on an ideological basis.

34. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 246–47 (2010); Bossert, *supra* note 25 (quoting Judge Kozinski); *see also* Tony Mauro, *Corps of Clerks Lacking in Diversity*, USA TODAY, Mar. 13, 1998, at 12A.

35. To take one example, Justice Stephen Breyer has hired eleven clerks who worked with Judge Michael Boudin, a colleague of Justice Breyer's on the Court of Appeals for the First Circuit between 1992 and 1994. Boudin's and Breyer's career information is in the Biographical Directory of Federal Judges. *Biographical Directory of Federal Judges: Michael Boudin*, FED. JUD. CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=218&cid=999&ctype=n>

law practice,<sup>36</sup> and former law clerks of their own.<sup>37</sup> In part, the success of District of Columbia judges in placing clerks with the Supreme Court<sup>38</sup> reflects the advantages of D.C. judges in developing relationships with Justices.<sup>39</sup>

The judges whom Justices know and like do not necessarily share ideological positions with them.<sup>40</sup> But there is undoubtedly a tendency in that direction.<sup>41</sup> Future judges and Justices sometimes get to know

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a&instate=na (last visited Oct. 24, 2014), *archived at* <http://perma.cc/FUP2-R9US>; *Biographical Directory of Federal Judges: Stephen Gerald Breyer*, FED. JUD. CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=255&cid=999&ctype=na&instate=na> (last visited Oct. 24, 2014), *archived at* <http://perma.cc/S7T3-FN7F>. The number of Boudin clerks that Justice Breyer selected is from the Dataset on Clerks' Backgrounds, *supra* note 2 (which also describes the possibility of a slight undercount).

36. Justice Thurgood Marshall hired at least five clerks who worked with Judge Spottswood Robinson of the D.C. Circuit, who worked with the NAACP and its Legal Defense and Educational Fund while in private practice from 1948 to 1960. Justice Marshall headed the Legal Defense and Educational Fund from 1940 to 1961. *Biographical Directory of Federal Judges: Thurgood Marshall*, FED. JUD. CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=1489&cid=999&ctype=na&instate=na> (last visited Oct. 24, 2014), *archived at* <http://perma.cc/P3G9-WQR9>; *Biographical Directory of Federal Judges: Spottswood William Robinson III*, FED. JUD. CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=2031&cid=999&ctype=na&instate=na> (last visited Oct. 24, 2014), *archived at* <http://perma.cc/3JCL-BGN5>. The number of Robinson clerks that Justice Marshall selected is from the Dataset on Clerks' Backgrounds, *supra* note 2 (which also describes the possibility of a slight undercount). One of the five clerks worked with Justice Marshall in the 1974 Term, prior to the beginning date for the Dataset on Clerks' Backgrounds, and Justice Marshall might have hired other Robinson clerks in earlier Terms for which the Supreme Court's datasheet "Law Clerk Report by Justices" did not list prior clerkships.

37. Ninth Circuit Judge Alex Kozinski, who worked with Judge Anthony Kennedy of the Ninth Circuit as clerk in 1975–1976, has provided twenty-six clerks to Kennedy as a Justice. Former Fourth Circuit Judge J. Michael Luttig, who worked with Judge Antonin Scalia of the D.C. Circuit as clerk in 1982–1983, provided fifteen clerks to Scalia as a Justice. *Biographical Directory of Federal Judges: Alex Kozinski*, FED. JUD. CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=1314&cid=999&ctype=na&instate=na> (last visited Oct. 24, 2014), *archived at* <http://perma.cc/CW3F-F7X8>; *Biographical Directory of Federal Judges: J. Michael Luttig*, FED. JUD. CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=1443&cid=999&ctype=na&instate=na> (last visited Oct. 24, 2014), *archived at* <http://perma.cc/F6JW-T9YM>. The numbers of clerks are from the Dataset on Clerks' Backgrounds, *supra* note 2 (which also describes the possibility of slight undercounts).

38. In the 1975–2014 Terms, 36% of all the Supreme Court law clerks whose most recent clerkship was in a federal court of appeals came from the D.C. Circuit. Dataset on Clerks' Backgrounds, *supra* note 2. The next highest percentage was 14% from the Second Circuit. *Id.*

39. The prestige of the D.C. Circuit is also a factor. ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 80 (2006).

40. *See* Ditslear & Baum, *supra* note 8, at 871.

41. *Id.*

each other in an ideologically defined setting such as a presidential administration or a political group. Further, people with strong views about public policy are drawn disproportionately to others who share those views.

Acquaintanceship aside, Justices may be inclined to choose clerks on the basis of their respect for the judges with whom those clerks serve. To take the most prominent example, that respect surely helps to explain the number of clerks for Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit who have gone on to the Supreme Court.<sup>42</sup> The esteem in which Justices hold other judges may be colored by their agreement or disagreement with those judges on matters of judicial policy.

Thus, there is a multiplicity of bases for an ideological linkage between judges and Justices in the clerk selection process. In light of the number of bases, it would be extraordinary if that linkage did not exist. These bases provide a starting point for examination of the reasons why the ideological linkage has strengthened over time.

#### IV. EXPLAINING THE STRENGTHENED LINKAGE

Why did Supreme Court Justices become more inclined to draw their law clerks from judges who shared the Justices' general ideological positions in the 1990s, and why have they maintained that stronger inclination since then? The most intriguing possibility is the growth in ideological polarization among political elites in the United States.

The term polarization has been used to refer to multiple phenomena.<sup>43</sup> One is "sorting," in which ideological differences become more fully aligned with other differences between people, especially political party identifications and affiliations. Considerable sorting of liberals into the Democratic Party and conservatives into the Republican Party has taken place in the mass public<sup>44</sup> and a great deal of

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42. Twenty-six Posner clerks have served in the Supreme Court. Dataset on Clerks' Backgrounds, *supra* note 2 (which also describes the possibility of a slight undercount). Judge Posner's standing is discussed in Christopher C. McCurdy & Ryan P. Thompson, *The Power of Posner: A Study of Prestige and Influence in the Federal Judiciary*, 48 IDAHO L. REV. 49 (2011).

43. On different aspects of polarization and the evidence of their existence at the elite and mass levels, see MORRIS P. FIORINA WITH SAMUEL J. ABRAMS, DISCONNECT: THE BREAKDOWN OF REPRESENTATION IN AMERICAN POLITICS (2009); Marc J. Hetherington, *Review Article: Putting Polarization in Perspective*, 39 BRITISH J. POL. SCI. 413 (2009).

44. There is considerable evidence of sorting in the mass public. See MATTHEW LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND

sorting has occurred among people in government and other people who are involved in politics.<sup>45</sup> In Congress, the sorting began in the 1950s and 1960s, and it is now complete: in the Congresses of 2009–2010 and 2011–2012, in both the House and Senate every Democrat had a more liberal voting record than every Republican.<sup>46</sup> Similarly, since the retirement of Justice John Paul Stevens in 2010, the Supreme Court for the first time has had ideological blocs that follow party lines (based on the party of the appointing president) perfectly.<sup>47</sup> To the extent that partisan divisions reinforce ideological divisions, the Court's liberal and conservative Justices are separated from each other to a greater extent than in the past.<sup>48</sup>

In itself, partisan sorting could not explain the strengthened ideological linkage between judges and Justices in the selection of law

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CONSERVATIVES BECAME REPUBLICANS (2009); Delia Baldassarri & Andrew Gelman, *Partisans Without Constraint: Political Polarization and Trends in American Public Opinion*, 114 AM. J. SOC. 408 (2008); see also Morris P. Fiorina & Samuel J. Abrams, *Political Polarization in the American Public*, 11 ANN. REV. POL. SCI. 563, 577–82 (2008) (discussing the evidence and disagreements about the extent of the sorting that has occurred).

45. Baldassarri & Gelman, *supra* note 44, at 413.

46. On congressional sorting generally, see NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 15–70 (2006); SEAN M. THERIAULT, *PARTY POLARIZATION IN CONGRESS* (2008). The relative positions of Republican and Democratic members in 2009–2012 were determined from “DW-Nominate” scores for members of Congress, also known as Poole-Rosenthal scores, that are calculated from agreements and disagreements between members in congressional votes. Royce Carroll, Jeff Lewis, James Lo, Nolan McCarty, Keith Poole & Howard Rosenthal, *DW-Nominate Scores with Bootstrapped Standard Errors*, VOTEVIEW, <http://pooleandrosenthal.com/dwnominate.asp> (last updated Feb. 17, 2013), archived at <http://perma.cc/YQ2U-M8RL> (describing the scores and presenting the data).

47. Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court* 7–10 (William & Mary Law Sch., Research Paper No. 09-276, 2014), available at <http://ssrn.com/abstract=2432111>, archived at <http://perma.cc/DS9X-VFEN>. There has been no other time when there were sizable conservative and liberal blocs on the Court that followed party lines and only one ambiguous instance in which all the Court's Democratic appointees were to the left of all the Republican appointees. *Id.* at 10–27. In the 1941–1944 Terms, the Justice with the most conservative voting position on the Court (Owen Roberts) was the only “pure” Republican appointee on the Court; Chief Justice Harlan Fiske Stone, originally appointed to the Court by Republican Calvin Coolidge and elevated to chief by Democrat Franklin Roosevelt, had the second most conservative position in two of the four Terms. *Id.* at 18 tbl.2, 21. The Justices' places on a liberal–conservative scale for the 1937–2012 Terms were determined from their Martin-Quinn scores, a transformation of their voting agreements and disagreements. *Id.* at 16. The scores are described and archived at *Martin-Quinn Scores*, BERKELEY L., <http://mqscores.berkeley.edu> (last visited Oct. 25, 2014), archived at <http://perma.cc/MZA5-KKBJ>.

48. Devins & Baum, *supra* note 47, at 7–27; see also Liptak, *supra* note 18.

clerks.<sup>49</sup> More relevant is another type of polarization: growth in the strength of people's identifications with one ideological side and in their antipathy toward the other side. This second type has been called "affective polarization."<sup>50</sup>

It is uncertain whether affective ideological polarization has occurred in the mass public,<sup>51</sup> but there are clear signs of it among political elites.<sup>52</sup> One reason is that, with the two parties more ideologically distinct, partisan loyalties and interests reinforce ideological disagreements.<sup>53</sup> In any event, there is now an extraordinary degree of enmity and distrust between conservatives and liberals.<sup>54</sup> Justice Scalia has described one result:

It's a nasty time. When I was first in Washington, and even in my early years on this Court, I used to go to a lot of dinner parties at which there were people from both sides. Democrats, Republicans. Katharine Graham used to have dinner parties

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49. Partisan sorting *could* explain a growing tendency of Justices to go to judges appointed by presidents of their own party as sources of clerks: if the ideological linkage remained at the same strength but the political parties became more homogeneous ideologically, the proportion of clerks that Justices drew from judges of the same party would increase. But the studies of ideological linkage did not use party affiliation (or party of the appointing president) as a measure of the Justices' ideological positions, and the linkage strengthened over time whether lower court judges' positions were measured by the party of the appointing president or by other measures. Baum & Ditslear, *supra* note 2, at 37–38; Ditslear & Baum, *supra* note 8, at 875–76.

It is also noteworthy that the most prominent feeder judges since the 1990s seem less moderate in their views than their counterparts in the late 1970s and early 1980s. On the feeders of the earlier period, see Baum & Ditslear, *supra* note 2, at 37–39. On the feeders since the 1980s, see David J. Garrow, *Acolytes in Arms*, 9 GREEN BAG 2D 411, 417–18 (2006) (reviewing PEPPERS, *supra* note 95; WARD & WEIDEN, *supra* note 59). But see Kerr, *supra* note 29, disagreeing in part with Garrow's characterization of these judges. In conjunction with the strengthened tendency of conservative and liberal Justices to draw their clerks from different feeder judges, this change provides additional evidence that something more than partisan sorting is involved in the changing linkage between judges and Justices in the selection of law clerks.

50. Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OPINION Q. 405, 406 (2012). These authors focused on affect as a source of partisan polarization, distinguishing it from ideology, but affect is relevant to ideological polarization as well. *See id.*

51. Iyengar, Sood, and Lelkes see ideology as largely irrelevant to the growth in affective polarization along partisan lines. *Id.* at 421–24.

52. *See id.* at 405–06.

53. *Id.* at 421.

54. THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 44–51, 55–67 (2012).

that really were quite representative of Washington. It doesn't happen anymore.<sup>55</sup>

This development is reflected in, and reinforced by, the establishment of new ideologically based institutions. In the mass media, television networks and websites cater separately to liberals and conservatives. In the legal profession, the Federalist Society and (more recently) the American Constitution Society provide separate homes for conservative and liberal law students, lawyers, and even judges.

If the thinking of Justices, judges, and prospective law clerks has changed as a result of affective polarization, the result would be to strengthen the ideological linkage between judges and Justices in the selection of law clerks in multiple ways. For one thing, law students who have stronger identifications with one ideological side would give greater weight to the ideological positions of lower court judges when they seek clerkships.<sup>56</sup> Justices would also have reason to worry more about the danger of hiring clerks who seek to advance their own ideological agendas, so they would have a stronger incentive to seek clerks who share the Justices' own views.<sup>57</sup>

Further, if judges have stronger ideological identities than they did in the past, they too give greater weight to ideology in the selection of clerks. In combination with clerks' own choices about where to apply for clerkships, this change in behavior makes a judge's identity a better indicator of clerks' ideological positions for Justices who care about those positions.

Especially intriguing is the possibility that Justices' own perspectives have changed. If Justices have become more conscious of ideology, they have stronger incentives to choose law clerks who share their ideological positions. In turn, they have more reason to draw clerks from the lower court judges whose own ideological positions provide information about clerks' positions. Former U.S. Court of Appeals Judge J. Michael Luttig has argued that these changes have indeed occurred, ascribing them to

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55. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 14, 2013, at 22, 27. Katharine Graham was publisher and chaired the board of the *Washington Post*.

56. See *supra* notes 24–26 and accompanying text.

57. In the 1990s, one judge on a federal court of appeals expressed his concern about “the risk of staff disloyalty” from law clerks who disagree with the judges with whom they work, citing examples passed along by other judges. Andrew J. Kleinfeld, *Politicization: From the Law Schools to the Courts*, 7 ACAD. QUESTIONS 9, 16 (1994). Judge Kleinfeld linked such behavior to “politicization” of law schools. *Id.* at 13.

what he calls politicization of the courts.<sup>58</sup> Justices would also have more interest in rewarding ideologically similar lower court judges by choosing their clerks. Finally, the Justices might be more likely to develop acquaintanceships with judges and accord respect to them on the basis of ideological compatibility.

Thus, affective ideological polarization provides a potentially powerful explanation for the strengthened ideological linkage between judges and Justices in the selection of Supreme Court law clerks. The evidence on whether the changes associated with affective polarization have actually occurred is fragmentary, but that evidence can be used to reach tentative conclusions about the validity of an explanation based on polarization.

#### A. *The Case for Polarization as an Explanation*

There is no systematic evidence on ideological thinking among applicants for clerkships and among those who actually serve in the courts of appeals and the Supreme Court. But it seems certain that law students and young lawyers in the most prestigious law schools have been affected by the growth in ideological polarization. The establishment of the Federalist Society in the 1980s<sup>59</sup> undoubtedly strengthened the ideological identities of conservative law students, and the same has been true of liberals and the American Constitution Society in the past decade.<sup>60</sup> Indeed, some of the law clerks who have worked with the conservative Justices since the 1980s were already visible participants in conservative politics by the time they came to the Court.<sup>61</sup>

As the hypothesis of greater ideological consciousness might suggest, accounts from the 1988 and 2000 Terms of the Court depict strong rivalries between sets of conservative and liberal law clerks.<sup>62</sup> Although

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58. Liptak, *supra* note 18.

59. On the development of the Federalist Society, see MICHAEL AVERY & DANIELLE MCLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* (2013); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 135–80 (2008).

60. On the American Constitution Society, see Charlie Savage, *Liberal Legal Group is Following New Administration's Path to Power*, N.Y. TIMES, Dec. 11, 2008, at A30.

61. See *infra* note 78 and accompanying text.

62. The 1988 Term is discussed in EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* 263–71 (1998). Some commentators have questioned Lazarus's depiction of the Court and of the clerks' role, though not (to my knowledge) the existence of ideological rivalries among the

such accounts must be interpreted with caution, they are consistent with the possibility that law clerks in the Court act more deliberately to advance legal policies they favor than in the past. If so, Justices have a strong incentive to choose clerks who will be on their own side of the divide.

It seems reasonable to posit that ideological thinking among lower court judges, and specifically judges on the federal courts of appeals, has also strengthened. In selecting judges, presidents today generally give more emphasis to the policy preferences of prospective nominees than they did in the mid-twentieth century.<sup>63</sup> Responding in part to activists in their party coalitions, the Reagan Administration and its successors have elevated policy considerations in their criteria for selection of judges.<sup>64</sup> One indication is the importance of Federalist Society membership as a qualification for Republican nominees.<sup>65</sup> Both for this reason, and because of the ideological polarization that has occurred all around them, judges on the courts of appeals in the current era are more ideologically committed as a group than were their predecessors in earlier eras.

Similarly, Justices of the current era surely have been affected by ideological polarization.<sup>66</sup> For one thing, the forces that have led recent presidents to choose Justices who share their parties' now-dominant ideological orientations have also led to the selection of Justices whose liberalism or conservatism is deeply rooted.<sup>67</sup> This development is especially clear on the Republican side. Chief Justice John Roberts and

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clerks. 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 L. & SOC. INQUIRY 185, 193–211, 218–219, 221 (2000) (book review). The 2000 Term is discussed in David Margolick, Evgenia Peretz & Michael Shnayerson, *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310, 320.

63. NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 28, 46 (2005).

64. See *id.* at 51.

65. Nancy Scherer & Banks Miller, *The Federalist Society's Influence on the Federal Judiciary*, 62 POL. RES. Q. 366, 367–68, 375 (2009). One commentator, in 1998, reported his observation that some Republican appointees in the federal judiciary were affiliated with the Federalist Society and that they and their Federalist-affiliated law clerks “form a loose knit ideological unity within the court system.” Lawrence E. Walsh, *The Future of the Independent Counsel Law*, 1998 WIS. L. REV. 1379, 1389.

66. The impact of polarization on the Court, including some of the effects discussed here, is analyzed in Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L.J. 661, 693–704 (2013).

67. See *id.*

Justices Antonin Scalia, Clarence Thomas, and Samuel Alito were all highly committed conservatives when they were chosen as Justices.<sup>68</sup>

Further, ideological polarization among political and social elites has changed the environment in which Justices live and work.<sup>69</sup> To a great extent, that environment has bifurcated. As noted earlier, there are now separate segments of the mass media and the legal elite on the left and right, and law schools differ sharply in their ideological orientations. As Justice Scalia pointed out, even socializing in Washington, D.C. now tends to be within ideological subgroups.<sup>70</sup> As a result, it is easier for Justices to live in an environment consisting primarily of people who share their own views.<sup>71</sup>

Indeed, the strongly conservative members of today's Court have had significant ties with conservatives outside the Court. Justices Antonin Scalia, Clarence Thomas, and Samuel Alito, all members of the Federalist Society before their appointments to the Court, have each participated in Society events multiple times as Justices, and Chief Justice John Roberts also has links to the Society.<sup>72</sup> Justices Scalia and Thomas frequently appear before other conservative groups as well.<sup>73</sup> Justice Scalia's deep conservative roots include a role in founding the Federalist Society,<sup>74</sup> and he has indicated his disdain for what he regards as the orthodoxy of a liberal elite.<sup>75</sup> For his part, Justice Thomas has

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68. Based on references to Supreme Court nominees' ideological positions in newspaper editorials, all four of these Justices were perceived as highly conservative. On a scale of 0 (very conservative) to 1 (very liberal), Justice Scalia was rated at .000, Justice Thomas at .160, Justice Roberts at .120, and Justice Alito at .100. The scores, calculated by Jeffrey Segal, are in the table *Perceived Qualifications and Ideology of Supreme Court Nominees, 1937–2012*. JEFFREY SEGAL, PERCEIVED QUALIFICATIONS AND IDEOLOGY OF SUPREME COURT NOMINEES: 1937–2012, available at <http://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf>, archived at <http://perma.cc/PGC5-S3QG>. The derivation and use of the scores are discussed in Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 560 tbl.1 (1989).

69. See *supra* notes 54–55 and accompanying text.

70. See *supra* note 55 and accompanying text.

71. Of course, even in the past it was possible for Justices to do so. On Justice Brennan in the 1970s, see STERN & WERMIEL, *supra* note 34, at 425.

72. Devins & Baum, *supra* note 47, at 64–67; see also Jeffrey Toobin, *The Absolutist*, NEW YORKER, June 30, 2014, at 34, 44 (discussing Justice Alito).

73. Devins & Baum, *supra* note 47, at 64–66.

74. TELES, *supra* note 59, at 141.

75. See *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting); *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

openly expressed his bitterness toward what he sees as a liberal establishment.<sup>76</sup>

As Table 1 shows, Justices Scalia, Thomas, Alito, and Kennedy all take their clerks preponderantly from Republican appointees in the lower courts.<sup>77</sup> The clerks for each of the four Justices have included people who already had visible involvement in conservative causes.<sup>78</sup> During much of his tenure on the Court, those who help Justice Kennedy select clerks have made a considerable effort to screen out applicants with liberal views.<sup>79</sup> Justice Scalia has been open to clerks with liberal views, but he recently expressed his view that it is difficult to find liberals who are willing to follow his jurisprudential approach.<sup>80</sup> Justice Thomas has argued that it is pointless for him to select clerks who disagree with his conservative views,<sup>81</sup> and he has explained his preference for conservative judges as sources of clerks by saying that choosing clerks is like “selecting mates [for] a foxhole.”<sup>82</sup>

The links between liberal Justices and liberal groups outside the Court have not been as prominent. In part, this is because some important institutions that do not have an explicit ideological

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76. Jeffrey Toobin, *The Burden of Clarence Thomas*, NEW YORKER, Sept. 27, 1993, at 38, 39–40; see also Neil A. Lewis, *2 Years After His Bruising Hearing, Justice Thomas Can Rarely Be Heard*, N.Y. TIMES, Nov. 27, 1993, at 7.

77. See *supra* Table 1.

78. Al Kamen, *Scalia's Federalist from Justice*, WASH. POST, Dec. 22, 1986, at A23; Adam Liptak, *New Clerk for Alito Has a Long Paper Trail*, N.Y. TIMES, Feb. 19, 2006, at C14; Tony Mauro, *A New Clerk, a "Vanilla" Face*, LEGAL TIMES, Feb. 15, 1988, at 16 (discussing Justice Kennedy); Toobin, *supra* note 76, at 46–47 (discussing Justice Thomas).

79. Margolick et al., *supra* note 62, at 320; Jack Newfield, *The Right's Judicial Juggernaut*, NATION, Oct. 7, 2002, at 11, 15. In the 2002 confirmation hearings for Miguel Estrada, nominated to a seat on the Court of Appeals for the D.C. Circuit, reports that Estrada had blocked liberal candidates for clerkships with Justice Kennedy were raised by Democratic senators and largely denied by Estrada. *Confirmation Hearings on Federal Appointments: Hearings Before the S. Comm. on the Judiciary*, 107th Cong. 779–80, 802–03, 805–08 (2002).

80. Senior, *supra* note 55, at 28.

81. Michael A. Fletcher & Kevin Merida, *Culling the Reputable, Reliable, Right-Leaning: For "Family" of Clerks, Thomas Weighs Politics, Loyalty and, Sometimes, Hard-Luck History*, WASH. POST, Oct. 11, 2004, at A11 (“I’m not going to hire clerks who have profound disagreements with me . . . . That is a waste of my time. Someone said that is like trying to train a pig. It’s a waste of your time, and it aggravates the pig.” (internal quotation marks omitted)).

82. Ditslear & Baum, *supra* note 8, at 883. In that source, Justice Thomas is quoted as referring to “mates in a foxhole”; that was my error in transcribing the quotation from my notes on Justice Thomas’s response to a question in an appearance at Texas A & M University, Oct. 22, 1999. See *id.* at 833 n.7.

orientation, such as the American Bar Association, are friendly to liberal views.<sup>83</sup> But the involvement of Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor in the American Constitution Society<sup>84</sup> is a sign that the liberal Justices, too, orient themselves toward a liberal audience. And as dean of Harvard Law School, Justice Elena Kagan made her perspective clear when she told a national student convention of the Federalist Society, “I love the Federalist Society” but added, “[y]ou are *not* my people.”<sup>85</sup>

Thus, there is reason to think that affective ideological polarization among American elites has helped to reorient the Justices’ criteria for selection of clerks. On average, prospective law clerks, lower court judges, and the Justices themselves almost surely are more committed to conservatism or liberalism than their counterparts in earlier eras.<sup>86</sup> That commitment inevitably affects the selection of law clerks, including the Justices’ consideration of the identities of the judges with whom those clerks worked. It is noteworthy that conservative Justices have an especially strong tendency to choose clerks from judges on their side of the ideological divide because ideological consciousness seems especially strong among conservative Justices. Thus, affective polarization is a persuasive explanation for the strengthening of the ideological link between judges and Justices.

### B. *The Case for a More Complex Explanation*

Though persuasive in itself, an explanation based on polarization may exaggerate how much Supreme Court Justices and others involved in the selection of law clerks have changed. To start with, this is hardly the first era in which some prospective law clerks and lower court judges have adhered firmly to ideological positions. Certainly that is true of judges. As people who are politically aware and who generally had been politically active, federal judges were always likely to have strong views about policy issues and, in some cases, strong self-identifications

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83. Adam Liptak, *As the Bar Gets Its Voice Back on Judges, Advice May Ring Familiar*, N.Y. TIMES, Mar. 31, 2009, at A14.

84. Devins & Baum, *supra* note 47, at 72 n.331 (discussing Justices Breyer and Ginsburg); Andrew Hamm, *Justice Sotomayor Speaks at ACS Convention*, SCOTUSBLOG (June 24, 2014, 10:41 AM), <http://www.scotusblog.com/2014/06/justice-sotomayor-speaks-at-acs-convention/>, archived at <http://perma.cc/G9KY-JGDN>.

85. MARK TUSHNET, *IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT* 90 (2013) (internal quotation marks omitted).

86. See Ditslear & Baum, *supra* note 8, at 869–80.

as liberals or conservatives. And if enmity between judges with different ideological views seems to be a phenomenon of the current era, it is useful to cite the sharp divide between liberals and conservatives on the U.S. Court of Appeals for the D.C. Circuit in the 1960s.<sup>87</sup>

What about the Justices? In some important respects, the Court of the last quarter century does not seem especially polarized by historical standards. The massive growth in the proportions of non-unanimous decisions and in the occurrence of separate opinions that began in the late 1930s was completed by the time the Justices began to draw the preponderance of their clerks from lower courts in the 1970s.<sup>88</sup> Measured by the proportions of their votes that can be characterized as conservative or liberal, the Justices have not become more divided over the past quarter century.<sup>89</sup> Although the Justices' frequent references to a friendly atmosphere in the Court<sup>90</sup> might be discounted, there is no

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87. That divide was so sharp that a judge who sought to avoid identification with one camp or the other had to walk to another federal building for lunch to avoid choosing between the separate groups of conservative and liberal judges in the judges' dining room. JOSEPH C. GOULDEN, *THE BENCHWARMERS: THE PRIVATE WORLD OF THE POWERFUL FEDERAL JUDGES* 253 (1974).

88. See LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 225–36 (4th ed. 2007) (showing term-by-term proportions of unanimous decisions, decisions with dissenting opinions, and decisions with concurring opinions); Peppers & Zorn, *supra* note 1, at 61–62.

89. The standard deviation measures the spread of a set of numbers, so it provides a good indication of the variation in the Justices' proportions of liberal and conservative votes by Term. There is no clear trend across the 1975–2012 Terms, though there was a slight decline over time that indicated the Justices were a bit closer to each other in voting tendencies. The mean of the standard deviations by decade was 15.3% for the 1975–1984 Terms, 15.1% for the 1985–1994 Terms, 14.3% for the 1995–2004 Terms, and 13.5% for the 2005–2012 Terms. Percentages of liberal and conservative votes were calculated from data in the Supreme Court Database, archived at Washington University. Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, *2014 Supreme Court Database, Version 2014 Release 01*, THE SUPREME COURT JUDICIAL DATABASE, <http://supremecourtdatabase.org/> (last visited Oct. 25, 2014), archived at <http://perma.cc/SD8F-2K9R>. The cases analyzed were those in which the Court held oral arguments; the percentages used to calculate the standard deviation were for the nine Justices who participated in the largest number of cases in a Term. In a study that covered the 1953–2004 period, different measures of polarization showed different patterns, but none indicated a sharp increase in polarization over time. Tom S. Clark, *Measuring Ideological Polarization on the United States Supreme Court*, 62 POL. RES. Q. 146, 150, 152 fig.3 (2009).

90. Senior, *supra* note 55, at 27 (Justice Scalia: “Everybody I’ve served with on the Court I’ve regarded as a friend.”); Mike Tolson, *Chief Justice Roberts: Technology Among Top Issues for Court*, HOUS. CHRON. (Oct 17, 2012), <http://www.chron.com/news/houston->

visible evidence that the Rehnquist and Roberts Courts have had the very bad interpersonal relations of some past Courts.<sup>91</sup>

Nor are the Justices of the current era the first to display behavior that is motivated consciously or unconsciously by ideological considerations. To take one example, what some observers have read as a strategic effort by Chief Justice Roberts to move doctrine in a conservative direction<sup>92</sup> could hardly be more conscious or elaborate than the efforts of Justice William Brennan to win his colleagues' support for liberal doctrine in an earlier era.<sup>93</sup> And if judges and Justices today are more likely to be acquainted if they share an ideological position, that tendency surely existed in prior eras as well. One example was the close relationship between some liberals on the Supreme Court and the U.S. Court of Appeals for the D.C. Circuit in the 1960s and 1970s.<sup>94</sup>

The most striking evidence of continuity between current and past eras comes from the surveys of former law clerks by Todd Peppers and Christopher Zorn<sup>95</sup> and by Artemus Ward and David Weiden,<sup>96</sup> surveys

texas/houston/article/Chief-Justice-Roberts-Technology-among-top-3957626.php (last updated Oct. 17, 2012, 11:22 PM), *archived at* <http://perma.cc/XX9C-82MC> (“We are extremely close . . . . I was surprised by the extent to which the justices have a collegial relationship.” (internal quotation marks omitted)); *Kagan Praises Scalia for Work on Supreme Court*, ASSOCIATED PRESS: THE BIG STORY (Dec. 13, 2012, 10:23 PM), <http://bigstory.ap.org/article/kagan-praises-scalia-work-supreme-court>, *archived at* <http://perma.cc/F5V4-K83V> (“Kagan says she loves all her colleagues.”).

91. On the Court of the 1940s, see NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* 305–06 (2010). Some journalists have pointed to signs of frictions among the current Justices. See, e.g., Richard Wolf, *Justices' Jabs Reveal Ideological Rifts*, USA TODAY, May 13, 2014, at 2A; Jan Crawford, *Discord at Supreme Court is Deep, and Personal*, CBS NEWS (July 9, 2012, 11:06 AM), <http://www.cbsnews.com/news/discord-at-supreme-court-is-deep-and-personal/>, *archived at* <http://perma.cc/BY33-9Z44>. But to the extent that these conflicts exist, they seem to pale in comparison with those of some past eras.

92. See Linda Greenhouse, *The Cost of Compromise*, N.Y. TIMES OPINIONATOR (July 10, 2013, 9:00 PM), [http://opinionator.blogs.nytimes.com/2013/07/10/the-cost-of-compromise/?\\_php=true&\\_type=blogs&\\_r=0](http://opinionator.blogs.nytimes.com/2013/07/10/the-cost-of-compromise/?_php=true&_type=blogs&_r=0), *archived at* <http://perma.cc/68QK-JLFG>; Richard A. Posner, *The Voting Rights Act Ruling is about the Conservative Imagination*, SLATE (June 26, 2013, 12:16 AM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2013/supreme\\_court\\_2013/the\\_supreme\\_court\\_and\\_the\\_voting\\_rights\\_act\\_striking\\_down\\_the\\_law\\_is\\_all.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html), *archived at* <http://perma.cc/Y5UD-3P7V>.

93. STERN & WERMIEL, *supra* note 34, at 155–56, 197, 250–51, 383.

94. See Philip Taubman, *Milton Kronheim's, Where the Justices Adjourn for Lunch*, N.Y. TIMES, July 15, 1979, at 36 (discussing frequent lunches attended by Justices Brennan and Marshall and D.C. Circuit Judges Bazelon and Wright).

95. TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 34–37 (2006); Peppers & Zorn, *supra*

that found strong statistical relationships between the ideological positions of Justices and the self-reported positions or partisan loyalties of their clerks.<sup>97</sup> Collectively, the respondents to these surveys served in the Court over a long period of time, and the great majority of the respondents served before the time that the ideological linkage between judges and Justices in the selection of law clerks strengthened.<sup>98</sup>

Undoubtedly, the relationship between Justices' and clerks' views in past eras had multiple sources. It stemmed in part from selectivity by prospective clerks about where to send their applications.<sup>99</sup> For their part, the people who helped Justices select clerks (or, in some instances, who selected clerks themselves) sometimes used ideological criteria based on what they thought Justices wanted.<sup>100</sup> Finally, Justices' own preferences surely played a direct role in producing the correlation between the views of Justices and the views of their law clerks. Indeed, there is scattered but substantial evidence that some Justices of past eras sought out clerks who shared their ideological positions.<sup>101</sup>

Thus, there is some reason to doubt that affective polarization fully accounts for the strengthening of the ideological linkage between judges and Justices in the selection of law clerks. But what else could have helped bring about this change? The most likely candidate is changes in

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note 1, at 63–70. The Peppers and Zorn article reported the results of the survey reported in the Peppers book, combined with a survey of law clerks who served in the 2001–2004 period.

96. WARD & WEIDEN, *supra* note 39, at 103–07.

97. See PEPPERS, *supra* note 95, at 34–36; WARD & WEIDEN, *supra* note 39, at 105 tbl.2.17 & fig.2.3; Peppers & Zorn, *supra* note 1, at 63, 64 fig.2.

98. See PEPPERS, *supra* note 95, at 34 (noting that respondents to the survey reported in the book served during the period between 1940 and 2000 and that clerks whose Justices were deceased responded at a higher rate); WARD & WEIDEN, *supra* note 39, at 10 (noting that respondents served as law clerks during the period from the 1930s to the late 1990s); *id.* at 104 (showing that among the clerks who worked with Justices for whom at least five law clerks responded to a question about their ideological position, 93 of 107 served with Justices whose service ended in 1986 or earlier); Peppers & Zorn, *supra* note 1, at 60 (noting that the law clerks who were surveyed served between 1940 and 2004). The sharpest increase in the strength of the relationship between Justices' and judges' ideological positions came in the 1990s. See *supra* note 10 and accompanying text.

99. PEPPERS, *supra* note 95, at 35; WARD & WEIDEN, *supra* note 39, at 57–58.

100. PEPPERS, *supra* note 95, at 120, 147–48, 152.

101. See PEPPERS, *supra* note 95, at 147–48 (Chief Justice Warren); *id.* at 134 (Chief Justice Vinson); WARD & WEIDEN, *supra* note 39, at 101, 105 tbl.2.7 & fig.2.3 (Justice Douglas); *id.* at 103, 105 tbl.2.7 & fig.2.3 (Justice Brennan); Sean Donahue, *Behind the Pillars of Justice: Remarks on Law Clerks*, 3 LONG TERM VIEW 77, 78 (1995) (noting “[a] few Justices”).

applications for Supreme Court law clerkships.<sup>102</sup>

There has been a massive growth in the number of applications for clerkships that each Justice receives, from the few dozen a year that some Justices reported in the late 1950s and early 1960s to something like one thousand today.<sup>103</sup> Thus, the Justices are more dependent on others, such as current law clerks, to help them choose from the applicants. Further, the Justices and those who help them face a far more daunting task than they did in the past. As a result, information about applicants that is both relevant and readily ascertained has become more valuable. One such piece of information is the identity of the lower court judge with whom an applicant has worked.

For the most part, the growth in the numbers of applications to each Justice reflects a larger number of people who apply for clerkships. But there has also been a change in the numbers of Justices to whom aspiring clerks apply. For most of the time that Justices have employed law clerks, prospective clerks (or the law professor sponsors who acted on their behalf) applied to only a subset of the Justices, a subset chosen in part on the basis of ideological preferences.<sup>104</sup> But the growing attractiveness of clerkships impelled aspirants to apply to larger numbers of Justices, and it is now both standard practice and a norm to send applications to all nine Justices.<sup>105</sup>

The exact timing of this change is uncertain, but data on the clerks who worked with Justice Blackmun provide some sense of when it became nearly complete.<sup>106</sup> The clerks of the 1975–1985 Terms applied to a mean of 6.8 Justices; the clerks of the 1986–1993 Terms applied to a mean of 7.4.<sup>107</sup> Although this is not a very large increase, the median number of applications increased from 7 to 9.<sup>108</sup> In other words, the most common practice for the applicants who became Blackmun clerks changed from omitting a few Justices to omitting none.

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102. The discussion of the impact of change in application processes that follows draws much from suggestions to me by Artemus Ward. *See also* WARD & WEIDEN, *supra* note 39, at 106–07.

103. *Id.* at 56–58.

104. *See supra* note 99.

105. PEPPERS, *supra* note 95, at 35; WARD & WEIDEN, *supra* note 39, at 58–59; Tom McCann, *Clerks See Life on the Inside of the U.S. Supreme Court*, CHI. LAW., Sept. 2003, at 20, 21.

106. WARD & WEIDEN, *supra* note 39, at 59.

107. *Id.* at 59 tbl.2.I

108. *Id.*

As discussed earlier, Justices may be attracted to the clerks of judges whom they know personally and whom they respect highly.<sup>109</sup> To the extent that acquaintanceship and respect are products of ideological agreement, increased reliance on the identity of lower court judges as a basis for selection of law clerks would strengthen the ideological linkage between judges and Justices in the selection process.

Meanwhile, once it became standard practice for aspirants to apply to every member of the Court, a Justice could no longer infer from an application that a prospective clerk agreed (or at least did not strongly disagree) with the Justice's views about public policy. In the absence of changes in Justices' ways of gathering information, the result might be to reduce ideological agreement between Justices and their clerks.<sup>110</sup> To the extent that Justices care about such agreement, they must make effective use of any available information sources. In the current era, the ideological positions of some applicants are apparent from membership in the Federalist Society or the American Constitution Society or from other activities listed on their résumé. For other applicants, the judge with whom a clerk has worked can provide valuable information. If a Justice knows that a particular judge is careful to choose only conservative clerks, for instance, the identity of the judge tells a Justice a good deal. Further, a Justice can consult with an ideologically similar judge to get assurance about a clerk's views.

The same is true of the people who help Justices select their law clerks. Current clerks or committees of former clerks might have direct knowledge about the ideological positions of applicants.<sup>111</sup> Their help could make Justices less reliant on information such as the identity of the judge with whom an applicant has worked. But these helpers may themselves give considerable weight to that type of information. Further, current and former clerks may help to perpetuate an ideological linkage that already exists by favoring applicants who worked with the same judge they did and whose ideological reliability they can infer from that service.

Thus, a movement away from ideological behavior in applications for clerkships to the Justices has given the Justices reason to engage in a different form of ideological behavior, going to like-minded lower court

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109. *See supra* Part III.

110. *See* WARD & WEIDEN, *supra* note 39, at 106–07.

111. *Id.* at 60–65.

judges as sources of law clerks.<sup>112</sup> Further, the broader growth in the number of applications makes readily ascertainable information such as the identity of the judge with whom an applicant has clerked more valuable.<sup>113</sup> If an applicant has no obvious markers of ideological position, such as membership in the Federalist Society, and if the people who help Justices select clerks have no personal knowledge of applicants' positions, the judge's identity serves as a good substitute.

The relative importance of these two changes in applications—growth in the number of applications and in the number of Justices to whom aspirants apply—cannot be determined with certainty. Indeed, an argument could be made for the dominance of either change. But the more persuasive argument may be for the second change. When prospective clerks applied selectively, Justices and those who help them select clerks could infer that applicants saw themselves as ideologically compatible with the Justices they selected. Once it became the standard practice to apply to all the Justices, that inference was no longer possible. In turn, other sources of information on ideological compatibility, including the identity of the judge with whom an applicant worked, became considerably more valuable.

No matter which of these changes was more important, the two changes appear to be an important cause of the strengthened ideological linkage between judges and Justices. But are they the only source of that strengthening?

I think the answer is no. For one thing, in light of the affective polarization that has occurred among elites in general, it seems unlikely that students at the most prestigious law schools and federal judges—including Supreme Court Justices—have been immune to that polarization.

Further, there is some suggestive evidence that the clerks who work with liberal and conservative Justices in the current era differ from each other more sharply than did their counterparts in past eras. The surveys by Peppers and Zorn and by Ward and Weiden found statistical relationships between the ideological positions of the Justices and the positions and party affiliations of the law clerks who worked with them in past eras.<sup>114</sup> But the surveys also found that the law clerks as a group

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112. See *supra* note 58 and accompanying text.

113. See WARD & WEIDEN, *supra* note 39, at 58.

114. See PEPPERS, *supra* note 95, at 35–37; WARD & WEIDEN, *supra* note 39, at 105 tbl.2.17 & fig.2.3; Peppers & Zorn, *supra* note 1, at 63–64.

in these past eras leaned toward the left.<sup>115</sup> Indeed, among the Justices for whom there were sufficient survey responses from former clerks to be included in tables, the more conservative Justices typically had a majority of clerks who identified themselves as Democrats—in some instances, a large majority.<sup>116</sup> Similarly, the mean ideological position of the clerks who worked with most of the conservative Justices was to the left of center.<sup>117</sup> In light of the expressed preferences of some of today's conservative Justices for conservative clerks<sup>118</sup> and the backgrounds of some of those clerks,<sup>119</sup> it seems very likely that their clerks as a group are predominantly Republican and conservative.<sup>120</sup> It might well be that the more conservative Justices of the 1950s and the 1970s were relatively moderate compared with today's conservatives. Even so, it appears that there is a closer ideological match between Justices and clerks today than there was in those earlier eras.<sup>121</sup>

Also relevant are the patterns of post-Court careers for law clerks, compiled and analyzed by William Nelson and his colleagues.<sup>122</sup> Their study found that in the current era, unlike past eras, there is a strong tendency for the clerks who work with conservative and liberal Justices to take different career paths after their service on the Court.<sup>123</sup> Clerks for liberal Justices tend to go to positions in elite law schools, Democratic administrations, and law firms with liberal orientations; clerks for conservative Justices tend to go to Republican administrations and firms with conservative orientations.<sup>124</sup> Because of this development, the study authors note, clerks for liberal and conservative Justices now tend to differ in the ideological coloration of what they do

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115. See PEPPERS, *supra* note 95, at 34; WARD & WEIDEN, *supra* note 39, at 105 tbl.2.17; Peppers & Zorn, *supra* note 1, at 60.

116. See PEPPERS, *supra* note 95, at 34–35, 37 tbl.2.8.

117. See WARD & WEIDEN, *supra* note 39, at 104 tbl.2.16, 105 tbl.2.17.

118. See *supra* notes 77–82 and accompanying text.

119. See *supra* notes 77–78 and accompanying text.

120. It is noteworthy that Chief Justice William Rehnquist, the one strongly conservative Justice in the two books' listings who served into the 1990s, was also the only Justice who had a majority of Republican law clerks and the only one whose clerks leaned distinctly to the conservative side of the ideological spectrum. PEPPERS, *supra* note 95, at 35, 37 tbl.2.8; see WARD & WEIDEN, *supra* note 39, at 105 tbl.2.17.

121. See Liptak, *supra* note 18.

122. Nelson et al., *supra* note 18, at 1780–95.

123. *Id.*

124. *Id.*

both before they get to the Court (including the ideological orientations of the lower court judges they serve) and after they leave it.<sup>125</sup>

These pieces of evidence certainly are not conclusive. But they suggest that the clerks who work with liberal Justices and those who work with conservative Justices have become more distinct from each other in ideological terms. That development probably could not have occurred unless Justices gave more weight to ideology in their selection of law clerks, and increased reliance on the ideological positions of lower court judges as a criterion for selection would be an attractive means to that end.

Thus, while no definitive answer is possible, I think that both affective polarization and changes in the numbers of applications for clerkships and the application practices of aspiring Supreme Court law clerks help to account for the strengthened ideological linkage between judges and Justices. If that judgment is accurate, it is likely that these two sources have reinforced each other rather than operating separately. That reinforcement could help to explain what has been a quite substantial change in the Justices' own practices in the selection of law clerks.

#### V. CONCLUSIONS

The tendency for Supreme Court Justices to draw their law clerks from ideologically compatible lower court judges became considerably stronger by the 1990s, and that tendency has remained very strong since then.<sup>126</sup> Regardless of how the strengthened ideological linkage between judges and Justices is best explained, it is striking that the Justices of the last two decades have drawn their law clerks so heavily from lower court judges who share their general ideological positions.<sup>127</sup> This reliance strongly suggests that the Justices (or, at least, most of the Justices) think of themselves as standing on one ideological side or the other, and it suggests as well that they care a good deal about choosing clerks who share their point of view.

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125. *Id.* at 1797–98.

126. *See supra* Part II.

127. *See supra* Part III.

If at least some Justices and their clerks function in part as an ideological team,<sup>128</sup> one result might be to heighten Justices' reluctance to deviate from the positions that are identified with their side of the ideological spectrum in the cases that have the highest stakes for conservatives and liberals within and outside the Court. Another result might be that Justices and their clerks encourage each other to take uncompromising stands and to proclaim a Justice's disagreements with colleagues in strong terms,<sup>129</sup> thereby exacerbating conflicts within the Court. These possibilities are speculative, but they merit consideration.

The Justices' selection of law clerks and the ways they employ their clerks also merit consideration for the window that they provide on the functioning of the Court. Law clerks are important participants in the process of reaching decisions in the Court.<sup>130</sup> For this reason, the Justices' choices concerning their clerks also tell us something about the goals they seek to advance and the ways that they see their roles. As I have suggested in this Article, the development of a strong ideological linkage between judges and Justices in the selection of law clerks tells us something as well about the impact on the Court of changes in the world of political and social elites in which both Justices and law clerks reside.

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128. Some Justices appear to favor ideologically diverse sets of law clerks in a given Term rather than sets in which all the clerks have the same ideological leanings as that of the Justice. Kromphardt, *supra* note 9, at 309–10.

129. STERN & WERMIEL, *supra* note 34, at 350–51, 438–39, 478–79 (discussing interactions between Justice Brennan and his clerks); *see also* Kenney, *supra* note 62, at 221.

130. *See supra* note 27 and accompanying text.