

**APPRENTICES OF TWO SORCERERS: DO SUPREME
COURT LAW CLERKS WHO CLERK FOR MULTIPLE
JUSTICES NUDGE THEM TO AGREE?**

*Michael P. Kenstowicz**

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INTRODUCTION

There are few more prized badges of legal distinction than a Supreme Court clerkship.¹ Within the club of Supreme Court law clerks, a select few have attained an even more exclusive status: clerking for multiple Supreme Court Justices. More than one thousand lawyers have clerked on the Supreme Court since the early 1940s² when law clerks became more active in helping the Justices decide cases.³ But only twenty-two of these law clerks have clerked for two or more Justices while they remained on the Court.⁴ The influence of this group of law clerks warrants consideration because while there has been a plethora of literature on Supreme Court law clerks' effects on Justices' opinions and votes,⁵ no scholarship has yet examined whether a law clerk for multiple Justices nudges them to agree on case holdings during the law clerk's second term on the Court. This question is important because answering it will help Court followers better understand the factors affecting the Justices' votes and will thereby advance the contentious debate over whether law clerks exert too much influence over the Supreme Court's decisions.⁶ Further, answering this question could provide information generally useful to appellate judges who consider hiring law clerks who previously clerked for colleagues so that these judges know the potential consequences of this employment decision.

Although approximately seventy-five law clerks have clerked for multiple Justices at the Supreme Court since 1946, only sixteen of these law clerks served at the Court during their second clerkship while their first Justice was still on the Court.⁷ For the other clerks, their first Justice was either deceased or retired during their second Supreme Court clerkship or their second Justice was retired from the Supreme Court.⁸ In addition, six other law clerks clerked at the Supreme Court during Terms in which their Justices served on the bench with colleagues who previously served as court of appeals judges and employed these six clerks.⁹ Thus, during their second clerkships with Supreme Court Justices, these twenty-two law clerks potentially had the opportunity to influence the votes of two Justices. To examine whether any law clerks took advantage of their unique circumstances, this Article compares Justices' votes during these clerks' second term on the Court (or first term if his or her court of appeals judge was later appointed to the Supreme Court) to the votes of these Justices during the

1. See generally DAVID LAT, *SUPREME AMBITIONS* (2015) (describing the traverses of a fictional Ninth Circuit law clerk to obtain a Supreme Court clerkship and the accompanying status).

2. TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 219 app. 4 (2006).

3. ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 23 (2007).

4. See *infra* Tables 1 and 2 for a list of the twenty-two law clerks.

5. See *infra* Part I.B for a sampling of the scholarship on this topic.

6. See *infra* Part I.B for an overview of this debate.

7. See PEPPERS, *supra* note 2, at 219 app. 4.

8. See *id.*

9. See *infra* Table 2 for a list of these six clerks.

other Terms in which the Justices served concurrently.

The growth of a Supreme Court law clerk network suggests that law clerks may influence the voting behavior of their past bosses during the clerks' second terms at the Court. Since all of the Justices began occupying their Supreme Court chambers in 1946,¹⁰ Justices have used their law clerks to serve as diplomats in negotiating over case matters.¹¹ For example, Justice William Douglas claimed that Justice Felix Frankfurter "used his law clerks as flying squadrons against the law clerks of other Justices and even against the Justices themselves. Frankfurter, a proselytizer, never missed a chance to line up a vote."¹² In addition, Justice Lewis Powell regularly instructed his clerks to negotiate with other Justices' law clerks.¹³ Given the substantial research indicating the importance of prior relationships to successfully influencing others during negotiations,¹⁴ there is good reason to believe that law clerks who worked for multiple Justices may be in an especially effective position to influence their bosses to agree to particular holdings. According to Justice Sandra Day O'Connor, Supreme Court Justices generally "feel close to [their law clerks] for a lifetime."¹⁵ This evidence leads me to hypothesize that there is a significant difference between the votes of the Justices during (1) the Term in which a law clerk served for a second Justice, and (2) the other Terms in which the law clerk's two Justices served together.

It is possible that there is no significant difference in Justices' voting patterns between these two groups of votes. This possibility of no effects receives support from clerks' accounts of Justices' chambers as independent law offices.¹⁶ Given these professional divisions among the chambers, law clerks may have few occasions to interact with their former bosses. Moreover, a Justice's own law clerks may drown out the influence of the Justice's former clerk working for a colleague. Such opportunities for a law clerk to influence his former boss also may be few in number because the Justices record their preliminary votes in

10. WARD & WEIDEN, *supra* note 3, at 160.

11. *Id.* at 164.

12. WILLIAM O. DOUGLAS, *THE COURT YEARS: 1939-1975*, at 173 (1980).

13. *See* WARD & WEIDEN, *supra* note 3, at 167.

14. *See* DAVID A. LAX & JAMES K. SEBENIUS, 3-D NEGOTIATION: POWERFUL TOOLS TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS 218 (2006) ("[E]stablishing and continually strengthening your relationships with the other side will . . . go a long way toward making you more persuasive."); Robert B. Cialdini, *Harnessing the Science of Persuasion*, HARV. BUS. REV., Oct. 2001, at 72, 74 ("The important thing is to establish the bond early [when trying to influence a particular person] because it creates a presumption of goodwill and trustworthiness in every subsequent encounter."). *See generally* WILLIAM URY, *GETTING PAST NO 68* (1st ed. 1991) (explaining that having a good relationship with a bargaining partner makes negotiations more successful because the parties are more effective at communicating with one another and likely trust each other more).

15. Barbara Gamarekian, *O'Connor's Agonizing Search for Law Clerks*, N.Y. TIMES (Nov. 3, 1989), <http://www.nytimes.com/1989/11/03/us/law-o-connor-s-agonizing-search-for-law-clerks.html>.

16. Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109, 2110 (1992) ("The Justices had become accustomed to working within the Court as if they ran, as Justice Powell put it, nine small law firms, with one senior partner and several junior associates, the law clerks.").

conference just days after a case's oral argument¹⁷ and because the Justices do not want to look like flip-floppers by changing their votes post-conference.¹⁸ Further, a law clerk may experience little incentive to nudge his second Justice to agree with his first Justice because the law clerk presumably has a stronger duty of loyalty to his second Justice—his current employer.

I find little support for the hypothesis that law clerks for multiple Justices nudge them to agree.¹⁹ The Justices who both employed a particular law clerk agreed in approximately 1 percent fewer cases during the law clerk's second clerkship in comparison to the Justices' other Terms on the Court together.²⁰ Furthermore, the Justices who both employed a law clerk agreed in 2 percent fewer cases decided by 5–4 or 6–3 votes during the law clerk's second term.²¹ These Justices also voted the same way in approximately 0.2 percent fewer cases reported on the front page of the *New York Times* during the law clerk's second clerkship, relative to the Justices' other Terms of concurrent service.²² An outlier in the data is Justice Anthony Kennedy's substantially greater agreement with Justice Antonin Scalia during the 1988 Term—when Kennedy employed a former Scalia clerk—in comparison to their other years of concurrent service. With the possible exception of this finding, the data suggest (1) that law clerks with prior clerking relationships with other Justices do not influence them in significantly more cases than law clerks without these relationships, and (2) that if these second-term clerks do try to exercise greater influence over the votes of their old bosses, they are not effective at this task. This conclusion is especially significant for the cases that were decided by 5–4 or 6–3 votes and those that appeared on the front page of the *New York Times*. Law clerks would likely be more invested in the Court reaching their preferred holdings in these cases as they are the most politically salient.

This Article proceeds in three parts. Section I first examines the changes in law clerks' roles at the Supreme Court to explain the Article's focus on clerks serving on the Court since 1946. This Section continues by situating the Article's inquiry within the literature on the influence of law clerks on Justices' opinions and votes. Section II describes the Article's empirical project and findings.

17. *Supreme Court Procedures*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited Feb. 3, 2017).

18. For example, Chief Justice John Roberts received substantial criticism from conservatives after he allegedly changed his vote in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). See JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 291 (2012) (noting that Justice Ruth Bader Ginsburg prepared her concurring opinion to be a dissent); Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012, 9:43 PM), <http://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/> (“Chief Justice John Roberts initially sided with the Supreme Court's four conservative justices to strike down the heart of President Obama's health care reform law, the Affordable Care Act, but later changed his position and formed an alliance with liberals to uphold the bulk of the law . . .”).

19. See *infra* Part II.A for a description of how data was gathered and analyzed.

20. See *infra* Table 3 for more detailed statistics.

21. See *infra* Table 6 for more detailed statistics.

22. See *infra* Table 5 for more detailed statistics.

Section III then analyzes those findings. The Article concludes with brief commentary on opportunities for further research in light of its findings and on the value of the Supreme Court's law clerk network.

I. SURVEYING THE HISTORY OF SUPREME COURT CLERKSHIPS AND THE DEBATE OVER CLERKS' PROPER ROLES AT THE COURT

Before examining whether law clerks for multiple Justices nudge them to agree, this Article contextualizes this inquiry by presenting the literature on clerks' influence over their Justices and on scholarly debates over clerks' proper roles at the Court. Judicial behavior scholarship has empirically reinforced accounts of law clerks exercising significant influence on their Justices' votes in cases, on petitions for certiorari, and on the content of the Court's opinions.²³

Evidence of clerk influence over Justices' votes comes from Todd Peppers and Christopher Zorn, who surveyed 532 Court law clerks serving between 1940 and 2004 and compared their ideological preferences to those of their Justices and the Justices' votes during the 1953–2004 Terms.²⁴ Peppers and Zorn found that even accounting for the selection effect of Justices choosing like-minded clerks, “clerks’ ideological predilections exert an additional, and not insubstantial, influence on the Justices’ decisions on the merits.”²⁵ Furthermore, Jeffrey Rosenthal and Albert Yoon empirically identified significant variation in Justices’ use of various functional words in their opinions during different Supreme Court terms between 1941 and 2011, demonstrating law clerks’ substantial role in drafting the Court’s opinions.²⁶ Finally, recent research also shows that law clerks influence the Justices’ votes on petitions for certiorari: the Court grants certiorari less frequently during law clerks’ initial months on the Court when they are more risk averse²⁷ and the Justices follow the recommendations of law clerks’ “cert pool” memos for about 75 percent of petitions.²⁸ Cumulatively, this evidence indicates that Supreme Court law clerks

23. See J. Daniel Mahoney, *Law Clerks: For Better or for Worse?*, 54 BROOK. L. REV. 321, 339 (1988) (“[I]t is widely known that law clerks play a substantial role in opinion writing.”); David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFF. (May–June 2005), http://legalaffairs.org/issues/May-June-2005/feature_garrow_mayjun05.msp (“Harry Blackmun’s papers reveal that, more than any [J]ustice in memory, he gave his law clerks control over his thinking and writing when he was on the Supreme Court.”).

24. Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 60–61 (2008).

25. *Id.* at 53.

26. Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 CORNELL L. REV. 1307, 1319–21 (2011).

27. See William D. Blake, Hans J. Hacker, & Shon R. Hopwood, *Seasonal Affective Disorder: Clerk Training and the Success of Supreme Court Certiorari Petitions*, 49 L. & SOC’Y REV. 973, 976 (2015) (“[P]etitions arriving over the summer have a 16 percent worse chance of being granted by the Court.”).

28. Ryan C. Black, Christina L. Boyd, & Amanda C. Bryan, *Revisiting the Influence of Law Clerks on the U.S. Supreme Court’s Agenda-Setting Process*, 98 MARQ. L. REV. 75, 77 (2014). The certiorari, or “cert,” pool is a process through which Justices “combine (pool) their clerks’ labor in the review of cert petitions so as to divide the workload of summarizing the content and merit of each

have significant influence on the Court's output.

A. *The Evolution of Supreme Court Law Clerks' Roles in Chambers*

Supreme Court law clerks have substantially grown in number and influence on their Justices since Justice Horace Gray hired Thomas Russell to be the first Supreme Court law clerk in 1882.²⁹ Four years after this initial hire, law clerks became a larger presence at the Court when Congress appropriated funds for the Justices each to employ a stenographic clerk.³⁰ This opportunity to hire help arose as the Court's production of signed opinions increased more than fourfold between 1856 and 1886 to approximately 300 opinions per year.³¹ Between 1886 and 1918, Supreme Court law clerks principally performed secretarial work for their Justices.³² Most clerks took dictated opinions, reviewed them for grammatical errors, and completed administrative tasks for the Justices,³³ although Justice Gray gave his clerks legal work too.³⁴

Supreme Court law clerks began performing more legal work after Congress authorized funds in 1919 for each Justice to hire a law clerk in addition to a stenographic clerk.³⁵ Between 1919 and the early 1940s, law clerks mostly cite checked and edited opinions, performed legal research, and wrote summaries of petitions for certiorari.³⁶ "With some exceptions, the law clerks were not called upon to provide sophisticated legal analysis—either in meetings with the justices, in bench memoranda, or in opinion drafts—and were not asked to give the type of legal advice that a client might call upon an attorney to provide."³⁷ The exceptions were the law clerks of Justices Oliver Wendell Holmes and Louis Brandeis. Holmes asked his law clerks to discuss the Court's cases and propose edits to his opinions to improve their readability.³⁸ Brandeis instructed his clerks to critique his opinions and provide legal research for them.³⁹

Dating the advent of the modern Supreme Court law clerk is a matter of

petition coming to the Court." *Id.* at 80.

29. See PEPPERS, *supra* note 2, at 43, 46.

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

31. WARD & WEIDEN, *supra* note 3, at 25.

32. PEPPERS, *supra* note 2, at 70.

33. *Id.* at 55–60; WARD & WEIDEN, *supra* note 3, at 30–31.

34. PEPPERS, *supra* note 2, at 52. Justice Gray asked his law clerks to synthesize and present each case's facts and central arguments after oral argument. *See id.*

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

36. PEPPERS, *supra* note 2, at 84.

37. *Id.*; see also JOHN KNOX, THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR'S WASHINGTON 86 (Dennis J. Hutchinson & David J. Garrow eds., 2002) ("Only gradually did it dawn upon me that [Justice James McReynolds] regarded all of my work on these petitions as little more than a mental exercise to keep me busy and out of mischief.").

38. WARD & WEIDEN, *supra* note 3, at 35.

39. PEPPERS, *supra* note 2, at 64. Dean Acheson, who clerked for Brandeis during the 1919 and 1920 Terms, said that "[a] touching part of our relationship was the Justice's insistence that nothing should go out unless we were *both* satisfied with the product." *Id.*

historical debate. Artemus Ward and David Weiden mark the “rise of the modern clerk” to 1941 when Congress appropriated funds for the Justices to hire two law clerks.⁴⁰ Ward and Weiden explain that around this time, law clerks assumed more responsibility in the process of reviewing petitions for certiorari by writing memos that included clerk recommendations on whether to grant or deny the petitions.⁴¹ Law clerks also started preparing bench memos on pending cases; some included recommendations of particular holdings.⁴² Furthermore, many law clerks took on the responsibility of drafting opinions for their Justices.⁴³ This change became more of a practical necessity once Chief Justice Earl Warren eschewed the past practice of assigning opinions based on whether the Justices finished their last opinion assignment and began assigning each Justice roughly an equal number of opinions.⁴⁴ Slowgoing Justices had to keep up and turned to their law clerks for help.⁴⁵

Placing greater emphasis on the frequency of Justices assigning opinion drafting to their law clerks, Todd Peppers points to Warren’s appointment in 1953 as marking a “transformation of the law clerk into an attorney involved in all aspects of chamber work.”⁴⁶ Warren assigned his law clerks the responsibility of drafting opinions, as did seven colleagues who joined his Court: Justices William J. Brennan, Abe Fortas, Arthur Goldberg, John Marshall Harlan II, Thurgood Marshall, Potter Stewart, and Byron White.⁴⁷ Peppers therefore argues that it is proper to demarcate the Warren Court as the beginning of the modern era for Supreme Court law clerks because the Warren Court adopted a new practice of the Justices primarily acting as decision makers and managers, while the law clerks performed the “tedious legwork of reviewing briefs, gathering information, and drafting opinions.”⁴⁸

For the purposes of this Article, the critical year during this period is 1946, when all nine Justices first occupied their Supreme Court chambers.⁴⁹ Before Chief Justice Fred Vinson’s appointment to the Supreme Court, some Justices and their law clerks worked at the Justices’ homes instead of at the Court.⁵⁰ Once the Justices began working from their chambers, their law clerks lunched together regularly and saw each other socially after work.⁵¹ During these

40. WARD & WEIDEN, *supra* note 3, at 36.

41. *Id.* at 37–39.

42. *Id.* at 40–41.

43. PEPPERS, *supra* note 2, at 143 (noting that Justices Tom Clark (1949–1966 Terms), Felix Frankfurter (1939–1962 Terms), Sherman Minton (1949–1955 Terms), Frank Murphy (1940–1949 Terms), and Chief Justice Fred Vinson (1946–1952 Terms) all assigned opinion writing responsibilities to their law clerks).

44. WARD & WEIDEN, *supra* note 3, at 42–43.

45. *See id.*

46. PEPPERS, *supra* note 2, at 145–46.

47. *Id.* at 151–52.

48. *Id.* at 152.

49. WARD & WEIDEN, *supra* note 3, at 160.

50. *Id.*

51. *Id.*

interactions, clerks sometimes discussed their cases and served as “informal ambassadors in negotiations across chambers.”⁵² According to Ward and Weiden, the Justices generally encouraged an active Supreme Court clerk network because it enabled the Justices to glean information about the other Justices’ positions and provided a social mechanism to influence other Justices.⁵³ A law clerk for Justice Tom Clark confirmed the practice of law clerks lobbying each other on behalf of their Justices and explained that “[w]hen you need five votes and you only have four, you go to somebody who you think you can win over and say, ‘What’s it going to take?’”⁵⁴ Because the law clerk network arose upon all nine Justices working at the Court, this Article focuses on the Justices’ votes since 1946 to determine whether clerks who clerked for multiple Justices nudged them to agree.

B. The Debate over Law Clerks’ Influence on their Justices

Controversy over the proper role of Supreme Court law clerks has commanded the attention of legal commentators for more than a half century and has a surprising source. After *U.S. News & World Report* raised, but did not examine, the issue of Supreme Court law clerks’ influence in a July 1957 article,⁵⁵ William Rehnquist wrote a follow-up article six months later and described his clerkship with Justice Robert Jackson. Rehnquist expressed concern that Justices’ votes on petitions for certiorari might be affected by law clerks’ unconscious slanting of their legal research, which would move the Court to the left because of law clerks’ general liberal bias.⁵⁶ Rehnquist’s position received a sharp rebuke from Alexander Bickel, a former clerk for Justice Frankfurter, who refuted Rehnquist’s claim that law clerks have a liberal bias.⁵⁷ Bickel contended that “law clerks are in no respect any kind of a powerful kitchen cabinet, though they are not to be dismissed as just messenger boys either.”⁵⁸ In addition, William Rogers, an associate at Arnold & Porter who clerked for Justice Stanley Reed, attacked Rehnquist’s claim that law clerks can unconsciously or consciously influence their Justices’ votes.⁵⁹ Rehnquist

52. *Id.* at 43; see also BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 108 (1979) (reporting the efforts of one of Justice Thurgood Marshall’s law clerks in lobbying a law clerk of Chief Justice Warren Burger on the issue of courts’ role in addressing “residential segregation patterns in designing school desegregation plans” in Burger’s unanimous opinion in *Swann v Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)).

53. WARD & WEIDEN, *supra* note 3, at 166, 169.

54. *Id.* at 168.

55. *The Bright Young Men Behind the Bench*, U.S. NEWS & WORLD REP., July 12, 1957, at 45, 48 (asking “whether the influence of these young law clerks—some not yet admitted to the bar—is reflected in Court opinions”).

56. William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP. (Dec. 13, 1957), <http://www.usnews.com/opinion/articles/2008/12/09/william-rehnquist-writes-in-1957-on-supreme-court-law-clerks-influence>.

57. See Alexander M. Bickel, *The Court: An Indictment Analyzed*, N.Y. TIMES MAG., Apr. 27, 1958, at 16, 16.

58. *Id.*

59. See William D. Rogers, *Clerks’ Work is “Not Decisive of Ultimate Result”*, U.S. NEWS &

responded by reiterating his prior position and suggesting that “[t]he resolution of these disagreements must await a thorough, impartial study of the matter by someone who is not personally involved.”⁶⁰

Rehnquist’s concern about law clerks’ influence was validated by Bob Woodward and Scott Armstrong’s *The Brethren: Inside the Supreme Court*. This book described the Justices’ varying levels of reliance on their clerks and contained detailed accounts of law clerks’ influence on not only the Justices’ votes on petitions for certiorari but also on their votes and opinions on matters before the court.⁶¹ For example, when Justice Lewis Powell asked Justice Thurgood Marshall about a point in his dissent in *San Antonio Independent School District v. Rodriguez*,⁶² Marshall remarked, “Did I say that?” and brushed aside the question.⁶³ The publication of *The Brethren* resulted in some legal commentators contending that Supreme Court law clerks exercise too much influence.⁶⁴ This argument received strong support from *Closed Chambers*, a 1998 book by Edward Lazarus, a former clerk of Justice Harry Blackmun. Lazarus reported in detail on clerks’ significant influence on the Court’s opinions and death penalty stays.⁶⁵ Lazarus contended that some Supreme Court law clerks abused their influence by manipulating their Justices to deny stays of execution and by integrating the clerks’ policy preferences into decisions through the opinion-drafting process.⁶⁶

More recent assessments of Supreme Court law clerks’ influence have diverged. Peppers argues that “law clerks do not wield an inordinate amount of influence.”⁶⁷ He supports his position by highlighting the decreasing ideological differences between Justices and their law clerks, the practice of multiple law clerks within a chamber working on an opinion, and interchamber review of opinions by concurring Justices.⁶⁸ Ward and Weiden are more critical of law clerks’ influence, though they acknowledge that they are “not the behind-the-scenes manipulators portrayed by some observers.”⁶⁹ Instead, Ward and Weiden claim that law clerks’ roles in setting the Court’s agenda and in drafting the Court’s opinions “tread perilously close to what many critics see as an

WORLD REP., Feb. 21, 1958, at 114, 114–15.

60. William H. Rehnquist, *Another View: Clerks Might “Influence” Some Actions*, U.S. NEWS & WORLD REP., Feb. 21, 1958, at 116, 116.

61. See generally WOODWARD & ARMSTRONG, *supra* note 52.

62. 411 U.S. 1 (1973).

63. WOODWARD & ARMSTRONG, *supra* note 52, at 258–59.

64. See, e.g., John G. Kester, *The Law Clerk Explosion*, LITIGATION, Spring 1983, at 20, 20 (“Once an institution that supplied mentors to instruct bright graduates, the clerkship has grown into a corps of post-adolescent mandarins, Judges for a Year after the fashion of *Queen for a Day*.”); Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 787 (1981) (expressing concern over the threat to judicial independence posed by significant delegation by judges to their law clerks).

65. See EDWARD LAZARUS, *CLOSED CHAMBERS* 272 (1st ed. 1998).

66. *Id.* at 269–72.

67. PEPPERS, *supra* note 2, at 211.

68. *Id.*

69. WARD & WEIDEN, *supra* note 3, at 246.

unconstitutional abdication of the [J]ustices' duties."⁷⁰ Among their proposed reforms, Ward and Weiden suggest that the Justices should consider forbidding their law clerks from professionally interacting with law clerks from other chambers in order to "guard against clerk activism in coalition forming and opinion writing."⁷¹ This Article contributes to this debate by providing evidence to evaluate the merits of Ward's and Weiden's proposal and the disagreement between those authors and Peppers on the scope of law clerks' current influence on the Court.

II. EXAMINING THE VOTES OF SUPREME COURT JUSTICES EMPLOYING A LAW CLERK DURING DIFFERENT TERMS

A. *Empirical Project*

In order to examine whether law clerks nudge their Justices to agree, I compiled a list of the law clerks with two Supreme Court clerkships whose Justices both remained on the Court during the law clerks' second terms. To make this list, I referenced Appendix 4 in *Courtiers of the Marble Palace*, which lists all Supreme Court law clerks who served between 1882 and 2004,⁷² and performed online searches to identify the law clerks who served on the Supreme Court between 2005 and 2015. I then noted the law clerks with multiple Supreme Court clerkships and through further online research, narrowed this list to the sixteen law clerks whose Justices both sat on the Court during the clerk's second term. It is notable that among these sixteen law clerks, thirteen had their second clerkships with Justices in their first Term on the Court. This fact is important because it suggests that these Justices likely had less established chambers practices and preferences than their colleagues with longer tenures on the Court and might therefore be especially subject to the influence of their law clerks.

70. *Id.*

71. *Id.* at 248. Ward and Weiden also recommend that Senators ask Justices about the proper role of law clerks at the Court during the confirmation process, that Justices release clerks' pool memos analyzing petitions for certiorari, and that Justices identify their chambers as the authors of opinions rather than themselves. *Id.* at 247–48.

72. See PEPPERS, *supra* note 2, at 219 app. 4.

TABLE 1: SUPREME COURT LAW CLERKS WHO CLERKED ON THE SUPREME COURT FOR TWO JUSTICES, BOTH OF WHOM SERVED ON THE COURT CONCURRENTLY, 1946–2015⁷³

Law Clerk	First Supreme Court Clerkship (Term(s))	Second Supreme Court Clerkship (Term)	Third Supreme Court Clerkship (Term)
Hugh W. Baxter	Blackmun (1991)	Ginsburg (1993)*	
Henk J. Brands	Souter (1991)	Breyer (1994)*	
Paul T. Cappuccio	Scalia (1987)	Kennedy (1988)*	
Jerome A. Cohen	Warren (1955)	Frankfurter (1956)	
Richard Cordray	White (1987)	Kennedy (1988)*	
Andrew Crespo	Breyer (2009)	Kagan (2010)*	
Allon Kedem	Kennedy (2009)	Kagan (2010)*	
Gilbert Kujovich ⁷⁴	White (1976)	Stewart (1976)	
Christopher Landau	Scalia (1990)	Thomas (1991)*	
Gregory Maggs	Kennedy (1989)	Thomas (1991)*	
Stephen R. McAllister	White (1989–1990)	Thomas (1991)*	
Lindsay Powell	Stevens (2008)	Sotomayor (2009)*	
Elizabeth Prelogar	Ginsburg (2009)	Kagan (2010)*	
E. Barrett Prettyman, Jr.	Jackson (1953) ⁷⁵	Frankfurter (1954)	Harlan (1955)
Hannah C. Smith	Thomas (2003)	Alito (2005)*	
Robert Yablon	Ginsburg (2008)	Sotomayor (2009)*	

Given the structure of this Article's empirical inquiry, it is appropriate to also consider the votes of Justices with law clerks who clerked for court of

73. In Table 1, the asterisk (*) signals that the law clerk served during his or her Justice's first term on the Court. This table excludes law clerks who clerked for two Supreme Court Justices when the Justices did not serve together during the law clerk's second term because these clerks had no opportunity to influence two Justices' votes during their second terms.

74. Gilbert Kujovich clerked for both Justice Byron White and Justice Potter Stewart during the 1976 Term. See Interview by Marie Allen with Gilbert Kujovich (Feb. 22, 1980), <http://www.jimmycarterlibrary.gov/library/exiInt/Kujovich.pdf>.

75. Justice Jackson died on October 9, 1954; Justice Frankfurter therefore had no opportunity to use E. Barrett Prettyman, Jr. to influence Jackson before the Court issued its first opinion of the 1954 Term, *In re Disbarment of Isserman*, 348 U.S. 1 (1954), on October 14, 1954. See *Robert H. Jackson*, OYEZ, https://www.oyez.org/justices/robert_h_jackson (last visited Feb. 7, 2017).

appeals judges later appointed to the Supreme Court. There have been six law clerks who clerked for a Justice while their court of appeals judge also served on the Court. These six law clerks had relationships with the judges who joined the Court just as the aforementioned sixteen law clerks with two Supreme Court clerkships did. Among these six law clerks and the aforementioned sixteen, only David Ellen and David Kravitz served for the same two Justices: then-Judge Breyer on the First Circuit from 1993 to 1994 and Justice O'Connor during the 1994 Term. This is somewhat surprising as it might be expected that there would be clerkship pipelines for Justices with especially close ideologies. Nevertheless, with several exceptions, most of these twenty-two law clerks clerked for Justices with similar political ideologies, which is consistent with recent evidence that Justices almost exclusively hire law clerks with similar ideologies.⁷⁶

TABLE 2: LAW CLERKS WHO CLERKED ON THE SUPREME COURT FOR ONE JUSTICE AND ON THE COURT OF APPEALS FOR A JUDGE LATER APPOINTED TO THE SUPREME COURT, BOTH OF WHOM SERVED ON THE COURT CONCURRENTLY, 1946–2015

Law Clerk	Court of Appeals Clerkship (Circuit, Clerkship Years)	Supreme Court Clerkship (Term)/Court of Appeals Clerkship (Circuit, Clerkship Years)	Supreme Court Clerkship (Term)
Susan M. Davies	Breyer (First Circuit, 1991–1992)	Kennedy (1994)	
Sean H. Donahue	Ginsburg (D.C. Circuit, 1992–1993)	Stevens (1993)	
David Ellen	Ginsburg (D.C. Circuit, 1992–1993)	Breyer (First Circuit, 1993–1994)	O'Connor (1994)
David Goldberg	Ginsburg (D.C. Circuit 1991–1992)	Souter (1993)	
David Kravitz	Breyer (First Circuit, 1993–1994)	O'Connor (1994)	
E. Joshua Rosenkranz	Scalia (D.C. Circuit, 1985–1986)	Brennan (1987)	

The practice of Justices hiring law clerks with experience clerking for a

76. See Adam Liptak, *A Sign of the Court's Polarization: Choice of Clerks*, N.Y. TIMES (Sept. 6, 2010), <http://www.nytimes.com/2010/09/07/us/politics/07clerks.html> (“These days the more conservative justices are much more likely than were their predecessors to hire clerks who worked for judges appointed by Republicans. And the more liberal justices are more likely than in the past to hire from judges appointed by Democrats.”).

colleague still on the Court is a relatively recent phenomenon. Thirteen of these twenty-two law clerks served between 1986 and 1995 and five clerked between 2006 and 2015. Explaining the recentness of this practice is challenging. The turnover in the appointment of new Justices on the Court is comparable during these two periods to other ten-year periods⁷⁷—so the timing for nominations is not alone a persuasive explanation for the concentration of this practice in more recent Terms. Furthermore, other than Justices Frankfurter and Kagan, who joined the Court after holding academic positions,⁷⁸ the other eleven Justices who hired law clerks with experience clerking for a colleague had served on a federal or state appellate court.⁷⁹ These other Justices were therefore likely experienced in how to delegate work to law clerks and did not need to hire a seasoned Supreme Court clerk to assist them in this task.

The most convincing explanation appears to be that as the Court has become especially politically polarized,⁸⁰ new Justices may have a strong interest in hiring a clerk with experience clerking for a Justice with a similar ideology. This law clerk will know the judicial preferences and practices of his previous Justice and the other Justices with similar ideologies. New Justices probably want to know this information to improve their abilities to work with their Court allies and swing voters in order to build coalitions and reach preferred holdings.

Support for this polarization explanation comes from a recent empirical study of law clerks' post-clerkship employment that found that "the Supreme Court clerkship appeared to be a nonpartisan institution from the 1940s into the 1980s."⁸¹ This study found that after roughly 1990, a pattern emerged of conservative Justices hiring law clerks who clerked for lower court judges appointed by Republican presidents and vice versa.⁸² Because sixteen of the identified twenty-two law clerks with multiple Supreme Court clerkships served after 1990 (73 percent), this theory is consistent with the timing for the emergence of Justices hiring colleagues' law clerks. Additional evidence for this theory comes from the ideological classifications of the Justices in *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*.⁸³

77. Between 1986 and 1995, six Justices were replaced on the Court; between 2006 and 2015, three Justices were replaced on the Court. *Members of the Supreme Court of the United States*, SUPREMECOURT.GOV, https://www.supremecourt.gov/about/members_text.aspx (last visited Feb. 6, 2017). The average number of changes in the composition of the Court for each ten-year period beginning in 1946 is four. *See id.*

78. *See* PEPPERS, *supra* note 2, at 57, 104; RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 3 (2016).

79. LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 367–70, 372–73 (6th ed. 2015).

80. *See* Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 208 (2013) (discussing the "continued political polarization" of the Supreme Court and Congress).

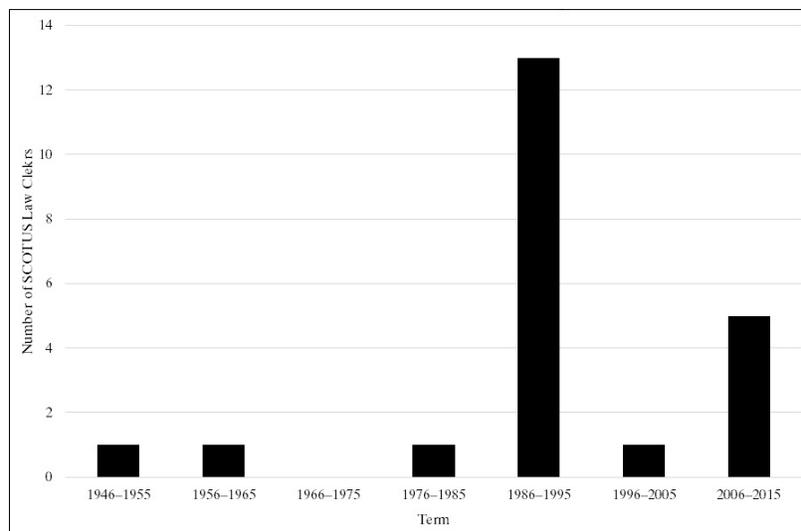
81. William E. Nelson et al., *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 VAND. L. REV. 1749, 1766 (2009).

82. *See id.*

83. *See* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 115 nn.1–3 (2013) (listing Justices Souter, Brennan, Breyer, Ginsburg, Stevens, Warren, and Sotomayor as liberals;

Based on these classifications, twelve of these twenty-two law clerks (55 percent) served for multiple Justices who shared the same ideological classification as liberal, moderate, or conservative.⁸⁴ If law clerks' ideology played a negligible role in the Justices' hiring practice, it would be expected that roughly 33 percent of the law clerks' Justices would share the same ideology. The ten law clerks who clerked for Justices of different ideologies might be expected to successfully nudge their Justices in more cases than the twelve clerks who clerked for Justices of the same ideology because the former group of clerks presumably had more opportunities to convince their current and former bosses to agree.⁸⁵

FIGURE A: SCOTUS LAW CLERKS CLERKING FOR MULTIPLE JUSTICES WHO SERVED CONCURRENTLY



After gathering this list of relevant Supreme Court law clerks, I then compared the votes of their Justices during the Term of these clerks' second

Justices Stewart, Frankfurter, O'Connor, Jackson, and White as moderates; and Justices Harlan, Kennedy, Scalia, Alito, and Thomas as conservatives). I categorize Justice Kagan as a liberal.

84. *See id.* Paul T. Cappuccio, Christopher Landau, Gregory Maggs, and Hannah C. Smith all clerked for two conservative Justices. Gilbert Kujovich clerked for two moderates. Henk J. Brands, Andrew Crespo, Sean H. Donahue, David Goldberg, Lindsay Powell, Elizabeth Prelogar, and Robert Yablon all clerked for two liberal Justices.

85. This Article counts David Ellen (who clerked for then-Judges Breyer and Ginsburg on the court of appeals and Justice O'Connor) as having clerked for Justices with different ideologies because, even though Breyer and Ginsburg are both liberals, he presumably could not have nudged them to agree during his clerkship with O'Connor, a moderate. Further, this Article counts E. Barrett Prettyman, Jr. (who clerked for Justices Jackson, Frankfurter, and Harlan) as having clerked for Justices with different ideologies because, although Jackson and Frankfurter were both moderates, Jackson died before the Court issued its first opinion during Prettyman's clerkship with Justice Frankfurter.

clerkships to the votes of the Justices during the other Terms that they served concurrently on the Court. I obtained the data on the Justices' votes from the Supreme Court Database, which conveniently has this voting data for all terms between 1946 and the present.⁸⁶ I then worked with Morgen Miller, a Coase-Sandor Institute researcher, to calculate the percentage of cases in which the law clerks' Justices agreed during the law clerk's second clerkship and the percentage of cases in which the Justices voted together during the other terms in which they served concurrently. We calculated these percentages for the following three sets of cases: (1) all nonunanimously decided cases,⁸⁷ (2) closely contested cases decided 5–4 or 6–3, and (3) all cases in which the *New York Times* published a front-page piece on the Court's opinion (hereinafter referred to as the "N.Y. Times cases").⁸⁸

I reviewed the Justices' votes for the second and third sets of cases because the pairs of Justices may be more likely to agree on these cases' holdings during the Term of their law clerk's second clerkship relative to the Justices' other Terms of concurrent service. This is because their law clerks might be more likely to diplomatically engage other Justices' clerks in these "blockbuster" cases, which are "the most important and, often, controversial and divisive cases."⁸⁹ Law clerks may have especially high-intensity preferences for particular holdings in these cases because of their high political salience. This Article therefore examines whether the Justices agree more in cases in which their law clerks may have engaged in greater efforts to influence the Justices' votes.

The timing of Justices Blackmun's and Stevens's retirements meant that I could not consider the influence of Hugh W. Baxter, who clerked for Justices Blackmun and Ginsburg, and Lindsay Powell, who clerked for Justices Stevens and Sotomayor, as part of this Article's inquiry. Blackmun served with Ginsburg during only the 1993 Term, and Stevens served with Sotomayor during only the 2009 Term. Thus, there were not the multiple Terms of these Justices voting on the same cases, which is necessary to compare their votes and to weigh the influence of Baxter and Powell. I also determined that David Ellen's Supreme Court clerkship with Justice O'Connor and court of appeals clerkships with Judges Ginsburg and Breyer created the potential for Ellen to nudge both O'Connor and Ginsburg and O'Connor and Breyer to agree more while Ellen

86. Harold J. Spaeth et al., *Supreme Court Database, Version 2015 Release 03*, SUPREME CT. DATABASE (Apr. 8, 2016), <http://supremecourtdatabase.org/data.php?s=2> (Justice Centered Data version). The database version used for this Article contained data for all cases decided during the 1946–2014 Terms.

87. We excluded unanimous decisions because the inclusion of these decisions biases the inquiry towards a finding of no effects. See EPSTEIN, LANDES & POSNER, *supra* note 83, at 54–55, 136–37 (explaining that researchers looking for the effects of independent variables on Supreme Court decisions should exclude unanimous decisions—which constituted 38 percent of the Court's decisions between the 1946 and 2009 Terms—because unanimity exaggerates consensus).

88. Andrew Martin, *Salience Measures*, SUPREME CT. DATABASE (Apr. 11, 2011), <http://supremecourtdatabase.org/data.php?s=5&i=2>. The data for the cases appearing on the front page of the *New York Times* covers the 1946–2009 Terms.

89. Lee Epstein, William M. Landes & Richard A. Posner, *The Best for Last: The Timing of U.S. Supreme Court Decisions*, 64 DUKE L.J. 991, 993 (2015).

served as an O'Connor clerk than these pairs of Justices otherwise would. After excluding Baxter and Powell and counting the two pairs of Justices that Ellen could have influenced on the Court, there were votes from twenty-one pairs of Justices for this Article to examine.

B. Findings

I found that the twenty-one pairs of Justices identified in this Article agreed in 1.1 percent fewer nonunanimously decided cases during their law clerk's second clerkship in comparison to the Justices' other votes when they served together. Among the Justices who both employed a particular law clerk and served concurrently during the law clerk's second clerkship, the Justices agreed in 65.9 percent of the cases nonunanimously decided during the law clerk's second clerkship. These Justices agreed in 67 percent of all other nonunanimously decided cases that they both heard. Further, only ten of the twenty-one pairs of Justices agreed more during their law clerk's second term on the Court. These findings ultimately provide no support for this Article's hypothesis that Justices who both employ a particular law clerk are more likely to agree during that law clerk's second term on the Court.

TABLE 3: A COMPARISON OF THE JUSTICES' VOTES IN NONUNANIMOUSLY DECIDED CASES

	Percentage of Cases in which the Justices Voted Together	Number of Cases
During the Term of Law Clerks' Second Clerkship with a Justice	65.9%	1,294 cases
During the Justices' Other Terms When They Served Concurrently	67.0%	12,392 cases

Among the twenty-one pairs of Justices, ten pairs were Justices of different ideologies as defined by *The Behavior of Federal Judges*.⁹⁰ Six of these ten pairs agreed more often during their law clerk's second clerkship in comparison to the Justices' other Terms serving concurrently.⁹¹ These ten pairs of Justices collectively agreed in 1.1% more cases during their law clerk's second year on the Court. These determinations do not support the hypothesis that law clerks who clerked for Justices with different political ideologies more effectively

90. See EPSTEIN, LANDES & POSNER, *supra* note 83, at 115 nn.1–3.

91. I count separately David Ellen's and David Kravitz's clerkships with then-Judge Breyer and Justice O'Connor. The following pairs of Justices agreed more during their clerk's second year on the Court: Justice Frankfurter and Chief Justice Warren (Cohen, 1956 Term); Justices Kennedy and White (Cordray, 1988 Term); Justices Breyer and Kennedy (Davies, 1994 Term); Justices Breyer and O'Connor (Kravitz and Ellen, 1994 Term); and Justices Brennan and Scalia (Rosenkranz, 1987 Term). And these Justices agreed less during their clerk's second year on the Court in comparison to their other years of concurrent service: Justices Kagan and Kennedy (Kedem, 2010 Term); Justices Thomas and White (McAllister, 1991 Term); Justices Frankfurter and Harlan (Prettyman, 1955 Term); and Justices Ginsburg and O'Connor (Ellen, 1994 Term).

influenced them than these Justices' other law clerks. Given the small sample size, an array of factors could be significant in explaining these findings, including the Court's case mix during the law clerks' second clerkships and developments affecting the Justices' relationships.

TABLE 4: A COMPARISON OF THE VOTES OF JUSTICES WITH DIFFERENT IDEOLOGIES IN NONUNANIMOUSLY DECIDED CASES

	Percentage of Cases in which the Justices Voted Together	Number of Cases
During the Term of Law Clerks' Second Clerkship with a Justice	58.9%	593 cases
During the Justices' Other Terms When They Served Concurrently	57.8%	4,190 cases

This Article also found no evidence for the hypothesis that Justices in their first Term on the Court would agree with their law clerk's prior Justice more often than during the Justices' other Terms serving concurrently. Only five of eleven new Justices agreed with their clerk's former Justice more often during the new Justice's first Term on the Court. In addition, these eleven Justices agreed with their law clerks' other Justice in only 1.1% more cases during these law clerks' second clerkships. These findings are unexpected. Seasoned Supreme Court law clerks would appear to be in a position of relatively significant influence as they have more experience on the Court than their new bosses.

There appears to be one exception to this Article's finding that law clerks do not exert significant influence over their Justice's votes during his or her first Term on the Court. Paul Cappuccio and Richard Cordray, two of Justice Kennedy's clerks during his first Term on the Court, may have nudged Kennedy to agree more with their former Justices, Scalia and White. Among all nonunanimously decided cases, Justice Kennedy agreed with Justice Scalia in 22.1% more cases during the 1988 Term than in all other Terms that they served together. Justice Kennedy also agreed with Justice White in 9.7% more cases during this Term. This more frequent agreement among these pairs of Justices is generally more pronounced for the *N.Y. Times* cases and the 5–4 and 6–3 cases. Justice Kennedy agreed with Justice Scalia in 29.6% more of the 5–4 and 6–3 cases during the 1988 Term compared to their other Terms together and in 20% more of the *N.Y. Times* cases. Moreover, Justice Kennedy voted with Justice White in 20.9% more 5–4 and 6–3 cases during the 1988 Term relative to their other Terms together and in 16.9% more *N.Y. Times* cases during this Term.

Although these data are not conclusive, they provide some evidence that Justice Kennedy's clerks exercised influence over his votes in the most politically salient and divisive cases during the 1988 Term—likely the ones that the clerks cared about the most. Further support for this conclusion comes from Lazarus, who clerked for Justice Blackmun during the 1988 Term. According to Lazarus, Justice Kennedy was “susceptible to clerks' arguments and delegate[d] to them

almost all the opinion drafting and doctrine crunching.”⁹² In particular, Lazarus claims that Cappuccio was part of a conservative law clerk network on the Court called the “cabal” and influenced Justice Kennedy to vote conservatively, especially on petitions for stays of execution.⁹³ It seems plausible that Justice Kennedy is more susceptible to his clerks’ influence than the other Justices because some commentators say that he appears to lack a jurisprudential philosophy that would guide his thinking in how to decide cases.⁹⁴ Ultimately, the combination of this quantitative and qualitative evidence suggests that Cappuccio might have influenced Justice Kennedy to vote more with Justice Scalia during the 1988 Term, especially in the most important cases. This evidence is also significant because it supports the hypothesis posited by multiple commentators that newly confirmed Justice Neil Gorsuch, a former clerk to Justice Kennedy, could influence him to vote more conservatively and thereby move the Court to the right.⁹⁵

I found no support for the hypothesis that the pairs of Justices would agree in substantially more *N.Y. Times* cases during law clerks’ second terms on the Court. Among the *N.Y. Times* cases, the Justices agreed in 0.2% fewer cases during their law clerks’ second clerkships in comparison to the other Terms that the Justices served together. And there was greater agreement during the law clerks’ second term on the Court for just 47.1% of the Justice pairs.

TABLE 5: A COMPARISON OF THE JUSTICES’ VOTES IN CASES REPORTED ON THE FRONT PAGE OF THE *NEW YORK TIMES*

	Percentage of Cases in which the Justices Voted Together	Number of Cases
During the Term of Law Clerks’ Second Clerkship with a Justice	72.9%	273 cases
During the Justices’ Other Terms When They Served Concurrently	73.1%	2,502 cases

I also did not find support among the Justices’ votes in the *N.Y. Times* cases

92. LAZARUS, *supra* note 65, at 274.

93. *Id.* at 266, 269–70.

94. See Ilya Shapiro, *A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy*, 33 HARV. J. L. & PUB. POL’Y 333, 335, 353–55 (2010) (book review) (noting that the author is “at pains to describe what Justice Kennedy’s global jurisprudential theory actually is,” claiming that Justice Kennedy’s jurisprudence cannot be reliably categorized, and describing inconsistencies in Justice Kennedy’s votes); George Thomas, *The Curious Case of Justice Anthony Kennedy*, AM. INT. (Mar. 1, 2010), <http://www.the-american-interest.com/2010/03/01/the-curious-case-of-justice-anthony-kennedy/> (claiming that “Justice Kennedy remains a puzzle” and that “[h]e is often characterized by court watchers as behaving in an unprincipled or even confused manner”).

95. See, e.g., Tom McCarthy et al., *Neil Gorsuch Nominated by Donald Trump to Fill Vacant Supreme Court Seat*, GUARDIAN (Feb. 1, 2017), <https://www.theguardian.com/law/2017/jan/31/neil-gorsuch-supreme-court-nomination>; Ramesh Ponnuru, *Neil Gorsuch: A Worthy Heir to Scalia*, NAT’L REV. (Jan. 31, 2017, 4:33 PM), <http://www.nationalreview.com/article/444437/neil-gorsuch-antonin-scalia-supreme-court-textualist-originalist-heir>.

for the theory that law clerks who clerked for Justices of different ideologies would have a greater effect in nudging their Justices to agree than clerks for Justices of the same ideology. Collectively the pairs of Justices with different ideologies agreed in 4.4% fewer cases during their law clerks' second term on the Court.⁹⁶ This finding suggests that the Justices generally have strong ideological priors on how the most divisive and politically salient cases should be decided. This conclusion also applies to the Justices who, during their first year on the Court, employed a law clerk of a colleague. They agreed with their law clerks' former bosses in only 3.4% more cases, which is not sufficiently substantial to indicate that law clerks effectively nudged their first-year Justices in the *N.Y. Times* cases to agree with their former Justices.

Similar to the *N.Y. Times* cases, I found no evidence that the Justices agreed more during their law clerk's second term on the Court in cases decided by 5–4 or 6–3 votes. The Justices agreed in 2% fewer cases during the law clerks' second clerkship in comparison to the Justices' other Terms of concurrent service. Moreover, only six of the twenty-one Justice pairs agreed more during law clerks' second terms on the Court.

TABLE 6: A COMPARISON OF THE JUSTICES' VOTES IN CASES DECIDED
5–4 OR 6–3

	Percentage of Cases in which the Justices Voted Together	Number of Cases
During the Term of Law Clerks' Second Clerkship with a Justice	59.6%	683 cases
During the Justices' Other Terms When They Served Concurrently	61.6%	6,697 cases

I found no evidence for the hypothesis that law clerks clerking for Justices of different ideologies would nudge them to agree more in 5–4 and 6–3 cases. Only two of the ten pairs of Justices with different ideologies agreed more in these cases during their law clerks' second years on the Court. And these Justices agreed on case outcomes in 2.8% more 5–4 and 6–3 cases during their law clerks' second years on the Court. In addition, the first-year Justices agreed with their law clerks' former Justices in 0.9% fewer 5–4 and 6–3 cases during their law clerks' second years in comparison to the Justices' other years of concurrent service. Among the eleven Justice pairs in which a Justice employed a colleague's law clerk during that Justice's first Term on the Court, there was greater agreement during this Term for only five of the Justice pairs. These latter two statistics suggest that first-year Justices were not significantly influenced by their law clerks to agree with their former bosses.

96. The ten pairs of Justices agreed in 59 percent of cases during their clerks' second year on the Court and in 63.4 percent during the Justices' other periods of concurrent service.

III. SIGNIFICANCE OF FINDINGS

This Article's findings of no evidence that law clerks have nudged their two Justices to agree in nonunanimous cases, *N.Y. Times* cases, or 5–4 and 6–3 cases have several important implications. First, these findings provide some assurance that the Justices are fulfilling their constitutional duty to decide cases. Although Lazarus reported that some law clerks exercised undue influence,⁹⁷ the absence of substantial evidence that clerks nudge their Justices to agree suggests that Lazarus's concern may not reflect a systemic problem on the Court. This Article's finding of no effects for the *N.Y. Times* cases and the 5–4 and 6–3 cases is especially significant because these presumably are the cases that the law clerks really care about.

Second, these findings are useful to the Justices in their clerkship hiring practices. In his or her first year on the Court, a new Justice may hire a law clerk who previously clerked on the Court to benefit from that clerk's experience and relationships without historically based concerns that the new Justice will be dependent on and manipulated by the clerk. This law clerk could be especially helpful to the new Justice in building collegial relationships with his colleagues as the clerk would know the preferences and interests of his former boss and, presumably, other Justices. Further, this Article's findings should offer some confidence to the Justices to end the practice of establishing ideological echo chambers in which they almost exclusively hire law clerks with very similar ideologies. The Justices' votes appear likely to not significantly change by hiring a law clerk of a Justice with a different ideology, even in the most divisive and politically salient cases. This clerk may in fact offer valuable assistance in developing strong answers to counterarguments from Justices with different ideologies.

Third, the possible influence of Paul Cappuccio on Justice Kennedy's votes during the 1988 Term signals that some Justices may be susceptible to clerks' influence over how cases should be decided.⁹⁸ It seems less likely, however, that future presidents will nominate Justices who lack deep jurisprudential commitments to fill vacancies on the Court. Because Presidents "have become better at finding nominees who reliably vote according to [the appointing president's] ideology,"⁹⁹ future Justices will probably be more committed to reaching preferred outcomes and will not be as susceptible to clerks' influence as Justice Kennedy may be. This may be one unforeseen consequence of the Supreme Court's growing political polarization.¹⁰⁰

97. See *supra* notes 65–66 and accompanying text for a summary of Lazarus's claims.

98. See *supra* note 94 and accompanying text for information regarding the mercurial jurisprudence of Justice Kennedy.

99. Adam Liptak, Opinion, *The Polarized Court*, N.Y. TIMES (May 10, 2014), <http://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html>. See generally Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. (forthcoming 2017), <http://ssrn.com/abstract=2432111> (describing recent presidents' extensive efforts to appoint Justices with similar ideologies).

100. See Liptak, *supra* note 99. Liptak noted that based on a comparison of the Justices'

CONCLUSION

After comparing the votes of Justices who both employed the same law clerks, this Article found no evidence that these law clerks nudge their Justices to agree. Of the twenty-one pairs of Justices who hired the same law clerk during different terms, only ten pairs of the Justices agreed more during the law clerk's second year on the Court in comparison to the Justices' other terms serving concurrently. These Justices also agreed in 0.2 to 2% fewer nonunanimous, *N.Y. Times*, and 5-4 or 6-3 cases during their law clerk's second term than during the Justices' other years on the Court together. These findings offer some evidence that the Justices may not have abdicated their constitutional duty to decide their cases, which is important given the substantial criticism of the Justices' delegation to their law clerks.¹⁰¹ These findings suggest that law clerks who clerk for multiple Justices do not influence their votes more than clerks without these relationships and that if second-term clerks attempt to exercise greater influence over the votes of their Justices, they are not successful.

A worthwhile project would be to perform close examinations of Justices' effectiveness in using their law clerks to influence other Justices and Justices' susceptibility to these efforts. Given the advanced ages of Justices Breyer, Ginsburg, and Kennedy,¹⁰² it seems plausible that a wealth of information on their clerks' influence could soon become available via clerk interviews and the papers of the Justices once they leave the Court. This research could begin now by focusing on Justice Scalia's clerks as this Article found that they may have exercised especially significant influence.

Ultimately, this Article's finding that second-term law clerks do not nudge their Justices to agree more suggests that the Court's clerk network does not interfere with the Justices' constitutional duty to decide cases. This conclusion nevertheless does not assuage justifiable concern about clerks' influence on the opinion-drafting process.¹⁰³ But as commentators raise proposals to reform law clerks' roles at the Court,¹⁰⁴ the Justices should exercise caution in considering those that would restrain the operation of the Court's law clerk network. The clerks' network at the Court potentially facilitates the Justices' fulfillment of their responsibilities by identifying the possible doctrinal boundaries for particular opinions. Restraining this network could impair the value that law clerks provide to their Justices.

ideologies and that of their appointing presidents, “[f]or the first time, the Supreme Court is closely divided along party lines.” *Id.* Additionally, Kay Schlozman, a political scientist at Boston College, has remarked that “[p]olarization [on the Court] is higher than at any time I’ve ever seen as a citizen or studied as a student of politics.” *Id.*

101. See *supra* Part I.B for a discussion of this criticism.

102. S.M., *Are the Supreme Court Justices Too Old?*, *ECONOMIST: DEMOCRACY IN AM.* (Feb. 4, 2016), <http://www.economist.com/blogs/democracyinamerica/2016/02/age-and-wisdom> (commenting that “the Supreme Court has never been older” and specifically noting the advanced ages of Justices Breyer, Kennedy, and Ginsburg).

103. See *supra* notes 61–70 and accompanying text for an example of such concerns.

104. See *supra* note 71 and accompanying text for an example of these proposed reforms.