

## REVIEW SECTION

### Book Review

*Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*, by Todd C. Peppers. Stanford, CA: Stanford University Press, 2006. 328 pp.

*Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*, by Artemus Ward and David L. Weiden. New York: New York University Press, 2006. 352 pp.

*reviewed by Paul M. Collins, Jr.*

The United States Supreme Court operates under an air of secrecy. Although the justices are required to provide justifications for their decisions via the Court's formal opinions, beyond this mechanism for public accountability we know relatively little about day-to-day life behind the marble pillars. This somewhat unsettling fact is keenly exemplified by the mystery surrounding the roles occupied by Supreme Court law clerks. While sensationalist accounts of the duties performed by law clerks appear on occasion, most notably in Bob Woodward and Scott Armstrong's *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979) and Edward Lazarus's *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* (New York: Random House, 1998), there has been surprisingly little scholarly attention devoted to understanding the significant roles played by these young attorneys. With the publication of *Courtiers of the Marble Palace*, by political scientist Todd C. Peppers, and *Sorcerers' Apprentices*, by political scientists Artemus Ward and David L. Weiden, I am happy to report this is no longer the case. Each of these volumes provides a rigorous, but remarkably accessible account of the life of the formerly elusive Supreme Court law clerk. Shattering the myth of the almost omnipotent and conniving clerks depicted by journalists Woodward and Armstrong and attorney/legal columnist Lazarus, the authors paint a much more palatable picture of the roles and influence of Supreme Court law clerks. The authors of these fine treatments illustrate how the justices have come to rely on their clerks, not because of the justices' perceived incompetence (as suggested by aforementioned provocative accounts), but instead as a result of institutional changes that have occurred over time on the Court, such as the increasing number of certiorari petitions the justices must mull over each term. The result of both books is a candid and meticulously researched portrait of the highest clerks in the nation. Both together and individually, these books make significant contributions to our understanding of how cases are processed and decided, in addition to providing an illuminating perspective into the personalities charged with administering justice in the Supreme Court.

The volumes share a number of similarities, while diverging meaningfully enough that thoroughly interested readers will benefit from digesting both treatises. The most obvious similarity between the two books is the research strategy employed by the authors. In particular, both treatments rely primarily on surveys sent to former law clerks and in-depth interviews with the clerks. Ward and Weiden contacted 600 former clerks and heard back from 160, while Peppers contacted about 1,000 clerks and received responses from approximately 400 former clerks. While Ward and Weiden's more detailed survey received a slightly smaller response rate than Peppers's condensed survey (based mainly on background and career information), the fact that so many clerks responded speaks volumes about the willingness of former clerks to discuss, albeit in general terms, their experiences on the Court. Supplementing their surveys and personal interviews, both volumes rely on background information on former clerks provided by the Supreme Court, the papers of former justices, as well as academic and journalistic treatments of the role of law clerks. In utilizing these primary and secondary materials, both books provide rich and authoritative treatments of the life of the Supreme Court law clerk.

In addition to their similar research strategies, the books examine the role of clerks in comparable fashion. While the exact organization of the volumes differs (with Peppers relying primarily on a chronological structure and Ward and Weiden analyzing clerks in a more topical fashion), each delves into the critical questions surrounding the role of clerks: who are they, how are they selected, what do they do, and how influential are the clerks?

Attesting to the painstaking research performed by the authors, and casting serious doubt on more sensationalist accounts of Supreme Court law clerks, both volumes reach similar conclusions in answering these important questions. Overall, the theme of both books is one of change. For example, we learn that while the modal Supreme Court law clerk is a white male who attended an Ivy League school and served on the law review, in more recent years the gender, racial, and educational diversity has challenged this prototypical view of the clerk. In terms of selection, the authors again tell a story of transformation. While early law clerks were often selected by committees without ever meeting the justices, today the justices are generally quite active participants in selecting their clerks, paying particular attention to whether the potential clerks share a justice's ideological and jurisprudential preferences. With regard to the clerks' duties, their primary functions have altered quite substantially over time in a variety of ways. Both books conclude that the primary responsibility of the clerks is to deal with certiorari petitions, and this has held true since the 1940s. However, in more recent terms, clerk input into draft opinions grew. For example, compared to the World War II era, both volumes conclude that in more-recent times an additional central function of the clerk is to draft majority, and frequently concurring and dissenting, opinions. On occasion, these opinions become law of the land with little or no alterations from the justices.

Each of the books is appropriately cautious in answering the puzzle of clerk influence. Bar none, the analyses conclude that clerks exert the strongest influence during the certiorari stage. This should be expected since it is the clerks who are charged with drafting memoranda for the justices on each certiorari petition. It is apparently often the case that the justices forgo reading the petitions for themselves, instead authorizing the clerks—whether in their own chambers or in the cert pool—to condense the petitions for easy disposition. However, it is important to note that since the clerks are generally ideologically aligned with their employers, they overwhelmingly report that they act in good faith to provide an objective account of the merits of the certiorari petitions, rather than utilizing their role to etch their own policy preferences into law. Moreover, the need for clerks to provide objective accounts of certiorari petitions is further induced by the willingness of justices to have their clerks review the recommendations of clerks from other chambers who are members of the cert pool and are reputedly ideologically motivated. After the case-selection stage, the books conclude that clerks also wield influence on the content and style of the opinions. However, few clerks indicated that they were influential—in terms of being able to change a justice’s mind—when it came to the actual disposition of cases. In fact, Ward and Weiden (p. 195) indicate that the clerks themselves reported in surveys that their influence on judicial decision making was seldom important, with the justices’ jurisprudential philosophies, precedent, and case facts ranking as the most significant influences on the justices’ decision making. Of course, this is not to say that clerks never change the justices’ minds. Both volumes provide evidence that this type of influence happens on occasion, and Ward and Weiden’s discussion of *Planned Parenthood v. Casey* in chapter 4 is particularly poignant in this regard. Instead, the important conclusion is that clerk influence is one of many factors that shape the choices justices make.

While the books converge in these aspects, and others, they differ in a number of significant ways, three of which are particularly relevant. The chief divergence is the research framework employed by the authors. Ward and Weiden use an institutionalist approach to explain the role of law clerks by investigating how changes in the institution of the Court—its rules, norms, and workload—altered the duties and influence of clerks. Ward and Weiden conclude that as the clerks were delegated more responsibility over time, their potential for influence increased. Peppers, while recognizing the importance of institutional changes, employs a principal-agent framework—viewing the clerks as agents of the justices who enter into an agreement to carry out the justices’ will. Peppers concludes that the clerks act as loyal agents, assisting the justices in reaching decisions that maximize their policy preferences and create efficacious law. While both approaches are perfectly appropriate for understanding the role and influence of clerks, these frameworks lead the authors to slightly different conclusions about the magnitude of clerk influence. Peppers, in determining that clerks are loyal agents, posits that “law clerks do not wield an inordinate amount of influence” (p.

211). Ward and Weiden, in stressing how institutional changes gave the clerks more responsibility and, thus, more potential for influence, propose that “clerks are not merely surrogates or agents, but they are also not the behind-the-scenes manipulators portrayed by some observers” (p. 246). Simply put, Ward and Weiden surmise that the clerks have slightly more influence on Supreme Court decision making as compared to Peppers’s account. In and of itself, this suggests the utility in inspecting both treatments to determine how the authors reach these conclusions.

The second major point of departure in the two volumes deals with the time frame under analysis. While both books examine the background of the clerks since their inception in the 1880s, Ward and Weiden focus predominately on the role of clerks from the Vinson (1946-1952) to Rehnquist Courts (1986-2002), while Peppers’s study is more longitudinal in nature, devoting substantial attention to the roles performed by earlier law clerks beginning in the 1880s. In this sense, Peppers’s book is more historical in nature, while Ward and Weiden paint a more recent picture of the clerkship experience.

The final core difference between the books lies in the use of the surveys. While both volumes use surveys to explain the role of clerks, Peppers’s survey was based primarily on background information, such as where the clerks attended law school, whom they clerked for, and prior clerkship experiences. As such, Peppers uses his survey primarily to cast light on the background characteristics of the clerks. In contrast, Ward and Weiden prepared a much more in-depth survey, culling information, not only on the backgrounds of the clerks, but also on their perceptions of their roles and influence. As a result of this more detailed survey, Ward and Weiden exploit their findings throughout the book, providing the reader with a thorough analysis of how the clerks view their role in the Supreme Court. By juxtaposing this survey data with their extensive interviews and other secondary material, Ward and Weiden illustrate that the clerks provide a reasonably accurate and candid view of their experiences.

Taken as a whole, both of these volumes make profound contributions to our understanding of the power wielded by the nation’s elite law clerks. The two books provide astoundingly accessible accounts of the day-to-day workings of some of America’s most powerful young attorneys and their interactions with the justices. Colored with vivid commentary and anecdotes, *Courtiers of the Marble Palace* and *Sorcerers’ Apprentices* represent exceptional research on the Supreme Court and belong on the bookshelves of academics, practitioners, and laypersons interested in an unbiased understanding of the formerly elusive Supreme Court law clerk. **jsj**