

GOOD STEWARDS: LAW CLERK INFLUENCE IN STATE HIGH COURTS*

RICK A. SWANSON AND STEPHEN L. WASBY

Court observers disagree over the influence judicial law clerks exert on the judicial decision-making process. To address this question, eighty-one justices on thirty-five state high courts in the United States were surveyed for their perceptions of the role of their law clerks. The data reveal that these clerks are highly useful in providing legal and factual information about cases, often make recommendations and help write judicial opinions, and sometimes collaborate with judges in reaching judicial outcomes. Thus, law clerks exert moderate influence overall on the judicial decision-making process in state high courts. These conclusions are consistent both with the predictions of principal-agent organizational theory as well as with the findings of studies of clerk influence on the United States Supreme Court.

For the public to perceive the rulings of courts in a democratic system as legitimate, the courts must be perceived as politically neutral and institutionally accountable for their rulings. Yet in recent decades, some court observers or participants have made accusations that judges in the United States are irresponsible in performing their constitutional tasks by partially delegating their decision-making role to their law clerks. Relatively little information exists, however, to evaluate this claim as it applies to law clerks in state high courts. The research here intends to address this question. After we review existing literature regarding law clerks and their influence in the United States, we apply organizational theory to the study of law clerks and then present the results of a survey of eighty-one state high-court judges, who were asked about their clerks' roles and influence. We will see that law clerks in state high courts perform several different roles in the decision-making process and exert a not insignificant amount of influence on that process overall.

The influence of U.S. Supreme Court clerks has been reported to vary from almost nil to the situation in which they practically substitute their opinions for that of "their" justice (O'Brien 1986:127). Even former clerks themselves disagree about their influence. Future chief justice Rehnquist, then writing as a Supreme Court law clerk, stated that the justices were clearly in charge (Rehnquist, 1957). Recently, however, a former U.S. Supreme Court law clerk renewed debate over the influence of law clerks when, in a "tell-all" book, he described a "cabal" of conservative law clerks who steered justices to right-wing results and one justice who was "spoon-fed" legal interpretations by clerks (Lazarus, 1998), claims that caused media debate over their veracity.

* The authors thank the justices who participated in the study; the University of Louisiana—Lafayette for a Summer Research Fellowship, which funded the data collection; and anonymous reviewers for their helpful comments. [ED. NOTE: The review process for this manuscript was directed by Robert Howard.]

Two recent books on clerk influence on the U.S. Supreme Court offered more substantial evidence regarding the role of law clerks. Peppers (2006:211, 206) concluded that law clerks on the U.S. Supreme Court “do not wield an inordinate amount of influence” because “the necessary conditions for the exercise of influence by law clerks have rarely, if ever, existed on the Supreme Court.” Finding evidence of somewhat stronger influence than had Peppers, especially in the certiorari-granting process, Ward and Weiden (2006:237, 246) concluded that “clerks are not merely surrogates or agents, but they are also not the behind-the-scenes manipulators portrayed by some observers. . . . Overall, then, we take a middle path—we suggest that the influence of the clerk is neither negligible nor total.”

The question of clerks’ influence is unlikely to disappear soon. The law clerk-appellate court judge relationship is an intimate working one, in which the primary intended function of the clerk is to research the facts and the law involved in a case, make recommendations to the judge regarding the proper outcome of the case, and then often draft the court’s opinion in the case. In other words, *the express role of law clerks is to affect the behavior of appellate court judges*, even if it is only to help the judge to make more “accurate” rulings by providing better, more “correct” facts and law on which to base the decision.

Despite law clerks’ possibly strong effect, there is a relative paucity of research about them. Most of these studies have been limited to relatively narrow issues: the ideological selection of U.S. Supreme Court clerks (Ditslear and Baum, 2001), the recruitment and job duties of supreme court clerks in the state of Washington (Sheldon, 1981, 1988), or the increased hiring of career, rather than temporary clerks by state and federal judges in California (Oakley and Thompson, 1980). Other researchers have looked at the possible influence clerks have *after* their clerkship, such as in Supreme Court clerks’ later appearances as attorneys before that court (O’Connor and Hermann, 1995). Only a handful of scholars have focused on the direct influence of clerks in the decision-making process. Their work, however, has also been relatively narrow, covering recommendation success rates in conference voting in the U.S. Supreme Court (Palmer and Brenner, 1995) or, by a centralized research staff, at a single state court of appeals (Stow and Spaeth, 1992) or clerk influence on the decision to grant certiorari in the U.S. Supreme Court (Perry, 1991) or over the literary style (not substance) of Supreme Court opinions (Wahlbeck, Spriggs, and Sigelman, 2002).

Book-length treatments of the overall influence of law clerks on the U.S. Supreme Court only recently appeared, in the works of Ward and Weiden (2006) and Peppers (2006), who examined law-clerk influence through surveys, interviews with former clerks and justices, and historical court documents. Both studies reached the same conclusion: law clerks to the U.S. Supreme Court have, at best, some moderate influence on the grant of certiorari and perhaps on the language of opinions, but law clerks have relatively little influence, if any, on the actual voting outcomes in cases.

Although pathbreaking, these studies in no way examined the influence of law clerks in high courts in the fifty states. Hanson, Flango, and Hansen (2000), however, surveyed clerks of court, central staff attorneys, and in-chambers law clerks in state high courts, state intermediate appellate courts, and federal appellate courts to determine the percent of their time spent on various tasks. Of particular relevance to the present study, the researchers found that all state high courts use in-chambers clerks, with a mean of 2.18 in-chambers staff per judge plus almost one (.94) central staff attorney per judge, so that these judges most commonly have three legal staff at their disposal. State high courts and their judges differed in hiring either short-term or long-term (career) in-chamber clerks, but the precise proportions of each could not be determined because there were “uncertainties about the presence of in-chambers law clerks in each court” (Hanson, Flango, and Hansen, 2000:33), and we do not examine this matter further here.

In-chamber law clerks on state high courts estimated they spent roughly between 54 and 68 percent of their time in opinion preparation and roughly between 20 and 36 percent of their time preparing pre-hearing memoranda, or “bench memos” (Hanson, Flango, and Hansen, 2000:40, 47). The rest of their time was divided among numerous other tasks, primarily managing cases, training other court staff, researching motions and writs, attending decisional conferences, conducting and managing settlement conferences, and preparing memoranda on discretionary petitions. As the study also noted, federal appellate courts similarly employ both central staff attorneys and in-chamber (“elbow”) clerks, with the latter spending most of their time drafting judicial opinions, as did state high-court elbow clerks.

Beyond such information, however, we still know relatively little about the degree of influence of law clerks on state high courts. In particular, there has never been a “large *n*” study across numerous state high courts of the role of law clerks, which attempts to answer this question by asking state high-court judges themselves. The present study attempts to undertake this task. Given the relative lack of knowledge about the influence of law clerks on state high courts, this study is primarily exploratory and qualitative in nature.

THEORY

Principal-agent (PA) theory was not the impetus for the study here, but we believe it can be useful in helping us understand the potential influence of law clerks and in helping us evaluate the data from the survey. PA theory is an organizational theory that has been widely applied in the fields of economics, business management, industrial organization, and the organizational sociology of corporate firms (e.g., Laffont and Martimort, 2001; Milgrom and Roberts, 1992). Moe (1991) notes that even though organizational theory is also well-suited to explaining political processes, it has been relatively neglected within political science, with the most notable exception of the subfield of bureaucratic politics (e.g., Moe, 1984, 1991). PA theory, which applies to any hierarchical relationship, such as that between Congress and the

bureaucracy or an employer and employee, also provides a framework for understanding and evaluating the relationship between judges and their clerks.

According to PA theory, a principal contracts with an agent to work for the principal. The agent possesses skills and abilities that are needed for performing the tasks the principal desires to have performed. Thus, agents will be able to influence the actions of their principals in varying degrees, such as helping them achieve their goals. However, agents might have goals different from the principal's goals. An agent's failure to pursue a goal of the principal is called *shirking*. This is not simply a failure to work, such as through laziness, but is noncompliance with the principal's wishes. However, agents might go further and use their advantage in expertise or information to actively undermine the principal's goals and instead pursue their own goals in obstructive behavior labeled *sabotage* (Brehm and Gates, 1997).

Although the principal can observe the *outcome* of the agent's actions, the principal can not observe all of the *process* involved in the agent's behavior. Thus, the problem for the principal is to limit the agent's shirking and sabotage (Moe, 1984, 1991). There are two ways to do this: screen potential agents to select the most capable and trustworthy agents, and (then) induce the selected agents to choose the actions the principal desires. Inducement comes through either tying the agent's reward to the outcome or monitoring and supervising the agent's actions (Brehm and Gates, 1997). Note that the *opportunity* for shirking or sabotage is determined by the asymmetry of *information*, *skill*, or *expertise* between agent and principal, but that the *motive* for shirking or sabotage is determined by the asymmetry of *interest* present.

PA theory has yet to have much effect on the study of judicial clerks. Palmer and Brenner (1995) applied PA theory in their study of correspondence rates between clerk memos and judge votes, and found that, despite relatively high agreement, clerks exert relatively little influence over the final choice of the winning litigant. Also, Ditslear and Baum (2001) found that, consistent with PA predictions, recent Supreme Court justices have largely screened potential law clerks for ideological harmony. Peppers (2006), who has made the most extensive use yet of PA theory in the judicial literature in his historical analysis of U.S. Supreme Court law clerks, described how judges are principals and clerks are their agents. In one example, justices now use clerks to verify the accuracy of, and check for ideological bias in, the work of other clerks. Thus, consistent with PA theory, justices (as principals) set up a monitoring mechanism to verify that clerks (their agents) are not shirking.

The work of these scholars has shown that PA theory is applicable to the judge-clerk relationship. The judge and clerk are in a hierarchical relationship, with the judge (as principal) directing the actions of the clerk (as agent). The judge contracts with the clerk, based on the clerk's skill, to perform certain tasks that alleviate the judge's excessive workload. The clerk can help share in the judge's legal research and memo drafting, or opinion writing. In this way, the clerk is able to influence the judge, through helping the judge achieve the judge's desired outcome by providing supporting legal precedents and by crafting written language reaching that outcome.

However, because the potential for influence is significant, the judge also must monitor the clerk so that shirking or sabotage of the judge's goals does not occur as a result of any information or interest asymmetries where the clerk has an advantage.

PA theory, however, would predict that such an asymmetry of information would rarely arise. After conducting research on a particular case, the clerk might have more knowledge of the trial record and the law regarding a case than does the judge. On the other hand, most law clerks have significantly less legal expertise and experience than the judges for whom they work, and the judge has access to the litigants' briefs, oral argument, the knowledge and opinions of other clerks, and other judges on the panel and their clerks. It is unlikely that a clerk would discover information in the record or law that is critical to the outcome of a case, *and* choose to hide that information so as to engage in sabotage, *at the same time* that all the litigants, judges, and clerks involved in the case would fail either to discover the information or to bring that information to the judge's attention.

PA theory would also predict that significant asymmetry of interest also should occur only rarely. On occasion, for personal or ideological reasons, a clerk might desire to reach an outcome other than the one sought by the judge. However, judges often screen clerk applicants for compatibility of viewpoints. Also, a clerk has much to lose in the way of a job, money, status, reputation, and career opportunities for engaging in such a risky practice as shirking or sabotage. In short, and importantly, the clerk and judge typically share *common*, or at least *mutually reinforcing*, interests. This means that it is likely that clerks have little opportunity or motive for shirking or sabotage. In all likelihood, then, law clerks' effect on final decisional outcomes in appellate cases is quite likely in line with judges' goals, not contrary to them.

Although PA theory did not guide the survey questions, we can derive a general guiding proposition or broad hypothesis that the state high court judges' views derived from the survey we use will provide support for the predictions from principal-agency theory: that law clerks have little opportunity or motive to engage in shirking or sabotage and, thus, relatively little influence in altering judicial outcomes overall.

THE PRESENT STUDY: METHODS

"Elite interviewing is a well-developed tradition in social science" (Perry, 1991:8). Elites who have been interviewed include members of Congress (Fenno, 1978; Kingdon, 1989) and especially judicial actors, including judges on the U.S. courts of appeals (Cohen, 2005) and justices of the U.S. Supreme Court (Perry, 2005; Peppers, 2006; Ward and Weiden, 2006). In line with this tradition, one of us constructed a questionnaire that would allow us to study judicial perceptions of the role of various factors that might influence the judicial decision-making process. Letters requesting interviews were sent to a total of 315 justices then serving on forty-seven state supreme courts¹ in the United States, and a follow-up telephone call was made. The

justices were ensured complete confidentiality and anonymity for their responses. Seventy-five in-depth telephone interviews, averaging thirty to forty minutes, were conducted, and another six judges sent written responses. The total of eighty-one responses from state supreme court justices in thirty-five states² resulted in a 25.7 percent response rate. During and immediately after the interviews, each judge's answers were transcribed.

Although one might attempt to interview both judges and their current clerks in a study of the sort undertaken here, clerks are more difficult to contact, are limited in what they might say by the need to obtain permission from their judges and might be hesitant to be as forthright, and would have less experience and, therefore, a limited perspective on these issues. Thus, despite possible drawbacks, at the moment there are few if any alternative sources of information, and certainly no better sources of information, for researching this matter, other than asking judges. In short, surveying judges remains an optimal research method.

Judges responded from at least half, and typically from a large majority, of the states in major categories, such as small or large populations, various national regions, differing judicial term lengths, and alternative judicial retention methods (see Table 1). For the small number of states lacking an intermediate appellate court, almost half (just over 45 percent) of such states are represented in the survey.

Judges' answers to questions not specifically directed to the work of law clerks were sometimes tangentially related to law clerks, and those responses will be used when appropriate. However, of primary relevance to the present study is the only survey question focusing specifically on law clerks, one in three parts, which asked judges their views regarding the role of their law clerks. This question was:

- A. *What role do your law clerks play in your decision-making process? Please give an example if you can.*
- B. *In what percent of cases have you agreed with your law clerk's recommendation?*
- C. *In what percent of cases have you changed your opinion regarding the proper outcome of a case based upon advice from a law clerk? Please give an example if you can.*

In an effort to obtain more detail regarding the judges' perspectives, the question was open-ended so as not to lead to particular answers, and it also asked for examples. The intent of part C was to obtain the frequency of instances in which a judge would not have ruled for a particular litigant but for influence by the law clerk. However, the question did not further clarify what was meant by "changed your opinion regarding the proper outcome of a case," nor did it specify what was meant by "advice from a law

¹ Because of budgetary and time constraints as the data-collection portion of the project drew to a close, surveys were not requested from three randomly selected states: Arkansas, Montana, and Nevada.

² The thirty-five states were Alabama, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

Table 1
Institutional Variation Across Participating States (2002 Data)

| | Participating States | Responding Judges | Nonparticipating States | % States with Responding judges |
|--------------------------------------|--|--------------------------|---------------------------------------|--|
| State Population | | | | |
| < 2.5 million | 10: DE, HI, ID, ME, NM, ND, RI, UT, VT, WV | 20 | 7: AK, MT, NE, NH, NV, SD, WY | 58.8 |
| 2.5-4.9 million | 9: AL, CO, CT, IA, KS, KY, LA, OR, SC | 21 | 3: AR, MS, OK | 75.0 |
| 5.0-10.0 million | 10: GA, IN, MA, MD, MN, MO, TN, VA, WA, WI | 24 | 3: AZ, NC, NJ | 76.9 |
| >10.0 million | 6: FL, IL, MI, OH, PA, TX | 14 | 2: CA, NY | 75.0 |
| Region | | | | |
| Northeast | 7: CT, DE, ME, MA, PA, RI, VT | 16 | 3: NH, NJ, NY | 70.0 |
| Midwest | 10: IL, IN, IA, KS, MI, MN, MO, ND, OH, WI | 22 | 2: NE, SD | 83.3 |
| South | 11: AL, FL, GA, KY, LA, MD, SC, TN, TX, VA, WV | 17 | 4: AR, MS, NC, OK | 73.3 |
| West | 7: CO, HI, ID, NM, OR, UT, WA | 24 | 6: AK, AZ, CA, MT, NV, WY | 53.8 |
| Intermediate Appellate Court? | | | | |
| Yes | 30: AL, CO, CT, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, MD, MA, MI, MN, MO, NM, ND, OH, OR, PA, SC, TN, TX, UT, VA, WA, WI | 68 | 9: AK, AZ, AR, CA, NE, NJ, NY, NC, OK | 76.9 |
| No | 5: DE, ME, RI, VT, WV | 11 | 6: MS, MT, NV, NH, SD, WY | 45.5 |
| Term Length (Years) | | | | |
| Less than 8 | 12: AL, FL, GA, ID, KS, ME, MN, OH, OR, TX, VT, WA | 31 | 4: AZ, NE, NV, OK | 75.0 |
| 8 | 6: CT, IA, KY, MI, NM, TN | 11 | 6: AR, MS, MT, NC, SD, WY | 50.0 |
| 10 | 11: CO, HI, IL, IN, LA, MD, ND, PA, SC, UT, WI | 26 | 1: AK | 90.9 |
| 12 or more | 6: DE, MA, MO, RI, VA, WV | 11 | 4: CA, NH, NJ, NY | 60.0 |
| Retention Methods | | | | |
| Partisan Elections | 4: AL, LA, TX, WV | 7 | 2: AR, NC | 67.7 |
| Nonpartisan elections | 10: ID, GA, KY, MI, MN, ND, OH, OR, WA, WI | 29 | 3: MS, MT, NV | 76.9 |
| Retention elections | 12: CO, FL, IA, IL, IN, KS, MD, MO, NM, PA, TN, UT | 26 | 7: AK, AZ, CA, NE, OK, SD, WY | 63.2 |
| | 7: CT, DE, HI, ME, SC, VA, VT | 13 | 1: NY | 87.5 |
| Long-term (age 70 or life) | 2: MA, RI | 4 | 2: NH, NJ | 50.0 |

clerk.” Thus, it is possible that a judge might have interpreted this to include anything from modifying the language of an opinion based on additional law discovered by a clerk, to switching votes based on advice from a law clerk that the judge is ruling for the wrong litigant. However, many examples the judges provided indicated that they understood the question to mean the stronger possible version of influence. They spoke of changing from affirming to reversing or of “switching sides” or going in a “different direction”; they said “the way I was going” was “the wrong way” or “down the wrong road”; they spoke of “wanting outcome x and my law clerk said ‘no, I want outcome Y’”; or they said they “decided against the way I wanted to decide.” Another judge who responded with a “zero percent” estimate noted that it was “not the outcome, but how I might approach writing the case” that would change. However, as some judges might have included lesser types of influence in their estimates, any numerical estimate from part C should probably be considered as a high-to-upper estimate for the stronger type of law-clerk influence, and thus should also correspondingly be considered a lower estimate of the weaker types of law-clerk influence.

RESULTS

In General. Judges of state high courts, when asked about “the role . . . your law clerks play in your decision-making process,” said they make *considerable* use of their law clerks to perform various functions, but the judges disagreed as to whether any of these functions necessarily constitute “having a role in the decision-making process.” Although the question did not specify particular aspects of judicial decision making, the judges’ responses focused almost exclusively on the decision on the merits rather than on other possible decisions, such as which appeals to hear. In what follows, one must evaluate the judges’ views in the context that, given criticism of judges for allowing clerks too much responsibility for opinions, judges might be hesitant to admit to substantial law-clerk effects.

The eighty-one responses by the judges (five declined to answer) can be categorized into four overall views of the role of law clerks in the judicial decision-making process: important/substantial, some/moderate, little, or none (see Table 2). Twenty-three judges, or 28.4 percent of those responding, variously characterized the clerk’s role as “substantial,” “very important,” “pretty important,” “significant” or “very significant,” “great,” “crucial,” or “huge,” or said the clerks had a “huge hand” or played a “great part.” As one judge put it, “They’re our right arm and our left arm.” At the other end of the spectrum, thirteen judges, 16.0 percent of the respondents, said their clerk had “very little” role or “no role” in the judge’s decision making. The remaining judges typically simply stated the functions of their clerk, or did not respond in language that would allow one to gauge the specific weight of the clerk’s influence, and so they were placed in the “some/moderate” category.

The judges referred to five different functions their clerks perform as part of the judicial decision-making process in a case. The clerks provide legal research, prepare

Table 2
Reported Overall Law-Clerk Influence

| Influence | Number of Judges | Percent of Judges |
|-----------------------|-------------------------|--------------------------|
| Important/Substantial | 23 | 28.4 |
| Some/Moderate | 40 | 49.4 |
| Little | 9 | 11.1 |
| None | 4 | 4.9 |
| No Answer | 5 | 6.2 |
| Total | 81 | 100.0 |

Table 3
Clerk Decision-Making Role Categories*

| Role in Decision Making | Number of Judges Mentioning | Percent of Judges Mentioning |
|---|------------------------------------|-------------------------------------|
| Legal Research | 42 | 51.9 |
| Recommendation [Implied Figure] | 9 [60] | 11.1 [74.1] |
| Opinion writing | 21 | 25.9 |
| Feedback/Discussion (Weak Collaboration) | 21 | 25.9 |
| Partnership (Strong Collaboration) | 8 | 9.9 |
| None | 4 | 4.9 |
| No Answer | 4 | 4.9 |

* Totals are more than 81 judges and more than 100 percent because some judges mentioned more than one role their clerks play.

bench memos, provide a recommended outcome, participate in collaborative discussion about that outcome, and draft the opinion. (For the frequency of judges' mention of the roles, listed somewhat chronologically and in increasing amount of influence because participation in each successive step provides increasing clerk input into the final product, see Table 3.)

Research. Forty-two of the judges (51.9 percent) referred to the *research* conducted by their clerks. In addition, when judges were asked in a separate question to list "the top two most important factors in your decision-making process,"³ two listed "the clerk's research" as number two, and three listed it as number one. Concerning the importance of the clerk's research, one judge stated, the clerk "inform[s] you thor-

³ A separate survey question asked the judges to designate "the top two most important factors in your decision-making process" from a list of steps in that process: the lower-court opinion, the litigant's briefs, oral argument, a

oroughly of the case,” or, in the words of another judge, “They’re primarily assembling the record, authority, to make it easier to decide the case.” But what exactly do the clerks provide in this regard? As various judges explained, clerks “do research and individual review of law” regarding the case, such as “the argument of the parties,” “applicable law,” “relevant legal precedents,” “nonpublished opinions of intermediate appellate court and trial court opinions,” “all of our state cases, other state and federal cases and treatises and law review articles,” “cases I don’t know, important cases from other jurisdictions,” or “the factual record.”

Several judges emphasized that the clerks’ most important work was research on the record and law of a case, which the clerk included in a bench memorandum, “making it easier to decide the case.” This can be seen in a judge’s comment about a clerk’s recommendation, which “is contained in a detailed bench memo . . . that’s a big factor because it’s the central independent research document done on each case we have.” And if a clerk affects the judge’s view of the outcome, “it’s not because of their recommendation, but their research and review of the record,” that is, “the bench memo analysis.”

Several judges highlighted the need for clerks to perform such research because workload pressures prevent the judges from always doing so. One remarked, “I couldn’t get the work done without enormously capable professionals working for me.” Three other judges expressly stated that clerks were needed because of constraints on the judge’s time. One simply said, “I don’t have time to do all the research.” Another, more detailed explanation was that “[b]ecause of the volume here, there’s no way I can do all I’d like to do on the case. And with all my administrative duties, I’m very reliant on my clerks. I view the decision on hiring my clerks as the most critical decision I can make.” This view was echoed by a judge who said that because there were “so many administrative duties—attorney regulation, committees,” it was the case that “[w]hen we want certain issues critically addressed, we have our law clerks do it.” This comports with PA theory’s explanation that principals hire agents because time constraints necessitate the delegation of tasks. Clerks are needed as legal experts to do some of the work their judges do not have sufficient time to perform.

The need for review of the record and the law was highlighted by a separate survey question:

In what percent of cases have both litigants failed to bring to the court’s attention a fact or law critical to the resolution of the case, but which the court discovered from its own research?

Just over one-fifth of the seventy-one judges responding to this question (21.1 percent) stated that this occurred 25 percent of the time or more, with five judges put-

law clerk’s recommendation, the judges’ own research, or another judges’ recommendation. As can be seen from this list, the item for clerks spoke of receiving a “*recommendation*” from the clerk, and did not speak of receiving “research” or other work product such as a “bench memo.” This is perhaps why, of the eighty judges responding to that question, only eleven included their clerks. Of those eleven, five either listed the law clerk’s *research* as most important, or included the law clerk’s work in a larger factor like “the law.” Six judges listed simply the “law clerk” as one of the top two most influential factors, and only three of those judges ranked law clerks first.

ting the frequency at 50 percent or higher. The mean was 16.3 percent, with both the mode and median at 10 percent, which means a significant proportion of state high court cases (roughly one in ten) are said to involve the discovery, presumably by a clerk, of a fact or law critical to the outcome of a case.

As one judge put it, the clerks “find things in cases that lawyers missed and it completely changes the course of the case.” Another judge made clear that “if there’s a statute or case they unearthed that wasn’t cited, that plays a big role.” And yet another remarked, “I have to depend on them for the record because the record is horrendous . . . if a clerk says ‘I found this case that’s clearly on point,’ of course I’m going to go with it.” Judges also noted that they could not rely on lawyers to provide adequate legal summaries: “neutral eyes” are needed because “lawyers can put spin on stuff,” and clerks are “responsible for checking . . . so the parties aren’t misrepresenting facts . . . they make sure the propositions of law cited by the attorneys stand for what they say they stand for.” Other judges mentioned that a clerk might find a “statute” or “a brand new U.S. Supreme Court case” or find that “the legal precedent is not as I predicted.” They added that the clerk’s research might have more influence “if it’s a new area, or a close case” or if the judge lacks knowledge of that legal issue. Thus, the clerk’s influence “depends on how familiar I am with that area of the law,” as “there’s some things you know a lot about and some things you don’t.” Thus, consistent with PA theory, the judges’ responses show that the work of clerks has a significant impact on case outcomes not because clerks are engaged in sabotage of the judges’ goals, but merely because clerks are providing more thorough and accurate information to judges than litigants tend to do. This is especially true with new legal issues and in close cases or where the judge is unfamiliar with that legal issue—in which any legal precedent supporting either litigant can more easily tip the balance.

The effect of a clerk’s research on a judge may be a function of *when* the clerk works on a case. If the clerk reviews the case before the judge begins to conduct research, clerk influence may be greater than if judge and clerk work “in parallel” or if the judge becomes acquainted with the case first. We can see the possible effect of sequence in the observation, “The law clerk may be the one to get the ball rolling . . . , and often they articulate the basis of doing things a different way, but it’s far more than just their opinion,” because “they see the case before I do.” The clerk’s research might also have more influence in a complex case. As one judge emphasized, “You really rely on them for fact-gathering when you have a long, complex situation with factual data.” Consistent with PA theory, when the clerk looks at the record first, or sifts through a complex record, the clerk possess greater information than the judge. This information asymmetry in favor of the clerk might allow greater clerk influence in such situations.

Recommendations. In describing the law clerk’s role, only nine judges (11.1 percent) expressly mentioned a law clerk’s “recommendation” (see Table 3). Yet the responses to another question, in which judges were asked to quantify the proportion of cases in which they agreed with their clerks’ recommendations (see Table 4), may lead to

Table 4
Percent of Cases Judge Agreed with Law Clerk*

| | Percent of Case Agreement | Response Frequency | Percent of Surveyed Judges | Percent of Responding Judges | Cumulative Percent of Responding Judges |
|----------------|----------------------------------|---------------------------|-----------------------------------|-------------------------------------|--|
| | 12.8 | 1 | 1.2 | 2.0 | 2.0 |
| | 50.0 | 3 | 3.7 | 6.0 | 8.0 |
| | 60.0 | 1 | 1.2 | 2.0 | 10.0 |
| | 70.0 | 3 | 3.7 | 6.0 | 16.0 |
| | 72.5 | 2 | 2.5 | 4.0 | 20.0 |
| | 75.0 | 8 | 9.9 | 16.0 | 36.0 |
| | 80.0 | 6 | 7.4 | 12.0 | 48.0 |
| | 85.0 | 1 | 1.2 | 2.0 | 50.0 |
| | 87.5 | 4 | 4.9 | 8.0 | 58.0 |
| | 90.0 | 11 | 13.6 | 22.0 | 80.0 |
| | 92.5 | 1 | 1.2 | 2.0 | 82.0 |
| | 95.0 | 2 | 2.5 | 4.0 | 86.0 |
| | 99.0 | 2 | 2.5 | 4.0 | 90.0 |
| | 100.0 | 5 | 6.2 | 10.0 | 100.0 |
| Response Total | | 50 | 61.7 | 100.0 | |
| No Response | | 31 | 38.3 | | |
| Total | | 81 | 100.0 | | |
| Mean | 81.3 | | | | |
| Median | 86.3 | | | | |

* For judges who provided a numerical range, the midpoint was taken as the estimate.

the inference that the figure should be sixty judges, or roughly three-fourths (74.1 percent).⁴ That sixty judges were able to give a numerical estimate clearly implies they did receive “recommendations” from their clerks. Of those judges, just over half agreed with their clerks at least 80 percent of the time (the mean was 81.3 percent). This high rate of agreement does not, however, necessarily mean a causal link. As will be discussed shortly, many judges pointed out that the agreement occurred because either the judges and clerks naturally shared views, the clerks had come to understand (and often internalize) the judge’s views, or the clerk’s “recommendation” was simply the one directed by the judge, who thus was in charge.

Several judges noted that not only do they sometimes listen to clerks’ recommendations, but that those recommendations can be highly influential on the case

⁴ Twenty-one judges did not give an estimate. Several of them explained this was because they do not request recommendations from clerks, or that recommendations are “rare.”

outcome. Sometimes a clerk shows the judge that a draft opinion “just doesn’t work” or “just won’t write,” and a judge commented, “On occasion, more frequently than I would have suspected before I became a judge, they convince me to change my mind about a case.” A different judge estimated, “In maybe 1 in 50 opinions a clerk thinks the court is wrong. 1 in 20 clerks comes to me and says the court is wrong. And only once in 5 or 6 times are they right.” One judge went so far as to say, “Once I read the law clerk recommendation, I think I understand” the case. Another judge, who responded that clerks changed the outcome 20 percent of the time, added it’s “more than you think.”

Other judges do not simply accept recommendations but *expect* them. As one said, “if I’m going out on a big limb, I’d like to know that,” but quickly added, “and then I’ll decide if I’m going out on that limb.” Another judge noted, “I’ll always ask the clerks ‘tell me what you think.’” As another stated, “if the law clerk finds the law and it doesn’t support the judges’ decision, the law clerk’s job is to approach the judge and inform him of that.” And yet another stated, “A good clerk tries to make it clear to the judge that maybe he’s got it wrong.”

Yet several of the judges who stated they accept or seek recommendations also noted that the recommendation typically agrees with the judge’s preexisting inclination. As one judge remarked about his clerks, “We’re usually on the same wavelength.” Consistent with PA theory, several judges noted that prescreening law clerks for philosophical compatibility is critical. Clerks are “well checked-out in advance of employment,” so that “happily the law clerks I hire tend to be of the same mind as me in most cases.” Judges “pick people who we’ll get along with, and have a somewhat similar point of view.” One judge bluntly stated, “You screen your law clerks—that’s pretty much in tune with my philosophy. I’m not gonna hire a redneck law clerk.” Another judge more expressly described ideological congruence: “We’re all liberals so we agree about 95% of the time.”

Other judges explained that clerks adapt over time and learn to conform their recommendations to the judge’s expectations: “I find some of my law clerks at the beginning are looking for justice, but pretty soon they get used to my way of approaching things, and we get along better then.” This was also indicated in a judge’s statement that “[a]fter a few months of working for me . . . they get my slant on things.” Thus, clerks learn to write what the judge, not the clerk, wants: “My research assistant . . . came in with an extremely well-written opinion and she said, ‘I don’t agree with this. But I know how you’d want it and I tried to reflect your philosophy.’” Other judges strongly implied that clerks make recommendations against their own desires: “I’m not so sure they really agree, if you know what I mean. They understand the approach I want to take and they do it consistent with that” or “recommend what you want to hear.” As another judge expressed it, “Most of us have career clerks . . . They’re very familiar with me. . . . Initially when they first come in, it may be 40-50%, but as time goes on, after six months or so, their analysis becomes sharper, it’s about 70-80%.” In short, many clerks either initially have, or eventually develop, a

shared outlook with the judge for whom they work. This is to be predicted by PA theory, because the clerk has a strong incentive to please the judge: continued employment as well as future job recommendations.

Other judges explained that, even if they receive a recommendation, it carries little weight because of the clerk's relative youth or inexperience or because the clerk is intimidated by the situation, as we see from the remarks that "The clerk has a lack of sophistication. . . . The law clerk came to law school and learned labels, but you need to think about the total matrix," and "You get a high level of agreement . . . but sometimes it might just be 'he must be right because he's 55 and I'm 21.'" Other judges commented, "A lot of our law clerks are intimidated to go against five Supreme Court judges that agree," and "My law clerks are not career employees, but recent law school graduates with no experience in the trenches. They're in an early stage of learning, and I have to take that into account." As two other judges put it, either "I know more than they do," or, "they're smarter than me, but I have the experience."

Long-term clerks, however, having more experience, are more likely to be "in tune" as one judge said, and thus provide better assistance and recommendations: "I've had my law clerks for quite some time—that's why we're compatible and in harmony." Another judge made this point almost identically: "Most of the time, we're on the same page from start to finish. I've had the same people with me for a long time and they know me well." Also noting the contrast between short-term and long-term clerks was one other judge who found his clerks "not important from the standpoint of making a decision . . . because all my clerks are just out of law school. With judges that have career clerks, that is different." This difference in influence between short-term versus long-term clerks is predicted by PA theory as well. As clerks gain considerable legal experience and expertise, the asymmetry of expertise between the clerk and judge lessens. Indeed, it is possible that a career clerk might even possess greater legal expertise than a relatively newer judge. Yet at the same time, the judge probably will only keep law clerks on a long-term basis if those clerks possess a considerable ideological harmony with the judge. Thus, over time, noncompatible law clerks get screened out, leaving only the ideologically congruent ones as long-term clerks.

On the other hand, several judges stated that they appreciated clerks because they sometimes provide perspectives unavailable to the judge. One judge actively sought this: "I try to hire clerks different from my philosophy and background to get different perspectives." Three judges noted their clerks' "fresh" youth. As one said, "They're often fresh out of law school and may be exposed to cutting-edge ideas—law reviews can be very helpful, and law students are more attuned to law reviews than we are." The gender of the clerk can also bring a different perspective: "It was a case of first impression on an all-male supreme court. The case involved a woman's right of procreation and damages in a medical malpractice action. It was helpful to have my female law clerks explore issues I hadn't thought of." Overall, however, although some judges appreciate or even seek diverse viewpoints, it appears that most judges would rather that the clerk share somewhat similar views most of the time.

Indeed, the high agreement rate between judges and clerks might also be partly explained by judges wishing to maintain strict control over the direction of the clerk's recommendation. This is so even when clerks "stand up on their hind legs and bark at me," or "tell you you're wrong." The judge, being in charge, "guide[s] their analysis" and the clerks are "working under my direction." As another judge said, "We agree most of the time because I tell them what to do and they say 'yes sir' and go off and draft an opinion in conformity with my instructions."

That the judge is in charge of the outcome is most obvious, of course, when a judge will not allow clerks to make recommendations. It is also true, however, for judges who do accept such recommendations, as when they say "We agree 100% because I decide," or "There's only one of us that can make the call," or "I lead the charge," or "I have a trump card. They write what I want and not what they feel." And some judges talked about "supervising" the clerks or of the clerks "working under my direction," or of checking the clerk's product, perhaps doing further research "to double-check them." As one judge forcefully put it, even in the face of disagreement from multiple clerks at once, "It's like the Emancipation Proclamation—there were four votes against to one for issuing the Emancipation Proclamation in 1863, but the one vote was Lincoln's, and that's my vote." Thus, as PA theory would expect, the principal (the judge) tends to maintain supervision over the actions of the agent (the clerk).

On the other hand, several judges asked for recommendations from clerks primarily (or only) "for their education," as a "writing exercise, not because we're going to pay attention to it," and "more for the purpose of making *them* come to a conclusion." As one judge put it, the recommendation is "to force them to decide. That results in a better bench memo." A similar viewpoint was shown in the remark, "We ask for their recommendation because as an intellectual exercise for them, if we don't ask them, their analysis will fall short."

Opinion Drafting. Another major contribution law clerks make is drafting part or all of the opinions the judge writes—either for the court or separate concurring or dissenting opinions. Twenty-one judges (25.9 percent) mentioned opinion drafting or writing as a law-clerk role (see Table 3). As one judge noted, clerks are "enormously important in research and writing opinions." This is based on the need, discussed earlier, for judges to delegate such tasks because of time constraints. A judge who noted that clerks were needed to do research also said, "We have our law clerks do it. . . . We only spend 30% of our time on opinion writing. . . . We have so many administrative duties—attorney regulation, committees—you have no idea." Several judges noted, somewhat vaguely, that clerks "do a certain amount of drafting," or "work on aspects of the opinion," but others were more specific, stating that the law clerks often or usually "write the first draft" or even prepare part or all of the opinion. This draft might even be substantially similar to the final court opinion, as indicated by one judge who remarked "With one exception in six years I didn't have an opinion where I had to substantially rewrite a law clerk's work to get it to where I like it." This does not mean,

however, that the clerk has total control over the draft, as shown by the remark “I never had a case where a clerk submitted a draft and I put my name on it.” Indeed, several judges noted that opinion writing is a collaborative process between the judge and clerk. Judges said, “They help me write the opinion”; “We’re partners together in research and writing opinions”; and “My clerk is my alter-ego. We shoot the cases back and forth, back and forth, back and forth and edit and re-edit.”

Importantly, several judges specifically stated their belief that it is at the opinion-drafting stage where clerks are likely to have the most influence. As one judge put it, “The law clerk is directly involved in writing and discussion. That’s when the law clerk is likely to be most influential.” Another explained that “there’s a fertile opportunity in the opinion-drafting stage” for the clerk to be influential. Two judges specifically contrasted the influence clerks have over the outcome of a case with their effect on opinion language. One said, “There have been times a law clerk has pointed out something I hadn’t thought about before. Usually that doesn’t change the result, but it changes the opinion,” and another observed that often “approaches might be changed, but the outcome in only 5 percent.”

In short, law clerks probably have more influence on the language of opinions than on the choice of winning litigant. This is probably because they spend more time on drafting, and because it would be relatively rare that a clerk’s recommendation would be able to swing *more than one* vote on a panel so that the opposite litigant would win. On the other hand, the language of the opinion is almost always scrutinized not just by the judge for whom the clerk works, but also by other judges on the panel and some of *their* clerks. As one judge explained, “I don’t have my law clerk work on other people’s cases, but some other judges on our court have their law clerk look at every single thing.” Thus, sabotage would require a clerk to attempt to evade numerous legal experts—both judges and clerks—who review opinion language, and this effort would be highly unlikely to succeed.

Feedback/Discussion. Some clerks perform another important function, which is to provide direct discussion with their judges as part of giving feedback about the proper outcome of cases. Twenty-four judges (29.6 percent) indicated their clerks provide some sort of discussion and feedback beyond a bare recommendation (see Table 3). In this role, the clerk is no longer merely writing an opinion as directed but is providing direct input as to both the proper outcome of the case and the appropriate language for the opinion, both before and after the judge has made a decision how to vote.

Several judges describing the clerks’ roles specifically mentioned their being a “sounding board.” Other judges spoke of “dialoging” with a clerk after having read the briefs, or said that the clerks “help me bounce ideas around.” Judges and the clerks “sit down and hash it out” and clerks provide “additional” and “conflicting” opinions. It is also possible that the clerks and the judge “will do devil’s advocate prior to oral argument.” One judge’s clerks “challenge me and debate me,” he reported, and another said “sometimes they convince me.” One judge who declared his

clerks are “not important from the standing of making the decision,” nonetheless also stated his clerks “test the decision,” like his colleague’s view that his clerks “test my reasoning in an opinion.”

A few judges spoke of even more direct clerk input when they indicated relatively close collaboration or joint consensus building during the decision-making process, such that the judge-clerk team makes decisions “as one.” Approximately eight judges indicated such close collaboration that the judge-clerk working relationship was something akin to an equal “partnership” or close “collaborative effort” (see Table 3). One judge used the interesting and very telling analogy that “you’re kind of a team of horses in a harness.” Other judges similarly stated that “it’s intertwined, what they’re thinking and you’re thinking,” or that the clerk is the judge’s “alter-ego.” A judge who declined to estimate the frequency of a clerk changing the outcome said, “That’s not the way we do it—it’s more of a consensus-building operation,” and another said, “We’re partners together in research and writing opinions.” A somewhat more extensive quotation, which captures the notion of collaborative clerk-judge roles, came from a judge who admitted that the clerks sometimes succeeded in altering case outcomes:

If I am at all—even a modicum—undecided in a case, all the law clerks and I sit down and hash it out. We don’t have majority rule because I’m a benevolent dictator, but we always try to reach consensus. There was an issue whether a health board can eliminate smoking in all public places. I admittedly have a bias against smoking. I hashed it out with my law clerks; one who had an opposite view was particularly persuasive and we dissected the statute and other statutes, and I changed my mind. So law clerks have some role but ultimately it’s the judge’s responsibility.

Notice some of the terms these judges used: “harness,” “intertwined,” “collaborative,” “consensus,” “partners.” Clearly these judges and clerks are working in close collaboration, something beyond an occasional discussion or two in which the clerk provides some feedback or serves merely as a “sounding board” to the judge’s thoughts.

Who’s in Charge? Whether judges use their clerks for research, recommendations, opinion drafting, or sounding-board discussions, or as collaborative partners in the judicial decision-making process, many of the judges were quite clear that they—the judges—are in charge, not the clerks. One could see this in our earlier discussion of the judge’s degree of agreement with law-clerk recommendations. Several judges were clear that they remain in charge not just with respect to recommendations but throughout the entire decision-making process. One judge, who had just indicated he and his clerks disagreed in roughly one-fifth of cases, quickly added, “But I am the judge.” Another judge said the question about a clerk’s recommendation changing a judge’s view of an outcome was “really not applicable” because “*I’m feeding them*” (emphasis in original). Judges state that they are the ultimate decision maker even when, as discussed immediately above, the working relationship is collaborative or

the judge and clerk are “partners.” The final authority of the judge was entertainingly described by one judge, who explained, “I used to have a law clerk that when her face and neck got so red, I know I’d better stop or she’d call me a son-of-a-bitch. But in the end I have to make the final decision.”

Of course, it is possible that some judges either consciously or subconsciously sought to downplay the influence of their law clerks. Yet some judges realized and openly admitted that their clerks exerted significant influence even over the direction of case outcomes. One judge, who stated that clerks have such influence in approximately 10 to 20 percent of cases, added “but I would want to make that a smaller percent.” And another, who estimated that law clerks change the outcome 25 percent of the time, explained, “Occasionally we’ll get topics that, shoot, I don’t know anything about.” Upon coming to the bench, one judge was surprised to learn how much influence law clerks have: “On occasion, more frequently than I would have suspected before I became a judge, they convince me to change my mind about a case.” Indeed, quite a few judges provided specific examples of cases in which clerks had altered the directional outcome of the case, such as “I thought the court of appeals made a mistake, but my clerk pointed out the court was correct,” or a clerk changed a judge’s mind about “whether pregnancy was a compensable injury.”

Empirical Measurement of Influence. These comments bring us to an attempt to measure the frequency of this influence empirically. A question that was a relatively direct test of clerk influence asked the judges in what percent of cases, based on law-clerk advice, they had changed their view of a case’s proper outcome. The data, where the modal estimate is 10 percent (see Table 5), can be characterized in one of two ways. On the one hand, almost three-fourths of judges reported clerk influence changing their views in 10 percent or fewer cases, half of all judges indicated 5 percent or less, and over one-tenth indicated *no* changed outcomes due to law-clerk influence. Only one judge—a clear outlier—indicated a proportion exceeding 30 percent. These data provide a picture of relatively weak clerk influence. Framing the data another way, however, one could say that half of all judges change their vote at least once every twenty cases as a result of clerk influence, and half of those judges (one-fourth overall) change their vote at least once in every ten cases, which sounds relatively substantial. Because the data are susceptible to either interpretation, we choose a middle ground, and characterize the influence of law clerks on case outcomes as “moderate” overall.

Correlations between this frequency of change and numerous factors were examined. Those factors were judicial retention method, judicial term length, presence of an intermediate appellate court, percent of docket discretion, number of justices on the court, number of clerks per justice, and percent of cases that are routine.⁵ Four statistically significant correlations were found. Two were moderately negative correlations—between the percent of cases in which a law clerk changed the judge’s

⁵ Full statistical details are available on request from the authors.

Table 5
Percent of Cases Law Clerk Changed Judge's Opinion*

| | Percent of Cases Changed | Response Frequency | Percent of Judges Surveyed | Percent of Judges Responding | Cumulative Percent of Judges Responding |
|----------------|--------------------------------|-----------------------|----------------------------------|------------------------------------|--|
| | 0 | 9 | 11.1 | 12.9 | 12.9 |
| | 1.0 | 12 | 14.8 | 17.1 | 30.0 |
| | 1.5 | 2 | 2.5 | 2.9 | 32.9 |
| | 2.5 | 2 | 2.5 | 2.9 | 35.7 |
| | 3.0 | 2 | 2.5 | 2.9 | 38.6 |
| | 5.0 | 8 | 9.9 | 11.4 | 50.0 |
| | 7.5 | 3 | 3.7 | 4.3 | 54.3 |
| | 10.0 | 13 | 16.0 | 18.6 | 72.9 |
| | 12.5 | 2 | 2.5 | 2.9 | 75.7 |
| | 15.0 | 4 | 4.9 | 5.7 | 81.4 |
| | 17.5 | 1 | 1.2 | 1.4 | 82.9 |
| | 20.0 | 5 | 6.2 | 7.1 | 90.0 |
| | 25.0 | 5 | 6.2 | 7.1 | 97.1 |
| | 30.0 | 1 | 1.2 | 1.4 | 98.6 |
| | 72.5 | 1 | 1.2 | 1.4 | 100.0 |
| Response Total | | 70 | 86.4 | 100.0 | |
| No Response | | 11 | 13.6 | | |
| Total | | 81 | 100.0 | | |
| Mean | 9.3 | | | | |
| Median | 6.3 | | | | |

* Non-numerical responses of "never" were coded as "zero percent," and non-numerical responses of "seldom" or "rarely" or "it happens" were conservatively coded as "one percent." For judges who provided a numerical range, the midpoint was taken as the estimate.

opinion, on the one hand, and the percent of docket discretion and the presence of an intermediate appellate court below the state high court, on the other. In other words, in state high courts *without* an intermediate court below them, which also tend to possess *less* docket discretion, law clerks were *more* influential in changing their judges' opinions regarding proper case outcomes. This might be a reflection of the typically larger workload placed on judges of such high courts, which could lead them to defer to clerk recommendations more often.

Two other moderate correlations were present. The more partisan the nature of judicial retention, the lower the percent of cases in which a clerk changed the judge's

mind. This is perhaps explained by the fact that judges in elected positions are more likely to be influenced by public opinion (Hall, 1992, 1995) and thus might be correspondingly less influenced by other factors such as clerks. Also, the higher the percent of routine cases on the court's docket (as perceived by the surveyed judges), the higher the percent of cases in which a clerk changed the judge's opinion. This is perhaps caused by the fact that in cases with clear-cut legal outcomes, where clerks provide highly controlling law or facts that cannot be evaded, judges must necessarily change any preconceived opinions to conform to the legally dictated result.

That clerks may affect or even change judges' opinions must be viewed in context: judge-clerk interaction takes place simultaneously with judge-judge interaction. Scholars have tended to discuss judicial voting fluidity (a judge altering one's vote before the final case decision) as (solely) a matter of judge-to-judge influence (see, e.g., Maltzman, Spriggs, and Wahlbeck, 2000), but clerks also appear to be a factor. This can be seen in a judge's remark, "I was the author in a 4-3 decision, and my clerk convinced me to switch sides. I ended up authoring a 6-1 opinion by the time we were done." In another response, a judge who had initially "affirmed as part of a 3-2 majority," said, "My law clerk convinced me it was wrong and it ended up 4-1 because when I changed, it convinced another judge to change."

Here it is important to note that a leading study of the U.S. courts of appeals (Cohen, 2005) strongly suggests that both *intra*-chambers and *inter*-chambers communication are all part of the larger institution of the court. Judges here described a similar situation on state high courts: "Some other judges on our court have their law clerk look at every single thing. Or I might have a law clerk work on something if I don't trust what a judge is saying." Importantly, it is not just clerk communication, but clerk *influence* that extends across chambers. For example, one judge, who explained that his mind was changed "probably about 20 percent" of the time, also added, "That's sometimes my law clerk and sometimes a law clerk for others—we circulate our bench memos." Another judge stated "minds tentatively get changed quite a bit, and also by law clerks from other judges, too."

And there is clerk-clerk interaction as well, shown in a judge's remarks that "My senior clerk oversees the work of the other clerks," and "I encourage them to talk with the other clerks, so by the time I reach a decision, I've had four other lawyers looking at it." Indeed, although we have tended to speak of the judge-clerk relationship as if there is a single clerk, it is increasingly the case that judges—especially judges on state high courts—have more than one clerk (Hanson, Flango, and Hansen, 2000). In short, there is no judge-judge or judge-clerk interaction *in isolation*; rather, judges and clerks are all extensively interacting with other judges and clerks. Hence, one might more appropriately speak of the judge-clerk relationship *network*. This is in fact what Ward and Weiden (2006) discovered occurs at the U.S. Supreme Court. Thus, judge-judge interaction and judge-clerk interaction are integrally interrelated even if scholars study them separately.

CONCLUSION

Are the concerns some court observers have voiced of undue influence of law clerks valid? Or are clerks instead merely helpers of judges? The findings here suggest that the most accurate answer is “somewhere in-between,” but perhaps closer to the latter. A consideration of the judge-clerk relationship, based on extensive interview data and aided by principal-agent theory, leads us to conclude that, at least as the judges themselves see it, law clerks on state high courts exert only “moderate” influence over the substantive outcomes of cases. In other words, the clerk’s influence is more than trivial but far from enormous. The data are arguably subject to a different interpretation—one that suggests more influence than less. However, we wish to avoid inflated claims, which are often part of a normative argument that clerks should have less influence, claims most often made by former clerks themselves (e.g., Lazarus, 1998) who lack the perspective of their “bosses.” Instead, we are interested in the seldom-told story of the *judges’* perspective.

Recall that PA theory did not guide the research here, but it is helpful in summarizing our results and placing them in perspective. Stated in the terminology of PA theory, the judge-clerk relationship in state high courts involves significant opportunity for influence over case outcomes but not sabotage of judges’ goals. Clerks are seen by half of state high court judges as being able to change those judges’ minds as to the proper outcome of a case in at least one instance in twenty. As several judges noted, however, this is primarily because clerks provide necessary and substantial research and thus sometimes discover controlling legal precedent of which the litigants (and hence the judge) are unaware. Making accurate legal decisions is generally a goal of judges, so clerks who uncover outcome-changing legal authority are furthering their judges’ goals, not obstructing them.

Beyond their undertaking legal research, clerks also have little motive or opportunity for sabotaging their judges’ goals in drafting written opinions or arguing for particular decisional outcomes. First, there is little *motive* for such sabotage. Law clerks are typically screened by the judges who hire them for attitudes similar to the judge’s. And even if clerks and judges do not initially share a common philosophical outlook, the clerks either come to share the judge’s outlook or learn to conform their behavior to harmonize with the judge’s preferred way of approaching cases. There also is little *opportunity* for sabotage by clerks. Judges firmly direct and oversee their clerks’ work and themselves have access to multiple sources of information about cases from the litigant’s briefs, oral argument, other in-chamber clerks, other judges on the panel, and sometimes those other judges’ clerks as well. Thus, any attempt by a clerk to steer a case outcome in the clerk’s favored direction would, to be successful, have to escape notice by several other well-trained legal actors closely reviewing that proposed outcome. Such a situation is unlikely to occur.

Overall, then, clerks’ influence is largely in the form of providing their judges with more accurate information regarding facts and law relevant to the case, helping

to draft opinions reaching the outcome sought by the judge or court, providing ideas that would strengthen the judges' position, and serving as a sounding board to help clarify the judge's thoughts. The most direct influence clerks tend to have is in the research stage, where clerks can discover facts or law critical to the resolution of the case, and then in the opinion-writing stage, where the clerk might influence the *approach* to a certain outcome, but seldom the *direction* of the outcome itself. Only rarely does a clerk persuade enough judges on a panel such that the *court* changes its decision as to the winning litigant, and even then that most often occurs in response to controlling legal precedent uncovered by the clerk.

Importantly, these results are consistent with the findings of Peppers (2006), and perhaps even more consistent with the findings of Ward and Weiden (2006), regarding the influence of law clerks on the U.S. Supreme Court. Each of those authors found that U.S. Supreme Court clerks possess moderate influence over the language of opinions, but relatively little influence over the choice of winning litigants. Thus, the data here provide evidence that law clerks in both federal and state high courts possess roughly similar types of influence. Moreover, because this is the first study based on a large number of judges of the influence of law clerks across numerous state high courts, the findings here are much more generalizable than were earlier small *n* studies or anecdotal reports. Of course, all the conclusions here call for further studies. Nevertheless, on the whole, it appears that although law clerks as agents on state high courts are moderately influential, in exerting that influence these clerks are "good stewards" of the interests of the principals—the state high-court judges—for whom the clerks work. **jsj**

REFERENCES

- Brehm, J., and S. Gates (1997). *Working, Shirking, and Sabotage: Bureaucratic Response to a Democratic Public*. Ann Arbor: University of Michigan Press.
- Cohen, J. (2005). *Inside Appellate Courts: The Impact of Court Organization on Judicial Decision Making in the United States Courts of Appeals*. Ann Arbor: University of Michigan Press.
- Ditslear, C., and L. Baum (2001). "Selection of Law Clerks and Polarization in the U.S. Supreme Court," 63 *Journal of Politics* 869.
- Fenno, R. (1978). *Home Style: House Members in Their Districts*. Boston: Little, Brown.
- Hall, M. G. (1995). "Justices as Representatives: Elections and Judicial Politics in the American States," 23 *American Politics Quarterly* 485.
- (1992). "Electoral Politics and Strategic Voting in State Supreme Courts," 54 *Journal of Politics* 427.
- Hanson, R., C. Flango, and R. Hansen (2000). *The Work of Appellate Court Legal Staff*. Williamsburg, VA: National Center for State Courts.
- Kingdon, J. (1989). *Congressmen's Voting Decisions*, 3rd ed. Ann Arbor: University of Michigan Press.

- Laffont, J., and D. Martimort (2001). *The Theory of Incentives: The Principal-Agent Model*. Boston: Princeton University Press.
- Lazarus, E. (1998). *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Court*. New York: Times Books.
- Maltzman, F., J. Spriggs II, and P. Wahlbeck (2000). *Crafting Law on the Supreme Court: The Collegial Game*. New York: Cambridge University Press.
- Milgrom, P., and J. Roberts (1992). *Economics, Organization, and Management*. New York: Prentice Hall.
- Moe, T. (1991). "Politics and the Theory of Organization," 7 *Journal of Law, Economics, and Organization* 106.
- (1984). "The New Economics of Organizations," 28 *American Journal of Political Science* 739.
- Oakley, J., and R. Thompson (1980). *Law Clerks and the Judicial Process: Perceptions of the Qualities and Functions of Law Clerks in American Courts*. Berkeley: University of California Press.
- O'Brien, D. (1986). *Storm Center: The Supreme Court in American Politics*. New York: W.W. Norton and Company.
- O'Connor, K., and J. Hermann (1995). "The Clerk Connection: Appearances Before the Supreme Court by Former Law Clerks," 78 *Judicature* 247.
- Palmer, J., and S. Brenner (1995). "The Law Clerks' Recommendations and the Conference Vote on-the-Merits on the U.S. Supreme Court," 18 *Justice System Journal* 185.
- Peppers, T. (2006). *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*. Stanford, CA: Stanford University Press.
- Perry, H. Jr. (1991). *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press.
- Rehnquist, W. (1957). "Who Writes Decisions of the Supreme Court?" *U.S. News and World Report*, December 13.
- Sheldon, C. H. (1988). "The Evolution of Law Clerking with the Washington Supreme Court: From 'Elbow Clerks' to 'Puisne Judges,'" 24 *Gonzaga Law Review* 45.
- (1981). "Law Clerking with a State Supreme Court: Views from the Perspective of the Personal Assistants to the Judges," 6 *Justice System Journal* 346.
- Songer, D., and S. Haire (1992). "Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals," 36 *American Journal of Political Science* 963.
- Stow, M. L., and H. Spaeth (1992). "Centralized Research Staff: Is There a Monster in the Judicial Closet?" 75 *Judicature* 216.
- Wahlbeck, P., J. Spriggs, and L. Sigelman (2002). "Ghostwriters on the Court: A Stylistic Analysis of U.S. Supreme Court Opinion Drafts," 30 *American Politics Research* 166.
- Ward, A., and D. Weiden (2006). *Sorcerer's Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. New York: New York University Press.