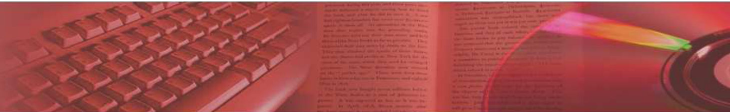
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Todd C. Peppers. *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk.* Stanford: Stanford University Press, 2006. 328 pp. $55.00 (cloth), ISBN 978-0-8047-5381-4; $22.95 (paper), ISBN 978-0-8047-5382-1.

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Do the law clerks in the U.S. Supreme Court's "Marble Palace" exercise undue, and at times inappropriate, influence over the justices? For more than fifty years, that question has been asked, answered, rebutted, and re-argued by professors, politicians, and, even, former law clerks. A definitive answer eludes the community of court watchers for two reasons. First, the response one offers or accepts depends substantially on one's definition of undue and inappropriate. At its root, this has been an ongoing proxy fight about the Court's controversial decisions. Second, reliable information is hard to come by, because a Supreme Court law clerk has been expected to maintain confidentiality and to keep silent even after his or her clerkship ends. The code of silence has been broken a few times, sometimes to set the record straight and sometimes just to settle old scores. Such true confessions usually raise eyebrows and tempers, but they do not occur often enough to satisfy the avid court watcher's hunger for behind-the-scenes tales of judicial wit, wisdom, or wickedness.

In *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*, Todd C. Peppers seeks to overcome the first difficulty, and asks a neutral, but to him "more important and interesting," question, which he frames as: "what are the institutional roles and norms surrounding the hiring and utilization of law clerks" (p. xiv). Peppers strives to triumph over the code of silence by constructing a theoretical model from political science, and then feeding it as much practical data as he can derive from a varied examination of judicial biography, memoirs, surveys and interviews, codes of procedure, and institutional history. Specifically, he analyzes the potential for law clerk influence on the justices by applying principal-agent theory to the Court's personnel. He presumes that a justice and a law clerk are self-interested actors, who will be pursuing their multiple goals within the constraints of their hierarchical relationship. Working against the likelihood of too much influence from below, Peppers suggests, is the "thicket of preexisting rules, norms, and expectations" that a law clerk must thread as he or she inhabits the strange, closed world of the Supreme Court. The clerks must learn to negotiate formal rules and informal customs, which have developed and continue to evolve to suit the needs of the institution as a whole, as well as the idiosyncrasies of individual justices. According to Peppers, "failure to appreciate this fundamental reality of the clerkship institution underlies many of the wildly exaggerated claims of law clerk influence" (pp. 10-11).

Peppers clearly hopes to de-emphasize the hot-button issue of ideological influence, and so confronts it early. He uses his first ten pages to demonstrate that the concern that law clerks might be wielding "undue" influence emerged around the same time that court watchers began to ask whether or not the Court was running off the rails under Chief Justice Earl Warren. The murmuring went public in 1957, when William H. Rehnquist, a conservative young lawyer and former law clerk for Associate Justice Robert H. Jackson, wrote an article for *U.S. News and World Report.* In "Who Writes Decisions of the Supreme Court?" (his rebuttal to an earlier, rosier *U.S. News and World Report* story entitled "The Bright Young Men Behind the Bench"), the future chief justice reviewed the duties performed by he and his fellow law clerks during the October Term 1952. He expressed concern that "inadequate" legal research by some law clerks, as well as "*unconscious* slanting" in the memoranda they wrote summarizing cert. (*certiorari*) petitions (emphasis is mine, p. 3), might tend to skew the Supreme Court's opinions leftward because, Rehnquist claimed, the clerks as a group leaned that way.

Rehnquist's suggestion of creeping liberal bias–even if "unconscious"–drew rebuttals, notably from Alexander Bickel (former law clerk for Associate Justice Felix Frankfurter). But the article also prompted Sen. John C. Stennis of Mississippi to suggest setting formal standards–and requiring Senate confirmation–for these allegedly in-

experienced and liberal legal assistants. Once ignited, the ideological influence debate has raged more or less continuously ever since, and is stoked whenever someone publishes a new memoir or expose of the Supreme Court. Both of the two of the more famous "behind the scenes" books, Bob Woodward and Scott Armstrong's *The Brethren* (1979) and Edward Lazarus's *Closed Chambers* (1998), as well as several conspiracy-minded novels, suggest that at least a few of the justices have relied far too heavily on the input of their clerks. Lazarus, a former clerk to Associate Justice Harry Blackmun, accused the conservative clerks of pursuing their own agenda in the late 1980s. That is, during the early years of the Rehnquist Court. This effectively brought the ideological debate full circle.

Having sketched the origins and development of the ideological influence controversy, Peppers avoids the temptation to weigh in on one side or the other of the debate, and instead takes the rest of the first chapter to introduce his principal-agent framework. In the second chapter, "A Portrait of the Supreme Court Law Clerk," Pepper retains the social science methodology, presenting statistics about the race, gender, education (that is, law school and academic standing), and prior experience for as many of the law clerks as he can find adequate records. The statistical tables are tempered with narrative history, as Peppers introduces the first female law clerk (Lucile Lomen, 1944) and the first African American (William T. Coleman Jr., 1948), and discusses the circumstances that led the justices to hire them. Peppers assesses the charge that the justices have drawn clerks too often from a few elite law schools, or from their own alma maters, and finds "mixed support" for the contention (p. 36). Ideology returns to the composition, but in a minor key, as Peppers describes how early informal requirements evolved to the point that successful applicants for Supreme Court clerkships usually needed prior experience clerking. Under this feeder system, some justices favored individuals who had served with a lower court judge who shared the justice's political ideology (p. 32). Yet, even as he re-introduces ideology as a factor, Peppers turns the usual partisan debate on its head–it is the justice's ideology that shapes the clerkship institution.

Historical anecdotage dominate the next three chapters, as Peppers traces the origins and evolution of the Supreme Court law clerk's role as, respectively, "Stenographer," "Legal Assistant," and "Law Firm Associate." Peppers now puts names and personalities to the previous chapters' statistics. In fleshing out his discussion of the Court's personnel, Peppers relies on published and unpublished letters, biographies, histories, court records, and his own surveys and interviews. He paints a picture of how and when certain modern duties emerged, asking, for example, when did clerks begin to draft cert. memos, and for which justices, and when did this begin to shade into drafting opinions? But, Peppers wastes little time dusting controversial judicial decisions for a law clerk's fingerprints. This will disappoint readers looking for fuel for the ideological debate, but that seems to be Peppers' objective, allowing him to focus on the clerkship institution. Nevertheless, the general absence of discussion about actual cases and controversies is disconcerting.

In chapter 3, Peppers reports that Associate Justice Horace Gray, having enjoyed such services while on the Supreme Judicial Court in Massachusetts, hired his first clerk in 1882, which was four years before the Congress allocated funds for each justice to hire a clerk. What a clerk did for his salary was up to the justice who hired them–the clerk might undertake legal research as needed, like a law office apprentice, or might simply keep the calendar, write the checks to pay the bills, and answer correspondence, like any other gentleman's private secretary during the late nineteenth century. As he aged and was widowed, for example, Associate Justice Oliver Wendell Holmes Jr., relied on his clerks, notably Alger Hiss, to be his "intellectual and social" companion who shared walks and read aloud to him as his eyes failed. Usually, the literary fare was a mystery thriller, not a legal case–since the justice did not need any green attorney to explain the law to him. Yet, Holmes is credited with being the first justice to have his assistants review and summarize cert. petitions (pp. 58-59). In chapter 4, Peppers details how other justices followed suit. The stenographic law clerk evolved closer to legal assistant after Congress authorized the funding for each justice to hire a second clerk in 1919. Some of the justices continued to give their clerks only minor responsibilities, but, from the 1920s through the 1940s, law clerks performed ever more court-related duties, such as "editing legal opinions, performing cite checks, Shepardizing cases, conducting legal research, and summarizing cert. petitions" (p. 84).

Peppers argues in chapter 5 that the assignment of "associate" duties to the law clerk coincided with the arrival of Chief Justice Earl Warren. Thereafter, law clerks were "full-blown" attorneys involved in all important aspects of chambers work, who assumed "the same responsibilities that an associate would in a small but very prestigious law firm" (p.145). The by-then routine reliance on the clerks to review cert. petitions continued during Warren's tenure, but he oversaw the creation of new duties, including preparing bench memoranda and drafting opinions. Warren also instituted rules for intra-chambers

confidentiality, which insulated his clerks from any influence but his own. The chief was reportedly annoyed by Associate Justice Felix Frankfurter's "subversion" of his clerks (p. 150). Another Warren innovation was to create a formal committee for selecting the law clerks. According to Peppers, the new committee selection process ended the lingering influence of a handful of elite professors (such as Frankfurter in his Harvard days, when he pipelined favored students directly to the Court, p. 62), but now "often contained an ideological litmus test" (p. 152). Again, Peppers indicates that ideological pressures were top-down, rather than bottom-up. As the duties of clerkship became more significant, the justices needed to maintain a proper mentor's (and efficient manager's) influence over the staff. Referring again to the principal-agent model, the roles and rules that have evolved allow justices to hire clerks who have compatible objectives for the relationship. Although this is not to say that the justices seek compliant clerks, it is natural to expect that law clerks would serve his or her justice's policy ends as they execute their duties.

With *Courtiers of the Marble Palace*, Peppers has, therefore, constructed an elaborate argument in the alternative: law clerks have not exercised power, they are prevented by institutional rules from exercising power, and, they exercise only so much power as is allowed by their employers. Specifically, Peppers remains the agnostic, concluding that "the necessary conditions for the exercise of influence by law clerks have rarely, if ever, existed on the Supreme Court" (p. 207). He suggests that the early clerks had little chance to influence the outcome of cases before the Court, because they had few substantive legal duties, and thus were not "decision makers." As their duties expanded, so did the rules constraining their independent intention and action. Contemporary law clerks may contribute significantly to the Court's decisions, but "conference discussion and opinion circulation are sufficient institutional checks" on unwarranted influence (p. 208). This book will not end political and academic speculation about the law clerk corps' potential for manipulating the Justices and their decisions. But, it may make the critics who are committed to one side or the other of the partisan struggle stop and think about the practicalities, especially those who like to construct elaborate conspiracy theories. How can a clerk subvert the Court, when there is so much hard work to do?

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