THE SUPREME COURT CLERKSHIP AND THE POLARIZATION OF THE COURT

CAN THE POLARIZATION BE FIXED?

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NUMEROUS COMMENTATORS have observed that the Supreme Court and the lower federal courts have become increasingly polarized over the past two decades as ideological gaps between conservatives and liberals have widened. Of course, there is no agreement about how to respond to that polarization. Many think it an inevitable – some, even a positive – development, and they urge its acceptance. Others find it deleterious.[1] For the latter, this article offers suggestions about what the legal

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[1] *See, e.g.*, CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 6-7 (2006); Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit*, 85 VA. L. REV. 805 (1999). For an example of scholarship explicitly supporting polarization, *see* NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN

profession and the political system might do to reverse recent changes.

NEW EVIDENCE OF POLARIZATION

But first we must turn to some important evidence that this article adds to the view that has been emerging of increasing polarization. Drawing on a larger study presenting the first empirical research into the employment of former Supreme Court law clerks,[2] this article shows that employment patterns changed dramatically during the years since 1990. It shows how, from the 1940s through the 1980s, law clerks from nearly all chambers, conservative and liberal alike, pursued a common pattern of post-clerkship employment. Since 1990, however, a new pattern has emerged among the clerks from conservative chambers, while those from liberal chambers have continued to follow the traditional paths.

Since the outset of the twentieth century, the majority of former Supreme Court clerks have become attorneys in the private practice of law. Prior to 1990, most of them engaged in general business practice, typically as partners in large firms and often as transactional lawyers rather than litigators.

What typified the half-century from roughly 1940 to 1990 was that approximately one-third of all the clerks became law professors, either immediately or some years after leaving the Court. While significant variation existed in the percentage of clerks who entered the academy from particular chambers, the variation did not correlate with the political leanings of particular justices. The justice who produced the highest percentage of future academics was the moderate Felix Frankfurter, at 48.6%. Next was the arch-liberal Thurgood Marshall, at 43.2%. In third place was the conservative Fred Vinson, at 38.9%. Four other justices had percentages in the thirties: Harry Blackmun, who began as a conservative and became a liberal, 36.2%; centrist Byron White, 34.7%; conservative John Marshall Harlan II,

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APPRECIATION OF PARTIES AND PARTISANSHIP (2008).

[2] William E. Nelson, Harvey Rishikof, I. Scott Messinger & Michael Jo, *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 77 VAND. L. REV. (forthcoming Nov. 2009).

34.2%; and liberal Earl Warren, 31.9%.

An influential triangular relationship among the Court, the law clerks, and the legal academy arose out of the large number of clerks who became law professors. Former clerks in the academy trained new clerks for the Court, which then completed the clerks' training and sent them out to train the next generation of clerks and lawyers, both through classroom teaching and more generally through their scholarship. Former Supreme Court clerks developed into scholars of every political stripe, who collectively spread a message that law was distinct from politics and that the Supreme Court's decision making transcended politics. In seemingly apolitical fashion, the former clerks thereby raised the stature of their former justices and promoted the independence of the judiciary as a whole.

All this began to change in the mid-1980s to 1990s. In the eyes of Reagan-era conservatives, the institution of the Supreme Court clerkship as it existed at the end of the 1980s was not apolitical. On the contrary, conservatives viewed it as part of "a cohesive and pragmatic ideological program with support from legal academia" through which the acolytes of liberal justices had dominated the output of the Supreme Court for half a century.[3] Conservatives "concluded . . . that the Left had very powerful networks of Harvard and Yale Law School, or past Supreme Court clerks who tended to be liberal, and those networks on the left tended to be very effective . . . at influencing legal developments in a liberal direction."[4] Accordingly, they set about "to replicate the function that major universities serve on the left of creating a community of people with similar views on similar issues."[5]

Subsequent to the rise of the conservative legal movement, signifi-

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[3] Interview of Steven Teles with William H. "Chip" Mellor, *quoted in* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008), 82. Mellor is co-founder, president, and general counsel of the Institute for Justice, a libertarian public interest law firm.

[4] Interview of Steven Teles with Steven G. Calabresi, *quoted in* TELES, CONSERVATIVE LEGAL MOVEMENT, 165. *See generally id.*, 11-12. Calabresi is professor of law at Northwestern University and a co-founder of the Federalist Society who serves on its Board of Directors.

[5] *Id.* at 164.

cant transformations occurred in institutional practices surrounding the office of the Supreme Court law clerk. We cannot on the basis of our data postulate causal explanations for the changes. Nonetheless, it is important to take note of them.

For example, former law clerks of the four most conservative justices serving for a significant length of time on the Rehnquist and Roberts Courts – Justice Kennedy, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas – have tended not to follow established patterns into law teaching. Of the four, only Justice Scalia's clerks have entered teaching at a percentage approaching the average rate of one in three during the 1940-1990 period – 26.5%. The percentage of Justice Thomas's clerks entering academia is lower – 18.8%, while those of Justice Kennedy's and Chief Justice Rehnquist's clerks are lower yet – with Kennedy at 17.7%, and Rehnquist at 15.4%. In all, only 19.4% of the law clerks from the four conservative chambers have become professors at some point since leaving the Court.

Even this number, moreover, overstates the percentage following the traditional liberal path because out of the total of 63 clerks of the conservative justices who have joined the academy, 9 have gone to religiously oriented or otherwise conservative-leaning faculties that hired few or no former law clerks prior to recent decades. Only 6.7% of the former law clerks from conservative chambers have gone into teaching in the elite, highly ranked law schools[6] to which clerks had customarily gone, compared with the average for the Court as a whole between 1940 and 1989 of 18.0%.

Clerks from the chambers of Justice O'Connor and the four liberal justices, on the other hand, have remained tied to the traditional pattern. Of Justice O'Connor's clerks, 35.0% became academics, while 34.8% of Justice Stevens's clerks have entered law teaching; for Justice Breyer, the figure is 32.0%; for Justice Ginsburg, 37.0%, and for Justice Souter, 44.6%. The percentage for all five justices is 34.2%, of which slightly less than half have gone to elite schools.

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[6] Throughout this article, elite schools are defined as those that have reached the top ten in the law school rankings published annually by *U.S. News & World Report*, including those tied for tenth place, at any time since rankings began in 1987.

This change since 1990 in the frequencies with which former clerks enter the academy has been paralleled by another new phenomenon – the creation of politically oriented Supreme Court practice groups in large national law firms.

Many of these firms have a conservative bent. Consider Kirkland & Ellis, notable for the number of clerks it hires, its ideological consistency, and its partisan connections; it provides the paradigm for how conservative Supreme Court practice groups have been created and function. Of the 22 former clerks hired since 1990, nine came from Justice Scalia's chambers, six from the chambers of Justice Thomas, four from Justice Kennedy, and three from Chief Justice Rehnquist; the firm did not hire a single clerk from any other justice. Most of these former clerks joined the firm after Kenneth Starr joined as a partner in 1993 in order to build an appellate practice group staffed by lawyers groomed in conservative circles.

Other firms hiring clerks from conservative Justices include Bartlit Beck Herman Palenchar & Scott; Baker Botts; Sidley Austin; and Jones, Day, Reavis & Pogue. Sidley, for example, has 18 former clerks from the chambers of Justices Kennedy, Rehnquist, Scalia, and Thomas and only seven from the remainder of the Court, while Jones Day – where Justice Scalia worked from 1961 to 1967 – has 15 from the same four chambers and only five from the rest of the Court.

Although the main goal of these conservative practice groups has been to provide representation to clients at a profit to themselves, they also have presented cases, issues, and arguments to the Court that a conservative majority can use to separate the Court's jurisprudence from liberal methodologies and thereby return the law it administers to older moorings. On the whole, though, the conservative groups have not focused upon the core issues and controversies of constitutional law. Instead, conservative firms have increasingly focused their practice on commercial cases, just as the Court has increased its consideration of such cases.

As early as 1993, Kenneth Starr accused the Court of "abdicat[ing] its responsibility to select complex cases . . . often cases of immense importance to business," attributing this failure to the predilections of clerks who in reviewing certiorari petitions "chok[ed] off much of the

important but unglamorous business-related issues from the contemporary court's docket."[7] A few years later, Richard Posner discerned "a bias in favor of non-commercial cases."[8] But after the appointments of Chief Justice Roberts and Justice Alito, "a pro-business shift in the Court's docket succeeded" as elite firms "persuade[d] the Court to enter into areas of law of interest to the regulated community to correct what business perceives as problematic legal doctrine."[9]

Of course, liberal firms also have sought to build Supreme Court practices. Under the leadership of Seth P. Waxman, former Solicitor General during the Clinton administration, Wilmer, Cutler, Pickering, Hale & Dorr has built an analogous left-oriented practice, hiring a total of 35 clerks since 1990 from the chambers of Justices Breyer, Ginsburg, O'Connor, Souter, and Stevens, while hiring only five from the remainder of the Court. O'Melveny & Myers similarly has built up an appellate practice headed by Walter E. Dellinger III, former head of the Office of Legal Counsel and Solicitor General during the Clinton administration. Of eleven clerks it has hired since 1990, only one came from conservative chambers.

What is arguably troubling about these politically oriented practice groups is a tendency to reify the role of the Court as a super-legislature responding to ideological arguments rather than an old-fashioned legal institution responding to concerns grounded in the rule of law. Lawyers advancing political programs will tend to push the Court's agenda in political directions, away from legal questions that arise randomly in the broad national litigation process. They might thereby enhance the political salience of the Court – perhaps danger-

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[7] Kenneth W. Starr, *Rule of Law: Supreme Court Needs a Management Revolt*, WALL ST. J., October 13, 1993, at A23.

[8] Richard Posner, *quoted in* Tony Mauro, *The Hidden Power Behind the Supreme Court: Justices Give Pivotal Role to Novice Lawyers*, USA TODAY, March 13, 1998, at 1A.

[9] Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. REV. 1487, 1531-32 (2008). According to Michael S. Greve of the American Enterprise Institute, O.T. 2005 featured 20 business-related cases out of 72 signed opinions, and O.T. 2006, 25 out of 67. Michael S. Greve, *Does the Court Mean Business?*, 26 FEDERALIST OUTLOOK (September 19, 2007), at 1-2.

ously so.

A divide similar to that in the appellate bar has emerged in the federal government's hiring of former Supreme Court clerks. Since midcentury, government service has become a rite of passage for a significant proportion of clerks leaving the Court. Between 20 and 30 percent of clerks in any given decade have worked for the federal government at some point in their careers, although the vast majority of them leave for private practice or the academy after less than ten years of service.

From the 1940s to the 1990s, successive presidential administrations exhibited little political preference in hiring Supreme Court clerks, and rarely favored particular chambers. Only the Kennedy administration, which hired eight of Justice Frankfurter's clerks, showed any particular partiality. The Carter administration chose nine clerks from Justice Brennan, but also seven clerks from Justice Stewart. Even the Reagan administration followed this pattern, hiring a number of clerks from Justice Blackmun equal to the number from Chief Justice Burger, and more clerks from Justice Marshall than from Justice O'Connor. The administration of the elder Bush hired more clerks from Justice Marshall than from Chief Justice Rehnquist.

With the Clinton presidency, federal government hiring of Supreme Court clerks jumped dramatically and began a significant partisan shift. The two-term administration hired 96 former clerks, more than twice as many as Reagan, but only 15.6% of them were from the chambers of four conservatives – Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas. The administration of George W. Bush, on the other hand, employed 89 former clerks, of whom 68.5 percent had worked in one of the four conservative chambers. The only other justice who provided five or more clerks for President Bush was the fifth justice who cast a vote in his favor in *Bush v. Gore*[10] – Justice O'Connor, who provided eight clerks. Thus, 77.5% of all former clerks in the Bush administration came from one of the five chambers that had put him into office. Only 10 clerks, or 11.2% of all who were hired, came from the chambers of dissenting Justices Breyer, Gins-

[10] 531 U.S. 98 (2000).

burg, Souter, and Stevens.

In sum, separate career tracks have developed for former clerks from liberal chambers, on the one hand, and conservative chambers, on the other. At least some readers may be concerned that these distinct tracks may tend to reify political polarization on and surrounding the Court. More specifically, they may postulate that clerks who arrive at the Supreme Court with sharply divergent ideological views, after having their views confirmed by their experience in chambers, will go on to the government, law firms, and law schools, where they will preach their divergent ideologies and further divide their students, their associates, and the public at large, thereby reinforcing ideological dissonance and stridency. For those readers, we offer some suggestions about what the legal profession and the political system might do to reduce polarization.

SUGGESTED REMEDIES FOR POLARIZATION

Polarization has deep roots in competing visions of the role that the Supreme Court should play in American politics and society. The liberal view, which can be traced back to the Progressive Movement, the New Deal, and the Warren's Court's seminal decision in *Brown v. Board of Education*,[11] understands law, not as a derivative of eternal principles, but as a pragmatic response to societal needs. According to liberals, society is always changing, law is in constant flux, and a lawyer seeking to argue what law ought to be first must grasp what society is becoming. For more than half a century, perhaps, the main job of liberal legal academics thus has been to excavate and elaborate the relationship between law and social change, thereby creating what Justice Louis Brandeis called "enlightened public opinion."[12] It is here that the triangular relationship between the Court, its law clerks, and the academy becomes key, as liberal justices identify and place on faculties the future scholars whose work will lay the foundations for future liberal legal progress.

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[11] 347 U.S. 483 (1954).

[12] Letter from Louis D. Brandeis to Felix Frankfurter, January 24, 1926, in MELVIN I. UROFSKY & DAVID LEVY EDS., 5 LETTERS OF LOUIS D. BRANDEIS 204 (1972-1980).

Conservatives, in contrast, are troubled by the judiciary's capacity to promote change. They begin with a fear, which can be traced back over two centuries to the men who led the American Revolution, that government is a dangerous entity that will oppress its subjects if left unrestrained. They understand that America's founding generation shared their fear of government and therefore created constitutional structures, such as federalism, separation of powers, judicial review, and the rule of law, to impose restraint.

Most conservatives accordingly object to giving judges a role in accommodating the law to social change. They reject the liberal view that judges, with the assistance of academics, should sculpt legal and constitutional doctrine to meet society's needs and promulgate rules designed to nudge society in progressive directions. The job of judges, in the view of such conservatives, is to put the brakes on government actors seeking to promote social change, not themselves to become agents of change. The duty of judges is "to interpret the law, not write it"[13] and not to behave as "a super-legislature" responsive to a liberal "advocacy movement with a well-defined legal and social agenda."[14] Judges who act as legislators get their role precisely backwards: their proper role is to slow change down, not to facilitate it. The role of the Court is "to extend the principles of Founders and the words of the Constitution into a world that still needs their wisdom."[15]

Perhaps the protagonists of today's competing constitutional norms are about to reach out to each other and engage in conversation and compromise. But conversation and compromise will be extremely difficult. The commitment of conservatives to use law to slow change and the commitment of liberals to use law to promote it both have deep, irreconcilable roots in America's constitutional past. It will undoubtedly prove difficult, at best, to reconcile the irreconcilable unless the Court can have reference to a clear, objective body of "law" on

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[13] 149 CONG. REC. S121 (daily ed. Jan. 9, 2003) (statement of Sen. Orrin Hatch), *quoted in* TELES, CONSERVATIVE LEGAL MOVEMENT, 152.

[14] William H. Mellor & Clint Bolick, "The Center for Constitutional Litigation," 1985, 1, *quoted in* TELES, CONSERVATIVE LEGAL MOVEMENT, 80.

[15] Collin Levy, *Sotomayor and International Law*, WALL ST. J., July 14, 2009, at A13.

which all the Justices can agree. Of course, there is doubt whether and under what circumstances such "law" might exist.[16]

Awareness of the difficulty of compromise brings us back, in turn, to a central insight – that politically based approaches to law gain their greatest strength when they become institutionalized. Institutions give ideas traction and maintain that traction even if the ideas themselves lose some force. The triangular relationship between the Court, the clerks, and the academy is of particular importance. Liberal thinkers have long appreciated this insight, as do current conservative intellectuals. If the insight is correct, it may be that those seeking to put an end to political polarization on the Supreme Court and return the Court to the task of enforcing a rule of generally accepted law need to proceed by altering the institutional structures that support polarization.

We do not now recommend such a course. In our view, it is unwise and premature to tamper lightly with institutional structures surrounding core elements of government, such as the Supreme Court. The rule of law is premised on stability, not radical revolution. We hope that the American people will again realize that their government and their courts functioned effectively on their behalf during the six decades from 1940 to 2000 (i.e., the golden years of the American century) when they facilitated change through law, even if that change occurred too slowly for some and too rapidly for others. We hope leaders, among them the justices of the Supreme Court who want conversation and compromise, will engage each other in it.

At the same time, we understand that the prospect of institutional redesign, even if it is distant, might push some actors toward compromise. Hence we urge readers interested in ending polarization to begin thinking about the sorts of redesign that might be enacted by a majority of the Court or by other institutions. In an effort to stimulate thought, we offer a few suggestions of our own. But we neither advocate nor oppose the measures we suggest, nor do we vouch for their efficacy; we put them forward only in the hope that others will re-

[16] It should be noted that the authors of this article are themselves not of one mind on this issue. Some of them plan to address it in future scholarship.

spond with alternative, and perhaps better, measures and in the belief that discussion by the profession of how to decrease polarization might induce the justices themselves to begin addressing the problem.

There might, for example, be a rule prohibiting practice before the Supreme Court by former clerks, at least while their justices remain on the bench.[17] Another approach would be to require the justices to hire law clerks directly out of law school, thereby reducing the information a justice might have about a prospective clerk's ideological convictions. A more fundamental change would be for the Court collectively to select the clerks and place them in a pool from which they would be assigned to work randomly, on a rotating basis, for all the justices.[18]

Perhaps larger changes in the structure and procedures of the Court are needed. One possibility would be to increase the number of votes needed to grant certiorari,[19] so that the Court might hear fewer politically charged cases. Another would be an alteration in the processes for appointing and confirming federal judicial appointees so as to focus attention on professional achievement rather than political opinion.[20] One might even want to see a constitutional amendment fixing

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[17] The Supreme Court currently forbids former clerks, or any other former employees of the Court, from participating "in any professional capacity in any case pending before this Court or in any case being considered for filing in this Court" for two years after separation. SUP. CT. R. 7.

[18] The Supreme Court of Canada follows a partially similar procedure. Initial applications are submitted directly to the Court, although applicants ultimately work for individual justices. *See* Mitchell McInnes, Janet Bolton & Natalie Derzko, *Clerking at the Supreme Court of Canada*, 33 ALTA. L. REV. 58, 63-64 (1994). Clerk selection procedures at the state level vary widely, with courts in some states, such as California, employing staff attorneys rather than clerks for individual judges. *See generally* Vermont Law School, Office of Career Services, Vermont Public Interest Action Project, The 2009 Guide to State Judicial Clerkship Procedures, *available at* http://forms.vermontlaw.edu/career/guides/judclerkguide2009.pdf.

[19] Perhaps to six. For similar proposals, *see* Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003); Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73 (2003).

[20] Since 1977, a "merit" selection process has governed appointments to the New York Court of Appeals; the governor must select his or her candidate from nominations by

judicial tenure at some term of years, with no eligibility for reappointment, rather than for life, as is done in other constitutional democracies.[21]

The greatest need for institutional redesign, however, is in the legal academy, which has played a unique role in the triangular relationship with the Court and the clerks. The justices of the Supreme Court by themselves are unlikely to invent new forms of constitutional dialogue through which to engage each other in conversation. They need help from the academy. They will not get it from academics who write for audiences other than judges.[22] Nor will new constitutional dialogue emerge if academics at liberal law schools write only for liberal justices and academics at conservative schools write for conservative justices. If the Court is to come together around some new understanding of the rule of law, it needs support from collegial academic institutions in which liberals and conservatives reflect together about what that rule of law should be. It needs intellectuals to reintegrate the vision of conservatives – that law should serve as a mechanism for slowing government and thereby preventing it from trampling on religious and economic rights – with the vision of liberals – that law should be a vehicle for promoting social justice through social change.

The institutions of legal education and legal scholarship are simultaneously the easiest and the most difficult to alter. *Grutter v. Bollinger*,[23] for instance, raises the possibility that law schools, at least those that are publicly supported, might be subject to judicial or administra-

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the statewide Commission on Judicial Nominations, charged with making merit-based recommendations. *See* Luke Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 ALB. L. REV. 339 (1996).

[21] Such is the practice on a number of foreign constitutional courts. *See* VICKI JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 489-91 (1999). For a proposal to eliminate life tenure on the United States Supreme Court, *see*, *e.g.*, Roger C. Cramton, *Reforming the Supreme Court*, 95 CAL. L. REV. 1313 (2007).

[22] *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (2002).

[23] 539 U.S. 306 (2003).

tive[24] oversight to insure politically balanced faculty hiring. Might law reviews similarly be subject to oversight, akin to the fairness doctrine in broadcasting, to insure greater balance in the scholarship they publish?[25] Might such oversight induce the legal academy to place less emphasis on articles advancing smart, but often unidimensional policy initiatives, whether they be of a conservative sort striving to maximize the efficiency of capitalist markets or a liberal sort seeking equalization of wealth and power? Might oversight induce scholars instead to analyze systematically how law that everyone agrees had dispositive force in the past should be applied under changed conditions in the present?[26]

This article is not the place to weigh the value of these or other possible institutional reforms. We are quite uncertain whether proposals such as those listed above are good ideas, whether they would ever be enacted, or whether they would achieve their objective. As noted above, we also think that institutional change is not yet timely: judicial, academic, and political actors should first be given the opportunity to come together voluntarily on their own.

It is, however, time for readers seeking to end political polarization on the Supreme Court to understand that currently emerging institutional practices are encouraging and reifying it. Those who believe that judicial polarization is bad for the Court and bad for the nation should look first to the justices themselves, next to the legal academy, and then to the larger legal profession for self-imposed remedies. But ultimately lawmaking by Congress or a majority of the Court may be needed to bring polarization to an end.

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[24] An administrative body, of course, would need to be created by enactment of federal or state legislation.

[25] Litigation might assist in the construction of new scholarly standards, although there are compelling reasons for judges and legislators not to interfere with academic decisionmaking about what scholarship ought to be published. The issue is an enormously complex one beyond the scope of our limited space for analysis here.

[26] *See* RONALD DWORKIN, LAW'S EMPIRE (1986).