

## REVIEW ESSAY

### OPEN CHAMBERS: HIGH COURT ASSOCIATES AND SUPREME COURT CLERKS COMPARED

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*Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* by Artemus Ward and David L Weiden (New York: New York University Press, 2006) pages i–xiv, 1–358. Price A\$65.00 (hardcover). ISBN 0 8147 9404 1.

#### I

They have been variously described as ‘junior justices’, ‘para-judges’, ‘puppeteers’, ‘courtiers’, ‘ghost-writers’, ‘knuckleheads’ and ‘little beasts’. In a recent study of the role of law clerks in the United States Supreme Court, political scientists Artemus Ward and David L Weiden settle on a new metaphor. In *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*, the authors borrow from Johann Wolfgang von Goethe's famous poem to describe the transformation of the institution of the law clerk over the course of a century, from benign pupilage to ‘a permanent bureaucracy of influential legal decision-makers’.<sup>1</sup> The rise of the institution has in turn transformed the Court itself.

Nonetheless, despite the extravagant metaphor, the authors do not set out to provide a new exposé on the internal politics of the Supreme Court or to unveil the clerks (or their justices) as errant magicians.<sup>2</sup> Unlike Bob Woodward and Scott Armstrong's *The Brethren*<sup>3</sup> and Edward Lazarus' *Closed Chambers*,<sup>4</sup> *Sorcerers' Apprentices* is not pitched to the public's right to know (or its desire

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<sup>1</sup> Artemus Ward and David L Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (2006) 248–9 (‘*Sorcerers' Apprentices*’).

<sup>2</sup> *Ibid* 249, quoting the passage from Goethe's *The Sorcerer's Apprentice*:

The old sorcerer has vanished  
And for once has gone away!  
Spirits called by him, now banished,  
My commands shall soon obey.

<sup>3</sup> Bob Woodward and Scott Armstrong, *The Brethren* (1979).

<sup>4</sup> Edward Lazarus, *Closed Chambers* (1998).

for scandal). Instead, it is presented as a more scholarly contribution to the debates — sparked especially by those books — about the influence of Supreme Court clerks on US law. Employing the methodology of ‘new institutionalism’, they describe an institution transformed at several historical junctures — sometimes predictably, often reactively — to acquire its current incarnation.

This transformation has opened up three main opportunities for clerk influence — in reviewing petitions for certiorari to the Supreme Court, in assisting justices in the decision-making process, and in drafting opinions. Ward and Weiden also examine the background process of selecting law clerks, the increasing competition to secure the clerkship, and a rough profile of the young law graduates who are now entrusted with this role. In the course of this review essay, these claims are described, assessed and finally contrasted with the institution of the judge’s associate in the High Court of Australia.

## II

The most obvious potential for influence by US Supreme Court clerks lies in their responsibility to review petitions for a writ of certiorari. Known colloquially as ‘cert’, the grant or denial of certiorari is a matter of judicial discretion, and is the primary means by which cases come before the Court.<sup>5</sup> Supreme Court clerks initially scan cert petitions, provide memoranda on their merits, and recommend that cert be either denied or granted, exercising an important part of what commentators have described as the Court’s ‘agenda setting’ power.<sup>6</sup> Over time, clerks’ responsibility has grown in line with the number of petitions to the Supreme Court — which has expanded sevenfold over the course of the 20<sup>th</sup> century.<sup>7</sup> In the 2005 term, the Court’s docket numbered 8236 filings, resulting in 78 grants — a success rate of just under one per cent.<sup>8</sup> Ward and Weiden trace the increase in clerking responsibility to the creation, in 1935 by Chief Justice Charles Hughes, of a ‘dead list’ of petitions no longer discussed by judicial conference, after which many justices gradually began to delegate the initial review of all petitions to their clerks.<sup>9</sup> Clerking practice changed more dramatically in 1972, when Justice Louis F Powell Jr suggested a system of pooling clerks to provide a single memorandum per petition, in order to meet the workload of the ‘ubiquitous things [which] will be with us always’.<sup>10</sup> At the time, five justices agreed to participate — the number has now increased to eight, with only Justice Stevens’ clerks working outside of the pool.<sup>11</sup> As a

<sup>5</sup> *Judiciary Act of 1925*, ch 229, 43 Stat 936, which expanded the Supreme Court’s certiorari jurisdiction.

<sup>6</sup> H W Perry, *Deciding to Decide: Agenda Setting in the United States Supreme Court* (1991) (a study based on interviews with five justices and 64 former clerks).

<sup>7</sup> Ward and Weiden, above n 1, 117 fig 3.1.

<sup>8</sup> Frederick Schauer, ‘The Supreme Court, 2005 Term — The Statistics’ (2006) 120 *Harvard Law Review* 372, 380 table II(B). This number includes 1703 formal petitions and 6533 informal petitions, or *in forma pauperis*, which are unpaid and often — but not always — frivolous.

<sup>9</sup> Ward and Weiden, above n 1, 113–15.

<sup>10</sup> *Ibid* 118, citing Memorandum from Lewis F Powell Jr to Hamilton Fox, Lawrence A Hammond, Covert Parnell and J Harvie Wilkinson III, 20 March 1972, in *Powell Papers* (Lewis F Powell Jr Archives, Washington and Lee University) Box 130B.

<sup>11</sup> Ward and Weiden, above n 1, 125.

consequence, only two pairs of clerks' eyes may determine whether a petition is brought to the justices' attention — and perhaps only one, once Justice Stevens' tenure comes to an end.<sup>12</sup>

Beyond the certiorari process, clerks enjoy a certain degree of influence in judicial decision-making, by acting as go-betweens for potential concurrences and by persuading their justices to adopt particular arguments, which they are free to propose in private discussions, bench memoranda or more focused, follow-up research.<sup>13</sup> The extent of this influence is difficult to measure, and is perhaps prone to over-exaggeration in the memory of clerks themselves (a drawback of the clerk survey methodology in *Sorcerers' Apprentices*).<sup>14</sup> Yet Ward and Weiden argue that current clerks are better able to influence the outcome of judicial decision-making because of a series of institutional changes. They suggest that the rise in the number of clerks (now four per justice), the greater time they have to spend on cases, and the number of opportunities they have to trade gossip, strategies and even case assignments all lead to an escalation in clerking influence.<sup>15</sup> Moreover, they describe a more forthright and independent coterie, with 'recent clerks more likely than their predecessors to give their personal beliefs about cases to their justice, to attempt to convince their justice about cases or issues, and to disagree with their justice'.<sup>16</sup> This conclusion is perhaps overdrawn, due to the small survey sample of clerks' testimonies,<sup>17</sup> and even smaller source of justices' responses.<sup>18</sup> As well as bias problems, the authors are thus unable to address more complex changes in clerks' roles during differently constituted courts and during the periods of especial disharmony between justices.<sup>19</sup> If collective influence is their suggestion, it is also curious that Ward and Weiden do not address more explicitly the polarisation and constraints operating between clerks themselves.<sup>20</sup>

Finally, clerks are responsible for drafting the written opinions for many of the justices. The surge in this practice is linked to the Supreme Court's equality

<sup>12</sup> In its first phase, four justices chose not to participate in the cert pool, yet recently appointed justices have all added their clerks to the pool: see Tony Mauro, 'Courtside', *Legal Times* (Washington DC), 18 September 2006, 10, which records the decision of both Chief Justice John Roberts and Justice Samuel Alito to take part.

<sup>13</sup> Ward and Weiden, above n 1, 150–9.

<sup>14</sup> See *ibid* 275 app G, which reproduces the questionnaire sent to former clerks.

<sup>15</sup> *Ibid* 159–73.

<sup>16</sup> *Ibid* 241.

<sup>17</sup> Only 12 clerks who served after the adoption in 1989 of the *Code of Conduct for Law Clerks of the Supreme Court of the United States* responded to the surveys: Ward and Weiden, above n 1, 282 fn 32. The *Code of Conduct* stresses the clerk's duty of confidentiality to their justices and the Court: *ibid* 16–17.

<sup>18</sup> Personal interviews, archives and published works supplement the clerk surveys: *ibid* 10–11.

<sup>19</sup> See, eg, Linda Greenhouse, 'Friends for Decades, but Years of Court Left Them Strangers', *The New York Times* (New York), 5 March 2004, A1, which describes how Chief Justice Warren Burger and Justice Harry Blackmun 'barely spoke' after what had been a close friendship. Justice Oliver Wendell Holmes had described the Supreme Court as 'nine scorpions in a bottle', while Judge Richard A Posner likened it to 'arranged marriage in a system with no divorce': see Judge Richard A Posner, 'A Tribute to Justice William J Brennan Jr' (1990) 104 *Harvard Law Review* 13, 14.

<sup>20</sup> This is chronicled at length in Lazarus' book, which describes a 'cabal' of 'self-consciously coordinated' conservative clerks: Edward Lazarus, *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court* (2005) 265–75.

principle in opinion assignment, adopted in 1950 first by Chief Justice Fred Vinson and more fully by Chief Justice Earl Warren, to even out the workload of each justice, with clerks taking up the slack for the more 'methodical' justices.<sup>21</sup> In order to distinguish between writing responsibilities, Ward and Weiden produce a typology of clerk opinion-writing. This categorises practices of:

- 1 delegation: where the justice assigns the opinion to the clerk and later revises the draft;
- 2 retention: where the justice writes the opinion and the clerk provides citations, footnotes and editing; and
- 3 collaboration: where both justice and clerk work in tandem toward the construction of the opinion.<sup>22</sup>

They contend that, since 1950, practices of retention have given way to delegation, and cite one commentator's description of the attempt by a justice to draft his or her own opinion as 'something of a quaint idiosyncrasy'.<sup>23</sup> In Chief Justice William H Rehnquist's own words, justices' chambers have become 'opinion writing bureaus'.<sup>24</sup>

As well as providing the detail and origins of these trends in clerking, Ward and Weiden extend their research to law clerk selection. They document the increasing competition to secure one of the coveted 36 places (now numbering over 1000 applications per term), and the rather homogenous coordinates along the path to a clerkship, which includes admission to an elite law school (traditionally Harvard, but increasingly broadened to other schools),<sup>25</sup> excellent academic performance, law review membership and having undertaken a prior clerkship for the right court or judge.<sup>26</sup> In this latter respect, they examine how a few trusted 'feeder' judges supply a disproportionate number of clerks to the Supreme Court, by recommending their own selected (although not yet employed) clerks.<sup>27</sup> In true US style, the authors provide a ranking of feeder justices on their placement success rate, with the top spot going to Fourth Circuit Judge J Michael Luttig (who by 2002 had placed 30 of his clerks on the Rehnquist Court).<sup>28</sup> The authors also discuss the ideological congruence between 'conservative' and 'liberal' feeder judges and their beneficiary justices.<sup>29</sup>

<sup>21</sup> Ward and Weiden, above n 1, 42, 203–4.

<sup>22</sup> Ibid 213 table 5.1.

<sup>23</sup> Ibid 46, citing John Oakley, 'Defining the Limits of Delegation' (1995) 3 *The Long Term View* 86.

<sup>24</sup> Ibid 224, citing Justice William H Rehnquist, 'Are Old Times Dead?' (Mac Swinford Lecture delivered at the University of Kentucky, Lexington, 23 September 1983).

<sup>25</sup> Ibid 72 table 2.4. While almost one-third of clerks come from Harvard University, almost half from Harvard University and Yale University, and almost three-quarters from only seven schools across the US, these statistics actually reveal a widening number of 'clerk-producing schools' beyond the Ivy League.

<sup>26</sup> Ibid 76–85.

<sup>27</sup> Ibid 83.

<sup>28</sup> Ibid 81–2 table 2.9.

<sup>29</sup> See, eg, ibid 82–5. Judge Luttig's clerks, for example, were only placed with the Court's five most conservative members, Chief Justice Rehnquist, Justices O'Connor, Scalia, Kennedy and Thomas. With Judge Luttig's retirement, Judge Guido Calabresi of the Second Circuit assumes the top post, whose clerks mostly go on to the more liberal justices: at 82.

This picture is made more complete by Ward and Weiden's 'outing' of the hiring practices of all justices. They provide data on the overwhelming trend of employing young white males, the slow and uneven appointments of women and racial minorities (beginning in 1944 and 1948 with the first female and African-American law clerks respectively, followed by 1966 and 1967 for the second).<sup>30</sup> They also reveal surprising data, such as that Justice William Brennan never hired an African-American clerk in the three decades he spent on the bench.<sup>31</sup> Amongst the current Court, gender diversity is now important to a few justices, although only Justice Stephen Breyer has reached a 50 per cent rate of employing female clerks,<sup>32</sup> and the rest of the Court is very much out of step with the present reality that nearly 50 per cent of all law school graduates are women.<sup>33</sup> Racial diversity is reportedly important to all justices, yet the percentage of clerks from racial minorities remains low.<sup>34</sup>

According to Ward and Weiden, the evolving role of the Supreme Court clerk has undergone a number of key temporal 'breaks' or 'transformations': in particular, in 1918–19, 1941–42 and 1969–70.<sup>35</sup> These dates are notably unconnected to the watershed terms of 1937 and 1954 (of the New Deal 'switch'<sup>36</sup> and of *Brown v Board of Education of Topeka*<sup>37</sup> respectively), or the overtly partisan judicial appointments of the 1930s and 1940s (by Democrats) and the 1980s and 1990s (by Republicans).<sup>38</sup> At base, these breaks occur when the number of clerks per justice was expanded by statute — from a single clerk for each justice, funded by Congress, in 1919, to two in 1942, to three (and later four) in 1970.<sup>39</sup> At each juncture, Ward and Weiden claim that clerks have enjoyed an ever greater collective influence, and are now 'turning the process of judging on its head'.<sup>40</sup>

If their major thesis is law clerk transformation, Ward and Weiden's minor theses are equally bold. During the course of the book, they attribute the number of separate opinions in the Court to the clerks themselves, contending that this

<sup>30</sup> See, eg, *ibid* 90 table 2.11, 95 table 2.13.

<sup>31</sup> *Ibid* 96.

<sup>32</sup> *Ibid* 92 table 2.12.

<sup>33</sup> See Linda Greenhouse, 'Women Suddenly Scarce among Justices' Clerks', *The New York Times* (New York), 30 August 2006, A1.

<sup>34</sup> Ward and Weiden, above n 1, 97 table 2.14.

<sup>35</sup> *Ibid* 34, 36, 45.

<sup>36</sup> *West Coast Hotel Co v Parrish*, 300 US 379 (1937) which upheld the constitutionality of minimum wage legislation, overturning *Adkins v Children's Hospital*, 261 US 525 (1923) with the vote of Justice Owen Roberts; *National Labor Relations Board v Jones & Laughlin Steel Corporation*, 301 US 1 (1937) which upheld the constitutionality of the *National Labor Relations Act of 1935*, ch 372, 49 Stat 449 ('*Wagner Act*'). These cases effectively put an end to the activism of the Court in striking down economic regulation, exemplified by *Lochner v New York*, 198 US 45 (1905).

<sup>37</sup> 347 US 483 (1954) which held the longstanding practice of segregation of white and black school children unconstitutional.

<sup>38</sup> See, eg, Jack M Balkin and Sanford Levinson, 'Understanding the Constitutional Revolution' (2001) 87 *Virginia Law Review* 1045, 1070–7, who describe 'partisan entrenchment' as a key feature of constitutional change and emphasise the 'revolutions' effected by Presidents Franklin D Roosevelt and Ronald Reagan.

<sup>39</sup> Ward and Weiden, above n 1, 34, 36, 45.

<sup>40</sup> *Ibid* 249.

practice began to rise after clerks' time was freed up by the cert pooling system.<sup>41</sup> They suggest that the increased length of judgments, their overburdened footnotes and their sometimes equivocal tone all stem from delegation to novice lawyers.<sup>42</sup> The authors also suggest that the pooled cert memoranda are less likely to result in a grant of cert by the Court, not only because of the clerks' timidity in writing for many justices, but also because of the clerks' deliberate omission of dissenting views in lower courts, which they attribute to an unchecked partisanship.<sup>43</sup> This leads them to claim that 'the expansion of the cert pool is largely responsible for the steady decrease during the Rehnquist Court of the number of cases granted review and subsequently decided.'<sup>44</sup> These claims seem overstated. Some of the trends in the Supreme Court's output — such as an increasing number of separate opinions and longer judgments — are themselves contested.<sup>45</sup> The declining caseload is as striking as it is undisputed — and yet it is more reasonably traced to factors not mentioned by Ward and Weiden, such as the lesser conflicts between circuit courts in recent years, itself a result of many consecutive Republican appointments or, as one participant recently described it, an increased 'professionalism' and 'centrism' in lower courts.<sup>46</sup> Alternatively, the declining case load may be a result of litigants' choices not to pursue cases on certain issues, or of Supreme Court justices' own reluctance to pronounce judgment over lower courts, of which they are more often than not veterans.

Throughout the book, the authors draw on an interesting historiography of the Supreme Court. Their most helpful sources are the personal papers of retired Supreme Court justices, including the recently released papers of Justice Harry Blackmun, as well as those of Justices Thurgood Marshall and Lewis Powell. Indeed, these sources give rise to the book's best material, including the case study of the Court's internal wrangling in *Planned Parenthood of Southeastern Pennsylvania v Casey* ('Casey').<sup>47</sup> The authors describe the careful steps taken in developing the Court's abortion jurisprudence, from the initial deliberation on whether to grant cert (and thereby reopen *Roe v Wade*),<sup>48</sup> to the coordination of the final opinion and its delivery before the Presidential election.<sup>49</sup> This case study reveals a clear tendency of clerks — and justices — to analyse the political

<sup>41</sup> Ibid 45–6.

<sup>42</sup> Ibid 231–2.

<sup>43</sup> Ibid 133, 143.

<sup>44</sup> Ibid 240.

<sup>45</sup> See, eg, Judge Richard A Posner, 'The Supreme Court 2004 Term — Foreword: A Political Court' (2005) 119 *Harvard Law Review* 31, 68–9 figs 4, 6, which suggest a decline, after spikes in the 1970s and 1980s, in the number of separate Supreme Court opinions, and a current trend towards a smaller average length of opinion.

<sup>46</sup> Ibid 70–1. Judge Posner also refers to the use of computerised research tools, surely a factor which has transformed practice in both federal courts and the Supreme Court, and which Ward and Weiden fail to mention.

<sup>47</sup> 505 US 833 (1992). See also Ward and Weiden, above n 1, 173–84. *Casey* reaffirmed a woman's right to an abortion before foetal viability, but invoked a less stringent 'undue burden' standard of review and replaced the trimester framework devised in *Roe v Wade*, 410 US 113 (1973).

<sup>48</sup> 410 US 113 (1973), which held that a woman's decision to end her pregnancy is constitutionally protected.

<sup>49</sup> Ward and Weiden, above n 1, 173–84.

consequences of the Supreme Court's decisions as well as the legal.<sup>50</sup> The authors also make passing references to some of the particularly interesting contributions clerks have made, such as the drafting of the famous 'Footnote 4' of *United States v Carolene Products Co.*<sup>51</sup> This footnote arguably inspired the most influential theory of judicial review in US constitutional history by suggesting a 'more exacting judicial scrutiny' in order to protect 'discrete and insular minorities' in the democratic process.<sup>52</sup> Another example provided is a young William Rehnquist's bench memorandum, written during his clerkship with Justice Robert Jackson, submitting that the 'separate but equal' doctrine of *Plessy v Ferguson*<sup>53</sup> 'was right and should be reaffirmed.'<sup>54</sup>

For regular US court-watchers, such anecdotes are hardly scoops — most are taken from secondary material and have long since become Supreme Court folklore — and it is a drawback of the book that they are quickly buried under the authors' greater penchant for tables and graphs. Readers wanting to fill in their picture of Supreme Court decision-making are in fact better served by the more elaborate hagiographies written by former clerks (and usually published after their justices' tenure), if not the sensationalist but often erroneous suggestions contained in the 'tell-alls'.<sup>55</sup> Ward and Weiden purport to offer a more factitious model of the institution of the law clerk; and yet, just as for the page-turners, it is necessary to read between the lines.

<sup>50</sup> See, eg, Ward and Weiden, above n 1, 269–72. It was stated in Memorandum from Molly McUsic to Harry A Blackmun, 'Re: Certiorari Petition, *Planned Parenthood v Casey*', 4 January 1992, cited in Ward and Weiden, above n 1, 173 that: 'If you believe that there are enough votes on the Court now to overturn *Roe*, it would be better to do it this year before the [1992 US presidential] election and give women the opportunity to vote their outrage.'

<sup>51</sup> 302 US 144, 152 (Stone J) (1938). See also Louis Lusky, "'Footnote Redux": A *Carolene Products* Reminiscence' (1982) 82 *Columbia Law Review* 1093; Ward and Weiden, above n 1, 203.

<sup>52</sup> *United States v Carolene Products Co*, 302 US 144, 152 (Stone J) (1938); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) presenting a process-based justification for judicial review. Ely himself acknowledges the clerk's contribution: at 76.

<sup>53</sup> 163 US 537 (1896).

<sup>54</sup> See Ward and Weiden, above n 1, 41, where the authors make reference to a controversial memorandum written by Rehnquist while he was a law clerk for Justice Robert H Jackson: 'A Random Thought on the Segregation Cases' (1952). *Plessy v Ferguson*, 163 US 537 (1896) gave rise to the 'separate but equal' rationalisation for segregation (of transportation) which would withstand several challenges until *Brown v Board of Education of Topeka*, 347 US 483 (1954). Ward and Weiden do not note that Rehnquist subsequently distanced himself from the memorandum: Hearings before the Senate Committee on the Judiciary on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States, United States Congress, Washington DC, 29–31 July and 1 August 1986, S Hrg 99–1067, 1159–60 (Justice William Hubbs Rehnquist).

<sup>55</sup> See, eg, David J Garrow, "'The Lowest Form of Animal Life'?: Supreme Court Clerks and Supreme Court History' (1998) 84 *Cornell Law Review* 855, 875, which reviewed Lazarus, above n 20, and compared it with other published sources. Lazarus changed his subtitle the year after its publication, from *The First Eyewitness Account of the Epic Struggles inside the Supreme Court* to *The Rise, Fall, and Future of the Modern Supreme Court*.

## III

When reflecting on his own clerking experience, Justice Byron White reported:

When I served as a clerk, I don't think anything I ever did or said influenced my Justice. I felt I was doing Chief Justice Vinson a service by making sure that relevant considerations were placed before him, such as opinions from other courts, law journals, ideas of my own — things he wouldn't have time to dig up on his own.<sup>56</sup>

Influence, he submitted, was absent. Yet an important service was being performed. Two things are striking about Justice White's description. The first is its refusal to equate important work with influence. This statement begs the questions that underlie the literature about the clerkship role. When do the contributions of a clerk become 'influence'? At what line does influence become 'undue'?<sup>57</sup> The second is the way the clerking role appears so analogous to the role of legal counsel in an adversarial system — of placing relevant material before the judge. Of course, the big difference is that clerks, unlike counsel, have not been employed to argue for one particular side. So for whom are they advocating? Is private counsel legitimate? Or is it more appropriate to draw clerking analogies from court personnel — like masters, registrars or auditors — who aid in the exercise of judicial power without themselves wielding it?

While judicial power is vested in courts according to strict separation of powers principles,<sup>58</sup> some judicial functions may be delegated to court officers acting under the supervision and control of the judges themselves.<sup>59</sup> Ward and Weiden do not examine these other court roles and their coexistence with separation of powers principles, and their concrete proposals for reforming the clerkship seem institutionally obtuse. For example, whilst endorsing greater clerking neutrality, diversity and modesty, they make the surprising proposal that clerks publish their cert memoranda, and be subject to the discipline of the public eye<sup>60</sup> — surely a recipe for increasing clerk power rather than limiting it.<sup>61</sup> Other prescriptions

<sup>56</sup> Richard L Williams, 'Justices Run "Nine Little Law Firms" at Supreme Court' (February 1977) 7(11) *Smithsonian* 84, 88, cited in Ward and Weiden, above n 1, 245.

<sup>57</sup> Such a question is addressed, although again from a narrow perspective, in the rival publication on clerks which came out in 2006: Todd C Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (2006), which tests a principal-agent hypothesis of clerking.

<sup>58</sup> *United States Constitution* art 3; see also *Australian Constitution* ch III.

<sup>59</sup> In both jurisdictions, this question has arisen in the context of court personnel other than clerks: see, eg, *Ex parte Peterson*, 253 US 300, 312–13 (Brandeis J) (1920), which permitted delegation to an auditor. Brandeis J observed that '[c]ourts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties': at 312. See also *Harris v Caladine* (1991) 172 CLR 84, 94–5, where Mason CJ and Deane J held that delegation to a registrar is permissible when judges 'continue to bear the major responsibility for the exercise of judicial power' and where 'decisions of the officers of the court in the exercise of the delegated jurisdiction, powers and functions [are] subject to review or appeal by a judge or judges of the court'.

<sup>60</sup> Ward and Weiden, above n 1, 247.

<sup>61</sup> Although the rejection of cert by the Supreme Court (like the rejection of leave by the High Court) is not supposed to indicate necessarily settled law, there is a tendency for it to work this way in practice.



made are conflicting (although none are as problematic).<sup>62</sup> In the end, these misfirings probably lie in the greater failure of the book to grasp that conclusions about clerking actually depend upon how one understands the practice of judging.

For example, one theory of judging emphasises legalism. The broad contours of legalist theory portray judges as deciding cases on the basis of legal precedent, with recourse to some neutral principles to develop any gaps or ambiguities. The best clerks for assisting in the legalist endeavor are those with the best legal qualifications; issues of clerk diversity are mere distractions, or worse, obstacles to impartiality. In fact, a graduate with a record of well-developed research and writing experience (much like a former clerk of Justice Ruth Bader Ginsburg, who at 57 had been a law professor for three decades) would be the most ideal. The completion of prior clerkships would also be important. Clerks' participation in legal writing, and their assistance in decision-making, would all be welcome aspects of clerking practice, as long as their contributions were confined to the law.

A second theory is legalism's oft-quoted opposite: realism. To sketch this theory in similarly simplified terms, realists assert that judges decide their cases on the basis of ideological preferences, which they cloak in legal argument. Because they are appointed by political parties in power, they often reflect partisan ideologies, and decide their cases along liberal or conservative lines, by party allegiance or by a more implicit acceptance of particular policy preferences. One way to accommodate this political element of judging (and it can only be accommodated, never removed) might be to diversify clerks, joining liberal justices with conservative clerks, and vice versa, or at least create a range of perspectives in each clerking team.<sup>63</sup> Another way might be to attempt to ensure that clerks mirror their justice's ideology, and then diversify the justices (which accords with the current feeder system). At the very least, criteria should regulate the professional backgrounds of clerks. It might be critically important to restrict, for example, the ability of Justice Samuel Alito to hire clerks from John Ashcroft's office.<sup>64</sup>

The problem with the first theory is that it is implausible. There is no denying that the justices of the Supreme Court approach decision-making with their own constitutional-legal visions in place — visions which are both political and ideological and not reducible to law. So much at least is revealed in the portrayal by Ward and Weiden of the justices' stratagem in *Casey*.<sup>65</sup> The problem with the

<sup>62</sup> For example, the authors suggest that an emphasis on consensus building may diminish the clerks' ambitions to generate their own opinions, and yet also point to the merits of embargoing interactions between clerks: Ward and Weiden, above n 1, 248.

<sup>63</sup> Justice Scalia has reportedly followed a practice of employing both liberal and conservative clerks each year. However, blogs which post on the minutiae of Supreme Court practice report a recent five-year gap in hiring liberal clerks: see, eg, the comments posted by Paul Horwitz, *Obsequiousness and Former Law Clerks* (19 April 2005) PrawfsBlawg <[http://prawfsblawg.blogs.com/prawfsblawg/2005/04/obsequiousness\\_.html](http://prawfsblawg.blogs.com/prawfsblawg/2005/04/obsequiousness_.html)>.

<sup>64</sup> Justice Alito faced some criticism for his appointment of a 37 year old former clerk who had also worked for John Ashcroft in the US Senate and the Department of Justice and then later as a senior lawyer at Time Warner: see Adam Liptak, 'New Clerk for Alito Has a Long Paper Trail', *The New York Times* (New York), 19 February 2006, 14.

<sup>65</sup> Ward and Weiden, above n 1, 173–84.

second theory is that it is also inapt. There are no straight lines between justices' ideology and the partisan politics of their Republican and Democratic appointers. Witness *Grutter v Bollinger*<sup>66</sup> and *Lawrence v Texas*,<sup>67</sup> decisions of the Rehnquist Court as constituted by five Reagan and Bush Sr appointees, two other Republican, and two Democrat appointees.<sup>68</sup> Such anomalies are not really strange. In the self-perception of justices themselves, deciding on ideological grounds is something they do not do. Furthermore, aside from the oft-made point that judges' positions often evolve during their tenure at the highest court, it is worth recognising that the legal (and political) philosophies that guide their decisions are notoriously complex: they are not simply conservative or liberal.<sup>69</sup> Conservatism can divide on the importance of states' rights versus individual property or standing.<sup>70</sup> Liberalism can be split over racial justice and cognisable state action. Both can waver over the merits of rules, a judicial method advanced by Justice Scalia, versus that of balancing, adopted by Justice O'Connor.<sup>71</sup>

Where does this leave our theory of clerking? Should we avoid the overstatements of realism by a retreat to legalism? Should we just ask clerks to 'do law'?

One way to overcome the binaries of the legalist–realist position is to accept a more complex theory of judging. For example, we do not have to deny that there will be cases before the Supreme Court which reverberate broadly, fiercely — and inevitably — with US politics. We may recognise that there is no formula for the Court to manage a dialogue with the public which captures a legal, rather than political tone. And yet we may concede that there is something to be gained by withdrawing 'some issues from the battleground of power politics to the forum of principle',<sup>72</sup> and forging some space for political dialogue and even, in some cases, education.<sup>73</sup> We may thus accept that the accommodation of the broader political culture into the law — especially, it might be said, constitu-

<sup>66</sup> 539 US 306 (2003) upholding affirmative action admissions policy for underrepresented minorities in legal education.

<sup>67</sup> 539 US 558 (2003) striking down the criminal prohibition of homosexual sodomy in Texas and 12 other states.

<sup>68</sup> See, eg, Charles Lane, 'Civil Liberties Were Term's Big Winner; Supreme Court's Moderate Rulings a Surprise', *The Washington Post* (Washington DC), 29 June 2003, A1 stating that 'the affirmative action and gay rights cases set the tone, and the disappointment at those rulings among conservatives was palpable — comparable, in its own way, to the disgust liberals expressed with the court after *Bush v Gore*.'

<sup>69</sup> But see Ward and Weiden, above n 1, 104: 'Justice ideology is measured by the average percentage of liberal policy decisions on criminal procedure, civil rights, and First Amendment cases.'

<sup>70</sup> See, eg, *Massachusetts v Environmental Protection Agency*, 127 S Ct 1438 (Unreported, Roberts CJ, Stevens, Scalia, Kennedy, Souter, Thomas, Bader Ginsburg, Breyer and Alito JJ, 2 April 2007).

<sup>71</sup> Kathleen M Sullivan, 'The Justices of Rules and Standards' (1992) 106 *Harvard Law Review* 22, 122, notes that while the judicial philosophy which invokes standards tends to be centrist in character, and the philosophy of rules moves toward the poles, 'the political valences of rules and standards are contingent because ideological poles may be located either on the right or the left.'

<sup>72</sup> Ronald Dworkin, *A Matter of Principle* (1985) 71.

<sup>73</sup> Christopher Eisgruber, 'Is the Supreme Court an Educative Institution?' (1992) 67 *New York University Law Review* 961.

tional law — is not only unavoidable, but also vital to its continuing legitimacy.<sup>74</sup>

Such a theory is better able to explain the clerks' wide-ranging memoranda, examined by Ward and Weiden, in the politically charged decisions of *Casey*,<sup>75</sup> *Regents of the University of California v Bakke*,<sup>76</sup> and *McClesky v Kemp*.<sup>77</sup> It is also better able to accommodate the instinct — documented but not examined by Ward and Weiden — that the selection of clerks is important, and that their backgrounds should matter. Such selection may not resolve the hard questions of who judges are and how they understand their role; but a diverse selection of clerks may, in some small way, trigger the perspectival shifts in justices' own interpretation of law, by allowing previously unvoiced experiences to be present. To be clear, this view does not depend upon a representative clerk corps: we expect clerks, just like justices, to act as officers not representatives. We would lose much of the elusive 'legitimacy' of law if judges decided according to some gendered or (multi)cultural mandate. Yet we expect them to decide according to experience, and with a perspective which is open — and empathic — to the range of situations that are likely to come before them.<sup>78</sup> Diversity of outlook, rather than of representation, is why a court without a single female member is so fundamentally unsatisfactory.

This is not to say that the diversity of clerks may substitute for the diversity of justices. As we find in Ward and Weiden's description, constraints operate. For instance, we learn that Justice Powell, who changed his mind a week after the judicial conference to provide the fifth vote in the Court's 1986 decision to uphold a state law criminalising gay sex,<sup>79</sup> had remarked to Justice Blackmun, 'Harry, I've never known a homosexual in my life'. The comment was sincerely meant, if incorrect: at that point in time, two of Justice Powell's clerks were gay.<sup>80</sup>

Finally, a theory of the Court's inevitable dialogue with the wider culture might make it important to understand the career trajectories of clerks. Although we are told that many clerks follow their justices' footsteps into the judiciary, or enter into other prominent public or private roles, there is a lot of information that Ward and Weiden leave unmined. We find out that previous clerkships are required, but not whether experience in foreign legal systems is valued.<sup>81</sup> The

<sup>74</sup> Robert C Post, 'Fashioning the Legal Constitution — Culture, Courts, and Law' (2003) 117 *Harvard Law Review* 4, 8.

<sup>75</sup> 505 US 833 (1992).

<sup>76</sup> 438 US 265 (1978) striking down quota systems for college admissions but otherwise holding affirmative action constitutional. See also Ward and Weiden, above n 1, 44–6, 153.

<sup>77</sup> 481 US 279 (1987) refusing to invalidate death sentence despite evidence of profound racial disparity in application of death penalty. See also Ward and Weiden, above n 1, 162.

<sup>78</sup> Frank I Michelman, 'Dilemmas of Belonging: Moral Truth, Human Rights, and Why We Might Not Want a Representative Judiciary' (2000) 47 *UCLA Law Review* 1221, 1224; Judith Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges' (1988) 61 *Southern California Law Review* 1877.

<sup>79</sup> *Bowers v Hardwick*, 478 US 186 (1986); cf *Lawrence v Texas*, 539 US 558 (2003).

<sup>80</sup> Ward and Weiden, above n 1, 98–9.

<sup>81</sup> One Supreme Court clerk previously clerked at the Supreme Court of Canada. Information about this practice, or any expertise in foreign education by clerks, does not appear in *Sorcerers' Apprentices*.

authors do not comment on the entry rate of clerks into the elite corporate law firms, where they receive a US\$200 000 signing bonus on the completion of their clerkships.<sup>82</sup> This contrasts jarringly with the US\$212 100 remuneration accorded to Chief Justice Roberts.<sup>83</sup> Such facts show a different range of incentives and expectations operating on clerks, and a different perspective on how clerking may be an apprenticeship into the legal profession rather than an apprenticeship in the law.

#### IV

The great interest for the Australian reader of *Sorcerers' Apprentices* surely lies in the fruits of comparison with our own High Court. Certainly, in matters of public law, comparativism has become the name of the game. For the intricacies of constitutional design, as well as for the substantive constitutional theories through which the law is shaped, the value of reaching outwards to compare different constitutions with our own is increasingly recognised.<sup>84</sup> The institutional details underlying the practice of judicial review in the High Court of Australia may be richly contrasted with the constitutional systems in operation in Canada, Germany, India, New Zealand, South Africa, the UK and the US, and more challengingly, but no less fruitfully, with Europe's quasi-constitutional order or that established by the United Nations. The list is in fact as endless as are the methodological hazards, which are different for academics and judges. The US, once an unreliable comparativist — equal parts parochial and patronising — has itself become a more reflective and perhaps less exceptional participant.<sup>85</sup>

In the best version of comparison, we may ask whether the empirical insights contained in *Sorcerers' Apprentices* help us to reflect differently on our own High Court and the role of the associates working within it. Do they signal a greater need for transparency on the part of the High Court? Do they suggest important reforms? Or do they offer a negative model that the High Court would do well to avoid,<sup>86</sup> and even take steps to counter?

<sup>82</sup> This is added to the initial salary, which lies between \$145 000 and \$160 000: Dahlia Lithwick, 'No Justice in These Pay Scales', *The Washington Post* (Washington DC), 11 March 2007, B01.

<sup>83</sup> Ibid. As Justice Anthony M Kennedy reported to the Senate Judiciary Committee: 'Something is wrong when a judge's law clerk, just one or two years out of law school, has a salary greater than that of the judge or justice he or she served the year before.' See Testimony to the Committee on the Judiciary, United States Senate, Washington DC, 14 February 2007 (Anthony M Kennedy). For a more general discussion of consequences of declining judicial pay in the US relative to the pay of average American workers and legal academics: see John Roberts, *2006 Year-End Report on the Federal Judiciary* (2007).

<sup>84</sup> See, eg, Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 118–262; Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006).

<sup>85</sup> See, eg, Harold Hongju Koh, 'On American Exceptionalism' (2003) 55 *Stanford Law Review* 1479. See also Norman Dorsen, 'The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3 *International Journal of Constitutional Law* 519.

<sup>86</sup> Kim Lane Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models' (2003) 1 *International Journal of Constitutional Law* 296, 300.

This version of comparison is more reflective than prescriptive, and therefore relaxes the requirement of functional or historical resemblance when jurisdictions with admittedly great differences are put together in the same study. Accordingly, in this brief review essay the considerable variations between the US and Australian systems are no barrier to our contemplation of the institution of the judicial associate at the highest court in Australia.

In the first place, comparison may be entertained because the US law clerkship and the Australian associateship bear a simple family resemblance. The two final 'federal Supreme Courts' entertain certain similarities. Each Court operates under the pressure of a busy and varied docket, with the High Court's seven justices standing in place of the Supreme Court's nine.<sup>87</sup> They each hear matters of federal law, through both constitutional and appellate jurisdiction, although the High Court also reviews appeals from the state Supreme Courts.<sup>88</sup> The special leave process in Australia has developed in the direction of the US model of cert,<sup>89</sup> although it deals with a smaller overall number of applications.<sup>90</sup>

Finally, each Court appoints recent law graduates for one-year terms, to assist in their research tasks, with the usual employment of two associates per justice in the High Court to the Supreme Court's four. In fact, it seems the role evolved from similar origins, with the rather measured (and even nepotistic)<sup>91</sup> apprentice clerkships giving way to a more focused and well-known institution, with a particular professional cachet. Etymologically speaking, 'law clerking' was used in Australia (and in other Commonwealth countries) to refer to the supervised 'articles of clerkship' position undertaken by recent graduates in law firms before admission to the bar.<sup>92</sup> Notwithstanding the more exalted title of 'associate', traces of the apprenticeship idea are recognisable in the Australian position. Australian associates work long hours and debate particular cases with other associates, usually defending their own justice's position. They act within the same strict norms of confidentiality, and the lack of public literature on this

<sup>87</sup> The High Court has numbered seven justices since 1946. H V Evatt, then Attorney-General, successfully persuaded Cabinet not to expand the Court to nine: Troy Simpson, 'Appointments That Might Have Been' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 23, 25.

<sup>88</sup> *Australian Constitution* s 73.

<sup>89</sup> See *Judiciary Amendment Act [No 2] 1984* (Cth), which abolished appeals to the High Court as of right in 1984.

<sup>90</sup> The 2005–06 term recorded 58 grants of civil and criminal special leave applications, out of a total 720 filed. The Court was presented with 50 constitutional writs and heard one. It also heard 12 constitutional and other full court matters: High Court of Australia, *Annual Report 2005–2006* (2006) 89 table 2, 90 table 4, 94 table 12, 100 table 20. Cf Schauer, above n 8.

<sup>91</sup> Ward and Weiden, above n 1, 290 fn 72, noting that Justice John Marshall Harlan's first clerk was his son, and another of his sons clerked for Chief Justice Melville Weston Fuller. Justice William R Day selected his two sons as law clerks. In Australia, one of the first associates was Justice Griffith's son, and later justices employed relatives or the children of friends: see Andrew Leigh, 'Behind the Bench: Associates in the High Court of Australia' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 34, 34.

<sup>92</sup> See, eg, *Legal Profession Act 2004* (Vic) s 1.2.1, which includes 'articles of clerkship' as part of 'practical legal training'. Barristers' clerks and seasonal clerks refer to different roles.

subject in Australia indicates that they might be more disciplined than their US counterparts.<sup>93</sup>

And yet, *Sorcerers' Apprentices* suggests that the details of the clerking role are quite different. Comparing directly the triad of practices which provide the opportunity for influence by US clerks — cert granting, decision-making and writing opinions — Australian associates appear to enjoy a different level of responsibility at each stage, at least in the forms analysed by Ward and Weiden.

For the special leave process, associates may draft memoranda, but their role is less central than that enjoyed by clerks. It is worth noting that the notion of 'agenda setting' through grant of leave is something of a heresy in Australia, where the special leave process is regarded more as a case of filtering out unwarranted cases than of choosing favoured ones.<sup>94</sup> Associates do not pool their memoranda, and do not vet special leave applications before they come to the attention of justices. In 2005, the High Court created a new role, that of Special Assistant to the Chief Justice and justices of the High Court of Australia, which has no equivalent in the US Supreme Court.<sup>95</sup> Amongst other responsibilities, the Special Assistant may provide a preliminary review of leave applications, especially the applications of self-represented litigants, whose filings, like the *in forma pauperis* process in the US Supreme Court, far exceed those of represented litigants.<sup>96</sup> Moreover, although some are now dealt with on the papers in accordance with recent changes to the *High Court Rules*,<sup>97</sup> leave applications continue to be allocated time for oral argument.<sup>98</sup> This procedure undoubtedly focuses the attention of justices in ways that are not available to cert petitioners in the Supreme Court.

Oral argument also accounts for a lesser degree of associate influence on judicial decision-making, and no doubt the relative dearth of claims of undue associate influence by court-watchers in Australia. Unlike the 30 minute rule for

<sup>93</sup> The duty of confidentiality of Supreme Court clerks was discussed most recently during the publicity surrounding *Bush v Gore*, 531 US 98 (2000), where a number of liberal law clerks who disagreed with the Court's ruling were quoted anonymously in a behind the scenes article appearing in *Vanity Fair*: see David Margolick, Evgenia Peretz and Michael Shnayerson, 'The Path to Florida', *Vanity Fair* (New York), October 2004, 310–23, 355–67, 369. Ward and Weiden describe how nearly 100 mostly conservative former clerks and current Court advocates condemned the clerks' divulgements in a joint letter published in the *Legal Times*: see Ward and Weiden, above n 1, 18.

<sup>94</sup> See Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (2006) 216, 217–23 contrasting the views of judges on the criteria for the grant of special leave with the more realist impressions of Australian barristers.

<sup>95</sup> It may have its comparisons, however, in Supreme Court history. In 1969, Chief Justice Burger created the office of 'General Law Clerk' to deal with the miscellaneous docket and burgeoning number of informal petitions. The solution was to be short-lived, and after a year developed into a plan to appoint an extra clerk for each justice: see Ward and Weiden, above n 1, 140–1. The cert pool was created shortly afterwards: at 141–2.

<sup>96</sup> See, eg, High Court of Australia, above n 90, 15 where it is documented that, in 2005–06, 63 per cent of civil applications for leave or special leave to appeal, and 74 per cent of applications for constitutional writs, were filed by self-represented litigants. The period for review is tabulated: at 96–7.

<sup>97</sup> *High Court Rules 2004* (Cth), which came into effect on 1 January 2005. In 2005–06, this led to the determination of approximately 50 per cent of applications on the papers: see High Court of Australia, above n 90, 15.

<sup>98</sup> *High Court Rules 2004* (Cth) r 41.11.3, which allocates 20 minutes per side as the default rule.

each side that applies to the Supreme Court,<sup>99</sup> oral argument in the High Court is not subject to a formal limit, and can extend, in unusual cases, through several days.<sup>100</sup> Justices' questions are therefore more likely to be addressed to counsel, although they may explore the issues with their associates as well. Associates also relay information between chambers, and more so between chambers where judges are issuing joint opinions, but there is little evidence of the high stakes diplomacy suggested by Ward and Weiden.

Finally, High Court associates do not regularly draft the opinions of their justices. They perform legal research for particular cases, either before a case is heard, during argument, or during the production of the judgment. In terms of Ward and Weiden's typology, the practice is more akin to retention — proofreading opinions, correcting typographical errors or legal ambiguities, and providing memoranda on discrete points, some parts of which may end up in an opinion. Other court officers, such as the library-based research officer, and the permanent copy editors, also assist. The research officer (a role initiated by Chief Justice Garfield Barwick in 1976), undertakes substantial research tasks, sometimes in collaboration with associates. These assignments have long included comparative legal research, as well as philosophical or historical examinations of particular doctrine.<sup>101</sup>

Associates in Australia also perform roles wholly foreign to their US counterparts. When acting as tipstaff, one associate sits behind their justice in court, at hand to furnish any material cited by counsel (and to witness the exchanges between bench and bar, courtly or otherwise). A rotating associate also acts as clerk of the court, sitting at an adjacent table to the bench, in order to hand up materials from the bar table and hand down judgments from the bench. Finally, associates assist the justices when on circuit, usually once per year in each state. Some associates work permanently in their justice's personal chambers (mostly in Sydney, but also in Melbourne and Brisbane) and travel to Canberra only for sittings.

What accounts for the differences between the Supreme Court clerk and the High Court associate? These, which I will roughly categorise in terms of form and content, make for an interesting speculation on the different institutional trajectory taken by the High Court associate in Australia. While there is much more comparison-worthy material between the two Courts than that presented here, I wish to focus particularly on those elements which have the most bearing on the development of the clerking/associateship role. Many of these differences raise interesting questions of cause and effect, and a rather different explanation of expansions in clerk power, from Ward and Weiden's favoured hypothesis of an expanded quota of clerks. For instance, High Court justices began employing

<sup>99</sup> *Rules of the Supreme Court of the United States* r 28.3, which allocates 30 minutes and notes that '[a]dditional time is rarely accorded'.

<sup>100</sup> The recent case *New South Wales v Commonwealth* (2006) 231 ALR 1 ('*Workplace Relations Challenge*') was held over six days: see *New South Wales v Commonwealth* [2006] HCATrans 215–18 (4–5, 8–11 May 2006). It also set a record for the number of counsel to appear (39, including 16 Senior Counsel): see High Court of Australia, above n 90, 13.

<sup>101</sup> Amelia Simpson, 'Research Assistance' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 600, 600, citing the example of research undertaken on the proportionality principle in the European Union.

two associates, substituting an associate for their tipstaff, in the early 1990s, and although this was undoubtedly a time of transformation in the High Court, no studies (so far) of the influences on the Mason Court have suggested that the increase in associates was one of them.<sup>102</sup>

First, aside from the other procedures mentioned above, it is clear that the time given over to oral argument bears a significant influence on the participation of associates in cases. Proposals to restrict argument — for example, Chief Justice Gerard Brennan had been in favour of introducing limits — have proved unpopular with justices (and unsurprisingly with counsel).<sup>103</sup>

Secondly, the compulsory retirement of High Court justices at age 70 may have indirectly controlled the institution of associateship. Unlike the US Supreme Court, which equates life tenure with judicial independence, High Court justices are required to make way for younger judges in order to maintain the dynamism and vigour of the Court.<sup>104</sup> While the choice of 70 has generated controversy in the past — and there is no doubt that some justices have left the position in their judicial prime (which has actually benefited a number of courts and tribunals around the world on which they go on to serve) — the practice of compulsory retirement at least deflects the suggestion, recounted in Ward and Weiden, that clerks enable their septuagenarian and octogenarian justices to keep up the appearance of their judicial duties by substituting their own work.<sup>105</sup> The constitutional amendment of 1977, which ended the practice of life tenure in Australia,<sup>106</sup> may have unintentionally kept associates from assuming this type of role.<sup>107</sup>

Thirdly, the appointment process in the two Courts has indirectly influenced the public attention paid to associates versus clerks. Judicial appointments in Australia are formally made by the Governor-General, on the advice of the Attorney-General following a decision by Cabinet. These decisions, which are subject to little constraint,<sup>108</sup> attract media speculation and legal commentary, and many appointments have been contentious. Yet it was not until 1997, after Deputy Prime Minister Tim Fischer's announced intention for a 'capital C

<sup>102</sup> See, eg, Pierce, above n 94, ch 6.

<sup>103</sup> Stephen Gageler, 'Role of Counsel' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 167, 168.

<sup>104</sup> Rebecca Craske, 'Retirement of Justices' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 604, 604–5.

<sup>105</sup> David Savage, *Turning Right: The Making of the Rehnquist Supreme Court* (1992) 73, cited in Ward and Weiden, above n 1, 207, report the statement of a former clerk for Justice Thurgood Marshall when he was 78 years old, that '[h]e didn't write anything my year, but I still think he could'.

<sup>106</sup> *Australian Constitution* s 72. The High Court had interpreted s 72 (before its amendment) to accord with life tenure, Isaacs and Rich JJ reasoning that 'the independence of the tribunal would be seriously weakened if the Commonwealth Parliament could fix any less permanent tenure than for life, subject to proved misbehaviour or incapacity': see *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 469–70.

<sup>107</sup> Age might have factored in the reverse way in relation to associates' potential for influence: they tend to be a couple of years younger than US clerks, because of the different entry requirements for the LLB and JD degrees, and the infrequency of having worked as associates in other courts.

<sup>108</sup> *High Court of Australia Act 1979* (Cth) s 7, restricting appointment to persons who have been a judge or enrolled for at least five years as a legal practitioner in Australia.



Conservative',<sup>109</sup> that the appointment process — and with it, the role of the Court — became more overtly politicised. While this review essay is not the place to examine the chicken and egg question of whether the Court's native title jurisprudence first fuelled this politicisation,<sup>110</sup> it is significant to acknowledge that the more public starting point of US Supreme Court appointments — who must be nominated by the President and confirmed with the 'advice and consent' of the Senate<sup>111</sup> — only latterly evolved into its current spectacle of partisanship. This transformation — revealing itself most plainly during the special interest group lobbying and filibustering behind Robert Bork's nomination in 1987 — was at least as much due to Republican and Democrat reconfigurations as to the decisions of the Court.<sup>112</sup> In any event, such comparisons help us to place in their context the calls in the US for Senate confirmation of clerks.<sup>113</sup>

Fourthly, different norms of consensus have operated in the two Courts through time. The practice of producing a single 'opinion of the Court', introduced to the US Supreme Court by Chief Justice Marshall in the 1800s, is not followed in the High Court, which follows the English tradition of seriatim opinion writing.<sup>114</sup> In Australia, the virtues of joint and separate judgments are always in balance — where joint writing is understood to promote 'consensus, clarity, certainty, and stability', while separate writing (including concurrences and dissents) encourages 'individual responsibility, fluidity, difference, and diversity'.<sup>115</sup> Because of the lesser pressure towards consensus, it may be that skills of diplomacy are less required of High Court associates. Moreover, in both Australia and the US, consensus is promoted more directly through the judicial conference, which associates do not attend (although their memoranda might). The conference's success rates for promoting consensus have changed in various courts through time, but they are currently emphasised in both the Roberts Court<sup>116</sup> and the Gleeson Court.

<sup>109</sup> Niki Savva, 'Fischer Seeks a More Conservative Court', *The Age* (Melbourne), 5 March 1997, 1.

<sup>110</sup> Fischer's announcement came after *Wik Peoples v Queensland* (1996) 187 CLR 1. See David Solomon, *The Political High Court: How the High Court Shapes Politics* (1999) 35–7, describing the 'political uproar' around native title, but arguing that the Court was not responsible for its political divisiveness.

<sup>111</sup> *United States Constitution* art 2. Their nomination goes to the Senate Judiciary Committee, which holds hearings and invites nominees to give testimony, with successful candidates proceeding to confirmation by Senate vote.

<sup>112</sup> See, eg, Balkin and Levinson, above n 38, 1071, who claim that 'the ideological centers of the major parties shift over time ... the Republican Party today is far more conservative than it was in 1968 or in 1975'.

<sup>113</sup> See the call by Senator John C Stennis for a return to career appointments for clerks, for minimum statutory qualifications and for Congress to 'determine whether or not Senate confirmation should be required for these positions of ever-increasing importance and influence': United States, *Congressional Debates*, Senate, 6 May 1958 (Senator John C Stennis), cited in Ward and Weiden, above n 1, 244.

<sup>114</sup> Paresh Kumar Narayan and Russell Smyth, 'The Consensual Norm on the High Court of Australia: 1904–2001' (2005) 26 *International Political Science Review* 147, 151.

<sup>115</sup> Michael Coper, 'Joint Judgments and Separate Judgments' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 367–9.

<sup>116</sup> It should be noted that Ward and Weiden's description ends with the Rehnquist Court.

Finally, we can turn to questions of content. No-one would disagree that the most obvious difference between the work of the two Courts is the presence of a Bill of Rights in the US. These substantive protections, which encompass the broad parameters of the First Amendment, due process and equal protection, require the Supreme Court, in the words of Justice Felix Frankfurter, 'to touch the nerve center of economic and social conflict'.<sup>117</sup> Certainly, the Supreme Court is embroiled in the ongoing US culture wars — from abortion, to affirmative action, to the death penalty. The Bush administration's response to terrorism has entered the docket,<sup>118</sup> and the question of same-sex marriage is waiting in the wings in Massachusetts.<sup>119</sup> While commentators are divided on the question of whether judicial review is a good or bad thing for liberal democracy,<sup>120</sup> (and this is not the place to enter into a debate on the subject, short of recognising that there are many *types* of judicial review), Australia is often held up as a last bastion of parliamentary sovereignty in a world moving inexorably towards bills of rights.

Nonetheless, the idea that the High Court is engaged in something different from judicial review is an overstatement. Although the implied freedom of political speech is often cited as the first and only foray into the world of judicially protected essentials,<sup>121</sup> there is no doubt that the imprint of the decisions of the High Court can be found in all spheres of Australian political, economic and social life. For example, judicial review has always existed to maintain federalism, and it has always been contentious. The best current example is, of course, the *Workplace Relations Challenge*, where the High Court construed the Commonwealth corporations power broadly, effectively diminishing the states' role in industrial relations.<sup>122</sup> This issue looms large for the Australian public, as it does for its political parties, underscoring the ideological

<sup>117</sup> Felix Frankfurter, *Mr Justice Holmes and the Supreme Court* (1938) 23.

<sup>118</sup> See, eg, *Hamdan v Rumsfeld*, 126 S Ct 2749 (Unreported, Roberts CJ, Stevens, Scalia, Kennedy, Souter, Thomas, Bader Ginsburg, Breyer and Alito JJ, 29 June 2007). David Hicks was the first person to be charged under the new *Military Commissions Act of 2006*, Pub L No 109–366, 120 Stat 2600, after the Supreme Court held that the Guantánamo military tribunals violated the *Geneva Conventions* (*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950)) and US law in *Hamdan v Rumsfeld*: John R Crook (ed), 'Australian Detainee Pleads Guilty in First Guantánamo Conviction' (2007) 101 *American Journal of International Law* 486, 486–7.

<sup>119</sup> *Goodridge v Department of Public Health*, 798 NE 2d 941 (Mass, 2003).

<sup>120</sup> See, eg, Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346. Cf Lawrence G Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (2004).

<sup>121</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. For subsequent limitations: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

<sup>122</sup> (2006) 231 ALR 1.

divide between the Australian Labor Party and the Liberal/National Coalition.<sup>123</sup> While the High Court's role in shaping Australian federalism has always elicited controversy,<sup>124</sup> there is no doubt that the *Workplace Relations Challenge* disturbed the vectors upon which judicial appointments had been made and upon which elections will be decided. We may here recall the comments made by a former clerk, in respect of the inevitable character of politics in *Casey*: 'with an issue that confirmation hearings had focused on, and which could be affected by the next election, it would be disingenuous of us not to think about politics.'<sup>125</sup>

Other recent examples abound: the majority decision to uphold indefinite detention of failed asylum seekers;<sup>126</sup> to refuse special leave to hear a challenge to the Australian government's decision to remove the 438 rescued asylum seekers aboard the *MV Tampa* to detention in Nauru and New Zealand;<sup>127</sup> to uphold executive expenditure on an advertising campaign for, at that time unenacted, industrial relations laws;<sup>128</sup> and to limit the application of administrative law to private corporations exercising public functions.<sup>129</sup> An analysis of the implications of these decisions for Australian constitutional law is best left to another time. For present purposes, it suffices to show that the Court is unavoidably implicated in matters that resonate deeply in Australian political, economic and cultural affairs. And to note the venerable jurisprudential insight that the decision not to recognise certain claim rights will result in as much legal significance — by thus creating privileges and immunities — as a decision to enforce them.<sup>130</sup> The fact that the overall trend in the Gleeson Court is to deny judicial power rather than flex it does not thereby remove the High Court from public politics, the High Court justices from public scrutiny, and perhaps the High Court associates from some degree of public curiosity.

There is one last difference between the substantive content of the two Courts' dockets. Since the brief moratorium on the death penalty after *Furman v Georgia*,<sup>131</sup> the US Supreme Court justices are regularly required to hear last-minute

<sup>123</sup> Some commentators have suggested that this divide brought a more contentious aspect to the *Australian Constitution* as opposed to the *United States Constitution*, although this view is dated and probably inaccurate at the time it was made. See Brian Galligan, *Politics of the High Court* (1987) 39–40: 'In Australia, in contrast to America, the *Constitution* did not preside over political conflicts; rather it was itself one of the points of conflict'.

<sup>124</sup> See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1.

<sup>125</sup> Interview with Stephanie Dangel, Law Clerk to Blackmun J, reproduced in Anne Gearan, 'Blackmun's Papers Tell Tale of '92 Ruling on Abortion', *Associated Press*, 5 March 2004, cited in Ward and Weiden, above n 1, 184.

<sup>126</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>127</sup> Transcript of Proceedings, *Vadarlis v Minister for Immigration and Multicultural Affairs* (High Court of Australia, Gaudron, Gummow and Hayne JJ, 27 November 2001). See Ellie Vasta, 'Migration and Migration Research in Australia' in Ellie Vasta and Vasoodeven Vuddamalay (eds), *International Migration and the Social Sciences* (2006) 13, 27, who notes that asylum seekers became the central issue in the November 2001 election, and that an Australian Labor Party victory had been predicted before the *MV Tampa* affair.

<sup>128</sup> *Combet v Commonwealth* (2005) 221 ALR 621.

<sup>129</sup> *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.

<sup>130</sup> Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710.

<sup>131</sup> 408 US 238 (1972) which held that the arbitrariness in death penalty procedures was unconstitutional on Eighth and 14<sup>th</sup> Amendment grounds. Cf *Gregg v Georgia*, 428 US 153 (1976), which reaffirmed the constitutionality of the death penalty where rational processes followed.

appeals from death row. Ward and Weiden touch on aspects of the drama that ensues, for both justices and clerks. Executions usually occur between midnight and dawn, and papers come in after the end of the justices' work day, so that clerks must decide whether there is enough merit in the appeal to awaken the justice.<sup>132</sup> Justice Blackmun famously ended two decades of reviewing the procedural fairness of executions by choosing to vote for a stay in all cases: 'From this day forward, I no longer shall tinker with the machinery of death.'<sup>133</sup> For those who choose to continue case-by-case review, this jurisdiction forces a life-and-death character into their decision-making which may appear foreign to the quotidian practices of the Australian High Court.

Yet there are areas which may parallel these terrible individual stakes. For example, the immigration cases that enter the Court through constitutional writs under s 75(v) of the *Australian Constitution* require the justices, often sitting individually, to decide on matters where the results of a misstep may indeed be death, torture or serious harm for the applicant. So much is clear from the fact that many asylum seekers are nationals of countries experiencing severe political and religious conflict — in recent years, Afghanistan and Iraq (countries with such problematic records that the Australian government saw fit to invade as part of the US-led coalition in 2001 and 2003 respectively)<sup>134</sup> — and many appeals from the Refugee Review Tribunal are upheld.<sup>135</sup> These are funnelled into the High Court because of the government's curtailment of review of migration matters in lower courts. The constitutional duty to ensure that officers of the Commonwealth act within the law, which the High Court will not abandon, resulted in a peak in 2002–03 of over 2000 applications for constitutional writs.<sup>136</sup> The administrative burden from this jurisdiction, as well as its tenor, have undoubtedly changed the daily work of justices and perhaps their associates in the current High Court.

## V

In light of these comparisons, it is interesting to revisit the question of who is selected to be an associate of the High Court. Most associates are recent law graduates, and are appointed by their justice two to three years in advance of their terms. The great majority have not clerked previously, which means there is no system of 'feeder' judges in operation. Sometimes, justices receive recommendations from particular legal academics or friends, but this system is relatively opaque.<sup>137</sup> Only Justice Kirby advertises each year, by sending notices

<sup>132</sup> Ward and Weiden, above n 1, 193, noting that Justice O'Connor was awakened three times in one night by one of her clerks on a single death row appeal.

<sup>133</sup> *Callins v Collins*, 510 US 1141, 1145 (Blackmun J dissenting) (1994).

<sup>134</sup> Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (2006) 37–8.

<sup>135</sup> *Ibid* 79–81.

<sup>136</sup> High Court of Australia, above n 90, 14.

<sup>137</sup> But see the inaugural Australian Law Students' Association, *Australian Judges' Associates Handbook* (2004), which provides information on the application process for various courts, including the High Court. The *Handbook* also describes the various roles of judges' associate in lower courts in Australia, which are not discussed in this review essay.

to a wide variety of law schools in Australia. He receives hundreds of applications for these positions, and the notices undoubtedly inspire graduates to apply to other justices of the High Court. Australian law schools apparently do not follow the aggressive strategies of promoting their graduates into these roles, in contrast to the US law schools. One wonders whether the High Court associate position will become less visible upon the retirement of Justice Kirby in 2009.

At his own retirement in 1981, Chief Justice Barwick thanked ‘all those young men who were my associates over the past seventeen years’. Ward and Weiden report similar statements from Supreme Court justices during its long history, but by 1977, all had hired a female clerk.<sup>138</sup> Many were prompted by the Court’s own equal protection jurisprudence on gender discrimination.<sup>139</sup> The diversity of Supreme Court clerks also became a public issue in the 1999 term, after protests outside the Court building from representatives of the National Association for the Advancement of Colored People (known as the ‘NAACP’) and others concerned about the fact that, at the time, less than two per cent of clerks in the historic record were African-American, five per cent were Asian-American and 25 per cent women. Justices took some notice.

Currently, the justices of the High Court do not follow a set hiring policy. Justice Kirby, like both Justice Breyer in the US and Justice Gaudron before her retirement, is the exception, following a practice of hiring equal numbers of men and women. Early leadership in appointing female clerks was demonstrated by Justice Michael McHugh, with parallels to Justice Blackmun’s practice in the US. Most associates are drawn from five traditional law schools — the University of Sydney, the University of New South Wales, the Australian National University, the University of Melbourne and the University of Queensland. Few have come from non-English speaking backgrounds or from state schools.<sup>140</sup> It is worth pondering whether it will take an act of public protest or the justices’ own reflection wrought by deciding anti-discrimination cases — both somewhat unlikely contingencies, given Australia’s current political and legal culture — for the selection of associates to broaden.

## VI

Whatever the success of the examination of law clerks in *Sorcerers’ Apprentices* — and however inapt the image of surrogate wizardry — the publication of this book invites some illuminating comparisons with the Australian High Court. One is left with the impression that the apex courts are grappling with similar problems, from the technical management of a burgeoning case load to the administration of law and justice within the inevitable play of politics, and that the annual employment of legal graduates by each justice plays some part in addressing these challenges. Comparisons with other courts are similarly

<sup>138</sup> Ward and Weiden, above n 1, 90.

<sup>139</sup> See, eg, *Frontiero v Richardson*, 411 US 677 (1973), striking down differential benefits for military service members’ families on equal protection grounds.

<sup>140</sup> Andrew Leigh, ‘Behind the Bench: Associates in the High Court of Australia’ (2000) 25 *Alternative Law Journal* 295, 297–8, which provides an analysis based on a sample of 97 associates appointed between 1993 and 2000.

illuminative — such as the fact that all 27 clerk vacancies at the Supreme Court of Canada are advertised over the internet with a centralised procedure and common deadline,<sup>141</sup> or that numerous international tribunals, most notably the International Court of Justice, coordinate clerkships (or what appear to resemble clerking internships) directly through law schools, or that the Constitutional Court of South Africa appoints five foreign clerks for the Court, along with two South African clerks per justice,<sup>142</sup> to assist in the development of the international and comparative expertise required for interpreting the *South African Constitution*.<sup>143</sup> Such empirical contrasts serve as reminders that the High Court associate role does not assume a natural, unchangeable form. Ward and Weiden's thesis of institutional transformation both supplements and complicates this insight by demonstrating that major change can occur without intentional reform.

<sup>141</sup> Supreme Court of Canada, *Employment Opportunities: Law Clerk Program* (12 March 2007) Supreme Court of Canada <[http://www.scc-csc.gc.ca/aboutcourt/lawclerks/LawClerk\\_e.asp](http://www.scc-csc.gc.ca/aboutcourt/lawclerks/LawClerk_e.asp)>. Clerks thus apply to the Court, with all judges examining the applications and calling individual interviews, and the judge chooses their clerk in order of seniority.

<sup>142</sup> Constitutional Court of South Africa, *About the Law Clerks Association* (2007) Constitutional Court of South Africa <[http://www.concourt.gov.za/text/law\\_clerks/main.html](http://www.concourt.gov.za/text/law_clerks/main.html)>. Foreign clerks work for a period of six months and are unpaid.

<sup>143</sup> *South African Constitution* s 39(1): 'When interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law; and ... may consider foreign law.'